EMORY LAW JOURNAL

AN ANALYSIS OF ALTERNATIVES TO INCARCERATION IN GEORGIA

AN ANALYSIS OF ALTERNATIVES TO INCARCERATION IN GEORGIA—A SPECIAL RESEARCH PROJECT, EMORY LAW JOURNAL

EMORY UNIVERSITY SCHOOL OF LAW

ATLANTA, GEORGIA 30322

AN ANALYSIS OF ALTERNATIVES TO INCARCERATION IN GEORGIA—A SPECIAL RESEARCH PROJECT, EMORY LAW JOURNAL*

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*This project was funded by a research grant from the Law Enforcement Assistance Administration of the United States Department of Justice, grant #74ED-99-0004.

PREFACE

Georgia's correctional institutions are faced with a serious and common problem: a steadily increasing prison population. Conservative estimates indicate that if present trends continue, the inmate population, already at an alarmingly high level, will soon outstrip the capacity of the correctional institutions. This project was thus undertaken with the basic objective of analyzing possible alternatives to traditional methods of dealing with the criminal defendant in an attempt to alleviate the overcrowding of the Georgia correctional facilities, and to propose mechanisms to check the growth rate of the prison population.

The project analyzes the concept of pretrial intervention and post-trial alternatives to incarceration in chapters one and two; an examination of parole and probation in chapter three; and an analysis of the juvenile offender in chapter four. These areas were chosen because they are the focal points of the solution to the problem of the increasing number of criminal offenders who comprise the prison population.

We did not attempt to analyze the administration and policies of correctional institutions; the causes or reasons for crime in our society; or the philosophical underpinnings of the necessity for incarceration as a retribution concept.

Although we dealt exclusively with the Georgia prison population, the overcrowding of prison inmates is not indigenous only to Georgia, but rather is a problem having national ramifications. Therefore, we feel that the areas discussed in the project which may be available to reduce the number of offenders being sent through the traditional correctional process are valuable as a guide to those in other states who share this problem with Georgia.

We would like to acknowledge our appreciation to Dr. Allen L. Ault, Commissioner of the Georgia Department of Offender Rehabilitation; Dr. Ronald L. Powell, Deputy Commissioner, Research and Development Division, Department of Offender Rehabilitation; Mr. Bill Read, Coordinator/Monitor of Research Grant; and Mr. Tim Carr, Chief, Descriptive Research and Statistics Unit, who devoted their labors and diligent assistance in developing this project. To these individuals and to many others who took part on the project we say thank you very much.

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February 26, 1975
Atlanta

CONTENTS

CHAPTER ONE

PRETRIAL INTERVENTION— AN ALTERNATIVE TO THE CRIMINAL JUSTICE SYSTEM

Chapter One is an examination of the concept of pretrial intervention, and its potential for being an alternative to the criminal justice system. Part I presents an overview and history of pretrial intervention and analyzes the merits and disadvantages of intervention in conjunction with the present correctional system. Part II is an empirical survey of pretrial intervention programs and analysis of the possible implications that a statewide pretrial intervention program would have on the Georgia prison population. Part III discusses some of the legal and constitutional issues that may arise because of the interaction between pretrial intervention and the rights of a participant in the program.*

I. OVERVIEW AND HISTORY OF PRETRIAL INTERVENTION

A. *Introduction*

The concept of pretrial intervention denotes a formalized procedure whereby, prior to adjudication and after legally proscribed conduct has occurred or is alleged to have occurred, formal criminal proceedings against the alleged offender are halted or suspended for a three to eighteen month period[1] on the condition that, as an alternative to traditional criminal processing, the alleged offender voluntarily enters into a community based rehabilitation program. The program provides intensive manpower and support services designed to meet the needs of the particular offender. Upon successful completion of the program the case is dismissed, but if the offender's performance is unsatisfactory his participation in the program can be terminated at any time and he will be returned for the continuation of normal criminal processing.

The concept of diversion is itself not new. In its broadest sense it represents an exercise of discretion on the part of a criminal justice official which results in the channeling out of the criminal justice system of certain classes of offenders, who, as a consequence of their probable, assumed, or admitted guilt should, and theoretically

* The terms pretrial diversion and pretrial intervention are used interchangeably throughout this study.

could be handled by the criminal justice system. Officials exercise some form of discretion beginning with the critical decision not to arrest.[2] After the decision to arrest has been made and the defendant has been brought to the attention of the prosecutor, the system has allowed, if not required, the exercise of broad discretion.[3] Noncriminal handling of non-serious criminal offenses and nonadjudicated dispositions involving greater leniency than that specified by statute are recognized requisites for the successful operation of the criminal justice system.

Operating at the first level (that of the offender himself), there are two overlapping notions to be considered. First, not all offenders require prosecution in order to protect society, secure justice, and correct unlawful behavior.[4] Second, since prosecution of full criminal disposition is inappropriate in dealing with certain types of defendants, the present system is not only ineffective and inefficient, but may even be counterproductive to the objectives of the criminal justice system.[5]

B. *The Present Correctional System*

Although the principle objective of a criminal correctional system seems to be to rehabilitate the offender and return him to society as a better person, better equipped to live a normal and constructive life, the overwhelming evidence is that the system has failed in this respect.[6] Prisons are overcrowded,[7] understaffed, and underfunded. Ninety-five per cent of the money funded is spent on custodial costs—bars, walls, and guards. Only five per cent of every dollar is spent on rehabilitation, education, job training and health services.[8] Prisons have been viewed as graduate schools in the criminal arts[9] and studies have indicated that the longer one's duration in prison, the more likely he is to recidivate.[10] Prisons inhibit and discourage those character traits admired in the outside community: the development of decision-making skills; initiative; responsibility; aggressiveness; and independence. The prisoner may even come to justify an act he could not have justified when he committed it[11] and upon release, the labels of "ex-con" or "criminal" cannot be avoided. These labels and the stigma of official processing seriously limit the offender's social and economic opportunities and can further become an internalized and self-fulfilling perception which can encourage the offender to act out his self-perceived deviant social role:[12]

> The correction system should not take all the blame for the failure to rehabilitate offenders. Corrections usually come into the picture only after the offender has been processed through the criminal court system and adjudicated guilty. By that time, most hopes of salvaging the offender have already been lost. Exposure to hardened criminals and the dehumanizing experience in pretrial detention facilities, combined with the psychological harm that is done to the offender as he and his lawyer look for some way to escape conviction and find a scapegoat of rationalization for the original wrongdoing, produces human raw material which is neither receptive nor motivated to rehabilitation efforts.
>
> On top of all that, of course, the traditional emphasis of security and safekeeping makes it virtually impossible for an offender in custody to really believe that anyone wants to help him.[13]

If the offender is placed on probation[14] he:

> walks away from the courtroom wondering what it was all about. Why was he arrested, indicted, arraigned [and brought to trial] on such an insignificant matter? Even the judge recognized it was insignificant, because he let him go. The police are frustrated. What is the point in making such arrests, commanded by the state penal code, when the judge consistently puts the defendant on probation? The judicial system buckles under the onerous administrative burden of trials on such lesser offenses, leaving the courts little time for the serious cases.[15]

C. *The Recognized Existence of Informal Diversion*

Not all offenders require the full prosecution of the law. Prosecuting youthful first offenders is often regarded as needlessly creating a potentially harmful criminal record. These offenders are often diverted to minimize the harmful effects resulting from conviction, and to enable the youthful offender to receive the supervision of specialized agencies or programs. Full prosecution of intrafamily assaults is more likely to aggravate the disharmony than reach and correct the causes of the marital discord.[16] In some cases, the offender's mere apprehension may serve as a deterrent to future criminal involvement. The other opportunity for diversion occurs at the interface of criminal law and public health. Because of their prevalence and peculiar rehabilitation problems, special programs have been created for drug addicts,[17] alcoholics[18] and the mentally ill.[19]

Common to all these instances of foregoing the processing of the criminal justice system is the discretion exercised by an official of the criminal justice system that there is a more appropriate way to deal with particular classes of offenders than to prosecute them. Although distinctions can be made with respect to the type of obligation imposed, the types of offenses handled, and the types of offenders admitted, the components of a decision to divert are more complex. Pressure is generated by the political views of the community and the concurrent political pressures exerted on the criminal justice officials. Only general guidelines and policies can be promulgated and decisions then examined with reference to these touchstones in light of the particular offense and its surrounding circumstances.

There is a final leveling factor to be recognized: the functioning of a finite criminal justice system. This approach to diversion is influenced by two overriding factors: *the inadequacy of other forms of dispositions* and *expediency*. The effectiveness of the traditional methods is limited by the general lack of resources in the criminal justice system: the lack of resources to staff programs adequately and the lack of resources to implement them result in defendants being dismissed under the imposition of vague obligations and with or without minimal supervision and counselling.[20] "Diversion often occurs not because of a desire to help the offender or to protect society, but because of the pragmatic realization that there are not enough resources to pursue formal prosecution."[21]

Whether an offender qualifies for traditional diversionary dispositions, then, would seem to be contingent on either the existence of an established policy with respect to the type of offense committed, the attendant circumstances, and when necessary, an available criminal justice program, or both the inability of the traditional criminal justice process to deal effectively with the needs of the defendant and an available program designed to meet those needs.[22]

Pretrial intervention represents a formal recognition of the needs of another class of offenders—the poor, the unemployed, or the underemployed[23] adult non-addict: without the possibility of pretrial intervention the offender who has committed a threshhold offense is either incarcerated or placed on probation after undergoing complete and usually lengthy official processing. There is every

reason to believe that he will emerge from the process a better criminal, not a better citizen, and that he will be back in the criminal justice system again.[24]

D. *History and Format of Pretrial Intervention Projects*

During the mid-'60's the Vera Institute of Justice at New York University conducted research and formulated a program for pretrial intervention based on a manpower model. In 1967, the President's Commission on Law Enforcement and the Administration of Justice recommended the "early identification and diversion to other community resources of those offenders in need of treatment when full criminal disposition does not seem required."[25] This and other developments resulted in the establishment, in 1967, of the Manhattan Court Employment Program.[26] Simultaneously, under the sponsorship of the National Council on Children and Youth, a similar program, Project Crossroads, was instituted in Washington, D.C.[27] The New York and Washington programs ran for three-and-one-half years funded by the Department of Labor, and both programs have now become an integral part of the court services functions in those cities. Throughout this period, the American Bar Association was developing its Standards for Criminal Justice. In 1971, Standards Relating to the Prosecution Function and the Defense Function were adopted.[28] In each recommendation, the prosecuting and defense attorneys are urged to explore the availability of non-criminal disposition, including diversion into community based rehabilitation programs. Also in 1971, based on the favorable reports from the Washington and New York programs, the Department of Labor began funding a second round of programs,[29] including the present Atlanta Pretrial Intervention Project. Within the past few years, the diversion concept has been endorsed by public officials,[30] national commissions,[31] professional law organizations[32] and various citizen groups.[33] Federal and state legislation authorizing pretrial diversion have been introduced.[34] Two state supreme courts[35] and one Federal court[36] have also adopted rules authorizing diversion. Today there are programs in over fifty cities offering a variety of conceptual designs and operational modes in providing community centered rehabilitation services in lieu of criminal processing. A typical program from intake to discharge might be outlined as follows:

1) At the time of arrest or shortly thereafter the offenders are screened by program personnel on a number of criteria to determine whether any are eligible and might benefit from the available services. The eligibility requirements vary depending on the scope and range of the particular project.[37]

2) If the offender appears eligible he is interviewed by a staff member. Both the offender and his attorney are asked whether they would agree to the offender's participation in the program.

3) If an eligible offender wants to participate the prosecutor's and/or court's consent is requested.[38] If the prosecutor and/or court does not consent, regular processing continues.

4) If the appropriate criminal justice official assents to the offender's participation, the offender is asked if he would voluntarily participate in a program which would include waiving the statute of limitations and waiving his right to a speedy trial for a period of time.[39]

5) The offender is released on his own recognizance to participate.

6) Upon entering the project the offender is interviewed and a service plan is devised with his cooperation.

7) At the end of the prescribed period there are three possible dispositions:

a) If the prosecutor or staff determines that the individual is not fulfilling his plan or that the public interest otherwise requires, participation in the program may be terminated at any time and prosecution resumed without prejudice.[40]

b) The staff may recommend an extension of the offender's participation to allow the program staff more time to work with the defendant.[41]

c) If the defendant performs well, avoids illegal activities, behaves responsibly, becomes involved in the counselling sessions and makes a satisfactory vocational adjustment the staff recommends to the prosecutor that the charges against the defendant be dismissed. In an appropriate case, dismissal may be conditioned on the defendant's making restitution.[42]

Underlying all the pretrial intervention programs are several basic assumptions which are exploited with the hope of remedying

some of the defects in the present system. For some offenders criminalization is thought to result in the hardening of anti-social tendencies, whereas for other offenders the theory is maintained that exposure to the criminal justice system produces a deterrent effect. What is implicit in this view is the premise of pretrial intervention; that not all law violators are criminals and planned intervention to inhibit the development of a criminal life-style may indeed be more productive for such individuals than a punishment oriented response.

Law violators are distinguished from criminals as having committed an offense of a temporary or impulsive nature significantly related to a condition or situation such as unemployment. Although they may have had some previous contact with the law they do not exhibit a continuing pattern of anti-social behavior. The law violator is a first or occasional offender who has not developed a life-style or career of criminality that would make him particularly resistant to change. Rather, his social, vocational,[43] educational or marital problem which has precipitated his becoming an offender would be subject to change with a comprehensive plan and intensive counselling executed at a critical point in his incipient criminal career.

Treatment normally begins within days after arrest, and not months later, as is often indicative of cases processed through the criminal justice system.[44] By making the possibilities of rehabilitation available as a diversionary program rather than a sentencing alternative the labeling and stigmatizing effects of the criminal justice system which detract from the rehabilitation process are effectively minimized. Counselors are able to deal with the defendant at the moment when the magnitude of his anti-social conduct is still uppermost in his mind; "the peak moment of contrition and sense of guilt when an offender is most anxious to make amends and set things right."[45] The offender also receives counselling before he has had an opportunity to spend months rationalizing or justifying his acts or learning from his fellow cellmates how not to get caught the next time.

Benefits are not based simply on the fact of diversion, but also on the duality and scope of available supervisors and services. Because of its informality and internal flexibility,[46] a pretrial intervention project can encompass more programs than could be made available as sentencing alternatives and permits a more effective

allocation of the available community resources. The defendant develops a plan with his counselor designed to meet short term needs and long term goals. The development of an individual program might entail three steps:

> 1) The assessment period is designed to determine interests, aptitudes, skills and often includes psychological and vocational testing.[47]
>
> 2) The development of a service plan by both the counselor and the offender with clear-cut goals and objectives to be achieved during the period of the defendant's participation.
>
> 3) Service delivery during which the counselor and defendant work together toward the achievement of mutually established goals and objectives.[48]

The participant's counselor is likely to have come from his own neighborhood and has often spent some time in prison. Projects frequently employ a non-professional staff supervised by professionals.[49] In this way it is hoped to overcome any mistrust and hostility and to soften the basic structure of authority encountered in traditional correction agencies. The individual program attempts to make use of whatever community resources are available.

Ideally, the law is a system to which one can be subordinate and through which one can achieve self realization.[50] The criminal justice system is based primarily on the former at the expense of the latter. The diversion programs, instead of severing ties with the community, family, and employment, seek to reintroduce the offender to his community and create and reinforce stable ties. By keeping the defendant in the community and using its resources to meet his needs, not only is the possibility of rehabilitation increased, but the defendant is also taught how to use his community to meet his needs.[51]

E. *Conclusion*

Pretrial intervention is to be distinguished from other often highly structured[52] or limited[53] practices which have been labeled diversionary in conception and implementation. Traditional diversionary methods are those alternatives which use existing powers and facilities to minimize penetration into the criminal justice system: preconviction probation, advisement, referral, probation and the noncriminal handling of drug addicts, alcoholics and the mentally ill.

Traditional diversion from the criminal justice system may occur at any stage of the proceedings, whereas pretrial intervention focuses on the diversion of certain groups of offenders before court processing begins. It is a process whereby it is determined, after diagnosis and evaluation, that a person accused of an offense be diverted from the criminal justice system to participate in a community based rehabilitation program while the charges against him are held in abeyance.[54]

Most pretrial diversion models are based on prosecutorial discretion as distinguished from police or judicial discretion. The prosecutor can exercise his option to divert over a broad spectrum of defendants who should not be screened but whose prosecution is not necessary for the security and safety of society. In these instances there is no interest in punishment or even in determining guilt, and the traditional court order following prosecution is substituted with a community treatment plan. The sentence is substituted with a "contract" between offender and counselor that is drafted together and open to renegotiation so as to be flexible to the defendant's changing needs and goals.

After the decision to divert has been made, the program is more effective than any of the current programs available or in use with respect to both scope and intensity. As distinguished from deferred prosecution or probation programs that do not place the defendant under a specific supervised program, the pretrial intervention goal is to provide each defendant with an intense period of counselling (usually ninety days, subject to periods of extension) during which time he has the opportunity to demonstrate sufficient progress toward vocational goals and thus convince the prosecutor that he merits having the charges against him dismissed.

Historically, the need for special handling of different classes of defendants has led to the establishment of the juvenile court, a noncriminal procedure to be used for the better interest of the child offender; the sanctioning of civil commitment for the mentally ill; the decriminalization of public drunkenness statutes,[55] and statutory reduction of sentences.

A pretrial intervention program has three focal points: the criminal justice system, the defendant, and the community. Court time is saved by eliminating the need for lengthy motions, plea negotiations, trials, and other court procedures, in those cases which can

be best solved by programs and treatment rather than punishment. It is a less expensive[56] and more effective technique than incarceration for helping people who may be at the threshhold of a criminal career. It will help to reduce the backlog of criminal cases,[57] improve the deterrent effect of the criminal law,[58] and provide the criminal justice system with a more effective allocation of law enforcement resources. It permits the system to be more flexible and more effective as a rehabilitation device and increases public safety by increasing the chances that certain offenders will not embark on criminal careers. Pretrial diversion assists in the reintegration of defendants into the community by helping to break a pattern of failure, and maximizes the use of available community resources. The community benefits from the reduced recidivist rate and the defendant's increased employability and productivity.[59] The defendant is provided with counselling, training, education and employment, and is given the opportunity of becoming a productive citizen.

II. Survey of Pretrial Intervention Programs

A. *Eligibility Requirements*

1. Introduction

> In many cases effective law enforcement does not require punishment or attachment of criminal status, and community attitudes do not demand it. Not all offenders who are guilty of serious offenses as defined by the penal code are habitual and dangerous criminals. It is not in the interest of the community to treat all offenders as hardened criminals; nor does the law require that the courts do so. It is at the charge stage that the prosecutor should determine whether it is appropriate to refer the offender to noncriminal agencies for treatment or for some degree of supervision without criminal conviction.[60]

The main goal of pretrial diversion is the rehabilitation of the accused criminal by removing him or her from the traditional criminal justice system and introducing the participant to realistic and attainable alternatives to criminal conduct. Diversion might be best described as an intensively supervised instructive and motivational pretrial probationary test period, the successful completion of which will terminate the offender's confrontation with the traditional criminal justice system.

Most pretrial diversion programs apparently operate on the socio-economic principle that there is a direct relationship between a person's employment status and criminal activity. The underlying assumption of this theory is that persons who are unemployed or underemployed are more inclined to commit a criminal act than those persons who are satisfactorily employed. As one pretrial project has written:

> Current theories of deviant behavior describe a range of motives which induce people to commit crimes. One of the more direct and soundly authenticated of these motives is a simple economic calculation which leads a potential offender to believe that the economic rewards of crime are greater than its economic costs. Society confronts such an individual with a paradox—material goods appear essential for self esteem and general well being; legal means of obtaining these goods may be closed . . . . [T]he offender resolves this paradox in the only way he or she can; through the commission of a property crime.[61]

The inverse of this theory is that employment is seriously threatened by arrest and even more so by a subsequent conviction. This predicament of the employed accused has been recognized by The Atlanta Pre-Trial Intervention Project:

> Of the 500 accepted by the project who are working at the time of their arrest, 100 would have lost their job between time of arrest and trial [had the project not intervened] and another 200 would [have lost] their job after conviction and over 100 would have their livelihood affected to lesser degrees such as limiting promotional possibilities, and being afraid to change jobs because they would be afraid their conviction would come out.[62]

Thus, the immediate goal of a pretrial diversion program is to assist the employed participant in keeping his job and in addition to provide him, as well as the unemployed participant, with employment opportunities through individual and group counselling, employment assistance and placement, vocational training and supplemental education. The long-term goal of the diversion program is the sustained productivity and self esteem of the participants.

The majority of diversion programs, as presently constituted, limit participation to those persons charged with "lesser" crimes.

The "utopian" pretrial diversion program, on the other hand, is one which would effectively service the entire scope of criminal conduct, including among its participants the petty thief as well as the murderer. Indeed, it is arguable that the petty thief is more likely to commit further such crimes than is the murderer. In theory the long-term goal of pretrial diversion should be to this end. A program presently designed and operating with this goal, however, would be impractical particularly in view of political considerations which are grounded in public opinion. It is basic that:

> All diversionary programs must not only maintain complete credibility in the public mind, but must also have and maintain total public support and full-scale community involvement, participation and effort if they are to be truly successful.[63]

The prevailing eligibility requirements and various project publications reflect that the present political climate is not willing to wholly commit its resources to extensive pretrial criminal diversion. Indeed, one of the unanswered questions with respect to pretrial diversion is whether it can effectively deal with the entire scope of criminal conduct. But diversion has yet to prove its capabilities because it has been denied the opportunity to do so; the circuity of the problem is obvious. There is evidence in support of limited participation which suggests that there are offenders who are not likely to benefit from an employment oriented diversion program as well as certain classes of offenders whose specialized needs cannot be met by such a program. It is for these reasons, both political and empirical, that the present inquiry focuses on employment oriented diversion. It is within this same framework that eligibility requirements must be examined and upon which the analysis of existing pretrial diversion programs must be based.

From the available literature it appears that eligibility requirements can be divided into two broad categories: those pertaining to the individual offender and those dealing with "administrative" requisites which must be satisfied prior to participation. Those requirements in the first group include the nature of the crime charged, age, sex, residency, personal behavioral characteristics, economic status, prior criminal record and the existence of other pending charges. The "administrative" requisites include consent to participation, waiver of speedy trial, waiver of the statute of

limitations and entrance of a plea. In this latter category a limited number of pretrial diversion programs also require that the offender agree to make restitution to the victim of the crime. In general, all the requirements of a particular program must be satisfied prior to participation; in some instances, however, those requirements pertaining to the individual offender may be waived at the initiative of the prosecutor or court, depending on the jurisdiction.

2. Offender Eligibility

(a) *Exclusion Based on the Crime Charged*

Without exception all pretrial diversion programs place a highly restrictive requirement on the type of crime with which an offender may be charged and yet be eligible for participation in the program. Most programs initially require that an offender must not be charged with a crime which is excessively violent or aggressive, capital or sexual in nature. Because relatively few programs deny participation on the basis of a statutory determination that the crime charged is a felony or misdemeanor,[64] it may be concluded that such classifications are deemed arbitrary and unrelated to successful completion of the program. The adoption of such a standard could result in varied state treatment of offenders charged with the same crime because it ignores inconsistencies in state criminal statutes with regard to the classification of offenses. Additionally, in such a situation a prosecutor or law enforcement officer opposed to pretrial diversion might prevent an offender from participating in the program by charging him with a felony where a misdemeanor might be more appropriate. Focusing instead on the nature of the crime itself would minimize such occurrences.

It is with respect to this requirement that political considerations exert the most influence. The existence of political pressure and public opinion may philosophically be traced to what is perhaps the most basic premise of the American criminal justice system: that punishment deters crime, and more specifically, the positive correlation between the severity of the crime as judged by society and the corresponding punishment. It is this classical view of criminal justice which is categorically rejected by the pretrial diversion program:

> The overall goal of the program is to enhance public safety by continued insistence that program services remain relevant to client needs. In order to accomplish this, it is necessary to avoid the classical model of punishment-deterrence and the positivist model of "treatment," both of which have failed because they are irrelevant to client needs . . . This New Criminology adheres to the philosophy that crime is a product of interacting socio-economic forces rather than personal depravity or pathology. It focuses on definition of practical needs and a pragmatic, common-sense approach to meeting those needs.[65]

Without exception all the existing pretrial diversion programs analyzed exclude from participation those offenders charged with what society has legislatively determined to be the most serious offenses. The rationale for such exclusion was recognized by The Manhattan Court Employment Project during its formative phase:

> The nature of the charge against the defendant is key to how seriously his case is regarded by the court. Bail is consistently set higher for defendants charged with serious crimes, and if they are convicted, sentences are stiffer. It would be extremely unrealistic to expect the court and the District Attorney to release such defendants.[66]

Thus, among the most frequently excluded crimes are murder, voluntary manslaughter, rape, armed robbery, felonious or aggravated assault, arson, molesting a minor and other sexually oriented crimes.

The experience of The Atlanta Pre-Trial Intervention Project tends to confirm suspicions that persons charged with more serious crimes are less susceptible to rehabilitation than those charged with "lesser" crimes. Over a thirty-four month period, statistics indicate that persons charged with burglary are less likely to successfully complete the program than are persons charged with drug offenses or theft by taking. This finding is illustrated in Table I:

TABLE I

THE ATLANTA PRE-TRIAL INTERVENTION PROJECT, SELECTED CHARGES AND COMPLETION RATES

Charge	Percent All Completions	Percent Successful Completions	Percent Unsuccessful Completions
All	100.0	79.2	20.8
Burglary	14.2	68.6	31.4
Drug Related	23.5	88.5	11.5
Taking by Theft	38.9	84.7	15.3
All Others	23.4	67.1	32.9

Source: Special Participant Study, The Atlanta Pre-Trial Intervention Project, September 1, 1971 to June 30, 1974.

On the other hand, it has been suggested that:

> [t]here is little evidence to support the proposition that those charged with more serious crimes are less susceptible to early and relevant rehabilitation or any of the other goals advanced by the intervention concept.[67]

Contrary to the findings of The Atlanta Project are statistics presented by three programs which show that the respective successful and unsuccessful termination rates of offenders charged with felonies and misdemeanors correspond with their ratio to the total number of participants. This is illustrated in Table II:

TABLE II

SELECTED PRE-TRIAL DIVERSION PROGRAMS, FELONY AND MISDEMEANOR COMPLETION RATES

	Program 7[a]		Program 8[b]		Program 10[c]	
Crime Charged	Felony	Misdemeanor	Felony	Misdemeanor	Felony	Misdemeanor
Percent All Participants	32	68	39	61	98	2
Percent All Successful Terminations	33	67	40	60	95	5
Percent All Unsuccessful Terminations	29	71	40	60	90	10

Notes: a. Court Resources Project, Boston, Mass.
b. The Manhattan Court Employment Project, New York, N. Y.
c. Pre-Trial Diversion Services Project, Kansas City, Mo.

Source: Independent Questionnaire, July, 1974

Although it has been suggested that political policy and public sentiment, valid or invalid, are perhaps the most influential factors in determining crime-eligibility, there are other more practical considerations for denying participation to offenders charged with certain types of crimes. As stated by The Manhattan Court Employment Project:

> Convictions [based on ordinance violations and petty offenses] result in either a small fine or short-term sentence . . . both of which are so inconsequential to most persons charged with violations that their cooperation with the Project has been minimal. In the past, defendants charged with violations who were admitted into the Project received dismissals at a much lower rate than the overall participant population. They are no longer routinely considered for admission, although this rule is waived on occasion.[68]

Similarly, persons charged with offenses such as prostitution, gambling, loan sharking and sale of drugs, which yield a continuous and substantial source of income to the extent that such is an employment substitute are often denied participation. The alternative employment offered by employment oriented pretrial diversion programs cannot yield sufficient benefits when compared to the income opportunities and freedom associated with this type of criminal conduct.[69]

Other persons charged with certain offenses are probably excluded on the assumption that there is a positive correlation between the criminal activity charged and a serious psychological disorder to the extent that an employment-oriented diversion program is unable to effectively deter future criminal activity of the same type. Although this basis is not affirmatively stressed in diversion literature, it may form the justification for excluding persons charged with rape, arson, child molesting and other sexually oriented crimes.

Recommendation:

It is recommended that general "crime exclusion" guidelines be established in accordance with the preceding discussion. It is advised that such requirements be flexible, especially with respect to first offenders and those without a serious prior record, and who may be found receptive and likely to benefit from program participation.

(b) *Exclusion Based on Age*

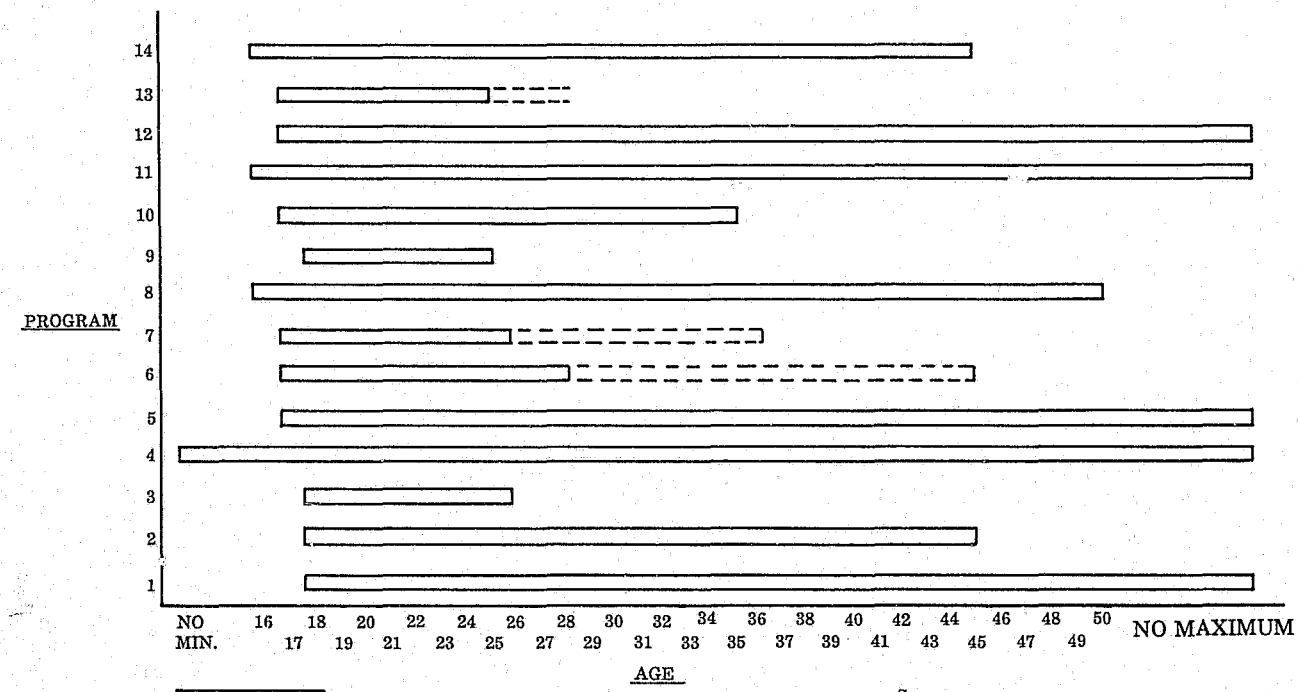
Of the fourteen pretrial diversion programs examined, thirteen have imposed a minimum age for participation while only nine have set a maximum age requirement. Only one program has omitted age as an eligibility criterion.[70] The respective requirements are illustrated in Chart I.[71]

Of the thirteen programs setting a minimum age requirement, all are within the sixteen to eighteen age range. The apparent basis for excluding offenders below these ages is that such persons are deemed too immature to benefit from the employment oriented structure of the diversion program and the intensive counselling directed toward this end.[72] The single program which has no minimum age requirement offers extensive educational services to lower aged participants which enable them to benefit from the program.

It is to be noted, however, that in at least six of these programs[73] the age requirement is flexible, thereby enabling selected offenders under the minimum age to participate if the program staff and/or a unit in the local criminal justice system or both determine that such persons could benefit from the program.[74] Similarly, in at least three programs where the minimum age requirement is inflexible,[75] a separate juvenile diversion program exists to assist offenders under the minimum age.

CHART I

SELECTED PRE-TRIAL DIVERSION PROGRAMS
ELIGIBILITY BY AGE



Source:
National Pre-Trial Intervention Service Center of the American Bar Association Commission on Correctional Facilities and Services, "Descriptive Profiles on Selected Pretrial Criminal Justice Intervention Programs," Wash., D. C., April, 1974.

In the case of maximum age requirements, there is no consensus among the various programs as the following Table illustrates:

TABLE III

SELECTED PRE-TRIAL DIVERSION PROGRAMS
MAXIMUM AGE LIMIT REQUIREMENT

Maximum Age Limit	Number of Programs
25	2
26	2
28	1
35	1
45	2
50	1
No Limit	5

Sources: Independent Questionnaire, July, 1974; National Pre-Trial Intervention Service Center of the American Bar Association Commission on Correctional Facilities and Services, "Descriptive Profiles on Selected Pretrial Criminal Justice Intervention Programs," Wash., D.C., April, 1974.

The five programs which set low maximum age requirements have apparently adopted the view that:

> [t]here is a special basis for affording the benefits of pretrial intervention to the young, for they are still in their formative years and have traditionally been considered more susceptible to correctional treatment. Additionally, society would suffer greater harm and carry a greater burden from recidivism in youth than in older offenders, for there is a longer life in which to recidivate—and one of the stated goals of pretrial intervention is the reduction of recidivism.[76]

Furthermore, the fact that most pretrial diversion programs operate on small budgets and have limited staff and facilities demands that the number of participants be limited. Low age restriction is a practical means by which this can be accomplished. Similarly, as three of the five programs setting low maximum age requirements additionally restrict participation to first offenders,[77] a low maximum age is internally justifiable as first offenders are likely to be in the younger age range. As with minimum requirements, at least six programs[78] have made the maximum age requirement flexible,

thereby granting participation to offenders who, although older than the requirement, are receptive to the program.[79]

The four programs which have set high maximum age limits also recognized the need to limit participation but apparently have rejected the premise that their sole obligation is the rehabilitation of the young offender. In the initial stage of establishing eligibility criteria The Manhattan Court Employment Project determined that:

> [P]ersons over 45 are [to be] excluded because they present placement problems and usually have long criminal records and chronic personal problems which the Project is not equipped to deal with at the present time. The upper age limit is flexible, however, and waived on occasion.[80]

Although other eligibility criteria may act to exclude a higher proportion of older offenders, the fact that these programs as well as those not setting a maximum age limit subscribe to the principle that society is more likely to benefit from rehabilitation of the younger offender may be evidenced by the high proportion of lower aged offenders in the total number of participants. This is illustrated in Table IV.

Recommendation: In the absence of separate juvenile diversion facilities, it is recommended that there be no minimum age requirement and concurrently that an upper age limit be set at a high level. The basic thrust of the program, however, should be to service those offenders in the seventeen to thirty age range because society and the individual offender are most likely to benefit from such a requirement. Where separate juvenile diversion is present or where it is deemed advisable to fix both upper and lower age requirements, it is recommended that flexibility be injected so as to service those offenders excluded by this requirement, but otherwise eligible, who may be benefitted from participation.

(c) *Exclusion Based on Sex*

None of the pretrial diversion programs reviewed presently exclude a potential participant on the basis of a sex classification. Indeed, disqualification on such grounds in the case of a program authorized by statute as well as in an independent program operated with the concurrence and participation of the state or local

TABLE IV

SELECTED PRETRIAL DIVERSION PROGRAMS: PARTICIPANT DISTRIBUTION BY AGE

Program	Maximum Age Requirement	Selected Age	Percent at or Below	Selected Age	Percent at or Above
1	none	29	85	30	15
2	45	21	58	22	42
		26	82	27	18
4	none	21	76	22	24
		44	98.6	45	1.4
5	none	25	70	26	30
		30	85	31	15
		35	95	36	5
8	50	17	52	18	48
		21	84	22	16
		25	92	26	8
		30	98	31	2
10	35	21	80	22	20
		24	93	25	7
		30	98	31	2
11	none	21	57	22	43
		24	69	25	31
		27	80	28	20
		36	95	37	5
12	none	21	57	22	43
		25	70	26	30
		35	87	36	13

Sources: Independent Questionnaire, July, 1974; National Pre-Trial Intervention Service Center of the American Bar Association Commission on Correctional Facilities and Services, "Descriptive Profiles on Selected Pretrial Criminal Justice Intervention Programs," Wash., D.C., April, 1974.

criminal justice system, without the showing of a compelling state interest, is likely to be unconstitutional as constituting state action in violation of the Equal Protection Clause of the Fourteenth Amendment.[81]

At least two programs, however, initially excluded female offenders from participation.[82] The Manhattan Court Employment Project justified its exclusion as follows:

> Most women are arrested on drug or prostitution charges. Since the Project was not equipped to deal effectively with drug problems nor to offer employment that could compete financially with prostitution, women initially were eliminated from consideration.[83]

Similarly, Project Crossroads initially excluded female participation. Project Crossroads, which "has accepted prostitutes ever since females were admitted into the program," has found that such offenders "respond better to services than the average female divertee."[84]

The respective proportions of male and female participants in the eleven programs responding to the questionnaire are illustrated in Chart II.

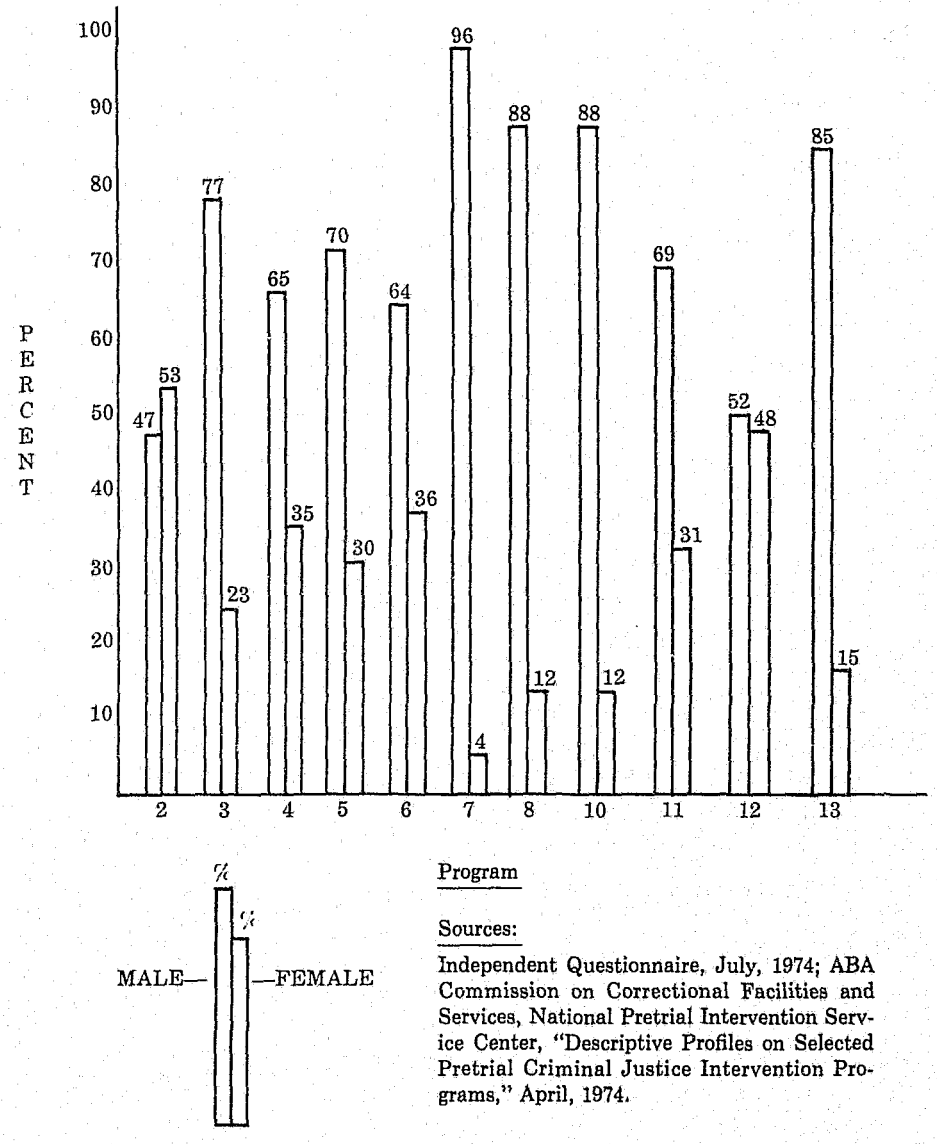
(d) *Exclusion Based on Non-Residency*

Of the fourteen pretrial diversion programs examined for residency requirements, eleven require that an offender reside within a specific geographical area in order to be eligible for program participation. Many also require that the offender have verifiable address stability. These requirements are based on the fact that most programs operate on intensive contact with the participant and reflect the view that offenders residing outside the prescribed area are less likely or able to maintain the continuous and regular in-person contact with the program deemed essential if the services offered are to be beneficial. As noted by The Manhattan Court Employment Project:

> Participants living in the Bronx, Brooklyn, and Manhattan must have a verifiable address, since those without a permanent residence are more likely than others to disappear. If they do disappear, finding them is impossible.
> Because of the distance they must travel to Project facilities in Manhattan, persons living in Queens and Staten Island have difficulty attending group counselling and keeping office appointments. They are also more difficult to visit and to locate if they do not appear for scheduled appointments. For these reasons persons living in Queens and Staten Island are excluded.[85]

CHART II

SELECTED PRETRIAL DIVERSION PROGRAMS:
PARTICIPANT DISTRIBUTION BY SEX



Sources:

Independent Questionnaire, July, 1974; ABA Commission on Correctional Facilities and Services, National Pretrial Intervention Service Center, "Descriptive Profiles on Selected Pretrial Criminal Justice Intervention Programs," April, 1974.

In addition, because many programs integrate various local community services into the program, non-residents are less likely to be eligible to receive such services, thereby precluding them from a major portion of the rehabilitative services offered by the program. It has been suggested, however, that where a non-resident offender is otherwise eligible for program participation and is also eligible for any integrally offered community services (or in the appropriate case such services are absent or unnecessary), automatic exclusion based on non-residency may be constitutionally suspect.[86] It is, therefore, not surprising that at least seven of the eleven programs imposing residency requirements provide that non-residents may be admitted on discretion, if effective counselling and supervision can be maintained. In the majority of these programs the discretionary factor is keyed to serviceable address stability, thereby decreasing the likelihood that a non-resident offender would leave the jurisdiction.

Of the eleven programs with residency requirements only two impose the additional requirement that an offender must have resided in the prescribed area for a minimum length of time.[87] So few diversion programs impose such a requirement because of the serious constitutional questions as to its validity.[88]

Recommendation: With respect to a state-wide diversion program, it is recommended that state residency be considered in determining eligibility. Non-residents should be considered on a case by case basis, with emphasis on whether the individual would be receptive to program services and the likelihood of the offender fleeing the jurisdiction. In the case of a localized diversion program, local residency should also be a limiting factor, but applied only where the offender would be unlikely to meet the demands of personal contact with the program. In either case, address verification should be a prerequisite to program participation for the reasons discussed.

(e) *Exclusion Based on Other Pending Charges*

Closely linked with residency is the requirement that the offender not have any other charges pending against him. If the pending charge is within the same local jurisdiction and is for a crime rendering the offender ineligible for program participation, subsequent conviction and incarceration would effectively prohibit participa-

tion. Where the pending charge is in another jurisdiction, but within the same state, no program has affirmatively indicated the existence of an agreement, either formal or informal, between prosecutors to permit participation where the pending charge would not of itself bar participation. Similarly, where the pending charge is in another jurisdiction, participation would be barred due to the presence of the offender at pretrial and trial proceedings in that jurisdiction. Although the number of persons affected by such situations may be small, the needs of such persons should be met by the diversion process.

Recommendations:

(a) Where the pending charge is within the same local jurisdiction and does not in itself cause the offender to be ineligible, participation should be granted, subject to the satisfaction of other relevant eligibility requirements. Successful completion of the program should be the basis for dismissal of both charges.
(b) Where the pending charge is in any jurisdiction, but renders the offender ineligible for participation, eligibility determination should be deferred pending judicial determination of the pending charge and the sentence imposed.
(c) Where the pending charge is in the same state, but in a different local jurisdiction and in itself does not bar participation, there should be a formal agreement between prosecutors, or a legislative determination that participation in the program will be permitted, subject to other eligibility criteria.
(d) Where the pending charge is in another state jurisdiction and does not in itself bar participation, there should be either a formal or informal agreement between the states authorizing participation in the 'diversion' state, subject to other eligibility criteria.
(e) With respect to recommendations (c) and (d), it is anticipated that successful completion of the diversion program would be a basis for dismissal of charges in the non-diversion state.

(f) *Exclusion Based on Offender Behavioral Characteristics*

Most pretrial diversion programs exclude from participation those offenders who, although otherwise eligible, are found to have certain behavioral characteristics. As illustrated in Chart III, thirteen of the fourteen programs surveyed provide that an offender will be deemed ineligible if he or she is a hard drug addict, hard drug

user, or an alcoholic. As most of these programs are primarily employment oriented, their inability to medically treat and counsel individuals with these characteristics largely accounts for their exclusion.[89] Similarly, many pretrial diversion programs will deny participation to those offenders with identifiable and serious psychological disorders.[90] The single program which does not exclude offenders with these characteristics refers such individuals to an appropriate local treatment center.[91]

One of the most basic elements of successful participation in a diversion program is the motivation which the offender "brings" with him or her or which can be developed by the program. One program has noted that "persons failing in the program usually fail because of a lack of motivation . . . ."[92] In this respect the hard drug addict and heavy user pose a particular problem. In its formative stage The Manhattan Court Employment Project opted to exclude addicts and heavy users from participation:

> Project administrators knew that addicts would have difficulty committing themselves to the Project's goals, particularly employment. Addicts generally cannot meet responsibilities beyond satisfying their "habits." If the Project were to admit them, it would risk their being rearrested for crimes committed to support their needs, the cost of which could not be covered by any salaried job the Project could offer them. Experts trained in addict treatment maintain that addicts allowed to focus on anything except their need for treatment want to think that they can get along simultaneously in the straight and addict's world.[93]

The New York program, however, found that despite its efforts to exclude addicts and heavy users, "one out of every four defendants who came through the Project's screening process was later found to be using drugs to an extent that imparied his participation."[94] Although the project continued to service persons so admitted, later analysis confirmed the project's basis for excluding them from participation: the project "devoted disproportionate amounts of time to working with addicted participants" and "[b]y Project standards of success, staff [had] been of minimal assistance. Addicts . . . received one-fifth as many [successful completions] as other participants."[95]

CHART III

SELECTED PRETRIAL DIVERSION PROGRAMS:
EXCLUSION BASED ON BEHAVIORAL CHARACTERISTICS

Program	Hard Drug User	Hard Drug Addict	Alcoholic	Marijuana User
14		X	X	
13		X	?	
12[a]	(X)	(X)	(X)	
11	X	X	X	*
10	(X)	(X)	(X)	
9	X	X	?	X
8	(X)	X	X	**
7	X	X	(X)	
6	X	X	X	
5[b]				
4[c]	(X)	(X)	(X)	
3		X	?	
2	X	X	X	
1[d]		X	X	

Exclusionary Characteristic

Legend:
* = Only excluded if charged with possession or sale.
** = Usually admitted; excluded with discretion.
X = Designated characteristic will exclude offender.
? = Data incomplete; suggests exclusion.
(X) = Designated characteristic generally excluding; offender may be admitted with discretion.

Notes:
a. Those admitted transferred to Drug Diversion Program.
b. All admitted; referred for treatment.
c. Project includes a Chemical Dependency Unit for alcoholic and drug dependent offenders in need of both treatment and manpower services.
d. Excluded unless enrolled in an appropriate abuse program and are able to undertake employment.

Sources: Independent Questionnaire, July, 1974; National Pre-Trial Intervention Service Center of the American Bar Association Commission on Correctional Facilities and Services, "Descriptive Profiles on Selected Pretrial Criminal Justice Intervention Programs," Wash., D.C., April, 1974.

It is perhaps significant that only one program has chosen to exclude offender participation based on marijuana use.[96] Thus, it may be presumed that in the view of most programs, marijuana use is considered neither an obstacle to effective treatment nor supervision. Alcoholism and hard drug addiction are the most frequently excluded characteristics, being excluded in twelve and thirteen programs, respectively. Nine programs exclude the heavy drug user. Several of these programs, however, do not regard such behavioral characteristics as a complete bar to successful participation and will, with discretion, admit offenders with these characteristics. Table V reflects the programs' attitudes towards offenders with any of the four above mentioned behavioral characteristics:

TABLE V

SELECTED PRETRIAL DIVERSION PROGRAMS: EXCLUSION BASED ON OFFENDER BEHAVIORAL CHARACTERISTICS

	Characteristic			
Disposition	Hard Drug User	Hard Drug Addict	Alcoholic	Marijuana User
Admit	5	1	2	13
Exclude on Discretion	0	0	0	1
Exclude	9	13	12	1
Admit on Discretion	4	3	4	0
Exclude, No Discretion	5	10	8	1

Sources: Independent Questionnaire, July, 1974; National Pre-Trial Intervention Service Center of the American Bar Association Commission on Correctional Facilities and Services, "Descriptive Profiles on Selected Pretrial Criminal Justice Intervention Programs," Wash., D.C., April, 1974.

Recommendation: It is recommended that excessive hard drug use, hard drug addiction and alcoholism be excluding characteristics with respect to an employment-oriented diversion program. Such offenders should be referred to the appropriate treatment facility and upon a determination by that authority, returned to the diversion program for employment assistance with full participant status. In certain limited instances, offenders with these charac-

teristics may be amenable to diversion program services in the first instance. In such cases they should be accepted for participation, subject to other eligibility requirements, and provided with the necessary treatment and counselling, either in-house or by referral, as their needs indicate. It is further recommended that marijuana and related "soft" drug usage not form a basis for denial of participation except in extreme circumstances.

(g) *Exclusion Based on Employment and Other Economic Status*

Seven of the pretrial diversion programs surveyed affirmatively indicated that an offender's economic status is of significant importance in determining eligibility.[97] Such a requirement is in complete accordance with the fact that most pretrial diversion programs are employment-oriented. Indeed, "the needs of the unemployed, underemployed or the unemployable and the risk to and burden on society are greater because of their economic circumstances."[98] Many programs apparently extend this principle to include those persons who have evidenced educational difficulties, suggesting acceptance of the theory that educational achievement is directly related to employability.[99] Only two additional programs have affirmatively indicated what appear to be rigid eligibility requirements with respect to earned income.[100]

At least one program, however, has recognized that overemphasis on the unemployed offender may result in adverse consequences and legal complications:

> To limit the program to only poor or disadvantaged would create a large problem by which we would encourage persons to quit their jobs or lie in order to get into the program. It would also put us in a position of discriminating against certain persons for reasons of employment and denying them equal protection of the law.[101]

Further, to limit program participation to the unemployed ignores the predicament of the employed offender:

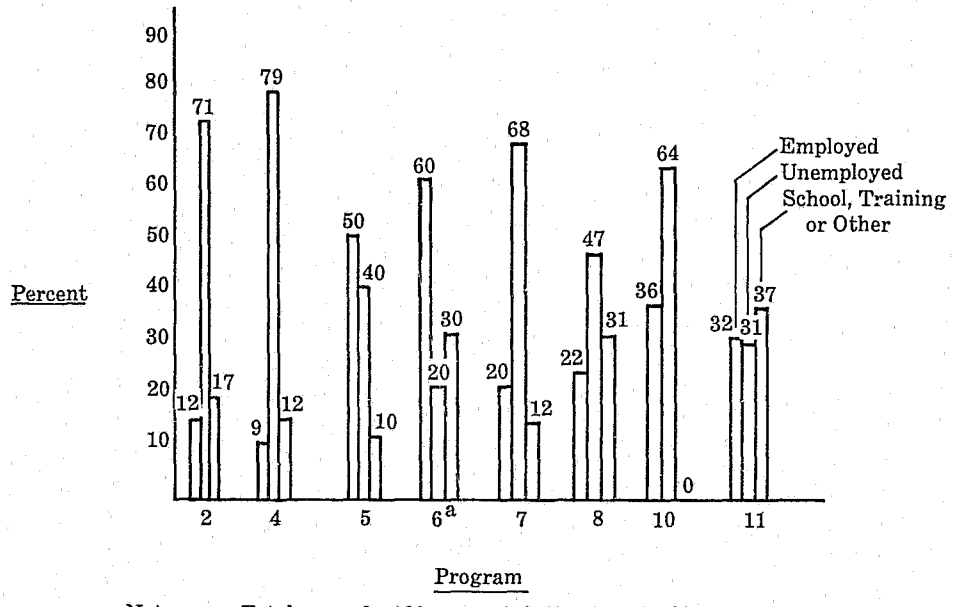
> [E]mployed defendants may want to increase their employability through training or better jobs, the desire for which assumes increased significance in light of the fact that individuals who are arrested often lose their present employment either because their post-arrest confinement makes continued

employment impossible or because of reluctance on the part of employers to continue employing those they may see as "criminals" or untrustworthy.[102]

Table VI-A illustrates that many programs have recognized their responsibility to assist the employed offender.

TABLE VI-A

SELECTED PRETRIAL DIVERSION PROGRAMS: PARTICIPANT STATUS AT INTAKE IN PROPORTION TO ALL PARTICIPANTS



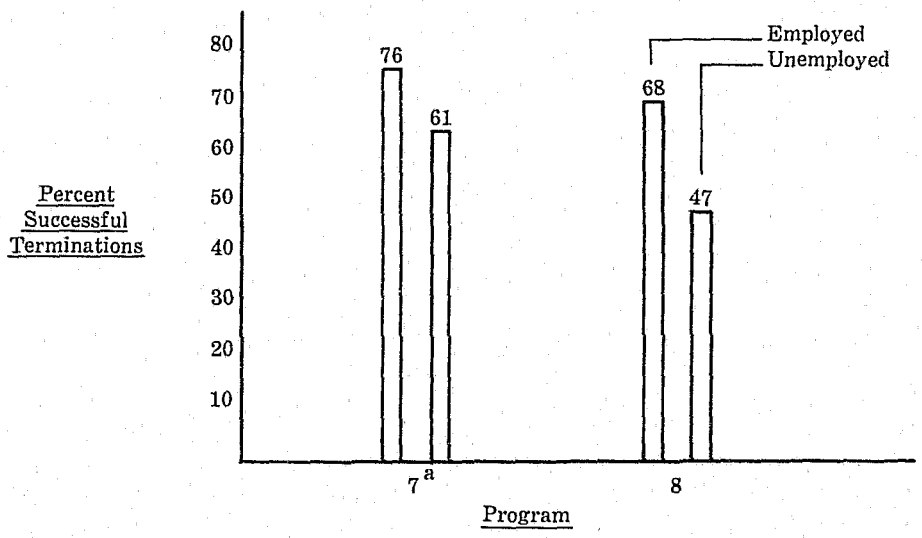
Note: a. Total exceeds 100 percent indicating double counting of participants who exhibit more than one status.

Source: Independent Questionnaire, July, 1974.

Although apparently few programs have kept statistics on point, two programs have indicated that the employed offender is more likely to successfully complete the program than is his unemployed counterpart. Similarly, an informed estimate made by The Manhattan Court Employment Project indicates a positive correlation between a participant's income level and successful completion of the program. These findings are illustrated in Tables VI-B and VI-C, respectively.

TABLE VI-B

SELECTED PRETRIAL DIVERSION PROGRAMS: COMPARATIVE RATES OF SUCCESSFUL TERMINATION, PARTICIPANTS EXHIBITING "EMPLOYED" AND "UNEMPLOYED" STATUS AT INTAKE

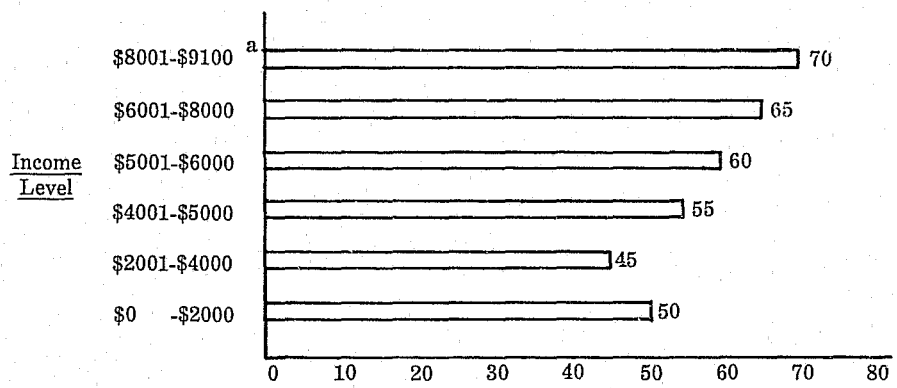


Note: a. Extrapolated data for unemployed successful termination rate. The project indicated an overall success rate of 65.4% and an employed success rate of 75.6%. Assuming that those participants in school or training achieved a success rate equal to that of employed participants, the estimated success rate of unemployed participants was calculated.

Source: Independent Questionnaire, July, 1974.

TABLE VI-C

THE MANHATTAN COURT EMPLOYMENT PROJECT: COMPARATIVE RATES OF SUCCESSFUL TERMINATION AND PARTICIPANT INCOME LEVELS (AT INTAKE)



Note: a. As project eligibility is restricted to offenders with income levels at or under $175 per week, no data is available for higher income bracketed offenders. The trend, however, would indicate a continuing rise in the success rate. The total success rate of the project is 56%.

Source: Independent Questionnaire, July, 1974.

Recommendation: It is recommended that the approach suggested by the National Pre-Trial Intervention Service Center of the ABA Commission on Correctional Facilities be adopted:

> Rather than a hard and fast exclusion of defendants who are employed, the authorization for programs should disregard employment exclusions altogether or allow the staff, where employment counselling is paramount, to proceed on a case-by-case, discretionary basis in selecting those who have a genuine need or desire for such counselling, notwithstanding present employment.[103]

(h) *Exclusion Based on Prior Record*

Of the twelve pretrial diversion programs analyzed for participation exclusion, based on the offender's prior record, all indicated that this criteria is of critical importance in determining eligibility. One program excludes participation for any prior arrest;[104] three deny participation for any prior conviction;[105] and, eight emphasize varying combinations of prior convictions and prior incarcerations.[106] Many of the programs in the latter category also examine the nature and pattern of prior convictions, with emphasis on antisocial criminal behavior and the propensity for violence in determining eligibility.[107]

Although it has been suggested that "there is little evidence to support the proposition that multiple offenders . . . are less susceptible to early and relevant rehabilitation or any of the other goals advanced by the [diversion] concept,"[108] the fact that all twelve of these programs deny participation based on prior arrest, conviction or incarceration suggests the presence of political and public pressure to exclude multiple offenders.[109] The existence of such pressure was recognized by The Manhattan Court Employment Project:

> A defendant's prior record affects how the court regards his case. After consultation with prosecutors and administrative judges, project staff decided that time spent in prison would be a selection factor.[110]

Statistically, the experience of one program confirms the suspicion that multiple offenders are in fact less susceptible to rehabilitation by the employment-oriented diversion program. Over a thirty-four month period the Atlanta Pre-Trial Intervention Project found that there was a significant difference in the rates of successful participation between participants with and without a prior record. This is illustrated in Table VII.

TABLE VII

THE ATLANTA PRE-TRIAL INTERVENTION PROJECT: COMPARISON OF SUCCESSFUL COMPLETION RATES OF PARTICIPANTS WITH AND WITHOUT PRIOR RECORDS

	Participant Class	
	Without Prior Record	With Prior Record [a]
Intake		
Total Accepted	876	363
Percent, All Participants	70.7	29.3
Status		
Active/Incomplete	160	31
Completions (All)	716	332
Disposition		
Successful	611	225
Percent, All Completions of Class	85.3	67.8
Unsuccessful	105	107
Percent, All Completions of Class	14.7	32.2

Note: a. One or more convictions, not over six months incarceration.

Source: Special Participant Study, Atlanta Pre-Trial Intervention Project, September 1, 1971 to June 30, 1974.

Recommendations:

It is recommended that no absolute disqualification be attached to any particular facet of an offender's prior record. There are likely to be instances where a twice-convicted felon is more amenable to rehabilitation than his once-convicted counterpart. In such a situation a requirement which, for example, would limit participation to offenders not having more than one prior felony conviction would ignore the individual in favor of an arbitrary standard.

The focus should instead be on the individual offender and his propensity for criminal activity as *evidenced* by his prior record. Guidelines, however, are a necessity and inquiry should be directed into the pattern of criminal behavior, particularly with respect to violence and anti-social behavior, the length of prior incarceration, the nature of the confining institution and the interval between

release and known criminal activity, the history of the offender between the time of his release and subsequent criminal activity, as well as the particular circumstances surrounding the present offense. In this manner a program will have built-in flexibility and extend its services to those offenders who, although having varying prior records, appear amenable to program rehabilitation.

With respect to "offender eligibility requirements" it has been recommended that they be loosely applied so that offenders who, although ineligible for failure to satisfy a specific requirement, may be admitted if they are otherwise deemed amenable to the rehabilitative process. Application of this principle will serve the best interests of the offender and the community. It has been shown, however, that many programs have made various eligibility requirements inflexible, apparently reflecting the view that flexible requirements would result in inefficient program management or inequitable treatment of offenders.[111] Unquestionably such a structure ignores the capabilities of the individual offender.

Recommendation:

Where a diversion program has made any eligiblity requirement inflexible and participation is denied because of a failure to satisfy such a requirement, it is recommended that participation be granted upon written request of the prosecutor or upon pretrial motion of the offender where the court finds participation to be in the best interest of the offender and the community. It is also recommended that where any offender is in need of services not offered by the diversion program, but which are otherwise available, participation should be granted subject to the offender's acceptance of such additional services.

3. Administrative Eligibility

(a) *Consent to Participation*

In varying degrees all pretrial diversion programs require the consent of certain persons prior to the initiation of program participation. For the programs surveyed, these requirements are illustrated in Table VII. All these programs have indicated that participation is, in the first instance, dependent upon the offender's voluntary acceptance of placement in the program. Forced participation with-

out the consent of the offender would seem to be an unconstitutional abridgment of due process and the right to a speedy judicial determination of the charge.[112] Pragmatically, the consent of the offender is necessary because cooperation and motivation are operational requisites to successful participation.

The consent of the prosecutor or the court is also a prerequisite to offender participation in all the jurisdictions surveyed — six programs require only consent by the prosecutor;[113] one requires only consent of the court;[114] and six require the consent of both.[115]

The respective functions and interests of the prosecutor and court in pretrial diversion rests in the doctrine of separation of powers. The determinative factor in this respect appears to be whether diversion is initiated prior or subsequent to the filing of formal charges.[116] With respect to pre-charge diversion the National Pretrial Intervention Service Center of the ABA Commission on Correctional Facilities and Services has stated that:

> [T]he basic concept of the prosecutor's broad discretion in the charging function is well recognized. The decision to divert individuals to the pretrial intervention program before they are formally charged by way of indictment, information or arraignment would seem to rest solely and legitimately within this properly exercised discretion . . . .
>
> The court would not ordinarily have a role in the initial decision to divert a particular offender if it occurs prior to the charge decision . . . .[117]

In the case of post-charge diversion, the same authority has stated that:

> [T]he process which leads to acquittal, dismissal of charges, and sentencing, or the exercise of sentencing discretion, is inherently a judicial function. Therefore, once formal charges are filed by way of arraignment, indictment, or information, determining the ultimate disposition of the case is primarily a judicial function, regardless of the advisory role assigned to the prosecutor by the Court.[118]

Six of the thirteen programs surveyed, as illustrated by Table VIII require only the consent of the offender and the court or prosecutor. The remaining seven programs additionally require the consent of various other persons: the arresting officer, victim, defense

attorney and parent if the offender is a juvenile. Since a parent is generally deemed the legal guardian of a juvenile, parental consent would seem to be consistent with this role. Similarly, it does not appear inconsistent with the best interests of the offender to require the consent of the defense attorney. It has been suggested, however, that:

> [G]iving veto power over the diversion decision to persons other than the prosecutor or judge, as for example to the arresting officer or victim of the crime . . . raises serious issues of due process. It makes the fate of an otherwise eligible defendant dependant on the unfettered exercise of the subjective discretion of individuals who never have had the constitutional authority to determine which individuals are to be charged once an arrest is made.[119]

Recommendations:

(A) *Pre-Charge Diversion*

Alternative I: Where formal charges have not been made by way of arraignment, indictment or information, initial consent should rest in the sole discretion of the prosecutor. Where the offender, however, is otherwise eligible for participation, and consent is withheld by the prosecutor, it is recommended that the program have standing to challenge the prosecutor's decision. Because one of the goals of pretrial diversion is to reduce court congestion, it is recommended that the offender not have standing to make such a challenge.

Alternative II: Where the offender is eligible in all respects, participation would be automatically granted, but subject to the prosecutor's right to challenge by court action.

(B) *Post-Charge Diversion*: Where formal charges have been made by way of arraignment, indictment or information, participation should be granted by the court upon motion of the defendant and the appropriate showing that eligibility requirements are satisfied. The prosecutor, of course, could challenge the motion.

(b) *Waiver of Speedy Trial*
Waiver of the Statute of Limitations
Required Pleadings

The administrative requirements relating to the waivers of speedy trial, the statute of limitations, and required pleadings of guilty prior to participation are essentially constitutional issues and are

TABLE VIII

SELECTED PRETRIAL DIVERSION PROGRAMS: PERSONS WHO MUST CONSENT TO OFFENDER PARTICIPATION

Program	Formal Charges Filed	Consent Required From: Offender	Prosecutor	Court	Victim	Arresting Officer	Defense Attorney	Parent[a]
1	NA	X	X	X				
2	No	X	X	X		X		
3	NA	X	X					
4	No	X	X	X				
5	Yes	X	X		X	X		
6	Yes/No	X	X			b		
7	Yes	X		X				X
8	Yes	X	X	X	X	b	X	
9	Yes	X	X	X				
10	Yes/No	X	X	X			X	
11	Yes	X	X	X				X
12	No	X	X					
13	NA	X	X		X	X		

Notes: a. Applicable only where offender is a juvenile.
b. Project has indicated that although consent of arresting officer is not required, objection by the arresting officer is likely to bar participation.
NA Not available.

Sources: Independent Questionnaire, July, 1974; National Pre-Trial Intervention Service Center of the American Bar Association Commission on Correctional Facilities and Services, "Descriptive Profiles on Selected Pretrial Criminal Justice Intervention Programs," Wash., D.C., April, 1974.

discussed in the section on legal issues of a pretrial diversion program.[120] However, in examining requirements of the various programs, reference must be made to these issues, and the discussion presented in this section is intended only to be general.

Table IX shows the respective requirements of selected pretrial diversion programs with respect to the pre-participation requirements of waiver of speedy trial and pleading.[121]

TABLE IX

SELECTED PRETRIAL DIVERSION PROGRAM; PRE-PARTICIPATION REQUIREMENTS OF SPEEDY TRIAL WAIVER, PLEADING, AND THE FILING OF FORMAL CHARGES

Program	2	4	5	6	7	8	9	10	11	12
Formal Charges Filed	D	D	P	P/D	P	P	P	P/D	P	D
Waiver of Speedy Trial Required	Y	Y	Y	Y	Y	N	N	Y	Y	Y
Pleading Required	N	N	N	N	N	N	G	N	N	N

Legend: D: Charges, if any, deferred pending completion of program.
P: Charges must be filed prior to participation.
Y: Yes
N: No

Source: Independent Questionnaire, July, 1974.

Eight of the ten programs represented in Table IX require an offender to sign a written waiver of his right to a speedy trial prior to participation. This illustrates a recognition that constitutional principles relating to waiver of speedy trial are clearly applicable to participants in diversion programs which defer formal charging pending completion of the program, as well as those which operate subsequent to the formal charging process.

Closely linked to the issue of speedy trial is the waiver of the statute of limitations. Because the placing of formal charges commences prosecution and tolls the statute, there is no waiver issue with respect to programs initiating participation subsequent to the formal charging process. However, where formal charges are deferred pending completion of the program, it is theoretically pos-

sible that the statute of limitations could expire prior to completion of the program.[122] It would thus appear that a required waiver of the statute of limitations is appropriate in such programs. Furthermore, the fact that only one[123] of the ten programs in Table VIII conditions participation on the offender pleading guilty to the charges undoubtedly reflects the serious constitutional objections to such a requirement.

Recommendations:

(a) *Waiver of Speedy Trial*: It is clear that either the Fifth Amendment Due Process clause or the Sixth Amendment right to speedy trial grants constitutional protection to a participant in a pretrial diversion program. It is also likely that a participant's voluntary acceptance of the program will act as an implied waiver of the right to a speedy trial, thereby not requiring a written waiver. It is recommended, however, that a written waiver of this right be required prior to participation, as it would serve to reacquaint the participant with his obligations while in the program and specifically advise him of his suspended relationship with the prosecutor and the court. As such a waiver would become part of the participant's official file; it could be used to inhibit an unwarranted assertion of a violation of the right.

(b) *Waiver of the Statute of Limitations*: Although it is highly unlikely that a statute of limitations would expire prior to successful completion of a diversion program in which formal charges are deferred pending completion, it is recommended that an offender be required to make such a waiver. As with waiver of speedy trial, it would serve to reemphasize the terms of the participant's obligations to the program and the options of the prosecutor. Its usefulness in those unlikely situations where the statute would expire prior to completion cannot be questioned, especially since, in the absence of a diversion program, formal prosecution would have been initiated shortly after arrest.

(c) *Pleading Prior to Participation*: It is recommended that a participant not be required to enter a plea of guilty prior to participation. No opinion is expressed as to whether an "assumption of moral responsibility" should be a mandatory prerequisite to participation.

B. *Program Mechanics*

1. Screening

Following the formulation of eligibility requirements, those offenders potentially satisfying the criteria must be located and made aware of the diversion program. From this group of offenders, those who are in fact found to be eligible and who desire participation must be identified. It is this process which is referred to as "screening."[124] Because local police and judicial structures vary, there is no single "correct" form of screening—it must be designed to meet the specific demands of localized procedures. For these reasons, the screening process outlined in the following discussion is intended only as a general overview of the process.

Each morning, the previous day's arrest records and grand jury indictments should be reviewed by a project screener, and those offenders charged with crimes for which participation may be permitted must first be separated from those charged with crimes denying participation. This initial determination of eligibility, however, may be insufficient as initial charges are frequently reduced. As such, with respect to those offenders who are charged with crimes rendering them ineligible for participation, a second screener should contact such persons as the arresting officer, victim or complainant, in order to ascertain the circumstances of the alleged offense. If the screener believes that there are grounds for reducing the charge to one which would enable participation, the prosecutor should be informed, at which point an initial decision on the reduction of charges can be made. The screener should next obtain a copy of the prior record of each potentially eligible offender. Those whose records do not satisfy program requirements are rejected. In doubtful cases, rejection should be withheld pending further examination of the offender and his record by the prosecutor and program staff.

The next phase of the screening process involves an interview with those offenders whose charges and prior records are within the standards of the program.[125] Most offenders will still be in police custody awaiting arraignment, and the interview can be held at the place of detention. Other offenders will have been released on their own recognizance or on bail, and will have to be located. The screener should first outline program participation and its objectives, and the possibility that the charge might be dismissed following success-

ful completion of the program, and also of the possibilities of the continuance of charges if participation is unsuccessful.[126] If the offender expresses interest in the program, the screener should next make inquiry with respect to age, place and length of residency, employment, education, prior record, drug/alcohol usage, circumstances of the arrest and any other information relevant to program eligibility. Where the interview reveals nothing which would preclude participation, the screener must make sure that the case will not be called pending verification of the information received. Verification includes contacting the employer, visiting the place of residence, conversations with relatives and friends and any other procedures indicated by the information secured in the interview. If vertification is obtained, the offender is deemed eligible for participation.

Those offenders who are found to satisfy the eligibility criteria and who have expressed a desire to participate must next be administratively processed for entrance into the program. Depending upon the program requisites and whether charges have been formally filed, consent of the prosecutor and/or the court will need to be obtained. At this time the necessary waivers will be signed, and the offender is ready to begin program orientation. The process just described is graphically illustrated in Diagram I.

2. Program Services: Job Development and Placement

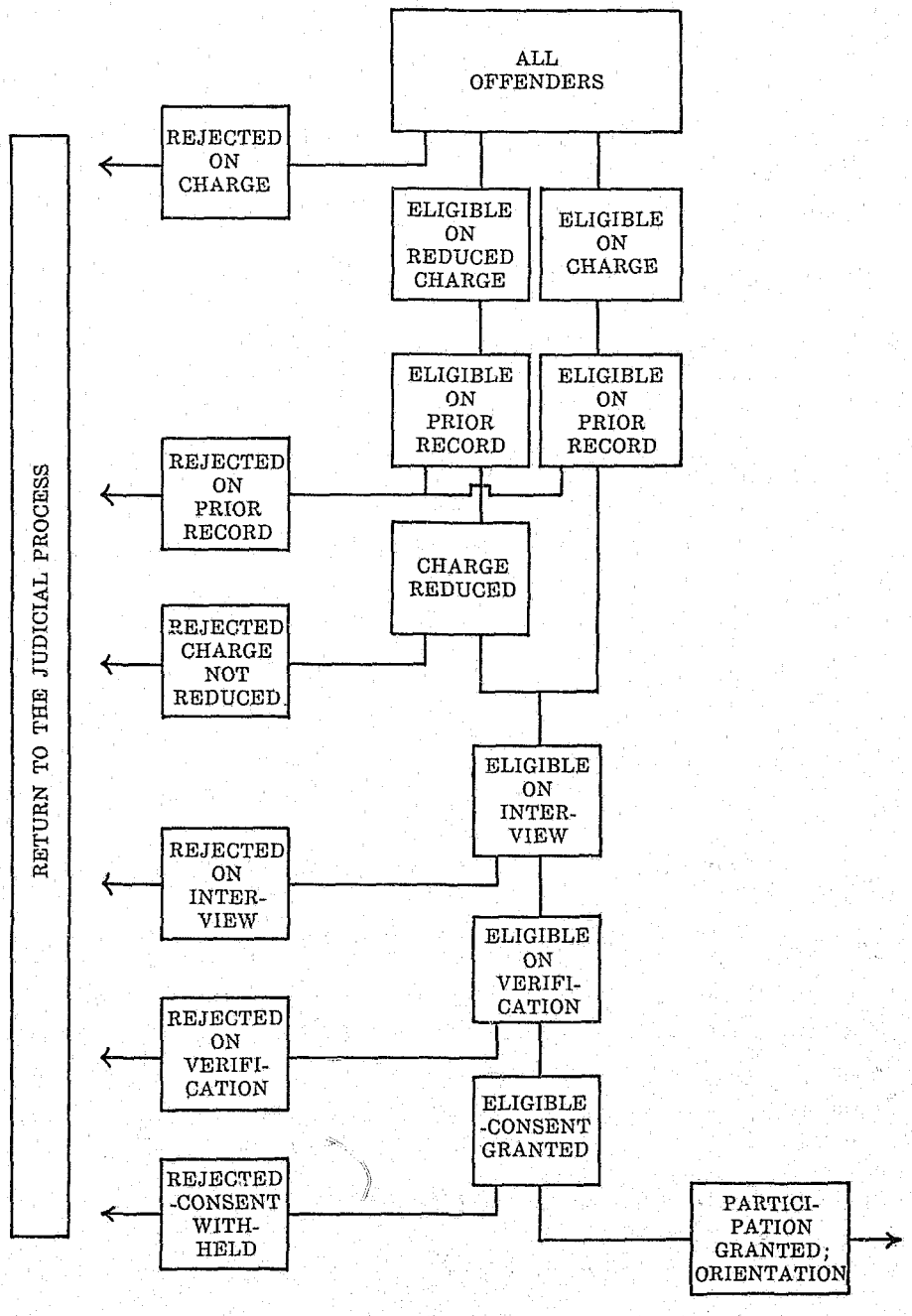
Because most pretrial diversion programs operate on the socioeconomic theory that employment status and income are directly related to criminal activity, substantial efforts are directed towards preparing the unemployed offender for job placement and upgrading the skills of the employed offender.

> As employment plays a vital role in the success of a participant, all project efforts will be directed toward finding suitable employment for those participants who need it and in assisting those participants who enter the project employed with keeping and maintaining the job they have.[127]

The first step in this process is the regular development of employer contacts. The receptiveness of employers to working with participants has been affirmatively indicated by two programs. The Atlanta Pre-Trial Intervention Project noted that "no major selling job

DIAGRAM I

THE SCREENING PROCESS



is anticipated in securing the Atlanta area employers' participation. They have demonstrated, again and again, their willingness to hire and train offenders."[128] The Manhattan Court Employment Project has reported that "virtually every employer approached by the Project has voiced a commitment to hire the hard core unemployed."[129] This willingness of employers to assist in pretrial diversion programs is evidenced by significant shifts in participant employment status at intake and termination, as illustrated in Table X.

Sustained employment must be the goal of the pretrial diversion program, and those employers who are to employ participants should be carefully screened. At least one program has found that larger firms could more easily accommodate project objectives because they offer wider benefits and opportunities for advancement,[130] as well as training programs and systematic upgrading for unskilled jobs.[131] In addition, such employers may be more receptive to lowering entrance requirements, and committing their administrative and supervisory staff to the growth and development of entry-level employees.[132] Furthermore, continued cooperation of larger firms may be anticipated as they engage in long-term employment planning while the smaller firms are characterized by infrequent job turnover and more limited employment opportunities.[133]

The next step in the employment process is evaluating each individual participant's interests and aptitudes, so that appropriate placement can be attempted. Placement in a job for which the participant is neither interested nor capable can only result in frustration, low motivation and a need for subsequent placement.[134] One of the methods of ascertaining job interests and aptitudes employed by programs is standardized testing,[135] which enables program staff to more efficiently counsel participants with respect to employment possibilities. After an agreement has been reached between the participant and job counsellor, some participants will be ready to interview with employers who have been approved by the project. One program, however, has indicated that many participants:

> lack an understanding of the purpose of the application, interview process, and consequently fail to present themselves in a positive manner while seeking employment. Many such [participants] though faithfully seeking work, are consistently insuring that they will not be hired due to negative or incomplete application forms, or to the inability to communicate with the interviewer in a positive manner.[136]

TABLE X

SELECTED PRETRIAL DIVERSION PROGRAMS:
PERCENT OF PARTICIPANTS EMPLOYED, UNEMPLOYED, IN SCHOOL AND IN TRAINING AT INTAKE AND TERMINATION

	Program 4[a]			Program 7			Program 8			Program 10[b]		
Status	Intake	Termination	Change	Intake	Termination	Change	Intake	Termination	Change	Intake	Termination	Change
Employed	9.0%	45.3%	+36.3%	19.7%	46.7%	+27.0%	22.0%	37.7%	+15.7%	35.6%	72.5%	+36.9%
Unemployed	79.0	26.8	—52.2	68.1	38.4	—29.7	47.0	32.2	—14.8	64.4	14.5	—49.9
School	7.0	14.3	+ 7.3	1.1	6.8	+ 5.7	1.0	3.3	+ 2.3	0	6.5	+ 6.5
Training				11.1	6.9	— 4.2	30.0	26.8	— 3.2	0	6.5	+ 6.5
Other/Unknown	5.0	13.6	+ 8.6	0	1.2	+ 1.2	0	0	—	0	0	—
Total	100.0	100.0	0	100.0	100.0	0	100.0	100.0	0	100.0	100.0	0

Notes: a. Data supplied by the program indicated a successful termination rate of 69% and an unsuccessful termination rate of 26%. In calculating the above figures, the unaccounted 5% was evenly split between the two rates, giving 71.5% and 28.5%, respectively.

b. Data supplied by the program was estimated.

Source: Independent Questionnaire, July, 1974.

Thus, as an integral part of job placement, the program must actively prepare participants for the interview process. To accomplish this, Project de Novo[137] utilizes group counselling to "impart an understanding" to the participants with respect to:

1. Purpose of the application form and of the interview.
2. How to organize information for the application form.
3. Expectations of the interviewer.
4. The role of the applicant as a participant in negotiating for the job.
5. Techniques of dealing with problem areas honestly, but in a positive manner.

In order to avoid misunderstanding and to minimize disappointment it is critical that the participant be made aware of the fact that he is not likely to receive a job offer from the first interview and that his first job placement may not be his last. Over a three-year period The Manhattan Court Employment Project found that only 48.3% of participants received job placement after one referral, 21.4% after 2 referrals, 11.6% after 3 referrals and that 18.6% required between 4 and 11 referrals prior to placement.[138] Over the same period the same project found that 66.4% of participants required only one job placement, 24.1% required two placements, and that 9.5% had to be placed between three and six times.[139]

Once a participant has received a job placement, the project must direct its efforts to maintaining employment and acting as "a source for advice during the uncertain days of a new job."[140]

> This increases the chances that he will remain on the job until the habit of a regular pay check will be hard to break.
>
> To accomplish this the project must offer training, educational advancement, behavioral guidance and counselling enabling the participant to view himself as a healthy and contributing member of society.[141]

The importance of the employer's role in job retention cannot be overemphasized. One means by which an employer can induce the participant to remain on the job has been suggested by The Manhattan Court Employment Project:

> Surprisingly, starting salaries have no effect on whether a person will stay on the job. Project administrators conducted

> a study that showed exactly the same retention rates for jobs paying more than $90 per week as for jobs paying less than that . . . Raises, not starting salaries may be the key to job retention. Project staff has suggested that employers start participants at salaries lower than planned so that small, frequent raises can be given, each one based on merit.[142]

3. Other Services

As the needs of the participants neither start nor end upon job placement, most programs offer a wide range of services other than those directly related to immediate employment placement. Almost all programs conduct psychological counselling, both group and individual, to the participant in his personal and employment readjustment. Most of these programs have indicated the use of psychological testing to facilitate the counselling. Where employability is hindered by a low level of educational achievement, many programs offer basic education courses,[143] with emphasis on reading and mathematics. Many of the programs, either independently or in conjunction with other organizations, offer the participant a broad range of social services, including family counselling, sex counselling, housing assistance, medical and dental care, child care, clothing, and in one case immigration assistance. Some also provide participants with emergency assistance funds for such items as carfare, tools, uniforms, eyeglasses, and other medical or dental care. Several programs also offer general legal assistance to the participant, either in-house or through community legal agencies.

4. Termination

Most pre-trial diversion programs operate under the belief that offender rehabilitation can be accomplished in a relatively short time and this is suggested by the fact that seven of the ten programs surveyed set the basic participation period at 90 days. In certain cases, however, where the program feels that the participant can successfully complete the program only if further participation is granted, the program will recommend an extension to the basic program period, in which the court and/or prosecutor must concur.[144] The basic participation period and procedures for extension periods for the programs surveyed are set forth in Table XI.

TABLE XI

SELECTED PRETRIAL DIVERSION PROGRAMS:
LENGTH AND EXTENSION OF BASIC PARTICIPATION PERIOD

Program	Basic Period	Extension Recommendation By	Extension Concurrence By	Maximum Participation
2	90 days	Counselor	Court and District Atty.	No limit
4	6 months	Counselor	Counselor's Supervisor	No limit
5	90 days	Counselor or Job Developer	Prosecutor	1 year
6	90 days	Counselor	Prosecutor	270 days
7	90 days	Program	Court	No limit
8	90 days	Program	Prosecutor and Court	No limit
9	18 months	no extensions	—	18 months
10	90 days	Screener and Program Director	Prosecutor and/or Court	No limit
11	90 days	Counselor	Court	No limit
12	variable, to 1 year	Program	Prosecutor	variable, to 18 months

Source: Independent Questionnaire, July, 1974.

Once a participant has been accepted into a diversion program his continued participation is contingent upon his cooperation and compliance with program rules and regulations. Generally the participant is required to attend scheduled counselling sessions and participate meaningfully therein, appear at employment interviews, take part in any other activities deemed necessary by the program, refrain from the use of drugs or excessive use of alcohol and not engage in any criminal activity. Failure to meet these obligations is likely to result in an unsuccessful termination from the program and the resumption of criminal proceedings prior to the expiration of the basic participation period. A summary of the most often expressed bases for such termination is presented in Table XII.

TABLE XII

TEN SELECTED PRETRIAL DIVERSION PROGRAMS, CAUSES OF UNSUCCESSFUL TERMINATION PRIOR TO EXPIRATION OF BASIC PROGRAM PARTICIPATION

Nature of Occurrence	Number of Programs in Which the Occurrence will Result in Immediate Termination:	Number of Programs in Which Repetitive Occurrences will Result in Termination:
Non-Cooperation	1	8
Marked Non-Cooperation	5	4
Arrest[a]	6	7
Conviction	7	2
Drug Use	3	5

Note: a. Total over ten as three programs indicated that arrest can result in either immediate termination or termination after several arrests, depending upon the severity of the charge and the circumstances.

Source: Independent Questionnaire, July, 1974

At the end of the basic participation period (or extension period) the program will determine[145] whether the participant has successfully or unsuccessfully completed the program and forward this finding to the prosecutor and/or court for disposition of the case based upon acceptance or rejection of the recommendation.[146] Acceptance of a "successful" recommendation will result in the dismissal of charges against the participant; rejection of a "successful"

recommendation or acceptance of an unsuccessful recommendation will usually result in resumption of legal proceedings against the participant at the discretion of the prosecutor.[147] The uniformly high rate of court and/or prosecutor acceptance (96-100%) of "successful" recommendations suggests that program recommendations are favorably viewed and that the pre-trial diversion structure is conducive to criminal rehabilitation. Table XIII indicates the respective successful and unsuccessful termination rates and the rate at which successful recommendations are accepted by the court and/or prosecutor.

Recommendations:

(a) *UNSUCCESSFUL TERMINATION*: Where a member of the program staff intends to recommend that a participant be unsuccessfully terminated from the program the following procedures are recommended: (1) That the staff member inform the appropriate program administrator of his intentions; (2) That the administrator advise the participant of the pending recommendation, his right to hearing on the issue and his right to be representated at such hearing by counsel; That if the participant is unable to obtain counsel, the program's in-house counsel will represent the participant or the program will secure counsel from an appropriate outside agency; (3) Following the hearing the program will forward its decision to the prosecutor and/or court.

(b) *PROSECUTOR OR COURT REJECTION OF A TERMINATION RECOMMENDATION*: (1) Where a prosecutor rejects a "successful" termination recommendation of the program and intends to prosecute the participant it is recommended that a pre-trial in-court hearing be held on the issue. Appellate review procedures (if any) would be available in accordance with court procedures on pre-trial hearings. (2) Where any recommendation is to be made to the court, it is recommended that the court conduct a full hearing on the issue prior to acceptance or rejection of the recommendation. Appellate review is to be in accordance with court procedures.

TABLE XIII

SELECTED PRETRIAL DIVERSION PROGRAMS: RATES OF SUCCESSFUL AND UNSUCCESSFUL TERMINATIONS AND RATE OF ACCEPTANCE OF SUCCESSFUL TERMINATION RECOMMENDATIONS

Program	Unsuccessful Terminations as a Percent of all Terminations	Successful Terminations as a Percent of all Terminations	Rate of Acceptance of Successful Termination Recommendations
2	19%	81%	—
4[a]	26	69	99%
5	—	—	100
6	20	80	99
7	34.6	65.4	96
8	44	56	99
9	2	98	100
10[b]	29	71	100
11	37	63	99
12	10	90	100

Notes: a. 5% unaccounted for by program.
b. Estimated by Program

Source: Independent Questionnaire, July, 1974.

C. *Program Evaluation*

Following the foregoing examination of the operating characteristics of pretrial diversion programs, an attempt must be made to ascertain their effectiveness. Because diversion programs share with the traditional criminal justice system the common goal of crime deterrence, a measure of the effectiveness of each, in the context of recidivism, could arguably be the best index of success. It is frequently argued, however, that such a comparison is oversimplified and somewhat suspect in that the eligibility criteria of the diversion program is conducive to admitting only those offenders who are deemed likely to successfully complete the program and refrain from further criminal conduct. Similarly, within the screening process, it may be hypothesized that the court and/or prosecutor are likely to grant consent to participation to only those offenders they regard as "low-risk" and who, upon conviction, would most likely receive suspended sentences and traditional criminal justice probation. Thus, it may be said that the low recidivism rates indicated in Table XIV only serve to document the expected when compared to a California study[148] indicating that approximately one-third of those released on parole from state prisons will be reincarcerated in a state prison within several years and that an additional 15% will commit lesser crimes resulting in jail sentences or fines.

Notwithstanding the validity of the above criticisms of a recidivism comparison, "controlled" comparisons between diversion and traditional criminal justice recidivism rates tend to indicate the success of pre-trial diversion. Over a 34 month period the Atlanta Pre-Trial Intervention Program successfully terminated 438 felons. During the same period 60 participants whose original participation charge had been a felony were rearrested, yielding an unadjusted recidivism rate of 13.7%. As charges were dismissed in the cases of 12 of these felons, the maximum adjusted recidivists numbered 48, or 11% (representing convictions obtained and "open" cases).[149] Contrasting this low recidivist rate reported by the Atlanta project is a California Superior Court study indicating that 34% of the felons placed on probation immediately following conviction recidivated within a 12 month period.[150] Assuming that the California felons placed on probation represent the type of "low-risk" offenders

TABLE XIV

SELECTED PRETRIAL DIVERSION PROGRAMS
RECIDIVISM RATES
SUCCESSFUL COMPLETIONS

Program	% Re-arrested[a]	% Felony	% Mis-demeanor	% Con-victed[b]	% Felony	% Mis-demeanor	Recidivism Period[c]
12	16.5	38.8	61.2	7.2	15.3	84.7	36
8	15	26	74	NA			12
7	5.8			NA			6
6	9.5	53	47	NA			34
2	3			NA			8

Notes: a. Represents maximum unadjusted recidivism
b. Represents maximum adjusted recidivism
c. In months

Sources: Independent Questionnaire, July, 1974. Atlanta Data: "Special Participant Study," September 1, 1971-June 30, 1974.

who would be eligible for diversion and further assuming that geographical variables are insignificant, the fact that the pre-trial diversion program (in 34 months) proportionately resulted in one-third as many recidivists as did the traditional post-conviction probation program (in 12 months) suggests the success of pre-trial diversion. Similarly, the results also tend to confirm the view that traditional probation offers "no attention or services . . . which would alter criminal behavior."[151] Indeed, the Atlanta project found that:

> A large sampling of the attitudes of those presently on probation convinced the researchers that most probationers consider being on probation a "joke." . . . And, research revealed that the youthful offender, if left to his own devices, usually is arrested time and time again, with little or no corrective action taken until the individual is finally incarcerated due to a serious crime.[152]

Another study was conducted by the Manhattan Court Employment Project in which the recidivism rates of unsuccessful and successful participants during the initial 23 months of project operation (after a 12 month follow-up period) were compared to the recidivism rate of a control group of defendants charged within the three month period immediately preceding the initiation of the project. Those in the control group "were clearly not ineligible and [had] charges . . . , prior drug arrests, ages, and places of residency closely match[ing] the sample of [successful] participants."[153] The control group had a recidivism rate of 31.9% while the successful and unsuccessful participants had recidivism rates of 15.8% and 30.8%, respectively, over the entire 23 month period. These figures, however, understate the success of the program in that only 6.6% and 25.0% of the successful and unsuccessful terminations, respectively, recidivated during the final 10 months as compared to 25.0% and 36.7%, respectively, during the initial thirteen months. This marked decrease over the two subperiods suggests that the project's screening process increased in efficiency during the latter period and that project personnel gained confidence and ability to work with participants and employers as the project continued. The statistics are illustrated in Table XV.

TABLE XV

THE MANHATTAN COURT EMPLOYMENT PROJECT, 12 MONTH RECIDIVISM FOR CONTROL GROUP AND SUCCESSFUL AND UNSUCCESSFUL PARTICIPANTS

Time of Project Entry	Group	% Rearrest Recidivism [a]	Ratio to Control Group
	Control	31.9	—
Initial 13 Months	Successful	25.0	.78
	Unsuccessful	36.7	1.15
14-23 Months	Successful	6.6	.21
	Unsuccessful	25.0	.78
Initial 23 Months	Successful	15.8	.50
	Unsuccessful	30.8	.97

Note: a. Significant beyond the .01 level with chi square test.

Source: The Manhattan Court Employment Project of the Vera Institute of Justice, Final Report, November, 1967 — December 31, 1970, p. 47.

As already stated most pretrial diversion programs subscribe to the theory that there is a positive correlation between employment and criminal activity and accordingly direct a substantial portion of their efforts in finding acceptable employment for their underemployed and unemployed participants. If this assumption is in fact true, the effectiveness of pretrial diversion programs may be measured by shifts in participant status from unemployed to employed, school or training. The fact that the four pretrial diversion programs which have maintained statistics have been successful in reducing the number of participants who were unemployed at program intake has been demonstrated in Table X.[154] Table XVI summarizes the net change data in Table X.

TABLE XVI

SELECTED PRETRIAL DIVERSION PROGRAMS, CHANGES IN PARTICIPANT STATUS AT INTAKE AND TERMINATION FOR ALL PARTICIPANTS

Program	4[a]	7	8	10[b]
Employed	+36.3%	+27.0%	+15.7%	+36.9%
Unemployed	—52.2	—29.7	—14.8	—49.9
School	+ 7.3	+ 5.7	+ 2.3	+ 6.5
Training		—4.2	— 3.2	+ 6.5
Other/Unknown	+ 8.6	+ 1.2	—	—
	0.0	0.0	0.0	0.0

Notes: See Table IX.

Source: Table IX.

Because few bona fide control group studies are presently available it is perhaps impossible to objectively measure the success of pretrial diversion with any given recidivism comparison. Subjectively, however, it may be more appropriate to evaluate diversion programs in the context of the individual participants and what they have been able to accomplish with program assistance. One program[155] which responded to the independent questionnaire included several case histories of former participants which are condensed here as evidence of the success of pretrial diversion:

Case Histories

An eighteen year old, Black, male, service station attendant, was referred for participation for arrest on violation of the state drug abuse control act. He was not a first-time offender, having had one previous arrest.

This ambitious young man had been unable to secure for himself anything but menial labor jobs when he displayed an interest in improving his educational background. He was enrolled in the project's in-house basic education course. One month before completion he was placed in a production job at $2.97 an hour. At the time he entered the project he was making $1.65 an hour. After 16 months he is still employed there and his current salary is $3.39 an hour.

A thirty-two year old, white, female, school teacher was arrested for shoplifting and was referred to the project by the prosecuting attorney. A conviction could have meant dismissal from her job. She not only completed the project but went on to complete her master's program. She is still teaching and now has an eleven year tenure in the same position. Despite her one-time confrontation with law enforcement, she is an excellent teacher and in all aspects considered "very normal."

Pre-Trial participation offered her a chance to settle with legal authorities without completely revamping a life style she had erected.

A Black male, twenty-two years old, was arrested for attempted burglary. He was unemployed and in jail at the time the project screener located him. His employment record was sporadic, showing little tenure at any of his jobs. This was not an easy case as he has two close brushes with the law while he was in the project. Shortly after leaving the project he went to work for a construction company. Now one year later, he is a supervisor with the same company in a salary range of $12,000.00 a year.

A vocational rehabilitation authority referred a twenty-one year old, white male, charged with a felony, Theft by Taking, to the project. They had classified him with an I.Q. of about 60 and considered him "unemployable." He desired to work. After several attempts at placement, he was placed as a laborer in a bumper plating

factory. While employed by this firm he advanced to bumper inspector.

An auto accident in which he broke his arm caused him to be laid off. After his recovery he was placed in a production firm. His position was maintenance of delivery trucks and he continues his employment there. He enjoys his work there and it offers him a chance to assist his mother with her support as well as supporting himself and his new wife.

A second year education major, graduate school student was arrested for a felony charge, violation of the state drug abuse control act. This twenty-three year old, Black male was otherwise unemployed. Shortly after entering the project this above average young man obtained the position of room service waiter in a downtown hotel. He worked there until shortly after completing the project.

At that time he was hired as an instructor in basic education by one of the project sub-contractors. He is still employed there. As this is his chosen profession he would not have been able to be so employed if it were not for the project. If he had not entered the project he probably would not have completed the master's program, and would have a felony conviction record for the remainder of his life.

Forgery of a prescription is a very serious charge for a licensed nurse. When this twenty-six year old, white, female entered the project, she was in danger of having her license revoked. The Board of Nursing Examiners learned of her arrest and demanded that she be terminated from participation so that she could be prosecuted and her license revoked. The project refused to terminate her and after much argument the Board relented.

She is currently employed by a large foundation where she participates in cancer research.

A twenty year old, white male was arrested for the possession of marijuana; at the time of his arrest this charge was considered a felony. He had just been employed as a public service worker with a nearby community. Had his employer been aware of his arrest he would have been discharged. He was accepted by the project and completed it. With his charges dismissed he was able to keep his job and continue working in a profession that he loved, and now nearly

two years later he is still working and contributing to his community.

D. *State-Wide Diversion: an Alternative to State Incarceration?*

"The number of inmates in Georgia jumped from 8500 to almost 9900 between April of 1973 and May of 1974."[156] Continuation of this 16.5% annual rate of increase for six years will result in a Georgia prison population of approximately 24,750 by mid 1980. That this trend is continuing is evidenced by the fact that there were 10,085[157] persons incarcerated in the state prison system by the end of June, 1974, a monthly increase of 1.868% or an annual rate of 27.20%. The fact that the present Georgia prison system can accommodate a maximum of 11,000 inmates[158] will require that the state provide additional facilities for 13,750 inmates by 1980. As the estimated construction cost per prison bed space is $22,000,[159] required expenditure for physical plant to accommodate the increased population will amount to $302,500,000 for the six year period. Maintenance costs for the additional 14,850 inmates, currently estimated at $2891 annually per inmate[160] will increase from between $90,155,835 and $166,144,324, assuming the average total time served per inmate is between 2.10 and 3.87 years.[161] As illustrated in Table XVII this represents a total cost increment to the state of between $392 and $468 million over the next six years. These figures, however, understate the burden on the state as they do not include the cost of welfare assistance to families of inmates, prosecution and court costs, loss of state revenue in the form of income and sales taxes and the economic loss to the state economy due to the multiplier effect[162] of lost disposable income.

According to data compiled by the National Pretrial Intervention Services Center of the American Bar Association Commission on Correctional Facilities and Services the cost per participant in pretrial diversion programs ranges from a high of $1250 to a low of $506, with an average cost of $746.[163] These costs are reflected in Table XVIII. When compared to the estimated annual cost per inmate in the Georgia prison system, the savings potentially generated by state-wide pretrial diversion are highly significant. The highest participant cost of $1250 represents a savings in excess of 56.7%; the Atlanta cost of $580 corresponds to savings of 79.3%; and the average cost of $746 yields savings of 74.2%.

TABLE XVII

PROJECTED GEORGIA PRISON POPULATION INCREASE, 1974-1980, AND RESULTING BED SPACE AND MAINTENANCE COSTS

Year[a]	Population[b]	Annual Increase	Cumulative Over-Capacity[c]	Additional Bed Space Cost[d]	Cumulative Bed Costs	Additional Annual Inmate Maintenance Costs 2.10 Years Served	Additional Annual Inmate Maintenance Costs 3.87 Years Served[e]
1975	11,533	1,633	533	$ 11,726,000	$ 11,726,000	$ 9,914,106	$ 18,270,004
1976	13,437	1,904	2,437	41,888,000	53,614,000	11,559,374	21,301,952
1977	16,564	2,217	4,654	48,774,000	102,388,000	13,459,628	24,803,796
1978	18,236	2,582	7,236	56,804,000	159,192,000	15,675,580	28,887,416
1979	21,245	3,009	10,245	66,198,000	225,390,000	18,267,939	33,664,692
1980	24,750	3,505	13,750	77,110,000	302,500,000	21,279,205	39,213,940
TOTAL		13,750		$302,500,000		$90,155,832	$166,141,800

Notes: a. Based on May of each year.
b. Based on 16.5% annual rate of growth with a base of 9,900 (May, 1974).
c. Based on 11,000 Georgia Prison System Capacity.
d. Based on a cost of $22,000 per bed space.
e. See Tables XIX and XXIII, note (f).

TABLE XVIII

SELECTED PRETRIAL DIVERSION PROGRAMS, COST PER PARTICIPANT

Program/City	Participant Cost
Court Resources Project Boston, Mass.	$1,250
Hudson County Pretrial Intervention Project Jersey City, N. J.	855[a]
Dade County Pretrial Intervention Project Miami, Fla.	695
Court Rehabilitation Project Syracuse, N. Y.	657
Operation DeNovo Minneapolis, Minn.	650[b]
The Atlanta Pretrial Intervention Project Atlanta, Ga.	580[c]
Project Crossroads Washington, D. C.	506
Average	$ 746

Notes: a. Data indicates cost per successful participant at $1,250. Above figure calculated from data indicating total of 216 participants, 153 of whom were successful.
b. Data given as $620-650.
c. Data given as $490-580.

Source: National Pre-Trial Intervention Service Center of the American Bar Association Commission on Correctional Facilities and Services, "Descriptive Profiles on Selected Pretrial Criminal Justice Intervention Programs," Wash., D.C., 1974, Appendix "A".

As previously stated, the inmate population in the Georgia prison system was 10,085 at the end of June, 1974.[164] How many of these inmates would have been eligible for pretrial diversion participation had such a program been available to them? What portion of the projected 1980 prison population might be eligible for pretrial diversion? There are, of course, no ready answers. Hypothetically, however, and in accordance with prior recommendations, an examination of certain characteristics of the present inmate population indicates that approximately 38% of those inmates might have been eligible for pretrial diversion. From the total prison population those inmates with the following characteristics may be excluded: those presently serving time for what are deemed 'serious crimes';[165] those who exhibit identifiable 'bad' behavior characteristics;[166] and those inmates who were below the age of 17 or over the age of 45 at the time of their incarceration.[167] The 3,916 (38.83%) who remain following these exclusions may be deemed eligible for pretrial diversion. Contrasting this 38.83% is a study conducted by the Chamber of Commerce of the United States which suggests that the number of eligible inmates may be almost double that figure. That study states that "[e]xperts agree that only 20% to 30% of present inmates represent a danger to society and must be securely confined."[168] Based on this study's more conservative estimate of 70%, after having extracted those inmates below the age of 17 or over 45, the Georgia inmates potentially eligible for pretrial diversion number 6,530, or 64.75% of the June, 1974 population.

Assuming that the number of inmates eligible for pretrial diversion lies somewhere between 3,916 and 6,530, the potential beneficial impact of a state-wide pretrial diversion program on the June, 1974 and the 1980 projected prison populations with respect to both the individual offender and the state cannot be overemphasized. While the personal losses to these 'eligible' inmates cannot accurately be ascertained, it is possible to estimate some of the economic costs to the state resulting from the absense of state-wide diversion.

After extracting those inmates either guilty of a 'serious crime,' having a 'bad' behavior characteristic, or below the age of 17 or above the age of 45, the sentences to be served by the 3,916 inmates deemed eligible for pretrial diversion are set forth in Table XIX. Based on the annual cost of $2891 per inmate the cost to the state in terms of 8,208 total actual years amounts to $23,729,328. Had

TABLE XIX

GEORGIA PRISON SYSTEM, SENTENCES TO BE SERVED BY 3,916 INMATES ELIGIBLE FOR PRETRIAL DIVERSION

Sentence	1 yr. or less	1-3 yrs.	3.1-5 yrs.	5.1-7 yrs.	7.1-10 yrs.	10.1-15 yrs.	15.1-20 yrs.	over 20 yrs.[a]	TOTAL
No. Inmates	845	1,233	841	298	374	167	106	52	3,916
Percent	21.58	31.49	21.48	7.61	9.55	4.26	2.71	1.33	100.00
Median Sentence (yrs.)	.75[b]	2	4	6	8.5	12.5	17.5	20[e]	—
Man-years[c]	634	2,466	3,364	1,788	3,179	2,088	1,855	1,040	16,414
Actual Years[d]	317	1,233	1,682	894	1,590	1,044	928	520	8,208
Average Actual Years[f]	2.10								

Notes: a. Includes life sentences.
b. Estimated at 9 months.
c. = (median sentence) x (inmates).
d. Estimated. Based on serving one-half median sentence to account for those inmates receiving parole and time off for good behavior.
e. Estimated.
f. Total actual years divided by total inmates.

TABLE XXI

GEORGIA PRISON SYSTEM, SENTENCES TO BE SERVED BY 5,766 INMATES PROJECTED TO BE ELIGIBLE FOR PRETRIAL DIVERSION, MAY 1974-1980

Sentence	1 yr. or less	1-3 yrs.	3.1-5 yrs.	5.1-7 yrs.	7.1-10 yrs.	10.1-15 yrs.	15.1-20 yrs.	over 20 yrs.[a]	TOTAL
No. Inmates	1,244	1,816	1,238	439	551	245	156	77	5,766
Median Sentence (yrs.)	.75[b]	2	4	6	8.5	12.5	17.5	20[e]	—
Man-years[c]	933	3,632	4,952	2,634	4,684	3,063	2,730	1,540	24,168
Actual Years[d]	467	1,816	2,476	1,317	2,342	1,532	1,365	770	12,085
Average Actual Years[f]	2.10								

Notes: See Table XIX.

pretrial diversion been available to these inmates the savings to the state would have been substantial, as indicated in Table XX.

TABLE XX

SELECTED COST LEVELS FOR 3,916 PARTICIPANTS IN A PRETRIAL DIVERSION PROGRAM; SAVINGS TO THE STATE OVER INCARCERATION

Cost Per Participant[a]	$1,250	$580	$746
Number of Participants	3,916	3,916	3,916
Total Cost	$ 4,895,000	$ 2,271,280	$ 2,921,336
Savings[b]	$18,834,328	$21,458,048	$20,807,992

Notes: a. Based on the high, Atlanta Pretrial Intervention Project, and average participant costs, respectively, as per Table XVIII.

b. Difference between state annual cost for 3,916 prison inmates and total participant cost of diversion. Does not include associated trial costs and other direct and indirect costs to the state.

Based on the 38.83% of the June, 1974 inmate population deemed eligible for pretrial diversion, approximately 5,766 of the 14,850 inmate increase projected for 1980 will likewise be eligible for diversion. Assuming that the sentences of this eligible group corresponds with the eligible group of the June, 1974 population, Table XXI reflects the probable sentence distribution for this group.

Based on the current annual cost of $2891 per inmate, the cost to the state in terms of actual years projected to be served by the 5,766 inmates deemed eligible for diversion between 1974 and 1980 amounts to $34,937,735. If pretrial diversion can be made available to these offenders, the savings to the state will be substantial, as indicated in Table XXII.

TABLE XXII

SELECTED COST LEVELS FOR 5,766 PARTICIPANTS IN A PRETRIAL DIVERSION PROGRAM; SAVINGS TO THE STATE OVER INCARCERATION

Cost per Participant [a]	$1,250	$580	$746
Number of Participants	5,766	5,766	5,766
Total Cost	$ 7,207,500	$ 3,344,280	$ 4,301,436
Savings [b]	$27,730,235	$31,593,455	$30,636,299

Notes: See Table XX.

Additionally, by diverting these 5,766 offenders, the projected 1980 Georgia prison population would be decreased to 18,984, necessitating the construction of 7,984 additional bed spaces, at an expenditure of $175,648,000 compared to $302,500,000 for the projected 1980 overcapacity of 13,750 inmates, or a savings of $126,852,000.

If the aforegoing calculations are instead based on the 70% eligible estimate as suggested by the Chamber of Commerce of the United States, the potential results are even more striking. As previously stated, after extracting those inmates below the age of 17 and above the age of 45 and applying the 70% figure to the remainder, some 6,530 of the June 1974 inmates would be eligible for pretrial diversion. Table XXIII shows the sentence distribution for this group of inmates (based on the June, 1974 sentence distribution after removing those inmates under 17 and over 45).

TABLE XXIII

GEORGIA PRISON SYSTEM, SENTENCES TO BE SERVED BY 6,530 INMATES PROJECTED TO BE ELIGIBLE FOR PRETRIAL DIVERSION, JUNE, 1974

Sentence	1 yr. or less	1-3 yrs.	3.1-5 yrs.	5.1-7 yrs.	7.1-10 yrs.	10.1-15 yrs.	15.1-20 yrs.	over 20 yrs.[a]	TOTAL
No. Inmates	748	1,282	1,178	571	898	586	406	861	6,530
Median Sentence (yrs.)	.75[b]	2	4	6	8.5	12.5	17.5	20[e]	—
Man-years[c]	561	2,564	4,712	3,426	7,633	7,325	7,105	17,220	50,546
Actual Years[d]	281	1,282	2,356	1,713	3,817	3,663	3,553	8,610	25,275
Average Actual Years[f]	3.87								

Notes: a. Includes inmates having received life and death sentences. All other notes as in Table XIX.

Based on the present annual cost of $2891 per inmate, the cost to the state in terms of 25,275 total actual years amounts to $73,070,025. If pretrial diversion had been available to these inmates, the savings to the state would have been substantial, as indicated in Table XXIV.

TABLE XXIV

SELECTED COST LEVELS FOR 6,530 PARTICIPANTS IN A PRETRIAL DIVERSION PROGRAM; SAVINGS TO THE STATE OVER INCARCERATION

Cost per Participant [a]	$1,250	$580	$746
Number of Participants	6,530	6,530	6,530
Total Cost	$ 8,162,500	$ 3,787,400	$ 4,871,380
Savings [b]	$64,907,525	$69,282,625	$68,198,645

Notes: See Table XX.

With respect to the projected Georgia prison population increase of 14,850 inmates by 1980, after extracting those offenders who will be outside the set age limits and applying the 70% estimate to those remaining, approximately 9,617 inmates will be eligible for pretrial diversion. Based on the June, 1974 sentence distributions, this group of eligible inmates will have sentence distributions as indicated in Table XXV.

TABLE XXV

GEORGIA PRISON SYSTEM, SENTENCES TO BE SERVED BY 9,617 INMATES PROJECTED TO BE ELIGIBLE FOR PRETRIAL DIVERSION, 1974-1980

Sentence	1 yr. or less	1-3 yrs.	3.1-5 yrs.	5.1-7 yrs.	7.1-10 yrs.	10.1-15 yrs.	15.1-20 yrs.	over 20 yrs.[a]	TOTAL
No. Inmates	1,101	1,889	1,735	842	1,322	863	598	1,267	9,617
Median Sentence (yrs.)	.75[b]	2	4	6	8.5	12.5	17.5	20[e]	—
Man-years[c]	826	3,778	6,940	5,052	11,237	10,788	10,465	25,340	74,426
Actual Years[d]	413	1,889	3,470	2,526	5,619	5,394	5,233	12,670	37,214
Average Actual Years[f]	3.87								

Notes: a. Includes life and death sentences. All other notes as in Table XIX.

Again, based on the present annual cost of $2891 per inmate, the cost to the state in terms of 37,214 total actual years amounts to $107,585,674 for the persons projected to be incarcerated from 1974-1980. If these offenders could be subject to pretrial diversion, substantial savings would accrue to the state, as indicated in Table XXVI.

TABLE XXVI

SELECTED COST LEVELS FOR 9,617 PARTICIPANTS IN A PRETRIAL DIVERSION PROGRAM; SAVINGS TO THE STATE OVER INCARCERATION

Cost per Participant [a]	$1,250	$580	$746
Total Participants	9,617	9,617	9,617
Total Diversion Cost	$ 12,021,250	$ 5,577,860	$ 7,174,282
Savings [b]	$ 95,564,424	$102,007,814	$100,411,302

Notes: See Table XX.

Additionally, by diverting these 9,617 offenders, the projected Georgia prison population would be 15,133 by 1980, necessitating the construction of 4,133 additional bed spaces, at an expenditure of $90,926,000, compared to $302,500,000 for the projected 1980 overcapacity of 13,750 inmates. This would amount to a savings of some $211,534,000.

Table XXVII summarizes the information found in Tables XIX through XXVI and also indicates potential savings in construction costs which may be realized as a result of pretrial diversion.

TABLE XXVII

SUMMARY: COSTS AND SAVINGS OF PRETRIAL DIVERSION OVER INCARCERATION FOR TWO METHODS OF DETERMINING DIVERSION ELIGIBILITY, JUNE 1974 PRISON POPULATION AND PROJECTED PRISON POPULATION INCREASE, 1974-1980.

	June, 1974 Georgia Prison Population: 10,085	
Inmates eligible	3,916	6,530
Total Actual Years to be Served	8,208	25,275
Inmate Cost/Year	$ 2,891	$ 2,891
Total Cost	$ 23,729,328	$ 73,070,025
Pretrial Diversion		
Total Cost		
High	$ 4,895,000	$ 8,162,500
Atlanta	$ 2,271,280	$ 3,787,400
Total Savings		
High	$ 18,834,328	$ 64,907,525
Atlanta	$ 21,458,048	$ 69,282,625

	Projected Prison Population Increase, 1974-1980: 14, 850	
Inmates eligible	5,766	9,617
Total Actual Years to be Served	12,085	37,214
Inmate Cost/Year	$ 2,891	$ 2,891
Total Cost	$ 34,937,735	$107,585,674
Pretrial Diversion		
Total Cost		
High	$ 7,207,500	$ 12,021,250
Atlanta	$ 3,344,280	$ 5,577,860
Total Savings		
High	$ 27,730,235	$ 95,564,424
Atlanta	$ 31,593,455	$102,007,814
Cost of Saved Bed Spaces ($22,000@)	$126,852,000	$211,574,000

III. Constitutional and Legal Issues of Pretrial Intervention

A. *The Decision to Divert*

1. The Discretionary Role of the Prosecutor in Determining Whether or Not to Prosecute

It appears that the decision by the prosecutor to divert an individual into a pretrial intervention program is encompassed within his traditional discretionary role of whether or not to prosecute an offender. The decision of the prosecutor to decide, as a matter of policy, whether to prosecute is clearly recognized as a concomitant duty of his office.[169] In making this decision the prosecutor is accorded wide discretion, and the exercise of this discretion is not subject to direct judicial review, except in instances of flagrant abuse.[170] Although there are reasonably effective means to ensure that the prosecutor does not abuse his power by prosecuting upon less than sufficient evidence, there are in effect, no checks upon this discretionary judgment of whether or not to prosecute.[171] While the prosecutor is in theory responsible to the public, the electorate cannot effectively police prosecution policies.[172] Realistically, "[f]ew subjects are less adapted to judicial review than the exercise by the Executive of his discretion in deciding when and whether to institute criminal proceedings, or what precise charges shall be made, or whether to dismiss a proceeding once brought."[173]

It may be argued that the decision to divert which is delegated to the prosecutor and/or the judiciary is inconsistent with the doctrine of separation of powers, because the determination of diversion encroaches on the legislative function of defining classes of offenders and the appropriate treatment or punishment to be meted out.[174] This systematic program of pre-prosecutorial diversion of eligible offenders, however, if properly assessed, is not an expansion of the traditional discretionary prosecutorial decisions on whether to prosecute, but rather promotes a more intelligent and efficient utilization of that discretion.[175] The pretrial intervention program standards enable the prosecutor to have more and better information about the suspected offender and thus replaces *ad hoc*, informal decisions with a regulated discretion which is exposed to public review.[176]

The traditional determination not to prosecute an offender and thus place no restraint upon his freedom may be regarded as being

analogous to a "probationary" program which withholds prosecution, an ensuing trial and possible incarceration, on the condition that the "uncharged, untried, and unconvicted person submit to a correctional program."[177] Prosecutors have often exercised their discretion not to charge by having the offender consent to entering the military service, complete his education, or seek rehabilitative counselling or mental treatment. Another basis for supporting the prosecutor's role in the decision to divert is the concept that an elected and responsible public officer is more capable of making impartial decisions concerning the advisability of charging and prosecuting an offender than is an appointed official.[178] Furthermore, numerous federal committees[179] and the Community Supervision and Services Act[180] have given their imprimatur to the prosecutor's role in this decision to divert.

Because one of the basic premises of a pretrial intervention program is to decrease the work-load of the courts, the decision to divert usually occurs prior to the institution of the criminal process. The discretionary decision of diversion thus lies solely within the purview of the duties of the prosecuting attorney. However, if diversion occurs after criminal proceedings have commenced (i.e., post indictment or arraignment) the role of the judiciary is invoked, and the discretionary decision of diversion cannot be made by the prosecutor alone.[181] The necessity of having the court take part in the diversion decision has quasi-probation elements because the participant in the program can have the charges brought against him dismissed if he successfully terminates his participation in the program.[182] Furthermore, because the process which leads to acquittal or dismissal of formal charges is one exercised by the judiciary,[183] if diversion is to occur after formal charges are filed, the determination of an individual's ultimate disposition should be a judicial function. The perspective roles of the prosecutor and judiciary in the decision to divert after formal charges have been brought have not been resolved but it has been proposed that the best solution would be to implement the system now practiced in the District of Columbia Project Crossroads, wherein the prosecutor, with the aid of staff members, screens eligible applicants and presents his recommendations to the Court, which if it deems proper, will order intervention.[184]

2. Should There Be Review of the Prosecutor's Decision to Grant Diversion or Not to Divert?

As stated earlier the prosecutor has traditionally exercised wide discretion in deciding whether charges will be brought and unless the defendant can show that he has been the victim of discriminatory enforcement of the law, that is, if law enforcement officers have been guilty of unfair conduct by discriminatorily singling out the defendant for prosecution without prosecuting others for similar violations, the decision to prosecute will not be reviewed.[185] Preconviction procedures either as incidental to the defense of a criminal proceeding itself, or by way of independent proceedings seeking injunctive relief, are designed to prevent a conviction because of the claimed allegation of unconstitutionally discriminatory enforcement of the law:[186]

> If the court finds that there was an intentional and purposeful discrimination, then it should quash the prosecution, not because the defendant is not guilty, but because the court as an agency of government, should not lend itself to a prosecution whose maintenance would violate constitutional precepts.[187]

An analogy of the discretion to prosecute a defendant with the discretionary decision granting entrance into a pretrial intervention program cannot be made because the former decision usually will be contested by a defendant who alleges an unfair practice, whereas the concept of being diverted in a pretrial intervention program requires the consent of the participant and thus no issue of an unfair application of the laws would be present. Furthermore, since pretrial intervention in lieu of prosecution, trial, and possible incarceration, is beneficial to the interests of the participant, it seems unlikely that in most instances any opposition to participation would be voiced.

Although the decision *to divert* will not be reviewed, should the decision *not to grant diversion* also be precluded from review even though a potential participant has met all of the formal requirements of the pretrial intervention program? Some guidance to answering this issue may be provided by a recent Missouri federal court decision. In *United States v. Gillespie*,[188] a defendant acting pursuant to rights accorded her by 42 U.S.C. § 3412 (1973),[189] established to the satisfaction of the United States Attorney that there

was reasonable cause to believe that she was a narcotic addict and a petition for a NARA[190] civil commitment was filed on her behalf by the United States Attorney. In spite of the defendant's committal to the care and custody of the Surgeon General for treatment, an Assistant United States Attorney, other than the one handling the NARA proceeding, obtained an indictment against the defendant. The court after reviewing the legislative hearings which demonstrated that Congress gave careful and detailed consideration to affording treatment, in lieu of prosecution, to a narcotic addict who was judicially determined to be likely to be rehabilitated, concluded that "Congress did not intend to vest discretion in the United States Attorney as to whether an *eligible* narcotic addict is to be afforded the benefit of treatment under The Narcotic Rehabilitation Act."[191] (Emphasis added.)

The issue of reviewing the decision not to grant diversion to a potential participant who has fulfilled all the formal entrance requirements may also be partially resolved by an analysis of the analogous area of granting parole.[192] In *Scarpa v. United States Board of Parole*,[193] a defendant who was denied parole instituted a claim for declaratory relief based on the internal procedures and practices of the Parole Board,[194] which he asserted denied him due process of law.[195] The Court of Appeals for the Fifth Circuit dismissed the defendant's constitutional argument concluding that a defendant is not entitled to the "full panoply of due process protections . . . every time the government takes some action which confers a new status on the individual or denies a request for a different status."[196] The court distinguished the discretionary granting of parole from the revocation of one's conditional freedom, because the refusal to grant parole does not result in any deprivations to the criminal defendant. The majority opinion reiterated the view that "the granting of parole is not an adversary proceeding" and that "[d]ue process rights do not attach at such proceeding" and "[i]n the absence of evidence of flagrant, unwarranted, or unauthorized action by the Board, it is not the function of the courts to review such proceedings."[197] A dissenting opinion by Senior Circuit Judge Tuttle concluded that the distinction between a hearing to *revoke* parole and a hearing to *grant* parole is a valid one, but in and of itself is insufficient to condone a practice which holds that although the parole revocation hearing is subject to the due process require-

ments enunciated in *Morrissey v. Brewer*,[198] a parole hearing itself can be conducted in absolute disregard of all due process requirements."[199]

The conclusion that the decision denying diversion does not require full procedural and substantive due process, may be premised on the prosecutor's traditional discretionary role in charging and on the argument that such protection would place an "undue burden" on the prosecutor and the pretrial program in general. This approach must be viewed in light of statistics which demonstrate the success of the pretrial diversion program and that the program does result in lower costs for the correctional and rehabilitation process.[200] It appears that a valid alternative to the exclusion of any judicial review of the decision not to divert, absent a flagrant abuse by the prosecutor, would be to have counsel for the pretrial program separate out frivolous claims by potential participants so that the courts would not be flooded by participants' petitions for review.[201] Another viable suggestion may be to provide the potential participant with a modified array of procedural and substantive rights that *Morrissey v. Brewer*[202] held applicable to parole revocation hearings, retaining unreviewable discretion by the prosecutor and/or court, subject to the requirements that the decision not to divert be an informed one which can be substantiated. Thus, judicial review could insure that at least the minimum due process requirements of *Morrissey* were also provided to the pretrial diversionary participant.

To hold that the decision determining whether to divert a participant must be one replete with the *full* panoply of due process rights is unnecessary, and might be destructive of the usefulness of diversion as being a means to bypass the judicial process. This may also undermine the experienced judgment of the prosecutor, and violate the constitutional separation of powers. However, a minimum of safeguards should still be required to protect the interests of the potential participant who has met all the entrance requirements for the pretrial intervention program and has been denied participation.

B. *May Participation in the Pretrial Intervention Program and Successful Adherence to its Requirements be Made a Condition of Release on Bail?*[203]

The purposes of bail have been stated to be the prevention of undue pre-conviction punishment and the insurance of the presence of the accused at a later appointed time.[204] Georgia statutory provisions suggest a legislative policy favoring the release of defendants pending the judicial determination of their guilt or innocence[205] and it is clear that unnecessary pretrial detention produces unconscionable economic and psychological preparation:

> Deprivation of liberty pending trial is harsh and oppressive in that it subjects persons whose guilt have not yet been judicially established to economic and psychological hardships, interferes with their ability to defend themselves and, in many cases, deprives their families of support. Moreover, the maintenance of jailed defendants and their families represents major public expense.[206]

Pursuant to Georgia statutory authority all offenses except certain delineated felonies are bailable by the commitment court, and no person charged with a misdemeanor can be refused bail at any time, either before the commitment court, when indicted, after a motion for new trial is made, or while an appeal is pending.[207] The Georgia policy favoring the granting of bail is further exemplified by a recent statute which provides that any individual who is denied bail pursuant to his arrest shall be entitled to have the charge or accusation heard by a grand jury within ninety days after the date of his confinement.[208] Furthermore, if this hearing has not taken place within the ninety-day period of incarceration, "the accused shall have the bail set upon application to the court."[209]

Although there are numerous means of granting pretrial release,[210] money bail is the most commonly used method in Georgia.[211] This approach contrasts with the conclusions of various national proposals[212] and the Bail Reform Act of 1966,[213] which have determined that "[r]eliance on money bail should be reduced to minimal proportions" and that "[i]t should be required only in cases in which no other condition will reasonably ensure the defendant's appearance."[214] Release on personal recognizance or on order to appear, rather than reliance on money bail, is proposed to be the rule, rather

than the exception for the various methods of pretrial release.[215] However, there is no presumption in Georgia in favor of release on personal recognizance, and consequently there are presently no formally adopted procedures in Georgia which are designed to increase the number of defendants released on either an order to appear, or on their own recognizance.[216]

The preference for pretrial freedom, as well as recent research indicating that release without bail may safely be increased, will not result in the perfunctory release of all defendants, but rather will require the State to show factors justifying the imposition of a defendant's conditional release.[217] The National Advisory Commission on Criminal Justice Standards and Goals concluded that extensive experimentation has shown that most defendants could be safely released on their own recognizance, and recommended that maximum use be made of this method of pretrial release.[218] Nevertheless, the Commission also recognized that such release may in certain circumstances be appropriate only when restrictions are placed on the defendant's actions, and endorsed the use of restrictions to insure the fulfillment of the released defendant's promise to reappear at a later time.[219]

Conditioning a defendant's pretrial release on his participation in a pretrial intervention program is dichotomous in two respects: First, as was noted previously, the use of monetary bail is the predominant means of pretrial release in Georgia, so granting a conditional release on the defendant's own recognizance would not be frequently utilized in Georgia. Second, a participant in a pretrial intervention program will usually warrant being released on his own recognizance, thus precluding the necessity of bail or conditional release.[220] The proscriptions of the constitutions of the United States and Georgia[221] providing that "excessive bail shall not be required" dictate the need for an inquiry into the necessity of conditioning pretrial release on participation in a pretrial diversion program to determine whether such a condition is excessive.[222] Thus the defendant whose pretrial release was conditioned on participation in a pretrial diversion program may successfully be able to challenge the condition as being excessive.[223]

Participation in the pretrial intervention program is based upon the accused's voluntary consent and thus the decision that an indi-

vidual's right to pretrial release is to be conditioned upon his participation in the program (where no consent is initially given by the participant) must be formulated only after the commitment or superior court judge has taken into account the following varying factors concerning the defendant:

> i) the length of his residence in the community;
> ii) his employment status and history and his financial condition;
> iii) his family ties and relationships;
> iv) his reputation, character and mental condition;
> v) his prior criminal record, including any record of prior release on recognizance or on bail;
> vi) the identity of responsible members of the community who would vouch for the defendant's reliability;
> vii) the nature of the offense presently charged and the apparent probability of conviction and the likely sentence, insofar as these factors are relevant to the risk of nonappearance and
> viii) any other factors indicating the defendant's ties to the community or bearing on the risk of willful failure to appear.[224]

Because the purpose of conditional release is to insure the defendant's future appearance, the finding that such release is warranted dictates that the judicial officer impose the *least* restrictive condition *reasonably likely to assure* the defendant's appearance in court. If a defendant is to be released on his own recognizance, conditioned on his participation in a pretrial program, the condition should only be imposed after the following alternative conditions have been deemed inadequate:

> i) release the defendant into the care of some qualified person or organization responsible for supervising the defendant and assisting him in appearing in court,
> ii) place the defendant under the supervision of a probation officer or other appropriate public official
> iii) impose reasonable restrictions on the defendant's activities, movements, associations, etc., *or*
> iv) release the defendant during working hours requiring him to return to custody at specified times.[225]

Assuming that conditional release based upon participation in a pretrial intervention program is found to be necessary, a defendant

who has not successfully met the conditions of this release will warrant renewed pretrial incarceration only if it can be shown that no other method can be utilized to assure his presence at a later date. Incarceration may be warranted when participation is terminated because of the participant's failure to appear for program activities or commission of a serious or violent crime, because such conduct indicates whether there is a risk that the participant will fail to appear for prosecution.[226] However, because the participant in a pretrial intervention program would be of minimal risk in failing to appear and would not be a threat to the community's safety, it appears likely that pretrial detention would not usually be required. In most instances following violations of a conditional release premised on participation in a pretrial intervention program, if release on the defendant's own recognizance or on an order to appear were not employed, some form of bail, either a money bond or secured appearance bond, should be provided.[227]

C. *The Constitutionality of Requiring a Participant in a Pretrial Intervention Program to Plead Guilty*

The existing Atlanta Pre-Trial Intervention Program, as is typical of most programs, does not require a guilty plea as a condition for entrance into the program.[228] Although the legitimacy of the practice of plea-bargaining has been recognized, and has even received the imprimatur of the Supreme Court as being an essential and desirable component of the administration of criminal justice, when properly conducted,[229] it is the conclusion of this study that a requirement of entering a plea of guilty should not be imposed on the participant; or alternatively, if a guilty plea is required as a condition of participation in the pretrial diversion program, its effect should be expunged and should not be used against an unsuccessful participant in a later prosecution.

1. Procedure of Entering Guilty Plea in Georgia

Pursuant to Georgia statutory authority, upon arraignment a defendant is required to plead guilty or not guilty to the offense charged in the indictment.[230] A plea of *nolo contendere* may also be entered in any case other than a capital felony once the judge has consented and given his approval.[231] Furthermore, Ga. Code Ann. § 27-2528 (1974) authorizes that:

> Any person who has been indicted for an offense punishable by death may enter a plea of guilty at any time after his indictment, and the judge of the superior court having jurisdiction may, in his discretion, during term time or vacation, sentence such person to life imprisonment, or to any punishment authorized by law for the offense named in the indictment. . . .

In exercising discretion to determine the sentence, the judge should consider whether 1) the defendant's plea has aided in the prompt application of the correctional process; 2) the defendant has acknowledged his guilt and shown a willingness to assume moral responsibility for his actions; 3) the defendant has relieved the state of the necessity of trial, thereby avoiding delay in the disposition of other cases and increasing the probability of prompt application of the judicial and correctional processes to other offenders; 4) the concessions reached in the plea bargaining may provide for alternative correctional measures better adapted to achieving the purposes of correctional treatment.[232]

It may be posited that the requirement that a participant in a pretrial intervention program plead guilty to the alleged offense is not too harsh a condition in exchange for foregoing criminal charges and prosecution. However, while the defendant who pleads guilty after indictment is usually not required to undergo any further custodial supervision, the participant in pretrial intervention programs must successfully complete the requirements of the program to preclude further prosecution. Consequently, if the participant's termination from the program is not successful and prosecution is resumed, the plea of guilty, if it is deemed to be a requisite to participation in a pretrial intervention program, should not be received against the defendant in any future criminal proceedings.[233]

2. Determination of the Voluntariness of the Plea

The participant's plea of guilty is more than a confession admitting guilt, in effect "it is itself a conviction; nothing remains but to give judgment and determine punishment."[234] The defendant who pleads guilty concurrently waives several constitutional rights, including his privilege against self-incrimination;[235] his right to trial by jury;[236] and his right to confrontation of witnesses.[237] If the plea is to be used against the defendant as a confession of his guilt, the Due Process Clause of the Fourteenth Amendment requires that

this plea be an intentional relinquishment or abandonment of the defendant's above delineated rights.[238] When the participant's

> guilty plea is not equally voluntary and knowing, it has been obtained in violation of due process and is therefore void. Moreover, because a guilty plea is an admission of all the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts.[239]

If the guilty plea may be used in a future prosecution against an unsuccessful participant, he must be fully apprised of this potential and that the resulting conviction will be determined without a trial of his guilt or innocence.

The three rights which are foregone upon a plea of guilty cannot be presumed waived from a silent record.[240] In *Carnley v. Cochran*,[241] concerning waiver of the right to counsel, the Supreme Court held that

> Presuming waiver from a silent record is impermissible. The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver.[242]

The Georgia Supreme Court has held that a state trial judge has the duty "in canvassing the matter with the accused to make sure he has a full understanding of what the plea connotes and of its consequences."[243] Although Georgia courts have not specifically required that all warnings delineated in the Federal Rules of Criminal Procedure and the American Bar Association's Minimum Standards Relating to Guilty Pleas[244] be given by the trial judge, they have required that: the plea be made knowingly and intelligently;[245] the plea be received by the courts with caution and care;[246] the judge admonish the defendant of the consequences of entry of the plea;[247] the defendant be apprised of the nature of the offense charged;[248] the trial judge make an adequate record affirmatively showing that the plea was intelligently and voluntarily entered; and the basis for acceptance of the plea appear in the record.[249]

In addition to the requirement that a guilty plea be intentional, voluntary and intelligent, the court must be convinced that the plea

was not induced by threat, coercion, or improper promise of immunity.[250] The voluntariness of the participant's guilty plea should be suspect because the potential participant is aware of the possibility of foregoing criminal prosecution if he pleads guilty and the denial of diversion if he elects to exercise his privileges to be free from self-incrimination and to be tried by a jury. Recent cases have shown concern over a state procedure that discourages the exercise of a constitutional right by placing a premium on the waiver of that right.[251] These decisions are an outgrowth of the doctrine of *unconstitutional conditions* which has been regarded as a safeguard to prevent a state or federal government from offering a benefit or privilege on conditions requiring the recipient to relinquish his constitutional rights in some manner.[252]

This "chilling effect"[253] on the participant's exercise of his constitutional rights should not be held permissible merely because of past Supreme Court decisions which have recognized the constitutionality of plea bargaining. In *Brady v. United States*,[254] a defendant who was indicted under the Federal Kidnapping Act[255] pled guilty to avoid the possible imposition of the death penalty. Pursuant to the Act, the death penalty could be imposed only "if the verdict of the jury shall so recommend," and the death penalty could not have been meted out upon a plea of guilty or jury-waived convictions. The Supreme Court, however, refused to conclude that the plea entered into by Brady was unconstitutional, notwithstanding the defendant's claim that the effect of the Federal Kidnapping Act was to dissuade him from exercising his constitutional rights to be tried by a jury and to plead not guilty.[256] Similarly, in *North Carolina v. Alford*[257] and *Parker v. North Carolina*,[258] the Court upheld the voluntariness of guilty pleas that were entered to avoid the possibility of the death penalty. The otherwise valid pleas were not involuntary even though they may have been induced by a "legislative imposition of a markedly more severe penalty if a defendant asserts his right to a jury trial and a concomitant legislative promise of leniency if he pleads guilty."[259]

Although *Brady, Alford* and *Parker* would seem to uphold the constitutionality of requiring a guilty plea as a condition precedent to entrance into a diversion program, an important distinction between these cases and the guilty plea requirement of the participant

may be that in the former instances the defendants all pled guilty in order to obtain a lesser term of imprisonment; whereas the participant's plea of guilty is entered to obtain an *alternative* to incarceration. The enticement provided by this potential freedom from prosecution and ensuing incarceration in exchange for a plea of guilty could be deemed more coercive than offering a defendant the opportunity to plead guilty to secure a lesser period of incarceration than would have been imposed had he chosen not to plead guilty:

> Theoretically, at least, the possibility of avoiding criminal prosecution altogether presents a much greater degree of compulsion or inducement than does the choices between the courses of prosecution, . . . (and) may be of enough impact to bring the plea requirement of a Pretrial Intervention program without the application of *Brady* and *North Carolina v. Alford*.[260]

3. The Requirement of a Guilty Plea Is Not Compelling State Interest

In *Miranda v. Arizona*,[261] the Supreme Court explicitly recognized the existence of the fundamental right to be free from self-incrimination. Thus the exercise of the right not to plead guilty cannot be interfered with by a state policy unless such interference promotes a "compelling" state interest and its conditional exercise is the least restrictive procedure available to promote the state's interest.[262] It may be argued that a legitimate state interest is advanced by requiring a plea of guilty to be entered by the participant because the plea is an effective element of rehabilitation,[263] a means of preserving effective prosecution by minimizing the failure of a future trial because of the unavailability of witnesses or the dulling of testimony due to the passage of time;[264] and serves both the interests of the state and of the individual defendant.[265]

However, even if these interests are deemed to be compelling, thus warranting that participation in a pretrial diversion program be conditioned on a guilty plea, it must still be shown that the requirement of the guilty plea is the least oppressive method available to the state to serve its interests. Other alternatives have been suggested by the National Pretrial Intervention Center:

> 1) A deferred plea, where at the time of diversion, the entry of a plea is continued to after the defendant's term in the pro-

> gram, at which time a plea will be entered only if the defendant is unsuccessful;[266] 2) a conditional plea of guilty, where the defendant enters a plea of guilty but may withdraw if he is unsuccessful in the program;. . . 3) requiring a potential participant to list his defenses and witnesses, which may not be deviated from in the event prosecution is resumed; 4) stipulated testimony prior to diversion or 5) an informal and extra court acknowledgment of responsibility for the offense (a "moral plea of guilty" or assumption of responsibility).[267]

It appears that these alternatives would protect the state's interests as well as enable the defendant not to forego his privilege against self-incrimination, without incurring the legal issues involved with the requirement of a guilty plea.

D. *Can a Participant in the Pretrial Intervention Program Successfully Claim a Denial of his Right to a Speedy Trial?*

The right to a speedy trial is a fundamental constitutional right, guaranteed by the Sixth Amendment of the United States Constitution,[268] and held applicable to the states through the Fourteenth Amendment.[269] The Constitution of the State of Georgia,[270] as well as those of 47 other states also expressly guarantees this right.[271] The guarantee of a speedy trial is intended as "an important safeguard to prevent undue and oppressive incarceration prior to trial, to minimize anxiety and concern accompanying public accusation and to limit the possibilities that long delay will impair the ability of an accused to defend himself."[272] The evils at which the guarantee of a speedy trial are directed are readily identifiable: it protects the incarcerated accused against prolonged imprisonment;[273] it minimizes the anxiety and concern accompanying public accusation of crime;[274] it minimizes lengthy prosecution which may subject the accused to "public scorn and deprive him of employment, and almost certainly will force curtailment of his speech, associations and participation in unpopular causes;"[275] it also protects the accused, who is either incarcerated or out on bail, by mitigating the detrimental effects of the passage of time which may result in the reduction of his ability and capacity to respond adequately to the prosecution's charges.[276] Unlike other constitutional rights, deprivation of the right to speedy trial may also affect societal interests such as the effective prosecution of criminal cases (thus precluding its restraint upon the guilty and a deterrence to those contemplating criminal

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1 OF 6

acts); create a reduction in the government's capacity to prove its case; and prevent the advancement of a policy of deterrence which will be undermined by a greater length of time between the commission of an offense and the conviction of an offender.[277]

The right to a speedy trial attaches after an individual has been "accused" of a crime.[278] In *United States v. Marion*,[279] the Supreme Court held that "it is either a formal indictment or information or else the *actual restraints imposed by arrest and holding to answer a criminal charge* that engage the particular protections of the speedy trial provisions of the Sixth Amendment"[280] (emphasis added). The Court's recognition that an arrested individual has a right to a speedy trial is of importance to the diversion program because the Atlanta Pretrial Intervention Program, as well as many other diversion programs throughout the country, selects its participants after an arrest has been made, but prior to the bringing of any formal charges.

Because the guarantee of speedy trial takes effect pursuant to an arrest, an accused is required to waive his right to a speedy trial in order to participate in a pretrial intervention program.[281] This waiver can be effectuated either expressly by having the participant understandingly sign a written waiver,[282] or impliedly by the individual's voluntary participation in the program.[283] It would be inconsistent for a participant to either expressly or impliedly waive his right to a speedy trial by agreeing to participate in the pretrial program, thus making the need for trial of the successful participant unnecessary, while on the other hand, object to the denial of his right to be tried.[284]

To insure that the participant's waiver is an "intentional relinquishment or abandonment of a known right or privilege,"[285] the participant in the pretrial program should have assistance of counsel.[286] In *Kirby v. Illinois*,[287] where a recently arrested defendant was identified at the police station without the benefit of counsel by the victim of robbery, the Supreme Court held that the right to counsel attaches only at or after adversary judicial proceedings have commenced against the defendant, through "formal charge, preliminary hearing, indictment, information, or arraignment,"[288] and an arrest was considered to be "nothing more than part of a 'routine police investigation,' and thus not the starting point of our whole

system of adversary criminal justice."[289] Thus in those programs where diversion occurs after formal charges have been initiated, the participant has an absolute right to counsel to assist him in his waiver of his right to speedy trial; whereas the participant who has only been arrested and not formally charged is not expressly given the right of assistance of counsel.

The argument may be posited, however, that while *Kirby* dealt with a pre-indictment line-up which was not considered to be a "critical stage" in the criminal prosecution necessitating assistance of counsel,[290] the diversion program may be the most determinative phase in the judicial processing of an accused's case.[291] The accused has a substantial interest in his decision to participate in the pretrial program because of his realization that successful completion of the diversion program may result in dismissal of all charges against him. This "enticement" to participate should be viewed together with the participant's election to forego trial by jury and proof of his guilt in exchange for some supervisory control by the pretrial project.[292] It thus may be successfully argued that such decision, unlike pre-indictment identification, is a critical stage in the criminal process warranting assistance of counsel.[293]

Although the state may not be constitutionally required to provide counsel to assist the participant who has not been formally charged in his decision to participate in an intervention program and in the waiver of his rights, it would not be burdensome to provide assistance of counsel at the time of the participant's referral. Regardless of whether counsel is provided to insure that the waiver of speedy trial was voluntarily, knowingly, and intelligently made,[294] the participant should be informed of all the effects of his waiver. This should include an explanation of 1) the extent of the program and its consequences in terms of the possible loss of witnesses and evidence, and the fading of the memory of the participant and witnesses, 2) that an extension period may be granted if the participant's progress is not deemed successful, 3) that a successful termination from the program does not guarantee the dismissal of charges by the prosecutor, 4) that upon unsuccessful termination prosecution will be resumed.[295] The presence of counsel would protect the interests of the state against a subsequent claim by a participant that his constitutional rights were violated, and could assess any potential prejudicial effects (if any) on the partici-

pant which may have resulted from his voluntary participation in the pretrial program.[296]

Besides the requirement of a waiver of speedy trial, the state is also protected against a participant's claim of denial of a speedy trial because the delay in being tried was not "a deliberate attempt by the government to use delay to harm the accused, or governmental delay that is 'purposeful or oppressive'. . . ."[297] The crucial question in determining the legitimacy of governmental delay is whether it was necessary. To determine the necessity for governmental delay, the reasons for such delay must be considered, and since the participant has voluntarily agreed to a temporary halt in the judicial process of his offense, his claim for denial of speedy trial could not be successfully maintained.

Although the express or implied waiver of speedy trial will enable the prosecution to overcome a participant's claim of a denial of speedy trial, the statute of limitations of prosecutions explicitly provides that prosecution for a crime must be brought within a specified period of time following the commission of the crime.[298] It seems highly improbable that participation in the pretrial program would extend beyond the statutory period of limitations; however, it is theoretically conceivable that the period may run out where the pretrial program is extended beyond the required initial period.[299] To insure that the interests of the state in continuing its prosecution against the unsuccessful participant are protected, the participant should also be required to intelligently, knowingly and understandingly waive or toll the statute of limitations of prosecution during his participation in the pretrial intervention program.[300]

E. *Should the Participant in a Pretrial Intervention Program Be Afforded a Hearing Upon Termination From the Program Because of His Unsuccessful Participation?*

1. Analogy to Termination of Parole or Probation

The determination of whether a hearing is required prior to the termination of an individual's unsuccessful participation in a pretrial intervention program can best be analyzed by reviewing the doctrines of the revocation of parole or probation. Although the Supreme Court has broadly defined the rights of the criminal defendant before, during and after his conviction,[301] the Court has not

completely defined the rights of the defendant who has either been released prior to the completion of his maximum sentence or has had the execution of his sentence suspended.[302] However, recent Supreme Court decisions recognizing the existence of constitutional rights in both the revocation of parole and probation may be applicable to the termination of the participant in a pretrial intervention program.[303] The loss of diversionary status, like the revocation of a defendant's parolee or probation status, is attended by the sanction of incarceration, possible conviction if prosecution is resumed, and a potentially detrimental effect on the participant's record and pretrial sentence report.[304]

Historically the courts have denied the parolee or probationer full due process rights in the revocation of either status,[305] utilizing numerous theories to support this approach: parole or probation revocation is an administrative hearing and not a criminal prosecution subject to procedural guarantees;[306] the state acts in role of *parens patriae* to both the probationer and parolee and thus its wide discretion in regard to each case should not be constrained by strict procedural rules;[307] the effect of parole or probation is that the defendant bargains for his conditional freedom and thus consents to a waiver of his procedural rights;[308] the parolee remains in legal custody of the parole board until expiration of the maximum sentence, and is subject to summary prison discipline upon a violation of the terms of his parole.[309]

The most significant consequence of this attitude of parole or probation was that the determination of revocation was within the discretion of the Parole Board or probation officer respectively, and such action was not held subject to judicial review.[310] Because of the view that the parolee or probationer had already lost his personal freedom pursuant to a criminal trial where he was afforded the full panoply of procedural protections, many courts thus determined that the defendant was not entitled to further protection.[311] Furthermore, the Supreme Court in *Escoe v. Zerbst*,[312] articulated in dictum that probation was a privilege granted by the state and that all forms of early release and revocation hearings supported no right of due process since these were matters of legislative grace.[313] This distinction of "right-privilege," posited by Justice Cardozo's dictum in *Escoe*, has been interpreted as meaning that a prisoner has no vested "right" to have his incarceration fixed at a term of years less

than the legally maximum sentence: many courts concluded that they were precluded from reviewing the revocation of parole or probation, especially in light of the lack of a defendant's constitutional right to early release.[314] Similarly, it can be argued that an accused does not have a fundamental right to participate in a pretrial intervention program and thus the decision to terminate his participation would generally not be subject to review under the *Escoe* doctrine. Thus by continuing the dichotomy of right-privilege in regard to participation in a pretrial intervention program, the courts could view this alternative to prosecution as not being within the purview of constitutional protection and utilize this distinction to defeat a participant's claim for judicial review and procedural due process. Notwithstanding the theory that parole or probation (or participation in a pretrial intervention program) is granted as a privilege and not as a matter of right, and that an order of revocation of parole and probation is not an appealable order,[315] this does not preclude reviewability of revocation decisions where a manifest abuse of discretion could be shown;[316] when the circumstances of the case evince an arbitrary or capricious action;[317] or under "exceptional circumstances."[318]

In two Supreme Court decisions, unrelated to the revocation of either parole or probation, the concept of due process requirements being couched as a privilege or right became less meaningful.[319] In *Goldberg v. Kelly*,[320] a decision concerned with the termination of welfare benefits, the Court in recognizing the difficulties created by the right-privilege dichotomy, rejected the argument that welfare stipends are benefits or privileges to which a recipient has no vested right, and thus could be terminated at will.[321] The Court held that welfare benefits were a matter of statutory authorization for those individuals qualified to receive them, and procedural due process warranted the necessity of a pre-termination hearing, wherein the recipient must be provided with timely and adequate notice detailing the reasons for termination, and an effective opportunity to confront adverse witnesses by presenting his own arguments and evidence.[322] The opportunity to be heard must comply with the capacities of the individual,[323] who must be allowed to retain an attorney if he so desires, and the decision at the hearing must be formulated solely on the evidence adduced at the hearing.[324] In language which is of importance in the analysis of whether the pretrial inter-

vention program participant is entitled to have a termination hearing, the Court concluded:

> The constitutional challenge cannot be answered by an argument that public assistance benefits are "a 'privilege' and not a 'right'. . . ." The extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be "condemned to suffer grievous loss," and depends upon whether the recipient's interest in avoiding that loss outweighs the governmental interest in summary adjudication . . ." [C]onsideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action."[325]

(Citations omitted). Following *Goldberg*, the Court in *Graham v. Richardson*,[326] proclaimed the demise of the right-privilege distinction, holding that "this Court now has rejected the concept that constitutional rights turn upon whether a government benefit is characterized as a 'right' or as a 'privilege.' "[327]

Goldberg and *Graham* have thus indicated that the classification of a legislative act as either a right or privilege is of little consequence for the determination of whether the constitutional precepts of due process are applicable when the government seeks to withdraw a benefit from an individual.[328] In a particular case, the extent to which the substantive and procedural due process guarantees of the Fourteenth Amendment must be afforded an individual to whom governmental termination of a benefit is sought would involve an in-depth examination of the deprivation claimed to be suffered by the individual, the determination of whether such deprivation amounts to a "grievous loss" for which procedural fairness is warranted,[329] and a determination that the individual's interest in "avoiding that loss outweighs the governmental interest in summary adjudication."[330] In delineating a number of factors to be considered in this determination, Justice Frankfurter concluded:

> . . . "[D]ue process" cannot be imprisoned within the treacherous limits of any formula. . . .The precise nature of the interest that has been adversely affected, the manner in which this was done, the reasons for doing it, the available alternatives to the procedure that was followed, the protection im-

> plicit in the office of the functionary whose conduct is challenged, the balance of hurt complained of and good accomplished—these are some of the considerations that must enter into the judicial judgment.[331]

The participant in a pretrial intervention program is apprised of the fact of the eventual dismissal of charges upon his successful termination. However, if declared to be unsuccessful, the risk of conviction, incarceration, and an unfavorable pre-sentence report, can all accompany the decision of the participant's termination from the program.[332] Like the welfare recipient in *Goldberg*, the participant in a pretrial intervention program has a substantial interest which would be adversely affected by termination.[333] It is thus suggested that the efficacy of the continued success of the diversion program requires that the participant be afforded minimum due process considerations to guard against an unwarranted termination of his pretrial diversionary participant status.[334] Following the dictates of past Supreme Court decisions in the area of administrative hearings, it appears that the participant's interest in maintaining his diversionary status is not outweighed by a governmental interest in a summary adjudication of his termination, and thus the state, after it has given its imprimatur to this alternative to prosecution, should be precluded from arbitrarily and summarily revoking a diversionary status without meeting the requisites of due process.[335]

2. Requirement of a Revocation Hearing for the Termination of Parole or Probation

A major breakthrough in the grace or privilege concept of parole or probation was the Second Circuit decision of *United States ex. rel. Bey v. Connecticut State Board of Parole*,[336] wherein the court found that because parole revocation would have a serious detrimental effect on a prisoner's record, the precepts of due process dictated that the parolee be afforded legal assistance at his revocation hearing.[337] In *Morrissey v. Brewer*,[338] the Supreme Court dealt with the issue of whether Fourteenth Amendment due process requires that a state afford an individual some opportunity to be heard prior to revoking parole. The Court accepted the *Goldberg-Graham* treatment of the right-privilege distinction and concluded that a parolee was entitled to protection afforded by a minimum of standards derived from constitutional due process.[339]

The Court correctly concluded that due process should apply to parole revocation because the parolee would suffer "grievous loss," and to determine the extent of the required due process the Court defined and examined the interests of both the parolee and the state.[340] The parolee's liberty was found to enable him to be employed and "free to be with family and friends and to form the other enduring attachments of normal life."[341] Thus "his condition is very different from that of confinement in a prison. . . . The parolee has relied on at least an implicit promise that parole will be revoked only if he fails to live up to the parole conditions."[342] Although the liberty of the parolee is conditioned and indeterminate and the state had a valid interest in restricting his liberty, the state had no interest or justification in summarily revoking parole without affording the parolee "some orderly process, however informal."[343]

The Court dismissed the argument that since revocation is so totally a discretionary matter a hearing would thus be an administrative burden.[344] The hearing which was required by the Court was comprised of two stages: the first being a minimal retrospective factfinding conducted at or reasonably near the place of the alleged parole violation or arrest, and the second being a discretionary decision on revocation.[345] The function of the first hearing would be the determination by someone not directly involved in the parolee's case that there was "probable cause or reasonable ground to believe that the arrested parolee has committed acts that would constitute a violation of parole conditions."[346]

The Court stressed the importance of having a decisionmaker who would not lack complete objectivity in this determination of probable cause. Because the granting and revocation of parole are administrative proceedings, wide discretion was permissible in the designation of the hearing officer, the Court not requiring that the hearing be conducted by a judicial officer.[347] The hearing officer had the duty of summarizing what had occurred at the hearing and he "'. . .should state the reasons for his determination and indicate the evidence he relied on. . .' but this is not a final determination calling for 'formal findings of fact and conclusions of law.' "[348]

Although the preliminary factfinding hearing was deemed to be informal, the Court required that the parolee be given notice delineating the alleged parole violation and a hearing to determine

whether there is probable cause to support the purported violations.[349] Procedurally, at the hearing the parolee had the right to appear and speak in his own behalf; present documentary evidence or individuals who could provide relevant information; and could question an adverse witness (if the hearing officer determined that the safety of the informant would not be subjected to harm if the parolee was apprised of his identity).[350] After this procedure, the parolee must then be given the opportunity to insist on a final revocation hearing to determine by more than probable cause whether the alleged violation occurred and to provide a final evaluation of whether revocation was warranted.[351]

Unlike the parolee or probationer who has had his status jeopardized, the cause for the possible termination of participation in a pretrial intervention program would (generally) not be accompanied by the participant's immediate incarceration.[352] Thus it appears that the constitutional requisites of due process which should be afforded the participant on the determination of his termination from the diversion program can be adequately fulfilled in the second-stage of the *Morrissey* hearing requirement.[353]

The revocation hearing must present the parolee/participant with the opportunity to show, if it is possible, that he did not commit the alleged violations, or, if he did, that mitigating circumstances preclude the necessity of revocation.[354] Although Georgia and the majority of states have codified a procedure for parole and probation revocation hearings,[355] the Court in *Morrissey* correctly determined that to establish such procedures is within the purview of the responsibility of the individual state. The Court, however, did provide for the minimum requirements of the revocation hearing:

> (a) written notice of the claimed violations of parole;[356] (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence;[357] (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a "neutral and detached" hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking parole.[358]

If the decision to divert is made by the court then it should also be the decisionmaker at the hearing on termination from the pretrial intervention program. However, where the discretion of granting diversion is vested in the prosecutor, a conflict with the *Morrissey* requirement of a "neutral" hearing may be created. Because the prosecutor and/or the staff of the diversion program have usually been responsible for preparing the evidentiary facts upon which the decision for termination will be premised, as well as being the body to apply for termination, it is questionable whether their "neutrality" can reasonably be assured.[359] The efficacy of this hearing is contingent on having an impartial decisionmaker,[360] but the prosecutor's or staff member's prior involvement in some aspect of the participant's case will not necessarily bar them from acting as the decisionmaker, provided that they have not participated in making the determination under review.[361] The Supreme Court's reiteration of the minimum due process elements of due process articulated in *Morrissey* may be construed as providing its imprimatur on the minimum standards of due process applicable to similar nonjudicial administrative situations.[362] It appears that the *Morrissey* standards can be easily implemented in the decision to terminate participation in a pretrial intervention program.[363] If participation in the program is terminated, the time spent by the accused in the pretrial intervention program does not have to be credited toward any sentence which may be meted out following continued prosecution.[364]

3. Is There a Right to Counsel at the Termination Hearing for a Pretrial Intervention Program Participant?

Whether the participant in a pretrial intervention program has the right to be represented by counsel at the termination hearing can also be attempted to be answered by a review of the case law on the constitutional necessity of requiring assistance of counsel in the analogous parole and probation revocation hearings. In *Morrissey*, the Supreme Court specifically stated that it did not reach or decide the issue of whether a parolee (and consequently a probationer) was entitled to retained or appointed counsel at the revocation hearing,[365] even though it had decided in *Goldberg* that the welfare recipient who was subject to the termination of his welfare benefits must be allowed to retain counsel.[366] In *Goldberg*, the Court concluded that:

> "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel." . . . We do not say that counsel must be provided at the pretermination hearing, but only that the recipient must be allowed to retain an attorney if he so desires. Counsel can help delineate the issues, present the factual contentions in an orderly manner, conduct cross-examination, and generally safeguard the interests of the recipient. We do not anticipate that this assistance will unduly prolong or otherwise encumber the hearing.[367]

The Court in *Gagnon v. Scarpelli*[368] was presented with the issue of whether an indigent probationer or parolee has a constitutional right to be represented by appointed counsel at a revocation hearing.[369] The Court began its analysis by examining the relationship between the parolee or probationer and their supervising officer. Although both the supervisory officer and the defendant have the common purpose to keep the parolee or probationer from losing his conditional release, such benevolent attitude on behalf of the officer changes upon his decision to recommend prosecution, at which time "his role as counsellor to the probationer or parolee is then surely compromised."[370] Because the parolee and probationer and the State thus have interests in common to assure the accuracy of the finding of fact and a valid exercise of the discretionary power of revocation, the *Morrissey* requirements were implemented to "serve as substantial protection against ill-considered revocation."[371] The effectiveness of these minimum requisites of due process, however, may in the factual circumstances of an individual case, depend on "the use of skills"[372] not possessed by the parolee or probationer. Although the revocation hearing does not encompass technical procedural or evidentiary rules, counsel may be more effective and successful than the unskilled or uneducated parolee or probationer in presenting the facts and evidence of the case, as well as in the examining and cross-examining of witnesses.[373]

The Court did not accept the contention that counsel must be provided in all parole or probation revocation cases: such a rule would in effect thwart the efficiency of the revocation process because it would impose added costs and "alter significantly the nature of the proceeding."[374] Rather than adopting a *per se* right to counsel in all revocation hearings, the Court decided upon a case-by-case approach,[375] correctly concluding that the need for counsel

arises from the "peculiarities of particular cases" and not from the constant attributes of the proceedings.[376] Although the Court stressed that the decision of the necessity for counsel in an individual case was entrusted to the discretionary determination of the state authority administering the supervision of parole and probation, two presumptive situations were posited as warranting the right to counsel:

> . . .[C]ounsel should be provided in cases where, after being informed of his right to request counsel, the probationer or parolee makes such a request, based on a timely and colorable claim (i) that he has not committed the alleged violation of the conditions upon which he is at liberty; or (ii) that, even if the violation is a matter of public record or is uncontested, there are substantial reasons which justified or mitigated the violation and make revocation inappropriate, and that the reasons are complex or otherwise difficult to develop or present.[377]

The Court thus implied that the parolee or probationer must be apprised of his right to request counsel, and expressly concluded that the refusal to grant counsel must be stated in the record of every case.[378]

Although the Georgia Supreme Court has decided in decisions prior to *Gagnon* that the failure to provide counsel at a revocation hearing is not violative of a defendant's right to counsel under either the Federal or State Constitutions,[379] the interpretation, by Justice Gunter, of the Georgia statute on the revocation of probation would indicate that the benefit of counsel is to provided at such a hearing.[380] Furthermore, in addition to the dictates of *Gagnon*, a participant in a pretrial intervention program may have a *right* to counsel at a termination hearing because this proceeding can be regarded as occurring at a critical stage of the criminal proceeding when substantial rights of the accused may be affected: the traditional test for requiring the right to counsel.[381] The termination hearing will be a crucial factor in the participant's preservation of his status: resulting in a possible recordation of statements made by the participant to be used against him in a later prosecution (unless procedurally precluded by the program's operational procedures),[382] prohibiting the expungement of the accused's record of arrest and thus having further consequential effects on his future, as well as being attended by the possible sanction of imprisonment. The necessity for the right to counsel thus seems evident.

F. *Confidentiality of Statements Made By The Participant to Counselor in a Pretrial Intervention Program*

It is advanced here that the communication between the counselor and participant in a pretrial intervention program should be privileged information and inadmissible as substantive evidence in any subsequent proceeding against the participant. Unlike the rules of exclusion which have as their common design the facilitation of fact gathering by guarding against the use of unreliable or prejudicial evidence,[383] the sole purpose of privileged communication in evidentiary matters is the protection of interests and relationships which are regarded as of sufficient social importance to justify the exclusion of relevent evidence.[384] The encouragement of full and free disclosure between husband and wife, attorney and client, psychiatrist and patient, and similarly between counselor and the pretrial intervention participant, and the constitutional freedom from self-incrimination,[385] are the justifications for sacrificing reliable evidence needed in the administration of justice.[386] If the statements of the participant in the intervention program are considered to be privileged communication, the mechanism creating the project must so provide, because in Georgia there is no privilege between counselor and client; probation officer and probationer, parole officer and parolee (if an analogy can be made between probation or parole and pretrial intervention); or social worker and client.[387]

Unless the statements made by the participant are privileged communication, the pretrial intervention staff "may be compelled to disclose information confided to them by the participant which related to the commission of a crime or similar matters of prosecutorial interest."[388] The efficacy of a pretrial intervention program would seem to depend on the participant's assurance of the confidentiality of his communications with the program staff. "[H]onest and fully-disclosed communication is a pivotal factor in understanding and administering to the rehabilitative needs of 'offenders.' "[389] With the fear that any statements made by him may be used against him in a future prosecution, the participant in a pretrial intervention program may not converse with a counselor as candidly as he would under the protection of a privileged communication.[390]

One justification for the privileged nature of such communication

would be an analogy to Ga. Code Ann. § 38-418(5) (1974) which provides that communication between psychiatrist and patient is privileged. Although Georgia does not have a privilege for communication between doctor and patient, it has provided for the exclusion of communication between a certified or licensed psychiatrist and patient because of the special therapeutic need for assurance to the patient of protection against future disclosure.[391] Before the psychiatrist-patient communications privilege may be invoked, however, the requisite relationship of psychiatrist and patient must have existed to the extent that treatment was given or contemplated.[392] Although the participant in the pretrial intervention program does not undergo "psychiatric" treatment per se, it is contended that the psychological services, corrective and preventive guidance, training and counseling, which are afforded to the participant, are sufficiently similar to treatment intended to be within the purview of the psychiatrist-patient privilege.

In addition to the assertion of a privilege analogous to the psychiatrist and patient relationship, the protections afforded by the Fifth Amendment privilege against self-incrimination[393] may be invoked to prevent the use of any statements made by the participant in a trial subsequent to his unsuccessful termination from the program. Because the primary purpose of the program is rehabilitation of the offender, the participant's assumption of responsibility for the alleged offense is deemed essential in many programs to the successful completion of the "reality-therapy" approach.[394] However, this is not a confession to a crime or an admission of legal guilt but rather is merely the assumption of responsibility for committing the physical actions comprising the alleged offense.[395] Nevertheless, if such assumptions of moral responsibility for the participant's actions were not deemed inadmissible at a subsequent trial, the testimony of staff members concerning such statements would indeed be damaging to the participant-defendant at his trial. Express statements made by the participant and any assumptions or responsibility for his conduct should thus be precluded from any future prosecutorial action.

In *Miranda v. Arizona*,[396] the Supreme Court expressly declared that the Self-Incrimination Clause was fully applicable to state interrogations at a police station. The *Miranda* Court set forth a set of protective guidelines, now commonly known as the *Miranda*

rules, which are applicable whenever an individual is first subjected to police interrogation while in custody at the station "*or otherwise deprived of his freedom of action in any significant way.*"[397] The Court particularly stated:

> Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed.[398]

The Court correctly recognized that these procedural safeguards were not constitutionally protected rights but were instead measures to insure that the right against compulsory self-incrimination was protected. The Court determined that "we cannot say that the Constitution necessarily requires adherence to any particular solution for the inherent compulsions of the interrogation process as it is presently conducted."[399]

An interesting question is whether the *Miranda* custodial situation is established when a potential participant in a pretrial intervention program has been arrested and is subjected to the necessary screening to determine his eligibility into the program. Two Supreme Court decisions subsequent to *Miranda* provide some guidance to this problem. In *Mathis v. United States*,[400] an Internal Revenue Service agent failed to give the *Miranda* warnings to a petitioner incarcerated in a state jail serving a state sentence when questioning him about his prior income tax return. The majority opinion rejected the government's arguments that *Miranda* was inapplicable because 1) the questioning was part of a "routine tax investigation" and 2) petitioner had not been jailed by the interrogating federal officers but was there for an entirely different offense, and concluded that these differences were "too minor and shadowy to justify a departure from the well-considered conclusion of *Miranda* with reference to warnings to be given to a person held in custody."[401] The dissenting opinion maintained that:

> . . . *Miranda* rested not on the mere fact of physical restriction but on a conclusion that coercion—pressure to answer questions—usually flows from a certain type of custody, *police station interrogation* of someone charged with or suspected of a crime. Although petitioner was confined, he was at the time of *interrogation* in familiar surroundings. . . . The rationale of

> *Miranda* has no relevance to inquiries conducted outside the *allegedly hostile and forbidding atmosphere surrounding police station interrogation* of a criminal suspect.[402]

Subsequent to *Mathis*, the Court in *Orozco v. Texas*,[403] held that the questioning of a suspected murderer in his boarding house bedroom at four a.m. by four police officers without issuance of any *Miranda* warnings violated the Self-Incrimination Clause as construed in *Miranda* and thus the use of any statements obtained through the interrogation would be inadmissible. The Court concluded:

> The State has argued here that since petitioner was *interrogated* on his own bed, in familiar surroundings, our *Miranda* holding should not apply . . . But the opinion [*Miranda*] iterated and reiterated the absolute necessity for officers interrogating people "in custody" to give the described warnings.[404]

Justice White, joined by Justice Stewart, dissented, protesting that

> [t]he Court now extends [*Miranda*] to all instances of in-custody questioning outside the station house. Once arrest occurs, the application of *Miranda* is automatic. The rule is simple but it ignores the purpose of *Miranda* to guard against what was thought to be the corrosive influence of practices which station house interrogation makes feasible.[405]

Both *Mathis* and *Orozco* contained instances of police interrogation. It is thus doubtful if the screening by a staff member of the pretrial intervention program to determine the eligibility of a participant would be deemed comparable to a police interrogation warranting the need for *Miranda* warnings.[406] Furthermore, it would appear that advising the participant of his right to remain silent would be detrimental to the goals of the program, because the channels of communication between counselor and patient may indeed become inhibited, and the interview may change from one of cooperation to one marred by adversariness.[407] It is thus contended that the interviewing of a potential participant in a pretrial intervention program by a staff member does not come within the purview of *Miranda*, and if it did, the providing of *Miranda* warnings would only thwart the participant's willingness to cooperate in his rehabilitation.

Cognizant of the *Miranda* issue and that the *Miranda* warnings would be counter-productive to the efficiency of the pretrial intervention program, various federal and state legislation and court rules have been enacted making all communication between counselor and patient privileged, thus advancing rather than inhibiting the purposes of the program. Section 6(b) of "The Community Supervision and Services Act," S. 798, recognizes the need for the confidentiality of communication, concluding that:

> . . . [N]o statements made or other information given by the defendant in connection with determination of his eligibility for such program, no statements made by the defendant while participating in such programs, no information contained in any such report made with respect thereto, and no statement or other information concerning his participation in such program shall be admissible on the issue of guilt of such individual in any judicial proceeding involving such offense.

The Senate Act removed the requirement of sealing the reports prepared by the program administrator which the predecessor to S. 798 had delineated as part of the procedure of a pretrial intervention program, because the provision treating as confidential any statements made by the participant and the preclusion of such statements on the determination of guilt in any subsequent proceeding was deemed sufficient to avoid any self-incrimination problems.[408] The United States Justice Department has expressly concurred in this approach with the exception that such statements could be used for impeachment purposes in a subsequent proceeding.[409] In accord with the Senate Act is the Massachusetts Pre-Trial Diversion Act;[410] New Jersey Supreme Court Rules For Pre-Trial Intervention Programs;[411] Pre-Trial Diversion Procedures Adopted by U.S. District Court Northern District of Ohio, Eastern Division;[412] and the Pennsylvania Supreme Court Rules For Program of Accelerated Rehabilitative Disposition.[413]

Realistically, the need for the confidentiality of communication is only necessary if the prosecutor undertakes a systematic effort to use the obtained information as incriminating evidence against the participant/defendant at a subsequent trial. The prosecutor who is committed to the success of the pretrial intervention program would not utilize such communication for *prosecutorial* interest, because the willingness of the participant to undergo rehabilitation would be

significantly diminished, and "it seems unlikely that he would either risk or seek destruction of his own program, a program that is of great benefit to his office, by exploiting it for the sake of criminal convictions."[414]

In conclusion, the efficacy of the pretrial intervention program will depend on the participant's assurance that any statements he has made for rehabilitative or therapeutic purposes will not be used against him in a later trial. The privileged communication should be qualified because the prosecutorial or court approval which is a necessary requisite for successful termination from the program cannot be made from a limited report.[415] Thus any statements, such as the participant's assumption of guilt, could be utilized in this report, with the preclusion of such staff-participant communication for prosecutorial interest in a subsequent trial or the utilization of such communication by other persons or organizations.[416]

G. *The Constitutionality of Requiring the Participant in a Pretrial Intervention Program to Make Restitution to the Victim of the Alleged Offense*

Two constitutional issues are involved when a participant in a pretrial intervention program is required to make restitution as a condition of his participation in the program.[417] First, as was emphasized earlier in the discussion on the permissibility of requiring a guilty plea as a condition of participation,[418] the requirement of restitution would in effect be the participant's admission of guilt and thus a waiver of his right to be free from self-incrimination. The exercise of the right against self-incrimination cannot be "chilled"[419] by enticing the potential participant with the opportunity of a possible dismissal of charges, and thus, if restitution is deemed an important rehabilitative concept in a pretrial intervention program, the fact of the participant's making restitution should be precluded from being used against him in a later prosecution.[420]

The restitution requirement also raises an issue of the denial of the equal protection of the laws because this requisite of eligibility in the program may result in the exclusion of indigents from participation. Recent Supreme Court decisions[421] may indicate that the participant's inability to make restitution should not result in his automatic incarceration, and the rationale of the *Williams v. Illinois*

trilogy[422] clearly precludes the different treatment of two similarly situated categories of potential participants. If an indigent participant is denied the opportunity for pretrial intervention because of his inability to make restitution, the state must demonstrate a compelling state interest which substantiates this exclusion of participants based on a classification of wealth.[423] Thus, although the requirement of restitution may have significant rehabilitative effects, such as reminding the participant of "his wrongdoing and so increase his awareness of an obligation to society,"[424] and in compensating a victim of an alleged offense, the efficacy of a pretrial intervention program, as well as an analogy to the recent Supreme Court decisions on the constitutionality of imprisoning an indigent defendant unable to pay a fine, require that in the instance of an indigent participant the making of restitution could be waived, reduced in amount, or be permitted to be made in installment payments.[425]

H. *Expungement of Criminal Records of a Successful Participant in a Pretrial Intervention Program*

The criminal justice system has as a major goal the rehabilitation of the offender. Not all, but a large number of offenders, do indeed become rehabilitated. This is particularly true of the adult first offenders and juveniles who have been given the opportunity to participate in pretrial intervention programs. However, society's goal of turning the rehabilitated adult first offender or juvenile back into the mainstream of society cannot be properly effectuated unless the successfully rehabilitated person is in fact forgiven.

Unfortunately, the rehabilitated offender cannot be forgiven, nor will society forget the past offense so long as the law does not remove the disabilities of the arrest incurred by the pretrial intervention participant. As Justice Minton of the United States Supreme Court observed:

> Of course the record of a conviction for a serious crime is often a lifelong handicap. There are a dozen ways in which even a person who has reformed, never offended again, and constantly endeavored to lead an upright life may be prejudiced thereby. The stain on his reputation may at any time threaten his social standing or affect his job opportunities.[426]

The disabilities of the convicted, even after release, include legal limitations on their rights as citizens under the law of forty-six states and under federal law.[427] A number of these states do provide, however, for the removal of these legal disabilities.[428] The Federal Youth Offenders Act provides that the unconditional discharge of an offender before the expiration of his sentence automatically removes the taint of the conviction.[429]

The most difficult disability to remove from the offender's life, though, is the unofficial disability: the societal condemnation and mistrust of those that have been arrested, as illustrated by the ominous question on the employment application, "Have you ever been arrested?" In a survey of employers in the 1960's, it was found that only 11% of those surveyed would consider for employment a man convicted of assault, and only one-third would consider for employment a man charged but acquitted of assault.[430] Similarly, the Supreme Court of California has observed that "[a] juvenile who states that he has been either detained or arrested will be subjected to economic and other sanctions."[431] It is submitted here that the adult first time offender or the juvenile offender, who has successfully been rehabilitated in a pretrial intervention program should be able to have his or her record expunged so as to avoid unofficial but severe impediments to a useful and productive life.

A number of states have enacted so-called "expungement statutes." Essentially, the expungement statutes attempt to remove the legal and social implications of arrest without unduly hampering police operations. This is done by either sealing or destroying the arrest record of appropriate classes of rehabilitated offenders after which the offender does not have to represent that he has been arrested or detained for the offense in question. In California, for example, a juvenile offender's record is sealed for five years and kept in the custody of the juvenile court, which will not show the record to third parties without the offender's permission.[432] If, after five years, the juvenile has not committed another offense, the previous record is destroyed.[433] During the five year period, the juvenile is deemed not to have any of the impediments of conviction. This means, for example, that the juvenile need not tell employers that has been arrested or detained.[434] The police, however, are not hampered because they can obtain the records in the event of a subsequent arrest. But when the juvenile is not a recidivist, the unfortun-

ate "stigma" of the previous arrest will not haunt the rehabilitated youth. The New York Youthful Offender law similarly provides that a youthful offender adjudication "is not a judgment of conviction for a crime or any other offense,"[435] and the adjudication shall not serve as a legal impediment in holding public office, obtaining public employment, or receiving any license granted by public authority.[436] Although a New York youthful offender is thereby not "convicted," he is nonetheless "arrested." It is submitted that the New York statute, therefore, fails to remove the important "informal" impediments of an arrest.

Delaware has enacted a statute which provides for expungement by court order:

> (a) Whenever a person with no prior criminal record is arrested but is not convicted of any crime nor adjudged a delinquent as a result of the arrest, the Superior Court in the county wherein such person resides, or if such person does not reside in this State, the Superior Court of New Castle County, upon petition of such person, may order that all indicia of arrest, including, without limitation, any record entries, photographs or fingerprints, be destroyed. Upon the issuance of any such order of the Superior Court it shall not be necessary for such person to report or acknowledge that he has ever been arrested for such crime.
>
> (b) Any petition filed pursuant to subsection (a) of this section shall be served upon the Attorney General, and no action shall be taken by the Superior Court for 10 days after the date of such service.[437]

The Delaware statute enables an arrestee with no record who is not convicted to represent that he has not been arrested; the indicia of the arrest are destroyed by order of court. Because the state attorney general is a party to such a court proceeding, however, the state is able to come forward and show cause when, in the interest of justice, a petitioner's records should not be destroyed.

This study has determined that of the pretrial intervention programs responding to an independent questionnaire, five currently provide for the expungement of the successfully rehabilitated participant's arrest record.[438]

The following suggested guidelines for an expungement statute for a Georgia pretrial intervention program are based largely on the

Delaware statute and the article by Professor Gough.[439] First, the successfully rehabilitated participant in the pretrial program should be entitled to petition the appropriate court for the sealing of the indicia of his arrest. Absent a strong showing by the prosecutor, the court should be obliged to order the sealing. Second, there should be a probationary period during which this process takes place. Professor Gough suggests two years probation for juveniles, three years for adults accused of a misdemeanor, and five years for adults accused of a felony. There could be exemptions from this statute for certain kinds of felonies as well as for minor offenses. Third, the arrest indicia could then be sealed, instead of destroyed, so the record would not be in the public domain, but would be available to law enforcement officials for proper purposes. Finally, the petitioner should be able to represent that he has not been arrested, detained, or involved in a criminal adjudication process. The statute could further provide that the sealed indicia of arrest could be used for purposes of sentencing pursuant to subsequent arrest and conviction. A statute designed along these lines would enable the rehabilitated offender to go about his reformed life in society without the official and societal stigma of having been arrested or detained.

APPENDICES

APPENDIX A

Number	Program
1	Hudson County Pretrial Intervention Project Jersey City, New Jersey
2*	Project Intercept Hayward, California
3	Project FOUND (First Offenders Under New Direction) Baltimore, Maryland
4*	Operation DeNovo Minneapolis, Minnesota
5*	Pretrial Intervention Project Columbia, South Carolina
6*	Atlanta Pretrial Intervention Project Atlanta, Georgia
7*	Court Resources Project Boston, Massachusetts
8*	The Manhattan Court Employment Project New York City, New York
9*	Deferred Prosecution Program Honolulu, Hawaii
10*	Pre-Trial Diversion Services Project Kansas City, Missouri
11*	Pretrial Services Diversion Program New Haven, Connecticut
12*	Genesee County Citizens Probation Authority Flint, Michigan
13	Date County Pretrial Intervention Project Miami, Florida
14	Project Crossroads Washington, D.C.

*Indicates program responding to Independent Questionaire

APPENDIX B

Program	Eligibility and Prior Record
2	Participant may have a prior arrest record. Prior conviction will bar participation.
4	Participant may have a prior arrest record. Prior conviction record will not bar participation but convictions related to drugs, alcohol or serious crimes against a person may result in exclusion.
5	Participant may have a prior arrest record. Prior conviction will not bar participation. Incarceration of over one year will bar participation.
6	Participant may have a prior arrest record. Prior conviction will not bar participation. Incarceration of over six months will bar participation.
7	Participant may have a prior arrest record. No more than two prior adult convictions permitted.
8	Participant may have up to three prior arrests, but if arrests are less than three and are for serious offenses participation may be denied. Incarceration of over one year will bar participation.
9	Any prior arrest or conviction will bar participation.
10	Participant may have a prior arrest record. Presence of many prior arrests or where such arrests indicate a violent behavior pattern will bar participation. Prior conviction will not bar participation if no long-term incarceration resulted therefrom.
11	Participant may have a prior arrest record. No more than one felony or three misdemeanor convictions permitted.
12	Participant may have a prior arrest record. Participation will be denied if present offense indicates a continuing pattern of anti-social behavior. Prior convictions will not bar participation unless such indicate a pattern of anti-social behavior.

Source: Independent Questionaire
July, 1974

APPENDIX C

Excerpt from The Manhattan Court Employment Project of the Vera Institute of Justice, "Final Report, November, 1967-December 31, 1970" at 23-25 (1972).

OPERATIONS: FINDING DEFENDANTS WHO MEET THE CRITERIA

Throughout the three-year demonstration phase, the role of the Manhattan Court Employment Project Screening Unit has been:

1. to screen the arrestee population to determine those defendants who are eligible and willing to participate;
2. to request the court's permission to stay prosecution for a period of three months so that those eligible and willing may participate in the Project.

When a person is arrested in Manhattan, he is taken by the arresting officer to a precinct house and booked. Some suspects, who are booked for minor offenses and who can prove strong community ties, are released immediately after booking and are given a summons to appear in court at a future date. For the vast majority, however, booking is the beginning of a tedious and oppressive process culminating in appearance before an arraignment court judge some 12 hours later.

If the arrestee is charged with a felony or certain misdemeanors, he is fingerprinted and photographed.* The officer is then required to pick up a copy of the defendant's prior criminal record (referred to as a Yellow Sheet), if any, from the Police Department's Bureau of Criminal Identification. He takes this to court.

All arrestees, whether or not they are fingerprinted and photographed, are taken by the arresting officer from the cells in the precinct house to the detention area of the Criminal Court Building. Upon entering, they are questioned by an officer of the Department of Probation about their place of residence, family, employment and schooling. He records this information on a standard form known as an R.O.R. (Release on Own Recognizance) Sheet. The information on the R.O.R. Sheet helps the arraignment court judge decide upon bail or parole for the defendant.

*As of September 1971, all arrestees, regardless of their charge, will be fingerprinted and photographed. This will greatly facilitate future follow-up studies on the rearrest rates of former participants.

Meanwhile, the arresting officer goes to the Complaint Room of the Criminal Court where the complainant (if any) and an assistant district attorney draw up an affidavit formally stating the charges and details of the alleged crime. If the arresting officer has reason to believe that the arrestee is a narcotics addict, he checks off the symptoms he has observed on a CR-1 form, which is a checklist of possible addiction symptoms.

All of these forms—the Yellow Sheet, the R.O.R. sheet, the affidavit and the CR-1 form—are brought together in a packet by the arresting officer to the clerk of the arraignment court. The clerk hands the papers to a Project Screener manning a desk in the arraignment court clerk's office.

In retrospect, it is clear that introducing the Screening Unit at this point in the legal process enabled the Project to function efficiently. At first, Screeners lacked desk space of their own. They had to intercept defendant's court papers as the court clerk handed them to the defense attorney. Now, Screeners are handed automatically each court paper as soon as it is turned over to the court clerk by the arresting officer. Thus they have sufficient time to evaluate each defendant's eligibility.

The job of the Screener stationed at the desk in the arraignment court clerk's office is to check the information in the defendant's court papers against the Project's official criteria. It was hoped that this simple clerical operation would be sufficient to determine a defendant's eligibility. This hope, however, proved unrealistic. Court papers often lack vital information and at times contain inaccuracies. Arresting officers sometimes fail to inspect defendants closely for signs of narcotic addiction, and even when they observe such signs, they often fail to fill out a CR-1 form. No prior record sheet is attached in most misdemeanor cases. No information pertaining to alcoholism or psychopathology is noted. And most important, a review of court papers does not reveal whether a defendant would like to participate in the program. Clearly, Screeners need to interview defendants.

To facilitate this interview, a Screener stationed at the desk transfers all useful information from the court papers of potentially eligible defendants to an interview form. A second Screener uses this form to conduct the interview. First he makes sure that the case will

not be called in court until he has determined the defendant's eligibility. Then he enters the detention pens to speak with the defendant. Talking through the bars in the crowded and noisy pens (the Project has been unable to provide a more desirable interviewing situation because of time, space and security problems), the Screener explains the program and ascertains whether the arrestee is interested. All but about 10% of those interviewed respond positively. The Screener proceeds with his questioning, seeking information on place and length of residency, employment, prior record, drug use and the circumstances of arrest.

The Screeners then verify the information they have obtained. Family, friends, or neighbors are contacted to validate the defendant's address. When no Yellow Sheet is attached to the court papers, the Bureau of Criminal Identification is called. A defendant's past or present employer also may be called.

Finally, the Screener finds the arresting officer and the complaint (if any) in the court room and interviews them. These interviews allow the Screener to:

1. secure information about the defendant's lifestyle since the arresting officer may be familiar with the defendant; and
2. explain the program and its rationale to the arresting officer and the complainant.

The arresting officer and complainant need not consent to the defendant's admission into the Project, but it is much easier to convince the court to grant the defendant's release to the Project if they do consent.

At this point, a Screener's investigation is complete. He must now decide:

1. that the defendant is eligible; or
2. that the defendant does not meet the eligibility requirements and should be rejected; or
3. that a decision cannot be made until the defendant's next court appearance and that the defendant should be "futured".

A Screener may have to future a case because a defendant's address has not yet been verified, or because the defendant may be on probation and his probation officer has not yet been contacted. At present, approximately 5% of cases that appear eligible on the basis of court papers are futured. Of the total number of defendants accepted into the Project each week (20), 25% come from futured cases.

During the Project's first two and one-half years of operation, a defendant found elibigle by a Screener next would be interviewed by a Project Representative. Because of their superior knowledge of street life, the Reps were able to identify drug use and misrepresentation that Screeners might have overlooked. The Reps trained the Screeners in interviewing techniques so the second interview was eliminated. The percentage of addicts inadvertently admitted into the Project (which had been decreasing steadily when the Reps were involved in screening) continued to decrease after the elimination of the Rep interview. At first, one out of every four accepted participants was later found to have a "drug problem." Currently, only one out of every 12 turns out to be drug-involved.

When a Screener finds a defendant eligible, he consults with the District Attorney's office. When the Project began, Screeners had to secure the approval of the assistant district attorney who was prosecuting the case. In January 1970, the Chief District Attorney of the Criminal Court Bureau appointed one Assistant District Attorney to act as Project liaison and to review all cases found eligible by Screeners. At first, this new arrangement was awkward. There were times when the assistant D.A. was absent, unavailable, or difficult to locate. The arrangement also tended to allow the ADA's prejudices to prevail more than they would have had he been only one of several assistant D.A.s consulted regularly by Screeners. These difficulties, however, have been overcome. The liaison now has assistants who can act for him when he is unavailable. Furthermore, because Screeners deal with the liaison over a long period of time, they have been able to establish a relationship of mutual repect and trust, which they had been unable to maintain in the initial stages of the program.

When the ADA approves a prospective participant, a Screener returns to court, requests that the case be called, and asks the

presiding judge to parole the defendant for three months, so that he may participate in the Project. Judges grant about 90% of these requests. The ADA liaison frequently has helped Screeners convince the judge of the Project's appropriateness for a particular defendant.

APPENDIX D

New Haven Pretrial Services Council

Initial Statement to Potential Participants

May 12, 1972

In an effort to insure that individuals being interviewed in the police detention facility fully understand their legal rights and privileges, the following points must be explained as clearly as possible to them:

1. Explanation of the Diversion Program
   a. What the program is trying to accomplish
   b. Eligibility criteria
   c. Obligation of program to the participant
      1. Program will try to find him employment, or enroll him in an employment training program or employment oriented program.
      2. Provide supportive services to include group and individual counseling.
   d. Obligation of participant to the program
      1. With the assistance of project staff, the participant must enter and remain in a job or a job training program (if a participant is a full time student, regular attendance at school must be shown).
      2. The participant must attend a regular weekly group counseling session.
      3. The participant must attend periodic individual counseling session when scheduled.
      4. The individual must participate meaningfully in the counseling sessions.
      5. The participant must call his counselor once per week to check in, schedule appointments, and inform the counselor of problems or developments.

2. The interviewee must be advised of his/her right to counsel, either private, or court appointed Public Defender. If the interviewee wishes to defer making a decision on participating in the program until after seeking counsel, it will be explained that this will not affect his being accepted or rejected.

3. The interviewee must also understand that upon entering the

program, he is waiving his right to a speedy trial for at least a 90-day period.

4. a. Being eligible and acceptable to the Diversion Program screener, does not guarantee that the interviewee will be released on promise to appear (PTA). First the screener has to discuss the case with the prosecutor, and if the prosecutor agrees to cooperate, he will recommend to the judge, who has the final decision, that the interviewee be released on PTA, and granted a continuance for 90-days to participate in the Diversion Program.

b. The screener or counselor cannot guarantee to the interviewee, that if he is successful in the program, the charges will be dismissed. However the screener can indicate that if the interviewee is successful in the Diversion Program, there will be a strong likelihood of a favorable disposition of his case (dismissal or nolle).

5. If information is found to be falsely given then the interviewee will be dropped from consideration for the program.

6. It will also be explained to the interviewee that being interviewed for the Diversion Program does not indicate a presumption of guilt or innocense on the part of Diversion Program staff, prosecutor or judge.

APPENDIX E

Escape Tendencies:	Evidenced by psychological testing or record of escape or attempted escape.
Assaultive:	Record of fighting or threatening force; demonstration of verbal or physical force to do harm to another without actually executing the act; conviction of battery, rape, etc.
Narcotic:	Narcotic addiction.
Withdrawn:	Incommunicative to a noticeable degree; anti-social.
Alcoholic:	Medically determined to be an alcoholic; offender admits to being an alcoholic.

APPENDIX F

RELEASE

GEORGIA: FULTON COUNTY:

WHEREAS, the undersigned was arrested and charged with the offense of _____, the alleged victim being _____, AND WHEREAS the said case has been bound over to the Criminal Court of Fulton County, and, WHEREAS, the prosecution of the said charge against me is now being held by the Solicitor-General of the Criminal Court of Fulton County, pending my acceptance into, and successful completion of the Atlanta Pre-Trial Intervention Project and with the consent of the victim aforesaid in said case, or his/her/its Agent and/or Attorney, *now, therefore*, for and in consideration of being permitted to participate in the Atlanta Pre-Trial Intervention Project, as aforesaid, and with the understanding that the prosecution in said case against me will be terminated upon my successful completion of said project and with the recommendation of the Atlanta Pre-Trial Intervention Project to the Solicitor-General of Criminal Court of Fulton County, I do now and forever, fully and finally, release, acquit and discharge _____ his/her/its heirs, executors, administrators, or successors or assigns, or all other firms, persons or corporations who might be liable in any way, from any and all present or future claims of any nature, and any and all liability, past, present, or future, arising out of my said arrest and/or prosecution of said offense, or any claim for false arrest, false imprisonment, malicious arrest or malicious prosecution.

I further agree that the execution of this release shall not constitute an admission of liability on the part of any person, firm or corporation, but such liability by them is expressly denied.

Given under my hand and seal, this the ____ day of _____ 197__.

_____

ATTEST:

_____

APPENDIX G

POST-TERMINATION FOLLOW-UP STATUS (EMPLOYMENT/ EDUCATION) OF SUCCESSFUL AND UNSUCCESSFUL PARTICIPANTS

Program	Follow-Up Period	Status: Successful Participants		Status: Unsuccessful Participants
2	unavailable			
4	3, 6 & 12 month avg.	E	54%	unavailable
		U	21	
		S,T	15	
		Other	10	
5	unavailable			
6	unavailable			
7	unavailable			
8	unavailable			
9	unavailable			
10	unavailable			
11	unavailable			
12	unavailable			

Legend: E (employed)
U (unemployed)
S (in school)
T (in technical/vocational training)

Source: Independent Questionnaire, July, 1974.

APPENDIX H

PARTICIPANT EDUCATION LEVELS: HIGHEST LEVEL COMPLETED AT INTAKE, SUCCESSFUL AND UNSUCCESSFUL TERMINATIONS

Program	Level Completed	Percent All Participants	Percent Successful	Percent Unsuccessful
2	1	5	not available	
	2	38		
	4	57		
4	1	1.2		
	2	4.3		
	3	50.2		
	4-8	44.3		
5	not available			
6	3	48	not available	
	4	52		
7	1	9.57	63.8	36.2
	2	27.65	65.7	34.3
	3	39.36	64.6	35.4
	4	19.14	62.5	37.5
	6	4.20	87.5	12.5
8	1	8	40	60
	2	2	45	55
	3	17	45	55
	4	72	62	38
	6	0.5	81	19
	7	0.5	90	10
9	not available			
10	1-2	9.63	not available	
	3*	60.75		
	4	24.44		
	6-7	3.70		
	8	1.00		
11	not available			
12	1	5	not available	
	2	3		
	4	35		
	7	1		
	unknown	56		

*Completed 9th, 10th or 11th grade.

Legend: (1) did not finish grade school; (2) grade school; (3) junior high school; (4) high school; (5) technical or vocational school; (6) 1 or 2 years college; (7) 2 or more years college; (8) professional or graduate school.

Source: Independent Questionnaire, July, 1974.

APPENDIX I

ANNUAL INCOME OF PARTICIPANTS AT INTAKE: SUCCESSFUL AND UNSUCCESSFUL PARTICIPANTS

Program	Income Class	Percent All Participants	Percent Successful	Percent Unsuccessful
2	1	50	not available	
	2	24		
	3	12		
	4	9		
	6	5		
4	not available			
5[a]	1	20	90	10
	2	10	85	15
	3	40	100	0
	4	16	100	0
	5	5	98	2
	6	4	100	0
	7	3	100	0
	8	2	100	0
6	5	51	not available	
	6	49		
7	1	2.4	not available	
	2	12.5		
	3	15.5		
	4	11.4		
	5	20.9		
	6	20.0		
	7-8	16.7		
8[b]	1	75	50	50
	2	5	45	55
	3	5	55	45
	4	10	60	40
	5	4	65	35
	6	1	70	30
9	not available			
10	not available			
11	not available			
12	not available			

Notes: a. All percentages estimated by program.
b. Successful and unsuccessful percentages estimated by program. Maximum income level permitted participant is $9,100.

Income Classes: (1) under $2,000; (2) $2,001-4,000; (3) $4,001-5,000; (4) $5,001-6,000; (5) $6,001-8,000; (6) $8,001-10,000; (7) $10,001-12,000; (8) over $12,000.

Source: Independent Questonnaire, July, 1974.

NOTES

Chapter One

[1] Of the ten programs surveyed, seven have a basic participation period of 90 days, see Table XI Chapter One §§ II *infra*.

[2] *See, e.g.*, W. LaFave, *Arrest: The Decision to Take a Suspect into Custody*, AM. BAR FOUNDATION, ADMINISTRATION OF CRIMINAL JUSTICE SERIES (1966); J. SKOLNICK, JUSTICE WITHOUT TRIAL (1966); Goldstein, *Police Discretion Not to Invoke the Criminal Process, Low-Visibility Decisions in the Administration of Justice*, 69 YALE L. J. 543 (1960).

[3] About one-half of all arrested cases are dismissed at the pretrial stage. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE: THE CHALLENGE OF CRIME IN A FREE SOCIETY, at 133 (1967). For a discussion on the discretionary role of the prosecuting attorney and its interrelationship with pretrial diversion see Chapter One § III, subsection A, *infra*.

[4] In many cases effective law enforcement does not require punishment or attachment of criminal status, and community attitudes do not demand it. Not all offenders who are guilty of serious offenses as defined by the penal code are habitual and dangerous criminals. It is not in the interest of the community to treat all offenders as hardened criminals; nor does the law require that the courts do so.

PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS, at 5 (1967).

[5] *See, e.g.*, statement of Whitney North Seymour, Jr., U.S. Attorney, Southern District of New York, New York City, New York, in *Hearings on S. 3309 Before the Subcomm. on National Penitentiaries of the Senate Comm. on the Judiciary*, 92d Cong., 2d Sess. 28 (1972) [hereinafter cited as *Hearings on S. 3309*]. This bill subsequently became S.798. *See Hearings on S. 798 Before the Subcomm. on National Penitentiaries of the Senate Comm. on the Judiciary*, 93d Cong., 1st Sess. (1973) [hereinafter cited as *Hearings on S.798*]. (Amended S.798; passed the Senate on Oct. 3, 1973.)

[6] The success of CPA [the Genessee County (Michigan) Citizens Probation Authority] and any corrections program depends upon the rehabilitative function. Here it becomes difficult to separate the policy-legal-procedural operation from the "treatment" aspect of a program. Philosophically and institutionally determined policies and procedures of traditional corrections have resulted in field services defining by practice their primary function as "enforcement" of probation and parole orders. The increasingly recognized implication of this is that "rehabilitation" remains the *myth* of criminal justice and "punishment" the *fact*. Despite the claims of its detractors, the criminal justice system has never been wagged by the tail, the criminal. Corrections was and is the afterthought of "Justice American Style."

There is even a legitimate question as to whether a real victim is not the criminal himself, or his family, and, ultimately, a society which perpetuates criminalization in the name of justice and rehabilitation.

Perlman, Runcie, Singer, Vann, *Deferred Prosecution and the Citizen's Probation Authority: The Organization Concept*, 9 THE PROSECUTOR 220, 221 (1973). With respect to institutionalized offenders returned to the community after varying degrees of confinement, studies of their performance in the community failed to prove that the offenders were either helped or hindered by their correctional experience. Nor does ". . . the present array of correctional treatments [have any] appreciable effect—positive or negative—on the rates of recidivism of corrected offenders." R. Martinson, *The Paradox of Prison Reform—II: Can Corrections Correct?*, THE NEW REPUBLIC, April 8, 1972, at 13; *accord*, Schrag, CRIME AND JUSTICE: AMERICAN STYLE (Crime and Delinquency Issues, NIMH Monograph Series 1971); Doleschal and G. Geis, GRADUATED RELEASE (Crime and Delinquency Topics, NIMH Monograph Series 1971); NEWSWEEK, Feb. 10, 1975, at 36.

> . . . overcrowding . . . leads to nothing but trouble and a breakdown of order, violence among prisoners and terrible experiences for some first-timers who shouldn't have been sent to prison in the first place, and makes a shamble of most rehabilitation efforts . . . . The worst casualties of overcrowding in Georgia prisons are the rehabilitation programs for those inmates who are not really criminal by nature. Georgia's rehabilitation programs were improving, but the overcrowding conditions are making it very difficult to do anything.

Atlanta Constitution, Oct. 21, 1974, at 4-A, col. 1. For a discussion of the mounting population crisis in the Georgia prison system see Atlanta Journal, Feb. 6, 1975, at 1-A, col. 1, and see text at notes 156-158 and Table XVII *infra* Chapter One § II.

[8] See statement of Senator Bill Brock, *Hearings on S.790 supra* note 5, at 5.

[9] I read with great interest two letters to the editor in The Sun, March 5. The first, from John L. Trimble, President of Local 2015 of the American Federation of Teachers, says in his letter: "If you, the people of Maryland, lose the Training School, you'll lose a lot more than money." A rather dire prognostication from a public servent.

> I am currently serving a 25-year sentence for armed robbery and burglary. My criminal career began at the Maryland Training School for Boys, where I was committed for the heinous crime of truancy. Before my incarceration at the Cub Hill institution, I was rather ignorant of criminal activities and the subtle niceties needed for successful accomplishment of the same.
>
> But thanks to the things learned at the Training School I soon learned to steal a car, how to mug someone so they could not make an outcry, how to use celluloid to open a house door, how to make checks to see whether people were at home before a burglary, how to make up and use a burglar's kit and various other things necessary to a successful criminal career. I learned well, and the young men who taught me had reason to show pride in their pupil.
>
> Since graduating from the Training School I have attended other schools with honor. Schools like the Maryland State Reformatory for Males, Maryland House of Correction, Atlanta Federal Penitentiary. Quite an impressive course of post-graduate honors, wouldn't you say?
>
> My point is this, now that we are finally about to rid the community of one of the worst criminal schools (wherein everything from A to Z a man should know is taught) one of our local people cries "Wolf." Mr. Trimble warns the public that they are going to lose more than money. For God's sake, what are they losing now? Daily I read in the newspapers, magazines, hear on television and radio about crimes committed against property and people—crimes, many of them, I am sure, the basics of which, were learned in places such as the Maryland Training School for Boys.

Article written by Arthur Middleton, Jr. entitled "To Learn Crime or Cure Criminal Tendencies," *as found in* the statement of Bernard J. Vogelgesang, Director, Department of Court Services, Polk County, Des Moines, Iowa, *Hearings on S.798 supra* note 5 at 433; see also Chapter One § II at note 107 *infra*.

[10] It is difficult to escape the conclusion that the act of incarcerating a person at all will impair whatever potential he has for a crime-free future adjustment, and that regardless of which "treatments" are administered while he is in prison, the longer he is kept there, the more deteriorated and recidivistic he will become.

Quoted in Doleschal and G. Geis, GRADUATED RELEASE 23-24 (Crime and Delinquency Topics, NLMH Monograph Series 1971); National Council on Crime and Delinquency, Policies and Background Information, The Federal Bureau of Prisons N.C.C.D., Hackensack, N.J. at 14 (1971); Jaman and Dickover, A STUDY OF PAROLE OUTCOME AS A FUNCTION OF TIME SAVED,

Sacramento, California Department of Corrections (1969).

[11] E. Goffman, ASYLUM 57 (1961).

[12] Statement of Robert T. Leonard, Prosecuting Attorney, Genessee County; Founder, Citizens Probation Authority, Flint, Mich.; and Representative, National District Attorneys Association, *Hearings on S.798, supra* note 5, at 411.

[13] Statement of Whitney North Seymour, Jr., *Hearings on S.3309, supra* note 3 at 29.

[14] The probation programs themselves are usually understaffed and the support services provided are usually minimal, inadequate, or simply nonexistent. See note 12 *supra*. See also text accompanying notes 151-152 in Chapter One § II *infra*.

[15] Specter, *Diversion of Persons From the Criminal Process to Treatment Alternatives*, 44 PA. B. ASS'N Q. 691, 694-95 Rule 11 (1973).

[16] *See, e.g.*, Parnes, *Judicial Response to Intra-Family Violence*, 54 MINN. L. REV. 585 (1970); Parnes, *Police Response to the Domestic Disturbance*, 1967 WIS. L. REV. 914; Bard, *Family Intervention Police Teams as a Community Mental Health Resource*, 60 J. CRIM. L. C. & P. S. 247 (1969). The New York Police Department's Family Crisis Intervention Unit, sponsored by the Vera Institute, has become a model program and has been implemented in Oakland, Denver, Chicago, and Philadelphia. *See* Bard, Training Police as Specialists in Family Crisis Intervention, U.S.H.P.O., Wash., D.C. (1970).

[17] The Treatment of Drug Abuse: Programs, Problems, Prospects, Wash., D.C., Joint Information Service (1972); Robertson, *Pre-Trial Diversion of Drug Offenders: A Statutory Approach*, 52 B.U.L. REV. 335 (1972); The Narcotic Addict Rehabilitation Act (NARA), 42 U.S.C. § 3401 *et. seq.* (1973); Treatment Alternatives to Street Crime, Special Action Office for Drug Abuse Prevention, Wash., D.C. (1972). For an excellent discussion of proposed legislation in Georgia for the diversion of drug abusers see *Note, The Diversion of Drug Abusers From the Criminal Justice System: Georgia's Proposed Legislation*, 23 EMORY L. J. 1071 (1974). Drug addicts are generally ineligible for pretrial intervention, see text at notes 89-96 in Chapter One § II *infra*.

[18] Erskine, Alcoholism and the Criminal Justice System: Challenge and Response, Wash., D.C., LEAA (1972); Nimmer, Two Million Unnecessary Arrests, American Bar Foundation (1971); Stern, *Public Drunkenness: Crime or Health Problem*, ANNALS OF THE AM. ACAD. OF POLITICAL AND SOCIAL SCIENCE (1967); alcoholics are generally ineligible for pretrial intervention programs. See text at notes 89-96 in Chapter One § II *infra*. Effective as of July 1, 1975, Georgia has passed legislation whereby drunkenness is to be treated as a disease and not a public offense. GA. L. 1974 at 200.

[19] Hickey and Rubin, CIVIL COMMITMENT OF SPECIAL CATEGORIES OF OFFENDERS (Crime and Delinquency Topics, NLMH Monograph Series) (1971).

[20] See note 12 *supra* at 413.

[21] NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, COURTS at 33 (1973) [hereinafter cited as STANDARDS AND GOALS, COURTS].

[22] An illustration of the lack of effective programs to deal with various categories of offenders is provided by a recent study which showed that 2,800 Georgia prisoners (almost one-third of the prison population) can be classified as retarded—that is, they have an I.Q. below 69. Atlanta Constitution, Oct. 16, 1974 at 6-A, col. 1.

[23] "Many prisoners are socially or educationally inept and ended up committing crimes because they were uneducated and could not find decent jobs because they have no skills." Atlanta Constitution, Oct. 21, 1974, at 4-A, col. 1. See also Atlanta Journal, Oct. 18, 1974 at 1-A, col. 1; Atlanta Constitution, Oct. 16, 1974, at 6-A, col. 1.

> As documented in the professional literature and by everyday court experience, the majority of offenders are generally young, mostly ill-educated, and unemployed, lacking in coping skills, alienated from the mainstream of society and without reasonable economic alternatives to criminal behavior which they frequently view as an attempt to equalize perceived social injustices.

Statement by Leon Leiberg, Projector, Parole Corrections Project, American Correctional Association, *Hearings on S. 3309 supra* note 3 at 137.

[24] For a discussion of recidivist rates and their relation to time served see text at notes 148-153 in Chapter One § II *infra*.

[25] PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE: THE CHALLENGE OF CRIME IN A FREE SOCIETY at 134 (1967).

[26] VERA INSTITUTE OF JUSTICE, THE MANHATTAN COURT EMPLOYMENT PROJECT: FINAL REPORT (1972).

[27] NATIONAL COMMITTEE FOR CHILDREN AND YOUTH, FINAL REPORT: PROJECT CROSSROADS (1971).

[28] ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION (1971) (Standards 2.5 and 3.8 of the Prosecution Function, Standard 6.1 of the Defense Function).

[29] In addition to the present Atlanta project, programs were also established in Baltimore, Boston, Cleveland, Minneapolis, San Antonio, Hayward, Calif., San Jose, Calif., and Santa Rosa, Calif.

[30] *See, e.g.*, address by Associate Justice Rehnquist, LEAA National Conference on Criminal Justice, Jan. 25, 1973. In an address to the National Conference on Corrections former Attorney General John Mitchell said that "in many cases society can best be served by diverting the accused to a voluntary, community oriented correctional program instead of bringing him to trial." Minneapolis Star, Dec. 6, 1971, at 131.

[31] *See, e.g.*, NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, CORRECTIONS Standard 3.1 (1973); STANDARDS AND GOALS, COURTS, *supra* note 19, Standard 2.1; NATIONAL PRETRIAL SERVICE CENTER OF THE ABA COMMISSION ON CORRECTIONAL FACILITIES AND SERVICES, Wash., D.C. (1974); PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE: THE CHALLENGE OF CRIME IN A FREE SOCIETY 134 (1967); REPORT OF THE PRESIDENT'S TASK FORCE ON PRISONER REHABILITATION, THE CRIMINAL OFFENDER—WHAT SHOULD BE DONE? 22 (1970).

[32] *See, e.g.*, The National District Attorneys Assoc., see *Hearings on* S.798, *supra* note 5, at 402; The National Council on Crime and Delinquency, and the American Correctional Association, see *Hearings on S.798, supra* note 5, at 382.

[33] Chamber of Commerce of the U.S., *Marshalling Citizen Power to Modernize Corrections* (1972); League of Women Voters of Minneapolis, *Hennepin County Municipal Court* 44 (March, 1971).

[34] Massachusetts Pre-Trial Diversion Act (H.2199); Washington State Adult Probation Subsidy Act (Senate Bill No. 2491); Connecticut Accelerated Rehabilitative Disposition (Public Act No. 73-641) (Approved June 12, 1973); S.798 Community Supervision and Services Act, Diversionary Placement Procedures (H.R. 9007).

[35] PA. R. OF CT. (Crim.) 175-185; Rules Governing the Courts of the State of N. J. (Rules Governing Criminal Practice) 1:38, 3:4-2, 3:28.

[36] U.S. District Court, Northern District of Ohio, Eastern Division Procedures for Pre-Trial Diversion.

[37] The programs are selectively permeable since the purpose of screening is to identify those offenders both willing to change and capable of making significant progress toward rehabilitation during the 90 day period of intensive assistance. The safety of society cannot be unreasonably jeopardized, so those chosen will, of necessity, be low risk.

[38] The approval or consent of other parties, the arresting officer, or the victim, may be required in addition to the consent of the prosecutor or court. See text accompanying notes 112-119 *infra* Chapter One § II.

[39] For the constitutional implications of this waiver see Chapter One § III, subsection D, *infra*.

[40] Only four programs require that a participant be granted a formal or informal hearing prior to a decision to recommend an unsuccessful termination. See note 145 *infra* Chapter One § II. For a discussion of the constitutional issues involved see Chapter One § III, subsection E, *infra*.

[41] See text accompanying note 144 *infra*.

[42] For the constitutional implication of this requirement see Chapter One § III, subsection G, *infra*.

[43] The vocational aspect of the programs are geared to the problems of economically motivated crimes because of the recognition of the high correlation between property offenses and unemployment. The work ethic often does not provide the faith necessary to make the leap between the level of realization and the level of expectation:

> The majority of inmates have little or no education, are for the most part, unskilled, come from poverty income neighborhoods, have been identified as problem individuals before their incarceration. . . . [T]his suggests . . . that if the individual received an adequate education which would qualify him to work at some enhancing, well paying job, or was equipped with a skill that allowed the same ends to be achieved, he would never have come into the corrections systems.

Statement of A.J. Bellamy, Human Services Coordinator, Pretrial Intervention Project, Baltimore, Md., *Hearings on S.798, supra* note 5, at 435.

[44] There are several preconditions that must be satisfied. Diversion assumes that some act justifying criminal intervention has occurred and that there is a substantial likelihood that conviction can be obtained. Often the facts are clear or the offender admits committing the act. Since the persons for whom diversion programs are designed are accused of criminal activity but have not been adjudicated, the only justification for intervening in their lives is that they voluntarily agree to participate in the program.

[45] *See Hearings on* S.3309, *supra* note 5, at 30. Two other factors contribute to a receptive psychological climate: 1) the offender enters the program voluntarily rather than by court order as a final step in the legal process and 2) the offender is not forced into an intense adversary situation.

[46] Diversion programs are informal because they are basically nonauthoritarian. Most programs do, however, have a structure that: 1) identifies a target group, 2) specifies objectives, 3) outlines means for achieving goals, 4) implements programs, and 5) produces evidence to evaluate whether the means are working. See STANDARDS AND GOALS, CORRECTIONS Standard 3.1, *supra* note 31.

[47] See note 135 *infra* Chapter One § II.

[48] See text accompanying notes 127-142 *infra* Chapter One § II.

[49] The staff might include paraprofessionals, "street people," ex-offenders, and college students.

> Traditional court staff, professional probation officers, social workers, etc., have not succeeded too well in establishing the kind of relationship which would redirect the person to socially acceptable patterns of behavior. By contrast, pretrial intervention projects operational to date have been able to recruit, select and train a new breed of workers (professional and non-professional) who have proven themselves to be unusually effective in bridging the distrust of their clients and who are committed to reach out and to assist without making moral judgments as to the guilt or innocence of program participants and become totally involved in solving crisis situations with the defendant as an equal partner in the relationship.

Statement of Leon Leiberg, Projector, Parole Corrections Project, American Correctional Association, *Hearings on* S.3309, *supra* note 5, at 137.

[50] Though one may feel a moral duty to obey the law because the law represents legal authority, morality is more a matter of one's conscience. Law depends for its ultimate efficacy

on the degree to which it is backed by organized force-coercion. Diversion is not a "free out." The prosecutor still retains the authority to terminate an offender's unsuccessful participation in the program at any time if the situation so merits. The program staff can also terminate an offender's participation and return him to normal criminal justice processing. This coercion runs concomitantly with the individual's participation under the assumption that the need for this coercion declines as the participant progresses. The goal of the program is to divert persons from the criminal process to treatment alternatives before they fall into a pattern of criminal activity by combining the incentive of a fresh start with the threat of renewed prosecution if the new start is not taken.

[51] The prison experience in the kind of prison in which an offender is usually confined may have less to do with whether he commits other offenses after release than will the effect of the interruption of normal occupational progress. Although correctional institutions are enriched and improved, recidivism still continues to increase, not because the institution does or does not do something to or for the offender, but simply by removing him from society. Robert Martinson, "The Paradox of Prison Reform—I: The 'Dangerous Myth,'" THE NEW REPUBLIC, April 1, 1972 at 23-25.

> The general underlying premise for the new directions in corrections is that crime and delinquency are symptoms of failures and disorganization of the community as well as of individual offenders. . . . The task of corrections therefore includes building or rebuilding solid ties between offender and community, integrating or reintegrating the offender into community life. . . . This requires not only efforts directed toward changing the individual offender, which has been the almost exclusive focus of rehabilitation, but also mobilization and change of the community and its institutions.

PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT ON CORRECTIONS 7 (1967).

[52] The Narcotic Addict Rehabilitation Act (NARA) was criticized as being a failure because of its lack of flexibility. See statement of Whitney North Seymour, Jr., U.S. Attorney, S.D. N.Y., *Hearings on S.* 3309, *supra* note 5, at 28; *see* A. Mathews, MENTAL DISABILITY AND THE CRIMINAL LAW (1970); R. Rock, HOSPITILIZATION AND DISCHARGE OF THE MENTALLY ILL (1968).

[53] "With few exceptions, an absolute precondition for traditional diversion is the presence of a dispositional dilemma, a dilemma that exists only if the criminal act is considered nonserious or marginally criminal." R. Nimmer, DIVERSION: THE SEARCH FOR ALTERNATIVE FORMS OF PROSECUTION, AMERICAN BAR FOUNDATION 15 (1974).

[54] 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 the 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.

STANDARDS AND GOALS, CORRECTIONS Standard 3.1, *supra* note 31 (1973).

[55] See note 18 *supra*.

[56] *See* text accompanying notes 156-168 and Tables XVII through XXVII, *infra* Chapter One § II.

[57] See *Hearings on S.798, supra* note 5, at 480-484.

[58] *Cf. Selective Prosecution for Reporters (sic) to get Test*, Atlanta Journal, Oct. 4, 1974, at 20, col. 1.

[59] See text accompanying notes 127-129 and Table X, *infra* Chapter One § II.

[60] PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 5 (1967).

[61] OPERATION DE NOVO, A NEW BEGINNING, at 22-23 [undated]. Hennepin County Pre-Trial Diversion Project, Minneapolis, Minn. [Hereinafter cited as OPERATION DE NOVO].

[62] THE ATLANTA PRE-TRIAL INTERVENTION PROJECT, A PROPOSAL FOR ACTION, FISCAL YEAR 1975 at 2 [unpublished]. [Hereinafter cited as Atlanta Project PROPOSAL FOR ACTION].

[63] NATIONAL PRETRIAL INTERVENTION SERVICE CENTER OF THE AMERICAN BAR ASSOCIATION COMMISSION ON CORRECTIONAL FACILITIES AND SERVICES, LEGAL ISSUES AND CHARACTERISTICS OF PRETRIAL INTERVENTION PROGRAMS at 41 (1974). [Hereinafter cited as LEGAL ISSUES].

[64] Project FOUND, Baltimore, Md. (property misdemeanors only); Project Crossroads, Washington, D.C. (misdemeanors only); Project Intercept, Hayward, Cal. (misdemeanors only).

[65] OPERATION DE NOVO, *supra* note 61, at 3.

[66] VERA INSTITUTE OF JUSTICE, THE MANHATTAN COURT EMPLOYMENT PROJECT, FINAL REPORT, NOVEMBER, 1967—DECEMBER 31, 1970 at 22 (1972). [Hereinafter cited as Manhattan Project FINAL REPORT].

[67] LEGAL ISSUES, *supra* note 63, at 40.

[68] Manhattan Project FINAL REPORT, *supra* note 66 at 22.

[69] *See also* note 83 *infra* and accompanying text.

[70] OPERATION DE NOVO.

[71] For the names of the projects corresponding to the program numbers in Chart I and following illustrations see Appendix A.

[72] *See* Manhattan Project FINAL REPORT, *supra* note 66, at 21.

[73] Pre-Trial Diversion Services Project (Kansas City, Mo.); Deferred Prosecution Program (Honolulu, Hawaii); The Manhattan Court Employment Project (New York, N.Y.); Court Resources Project (Boston, Mass.); Atlanta Pre-Trial Intervention Project (Atlanta, Ga.); Project Intercept (Hayward, Cal.).

[74] It does not appear that any substantial use of the minimum age flexibility has been made as no program surveyed has indicated participants below its respective minimum age requirement. See Chart I, *supra* in text at note 71.

[75] Genesee County Citizens Probation Authority (Flint, Mich.); Project FOUND (Baltimore, Md.); Pre-Trial Diversion Services Project (Kansas City, Mo.).

[76] LEGAL ISSUES, *supra* note 63, at 38 (footnotes omitted).

[77] Dade County Pretrial Intervention Project (Miami, Fla.); Deferred Prosecution Program (Honolulu, Hawaii); Project FOUND (Baltimore, Md.).

[78] See note 71 *supra*.

[79] Three programs have indicated participants above their maximum age requirement. See Chart I *supra* in text at note 71.

[80] Manhattan Project FINAL REPORT, *supra* note 66, at 32. The Project maximum age limit

is now 50.

[81] *See* LEGAL ISSUES, *supra* note 63, at 35, for a concise discussion of sex as a suspect eligibility criteria.

[82] The Manhattan Court Employment Project (New York, N.Y.); Project Crossroads (Washington, D.C.).

[83] Manhattan Project FINAL REPORT, *supra* note 66, at 21. *See also* Manhattan Project FINAL REPORT at 56.

[84] NATIONAL PRETRIAL INTERVENTION SERVICE CENTER OF THE AMERICAN BAR ASSOCIATION COMMISSION ON CORRECTIONAL FACILITIES AND SERVICES, DESCRIPTIVE PROFILES ON SELECTED PRETRIAL CRIMINAL JUSTICE INTERVENTION PROGRAMS at 24 (1974). [Hereinafter cited as DESCRIPTIVE PROFILES].

[85] Manhattan Project FINAL REPORT, *supra* note 66 at 21.

[86] LEGAL ISSUES, *supra* note 63, at 36.

[87] Genesee County Citizens Probation Authority, Flint, Mich. (1 year); Pretrial Services Diversion Program, New Haven, Conn. (6 months).

[88] LEGAL ISSUES, *supra* note 63, at 36 where the analogy is made to *Shapiro v. Thompson*, 394 U.S. 618 (1969), which held unconstitutional a state residency requirement for a specified length of time as a prerequisite to welfare qualification.

[89] *See* Manhattan Project FINAL REPORT, *supra* note 66, at 22.

[90] Project FOUND (Baltimore, Md.); Project Crossroads (Washington, D.C.). The Atlanta Pre-Trial Intervention Project (Atlanta, Ga.) excludes long-term homosexuals.

[91] Pretrial Intervention Project (Columbia, S.C.). For a discussion of drug abuser intervention see Note, *The Diversion of Drug Abusers from the Criminal Justice System: Georgia's Proposed Legislation*, 23 EMORY L.J. 1071 (1974).

[92] OPERATION DE NOVO, *supra* note 61, at 2.

[93] Manhattan Project FINAL REPORT, *supra* note 66, at 55.

[94] *Id.*

[95] *Id.* at 56.

[96] Deferred Prosecution Program (Honolulu, Hawaii).

[97] Atlanta Pre-Trial Intervention Project (Atlanta, Ga.), Court Resources Project (Boston, Mass.), Project Crossroads (Washington, D.C.), Operation de Novo (Minneapolis, Minn.), Project FOUND (Baltimore, Md.), Project Intercept (Hayward, Cal.) and Dade County Pretrial Intervention Project (Miami, Fla.).

[98] LEGAL ISSUES, *supra* note 63 at 39. Three programs, responding to the questionnaire, indicated th[illegible]0-86% of their respective participants had annual income levels of $5000 or less and that 91-99% had income levels of $8000 or less. See Appendix I.

[99] The need for basic education services is evidenced by the educational levels attained by program participants prior to entering the program. Responses from five programs indicated that 27-77% of their respective participants had not completed high school. See Appendix H.

[100] The Manhattan Court Employment Project, New York, N.Y. (maximum income: $175 per week); Pre-Trial Diversion Services Project, Kansas City, Mo. (maximum income: $50 per week plus dependent allowance).

[101] Atlanta Project PROPOSAL FOR ACTION, *supra* note 62 at 2-3.

[102] LEGAL ISSUES, *supra* note 63 at 39. *See also* note 61 and accompanying text, *supra*.

[103] *Id.* at 39-40.

[104] Deferred Prosecution Program (Honolulu, Hawaii).

[105] Project Intercept (Hayward, Cal.); Dade County Pretrial Intervention Project (Miami, Fla.); and Project FOUND (Baltimore, Md.).

[106] "In prison the inmate is exposed to the higher educational opportunities in crime and criminal behavior . . . The chances for an ignorant, unguided, bitter and frustrated individual to break the bonds of this type of life style are infinitely small, if any exist at all." THE

ATLANTA PRE-TRIAL INTERVENTION PROJECT, FINAL REPORT, SEPTEMBER 1, 1971—MAY 31, 1973 at 7 [unpublished], Atlanta, Georgia. [hereinafter cited as Atlanta Project FINAL REPORT].

[107] A catalogue of the various program requirements may be found in Appendix B.

[108] LEGAL ISSUES, *supra* note 63, at 40.

[109] See discussion *supra* at § II(A)(1).

[110] Manhattan Project FINAL REPORT, *supra* note 66, at 22.

[111] Inefficient program management may result from the varied needs of a widely diverse participant population. Unequal treatment of similar offenders may result where program funding is limited and flexibility would be available only when there is a temporary undercapacity of participants.

[112] For a discussion on whether participation without consent of the offender is a denial of his right to a speedy trial, see Chapter One § III, subsection D, *infra*.

[113] Project FOUND (Baltimore, Md.); Pretrial Intervention Project (Columbia, S.C.); Atlanta Pre-Trial Intervention Project (Atlanta, Ga.); Genesee County Citizens Probation Authority (Flint, Mich.); Pre-Trial Diversion Services Project (Kansas City, Mo.); and Dade County Pretrial Intervention Project (Miami, Fla.).

[114] Court Resources Project (Boston, Mass.).

[115] Hudson County Pretrial Intervention Project (Jersey City, N.J.); Project Intercept (Hayward, Cal.); Operation de Novo (Minneapolis, Minn.); Manhattan Court Employment Project (New York, N.Y.); Deferred Prosecution Program (Honolulu, Hawaii); and Pretrial Services Diversion Project (New Haven, Conn.).

[116] *See* LEGAL ISSUES, *supra* note 63 at 13-21. For a discussion of the constitutional issues involved in this aspect of pretrial intervention see Chapter One § III, subsection A, *infra*.

[117] *Id.* at 13-14 (footnotes omitted).

[118] *Id.* at 18-19 (footnotes omitted).

[119] *Id.* at 20.

[120] *See* note 112 *supra*.

[121] The question relating to waiver of the statute of limitations was inadvertently omitted from the final questionnaire draft. No other program survey with respect to this information could be located.

[122] This may occur where program participation can be extended indefinitely or where the interval between the commission of the crime and the completion of the program exceeds the statutory period. Generally, the prosecutor will formally agree not to prosecute pending completion of the program (except in the event of re-arrest or other untimely unsuccessful dismissal from the program) and failure to secure a waiver of the statute in such circumstances may be a formidable bar to prosecution for the diverted charge. See Appendix F.

[123] Deferred Prosecution Program (Honolulu, Hawaii).

[124] An excerpt from the Manhattan Project FINAL REPORT, *supra* note 66 at 23-25 with respect to participant screening may be found in Appendix C.

[125] For a discussion on how the protections afforded by the Fifth Amendment privilege against self-incrimination may be invoked to prevent the use of any statements made by the offender (participant) in a trial subsequent to his unsuccessful termination from the program see notes 179-200 and accompanying text, *infra* at Chapter One § III, subsection F.

[126] A copy of the interview outline used by the Pretrial Diversion Services Program (New Haven, Conn.) may be found in Appendix D.

[127] Atlanta Project PROPOSAL FOR ACTION, *supra* note 62 at 4.

[128] *Id.* at 17.

[129] Manhattan Project FINAL REPORT, *supra* note 66 at 28.

[130] *Id.*

[131] *Id.* at 31.

[132] *Id.*

[133] *Id.* at 27.

[134] A depressed economy may render this objective unrealistic in many cases.

> Due to a contracting job market severely influenced by . . . economic factors hiring at all skill levels has been reduced. As unemployment figures climb competition for each job opening will intensify. This may make it necessary to discuss stop-gap employment with participants on jobs which offer no skill training or future.

Atlanta Project PROPOSAL FOR ACTION, *supra* note 62 at 17.

[135] Manhattan Court Employment Project (New York, N.Y.), Court Resources Project (Boston, Mass.), Operation de Novo (Minneapolis, Minn.) and the Atlanta Pre-Trial Intervention Project (Atlanta, Ga.) have indicated use of vocational interest and general aptitude testing.

[136] OPERATION DE NOVO, *supra* note 61 at 16.

[137] *Id.* at 16-17. Pretrial Intervention Project (Columbia, S.C.) offers a similar program.

[138] Manhattan Project FINAL REPORT, *supra* note 66 at 30.

[139] *Id.*

[140] Atlanta Project PROPOSAL FOR ACTION, *supra* note 62 at 8.

[141] *Id.* at 8-9.

[142] Manhattan Project FINAL REPORT, *supra* note 66 at 32.

[143] *See* note 99 *supra.*

[144] The respective role of the prosecutor and/or court in the concurrence of a requested participation extension corresponds to the role of each with respect to consent to initial participation. See Table VIII, *supra.*

[145] Only four programs require that a participant be granted a formal or informal hearing prior to a decision to recommend an unsuccessful termination. For a discussion of the constitutional issues involved see Chapter One § III, subsection E *infra.*

[146] The respective role of the prosecutor and/or court in the acceptance or rejection of a program recommendation corresponds to the role of each with respect to consent to initial participation. See Table VIII, *supra.*

[147] Prosecution is mandatory in Court Resources Project (Boston, Mass.) and Pretrial Intervention Project (Columbia, S.C.). In each of these jurisdictions formal charges are made prior to participation.

[148] *See* NATIONAL COUNCIL ON CRIME AND DELINQUENCY, POLICIES AND BACKGROUND INFORMATION, INSTITUTIONAL CONSTRUCTION, COMPENSATION OF INMATE LABOR, THE FEDERAL BUREAU OF PRISONS 14 (1972). [Hereinafter cited as N.C.C.D.].

[149] Data from Independent Questionnaire (July, 1974). Project data does not indicate whether the 60 felons who were re-arrested are from the total of successful felony terminations or the total of *all* felony terminations. If from the latter population the stated recidivism rate would be significantly lower.

[150] N.C.C.D., *supra* note 148 at 15.

[151] Atlanta Project FINAL REPORT, *supra* note 106 at 6.

[152] *Id.* at 6-7.

[153] Manhattan Project FINAL REPORT, *supra* note 66 at 45.

[154] Program response to the questionnaire with respect to changes in participant status following termination was negligible. See Appendix G.

[155] To preserve the integrity of the program and maintain the confidentiality of the participants whose case histories are reprinted, the intervention program is not identified.

[156] The Atlanta Constitution, Oct. 16, 1974 at 6-A.

[157] Computer Data from information compiled by Georgia Department of Offender Rehabilitation.

[158] *Supra* note 156 at 6-A.

[159] *Hearings on S. 798 Before the Subcomm. on National Penitentiaries of the Sen. Comm.*

on the Judiciary, 93rd Cong., 1st Sess., at 427 (1973). [Hereinafter cited as *Hearings on S. 798*].

[160] Atlanta Project PROPOSAL FOR ACTION, *supra* note 62, at 6. It is not known whether this figure includes staffing costs as *Hearings on S. 798, supra* note 159, at 427 indicate annual per inmate maintenance costs at $6,666 (extrapolated data). The difference may result from higher federal costs compared to state costs.

[161] See Tables XIX and XXIII, *infra*.

[162] *See generally* P. SAMUELSON, ECONOMICS: AN INTRODUCTORY ANALYSIS 231-34 (6th ed. 1964). Disposable income represents a person's consumption and saving. When spent the consumption component of disposable income generally becomes an increment to another person's disposable income, part of which is in turn spent in consumption. The cycle continues in a geometric progression with the ultimate amount derived from the multiplier effect being limited by the fraction represented by the ratio of consumption to disposable income of each person in the cycle. Thus, if X spends $1000 and the consumption of all persons is of disposable income, the net result is an *additional* $2000 of consumption spending, assuming no leakage from the cycle. As the ratio of consumption to disposable income approaches 1 the amount of additional consumption resulting from the multiplier effect increases geometrically. State and local governments are indirect beneficiaries of the multiplier effect as represented by increased income and sales tax revenues.

[163] DESCRIPTIVE PROFILES, *supra* note 84 at Appendix A.

[164] Except as otherwise noted, data hereinafter used in this section was obtained from computer print-outs from information compiled by the Georgia Department of Offender Rehabilitation.

[165] Murder, voluntary manslaughter, aggravated assault, aggravated battery, kidnapping, arson (1st and 2nd Degrees), armed robbery, rape, sodomy, aggravated sodomy, child molestation (felony), enticing a minor for indecent purposes, escape, possession of firearm during commission of a crime, aircraft hijacking, driving under the influence, molesting a minor (misdemeanor), carrying a pistol without a license and carrying a concealed weapon. See discussion at § II(A)(2)(a) *supra*.

[166] Escape tendencies, assaultive, narcotic, withdrawn, alcoholic. See Appendix E for explanation of these characteristics. See also discussion at § II(A)(2)(f) *supra*.

[167] See discussion at § II(A)(2)(b) *supra*.

[168] CHAMBER OF COMMERCE OF THE UNITED STATES, MARSHALLING CITIZEN POWER TO MODERNIZE CORRECTIONS 7 (1972).

[169] *See, e.g.*, Oyler v. Boles, 368 U.S. 448, 456 (1962) ("the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation"). United States v. Gainey, 440 F.2d 290 (D.C. Cir. 1971); Moses v. Kennedy, 219 F. Supp. 763 (D.D.C. 1963); Pugach v. Klein, 193 F. Supp. 630 (S.D.N.Y. 1961). In United States v. Cox, 342 F.2d 167, 171 (5th Cir.), *cert. denied*, 381 U.S. 935 (1965), the Fifth Circuit Court of Appeals concluded that:

> Although as a member of the bar, the attorney for the United States is an officer of the court, he is nevertheless an executive official of the Government, and it is as an officer of the executive department that he exercises a discretion as to whether or not there shall be a prosecution in a particular case. It follows, as an incident of the constitutional separation of powers, that the courts are not to interfere with the free exercise of the discretionary power of the attorneys of the United States in their control over criminal prosecutions.

The precise limits of this discretion have not been defined by the courts.

In Georgia, the District Attorney, however, has the duty to draw up all indictments and presentments when requested by the grand jury and to prosecute all indictable offenses. GA. CODE ANN. § 24-2908(4) (1972).

[170] *See* cases at note 169 *supra* and text at note 185 *infra*. The Supreme Court has held that before judicial review will be invoked there must be a showing of "clear and intentional discrimination." Snowden v. Hughes, 321 U.S. 1, 8 (1944), *quoting from* Gundling v. Chicago, 177 U.S. 183, 186 (1900). *See* Bailey v. Alabama, 219 U.S. 219 (1911); Ah Sin v. Wittman, 198 U.S. 500 (1905). *See also* Oyler v. Boles, 368 U.S. 448 (1962); Yick Wo v. Hopkins, 118 U.S. 356 (1886). In Newman v. United States, 382 F.2d 479, 482 (D.C. Cir. 1967) any judicial review was precluded.

[171] A decision to prosecute is reflected in the issuance of an arrest warrant. In Georgia, the warrant must be issued by any judge of a superior, city, or county court, or justice of the peace, or any municipal officer clothed by law with the powers of a justice of the peace. GA. CODE ANN. § 27-102 (1974); *see* FED. R. CRIM. PROC. 4(b)(1). There is, therefore, (at least in theory) a judicial review of the decision to charge, and since the arrest will be made pursuant to the warrant, a judicial review prior to arrest. In practice, however, the warrant is issued by the justice of the peace, or more frequently, by his clerk, without any true effort at independent evaluation of the facts of the particular case.

The Fourth Amendment of the United States Constitution requires that to justify charging a suspect with an offense, there must be "probable cause" to believe that the suspect has committed the offense. This standard, like the "reasonable grounds" standard employed to justify an arrest without a warrant in permitted circumstances, (see GA. CODE ANN. § 27-207 (1972)) is very general in its terms. Although in the majority of cases the warrant is issued as a perfunctory matter, the prosecutor does not have the power to subject an accused to trial without having his decision subjected to review. There is criticism of the efficacy of this before-the-fact review, but this process of review pursuant to GA. CODE ANN. § 27-102 (1974), may at least have the advantage of providing a before-the-fact record of the facts upon which probable cause is based. (This may not always be true because in Georgia, as well as in many other states which do not follow the Federal practice whereby the affidavit must sufficiently state probable cause within the four corners of the document, the standard of probable cause can be satisfied by parol testimony with no correlative requirement of recording such testimony). Prior to trial, the defendant has a right to a preliminary examination (either via a preliminary hearing or grand jury indictment), the purpose of which is to determine whether there is probable cause to hold him for trial. This preliminary examination is the "judicial review" of the prosecutor's decision to prosecute.

Every warrant must be issued on oath or affirmation, with probable cause and before a magistrate. U.S. CONST. amend. IV. The requirement of oath is to insure the protection of an individual against malicious prosecution, as the affiant swears under the penalty of perjury. The probable cause for arrest must show that an offense has been committed and that the person to be arrested committed it. In *Brinegar v. U.S.*, 338 U.S. 160, 175 (1949), the Court held that:

> In dealing with probable cause . . . as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. The standard of proof is accordingly correlative to what must be proved.

Thus before bringing the charge, the prosecutor is expected to weigh its merits, including statements of facts. When a prosecutor brings a charge, he has himself made a thorough investigation of the circumstances of that individual case. If the prosecutor decides that there is sufficient evidence to justify prosecution and that prosecution is called for as a matter of policy, he then must select the charge. Generally, the practice is to select the most serious offense for which conviction appears possible, although sometimes a lesser offense is charged.

[172] Although the prosecutor generally exercises firm control over the initiation of criminal prosecution, the grand jury also has broad formal powers of its own. *E.g.*, GA. CODE ANN. § 59-304 (1972).

[173] Newman v. United States, 382 F.2d 479, 480 (D.C. Cir. 1967).

[174] LEGAL ISSUES AND CHARACTERISTICS OF PRETRIAL INTERVENTION PROGRAMS 13-14 (April, 1974) [hereinafter cited as LEGAL ISSUES]; A PROSECUTOR'S MANUAL ON SCREENING AND DIVERSIONARY PROGRAMS 124 [hereinafter cited as PROSECUTOR'S MANUAL].

[175] *Id.*

[176] Criticisms of the informal diversion decision-making are that prosecutors lack both sufficient information on which to formulate decisions to prosecute or not to prosecute, and established procedures to implement their decision making. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 55 (1967).

[177] LEGAL ISSUES, *supra* note 174, at 14.

[178] *See, e.g.*, Pugach v. Klein, 193 F. Supp. 630 (S.D.N.Y. 1961); United States v. Brokaw, 60 F. Supp. 100 (S.D.Ill. 1945). This argument lacks persuasiveness in Georgia because the judges, as well as the prosecutor are elected by the people.

[179] THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS (1967) [hereinafter cited as THE COURTS], determined that "[i]t is at the *charge stage* that the *prosecutor* should determine whether it is appropriate to refer the offender to noncriminal agencies for treatment or for some degree of supervision without criminal convictions." *Id.* at 5. THE AMERICAN BAR ASSOCIATION PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION, (Approved Draft, 1971) § 3.8 at 90, concluded that:

> [t]he prosecutor should explore the availability of non-criminal disposition, including programs or rehabilitation, formal or informal, in deciding whether to press criminal charges; especially in the case of a first offender, the nature of the offense may warrant non-criminal disposition.

[180] S. 798, 93d Cong., 1st Sess. § 3(1) (1973) [hereinafter cited as S. 798].

[181] Court approval is required in S. 798, *supra* note 180, at §§ 3(4), 5; Pre-Trial Diversion Procedures Adopted By United States District Court Northern District of Ohio, Eastern Division § (a) [hereinafter cited as Northern District Court of Ohio], *reprinted in* PRETRIAL CRIMINAL JUSTICE INTERVENTION TECHNIQUES AND ACTION PROGRAMS 60-62 (May, 1974) [hereinafter cited as INTERVENTION TECHNIQUES]; the New Jersey Supreme Court Rules for Pretrial Intervention Programs R.3:28(b) [hereinafter cited as N.J. Sup. Ct. Rules], *reprinted in* INTERVENTION TECHNIQUES at 57-59, Penn. Supreme Court Rules for Program of Accelerated Rehabilitation R.175 [hereinafter cited as Penn. Sup. Ct. Rules], *reprinted in* INTERVENTION TECHNIQUES at 63-66; Massachusetts Pre-Trial Diversion Act § 2 [hereinafter cited as Mass. Diversion Act], *reprinted in* INTERVENTION TECHNIQUES at 67-72.

[182] Probation is an inherent function of the judiciary. GA. CODE ANN. § 27-1801 (1972), which gives the prosecutor the authority to dismiss an indictment "after an examination of the case in open court and before it has been submitted to the jury, . . . with the consent of the court. After the case has been submitted to the jury, a *nolle prosequi* shall not be entered except by the consent of the defendant."

[184] Recent cases have made some inroads in resolving the court-prosecutor conflict of functions which arises in the decision to divert after formal charges have been brought. In *People v. Navarro*, 7 Cal.3d 248, 102 Cal. Rptr. 137, 497 P.2d 481 (1972), the California Supreme Court held that the requirement of the concurrence by the district attorney before a defendant, who was found guilty by a jury and had been previously convicted of certain crimes, may be committed to a narcotic treatment and rehabilitation facility, violated the California Constitutional mandate that judicial power is to be vested in the judiciary and that the powers of government are to be separated into executive, legislative and judicial branches. *Id.* at 488-89. The court concluded:

> Defining offenses and prescribing punishments (mandatory or alternative

choices) are legislative functions designed to achieve legitimate legislative goals and objectives. The imposition of sentence and the exercise of sentencing discretion are fundamentally and inherently judicial functions . . . "[T]he Legislature, . . . by *general laws* can control eligibility for probation, parole and the term of imprisonment, but it cannot abort the *judicial process* by subjecting a judge to the control of the district attorney."

Id. at 487-88, *quoting from* People v. Sidener, 58 Cal.2d 645, 25 Cal. Rptr. 697, 702, 375 P.2d 641, 646 (1962). (Emphasis original.)

Similarly, the same court held that the requirement of approval and action by the district attorney in order for the court to dismiss a prior conviction violated the constitutional separation of powers doctrine. People v. Tenorio, 3 Cal.2d 89, 89 Cal. Rptr. 249, 473 P.2d 993 (1970). The court determined:

> When the decision to prosecute has been made, the process which leads to acquittal or to sentencing is fundamentally judicial in nature. . . . The judicial power is compromised when a judge, who believes that a charge should be dismissed in the interests of justice, wishes to exercise the power to dismiss but finds that before he may do so he must bargain with the prosecutor.

Id. at 996. *See* Esteybar v. Municipal Court, 5 Cal.3d 119, 95 Cal. Rptr. 524, 485 P.2d 1140 (1971) wherein the California Supreme Court held that requiring the consent of the prosecutor before a magistrate could exercise his judicial power in determining that a charged offense was to be tried as a misdemeanor was unconstitutional.

[185] In Snowden v. Hughes, 321 U.S. 1, 8 (1943) the Court concluded:

> The unlawful administration by state officers of a state statute fair on its face, resulting in its unequal application to those who are entitled to be treated alike, is not a denial of equal protection unless there is shown to be present in it an element of intentional or purposeful discrimination. This may appear on the face of the action taken with respect to a particular class or person, . . . or it may only be shown by extrinsic evidence showing a discriminatory design to favor one individual or class over another not to be inferred from the action itself . . . . But a discriminatory purpose is not presumed, . . . there must be a showing of "clear and intentional" discrimination. . . .

(citations omitted.) *See* cases cited at notes 169 and 179 *supra*.

[186] For an excellent commentary on which preconviction procedures constitute the proper means for raising the contention that enforcement of a statute or law is unconstitutionally discriminatory see 4 A.L.R.3d 404 (1956). *See generally* Yick Wo v. Hopkins, 118 U.S. 356, 373 (1886), a postconviction habeas corpus proceeding, wherein the Court concluded:

> Though the law itself be fair on its face, and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.

[187] People v. Utica Daw's Drug Company, 16 App. Div. 2d 12, 225 N.Y.S.2d 128, 132 (1962).

[188] 345 F.Supp. 1236 (W.D. Mo. 1972).

[189] 42 U.S.C. § 3412 (1973), states in pertinent part that "whenever any narcotic addict desires to obtain treatment for his addiction, . . . such addict . . . may file a petition with the United States attorney . . . requesting that such addict . . . be admitted to a hospital of the Service for treatment of his addiction."

[190] Narcotic Addict Rehabilitation Act, 42 U.S.C. § 3401, et. seq. (1973). 42 U.S.C. § 3401 states:

> It is the policy of the Congress that certain persons charged with or convicted of violating Federal criminal laws, who are determined to be addicted to narcotic

drugs, and likely to be rehabilitated through treatment, should, in lieu of prosecution or sentencing, be civilly committed for confinement and treatment designed to effect their restoration to health, and return to society as useful members.

It is the further policy of the Congress that certain persons addicted to narcotic drugs who are not charged with the commission of any offense should be afforded the opportunity, through civil commitment, for treatment, in order that they may be rehabilitated and returned to society as useful members and in order that society may be protected more effectively from crime and delinquency which result from narcotic addiction.

[191] United States v. Gillespie, 345 F.Supp. 1236, 1239 (W.D. Mo. 1972) (emphasis added). *See also* United States v. Phillips, 403 F.2d 963, 965 (6th Cir. 1968) where the court concluded that "[i]f he is an addict eligible for treatment under the Act, the procedures provided for in the Act should be followed unless there is some good reason for not doing so."

[192] For a discussion on why an analogy can be drawn between pretrial intervention and parole or probation see § E *infra* on the need for a hearing upon a participant's unsuccessful termination from a pretrial intervention program.

[193] 477 F.2d 278 (5th Cir.), *vacated* and *remanded* 414 U.S. 809 (1973).

[194] The Board is an independent agency which is statutorily granted broad discretionary powers in determining parole eligibility. *See* 18 U.S.C. § 4203 (1975). In *Tarlton v. Clark*, 441 F.2d 384, 385 (5th Cir.), *cert. denied*, 403 U.S. 934 (1971), the court held that "it is not the function of the courts to review the discretion of the Board in the denial of application for parole or to review the credibility of reports and information received by the Board in making its determination."

[195] Another argument posited by the defendant was that the Board did not follow the applicable regulations governing its internal procedures because it failed to fully investigate all the information he had submitted in his parole application. The court concluded that the weight to be given to various factors involved in the parole determination is solely within "the Board's broad discretion in determining parole eligibility" and the court is precluded from undermining this process by "second-guess[ing] the outcome of such proceedings or what factors went into their formulation." 477 F.2d 278, 281.

[196] *Id.* at 282.

[197] *Id.* at 283. *But see* 23 EMORY L. J. 597, 612-13 (1974) for a view that the granting of parole is in fact an adversarial proceeding.

[198] 408 U.S. 471 (1972).

[199] Scarpa v. United States Board of Parole, 477 F.2d 278, 287 (5th Cir. 1973) (Tuttle, J., dissenting).

[200] See Chapter One § II, subsection C *supra*.

[201] In *Hyser v. Reed*, 318 F.2d 225, 261 (D.C. Cir.), *cert. denied*, *Thompson v. United States Board of Parole*, 375 U.S. 957 (1963), *cited in* 23 EMORY L.J. 597, 613 (1974), the court held that by providing this procedure for the granting of parole the Board would in fact become swamped with petitions and thus indiscriminately reject most of them.

[202] 408 U.S. 471 (1972). In *Morrissey* the Supreme Court held that in the *revocation* of parole certain minimal procedural and substantive due process rights must be afforded the criminal defendant. *Id.* at 483. For a discussion of how the *Morrissey* requirements should apply *a fortiori* to the decision to terminate participation in a pretrial intervention program see § E(1) *infra* on the need for a hearing upon a participant's unsuccessful termination from a pretrial intervention program.

[203] It is beyond the scope of this section to do an in-depth study on pretrial release in Georgia. For a comparison of the Georgia statutory provisions with the AMERICAN BAR ASSOCIATION PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO PRETRIAL RELEASE (Approved Draft, 1968) [hereinafter cited as PRETRIAL RELEASE]; *see*

COMPARATIVE ANALYSIS OF AMERICAN BAR ASSOCIATION STANDARDS FOR CRIMINAL JUSTICE WITH GEORGIA LAWS, RULES AND LEGAL PRACTICE § II (1974). For general discussions on the area of bail *see, e.g.*, Foote, *The Coming Constitutional Crisis in Bail: I*, 113 U. Pa. L. Rev. 459 (1965); Foote, *The Coming Constitutional Crisis in Bail: II*, 113 U. PA. L. REV. 1125 (1965); FREED AND WALD, BAIL IN THE UNITED STATES: 1964 [hereinafter cited as BAIL IN THE UNITED STATES]. Throughout this section the term *pretrial release* will be used to encompass all of the methods employed to release a defendant pending determination of his guilt or innocence. These varied methods include: release on money bail (with or without sureties); release on the defendant's own recognizance (the release of a defendant without bail upon his promise to appear at all appropriate times, sometimes referred to as "personal recognizance"); an order to appear (an order issued by the court at or after the defendant's first appearance releasing him from custody or continuing him at large pending disposition of his case but requiring him to appear in court or in some other place at all appropriate times); and the use of a summons (an order issued by a court requiring an accused to appear in a court at a designated date and time) and citation (this serves the same function as the summons except that it is a written order issued by a law enforcement officer). PRETRIAL RELEASE at § 1.4.

[204] *See, e.g.*, Bandy v. United States, 81 S.Ct. 197 (1960); Stack v. Boyle, 342 U.S. 1, 5 (1951); Jones v. Grimes, 219 Ga. 585, 587, 134 S.E.2d 790 (1964); Roberts v. State, 32 Ga. App. 339, 340-41, 123 S.E. 151 (1924).

[205] GA. CODE ANN. § 27-901, et. seq. (1974).

[206] PRETRIAL RELEASE, *supra* note 203, at § 1.1.

[207] GA. CODE ANN. § 27-901 (1974). The offenses of rape, armed robbery, aircraft hijacking, treason, murder, perjury and the sale of any narcotic drug are bailable only before a judge of the superior court, within his discretion.

[208] GA. CODE ANN. § 27-701.1 (1974).

[209] *Id.*

[210] *See* note 203 *supra*.

[211] *Compare* 18 U.S.C. §§ 3146 et. seq. (1969) which is predicated on the premise that every other feasible method of release should be exhausted before resorting to money bail.

[212] *See, e.g.*, PRETRIAL RELEASE, *supra* note 203, at § 5.3; NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS—COURTS 83 (1973) [hereinafter cited as COURTS].

[213] 18 U.S.C. §§ 3141 et. seq. (1969).

[214] PRETRIAL RELEASE, *supra* note 203, at § 1.2(c).

[215] *E.g.*, PRETRIAL RELEASE, *supra* note 203, at § 5.1 et. seq.; COURTS, *supra* note 212, at § 4.6 and commentary; 18 U.S.C. § 3146(a) (1969).

[216] *But see* GA. CODE ANN. § 27-911 (1972) which provides that the judge of any court having jurisdiction over a person charged with committing a crime has the discretionary authority to release the offender upon his own recognizance. The 1973 Georgia Legislature enacted a procedure whereby one arrested for a traffic offense is allowed to post his driver's license in lieu of bail, recognizance or incarceration. GA. L. 1973 at 435. *See also* GA. CODE ANN. § 27-222 (1972) authorizing the issuance of a citation, in lieu of detention and ensuing release, in the case of an arrest for a traffic violation committed in the presence of the law enforcement officer.

[217] PRETRIAL RELEASE, *supra* note 203, at § 5.1(a) and commentary.

[218] COURTS, *supra* note 212, at § 4.6 and commentary.

[219] *Id.*; *accord* PRETRIAL RELEASE, *supra* note 203, at §§ 5.1, 5.2, 5.5.

[220] LEGAL ISSUES, *supra* note 174, at 24.

[221] U.S. CONST. amend. VIII; GA. CONST. art. 1, § 1, par. IX [GA. CODE ANN. § 2-109 (1972)].

[222] The requirement of excessive bail is equivalent to the refusal to grant bail, and habeas corpus is available as an appropriate remedy for relief therefrom. *See* GA. CONST. art. 1, § 1,

par. IX [GA. CODE ANN. § II 2-109 (1972)]; Reid v. Perkerson, 207 Ga. 27, 29, 60 S.E.2d 151 (1950).

[223] *But cf.* Georgia's Proposed Addict Diversion Statute, proposed GA. CODE ANN. § 88-407.3(b)(1972) which stated that:

> A person in police custody, who appears to be drug-dependent after the screening procedure or after diagnosis . . . may request at the appropriate proceeding in the criminal process that, *either in lieu of bail or as a condition of release on bail*, he be referred to a treatment facility for complete diagnosis and treatment.

If participation in a pretrial intervention program was held to be a valid condition for parole the defendant should be made explicitly aware of what his obligations are and that his failure to fulfill them will result in charges being filed against him and a continuation of prosecution.

[224] PRETRIAL RELEASE, *supra* note 203, at § 5.1(b); *accord* 18 U.S.C. § 3146(b)(1969); Jones v. Grimes, 219 Ga. 585, 587, 134 S.E.2d 790 (1964).

[225] PRETRIAL RELEASE, *supra* note 203, at § 5.2.

[226] LEGAL ISSUES, *supra* note 174, at n.3, 29-30.

[227] Similarly, if a participant in a pretrial intervention program who did not have his pretrial release conditioned on his participation in the program did not successfully meet the requirements of the program, incarceration would not necessarily be warranted. It would have to be shown that money bail or the imposition of conditional release on the defendant's own recognizance would not adequately assure the defendant's future appearance before incarceration would result.

[228] The Honolulu pretrial intervention program requires that a plea of guilty be signed by the participant. S. 798, *supra* note 180, at §2 requires that the participant accept responsibility for his behavior and admit the need for the assistance provided by the program. This moral acceptance of responsibility is utilized in the Genessee County Citizens Probation Authority, Flint, Michigan Program. In report #93-417 which accompanied S.798, Senator Burdick of the Judiciary Committee concluded that:

> There are several important reasons why a plea should not be made a prerequisite of diversion. In the first place, the requirement of a plea would cause individuals who were eligible for diversion to attempt to plea bargain. The offender is well aware that by delaying his plea and pretending to desire a trial, he is in a better position to plea-bargain for a lesser charge.
>
> One of the great values of pretrial diversion is that it offers the chance to rehabilitate offenders while they still feel the impact of their arrests. Under our present criminal justice system, court backlogs, trial delays and large probation caseloads usually mean weeks and often months before even the first consideration of an individual's behavior is attempted . . .
>
> Pretrial diversion provides an opportunity for working with the offender at a time when his family and community ties are still intact and he is best prepared psychologically for rehabilitation . . . A court could find the plea of guilty to be coerced because the prisoner would know that if he cooperates with the authorities, he might be spared a jail sentence and be released to a community services program which would probably be preferable to imprisonment . . . Finally, there is a real question as to the therapeutic value of the plea of guilty. It is frequently argued that a plea of guilty is the first step to rehabilitation. However, the American Bar Association has taken the position that they are "not persuaded of the validity of this contention." S. 798 acknowledges that assumption of responsibility for prior behavior is an essential element in rehabilitation, but such an acknowledgment and formal pleadings before a court are not necessarily related.

Reprinted in INTERVENTION TECHNIQUES, *supra* note 181, at 96-97.

[229] Brady v. United States, 397 U.S. 742, 752 (1970); *see* Santobello v. New York, 404 U.S.

257, 261 (1971). Approximately ninety percent of all criminal convictions and between seventy and eighty-five percent of all felony convictions are estimated to be accomplished by guilty pleas. Brady v. United States, 397 U.S. 742, 752 n.10 (1970); *e.g.*, ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 273 (1969), REPORTS OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES (1970); AMERICAN BAR ASSOCIATION PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO PLEAS OF GUILTY, 1-2 (Approved Draft, 1968) (hereinafter cited as PLEAS OF GUILTY); D. NEWMAN, CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL, 3 and n.1 (1966).

Plea-bargaining is advantageous to the defendant who realizes only a slight possibility of acquittal, since it affords him probable limitation of penalty, reduction of embarrassing exposure, and the immediate enforcement of the correctional process. *See* Santobello v. New York, 404 U.S. 257, 261 (1971); Brady v. United States, 397 U.S. 742, 751-53 (1970). The state in turn derives mutual benefits through the elimination of the practical burdens and expenses of going to trial and a conservation of scarce judicial and prosecutorial resources. *Id.* If plea-bargaining were invalidated by the Court, an important effect would be an increase in the period of time spent for pretrial incarceration and a resulting release of prisoners who could not be tried consistently with current standards of the constitutional right to a speedy trial. *See* Barker v. Wingo, 407 U.S. 514 (1972). In *Strunk v. United States*, 412 U.S. 434 (1973), the Court held that when a deprivation of the right to a speedy trial has been found, the only permissible remedy is a dismissal of the indictment. *Id.* at 435-40.

[230] GA. CODE ANN. § 27-1404 (1974).

[231] GA. CODE ANN. § 27-1408 (1974). After a plea of guilty or *nolo contendere* has been entered by a defendant, it has been held proper for the court to grant concessions to the defendant when the interest of the public in the effective administration of criminal justice would be served.

[232] *Pleas of Guilty*, note 229 *supra*, at § 1.8.

[233] At any time before judgment is pronounced the accused may, as a matter of right, withdraw his plea of guilty and substitute a plea of not guilty, and thus be in the same position as if he had never entered a guilty plea. However, after judgment is pronounced, the withdrawal of the plea is a discretionary matter for the trial judge. GA. CODE ANN. § 27-1404 (1974). *E.g.*, McCray v. State, 215 Ga. 887, 114 S.E.2d 133 (1960); Calloway v. State, 115 Ga. App. 158, 154 S.E.2d 291 (1967); Griffin v. State, 12 Ga. App. 615, 77 S.E. 1080 (1913). Thus because prosecution and possible judgment are held in abeyance until the period of participation is completed or has been unsuccessfully terminated, the participant in the pretrial intervention program has the opportunity to withdraw his plea if prosecution should be commenced against him.

[234] Boykin v. Alabama, 395 U.S. 238, 242 (1968). *See, e.g.*, Goodwin v. Smith, 226 Ga. 118, 172 S.E.2d 661 (1970); Hamm v. State, 123 Ga. App. 10, 179 S.E.2d 272 (1970).

[235] U.S. CONST. amend. V.

[236] U.S. CONST. amend. VI.

[237] *Id.*

[238] Before a court will accept a waiver of a constitutional right it must be assured that such a waiver was voluntarily, knowingly and intelligently made with sufficient awareness of all the occurring consequences. *E.g.*, Brady v. United States, 397 U.S. 742, 748 (1970); Miranda v. Arizona, 384 U.S. 436, 444 (1966); Johnson v. Zerbst, 304 U.S. 458, 464 (1938). *But see* Schneckloth v. Bustamonte, 412 U.S. 218, 248-49 (1973). In *Hamm v. State*, 123 Ga. App. 10, 179 S.E.2d 272 (1970), the Georgia Court of Appeals held that a state judge had the duty to make an adequate record affirmatively showing that the pleas were both intelligently and voluntarily entered. *Id.* at 10. The court quoted from Boykin v. Alabama, 395 U.S. 238, 243-44 (1969), wherein the Supreme Court had concluded:

> What is at stake for an accused facing death or imprisonment demands the utmost solicitude of which courts are capable in canvassing the matter with the accused to make sure he has a full understanding of what the plea connotes and of its consequence. When the judge discharges that function, he leaves a record adequate for any review that may be later sought (citations omitted), and forestalls the spin-off of collateral proceedings that seek to probe murky memories.

Hamm v. State, 123 Ga. App. at 10-11, 179 S.E.2d 272 (1970).

[239] McCarthy v. United States, 394 U.S. 459, 466 (1969).

[240] *E.g.*, Boykin v. Alabama, 395 U.S. 238, 242 (1968).

[241] 369 U.S. 506 (1962).

[242] *Id.* at 516.

[243] Purvis v. Connell, 227 Ga. 764, 766, 182 S.E.2d 892 (1971), *quoting from* Boykin v. Alabama, 395 U.S. 238, 242 (1968). A federal trial judge's role comes within the purview of Rule 11 of the Federal Rules of Criminal Procedure.

[244] PLEAS OF GUILTY, note 229 *supra*, at §§ 1.4-1.6.

[245] *See, e.g.*, Hollis v. Ault, 229 Ga. 12, 189 S.E.2d 389 (1972); Hamm v. State, 123 Ga. App. 10, 179 S.E.2d 272 (1970).

[246] Hamm v. State, 123 Ga. App. 10, 179 S.E.2d 272 (1970); Calloway v. State, 115 Ga. App. 158, 154 S.E.2d 291 (1967). "When not made freely and voluntarily a confession is presumed to be legally false, and can not be the underlying basis of a conviction." McKennon v. State, 63 Ga. App. 466, 11 S.E.2d 416 (1940). Thus a plea of guilty not freely and voluntarily entered is *a fortiori* legally false and cannot be the basis for imposing punishment or to fulfill a condition precedent of entrance in a pretrial intervention program.

[247] *E.g.*, Griffin v. State, 12 Ga. App. 615, 622, 77 S.E. 1080 (1913), where the court held, "[i]n some States statutes have been enacted requiring the judge to admonish the prisoner of the consequences before receiving his plea; and it is good practice and in the interest of fairness to do this, even though there is no statute requiring it."

[248] *See, e.g.*, Hamm v. State, 123 Ga. App. 10, 179 S.E.2d 272 (1970); Farley v. State, 23 Ga. App. 151, 97 S.E. 870 (1919).

[249] See note 70 *supra*.

[250] LEGAL ISSUES, *supra* note 174, at 95. The Georgia courts have evinced their concern that a defendant might be misled by someone affiliated with the court (i.e., the judge, sheriff, prosecuting attorney or defense attorney) over the consequences of a guilty plea. *See, e.g.*, Holston v. State, 103 Ga. App. 373, 119 S.E.2d 302 (1961); Strickland v. State, 199 Ga. 792, 35 S.E.2d 463 (1945); Foster v. State, 22 Ga. App. 109, 95 S.E. 529 (1918). If this occurs the defendant should be allowed to withdraw his plea even after judgment is pronounced, although withdrawal is held by statute to be within the discretion of the trial judge. See note 233 *supra*.

[251] *E.g.*, United States v. Jackson, 390 U.S. 570, 583 (1968); Fay v. Noia, 372 U.S. 391, 439-40 (1963); Green v. United States, 355 U.S. 184, 193-94 (1957).

[252] *See, e.g.*, Cramp v. Board of Public Instruction, 368 U.S. 278, 288 (1961); Torcaso v. Watkins, 367 U.S. 488, 495-96 (1961); Wieman v. Updegraff, 344 U.S. 183, 192 (1952). For treatments of this concept see Hale, *Unconstitutional Conditions and Constitutional Rights*, 35 COLUM. L. REV. 321 (1935).

[253] The term was first employed in *Wieman v. Updegraff*, 344 U.S. 183, 195 (1952) (Frankfurter, J., concurring). For an excellent discussion of this constitutional concept see, Note, *The Chilling Effect In Constitutional Law*, 69 COLUM. L. REV. 808 (1969).

[254] 397 U.S. 742 (1970).

[255] 18 U.S.C. § 1201(a)(1970).

[256] 397 U.S. at 746-47.

[257] 400 U.S. 25 (1970).

[258] 397 U.S. 790 (1970).

[259] Parker v. North Carolina, 397 U.S. 790, 809 (1970) (Brennan, J., dissenting in *Parker* and concurring in *Brady*).

[260] LEGAL ISSUES, *supra* note 194, at 57. To further insure the voluntariness of the participant's guilty plea the American Bar Association Standards Relating to Pleas of Guilty recommends that "a defendant should not be called upon to plead until he has had an opportunity to retain counsel, or, if he is eligible for appointment of counsel, until counsel has been appointed or waived . . . ." PLEAS OF GUILTY, *supra* note 229, at § 1.3. If a pretrial intervention program is not utilized, a plea of guilty takes place at formal arraignment. See note 230 *supra*. A defendant is entitled to consultation with counsel before entering a guilty plea. Reed v. United States, 354 F.2d 227 (5th Cir. 1965); Hamilton v. Alabama, 368 U.S. 52 (1961) (where the Supreme Court held that the arraignment is a critical stage of a state's criminal process, thus warranting the right to be represented by counsel); Von Moltke v. Gillies, 332 U.S. 708 (1948). (On the issue concerning representation by counsel at a critical stage in the criminal process see notes 285-293 *infra* and accompanying text.) Furthermore, since the arraignment occurs after the information or indictment has been issued, formal judicial proceedings have thus been initiated, and this is the point of time in the criminal process when the defendant is entitled, as a matter or right, to counsel. Kirby v. Illinois, 406 U.S. 682 (1972). It could be concluded that requiring an entry of a plea of guilty as a condition precedent to participation in a pretrial intervention program serves the same function as the formal arraignment, and so this plea of guilty should similarly be entered only when the participant is represented by counsel.

[261] 384 U.S. 436 (1966).

[262] "[A]ny classification which serves to penalize the exercise of that right [a fundamental right], unless shown to be necessary to promote a *compelling* governmental interest, is unconstitutional." Shapiro v. Thompson, 394 U.S. 618, 634 (1969) (emphasis in original) (see cases cited therein).

[263] LEGAL ISSUES, *supra* note 174, at 46.

[264] *Id.* at 46-47.

[265] See note 229 *supra*.

[266] In the Boston Court Resources Project arraignment is not undergone until after participation in the program; if the defendant has successfully completed the program, no plea is entered, while if he is unsuccessful, he may plead guilty or not guilty.

[267] LEGAL ISSUES, *supra* note 174, at 46-47.

[268] "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial. . . ." U.S. CONST. amend. VI. *See, e.g.*, Reid v. State, 116 Ga. App. 640, 644, 158 S.E.2d 461 (1967); Blevins v. State, 113 Ga. App. 702, 703, 149 S.E.2d 423 (1966). The Federal Rules of Criminal Procedure insure the right to a speedy trial. FED. R. CRIM. PROC. 32(a).

[269] Klopfer v. North Carolina, 386 U.S. 213 (1967). In an unanimous opinion the Court held that "the right to a speedy trial is as fundamental as any of the rights secured by the Sixth Amendment." *Id.* at 223. The Court expressly held that the right to a speedy trial would be "enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment," *quoting from* Malloy v. Hogan, 378 U.S. 1, 10 (1963). *Id.* at 222-23.

[270] Art. I, § I, Par. V of the Georgia Constitution (GA. CODE ANN. § 2-105 (1972)) provides that "Every person charged with an offense against the laws of this state . . . shall have a public and speedy trial by an impartial jury." Statutory provisions also provide for the right to a speedy trial. GA. CODE ANN. §§ 27-1901, 27-1901.1, 27-1901.2, 27-2001, 27-2002 (1972).

[271] *See* Note, *Convicts—The Right to a Speedy Trial and the New Detainer Statutes*, 18 RUTGERS L. REV. 828 n.2 (1964).

[272] United States v. Ewell, 383 U.S. 116, 120 (1966), *quoted in* Reid v. State, 116 Ga. App.

646-47, 158 S.E.2d 461 (1967).

[273] Dickey v. Florida, 398 U.S. 30, 41 (1970); United States v. Ewell, 383 U.S. 116, 120 (1966).

[274] *Id.*

[275] Klopfer v. North Carolina, 386 U.S. 213, 222 (1967), *quoted in* Dickey v. Florida, 398 U.S. 30, 42 (1970). *See* Smith v. Hooey, 393 U.S. 374, 377-78 (1969).

[276] The Supreme Court in *Barker v. Wingo*, 407 U.S. 514 (1972), however, recognized that deprivation of the right to speedy trial does not necessarily disadvantage the accused because delay is a common defense tactic and thus unlike other constitutional rights (i.e., the right to be free from compelled self-incrimination or the right to counsel) deprivation of the right to speedy trial may not *per se* prejudice the accused's defense.

[277] Dickey v. Florida, 398 U.S. 30, 42 (1970) (Brennan, J., concurring); *see* Barker v. Wingo, 407 U.S. 514, 519-20 (1972).

[278] U.S. CONST. amend. VI; GA. CODE ANN. § 2-105 (1972); United States v. Marion, 404 U.S. 307, 320 (1971).

[279] 404 U.S. 307 (1971).

[280] *Id.* at 320.

[281] *See, e.g.*, Northern District Court of Ohio Procedures, *supra* note 181, at § (a)(2); Pennsylvania Supreme Court Rules, *supra* note 181, at R.177; Massachusetts Diversion Act, *supra* note 181, at § 5; S. 798, *supra* note 180, at § 5. Pursuant to Georgia statutory provisions, if an *indictment* has been found by a grand jury, the defendant must demand to be tried at either the term when indictment is found, or the next succeeding regular term, or at any subsequent term thereafter if special permission by the court is granted. GA. CODE ANN. §§ 27-1901, 27-1901.1 (1972). Even though time has expired for the defendant to exercise his statutory right to demand trial or discharge at the term of demand, the constitutional right to speedy trial requires that the court call for trial unless the State makes a reasonable showing for a continuance. Dublin v. State, 126 Ga. 630, 55 S.E. 487 (1906); Blevins v. State, 113 Ga. App. 413, 148 S.E.2d 192 (1966). Failure to make proper demand does not leave the defendant without remedy. *See* GA. CODE ANN. §§ 27-2001, 27-2002 (1972). If the defendant believes the State has delayed beyond a reasonable time in bringing him to trial, he can make a motion that he be tried or that the indictment be dismissed for want of prosecution, and call upon the court to apply GA. CODE ANN. § 27-2001 (1972) and deny the State a continuance unless it shows sufficient cause for it. Blevins v. State, 113 Ga. App. 413, 416, 148 S.E.2d 192 (1966). The Demand Statute (GA. CODE ANN. §§ 27-1901, 27-1901.1 (1972)) is to be regarded as an aid and implementation of the state and federal constitutional guarantees of the right to speedy trial and the courts "should seek to uphold rather than whittle away by judicial construction this and other provisions of our Bill of Rights . . . ." Rider v. State, 103 Ga. App. 184, 185, 118 S.E.2d 749 (1961).

[282] Before a court will accept a waiver of a constitutional right it must be assured that such waiver was voluntarily, knowingly, and intelligently made with sufficient awareness of all the consequences. *E.g.*, Brady v. United States, 397 U.S. 742, 748 (1970); Miranda v. Arizona, 384 U.S. 436, 444 (1966); Johnson v. Zerbst, 304 U.S. 458, 464 (1938). *But see* Schneckloth v. Bustamonte, 412 U.S. 218, 248-49 (1973).

[283] There is no violation of the constitutional guarantee to speedy trial or of due process when an individual consents to participate in a pretrial intervention program, because substantially all of the delay in bringing the participant to trial will be directly or indirectly attributable to his conduct. *See, e.g.*, Dickey v. Florida, 398 U.S. 30, 48 (1970); Mays v. State, 229 Ga. 609, 611, 193 S.E.2d 825 (1972); Walker v. State, 89 Ga. 482, 15 S.E. 553 (1892).

The importance of obtaining an express or implied waiver of the right to speedy trial is exemplified by the realization that the only remedy for the denial of a speedy trial is dismissal of the charges. Strunk v. United States, 412 U.S. 434, 439-40 (1973); Barker v. Wingo, 407

U.S. 514, 522 (1972); GA. CODE ANN. § 27-1901.2 (1972). *E.g.*, Mays v. State, 229 Ga. 609, 610, 193 S.E.2d 825 (1972); Hakala v. State, 225 Ga. 629, 630, 170 S.E.2d 406 (1969); Dublin v. State, 126 Ga. 580, 583, 55 S.E. 487 (1906).

The State's interests are protected because the court will assess four factors in considering a claim of denial of speedy trial: length of delay; the reason for delay; the participant's assertion of his right; and resulting prejudice to the participant. *See* Barker v. Wingo, 407 U.S. 514, 530 (1972); United States v. Fay, 313 F.2d 620, 623 (2d Cir. 1963). Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other three delineated factors. Strong evidentiary weight should be given to deliberate attempts by the government to delay the trial in order to hamper the defense, while pretrial intervention will preclude the claim of governmental delay. The participant's assertion of his right to speedy trial will be given strong evidentiary weight and his failure to assert this right will make it difficult for him to prove denial of speedy trial. The factor of proving that prejudice has resulted because of the participant's waiver may be shown by the disappearance or loss of specific evidence or witnesses, the fading of the participant's memory and the memories of witnesses, and the likelihood that some defenses (e.g., insanity) may become more difficult to sustain with the passage of time. *See* Dickey v. Florida, 398 U.S. 30, 42 (1970) (Brennan, J., concurring). These four factors have been adopted by the Georgia Supreme Court in its determination of whether denial of speedy trial assumes due process proportions. *E.g.*, Hughes v. State, 228 Ga. 593, 187 S.E.2d 135 (1972); Sullivan v. State, 225 Ga. 301, 168 S.E.2d 133 (1969).

[284] In Barker v. Wingo, 407 U.S. 514 (1972), the Court quoted from 51 VA. L. REV. 1587, 1610 (1965), wherein the commentator concluded:

> If a defendant deliberately by-passes state procedure for some strategic, tactical, or other reason, a federal judge on habeas corpus may deny relief if he finds that the by-passing was the *considered* choice of the petitioner. (Emphasis in original.)

[285] Johnson v. Zerbst, 304 U.S. 458, 464 (1938).

[286] The right to counsel is guaranteed in "all criminal prosecutions" in the federal courts by the Sixth Amendment to the Federal Constitution. In Powell v. Alabama, 287 U.S. 45 (1932), the Supreme Court held that the right to counsel for state trials for capital offenses applied to the states and in Gideon v. Wainwright, 372 U.S. 335 (1963). the right to appointed counsel was held applicable in state felony cases. In 1972, the Court further held in Argersinger v. Hamlin, 407 U.S. 25 (1972), that counsel must be appointed in all criminal prosecutions where imprisonment lies as a possible penalty. Article I, § I, Par. V (GA. CODE ANN. § 2-105 (1972)) of the Georgia Constitution provides that "Every person charged with an offense against the laws of this State shall have the privilege and benefit of counsel. . . ."

Georgia's Proposed Addict Diversion Statute, Proposed GA. CODE ANN. § 88-407.3(a) expressly provides for a reasonable opportunity for the accused to consult with counsel after preliminary police processing. Various pretrial intervention programs provide for the participant's right to be represented by counsel. *See, e.g.*, Northern District Court of Ohio Procedures, *supra* note 181, at § (a)(2), wherein it is concluded that the participant in the intervention program must waive his right to a speedy trial, the applicable statute of limitations and the speedy presentment of indictments *in the presence of counsel*; Massachusetts Diversion Act, *supra* note 181, at § 5; Washington State Adult Probation Subsidy Act (Senate Bill No. 2491) § 3(4)(a); *reprinted in* INTERVENTION TECHNIQUE, *supra* note 181, 73-82. The New Haven Pretrial Services Council expressly provides that in its initial statement to potential participants, the individual "must be advised of his/her *right to counsel*, either *private, or court appointed* Public Defender. If the interviewee wished to defer making a decision on participating in the program until after seeking counsel, it will be explained that this will not affect his being accepted or rejected." (Emphasis added.) ACTION GRANT APPLICATION: METHODS AND PROCEDURES CITY OF NEW HAVEN, SUBJECT: PRETRIAL DIVERSION APPLICANT: PRETRIAL SERVICES

COUNCIL (unpublished) [hereinafter cited as PRETRIAL SERVICES COUNCIL]. The Atlanta Pre-Trial Intervention Program does not expressly provide for a participant's right to counsel, but does maintain the services of counsel which a participant may avail himself of if so requested.

[287] 406 U.S. 682 (1972).

[288] *Id.* at 689.

[289] *Id.* at 698 (Brennan, J., dissenting). The Court further stated that:

> The initiation of judicial criminal proceedings is far from a mere formalism. It is the starting point of our whole system of adversary criminal justice. For it is only then that the government has committed itself to prosecute . . . . It is then that a defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law.

Id. at 689. *But see* Miranda v. Arizona, 384 U.S. 436, 477 (1966), where the Court held:

> The principles announced today deal with the protection which must be given to the privilege against self-incrimination when the individual is first subjected to police interrogation *while in custody at the station or otherwise deprived of his freedom of action in any significant way. It is at this point that our adversary system of criminal proceedings commences.* . . . (Emphasis added.)

Although Escobedo v. Illinois, 378 U.S. 478 (1964), held that where a police investigation had begun to focus on a particular suspect in custody who had been refused an opportunity to consult with his counsel and who had not been warned of his constitutional right to keep silent, the accused had been denied his right to counsel, the plurality opinion in *Kirby* distinguished *Escobedo* by concluding that "the 'prime purpose' of *Escobedo* was not to vindicate the constitutional right to counsel as such, but, like *Miranda*, 'to guarantee full effectuation of the privilege against self-incrimination. . . .'" 406 U.S. at 689. The *Kirby* doctrine has been followed by the Georgia Supreme Court. *See, e.g.*, Mitchell v. Smith, 229 Ga. 781, 194 S.E.2d 414 (1972)(alternate holding).

[290] The rationale of the Court's decisions holding that there is a right to be represented by counsel prior to trial is that the accused is entitled to counsel at any critical stage of the prosecution. *E.g.*, Coleman v. Alabama, 399 U.S. 1 (1970)(preliminary hearing); United States v. Wade, 388 U.S. 218, 226-27 (1967)(post-indictment lineup) wherein the Court concluded:

> the accused is guaranteed that he need not stand alone against the State at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial. The security of that right is as much the aim of the right to counsel as it is of the other guarantees of the Sixth Amendment . . . The presence of counsel at such critical confrontations, as at the trial itself, operates to assure that the accused's interests will be protected consistently with our adversary theory of criminal prosecution.

White v. Maryland, 373 U.S. 59 (1963)(preliminary arraignment). In Ballard v. Smith, 225 Ga. 416, 169 S.E.2d 329 (1969), where the petitioner contended that his right to counsel was abridged because he was not offered or allowed counsel upon arrest or indictment, the Georgia Supreme Court held that the contention was without merit, because "the petitioner made no showing that anything occurred at the times on which he contends he was denied the benefit of counsel which in any way affected any of his rights." *Id.* at 418. However, the court did conclude that:

> the assistance of counsel is one of the essentials of due process, and the accused is entitled to this assistance *at every critical stage in a criminal prosecution.* . . . A critical stage in a criminal prosecution is one in which a defendant's rights may be lost, defenses waived, or one in which the outcome of the case is substantially affected in some other way.

Id. (Emphasis added.)

[291] LEGAL ISSUES, *supra* note 174, at 11.

[292] *Id.* at 10-12.

[293] *Id.*

[294] See note 282 *supra*.

[295] LEGAL ISSUES, *supra* note 174, at 9. *See, e.g.*, Pennsylvania Supreme Court Rules, *supra* note 181, at R.178. PRETRIAL SERVICES COUNCIL, *supra* note 286, at Initial Statement to Potential Participants.

[296] The Due Process Clause of the Fourteenth Amendment may provide a basis for dismissing an indictment if an unsuccessful participant in the pretrial program can show at trial that the delay has prejudiced his right to a fair trial. United States v. Marion, 404 U.S. 307, 325-26 (1971).

[297] Dickey v. Florida, 398 U.S. 30, 51 (1970). *Accord* Pollard v. United States, 352 U.S. 354, 361 (1957); Hughes v. State, 228 Ga. 593, 187 S.E.2d 135 (1972); Johnson v. Smith, 227 Ga. 611, 612, 182 S.E.2d 101 (1971).

[298] GA. CODE ANN. §§ 26-502; 26-503 (1972). *See* United States v. Marion, 404 U.S. 307, 323 (1971). Although there is no right to a speedy trial prior to arrest or other means of formal charges, the statute of limitations is a mechanism to guard against actual prejudice resulting from the passage of time between commission of the crime and the ensuing arrest or charge. *Id.* at 322. "The applicable statute of limitations . . . is . . . the primary guarantee against bringing overly stale criminal charges." United States v. Ewell, 383 U.S. 116, 122 (1966). *Accord* Toussie v. United States, 397 U.S. 112, 114-15 (1970).

[299] In Georgia the statute of limitations for prosecution of a misdemeanor is two years after the commission of the offense. Participation in the Atlanta program can only be for a period of a maximum of 270 days (an initial period of 90 days and two additional extensions of 90-day periods), and so no conflict with the statute of limitation on prosecution can result. *But see* Pennsylvania Supreme Court Rules, *supra* note 181, at R. 182, wherein it is stated that "the period of such program for any defendant shall not exceed *two years*." (Emphasis added.)

[300] *See, e.g.*, Northern District Court of Ohio Procedures, *supra* note 181, at (a)(2); Pennsylvania Supreme Court Rules, *supra* note 181, at R.177; S. 798, *supra* note 180, at § 5; H.R. 9007, § 3171.

The waiver of both the right to speedy trial and the applicable statute of limitations for prosecution should be expressly made by the participant. "Courts should 'indulge every reasonable presumption against waiver,' and they should 'not presume acquiescence in the loss of fundamental rights.' " Barker v. Wingo, 407 U.S. 514, 525-26 (1972)(citations omitted). *Barker* further quoted from Gainley v. Cochran, 369 U.S. 506, 516 (1962) wherein the Court held:

> Presuming waiver from a silent record is impermissible, the record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandably rejected the offer. Anything less is not waiver.

The Atlanta Pre-Trial Intervention program, as do other programs, provides a form for the waiver of speedy trial, which the participant must sign.

[301] *See, e.g.*, Coleman v. Alabama, 399 U.S. 1 (1970)(preliminary hearing); Boykin v. Alabama, 395 U.S. 238 (1969) (plea-bargaining); Benton v. Maryland, 395 U.S. 784 (1969)(guarantee against double jeopardy); Mempa v. Rhay, 389 U.S. 128 (1967)(sentencing); Pointer v. Texas, 380 U.S. 400 (1965); Malloy v. Hogan, 378 U.S. 1 (1964) (privilege against self-incrimination).

[302] 23 EMORY L. J. 617, 618 (1974).

[303] Minimum requisites of due process for a parole revocation hearing were recognized in Morrissey v. Brewer, 408 U.S. 471 (1972); and the parolee's and probationer's right to be

represented by counsel at such hearings was discussed in Gagnon v. Scarpelli, 411 U.S. 778 (1973). For an excellent commentary on *Gagnon* see 23 EMORY L. J. 617 (1974).

[304] *See* LEGAL ISSUES, *supra* note 194, at 53. Immediate incarceration would be warranted only if the participant could not be released on bail, and if an accused's pretrial release was conditioned on his participation in the pretrial intervention program, imprisonment should result only if the prosecutor cannot show that a less restrictive alternative can be utilized. See notes 226-27 *supra* and accompanying text.

[305] In Burns v. United States, 287 U.S. 216 (1932), *quoted in* Sellers v. State, 107 Ga. App. 516, 517, 130 S.E.2d 790 (1963), the Supreme Court discussed the discretionary element of the revocation of probation. The Court concluded that the reason for flexibility is obvious because the probationer

> . . . is still a person convicted of an offense, and the suspension of his sentence remains within the control of the court. The continuance of that control, apparent from the terms of the statute, is essential to the accomplishment of its beneficient purpose, as otherwise probation might be more reluctantly granted or, when granted, might be made the occasion of delays and obstruction which would bring reproach upon the administration of justice.

Burns v. United States, 287 U.S. at 222. GA. CODE ANN. §§ 77-519, 27-2713 (1972) provide for the procedure of termination of parole and probation respectively.

[306] *See, e.g.*, Morrissey v. Brewer, 408 U.S. 471, 480 (1972); Hiatt v. Compagna, 178 F.2d 42 (5th Cir. 1949), *aff'd by an equally divided court*, 340 U.S. 880 (1950); Dutton v. Willis, 223 Ga. 209, 210, 154 S.E.2d 221 (1967); Johnson v. State, 214 Ga. 818, 819, 108 S.E.2d 313 (1959); Sellers v. State, 107 Ga. App. 516 (1963); Allen v. State, 78 Ga. App. 526, 51 S.E.2d 571 (1949). *See also* Scarpa v. United States Bd. of Parole, 477 F.2d 278 (5th Cir.), *vacated and remanded* 414 U.S. 809 (1973) (parole board proceedings to determine parole eligibility are neither subject to judicial review nor susceptible to safeguards of due process. For an excellent commentary on *Scarpa* see 23 EMORY L. J. 597 (1974)).

[307] *See, e.g.*, Burns v. United States, 287 U.S. 216, 220 (1932); Hyser v. Reed, 318 F.2d 225 (D.C. Cir. 1963).

[308] Johnson v. Walls, 185 Ga. 177, 194 S.E. 380 (1937).

[309] Balkcom v. Sellers, 219 Ga. 662, 135 S.E.2d 414 (1964); *see* Rose v. Haskins, 388 F.2d 91 (6th Cir.), *cert. denied*, 392 U.S. 946 (1968); GA. CODE ANN. §§ 77-515, 77-517 (1972).

[310] *See, e.g.*, Escoe v. Zerbst, 295 U.S. 490 (1935); Morgan v. Wofford, 472 F.2d 822 (5th Cir. 1973); Antonopoulas v. State, 151 Ga. 466, 107 S.E. 156 (1921); Watts v. State, 36 Ga. App. 215, 136 S.E. 323 (1926). *But cf.* Sobell v. Reed, 327 F. Supp. 1294, 1302 (S.D.N.Y. 1971), where it was held that the Administrative Procedure Act, 5 U.S.C. § 701 (1970) contained a presumption of reviewability of the discretionary decision of granting parole.

[311] *See, e.g.* Escoe v. Zerbst, 295 U.S. 490, 492 (1935); Burns v. United States, 287 U.S. 216, 220 (1932).

[312] 295 U.S. 490 (1935).

[313] *Id.* at 492-93. *Accord*, Burns v. United States, 287 U.S. 216, 223 (1932); Brown v. Kearney, 355 F.2d 199 (5th Cir. 1966); Sellers v. State, 107 Ga. App. 516, 130 S.E.2d 790 (1963).

[314] See note 310 *supra*.

[315] *Id.*

[316] *See, e.g.*, Theriault v. Blackwell, 437 F.2d 76 (5th Cir.), *cert. denied*, 402 U.S. 953 (1971); Rowland v. State, 124 Ga. App. 494 (1971); Turner v. State, 119 Ga. App. 117, 166 S.E.2d 582 (1969).

[317] *See, e.g.*, Burns v. United States, 287 U.S. 216, 223 (1935); Williams v. State, 162 Ga. 327, 328, 133 S.E. 843 (1926); Sparks v. State, 77 Ga. App. 22, 24, 47 S.E.2d 678 (1948); Sellers v. State, 107 Ga. App. 516, 130 S.E.2d 790 (1963).

[318] *See, e.g.*, Harrington v. State, 97 Ga. App. 315, 320, 103 S.E.2d 126 (1958); Waters v. State, 80 Ga. App. 104, 108, 55 S.E.2d 677 (1949).

[319] The grace theory of early release as articulated in *Escoe* was the premise of other Supreme Court decisions which held that the denial of a mere privilege granted by the state did not support a concurrent right of due process. *See, e.g.*, Cafeteria and Restaurant Workers Union, Local 1473 v. McElroy, 367 U.S. 886 (1961); Jay v. Boyd, 351 U.S. 345 (1956); United States *ex. rel.* Knauff v. Shaughnessy, 338 U.S. 537 (1950)(cited in 23 EMORY L. J. 617, 622 n.41 (1974)).

[320] 397 U.S. 254 (1970).

[321] *Id.* at 261-63. "The fundamental requisite of due process of law is the opportunity to be heard, Grannis v. Ordean, 234 U.S. 385, 394 (1914). The hearing must be 'at a meaningful time and in a meaningful manner.' Armstrong v. Manzo, 380 U.S. 545, 552 (1965)." Goldberg v. Kelly, 397 U.S. 254, 267 (1970).

[322] 397 U.S. at 268-71.

[323] *Id.* at 267.

[324] 397 U.S. at 270-71.

[325] *Id.* at 262-63.

[326] 403 U.S. 365 (1971).

[327] *Id.* at 374.

[328] *See, e.g.*, Morrissey v. Brewer, 408 U.S. 471, 482 (1973); Fuentes v. Shevin, 407 U.S. 67 (1972).

[329] Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 168 (1951)(Frankfurter, J., concurring).

[330] Goldberg v. Kelly, 397 U.S. 254, 263 (1970).

[331] Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. at 162-63 (Frankfurter, J., concurring).

[332] LEGAL ISSUES, *supra* note 174, at 53, 58.

[333] *See* Goldberg v. Kelly, 397 U.S. 254, 265 (1970) where the Court stressed that:

> [T]he same governmental interests that counsel the provision of welfare, counsel as well its uninterrupted provision to those eligible to receive it; pre-termination evidentiary hearings are indispensable to that end.

[334] *See* LEGAL ISSUES, *supra* note 174, at 56.

[335] *Id.*

[336] 443 F.2d 1079 (2d Cir. 1971), *vacated as moot*, 404 U.S. 879 (1971).

[337] *Id.* at 1087; *cf.* Menechino v. Oswald, 430 F.2d 403 (2d Cir. 1970), *cert. denied*, 400 U.S. 1023 (1971), where the same court held that no procedural due process rights attach at Parole Board hearings to grant parole. In *Bey* the court distinguished the effect of parole revocation from parole denial because revocation may affect the parolee's chances for future parole, whereas the denial of parole merely indicates that the prisoner has failed to adjust.

[338] 408 U.S. 471 (1972) wherein, petitioners' paroles were revoked on the basis of written reports by their supervising officers but with no prior hearing.

[339] *Id.* at 482. Although the *Morrissey* rationale was specifically limited by its facts to parole revocation hearings, the Court in Gagnon v. Scarpelli, 411 U.S. 778, 782 (1973), concluded that:

> . . . [T]here is . . . [no] difference relevant to the guarantee of due process between the revocation of parole and the revocation of probation . . . . Probation revocation, like parole revocation, is not a stage of criminal prosecution, but does result in a loss of liberty. Accordingly . . . a probationer, like a parolee, is entitled to a preliminary and a final revocation hearing . . . ."

[340] Morrissey v. Brewer, 408 U.S. 471, 481-82 (1972).

[341] *Id.* at 482.

[342] *Id.*

[343] *Id.*

[344] *Id.* at 483.

[345] *Id.* at 485, 486. The Court stressed the need for timeliness in providing the parolee with the local preliminary and probable cause hearing. *Id.* at 485. *Accord*, O'Brien v. Henderson, 368 F. Supp. 7 (N.D. Ga. 1973).

[346] Morrissey v. Brewer, 408 U.S. 471, 485 (1972).

[347] *Id.* at 486. It was found sufficient if the evaluation of probable cause hearing was conducted by a fellow parole officer who did not make out the report of the parole violations. This requirement of the *Morrissey* standard of due process could easily be implemented in the pretrial intervention program, by having a member of the staff act as the decisionmaker. The argument that a hearing will place an "undue burden" on the diversion program, and thus its preclusion is warranted, should not be adhered to when it is realized that a minimum of safeguards for both the participant's and the state's interests could be achieved from this opportunity to make an informed decision on an individual participant's termination from the program. See 23 EMORY L. J. 597, 613-14 (1974).

[348] Morrissey v. Brewer, 408 U.S. 471, 487 (1972), *quoting from* Goldberg v. Kelly, 397 U.S. 254, 271 (1970).

[349] *Id.*

[350] *Id. See also* Goldberg v. Kelly, 397 U.S. 254, 269 (1970).

[351] Morrissey v. Brewer, 408 U.S. 471, 488-89 (1972).

[352] See note 304 *supra*.

[353] *See* LEGAL ISSUES, *supra* note 174, at 57. A termination hearing is provided in the New Jersey Supreme Court Rules, *supra* note 181, at R.3.28(3); Northern District Court of Ohio Procedures, *supra* note 181, at (b)3; Pennsylvania Supreme Court Rules, *supra* note 181, at § 6. No termination hearing is provided in the Connecticut Law on Accelerated Rehabilitative Disposition, *reprinted in* INTERVENTION TECHNIQUES, *supra* note 181, at 83; S. 798 *supra* note 180, at § 7(b).

[354] The Court also required that the revocation hearing take place within a "reasonable" time after the petitioner is taken into custody. Morrissey v. Brewer, 408 U.S. 471, 488 (1972). While in *Morrissey* the Court held a period of 2 months between the parolee's being placed under custody and the revocation hearing as not being unreasonable, the court in *Brannum v. United States Bd. of Parole*, 361 F.Supp. 394, 397 (N.D. Ga. 1973), *aff'd*, 490 F.2d 990 (5th Cir. 1974), held a period of 4 months as "patently unreasonable if there has been no preliminary probable cause hearing." The constitutional right to a speedy trial is not applicable to parole revocation proceedings. Cox v. Feldkamp, 438 F.2d 1 (5th Cir. 1971). This similarly applies to the termination hearing from the pretrial intervention program. See section C *supra* for the requirement that a participant waive his right to a speedy trial.

[355] Morrissey v. Brewer, 408 U.S. 471, 488 (1972). See note 137 *supra*.

[356] GA. CODE ANN. § 27-2713 (1972) expressly gives the probationer the right to notice and a hearing on the question of revocation. Johnson v. State, 214 Ga. 818, 108 S.E.2d 313 (1959); Balkcom v. Gunn, 206 Ga. 167, 56 S.E.2d 482 (1949); Sellers v. State, 107 Ga. App. 516, 130 S.E.2d 790 (1963). In order to revoke the probationary features of a sentence the defendant must have notice and opportunity to be heard, the notice being sufficient to inform him not only of the time and place of the hearing and the fact that revocation is sought, but also of the grounds upon which it is based. Horton v. State, 122 Ga. App. 106, 176 S.E.2d 287 (1970). Whether the failure of the Parole Board to give the parolee more than one day's notice prior to his hearing is inconsistent with the due process standard of *Morrissey* depends upon the resulting prejudice, if in fact any occurs, to the parolee's defense. Brannum v. United States Bd. of Parole, 361 F. Supp. 394, 397 (N.D. Ga. 1973), *aff'd*, 490 F.2d 990 (5th Cir. 1974). Thus in *Brannum*, where a parolee was surprised by a notice of his preliminary or final revocation

hearing and was subsequently unprepared to defend against the Board's charges, the court held that this clearly violated the *Morrissey* standard. *Id.*

[357] GA. CODE ANN. § 27-2713 (1972). The failure to afford the probationer a hearing would render the revocation order void for lack of due process. Lester v. Foster, 207 Ga. 596, 63 S.E.2d 402 (1951); Sellers v. State, 107 Ga. App. 516, 130 S.E.2d 790 (1963); Waters v. State, 80 Ga. App. 104, 55 S.E.2d 677 (1949).

[358] Morrissey v. Brewer, 408 U.S. 471, 489 (1972). In O'Brien v. Henderson, 368 F. Supp. 7 (N.D. Ga. 1973), the court held that a bare statement that the probationer's officer testified that petitioner committed the parole violations did not satisfy the *Morrissey* requirement. The quantum of evidence sufficient to justify revocation of a probationary sentence is less than that necessary to sustain conviction in the first instance. Thus, where after notice and hearing has been given the court revokes probation, and there *is some evidence* that there had been a violation of the probationer's terms, the appellate court will not interfere in absence of manifest abuse of discretion by the trial court. *E.g.*, Harrington v. State, 97 Ga. App. 315, 103 S.E.2d 126 (1958); Olsen v. State, 21 Ga. App. 795, 95 S.E. 269 (1918). In probation revocation the judge is not bound by ordinary rules of evidence applicable to criminal or civil proceedings. The testimony of the defendant is not required to be accepted as true testimony, Sellers v. State, 107 Ga. App. 516, 130 S.E.2d 790 (1963); only "slight evidence" is required to support the revocation, *e.g.*, Rowland v. State, 124 Ga. 494, 184 S.E.2d 494 (1971); Sellers v. State, 107 Ga. App. 516, 130 S.E.2d 790 (1963); Faulkner v. State, 101 Ga. App. 889, 115 S.E.2d 393 (1960); it is not necessary that the evidence support the finding for revocation beyond a reasonable doubt or even by a preponderance of the evidence, Price v. State, 91 Ga. App. 381, 85 S.E.2d 627 (1955); Allen v. State, 78 Ga. App. 526, 51 S.E.2d 571 (1949). *But see* Compagna v. Hiatt, 100 F.Supp. 74 (N.D. Ga. 1951)(substantial evidence of violations of conditions of parole is necessary before parole board is warranted in ordering revocation and suspicion, belief, assumption and conclusions alone are not evidence and are not sufficient to justify the revocation of parole); Horton v. State, 122 Ga. App. 106, 176 S.E.2d 287 (1970) (probation may not be revoked where there is no evidence that the defendant violated its terms in the manner charged in the notice, even though there was evidence at the hearing that the defendant violated the terms in some other manner as to which there was no notice given). *Accord*, George v. State, 99 Ga. App. 892, 109 S.E.2d 883 (1959).

[359] LEGAL ISSUES, *supra* note 174, at 58.

[360] *Cf. In re* Murchison, 349 U.S. 133 (1955); Wong Yang Sung v. McGrath, 339 U.S. 33 (1950), *modified*, 339 U.S. 908 (1950), *cited in* Goldberg v. Kelly, 397 U.S. 254, 271 (1970).

[361] Goldberg v. Kelly, 397 U.S. 254, 271 (1970).

[362] 23 EMORY L. J. 617, 632 (1974) and cases cited therein.

[363] A divertee's re-arrest should not be treated as a *per se* disqualification from the program. In individual cases, the arrest during the diversionary period may warrant termination; however, as a general matter, no administrative or therapeutic goals are fostered by regarding a participant's re-arrest as an indication of his failure to make complete progress toward rehabilitation. LEGAL ISSUES, *supra* note 174, at 60.

[364] When there is a violation of the conditions of parole and the parolee is returned to prison to serve the remainder of his sentence, he is not entitled to credit on his sentence for the time spent on parole. *E.g.*, Hickman v. United States, 432 F.2d 414 (5th Cir. 1970); Sanford v. Runyon, 136 F.2d 54 (5th Cir. 1943). *See also* Balkcom v. Jackson, 219 Ga. 59, 131 S.E.2d 551 (1963). GA. CODE ANN. § 77-519 (1972) provides in pertinent part that upon the revocation of parole, the parole board "shall enter an order thereon rescinding said parole or conditional release and returning such person to serve the sentence theretofore imposed upon him, *with benefit of computing the time so served on parole or conditional release as part of such person's sentence . . .*." Absent a contrary indication, the board's order revoking parole in

unambiguous terms carries with it a forfeiture of all previously accumulated credit. Henning v. United States Bureau of Prisons, 472 F.2d 1221 (1973).

[365] 408 U.S. at 489. The right to counsel applies only in a criminal proceeding, U.S. CONST. amend. VI, and thus a parolee or probationer does not have a constitutional basis for a claim to be represented by counsel at a revocation hearing. In *Mempa* the Court held that an indigent defendant had a right to appointed counsel in a post-trial proceeding for revocation of his probation and imposition of *deferred sentencing*. Mempa v. Rhay, 389 U.S. 128, 133-37 (1967). Although the holding in *Mempa* recognized the right for appointed counsel at sentencing, (*see* Townsend v. Burke, 334 U.S. 736 (1948), where the Court held that the absence of counsel during sentencing, coupled with the trial court's "materially untrue" assumptions regarding the defendant's criminal record, resulted in a denial of due process), its extent was distinguished by the courts from applying to the right of appointed counsel at a probation or parole revocation proceeding distinct from the implementation of sentencing. *See, e.g.*, Shaw v. Henderson, 430 F.2d 1116 (5th Cir. 1970); Reece v. Pettijohn, 229 Ga. 619, 193 S.E.2d 841 (1972).

[366] Goldberg v. Kelly, 397 U.S. 254, 270 (1970). *See also* Reece v. Pettijohn, 229 Ga. 619, 622, 193 S.E.2d 841, 843 (1972) (Gunter, J., dissenting).

[367] 397 U.S. at 270-71. The Court quoted from Powell v. Alabama, 287 U.S. 45, 68-69 (1932).

[368] 411 U.S. 778 (1973).

[369] *Id.* at 783.

[370] *Id.* at 785.

[371] *Id.* at 786.

[372] *Id.* at 787-88.

[373] *Id.* See text at note 199 *supra*.

[374] 411 U.S. at 787.

[375] *Id.* at 788. For the criticism of a case-by-case approach to the right to counsel in a criminal trial *compare* Betts v. Brady, 316 U.S. 455 (1942), *with* Gideon v. Wainwright, 372 U.S. 335 (1963); Argersinger v. Hamlin, 407 U.S. 25 (1972). *Gagnon* dismissed the precedent of *Gideon* and *Argersinger* as requiring the need for a *per se* right to counsel at a revocation hearing because "there are critical differences between criminal trials and probation or parole revocation hearings, and both society and the probationer or parolee have stakes in preserving these differences." 411 U.S. at 788-89.

[376] 411 U.S. at 789.

[377] *Id.* at 790.

[378] *Id.* at 791.

[379] Reece v. Pettijohn, 229 Ga. 619, 193 S.E.2d 841 (1972); Dutton v. Willis, 223 Ga. 209, 154 S.E.2d 221 (1967).

[380] *See* Reece v. Pettijohn, 229 Ga. 619, 193 S.E.2d 841 (1972), Gunter, J., dissenting, wherein Justice Gunter interpreted present GA. CODE ANN. § 27-2713 (1972) to be an explicit proclamation that the right to counsel exists at the revocation hearing. The significant language in the statute is: " . . . the court shall give the probationer an opportunity to be fully heard at the earliest possible date on his own behalf, in person *or by counsel*." (Emphasis added). Justice Gunter also determined that the right to counsel existed because the alleged violator of the terms and conditions of his probation is charged with an "offense against the laws of Georgia" and thus falls within the purview of the protection afforded under the Georgia Constitution. GA. CODE ANN. § 2-105 (1972) provides that "[e]very person charged with an offense against the laws of this State shall have the privilege and benefit of counsel . . . ."

[381] See notes 289-93 *supra* and accompanying text. LEGAL ISSUES, *supra* note 174, at 58.

[382] LEGAL ISSUES, *supra* note 174, at 58.

[383] *E.g.*, the hearsay rule; the "best-evidence" rule; the opinion rule; the rule rejecting

proof of bad character as evidence of crime.

[384] McCORMICK, HANDBOOK OF THE LAW OF EVIDENCE 152 (2d ed. 1972) (hereinafter cited as McCORMICK).

[385] U.S. CONST. amend. V, "No person . . . shall be compelled in any criminal case to be a witness against himself . . . ." The Fifth Amendment protection against self-incrimination was held applicable to the states through the Due Process Clause of the Fourteenth Amendment in Malloy v. Hogan, 378 U.S. 1 (1964) and Griffin v. California, 380 U.S. 609 (1965).

[386] McCORMICK, *supra* note 384, at 152.

[387] Because of consideration of public policy, communications between husband and wife; attorney and client; psychiatrist and patient; among grand jurors; and secrets of state are excluded. GA. CODE ANN. § 38-418 (1974).

[388] LEGAL ISSUES, *supra* note 174, at 63-64.

[389] *Id.* at 64.

[390] *Id.*

[391] *See also* McCORMICK, *supra* note 384, at 213 n.9.

[392] *See*, Massey v. State, 226 Ga. 703, 177 S.E.2d 79 (1970) and cases cited therein.

[393] See note 385 *supra*.

[394] PROSECUTOR'S MANUAL, *supra* note 174, at 167 n.163.

[395] *Id.*

[396] 384 U.S. 436 (1966).

[397] *Id.* at 444 (emphasis added).

[398] *Id.* The Supreme Court has recently held that incriminating information elicited from the interrogation of an arrested suspect who was advised of his right to remain silent and his right to counsel but not of his right to the appointment of counsel (in a case antedating *Miranda*) did not violate the dictates of *Miranda*. Michigan v. Tucker, 417 U.S. 433 (1974). *See also* Title II of the Crime Control Act which retreats from the Miranda rules by applying a test of voluntariness in determing the admissibility of confessions. 18 U.S.C. § 3501 (1969).

[399] 384 U.S. at 467.

[400] 391 U.S. 1 (1968).

[401] *Id.* at 4.

[402] *Id.* at 7-8 (emphasis added).

[403] 394 U.S. 324 (1969).

[404] *Id.* at 326 (emphasis added).

[405] *Id.* at 329.

[406] This initial interviewing process is described as:

> Individuals who meet the standards outlined above or who are referred to the Council by the Prosecutor or State's Attorney must undergo a screening interview. The interview will be administered by project staff screeners on forms prepared for such purpose. *It is designed to gather background information on the prospective program participant and to assist the screener to reach a judgment as to whether to recommend the individual for inclusion in the program.* After conclusion of the interview and verification of the information obtained, the screener will evaluate the results based upon three criteria:
>
> 1. Does the individual express a sincere interest in securing employment or job training and seem likely to benefit if this need is met?
> 2. Does the individual, in the judgment of the screener, seem to be interested in securing counseling assistance and overcoming personal problems?
> 3. Is the individual free of serious emotional or psychological problems beyond the ability of project staff to overcome?

(Emphasis added). Action Grant: Application: Methods and Procedures, City of New Haven, Subject: Pretrial Diversion Applicant: Pretrial Services Council, Diversion Program Eligibil-

ity Criteria at 2.

[407] PROSECUTOR'S MANUAL, *supra* note 174, at 148.

[408] INTERVENTION TECHNIQUES, *supra* note 181, at 99.

[409] *Id.* PROSECUTOR'S MANUAL, *supra* note 174, at 147. *See also* Harris v. New York, 401 U.S. 222 (1971), where the Court held that a confession obtained without prior *Miranda* warnings could be used to impeach a defendant who chose to testify.

[410] See note 181 *supra*.

[411] *Id.*

[412] *Id.*

[413] *Id. See also* § 408 of Georgia's Proposed Addict Diversion Statute (proposed GA. CODE ANN. § 88-407) which established addict pretrial intervention programs and which created a qualified privilege of communications between counsellor and participant. However, § 408(b)(2)(B) authorized the disclosure by the court of records maintained by treatment programs "if authorized by an appropriate order of a court of competent jurisdiction granted after application *showing good cause* therefore."

[414] PROSECUTOR'S MANUAL, *supra* note 174, at 147.

[415] LEGAL ISSUES, *supra* note 174, at 65.

[416] *Id.*

[417] The Genessee County, Michigan Citizens Probation Authority, and Project de Novo of Minneapolis, Minnesota, require restitution by certain participants if restitution would be deemed proper. LEGAL ISSUES, *supra* note 174, at 61 n.1. Project de Novo summarizes some of the major benefits that are derived from its restitution program:

> 1. The victim is the primary beneficiary, inasmuch as he is directly compensated for his loss under a contract agreement, outside the depersonalized atmosphere of the criminal justice system.
> 2. The defendant is a secondary beneficiary, in as much as he can, by satisfactory performance and payment of restitution, avoid the criminal justice process and the stigma of a criminal conviction. The defendant is also provided with counselling, thus diminishing the likelihood of his repeating the offense, and with valuable manpower services to enhance his employability.
> 3. The criminal justice system is a third beneficiary through the decreased volume of cases to be processed through the traditional court and corrections system.
> 4. The community at large is a beneficiary through the restitution paid by the offender to his victim; the offender not being processed through the traditional system and avoiding the stigma of the criminal record, and hopefully, his reduced likelihood of recidivism.

Operation de Novo—A New Beginning (unpublished) 19-20.

If the restitution requirement was employed in a Georgia pretrial intervention program, the authority upon which the requirement is based may be found in GA. CODE ANN. § 77-517 (1973), where it is provided that parole could be conditioned on the parolee's making reparation or restitution for his crime.

[418] See § C *supra*.

[419] See note 253 *supra*.

[420] In Operation de Novo, payment of restitution will not be used as an admission of guilt if prosecution is resumed. LEGAL ISSUES, *supra* note 174, at 63 n.4.

[421] Tate v. Short, 401 U.S. 395 (1971); Morris v. Schoonfield, 399 U.S. 508 (1970); Williams v. Illinois, 399 U.S. 235 (1970). These cases did not involve pretrial intervention programs, but dealt with the incarceration of a defendant because of his inability to pay a fine assessed against him.

[422] *Id.*

[423] The *Williams* Court correctly recognized that imposition of imprisonment for the

defaulting indigent did not satisfy the two different degrees of judicial review invoked when a state practice is claimed to violate the Equal Protection Clause of the Fourteenth Amendment. Under the traditional equal protection standard, ". . . classification . . . must rest upon some ground of difference having a fair and substantial relation to the object of the legislation." F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920); *See, e.g.*, McDonald v. Board of Elec. Comm'rs., 394 U.S. 802 (1969); Williamson v. Lee Optical, 348 U.S. 483, 489 (1955). An even stricter standard of judicial scrutiny demanding a *compelling* state interest to justify the distinction of having a defendant's sentence be increased solely because he did not possess the means to pay a fine should be applied because this distinction is based on the *suspect* criterion of *wealth*. *See, e.g.*, Tate v. Short, 401 U.S. 395 (1971); Douglas v. California, 372 U.S. 353 (1963); Griffin v. Illinois, 351 U.S. 12 (1956). Under this latter standard "a statute must be precisely tailored to further the purpose it is designed to accomplish, and the state bears the burden of proving that there is no less onerous alternative by which its objective may be achieved." 23 EMORY L. J. 211, 215 (1974).

[424] PROSECUTOR'S MANUAL, *supra* note 174, at 137.

[425] *Id.* LEGAL ISSUES, *supra* note 174, at 63. The Supreme Court both in *Williams* and *Tate* expressly stated that a valid alternative to imprisonment for an indigent's nonpayment of a fine is a procedure whereby the indigent pays the fine in installments. 399 U.S. at 244-45 n.21; 401 U.S. at 400 n.5. The policy of permitting installment payments of fines has been adopted in several states, *e.g.*, CAL. PENAL CODE § 1205 (West Supp. 1975) (misdemeanors); MICH. COMP. LAWS § 769.3(1948). *See also* MODEL PENAL CODE § 302.1 (P.O.D. 1962). The Fifth Circuit Court of Appeals in Frazier v. Jordan, 457 F.2d 726 (5th Cir. 1972), in affirming the decision of the District Court for the Northern District of Georgia, held:

> that the penal and deterrent effect of the immediate fine may be achieved through *the alternative device of installment payments* appropriately calculated, and perhaps through other measures which the states, in their wisdom, may devise. Imprisonment of those who cannot pay their fines immediately, is not necessary to promote the state's compelling interests in effective punishment and deterrence of crime.

Id. at 730 (emphasis added). See also the authorities cited in Tate v. Short, 401 U.S. 395, 400 n.5 (1971). This procedure of installment payments could also be applied to the requirement of restitution in a pretrial intervention program.

[426] United States v. Morgan, 346 U.S. 502, 519 (1954) (Minton, J., dissenting).

[427] *See* Gough, *The Expungement of Adjudication Records of Juvenile and Adult Offenders: A Problem of Status*, 1966 WASH. U.L.Q. 147, 151 [hereinafter referred to as Gough].

[428] *See, e.g.*, MISS. CODE ANN. § 47-7-41 (1972); N.C. GEN. STAT. §§ 13.1 to 4 (Supp. 1974); TENN. CODE ANN. §§ 15-1 *et seq.* (1955).

[429] 18 U.S.C. § 5021 (1969).

[430] This survey is discussed in Gough, *supra* note 427, at 153.

[431] T. N. G. v. Superior Court, 4 Cal. 3d 767, 780, 484 P.2d 981, 989, 94 Cal. Rptr. 813, 821 (1971).

[432] *See* CAL. WELF. & INST'NS CODE § 676 (West 1972); CAL. WELF. & INST'NS CODE §§ 781, 827 (West Supp. 1975).

[433] *Id.*

[434] T.N.G. v. Superior Court, 4 Cal. 3d 767, 484 P.2d 981, 94 Cal. Rptr. 813 (1971).

[435] N.Y. CODE CRIM. PRO. § 720.35 (McKinney 1971).

[436] *Id.*

[437] DEL. CODE ANN. tit. 11, § 3904 (1974).

[438] Category: The Judicial Process and the Terminated Participant Factor: Dismissal, expungement of arrest record.
Information requested: If the program recommends "dismissal" of charges upon successful

termination, and such is accepted by the appropriate authority, must such be conducted in an open court, with participant present; if accepted by appropriate authority, is the arrest record for the participatory crime expunged.

Program Answering	Open Court Dismissal	Arrest Record Expunged
Flint, Michigan	No	Yes
New Haven, Connecticut	Yes	Yes
Kansas City, Missouri	No	Yes
Honolulu, Hawaii	No	No
New York City	Yes	Yes, upon request
Boston, Massachusetts	Yes	No
Atlanta, Georgia	No	No
Columbia, South Carolina	No	Yes

Source: Independent Questionnaire: July, 1974.

See also Note, *Sealing of Juvenile Records*, 54 MINN. L. REV. 433, 434-38 (1969).

[139] See text at note 437 *supra*; Gough, *supra* note 427, at 187-90.

CHAPTER TWO

Sentencing And Post-Trial Alternatives To Incarceration

Chapter Two examines available alternatives to the traditional forms of incarceration after an offender has been convicted. Part I analyzes the sentencing procedure in Georgia with an eye towards discovering how the sentencing procedure might be contributing to overpopulation in the prisons and the potential of the new sentencing procedure as an element in alleviating the overcrowding. Part II examines the work release program in Georgia, how it is currently operating and how it might operate more effectively, concluding that Georgia needs to commit much more of its energy and resources into this type of program. Part III discusses restitution as another major alternative to incarceration in Georgia. This Part traces the history and policy of a restitution program and examines some of the more successful programs in the United States today. Part III suggests ten different proposals by which a restitution program can be functionally implemented in Georgia. The alternatives to incarceration discussed in Chapter Two can, with some creativity and the commitment of resources, be made a reality in Georgia and contribute significantly to the rehabilitation of offenders and to the easing of the overcrowding of Georgia prisons.

I. Sentencing

A. *Goals of Punishment*

Traditionally, there have been four generally accepted goals of penology: retribution, protection of society, general and special deterrence, and rehabilitation.[1] Most authorities conclude that although retribution is still a factor in some sentencing decisions,[2] it is not the sole factor.[3] It is to the remaining goals that we must address ourselves.

The most obvious indication that society intends to protect itself from criminal activity is the predominance of state habitual offender statutes.[4] They represent a recognition by society that there are some offenders who are incapable of rehabilitation and must be confined for the protection of the public.[5] A major difficulty in this conclusion is the question of what criteria should be used to determine who is incapable of rehabilitation.[6] Most state statutes provide

that after a certain number of felony convictions, the multiple offender must be sentenced to life[7] or to the longest possible term for that felony without parole.[8] Society has determined that the danger the habitual offender presents to the general public necessitates long-term confinement.[9]

Deterrence has traditionally been recognized as one of the major goals of correctional punishment.[10] The theory of deterrence is broken down into two categories: special deterrence and general deterrence.[11] Special deterrence refers to the specific deterrence of a given individual as the result of actual punishment.[12] General deterrence, on the other hand, involves the overall reduction of crime due to the inhibitory effect of possible criminal punishment upon the general public.[13]

The basis of the theory of special deterrence is that the offender who has experienced prosecution, conviction, and imprisonment is in a much different position than the individual who has experienced none of these. An individual who has undergone actual physical confinement as the result of criminal activity should be less likely to repeat his activity than one who has only been threatened with prosecution and punishment.[14] However, statistics prove that this is not the case.[15] The predominance of multiple offender statutes directly supports this conclusion.[16] The reasons for the failure of this theory seem to be two-fold. First, the public does not readily accept the ex-convict back into society. Faced with the prospect of unemployment, the ex-convict is often forced to resort to crime to support himself.[17] Second, correctional facilities are generally not adequate to rehabilitate the convicted offender, let alone provide him with a marketable skill.[18] The result is that offenders are "recycled" rather than deterred from committing further crimes.

In light of the high recidivist rate, the effectiveness of special deterrence must be seriously questioned.[19] However, the theory is functionally correct; it is the adverse environment in which it attempts to operate which causes its failure.

The theory of general deterrence is based on the premise that the potential criminal will not break the law because of the threat of punishment.[20] Compared with special deterrence, the statistical data in this area is much less conclusive as to the effect on the crime rate.[21] One statistical study on general deterrence[22] reveals that the

certainty of punishment has a greater effect on crime rates than the severity of the punishment, with the exception of the homicide rate, in which case the certainty and severity of punishment have approximately the same effect.[23] From this analysis, the study concludes: ". . . the appropriate criminal justice policy is one which attempts to reduce crime by increasing the probability of apprehension and prosecution."[24] This view, however, is contrary to the traditional belief of many public officials that the way to deter the commission of crime is to increase the severity of the sentence.[25] The former theory seems to be the better approach. The potential criminal will not be concerned with the severity of the sentence unless he is reasonably certain that he will be prosecuted, convicted and sentenced if apprehended. It is this fear which will most likely deter his actions.[26]

In short, the effectiveness of general deterrence must be questioned as stringently as the effectiveness of special deterrence. Although the certainty of punishment apparently has some general deterrent effect,[27] the harsh maximum sentences allowed by state criminal codes do not have the deterrent effect in which most public officials believe.[28]

The major goal of modern sentencing and corrections authorities is rehabilitation.[29] In *Williams v. New York*,[30] the Supreme Court emphasized:

> Retribution is no longer the dominant objective of the criminal law. Reformation and rehabilitation of offenders have become important goals of criminal jurisprudence.[31]

The theory of rehabilitation is premised on the assumption that convicted criminals' behavior can be modified so that they will not repeat their unlawful activity when released from confinement.[32] As noted above however, statistical studies have revealed a high recidivism rate.[33] It is generally accepted that inadequate rehabilitative facilities and programs have caused this high rate of recidivism.[34]

It is generally assumed by authorities that if there was more money for rehabilitation programs and more professionally trained personnel, the rate of recidivism would decrease.[35]

The rehabilitative philosophy of sentencing has paralleled the development of the belief that each sentencingdecision should be

fashioned to accommodate the particular individual involved.[36] This in turn raises the question of *who* should have sentencing authority, the judge or the jury? Or more correctly stated, who is in the better position to implement the dual aims of rehabilitation and individualized sentencing?

B. *The Pros and Cons of Judge and Jury Sentencing in Noncapital Felony Cases*

The arguments for and against judge and jury sentencing in noncapital felony cases are diverse.[37] The great majority of writers, committees, and states favor judge sentencing,[38] although a respectable minority of states still require jury sentencing.[39] Georgia was included in this minority until July 1, 1974, when a comprehensive bill requiring judge sentencing in all noncapital felony cases was enacted.[40]

Judge sentencing is based upon the premise that imprisonment in an organized society is for rehabilitation and deterrence of future criminal activity, rather than for retribution.[41] Thus, the sentencing procedure must be comprehensive and individualized.[42] The sentencing authority must possess the experience and expertise to select a sentence most likely to induce a change in the behavioral pattern which led to the commission of the particular offense.[43] Jury sentencing fails to afford the convicted defendant individualized sentencing resulting in rehabilitation. The jury generally lacks the technical knowledge and training of an experienced judge regarding avenues of rehabilitation.[44] In addition, the jury often lacks the authority generally vested in judges to grant probation or suspend a sentence.[45] Moreover, much of the information most relevant to individualized sentencing is inadmissible before the jury during the trial.[46] Therefore, when the issue of guilt and the type of sentence are concurrently determined by the jury, evidence relevant solely to the question of sentence is not heard by the jury. A "bifurcated system" is a feasible, but nonetheless little-used alternative where the jury is the sentencing authority in noncapital felony cases.[47]

Another basic deficiency in jury sentencing is the inconsistencies in the criteria applied by juries to determine the length and nature of the penalty. For example, juries may engage in a "compromise verdict," conflicting with the standard for criminal responsibil-

ity—guilt beyond a reasonable doubt.[48] Ideally, a jury with the dual function of determining both guilt and sentence should consider the two issues separately, reaching the question of sentence only if the defendant is found guilty. However, it is often difficult for a juror to separate the issue of guilt from punishment. A juror who is not convinced "beyond a reasonable doubt" that a defendant is guilty may be persuaded to vote "guilty" by the assurances of other jurors that they will grant the defendant a light sentence.[49] A second example of inconsistent application of criteria by jurors is the "quotient verdict." Here, the jurors agree to avoid analyzing and criticizing their respective views on a proper sentence by allowing the foreman to add the twelve jurors' suggested sentences and divide by twelve.[50] Both of these problems inherent in jury sentencing are eliminated by a system of judge sentencing.[51]

Despite the problems indicated above, there are five arguments traditionally proffered in favor of jury sentencing: (1) colonial distrust and fears of a centralized government; (2) judges' lack of humanity and fairness at the time of sentencing; (3) public pressure on elected judges; (4) adverse effect on plea bargaining; and (5) fear that a sympathetic jury will acquit a guilty defendant because it believes the judge will impose too harsh a sentence.[52]

In the eighteenth century, American colonists feared that royally appointed judges would be unfair to colonists when exercising their power to punish.[53] Although this argument may have some vitality in a state where jury sentencing was installed soon after American independence was achieved, it is inapplicable to the Georgia experience, because jury sentencing in noncapital felony cases did not begin until 1919.[54]

A more persuasive argument for jury sentencing is that the consensus of a body of jurors mollifies extreme feelings to which an individual judge may be subject; the jury may provide a "reconciliation of varied temperaments," resulting in a fairer punishment.[55] Nevertheless, as discussed above, the judge is in a better position to weigh the applicability of rehabilitative opportunities available to a convicted defendant,[56] individualize the sentence; and grant probation or suspend the sentence.[57] However, there will always be some instances in which an individual judge's temperament will determine the defendant's sentence,[58] rather than the relevant fac-

tors which should be considered.[59] Therefore, it is essential that there be a written record containing findings of fact and conclusions of law supporting the particular sentence[60] in order to insure an adequate opportunity for appellate review.[61]

Jury sentencing also avoids the possibility that public pressure may influence elected trial judges in determining sentences. While it is unlikely that the average voting citizen is aware of sentences handed down in the day-to-day cases which come before the trial judge, well-publicized cases present a problem of public influence on a judge's sentencing deliberations. However, often a change in venue avoids the potential of public opinion influencing the judge's sentencing in a highly publicized case.[62]

The effect of judge sentencing on a defendant's plea-bargaining position is two-fold. While the defendant with a favorable prior record would benefit from judge sentencing, it may be detrimental to the defendant with a prior criminal record as the judge would be aware of the record when making his sentencing decision. With the knowledge that he could be subject to a heavier penalty if sentenced by the judge, the defendant's bargaining position with the prosecution is weakened. In a system of jury sentencing, the defendant with the prior criminal record would be protected by the jury's lack of knowledge of that record and thereby be in a stronger plea-bargaining position, but would not benefit by having a good prior record. Therefore, the only individual whose plea-bargaining position is disadvantaged by judge sentencing is the multiple offender. This is entirely consistent with the modern penological view that all relevant information be taken into account in making sentencing decisions.[63]

The most persuasive argument against judge sentencing is that the jury with the single function of determining guilt or innocence may acquit to avoid a perceived harshness by a sentencing trial judge.[64] This danger can be mitigated by allowing the jury to attach a recommendation of mercy to a guilty verdict,[65] although normally, the judge is not bound by the recommendation.[66]

Despite some support for jury sentencing, the jury is relatively inexperienced and lacks adequate knowledge to make reasoned sentencing decisions. Concluding that jury sentencing should be abolished for all but capital offenses, an American Bar Association report has stated:

> [C]learly the most telling argument against jury sentencing is that a proper sentencing decision calls on an expertise which a jury cannot possibly be expected to bring with it to trial, nor develop for the one occasion on which it will be used. The day is long past when sentencing turned solely on the degree of moral approbation which the offense commanded. An enlightened sentencing decision today calls for a sophisticated and informed judgment which takes into account a vast range of additional factors . . . .[67]

C. *Georgia Sentencing Procedure*

Under Georgia's previous system, if the jury determined that the defendant was guilty, it also determined the sentence.[68] On July 1, 1974, however, Georgia joined the large majority of states in requiring that all but capital offenders be sentenced by the trial court judge.[69]

Under Ga. Code Ann. § 27-2503 of the new Act, which repealed Ga. Code Ann. § 27-2534 (Supp. 1973), the jury is dismissed after a finding of guilt in a noncapital felony case.[70] The trial judge must then conduct a pre-sentence hearing in which the sole issue is the determination of the punishment to be imposed. At the hearing, evidence is heard "in extenuation, mitigation, and aggravation of punishment."[71] Under the old provision, the admissibility of evidence was governed by the rules of evidence. Under the new Act, however, this limitation has been removed. This has a significant effect on the pre-sentence hearing, particularly in terms of the admission of aggravating evidence offered by the State. Under the previous law, such evidence was generally limited to the defendant's criminal record and *general* character.[72] Under the new provision, the State may introduce evidence of *specific* transactions to the detriment of the defendant.[73]

Under both the old and new laws, the State may not introduce any aggravating evidence of which it has not informed the defendant prior to his trial.[74] The standards applied by the Georgia courts to govern notice to the defendant have been stringent and this strict application will probably continue under the new rules.[75]

At the conclusion of the hearing, the judge may immediately impose the sentence or recess to take it under advisement. He is

required to fix a determinate sentence within the limits prescribed by law for the defendant's offense.[76] Should the decision of the court be reversed solely on the grounds of error during the pre-sentence hearing, the new trial will consider only the question of punishment.[77]

The trial court judge has several available alternatives when imposing a sentence, depending upon the particular circumstances of each case. First, the judge may grant probation or suspend the sentence if

> it appears . . . that the defendant is not likely to engage in a criminal course of conduct and that the ends of justice and the welfare of society do not require that the defendant shall presently suffer the penalty imposed by law . . . .[78]

Although this power is entirely discretionary, it is limited in time to the term of court during which the sentence was imposed.[79]

Second, Ga. Code Ann. § 27-2501 provides that for certain felonies, the judge may, upon recommendation by the jury, reduce the punishment to that of a misdemeanor. The Georgia Supreme Court has held, however, that this provision was repealed by implication by the enactment of Ga. Code Ann. § 26-3101 in 1968.[80] This section provides that any defendant found guilty of *any* felony punishable by imprisonment for a maximum term of ten years or less may be punished as for a misdemeanor, if the jury so recommends and the judge follows the recommendation.[81] The court has full discretion in determining whether to follow the jury's recommendation.[82] The enactment of the new Act raises the question of whether the judge who sentences a defendant after a jury verdict of guilty may exercise the discretion allowable under Ga. Code Ann. § 26-3101. Although the Act does not expressly provide for this situation, such discretion would seemingly be allowed in light of the discretion allowed to a judge where there is no jury involved.[83]

Third, under the First Offender Act,[84] the trial judge has authority to place *any* defendant who has not been previously convicted of a felony on probation. This is a significant part of any plan to alleviate the overcrowding problems in Georgia prisons. It appears, however, that some judges, especially those in rural areas, are reluctant to exercise this discretion.[85]

Finally, the judge has little discretion in sentencing the habitual offender. Like most other states,[86] Georgia requires that recidivists be subjected to a harsher penalty than the first offender.[87] If the defendant has been previously convicted of an offense and sentenced to confinement and labor in the penitentiary, a subsequent offense punishable in the same manner will result in a sentence for the longest period allowed by law. If the defendant has been convicted of three or more previous felonies and is convicted of a subsequent offense,[88] the convicted individual must serve the maximum time provided in the judge's sentence without the possibility of parole. These statutory requirements imposed when sentencing a habitual offender are not actually "alternatives" available to the sentencing judge. Although it is clear that such a habitual offender statute is constitutional,[89] it is questionable whether or not the judge should be so restricted in sentencing the second offender.[90]

The new Act has added a significant provision to the Georgia Criminal Procedure Code by giving every defendant who has been sentenced to five or more years by a judge the right to have such sentence reviewed.[91] The provision creates a panel of three superior court judges who serve terms of three months.[92] This panel is responsible for hearing all sentence appeals upon application by the particular defendants.[93] Such application must be made within thirty days of the date sentence is imposed by the superior court judge, or after the remittitur from the Court of Appeals or Supreme Court affirming the defendant's conviction is made the judgment of the sentencing court.[94]

The purpose of the appellate review provision is to determine whether a particular sentence is "excessively harsh."[95] This determination is made "in light of all of the circumstances surrounding the case and the defendant, and in light of the defendant's past history."[96] Both the defendant and the district attorney may present written argument on the harshness or justification of the sentence.[97] Although the panel is given the authority to reduce any sentence appealed under the provision, it is specifically prohibited from reducing any sentence to probation or to suspend a sentence.[98] No written opinion need be filed[99] because decisions of the panel are final and unreviewable.[100]

D. *Disparity of Sentences in Georgia*

A major reason for the passage of a judge sentencing statute in Georgia for noncapital felonies was the lack of uniformity in sentencing.[101] The reasons for these disparities have been discussed above.[102] The objective of this section is to offer statistical evidence of the existing disparities and to recommend methods by which they can be eliminated or at least reduced.

1. *Statistics*

The following tables consist of statistics relative to three crimes: injury, burglary, and armed robbery.[103] The crimes are broken down into the Georgia circuits; and broken down further into the percentages of defendants sentenced to various terms of imprisonment for each crime.

Under the general category of injury, the two circuits with the largest number of offenders are Atlanta and Chattahoochee, with 429 and 127 respectively. Although there are no substantial differences between the two, Chattahoochee tends to sentence a larger percentage of offenders to one year or less, or to two or three years. Conversely, Atlanta tends to sentence more offenders to terms in the categories of four or five years and up.

In the next three circuits in order of the number of offenders, Macon (93), Coweta (85), and Stone Mountain (81), more substantial disparities are evident. Those offenders sentenced in Stone Mountain are more likely to be sentenced to a longer term than those sentenced in Macon and especially Coweta. For example, in Coweta, 12.7% more offenders are sentenced to the same terms than in Stone Mountain. Stone Mountain, or the other hand, sentenced 22.2% to four or five years, as compared to 17.6% in Coweta. Approximately the same disparity exists in the eight to ten category.

In a third group of circuits, Ocmulgee (52), Clayton (43), Cobb (43), and Augusta (41), significant disparities are evident as well. Augusta sentences as many as 23.5% more offenders to one year or less, or two or three years than the other three circuits. On the other hand, the same circuit sentences more offenders to the eight to ten and sixteen to twenty categories than any of the other three circuits.

TABLE I — INJURY

Circuit	One yr. or less	2 or 3 yrs.	4 or 5 yrs.	6 or 7 yrs.	8-10 yrs.	11-15 yrs.	16-20 yrs.	21 yrs. & up	Life	Total Number of Offenders
Alapaha	14.5	28.6	35.7	7.1	—	—	14.3	—	—	14
Alcovy	17.9	21.4	35.7	7.1	7.1	3.6	3.6	—	3.6	28
Atlanta	14.2	21.4	21.9	7.2	13.5	1.9	2.8	—	0.2	429
Atlantic	4.8	42.9	38.1	4.8	4.8	—	4.8	—	—	21
Augusta	34.1	31.7	9.8	2.4	12.2	—	7.3	2.4	—	41
Blue Ridge	14.3	64.3	14.3	—	—	—	7.1	—	—	14
Brunswick	25.0	37.5	25.0	—	—	12.5	—	—	—	8
Chattahoochee	16.9	42.5	18.1	6.3	8.7	1.6	3.1	—	0.8	127
Cherokee	14.7	38.2	38.2	2.9	5.9	—	—	—	—	34
Clayton	9.3	37.2	30.2	11.6	9.3	—	2.3	—	—	43
Cobb	23.3	30.2	11.6	23.3	—	7.0	4.7	—	—	43
Conasauga	34.8	39.1	13.0	—	13.0	—	—	—	—	23
Cordele	27.3	40.9	22.7	—	4.5	4.5	—	—	—	22
Coweta	25.9	42.4	17.6	5.9	7.1	1.2	—	—	—	85
Dougherty	4.0	52.2	20.0	12.0	8.0	—	4.0	—	—	25
Dublin	—	—	33.3	—	66.7	—	—	—	—	3
Eastern	—	25.0	31.3	—	31.3	—	12.5	—	—	16
Flint	—	—	—	—	—	—	—	—	—	—
Griffin	34.5	20.7	17.2	10.3	6.9	3.4	6.9	—	—	29
Gwinnett	30.0	25.0	20.0	15.0	10.0	—	—	—	—	20

TABLE I — INJURY (Cont.)

Circuit	One yr. or less	2 or 3 yrs.	4 or 5 yrs.	6 or 7 yrs.	8-10 yrs.	11-15 yrs.	16-20 yrs.	21 yrs. & up	Life	Total Number of Offenders
Houston	25.0	62.5	—	—	12.5	—	—	—	—	8
Lkt. Mtn.	41.9	29.0	16.1	—	6.5	3.2	3.2	—	—	31
Macon	33.3	30.1	23.7	5.4	4.3	2.2	1.1	—	—	93
Middle	50.0	25.0	15.0	5.0	—	—	5.0	—	—	20
Mountain	31.8	27.3	4.5	9.1	18.2	9.1	—	—	—	22
N. Eastern	21.4	21.4	35.7	3.6	10.7	—	7.1	—	—	28
Northern	4.0	28.0	44.0	17.0	8.0	—	4.0	—	—	25
Ocmulgee	11.5	30.8	11.5	25.0	11.5	—	7.7	—	1.9	52
Oconee	25.0	—	25.0	—	50.0	—	—	—	—	4
Ogeechee	15.0	35.0	30.0	10.0	10.0	—	—	—	—	20
Pataula	11.1	50.0	16.7	5.6	11.1	5.6	—	—	—	18
Piedmont	21.4	42.9	14.3	—	14.3	—	—	—	7.1	28
Rome	33.3	33.3	20.0	6.7	6.7	—	—	—	—	15
South Ga.	30.0	23.3	26.7	3.3	16.7	—	—	—	—	30
Southern	16.0	32.0	20.0	—	24.0	—	8.0	—	—	25
S. Western	40.0	40.0	12.0	—	4.0	4.0	—	—	—	25
Stone Mtn.	23.5	32.1	22.2	6.2	11.1	2.5	1.2	—	1.2	81
Tallapoosa	5.9	35.3	17.6	5.9	17.6	11.8	5.9	—	—	17
Tifton	6.7	40.0	23.3	6.7	23.3	—	—	—	—	30
Toombs	50.0	50.0	—	—	—	—	—	—	—	8
Waycross	13.0	43.5	4.3	8.7	21.7	—	4.3	—	4.3	23
Western	26.1	17.4	30.4	17.4	4.3	4.3	—	—	—	23

TABLE II — BURGLARY

Circuit	One yr. or less	2 or 3 yrs.	4 or 5 yrs.	6 or 7 yrs.	8-10 yrs.	11-15 yrs.	16-20 yrs.	21 yrs. & up	Life	Total Number of Offenders
Alapaha	8.2	36.1	19.7	—	18.0	9.8	3.3	4.9	—	61
Alcovy	3.4	36.8	31.6	6.8	16.2	2.6	1.7	0.9	—	117
Atlanta	10.0	35.2	28.3	9.9	9.5	3.2	3.2	0.7	0.1	2,055
Atlantic	7.5	34.6	19.6	12.1	14.0	5.6	6.5	—	—	107
Augusta	13.3	32.3	24.4	8.2	11.8	4.3	5.4	0.4	—	279
Blue Ridge	12.6	37.9	17.2	29.9	—	1.1	—	1.1	—	87
Brunswick	9.6	30.1	24.7	11.0	5.5	5.5	12.3	1.4	—	73
Chattahoochee	11.2	39.5	22.2	10.1	11.2	2.6	2.6	0.6	—	347
Cherokee	22.9	32.3	18.8	14.6	8.3	2.1	1.0	—	—	96
Clayton	5.8	24.3	32.0	17.5	11.7	3.9	4.9	—	—	103
Cobb	20.0	36.2	14.3	25.7	1.9	1.0	1.0	—	—	105
Conasauga	11.7	57.3	26.2	1.9	2.9	—	—	—	—	103
Cordele	30.4	51.8	12.5	1.8	3.6	—	—	—	—	56
Coweta	17.1	44.1	24.6	7.1	6.2	0.5	0.5	—	—	211
Dougherty	4.1	38.4	30.1	12.3	13.7	—	1.4	—	—	73
Dublin	—	11.1	38.9	5.6	16.7	16.7	11.1	—	—	18
Eastern	—	8.2	24.7	4.7	28.2	7.1	16.5	10.6	—	85
Flint	—	—	—	—	—	—	—	—	—	—
Griffin	17.5	47.4	17.5	8.8	3.5	3.5	1.8	—	—	57
Gwinnett	26.0	46.0	18.0	4.0	4.0	2.0	—	—	—	50

TABLE II — BURGLARY (Cont.)

Circuit	One yr. or less	2 or 3 yrs.	4 or 5 yrs.	6 or 7 yrs.	8-10 yrs.	11-15 yrs.	16-20 yrs.	21 yrs. & up	Life	Total Number of Offenders
Houston	32.7	51.0	12.2	2.0	2.0	—	—	—	—	49
Lkt. Mtn.	29.2	45.8	18.1	4.2	2.8	—	—	—	—	72
Macon	35.1	43.8	12.1	4.9	2.6	1.1	0.4	—	—	265
Middle	33.0	41.5	16.0	4.3	3.2	1.1	1.1	—	—	94
Mountain	26.1	39.1	17.4	10.9	4.3	2.2	—	—	—	46
N. Eastern	20.6	29.1	19.9	18.4	9.2	2.1	0.7	—	—	141
Northern	11.4	34.2	29.1	12.0	9.5	0.6	2.5	0.6	—	158
Ocmulgee	6.1	34.8	21.5	15.5	12.7	4.4	3.9	1.1	—	181
Oconee	—	25.0	25.0	12.5	25.0	12.5	—	—	—	8
Ogeechee	9.2	49.4	26.4	6.9	6.9	—	1.1	—	—	87
Pataula	7.1	44.3	30.0	7.1	11.4	—	—	—	—	70
Piedmont	10.9	45.7	21.7	7.6	8.7	4.3	1.1	—	—	92
Rome	17.8	42.6	13.9	13.9	9.9	2.0	—	—	—	101
South Ga.	12.1	34.1	28.0	6.8	12.1	4.5	2.3	—	—	132
Southern	15.3	34.7	33.3	2.3	6.9	2.8	4.2	0.5	—	216
S. Western	19.7	59.0	11.5	6.6	1.6	1.6	—	—	—	61
Stone Mtn.	10.7	42.2	23.7	7.3	11.1	2.6	2.1	0.2	—	422
Tallapoosa	3.8	12.5	33.8	10.0	30.0	3.8	6.3	—	—	80
Tifton	8.5	28.7	40.3	7.0	14.7	—	0.8	—	—	129
Toombs	25.3	17.7	26.6	5.1	15.2	7.6	—	1.3	1.3	79
Waycross	25.3	34.4	19.9	9.6	4.2	3.6	3.0	—	—	166
Western	17.3	30.0	30.9	11.8	8.2	0.9	0.9	—	—	110

TABLE III — ARMED ROBBERY

Circuit	One yr. or less	2 or 3 yrs.	4 or 5 yrs.	6 or 7 yrs.	8-10 yrs.	11-15 yrs.	16-20 yrs.	21 yrs. & up	Life	Total Number of Offenders
Alapaha	—	—	10.0	—	—	30.0	50.0	—	10.0	10
Alcovy	—	6.7	33.3	—	36.7	10.0	13.3	—	—	30
Atlanta	3.6	10.3	21.4	11.0	24.1	12.6	10.5	0.7	5.8	555
Atlantic	—	—	7.7	23.1	15.4	15.4	7.7	—	30.8	13
Augusta	—	7.2	17.4	10.1	24.6	8.7	20.3	—	11.6	69
Blue Ridge	—	29.4	20.6	29.4	11.8	5.9	2.9	—	—	34
Brunswick	6.3	6.3	28.1	15.6	12.5	18.8	12.5	—	—	32
Chattahoochee	1.9	15.1	15.1	22.6	14.2	13.2	12.3	1.9	3.8	106
Cherokee	22.2	11.1	11.1	22.2	22.2	—	—	—	11.1	9
Clayton	—	—	25.0	12.5	45.8	—	8.3	4.2	4.2	24
Cobb	—	15.4	15.4	16.9	27.7	15.4	6.2	1.5	1.5	65
Conasauga	5.0	7.5	27.5	7.5	27.5	12.5	12.5	—	—	40
Cordele	4.4	46.7	15.6	17.8	15.6	—	—	—	—	45
Coweta	3.9	22.3	21.4	13.6	15.5	16.5	4.9	—	1.9	103
Dougherty	6.7	13.3	20.0	6.7	13.3	33.3	6.7	—	—	15
Dublin	—	—	25.0	—	25.0	—	—	—	50.0	4
Eastern	—	—	40.0	—	20.0	10.0	30.0	—	—	10
Flint	—	—	—	—	—	—	—	—	—	—
Griffin	4.8	22.2	27.0	14.3	17.5	9.5	1.6	1.6	1.6	63
Gwinnett	10.9	27.3	18.2	9.1	21.8	5.5	5.5	1.8	—	55

TABLE III — ARMED ROBBERY (Cont.)

Circuit	One yr. or less	2 or 3 yrs.	4 or 5 yrs.	6 or 7 yrs.	8-10 yrs.	11-15 yrs.	16-20 yrs.	21 yrs. & up	Life	Total Number of Offenders
Houston	—	31.3	25.0	6.3	12.5	18.8	6.3	—	—	16
Lkt. Mtn.	5.3	24.0	28.0	9.3	13.3	12.0	6.7	—	1.3	75
Macon	8.2	20.3	21.7	9.2	22.2	13.5	3.9	—	1.0	207
Middle	4.7	25.6	14.0	16.3	23.3	14.0	2.3	—	—	43
Mountain	7.1	14.3	17.9	3.6	32.1	17.9	7.1	—	—	28
N. Eastern	1.7	15.5	20.7	20.7	25.9	1.7	8.6	—	5.2	58
Northern	5.3	21.1	36.8	18.4	18.4	—	—	—	—	38
Ocmulgee	—	21.7	21.7	10.8	25.3	9.6	6.0	1.2	3.6	83
Oconee	—	—	—	—	33.3	—	33.3	—	33.3	3
Ogeechee	—	26.4	30.2	5.7	26.4	7.5	1.9	—	1.9	53
Pataula	5.3	31.6	10.5	18.4	13.2	10.5	5.3	—	5.3	38
Piedmont	5.6	22.2	11.1	5.6	16.7	16.7	22.2	—	—	18
Rome	—	25.0	25.0	—	50.0	—	—	—	—	4
South Ga.	4.0	—	36.0	4.0	24.0	12.0	16.0	—	4.0	25
Southern	—	23.8	11.9	7.1	28.6	16.7	9.5	—	2.4	42
S. Western	—	60.0	10.0	—	20.0	10.0	—	—	—	10
Stone Mtn.	—	26.2	24.6	16.4	19.7	9.2	4.9	—	—	61
Tallapoosa	10.0	—	10.0	10.0	50.0	10.0	10.0	—	—	10
Tifton	9.1	13.6	18.2	9.1	40.9	4.5	4.5	—	—	22
Toombs	—	—	38.3	—	33.3	—	16.7	—	16.7	6
Waycross	—	12.1	24.2	15.2	21.2	12.1	9.1	—	6.1	33
Western	4.0	8.0	8.0	28.0	20.0	20.0	4.0	4.0	4.0	25

Source: GEORGIA DEPARTMENT OF OFFENDER REHABILITATION REPORT 1972-73, Offender Statistics (1973).

Comparing Ocmulgee and Clayton, it is evident that a defendant would prefer to be sentenced in Clayton. In the lowest three categories, Clayton sentences 76.7% of all offenders, as compared to Ocmulgee which sentenced only 53.8% to the three categories.

In Atlanta (2055 offenders) and Stone Mountain (422 offenders), the top two circuits in numbers of offenders sentenced for burglary, there are no substantial disparities. In the next three circuits, Chattahoochee (347), Augusta (279) and Macon (265), however, there are very significant differences. In the two lowest categories, Chattahoochee sentenced only 50.7% of all such offenders. Conversely, Chattahoochee sentences more to *all* of the higher term categories than Macon.

In a third group of circuits, Southern (216), Coweta (211), Ocmulgee (181) and Northern (158), Southern tends to sentence more offenders to four or five years or less. This is particularly evident when the six or seven year category is examined. Southern sentenced only 2.3% to this term, while Ocmulgee sentenced 15.5%, Northern 12.0%, and Coweta 7.1%.

The top circuits for armed robbery, Atlanta (555) and Macon (207), have basically the same percentage of offenders in the middle categories of the tables. In the low and high categories, however, the disparities are significant. Atlanta sentenced only 13.9% of its offenders to either one year or less, or two or three years. Macon, on the other hand, sentenced 28.5% of its armed robbery offenders in these two categories. At the other extreme, Atlanta sentenced 17.0% to twenty-one years up to life, while Macon sentenced only 4.9% to the same terms.

Although Atlanta has a high percentage of heavy sentences, Augusta, the seventh-ranked circuit in numbers of offenders, is even higher. Again, the extreme categories show the most substantial disparity. Only 7.2% of Augusta's armed robbery offenders are sentenced to three years or less, while 31.9% are sentenced to sixteen years up to life.

The above discussion is representative of the significant sentence disparities that exist in the various Georgia circuits. The question that remains is what can be done to eliminate these disparities. The recent passage of judge sentencing in noncapital felony cases is a

significant step.[104] Nevertheless, substantial reforms in the sentencing procedure are needed.

E. *Analysis and Criticism of Georgia Sentencing Procedure*

While in a few states sentencing is done by an administrative board,[105] the general sentencing authority in noncapital felony cases is in the trial court judge in Georgia[106] and under the A.B.A. Standards for Criminal Justice.[107]

Both the judge and board sentencing systems recognize the problems involved in jury sentencing of defendants convicted of noncapital felonies. A comparison of board and judge sentencing is not a subject of this discussion in light of the improbability that Georgia would consider a Washington or California-type system in the near future.[108] The recommendations for reform in this paper proceed on the assumption that Georgia will maintain its recently enacted judge sentencing procedure.

The first stage of the Georgia sentencing procedure is the presentence report. Under Ga. Code Ann. § 27-2710 (1972), the superior court judge *may* require a presentence investigation and written report before sentencing a defendant for the commission of a felony. This is a major problem with the Georgia sentencing procedure. As discussed previously, individualized sentencing is not possible without all relevant information about the defendant being taken into account.[109] The *discretionary* power of the court to require an investigation and report results in some sentences being based on inadequate information because the judge did not require a report. It is thus specifically recommended that Georgia adopt a mandatory requirement of a presentence investigation and written report for all crimes that would result in one year or more imprisonment.[110]

A major issue involving the presentence report is whether its contents should be disclosed, and if so, to whom. Georgia does not have a statutory provision governing disclosure, nor does there appear to be any relevant case law. Both the A.B.A. Standards [111] and the Model Sentencing Act[112] require that the information contained in such a report be made available to the defendant or his attorney prior to sentencing.[113] The reasons for this requirement are obvious. Without knowledge of what is contained in presentence reports, the defendant does not have a chance to correct false statements or to

explain other factors discussed in the report.[114] This is contrary to the concept of individualized sentencing which judge sentencing was intended to implement.[115] It is therefore recommended that Georgia provide statutorily that the contents of all presentence reports must be made available to the defendant or his attorney prior to the sentencing proceedings.

Proposed Ga. Code Ann. § 27-2503 compares favorably with the A.B.A. Standards on the actual sentencing proceedings.[116] In essence, the hearing is conducted as a trial would be,[117] with full rights of cross-examination, confrontation and representation by counsel. The only difference between Georgia and the A.B.A. Standards is that Georgia does not afford the right of allocution to the defendant, but instead assumes that the ceremony was performed.[118] In light of the other rights granted to the defendant, this does not seem to be particularly significant.

As discussed above,[119] Georgia took an important step toward eliminating disparity in sentencing by authorizing appellate review of any sentence over five years.[120] Although this provision affords the defendant substantial rights which did not exist previously, it has serious defects which limit its effectiveness.

The most obvious problem presented by the statute is that it applies only to a defendant who has been sentenced to five or more years. Although it is recognized that some limit on which sentences can be appealed may be necessary,[121] it seems that a cut-off point of five years may be too high for the provision to be effective in light of the large number of defendants sentenced to less than five years.[122] Future study of the effectiveness of the appellate review provision will be necessary to determine if this conclusion is accurate.

Another defect in the new provision is that it fails to require that the defendant sentenced to five or more years be informed of his right to appeal.[123] This is especially important in light of the thirty-day time limit for filing an application for appeal. Although it is possible that this could be grounds for reversal on the issue of sentence,[124] it would be much clearer if the statute was amended to require such notification by the trial court judge.

While it is clear that the decision of the three-judge panel is final,

the failure to require that the panel's decision be delineated is a crucial defect. Without such written opinions, the trial courts are left without any guidelines to follow in making future sentencing decisions. It is recommended that such written opinions be required of the three-judge panel.

A final defect in the new provision is the limited power of the appellate panel to substitute different alternatives for the sentences imposed by the lower court. *If* the panel is provided with an adequate record of the trial court proceedings,[125] there appears to be no reason for not allowing it to exercise any alternative open to the trial court.[126] This is especially true since *three* judges would be making the decision instead of one judge. Therefore, the combined experience of the judges would result in a more closely analyzed and hopefully more correct sentencing decision.

F. *Guidelines for Judge Sentencing*

An effective system of individual sentencing is not possible without sentencing judges being vested with the authority to exercise discretion in arriving at sentencing decisions.[127] Nevertheless, a judge must be required to follow some guidelines in making such decisions[128] in order to avoid the disparity of sentences so evident under a jury sentencing system.[129] The purpose of this section is to recommend such guidelines and to propose certain mandatory procedures for judges to follow.

Under the present system, the judge must sentence the convicted defendant to a determinate term of imprisonment.[130] The only guidelines provided for the actual length of the sentence are those imposed under the various crimes committed. Besides death and life imprisonment, there are eight different categories for felonies: (1) not less than ten or more than twenty years; (2) not less than one or more than twenty years; (3) not less than five or more than ten years; (4) not less than one or more than ten years; (5) not less than three or more than seven years; (6) not less than one or more than five years; (7) not less than one or more than three years; (8) not less than one or more than two years.[131]

Many authorities have questioned the effectiveness of a long sentence imposed on an individual convicted of a noncapital felony.[132] Often, it appears that the only function of the harsh maximum

sentence is to encourage the defendant to plead guilty to a lesser offense because of the possibility of receiving the maximum penalty.[133]

As discussed previously, the theory of special deterrence has been rebutted by the high rate of recidivism.[134] The most significant effect of deterrence appears to be directly tied to the certainty of punishment, as opposed to the severity of punishment.[135] With this realization in mind, it is recommended that the sanctions authorized by Title 26, Ga. Code Ann. be reviewed and reduced.

Under Georgia's habitual offender act,[136] the second conviction of an offense punishable by labor and confinement in the penitentiary requires the judge to sentence the offender to the maximum term allowed by law. This mandatory sentence is entirely contrary to the theory of individualized sentencing.[137] The judge is given no discretion to vary the defendant's sentence because of extenuating circumstances. It is thus recommended that this mandatory sentence for second offenders be abolished.

Perhaps the most difficult aspect of developing sentencing guidelines is to set forth different factors that the judge should consider in making sentencing decisions. *If* the recommendations for improving the appellate review procedure are adopted,[138] *specific* guidelines are not necessary; nor does it appear that they would be practical in light of the need for individualized sentencing. It is recommended, however, that judges be informed of the status of defendants they have sentenced.[139] In this way, the judge will be in a better position to evaluate the accuracy of his sentencing criteria.

It is essential that there be an accurate trial court record for any system of appellate review to be effective. This proposition is especially true when the appellate review involves a sentencing decision based on a variety of factors.[140] This requirement will also help to minimize the absolute discretion now possessed by trial court judges. It is therefore recommended that the sentencing judge be required to articulate his reasons and the various considerations in sentencing a particular defendant to a particular term.

G. *Conclusion*

As discussed above, the new judge sentencing system and appellate review provisions are significant steps toward eliminating dis-

parity in sentences. Nevertheless, further reforms are needed to continue implementing this policy.

Besides the desired effect of reducing disparity in sentencing, these reforms can aid in the solution of overcrowding in Georgia prisons. By reducing excessively harsh sentences and sentencing convicted defendants on the basis of individual rehabilitation, the reforms will help reduce the prison population to a financially manageable level.

II. Work Release

The Select Committee on Crime of the United States House of Representatives declared, in June, 1973, that the most serious problem facing the American prison system is overcrowding.[141] As an example of a severely overcrowded prison, the Committee cited Reidsville prison in Georgia, a facility designed to accommodate 1800 prisoners which, in June, 1973, housed 2900 inmates.[142] Reidsville is not unique in Georgia; with the highest prisoner per capita ratio in the country, the state faces a population crisis in many of its prisons.[143] As the recent disturbances at Reidsville[144] have shown,

> [t]he net results of overcrowding in massive facilities are depersonalization of inmates, a breakdown of effective control over inmate populations, and a reduction in the effectiveness of rehabilitation programs.[145]

As a partial remedy for this serious problem, the Committee recommended expansion of community-based pre-release programs, including work release.[146]

Work release is not a new concept. As early as 1913, the Wisconsin legislature authorized the release of state prisoners during the day to assist with the harvesting of an unusually large apple crop.[147] After the harvest that year, however, the statute was not used for several decades;[148] no other state passed a work release statute until 1957,[149] and most states did not authorize work release programs before passage of the federal work release law[150] in 1965. Every state except Kentucky[151] presently has an operative work release statute or program.[152]

Work release operates on a basically similar plan in all states. The inmate is housed in a minimum-security facility and is free to leave

such facility during necessary hours to pursue employment in the community. The major variation from state to state is the type of facility in which work releasees are housed. Four types of living units are used: state prisons, county jails and community centers or halfway houses.[153] Most work release legislation gives state corrections departments authority to house work releasees in state prisons, to contract with county or municipal corrections facilities where they provide job accessibility, or to use any other appropriate, supervised facility.[154] In many states, including Georgia, counties have independent authority to establish work release programs operating autonomously in county institutions.[155] While most states presently use primarily institution-based programs,[156] the trend is toward smaller community-based centers.[157]

The trend toward community treatment centers is grounded on the premise that aside from relieving prison overcrowding, work release is a rehabilitative tool and is effective in gradually reintegrating the prisoner into his home community, so that he can reestablish contacts with his family and pursue employment which may be continued when he is discharged or paroled.[158] In a community treatment center a prisoner may gradually assume greater degrees of responsibility under a controlled and supportive system.[159] While he is in a county work release program, the inmate makes productive use of his time, earns money which is used to reimburse the state for his room and board, provides some support for his family, pays debts and fines, and accumulates savings for his release;[160] he saves the state money, since community facilities are less costly than large institutions,[161] and his ability to accept responsibility and his readiness for parole are tested:

> Work release is "hard time" to serve. It is far more difficult to be faced with decisions to be made and seduction to be resisted while still serving time than to serve it under conditions where temptations do not arise and decisions are made by others.[162]

This part will examine work release as it operates in Georgia, with comparisons, where relevant, to programs in other states.[163] First, the comparative advantages and disadvantages of institution-based and community-based programs will be examined. Selection criteria and procedures, employment of releasees, wage disbursement and termination under the Georgia work release plan will then be

CONTINUED

2 OF 6

discussed and related to their counterparts in other states. Finally, education release and training release, options provided for in most work release legislation but generally little-utilized,[164] will be examined.

A. *Institution-Based and Community-Based Programs in Georgia*

In December, 1973, approximately 53% of Georgia's work releasees were housed in institution-based programs, with 47% in community-based programs.[165] In January, 1974, a dramatic shift in this ratio began, caused by the implementation of a new, federally funded program to alleviate prison overcrowding. Twenty-one trailer units, housing twenty residents each, were purchased and distributed among nine state institutions, providing 420 additional beds.[166] Three institutions used the trailers to establish new work release programs.[167] Six institutions which already had work release programs transferred their participants to the trailer units, a logical step in light of the general Department of Corrections policy that work releasees should be segregated as much as possible from non-releasees in the prisons.[168] Currently, in Georgia, nine state prisons have trailer-based work release.[169] One has an institution-based program,[170] two counties have established their own institutional work release plans,[171] and there are five community-based work release centers.[172] The state presently has 588 beds available for work release participants, of which 413, or 70% are institution- or trailer-based;[173] the majority of these are in trailers.

This new emphasis on trailer-based work release is an unfortunate compromise of program quality, necessitated by the prison population problem. For reasons enumerated below, the trailer-based programs have far less rehabilitative potential than community centers.

First, the trailers are physically inferior to the community centers. Georgia's community treatment centers are remodeled apartment buildings, large homes, or motels and can accommodate forty to sixty-five residents while allowing most to have single or double rooms. They have separate and adequate kitchen and dining facilities and often a recreation area of some sort, as well as administrative and counseling offices.[174] In contrast, for twenty residents each, the trailers provide only bunk space, a small kitchenette and a single bathroom. Recreation is limited to one television,[175] and the

policy against allowing releasees and non-releasees to mix prevents the trailer residents from using institutional sports equipment and facilities, as they could prior to their transfer to the trailers. Lack of privacy and of any physical recreational outlet are serious failings in this program.

The trailers residents also receive much less in the way of counseling, a factor which contributes meaningfully to an inmate's adjustment to work release.[176] A recent study has shown that the likelihood of an inmate's completing his scheduled work release and being discharged or paroled is significantly related to a sustained participation in counseling programs.[177] The community-based work release programs in Georgia emphasize counseling strongly, recommending or requiring at least weekly participation in individual or group sessions.[178] The ratio of residents to counselors is very low compared to traditional prisoner-counselor standards—about eleven to one in the state-run community programs, and three to one in the two joint state-federal programs.[179] Counselors meet individually with the residents at least once a week and more often during periods of personal stress or employment difficulty. They also assist the resident with money management, and at least one center has a staff member who counsels inmates' families.[180] Since all of the community-based programs are in urban areas,[181] they can draw from a large pool of experienced, qualified counselors. The staff members are well-educated and interested in progressive rehabilitation techniques.[182]

In contrast, the staff in the state institutions is primarily custodial in nature[183] and far less educated, since the institutions are mostly in rural areas, where the prison is a primary employer for the locale. In 1973, 28.5% of the state institution *wardens* had only a high school education.[184] Many of the employees are sons and grandsons of former prison security guards. Even where institutional counseling is provided, it is not available to work releasees living in trailers because of the restrictions on their access to the general institution. Their contact with institution personnel is generally limited to security guards assigned to their trailers. Thus, the level of personal resources available to the inmate often decreases if he participates in work release, while at the same time he must accept new responsibilities and face challenging and unfamiliar situations in the community.

Another distinction between institution-based and community-based programs is the variety of employment options available. Again, the urban community centers have a significant advantage in the number of potential employers within easy access of the center. Public transportation is efficient, inexpensive and easily available to community center residents. Jobs at all skill levels are available and a releasee who has had training or experience in a skill area is likely to find a job in which he can utilize that training or experience.[185]

Institutional work releasees are not so fortunate; eight of the ten state institutions with work release are located in rural areas[186] and offer few choices of employment. The jobs available to releasees in those areas tend quickly to become "inmate jobs" and are less desirable and lower-paying than other jobs.[187] This trend is accentuated when many work releasees are employed in the same establishment, a common phenomenon where only one or two places of employment are available.[188] Where such a situation exists, much of the value of work release is lost, since one of the primary goals of the program is to provide the inmate with an interesting and rewarding job which he will potentially continue after his discharge.

At present, few of the releasees in the rural institutional programs do continue their employment because they are not confined near their homes. Seven of the ten work release institutions are located in counties which produce in tote less than 7% of the total inmate population.[189] The majority of prisoners in Georgia are from the northern portion of the state,[190] but more than 50% of the institutional work release beds are in the southern half.[191] Remaining near the institution after discharge is not a viable nor a desirable alternative for most releasees, since their families and community ties are elsewhere and employment possibilities seem more attractive in urban areas. Thus, the goal of releasing an inmate with an established and satisfactory job is not met in the institutional programs.

Community-based centers are superior to institutional programs in providing avenues of reintegration into the non-prison community. When the institution-based work releasee leaves his job, he returns to his trailer and must remain there with little diversion except television. Visitors are allowed during established institutional hours, but the location of many of the prisons makes visiting

impossible for families or friends without cars and difficult for those who may be located many miles away. In the community centers, however, many more alternatives are available. An urban location affords a great potential for interaction with city sports leagues, civic clubs such as the Jaycees, church groups, and self-help groups like Alcoholics Anonymous.[192] Since many of the residents have families in the metropolitan area in which the center is located,[193] frequent visits are possible and gradual reestablishment of the family unit may be effected. Counseling for the family unit as a whole is available when it is needed.[194] Because inmates who participate in recreational or counseling programs have a significantly higher rate of successful completion of work release programs than those who do not,[195] more of these civic opportunities should be exploited. For example, citizen volunteers could escort center residents to entertainment events or club meetings, providing constructive interaction between the releasee and the community. Some clubs might choose to meet at community centers and include those inmates who wished to participate. More aggressive public education is needed to take advantage of existing and potential opportunities.

A further benefit available only to community-based work releasees is the earned pass. In the purely state-run community-based programs, an inmate may earn up to twelve hours of time away from the center during non-working hours.[196] At the state and federally assisted programs, Gateway House and Wheeler House, the residents may earn passes which gradually increase in length to forty-eight hours as the releasee approaches discharge.[197] The resident must file a pass plan, to be approved by the center Superintendent.[198] Within certain restrictions,[199] the pass may be used as the resident pleases; most use the time to visit with families and friends. The pass appears to be an effective method of encouraging constructive behavior; the Department of Offender Rehabilitation should consider the possibility of lengthening passes to twenty-four or forty-eight hours in state-run programs toward the end of the resident's term, to facilitate apartment or job hunting, where necessary, and to give the family assistance in adjusting gradually to the inmate's presence.[200]

County work release programs have some of the advantages of community centers. County inmates are usually confined close to their homes; if a man has a job before his arrest, county work release

allows him to keep it; if he has no job, he can search for one near his home and is able to continue in it after his release. The family can visit easily, and the releasee is maintaining or establishing contact with the community in which he will remain upon discharge. Serious disadvantages are also present, however. County jails have notoriously poor facilities.[201] No counseling is available, there are no recreational opportunities, and any time not spent in employment is spent in a cell. Despite these disadvantages, Georgia should repeal that section of the work release law preventing the state from contracting with counties for the housing of work releasees.[202] The two counties which presently have their own work release programs consider them successful; Richmond County's program ran at 102% of capacity in fiscal year 1974.[203] If the state contracted with counties for housing of only county residents on work release, the releasees would benefit because they would be in their own communities. Many more work release beds would be available and the overcrowding in state prisons could be alleviated. Any county which chooses to accept work releasees should be required to provide some of the services, such as counseling and recreation, which are important to the success of the programs and are provided in community centers.

Evidence available at this date suggests that community-based work release has a significant effect on recidivism, while institution-based work release does not affect recidivism. The Georgia Department of Offender Rehabilitation so far has been unable to gather meaningful recidivism statistics,[204] but several states have made significant findings. Oregon and South Carolina report recidivism rates of 10% for work releasees discharged from community treatment centers,[205] compared to a national rate for prisoners without work release of 65-70%.[206] A work release-halfway house program in Maryland claims a 20% recidivism rate,[207] and in Pennsylvania, offenders discharged from community treatment centers in 1972 had a recidivism rate lower by one third than those discharged directly from prison.[208] Only Massachusetts reports that work release has apparently not affected the recidivism rate of its participants. In the Massachusetts program, an institution-based plan, no treatment is offered, and the inmate is cut off from the services offered in his base institution, as are the Georgia work releasees who are based in trailers. A Massachusetts study recommended that the program be

structured around a comprehensive treatment plan, becoming gradually less intensive as release date approaches.[209] Secondly, the study recommended that the participants be allowed to maintain links with the larger institutional programs and services.[210]

Presently, about 5% of the total Georgia prison population is on work release.[211] This figure compares with 10% in Florida,[212] 20% in North Carolina,[213] and 65% in Vermont.[214] In Wisconsin, 50% of all inmates discharged from the prison system have had work release experience; in Oklahoma, the comparable percentage is thirty-seven.[215] The Georgia program should be expanded so that a greater percentage of prisoners could experience work release; for reasons discussed above, expansion should be primarily, if not exclusively, directed toward community-based centers. Rapid expansion is possible; because of devastating overcrowding in its prisons, Florida has opened 25 new community-based work and educational-release centers since 1970, accommodating approximately 1,000 inmates.[216] The Atlanta area could support at least three or four community centers immediately;[217] and a present need also exists in Savannah, Augusta, Rome and Columbus.[218] For the immediate future, expansion should be concentrated in urban areas; employment opportunities are more plentiful in cities, better treatment staff are available, and there is a greater possibility that employment will be continued after release.

Moreover, community work release centers are not more expensive than large institutions. Per capita costs are lower in community centers,[219] and the initial capital outlay for each center would of course be much smaller than that for a prison. The greater number of counselors required by community centers is partially offset by the smaller requirement for security personnel. Inmates in community centers actively contribute to their own maintenance; they also contribute to the support of their dependents and, instead of being purely a drain on taxpayers, are taxpayers themselves.[220]

A modification of the community-based work release program, under consideration in Maryland[221] and in use in Pennsylvania,[222] is a concept known as "living out"[223] or "out-residence."[224] After a specified time in a community treatment center, an "out-resident" moves into his home, an apartment, a YMCA or other facility to test his readiness for full release. He is still technically a prisoner and

he must be in frequent contact with his center, appearing personally several times each week and, initially, telephoning daily. Gradually, less frequent contact is required as the release date approaches, placing on the participant increasing responsibility. Aside from making the adjustment to freedom a less sudden experience, "living out" results in a faster turnover of work release beds and helps to alleviate prison over-population. Serious consideration should be given to the adoption of such a program in Georgia.

Georgia must make a commitment very soon to some form of expansion of the prison system. Work release centers in the community provide a viable, economical means of increasing capacity, especially with the modification just discussed. For the reasons presented above, the state should increase as soon as possible the number of urban community treatment centers.

B. *Selection Criteria*

At present in Georgia, only 588 inmates of a prison population greater than 10,000 may participate in work release at any given time.[225] With such restrictions, corrections officials in Georgia, and in most states, can be extremely selective in choosing work releasees.[226] Many states base selection on criteria which ensure that the public at large will tolerate the program. For example, in Georgia[227] and most other states, an inmate serving a sentence for a violent crime against the person or a sexual offense is precluded from work release.[228] Also precluded are offenders whose release into the community would evoke public criticism, regardless of the crime.[229] In Georgia, arrest for a drug-related offense prevents participation in work release unless the inmate receives a recommendation from an approved treatment program within the institution.[230] Georgia and other states also exclude prisoners identified with large scale, organized criminal activity.[231]

Other criteria, unrelated to the prisoner's offense, in Georgia are: he must be free of restricting detainers;[232] he must be in good physical health;[233] he must have a demonstrated need for the program;[234] he must apply for the program voluntarily and be under full minimum custody; he should be a resident of the community in which he will be placed on work release;[235] and he must be within twenty-four months of his scheduled release date.[236]

Georgia's twenty-four month requirement is unusual. Most states provide that the inmate must be within six months of release, and one state has a three month requirement.[237] For community-based work release programs, a shorter period is mandated because of the frustration generated when an inmate has nearly complete freedom for most of the day and then is restricted, but without bars, on his return to the center.[238] Presently, the average time spent on work release in Georgia is five months. Ninety-nine percent of those granted work release spend one year or less in the program.[239] Consideration should be given to decreasing the amount of time spent in community centers to three months, as is the case in California.[240] This could be done through use of a living out program, which would relieve frustration and result in greater turnover of spaces available, giving more inmates an opportunity to participate in the program and helping to alleviate prison congestion.

Tying eligibility for work release to the nature of the inmate's offense arbitrarily eliminates the possibility of participation in the program for a substantial percentage of the inmate population.[241] This system is a result of the Department of Correction's concerns with administrative convenience and public pressure; it disregards the needs of individual offenders. Those who have been convicted of one of the precluding offenses have no incentive to strive to earn work release. Several states have recognized this problem and have made work release eligibility criteria much more flexible. In Maryland and Missouri, for example, any inmate is eligible for work release if it seems appropriate for his personal rehabilitation plan.[242] As public awareness and tolerance of new correctional programs increases, the Georgia criteria should be made more responsive to the needs of the inmates, rather than to the needs of the system: "Until the selection of participants is based on the needs of the individuals, not the institution, work release will be a 'showcase program' with few long-term benefits."[243] As changes are made in both the selection criteria and selection procedure, work release should begin to serve prisoners who are in the most need of rehabilitation.[244]

C. *Selection Procedure*

The Georgia Department of Corrections/Offender Rehabilitation presently has complete discretion in the selection of work relea-

sees.[245] This discretion has not yet been tested in the Georgia courts, but in *Green v. United States*,[246] discretionary authority in the United States Attorney General was sustained, and the Court of Appeals for the District of Columbia held that "although Congress recognized . . . that work release may . . . be a valuable rehabilitative tool, it did not establish an absolute legal right to immediate work release,"[247] indicating, by analogy, that a challenge of a Georgia Department of Corrections decision denying work release would fail.

Presently, for an inmate to be granted work release, he must receive the approval of his institutional counselor, the warden or superintendent of his institution, and the Institution Classification Analyst for Work Release in the Department of Offender Rehabilitation.[248] The inmate must initiate the selection process by requesting an application form from his counselor; he may do so as the result of his own knowledge of the program or at the counselor's suggestion.[249] In completing the application, the inmate lists his first three preferences of work release units, or, if he has no preference, indicates that he will accept placement anywhere in the state. The counselor completes an evaluation of the inmate's fitness for work release[250] and recommends either that the inmate be placed or not be placed on work release. The application is then passed to the warden, who makes any appropriate comments and also recommends or refuses to recommend work release. If work release is recommended, the inmate's file and application form are forwarded to the Classification Analyst in Atlanta. If recommendation is denied, the inmate is so informed and is afforded the right of petitioning the Classification Analyst for a review of his case.[251]

One half of the applications received by the Classification Analyst bear negative recommendations from the warden and are forwarded on petition by the inmate.[252] Only in exceptionally rare circumstances will the Classification Analyst accept for work release an inmate who has received a negative recommendation from his warden.[253]

Of the one-half of the applications which receive positive recommendations, the Analyst rejects 44% because the inmates fail in some way to meet the eligibility requirements.[254] Thus 72% of the applications reviewed by the Analyst do not meet the eligibility criteria or bear negative recommendations from institution heads.

If an inmate's application receives the Analyst's approval,[255] the inmate is so notified and his name is placed on a work release waiting list. Rank on this list depends on the institutions indicated on the application form and the time remaining until the prisoner's first parole eligibility date for a first offender, or his release date for a recidivist.[256] Because of the disproportionate demand for such units as the Atlanta Advancement Center, some inmates are paroled or discharged before a place for which they would be eligible becomes available.[257]

Several defects in this selection system are evident. Having the Classification Analyst spend a significant amount of his time rubber-stamping negative recommendations is a waste of resources. Other states have alternative systems which prevent such waste.[258] The Classification Analyst's work load has increased greatly as the work release program has expanded since 1970,[259] resulting in less attention being given each application. Consequently, the percentage of work releasees failing to complete their programs because of rule violations, escape, rearrest, or job failure has increased from 19.5 in 1971 to 31.2 in 1974.[260]

Rather than having the counselor and the warden make individual recommendations, a committee should do the institutional screening. This committee should be composed of the inmate's counselor, his work or training supervisor, the warden or deputy warden of the institution, and perhaps the inmate himself.[261] In considering the inmate's fitness for work release, the committee should have before it not only personal reports of those who have worked with the inmate, but also the results of a recent and complete battery of personality tests to compare with tests administered at the Georgia Diagnostic and Classification Center when the prisoner was first incarcerated.[262] Committee rejection of the inmate's first application should be final.[263]

If the committee approves the inmate's application, it should be sent to the Inmate Classification Analyst whose primary function would be to evaluate the application in order to recommend the best program for the individual inmate (i.e., whether he should be placed in a county program, an institution-based program or a community center, and of the programs available in the category, which would be best in location, in size, and in available employment opportuni-

ties). After choosing two or three centers which fit the inmate's needs, the Classification Analyst would forward the file to the recommended receiving institutions for input or a decision. Presently the work release centers receive residents without any choice,[264] although other states with community work release programs give the centers an opportunity for input and in some cases give the community centers veto power.[265]

In California, for example, the inmate's file travels directly from the institution which approved work release to the community center nearest the inmate's home (in California, an inmate is both imprisoned and assigned to work release only in his native geographic region).[266] A center committee consisting of the center administrator, center manager, work furlough agent, and advisory committee members evaluates the application and either rejects it or gives a tentative acceptance, contingent upon favorable interviewing of the inmate at the center.[267]

In Illinois, the work release center supervisor receives the inmate's application and may reject it. If he wishes to consider the applicant further, however, he receives additional information on the inmate's institutional adjustment and progress and his amenability to work release, as well as personal recommendations from institution personnel.[268] He may again reject on the basis of these new credentials.[269]

Correction officials in Georgia oppose giving a voice in the selection process to the receiving center officials because they believe that these officials would refuse to accept inmates who would require extra effort on the part of the center staff.[270] They also argue that it would be procedurally cumbersome. If the applications were forwarded through the Inmate Classification Analyst, who would recommend the placement of each approved inmate, there would be centralized control of the process, and centers which refused to accept recommended candidates for spurious reasons would be easily discovered. The process would not be unduly cumbersome; as work release expands in Georgia, a new system will be demanded, and a procedure whereby an institutional committee, the Classification Analyst, and the work release center would all have input into inmate selection should be adopted.[271]

D. *Work Release Employment*

An important relationship exists between employment after an ex-offender's release and the likelihood of his being rearrested.[272] A former offender who is employed full time has an 87% chance of successful parole; that figure drops to 55% if he works part time, and to 27% if he works only sporadically.[273] Thus, one of the important functions of work release is to begin a pattern of employment for an inmate while he is still in custody with the hope that full time employment will continue when the individual is discharged. Ideally, this employment would be at the same job; where this is impossible,[274] however, the plan's goal is that the prisoner will have developed a skill which he can transport readily to his new location, and will have the personal resources to find and maintain a job on his own.

Toward this end, the work releasee must take most of the responsibility for finding employment.[275] In the community work release centers under the State Board of Corrections, inmates usually serve as kitchen workers for a short period before being allowed to leave the center. They then have a week-long orientation period before they are expected to begin seeking work.[276] During this period, the center employment counselor provides assistance in counseling the releasee concerning his abilities and aptitudes and suggesting possible employers.[277] He also coaches the releasees in interviewing techniques and in completing applications. Additional assistance may be provided by the Georgia State Employment Office[278] and the Georgia Department of Vocational Rehabilitation,[279] but in any case the releasee must make his own contacts with potential employers and must decide for himself whether or not to accept a job.[280] Most center residents find employment in one to two weeks.[281]

Few restrictions are placed on the types of employment available to work releasees. The Georgia work release legislation merely provides that union officials in employment areas affected must be consulted, work releasees may not displace civilian employees, a work releasee must be paid the equivalent of the amount paid a regular worker performing similar services, and the work releasee is not to be considered an agent of the state.[282] Under the authority granted it by Georgia Code § 77-307, the Department of Corrections has further stipulated that 1) the job must have reasonable pros-

pects of continuing at least six months beyond the resident's anticipated discharge date; 2) job requirements must be consistent with the resident's interests, aptitudes, experience and capabilities; 3) the job may not be the subject of a labor dispute and may not be likely to lead to criminal activity or center rule violations; 4) the employer must have insurance adequate to protect the employee's interest; 5) the job should not require more than two hours spent in transit daily; and 6) the employer must agree to confer with the center employment coordinator over difficulties in the resident's employment and to notify center staff if the resident must work overtime or is absent from work.[283]

One of the handicaps under which the employment counselor works is that frequently he has no way of knowing the resident's interests, aptitudes, experience and capabilities. Residents frequently misrepresent their skill levels and experience, and employment histories in the releasees' files are often grossly inadequate.[284] Generally, the education and skill levels are low; the average work releasee has completed the ninth grade but tests at the sixth grade level.[285] Seventy per cent of the inmates entering work release are unskilled, as compared to 80% for the general prison population. Over 18% of Georgia work releasees never learn a skill, but 51% use skills acquired in prison at work release jobs.[286]

It is distressing that so few work releasees use skills acquired in prison training programs; however, this problem is not unique to Georgia. A 1969 Michigan study found that of 120 parolees from Michigan institutions emphasizing trade training only 14% were using the training received within a year after discharge.[287] Similarly, a study of parolees from a special training unit in Alabama which utilized intensive placement procedures showed that twelve to eighteen months after placement in training-related jobs, only 16% of the participants remained in such jobs.[288]

The Michigan study did not identify any specific stage in the job-finding process at which the attrition rate was disproportionately high. It did find, however, that 63% of the parolees never actually used their training; 22% indicated interest in the training area but did not apply for jobs in the area on release; and 25% applied but were not hired. Twenty-three per cent were successful in obtaining jobs but left them, leaving 14% who found jobs and remained with them.[289]

The Michigan study did recommend that careful screening and extensive counseling be done at the diagnostic-reception center in order to place men in programs which suited their ability and interests to eliminate the placement of prisoners in training programs which they would never utilize.[290] The study recommended further that training, at least in its final stages, should be made as demanding as possible; some of the men who had left their employment did so because they were unable to adjust to the demand for rapid and sustained production. Furthermore, a great need for supportive counseling in the training program and during parole employment was expressed; the in-training counseling should develop realistic expectations, since early discouragement and failure may result from an inflated idea of available opportunities. Also suggested was simulation of the factory environment in prison industries, since most of the training provided led to industrial employment. Finally, the study recommended increased assistance from parole officers in finding training-related jobs.[291]

Several of these suggestions may be adapted to the work release program in Georgia. Provision should be made for aptitude and interest screening at the Georgia Diagnostic and Classification Center at Jackson when the prisoner is first incarcerated. On the basis of this testing, the inmate should be assigned to a prison facility which provides the training selected by the inmate. When the inmate applies for work release status, the Department of Corrections Inmate Classification Analyst should assign him to a program which will provide him an opportunity to use his training. The need for extensive counseling on work release has been discussed[292] but bears repeating in light of the Michigan study's emphasis of the need for support during the first stages of actual employment. The quality of training in the state prisons must be evaluated constantly and training provided should reflect shifts in the labor market. The employment counselor in each center should receive extensive information regarding the nature and quantity of prison training provided each new work releasee.

Currently job retention rates for work releasees in Georgia are not documented; an estimate is that at the Atlanta Advancement Center 65-70% of the residents remain at their work release jobs on discharge.[293] This rate is higher than rates for most of the other state work release programs[294] and is a probable result of the center's

excellent location. To improve the effectiveness of the work release program, funds should be provided for research on work release employment continuity and for a study of methods of coordinating an overall treatment program for each prisoner, including prison training, counseling, and post-release plans.

E. *Wage-Disbursement*

The Georgia Work Release Law provides that as a condition of participation in the program the inmate

> shall comply with all rules and regulations promulgated by the Board of Corrections relative to the handling, disbursement and holding in trust of all funds earned by said prisoner while under the jurisdiction of the Department of Offender Rehabilitation.[295]

Under Department rules, on his arrival at a work release center, the resident executes an agreement that he will surrender his earnings and allow his finances to be managed in accordance with the state work release law.[296] Residents' paychecks must be marked by their employers, "Deposit Only," and must be endorsed over to the center business office on receipt.[297] In accordance with Board of Corrections Regulations, the earnings are then disbursed as follows: 1) cost of the inmate's room and board must be paid to the state, or, if the inmate is housed in a county institution, to the county; 2) a reasonable sum is disbursed to the resident to cover his transportation costs and incidental expenses; 3) a reasonable amount is deposited to a savings account for use on release; 4) support is given the inmate's dependents.[298] The Department of Corrections has established the daily room and board fee at four dollars[299] and has decreed that each inmate must save at least five dollars of his check each week he is in the program.[300] Further, when the resident arrives at the center, a letter is sent to the Department of Family and Child Services to determine whether or not his dependents are receiving state aid. If such is the case, the inmate must contribute a stipulated amount to that department each week.[301] Finally, the inmate may make withdrawals for personal purchases, but all such withdrawals must be approved by the business office.[302] Where the check is inadequate to meet all the inmate's expenses, disbursements are made first to transportation and incidental costs,

then to the five dollar reserve account, followed by maintenance costs and, finally, support of dependents.[303]

A comparison of the priority of disbursement required under Georgia law and under the law of other states yields some variation. The most common pattern followed by other states is: 1) room and board; 2) transportation and incidental expenses; 3) support of dependents; 4) payment of fines and acknowledged debts; 5) savings toward release.[304] In Georgia transportation, incidentals, and reserve savings are given more weight than room and board, and there is no forced payment of fines or debts.[305]

Comparative data from some states are available; since absolute amounts vary greatly according to the size of the work release program and the number of years included in each study, the best way to compare the disbursements is to express each item as a percentage of the total expenditure. The following items, common to most of the states, are included in the comparison: Taxes,[306] (T), Maintenance (room and board), (M), Transportation, (Tr), Clothing and Incidentals, (C), Reserve Savings, (Sav), Dependents, (Dep), and Fines and Debts, (Fi). Totals may not equal 100% because of rounding off.

TABLE IV

	T	M	Tr	Cl	Sav	Dep	Fi
Ga.[307]	19	27	10	19	8	17	—
Ala.[308]	18	22	—	44	44	12	—
Fla.[309]	16	24	—	26	23	10	2
Kan.[310]	18	13	1	27	25	14	1
Ma.[311]	13	27	6	35	35	18	—
N. J.[312]	12	21	—	37	21	9	9
N. C.[313]	—	21	2	18	28	26	—
Ok.[314]	16	22	—	23	30	9	—
S. D.[315]	15	27	—	23	27	4	4
Vt.[316]	15	15	—	43	14	15	1
Wis.[317]	20	13	5	38	38	6	1

Analysis of this table shows that Georgia takes more than other states for transportation costs, for maintenance, for taxes, and for dependents, leaving less for clothing, incidentals, and savings. Since one of the purposes of work release is to give the inmate some financial stability when he is discharged, this disbursement pattern should be changed. The transportation increment changed from 4%

in 1971 to 16% in 1973, while savings decreased from 11% to 7% during the same period. The change in transportation expenses is a result of the trailer system. Many new work release places were created in areas where employment opportunities are a significant distance away. The effect this has on the inmate's ability to accumulate earnings reinforces the necessity for locating work release programs in urban areas, where public transportation is inexpensive. To spend 16% of earnings getting to and from work is to frustrate the intent of the program.

Georgia could alleviate this problem to some extent by requiring less from the inmate in support of his family. The state demands more proportionately than all but two of the states providing data and should consider allowing the inmate to save some of the money presently taken for his dependents.[318]

Under a recent amendment to the Department of Correction rules, an inmate may earn the right to manage his own money if he has been in the center three months, has a satisfactory work report, has a good conduct record, and has had training in money management and consumer education.[319] Although receiving little, if any, utilization at present,[320] this program should be strongly encouraged for those inmates who can earn and use it. The program provides for some supervision[321] but at the same time helps the inmate to develop the fiscal responsibility which will be an important factor in his success after discharge. Programs in consumer education which are offered in the centers are often available to the inmate's family[322] and ought to be stressed; the family's participation in the courses are of practical benefit and also reinforce the inmate in his attempt to manage his money wisely. Community-based centers, in particular, should exercise the new flexibility provided by this legislation. Gradual assumption of responsibility by the inmate is one of the goals of work release. This goal should include fiscal as well as personal responsibility. With counseling, the inmate should learn to make his own financial decisions and should have at least a short period of independent but supervised money management before exiting the program. Short-range goals for work release centers in Georgia should be to minimize transportation expenses[323] and dependent support, increase the amounts saved by inmates, and encourage responsible, independent money management.

F. *Exit From Work Release*

1. Successful Completion

Successful completion of the work release program is defined, statistically, as discharge or parole from the center into the community.[324] The majority of participants in the work release program in Georgia do complete participation in the program successfully, but the percentage has declined from 80.5 in fiscal year 1972 to 78.0 in 1973, and 68.8 in 1974.[325] Available percentages from other states suggest that a 78% success rate is average, and that the Georgia 1974 rate is lower than any of those reported.[326]

Failure to complete a work release program may result from failure to adjust to the program, from commission of a new crime, or from escape. In Georgia, commission of a new crime has been a negligible factor in program failures.[327] Eighty per cent of the failures have resulted from failure to adjust, and 20% from escapes.[328] Of the overall work release population, 5.8% terminate by escape.[329]

Factors important in determining the success or failure of work releasees are the selection process and the quantity and quality of the work releasee's participation in counseling and recreational programs.[330] Other important indicators are histories of drug or alcohol addiction and marital difficulties.[331] More careful screening is necessary to determine which work release applicants are afflicted with these three problems. These applicants should not be excluded from work release but should be directed into programs such as the Andromeda Drug Treatment Center, which would offer special treatment for the inmate as well as provide him employment. A special work release center might be established for alcoholic inmates; as a condition of selection for the center, the inmate would agree to participate in an Alcoholics Anonymous-type of group counseling, as well as individual therapy and any appropriate medical treatment. The center should require medical consultation for each resident. For work releasees with difficult marriages, intensified group and individual therapy should be required. A special center or subcenter[332] should be located in Atlanta in order to facilitate family counseling in group or individual units. Any inmate admitted into such a program should understand that his placement is conditional on full participation in drug, alcohol, or marriage counseling programs recommended for him and should recognize his need for such

counseling. The receiving institution should have enough information about the inmate to be assured of the inmate's willing participation and cooperation.

With a three-pronged selection process, additional counseling and recreation for all work releasees, and special assistance for those with specific and identified problems, a rise in the work release success rate can be achieved.

2. Failure to Adjust to Work Release

Of the 80% of work release failures who are removed for violation of center rules,[333] more than one-third are terminated for alcohol abuse; other violations causing transfer to an institution are poor attitude, unauthorized absence, and possession of contraband.[334] Center administrators have wide discretion in the enforcement of rules,[335] and great disparity among centers in treatment of rule violators results from such discretion.[336] Punishments less severe than termination are available; for example, the inmate may receive a verbal reprimand or be put on temporary probation, may be denied passes, recreation, or visitation, may be assigned extra housekeeping duties or be forced to change living quarters, or may forfeit good time allowance.[337] Also, bases for termination such as "poor attitude" may be interpreted in widely different ways, depending on the institution personnel; the rules do not define conduct required for a "good attitude." Therefore, in one institution, behavior which might bring only a warning from custodial personnel would, in another center, be sufficient grounds for termination.[338]

Wide variation also exists in the type of due process accorded every rule violator. Under the present Department of Offender Rehabilitation regulations, an inmate charged with an infraction may defend himself as follows:

> The Director shall form a disciplinary committee of at least three (3) staff members to review disciplinary reports and conduct hearings at which the resident will be present, questioned, and given an opportunity to answer the charges. This committee shall include at least one person from the correctional staff and one person from the treatment staff, with the witnessing staff member excluded from service on that committee. If necessary, further written or verbal information on

> the charge may be required of the witnessing staff member and/or the resident will be asked to present evidence or witnesses in his behalf.[339]

Unfortunately, these regulations are not followed in all institutions, and even where they are followed, a director may comply with the formalities having decided in advance that the inmate will be terminated.[340]

Two cases have recently held that there must be due process before an inmate on work release may be sent back to his original institution, although most authority in the area takes the opposite view.[341] In *Commonwealth v. Cristina*,[342] defendant was sentenced immediately to work release by a judge who three months later revoked his decision; the defendant was sent to jail with no hearing or opportunity to contest the decision. The court held that the revocation of defendant's work release privilege was analogous to revocation of parole and cited *Morrissey v. Brewer*[343] as requiring a hearing for the defendant in that situation. The same Supreme Court case and the same analogy were used in *People ex rel Cooper v. Smith*,[344] to require the same due process for the petitioner as would be required for a parolee:

> He should have had written charges presented to him, the opportunity for a preliminary hearing, a revocation hearing before the Parole Board with counsel, with evidence presented against him and the right to produce his own witnesses.[345]

The Georgia termination procedure, as outlined above, fails to meet due process standards; the inmate is not presented with written charges and has no representation by counsel. Due process standards will not be enforceable as long as each center director has the wide discretion presently accorded him.

To remedy this inequality of treatment, centralization is necessary. Each center director should be required to make a complete report of all disciplinary hearings to one Department of Offender Rehabilitation official. This official should be entitled to observe disciplinary hearings at all work release centers, to insure that at least minimal due process standards are met. Guidelines suggesting punishments appropriate for particular violations should be established; such guidelines would not be rigid because individual treat-

ment is to be encouraged and some flexibility is desirable; however, they would give some assurance that comparable behavior would be treated in at least a similar manner in different institutions.[346]

3. Escape

Under Georgia law, and the law of several other states, failure to remain within the extended limits of confinement or to return within the designated time to the work release center constitutes an escape from prison.[347] Where the issue has been raised by accused inmates, the majority of cases have held that failure to return to a work release center is such an escape.[348] In *Armstead v. United States*,[349] where defendant raised the question whether the halfway house in which he resided while participating in a work release program was a penal institution within the District of Columbia escape statute, the court stated:

> Appellant remained in the custody of the Department at all times and his place of limited confinement in a halfway house was but a substitute for a more structured environment of the minimum security facility from which he was transferred. He remained in a penal institution of the District of Columbia for purposes of the breach of prison statute and did escape therefrom.[350]

The opposite result was reached in *United States v. Person*,[351] in which a prisoner at a pre-release guidance center failed to return after he was given a five-hour pass. The court reasoned that the federal escape statute under which the prisoner was being tried was meant to prevent violent escapes, and that the defendant's situation was closer to that of a parole violator than an escapee.[352] Though similar reasoning has been used in several subsequent cases involving absences from work release centers, the general view presently appears to be that of *Armstead*.

At least one state has taken legislative action to provide for lesser penalties for absence from work release programs. In Maryland, willful failure to return to a work release center is punishable as a misdemeanor.[353] Such a statute allows flexibility in sentencing the absconder and provides for a full trial, without the mandatory felony punishment. Georgia should adopt such a law; the situation in a work release center is different from that in a prison; to treat

failure to return to a center as an escape from prison is unreasonable and unjust.

G. *Education and Training Release*

Although the legislation which authorizes work release also provides for training and educational release programs, few inmates are able to use these programs. Educational release is designed as a vehicle for inmates who have the ability to pursue a college or junior college degree. Georgia prisoners do not, for the most part, have sufficient education to begin a college curriculum. The average education level is ninth grade, but the mean score for Georgia inmates on the Wide Range Achievement Test is 6.4, the equivalent of sixth grade ability.[354] In 1973, 31% of the offender population tested at the fourth grade level or below, indicating functional illiteracy.[355] Demand for college level programs is low; priority within the institutions and work release centers is placed on remedial education for those who require it and on high school equivalency programs for those who can achieve at that level.[356]

If a well-qualified inmate chooses to attempt educational release, he must be accepted to a college or junior college, and, before he may begin the program, must demonstrate that he has independent funding. The state will not provide tuition or living expenses because the educational budget is spent on in-house training programs.[357] Therefore, the potential student must have funding from his own resources, his family, the Veterans' Administration, the Department of Vocational Rehabilitation or the educational institution itself in order to enroll. As federal funds have become scarce, Vocational Rehabilitation money has been directed primarily toward probationers and parolees; an educational releasee has to meet stringent mental, emotional or physical handicap requirements before Vocational Rehabilitation assistance would be forthcoming.[358] Grants from educational institutions to inmates are rare; family and Veterans' Administration funds will be the chief sources of support for Georgia educational releasees.

A further barrier to placement of the educational releasee is housing. Work release is favored over educational release by corrections officials because the work releasee contributes to his own support. An educational releasee is a drain on state resources; therefore,

officials are reluctant to have work release beds occupied by educational releasees. Furthermore, a difficulty with housing work and educational releasees together is that the disparity of interests and abilities between the groups creates tension within the center.[359]

Other states have solved the housing dilemma by establishing separate halfway houses for educational releasees on or near university campuses.[360] Often students serve as volunteer resident counselors and tutors, under correction department supervision. Center residents have responsibility for maintenance of the facility, and those who are able take part time jobs to help pay for their room and board. Recidivism rates in such programs have been remarkably low.[361] If demand for educational release increases in Georgia, a facility of this type should be opened near either the Georgia State or Atlanta University campuses. Where financial need is the only barrier to an inmate's participation in educational release, consideration should be given to a state loan or to a special scholarship program administered by the Department of Offender Rehabilitation.

Training release allows an inmate to attend vocational or technical institutions with the state or the Department of Labor absorbing the tuition. This program, too, is under-utilized. Part of the reason is that most training programs require one or two years, while work releasees are usually not placed until they have under six months to serve.[362] Because of this time conflict, training releasees should be selected separately; inmates with amenability to skill tranining should be identified at the Diagnostic Center and placed in institutions with good training facilities. Training could begin in the prison, where less sophisticated equipment and teaching resources would be necessary, and continue, when the inmate met training release standards, in a program at a vocational school. Another alternative is to have inmates go outside the prison under tighter security than under work release from the beginning of their sentences; security could be relaxed when the inmate qualified for work or training release, and the inmate could be transferred to a community center for an apprenticeship or a job. Experiments in this direction were begun in 1973, in Georgia under the Labor Department, with Manpower Development Training Act funds[363] but were only partially successful because of the difficulty

in coordinating programs and work release time requirements. Funding for the program expired in 1974.

An alternative program developed by the Manpower Administration is in use presently in Wisconsin, Arizona, and California and is scheduled for further adoption in Maryland and New York.[364] This program should be investigated for use as a work release and a training release vehicle in Georgia. It is called Mutual Agreement Programming (MAP) and is based on the theory that the inmate should have an opportunity to help determine what treatment program would best suit his needs, to contract to perform a stated treatment sequence (including work, education or training release), and to have in return a promise from corrections authorities that completion of treatment as contracted for will lead to a guaranteed parole date.[365] Each contract is to be negotiated by the inmate, a MAP project Coordinator, an institution representative, and a Parole Board representative.[366] Including Parole Board personnel in treatment planning in Georgia would be a novel step. Presently there is too little communication between work release authorities and Parole Board authorities; a work release center director may vouch firmly for a resident at a parole hearing and have his recommendation ignored because of the nature of the offense for which the releasee was incarcerated. Parole Board officials should be informed of the nature of treatment being given each inmate and of each potential parolee's progress in his treatment plan. Under MAP, the seriousness of the offense is considered when the contract is drafted; the inmate understands the reason for a lengthy sentence and the nature of the crime is a factor in the design of a treatment program. The parole officer under MAP can play a constructive role in developing proper treatment, rather than a destructive role in turning down parole on the basis of a prisoner's record, without regard to strong recommendations and apparent personal readiness. As the MAP program operates in states which use it now, inmates who have MAP contracts are paroled significantly in advance of those proceeding through the corrections system without the program.[367]

Training release for women does not exist in Georgia.[368] Female prisoners participate in rehabilitative treatment programs at a disproportionately low level nationwide.[369] Georgia is unusual in providing a community treatment center for women.[370] The location of the Georgia Rehabilitation Center for Women at Milledgeville pro-

vides an opportunity for training release which should be utilized. In California, female prisoners may receive training to become licensed practical nurses. The program has been based in a community center and serves fewer than 20 women.[371] Since the Georgia women's prison is on the grounds of the state mental health hospital, an ideal opportunity exists for the training of selected inmates as practical nurses and nurses' aides; the number of women it could serve would be limited only by the number of women it could qualify, and the availability of teachers. A woman who completes the training program successfully might choose to apply for work release in Atlanta to gain experience while in the community treatment environment. Such a program should be instituted in Georgia.

H. *Conclusion*

Since the mid-1960's, the use and implementation of work release programs has expanded greatly. As demand for more efficient and effective means of treating offenders increases, work release will surely play an important role in corrections at the federal, state and local levels. Expansion of the program in Georgia is a necessity as overcrowding in the state prisons worsens; for the many reasons expressed previously, expansion resources must be directed toward the establishment of urban, community-based centers. To invest more money in rural, institution-based programs would be gross misuse of public funds. A community-based center provides plentiful employment opportunities urgently necessary for a successful program, a non-prison atmosphere which fosters the development of independence and responsibility with supervision and support, and a meaningful opportunity for community and family interaction. None of these advantages is available in an institutional program; without them work release offers little or no rehabilitative potential.

To develop new urban centers Georgia will have to commit substantial financial resources and will need to develop a broad base of community support for the programs. A well-staffed community center is expensive; good physical facilities are important, and a competent staff is mandatory for a successful program. To convince the public that resources should be used for the release of prisoners rather than for better, stronger prisons is a formidable task. While the public is aware of the failure of the traditional corrections methods, resistance to programs such as community-based work release

is high.[372] One method of combating resistance is to educate the public. As studies of work release programs nationwide proliferate and gain validity because of the longevity of programs and improvement of research techniques, their results should be disseminated. The logic of work release becomes apparent when one considers that nearly all prisoners will ultimately be returned to free society; the risk of temporary release on a gradual basis and in a structured program is minimal in comparison to the risk of discharging an unrehabilitated prisoner "cold turkey."[373] As recidivism statistics become more available and reliable, they can be used to demonstrate the effectiveness of community-based work release programs.

Other methods of improving the public image of work release will become increasingly important. The news media should be heavily utilized to give an objective picture of the operation of work release, its philosophy, and its advantages and disadvantages. Favorable and unfavorable events should be reported objectively. Civic organizations should be encouraged to take an interest in work release programs. Work release "graduates" should be invited to speak at meetings; employers of work releasees should speak of their experiences and encourage others to hire releasees. Clubs should be invited to donate time at work release centers, either working with releasees on an individual basis or helping with the improvement of physical facilities. Civic sports leagues should invite participation from community center teams. Depending on the proposed location of the center, a major public relations campaign may be necessary to avoid massive neighborhood resistance.[374] Public support and involvement are vital components of a successful program.

As work release grows and strengthens in Georgia, consideration should be given to using it other than simply as a pre-release program. Many offenders need more supervision than probation programs offer, but are not such a threat that incarceration is necessary. For such persons, the judge should have the option of sentencing directly to a work release center near the offender's home, so that employment would not be interrupted. This should not become a replacement for probation, however.

The potential of work release as a rehabilitative tool in Georgia should not be underestimated. To realize its potential will demand a real commitment to planning, administration, physical resources,

active community support and continuing, careful research and evaluation. The possible rewards for both the offender and the public are great.

III. Restitution

The criminal process, by its very definition, has one major focus—that is on the offender of the law. One criminal act sets in motion a host of governmental and legal forces that maneuver to assure that the offender "pays back his debt to society." Yet, in the wake of the arrest, trial, detention and remaining criminal process, the party who suffers the actual "indebtedness" is the "forgotten" victim.[375] This apparent dichotomy has caused consternation, both in public and professional forums.

Consequently, several schemes have been developed to restore as nearly as possible the loss to the victim of crime. One is victim compensation, a type of public insurance for certain victims. Another is criminal or corrective restitution, or individual reparation from the offender to his victim.

A full overview of the criminal interaction with an eye toward long-term solutions, however, demands more than mere repayment to the victim, or for that matter, to society. Efforts toward curbing crime, reducing recidivism, and alleviating overcrowded prisons require that strong consideration be given to the perpetrator's adjustment to society. As if travelling full circle, the offender again becomes an integral part of the scene.

The goals of any victim compensation plan, therefore, should comprehend not only monetary restoration to the victim, but societal restoration of the offender. Restitution actually has a dual purpose in this sense, one in replacing the "forgotten" individual to his pre-victimization standing and the other in replacing the offender in, at least, his pre-criminalization posture, hopefully with some rehabilitative accomplishment. The intent of this section, then, is to suggest ways and means for Georgia to implement these twin goals through restitution and compensation.

A. *History*

The modern definition of a crime is simply stated as "an unlawful

act or omission in respect of which the state might use its coercive authority to redress some social harm."[376] Yet, the criminal law arose from under the canopy of tort law in early Anglo-Saxon history. In a system of tribes and familial association, a crime was an offense against the family. The price to be paid was the eruption of a blood-feud, banishment, or most frequently, a money payment exacted from the perpetrator or his clan.[377]

As Anglo-Saxon society evolved, a system of compensation developed consisting of the *wer*, *wite*, and *bot*.

> The *wer* or *wergild* was a money payment made to a family group if a member of that family were killed or in some other way injured. The *bot* was a general payment of compensation for injuries less than death. The *wite* was a public fine payable to a lord or king.[378]

So, "[t]here can be no doubt that the compensation scheme was fully developed by law at earliest times."[379]

The *wer* replaced the blood-feud entirely, and eventually the king demanded the *wer* as the price for breach of the "King's peace."[380] This, and the existence of certain "botless" crimes,[381] so heinous that no money could repay them, led to the development of a fine system, where the money went to the state and not the victim. The early schemes of compensation dissipated.

As defined by Blackstone, a crime was now an offense against the public.[382] Criminal law became an entity unto itself, diverting the direct link between the offender and the victim. Of course, the individual victim still had recourse at law through the initiation of a tort suit. But, "[p]ractically speaking, this resulted all too often in denial of any personal satisfaction to the victims."[383] As the legal system became more cumbersome and because of difficult enforcement of damage awards against destitute offenders, the efficacy of the tort suit diminished. Victims were, essentially, "forgotten."

Interest in the plight of the victim was renewed in the 19th century.[384] But it was not until the mid-twentieth century that serious consideration of other alternatives for victims and a return to a compensation-type plan began to grow. This effort was spearheaded by Margery Fry in England, who called for public compensation for victims in a 1957 *Observer* article,[385] and in her book, *Arms of the*

Law (1951). Soon serious consideration was accorded to various modes of victim compensation under a modern penal system.

Currently several states and nations have victim compensation in some form,[386] and federal plans have been proposed.[387] In addition, one state, Minnesota, has a formalized restitution plan, whereby the ancient system of *wer* is adapted to modern penal goals.[388] Several states have indicated their interests in formulation of similar programs.[389] Other states have permitted informal restitution in one manner or another, as well.[390] Criminologists and legal philosophers have expanded on the historical foundations of restitution and numerous programs have been proposed to meet the ever-expanding needs in the criminal area.[391]

B. *Restitution Versus Victim Compensation*

The concepts of restitution and victim compensation are frequently mingled in one hurried cliche about aid for the victim. Yet they are vastly different ideas with varying theoretical applications.[392]

Compensation is not unlike public insurance. The state or sovereign undertakes to indemnify the victimized individual. The focus is on the victim, for generally compensation is given whether or not the perpetrator is apprehended.[393] Most programs or proposals have specific guidelines limiting the eligible recipients by wealth, amount and type of injury, relation to the criminal, participation in the crime, and so on.[394] Victim compensation plans are almost universally restricted to physical injuries. The programs are generally administered by a state board of compensation, which hears claims and makes awards.[395]

The underlying policy for implementation of a compensation program is not, as some imply, a welfare theory. It is based on the concept that the state has failed in its duty to the citizen and breached the citizen's right to be secure.[396] The city and state have assumed responsibility for prevention of the crime, manned a police force, restricted self-defense, and are therefore negligent when an individual is victimized.[397]

Restitution, on the other hand, has an entirely different aim. Its common ground with victim compensation is that the criminal prey

is *sometimes* reimbursed, but only by the perpetrator of the crime. Clearly, under a restitution-only plan, all victims are not reimbursed, since a large percentage of the criminal perpetrators are never apprehended or found guilty.[398] Thus, only victims of apprehended criminals have recourse under restitution. The center of restitution plans, then, is the criminal. Restitution is frequently linked with rehabilitation of the offender, for it comprehends his involvement as an essential element.[399]

Restitution schemes proposed are generally limited in scope to certain types of offenses, i.e. property crimes.[400] They are administered by the courts, probation or parole boards, a special center, or prison authorities. Often, a contract with the victim is necessary, but the victim's status rarely is considered.[401]

The underlying policy of restitution, then, is that the offender has committed a wrongful act against an individual.[402] His realization of that wrong is essential in his profitable return to society, and by correcting his wrong he can "work his passage back to society."[403] Restitution is said to satiate the acknowledged public need for retribution.[404] As Margery Fry stated: "Compensation cannot undo the wrong, but it will often assuage the injury, and it has a real educative value for the offender."[405]

Victim compensation and restitution can be complementary. Indeed, one proposal[406] considers having offenders pay restitution into a general victim compensation fund, which in turn reimburses the victims. "We find it logical to suggest the re-establishment of victim compensation while continuing present progressive efforts toward reformation of the criminal."[407]

C. *Restitution as an Alternative*

1. Background

An effective restitution plan can be an excellent alternative to traditional incarceration. Yet, one should not overlook the important role restitution has already played in criminology. Discussing the formation of "new" restitution schemes is often deceptive, as restitution has been used through the years as an effective tool.

> It is often a method pursued outside the scope of the law. It is probable that the system of restitution and reparation is used

> much more frequently than official records indicate. One of the prevalent methods used by professional thieves when they are arrested is to suggest to the victim that the property will be restored if the victim refuses to prosecute. This results in release in a large proportion of cases, for most victims are more interested in regaining their stolen property than in "seeing justice done." Also many persons are protected against crime by insurance. The insurance company is interested primarily in restitution. . . . Similarly, there are thousands of cases of shoplifting, embezzlement, and automobile theft which are not reported to the police by the victim because restitution or reparation is made.[408]

Inside the courtroom, restitution has also been a viable alternative. In juvenile cases, it is common for the court to order the youth to perform some type of restitutionary or community service.[409] Nor is it an uncommon method in the general law; judges frequently place an offender on probation with the condition that he reimburse his victim.[410] This can be done under a general probation statute (i.e. conditions the judge sees fit), or under a specific one (i.e. that the probationer may be asked to make restitution),[411] or without statutory authority but in the usually unchallenged province of a magistrate.[412] As early as the 1920's, Georgia courts held that a restitutionary provision of a sentence was legal. In *Swanson v. State*[413] the trial court had imposed a sentence of one year in jail, to be foregone on payment of $400 in child support. The court based its holding on a 1913 act,[414] which provided that:

> [w]here it appears to the satisfaction of the court that the circumstances of the case and the public good does not demand or require the defendant's incarceration, said court may mold its sentence so as to allow the defendant to serve the same outside the confines . . . under the supervision of the court, and in such manner and on such conditions as it may see fit, ...[415]

These words were found to be very broad and the sentence was upheld. Other decisions upheld similar discretionary powers to order reparation.[416]

In a case involving a conviction for cheating and swindling, however, it was found that the words "and in addition to said fine making restitution to E. K. Lockridge" as part of the *sentence* im-

posed had no legal force.[417] The court reasoned that since this was part of the sentence, and not probation, it violated Article 1, Section 1, Paragraph 21 of the Georgia Constitution which says there shall be no imprisonment for debt.[418] Nevertheless, the case indicates the court's general disposition to use restitution as part of its judicial powers.

Restitution in practice has depended largely on the courts' implementation of it in probation.[419] In 1944, one author noted, "[A]lthough restitution is an ancient institution, its modern practice was stimulated to a large degree by the development of the suspended sentence and probation."[420]

Indeed, as noted, several state codes have left the door open for restitution in their probation services. In Georgia, for example, Ga. Code Ann. § 27-2711 (1972), provides that:

> The court shall determine the terms and conditions of probation and may provide that the probationer shall . . . (7) make reparation or restitution to any aggrieved person for the damage or loss caused by his offense in an amount to be determined by the court, provided, however, that no reparation or restitution to any aggrieved person for the damage or loss caused by his offense shall be made if the amount is in dispute unless the same has been adjudicated; . . . .[421]

Federal statutes contain a similar provision under suspension of sentence and probation,[422] which provides, in part, that:

> While on probation and among the conditions thereof, the defendant—
>
> May be required to pay a fine in one or several sums; and
>
> May be required to make restitution or reparation to the aggrieved parties for actual damages or loss caused by the offense for which conviction was had; . . . .

In addition, the Model Penal Code provides that:

> The Court, as a condition of its order [of suspension of imposition of sentence or probation] may require the defendant: . . . (h) to make restitution of the fruits of his crime or to make reparation, in an amount he can afford to pay, for the loss or damage caused thereby; . . . .[423]

Other sections of the Model Penal Code and studies on judicial standards have formulated similar proposals for informal incorporation into the judicial system.[424] While adding sanctions, each tends to further systemitize restitution.

Yet restitution is far from institutionalized. It has no formal structure with which to insure its usefulness as a corrective tool. "It should be part of a . . . program, not a 'hit and miss' method of collections unrelated to the broader possibilities."[425] In the past the effectiveness and frequency of restitution depended solely on the whims of individual judges. Probation officers became overseers of a collection system that often relied on a person acquiring funds in unsanctioned methods in order to meet a condition of restitution. But in modern corrective restitution, far more sanctions and inducements can be implemented to insure usefulness and control.

2. Policy of Restitution

(a) *General*

Before a comprehensive restitution program can be undertaken, the goals and parameters of evaluation must be clearly stated and understood. As noted, in a corrective setting, restitution is used as a rehabilitative tool, the aims of which should be: 1) reform of the criminal, 2) restitution to the victim, and 3) extension of the protection of the law, including the public's interest in deterrence of crime.[426]

The correctional goal should include making the criminal aware of the damage he has done, but should not cause him any unnecessary suffering.[427] Restitution has a strong punitive element, and should serve as a criminal deterrent, as well as satisfying reformative goals. As Margery Fry noted, restitution should have a real educative value.[428] It is "a form of psychological exercise, building the muscles of the self."[429] Ideally, the payment to the injured person involves greater inner punishment than payment to the state through incarceration. By maintaining the relationship with the victim, in a constructive manner, the offender's thoughts are being channeled into concentrating on the harm he has done in a real, and not abstract, sense.[430] The result, it is hoped, is a new therapy element in offender corrections.[431]

Another benefit of a restitution system is to relieve the state of the burden of supporting the offenders who participate, and hence, to give some relief in overcrowded prisons.[432] A restitution program can easily be molded to divert or remove offenders from the penal institution.[433]

The benefits attained from an effective restitution program were succinctly summarized in review of Minnesota's program. They were: 1) diversion from prison, 2) offender relation to the damages done, 3) an understandable sanction for the offender, 4) participation of the offender, and 5) positive response from the community.[434]

Of course, administrative and practical goals must be considered. The system designed must be efficient, effective, and clearly within the budgetary ranges of the state.

(b) *Particulars—Implementing a Plan*

Beyond both the broad theoretical goals and practical limitations, are the details and difficult questions to be resolved in refining a workable restitution plan. It is essential, for example, to identify which offenders will be eligible to participate in a restitution program; the crimes it will encompass; whether certain offenders will be excluded for psychological or past behavioral reasons; and whether the relationship with the victim will play a part. Furthermore, it must be determined whether the victim's participation is necessary, and if so, whether a contract must be formed, and what terms will be included. If not, recourse should be considered to avoid a victim veto. Determination of the amount of restitution is essential. Also, limits should be formed to insure that the offender's rights are not being infringed. A decision should be made on whether the offender will be incarcerated, semi-contained, or unrestricted. The desirability of involvement of case-worker aid should be ascertained. The development of jobs and whether restitution will be tied to a work-release or vocational program, or will be left to the offender, must be determined, as well as the possible effects of the offender's economic status.

Some central issues in restitution were discussed by Galaway and Hudson.[435] They asked: 1) Should restitution be complete, or partial and therefore symbolic? 2) Should it be voluntary or required? 3) What is the effect of victim-offender interaction? 4) Should restitu-

tion be the sole penalty? 5) What part should victim responsibility for the crime play?

All of these factors are paramount to the formation of a good program and must be discussed before specific proposals can be forwarded. Many of the answers to sensitive questions emanate from Minnesota's sole practical experience,[436] even though their total design may not be applicable to another state. The solutions to other questions are yet unknown.

The foremost consideration is which offenders shall be eligible for restitution schemes. Authors on the topic generally suggest that only offenders involved in property crimes be considered.[437] Although this is not a necessary condition, it is a more manageable one. Property offenders have traditionally been candidates for court-imposed restitution,[438] while it is rare indeed for such a mandate in a violent crime case. Precedent, therefore, favors it. Also, property offenses would set a certain, not unreasonable, limitation on eligibility. Finally, the loss suffered by the victim is more easily determinable and compensatory in a property offense, thus reducing the necessity of the criminal system refereeing damage assessments.

Minnesota limits its program to property offenders, with the additional restrictions that no weapon was involved in the crime, that the offender does not have a drug or alcoholic addiction or serious psychological problem, that there are no pending indictments, no history of assault, and no less than one year of the sentence remaining.[439]

Assuming only property offenders would be eligible for restitution, it may be useful to measure the need in Georgia in terms of the availability pool being considered.[440] A Georgia Department of Offender Rehabilitation computer compilation of crimes committed by incarcerated persons for the second quarter of 1974 gives a clearer indication.[441] In categories comprising property crimes, there were 6,652 felony offenses,[442] and 429 misdemeanor crimes,[443] or a total of 7,081 clear property offenses.[444] Since some individuals are incarcerated for more than one crime,[445] the number of offenders must be reduced accordingly to approximately 4,500. No doubt there are many offenders who have been convicted of the same offenses but not imprisoned. But, if one goal of restitution is to reduce the prison population through such a program, nonincarcerated persons are only of marginal interest.

Thus, in Georgia, without further screening, there is a current availability pool of some 4,500 persons for a restitution program limited to property offenders. If other standards were to be imposed, the number would be reduced, but the need and possible usage of a restitutory program is clear.

Certain persons who may fit the crime delineation may be excluded from a restitution program for other reasons. Minnesota's exclusion of addicts is an example. In addition, it has been suggested that persons should be excluded if they would not properly benefit from the desired corrective goals, as perhaps, the insane.[446] Those persons often receive special treatment, and many are incapable of earning money. Furthermore, while restitution may be rehabilitative for some, for the insane it may not result or aid in any transformation or return to normality.[447]

Next, consideration must be given to what amount will be repaid (full or partial restitution, actual or consequential losses) and who will determine that amount. One problem that arises in ascertaining the amount is that it may compel a criminal court in an essentially criminal proceeding to determine a primarily civil matter.

> The courts have been, and still are, rather handicapped in making restitution orders because the court must be satisfied that the relevant facts have been sufficiently established and the pressure of criminal business leaves little time for a complicated inquiry in a disputed case, so an order tends to be made only in the very clear case where there is no dispute at all about the goods.[448]

Here, too, past history of informal restitution provides precedents. The amount to be paid has been within the discretion of the court, but courts traditionally restricted the reward to the actual damages for which the defendant was convicted.[449] Numerous cases support this proposition.[450] For example, the court noted in *State v. Barnet*:[451]

> But if we take this definition and apply it to restitution conditions in probation cases it is apparent that the restitution must be for loss sustained as a direct consequence of the commission of the particular crime for which the respondent stands convicted. . . .[452]

If the amount of restitution is not so limited, problems may arise. The offender's ability to take care of family needs may be impeded.[453] Furthermore, over-restitution can work directly counter to desired correctional goals.[454] In *People v. Miller*, [455] where the defendant was convicted of grand theft after non-performance on a paid contract, he was ordered to pay restitution on a host of other contracts as well. While the California court upheld this order, a commentator noted that it was

> . . . ironic, for the extremely tenuous connection between the claims upon which the restitution order was based and the criminal conduct for which Miller had been convicted clearly frustrated any rehabilitative purpose.[456]

The Minnesota program calls for "complete restitution," that is, placing the victim in his former position. Minnesota considers the total dollar loss, including loss, damage, the cost of repair or replacement, plus compensation for time spent by the victim.[457] This would by ordinary standards exceed actual loss, since time with investigators, in the courtroom and in negotiating a restitution contract are all considered. While the program contemplates out-of-pocket losses, restitution will not be attempted for "unmeasurable" losses such as pain and suffering.[458]

A corollary question is whether the restitution should ever be merely partial, and therefore symbolic.[459] In considering the rehabilitative effects, two views can be taken. If the goal is to channel thinking into the harm caused, partial restitution would seem to be sufficient. On the other hand, in giving an opportunity to undo the wrong done, "the more complete the restitution, the more complete the sense of accomplishment the offender gains."[460] In Minnesota full restitution is urged, except in special cases involving unusual hardship.[461]

In determining the restitutory amount, the judge will usually be the final arbiter. His decision can be based on evidence presented at the trial, on other information adduced such as a probationary report or pre-sentence hearing, or on information that results from separate proceedings.[462] This, of course, will impose a new burden on judges.

Considerable attention has been directed to the fact that an essentially civil judgment is emanating from the criminal proceed-

ings.[463] A restitutory sentence could be based solely on damages awarded in civil litigation.[464] This, however, may be counterproductive from both the correctional and the victim's viewpoints. Victims infrequently press their tort claims,[465] and if they do, it can be a costly and protracted procedure. One of the benefits of restitution is to aid the victim and to "obviate the expense and trouble of a civil action."[466] The amount awarded in a tort suit may be beyond the scope of practical restitution, untimely, and inappropriate to the individual offender's situation. Another method would be to allow the victim to press his claim in the criminal proceeding, thereby combining civil and criminal actions.[467] The benefit of procedural simplification gained by this method is clearly to the victim.[468] Besides saving time and expense, this precludes the difficulty of two different conclusions arising from a civil and a criminal case. But problems occur in that the rights of the defendant may be abridged by undue prejudice in a combined adjudication. Burdens of proof differ in civil and criminal matters,[469] the restitution limitation to certain crimes and individuals would become more onerous, and there is a serious possibility of abuse of the criminal process.[470]

Two other plans contemplate an independent restitution hearing. One involves a pre-sentence, post-trial hearing where the restitution is decided.[471] The other consists of a separate arbitration proceeding outside of the criminal process, combining the concepts of labor arbitration and plea-bargaining, at which the restitution plan could be settled.[472]

In lieu of these measures, it has been suggested that since restitution is currently within the discretion of the court in many jurisdictions, its use should be the subject of judicial consideration in every criminal proceeding.[473] It has even been urged that it be a mandatory subject of judicial review.

> In every criminal case involving property loss or damage to a victim, the court and the prosecution should be statutorily required to consider the possibility of a compensation and restitution order . . . . The criminal court should pursue a more vigorous inquiry into the loss or damage suffered by the victim.[474]

Such a statutory mandate is a possibility for a strong restitution program, although new legislation would be necessary.

Finally, the practice in Minnesota has followed none of these paths. The restitution order is essentially an administrative burden. Staff members for the Department of Corrections review all convicted persons for eligibility. If that individual desires to participate in the restitution alternative, the matter is pursued through court and parole proceedings.[475]

The best approaches for obtaining a restitution order seem to be working through the judicial powers—discretion, requested review (in lieu of mandatory), special hearing,—following the administrative path of Minnesota, or devising a separate restitution hearing. Combined civil-criminal hearings pose many difficulties, and it would seem wise to avoid treating sensitive constitutional areas.

The other essential party in a restitution equation is the receiver, i.e. the victim.[476] One of the key features of restitution is maintaining the criminal-victim relationship. Correctional restitution "does not allow the offender to terminate his relationship with the victim, but rather forces his relationship to be maintained until the victim's original position is restored."[477] This requires, to a certain extent, communication and cooperation from the victim to maximize the rehabilitative goal.[478] Thus, it is almost implicit that the person to receive the restitution should be the one who has suffered the actual damage, and not someone remotely involved in the criminal action.[479] But if the victim *must* be involved in the restitutionary program, the unwilling victim would then have a "veto" over the offender's participation.[480] In such cases, a "symbolic" victim, such as a community agency, may be used.

"Victimology," a relatively new concept formulated by von Hentig,[481] cannot be overlooked in balancing this equation. The studies[482] have theorized that victims, either consciously or unconsciously, contribute to the crime against themselves. Six levels of victim responsibility, which may preclude recovery or compensation, have been identified. First, is invitation, such as entry into a dangerous situation; second is facilitation, such as leaving keys in ignition; third is provocation, such as verbal threats; fourth is perpetration or initiation; fifth is cooperation or open consent; and sixth is instigation or active encouragement.[483]

An implication of victimology is that the victim should bear partial responsibility for the crime. In reference to restitution, three approaches have been suggested. One is a concept not unlike comparative negligence where the compensatory amount is reduced or erased depending on the degree of victim precipitation, which could be determined at a special restitution hearing.[484] Another view is that each person is individually accountable for his actions. Restitution would still be required even if there was victim precipitation because the offender could have chosen an alternative mode of response.[485] The final view is that, as in contributory negligence, recovery should be denied altogether.[486]

Of particular concern in violent crimes and consequently in victim compensation plans which generally deal with them, is the relationship of the victim to the perpetrator. Not infrequently, the victim is a relative or friend. In a victim compensation system where the state supplies the fund, this may be of less importance. But in restitution, the offender repaying a relative may create immense friction and resentment, thus destroying the usefulness of the plan. It seems logical that for any adult offender, restitution to an immediate relative would only be counter-productive, and therefore should be excluded.

Contract with the victim is viewed as part of the reformative plan.[487] Eglash would go beyond mere contract communication, having the offender instead reimburse the victim with meaningful and offense-related services.[488]

In the Minnesota program, continuing contacts with the victim are an integral part of the offender's return to the community. In the first instance, a general contract is negotiated with the victim.

> Wherever feasible, the program directly encourages personal involvement between the victim and the offender in the negotiation of a restitution contract as well as continuing involvement in the completion.[489]

All parties must agree to the restitution contract, which in addition to the amount and timing of payment, includes the obligation of the victim to cooperate. Payments from the offender should be made directly to the victim. However, writing in 1972, Galaway and Hudson, both involved with the Minnesota scheme, admitted that reliable information on the effects of personalizing restitution are still

unknown.[490] The effect on the victim and on the offender, as well as the effects of reparation by personal service, or by group restitution, are questions yet to be resolved.

Another issue is whether restitution should be the sole penalty, or used in combination with other sanctions. Karl Menninger suggests that restitution alone is sufficient.[491] The Council of Judges Model Sentencing Act would allow restitution as the sole penalty for non-dangerous offenders.[492] Schafer, on the other hand, insists that restitution can only be used as an accessory aid, and not as a substitute for punishment. Otherwise, he suggests, it might lead to the buying off of punishment by wealthy criminals, reduce the deterrent sanction against wrong-doing and possibly result in the reverse effect from that desired.[493] Other restitution programs contemplate incarceration with compensation made from prison earnings.[494] Yet, if a sentence was imposed in addition to restitution, the offender might easily feel resentful that he was, in essence, "paying" twice. Since restitution plans generally do not deal with the dangerous offender, some of the need for imprisonment is obliterated. Minnesota takes only convicted offenders who have been sentenced and served some time in jail. They are then placed on supervised, "halfway house," parole. Prison is still a threat, since the parole could be revoked.

It seems overly burdensome to subject an offender to two forms of punishment. Since, however, there may be exceptional cases and since deterrence should not be reduced, it is logical to retain flexibility for a two-fold plan. In absence of such a plan or of a specially devised plan, i.e. repayment from prison wages, restitution alone, especially under halfway house semi-incarceration, is sufficient.

Similarly, it is questionable whether participation in a restitution program should be voluntary or mandatory for the offender. Several writers view voluntariness as being more constructive[495] in effecting rehabilitation. The Canadian corrections bureau has pointed out that restitution is neither voluntary nor involuntary since "both elements are usually present."[496] The system cannot be separated from the coercion implied. Indeed, when restitution is bound with probation or parole, the inducements are so overwhelming that the conditions may be accepted, even if unreasonable or burdensome. In this sense, as with probation generally, care must be taken not to exceed constitutional limits.[497]

However, it may be that the offender's willingness to make restitution dictates his view of the justness of the scheme.[498] Of course, other factors may also weigh in the justness, i.e. amount of restitution, manner of payment, and one's self-appraisal of his guilt or innocence. Studies have been conducted to determine the psychological basis of restitution.[499] A study by Schafer indicated a positive attitude in willingness to make restitution among Florida offenders.[500] Minnesota does limit its program to offenders willing to participate.

While conclusions are yet to be determined, and if in fact involuntary restitution may have the same beneficial effects as voluntary, initially restitution should be limited to those willing to participate, especially in view of the vast number of offenders who potentially would be eligible.[501]

Administrative organization of a restitution program depends on the type of plan developed. In informal restitution, the courts generally maintain jurisdiction over the individual and probation departments collect the funds.[502] Minnesota has a separate restitution division under the state Department of Corrections, which operates its own center and staff, and derives its participants through special parole. Although the details might not correlate to an adopted program, such an independent division of the corrections department seems preferable to maintain an efficient and accountable system.

In summary, the policy alternatives in systematization of a new restitution scheme are many. A new plan should combine the best features of the above areas of concern, such as:

- The goal of restitution should be to rehabilitate the criminal and compensate the victim.

- Property offenders should be eligible to participate. Persons with certain backgrounds should be excluded.

- The amount of restitution should be no more than actual damages, and barring unusual circumstances, no less. The damages should go only to a victim who suffered loss as a result of the crime, or in his stead, a symbolic organization.

- The decision to use restitution can be left to the judge in a separate post-conviction action, to an administrative agency, or to

an independent arbitrator. Criminal and civil actions should not be combined.

- The offender and his victim should maintain contact and contract.

- Victims who are in the immediate family should be excluded. Victims who have precipitated the crime should have their rewards decreased.

- Restitution should be the sole penalty except in special cases or programs, but may include partial confinement.

- Offender participation should be voluntary.

- The administration of the program should be in an independent division.

Of course, the specifics will vary depending on the particular plan adopted. However, any viable restitution plan must thoughtfully evaluate each of these policy areas, while providing flexibility in administration and implementation.

3. The Minnesota Plan

Minnesota currently has the only program that focuses on restitution as a formal sanction. Other states have used restitution informally,[503] or incorporated it into probation,[504] or other correctional systems. Because of its unique position, an examination of the Minnesota program is useful in discussing operable proposals.[505]

Funded jointly by the Minnesota Governor's Commission on Crime Prevention and Control utilizing Law Enforcement Assistance Administration monies, and the Minnesota Department of Corrections, the Minnesota Restitution Center first opened its doors in September, 1972. The total costs during the first year, including initial implementation, were $100,118.50. The costs were expected to decrease substantially in the second and subsequent years. The initial grant was for three years and the Minnesota Department of Corrections is expected to continue the program under its own funds.[506]

The basic concept in the Minnesota program is the incorporation of a community-based residential facility with the features of restitution. Around this concept the body of the program developed. The

major vehicle of the Center's plan is the parole system, under which parole may be granted at any time.[507] The selection of participants is done by the Restitution Center staff which reviews all admissions to the penitentiary. If the individual offender meets the basic criteria, his name is forwarded to a screening committee. Some persons are also referred by the casework staffs of the women's prison and the reformatory for men. All are then reviewed by the committee, which consists of current participants, staff, and community advisory board representatives. Since many more persons are eligible than can be accepted, priority is given to those of whom it is thought will benefit the most. The basic criteria, as noted above,[508] are:

1. The candidate is a property offender convicted in one of seven metropolitan areas (this is to facilitate relations with the victim).

2. There must be no less than a year from entry into Center to end of sentence (that is, a sentence of at least 16 months).

3. Offender's earning power must be such as to enable him to complete restitution in time of sentence left.

4. No one is considered if a gun, knife or weapon was used during the commission of the crime.

5. There can be no pending indictments that would affect participation.

6. If a long history of chemical dependency exists, the offender will have to actively demonstrate changes.

7. If there is a history of severe psychiatric problems such that treatment is beyond the resources of the Center, the individual will not be considered.

8. A background of assaultive offenses will exclude a candidate, unless there is a 5 year period of free world living.

9. The program will exclude "the middle-class intelligent individual who has adequate social skills and resources and an absence of significant behavioral problems . . ." but has instead chosen to earn his living outside the law.

10. Candidates must be willing to participate.[509]

Those persons who are selected by the committee are then presented to the parole authority. All restitution participants are pa-

roled to the Center by the Corrections agency. Release to the Center is usually within four months of service in the institution. The staff of the Center serve as parole agents and periodic progress reports are sent to the Corrections agency. Failure to make restitution as provided or to meet Center rules are gounds for revocation of the parole, and return to prison.

The offender must formulate a contract for restitution with his victim or symbolic victim (such as a community agency). Repayments are scheduled over several months, but must be completed before parole expiration. The average contract has been for about $140, although the median is $303 due to some unusually high restitution contracts. A planning report is also drawn up with the Center staff, which includes identified problem areas and projected response. The contract and report both go to the parole authority before release to the Center is approved.

During the first year in Minnesota, 33 persons were randomly selected for admission. Two declined to participate. Thirty-one contracts were designed, but three were rejected by the Corrections division. The remaining 29 persons were granted parole to the Restitution Center.

Once in the Center, which is similar to a halfway house, the offender must find employment, make restitution under his contract and comply with house and program rules. Employability is one of the desirable aspects of a prospective participant and training programs not part of employment are generally excluded.

Three levels of rules are in force at the Center—"cardinal," house, and administrative. Only violation of a "cardinal" rule is the cause for an immediate report recommending parole revocation. They include: no drugs, violence, or thefts at the Center, and no absences for beyond 48 hours without contact. The other rules are basically housekeeping, and the penalties not so stringent.

Minnesota has broken down the restitution program into three distinct phases, each increasing responsibility demanded from the individual, and designed to facilitate behavioral progress.

The first phase is orientation and is accomplished in residence at the Center. In this four week phase, a climate of openness and cooperation is to be established. In the third week, a resident may

qualify for an overnight leave, and possibly a weekend on the fourth week. Otherwise, residents are free to leave to seek employment in the day and to visit with friends or family in the evening. The offender must spend two hours daily in counseling and interaction with others. Before the end of this first phase, the offender must be employed and should have begun restitution. Each resident is assigned to a staff person particularly responsible for him, thereby enhancing staff-resident involvement. This "key person" will evaluate the resident's report for future plans, completed after phase one. A special phase, correlating to phase one, has been devised for persons with behavioral problems.

Phase two extends responsibilities. This two month period is intended to provide for increased participation in meetings, planning abilities, family and community involvement. During this period the resident must make regular restitution, room and board payments (which are $12.50 a week), payments to welfare agencies, and maintain loan fund payments. The individual is allowed weekends as earned privileges, granted by meeting attendance.

The final phase seeks to achieve full integration into the community, and the resident consequently moves out of the Center. The offender's status is similar to that of one on regular parole. The individual must attend weekly meetings for several months as well.

Finally, the phases are terminated by the granting of a discharge from parole by the Minnesota Corrections Authority. The Center staff can make recommendations as to parole discharge or continuance. At the end of the first year, 19 of the original 28 remained in the program. Four were returned to prison, one was a fugitive, two had successfully completed the program and were released, and two were killed in accidents unrelated to the program.[510]

The staff of eleven is a broad social mixture, from professionals to ex-offenders. Program participants are encouraged to obtain employment at the Restitution Center after discharge. In addition to staff, the services of several local community agencies are utilized.

The Center encourages active participation and communication between staff and residents. This goal is partially achieved by biweekly meetings at which attendance is mandatory. A group treat-

ment program, following the transactional analysis line, is used. The sessions deal with day to day problems of the Center, evaluate each resident's progress and aid in self-evaluation and adjustment.

A Community Advisory board serves the center by advising them, providing an awareness of community concerns, and serving as its community advocate.

A re-evaluation process is continuous at the Center, evaluating success, parole performance, comparison with other offenders, cost accountability, as well as self-concept attitudinal testing of offenders and victims.

The Minnesota Center summarizes the beneficial elements of its program as:[511]

1. Diversion of offenders from prison to a community-based program.

2. A logical and damage-related restitution sanction.

3. Allows the offender on-going successes and goal achievement.

4. Active involvement of the offender in undoing the wrong done, enhancing self-esteem, and creating responsibility.

5. Positive community response to the offender.[512]

Three authors intimate with the Minnesota plan concluded about its primary features:

> In summary, the restitution process (to be) developed by the Minnesota Department of Corrections will involve careful formulation of an explicit individualized restitution plan involving the offender, whenever possible the victim, and an agent of the criminal justice system.[513]

In implementing these aims, Minnesota has successfully combined community-based residence and correctional restitution, using the parole system as its vehicle. In undertaking a new restitution program, the community aspect, goals, halfway house residence, open communication, planning, staff and phase structure are solid ideas to be emulated and followed, if possible. Perhaps one of the chief lessons to be learned from Minnesota is its open approach.

> The program structure of the Center has been one of continuous change. It has been extremely flexible, and has tried to

> meet the individual needs of the residents. The program of the Center has been one which accomplished its objectives with the least amount of controls necessary . . .[514]

The philosophies, structure and practical applications of restitution begun in Minnesota should receive serious consideration for adaption into a new Restitution plan.

4. Proposals for Implementing a Restitution Plan in Georgia

No proposal can be iron-clad. As Minnesota noted, flexibility is one of its chief assets. Yet the basic groundwork and design for implementation must be firmly laid. Following are several alternative proposals for a restitution program in Georgia, some of which can be undertaken jointly. With each is a discussion of the merits and flaws, knowns and unknowns, especially as applied in Georgia.

The programs discussed are: 1) Parole, 2) Probation, 3) Sentencing, 4) Modified Sentences, 5) Board-Ordered Restitution, 6) Work Release, 7) Prison Wages, 8) Fine to Victim, 9) Reparation and Creative Restitution, 10) Combined Restitution-Victims' Compensation.

A. Parole

The parole system is the program employed in Minnesota, whereby convicted offenders are released on parole to the Restitution Center. In Minnesota, this is done under a lenient parole statute that gives the Department of Corrections authority to grant parole at any time, when it is in the best interests of the state or the offender.[515] The individual is usually released to the center within four months of his original incarceration, and under a remaining sentence of not less than one year.

The main advantage of a parole scheme for restitution is that it assures that the persons being sent to the community center are truly being diverted from prison. In discussing the Minnesota plan, it was noted:

> Selecting candidates for the restitution center from a pool of recent admissions to the prisons offers several distinct advantages. In this way, the community-based center can be tested as a clear alternative to prison, thus avoiding what we see as the common occurence of community-based centers function-

> ing as a mode of incarceration for offenders who, in the absence of such programs, would probably be placed on probation.[516]

Moreover, it is felt that this method enhances the extent to which offenders would be likely to engage in the program, while allowing them sufficient time to make an unhurried decision concerning their participation.[517] The parole system is also advantageous because it has an easily contained group and a strong sanction, that is revocation of parole, and hence, imprisonment, for failure to meet restitutionary requirements. On the other hand, persons to be placed on parole are, perhaps, more easily swayed into accepting the restitution conditions to obtain relief from imprisonment. "Thus, the possibility exists that the offender may feel coerced into a restitution plan with which he does not totally agree."[518]

In Georgia, the power of parole is quite different from that in Minnesota. Parole is administered by the State Board of Pardons and Paroles, under Ga. Code Ann. § 77-501 *et seq.* (1973). As noted previously,[519] Ga. Code Ann. § 77-517 (1973) provides that the board may, under conditions of parole, prescribe that the parolee make restitution or reparation for his crime. Thus, the parole board in Georgia already has the statutory authority to order restitution. However, incorporating this ability into a systematic restitution program is hampered by other parole provisions. Under the current status, the ability to order restitution is virtually ignored.[520]

A flexible parole system, such as that in Minnesota, is not evident in Georgia. Indeed, numerous restrictions are placed on the granting of parole. For example, Ga. Code Ann. § 77-525 (1973) entitled "Power of board to adopt rules and regulation," states in part:

> Provided, however, that such an inmate serving a misdemeanor sentence . . . shall only be eligible for consideration for parole after the expiration of six months of his sentence or sentences, whichever is greater: and Provided, further, that such an inmate serving a felony sentence or felony sentences shall only be eligible for consideration for parole after the expiration of nine months of his sentence, or one-third of the time of such sentences, whichever is greater.

The statute continues to provide that the board shall adopt rules relating to other forms of clemency, including "removal of disabilities imposed by law."[521]

Ga. Code Ann. § 77-516.1 (1973), supplies a procedure to be followed when the board considers cases in which the prisoner has failed to serve at least one-third of his sentence. It provides that: "Notwithstanding any other provisions of law to the contrary" if the board is to consider such case, it must notify in writing the sentencing judge and district attorney, who may appear or make a statement expressing their views as to granting of parole. Practically, however, the Board of Pardons and Paroles *rarely* considers a case when the offender has served less than one-third of his sentence.[522]

Although Georgia's parole system is not so inflexible as to make a restitution program impossible, its feasibility is diminished. Since an offender is eligible for parole after one-third of his sentence is complete, further infliction of another punishment at that point is a strong action. The individual *may* be released on his own. Restitution might create reluctance and resentment, with the basic incentive removed. "Parolees who have served part of their sentence in confinement are very resistent to paying restitution."[523] In essence, then, under Georgia's current probation system an offender would be receiving dual punishment. As discussed earlier,[524] except in unusual circumstances, restitution should be used as the sole punishment. Also, since the possible candidate would be incarcerated the same length (minimum) as any other offender, the goal of reducing the inmate population would be defeated. Because the minimum sentence served would almost necessarily be six months, the basic rehabilitative aims would have been thwarted by previous service of a prison sentence. However, it should be noted that in Minnesota it is possible for an offender to have served four months of a sixteen month sentence, probably the bare minimum, and then join the Restitution Center. In comparison, Georgia's one-third might not be unreasonable in a case of a short sentence. Nevertheless, the board today, although authorized, does not use the restitution provision.

The general victim receives no real advantage under a parole system since only a small number would be compensated, based not so much on their loss as on the personal qualities of the criminal. This, however, is a common flaw of most corrective restitution programs.

Finally, dependency on the parole board could be self-defeating. The parole board is an individual entity, subject to its own aims and

political persuasions, and not necessarily desirous of reaching the same ends as a restitution program. Wherever possible, such dependency should be avoided.

The current Georgia parole system would be ineffective as a restitution tool. However, changes in the system could effectively modify it. For example, new legislation could be patterned after Minnesota's system, allowing for flexible parole as is seen fit. Or, an express modification could be made allowing for release of prisoners to a Restitution Center before one-third of the sentence has been served, when it is in the best interests of the prisoner and community. Since the authority, although unused, currently *exists* to order restitution, under certain provisions this might be incorporated into an adopted program. The same defeating aspects, such as dual punishment, might still exist, unless restrictive guidelines are drawn. But, for example, if the ability to parole before one-third were ever to be exercised, inclusion in a restitution program may become reasonable. Otherwise, other alternatives seem preferable.

B. Probation

Probation has been the most widely used scheme for informal restitution, as discussed above.[525] Georgia already has the statutory authority to provide restitution on terms of probation,[526] and this authority has been upheld in several cases.[527] Thus, Georgia would have no legal problems in instituting a restitution program along such lines.[528] But in instituting a formal program, several distinct disadvantages may arise, and the desirability of such a program in meeting the goals outlined is questionable.

A restitution program based on probation is too easily twisted to convert a prison diversion plan into an additional penalty for one who, in its absence, would be placed solely on probation. There is no diversion, and hence an increase rather than decrease in state-controlled offenders. Moreover, it is questionable under the current law in Georgia whether an individual can be remitted to a halfway house on terms of probation, although condition (6) of GA. CODE ANN. § 27-2711 (1974) is that the probationer "remain within a specified location." Given the vast discretion afforded judges in their probation authority, the assignment to a house would probably not be abusive. However, the court retains jurisdiction over the

probationer,[529] and he is not placed under the authority of the Board of Corrections, so there may be a conflict in authority for the probationer sent to a halfway house or restitution center. Although a judge's order could satisfy the problem, a discrepancy still exists.

If the probationer is required to make restitution, but is not sent to a Center, the correctional value of restitution might be entirely lost. The wealthy individual would have a clear advantage over the indigent person.[530] The wealthy person would be able to "buy his justice," while the poorer person would suffer his.[531] Since, in such a situation, there is no control over the manner of earnings, the debt may also be satisfied in undesirable ways. These inequities would destroy the goal of reformation.

An additional problem with probationary restitution is the lack of control over the persons chosen for the program. This would be an entirely judge-made decision, with no input or subsequent control by the corrections department.

The advantage of probation-ordered restitution is the ease with which it may be implemented.[532] From the victim's point of view, it is also desirable since use of probation *not* linked to a halfway house would allow a wider use of restitution. But the exercise of probation is basically defeating to any comprehensive restitution design.

The development of a formal program for restitution need not eliminate the informal methods for restitution already available. In fact, the best solution would involve the continuance of court-ordered probationary restitution, complemented by a formal program for certain selected offenders committed to prison, as the two are not mutually exclusive. But in a formalized program, probation would not be the preferred method of implementation.

C. Sentencing

An alternative means of restitution would be simply sentencing the offender to make restitution or to participate in an established program. The most serious problem with mere sentencing is its constitutionality. In *Ray v. State*,[533] noted above, a Georgia court found that a sentence imposing a condition of restitution is invalid under the Georgia Constitution, Article I, Section I, Para. XXI, which provides that there shall be no imprisonment for debt (this is not

true where the condition is *part* of probation). It was held in *Ray* that the part of the sentence so stated was invalid.

Under current Georgia law, a prison sentence may be imposed for a determinate number of years.[534] All felonies, except for certain sex crimes, crimes of violence, railroad interference crimes, and perjury, are punished by imprisonment or labor,[535] unless the judge or jury reduces the punishment to a misdemeanor.[536] For a misdemeanor, the courts have the authority to impose a fine and/or confinement "in a county correctional institution," or alternatively, confinement in the State penitentiary or other institutions "as the Director of Corrections may direct."[537] A misdemeanor of a high and aggravated nature is punishable by a fine and/or confinement in a county correctional institution.[538]

The court's sentencing authority, then, is limited to imposing a fine, or placing the party under the jurisdiction of the State Board of Corrections, which under another statute has the authority to order confinement or institutionalization as it sees fit.[539]

A possibility, then, would be to amend these laws to allow the courts to order restitution or sentencing to a Restitution Center. Although expedient, there may also be several disadvantages to this. For example, the convict's constitutional rights may be infringed by an "unusual" or vague punishment, the restitutionary division would have no control over participants, and it is perhaps wise to have some degree of limitation on the court's discretion. The possibility of abuse in sentencing one who otherwise might receive probation is also an obstacle.

A court-ordered restitution sentence, however, is a possible program in connection with modified sentences.

D. Modified Sentences

The elements of a modified sentence restitution plan are the following: 1) the convicted offender is sentenced, 2) the sentence takes effect, 3) an agency or the court reviews the matter, and on review re-sentences the individual —a) to make restitution;[540] or b) to probation, part of which is to make restitution or participate in a Restitution Center.

The advantages of such a plan are that the Restitution Center can be assured that it is accepting an individual who, in fact, would

have been imprisoned. This would fulfill the goal of reducing prisoner population. Furthermore, if the Center is able to choose participants and then return to the court with a specific request, the Center has control over its enrollees. On the other hand, since the final decision depends on the court, much discretion is left to the particular inclinations of the judge or court.

Under current Georgia law, in felony cases, the judge may modify a sentence *only* in the term in which the sentence was ordered. The law states:

> . . . After the term of court at which the sentence is imposed by the judge, he shall have no authority to suspend, probate, modify or change the sentence of said prisoner, except as otherwise provided.[541]

Thus, this statute does not preclude the modification of a sentence, but rather sets a definite time limit in which action must be taken.[542]

Furthermore, in cases of misdemeanors (although it is not clear if this encompasses felonies reduced to misdemeanors under Ga. Code Ann. 26-3101 (1972)) the court retains jurisdiction for certain modifications. The Code states:

> . . . Provided, further, that the sentencing courts shall retain jurisdiction to amend, modify, alter, suspend or probate sentences under (a) [fine or county confinement] at any time but in no instance shall any sentence under (a) be modified in a manner to place a county prisoner under the jurisdiction of the State Board of Corrections.[543]

A similar provision is made for punishment of misdemeanors of a high and aggravated nature.[544]

Although the court has some modification authority for misdemeanors, it is restricted in scope. If, however, the individual is ordered to serve his misdemeanor sentence in a state institution, the court would have authority to probate the sentence and provide for a probationary condition of restitution. In cases of felonies, which are more likely to be the focus of a restitution plan, and which certainly include the majority of incarcerated property offenders,[545] the court can only modify the sentence in that term of the court. This provision in itself could be effectively utilized to promote restitution.

Court modification authority beyond the scope of the original term would also be useful, and a change in the law granting the courts broader jurisdiction could be made. After having rendered several opinions on alterations of sentences past the term, Attorney General Arthur K. Bolton wrote:

> It is obvious that if the Judges of the Superior Courts desire authority to amend sentences after the term of court in which sentence is imposed, they should secure such authority through an act passed by the General Assembly.[546]

As far as its possible use in restitution is concerned, this would be wise advice. A provision for mandatory review on requested cases would also be desirable.

Even so, the use of a modified sentence may be one of the brighter prospects under the current status of Georgia law. Its implementation would, of course, require the education and cooperation of trial judges, an important factor in the evolution of the plan.

E. Board-Ordered Restitution

The State Board of Corrections in Georgia has broad powers and authority in dealing with prisoners. This authority may give rise to the development of an in-house restitution program, whereby certain sentenced offenders may be assigned by the state to serve in a restitution center.

The broad authority accorded the corrections division arises from Ga. Code Ann. § 77-309 (1973), which was originally entitled the Work Release Act. This lengthy section provides that where any person is convicted of a felony or misdemeanor and sentenced to serve time in a penal institution (other than a misdemeanant sentenced to a county jail), he shall be committed to the custody of the Board of Corrections, which

> . . . shall designate the place of confinement where the sentence shall be served:
>
> 1. The Director . . . may designate as a place of confinement any available, suitable, and appropriate correctional institution or public works camp . . . .
>
> 2. The Director . . . shall extend the limits of the place of confinement of a prisoner as to whom there is reasonable cause to believe he will honor his trust by authorizing him, under prescribed conditions, to:

> Work at paid employment or participate in a training program in the community on a voluntary basis while continuing as a prisoner of the institution to which he is committed . . .
>
> (iii) . . . A prisoner authorized to work at paid employment . . . shall comply with all rules and regulations promulgated by the Board of Corrections relative to the handling, disbursement and holding in trust of all funds earned . . . .

The statute further provides that after deduction of money for keep and confinement, the prisoner shall be allowed to withdraw from his account for incidental expenses or be required to pay an amount to dependents, or have money retained in his credit. No mention of court costs, fines, or restitution is made. Other parts of the statute require assignment to a correctional institution within a reasonable time after conviction.[547]

The Board of Corrections is given further authority in dealing with prisoners under Ga. Code Ann. §§ 77-342 to 344 (1973). The Director of the Department of Corrections, on recommendation of the warden, may authorize special leave "for participation in special community or other meritorious programs or activities deemed beneficial to the inmate and not detrimental to the public." Such activity must "contribute to the rehabilitation process of the inmate involved." Under Ga. Code Ann. § 77-343 (1973), all leaves must be issued in writing; Ga. Code Ann. § 77-344 (1973), lists purposes for which a leave might be granted, as for educational programs, to improve job skills, take a trade licensing exam, interview for employment, participate in drug abuse or crime prevention programs, serve as a volunteer, and "for any purpose which the State Board of Corrections deems beneficial to both the inmate and the public."[548]

Four basic approaches can be taken in reference to these provisions and restitution. First, it can be maintained that the broad powers and discretion given the Board of Corrections to designate the place of a prisoner's confinement under Ga. Code Ann. § 77-309 (1973) also encompasses the power to assign a prisoner to a Restitution Center, under subsection (1) of the act (general), or under subsection (2) of the act relating to "honor" prisoners.

Secondly, the provisions relating to work release may be inclusive and not necessarily exclusive of restitution. Although restitution is not mentioned, general statutory authority allows a prisoner to work

at employment on a voluntary basis, an integral aspect of restitution. This provision can be construed to encompass a restitution plan, thereby affording proper authorization to the Department of Corrections. Similarly, the special leave statutes do not preclude restitution, although they appear to be aimed more directly at short-term definite length projects. Yet, the last section leaves open a broad area "for any purpose . . . beneficial . . . ." Restitution Center participation could be made the subject of special leaves.

Finally, it is possible that restitution is not contemplated under these sections, or that the Department of Corrections would be unwilling to activate such a program in absence of clear statutory authority. In such a case, the Code might be amended, for example, to provide for assignment to a Restitution Center, or to provide that under outside job opportunities, restitution may be provided from the earnings obtained. Amending this Code section would not be difficult since it has been revised seven times since it was first enacted in 1964.[549] Although the statute seems broad enough without additions, the amendments would supply more specific guidelines and insure a solid foundation for implementing a plan. Among the advantages of a Corrections Board restitution plan is the total control that would be vested in the Board, thereby setting the groundwork for an independent program. The Department would have control over selection of participants and in the administration of the restitution program. The concern of taking persons committed to prison so as to achieve the goal of reduced prison population would be satisfied under such a program.

On the other hand, the Department or Board would be essentially making a judicial determination on the amount of restitution ordered. In this area it would perhaps be wise to provide for a court or separate restitution hearing to ascertain the amount, or at least to serve as a check on the amount ascertained. Also, a Board-administered program would not have the same built-in incentives of a probation or parole-based restitution program. In those programs, the offender can often achieve an earlier release or total freedom via restitution, while the Department of Corrections has no control over this matter other than by recommendations to the parole board.

Overall, the development of a program through the uniquely wide

powers accorded the Board of Corrections in Georgia is not only feasible, but also is a relatively workable plan.

F. Work Release

Georgia already has provisions for work release, as described above.[550] One possibility, then, would be to include restitution within a work release program, with provisions for certain persons repaying their victim. Under this concept an individual would be assigned to work release with a restitution condition. This is the practice currently utilized in other states.[551]

The facilities and mode for work release are already in force, thus easing implementation. However, it is questionable whether under Ga. Code Ann. § 77-309(2)(iii)(1-3)(1973) the money earned on work release can be used for restitution. Beyond this, other considerations are involved in merging the two. For example, it may create resentment among those making restitution who are housed with others not under similar burdens, and may obfuscate the correctional goals sought to be achieved. Restitution involves property crimes, while work release is broader but keys on honor inmates. The desirability of combining the two populations needs evaluation. Again, the ascertainment of amount of restitution would be Board determined, and provisions for review should be considered.

Also, a Restitution Center might not allow for the same broad opportunities available in a work release center. Minnesota, for example, rejects most restitution plans which involve training:

> When the alternative of using earnings to make restitution payments is followed, the issue of offender employability will have to be confronted. Restitution plans may be developed which require remedial steps such as job training or education as a prerequisite to making restitution. The focus of the Minnesota plan, however, will consistently be on the process of making restitution, with remedial training defined as clearly preparatory and secondary to the restitution requirements and only to be undertaken when training is a necessary condition for meeting these requirements. Not setting this priority could lead to an increasingly subsidiary role for restitution in the program.[552]

Interweaving restitution with work release is a possible alterna-

tive, but restitution would lose some of its unique character. It would not focus the proper attention on restitution and the rehabilitation sought from offender-victim participation. Statutory authority can be found if read in the very broadest sense, but additional authority allowing restitution is preferable.[553] Unless no other alternatives are available, restitution should remain separate. But, if desired, work release may be valid as an operating means.

G. Prison Wages

This scheme would involve the prisoner making reparation to his victim through wages earned at prison and attached as an "enforceable lien"[554] or otherwise forwarded to the victim. The primary benefit of a strict prison wage attachment goes to the victim who would be assured compensation. The program would be easy to administer. Wages are often attached for civil dependents. "There are no logical obstacles to the extension of this concept to the field of victim compensation."[555] However, the rehabilitative value, without other controls, is questionable.

A main roadblock to restitution through prison wages is the presumption that the prisoner *has* earnings to attach.

> This proposal depends upon the offender having earnings that can be attached and can only function effectively when the offender is adequately remunerated for his labor while incarcerated.[556]

In Georgia, the authority to pay prisoners is narrow. The so-called incentive pay plan described in Ga. Code Ann. § 77-318 (c) (1973) provides:

> The State Board of Corrections is authorized pursuant to rules and regulations adopted by said board, to pay compensation of not more than $25 per month from funds available to said board to each prisoner employed in any industry.[557]

This discretionary wage was the first allotted in Georgia and it is minimal, at best. Prison pay plans that have been forwarded call for an adequate pay scale to the prisoner. Otherwise the proposal is meaningless.[558] Indeed, the National Council on Crime and Delinquency has called for minimum wage limits to prisoners.[559] Political and economic realities in Georgia make this a rather long-range goal. A secondary problem is the lack of incentive in a prison wage

program. If adopted, provisions for parole or sentence remission should be included.[560]

Bruce Jacob has an elaborate prison wage-victim remuneration scheme, which depends on numerous changes in legislation that now restrict the types of industry and labor allowed in prison, on introduction of higher prison wages, an incentive scheme, and a general state fund in which the prisoner deposits and from which the victim draws.[561]

Kathleen Smith has devised a self-determinate prison sentence, evolving on victim compensation through prison wages. The wages, however, would go directly to the victim, the sentence ending when the amount of the victim's damages have been paid.[562] The constitutionality of the proposal in the United States is dubious. *Williams v. Illinois*[563] held that when a statute allowed imprisonment to extend until a fine was worked off on a *per diem* basis, the Fourteenth Amendment was violated in requiring an indigent defendant to serve an aggregate term more than the statutory minimum.[564]

The use of a prison wage system is a possibility for the future. But for the present, it is remote and impractical in Georgia.[565]

H. Fine to Victim

Another proposal, simple to comprehend, is the payment of all or a portion of any fine exacted to the victim. A major benefit would be to the victim, who would receive immediate compensation without further ado. Since the state's retention of a fine is based only on history with no logical justification, it is argued that the victim should be the beneficiary of any fine imposed. As one commentator has observed,

> Compensation and restitution should be given precedence or priority over the fine. Before even considering a fine the court should be required to consider the possibility or desirability or suitability of making a compensation and restitution order.[566]

While it is not clear that, as some authority holds, such a proposal would require a "radical revision of the penal laws,"[567] it is certain that Georgia courts ordering the fine to the victim would now be acting on shaky grounds. Under sentencing provisions, the courts only have authority to fine, imprison, probate or suspend.[568] A fine

is not part of probation and under the *Ray v. State*[569] line of cases, a sentence to restitute is invalid. There is no authority for a fine going elsewhere than to the state.

Penologically, the fined offender experiences no awareness of the damage caused by his transgression,[570] it being merely personal inconvenience. If the fine were linked to the crime to allow for redress by the offender, it might serve as a proper vehicle for rehabilitation.

The same disadvantage attaches to a portion-of-the-fine restitution as to other forms of non-institutionalized payments in money—wealthy offenders would be favored. Also, the court would have sole discretion, and the rehabilitative aims may be blurred. The portion-of-the-fine, like court-ordered restitution, could be used to supplement other restitution schemes.

To effectuate a fine-restitution plan, changes in statutory authority to impose punishment would probably be necessary. Also, current penal philosophy would have to shift to make the plan effective.[571]

I. Reparation and Creative Restitution

Reparation, or personal service to the victim, has been suggested in several forms, most of which would be used in conjunction with other restitution plans. Almost any plan could incorporate reparation as opposed to money payments.

One author developed the idea of "creative restitution" in the nature of service performed related to the offense.[572] A car thief, for example, might be required to wash the car. Kathleen Smith's indeterminate sentence is a form of reparation, as well, since the sentence is tolled by days of work.[573] Here, however, the service is not personal, but by way of prison.

Another proposal[574] is a day-fine system, whereby the offender performs labor, measured daily, to match the amount of the fine. The offender "performs work in the appropriate amount and payment passes to the victim." This would be especially valuable where the offender is indigent. It would diminish to some extent the wealth problem that haunts fines. But a day-fine is reminiscent of forced labor and unwelcomed specific performance. Its statutory basis and constitutionality are both in question, especially when the repara-

tion is ordered by the court. Prisoners under Georgia law are restricted to state labor or work release.

A tangent proposal is to attach the offender's property or wages for restitution. While civil attachments have been similarly accomplished, there is little precedent for such a plan in the criminal area.[575] However, day-fine and creative restitution may be used as an alternative to money restitution by consent of the parties, and in that respect, should not be ignored as a further alternative.

J. Combined Restitution—Victim Compensation

Without detailing victim compensation programs, a short discussion of a combined restitution-victim's compensation plan may be beneficial. Under this concept, the offender would make payments, not directly to the victim, but to a state fund. From that fund, the state would repay qualifying victims. The use of restitution in this kind of program naturally depends on the development of victims' compensation. Georgia has no such program, although it has been proposed (and soundly defeated).[576]

The main benefit of a joint program is in assuring compensation to victims, whether or not the criminal is apprehended, while on the other hand, obtaining reparation, and hopefully its rehabilitative penumbras, from the offender. One disadvantage, penologically, is that there is no personal contact and hence, it is not unlike a mere fine. Offenders may resent paying for crimes which they have not themselves committed. Yet, the state would not be forced to underwrite the entire cost of a compensation plan.

Although this is only a future possibility in Georgia, it is one frequently commented on, and a way of obtaining offender participation into repayment of the victim.

K. Conclusion

The above proposals describe programatic bases upon which a functional restitution plan in Georgia may be built. In the current stage of law in Georgia, modified sentences or Board-ordered restitution are the most feasible. With slight changes in the present law, parole-based restitution is viable, as is combined work release-restitution. Reparation and creative restitution can be interwoven in any plan, if used with caution. Prison wages, combined

restitution-victim compensation and portion-of-the-fine are alternatives for possible future use, since they involve extensive statutory and conceptual modifications. Probation, while feasible presently, should be avoided as inconsistent with other restitution goals, as should sentences requiring restitution, possibly only with statutory changes. Corrective restitution should be effective, yet flexible. The details, frills and internal preferences should be delineated further as one approach is adopted and followed:

> It should be clear at this point that a combination of one or more of the suggested alternatives may be required. . . . It is perhaps better to view the real problem of victim compensation not in the light of alternatives but rather as an adjunct to the proper administration of criminal justice. The main purpose of criminal justice is recognized as the restoration of the social equilibrium in all its aspects, individual and collective, following the disturbance by the criminal act. It follows that the principles enunciated herein can be favorably combined to establish a satisfactory balance . . . .[577]

The implementation of a viable restitution plan is a progressive step in the advancement of the correctional field. All aspects discussed—the broad goals of restitution, the fine points of policy, the practical initiation, and the operating bases—must be streamlined to forward a plan tailored to meet the specific needs of the state, and then implemented in the same expansive manner. In such a fashion an effective and broadly successful restitution scheme can be created. As noted:

> Correctional restitution is the type of compensation that holds the promise of both restitution to victims of crime and implementation of the reformative and correctional goals of the criminal law.[578]

APPENDIX I
Work Release Application

NAME:_____INMATE NUMBER:_____
INSTITUTION: _____AGE: _____

CHOICE OF WORK RELEASE UNIT: EVERY EFFORT WILL BE MADE TO PLACE APPLICANT IN HIS FIRST, SECOND, OR THIRD CHOICE, PLEASE LIST IN ORDER OF PREFERENCE:

1. _____

2. _____

3. _____

[ ] WILL ACCEPT ANY PLACEMENT IN STATE.

I respectfully request the full assistance of the Georgia Board of Corrections and its employees in locating and securing work release employment; and hereby authorize that my official records, or any portion thereof, be revealed to prospective employers at the discretion of such persons; and hereby exempt such authorized persons from any and all liability in connection therewith. I agree to abide by all regulations concerning my assignment to the Work Release Program.

This the _____ day of _____ 19____.

_____
Applicant

COUNSELOR EVALUATION:

Circle the appropriate number corresponding to the six listed responses: Does Not Apply, Always, Often, Sometime, Seldom, Never.

Behavior	DOES NOT APPLY	ALWAYS	OFTEN	SOMETIME	SELDOM	NEVER
1. Communicates with others well.	5	4	3	2	1	0
2. Shows hostility towards guards/authority.	5	4	3	2	1	0
3. Understands his problems.	5	4	3	2	1	0
4. Manipulator of authority/inmates.	5	4	3	2	1	0
5. Uses his time constructively.	5	4	3	2	1	0
6. Exhibits responsibility in work assignments.	5	4	3	2	1	0
7. Adjusts well to emotional problems.	5	4	3	2	1	0
8. Sets practical goals that can be reached.	5	4	3	2	1	0
9. Responds positively/accepts constructive criticism.	5	4	3	2	1	0
10. Shows interest in his programs, job assignment or schoolwork.	5	4	3	2	1	0
11. Needs little/no supervision.	5	4	3	2	1	0
12. Responsible group member.	5	4	3	2	1	0

APPENDIX II

Fry, Justice for Victims, The Observer (1957), reprinted 8 J. PUB. L. 191 (1959)

A man was blinded as the result of an assault in 1951, and awarded compensation of 11,500 pounds. His two assailants, now out of prison, have been ordered to pay 5 shillings a week each. The victim will need to live another 442 years to collect the last instalment. A bitter mockery! Have we no better help to offer to the victims of violent crime?

In our modern system of collective responsibility for sickness and injury, we have evolved a machinery for assuring compensation which could well be extended to injuries criminally caused, affording equal benefits to the man who falls from a ladder at work and the man whose enemy pushes the ladder from under him at home.

Modern finance is held together by sharing risks of almost every kind. The private citizen, if he is provident, hedges himself round with insurance on all sides: whether he fears the arrival of twins, or death, or a wet afternoon for the vicarage fete, he seeks the aid of an insurance company. So universal is this practice that burglars have been known to claim that they did no harm to the rightful owners, whose "sparklers" were sure to be well covered.

This principle of clubbing together for mutual protection is venerable in British social life. Early law, with its emphasis on compensation for the victim of crime, could never have worked but for the solidarity which laid upon the offender's relatives (sometimes to the sixth degree of cousinship) the duty of paying up for his misdeeds. It may have been a weakening of the bonds of kinship that led to the formation—as at Exeter and Cambridge in the eleventh century—of guilds whose members were pledged to provide wergild, or blood money, for those who became liable to pay it.

This system of sharing risks by potential offenders (in contrast with our usual method whereby potential victims unite for mutual protection) has a modern counterpart in the compulsory insurance against third party risks for motorists; while the barrow boys of the street markets are said to pay their "obstruction" fines from a common fund maintained for the purpose.

Failing some such supporting group, it is usually futile for courts to award heavy damages for personal injuries; the isolated individual offender can rarely make large amends. What, then, could be done to provide the compensation which the victim ought to receive?

It is old-fashioned now to quote Bentham, but on the tendency of criminal law to pay scant attention to the needs of the victim, he puts it well: "Punishment, which, if it goes beyond the limit of necessity, is a pure evil, has been scattered with a prodigal hand. Satisfaction, which is purely a good, has been dealt out with evident parsimony." He held that "satisfaction" should be drawn from the offender's property, but "if the offender is without property . . . it ought to be furnished out of the public treasury, because it is an object of public good and the security of all is interested in it."

Is Bentham's proposal useful today? Clearly, so far as offences against property go, any scheme for State insurance would be wrecked by the ease with which it could be defrauded. But crimes of violence against the person are a different matter. Few people would voluntarily wound themselves to obtain a modest compensation, and the risk of successful deception is negligible.

Employers and workmen contribute to cover benefits after industrial accidents, and the logical way of providing for criminally inflicted injuries would be to tax every adult citizen (the dangers of admitting children to benefit are obvious) to cover a risk to which each is exposed.

If the number and nature of crimes of personal violence remained as in 1956, and the victims were compensated, under a funded scheme, on the scale of those who suffer industrial injuries, the cost, after allowing for some savings in respect of National Insurance benefits would be about 150,000 pounds annually. This sum, less than a penny a head a year for the population over fourteen, would not warrant a separate collection, but should be found out of general taxation.

Difficulties would arise, of course, in the case of reported crimes where either no arrest was made or no conviction followed; and a special tribunal would have to be set up to decide upon the existence of an offence in these "cases known to the police."

As with the industrial injuries scheme, there should obviously be no interference with the present jurisdiction of the courts in awarding damages against the aggressor in cases of violent crime, as a supplement to the rather meagre benefits of the scale. But the value of the proposed compensation would not be economic alone. There is a natural sense of outrage on the sufferer's part, which the milder aspect of our modern penal methods only exacerbates. The young hooligan goes to a course of training in Borstal, while the shopkeeper he has "coshed" nurses his grievance with his broken head, gaining perhaps some solatium for a day's work lost giving evidence.

After all, the State which forbids our going armed in self-defence cannot disown all responsibility for its occasional failure to protect. When serious crimes occur in this category the consequences are often terribly tragic. For the family of a murdered man, for the girl whose health has been permanently broken by brutal rape, for the skilled workman who can no longer follow his trade, the simple fact that their hardships had been specially recognized would help to assuage the bitterness of their lot.

In those primitive societies already mentioned the clan of the injured person recognises a duty of ensuring his satisfaction as imperative as that of the aggressor's to help in giving it. The tribe has now broken down and the larger unit of the national inherits both obligations. It is at once the heir of those who claimed due satisfaction for outrage, and of those united to render it. A slight adjustment in our already wide scheme for sharing risks would fulfil our double duty.

Chapter Two

[1] *See* United States v. Brown, 381 U.S. 437, 458 (1965); JUSTICE IN SENTENCING: PAPERS AND PROCEEDINGS OF THE SENTENCING INSTITUTE FOR THE FIRST AND SECOND UNITED STATES JUDICIAL CIRCUITS 4 (L. Orland & H. Tyler eds. 1974) [hereinafter cited as JUSTICE IN SENTENCING]; Comment, *The Emergence of Individualized Sentencing*, 45 TEMP. L. Q. 351 (1972)(hereinafter cited as *Individualized Sentencing*).

[2] *See* Sullivan v. Ashe, 302 U.S. 51, 55 (1938); Mitchell v. United States, 350 F. Supp. 366, 368 (N.D. Fla. 1972); United States v. Leach, 218 F. Supp. 271, 274 (D.D.C. 1963); Hoffman, A *Sentencing Philosophy*, 32 FED. PROBATION 3, 6 (Dec. 1968) [hereinafter cited as Hoffman] (The author of this article is Judge Walter E. Hoffman, Chief Judge of the United States District Court for the Eastern District of Virginia, 1968).

[3] *See* Furman v. Georgia, 408 U.S. 238, 304-05 (1972)(Brennan, J., concurring); JUSTICE IN SENTENCING *supra* note 1, at 4-5; *Individualized Sentencing supra* note 1, at 351.

[4] *See, e.g.*, CAL. PENAL CODE §§644, 3024 (West 1970); GA. CODE ANN. §27-2511 (Supp. 1974); N.Y. PENAL LAW §70.10 (McKinney 1967), *as amended* (Supp. 1974). *See generally*, Katkin, *Habitual Offender Laws: A Reconsideration*, 21 BUFF. L. REV. 99 (1971). The United States Supreme Court has specifically rejected any claim that such statutes deny the recidivist due process of law. Spencer v. Texas, 385 U.S. 554, 565-66 (1967).

[5] Hoffman *supra* note 2, at 45.

[6] *Id.* at 44.

[7] See Katkin, *Habitual Offender Laws: A Reconsideration*, 21 BUFF. L. REV. 99, 102-03, n.22 (1971), for a listing of states requiring or authorizing life sentences for recidivists.

[8] *See, e.g.*, GA. CODE ANN. §27-2511 (Supp. 1974).

[9] *See* Mitchell v. United States, 350 F. Supp. 366, 368 (N.D. Fla. 1972); United States v. Leach, 218 F. Supp. 271, 274 (D.D.C. 1963).

[10] *See* Collins v. Brown, 268 F. Supp. 198 (D.D.C. 1967); Andenaes, *Does Punishment Deter Crime?*, 11 CRIM. L.Q. 76, 77 (1968)[hereinafter cited as Andenaes]. *Contra*, Furman v. Georgia, 408 U.S. 238, 345-54 (1972)(Marshall, J., concurring).

[11] Antunes & Hunt, *The Impact of Certainty and Severity of Punishment on Levels of Crime in American States: An Extended Analysis*, 64 J. CRIM. LAW 486 (1973)[hereinafter cited as Antunes & Hunt].

[12] *See* Andenaes *supra* note 10, at 78.

[13] *See* Antunes & Hunt *supra* note 11.

[14] *See generally* Andenaes *supra* note 10, at 78, 88-89.

[15] National estimates indicate that about 85 percent of all reported serious crimes are committed by prior offenders. Pettigrew, *Corrections: Protecting Society or Recycling Criminals*, 48 FLA. B.J. 260 (1974) [hereinafter cited as Pettigrew].

[16] See notes 4-9 *supra* and accompanying text.

[17] Pettigrew *supra* note 15, at 262.

[18] *Id.*

[19] *See, e.g.*, Antunes & Hunt, *The Deterrent Impact of Criminal Sanctions: Some Implications for Criminal Justice Policy*, 51 J. URBAN LAW 145 (1973).

[20] *See* Andenaes *supra* note 10, at 79.

[21] Justice Marshall rejects the theory of general deterrence for capital offenses because of the inconclusiveness of the data. Furman v. Georgia, 408 U.S. 238, 345-54 (1972)(Marshall, J., concurring). On the other hand, the high recidivism rate directly supports the conclusion that the goal of *special* deterrence is not being reached.

[22] Antunes & Hunt, *supra* note 11.

[23] *Id.* at 489.

[24] *Id.* at 493. *Accord*, Chirios & Waldo, *Punishment & Crime: An Examination of Some Empirical Data*, 18 SOCIAL PROBLEMS 200 (1970).

[25] See Antunes & Hunt, *The Deterrent Impact of Criminal Sanctions: Some Implications for Criminal Justice Policy*, 51 J. URBAN LAW 145, 145-46 (1973).

[26] This analysis presupposes, however, that an individual who commits a serious crime is rational at the time of commission; an assumption which has been seriously questioned, especially in the area of capital crimes. *See* Furman v. Georgia, 408 U.S. 238, 301 (1972)(Brennan, J., concurring).

[27] See notes 23, 24 *supra* and accompanying text.

[28] See notes 136-39 *infra* and accompanying text.

[29] *See* Benson v. United States, 332 F.2d 288, 292 (5th Cir. 1964); JUSTICE IN SENTENCING, *supra* note 1, at 4; Amos, *The Philosophy of Corrections: Revisited*, 38 FED. PROBATION 43, 44 (March 1974) [hereinafter cited as Amos]; Hoffman, *supra* note 2; *Individualized Sentencing, supra* note 1, at 352.

[30] 337 U.S. 241 (1949).

[31] *Id.* at 248.

[32] Hoffman, *supra* note 2, at 44.

[33] See note 15 *supra*.

[34] *See* Amos, *supra* note 29, at 44; Pettigrew, *supra* note 15, at 260-61.

[35] Amos, *supra* note 29, at 44. *See* Pettigrew, *supra* note 15, at 261-64.

[36] Williams v. New York, 337 U.S. 241, 247 (1949) ("The belief no longer prevails that every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender."). *Accord*, Williams v. Illinois, 399 U.S. 235, 243 (1970); Williams v. Oklahoma, 359 U.S. 576, 585 (1959). *See generally Individualized Sentencing, supra* note 1. It does not seem that these two philosophies could be implemented effectively if only one philosophy existed at a time.

[37] *See, e.g.*, LaFont, *Assessement of Punishment—A Judge or Jury Function?*, 38 TEXAS L. REV. 834 (1960); Moreland, *Model Penal Code: Sentencing, Probation and Parole*, 57 KY. L.J. 51 (1968); Stubbs, *Jury Sentencing in Georgia—Time For a Change?*, 5 GA. ST. B.J. 421 (1969)[hereinafter cited as Stubbs]; Webster, *Jury Sentencing—Grab-Bag Justice*, 14 SW. L.J. 221 (1960); Note, *Jury Sentencing in Virginia*, 53 VA. L. REV. 968 (1967)[hereinafter cited as *Jury Sentencing in Virginia*]; Note, *Statutory Structures for Sentencing Felons to Prison*, 60 COLUM. L. REV. 1134 (1960); Note, *Criminal Procedure—What Agency Should Fix Sentence?*, 46 KY. L.J. 260 (1958).

[38] *See* Stubbs, *supra* note 37, at 429. The United States Supreme Court, however, has never doubted the constitutionality of jury sentencing. *See, e.g.*, Chaffin v. Stynchcombe, 412 U.S. 17, 22 (1973); McGautha v. California, 402 U.S. 183, 196-208 (1971); Witherspoon v. Illinois, 391 U.S. 510, 519, n.15, *reh. denied*, 393 U.S. 898 (1968).

[39] ARK. STAT. ANN. §43-2307 (1964)(Allows judge sentencing only where jury can not agree on sentence); IND. ANN. STAT. §9-1819 (1956); KY. R. CRIM. P. 9.84 (1963); MO. ANN. STAT. §546.410 (1953); OKLA. STAT. ANN., title 22, §926 (1958); TENN. CODE ANN. §40-2707 (1955); TEX. CODE CRIM. P. art. 37.07 (Supp. 1974)(Allows defendant to choose between judge and jury sentencing); VA. CODE ANN. §§18.1-9, 19.1-291, 19.1-292 (1960).

[40] GA. LAWS 1974, p. 352. The amendments also include a procedure for appellate review of sentences of five years or more. For a historical analysis of Georgia's laws on sentencing, see Stubbs, *supra* note 37, at 422-26.

[41] INSTITUTE OF JUDICIAL ADMINISTRATION, A.B.A. PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO SENTENCING ALTERNATIVES AND PROCEDURES, 46-47 (Approved Draft, 1968) [hereinafter cited as A.B.A. SENTENCING ALTERNATIVES AND PROCEDURES]; JURY SENTENCING IN VIRGINIA, *supra* note 37, at 976.

[42] Highly relevant—if not essential—to [the sentencing judge's] selection of an appropriate sentence is the possession of the *fullest* information possible concerning the defendant's life and characteristics . . . , the punishment should fit the offender and not merely the crime.

Williams v. New York, 337 U.S. 241, 247 (1949). *See* A.B.A. SENTENCING ALTERNATIVES AND PROCEDURES, *supra* note 41, at 46.

[43] A.B.A. SENTENCING ALTERNATIVES AND PROCEDURES, *supra* note 41, at 46-47.

[44] *See* RUBIN, THE LAW OF CRIMINAL CORRECTIONS 149 (2d Ed. 1973) [hereinafter cited as RUBIN]; Stubbs, *supra* note 37, at 427. Obviously, all judges are not qualified. The solution, however, is not the retention of jury sentencing. Rather, it is more careful selection of judges with the necessary training. *See* A.B.A. SENTENCING ALTERNATIVES AND PROCEDURES, *supra* note 41, at 47.

[45] *See* RUBIN, *supra* note 44, at 148. Atlhough the judge normally has the authority to grant probation or suspend a sentence, he may be reluctant to do so after the jury has fixed the sentence. *See Jury Sentencing in Virginia supra* note 37, at 973-74.

In Georgia, the authority to grant probation or suspend sentence is vested in the judge. GA. CODE ANN. §§27-2709, 27-2527 (1972).

[46] Some of the information most helpful for sentencing include the defendant's prior record, if any, his education and religious background, his family history, his interests and activities, his employment history and his financial status. *See Jury Sentencing in Virginia, supra* note 37, at 978.

[47] A defendant does not have a constitutional right to a bifurcated trial in a capital case. *See* Crampton v. Ohio, 402 U.S. 183 (1971); Spencer v. Texas, 385 U.S. 554 (1967). At the time of the *Crampton* decision, only a handful of states required a bifurcated system in capital cases. *See* CAL. PENAL CODE §190.1 (West 1970); CONN. GEN. STAT. REV. §53a-46 (Supp. 1969); N.Y. PENAL LAW §§125.30, 125.35 (McKinney 1967); PA. STAT. ANN. tit. 18, §§1102, 2502 (1973); TEX. CODE CRIM. PROC. art. 37.07(2)(b), 37.071 (Supp. 1974). Georgia required a bifurcated system in noncapital felony cases until the new Act was enacted July 1, 1974. GA. LAWS 1970, p. 949 (repealed 1974).

[48] *See* A.B.A. SENTENCING ALTERNATIVES AND PROCEDURES *supra* note 42, at 46; *Jury Sentencing in Virginia, supra* note 37, at 986-87.

[49] *See Jury Sentencing in Virginia, supra* note 37, at 986.

[50] *Id.* at 985; Stubbs, *supra* note 37, at 428.

[51] The problem of "quotient verdicts" is virtually uncontrollable because only jurors know they are using the procedure to come to a decision. *See* State v. Jenkins, 327 Mo. 326, 37 S.W.2d 433 (1931).

[52] *See* A.B.A. SENTENCING ALTERNATIVES AND PROCEDURES, *supra* note 42, at 44; Stubbs, *supra* note 37, at 425-29; *Jury Sentencing in Virginia, supra* note 37, at 988-95.

[53] *See* Stubbs, *supra* note 37, at 425.

[54] *Id.* at 423. Although this argument is usually offered in favor of jury sentencing, it seems questionable whether it has any vitality at all today.

[55] *See* A.B.A. SENTENCING ALTERNATIVES AND PROCEDURES, *supra* note 41, at 44.

[56] See note 46 *supra* and accompanying text.

[57] See note 45 *supra* and accompanying text.

[58] *See, e.g., In re* Dellinger, 461 F.2d 389 (7th Cir. 1972); United States v. Seale, 461 F.2d 345 (7th Cir. 1972) (Chicago Seven contempt trials). *See The Chicago Seven Contempts: The Decision on Sentencing*, 10 CRIM. L. BULL. 239 (1974).

[59] Ideally, the judge's legal training should prevent this. *See Jury Sentencing in Virginia, supra* note 37, at 990.

[60] This is one of the basic weaknesses of the Georgia Criminal Procedure Code, Title 27. See note 140 *infra* and accompanying text.

[61] *See* INSTITUTE OF JUDICIAL ADMINISTRATION, A.B.A. PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO APPELLATE REVIEW OF SENTENCES 13 (Approved Draft, 1968) [hereinafter cited as APPELLATE REVIEW OF SENTENCES].

[62] *See Jury Sentencing in Virginia, supra* note 37, at 989. It should be recognized that such well-publicized cases usually involve capital offenses. Thus, the jury normally has the sentencing responsibility.

[63] See notes 29-36 *supra* and accompanying text.

[64] Two examples in Virginia are the acquittal of drunk drivers because of the mandatory forfeiture of the offender's driver's license for one year, and the acquittal of a man who had clearly killed several persons in a penitentiary when he went berserk, because of a mandatory death sentence. *See Jury Sentencing in Virginia, supra* note 37, at 994-95.

[65] *See, e.g.*, GA. CODE ANN. § 26-3101 (1972).

[66] *See* Harvey v. State, 128 Ga. App. 844, 198 S.E.2d 323 (1973) (judge's discretion to approve or disapprove recommendation for misdemeanor punishment). This is logical since the judge may become aware of additional information which would have caused the jury not

to recommend mercy if they had been aware of the information.

[67] A.B.A. SENTENCING ALTERNATIVES AND PROCEDURES, *supra* note 41, at 46.

[68] GA. LAWS 1973, p. 161 (repealed 1974). Georgia was one of the few states which had a bifurcated system for noncapital felonies.

[69] GA. LAWS 1974, p. 352, 354.

[70] For the procedure in a capital case, see GA. CODE ANN. § 27-2503(b) (Supp. 1974).

[71] After guilt is found and before sentencing, the court can require a written report on the defendant. Whether or not it may be disclosed, and to what parties, is unclear. *See* GA. CODE ANN. § 27-2710 (1972).

[72] *See* Dudley v. State, 228 Ga. 551, 561, 186 S.E.2d 875, 882 (1972); Baker v. State, 127 Ga. App. 99, 192 S.E.2d 558 (1972) (admissibility of prior convictions not limited to those involving moral turpitude); Young v. State, 125 Ga. App. 204, 205, 186 S.E.2d 805, 806 (1971)(authenticated copies of defendant's prior criminal convictions in another state held admissible).

[73] In *Horton v. State*, 228 Ga. 690, 187 S.E.2d 677 (1972), the Supreme Court held that the phrase "subject to the rules of evidence" in the old provision prohibited the state from introducing testimony that the appellant had committed a previous robbery of which he was accused, but not convicted. Without this provision, this evidence of a specific transaction would have been admissible.

[74] As for pre-sentence reports, see note 71 *supra*.

[75] *See* Davis v. State, 229 Ga. 509, 192 S.E.2d 253 (1972); Gates v. State, 229 Ga. 796, 194 S.E.2d 412 (1972)(It must be *clear* that such notice was given.); Hilliard v. State, 128 Ga. App. 157, 195 S.E.2d 772 (1973).

[76] GA. CODE ANN. § 27-2502 (Supp. 1974).

[77] *See* Johnson v. State, 126 Ga. App. 757, 191 S.E.2d 614 (1972).

[78] GA. CODE ANN. § 27-2709 (1972). See GA. CODE ANN. § 27-2502 (Supp. 1974).

[79] GA. CODE ANN. § 27-2502 (Supp. 1974); Phillips v. State, 95 Ga. App. 277, 97 S.E.2d 707 (1957).

[80] Ezzard v. State, 229 Ga. 465, 192 S.E.2d 374 (1972).

[81] GA. CODE ANN. § 26-3101(a)(1972). GA. CODE ANN. § 26-3101(b) provides that if a defendant is found guilty by the judge of such a felony, the judge may, in his discretion, impose sentence as for a misdemeanor.

[82] Harris v. State, 216 Ga. 740, 119 S.E.2d 352 (1961); Harvey v. State, 128 Ga. App. 844, 198 S.E.2d 323 (1973).

[83] *See* GA. CODE ANN. § 26-3101 (1972).

[84] GA. CODE ANN. § 27-2727 (1972).

[85] *See* Atlanta Journal, July 15, 1974, at 4A, col. 3.

[86] See notes 4-9 *supra* and accompanying text.

[87] GA. CODE ANN. § 27-2511 (Supp. 1974).

[88] Other than a capital offense, for which it is apparently assumed that the defendant will be sentenced to a harsh penalty notwithstanding the habitual offender provision.

[89] Spencer v. Texas, 385 U.S. 554, 565-66 (1967); Coleman v. State, 215 Ga. 865, 114 S.E.2d 2 (1960); Reid v. State, 49 Ga. App. 429, 176 S.E. 100 (1934).

[90] It is not questioned that a person who commits four felonies is a "habitual offender." What is questioned is whether or not an individual who has committed two offenses can be termed a "habitual offender" and punished accordingly. See notes 6-9 *supra* and accompanying text. For recommendations on reform of the second offender law, see notes 139-40 *infra* and accompanying text.

[91] GA. CODE ANN. § 27-2511.1 (Supp. 1974).

[92] GA. CODE ANN. § 27-2511.1(b) (Supp. 1974).

[93] GA. CODE ANN. § 27-2511.1(c) (Supp. 1974).

[94] GA. LAWS 1974, pp. 358-59 (proposed GA. CODE ANN. § 27-2511(a)).

[95] *Id.*

[96] GA. LAWS 1974, pp. 359-60 (proposed GA. CODE ANN. § 27-2511.1(c)).

[97] *Id.*

[98] *Id.* at 359-60.

[99] *Id.*

[100] GA. LAWS 1974, p. 360 (proposed GA. CODE ANN. §27-2511.1(d)).

[101] Letter from Rep. Wayne Snow, Jr., co-sponsor of the judge sentencing act, to author.

[102] See notes 45-52 *supra* and accompanying text.

[103] These crimes have been selected for two reasons. First a large number of offenders have been sentenced for each crime. Second, they represent a "middle" area of noncapital felonies.

[104] See note 40 *supra*.

[105] *See* CAL. PENAL CODE §§3020, 5077 (West 1970). Washington has a procedure similar to California's procedure. WASH. REV. STAT. ANN. §9.95.007 (1961). *See* Note, *The Collective Sentencing Decision in Judicial and Administrative Contexts: A Comparative Analysis of Two Approaches to Correctional Disparity*, 11 AM. CRIM. L. REV. 695, 704-20 (1973).

[106] GA. LAWS 1974, pp. 352, 354 (proposed GA. CODE ANN. §§27-2301, 27-2502).

[107] A.B.A. SENTENCING ALTERNATIVES AND PROCEDURES, *supra* note 42, at §1.1.

[108] This conclusion is based on the fact that the Georgia legislature passed the judge sentencing act in July, 1974. It is thus unlikely that another major change would be made for several years.

[109] See note 47 *supra* and accompanying text.

[110] *See* A.B.A. SENTENCING ALTERNATIVES AND PROCEDURES, *supra* note 42, at §4.1(b); MODEL SENTENCING ACT §2 (Revised Ed. 1972)(required where imprisonment for six months or more is possible). Both California and New York require a pre-sentence report. CAL. PENAL CODE §1203 (West 1970); N.Y. C.P.L. §390.20.1 (McKinney 1971). Another important reason for requiring this report is for future use in parole consideration.

[111] A.B.A. SENTENCING ALTERNATIVES AND PROCEDURES, *supra* note 42, at §4.4.

[112] MODEL SENTENCING ACT §4 (Revised Ed. 1972).

[113] *Contra*, N.Y. C.P.L. §390.50 (McKinney 1971). *See* People v. Peace, 18 N.Y.2d 230, 219 N.E.2d 419 (1966) (upheld New York policy of confidentiality before enactment of N.Y. C.P.L. § 390.50).

[114] *See generally* Townsend v. Burke, 334 U.S. 736 (1948) (appellant denied due process of law because of misinformation in pre-sentence report).

[115] See notes 41-51 *supra* and accompanying text.

[116] *See* A.B.A. SENTENCING ALTERNATIVES AND PROCEDURES, *supra* note 42, at §5.4.

[117] However, no jury is present and the rules of evidence do not apply.

[118] *See* Rawlins v. Mitchell, 127 Ga. 24, 30 S.E. 959 (1906) (Georgia practice does not require that it be entered on the record that defendant was asked if he had anything to say before sentencing).

[119] See notes 90-100 *supra* and accompanying text.

[120] GA. LAWS 1974, p. 358 (proposed GA. CODE ANN. §27-2511.1).

[121] *See* APPELLATE REVIEW OF SENTENCES, *supra* note 61, at §1.1(b).

[122] *See* TABLES *supra*.

[123] *See* APPELLATE REVIEW OF SENTENCES, *supra* note 61, at §2.2(b)(i).

[124] *See* Jones v. Luzier, 345 F. Supp. 724, 728 (N.D. Ga. 1972) (state trial judge must inform defendant of his right to appeal the verdict).

[125] See note 140 *infra* and accompanying text; APPELLATE REVIEW OF SENTENCES, *supra* note 61, at §2.3.

[126] *See* APPELLATE REVIEW OF SENTENCES, *supra* note 61, §3.3(ii).

[127] *See* Comment, *Discretion in Felony Sentencings —A Study of Influencing Factors*, 48 WASH. L. REV. 857, 859 (1973).

[128] The United States Supreme Court seems sensitive to the problem of discretionary sentencing. *See generally* Furman v. Georgia, 408 U.S. 238 (1972)(capital punishment).

[129] See notes 42-52 *supra* and accompanying text.

[130] GA. LAWS 1974, p. 353 (proposed GA. CODE ANN. §27-2502).

[131] *See* GA. CODE ANN. tit. 26, Table V of Commentary of Criminal Law Study Committee.

[132] *See, e.g*, A.B.A. SENTENCING ALTERNATIVES AND PROCEDURES, *supra* note 43, at §2.1(d); Murrah & Rubin, *Penal Reform and the Model Sentencing Act*, 65 COLUM. L. REV. 1167 (1965); Randolph, *Are Long Sentences Necessary?*, 21 AM. J. CORRECTIONS 4 (1959); Tappan, *Sentencing Under the Model Penal Code*, 23 LAW & CONTEMP. PROB. 528 (1958).

[133] *See* Drew, *Judicial Discretion and the Sentencing Process*, 17 How. L.J. 858, 862 (1973)(hereinafter cited as Drew).

[134] See notes 12-19 *supra* and accompanying text.

[135] See notes 22-27 *supra* and accompanying text.

[136] GA. LAWS 1974, p. 355 (proposed GA. CODE ANN. §27-2511).

[137] *See* A.B.A. SENTENCING ALTERNATIVES AND PROCEDURES, *supra* note 41, at 54-55.

[138] See notes 120-26 *supra* and accompanying text. Essential to this conclusion is the requirement that the sentencing judge state in the record his reasons for the particular sentence. See note 140 *infra* and accompanying text.

[139] *See* A.B.A. SENTENCING ALTERNATIVES AND PROCEDURES, *supra* note 42, at §7.5.

[140] *See* A.B.A. SENTENCING ALTERNATIVES AND PROCEDURES, *supra* note 42, § 5.6; Drew, *supra* note 133, at 863.

[141] H.R. REP. No. 329, 93d Cong., 1st Sess. (1973).

[142] *Id.* at 16.

[143] Atlanta Constitution, Dec. 5, 1974, at 12-E, col. 1.

[144] *Id.*, Oct. 19, 1974, at 1, col. 3; *id.*, Nov. 5, 1974, at 1, col. 6.

[145] H.R. REP. No. 329, *supra* note 141, at 16.

[146] *Id.* at 17.

[147] Ch. 625, Wis. Laws 1913, the "Huber Law," now replaced by WIS. STAT. ANN. § 56.08 (Supp. 1974).

[148] California Department of Correction, Report on the Work and Training Furlough Program 3, Dec. 31, 1972.

[149] N.C. GEN. STAT. § 148-33.1 (Supp. 1974).

[150] 18 U.S.C. § 4082 (1970).

[151] *E.g.*, ALA. CODE tit. 25, § 188 (Cum. Supp. 1973); ARIZ. REV. STAT. ANN. § 31-333 (Supp. 1974); CAL. PENAL CODE § 1208 (West Supp. 1975); CONN. GEN. STAT. ANN. § 18-100 (Supp. 1975); FLA. STAT. ANN. § 945.091 (1973); GA. CODE ANN. § 77-309 (1972); IDAHO CODE § 20-242 (Supp. 1974); MISS. CODE ANN. § 47-5-159 (Supp. 1974); MONT. REV. CODES ANN. § 95-2216 (1969); NEB. REV. STAT. § 83-184 (1971); NEV. REV. STAT. § 209.483 (1973); N.J. STAT. ANN. § 30:4-91.3 (Supp. 1974); N.M. STAT. ANN. § 42-1-78 (1972); N.Y. CORREC. LAW § 851 (McKinney Supp. 1974); N.D. CENT. CODE § 12-48.1 (Supp. 1973); ORE. REV. STAT. § 144.410 (1974); S.C. CODE ANN. § 55-303.1 (Supp. 1974); S.D. COMPILED LAWS ANN. § 24-8-1 (Supp. 1974); TENN. CODE ANN. § 41-1810 (Supp. 1974); TEX. REV. CIV. STAT. ANN. art. 6166x-3 (1970); VT. STAT. ANN. tit. 28, § 753 (Supp. 1974); WASH. REV. CODE ANN. § 72.65.020 (Supp. 1974). Wisconsin revised its work release code in 1965. WIS. STAT. ANN. § 56.065 (Supp. 1974).

[152] Kentucky passed a work release statute, KY. REV. STAT. ANN. § 197.120 (1972), in 1972. In 1974, in Commonwealth *ex rel.* Hancock v. Holmes, 509 S.W.2d 258 (Ky. 1974), the statute was declared violative of the Kentucky Constitution in permitting employment of prisoners outside prison grounds except on public roads or state or other farms. North Carolina's work

release statute was challenged in 1966 on the grounds that it violated a provision against the "farming out" of prisoners, but was declared constitutional. *In re* Advisory Opinion to the Governor, 268 N.C. 727, 152 S.E.2d 225 (1966).

[153] W. BUSHER, ORDERING TIME TO SERVE PRISONERS: A MANUAL FOR THE PLANNING AND ADMINISTERING OF WORK RELEASE: AN LEAA TECHNICAL ASSISTANCE PUBLICATION 5 (1972) [hereinafter cited as BUSHER].

[154] Root, *Work Release Legislation*, 36 FED. PROB. 38, 42 (March, 1972). Work releasees, for purposes of this paper, are always inmates. Even those in halfway houses are still technically prisoners, serving in minimum custody facilities. *See, e.g.*, WASH. REV. CODE ANN. § 72.65.130 (Supp. 1974); CAL. PENAL CODE § 1208 (West Supp. 1975); S.C. COMPILED LAWS ANN. § 24-8-1 (Supp. 1974); N.D. CENT. CODE § 12-48.1-01 (Supp. 1973); WIS. STAT. ANN. § 56.065 (Supp. 1974); MD. CODE ANN. art. 27, § 700A (1957); N.C. GEN. STAT. § 148-33.1 (Supp. 1974). Georgia is unusual in this respect; GA. CODE ANN. § 77-309 (1972) forbids using county jails to house state prisoners.

[155] *See* GA. CODE ANN. § 77-312 (1972) (authorization in Georgia is granted through the State Board of Corrections).

[156] BUSHER, *supra* note 153, at ix. Connecticut's statute authorizes only institution-based programs. CONN. GEN. STAT. ANN. § 18-100 (Supp. 1975). Massachusetts also uses only state institutions to house work releasees. Mass. Department of Corrections, An Evaluation of the Impact of the MCI-Concord Day Work Program, second printing, July 31, 1973, at 1.

[157] Vermont's work release program is exclusively community-based. Letter from Peter A. Profera, Director, Community Correction Centers, Vt. Department of Corrections, Aug. 23, 1974. In California, several different types of facilities are used: half of the counties in the state have their own programs, the state contracts with four counties for work release space, and there are several community centers. Until 1973, the state had six institution-based programs, but it has discontinued five. California Department of Corrections Report, *supra* note 148, at 9-18. Poor location, transportation problems and escapes were cited as primary reasons for the closing. *Id.*

[158] California Department of Corrections Report, *supra* note 148, at 5.

[159] *Id.*

[160] *Id.*

[161] H.R. REP. No. 329, *supra* note 141, at 17.

[162] BUSHER, *supra* note 153, at 13.

[163] In the course of this study, information on work release, study release, and training release was received from twenty-four states. Detailed information on work release was received from California, Florida, Illinois, Kansas, Massachusetts, Missouri, Oregon, Pennsylvania, and Wisconsin. Other states sending data were Alabama, Colorado, Kentucky, Louisiana, Maryland, Michigan, Minnesota, New Jersey, North Carolina, Oklahoma, South Dakota, Tennessee, Texas, Utah and Vermont.

[164] Telephone interview with Anne De Latte, Assistant Deputy Commissioner for Education, Georgia Department of Offender Rehabilitation, Oct. 18, 1974.

[165] Interview with William Read, Research Associate, Georgia Department of Offender Rehabilitation, Research, Planning, and Staff Development, October 16, 1974 (hereinafter cited as interview with William Read).

[166] *Id.*

[167] Lowndes Correctional Institution, Putnam Correctional Institution and Stone Mountain Correctional Institution. Interview with William Read, *supra* note 165.

[168] The reason for this policy is the pressure other inmates place on work releasees to import contraband into the prison or act as liaisons with persons in the community. The program may produce hostility for other reasons; non-releasees resent the freedom of those who go outside to work, while the work releasees often feel they are treated unfairly in being

required to pay for their own maintenance, *i.e.* rent a prison cell. *See* Root, *State Work Release Programs: An Analysis of Operational Policies*, 37 FED. PROB. 52, 57 (Dec. 1973); note 165 *supra*.

[169] Chatham Correctional Institution, Georgia Industrial Institute, Lee Correctional Institution, Lowndes Correctional Institution, Montgomery Correctional Institution, Putnam Correctional Institution, Stone Mountain Correctional Institution, Walker Correctional Institution, Ware Correctional Institution. Interview with William Read, *supra* note 165.

[170] Georgia Rehabilitation Center for Women. Interview with William Read, *supra* note 165.

[171] Richmond County and Gilmer County. Interview with William Read, *supra* note 165.

[172] Atlanta Advancement Center, Macon Transitional Center, and the Women's Advancement Center (Atlanta) are all state-run programs. Wheeler House and Gateway House are centers funded by LEAA-IMPACT grants, with matching grants from the state. Andromeda, the state drug rehabilitation program, has, as its final phase, a work release plan but is not primarily a work release center.

[173] Interview with William Read, *supra* note 165.

[174] A good example of such a facility is the Atlanta Advancement Center, which is located in the first three floors of a remodeled motor hotel in downtown Atlanta. The residents have single, double, or triple rooms, with ample bathrooms; a large kitchen and dining room which formerly serviced the motel's restaurant provide excellent meal preparation and service facilities. Spacious office quarters are available and there is some recreational space in the basement. Interview with Donald Quash, Assistant Superintendent, Atlanta Advancement Center, Oct. 11, 1974.

[175] Interview with William Read, *supra* note 165.

[176] Georgia Department of Offender Rehabilitation, Research Section (1-098), Work Release Evaluation, Fiscal Year 1974 (hereinafter referred to as Georgia Evaluation).

[177] *Id.*

[178] At Gateway and Wheeler Houses, the LEAA-IMPACT programs in Atlanta, each resident participates in eight weeks of treatment, for at least four hours each day, before beginning employment. Interview with Steve Sampson, Supervisor, Gateway House, Aug. 12, 1974.

[179] Interview with Donald Quash, *supra* note 174. Interview with Steve Sampson, *supra* note 178. The joint state-federal programs, Wheeler House and Gateway House, serve only offenders who meet the target criteria: they must live in the five-county Atlanta area at the time the offense is committed; must have committed the offense within Atlanta city limits, against persons unknown to them; and must have been convicted of burglary, armed robbery, aggravated assault, rape, or voluntary or involuntary manslaughter. Wheeler House serves parolees; Gateway House serves mainly probationers and is the only program in Georgia in which the residents are recommended to the program by a sentencing judge, thus experiencing work release as a true alternative to incarceration.

[180] Interview with Donald Quash, *supra* note 174.

[181] All facilities except the Macon Transitional Center are in Atlanta.

[182] For example, at Gateway House, each resident is treated by an individual social worker with at least a master's degree and two years' experience, and a counselor who has a bachelor's degree and two years' experience or a master's degree in counseling or psychology. Eight of eleven members of the treatment staff have master's degrees. Interview with Steve Sampson, *supra* note 178.

[183] In 1973, 80-90% of the national corrections budget was spent on custody and administration. H.R. REP. 329, *supra* note 141, at 16.

[184] Wardens' education levels are improving rapidly. In 1971, 94% of the wardens had a high school diploma or less. None had more than a bachelor's degree.

In 1973, 56.7% had at least a bachelor's degree and 21% had a master's or Ph.D. Georgia Department of Offender Rehabilitation Report, 1972-73, at 63 (1973).

[185] Interview with James Wagner, Employment Counselor, Atlanta Advancement Center, Aug. 20, 1974.

[186] Lee, Lowndes, Ware, Montgomery, Walker and Putnam Correctional Institutions, the Georgia Industrial Institute, and Georgia Rehabilitation Center for Women are all rural institutions.

[187] Root, *State Work Release Programs*, *supra* note 167, at 55. The Concord Work Furlough program in Massachusetts is cited as an example. All the releasees there worked in a school for retarded children. None stayed after release.

[188] *Id.* At the Lee Correctional Institute in Leesburg, the Rockwell International factory is virtually the only employer of work releasees. Options are as limited at the Walker Correctional Institute, where the only available employment is in the carpet industry.

[189] Interview with William Read, *supra* note 165. Georgia Evaluation, *supra* note 176. The counties are Baldwin, Lee, Lowndes, Montgomery, Putnam, Walker, and Ware.

[190] Twenty-seven percent of the prisoners are from Fulton and DeKalb Counties alone. *Id.*

[191] Places available at Chatham, Lee, Lowndes, Montgomery, and Ware Correctional Institutes, all in the southern half of the state, total 213 of the 383 work release beds in state institutions. *Id.*

[192] Civic sports leagues are a double benefit to the centers. They provide a controlled outside recreational activity, giving the community at large favorable exposure to the center residents. They also afford needed recreational space, since membership in a league provides reserved time at school gymnasiums and municipal ball parks, facilities to which the center does not have access on its own. Civic groups provide other needed functions which the center could not afford independently and also give the program favorable exposure to outside groups. Interview with Donald Quash, *supra* note 174.

[193] Seventy-seven percent of the inmates granted work release request placement in Atlanta, where only 22% of the work release beds are located. Most of these inmates live in Atlanta; some, however, live elsewhere and request Atlanta placement because of the greater employment flexibility, the opportunity to be in a community-based center, or simply the wish to be in a city. Interview with Michael MacKenzie, Institution Classification Analyst for Work Release, Department of Offender Rehabilitation, Aug. 15, 1974.

[194] Interview with Donald Quash, *supra* note 174.

[195] Interview with William Read, *supra* note 165.

[196] Georgia Department of Offender Rehabilitation, A Procedural Manual for Community Rehabilitation Centers, (1-117), March 1, 1974, p. 41 [hereinafter referred to as Manual]. To earn a pass at the Atlanta Advancement Center, The Women's Advancement Center or the Macon Transitional Center, the resident must have been at the center for two weeks, may not be a convicted sex offender, and must have proved himself trustworthy, dependable, and responsible. He may not have had any disciplinary problems within that period.

[197] The resident earns the pass by accumulating a certain number of points through fulfilling his employment responsibilities, keeping his living quarters neat, completing his assigned center maintenance task, participating in counseling sessions, and being free of disciplinary sanctions.

[198] Manual, *supra* note 196, at 42.

[199] A resident may not leave the state, may not consume alcoholic beverages, may not use drugs without the center Director's approval and issuance by a physician, and may not attend functions at which a large number of people will be present, *e.g.*, a rock festival, without the Director's approval.

[200] In Kansas, every work releasee is eligible for one 48-hour leave each month. Kansas Department of Penal Institutions, Work Release Manual (undated), p. 10. In North Carolina, any releasee within sixty days of his discharge date may receive a 48-hour pass each week. The pass must be used for a family visit. North Carolina State Office of Corrections, Guidelines: Outside Activities for Minimum Custody Honor Grade Inmates (undated), p. 5.

[201] Root, *State Work Release Programs, supra* note 168, at 56.

[202] GA. CODE ANN. § 77-309 (1973).

[203] Georgia Evaluation, *supra* note 176. The Gilmer county program ran at 94% of capacity in fiscal year 1974. *Id.*

[204] Until 1974, every prisoner entering the Georgia Diagnostic Classification Center at Jackson was assigned a prisoner number. The system did not treat recidivists differently; consequently, no method of tracking previous arrests existed. In 1974, the system began using computerized FBI numbers which will track prisoners in Georgia and nationwide, making recidivism research possible.

[205] Oregon Corrections Division, Work Release Six Year Report 16 (1972). H.R. REP. 329, *supra* note 141, at 37.

[206] Oregon Report, *supra* note 205, at 17.

[207] H.R. REP. 329, *supra* note 141, at 37.

[208] *Id.* at 156.

[209] Massachusetts Department of Corrections, An Evaluation of the Impact of the MCI-Concord Day Work Program, Second Printing, July 31, 1973, p. 31.

[210] *Id.* at 32. The study specifically recommended that work release participants have reasonable access to recreational facilities—use had been limited to off-hours on weekends—and that access to alcoholic and drug treatment programs be made available.

[211] This figure includes inmates on education release and training release, a very small fraction of the 5%. Interview with William Read, *supra* note 165.

[212] Florida Division of Corrections, Community Correction Centers, Philosophy and Programs, April 1974, p. 4.

[213] Letter from W.L. Kautzky, Program Services Director, North Carolina Department of Social Rehabilitation and Control, Aug. 30, 1974.

[214] Vermont's work release program is completely community-based. Every inmate participates in the program prior to discharge. Letter from Peter A. Profera, Director, Community Correction Centers, Vermont Department of Corrections, Aug. 23, 1974.

[215] Letter from Roland E. McCauley, Acting Administrator, Wisconsin Department of Health and Social Services, Sept. 4, 1974. Oklahoma Department of Corrections, Community Treatment Centers, Annual Report, 1973-1974 Fiscal Year (1974), p. 37.

[216] Florida Division of Corrections, *supra* note 212.

[217] Interview with James Wagner, *supra* note 185.

[218] *Id.*; Interview with LaVerne Ford, Superintendent, Women's Advancement Center, Aug. 21, 1974.

[219] Per capita cost per day at the Atlanta Advancement Center was $12.07 in fiscal year 1973. For the same period, the same cost in the nineteen state prisons, averaged, was $13.44. Georgia Department of Offender Rehabilitation, Report, *supra* note 184, at 83.

[220] In 1973, work releasees in Georgia returned to the state $100,023 in maintenance charges and $73,354 for support of dependents. They also paid $72,138 in federal and state taxes. Georgia Evaluation, *supra* note 176.

[221] Maryland Department of Corrections, General Elements of Community Corrections, Functional Elements of Community Corrections 7 (undated).

[222] Pennsylvania Bureau of Correction, Procedures for Obtaining Pre-Release Status for Participation in: Work/Educational Release, Temporary Home Furlough, Community Treatment Services, Administrative Directive BC-ADM 805 at 2 (undated).

[223] UNITED STATES BUREAU OF PRISONS, THE RESIDENTIAL CENTER: CORRECTIONS IN THE COMMUNITY 17 (1969).

[224] Pennsylvania Bureau of Correction, Procedures, *supra* note 222.

[225] Interview with William Read, *supra* note 27. Georgia Evaluation, *supra* note 176.

[226] An exception is Vermont, where every inmate in the system exits the corrections system through work release. Letter from Peter A. Profera, *supra* note 157.

[227] Manual, *supra* note 196, at 73.

[228] A recent study shows that prisoners convicted of violent or assaultive behavior are excluded from work release in 20 of 24 states studied; conviction of a sex offense excludes inmates in 18 of the 24 states. Root, *State Work Release Programs, supra* note 168, at 53. A modification of this policy is used in New Jersey, where a violent offense to the person or a sex offense precludes participation unless it is a first offense or the prisoner has not been arrested during the preceding two years. NEW JERSEY DIVISION OF CORRECTION AND PAROLE STANDARDS 680.211.

[229] Root, *supra* note 168. Twelve of the twenty-four states studied used this criterion. An example of such a prisoner is one whose trial attracts a great deal of public attention. Kansas Department of Penal Institutions Manual, *supra* note 200, at 6.

[230] Interview with Michael MacKenzie, *supra* note 193. *See* Manual, *supra* note 196, at 81.

[231] Root, *State Work Release Programs, supra* note 168, at 53. The theory behind this exclusion is that work release has little rehabilitative value for this type of offender, and he is likely to exploit work release in reestablishing his connections with organized crime and importing it into the prison.

[232] A detainer is a request made by one state or the federal government of another state to release a prisoner to the custody of the requesting unit within 180 days of the prisoner's release, for trial of an offense committed in the requesting state or of a federal offense. *See* Interstate Compact on Detainers, 18 U.S.C.A. Appendix. (Supp. 1974).

[233] This requirement is not to preclude the hiring of physically handicapped prisoners. Manual, *supra* note 196, at 73.

[234] Inmates who have shown an ability to utilize self-help programs receive preference under this criterion. *Id.* at 74.

[235] This requirement is a sound one for reasons discussed previously. In practice, it is often impossible to carry out because of the locations of the institution-based programs. See notes 189, 190, 201-03 *supra*, and accompanying text.

[236] Manual, *supra* note 196, at 74.

[237] In Missouri and New Jersey an inmate is not considered for work release unless he is within six months of parole or discharge. Missouri Department of Corrections, Bulletin No. 30 (revised), p. 2; NEW JERSEY, STANDARDS, *supra* note 228. The Louisiana statute leaves the determination of eligibility to the Department of Institutions. LA. REV. STAT. ANN. § 15:1111.B (Supp. 1975). In Illinois the requirement is that the inmate be within one year of his parole or discharge. State of Illinois Department of Corrections, Adult Division, Work Release Program (mimeo, undated), p. 1. Kansas requires that the inmate be dischargeable within eight months. Kansas Department of Penal Institutions, *supra* note 200, at 2. In Michigan, the requirement is three months. Root, *State Work Release Programs, supra* note 168, at 53. Massachusetts requires 18 months. MASS. GEN. LAW. ch. 723, § 49 (Supp. 1975).

[238] Interview with Donald Quash, *supra* note 174. "Due to the open character of [a community] facility, it is expecting too much of the men to keep them on work furlough status for [more than ninety days]." California Department of Corrections Report, *supra* note 157, at 13.

[239] Interview with William Read, *supra* note 165. The amount of time presently spent at the Atlanta Advancement Center averages more than six months per individuals. Interview with Donald Quash, *supra* note 174.

[240] *See* note 237 *supra*.

[241] Of the 1973 state prison population of 5,971 at least 2,714 were convicted of offenses prohibited in the work release eligibility criteria. Georgia Department of Offender Rehabilitation Report, *supra* note 184, at 73.

[242] Maryland Division of Corrections, Work Release Program #1 (undated mimeograph). When the original work release law was passed in Maryland in 1963, only inmates serving sentences of less than five years were eligible. The law was amended in 1964. *Id.*; *cf.* Missouri Department of Corrections, Bulletin, *supra* note 237.

[243] Root, *Work Release Programs*, *supra* note 168, at 57.

[244] Present work releasees are often ex-white collar workers, the most intelligent of the prison population, with the best previous employment records—men considered "good risks" for work release because they were convicted of fraud, forgery, or similar crimes and have no history of personal violence. Interview with Michael MacKenzie, *supra* note 193.

[245] GA. CODE ANN. § 77-307(b) (1973) authorized the State Board of Corrections to "adopt rules governing the assignment, housing, working, . . . treatment, discipline, rehabilitation, [and] training . . . of all prisoners coming under its custody."

[246] 481 F.2d 1140 (D.C. Cir. 1973).

[247] *Id.* at 1142.

[248] Interview with Michael MacKenzie, *supra* note 193.

[249] *Id.*

[250] See Appendix A.

[251] Interview with Michael MacKenzie, *supra* note 193.

[252] *Id.*

[253] *Id.* An example of such a circumstance is when the Analyst feels that the warden is refusing to make a positive recommendation because the inmate is an exceptionally good worker and the warden wants to keep him at the prison for that reason.

[254] Of the criteria used for selection, several are discretionary; thus, the judgment of the warden and the judgment of the Classification Analyst may differ. See notes 233-35 *supra*, and accompanying text.

[255] Recommendation by the Classification Analyst must be approved by the Deputy Commissioner for Offender Administration. However, such approval is granted without question except in rare circumstances. Interview with Michael MacKenzie, note 193 *supra*.

[256] *Id.*

[257] *Id.*

[258] For example, in Kansas each institution has its own Classification Officer, who refuses to process applications from inmates who do not meet the eligibility criteria. He does, however, forward a list of inmates so discouraged to the Director of Penal Institutions at the beginning of each month, so that an inmate whose application is denied is not without redress. Kansas Department of Penal Institutions, Manual, *supra* note 200, at 13.

[259] Interview with William Read, *supra* note 165.

[260] *Id.* Georgia Evaluation, *supra* note 176.

[261] States presently using institutional committees are Oregon, Pennsylvania, and Vermont. Oregon Corrections Division, Work Release. Informational Brochure (1974), at 2; Pennsylvania Bureau of Corrections, Procedures, *supra* note 222; Appendix 3-1. In Vermont, the inmate is included in the committee deliberations and receives directly the reasons for acceptance or rejections. Vermont Department of Corrections, Revised Bulletin No. 22 (undated), at 2-3.

[262] The test battery includes the Sixteen Personality Factor Questionnaire, the Clinical Analysis Questionnaire, the Culture Fair Intelligence Test, the Wide Range Achievement Test and the General Aptitude Test Battery. Georgia Report, *supra* note 184, at 23.

[263] Since the Classification Analyst presently routinely refuses any application not ap-

proved by the warden, this system would not affect any inmates rejected by the institutional committee. If an inmate applied twice for work release and was rejected by the institution committee, he should have the option of petitioning to the Classification Analyst for review.

[264] Community center officials interviewed felt strongly that they should have an opportunity to review the inmate's file and to have input into the selection process. They also stressed that more testing should be performed before the inmate is assigned to work release, and the center should receive a more complete and descriptive employment history. Interviews with Donald Quash, *supra* note 174, LaVerne Ford, *supra* note 218, and James Wagner, *supra* note 48.

[265] See notes 266-68 *infra* and accompanying text.

[266] California Department of Corrections, Sacramento Valley Community Correctional Center Operational Guideline (undated), at 10-11.

[267] *Id.*

[268] State of Illinois, Department of Corrections, Adult Division, Work Release Program, (Nov., 1973), at 3.

[269] *Id.*

[270] Interview with Michael MacKenzie, *supra* note 193.

[271] The Federal Work Release Handbook proposes that a committee representing all agencies involved in the inmate's treatment should decide the inmate's eligibility for work release and design his program. This possibility should be considered as an alternative to the plan proposed above. BUSHER, *supra* note 153, at 8.

[272] H.R. REP. 329, *supra* note 141, at 29.

[273] *Id.*

[274] An inmate often is unable or unwilling to remain in the geographic area of his incarceration after release. See notes 189-94 *supra* and accompanying text.

[275] This is usually more of a challenge for community-based residents than for releasees based in institutions because so little choice is available at the institutions. Employment is often limited to one company or one type of industry (e.g., carpet manufacturing at the Walker Correctional Institute program) and work release places depend on the jobs being open at these factories. Interview with James Wagner, *supra* note 185.

[276] Interview with Donald Quash, *supra* note 174.

[277] The job counselor is required to maintain an active file of past, present and potential employers, to explain the program to new employers, and to function as a liaison between the employer and the center staff. Manual, *supra* note 196, at 16.

[278] The center employment counselor is encouraged to assist inmates planning to use the State Employment Office with completion of the required forms. Manual, *supra* note 196, at 22. South Dakota and Florida also encourage use of the State Employment Offices. South Dakota Board of Charities and Corrections, Sixth Annual Progress Report 6 (1973); Florida Division of Corrections, Community Correctional Centers, Resident Orientation Manual 8 (May, 1974). In Oregon, two State Employment Counselors are assigned full time to finding employment for work releasees. Oregon Corrections Division, Work Release, Six Year Report 2 (1972). As Georgia's program expands, the State Employment Office should commit the needed resources to assist releasees in finding jobs.

[279] Vocational Rehabilitation assistance is restricted to those releasees who are qualified as mentally, physically, or emotionally handicapped which is rare, since mental or emotional disturbances usually disqualify inmates from work release; but for those who qualify resources for the purchase of tools, uniforms, etc. are available. Interview with Anne DeLatte, *supra* note 164.

[280] Inmates are discouraged from changing jobs; therefore, it is important that they have no grounds to claim they were forced to accept undesirable employment. In other states, job changes are also discouraged; in Kansas, each work releasee signs a Work Release Agreement

in which he contracts not to change employment. Kansas Work Release Manual, *supra* note 200, at 21. In Oregon, any proposed job change must be investigated and approved by a field counselor. State of Oregon, Transitional Services, Corrections Division, Handbook for Work Release Enrolees 10 (undated).

[281] Interview with James Wagner, *supra* note 185.

[282] GA. CODE ANN. §77-309(b)(2) (1973).

[283] Manual, *supra* note 196, at 20.

[284] Interview with James Wagner, *supra* note 185.

[285] Georgia Evaluation, *supra* note 176.

[286] *Id.* The remaining five per cent either never find a job or are on educational or training release.

[287] MICHIGAN DEPARTMENT OF CORRECTION, THE USE OF CORRECTIONAL TRAINING 19 (1969).

[288] *Id.* at 1.

[289] *Id.* at 18.

[290] *Id.* at 19.

[291] *Id.* at 20-21.

[292] See notes 176-84 *supra* and accompanying text.

[293] Interview with James Wagner, *supra* note 185.

[294] Employers of Atlanta Advancement Center residents are generally satisfied with the quality of work performed by their resident employees. Several request employees from the center on a regular basis. Eighty per cent of the inmates are successful in carrying on regular employment throughout their center residence.

[295] GA. CODE ANN. §77-309(b)(2)(iii) (1973).

[296] Manual, *supra* note 196, at 52.

[297] *Id.*

[298] *Id.* at 52-53.

[299] In Florida, the charge is $3.00 for room and board, $1.00 for transportation, Division of Corrections, Community Correctional Centers Resident Handbook 12, April, 1974; in North Carolina, $3.45, Department of Social Rehabilitation and Control, North Carolina's Work Release Program, mimeograph at 2, undated; in Maryland, $2.50 for room, $1.00 for transportation, Maryland Division of Corrections, Work Release Program, mimeograph at 1; and in Texas, $3.85, Texas Department of Corrections, Work Furlough Program, Special Study No. 1, Oct., 1973. A better policy seems to be that of Missouri, which charges inmates on a sliding scale according to salary; those inmates making less than $100 per month are charged nothing, those making $101 to $150 pay $30 per month, those making $151 to $200 pay $45 per month and so on up to maximum of $150. No inmate ever pays more than it costs the state to maintain him. Missouri Department of Corrections Memorandum, *supra* note 237. Georgia should adopt such a system.

[300] Manual, *supra* note 196, at 53. None of the other states surveyed required mandatory savings.

[301] *Id.* The amount is determined by considering the resident's salary and the amount of aid his family receives from the state.

[302] *Id.*

[303] *Id.* at 54.

[304] Root, *Work Release Legislation*, 36 FED. PROB. 38, 41 (March, 1972).

[305] See note 303, *supra*.

[306] Includes both state and federal taxes, as well as FICA.

[307] This figure is the cumulative total for fiscal years 1972, 1973, and 1974. Individual disbursements for those years are as follows:

	1972	1973	1974	
Taxes	17	20	18	
Maintenance	30	29	25	
Transportation	4	3	16	
Clothing	3	5	3	
Incidentals	12	17	17	
Reserve Savings	11	5	7	
Dependents	23	21	14	.121

Georgia Evaluation, *supra* note 176.

[308] Alabama Department of Corrections, Alabama Community Based Corrections Programs, pamphlet, July, 1974. Figures are for April 2, 1972, to June 30, 1974. No breakdown was given for the amount distributed to inmates. The 44% figure presumably accounts for both the savings and the incidentals portion of the total. The transportation figure is assumed to be included in the incidentals figure also.

[309] Florida Department of Health and Rehabilitative Services, Report for July, 1974, at 1. Figures for July 1, 1968 to July, 1974.

[310] Kansas Department of Corrections, Work Release Program 3, pamphlet, (1974).

[311] Massachusetts Department of Corrections, An Evaluation of the Impact of the MCI-Concord Day Work Program, *supra* note 209. Figures are for January, 1970 to December, 1971.

[312] New Jersey Department of Institutions and Agencies, Work Release 1, Mimeo (1974). Figures are for fiscal year 1974.

[313] North Carolina Department of Correction, Work Release Fund, chart, Financial Statement, Fiscal Year 1973-1974, period ending June 9, 1974. Figures used were for fiscal year 1972. Since figures are based on after-tax disbursements, the remaining disbursement percentages are correspondingly larger.

[314] State of Oklahoma, Community Treatment Centers, *supra* note 215, at 7.

[315] South Dakota Board of Charities and Corrections, Sixth Annual Progress Report, *supra* note 278, at 10-11. Figures for calendar year 1973.

[316] Vermont Department of Corrections, chart, Community Correctional Centers - Work Release Fiscal Year 1974 (1974).

[317] Wisconsin Division of Corrections, Work Release-Study Release Program booklet, (1973). Figures for calendar year 1972.

[318] Inmates whose families are not receiving state aid may choose to send money to them. Some use this as a method of getting access to spending money—a designated amount is sent home and then a visiting relative brings the inmate cash when he or she comes to visit. This practice should be watched for and discouraged by counselors.

[319] Manual, *supra* note 196, at 56.

[320] Interview with Donald Quash, *supra* note 174. Although several centers presently allow the inmate to have an input into his wage disbursement, nine in Atlanta, at least, has released funds at the discretion of the resident. All disbursements still must be made through center business offices. Interview with LaVerne Ford, *supra* note 218.

[321] Any purchase over ten dollars must be separately approved by the Director or Warden. Manual, *supra* note 174.

[322] Interview with Donald Quash, *supra* note 174.

[323] In remote institutions, the work releasees should not have to absorb the total cost of their transportation. The bulk of it should be included in the institution budget.

[324] Work releasees may accumulate good time allowances, as may regular prisoners. Work release will not by itself result in parole or discharge at an earlier date than would have been possible without participation in the program. Delay of release because of denial of parole does not make the completion unsuccessful.

[325] Georgia Evaluation, *supra* note 176.

[326] Alabama reported a 70.3% rate for the period from April, 1972 to June. 1974. Alabama Department of Corrections pamphlet, *supra* note 308. For a six year period ending in July, 1974, Florida reported a 75% success rate. Florida Department of Health and Rehabilitative Services, Community Work Programs 6 (revised, July, 1974). Kansas' success rate for fiscal year 1974 was 81%. Kansas Department of Corrections, Work Release Program 9 (undated). New Jersey's rate for calendar year 1973 was 83%. New Jersey Department of Institutions and Agencies, Division of Corrections and Parole, Annual Report, Calendar Year 1973, at 4 (1974). In fiscal year 1973, Oklahoma had a success rate of 73%. Oklahoma Department of Corrections, Community Treatment Centers, Annual Report (1973). Oregon's rate for the six years ending in December 1972, was 71%. Oregon Report, *supra* note 278, at 13. And in Wisconsin, in 1972, the success rate was 70%. Wisconsin booklet, *supra* note 317, at 10.

[327] Interview with William Read, *supra* note 165.

[328] Georgia Evaluation, *supra* note 176.

[329] *Id.* In other states reporting, the percentage was less than one. Michigan Department of Corrections, Monthly Report 1 (1974); Oklahoma Department of Corrections Report, *supra* note 326, at 7; Wisconsin booklet, *supra* note 317, at 10.

[330] See notes 261-71, 176-84, *supra* and accompanying text.

[331] Georgia Evaluation, *supra* note 176. Of the research group who completed work release successfully, 4.1% had known drug problems, 9.3% had histories of alcoholism, and 5.8% had marital problems. In the failure group, 14.3% had histories of drug involvement, 26.2% had an alcohol problem, and 16.7% had marital difficulties.

[332] Andromeda is located on two floors above the Atlanta Advancement Center. A special center for releasees with marital problems should be run in conjunction with another, larger center in a similar fashion.

[333] The Department of Corrections/Offender Rehabilitation has established rules which must be followed in each center, though center administrators may promulgate requirements in addition to these as long as all inmates are informed of any changes in the standard of behavior required of them. The rules which must be followed in all centers are: (1) inmates must be respectful of and responsive to center staff; (2) reasonable standards for dress and hygiene must be followed; (3) assigned housekeeping tasks must be performed adequately; (4) inmates must attend required counseling sessions; (5) possession of weapons, drugs, intoxicants, or other contraband is forbidden; (6) inmates may not barter, gamble, or exchange items among themselves or with staff members or civilians; (7) inmates may not participate in any rebellion or agitation and must not assault or resist any person; (8) inmates must sign in and out of the center and make their presence at all times known to the proper authority.

[334] Alcohol abuse accounts for 35.5% of terminations, attitude for 29%, unauthorized absence, 22.6%, possession of contraband, 9.7% and miscellaneous offenses, 3.2%. Interview was William Read, *supra* note 165. Evaluation, *supra* note 176.

[335] The center, however, has no authority over escapees or inmates who commit new crimes; once a violation of this nature is reported, public officials have full responsibility. Interview with Donald Quash, *supra* note 174.

[336] Interview with William Read, *supra* note 165.

[337] Manual, *supra* note 196, at 48. Forfeiture of good time allowance must be approved by the Commissioner or his deputy. *Id.* When any disciplinary action is taken, a report may be sent to the Office of Offender Administration, an act which will essentially guarantee denial of parole at an inmate's first hearing. No corporal punishment may ever be used. Interview with Donald Quash, *supra* note 174.

[338] A good example of this is unauthorized absence. The superintendent may decide when the absence is an absence and when it is an escape. In one center, a warrant may be sent out after an inmate is missing for two hours, while in another, the superintendant might feel that

the inmate could be located or would return on his own and would prefer to deal with him in the center. Also, within a center different inmates may be treated differently; an unauthorized two hour absence might result in a warning or probation for one inmate and termination for another. Interview with William Read, *supra* note 165.

[339] Georgia Manual, *supra* note 196, at 47.

[340] Interview with William Read, *supra* note 165.

[341] *See* Leonard v. Miss. State Probation and Parole Bd., 373 F. Supp. 699, 704 (N.D. Miss. 1974)("[T]he full panoply of due process protections does not attach every time the state merely confers a new status on the individual [prisoner] or denies a request for a different status"); Hutchinson v. Anderson, 366 F. Supp. 795, 796 (E.D. Okl. 1973)("The supervision of the internal affairs of correctional institutions including the discipline and care of inmates rests with the prison administrators and is not ordinarily subject to judicial review . . ."); Williams v. Cannon, 370 F. Supp. 1243 (N.D. Ill. 1974)(no right to counsel at an in-prison hearing). *But see* Adams v. Carlson, 352 F. Supp. 882, 893 (E.D. Ill. 1973)(" . . . while all procedural safeguards provided citizens charged with a crime cannot and need not be afforded to inmates charged with the violation of prison rules, some assurances of elemental fairness are essential when substantial individual interests are at stake.")

[342] 225 Pa. Super. 95, 311 A.2d 318 (1973).

[343] 408 U.S. 471 (1972). The holding in this case mandates a hearing with minimal due process requirements before parole may be revoked.

[344] 354 N.Y.S.2d 572 (1974).

[345] *Id.* at 574.

[346] Interview with William Read, *supra* note 165.

[347] GA. CODE ANN. §77-309(b)(3)(1972); WASH. REV. CODE ANN. §72.65.-070 (1964); MASS. GEN. LAWS ch. 777 §18; SO. DAK. COMP. LAWS §24-8-3 (1967); N.D. CENT. CODE §12-49-04 (1960); CAL. PENAL CODE § 1208 (1972); PA. STAT. ch.61 §1053 (1964); WIS. STAT. ANN. §56.065(2) (1957); SO. CAR. CODE ANN. §55.303.1 (1962).

[348] *See* United States v. Vaughn, 446 F.2d 1317 (D.C. Cir. 1971); People v. Haskins, 177 Cal. App. 2d 84, 2 Cal. Rptr. 34 (1960); State v. Kiggins, 86 S.D. 612, 200 N.W.2d 243 (1972); Lacey v. State, 506 S.W.2d 809 (Tenn. 1974).

[349] 310 A.2d 255 (D.C. App. 1973).

[350] *Id.* at 256.

[351] 232 F. Supp. 982 (S.D. Cal. 1963).

[352] *Id.* at 985.

[353] MD. CODE ANN. Art. 27 §700A(c).

[354] Interview with William Read, *supra* note 165. Evaluation, *supra* note 176.

[355] Georgia Report, *supra* note 184, at 51.

[356] Interview with Anne DeLatte, *supra* note 164. The quality of those programs varies greatly. Community centers hire trained professionals to come in specially for classroom and tutorial sessions. Institutions often use custodial personnel or counselors as *ad hoc* teachers, with inferior results.

[357] *Id.*

[358] *Id.*

[359] *Id.*

[360] Oregon is the only state in which on-campus housing is provided for those still on inmate status, but Colorado, Kentucky, Minnesota, New Mexico and Pennsylvania all have established halfway houses on university campuses for parolees and probationers. H.R. REP. No. 329, *supra* note 141, at 25.

[361] *See, e.g.*, Six Year Report, *supra* note 205, at 18.

[362] Interview with Anne DeLatte, *supra* note 164.

[363] Manpower Development Training Act, 42 U.S.C. § 2571 *et seq.* (1962). *See also* 29 U.S.C. § 871 (Supp. 1973).

[364] Parole-Corrections Project, American Correctional Association, Mutual Agreement Programming: An Overview 22 (June, 1974).

[365] *Id.*

[366] *Id.* Failure by the inmate to perform according to contract terms calls for renegotiation.

[367] *Id.* at 10.

[368] Within the Georgia Rehabilitation Center for Women, institutional programs in cosmetology, food service, business education, barbering and upholstery are offered but are available to only 20 of 300 women prisoners.

[369] *See* Note, *Denial of Work Release Programs to Women: A Violation of Equal Protection*, 47 So. CAL. L. REV. 1453, 1458 (1974).

[370] *Id.* The Women's Advancement Center, accommodating about 45 releasees, opened in July, 1974.

[371] California Department of Corrections, A Report on the Work and Training Furlough Program 15 (1972).

[372] H.R. REP. 329, *supra* note 141, at 32.

[373] *Id.* at 17.

[374] *Id.* at 18.

[375] *See* S. SCHAFER, COMPENSATION AND RESTITUTION TO VICTIMS OF CRIME 8 (2d ed. 1970). "The victim became the Cinderella of the criminal law." *Id.*

[376] Mueller, Cooper, *The Criminal, Society, and the Victim*, NCJRS Selected Topic Digest 3 [hereinafter cited as Mueller, Cooper]. *See also* Williams, *The Definition of Crime*, 8 CURRENT LEGAL PROBLEMS 107, 130 (1955).

> [377] All crime was crime against the family . . .(i)t was the family that had to atone, or carry out the blood feud. In time, money payments were fixed as commutations for injury.

1 H.D. TRAILLS, SOCIAL ENGLAND 5 (1899). Other early societies had similar schemes. In the Code of Hammurabi (c. 2380 B.C.) the practice of individual reparation applied to property damage. *See* Wolfgang, *Victim Compensation in Crimes of Personal Violence*, 50 MINN. L. REV. 223, 224 (1965) [hereinafter cited as Wolfgang]. Two Code sections demanded that in cases of highway robbery, if the criminal was not apprehended, the local community would make compensation of the victims. *See* Mueller, *Compensation for Victims of Criminal Violence, A Round Table*, 8 J. PUB. L. 191, 228 (1959). The Hebrew talmudic code sought exact reparation—an "eye for an eye"—that the same be returned as was taken. *See* Mueller, *Tort, Crime and the Primitive*, 46 J. CRIM. L.C. & P.S. 303, 316-17 (1955), containing table comparing the Code of Hammurabi and Mosaic law. Mueller concludes here that in primitive societies penal law and criminal justice were established and later followed by tort compensation for harm.

[378] Jeffery, *The Development of Crime in Early English Society*, 47 J. CRIM. L.C. & P.S. 647, 655 (1957). The only other punishment was outlawry. *Id.*

[379] Mueller, *Compensation for Victims of Criminal Violence, A Round Table*, 8 J. PUB. L. 191, 226 (1959).

[380] Jeffery, *supra* note 378, at 657. Some examples: "If anyone slays a foreigner, the King shall have two-thirds of his wergild, and his relatives one-third. (Ine.23)" *Id.* at 656.

> The special *munds* of the lords and bishops were devoured by the king's peace. The king was now a territorial king and his peace extended throughout the land. The king was now the source of law. He had jurisdiction in every case. The State, and not the family or lord, now was the proper prosecutor in every case.

Id. at 661-62. Thus, feudal justice was replaced with state justice. *Id.* at 657.

[381] Mueller, Cooper, *supra* note 376, at 4. By the 12th century, the system of *wer* and *bot* gave way to the criminal law.

[382] N. BLACKSTONE, IV COMMENTARIES ON THE LAWS OF ENGLAND 5 (8th ed. 1778). Distinguishing public and private wrongs, Blackstone wrote:

> . . . private wrongs, or civil injuries are an infringement or privation of the civil rights which belong to individuals, considered merely as individuals; public wrongs, or crimes and misdemeanors, are a breach and violation of the public rights and duties due to the whole community, considered as a community, in its social aggregate capacity . . . .

Id.

[383] Mueller, Cooper, *supra* note 376, at 4.

[384] Examples are philosopher Herbert Spencer, William Tallack, a British penal reformer, and penologist Raffaele Garofalo, in the late 1800's. The International Penal Congress in 1889 adopted a resolution that "Modern law does not sufficiently consider the reparation due the injured parties." S. SCHAFER, THE VICTIM AND HIS CRIMINAL 24, 114 (1968); Jacob, *Reparation or Restitution by the Criminal Offender to His Victim: Applicability of an Ancient Concept in the Modern Correctional Process*, 61 J. CRIM. L.C. & P.S. 152, 162-63 (1970).

[385] Fry, "Justice for Victims," reprinted in *Compensation for Victims of Criminal Violence, A Round Table*, 8 J. PUB. L. 191 (1959). *See* Appendix.

[386] Various programs are underway in California, Hawaii, Illinois, Maryland, Massachusetts, New Jersey, New York, Nevada, Washington, and in Great Britain, Australia, New Zealand and Switzerland.

[387] The Federal Violent Crimes Compensation Acts § 2155 and S. 9, 89th Cong., 1st Sess. (1965), both proposed by Ralph Yarborough, were defeated. *See* Yarborough, *S. 2155 of the Eighty-Ninth Congress: The Criminal Injuries Compensation Act*, 50 MINN. L. REV. 255, 256 (1965). John McClelland is supporting S. 800, read two times in the 93rd Congress, 1st session (1973). *See The Battle for a Federal Violent Crimes Compensation Act: The Genesis of S.9*, 43 So. CAL. L. REV. 93 (1970).

[388] See notes 504-14 *infra* and accompanying text.

[389] California, for example, is currently investigating such a program:

> We do not have a restitution program specifically geared to the inmate or parolee repaying the victim. Our Research Division is attempting to develop this concept. You probably are aware of Minnesota's Restitution House Project. We hope to develop something similar.

Letter to Michael Stone from William P. Sidell, Reentry Administrator, State of California Department of Corrections, Parole and Community Services Division, Sept. 6, 1974.

[390] Georgia is an example. See notes 399-455 *infra* and accompanying text.

[391] *See generally* SUTHERLAND & CRESSEY, PRINCIPALS OF CRIMINOLOGY 278-79 (5th ed. 1955).

[392] *See* Schafer, *Victim Compensation and Responsibility, Symposium on Crime Compensation*, 43 So. CAL. L. REV. 55, 65 (1970).

> Compensation and restitution are terms often used interchangeably—in fact they represent two different obligations and provide two different vantage points from which society's interest in the victim can be studied. Compensation is a responsibility assumed by society; it is civil in character. . . . Restitution, on the other hand, allocates responsibility to the offender; a claim for restitution by the criminal is penal in character, and thus manifests a correctional goal in the criminal process.

Id.

[393] *See generally* Floyd, *Victim Compensation: A Comparative Study*, 8 TRIAL 12 (May/June 1970); Brooks, *Who Gets What?*, 47 STATE GOVERNMENT 17 (1974).

[394] Brooks, *supra* note 393.

[395] Rensselaer, *A Compensation Board at Work*, 8 TRIAL 20 (May/June 1972).

[396] Bruen, *Controlling Violence v. Compensating Victims*, 50 A.B.A.J. 855 (1964).

[397] Kutner, *Crime Torts: Due Process for Crime Victims*, 8 TRIAL 28 (May/June 1972). Compensation is sometimes characterized as "tort loss compensation," since it essentially replaces the tort claim against the criminal. Mueller, *Compensation for Victims of Crime: Thought Before Action*, 50 MINN. L. REV. 213, 215 (1965). Others characterize it simply as a public take-over of private insurance. Kutner, *Id.* at 30 n.17 (comment by Murphy).

[398] *See* Lamborn, *Remedies for the Victims of Crime, Symposium on Crime Compensation*, 43 So. CAL. L. REV. 22, 35-36 (1970). Lamborn states that 49% of crimes are reported to police, and arrests are made in only 21% of serious crimes known to police. *Id.* at 36.

[399] *See* Schafer, *Corrective Compensation*, 8 TRIAL 25 (May/June 1972)[hereinafter cited as Schafer, TRIAL]. *See also* Schafer, *Compensation of Victims of Criminal Offenses*, 10 CRIM. L. BULL. 605 (1974).

[400] *See* notes 437-47 *infra* and accompanying text. *See also* Wolfgang, *supra* note 377, at 229.

[401] See notes 476-90 *infra* and accompanying text.

[402] It should be noted that, although frequently used interchangeably, restitution and reparation have different meanings. Restitution is reimbursement of a sum of money which the defendant appropriated in the commission of a crime. Reparation is synonomous with tort damages, being a sum ordered to the injured party commensurate with general and special damages. Best and Birzon, *Conditions of Probation: An Analysis*, 51 GEO. L.J. 809 (1963).

[403] Schafer, TRIAL, *supra* note 399.

[404] *Id.*

[405] M. FRY, ARMS OF THE LAW 126 (1951). Ms. Fry also wrote:

> To the offender's pocket it makes no difference whether what he has to pay is a fine, costs, or compensation. But to his understanding of the nature of justice it may make a great deal.

Id. at 124.

[406] *See* note 576 *infra* and accompanying text. *See also* K. SMITH, A CURE FOR CRIME 14, 15 (1965).

[407] Wolfgang, *supra* note 377, at 232.

[408] SUTHERLAND & CRESSEY, *supra* note 391, at 278.

[409] *See generally* Comment, *Juvenile Probation: Restrictions, Rights and Rehabilitation*, 16 ST. LOUIS U.L.J. 276, 280 (1971); Best and Birzon, *supra* note 402, at 827.

[410] Statistics on the frequency of use of this policy are difficult to obtain. A survey of Georgia judges on frequency of use received low response. A Georgia Department of Offender Rehabilitation study, *Research Project no. 138*, Read, found only fifteen persons in the state had had probation revoked for failure to make restitution or pay fines. Of 738 persons with their probation revoked, some 48 had been sentenced to serve time and pay a fine. The difficulty in this study, conducted by random sampling, is the lack of accurate information particularizing the reasons for probation revocation.

In addition, those with probation revoked, according to Georgia Department of Offender Rehabilitation quarterly statistics, are only 1.8% of the total persons on probation. Thus, if 15 were an accurate number in Project 138, to represent the entire conglomeration, the number must be increased proportionally to at least 750 persons, which would be a formidable amount. The reliability of these methods, however, is questionable.

Quarterly reports in Georgia also reveal the "Total monies collected—fines, costs, restitution and other" (but not including child support). This quarterly amount in 1973-1974 ranged from $348,183.31 to $532,588.90. These amounts are not further broken down though. Monthly reports from Fulton County, Georgia (containing most of Atlanta) does give an itemized cost

account. It shows restitution for July, 1974 at $10,047.93 in Superior Court, plus $118,695.60 in restitution collected. This is of total collections of $270,597.33, including child support, or $53,800 not including child support. Restitution is 35.3% of total collections, then. If these amounts were extended to the statewide statistics above, it would mean that from $125,000 to $175,000 collected quarterly is in restitution.

Obviously, none of these statistics are conclusive.

[411] *See, e.g.*, GA. CODE ANN. §27-2711 (1972). *See also* Federal Probation Act, 18 U.S.C. §3651 (Supp. 1975).

[412] *See* Note, *Use of Restitution in the Criminal Process: People v. Miller*, 16 U.C.L.A. L. REV. 456, 460 (1968):

> The utilization of correctional restitution is certainly not unique. . . . A majority of jurisdictions in the United States, as well as foreign courts, sanction reparation by the offender as a condition of probation.

[413] 38 Ga. App. 386, 144 S.E. 49 (1928).

[414] 1913 Ga. L. 112, "Probation of Offenders in Certain Cases."

[415] *Id.*

[416] Henry v. State, 77 Ga. App. 735, 49 S.E.2d 681 (1948)(fine and restitution for drunken driving upheld); Davis v. State, 53 Ga. App. 325, 185 S.E. 400 (1936)(order that $70 be paid as part compensation for selling of crops on which there was a lien was upheld as "legal" and "reasonable"); Roberts v. State, 41 Ga. App. 364, 152 S.E. 921 (1930)(order sustained that defendant should pay for costs of repair to third party's auto on conviction of drunken driving); Jones v. State, 27 Ga. App. 631, 110 S.E. 33 (1921)(drunken driving conviction holding that defendant should maintain a good life and not drive an auto was upheld under the 1913 Act); Towns v. State, 25 Ga. App. 419, 103 S.E. 724 (1920) (imprisonment for failure to pay support of child as probated sentence for abandonment was upheld without the 1913 Act).

[417] Ray v. State, 40 Ga. App. 145, 149 S.E. 64 (1929).

[418] *Id.* at 146. The court said there shall be no imprisonment for debt, adding "however equitable it may seem." *Id.*

[419] This excludes Minnesota with its active corrective restitution plan. See notes 504-14 *infra* and accompanying text.

[420] Cohen, *The Integration of Restitution in the Probation Services*, 34 J. CRIM. L.C. & P.S. 315, 316 (1944) [hereinafter cited as Cohen].

[421] This is not to overlook the other currently existing statutory provisions for restitution, despite their apparent non-use. *See, e.g.*, GA. CODE ANN. §77-517 (1973), which states that rules for parolees may include "that he shall make reparation or restitution for his crime . . . ." See notes 515-25 *infra* and accompanying text.

[422] 18 U.S.C. §3651 (Supp. 1975).

[423] ALI MODEL PENAL CODE §301.1(2), Proposed Official Draft (1962).

[424] *See, e.g.*, ALI MODEL PENAL CODE § 7.01(2), Proposed Official Draft (1962) which reads:

> The following grounds, while not controlling the discretion of the Court, shall be accorded weight in favor of withholding sentence of imprisonment: . . . (f) the defendant has compensated or will compensate the victim of his criminal conduct for the damage or injury that he sustained; . . .

See also ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO SENTENCING ALTERNATIVES AND PROCEDURES, § 2.7(c) (1967):

> In determining whether to impose a fine and its amount, the court should consider: . . . (iii) the extent to which payment of a fine will interfere with the ability of the defendant to make any ordered restitution or reparation to the victim of the crime; . . .

See also MODEL SENTENCING ACT § 9 (2d ed.), Council of Judges of National Council on Crime and Delinquency, in 18 CRIME & DELINQUENCY 335, 356-59 (1972).

[425] Cohen, *supra* note 420, at 321.

[426] Schafer, TRIAL, *supra* note 399, at 25.

[427] Schafer, TRIAL, *supra* note 399, at 26.

[428] FRY, *supra* note 405.

[429] Eglash, *Creative Restitution—A Broader Meaning for an Old Term*, 48 J. CRIM. L.C. & P.S. 619, 622 (1958). Eglash says creative restitution will increase the capacity for choice and bring release to the impulse-ridden individual. *Id.*

[430] Jacob, *supra* note 384, at 156.

[431] Schafer, *supra* note 392, at 67.

[432] Georgia's Department of Offender Rehabilitation, in an application for federal funds, stated that it "proposes . . . to increase this utilization as a diversionary program in lieu of incarceration and as a means of reducing the prisoner population." Law Enforcement Assistance Administration grant application, 66.

[433] *See* Fogel, Galaway, and Hudson, *Restitution in Criminal Justice: A Minnesota Experiment*, 8 CRIM. L. BULL. 681, 688-90 (1972).

[434] Minnesota Department of Corrections, Minnesota Restitution Center (undated) [hereinafter referred to as Minnesota].

[435] Galaway, Hudson, *Restitution and Rehabilitation: Some Central Issues*, 18 CRIME & DELINQUENCY 403 (1972)[hereinafter cited as Galaway, Hudson].

[436] Minnesota's plan is discussed in detail, *infra*, notes 504-14 and accompanying text.

[437] *See, e.g.*, Jacob, *supra* note 384, at 155.

[438] See cases cited *supra* note 415.

[439] Minnesota, *supra* note 434.

[440] Federal Bureau of Investigation Crime Reports for 1972 indicate a rate of 2,091.3 property crimes per 100,000 persons for the state of Georgia. Furthermore, the robbery rate is 134.3; burglary is 1,081.7; larceny over $50.00 is 702.9; and auto theft is 306.7, all per 100,000 persons. In major cities, the rates skyrocket. Atlanta experienced 3,470.7 property crimes per 100,000 persons, and Savannah 3,750.1 per 100,000. On the other crimes, Atlanta had (per 100,000) rates of: robbery—277.8, burglary—1,848.0, larceny over $50—1,077.8, auto theft—544.9. Savannah experienced (per 100,000 persons): robbery—274.7, burglary—1,953.4, larceny over $50.00—1,338.2, auto theft—458.5. Federal Bureau of Investigation statistics of Reported Crime in Metropolitan Areas (1972).

Comparatively Atlanta ranked 18th in the nation in robberies, and 2nd in burglaries, while Savannah ranked 24th in total property crime, 20th in robberies, and 16th in burglary. Note that all of these statistics are reported crime only; some estimates indicate property losses in financial terms may actually exceed by five or six times the reported amount. Lamborn, *supra* note 399, at 32.

[441] Georgia Department of Offender Rehabilitation (July, 1974) (computer print-out).

[442] Including: damage to property, burglary, deception, theft, unarmed robbery. Not including: arson, armed robbery, or criminal attempt.

[443] Including: theft offenses and criminal trespass. Not including: unspecified misdemeanors or non-support.

[444] A breakdown of the reported statistics shows:

Felonies:	GA. CODE ANN. § 26-	
1501	Criminal Damage One	15
1502	Criminal Damage Two	49
1504	Defraud	1

1505	Vandalism to place of worship	2
1601	Burglary	2995
1602	Possession of burg. tools	91
1701	Forgery One	529
1702	Forgery Two	67
1705	Ill. Use Cred. Card	33
1802	Theft by Taking	773
1803	Theft by Deception	30
1805	Theft of Lost Prop.	2
1806	Theft by Rec'g Stol. Goods	202
1807	Theft of Services	4
1813	Theft of Mot. Vehicle	902
1814	Conversion of Leased Prop.	3
1901	Robbery	957

Misdemeanors:

Rec'g Stolen Goods	17
Theft by Taking	230
Theft by Robbery	6
Cheat/Swindling	11
Bad Checks	46
Fraudulent Checks	11
Lottery	2
Forgery	11
Worthless Checks	26
Criminal Trespass	52
Shoplifting	1

See also Jacob, *supra* note 384, at 166:

> In some types of crimes there is no victim other than society in general. Included in this group are such offenses as treason, public drunkenness, prostitution, homosexuality between consenting adults, abortion and certain narcotic offenses. In trials of cases involving such offenses there would be no reparation issue.

[445] The statistics report approximately 17,000 offenses for approximately 11,000 incarcerants.

[446] Lamborn, *supra* note 398, at 30.

[447] *Id.*

[448] Samuels, *Compensation and Restitution*, 120 NEW L.J. 475 (1970)(writing about the English system).

[449] Note, *Limitations Upon Trial Court Discretion in Imposing Conditions of Probation*, 8 GA. L. REV. 466, 475 (1974).

[450] United States v. Taylor, 305 F.2d 183 (4th Cir. 1962) (restitution of tax on evasion conviction); Karrell v. United States, 181 F.2d 981 (9th Cir. 1950)(restitution on losses sustained from false certifications on loan application); United States v. Follette, 32 F. Supp. 953 (E.D. Pa. 1940) (restitution on conviction of embezzlement of postal funds); Basile v. United States, 38 A.2d 620 (Muni. Ct. App. D.C. 1944)(restitution to compensation on conviction of failure to insure).

[451] 110 Vt. 221, 3 A.2d 521 (1939).

[452] 3 A.2d at 525.

[453] ALI MODEL PENAL CODE §301.1 (Comment, Tentative Draft 2, 1957). *See also supra* note 449, at 475.

[454] Best, Birzon, *supra* note 402, at 827.

[455] 256 Cal. App. 2d 384, 64 Cal. Rptr. 20 (1967).

[456] *Supra* note 449, at 475. *See also* Note, *Use of Restitution in the Criminal Process: People v. Miller*, 16 U.C.L.A. L. REV. 456, 463-64 (1969).

[457] Minnesota, *supra* note 434, at 3.

[458] Fogel, Galaway, Hudson, *Restitution in Criminal Justice: A Minnesota Experiment*, 8 CRIM. L. BULL. 681, 684 (1972).

[459] Numerous authorities insist that restitution should not be so large as to interfere with family obligations. President's Commission on Law Enforcement and Administration of Justice, TASK FORCE REPORT: CORRECTIONS 35 (1967); *see also* ALI, *supra* note 454, and accompanying text.

[460] Galaway, Hudson, *supra* note 435, at 405. *Accord* Cohen, *supra* note 420.

[461] Minnesota, *supra* note 434, at 3.

[462] Mueller, Cooper, *supra* note 376, at 16.

[463] Mueller, Cooper, *supra* note 376, at 11.

[464] Best, Birzon, *supra* note 402, at 827. They state that ideally determination should be deferred to civil action, since without a civil hearing, defendant might be barred affirmative defenses. *See* People v. Good, 287 Mich. 110, 281 N.W. 920 (1938).

[465] Lamborn, *supra* note 398, at 30. Lamborn notes that in a study by A. Linden in Toronto, only 14.9% of the victims ever considered suing and only 4.8% tried to collect.

[466] Lamborn, *supra* note 398, at 30. *See also* Mueller, Cooper, *supra* note 376, at 7.

[467] Mueller, Cooper, *supra* note 376, at 11. See also Schafer, TRIAL, *supra* note 399, at 25.

[468] This is the method employed in Continental Europe, where the prosecutor often must present the victim's claim. Howard, *Compensation in French Criminal Procedure*, 21 MODERN L. REV. 387 (1958). Advocating this position in England, *see* Samuels, *supra* note 450, at 476.

[469] *See* People v. Becker, 349 Mich. 476, 84 N.W.2d 833 (1957). *See also* Hink, *The Application of Constitutional Standards of Protection to Probation*, 29 U. CHI. L. REV. 483, 490-91 (1962).

[470] Mueller, Cooper, *supra* note 376, at 11.

[471] Mueller, Cooper, *supra* note 376, at 11.

[472] *See* Galaway, Hudson, *supra* note 435, at 409-10; Kole, *Arbitration as an Alternative to the Criminal Warrant*, 56 JUDICATURE 295 (1973).

[473] SCHAFER, *supra* note 375, at 67. *See* Jacob, *supra* note 384, at 165. Jacob endorses the system of judge-determined restitution.

[474] Samuels, *supra* note 450, at 476.

[475] Minnesota, *supra* note 434, at 5-7. *See also* Fogel, Galaway, Hudson, *supra* note 458, at 684-86.

[476] Note, *Limitations on Trial Court Discretion in Imposing Conditions of Probation*, 8 GA. L. REV. 466, 474 (1974):

> There are two limitations which serve to keep restitution within proper boundaries. The first, not so firmly established, concerns the person to whom restitution must be made . . . .

[477] Schafer, TRIAL, *supra* note 399, at 27.

[478] This is not to foreclose restitution to a charity or state fund in lieu of the actual victim.

[479] *See, e.g.*, People v. Williams, 247 Cal. App. 2d 394, 55 Cal. Rptr. 550 (1966); People v. Miller, 256 Cal. App. 2d 348, 64 Cal. Rptr. 20 (1967).

[480] Minnesota, *supra* note 434, at 3.

[481] H. VON HENTIG, THE CRIMINAL AND HIS VICTIM (1948). This is a study in victim precipitation of crime and criminal-victim interaction.

[482] *Id.*

[483] Lamborn, *supra* note 398, at 44-46.

[484] *See* Galaway, Hudson, *supra* note 436, at 409-10. See note 460 *supra* and accompanying text.

[485] Galaway, Hudson, *supra* note 436, at 410.

[486] Lamborn, *supra* note 398, at 46.

[487] *But see* Canadian Corrections Association, *Compensation to Victims of Crime and Restitution by Offenders*, CANADIAN J. CORRECTIONS 591 (Oct. 1968). Canadians called for cash restitution through an "impersonal relationship."

[488] Eglash, *supra* note 429.

[489] Minnesota, *supra* note 434, at 4.

[490] Galaway, Hudson, *supra* note 436, at 409.

[491] K. MENNINGER, THE CRIME OF PUNISHMENT 68, 251-52 (1968).

[492] MODEL SENTENCING ACT §5.0, in 18 CRIME & DELINQUENCY 335, 348, 358-59 (1972).

[493] Schafer, TRIAL, *supra* note 399, at 26.

[494] *See* Mueller, Cooper, *supra* note 376, at 10.

[495] Cohen, *supra* note 420, at 321.

[496] *See* Canadian, *supra* note 487, at 598.

[497] *See generally* Best, Birzon, *supra* note 402; Note, *Limitations upon Trial Court Discretion in Imposing Conditions of Probation*, 8 GA. L. REV. 466, 473-76 (1974).

[498] Galaway, Hudson, *supra* note 436, at 407.

[499] *Id.* at 406-08.

[500] SCHAFER, THE VICTIM AND HIS CRIMINAL, *supra* note 384, at 82-83.

[501] See notes 442-45 *supra* and accompanying text.

[502] See note 410 *supra*.

[503] See notes 409-19 *supra* nad accompanying text.

[504] *See, e.g.*, Utah. The Restitution Program in Utah is administered through the courts by the Adult Probation and Parole Department as a condition of probation. Letter from Kenneth V. Shulson, administrative assistant, Utah Division of Corrections, August 29, 1974.

[505] *See generally*, Minnesota, *supra* note 434. Minnesota Department of Corrections, Minnesota Restitution Center (August 23, 1973)(two page description)[hereinafter referred to as Minnesota, Aug. 23, 1973]; Fogel, Galaway, Hudson, *Restitution in Criminal Justice: A Minnesota Experiment*, 8 CRIM. L. BULL. 681 (1972)[hereinafter cited as Fogel, Galaway, Hudson]; Hudson, Galaway, *supra* note 434.

[506] Minnesota, Aug. 23, 1973, *supra* note 505.

[507] Under Minnesota's Revised Criminal Code of 1963, MINN. STATS. ANN. §609.12, "Parole or discharge," it states:

> Subdivision 1. A person sentenced to the commissioner of corrections for imprisonment for a period less than life may be paroled or discharged at any time without regard to length of the term of imprisonment which the sentence imposes when . . . the granting of parole or discharge would be most conducive to his rehabilitation and would be in the public interest.

Advisory Committee Comment noted that the purpose of this subdivision is "to emphasize the right of the Adult Corrections Commission to grant parole or discharge at any time." *Id.*

[508] See note 434 *supra* and accompanying text.

[509] Minnesota, *supra* note 434, at 5-6.

[510] Minnesota, Aug. 23, 1973, *supra* note 505.

[511] See also note 434 *supra* and accompanying text.

[512] Minnesota, *supra* note 434, at 14-15.

[513] Fogel, Galaway, Hudson, *supra* note 505, at 687.

[514] Minnesota, *supra* note 434, at 8.

[515] See note 507 *supra*.

[516] Fogel, Galaway, Hudson, *supra* note 505, at 688-90.

[517] *Id.* at 689.

[518] *Id.* at 685-87.

[519] See note 422 *supra* and accompanying text.

[520] Interview with R. Maher, Administrative Asst., Board of Pardons and Parole, Atlanta, Georgia, September, 1974.

[521] GA. CODE ANN. § 27-545 (1972).

[522] See note 520 *supra*.

[523] Schultz, *The Violated: A Proposal to Compensate Victims of Violent Crime*, 10 ST. LOUIS U. L. J. 244 (Winter 1965).

[524] See notes 492-94 *supra* and accompanying text.

[525] GA. CODE ANN. § 27-2711 (1972). See notes 408-25 *supra* and accompanying text.

[526] Indeed, in one district, this apparently has already been done in a restitution center.

[527] See notes 416, 411-12 and 417-18 *supra* and accompanying text.

[528] See notes 408-25 *supra* and accompanying text; Fogel, Galaway, Hudson, *supra* note 505, at 689.

[529] GA. CODE ANN. § 27-2709 (1972).

[530] *See* Schafer, CRIM. L. BULL., *supra* note 399, at 634-35.

[531] *Id.*

[532] Utah currently has restitution via court probation and semi-incarceration in halfway houses. Letter from Kenneth V. Shulsen, administrative assistant, Utah Division of Corrections, August 29, 1974.

[533] 40 Ga. App. 145, 149 S.E. 64 (1929).

[534] GA. CODE ANN. § 27-2502 (1974).

[535] GA. CODE ANN. § 27-2501 (1972).

[536] Ezzard v. State, 229 Ga. 465, 192 S.E.2d 374 (1972), held that GA. CODE ANN. § 27-2501 (1972) was repealed by implication by GA. CODE ANN. § 26-3101 (1972) which describes reducible felonies.

[537] GA. CODE ANN. § 27-2506 (1974).

[538] GA. CODE ANN. § 27-2506.1 (1972).

[539] GA. CODE ANN. § 77-309 (1973).

[540] This is probably invalid under *Ray v. State, supra*, and sentence procedures described above.

[541] GA. CODE ANN. § 27-2502 (1974). *See also* Parks v. State, 206 Ga. 675, 58 S.E.2d 142 (1950); Fowler v. Grimes, 198 Ga. 84, 93-94, 31 S.E.2d 174, 180 (1944); 1970 GA. ATT'Y GEN. OPIN. 102-03; 1968 GA. ATT'Y. GEN. OPIN. 120.

[542] *See* Gobles v. Hayes, 194 Ga. 297, 21 S.E.2d 624 (1942); Jobe v. State, 28 Ga. 235 (1859); 1968 GA. ATT'Y GEN. OPIN. 165, 199.

[543] GA. CODE ANN. § 27-2506 (1974).

[544] GA. CODE ANN. § 27-2506.1 (1972).

[545] See note 444 *supra* and accompanying text.

[546] 1968 GA. ATT'Y GEN. OPIN. 252.

[547] GA. CODE ANN. § 77-309 (1973).

[548] GA. CODE ANN. § 77-344 (1973).

[549] *See* Editorial Note, GA. CODE ANN. § 77-309 (1973).

[550] For a full discussion of work release see Chapter Two, section II *supra*.

[551] In Utah, for example, restitution is ordered as a condition of probation, the offenders then being sent to a halfway house.

> The Halfway Houses provide living facilities and work programs for approximately 120 offenders—many of these are probation cases where restitution has been made a condition of probation.

Letter by Kenneth v. Shulsen, administrative assistant, Utah Division of Corrections, to Michael Stone, August 29, 1974.

[552] Fogel, Galaway, Hudson, *supra* note 505, at 685.

[553] *See, e.g.*, N. DAK. CENT. CODE tit. 12, 48.1-03 (Supp. 1973) ("Use of funds earned on work release"):

> The plan for the inmate shall provide that any funds earned in outside employment will be used . . . [for] court costs or fine; restitution is a part of the sentence.

See generally Root, *Work Release Legislation*, 36 FED. PROB. 38 (1972).

[554] *See* Mueller, Cooper, *supra* note 376, at 10.

[555] *Id.*

[556] *Id.*

[557] For an interpretation of this statute, *see* 1968 GA. ATT'Y GEN. OPIN. 434.

[558] Jacob, *supra* note 384, at 159-67.

[559] BOARD OF TRUSTEES, NATIONAL COUNCIL ON CRIME AND DELINQUENCY, *Compensation of Inmate Labor, A Policy Statement*, 18 CRIME & DELINQUENCY 333 (1972).

[560] Mueller, Cooper, *supra* note 376, at 10.

[561] Jacob, *supra* note 385, at 163-64.

[562] SMITH, *supra* note 405. *See* Jacob, *supra* note 385, at 163-64.

[563] 399 U.S. 235 (1970).

[564] *See* 1973 GA. ATT'Y GEN. OPIN. 96, 166-67.

[565] Wolfgang calls a prison wage proposal politically infeasible. *See* Wolfgang, *supra* note 377, at 229.

[566] Samuels, *supra* note 448, at 476.

[567] Mueller, Cooper, *supra* note 376, at 8.

[568] See notes 533-39 *supra* and accompanying text.

[569] 40 Ga. App. 145, 149 S.E. 64 (1929).

[570] *See* FRY, *supra* note 403.

[571] Mueller, Cooper, *supra* note 376, at 8.

[572] *See* Eglash, *supra* note 429.

[573] *See* SMITH, *supra* note 376.

[574] Mueller, Cooper, *supra* note 376, at 9.

[575] *Id.* at 11.

[576] *See* H.R. 7-27 (Ga. 1973).

[577] Mueller, Cooper, *supra* note 376, at 17-18.

[578] Schafer, *supra* note 392, at 67.

CHAPTER THREE

An Analysis of Parole and Probation

Chapter Three discusses the parole and probation systems in Georgia. The first section deals with parole: its history, the need for change in Georgia's system, the parole grant process, and the parole revocation process. The second section concerns the same subjects for probation. The third section of the chapter addresses itself to the problems of the parolees and probationers between the grant and the termination of parole or probation. The final section reports on related methods of release.

I. Parole

A. *Introduction*

Parole is one method of returning to the community offenders who are good social risks.[1] It has been defined as:

> . . . the release of an offender from a penal or correctional institution, after he has served a portion of his sentence, under the continued custody of the state and under conditions that permit his reincarceration in the event of misbehavior.[2]

Once considered an act of grace,[3] parole is now best characterized as a custodial and regulatory period of conditional liberty dependent upon compliance with certain conditions;[4] rather than a suspension of a sentence, parole is a form of custody having the legal effect of imprisonment.[5]

Parole has many objectives and functions, the most important being deterrence of future criminal activity.[6] Because a parole system lacks a third-party deterrent impact[7] and by definition touches only those who have already committed crimes, its chief function devolves to one of prevention of recidivist crime. It is an obvious fact that almost all inmates are eventually released from prison;[8] thus, the critical issue facing a paroling authority is usually not *whether* an inmate should be released, but *when* he should be released.[9] With the recent recognition that prolonged imprisonment may have deleterious consequences on the potential for rehabilitation of a prisoner, the issue of timing has become more critical.[10]

A parole system serves many other objectives. One of these is enhancement of traditional concepts of fairness—both the inmate's

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3 OF 6

point of view and the public's perception of fair treatment; this objective emphasizes sensitivity to the rights and dignity of the inmate. Another objective is to help insure appropriate sanctions, with particular concern for such issues as equalization of penalties for similar offenders committing similar crimes, and assurances that offenders serve sufficient time to fulfill public expectations and to maintain incarceration's deterrent effects. Maintenance of the criminal justice system, another objective, involves the role of the parole authority "as a kind of system regulator,"[11] in that parole has a direct impact on the other components of the system—the courts, the enforcement officials, and especially the correctional institutions. These are only some of parole's objectives[12]—to attempt to list all would be an almost impossible task. This report, although recognizing that the objectives and functions of parole are multitudinous, will assume that the above-mentioned objectives are parole's primary objectives.[13]

B. *History of Parole*

The earliest forerunner of parole was the English program of transporting convicts to the American colonies. This program, begun in 1597, attempted to solve a combination of problems: England's economy was declining, her a labor market was overcrowded, and the colonies were demanding cheap labor.[14] Convicted felons were granted reprieves and stays of execution and sent abroad as indentured servants. Despite opposition from the colonies,[15] the transportation program was increased and revised in 1717. Under the new system, the shipmaster was given "property in the service" of the prisoner until expiration of the prisoner's term. The prisoner was an indentured servant—when his services were sold to a settler, the "property in service" agreement was transferred along with the prisoner.[16] The terms of at least one indenture agreement were surprisingly similar to some modern-day standard parole conditions:

> Taverns, inns or alehouses he shall not haunt. At cards or dice tables or any other unlawful game he shall not play. Matrimony he shall not contract nor from the service of his said master day or night absent himself.[17]

When the American Revolution terminated the influx of English undesirables, the British began transporting criminals to Africa and Australia. It was in Australia that the first enlightened view of

corrections was practiced; stages of servitude, involving differing degrees of supervision and freedom, were imposed upon offenders. Through good conduct and hard work, inmates could earn progressively more favorable stages of servitude, culminating in full restoration of liberty. These new concepts were adopted and improved upon in Ireland, the first country to utilize the equivalent of a parole officer to provide supervision and treatment of releasees. When the United States finally was prepared for parole, the Irish system provided the principal model.[18]

In addition to these experiences, parole in the United States developed from two other innovations: the indeterminate sentence which specifies a minimum and a maximum period, and good time, the reduction of a sentence for good behavior. The indeterminate sentence was first used in 1824 in New York.[19] Although it gained slow acceptance, by 1891 the indeterminate sentence had been authorized in eight states.[20] Because a release date had to be determined for each inmate, parole was a natural outgrowth of the system. As this type of sentencing spread throughout the country, parole simultaneously expanded.[21] Reduction of sentences for good time was another factor contributing to general acceptance of parole. In 1817, New York passed a commutation law permitting reductions in the lengths of confinements for good conduct and volunteer work.[22] Prior to the system of good time allowances, each prisoner would serve his full sentence whether or not he behaved; the new law aimed at alleviating prison discipline problems by rewarding good behavior. As more states accepted the idea of good time, the transition to a parole system was eased—legislators and correctional authorities began to realize that early release from prison could be used both as a tool to regulate the prisoners and as a means of rehabilitation. Thus, these two innovations paved the way for acceptance of the more novel concept of parole.

Parole grew gradually and steadily. Presently it exists in all fifty states, the District of Columbia, and the Federal prison system. Georgia's parole authority, prior to 1897, rested with the Governor who exercised exclusive power to grant pardons, paroles, commutations of sentence, and reprieves.[23] In 1897, the Prisons Commission was established and given some of this responsibility; its function was to recommend to the Governor the prisoners to be paroled. If the recommendation was approved, the Commission was authorized

to issue a release order.[24] This system was modified in 1938 with the creation of the Prison and Parole Commission, a group empowered to grant paroles upon the unanimous vote of all members.[25] The same act which created the Commission also revoked the Governor's power to grant paroles and curtailed his powers over commutations, reprieves, and pardons. But it was not until 1943, when the State Board of Pardons and Paroles was vested with the clemency powers formerly held by the Governor, that Georgia had its first true parole system.[26]

The present Georgia parole system is provided for in constitutional and statutory provisions.[27] The Board of Pardons and Paroles has the power to grant reprieves, pardons and paroles, to commute penalties, to remove disabilities imposed by law, and, with limited exceptions,[28] to remit any part of a sentence for any offense against the state.[29] The Board has the further duties to determine which prisoners may be released on parole and to establish the timing and conditions of parole.[30]

C. *The Need for Change in Georgia*

Parole systems throughout the country have been the subjects of criticism in recent years.[31] This report may be viewed by some as an addition to this barrage. The purpose of the report, however, is neither to criticize nor to belittle the system, but rather to present an objective analytical and empirical study of parole as it exists in Georgia today—its procedures, results, and possibilities.

Before beginning, however, it is imperative to establish the primary deficiencies of the system, so that the reader is cognizant of the framework within which the authors are operating. Georgia's parole system is confronted with two primary problems: inconsistency and inefficiency. Inconsistency is a broad concept but centers upon inequitable and arbitrary treatment of inmates—both in the decision to grant parole and in the decision to terminate parole. The root of the problem lies in the informational bases available to the parole board and the operational methods of the parole system. What appears to be discriminatory treatment of individual situations is often the result of incomplete and erroneous data, failure to account for certain considerations, undue emphasis on certain considerations, or inherent deficiencies in the established procedural

framework. The problem of inefficiency concerns the effectiveness of the parole system in deciding whom and when to parole, when and why to terminate parole, and what supervision and services are required both to protect the community from future criminal activities and to maximize the parolee's rehabilitative possibilities. This problem is highlighted by Table I which indicates that parole does not lead to a substantial lessening of the amount of time inmates actually serve in prison.

This report will present an in-depth study of Georgia's parole system with a view towards these two problems. It will attempt to focus upon the weak points in the present system and suggest means to improve these deficiencies. Because the parole system is founded on and operates under statutory provisions as well as Board-imposed rules and regulations, the implementation of some proposals would require adoption of new legislation or amendment of existing law.

While an attempt has been made to avoid value judgments in the analyses, the nature of parole makes this an impossible task. Although at times this report criticizes particular aspects of the parole system, the criticisms are not directed at particular individuals, but rather, at improving the system. The authors, of course, recognize that there are no quick or easy solutions to the problems facing the Parole Board—what the authors hope to do is present modified and at times alternative methods of dealing with these problems, with the intention of improving a system which is not maximizing its enormous potential.

D. *The Parole Grant*

In Georgia, as in other jurisdictions, the decision to grant parole is discretionary. As a practical matter, the discretion vested in the Board of Pardons and Paroles is free from legal controls; not only is there no judicial review of the decision,[33] but there are few standards to which the decision must conform. The only safeguards which prevent the system from becoming totally arbitrary and unmanageable are the expertise and discretion of the Parole Board members,[34] and a number of procedural mechanisms designed to limit and delineate the Board's bounds of power. Because the personnel on the Board is subject to change,[35] the procedural safeguards in the parole system are the most important means of insuring a fair, open, and

TABLE I: AVERAGE LENGTH OF TIME ACTUALLY SERVED BY RELEASED INMATES[a]

Sentence Length (in yrs)	Avg. Time of Parole Eligibility[b] (in yrs)	Average Time Served (in yrs): By Parolees[c]	By Releasees Other Than Parolees	By All Releasees
1+ to 3	.75	1.02	1.34	1.19
3+ to 5	1.33	1.95	1.98	1.96
5+ to 7	2.00	2.38	2.69	2.53
7+ to 10	2.83	3.72	4.29	3.92
10+ to 15	4.17	5.54	5.31	5.47
15+ to 20	5.83	7.55	7.96	7.69
20+ to X	7.00[d]	11.69	Not Available	12.03*
Life	7.00[d]	9.96	Not Available	12.15*

a. These figures, with the exception of those marked with an asterisk (*), were compiled from the Criminal History Research Information System (CHRIS) at the Emory University Computer Center [hereinafter referred to as Computer CHRIS]. The period covered is from July 1, 1971 through May 26, 1974. The group chosen is exclusive of those inmates who were released from prison following imprisonment due to revocation of probation or parole. The figures marked with an asterisk (*) were compiled from "Statistical Analysis of Sentences Served Prior to Release," Research Division, Department of Offender Rehabilitation, 1973.

b. The parole eligibility date was computed as of the midpoint of the particular sentence length.

c. This group of parolees does not include those paroled following confinement due to revocation of parole or probation.

d. The parole eligibility date for those with sentences of over twenty-one years or with life sentences is seven years.

objective system. Many articles have suggested that the problems of arbitrariness and inefficiency in the parole grant process stem from substantive deficiencies and propose alterations and improvements in the nature of the system.[36] This report, however, does not

feel that the substantive aspects of the decision can be improved unless and until the procedural aspects leading up to the final decision are relatively flawless; rather, this report suggests that the institution of procedural safeguards—in the form of a series of controls and guidelines aimed at clearly defining the decisional framework—would improve the general nature of the parole system while minimizing its shortcomings. This notion is not novel. As Professor Kenneth Culp Davis has written:

> Administrative rule-making is the key to a large portion of all that needs to be done. To whatever extent is practical and consistent with the need for individualized justice, the discretion of officers in handling individual cases should be guided by administrative rules . . . . Agencies through rule-making can often move from vague or absent statutory standards to reasonable definite standards, and then, as experience and understanding develop, to guiding principles, and finally, when the subject matter permits, to precise and detailed rules.[37]

Davis, recognizing the importance of restricting excessive discretionary powers,[38] suggests that the most effective restriction is the imposition of structure and checks.[39]

It is anticipated that opposition to the institution of a more controlled decisional framework will be voiced, arguing that parole is a matter for expertise and discretion rather than rules.[40] This argument, however, fails to perceive the basis of a discretionary decision; the decision whether to parole, as any other decision requiring discretion, involves choices between competing alternatives[41]— discretion is operable so long as alternatives exist. Firm procedural controls will not eliminate the alternatives in the parole grant decision, but will merely serve to focus the use of discretion. This focusing process will benefit the individual members of the parole board by easing their workload and the pressures on them and, more importantly, will benefit society by improving the parole system.

This report recognizes, of course, that all the shortcomings of the present Georgia parole grant process will not be eliminated merely by the infusion of a more controlled framework; such an infusion is justified, however, by the benefits which will accrue to the correctional system, to offenders, and to society. Parole will operate more

efficiently, thus helping to maintain the prison population at an administratively efficient level. Inmates will benefit because rehabilitative resources of the correctional system will not be spread as thinly. Parolees will benefit because they will be more likely to have been released at the "optimal" time.[42] Society will benefit not only because the parole system will reduce the recidivist risks by releasing the proper inmates at the proper time, but also because the economic burdens of imprisonment will be reduced.[43]

The following section is concerned with various aspects of the parole grant decision and attempts to present an in-depth study of the process in Georgia—its procedural mechanisms, statutory provisions, and administrative rules and regulations. It includes proposals relating to mode of operation, fairness, and efficiency.

1. The Present Practice in Georgia

In order to view the Georgia parole system in the proper perspective, it is important to highlight the statistics of the Board of Pardons and Paroles in recent years. Table II provides a general panorama of parole board actions. Tables III through V indicate the role that parole plays in the overall picture of Georgia prison releases.

TABLE II: PAROLE GRANTS AND PAROLE RELEASES, FISCAL YEARS 1970-1974[a]

	FY 1970	FY 1971	FY 1972	FY 1973	FY 1974
Parole Cases Reviewed	4306	4195	4556	4474	4702
Paroles Granted[b]	1342	1391	2531	2156	2118
Paroles Denied	2964	2804	2025	2318	2584
Percent Granted[c]	31.2%	33.2%	55.5%	48.2%	45.0%
Parolees Actually Released[d]	not available	not available	2387	2124	1994
Percent Actually Released[e]	not available	not available	52.4%	47.5%	42.4%

a. This table was compiled from three information sources: (1) GEORGIA STATE BOARD OF PARDONS AND PAROLES, ANNUAL REPORT FISCAL YEAR 1973 (1973) [hereinafter referred to as ANNUAL REPORT]; (2) Records of Deputy Commissioner, Offender Administration, Georgia Department of Offender Rehabilitation [hereinafter referred to as Records of Deputy Commissioner]; and (3) "Parole Board Monthly Statistics," Georgia State Board of Pardons and Paroles [hereinafter referred to as Monthly Statistics].

b. Represents the total number of inmates *approved* for parole. Some inmates are approved for parole but never released from prison. In addition, these figures represent inmates released on parole and then immediately sent to other states for either incarceration or trial.

c. Paroles granted divided by parole cases reviewed.

d. Number of inmates actually released from prison exclusive of those inmates paroled and then sent to other states.

e. Parolees actualy released divided by parole cases reviewed.

TABLE III: PAROLEES ACTUALLY RELEASED AS A PERCENTAGE OF TOTAL RELEASEES[a]

	Parolees Actually Released	Total Releases	Parolees As A Percentage Of Releases
FY 1972	2387	6503	36.7%
FY 1973	2124	5332	39.8%
FY 1974	1994	5693	35.0%
Totals	6505	17,528	37.1%

a. This table was compiled from two information sources: (1) "parolees actually released" is from Records of Deputy Commissioner; (2) "total releases" is from Computer CHRIS.

TABLE IV: PAROLE CASES REVIEWED AS A PERCENTAGE OF PRISON POPULATION[a]

	Parole Cases Reviewed, FY / Prison Population At End Of Fiscal Year	Parole Cases Reviewed, FY / Felon Population At End Of Fiscal Year
FY 1972	4556/8199 = 55.6%	4556/7637 = 59.7%
FY 1973	4474/8875 = 50.4%	4474/8336 = 53.8%
FY 1974	4702/10,037 = 46.8%	4702/9056 = 51.9%

a. This table was compiled from three information sources: (1) ANNUAL REPORT, (2) Records of Deputy Commissioner, (3) Monthly Statistics.

TABLE V: PAROLEES ACTUALLY RELEASED AS A PERCENTAGE OF PRISON POPULATION[a]

	Parolees Actually Released / Prison Population At End Of Fiscal Year	Parolees Actually Released / Felon Population At End Of Fiscal Year
FY 1972	2387/8199 = 29.1%	2387/7637 = 31.3%
FY 1973	2124/8875 = 23.9%	2124/8336 = 25.5%
FY 1974	1994/10,037 = 19.8%	1994/9056 = 22.0%

a. This table was compiled from Records of Deputy Commissioner.

In Georgia, the parole decision-making process is initiated when the Board of Pardons and Paroles receives a copy of an inmate's time sheet, on which the Department of Offender Rehabilitation has indicated his parole eligibility date.[44] Approximately four months in advance of parole consideration, the "Parole Support Section," which is the department responsible for creation and maintenance of the files used by the Parole Board, will request the following information:[45]

a) An interview of the inmate by a parole supervisor. The information gathered is incorporated into the "Personal History Statement" and includes the names and addresses of family members and employers, references, and an account by the inmate of the circumstances of the offense.

b) A "Pre-parole Social Investigation." This is a verification and expansion of the Personal History Statement, and centers primarily on the family members and references. If the required information is not in Georgia, information is obtained through the Interstate Parole Compact Office. In most cases in which a presentence investigation has been made, that report will be used in lieu of pre-parole social investigation.

c) A "Legal History." This report is concerned with the particular offense committed by the inmate and may include information from court records, arrest reports, the arresting officer, victims of the crime, or other similar sources.

d) An "Inmate Evaluation." This is received from the institution within which the inmate is incarcerated and is written on a standardized form. The form is completed by the warden, prison counsellor, course instructor, trade school instructor, and detail supervisor.

These four reports constitute the core of information which the Board receives and upon which the parole decision is based. The reports may be supplemented by special interviews from the Probation-Parole field office[46] or by reports from Central State Hospital regarding the ability of the inmate to function in society. In addition, the inmate's file, when sent to the Parole Board for consideration, contains the following documents: a) a diagnostic and classification summary from the reception prison; b) F.B.I. and Atlanta Police Department reports;[47] c) transfer notices; d) detainers and withdrawal of detainers; e) court Production Orders; f) reports of escapes and recaptures; g) disciplinary reports; h) up-dated record sheets showing status of good time allowances; i) assignments to work release, drug treatment, and other similar programs; j) reports from vocational rehabilitation counselors; and k) psychiatric evaluations. All letters and other contacts by individuals with the Board in favor of or against parole are also included in the file.[48] If an interview is held with the inmate, Board members' notes and written impressions also become part of the file.[49]

A case is usually presented to the Board during the month scheduled for parole consideration;[50] however, cases may be presented as early as sixty days before the scheduled consideration month, depending on when all of the required reports are collected. If the case

is presented early, the final decision is not announced until the scheduled month.

When all of the required information in an inmate's file is collected, the file is randomly assigned to one of the five Board members. That member reviews the file and votes on an attached ballot, either to grant or to deny parole.[51] The file, with a new blank ballot attached, is reassigned to a different Board member and is thus circulated until three votes have been cast either for or against parole. This system of voting is utilized to maintain secrecy. When voting, a Board member can add special conditions to the parole in addition to the standard conditions imposed on all parolees.[52] Such additional conditions, if the inmate is paroled, become terms of the parole certificate.

In the event an inmate is denied parole, he is sent a personal letter advising him of the reasons for the denial. If an inmate is granted parole, he is sent a letter advising him of his tentative release date.

2. Parole Grant Criteria

The decision in most states whether to grant or deny parole in a particular case is generally guided by criteria established in statutes, administrative regulations, or both. The purposes of delineating criteria are dual: to establish a framework whereby it can be determined whether an inmate is entitled to and prepared for parole, and to provide inmates with a guide for modeling their efforts at achieving parole.

There have been two diverse approaches taken towards the establishment of parole criteria: some jurisdictions employ general criteria such as the welfare of society and of the inmate,[53] while others use an extended list of factors to be considered by the parole board.[54] Georgia uses a combination of these two approaches. Georgia's statutory prerequisite to parole is typical of many state statutes:[55]

> No prisoner shall be . . . placed on parole until and unless the board shall find that there is reasonable probability that, if he is so released, he will live and conduct himself as a respectable and law-abiding person, and that his release will be compatible with his own welfare and the welfare of society.[56]

In addition, the Board has indicated that parole will be denied if:

> there is substantial reason to believe he [the prisoner] will engage in further criminal conduct or will not conform to specified conditions of parole.[57]

Realistically, however, the considerations actually used by parole boards in each individual decision are more specific and extensive than merely broad statements such as the ones mentioned above. Parole boards consider many factors in deciding whether to parole; some of these factors are enumerated, while others are implicit in the nature of the decision making process.[58] The enumerated concerns focus upon both the inmate and upon his relation to the community.[59] In Georgia, the concerns which center on the inmate include such factors as "ability and readiness to assume obligations and undertake responsibilities," "the inmate's conduct during his term of imprisonment," and "the physical and emotional status of the inmate." The inmate's relation to the community is expressed in considerations such as "the availability of community resources to assist the inmate," the "type of residence, neighborhood or community in which the inmate plans to live," and "whether his relatives display an interest in him." One final enumerated concern which relates both to the inmate and to the community is the possibility of recidivism; not only is there a strong community interest in the avoidance of further criminal activities but also recidivism reflects a failure on the part of the parole system to meet its primary function—the return to society of a rehabilitated individual.

As suggested earlier, there are concerns which influence the parole board in particular parole decisions but which are not specifically expressed.[60] One concern is maintenance of control and discipline over inmates. Because in many states, including Georgia, proper prison conduct is one express prerequisite to parole,[61] the power to parole has been described as "the single most important source of coercive power within the correction system."[62] By predicating the parole decision in part upon conduct during confinement, the lure of parole encourages proper discipline on the part of inmates.[63] As one writer has commented:

> . . . I am convinced that the major impetus behind the development of parole . . . has been the effort of correctional bureaucracy to achieve better control over their population and management problems.[64]

The economics and statistics of prison population also enter into the decision making process.[65] Imprisonment is far more expensive than supervision in the community;[66] thus, as the prison population increases, the costs to taxpayers increase. Eventually, public demands for economy become so great as to cause correctional officials to take steps to reduce costs;[67] parole boards are under similar pressures to grant more paroles.[68] In addition, because overcrowding in penal institutions is a major factor contributing to breakdowns in prison discipline,[69] pressure is often applied to the parole board to reduce the population to an administratively efficient level.[70]

Another factor involved in the decision making process is the necessity for control over a released individual. By paroling an inmate, the parole board retains control over the individual, in the form of parole supervision. If an inmate is released outright at the expiration of his sentence, no control can be exercised over him. Thus, in determining the method of release, the need for supervision is considered, for supervision helps both to regulate the releasee's conduct and to ease his return into society.

Another major concern of the parole board is the equalizing of disparate sentences among the prison population. A recent report of the United States Board of Parole stated:

> It is clear that the multiplicity of sentencing choices available to the courts, and the varying attitudes between sentencing judges, results in a wide disparity in the lengths of sentences imposed for persons convicted of similar offenses, and often who possess similar backgrounds. To a very real degree, the Board of Parole tends, in practice, to equalize this disparity . . . .[71]

Thus, in deciding whether to parole an inmate, the parole board might consider the sentence length of the inmate and attempt to equalize differences in sentences among inmates.

A final consideration of the parole board is public opinion.[72] "Unpopular" criminals may be denied parole because of the adverse criticism that will result; "popular" criminals may be paroled prior to the time when an inmate with the same record but who is unknown is paroled. In addition, the public criticism and resentment which results when a parolee commits a new offense may deter an affirmative decision to release a different inmate at a later date.

The aforementioned list of factors are not all-inclusive of those considered by the parole board—such a list would be impossible to formulate. Recognizing this problem, the authors of the Model Penal Code, have suggested that parole boards adopt a "presumption of parolability"[73] instead of attempting to formulate parole criteria. They propose that an inmate be granted parole at the initial date of parole eligibility *unless* one of the following four considerations exist:

> a) There is a substantial probability that the inmate will violate the conditions of his parole if released.
> b) The inmate's release would have an injurious impact on prison discipline.
> c) The inmate's release would minimize the seriousness of the crime or foster disrespect for the law.
> d) The inmate's continued incarceration would substantially enhance his possibilities for rehabilitation.[74]

The major goal of the proposal is to minimize inconsistency and arbitrariness in the parole grant decision making process. Whereas present parole criteria provide neither meaningful nor definite guidelines for decision makers and thus often lead to inequitable results, the presumption attempts to alleviate this problem by requiring a parole board to specify reasons for denial, thus avoiding decisions unsupported by the record.[75]

Nevertheless, this report rejects the presumption of parolability as a solution to the problem of formulating parole grant criteria for several reasons. First, the presumption alters the substantive nature of the parole grant decision. Traditionally, a parole board is a fact-finding, non-adversarial body; its inquiry is objective—a potential parolee is considered by a supposedly unbiased panel.[76] The decision to grant or deny the parole is predicated upon the available information and the expertise and discretion of the board. The parolability presumption, by requiring parole unless reasons for denial exist, would alter the nature of the inquiry; because there would be no reason to inquire into the reasons for granting parole, the inquiry would center solely on whether parole should be denied. The fact that no reasons exist for denying parole does not necessarily indicate either that the inmate is rehabilitated or that society is prepared to accept him.[77]

Another reason for rejection of the proposal is that the attitudes of inmates towards parole could be adversely affected. Parole, generally the quickest and most prevalent form of release from prison, is achieved in part through proper discipline and by genuine efforts at rehabilitation.[78] Although a portrayal of the presumption as requiring only an absence of negative action and not as demanding affirmative action is not totally accurate, this is the understanding that inmates might well have; because the presumption speaks in language requiring parole "unless," inmates might think that an absence of negative action on their part will always result in parole. Finally, this report questions the premise that the presumption will reduce inconsistency and arbitrariness because of the requirement of stating reasons upon denial. It would not take long for board members to couch parole denials in terms specific enough to defeat the purpose of the presumption.[79] Board members could simply reach their decision and then perform the ministerial function of justifying that decision.

The problems that the presumption attempts to solve—arbitrariness and inconsistency—cannot be solved merely by shifting the burden of proof in the parole decision from the inmate to the parole board. Instead, this report suggests that if equitable procedures in the form of a series of regulatory controls and guidelines are instituted throughout the system, proper substantive parole decisions will result. To complement these measures, this report recommends that Georgia retain its present list of factors to consider in the parole grant decision;[80] however, this list should be modified so as to reflect those unenumerated concerns which play a significant role in each parole decision. This solution may be viewed as a failure to face the issue of parole criteria; however, this report contends that the crucial problem is to develop a parole system which performs its functions fairly and efficiently, not to develop a boilerplate set of guidelines or a system of watch-dogging over the parole board. The substantive thought processes of the parole board can never be sufficiently monitored to preclude all arbitrary and inconsistent actions; even if such monitoring were possible, it would be inimical to the history and purposes of parole. Parole is discretionary in nature and involves difficult judgmental questions; its exercise must be as free from unnecessary restraints as possible. This report recognizes that while broad grants of power can lead to

"discriminatory administration," minute formulations of standards and complex semantic proposals are no better. The most effective solution is the promulgation of procedural safeguards; safeguards which force a parole board to follow a certain path and which emphasize rationality.

This report suggests that Georgia's statutory standard for parole and the modified list of factors can provide a meaningful guide when counter-balanced with procedural safeguards. The standards would not only give relevant direction to the parole board but also prescribe a mode of operation which does not interfere with the objectives of parole. In addition to these standards, the use of scientific "parole prediction tables" can also aid the parole board in making the subjective decisions of which inmates to parole.

3. The Use of Parole Prediction Tables

In the majority of jurisdictions, including Georgia, the decision to grant or deny parole is made after a case study analysis of the individual inmate. This approach, often referred to as the clinical approach, attempts to identify the unique characteristics of the inmate through the use of interviews, background investigations, and other similar data-gathering techniques. For the past thirty years, authorities have urged that the case study approach towards parole be improved, largely because of the arbitrary and inconsistent decisions which often result. Case study predictions are dependent upon the particular viewpoint, idiosyncracies, and training of the decision maker; therefore, predictions vary considerably.[81] One judge, although speaking of probation, pointed out:

> Many defendants, especially those who are first offenders, are in a frenzy of fear when they appear before the court. The more hardened type, such as confidence men, appear at ease. It is obvious that in neither case will the appearance or the statements of the defendant serve as a reliable guide to the disposition of the case.[82]

The same logic applies to parole decision making, particularly when interviews are used. Those inmates "knowledgeable" in the ways of prison life may appear to be better parole risks than "inexperienced" prisoners. The result: favorable parole disposition for the poorer parole risk. A parole board, forced to decide for or against

parole solely on the basis of interviews and investigations, must often follow their hunches[83] or general philosophy[84] towards what constitutes a good parole risk. Ideally, a parole board should have not only accurate and reliable information on each inmate, but also proper guidance when making its final decision.

This report suggests that to improve the parole decision making process the Board of Pardons and Paroles utilize prediction tables *in conjunction with* the case study approach. Parole prediction tables estimate the probability of an individual's success on parole by plotting each inmate against experience tables developed with regard to groups of offenders possessing similar characteristics. Prediction tables lend structure to an otherwise discretionary and oftentimes arbitrary system. As one commentator has noted:

> A prediction table provides only a more systematic application of [the case study] process than we can achieve in our heads. The tables can cover all cases in a representative sample; when we compile experience in our head we are likely to recall some cases more vividly than others and thus get a distorted and incomplete summary of actual experience.[85]

The major argument for using parole prediction tables is their accuracy.[86] For example, in Illinois, the first state to use prediction tables, the violation rate on parole fell from 57 percent to 26 percent during the first year of use of parole prediction.[87] Another reason to use parole prediction is the relative objectivity and uniformity interjected into the parole decision making process.[88] The absence of a uniform, objective system of parole determination hinders the potential rehabilitation of an inmate; if an inmate receives what *he* considers arbitrary treatment, the possibilities of eventual rehabilitation seem to decrease.[89] As mentioned earlier, statistical parole prediction provides a more "systematic" application of the case study method, and thus will hopefully decrease the number of arbitrary decisions. In effect, parole prediction is a formalization of the case study method—hunches are translated into probabilities, and amorphous criteria into more structured categories.

Despite the evidence that the prediction table approach is more advantageous than the case study approach, there has been opposition to parole prediction, particularly from paroling authorities.[90] The opposition centers on the assumption that parole prediction

cannot account for the unique characteristics of an individual inmate—characteristics considered in the traditional case study approach. The argument, focusing largely on the idea that the fate of an inmate should not be predicated purely on the basis of statistics and other numerical methods, fails to perceive that a prediction table is *not* a litmus paper indicator of the parole decision, but rather, is a systematic application of the case study method. Another argument against parole prediction is that even the best prediction tables are not entirely accurate.[91] This argument fails to consider that although prediction tables might be improved upon, research has found the statistical approach more accurate than a pure case study approach.[92] Another argument against the use of parole prediction is economic—implementation of the system would require large amounts of capital and manpower.[93] The cost of the system, although an important factor, must be carefully balanced against the benefits that would accrue to society.[94]

Most commentators have advocated the use of prediction tables when used *in conuert with* the case study method.[95] Prediction tables, at least in their present form, will never be able to *replace* the case study method, and this report does not suggest such replacement. As Glaser points out, there are at least three considerations for which parole prediction cannot account; the moral aspects of the decision to parole, the fact that there is always unique information in each case to which statistics cannot be addressed and the fact that the parole decision is not solely predicated upon the possibility of violation.[96] This report agrees that prediction tables cannot and should not replace the decision makers; prediction tables, however, should be developed in Georgia as an *aid* to the decision makers.[98]

4. Parole Eligibility

In many jurisdictions, including Georgia, parole eligibility is predicated upon service of some fraction of the total confinement time imposed by the court.[98] The rationale of this policy is that an individual who has committed an offense should serve at least some time in prison, to satisfy the retributive aspect of imprisonment, to allow him to ponder the ramifications of his crime, and to accomplish rehabilitation.[99]

The Georgia Legislature has established the minimum time served requirements for parole consideration.[100] To meet these re-

quirements, inmates serving misdemeanor sentences must serve either six months or one-third of their sentences, whichever is greater;[101] inmates serving felony or combination felony and misdemeanor sentences must serve nine months or one-third of their sentences, whichever is greater; and inmates serving felony or combination felony and misdemeanor sentences of twenty-one years or more, including those serving life sentences, must serve seven years.

TABLE VI: ANALYSIS OF TOTAL RELEASES[a] OF INMATES WITH SENTENCE LENGTHS GREATER THAN ONE YEAR

Sentence Length (in yrs)	Releases Other Than Parole: number	percent	Releases By Parole: number	percent	Total Releases: number	percent
1+ to 3	2250	57.3	2007	42.0	4257	48.9
3+ to 5	784	19.9	1140	23.9	1924	22.1
5+ to 7	339	8.6	363	7.6	702	8.1
7+ to 10	265	6.8	496	10.4	761	8.7
10+ to 15	105	2.7	239	5.0	344	4.0
15+ to 20	81	2.1	162	3.4	243	2.8
20+ to X	40	1.0	75	1.6	115	1.3
Life	61	1.6	292	6.1	353	4.1
Totals	3925	100.0%	4774	100.0%	8699	100.0%

a. This table was compiled from Computer CHRIS. The period covered is from July 1, 1971 to May 26, 1974 and excludes those inmates released who were returned to prison following probation or parole revocation.

b. Only sentence lengths of greater than one year were chosen because inmates with sentence lengths of less than one year are ineligible for parole, assuming that they have kept all their good time. There were 4908 inmates released with sentence lengths of less than one year during the time period covered by the table.

Although in Georgia the *granting* of parole is considered an act of grace and within the discretion of the Parole Board,[102] parole *consideration* is automatic for all offenders who have had sentences imposed by a court of record and who are under the jurisdiction of the Department of Offender Rehabilitation.[103] A formal application is not required in order to be considered for parole;[104] upon satis-

faction of the minimum time served requirements, all inmates are considered.[105] Likewise, reconsideration of inmates who have been denied parole occurs automatically[106]—neither formal nor written request is required.[107] Inmates who have been given an initial parole consideration but who have since escaped are not reconsidered until one year following the date of return to the jurisdiction of the Department of Offender Rehabilitation.[108] If an inmate is returned to prison because of violation of the condition of parole or conditional release, the inmate will not be considered for re-parole until at least one year after the date of re-entering prison, unless the Board decides otherwise.[109]

The problem which results from minimum time served requirements is that parole consideration is not possible before the initial eligibility date is satisfied.[110] Correctional authorities have often found that time served eligibility requirements interfere with effective decision making because such requirements can cause unnecessary hardship and confinement and result in inequitable treatment of prisoners.[111] As one publication noted:

> A mandatory minimum prevents the parole board from granting an early release when appropriate and denies it the discretion which it properly requires.[112]

This report recommends that the minimum time served requirements for parole eligiblity in Georgia be reduced and suggests three alternative systems of parole eligibility:

a) *Plan A:* For *all* inmates, parole eligibility would occur after service of one-third of their sentences, with a minimum eligibility date of three months and a maximum parole eligibility date of four years. The only exception would be those inmates with life sentences; their parole eligibility date would be after seven year's service.

b) *Plan B:* For *all* inmates, parole eligibility would occur after service of of one-fourth of their sentence, with a minimum parole eligibility date of three months and a maximum parole eligibility date of four years. The only exception would be those inmates with life sentences; their parole eligibility date would be after seven year's service.

c) *Plan C:* For *all* inmates with sentences of five years or less, parole eligibility would occur after six months service. For inmates with sentences of over five years, parole eligibility

would occur after one year's service. The only exception would be those inmates with life sentences; they would be eligible for parole after seven year's service.

The benefits that would accrue from each of the above three parole eligibility systems are the same—although varying in degree, they do not vary in kind. One of the primary benefits is that the *number* of inmates eligible for parole would increase. Under the present system in Georgia, felons with sentences of one year are not eligible for parole because good time allowances reduce the prospective discharge date below the nine month minimum parole eligibility date.[113] With all of the proposed systems, felons with one year sentences would be eligible for parole—under Plan A and B after three months and under Plan C after six months. The second reason for the increase in the number of inmates eligible for parole is that although under the present system misdemeanants are *statutorily* eligible for parole, in practice very few are paroled because good time allowances reduce most misdemeanant's prospective discharge date with a perfect record below the present six month minimum parole eligibility date. Only misdemeanants who either have forfeited some good time or have consecutive misdemeanant sentences are eligible under the present Georgia system.[114] Under proposed Plan A and B, certain misdemeanants[115] not eligible for parole under the present Georgia system would become eligible because of the reduced initial parole eligibility date.

It must be remembered that under any system, mere parole eligibility does not mean that parole will be granted; however, if the *number* of inmates considered for parole increases, and those eligible are considered *earlier*, the number of inmates released on parole should increase; and if the present *rate* of parole grants were to remain constant, the number of inmates released on parole would increase significantly.

Another benefit of the proposed system results indirectly from earlier initial parole consideration dates. Considering inmates at an earlier time will enable the Parole Board to release those inmates who have been rehabilitated at an earlier point in time than permitted by the present Georgia system.[116] Inmates who have not attained a sufficient level of rehabilitation to entitle them to parole will not be affected, since they will be denied parole upon review by the Parole Board.

TABLE VII: SCHEDULES FOR PAROLE ELIGIBILITY

Duration of Sentence by Years	Present Georgia Parole Eligibility date	Plan A Parole Eligibility date	Plan B Parole Eligibility date	Plan C Parole Eligibility date
1	Not eligible[a]	4 mos.	3 mos.	6 mos.
1.5	9 mos.	6 mos.	4.5 mos.	6 mos.
2	9 mos.	8 mos.	6 mos.	6 mos.
2.5	10 mos.	10 mos.	7.5 mos.	6 mos.
3	1 yr.	1 yr.	9 mos.	6 mos.
3.5	1 yr. 2 mos.	1 yr. 2 mos.	10.5 mos.	6 mos.
4	1 yr. 4 mos.	1 yr. 4 mos.	1 yr.	6 mos.
4.5	1 yr. 6 mos.	1 yr. 6 mos.	1 yr. 1.5 mos.	6 mos.
5	1 yr. 8 mos.	1 yr. 8 mos.	1 yr. 3 mos.	1 yr.
6	2 yr.	2 yr.	1 yr. 6 mos.	1 yr.
7	2 yr. 4 mos.	2 yr. 4 mos.	1 yr. 9 mos.	1 yr.
8	2 yr. 8 mos.	2 yr. 8 mos.	2 yr.	1 yr.
9	3 yr.	3 yr.	2 yr. 3 mos.	1 yr.
10	3 yr. 4 mos.	3 yr. 4 mos.	2 yr. 6 mos.	1 yr.
11	3 yr. 8 mos.	3 yr. 8 mos.	2 yr. 9 mos.	1 yr.
12	4 yr.	4 yr.	3 yr.	1 yr.
13	4 yr. 4 mos.	4 yr.	3 yr. 3 mos.	1 yr.
14	4 yr. 8 mos.	4 yr.	3 yr. 6 mos.	1 yr.
15	5 yr.	4 yr.	3 yr. 9 mos.	1 yr.
16	5 yr. 4 mos.	4 yr.	4 yr.	1 yr.
17	5 yr. 8 mos.	4 yr.	4 yr.	1 yr.
18	6 yr.	4 yr.	4 yr.	1 yr.
19	6 yr. 4 mos.	4 yr.	4 yr.	1 yr.
20	6 yr. 8 mos.	4 yr.	4 yr.	1 yr.
21-X	7 yr.	4 yr.	4 yr.	1 yr.
Life	7 yr.	7 yr.	7 yr.	7 yr.

a. Assumes that the inmate has retained all his good time allowances.

A third reason for a reduction of initial parole eligibility is that empirical research has indicated the relationship between time served in prison and success on parole to be either that those inmates with less confinement time are more sucessful on parole or that the length of time served in prison makes no difference.[117] A recent study conducted in California which examined the parole outcomes of comparable groups serving differing lenghts of sentences, found that "prison terms can be reduced without reducing the risk to society as measured by recidivism."[118] The National Advisory Commission on Criminal Justice Standards and Goals has recently stated that "time spent in confinement is inversely related to success on parole."[119] Findings such as these must be carefully considered in determining the minimum parole eligibility dates of inmates. The California study indicates that within certain limits, the date of parole does not affect the parolee's potential success. This conclusion supports the notion that to incarcerate a prisoner for a longer time period than necessary not only results in an unnecessary loss to the community of the individual's services and a loss to the taxpayers in terms of added imprisonment costs, but also is the sanctioning of an inhumane measure. Both the offender and society as a whole pay the price of long prison terms:

> We may . . . persist in incarceration of persons who do not need institutional control. We can take a minor property offender and help him to develop into a more serious offender by unnecessary and long incarceration as surely as if we conducted vocational training in hate, violence, selfishness, abnormal sex relations, and criminal techniques.[120]

The major drawback of reducing the minimum time eligibility requirements for parole consideration is that an increased workload for the Parole Board will result. The Board presently reviews over 4000 cases a year[121] and is responsible for interviews, parole revocation hearings, and many other parole-related functions. An increase in the number of inmates eligible for parole might result in a reduction of time spent by each Board member reviewing particular inmates' files. This is a serious problem and cannot be avoided; however, this drawback must be balanced against the benefits that will accrue to society, the prison system, and those inmates who would otherwise be ineligible for parole.

The following is a detailed discussion of each of the three alternative systems proposed:

PLAN A

Plan A, the most conservative of the three proposed systems of parole eligibility, is merely a slight variation of the present system, but it affects a large group of prisoners and could ultimately result in a reduction of the Georgia prison population. The plan affects the *ends* of the spectrum of sentence lengths—misdemeanant sentences, sentences of two years or less, and sentences of more than twelve years, exclusive of life sentences.

At the lower end of the spectrum, present Georgia misdemeanant's parole eligibility requirements demand that a misdemeanant serve at least six months of his sentence;[122] if a misdemeanant keeps all of his good time, however, he is discharged at a maximum time of six months.[123] In effect, therefore, misdemeanants are pragmatically barred from being paroled—if a misdemeanant does not maintain all his good time, his chances for being paroled are probably minimal; if he does maintain his good time, he will be released either on or before his initial parole eligibility date.[124] Plan A affects misdemeanants by reducing the minimum eligibility date to three months, thereby opening up parole to those pragmatically precluded under the present system.

Prisoners who are sentenced to two years or less would also be affected. Under the present Georgia system, a felon is not eligible for parole unless he has served at least nine months.[125] Thus, although one-third of a two-year sentence is eight months, prisoners with two-year sentences are not eligible until they have served nine months.[126] Under Plan A, because of the three month minimum time served requirement, felons with sentences of two years or less will be treated on an equal basis with all other felons.

Plan A would also affect the parole eligibility dates of inmates with sentences of more than twelve years. Under the current system, a prisoner is eligible for parole after serving one third of his sentence; if the sentence totals twenty-one years or more, the inmate is eligible after seven years.[127] Plan A would set the *maximum* parole eligibility date at four years for all prisoners except those serving life sentences. Thus, the plan affects inmates with long sentences by

making them eligible for parole after four years, rather than the present seven.

The changes that Plan A suggest, although minimal, could have significant results.[128] A "wholesale" release of prisoners would not result, but the plan would enable certain classes of prisoners presently legally or pragmatically ineligible for parole to be considered for parole, and would make other classes of prisoners eligible at an earlier date.

The mose serious drawback of Plan A is that it does not change the system for most prisoners. One of the largest single categories of prisoners consists of those with sentence lengths of three to five years, yet this group is not affected by the plan.

PLAN B

Plan B retains the traditional characteristic of parole eligibility —prisoners still must serve a fraction of their sentence before becoming eligible for parole; however, Plan B would reduce the present one-third fraction to one-fourth of the sentence.[129] The system also has a three-month minimum and a four-year maximum parole eligibility date. The plan affects every prisoner in the system, with the exception of those prisoners serving life sentences.

Plan B has all the advantages of Plan A, plus the additional benefit of possibly easing each paroled inmate's reintegration into society; each inmate who is paroled at an earlier point in time than is presently possible will remain in prison for a shorter time and, consequently, out of society for a shorter period of time. He will have had less contact with the criminal element which exists in the prison system, and hopefully will have avoided the "hardening" process which occurs to so many inmates.[130] And, as the California study has indicated, the transition back into society might be eased through earlier rehabilitation and release.[131] Plan B might also contribute to improved prison discipline and morale. Because there is less time between the date of arrival at the prison and the initial date of eligibility, the nearness of potential parole might be an additional incentive to proper prison conduct.

The major drawback of Plan B is that it will result in an added workload for the Parole Board. However, this drawback must be

balanced against the benefits that will accrue from early parole eligibility.

PLAN C

Plan C is the most progressive of the three proposed systems. The plan will have the largest effect on the date of initial parole eligibility and is an extreme departure from the present Georgia system. Under the plan, prisoners with sentences of five years or less are eligible for parole after service of six months, while prisoners with sentences of over five years are eligible after one year's service. Prisoners with life sentences are eligible after service of seven years. This plan affects all prisoners, except those serving life sentences, and should maximize the efficiency of parole.

The primary benefit of this system is that it allows those prisoners who are rehabilitated and good risks to society to return to the community after a minimal amount of time in prison. As has been indicated earlier, research studies have shown not only that inmates with less confinement time are generally more successful on parole but also that recidivism rates might be reduced by minimizing confinement time.[132] Another advantage of Plan C is that it helps to alleviate inequities resulting from the present sentencing procedure. This proposed system groups all inmates into two broad categories and guarantees parole consideration after serving equivalent terms, rather than set periods. Under the present system it is possible for two people convicted of the same crime and sentenced by different judges to receive different sentences, allowing one to be eligible for parole at an earlier time than the other. Plan C groups all inmates into two categories and guarantees parole consideration after service of equivalent terms rather than after service of some minimum time period.

Sentence disparity has been found to be one of the prime causes of inmate grievances.[133] The United States Board of Parole stated in its 1970 Biennial Report:

> It is clear that the multiplicity of sentencing choices available to the courts, and the varying attitudes between sentencing judges results in a wide disparity in the lengths of sentences imposed for persons convicted of similar offenses, and often who possess similar backgrounds. To a very real degree, the

> Board of Parole tends, in practice, to equalize the disparity *whenever it is not bound to the one-third maximum time required in regular sentence.*[134]

Florida has enacted a statute[135] similar to proposed Plan C and has been very successful.[136] One reason for the success is that the Florida Parole and Probation Commission has maintained its policies for parole release; their decision to grant parole is based on the following considerations:

> a) The community must be provided reasonable protection and assurance that those released will not victimize society.
> b) The availability and capability of the Commission field staff must be adequate to provide supervision and the necessary concentrated programming consistent with the higher risk offender profile.
> c) The parole release must be consistent with the capability of the parolee to cope effectively with the complex demands of modern society.[137]

Florida's success is also attributable to the Parole Board's use of parole prediction scores. Scientific parole prediction correlates background data with parole performance data and combines the experience of the parole authority with each category of offender in the classification scheme.[138] Finally, Florida is successful because of the use of pre-sentence investigation reports as a tool in determining the parole decision.[139]

The main objection to Plan C is fear that there will be a wholesale release of prisoners. This fear is unwarranted for several reasons. First, parole eligibility is not synonymous with parole grant. The mere fact that an inmate is *eligible* for parole does not mean that the Parole Board will parole him. The criteria used for determining who will be granted parole will not differ from the criteria used in the present system. An inmate who would not be paroled under the present Georgia system will not be paroled merely because he is eligible at an earlier time. Second, the Parole Board has the option to become more strict in its release requirements, particularly at initial parole consideration. Finally, the minimum time eligibility for those inmates with life sentences remains at seven years; thus, the inmates who have committed the most serious crimes will not be eligible until that time.

5. The Parole Grant Hearing

A parole grant hearing is a mechanism which enables a potential parolee to speak on his own behalf concerning his parole grant determination. The principal purposes of the hearing are twofold: first, to aid in effective decision making by expanding the informational base available to the parole board; and second, to enhance the rehabilitation of an inmate not only by encouraging his participation in programs but also by providing him with what he perceives to be fair treatment.[140] These two purposes will be referred to as the informational goal and the rehabilitative goal.

At the present time, only three states do not provide some form of a parole grant hearing; Georgia is one of those.[141] The Georgia Board of Pardon and Paroles does, however, provide a number of potential parolees with the opportunity to speak face-to-face with board members, through an interview program begun in March, 1974.[142] When an interview is held, it is usually conducted by two Board members and a parole review officer. The interview, usually lasting fifteen to twenty minutes, is not recorded, but the parole review officer takes notes which are later used by the Board in its decision making process. At the conclusion of the interview, each Board member records his impressions for inclusion in the inmate's file.[143] Attorneys and witnesses are not a part of the interview process; they are permitted to present their support for or opposition to parole directly to the Board, on days designated for such presentations.[144]

An explanation of the parole grant hearing as it is used in other jurisdictions is useful in evaluating Georgia's interview system. A survey of fifty-one[145] jurisdictions which hold hearings revealed that in most jurisdictions there is little to distinguish the hearing from Georgia's question and answer interview. Only seventeen of the fifty-one jurisdictions permit the inmate to call witnesses, and only twenty-one permit counsel to be present.[146] Thus, the typical "hearing" is in reality Georgia's interview—a question and answer exchange between board member(s)[147] and inmate. Thus, the difference lies in the timing; in hearing states, the face-to-face exchange occurs at the end of the decision-making process, after the board members have possibly already decided.[148] There is little, if any reason, to think the informational and rehabilitative goals of the

face-to-face exchange are better served by such a proceeding than by an earlier proceeding. Indeed, the earlier proceeding would more readily allow time before the final decision for the parole authority to verify and file data challenged as inaccurate by the inmate. The probability that inaccurate information will be exposed to and challenged by the inmate is not a function of the timing of the proceeding. The achievement of the rehabilitative goal of the proceeding necessarily is a function of the personal attributes of the board members—warmth, interest, ability to communicate, etc.—and not a function of timing.

As for the jurisdictions which allow the inmate to call witnesses and permit him to be represented by counsel, it has been suggested that the proceeding's informational and rehabilitative goals are enhanced by the presence of attorney and witnesses.[149] Nevertheless, this report does not recommend that counsel be present at the parole interview, nor that the inmate be permitted to call witnesses at the interview. These two distinct questions will be discussed in separate sections of this report. This report also does not advocate that Georgia adopt a system of parole grant hearings. As explained above, the hearing as it is practiced in most states differs from Georgia's interview only in two respects: (1) the hearing in most states comes much later in the decision process than does the interview in Georgia, and (2) the decision in most states is made promptly at the conclusion of the hearing, while in Georgia it is made some time after the interview is completed. The board members in many hearing states study all the file data on an individual, then, in effect, give him a last minute chance to change their minds.[150] In Georgia, the interview is conducted prior to rather than after the decision.[151] This report suggests that the informational and rehabilitative goals important to the conventional hearing are satisfied at least as well by the Georgia interview.

Under the present system in Georgia, however, not all potential parolees have the opportunity to be interviewed, and are thus not beneficiaries of these goals. Those who are denied an interview are:

(1) those becoming eligible for parole consideration for the first time, or
(2) those similarly interviewed in the past, or
(3) former parolees or probationers imprisoned because of parole or probation revocation.[152]

The reason for limiting the number of interviews is undoubtedly the limited availability of manpower and other resources. This report, while recognizing the problems involved in expanding the interview program,[153] recommends that an interview be held with every inmate at every parole eligibility date. To prevent, at least to some extent, an unmanageable increase in the workload of the Board members, this report suggests that each interview be conducted by one Board member rather than the present two.[154] In addition to the written record of the interviewing member's impressions,[155] the interview itself should be recorded verbatim and be made a part of the data file upon which the board members base their votes to grant or deny parole. Institution of this more complete interview system will add a valuable informational input to the parole decision making process; the benefits that will redound both to the community and to the inmates should more than outweigh the added burdens imposed upon the parole system.

(a) *The Question of Counsel at the Hearing-Interview*

Some commentators have argued that the presence of an attorney before the parole board on behalf of an inmate could have a beneficial effect on both the amount and nature of the information discussed and the inmate's perception of the proceeding's fairness[156]—i.e., on the informational and rehabilitive goals mentioned throughout this report. Studies have indicated, however, that the presence of counsel does not necessarily aid an inmate in obtaining parole. One survey of forty-three states examined the relationship in 1970 between the permitted presence of counsel at a parole grant hearing and the ratio of parole releases to total inmate releases.[157] Of eighteen states which permitted counsel's presence, twelve had a *lower* percentage of releases by parole than the national average of 70%.[158] Of the twenty-five states which did not permit the presence of counsel, sixteen had a parole-release precentage *above* the national average.[159] While it is not possible to conclude that the permitted presence of counsel adversely affects the inmate's chances for parole,[160] it is reasonable to conclude that Georgia's adoption of a policy to permit counsel at the parole grant interview would not result in a significant increase in paroles.[161]

In addition, the nature of the parole grant decision is objective; the parole board acts as a "finder of fact."[162] If the parole grant

decision process were adversarial in nature, with either the parole board or some other governmental body advocating denial of parole, there would be a need for an offsetting advocate on behalf of the inmate.[163] In Georgia today, however, there is no reason to incarcerate an inmate any longer than necessary, especially in view of the overcrowded condition of the prisons. Therefore, the requirement or allowance of counsel would seem to be unnecessarily wasteful of needed resources and valuable parole board time.[164]

(b) *The Question of Witnesses at the Hearing-Interview*

There is little doubt that permitting the inmate to present witnesses in some forum works favorably towards both the informational and rehabilitative goals. The kind of personal information that is made available through family, friends, and others is vital to an informed decision by the parole authority. As to the rehabilitative goal, knowledge by the inmate that his best side can be presented is vital to his favorable perception of both the process and the authority. Virtually every jurisdiction, including Georgia, recognizes this, and has a mechanism which permits it. In Georgia, counsel, family, and friends are permitted to present their views directly to the board members on days designated for that purpose,[165] and this report suggests that this procedure substantially satisfies the intended goals.

(c) *Recording of the Interview*

Only twenty jurisdictions provide for a verbatim recording of the parole grant proceeding.[166] This is not solely a question of judicial reviewability; a verbatim record of the interview and a record of the reasons for the decision permit those who are to consider the inmate on a subsequent eligibility to: (1) gauge better the inmate's progress from the time of the first interview to the time of the second; (2) recognize more efficiently the particular problems of the inmate and determine if the conditions supporting the first denial still exist; and, (3) avail themselves of an additional information source otherwise non-existent. The recording of the proceeding would also be useful because the interviews in Georgia are conducted by less than the full Parole Board. While the interviewing Board members' opinions and the parole review officer's notes are valuable, a verbatim recording in addition to the interviewing Board members' opinions

would provide the remaining Board members with all the beneficial features of the former data system as well as the features indicated above.[167] Therefore, this report recommends that such inmate interviews be recorded verbatim, and that the recording become a part of the data file upon which the Board members base their votes to grant or deny parole.

6. A Requirement of Specific Reasons Upon a Denial of Parole

Most parole boards either fail to give reasons or give inadequate reasons to the inmate upon denial of parole. Georgia falls into this latter group—although inmates who have been denied are informed of the reasons,[168] the notice is usually in general and vague terms. This report recommends that Georgia adopt a procedure whereby inmates are given specific, concrete statements which adequately describe the reasons for denial and which are directed to the particular inmate. This policy of openness not only will enable the inmate to take steps toward rehabilitation but also will improve his perceptions of the correctional and parole systems. Statements which speak only in general terms do not inform the inmate of his failings or weaknesses and breed disrespect and contempt for the system because of the appearance of inequity and arbitrariness conveyed.

Fairness, perhaps the primary reason behind adoption of a policy of openness and disclosure,[169] is not mandated by any law—indeed, the closest written basis for a policy of fairness is embodied in the concept of due process.[170] Rather, fairness in the parole grant process is demanded by the rehabilitative nature of corrections and parole. If an inmate is not notified of the factors behind a decision denying parole, the rehabilitative purposes of incarceration are all but defeated; without knowledge of what is expected and required, an inmate will be unable to determine what actions or inactions to undertake. His self-rehabilitative efforts will become little more than hit-and-miss propositions. A former parole board member once concluded:

> It is an essential element of justice that the rule and processes for measuring parole readiness . . . be made known to the inmate. This knowledge can greatly facilitate the earnest inmate toward his own rehabilitation. It is just as important for an inmate to know the rules and basis of the judgement upon which he will be granted or denied parole as it was important

> for him to know the basis of the charge against him and the evidence upon which he was convicted. One can imagine nothing more cruel, inhuman, and frustrating than serving a prison term without knowledge of what will be measured and the rules determining whether one is ready for parole.[171]

Thus, fairness requires that adequate, informative reasons be given to an inmate.

The leading decision applying notions of fairness to the parole grant decision is *Monks v. New Jersey State Parole Board* in which the court held that each applicant denied parole has a right to a statement of reasons.[172] The primary rationale of the court was adherence to a policy of fairness:

> . . . fairness and rightness clearly dictate the granting of the prisoner's request for a statement of reasons. That course as a general matter would serve the acknowledged interests of procedural fairness . . . .[173]

Recently, some parole boards have begun to realize the inequities in refusing to give reasons.[174] Many of these have recognized that failure to give reasons or giving inadequate reasons fosters arbitrariness and casts suspicion on the board; a policy that does not encourage openness provides a curtain behind which bad decisions can be hidden. As emphasized in the *Monks* decision, adequate disclosure of reasons will "serve as a suitable and significant discipline on the Board's exercise of its wide powers."[175]

Another argument supporting institution of adequate disclosure of reasons stems from recognition that prison unrest has often resulted from the fact that applicants are not informed of the reasons for parole denial;[176] disclosure would help to alleviate the danger of prison unrest.

> If the prisoner population cannot see a correlation between socially acceptable behavior within the institution and an eventual parole, their motivation to conform . . . is so decreased as to appear almost non-existent.[177]

There are two arguments in opposition to adoption of a policy of full disclosure. First, a policy of disclosure is already in force in Georgia, and no further disclosure is needed.[178] Although the Georgia Parole Board furnishes reasons for parole denial, practically

speaking, the explanations given the inmate are no more than general statements—statements conceivably applicable to any or all inmates. Typical reasons include, for example, statements that (1) the inmate has not used his time in the institution as well as possible; (2) the serious nature and circumstances of his offense prevent the grant of parole at the present time; and, (3) a past record of parole failure (or a past record of drug problems, escapes, or work-release failure) indicates that parole is not advisable at the present time.[179] The second argument in opposition to disclosure is the administrative burden that will be imposed upon the system. This report recognizes that additional manpower and resources will be required and that the workload of the Board members will increase; however, the benefits that will accrue to the prison population, the correctional system, and society far outweigh these burdens. If violence and unrest in the prison system can be minimized, and, at the same time, prisoners can be rehabilitated more efficiently and expeditously, there can be little doubt that institution of a policy of openness and disclosure is advisable, if not mandatory.

This report further recommends that Georgia adopt a policy whereby inmates are given access to all material in their files except to the extent that such access would adversely affect the informational sources, endanger individuals, or have a deleterious effect on the inmate's rehabilitation. Presently, Georgia allows no access to the files[180] except in the rare cases where there is widespread public interest.[181] The primary reasons for denial of access are protection of the confidentiality of the witnesses in order to encourage their candor. Denying access to an inmate's files results in a grave problem—an individual is unable either to rebut unfavorable information or to learn what facts are being considered; although the individual may be given an opportunity to establish his version of the facts, he may fail to explain crucial points raised by others or may place undue emphasis on uncontroverted issues to the exclusion of unresolved and contested issues. The recent federal case of *Childs v. United States Board of Parole*[182] recognized the danger of factual errors[183] when parole applicants are denied the opportunity to view information used by the parole board; the court therefore concluded that access to the files must be permitted. The same reasoning used by the *Childs* court is applicable to the Georgia parole system—the danger of errors and omissions which could ad-

versely affect an inmate's chances for parole are too great to allow the Parole Board to deny access.

E. *Parole Revocation*

Increased concern has been shown in recent years for the rights of parolees,[184] particularly in the area of parole revocation.[185] The emphasis on parole revocation is due largely to the fact that revocation effects a termination of liberty, albeit conditional.[186] In addition, there is genuine interest in the protection of parole as an institution[187] and an awareness of the role that parole revocations play in admissions to prison. This report suggests that in order for parole to survive as a viable organ of the criminal justice system, parole revocation procedures which ensure fairness, efficiency, and consistency must be instituted—these procedures must be structured so that they contribute to and reinforce the ultimate goals of parole.

TABLE VIII: ADMISSIONS TO GEORGIA PRISONS RESULTING FROM PAROLE REVOCATIONS[a]

Fiscal Year	Total Felon Admissions to Prison	Total Parole Revocations	Parole Revocations as a Percentage of Total Admissions
1972	6604	268	4.1%
1973	6062	265	4.4
1974	6738	291	4.3

a. Sources: ANNUAL REPORT and Computer CHRIS.

Traditionally, the primary goal of parole has been the rehabilitation of inmates with its consequent reduction of recidivism.[188] Because revocation is the primary enforcement tool of parole boards,[189] it is the major device by which boards attempt to achieve this goal. Proper parole revocation procedures help ensure that the purpose of a revocation is attuned to safeguarding the community and aiding the parolee. Proper revocation procedures also serve the goal of enhancement of the concepts of fairness required in a parole system.[190] An inmate's perceptions of both the parole and correctional systems are vital factors in his eventual rehabilitation; if proper procedures will help achieve fairness, efficiency, and consistency, then an in-

mate will be more likely to have positive feelings about the systems[191]—if procedural fairness is related to mental attitude, then institution of proper procedures will encourage rehabilitation. The other goals and purposes of parole[192] will also be served by proper parole revocation procedures. Because revocation is a vital component of any parole system, it is logical to assume that proper revocation contributes to "proper parole."

This section of the report analyzes parole revocation in Georgia—from legal, administrative, and statistical standpoints. The first part deals with recent Supreme Court and Georgia decisions on parole revocation; the second part deals with the actual process in Georgia; and the third part analyzes the system and proposes recommendations. Our purpose is not to question the propriety of actions taken by the Georgia Board of Pardons and Paroles or its members, but to evaluate the system so as to increase its efficiency, fairness, and consistency.

1. The Legal Requirements of Parole Revocation

Because parole revocation results in the curtailment of one's liberty, two recent Supreme Court decisions require that certain due process protection be provided to the parolee at the revocation proceeding. In *Morrissey v. Brewer,*[193] Chief Justice Burger determined that the termination of a parolee's conditional liberty falls within the bounds of the Due Process Clause. The Court held that minimal due process requirements for parole revocation include a reasonably prompt preliminary inquiry at or near the place of the alleged parole violation or arrest in order to determine whether there is probable cause to believe that the parolee committed the parole violation, and a final revocation hearing which guarantees the parolee certain specified minimum due process requirements.

The Court required several protections at the preliminary hearing stage. The parolee must be given notice of the hearing, and this notice must inform the parolee of the alleged parole violations. To insure fairness for the parolee, an officer not personally involved with the parolee[194] should make the probable cause determination. The parolee may present relevant information and, absent security considerations, question any adverse informants. The officer conducting the hearing must summarize the evidence at the prelimi-

nary hearing and determine whether there is probable cause to send the parolee before the parole board for a final revocation hearing. The officer must "state the reasons for his determination and indicate the evidence he relied on."[195]

At the final revocation hearing, minimum due process requirements are: a) written notice of the claimed violations of parole; b) disclosure to the parolee of evidence against him; c) opportunity to be heard in person and to present witnesses and documentary evidence; d) the right to confront and cross-examine adverse witnesses;[196] e) a "neutral and detached" hearing body such as a traditional parole board;[197] f) a written statement by the factfinders as to the evidence relied on and reasons for revoking parole. The Court further emphasized that at the revocation hearing the parolee must be afforded the opportunity to be heard and to demonstrate that he did not violate the conditions of parole, or if he did, that there were mitigating circumstances. In addition, the final revocation must be within a reasonable time after the parolee is taken into custody.

The Court in *Morrissey* stressed that parole revocation is not part of a criminal prosecution and thus the full panoply of rights due a defendant in a criminal proceeding is not applicable[198]—parole revocation deprives an individual not of an absolute liberty, but only of a conditional liberty predicated upon adherence to special parole conditions. The Court also noted that it was not attempting to establish a rigid code of procedure for states to follow, but only a framework within which to work.[199]

In *Gagnon v. Scarpelli*[200] the Court considered the question of the right to counsel at parole revocation hearings. The Court determined that the Constitution did not require that counsel be provided in *all* revocation hearings; the due process requirements established in *Morrissey* were sufficient to ensure the parolee's rights. Because of the many situations in which appointed counsel could make a substantial difference, *Gagnon* adopted a case-by-case approach for determining when counsel was appropriate. Unfortunately, the Court failed to establish guidelines for this suggested approach and merely mentioned that in the following two fact situations a state should consider the question: (1) when the parolee claims that he has not committed the alleged violation, or (2) when

there are complex and difficult reasons which might have justified or mitigated the violation.[201] The Court also stressed that the individual's ability to speak effectively for himself should be considered.[202] Finally, the Court required that the reasons supporting a refusal to appoint counsel be set forth in the record whenever a request for counsel is denied.[203]

The effects, if any, of *Morrissey* and *Gagnon* on Georgia parole revocation procedures have not yet been determined;[204] the basic revocation procedures are statutorily established and seem to be largely compatible with the decisions. The Georgia statutes provide first that a parolee may be arrested if a Parole Board member has reasonable grounds to believe that a violation has occurred.[205] Although a preliminary hearing is not expressly provided for, such hearings are granted except in certain limited situations.[206] Second, the statutes entitle a parolee to a final hearing before the Board.[207]

There have been several decisions in two other areas of parole revocations. First, the Georgia Supreme Court has concluded that a person who is granted parole remains in the legal custody of the Parole Board until expiration of his maximum sentence; thus, the Board has the authority to revoke parole and return him to prison for the remainder of the maximum sentence.[208] Second, parole can be neither granted nor revoked except by a specific order of the Georgia Board of Pardons and Paroles.[209] Thus, in *Balkcom v. Jackson*[210] the court determined that although a prisoner, while on parole, has been convicted and sentenced to serve time for a federal offense, he was still entitled to have time served on the subsequent sentence computed as time served on the original sentence because the Parole Board did not by order revoke his parole.

2. Parole Revocation in Georgia

The process of parole revocation in Georgia is initiated when a delinquency report is filed by a parole supervisor alleging a violation of one or more terms and conditions of parole by a particular parolee.[211] This report is sent to the Executive Officer of the Board of Pardons and Paroles who is responsible for determining whether to issue a warrant calling for the arrest of the alleged violator.[212] The decision whether to issue the warrant is guided by statutory criteria:

> If any member of the Board shall have reasonable ground to believe that any parolee . . . has lapsed into criminal ways, or has violated the terms and conditions of his parole . . . in a material respect, such member may issue a warrant for the arrest of such parolee . . . .[213]

TABLE IX: LENGTH OF TIME BETWEEN GRANT OF PAROLE AND ISSUANCE OF ARREST WARRANT[a] BY PAROLE BOARD, FY 1974[b]

Length of Time Between Grant of Parole and Issuance of Arrest Warrant (in months)[a]	Number of Revocations
0 to 1[c]	21
1+ to 2	26
2+ to 3	33
3+ to 4	21
4+ to 5	17
5+ to 6	16
6+ to 7	11
7+ to 8	11
8+ to 10	15
10+ to 12	5
12+ to 14	4
14+ to 16	5
16+ to 18	7
18+ to 20	4
20+ to 25	6
25+ to 30	8
30+ to 35	3
35+ to 40	0
40+ to 45	0
45+ to 50	2
50+ to 55	0
55+ to 60	0
60+ to X	0
Not Available	25
Total	240

a. On some revocation orders the date of issuance of the arrest warrant was not listed. In these cases the date used was the date until which good time was allowed.
b. This table was compiled from "Revocation Orders," Georgia State Board of Pardons and Paroles [hereinafter referred to as Revocation Orders].
c. Of this group, 8 revocations occurred within 15 days.

If a warrant is issued, the Executive Officer must decide whether to hold a preliminary hearing.[214] If the decision is negative and two Board members consent, the warrant will be withdrawn. If the decision is affirmative, a preliminary hearing will be held[215] unless the parolee has been convicted of a new offense in a court of record, has not been arrested prior to his final hearing, or has admitted the violation with which he is charged.[216] In these three situations parole is automatically terminated.

TABLE X: FINAL PAROLE REVOCATIONS: METHOD OF REVOCATION, FY 1974 [a]

Method of Revocation	Revokees Number	Revokees Percent
Automatic Parole Revocations	139	57.9%
Parole Revocations after Hearings	101	42.1
Total Final Parole Revocations	240	100.0%

a. This table was compiled from the Revocation Orders.

The purpose of the preliminary hearing is to determine whether probable cause exists to believe that there has been a violation of the terms and conditions of parole and whether the parolee should be held under arrest pending the Board's decision on ordering a final hearing.[217]

The preliminary hearing is an informal proceeding presided over by a Parole Review Officer,[218] and is held in a courthouse at or near the site of the alleged violation.[219] The parolee and his supervisor[220] usually testify at the hearing, along with other available witnesses, all of whom are under oath. The parolee may present documentary and testimonial evidence,[221] may call his own witnesses,[222] and may cross-examine witnesses.[223] Parolees are allowed counsel; however, because of the lack of state funds for attorneys at these hearings, and because most parolees cannot afford to retain counsel, few parolees are represented.[224]

The Parole Review Officer who presides over the hearing is responsible for summarizing the proceeding in a written report.[225] This report usually contains (a) the name of the parolee; (b) the circumstances of the alleged violation; (c) the place of the alleged violation;

(d) the date of the alleged violation; (e) the location of the preliminary hearing; (f) the names of persons who attended the preliminary hearing; (g) a summation of testimony;[226] (h) the findings of the Parole Review Officer—that is, whether he thinks that probable cause exists to believe that there has been a violation of the terms or conditions of parole (the Officer also cites what testimony led to this finding); and, (i) a recommendation whether or not to hold a final hearing.[227] If the Officer feels that the violation was not serious enough to merit revocation, he may propose an alternative to full revocation.[228]

TABLE XI: ANALYSIS OF NEW OFFENSES COMMITTED BY PAROLE REVOKEES, FY 1974[a]

New Offense Type	Number of New Offenses	Percent
Burglary	39	16.6
DUI	35	14.8
Theft (other than motor vehicle theft)	21	8.9
Drug related offenses	18	7.6
Weapon related offenses	16	6.8
Forgery	15	6.4
Robbery, armed robbery, and attempted robbery	13	5.5
Alcohol related offenses[b] (other than DUI)	13	5.5
Assault related offenses[c]	13	5.5
Motor vehicle theft	8	3.4
Resisting arrest, obstructing an officer	6	2.5
Murder, manslaughter	5	2.1
Other	34	14.4
Totals[d]	236	100.0

a. This table was compiled from Revocation Orders.
b. Includes Drunkenness, Disorderly Conduct, and Violation of State Liquor Laws.
c. Includes Simple Assault, Aggravated Assault, and Battery.
d. The total includes only those crimes which had an incidence of five or greater. Because several revokees were revoked for committing more than one offense, the total of new offenses exceeds the number of revocations resulting from the commission of new offenses.

Upon receipt of the report, the Parole Board votes whether to hold a final hearing, a majority vote deciding.[229] If the decision is to hold a final hearing, the parolee is brought to the main office of the Parole Board, where the hearing is held. If the decision is not to hold the hearing, the parolee is continued on parole.

TABLE XII: ANALYSIS OF METHOD OF PAROLE REVOCATIONS BY LENGTH OF SENTENCE ORIGINALLY IMPOSED, FY 1974[a]

Length of Sentence (in years)	Automatic Parole Revocations	Parole Revocations After Hearing	Total Revocations Number	Total Revocations Percent
0 to 1	0	0	0	0%
1+ to 3	21	21	42	17.5
3+ to 5	35	27	62	25.8
5+ to 7	20	7	27	11.3
7+ to 10	27	11	38	15.8
10+ to 15	11	5	16	6.7
15+ to 20	9	4	13	5.4
20+ to X	5	5	10	4.2
Life	11	19	30	12.5
Not Available	0	2	2	0.8
Totals	139	101	240	100.0%

a. This table was compiled from Revocation Orders.

Every parolee who has been charged with a parole violation at a preliminary hearing is afforded a final hearing unless the parolee is convicted of a new offense in a court of record,[230] the parolee admits the violation and waives the hearing, or the Board votes against holding the hearing.[231] The final parole revocation hearing, presided over by three Board members, is an informal, non-adversarial proceeding.[232] At the final hearing, the Board is charged with the duty of advising the parolee of the following:[233]

a) The right to retain counsel;
b) The right to make statements or answer questions;
c) The right to remain silent, and that what he says may be used against him; and,
d) The right to present witnesses or documentary evidence in his behalf.

The parolee may present documentary and testamentary evidence and may retain counsel;[234] as with preliminary hearings, however, no state funds are provided for attorneys and many parolees are without counsel.[235] The Board questions the parolee, his field supervisor, and all other witnesses. The parolee may also question all the witnesses, may call his own witnesses,[236] and may present his account of the alleged violations and any defenses.[237] Because of the informal nature of the proceeding, witnesses may be recalled to testify at any time during the course of the hearing.

TABLE XIII: DISPOSITION OF FINAL PAROLE REVOCATION HEARINGS[a]

	Final Parole Revocation Hearings[b]	Number Revoked	Percent Revoked	Number Continued	Percent Continued
FY 1972	133	69	51.8%	64	48.2%
FY 1973	122	82	67.2	40	32.8
FY 1974	137	101	73.7	36	26.3
Totals	392	252	64.3%	140	35.7%

a. This table was compiled from the "Schedule of Parole Revocation Hearings," maintained at the office of the Executive Officer, State Board of Pardons and Paroles.

b. Although more final hearings were held, some of these did not result in a definitive disposition; that is, some were disposed of in manners other than revocation or continuance.

At the conclusion of the final hearing, the Board holds a private executive session at which the case is discussed and a decision regarding termination or continuance of parole is reached. If revoked, the parolee is provided with a copy of the revocation order;[238] if continued, the parolee is again a "conditionally" free man.

TABLE XIV: LENGTH OF TIME BETWEEN GRANT AND FORMAL REVOCATION OF PAROLE,[a] FY 1974[b]

Length of Time Between Grant and Revocation[c] of Parole (in months)	Number of Revocations
0 to 1	6
1+ to 2	12
2+ to 3	13
3+ to 4	18
4+ to 5	21
5+ to 6	20
6+ to 7	16
7+ to 8	14
8+ to 10	31
10+ to 12	16
12+ to 14	12
14+ to 16	11
16+ to 18	8
18+ to 20	9
20+ to 25	14
25+ to 30	10
30+ to 35	3
35+ to 40	0
40+ to 45	1
45+ to 50	2
50+ to 55	2
55+ to 60	1
60+ to X	9
Total	240

a. The dates used to compute the length of time were the official dates stamped on the revocation orders.
b. This table was compiled from Revocation Orders.
c. The date of formal revocation is the date stamped on the revocation order.

3. Analysis and Recommendations

The rate of parole revocations in Georgia has remained relatively constant over the past few years.[230] This rate of revocation must be

considered, however, with particular emphasis upon the question of *who* is being revoked. Many parolees are revoked solely for technical parole violations,[240] which are violations of the terms and conditions of parole other than the prohibition against further criminal activity.[241] This report recommends that revocations predicated solely upon technical violations be minimized.[242] As discussed in a later section of this report,[243] many terms and conditions currently imposed on parolees are irrelevant. In addition, what constitutes a violation of certain conditions is largely dependent upon the particular parole supervisor.[244] Yet, many parole revocations result solely from the imposition of such amorphous and unnecessary terms and conditions.

TABLE XV: ANALYSIS OF PAROLE REVOCATONS BY TYPE OF VIOLATION, FY 1974[a]

Type of Violation	Revokees	
	Number	Percent
Technical Violations	50	20.8%
New Offenses	146	60.9
Combinations of Technical Violations and New Offenses	44	18.3
Total Parole Revocations	240	100%

a. This table was compiled from Revocation Orders.

In respect to this recommendation, it must be remembered that the Parole Board has options other than total revocation or continuance of parole.[245] In order to help reduce the revocation rate without compromising parole's rehabilitative goals, this report recommends that present alternatives to full revocation of parole be utilized extensively and that new alternatives, such as short-term reconfinement or confinement in half-way houses, be implemented.[246] These alternatives should be used particularly in situations where an alleged violation is a technical violation or where the offender is not "dangerous."

TABLE XVI: ANALYSIS OF FINAL PAROLE REVOCATIONS BY LENGTH OF SENTENCE ORIGINALLY IMPOSED AND TYPE OF VIOLATION, FY 1974[a]

Length of Sentence (in years)	Technical Violations	New Offenses	Combination of Technical Violations and New Offenses
0 to 1	0	0	0
1+ to 3	11	25	6
3+ to 5	21	36	5
5+ to 7	1	21	4
7+ to 10	6	27	5
10+ to 15	2	13	1
15+ to 20	1	7	5
20+ to X	2	5	3
Life	5	10	15
Not Available	1	1	0
Totals	50	146	44

a. This table was compiled from Revocation Orders.

TABLE XVII: ANALYSIS OF TOTAL TECHNICAL VIOLATIONS[a] BY PAROLE REVOKEES, FY 1974[b]

Technical Violation Type	Number of Violations	Percent
Residence of employment	32	21.7%
Alcohol related violations	30	20.4
Supervision related violations	30	20.4
Failure to report	29	19.7
Failure to attend counseling	7	4.8
Left state without permission	6	4.1
Curfew violations	6	4.1
Motor vehicle violations (other than traffic violations and DUI)	3	2.0
Drug violations	2	1.4
Weapon related violations	2	1.4
Total Technical Violations[c]	147	100.0%

a. Several parole revokees had more than one technical violation contributing to their revocation. Others had combinations of technical violations and new offenses. Thus, this table represents the incidence of technical violations and does not purport to show only violations which resulted in revocation.
b. This table was compiled from Revocation Orders.
c. This total number does not include certain miscellaneous violations—those with an incidence of less than two. There were 13 miscellaneous violations.

There are several other areas in Georgia's parole revocation process which could be improved. First, the voting procedures at final revocation hearings should be revised. Only three out of five Board members preside at most final revocation hearings. Because all final decisions must be reached by a majority of the *entire* Board,[247] not just those sitting, a vote can easily be deadlocked. If a majority of the entire Board do not vote one way,[248] the Board members not present at the final hearing are called in to cast their vote, even though they did not attend the hearing.[249] This report recommends revision of this procedure. The weakness in this voting procedure is

readily apparent: the vote usually becomes deadlocked either in difficult factual situations or when the parolee has been charged with a minor violation—yet in these situations, either one of three Board members will be persuaded to change his vote, or Board members who did not attend the hearing will cast the deciding ballots. Both of these alternatives are unacceptable and contrary to parole's purposes. The former, a Board member changing his vote *so that a final decision can be reached*, is ethically and legally questionable. The latter, allowing Board members who have not attended the hearing to vote, defeats the purpose of holding the final hearing. A vote to terminate or continue a parolee's liberty should be made only by those possessing full awareness of the facts and circumstances surrounding an alleged violation. Such an awareness is absent if the Board member did not attend the hearing.

There are two alternatives to the present voting system: either all five Board members should be required to sit at *all* hearings, or a majority vote of those *present* should be sufficient to reach the final decision. This report recommends the latter approach. To require the entire Board to preside at all hearings would curtail the availability of the Board members for other functions. In addition, although the revocation decision is important, the presence of five Board members instead of some smaller number does not necessarily improve the quality of the hearing or the decision. Thus, this report recommends that a panel of fewer than five Board members be allowed to reach final decisions. The most preferable number is three; this number precludes deadlocked votes while at the same time minimizes the arbitrariness and inconsistency which would result if fewer members were present.[250]

Another facet of parole revocation which needs improvement is the giving of reasons upon revocation of parole. Under the present system, when a parolee has his parole revoked, he is given only a copy of his revocation order. This report suggests that the revocation order is not alone adequate to inform the parolee of the reasons for the revocation—he should be given *specific* reasons for the revocation.[251]

The final recommendation of this report in regard to parole revocation relates to the issue of counsel at the final revocation hearing. The Supreme Court concluded that this question must be

determined on a case-by-case basis[252] and provided guidelines for deciding when a state should consider the question. This report recommends that the Georgia Board of Pardons and Paroles make a concerted effort to evaluate the necessity for counsel for each parolee and to provide attorneys where needed.[253]

II. Probation

A. *Introduction*

While originally considered a suspension of sentence, probation is now better viewed as a sentence in itself.[254] Probation has been defined as

> a treatment program in which final action in an adjudicated offender's case is suspended, so that he remains at liberty, subject to conditions imposed by or for a court, under the supervision and guidance of a probation worker.[255]

The American Bar Association Project on Standards for Criminal Justice defines probation as a "sentence not involving confinement . . ." with retained authority in the court to *re-sentence* upon violation of imposed conditions.[256] This view more clearly recognizes that probation is not leniency. It has been said that

> [t]he essence of the probation system lies in the fact that the offender is not merely given "another chance," but that society provides him with constructive assistance in his struggle for social rehabilitation.[257]

It is this extra element which places probation "beyond either leniency or punishment."[258]

Because probation is a part of the total criminal justice system, it shares the system's basic purpose of prevention of crime.[259] Like parole,[260] probation's more specific purpose is the prevention of recidivist crime; probation concerns itself solely with individuals who have already committed crimes and is designed to prevent them from committing further criminal acts. One justification for probation lies in the fact that incarceration is not always the solution to the problem of recidivism; unless society is willing to incarcerate all offenders for life without parole, incarceration provides only short-term protection. In addition, the rehabilitative justification for incarceration is losing general acceptance;[261] the realization that im-

prisonment alone cannot foster rehabilitation of criminals has prompted the criminal justice system to seek new avenues such as probation.

Because probation offers rehabilitative and protective benefits in addition to obvious financial benefits,[262] for some offenders it is preferred over incarceration. For less dangerous offenders, the degree of supervision provided by a probation officer is sufficient to protect society against recidivist crime; for certain offenders, the supervision offered by prison is a waste of resources. Likewise, the guidance and direction that probation provides the offender in establishing or re-establishing his connections with family, community, school, and employment, is clearly more conducive to the offender's reintegration into society than any preparation in the artificial atmosphere of prison.

While a judge considering probation in a particular case must weigh the risks to society against the possibilities of rehabilitation, he must also consider other factors. One of these is the enhancement of traditional concepts of fairness, considering both the offender's point of view and the public's perception of the system. A related consideration is maintenance of a system of appropriate sanctions—equalization of penalties for similar offenders committing similar crimes and assurances that offenders are dealt with severely enough to fulfill public expectations and to ensure the deterrent impact of the criminal justice system.

B. *History of Probation*

The modern concept of probation—a movement away from the traditional approach of confinement and towards ideas of humanitarianism, rehabilitation, and utilitarianism—found its roots in the progressive social and cultural atmosphere of the past one hundred and fifty years. While English common law provided some practices which influenced the development of probation,[263] probation basically originated in the United States.[264]

Massachusetts was the first state to use probation, principally due to the efforts of John Augustus, an unofficial volunteer probation "officer." Beginning in 1841 and until his death in 1859, he posted bail for various offenders, agreed to supervise their conduct, reported to the court as required, and saw to their schooling or

employment. Following the successes of Augustus and subsequent volunteers, Massachusetts enacted a law in 1878 authorizing the mayor of Boston to appoint a paid probation officer with jurisdiction in Boston's criminal courts. By 1890, this authority was statewide, and the courts, rather than municipalities, were authorized to appoint probation officers.

This legislation dealing with probation officers assumed that the courts had the inherent power to suspend sentences and place offenders on probation. In 1916, however, the Supreme Court disturbed that assumption, holding that judges, at least in federal courts, lacked inherent power to suspend sentences permanently or indefinitely.[265] The Court stated that the practice was

> inconsistent with the Constitution, since its exercise in the very nature of things amounts to . . . an interference with both the legislative and executive authority as fixed by the Constitution.[266]

While apparently hindering the progressive probation movement, this decision actually promoted it, as it was interpreted to permit the indefinite suspension of sentence when supported by statute. Several states had already enacted such supportive legislation,[267] and those who had not soon did. By 1925, juvenile probation was authorized in every state.[268] Adult probation spread more slowly; in 1925, twenty-nine of the forty-eight states had enabling legislation. By 1940, however, the total was 40 states, and now every state has such legislation.[269]

Until 1972, Georgia's statewide probation system was administered by the State Board of Probation, composed of members of the State Board of Pardons and Paroles acting in an *ex officio* capacity; the probation system was run as a separate entity.[270] The State Board of Probation was abolished by the Executive Reorganization Act of 1972;[271] the policy-making functions of the Board were transferred to the Board of Offender Rehabilitation, and the administrative functions to the Department of Offender Rehabilitation. The same act also created the Division of Community-Based Services, whose function is to administer the supervision of parolees, probationers, and other offenders treated outside the correctional institutions.[272] The actual power to grant and revoke probationary sentences, of course, is and has been a function of the judiciary, vested in the trial judges by statute.[273]

C. *The Need For Change in Georgia*

The problems of the probation system in Georgia are similar to those of the parole system:[274] reasonable assurance that decisions are based on complete and accurate data; assurance that decisions are made with emphasis on proper considerations; establishment and adherence to a procedural framework conducive to consistent and efficient decisions; and, achievement of the proper kinds, degree, and combination of supervision and services required to protect the community and, concurrently, rehabilitate the offender.

Peculiar to the probation system is the fact that it involves two branches of government—the judiciary is empowered to grant, set conditions of, and revoke probation; the executive branch, through the Department of Offender Rehabilitation, oversees the probationers between grant and termination. While this report makes some recommendations regarding the executive branch and its share of the system, the most significant and controversial recommendations regard the judiciary. This report ignores political considerations involved in any attempt to limit the degree of judicial discretion; our attempt is designed not to *reduce* the power of any court, but rather, to channel discretionary power so as to make probation decisions in Georgia more consistent and efficient.

This report presents an in-depth study of Georgia's probation system, focusing on the weak rather than the strong points, and suggests changes and improvements. The proposals are based upon surveys of other states' experiences, upon interviews and comments from judges, probation workers, and others in the system, upon opinions of commentators and writers, and upon our observations and studies of the system in actual operation. Because the probation system is founded on statutory provisions rather than administrative rules and regulations,[275] the implementation of many proposals would require new legislation.

D. *The Probation Grant*

The probation grant decision making process in Georgia usually begins with the conviction of or plea of guilty or nolo contendere by the potential probationer.[276] In cases in which probation is either a legal or a practical possibility,[277] the judge may request that a probation officer prepare a presentence investigative report, usually

covering such things as the circumstances of the crime, the defendant's previous criminal, social, familial, medical and educational history, his residence and employment situation, and the probation officer's recommendation as to appropriate sentence. In reality, the investigation may be begun prior to conviction or plea (after indictment, for example), depending on the circuit involved.[278] The degree to which the judge requests or uses the pre-sentence report also varies greatly from circuit to circuit;[279] some judges issue standing orders for reports in all felony cases, while others rarely request reports at all.[280]

Whether a presentence report by a probation officer has been ordered or not, the judge may still obtain information with which to form an opinion as to the appropriateness of probation. The Georgia Code provides for a mandatory presentence hearing in each felony case.[281] While this hearing is not aimed specifically at the question of probation, but rather at the question of the "determination of punishment to be imposed,"[282] nevertheless, the statute calls for the hearing of evidence in extenuation and mitigation of punishment, as well as evidence in aggravation. The only aggravation evidence admissible is that known to the defendant prior to trial. At the conclusion of the information gathering process, the judge must determine the sentence—probation, confinement, confinement followed by a period of probation (a split-sentence), or some other suitable sentence such as fine, restitution, or commitment to a halfway house.

If the defendant is a first offender, the judge may invoke a special probation statute.[283] If the defendant has never been convicted of a felony and pleads guilty or nolo contendere, the court may, without entering a judgment of guilt and with the consent of the defendant, postpone further proceedings and place the defendant on probation.[284] Under the terms of this statute, upon fulfillment of the terms of probation, or upon release by the court prior to termination of the probation period, the defendant is exonerated from any criminal purpose, his civil rights or liberties are not adversely affected, and he is not considered to have a criminal conviction.[285] If the defendant violates the terms or conditions of probation, the court can enter an adjudication of guilt and proceed as otherwise provided.

1. Probation Grant Criteria

Probation grant decisions in Georgia very greatly from courtroom to courtroom[286] because each decision is reached by a trial judge who determines his own criteria for granting probation. Few uniform guidelines have been established to aid or direct the judges in their probation decisions; the statutory guidelines are so broad that they are grants of unchecked discretion. Probation may be granted

> . . . where it appears to the satisfaction of the judge that the circumstances of the case and the public good do not demand or require the defendant's incarceration . . . .[287]

or, stated another way,

> [i]f it appears to court upon a hearing of the matter that the defendant is not likely to engage in a criminal course of conduct and that the ends of justice and the welfare of society do not require that the defendant shall presently suffer the penalty imposed by law . . . .[288]

While the nature of probation requires a great deal of discretionary power, the discretion should not be so broad as to permit either inconsistent treatment or inefficient use of such a powerful correctional tool. One solution to avoid or alleviate these problems is to develop more specific decision criteria. The purposes of delineating criteria are twofold: first, to establish a framework within which desirable probation decisions can be made, and second, to encourage uniformity in decisions regarding similar defendants in similar situations.

There is little doubt that every judge develops some set of unarticulated criteria;[289] thus, each judge becomes consistent in his treatment of similar defendants in similar situations. This consistency within a court, however, is undoubtedly predicated at least in part upon application of personal idiosyncracies and social, political, and moral beliefs not shared by other judges. The unfortunate situation of unequal sentencing between courtrooms and between circuits which results[290] is easily understandable.

This report recommends that standard statewide probation grant criteria be established, not in order to eliminate judicial discretion, but to aid it. The criteria should be broad enough so as not to restrict unduly the judgment and experience of the judges; a list of

factors to consider in determining whether probation might be appropriate.[291] A panel of Superior Court judges with representatives from across the state would perhaps be the best medium to draft such criteria.[292]

In addition, this report recommends that probation prediction tables be developed and utilized. Prediction tables are discussed earlier in this report in connection with their use in the parole grant decision;[293] the reasons advanced for their use in parole also apply to probation.[294] Prediction tables estimate the probability of an individual's success on probation by plotting each defendant against experience tables developed with regard to groups of offenders possessing similar characteristics. A comparison of the defendant with similar past defendants is an integral part of the present probation grant decision; prediction tables will add a measure of statistical accuracy to this comparison process without infringing upon the judge's discretion by providing a judge with one more informational input to help guide his decision.

As mentioned earlier, prediction tables are not a perfect solution, particularly because there are at least three considerations for which they cannot account: the moral aspects of the decision to probate, the fact that there is always unique information in each case to which statistics cannot be addressed, and the fact that the probation decision is not predicated solely on the possibility of violation.[295] Nevertheless, prediction tables should be developed as an *aid* in the probation grant process.

2. The Presentence Report

The vast majority of sentencing decisions follow guilty pleas—cases in which there has been little or no presentation of evidence or information upon which the judge can base his sentencing decision.[296] The principal function of the presentence report is to provide the background information for this decision, not only in a guilty plea situation wherein no evidence has been aired, but also following a guilty verdict situation wherein little or no evidence has been presented which would aid in choosing between alternative treatment plans.[297]

The presentence report also can serve as an informational aid either to the probation officer assigned to the case if the offender is

granted probation, or to the institution in which the offender is imprisoned. Also, if the offender is incarcerated, the report can become valuable to the paroling authority when the offender becomes eligible for parole. In Georgia, this latter use of the report is recognized and, if the report is available, required by the Code.[298]

An additional function of the presentence report is to encourage uniformity in probation decisions. In Georgia, the trial judges have broad discretion regarding the use of the presentence report. Unlike several other states,[299] the use of the presentence report does not determine or restrict the available sentence options. Thus, first offenders are often placed on probation and habitual offenders often incarcerated without presentence reports having been made. Also, some judges elect never to use a presentence report; others use the report in every case, felony or misdemeanor.[300] This variation from courtroom to courtroom contributes to variations in sentencing.[301]

In order to fulfill properly the various functions of the presentence report, several commentators and studies have urged its frequent use.[302] The National Advisory Commission on Criminal Justice Standards and Goals recommended that the presentence report be required for all felonies, all cases involving minors, and as a prerequisite to a sentence of confinement. This report adopts that recommendation. Frequent use of the presentence report will encourage statewide uniformity not only in probation decisions, but in sentencing decisions in general; the information in the reports can aid judges in determining lengths of incarceration and types of institutions. Moreover, it will provide the background information essential to a rational sentence decision in every case in which a severe sentence is a possibility.

The principal arguments against the recommendation are the increased workload and the waste of resources which might result. Because the presentence report is presently used in most felony cases,[303] however, the increase in workload would be relatively insignificant, and would be offset entirely if the recommendation that additional supervisors be employed were also adopted.[304] In addition, the feared overburden of the probation system has not occurred in those states which have adopted mandatory reports.[305] The concern over the waste of resources is founded on the idea that certain sentencing decisions can be made and justified solely on the circum-

stances of the crimes or previous criminal records; thus, other information normally included in presentence reports would not affect those sentence decisions and therefore would be useless. This idea ignores any rehabilitative considerations involved in sentencing in favor of punitive considerations; the sentence would be molded to fit the crime rather than the criminal. In addition, even in a case where a defendant should clearly be incarcerated, the preparation of a mandatory presentence report nevertheless fulfills the secondary objectives mentioned earlier—information for the institution as to appropriate rehabilitative plans, and information for the paroling authority for its parole decisions.[306]

A possible alleviant to the concern over wasted resources has been suggested by the National Advisory Commission on Criminal Justice Standards and Goals long-form and short-form reports.[307] In certain situations, the accumulation of certain data normally considered essential might be unnecessary. Presently, Georgia utilizes one standard report format.[308] If found to be necessary, shorter reports might be developed.

(a) *Disclosure of the Report to the Defendant*

Although some state statutes require that the contents of the presentence report be disclosed to the defendant,[309] Georgia statutes are silent on the subject. In practice, disclosure to the defendant is rare in Georgia, although as a practical matter, the defendant is made somewhat aware of the report's contents through judge's comments during the sentencing procedure.[310]

Opponents of disclosure usually rely on the argument that confidential sources of information would "dry up" if those sources knew that defendants were notified of their participation. Some commentators reject the drying-up argument as insignificant in comparison to the defendant's right to know.[311]

A compromise proposed by the drafters of the Model Penal Code requires disclosure of the factual contents and conclusions of the report, but protects the confidentiality of sources.[312] This report recommends that Georgia adopt this disclosure position. In order for the presentence report to serve its fundamental purposes—to provide the information basic to a rational sentence decision—the report must contain only accurate information. The importance of

disclosure was emphasized by the National Advisory Commission on Criminal Justice Standards and Goals:

> Unless [the defendant] is given the opportunity to contest information in the presentence report, the entire sentencing decision becomes suspect and indefensible.[313]

No probation supervisor is infallible, and under the present system, a defendant may receive an inappropriate sentence based on an undisclosed and undiscoverable error. Disclosure to the defendant helps insure that errors in information are detected or corrected.

3. The Length of the Probation Sentence

In Georgia, the length of probation is discretionary with the sentencing judge as long as it does not exceed the allowable period of incarceration for the offense.[314] Other states have set different maximums, usually less than that set by Georgia.[315] In South Carolina and New Jersey, for example, the period of probation cannot exceed five years.[316] New York allows no flexibility; for a felony, the period of probation is five years.[317] For misdemeanors, the period is either one year or three years, depending on the classification of offense.[318]

This report recommends that Georgia adopt a five year maximum probation sentence. This would lower the ratio of probationers to supervisors to a more manageable level by eliminating many cases no longer requiring supervision.[319] Many of Georgia's probation officers agree that a probation period in excess of five years is a waste of resources and does not significantly contribute to rehabilitation;[320] apparently if a probationer is successful for five years, he is unlikely later to become a recidivist . Thus, supervision past the initial five year period is unnecessary. Another argument for limiting the maximum time on probation is that resentment may be created by unnecessarily long probation periods.[321] This resentment, which may deleteriously affect the probationer's chances of rehabilitation, might be avoided by a limited probation period.

E. *Probation Revocation*

Admissions into Georgia prisons resulting from probation revocation constitute a substantial portion of total admissions.

TABLE XVIII: ADMISSIONS TO GEORGIA PRISONS RESULTING FROM PROBATION REVOCATIONS[a]

Fiscal Year	Total Felon Admissions	Total Probation Revocations	Probation Revocations as a Percentage of Total Admissions
1972	6604	772	10.2%
1973	6062	756	12.5
1974	6738	725	12.3

a. Source: Compiled from Computer CHRIS.

Although not all revocations are revocations of the entire remainder of the probated sentence,[322] the total man-years contributed to the prison is still significant. Because of the importance of this admissions factor, it is essential that the process of probation revocation be both efficient and effective. Efficiency involves the questions of who, when, and why to revoke, while effectiveness centers on the question of whether the purposes of probation are being adequately served. This section of the report will describe the revocation process and recommend improvements.

1. Probation Revocation in Georgia

The nature of probation revocation is similar to parole revocation, although perhaps more formalized; the due process requirements established in *Morrissey v. Brewer*[323] apply equally to both. Basically, these requirements are a preliminary hearing and a final revocation hearing.

The authority and procedure for probation revocation in Georgia is statutory:

> Whenever, within the period of probation, a probation officer believes that a probationer under his supervision has violated his probation in a material respect, he may arrest such probationer . . . and return him to the court granting such probation. . . . The court, upon the probationer being brought before it, may commit him or release him . . . or it may dismiss the charge . . . .[324]

The probation supervisor, upon learning of an alleged violation of probation, files a delinquency report[325] which usually results in a preliminary hearing before the court of original sentencing. The purpose of the hearing is to determine whether there is probable cause to hold a final revocation hearing. Because many probationers have been convicted of new offenses, the preliminary hearings are often little more than formalities, lasting only a few minutes. The proceeding itself is informal. The probationer, usually his supervisor,[326] and occasionally other relevant witnesses are present. The proceeding commences when a probation officer informs the court of the alleged violations; the officer then presents his witnesses, if any. The probationer then may present his side of the story, present witnesses,[327] and cross-examine witnesses. He may be represented by counsel.[328] Most probationers, however, do not avail themselves of these opportunities. At the conclusion of the hearing, the judge renders his decision. If the judge determines that there is probable cause to hold a final hearing,[329]

> . . . the court shall give the probationer an opportunity to be fully heard at the earliest date on his own behalf, in person or by counsel . . . .[330]

Many final revocation hearings are conducted in the judge's private chambers and are relatively informal. When held in a courtroom, the proceedings are more formalized. Usually two probation officers are present at the hearing—one to "prosecute" and the other to assist. The hearing may be held with only one probation officer and he need not be the officer who supervised the particular probationer.[331] The "prosecuting" probation officer has the responsibility to inform the judge of the alleged violations and other relevant information. The probationer is permitted to respond to these allegations and explain, mitigate, or defend against them. The probationer is usually represented by counsel,[332] often court-appointed, even though the Georgia courts have held that there is no right to counsel.[333] He may present witnesses in his behalf[334] and cross-examine adverse witnesses.[335]

At the conclusion of the presentation of evidence, the probation officer makes a recommendation to the judge. The probationer and his attorney may also recommend a disposition of the case. Most frequently, the judge finds that there is sufficient evidence to war-

rant revocation and revokes the probation at that time. The judge has other options, such as partial revocation, available to him.[336] If the judge is not satisfied that the requisite quantum of evidence exists, he can either continue the probation or, in certain cases, hold the probationer until a later hearing.

In order for probation to be revoked, the individual must have been notified of the terms and conditions of his probation. In *Hinton v. State*,[337] the court concluded that because the probationer had been informed that his sentence was "five years in the penitentiary, to be suspended," the defendant was not chargeable with later knowledge of probation conditions; therefore, because the effect of the pronounced sentence was an unconditional discharge, the actual probationary status of the individual could not be revoked without depriving him of due process.

A revocation of probation is appealable in Georgia.[338] On appeal, however, the decision will not be disturbed unless there has been "a manifest abuse of discretion."[339] All that is required to sustain a revocation is evidence which reasonably satisfies the judge that the conduct of the probationer was not equal to the standard of conduct required by the conditions of probation.[340] A showing that the defendant has been convicted of the act constituting a violation of the probation conditions is not required.[341]

2. Analysis and Recommendations

For a proper analysis of the probation revocation decision, it is essential to recognize the basic differences between it and the probation grant decision. Whereas the process of granting probation is designed to promote the individual's rehabilitation,[342] the process of revocation is designed to punish the probationer for violating the terms and conditions imposed upon him.[343] Revocation reflects a reversal of the court's earlier decision that the offender and the circumstances of the offense do not merit incarceration—subsequent conduct on the part of the offender indicates that the initial decision was erroneous and that the need for incarceration actually outweighs the benefits of community-oriented rehabilitation.[344] This essential difference in the nature of the two processes permits a different level of discretion to apply to the judge in his decision-making process. Whereas the initial determination involves

a multitude of informational inputs, the later determination is involved merely with the question of whether a violation occurred.[345] Thus, it appears that a more restricted level of discretion should apply at the revocation stage of probation. One writer concludes that the revocation stage actually *demands* a lower level of discretion.[346] The commentator reaches this conclusion for two reasons. First, improper denial of probation does not have as detrimental an effect as improper revocation. Although the former deprives the state of the beneficial effects of community-oriented rehabilitation, the latter precludes those beneficial effects while also adversely affecting the offender's perceptions of the system. Second, assuming that probation offers a positive rehabilitative function,[347] it is to a state's benefit to promote a satisfactory probation system. Consequently, a state should strive to treat probationers fairly, particularly those who have made genuine rehabilitative efforts.

One of the most effective ways to maintain proper use of discretion is to confine and structure it through procedural safeguards.[348] This report suggests that limiting the discretion of courts as regards probation revocation is consistent both with recent Supreme Court decisions establishing a procedural framework[349] and with the purposes and goals of probation. This report recommends that the Georgia Judiciary adopt procedural safeguards directed at avoiding arbitrary and unnecessary infringements into the conditional liberties granted probationers. This position is consistent with recent trends; although courts were formerly vested with almost unfettered discretion in the area of probation revocation,[350] in recent years their discretion has been limited.[351] This trend recognizes that while the nature of both probation and probation revocation demand some level of discretion on the part of the judges, this discretion should be structured and focused so as to maximize the potential of probation as a component of the criminal justice system.

There are several areas of probation revocation which need particular attention. First, there are few standards by which the decision to revoke or continue probation is governed. A paucity of criteria for judges to follow leads only to inconsistency among judges, negative perceptions on the part of offenders, and a failure to take maximum advantage of probation. In Georgia there are no statutory criteria for a judge to follow.[352] The Georgia decisions indicate only that probation may be revoked if "the defendant violated the terms of his

probated sentence."[353] As mentioned earlier in this report, an inmate's perceptions of the criminal justice system are vital factors in his rehabilitation—if an inmate feels that he has not been treated fairly,[354] the chances for successful rehabilitation are reduced. Formulation of guidelines for judges will help to alleviate these problems. The American Bar Association has promulgated what they consider to be adequate standards for judges to follow:

> (a) Violation of a condition is both a necessary and a sufficient ground for the revocation of probation. Revocation followed by imprisonment should not be the disposition, however, unless the court finds on the basis of the original offense and the intervening conduct of the offender that:
>
> (i) confinement is necessary to protect the public from further criminal activity by the offender; or (ii) the offender is in need of correctional treatment which can most effectively be provided if he is confined; or (iii) it would unduly depreciate the seriousness of the violation if probation were not revoked.[355]

While perhaps adoption of a standard such as this is not the ultimate solution, it is a starting point for increasing consistency and fairness throughout the system.

Another area requiring improvement is the choice of alternatives available to a judge upon his finding that violation of a term or condition has occurred. This involves the question of what to do in cases of minor violations of probation, violations of unnecessary or irrelevant conditions, or any violations which do not merit full revocation. Judges presently have several available alternatives, but lack guidelines to help them reach their decision as to which to choose. Because of differences in philosophies, experiences and perceptions of the judges, this leads to a disparate pattern of revocations and continuances. The American Bar Association reaches a similar conclusion and proposes guidelines for when full revocation, as opposed to some lesser sanction, should occur.[356] This report recommends that the Georgia judiciary formulate and adopt similar standards and that all alternatives to full revocation be explored and utilized. The proper use of alternatives to full revocation will help reduce prison admissions while concurrently contributing to the rehabilitative goal of probation.

A final recommendation is that the Georgia judiciary strive to achieve the highest level of integrity and professionalism possible. Probation is predicated largely upon the expertise and wisdom of the judiciary. Only through searching and intensive self-scrutiny can probation ever be maximally utilized—only when the judiciary takes it upon itself to structure and confine its own discretionary powers will probation in Georgia attain its ultimate usefulness as an integral component in the criminal justice system.

III. Parolees and Probationers in the Community

A crucial aspect of both parole and probation is what happens to the individual after he is granted conditional liberty and returned to the community. In order to maximize the possibility that an ex-offender will successfully return to society, it is essential to provide him with adequate controls, supervision and assistance to enable him to integrate socially into the community. Control over the ex offenders is guided predominantly by the terms and conditions imposed upon him. Compliance with these terms and conditions is monitored by probation-parole officers who act as conduits through which the power of either the parole board or the court is channeled. The supervisors are also the primary instruments of supervision, aided to some degree by volunteers from the community. Assistance for the ex-offenders is provided by supervisors and is institutionalized through various programs, most notably the Correctional Manpower Program.

A. *Terms and Conditions of Parole*

The Georgia Code specifies that the Board of Pardons and Paroles may impose terms and conditions on a parolee.[357] Because violation of these terms or conditions may result in revocation of parole, the Board is also required to adopt rules concerning terms and conditions and defining what constitutes violations.[358] Under present practices, the Parole Board automatically places fourteen standard conditions on each parolee,[359] and is permitted to impose optional conditions.[360] This report suggests that it is more advantageous to use a limited number of essential and enforceable standard conditions; where relevant to the particular parolee, these conditions should be supplemented by optional conditions.[361] In addition, this report recommends that these conditions be specific and that con-

duct constituting violations be adequately defined. These recommendations are made with respect to the two purposes served by parole conditions: "facilitation of the rehabilitation and reintegration into society of the parolee, and protection of society."[362] This report recommends that only those conditions which serve at least one of these purposes be utilized and that conditions irrelevant to or inharmonious with these purposes be avoided.

Certain conditions of parole that are presently used in Georgia are essential in every situation and should be retained. Requirements of regular reporting, obeying all laws, and obtaining permission before leaving the state are necessary in virtually every case because they enable the parole supervisor to maintain contact with the parolee's actions. Additional conditions should be imposed when relevant and necessary for a specific parolee. These additional conditions should be precise and prohibit only behavior a violation of which would be sufficient to justify revocation. An example of such a necessary additional condition could be a prohibition on the use or possession of a weapon for a parolee who has committed violent crimes or crimes involving weapons.

Many standard conditions presently used serve neither of the purposes of parole, or disserve one purpose to the extent that service to the other is negated. In addition, the list of standard conditions includes some which do not result in revocation if violated, some which do not adequately define the desired behavior, and some which are neither essential nor relevant in many situations.[363] These are the conditions which this report recommends eliminating.

A basic problem with a standard list of conditions is that many of the conditions included involve fundamentally harmless conduct; violations of these conditions alone usually will not result in revocation. Examples include Georgia's standard conditions prohibiting the ownership of a motor vehicle or the incurrence of debts above $300 without permission, and the condition establishing a curfew between midnight and 6:00 a.m. The parolee soon learns that he can stay out past curfew or borrow over the allowed amount, and absent other misbehavior, will not be sent back to prison. As noted by one writer:

> We should not enjoin unless we mean to enforce . . . . To establish a rule then allow it to be violated with impunity

> makes the regulation meaningless and invites contempt of all regulations.[364]

Prohibitions against behavior *harmless in itself* lead to resentment, evasion, and lying to the parole officer, which in turn disserve the purposes of the parole conditions.

Another problem with the lengthy list of conditions is that oftentimes one or more conditions are unnecessary for a particular parolee. For example, a parolee who has never had a drug problem or used drugs begins his parole knowing that at least one of the conditions was not meant for him when he reads Georgia's standard prohibition against drug use. The nationwide trend has been toward reducing the number of rules and making them more relevant to the facts in a particular parole case.[365] Because an individual is more likely to respect conditions which he realizes are directed at solving his problems and tailored to his needs, a list of unnecessary conditions fosters disrespect and disobedience.

In addition to limiting the conditions imposed on parolees, informing the parolee exactly what those conditions entail is imperative. Georgia's standard parole conditions include prohibitions against "injurious habits," prohibitions against associating with persons and places of "bad reputation,"[366] and the requirement of a promise by the parolee to conduct himself "honorably." A parolee must determine for himself what these terms mean, yet remains subject to sanctions if his parole officer defines the terms differently.[367] Even if these conditions are not unconstitutional[368] or otherwise unenforceable,[369] they should either be defined in unambiguous terms or omitted. A parolee is entitled to know what behavior is expected of him and what behavior will result in revocation of parole. Ambiguous and unnecessary conditions force the parole officer either to ignore certain violations or to report minor violations thus jeopardizing his relationship with the parolee.[370] Both of these alternatives are unacceptable and defeat the purposes of parole conditions.

B. *Terms and Conditions of Probation*

The Georgia Code also specifies that a court can impose terms and conditions on probationers.[371] When an individual is placed on probation, a standard list of conditions is imposed upon him.[372] For

basically the same reasons as with parole terms and conditions, this report recommends that only a limited number of essential, enforceable, and relevant conditions be imposed upon probationers; where necessary or helpful for the particular probationer, these conditions could be supplemented by optional conditions.[373]

This position has been supported by Georgia courts. In *Inman v. State*[374] a condition of probation requiring maintenance of a conventional haircut was deemed invalid;[375] the court held that because of the invalidity of the condition, probation could not be revoked. The decision emphasized that although probation is only conditional liberty, it cannot be made the subject of "whim or fancy." Other conditions imposed on Georgia Probationers have been invalidated for similar reasons. For example, a condition requiring the probationer to conduct a "correct life" was found too vague and indefinite.[376] There has been some reluctance to invalidate conditions; conditions against indulgence in unlawful, disrespectful, or disorderly conduct or habits have been upheld.[377] Nevertheless, there is a definite tendency to strike down unnecessary or irrelevant conditions which either defeat or fail to promote the purposes of probation.

The Model Penal Code recommends that a limited number of conditions be imposed;[378] however, the Code suggests a list more extensive than is presently used in Georgia. The authors emphasize the importance of conditions which are material to the rehabilitation of the probationer and recognize the problems that may be involved with broad conditions.[379] The American Bar Association, recognizing that the basic purpose of terms and conditions is to aid the probationer in his rehabilitative efforts, proposes that:

> Conditions imposed by the court should be designed to assist the probationer in leading a law-abiding life. They should be reasonably related to his rehabilitation and not unduly restrictive of his liberty or incompatible with his freedom of religion[380]. . . .

In this regard, the American Bar Association stresses that general and vague conditions not only are of no particular value to the probationer but actually are an abdication of the courts' sentencing responsibility to the probation supervisor.[381]

This report recommends that the conditions imposed on probationers be limited to those which are essential and relevant to his rehabilitation.[382] Probation conditions must be viewed as:

> a means to an end, not an end in themselves. We are on the path to greater success in our treatment of probationers when we are able to interpret to them the specific restrictions imposed on them, not as blueprints of the perfect man, but rather as guides to probationers' growth in their responsibility from day to day.[383]

The use of probation conditions as guides for probationers is most effective when they aid the individual probationer in becoming a law-abiding citizen without unnecessarily impairing the conditional liberty granted him.

C. *Supervision of Parolees and Probationers*

A probation-parole supervisor has two distinct functions: protecting the community and helping those under his supervision.[384] These two functions involve two broad tasks—control and assistance. To perform properly these dual tasks, the supervisor must strike a delicate balance between the conditional liberty of the individual and the safety of the community. The conditional liberty of the releasee must not be so restricted as to endanger the chances for his rehabilitation; neither can the liberty be so unchecked so as to endanger the community. The manner in which this balancing function is accomplished varies among different supervisors, reflecting differences in both training and philosophy on the part of supervision personnel.[385] Nevertheless, by attempting to effectuate the rehabilitation of the individual while concurrently gathering and analyzing information on the individual's performance and progress, a supervisor is instrumental in determining whether the releasee's conditional freedom should be continued or revoked.[386]

One task of the supervisor, control, centers on the bounds of power of the particular governing authority—either the parole board or the court. Once the authority has granted the conditional liberty and has imposed terms and conditions on it, it becomes the responsibility of the supervisor to insure that the conditions are complied with, and if they are not, to initiate revocation proceedings. This report maintains that in regard to the control function, the primary

concerns of the supervisor should be prevention of criminal activity and serious violations of the conditional liberty. Keeping the balancing function in mind, the supervisor must ascertain the needs of the releasee and the rights of the community. The other task of the supervisor is assistance. This task is concerned with the successful return of the individual to society and encompasses a myriad of functions ranging from aid in obtaining employment to providing friendship and understanding. Ideally, the assistance task is directed at helping the individual cope with the particular problems confronting him.

1. Present Practice in Georgia

The parole and probation officers in Georgia are officially entitled Probation-Parole Supervisors. Upon acceptance for employment, certain supervisors become investigators. An investigator conducts interviews with inmates being considered for parole and conducts background investigations of the inmates. Those chosen to be investigators are generally eased into a supervisory role after gaining familiarity with the system. If an individual is not selected to be an investigator, he will generally step right into a supervisor's position.

The first six months of a supervisor's employment are conditional—if job performance is satisfactory, the individual becomes a tenured supervisor; if the performance is unsatisfactory, the individual is terminated. Upon satisfactory completion of the six-month period, a supervisor can be removed only for substantial reasons.[387]

The first contact between a supervisor and a parolee occurs at one of two times. Either they meet during the pre-parole investigation in the prison, or they meet when the parolee first reports to the probation/parole field office. This report recommends that the initial contact between a parolee and his supervisor occur while the inmate is still incarcerated. An early meeting not only allows a greater time period for the parolee and the supervisor to get to know each other but also affords the supervisor a more adequate and suitable opportunity to explain to the parolee what is expected of him. Because of the nature of probation, a supervisor usually meets a probationer at the probationer's first visit to the probation/parole field office.

2. Analysis and Recommendations

Perhaps the most pressing problem in supervision of Georgia's parolees and probationers is the enormous caseload of the typical supervisor. Presently, the average caseload of each supervisor is approximately 90 parolees and probationers.[388] This number is exclusive of abandonment, bastardy, and uniform support cases; when these are included, the average is approximately 120.[389] The caseload problem is well recognized by the Unit Coordinators in Georgia; in response to the question, "Do you have any 'pet' recommendations for improvements in the probation and parole systems?" twenty-two out of thirty-two Unit Coordinators who made a recommendation indicated that the most significant improvement would be a major reduction in the caseloads. This report is in full agreement— in order for parole and probation to fulfill their goals, the caseloads of supervisors must be reduced to a manageable level.[390] Supervisors should be able to allocate a substantial amount of time to their assistance function and should not be so burdened that they can do little more than conduct cursory checks on the individuals.

Because of the enormous caseload of most supervisors, contacts between the supervisor and the individuals he is responsible for are minimal. Most of the contacts are by telephone or other office contacts. For example, during the month of July, 1974, one probation /parole field office listed 640 probationers and parolees.[391] During the same month there were only 135 visits with these individuals. There were 338 office contacts, and 47 attempted visits. Another probation/parole field office listed 519 probationers and parolees, but only 48 successful visits, 354 office contacts and 17 attempted visits.[392] These results clearly show that the primary task of a probation-parole supervisor in Georgia has devolved to one of merely maintaining minimal contact with the individual. Thus, the assistance aspect (if not the control aspect) of a supervisor's role is seriously minimized by the large caseload. A reduced caseload would allow each supervisor to pay more attention to the problems and needs of each parolee and probationer, as well as to the supervision-protection function. Programs in other states which have reduced supervisor's caseloads have been successful in reducing recidivism.[393] These programs are further evidence that if Georgia's probation-parole supervisors had smaller caseloads, the goals

of probation and parole would be better served, while, concurrently, the community would be better protected against criminal activity.

Another major problem in Georgia's present supervisory programs is inefficiency. Much time is currently wasted between paperwork, unnecessary visits, and other fruitless acts. Along with reducing the caseloads of the supervisors, the activities of the supervisory staff must be channeled so as to maximize their efforts. One alternative is to use the team assignment approach rather than the traditional individual caseload. The team approach involves a group of supervisors taking collective responsibility for a group of parolees or probationers.[394] This method efficiently utilizes the available resources of the group by selectively using the talents of each member in the group. Not only are the supervisors reinforced by each other, but the parolees and probationers are more amenable to rehabilitation because they realize that a *group* of individuals is attempting to help them. In addition, personality conflicts between the supervisor and the individual that may arise in a one-on-one situation are more easily avoided.

Another problem area is the need for extra supervision during the first few months of parole or probation. As Table XIX shows, in a sample of parole revocations during fiscal year 1974, almost one-third of the total revokees had an arrest warrant issued for them within three months of parole, and almost two-thirds had an arrest warrant issued within six months. The time for formal revocation is somewhat longer;[395] however, the issuance of the arrest warrant is the crucial time because it indicates when the parolee got into trouble. Although statistics for probationers are unavailable, this report feels that the critical time is also in the early stages of the probationary period. It is apparent that supervision is most acutely needed during these critical first few months. Presently in Georgia, several probation/parole field offices are attempting to establish closer supervisory programs during these critical months. For example, in one county, each supervisor meets with the individual at least once a month for the first six months, although that period can be lengthened depending on the problems of the individual.[396] After these first six months, the contacts become less and less frequent. This report recommends that all probationers and parolees be supervised more closely during their first six months of conditional liberty, as this period is crucial to the success or failure of the individual. Georgia

TABLE XIX: LENGTH OF TIME BETWEEN GRANT OF PAROLE AND ISSUANCE OF ARREST WARRANT[a] BY PAROLE BOARD, FY 1974[b]

Length of Time Between Grant of Parole and Issuance of Arrest Warrant (in months) [a]	Number of Revocations
0 to 1[c]	21
1+ to 2	26
2+ to 3	33
3+ to 4	21
4+ to 5	17
5+ to 6	16
6+ to 7	11
7+ to 8	11
8+ to 10	15
10+ to 12	5
12+ to 14	4
14+ to 16	5
16+ to 18	7
18+ to 20	4
20+ to 25	6
25+ to 30	8
30+ to 35	3
35+ to 40	0
40+ to 45	0
45+ to 50	2
50+ to 55	0
55+ to 60	0
60+ to X	0
Not Available	25
Total	240

a. On some revocation orders the date of issuance of the arrest warrant was not listed. In these cases the date used was the date until which good time was allowed.
b. This table was compiled from Revocation Orders.
c. Of this group, 8 revocations occurred within 15 days.

has made some attempt at closer supervision with implementation of the "intensive supervision" program.[397] Under this program, certain supervisors are assigned smaller, but more difficult, caseloads. Although empirical data is unavailable because of the newness of

the project,[398] the Unit Coordinators throughout Georgia were overwhelmingly in favor of it. Out of forty-one Unit Coordinators, twenty-five were in favor, eleven failed to respond to the question or were uncertain, and five were opposed. The five Unit Coordinators were opposed mainly because of administrative and bureaucratic difficulties, and were apparently not opposed to the concept. This report recommends full implementation of the intensive supervision program, and pending analysis of empirical results, expansion of the program.

In addition to his duties of supervision and assistance, the probation supervisor is required by statute to submit to the sentencing court an annual written progress report on each probationer serving more than two years, the first report commencing two years after the grant of probation.[399] The annual review is useful in reducing caseloads by releasing early rehabilitated probationers and in timely recognizing the cases requiring modifications of terms and conditions or court admonishments in order to better achieve rehabilitation. The court has the power to terminate early the original probation period, and the probation officer must include a recommendation either to terminate the probation period early or to continue the probation as originally imposed.[400] The recommendation is important in practice, for it is usually followed by the court.[401] Unfortunately, not all probation supervisors comply with the statutory requirement—the reports and recommendations are not always made.[402] This report recommends that all probation officers and courts be notified of the requirement and that compliance be made mandatory.

D. *Correctional Manpower*

Ex-offenders are faced with almost insurmountable obstacles upon their release from prison—the stigma of their criminal record coupled with limited employment opportunities is an overwhelming burden. Correctional manpower programs attempt to deal with this problem by placing ex-offenders in suitable jobs and by aiding them in achieving socially integrated life styles through employment opportunities. Recognizing the fact that "the failure to obtain and maintain suitable employment goes hand in hand with recidivism,"[403] correctional manpower programs are designed to help ex-

offenders with marketable skills utilize these skills and to find suitable employment for unskilled ex-offenders.

It is clear that much criminal activity is entered into for financial survival or gain.[404] Imprisonment as an end result of criminal activity does not cure these financial problems; nor upon release from prison is a person any more capable of coping with financial burdens. Only if an individual receives help while incarcerated[405] will he, upon his return to society, be able to handle the very problems which predicated his confinement.

To achieve their goals, correctional manpower programs must recognize that most offenders had unsuccessful life styles prior to incarceration. For example, the Georgia prison population consists mostly of uneducated and unskilled people.[406] The vast majority of Georgia prisoners need assistance in learning marketable skills and in finding jobs upon release if they are to have a reasonable chance of avoiding recidivism. Correctional manpower holds the key to minimizing if not obviating these problems—it is imperative that programs be formulated and revised to meet the needs of ex-offenders.[407]

1. Present Programs

Within the last decade the problem of unemployment has been recognized as a major impediment to the rehabilitation of ex-offenders.[408] This problem stems from many factors. The lack of skills and training on the part of inmates makes it difficult to place ex-offenders in good jobs; many ex-offenders are forced to settle for low-paying, low-prestige jobs.[409] Another obstacle is reluctance on the part of employers to hire offenders without first evaluating them—few employers hire anyone, much less ex-offenders, without first determining the capabilities of the individual. The problem of employer resistance is compounded if the job that the ex-offender is attempting to secure requires bonding —commercial bonding companies normally refuse to provide bonds for ex-offenders. Prisoners eligible for parole encounter even another problem—oftentimes, one of the requirements of parole[410] is that the individual have a job plan with an offer of employment.[411] In many situations, unless the potential parolee knows someone who is capable of offering or finding him a job, this condition of employment is

difficult to meet.[412] Finally, the present state of the economy, with its attendant rate of unemployment, accentuates the difficulties normally associated with employment of ex-offenders.

In the 1960's, in response to the problem of unemployment, offenders were made a "special target group" for employment programs.[413] Legislation was passed designed to increase ex-offenders' chances of becoming productive members of society[414] by placing them in positions wherein they would be able to lead normal lives and avoid further criminal activities.[415] The benefits of these programs accrued both to society by reducing recidivism and to the individuals by raising their self-esteem and independence. The current nationwide effort in the area of correctional manpower began with the Manpower Development and Training Acts;[416] these have now been superceded by the Comprehensive Employment and Training Act of 1973.[417] These acts were motivated by awareness of the difficulty of successfully rehabilitating offenders and of the correlation between unemployment and recidivism.[418] They provide funds for the United States Department of Labor to institute measures to combat unemployment among ex-offenders and other groups. The correctional manpower programs initiated by these acts, although not a panacea for all the problems of rehabilitation after release, have been effective in reducing recidivism.[419]

2. The Georgia Correctional Manpower Programs in Perspective

In 1967, Georgia began providing vocational training through the Georgia Department of Labor. This program was sponsored initially by the United States Department of Labor and later by both state and federal agencies. In 1970 additional grants from the United States Department of Labor were received for statewide pre- and post-release programs for parolees and probationers.

The correctional manpower programs in Georgia presently employ 62 persons in staff positions and are divided into five areas: (1) MDTA Prison Inmate Training Projects; (2) The Fidelity Bonding Program; (3) The Atlanta Pretrial Intervention Project; (4) The Model Ex-Offender Project; and (5) The Georgia Department of Labor's Diagnostic and Evaluation Units.[420] The underlying aim of these efforts is to train unskilled ex-offenders for skilled jobs, and to place ex-offenders in jobs commensurate with their abilities.

(a) *Inmate Training Programs*

Essential to a successful post-release correctional manpower program is training while an individual is still incarcerated. Correctional manpower is able to exert the most influence over the inmate while he is a captive audience; to begin the program only *after* release would be futile. Therefore, the United States Department of Labor sponsors training programs designed to provide manpower services to offenders in state institutions. These training[421] programs, originally on the national level, have now been decentralized to the state level.[422] Joint efforts by the United States Departments of Labor and Health, Education and Welfare and state correctional authorities make available basic and remedial education, vocational skills training, work experience, and other services available to inmates within the prison and in the surrounding areas.

In Georgia the MDTA Prison Inmate Training Project provides academic and vocational training for inmates. Special training programs at certain institutions[423] provide over 250 inmates with a weekly incentive stipend. The inmates attending the area vocational training schools are confined in correctional institutions overnight, but are allowed to attend training during the day. Additional funds have been allocated to expand the training in the area technical schools during 1973.[424] Other training programs are offered at eleven correctional institutions[425] within the Georgia correctional system.[426] The academic training programs in state institutions include remedial, intermediate, and high school equivalency programs.[427]

(b) Bonding For Ex-Offenders

Bonding for ex-offenders is an effective method of reducing unemployment among them because it opens up new employment fields. Bonding is required by many employers as a protection against loss from dishonesty or default;[428] yet individuals with prison records usually cannot satisfy the requirements for commercial bonding. The establishment of a Federal Bonding Program for ex-offenders overcame this problem by providing an alternative to commercial bonding. In situations where the ex-offender has a skill and employment experience and the only obstacle to employment is the bonding requirement, the Federal Bonding Program provides access to a

job and increases the possibilities of successful rehabilitation. Bonds are available to all ex-offenders, the only requirement being that the individual have a job. Upon receipt of a letter from the employer stating the employment position, the salary, and the amount of the bond required, the program will issue a bond of up to $10,000 per month.[429] While the number of ex-offenders presently involved in this program is small, the program is growing.[430] This program is available through each state's employment service. In Georgia the Fidelity Bonding Program is sponsored by the United States Department of Labor.

(c) *Pretrial Intervention*

Pretrial intervention is one of the most effective ways to combat recidivism.[431] The theory behind pretrial intervention is to divert an offender from the judicial and prison systems in the hope that the person will have an increased chance of rehabilitation and be less of a burden to society. Through these projects,[432] selected accused defendants are offered an opportunity to enter the program. With the consent of the prosecuting attorney, the project staff recommends a continuance of the case to permit the defendant to participate in the program. The defendant first undergoes vocational or educational training and counselling and is then placed in a job. The progress of the defendant is evaluated before and after job placement and a recommendation is made to the prosecutor either to dismiss the charge due to satisfactory participation in the program and demonstrated rehabilitation or to return the defendant to the judicial system due to unsatisfactory performance in the program.[433]

The experimental pretrial intervention program in Atlanta is one of the most successful court diversion projects in the nation.[434] The project offers an alternative to a courtroom trial by providing selected persons (primarily first offenders arrested on less serious charges) with a comprehensive program of manpower services, including job preparation and placement, guidance and counselling, assistance in obtaining supportive social services, remedial education, and vocational and motivational training.

Under the program, if a potential project participant cooperates and shows promise of positive attitudinal, behavioral, and perform-

ance changes, a recommendation will be made to dispose of his case through means other than trial and imprisonment. The alleged offender is removed from the court system before trial, given a job, and required to participate in counselling sessions, behavior modification programs, and educational programs; his chances of rehabilitation increased and crowded court dockets are eased. In addition, the absence of a conviction makes it less difficult for the alleged offender to return to and function in society.

(d) *Employment Services For Ex-Offenders*

Prisoners and ex-offenders are usually out of touch with the labor market and employment resources. To combat this lack of information about jobs, employment service models[435] have been created in several states[436] to gather employment resources, counsel offenders, develop employment for offenders, and work with employers to encourage the hiring of qualified ex-offenders.[437] These employment service models focus on providing services to offenders on a continuing basis, both before and after release, to help them obtain and maintain their jobs.[438] These programs, though initially federally sponsored, are now under the auspices of the states in which they operate.

In Georgia the program is entitled the Model Ex-Offender Project. This program provides pre- and post-release manpower services to prisoners and ex-offenders. During 1973, 3,911 offenders received services through correctional institutions, local employment service offices, and project staff.[439] Two hundred and eight ex-offenders were referred to training while 1,726 ex-offenders were placed in gainful employment.[440] There are four counselors at the pre-release centers[441] and six local counselors, each responsible for a particular geographical area.[442] Within these ten divisions of the State there are thirty-three local service offices, each with offender representatives to counsel ex-offenders with employment problems.[443] These representatives are available to *all* ex-offenders and assist ex-offenders in finding new employment throughout the State. The state-wide availability of the representatives also insures the mobility of the inmate.

The correctional manpower program also aids inmates eligible for parole, guaranteeing placement of the inmate in a suitable job if he

is paroled. This satisfies the parole requirement of having a job plan with an offer of employment.

(e) *Vocational and Academic Evaluations*

The Georgia Department of Labor's Diagnostic and Evaluation Unit conducts both vocational and academic evaluations of inmates.[444] The purpose of these evaluations is to develop a plan for each inmate through which he can develop his knowledge, aptitudes, present skills, and abilities. Each inmate is vocationally tested and evaluated before a plan of action is recommended.[445]

In addition to training for inmates, assistance is available in Georgia for ex-offenders outside of prison. Upon entering the correctional manpower program, an inmate is interviewed and tested to provide vocational and academic evaluations. The evaluations are supplemented with data collected at pre-release centers from correctional institutions in their areas. The evaluations are used to determine what type of training or other services are needed by the individual. To aid in this determination, a personal interview is arranged thirty days prior to the inmate's release. At the interview it is determined where the inmate intends to go upon release and whether he has a job awaiting him. After release, thirty-three local service offices throughout the state are available to the ex-offender for employment counselling and help. The local service offices work with employers in their areas to encourage the hiring of ex-offenders. Thus, the ex-offender is put in contact with resources and information about the labor market under the supervision of the local employment service offices in the area in which he intends to reside.

(f) *Programs in Other States*

The United States Department of Labor has awarded planning grants to several states[446] the purpose of which is to:

> [I]dentify the manpower and related services needed by all groups in the correctional population; determine the best methods of delivering these services; obtain commitments from all public and private agencies within the State to provide needed services; and work out the interagency agreements necessary to operate a comprehensive program.[447]

These studies will serve as guides for the implementation of correctional manpower programs in their respective states.

The Department of Labor also sponsors several different innovative programs for finding employment for ex-offenders. One program attempts to establish not only a job placement program but also businesses owned and run by ex-offenders.[448] Other projects involve volunteer programs to aid ex-offenders in becoming responsible citizens. The United States Departments of Labor, Justice, and Health, Education and Welfare have developed a cooperative approach to solving offenders' problems. Through this program, the Comprehensive Offender Program Effort, federal agencies are studying the states' problems with offenders to determine the extent to which the agencies can aid the state programs.[449]

3. Future Considerations and Recommendations

As mentioned earlier, the basic aim of correctional manpower programs is to obtain suitable employment for ex-offenders. Placing ex-offenders in jobs with suitable pay and prestige will produce feelings of pride and achievement and will help insure full rehabilitation. But even placement in marginal occupations—occupations that do not necessarily offer either good pay or prestige—will increase the chances of rehabilitation over the chances of those individuals not afforded any employment opportunity. The ideal is to obtain a "suitable" job, but the reality is to obtain a job.

Ex-offenders with neither employment experience nor skills are the group most desperately needing the services of correctional manpower programs in order to gain employment. Most inmates who are able to secure job offers while still in prison are those who have either employment experience or skills. These ex-offenders usually have a lower rate of recidivism than inmates who must turn to employment services or correctional manpower programs to secure employment.[450] Thus, correctional manpower programs should focus on the group of ex-offenders which most need their services.

The effectiveness of correctional manpower programs in Georgia is highlighted by the Atlanta Pretrial Intervention Project with its attendant low rate of recidivism. This report recommends that the scope of the project be enlarged to include more alleged offenders.

The program, currently a pilot program, should be expanded to other metropolitan areas throughout Georgia.[451]

Unfortunately, due to a lack of long-range follow-ups on ex-offenders, the effectiveness of the other programs in Georgia is difficult to evaluate. The Fidelity Bonding Program opens up new fields of employment for ex-offenders; because it creates new employment opportunities for ex-offenders it should be continued and expanded. Employers should be advised that ex-offenders can obtain bonding and thus be encouraged to hire ex-offenders for responsible jobs. This report recommends that there be long-range follow-ups for the Model Ex-Offender Project. Research indicates that ex-offenders require sustained support in order to effectuate successful rehabilitation. Recent statistics on the quarterly wages of ex-offenders indicate a pattern: for the first three quarters the ex-offender seems to be successful, at least in terms of wages; however, in the fourth quarter, little or nothing is earned.[452] Nine to twelve months out of prison something happens to the ex-offender—it is unknown whether the drop in wages is due to parole revocations, due to movements out of state by members of the statistical group, or due to job losses or lay-offs; however, this drop indicates a potential problem area which long-range follow-ups of the ex-offenders could help alleviate. Although it will be extremely difficult for local offices to maintain contact with all ex-offenders while at the same time attempting to secure employment for current releasees, ex-offenders should be encouraged to make use of the local employment service resources at *all* times after release, not just at release itself. At present, local employment service counselors depend on the ex-offender to come to them for help and cannot be expected to individually chase down ex-offenders. This report does not recommend that correctional manpower do this, but does suggest that *some* effort be directed towards a follow-up of the employment status of ex-offenders.

IV. Related Methods of Release from Prison in Georgia

A. *Miscellaneous Releases Effected by the Georgia State Board of Pardons and Paroles*

This section of the report describes various methods of release available to the Georgia Board of Pardons and Paroles. These in-

clude reprieves, remissions to probation, exceptions, commutations to lesser or present service and early releases under either the Governor's Early Release Program or the Parole-Reprieve Program.[453] Table XX indicates the frequency of use of each of these programs over the past six years.

A reprieve is a short-term, temporary release, usually granted for compassionate reasons such as death or sickness in the inmate's family.[454] Although time on reprieve is credited toward service of sentence if the conditions of the reprieve are complied with,[455] these releases have little effect on prison population levels because they are usually for only a limited number of days. Reprieves must be applied for in writing and supported by written evidence, except that in emergency situations, the Board may use its discretion in receiving information by telephone or in person.[456] Since March 28, 1972, the Department of Offender Rehabilitation, through the prison wardens has been authorized to grant emergency special leaves within the state;[457] this change accounts for the recent decrease in reprieves granted by the Board.[458]

Remission to probation is a change in sentence from prison service to probated service. It differs from parole in three important aspects: (1) it is usually instigated at the request of the sentencing judge,[459] who cannot himself modify the original sentence after the term of court has ended;[460] (2) the inmate can be released through remission without regard to parole eligibility requirements;[461] and, (3) the releasee is subject to revocation by the Parole Board rather than the courts.[462]

TABLE XX

SELECTED MISCELLANEOUS RELEASES
FROM GEORGIA PRISONS

Type of Release:	Fiscal Year					
	1969	1970	1971	1972	1973	1974
Reprieves	147	132	127	332	95	91
Remissions to Probation	175	160	30	5	59	20
Exceptions	n/a	n/a	n/a	46	6	0
Commutations to Lesser Service	535	764	1038	460	177	n/a
Commutations to Present Service	144	150	127	187	95	n/a
Early Releases	—	—	—	1746	775	1011

Sources: ANNUAL REPORT and statistics provided by the Department of Offender Rehabilitation.

The Parole Board is also permitted to parole inmates who do not meet the minimum parole eligibility requirements for length of time served.[463] Technically, the grant of an exception to the parole eligibility requirements is only a Board decision to *consider* for parole an individual who has not served the requisite portion of his sentence. In practice, an exception is actually the decision to *parole* an inmate not eligible under the regular rules. An exception may be granted where necessary "[t]o equate justice or in the best interests of society;"[464] because the Board operates under the presumption that all sentences imposed by a court are fair and just,[465] the grant of an exception requires:

> (1) A substantial showing that the sentence was excessively harsh and failure to grant an exception would be a miscarriage of justice, *or*
> (2) A substantial showing that the rehabilitation of the inmate necessitates early consideration.[466]

Exceptions cannot be predicated upon family circumstances, business affairs, sickness, hardship, or other similar reasons because these are common to many inmates. Furthermore, although general statements and letters from officials and private individuals are helpful in the determination, they alone are not sufficient grounds for the grant of an exception.[467] Applications for exceptions must be made in writing,[468] and, when an exception is considered by the Board, the sentencing judge and the district attorney of the sentencing county must be notified in writing so they may appear at the hearing.[469]

A commutation to *lesser* service is a Parole Board action to reduce an inmate's sentence. The action is begun by inmate application; as in most of these other miscellaneous releases, there is no application form—a request in writing by the inmate will suffice if there is enough basis in the writing to warrant Board investigation.[470] The Board will consider a commutation only when there is substantial evidence that the sentence is:

excessive, illegal, unconstitutional or void; that the ends of justice would be best served thereby, and that such action would be in the best interests of society and the inmate.[471]

Commutation to *present* service is the reduction in sentence to that served to date, thus effecting immediate release.[472]

The most widely used miscellaneous methods of release are the early release programs—the Governor's Early Release Program and the Parole-Reprieve Program. The Governor's Early Release Program is initiated when the Parole Support Section of the Department of Offender Rehabilitation receives a computer printout listing those prisoners eligible for the program. The date when the prisoner is eligible for early release is six months from normal discharge date, provided at least two months remain to be served. In addition to these time requirements, the prisoner must:

(1) not have been considered for the Parole-Reprieve Program;
(2) have served at least four months in confinement by the date of release on all sentences listed;
(3) not have been serving for murder, kidnapping, armed robbery, rape, treason, aircraft hijacking, aggravated assault with intent to rape, sodomy, public indecency, incest, peeping tom, child molesting, enticing a child for indecent purposes, or bestiality;
(4) not have had more than one disciplinary report within six months prior to the release date;
(5) not have been committed to prison on two or more occasions prior to the sentence being served, due to felony convictions; and
(6) not have participated in previous early release programs which resulted in revocation.

The Parole Support Section deletes from the list those ineligible due to the above criteria, as well as those ineligible for reasons such as the prisoner is already on parole, is in federal custody, or is in jail awaiting further trial.

The list of eligibles is forwarded to a hearing examiner. If the inmate had been convicted of a misdemeanor, he is released unless the examiner has reason to recommend otherwise; if so recommended, the Parole Board decides the question. If the inmate had been convicted of a felony, the hearing examiner presents the case

to the Parole Board along with the examiner's recommendation as to release.

When a prisoner is granted early release, he is placed under the supervision of a parole officer if he had a probationary sentence to follow his incarceration, or if the Parole Board determines that supervision is appropriate. The period of supervision is normally two to six months. If the releasee is revoked, he is returned to prison to serve the remainder of his sentence undiminished by time spent on the early release program.

The Parole-Reprieve Program, or 90-day Early Release, was begun in October, 1973.[473] A prisoner is considered for the program when and if he is denied parole on his last parole eligibility date. If parole-reprieve is granted, the prisoner is released three months before his sentence would expire. He is placed under parole supervision and is subject to revocation. As under the Governor's Early Release Program, credit for time spent outside the prison is not given if the releasee is revoked.[474]

B. *Shock Probation*

Under shock probation, a convicted individual who has been given a sentence of confinement is released on probation after serving only a short incarceration period—the "shock" period. Having had "first-hand" knowledge of prison, the individual might be more susceptible and amenable to rehabilitation outside of prison.

Shock probation differs from parole in that the judge, rather than the parole board, effects it; the judge will often have shock probation in mind from the time the individual is sentenced. Shock probation also differs from split-sentencing[475] in that under the former, the defendant believes he is going to prison for his full sentence; under split-sentencing, the defendant knows exactly when he will be released and knows at the time of sentencing that a portion of his sentence will be served on probation.

Shock probation requires *retention* by the sentencing court of jurisdiction over the prisoner after sentencing. The judge in a particular case may feel that probation should be denied initially but *might be* appropriate after the prisoner has been briefly exposed to

prison. If jurisdiction can be retained, the judge does not have to rely on a parole board to discover the specific and possibly subtle improvement which he had hoped might occur, nor does he have to contend with parole eligibility dates.[476]

Ohio was the first state to enact a shock probation statute.[477] The statute provides:

> . . . the trial court may, upon motion of the defendant made not earlier than 30 days nor later than 60 days after the defendant, having been sentenced, is delivered into the custody of the keeper of the institution in which he is to begin serving his sentence, or upon the court's own motion during the same thirty-day period, suspend the further execution of the sentence and place the defendant on probation upon such terms as the court determines, notwithstanding the expiration of the term of court during which such defendant was sentenced.[478]

Shock probation has proved successful in Ohio; a seven year study showed that those individuals given shock parole had a success rate of 90.6%.[479] The success of the program seems to be attributable to the initial shock period because the criteria used for selecting candidates is comparable to the selection criteria used for traditional probation.[480]

The major opposition to shock probation is fear that it will result in overcrowded court dockets. This problem has to some degree been recognized and avoided in the states which have enacted shock probation statutes. The Ohio Court of Appeals, at least partially in response to the problem, held that a formal hearing was not necessary in determining whether to grant shock probation.[481] The court noted that:

> the legislature did not intend that the section be mandatory and left it within the discretion of the trial court whether to hear testimony in mitigation of sentence.[482]

In addition, the same court held that the order of the trial court denying shock probation is not appealable.[483] Indiana avoids the possibility of a flood of inmate applications by providing that a shock probation proceeding can be held only on the court's own motion.[484]

In Georgia, the trial judge has no authority, after the expiration

of the term at which a sentence is imposed, to modify or change the sentence,[485] and thus has no authority to use shock probation. This report recommends that the judges be given that authority, with a maximum time limit similar to that set in Ohio,[486] and that shock probation become an available sentencing alternative. In order to lessen the possibility of overcrowded court dockets, the proceedings to release should be initiated only on the court's motion, as in Indiana,[487] rather than on the motion of the prisoner.

SENTENCE OF PROBATION

(FELONY OR STATE MISDEMEANOR AND FIRST-OFFENDER)
DEPARTMENT OF OFFENDER REHABILITATION
COMMUNITY-BASED SERVICES

IN THE _____ COURT

_____ COUNTY, GEORGIA

THE STATE OF GEORGIA

VS

_____

_____

CASE NO. _____

OFFENSE _____

_____ TERM, 19____

PLEA (VERDICT) OF GUILTY

WHEREUPON, it is ordered and adjudged by the Court that the said defendant is hereby sentenced to confinement for a period of _____

_____

(years, months) in the State Penal System or such other institution as the Commissioner of the State Department of Offender Rehabilitation may direct, to be computed as provided by law. However, it is further ordered by the Court that the above sentence may be served on probation, provided that said defendant complies with the following general and special condition herein imposed by the Court as a part of this sentence:

WHEREUPON, it is ordered and adjudged by the Court that the defendant serve _____ (years-months) upon probation. This sentence is imposed with defendant's consent under the provisions of the Act for Probation of First-Offenders, approved March 18, 1968 (Ga. Laws 1968, p. 324) and further proceedings are deferred in accordance with said Act, provided, that said defendant complies with the following general and special conditions herein imposed by the Court as a part of this sentence:

---

(1) Do not violate the criminal laws of any governmental unit.
(2) Avoid injurious and vicious habits - especially alcoholic intoxication and narcotics and other dangerous drugs unless prescribed lawfully.
(3) Avoid persons or places of disreputable or harmful character.
(4) Report to the Probation-Parole Supervisor as directed and permit such Supervisor to visit him (her) at home or elsewhere.
(5) Work faithfully at suitable employment insofar as may be possible.
(6) Do not change his (her) present place of abode, move outside the jurisdiction of the Court, or leave the State for any period of time without prior permission of the Probation Supervisor.
(7) Support his (her) legal dependants to the best of his (her) ability.

Other special conditions ordered by the Court are as follows: _____

_____

It is further ordered by the Court that the defendant pay as specified: _____

_____

IT IS the further order of the Court, and the defendant is hereby advised, that the Court may at any time revoke or modify any conditions of this probation or change the period of probation and may discharge the defendant from probation. The probationer shall be subject to arrest for violation of any condition of probation herein granted. If such probation is revoked, the Court may order the execution of the sentence which was originally imposed or any portion thereof in the manner provided by law after deduction therefrom the amount of time the defendant has served on probation.

This _____ day of _____, 19____ _____
Judge Presiding

Certificate of Service — This is to certify that a true and correct copy of this Sentence of Probation has been delivered in person to the defendant and he has been duly instructed regarding the conditions as set forth above.

This _____ day of _____, 19____ _____
Probation/Parole Supervisor

Copy received and instructions regarding conditions acknowledged.

This _____ day of _____, 19____ _____ _____
Probationer

CBS-2

STATEMENT OF THE CONDITIONS UNDER WHICH THIS PAROLE IS GRANTED

This Certificate of Parole will not become operative until the following conditions are agreed to by the prisoner. Violation of any of these conditions may result in immediate revocation of parole:

1. I will report immediately upon arrival at my destination to my Parole Supervisor, either by mail, telephone or personal visit, furnishing to him the Notice of Arrival form

   Your Parole Supervisor's name and address:

2. I will, between the first and fifth days of each month, until my final release, make a full and truthful written report to my Parole Supervisor on the form provided for that purpose.

3. I will not change my residence or employment or leave the state without first getting permission from my Parole Supervisor. I also understand that should I fail to keep my Parole Supervisor informed as to my residence and employment my parole may be revoked and a warrant issued for my arrest.

4. I hereby waive all extradition rights and process and agree to return to Georgia from any State in the United States, its territories or the District of Columbia.

5. I will not use narcotic drugs in any form unless prescribed by a physician and I will not use intoxicating beverages to excess. I will not visit places of bad reputation where disorderly conduct may occur or which are frequented by persons of ill-repute.

6. I will avoid injurious habits and I will not associate with persons of bad reputation or character.

7. I will not own, use, possess, sell or have under my control any type of deadly weapon or firearm.

8. I will not purchase or have interest in any type motor vehicle without first getting permission from my Parole Supervisor and I will not operate a motor vehicle without having a valid operator's permit.

9. I will not let my debts exceed $300.00 at any time, except where necessary for food and shelter, without first getting permission from my Parole Supervisor.

10. I will not be away from my residence of record between the hours of 12:00 midnight and 6:00 A. M. unless required to do so in connection with my employment.

11. I will conduct myself honorably in all respects, work diligently at a lawful occupation and support my dependents, if any, to the best of my ability.

12. I will not violate any law.

13. I will promptly and truthfully answer all inquiries of the State Board of Pardons and Paroles and its duly authorized representatives and carry out all instructions from them.

14. If it becomes necessary to communicate with my Parole Supervisor and he is not available, I will direct my communication to the Boards's headquarters office at 270 Washington Street, S. W., Atlanta, Georgia; Telephone 656-2967.

Parole Plan: Residence:

Employment:

SPECIAL CONDITIONS: (PLEASE NOTE)

THE BOARD REALIZES THE FACT THAT THE USE OF ALCOHOL HAS BEEN THE MAIN CAUSE FOR MUCH OF YOUR DIFFICULTY IN THE PAST. IN VIEW OF THIS, THE BOARD STRONGLY URGES YOU TO MAKE EVERY EFFORT TO ABSTAIN COMPLETELY FROM THE USE OF ALCOHOL. THE BOARD ALSO ENCOURAGES YOU TO SEEK ASSISTANCE FROM YOUR PAROLE SUPERVISOR TO OBTAIN HELP IN SOLVING YOUR ALCOHOL PROBLEM. THIS WILL GREATLY INCREASE YOUR CHANCES OF SUCCESS ON PAROLE. YOU SHOULD BE AWARE THAT THE EXCESSIVE USE OF ALCOHOL CAN BE GROUNDS FOR REVOCATION OF YOUR PAROLE.

I hereby certify that this Statement of Conditions has been read and explained to the Parolee and he has agreed to them.

This _____ day of _____, 19_____.

_____
Parolee's Signature

_____
Warden's Signature

_____
(Give Full address where you can be reached)

DEPT. of OFFENDER REHABILITATION

Community-Based Services

OFFER OF EMPLOYMENT

Georgia Law provides, "No person shall be released on pardon or released on parole unless and until the Board is satisfied that he will be suitably employed in self-sustaining employment, or that he will not become a public charge." (Georgia Laws; 1943, pp. 185, 189)

Arrangement of an acceptable job plan is necessary prior to the release of an inmate on parole. This form should be executed by a competent person and the employment should be of such nature as to prevent the parolee from becoming a public charge.

Persons offering employment through this form should be aware that, while they are not held legally responsible for the acts of the parolee, it is the hope of this Board that employers will work closely with its parole supervisors in guiding, directing, and counseling the parolee so that both he and society may benefit. The parole supervisor will supervise and assist the parolee to the end that the conditions of parole will be observed.

Both State and Federal Laws against peonage apply in the case of parolees. Therefore, a parolee will not be forced to continue the employment described below if by leaving he can better his own conditions. Before making such a change, however the parolee must receive the prior approval of his parole supervisor. Employers should be aware that the Board discourages monetary advances to parolees and further, that the Board cannot, under law, force payment of a parolee's indebtedness.

. . . . . .

I hereby offer employment to_____,
Serial No._____to work as_____
(Title or description of work)
in_____County.
It is anticipated that such employment will be: ( ) Full time
( ) Part time
and that the compensation will be $____per_____ ( ) with, or
( ) without board.

Has this inmate ever been employed by you prior to this time? ( ) Yes ( ) No

This offer of employment will remain in effect until_____, unless I notify the Board of Pardons and Paroles to the contrary.

NAME OF FIRM OR INDIVIDUAL_____

STREET OR R.F.D._____

CITY AND STATE_____PHONE_____

Signature_____
Title or Position_____
Date signed_____

DO NOT WRITE BELOW THIS LINE - FOR BOARD USE ONLY

The above described employment was investigated and found to be:
( ) Valid ( ) Invalid
Checked by: ( ) Personal Contact ( ) Telephone
( ) Other:_____
Date_____Signed_____
(Parole Supervisor)

PI-912 CBS-19

COURT & PERSONAL CASE HISTORY

DEPARTMENT OF OFFENDER REHABILITATION
COMMUNITY-BASED SERVICES

Institution Number

Court Number

A. IDENTIFICATION AND COURT DATA

Name-First	Middle	Last	Alias (nickname)	Telephone

Address	How long?	How long lived in county?	SS Number

Sex	Race	DOB	Place of birth	Single	Mar.	Wid.	Div.	Sep.	Dependents Part	Dependents Whole

Ht.	Wt.	Eyes	Hair	Other identification data (scars, etc.)

Religious preference	Attendance Reg.	Attendance Irreg.	Education	Occupation	Name & Address of Employer	Date Began

Present Offense	Date convicted	Verdict	Plea	Nolo

Court	County

Judge	Offender's Attorney	Hired	Appt.

District Attorney

Sentence	First Offender	Susp.	Recipient of Money & Address

Date Probated	Costs	Fines	Restitution	Support	(per week/month/beginning) Pay at Rate $

Give full descriptions for reaching offender's home if other than street & number. (Last 2 home addresses)	DOB of children for support only

B. PREVIOUS COURT–INSTITUTIONAL RECORD (detainers)

Date	Place	Court	Offense	Disposition

C. OFFENSE DATA

Date of Offense	Arresting Officer	Complainant and Address

Co-Defendants and Dispositions

CBS-1

CASE STUDY

DEPARTMENT OF OFFENDER REHABILITATION
COMMUNITY-BASED SERVICES

Institution Number _____ Court Number _____

Name				Alias		
Address				County	State	
Race	Sex	Age	Ht.	Wt.	Birthdate	
Offense						
Date Arrested			Time in jail		District Attorney	Bond
Arresting officer				Defense Attorney		
Judge			Court		Report date	

PRESENT OFFENSE:

CASE STUDY GUIDE

DEPARTMENT OF OFFENDER REHABILITATION
COMMUNITY-BASED SERVICES

This form is designed as a guide only—omit all numbers I and II if Court and Social Case History, CBS-1, has been completed. When preparing narrative on CBS-1A, use outline and captions as presented in this guide.
EXAMPLE: Present Offense then narrative of Present Offense. (Verify all information)

I. PRESENT OFFENSE
- A. Official version
  1. Nature and date of plea or verdict.
  2. Nature of act or acts charged, including time, place, arrest and period of confinement.
  3. Arresting officers' statements, degree of cooperation, attitude of offender toward police.
  4. Extent to which offense follows pattern of previous offenses, alcohol and/or drug factor.
  5. Victims' statements, assessment of property damage or bodily injury.
- B. Statement of offender, attitude and any mitigating circumstances (impulsive or premeditated).
- C. Co-defendants
  1. Extent of their participation in crime.
  2. Present status of their case.

II. RECORD OF PREVIOUS OFFENSES
- A. Juvenile record.
- B. Adult record (date, place, court, offense, disposition).
- C. Circumstances of prior offenses, institutional records, and parole adjustment.

III. PERSONAL AND FAMILY HISTORY
- A. Date, place of birth, race:
- B. Parents—father or guardian—birthplace, address, occupation, number of marriages, reputation, attitude toward crime, arrest history, financial ability and comments.
  Mother—birthplace, address, occupation, number of marriages, reputation, attitude toward crime, arrest history, financial ability and comments.
- C. Siblings (brother, sisters), relation to offender, attitude, willingness to help, reputation and comments. History of emotional disorders and criminal behavior.
- D. Personal history of offender—age left home, reason for leaving, relationship of offender with parents, siblings and general family solidarity. Relatives with whom offender is especially close.

IV. MARITAL STATUS AND HOME CONDITIONS
- A. Name (maiden), age, address, employment, education.
- B. Offender's comments on marriage and children, how he perceives home conditions.
- C. Spouse's attitude toward crime, problems in marriage, courtship.
- D. Home
  1. Location—How long at present address, previous addresses (at least two), and possible influences on offender's behavior.
  2. Describe neighborhood and neighbors (environment).

V. EDUCATION
- A. Highest grade achieved and last date attended, age left school, reason for leaving.
- B. Interest in school, grades failed, best subjects, poorest subjects, extra curricular activities.

VI. RELIGION
- A. Faith, church and attendance.
- B. To what extent does religious beliefs influence life style.

VII. OCCUPATIONAL INTEREST AND HISTORY
- A. Employer, earnings, and job description.
- B. Employer's evaluation of defendant, attitude toward work, and relationship with co-workers.
- C. Occupational aptitudes, skills, interests, and ambitions.
- D. If unemployed, explain subsistence and why unemployed.
- E. Previous employers; started, ended, reason for leaving (verify). (Include and answer item B from at least two previous employers)

VIII. MILITARY SERVICE (branch, enlisted or inducted, time, highest rank, local selective service board or reserve unit, rank at discharge, type of discharge, VA number, classification.)

IX. RECREATION—ASSOCIATES
- A. Spare time activities and interests (hobbies)
- B. Associates (two best friends and descriptions of them).

X. ECONOMIC STATUS
- A. Assests
- B. Liabilities
- C. General standard of living (describe).

XI. HEALTH
- A. Physical description, eyes, hair, complexion, scars, deformities, etc.
- B. Serious illnesses or accident (state times), present general condition.
- C. Mental and emotional, psychiatric history.
- D. Offender's attitude about himself, and how he feels others feel about him (family, friends, co-workers).
- E. Offender's awareness of any apparent emotional problems (fears, hostility, obsessions, dislikes, peculiar ideas, etc.).

XII. EVALUATION AND SUMMARY
Evaluation of the Offender's personality, problems, needs and potential for growth and change.

CHAPTER THREE
NOTES

[1] Korematsu v. United States, 319 U.S. 432 (1943).

[2] U.S. Att'y Gen., 4 *Survey of Release Procedures* 4 (1939).

[3] *See, e.g.*, Escoe v. Zerbst, 295 U.S. 490, 492 (1935); Brown v. Kearney, 355 F.2d 199, 200 (5th Cir. 1966); People *ex rel.* Richardson v. Ragen, 400 Ill. 191, 79 N.E.2d 479, 484 (1948); Zink v. Lear, 101 N.J. Super. 515, 101 A.2d 72, 75 (1953); Commonwealth *ex rel.* Carmelo v. Burke, 168 Pa. Super. 109, 78 A.2d 20, 24 (1951).

[4] *See* Morrissey v. Brewer, 408 U.S. 471, 480 (1972); Berrigan v. Sigler, 358 F.Supp. 130, 135 (D.D.C. 1973).

[5] *See* Alvarado v. McLaughlin, 486 F.2d 541, 544 (4th Cir. 1973); United States v. Nicholson, 78 F.2d 468, 469-70 (4th Cir.), *cert. denied*, 296 U.S. 573 (1935).

[6] The natural corollary of this goal is rehabilitation of the individual. If an individual is not adequately rehabilitated, the possibility of further criminal activity on his part is increased.

[7] Seveal components of the criminal justice system are fashioned to deter not only the *perpetrator* of a crime, but also *potential perpetrators* of crimes. Parole, however, is involved only with those who have already perpetrated a crime.

[8] If they are not released by parole, then they are released by the full service of sentence. Obviously, the only inmates who are not eventually released into the community are those who die in prison. Death in prison does little to reduce the number of timing decisions facing the parole authority—there were only 29 such deaths in Georgia during fiscal year 1973, compared with other "departures" during the year of 5,824, and an offender population of 8,621 and 9,153 at the beginning and end of the year, respectively. GEORGIA DEPARTMENT OF OFFENDER REHABILITATION REPORT 1972-73, OFFENDER STATISTICS (1973).

[9] One key to successful parole practices lies in determining the ideal time to release an inmate, the time which will maximize the possibilities of rehabilitation while minimizing the risks to the community.

[10] *See* note 18 *supra* and accompanying text.

[11] NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, CORRECTIONS 395 (1973)[hereinafter cited as CORRECTIONS].

[12] For instance, some writers suggest that one purpose of parole is to maintain administratively efficient prison population levels and to ease fiscal burdens on the taxpayers. See note 65 *infra*. Indeed, parole was originally instituted as a solution to economic problems. *See* note 14 *infra* and accompanying text. And it is true today that parole is less expensive than imprisonment. *See* note 66 *infra* and accompanying text. However, this report suggests parole as a solution to population and financial problems will give only illusory results. To use parole to solve such problems ignores any rehabilitative, deterrent, or punitive concepts of criminal justice.

[13] At least one article has questioned the validity of these functions. *See* Kastenmeier and Eglit, *Parole Release Decision-Making: Rehabilitation, Expertise, and the Demise of Mythology*, 22 AM. U. L. REV. 477 (1973).

[14] D. DRESSLER, PRACTICE AND THEORY OF PROBATION AND PAROLE 57 (1969)[hereinafter cited as DRESSLER].

[15] In 1670, the General Court of Jamestown proclaimed:

> [B]ecause of the great number of felons and other desperate villains being sent over from the prisons of England, the horror yet remaining of the barbarious designs of those villains . . . we do now prohibit the landing of any more jailbirds . . . .

Quoted in M. WILSON, THE CRIME OF PUNISHMENT 94 (1931).

[16] It should be noted, however, that the indenture system was not used solely for prison-

ers. In fact, the system was originally intended as training for dependent persons. DRESSLER, *supra* note 14, at 72-73.

[17] Quoted in C. VAN DOREN, BENJAMIN FRANKLIN 13 (1938). These conditions were imposed on Benjamin Franklin when he was indentured, at the age of 12, to his brother. See DRESSLER, *supra* note 14, at 73.

[18] DRESSLER, *supra* note 14, at 72.

[19] In 1824, the indeterminate sentence was only applied to juveniles. It was not until 1876, at New York's Elmira Reformatory, that the indeterminate sentence was extended to adults. *See* THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: CORRECTIONS 60 (1967)[hereinafter cited as TASK FORCE]. The Elmira reformatory's interesting and enlightened view of corrections was: (a) offenders are reformable; (b) reformation is a right of every convict and the duty of the state; (c) every prisoner is an individual; (d) the rehabilitative process involves time; (e) rehabilitation is facilitated through the cooperation of the prisoner; (f) the most important source of coercive power that prison officials can have is the power to lengthen or shorten a prisoner's sentence; (g) the most effective rewards and punishments in prison are different levels of custodial classes, with attendant privileges in each; and (h) the rehabilitative process involves a re-education of attitudes, motivation and behavior. *See* DRESSLER, *supra* note 14, at 74-5.

[20] DRESSLER, *supra* note 14, at 76.

[21] The indeterminate sentence has waned in importance. For instance, in 1964, GA. CODE ANN. § 27-2502 (1972) repealed the indeterminate sentence in Georgia.

[22] DRESSLER, *supra* note 14, at 73.

[23] *See* GA. CONST. art. V, § 1, para. XII (1877).

[24] 1897 Ga. Laws 71-78.

[25] 1937-38 Ga. Laws 276-79.

[26] *See* GA. CONST. art. V, § 1, para. XI.

[27] *Id.*; GA. CODE ANN. §§ 77-501 *et seq.* (1973).

[28] The only exceptions are cases of treason and impeachment, and situations when the death sentence has been imposed and the Governor refuses to suspend the execution of the sentence. GA. CODE ANN. § 77-511 (Spec. Supp. 1974).

[29] *Id.* The power to grant parole impliedly carries with it the power to terminate parole. Thus, the Board presides over parole revocation hearings and bears final responsibility for determining whether to continue or revoke parole.

[30] *Id.*

[31] One pamphlet referred to parole as "one of the last bastions of unchecked and arbitrary power in America." CALIFORNIA ASSEMBLY'S SELECT COMMITTEE ON ADMINISTRATION OF JUSTICE, PAROLE BOARD REFORM IN CALIFORNIA—ORDER OUT OF CHAOS 15 (1970). Another article referred to the parole decision making process as carrying on the "motif of Kafka's nightmares." Frankel, *Lawlessness in Sentencing*, 41 U. CIN. L. REV. 1, 15 (1972). *See also* Kastenmeier and Eglit, *Parole Release Decision-Making: Rehabilitation, Expertise, and the Demise of Mythology*, 22 AM. U. L. REV. 477 (1973).

[32] For further evidence of this phenomenon *see* IV ATTORNEY GENERAL'S SURVEY OF RELEASE PROCEDURES 4 (1939); Federal Bureau of Prisons, *National Prisoner Statistics, State Prisoners: Admission and Releases*, 1964 (1967).

[33] GA. CODE ANN. § 3A-102(a)(Supp. 1974) specifically excludes the Georgia Board of Pardons and Paroles from the definition of the word "agency." Thus, the Georgia Administrative Procedure Act does not apply to the Parole Board.

[34] The only statutory qualifications for Board members are requirements that (1) they are not holding public office; (2) they are not representatives of a political party; and (3) they are not candidates for public office. *See* GA. CODE ANN. § 77-510 (1973).

[35] Parole Board members in Georgia are appointed by the Governor to seven year terms.

CONTINUED

4 OF 6

GA. CODE ANN. § 77-502 (1973). Board members may be removed only by the concurrent action of the Governor, Lieutenant Governor, and the Attorney General. Rules of the State Board of Pardons and Paroles ch. 475-1-.01 (1974)[hereinafter cited as Administrative Rules].

[36] *See, e.g.*, Kastenmeier and Eglit, *Parole Release Decision-Making: Rehabilitation, Expertise, and the Demise of Mythology*, 22 AM. U. L. REV. 477 (1973); Comment, *Curbing Abuse in the Decision to Grant or Deny Parole*, 8 HARV. CIV. RTS—CIV. LIBS. L. REV. 419 (1973); Dawson, *The Decision to Grant or Deny Parole: A Study of Parole Criteria in Law and Practice*, 1966 WASH. U. L. Q. 243 (1966); Parsons-Lewis, *Due Process in Parole-Release Decisions*, 60 CALIF. L. REV. 1518 (1972).

[37] K. C. DAVIS, DISCRETIONARY JUSTICE—A PRELIMINARY INQUIRY 218 (1969).

[38] *Id.* at 52-96.

[39] *Id.* at 216 (" . . . discretionary power that is . . . necessary should be properly confined, structured, and checked.").

[40] *See, e.g.*, Address by George J. Reed before the Congress of Correction, American Correctional Association, Dept. of Justice Press Release, Oct. 3, 1970:

> . . . discretion should be left entirely within the Board of Parole which can make informed judgements on individual cases as there will emerge over the years the changing profile of the criminal, the changing society in which he will exist, and the development of new means to deal with his problems.

[41] L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 586 (1965).

[42] *See* note 9 *supra*.

[43] *See* note 66 *infra*.

[44] The computation of the parole eligibility date is explained and recommendations regarding eligibility are discussed at text accompanying notes 98-139 *infra*.

[45] GA. CODE ANN. § 77-516 (1973) imposes a duty on the Board to collect "all pertinent" data on individuals who are reviewed for parole. *See also* GA. CODE ANN. § 77-512 (1973).

[46] Interview with Silas Moore, Parole Review Officer, Georgia State Board of Pardons and Paroles in Atlanta, Georgia, July 26, 1974.

[47] When these reports indicate prior incarceration in the Georgia corrections system, the inmate's prior records are retrieved and combined with the active record.

[48] *See* GA. CODE ANN. § 77-542 (1973). Most of these contacts result from Tuesday visiting days with Board members or parole review officers. *See* Administrative Rules, *supra* note 35, ch. 475-3-.02(1),(6).

[49] This program is more fully described at text accompanying notes 142-144 *infra*.

[50] Some cases are not considered for parole until after the scheduled month of consideration. Delays are usually due to late receipt of a required report. If there is to be a delay in the consideration process, the inmate is notified in writing. Interview with Silas Moore, Parole Review Officer, Georgia State Board of Pardons and Paroles, in Atlanta, Georgia, July 26, 1974.

[51] A Board members can request additional information on the inmate after the voting process begins, although it is unusual to do so. An example of such a request would be for a psychiatric examination of the inmate.

[52] *See* text accompanying note 360 *infra*.

[53] *See, e.g.*, ALA. CODE tit. 42, § 7 (1959); ARIZ. REV. STAT. ANN. § 31-414 (Supp. 1973); FLA. STAT. § 947.18 (1974); MICH. STAT. ANN. § 28.2303 (1972).

[54] *See, e.g.*, UNITED STATES BOARD OF PAROLE, DEPARTMENT OF JUSTICE, RULES OF THE UNITED STATES BOARD OF PAROLE 14-16 (1971).

[55] *See, e.g.*, ALA. CODE tit. 42, § 7 (1959); N. Y. CORREC. LAW § 213 (McKinney Supp. 1973); PENN. STAT. ANN. 61 § 331.21 (Purdin 1964).

[56] GA. CODE ANN. § 77-514 (Spec. Supp. 1974). The statute also mentions "good conduct

and efficient performance of duties" by the inmate, and dictates that parole be denied unless the Board is satisfied that the prisoner will have suitable employment upon release and will not "become a public charge." However, the statute permits the Board to grant parole to aged or disabled persons, notwithstanding other provisions. *Id.*

[57] GEORGIA STATE BOARD OF PARDONS AND PAROLES, ANNUAL REPORT FISCAL YEAR 1973 (1973) [hereinafter cited as ANNUAL REPORT].

[58] One article referred to the different parole board considerations as "articulated" and "unarticulated." *See* Kastenmeier and Eglit, *Parole Release Decision-Making: Rehabilitation, Expertise, and the Demise of Mythology*, 22 AM. U.L. REV. 477, 510-21 (1973).

[59] For a complete list of factors used by the Georgia Board of Pardons and Paroles *see* note 80, *infra*.

[60] Two of these "unenumerated" concerns will be discussed later in the paper. They are (1) the seriousness of the anticipated violation if released, and (2) the adverse effects of imprisonment. *See* text accompanying notes 118-120 *infra*.

[61] *See* GA. CODE ANN. § 77-514 (Spec. Supp. 1974):

> Good conduct and efficient performance of duties by a prisoner shall be considered by the board in [the parolee's] favor and shall merit consideration of an application for . . . parole.

Compare 18 U. S. C. § 4202 (1969); N. Y. CORREC. LAW § 213 (Supp. 1972-73); ALA. CODE tit. 42, § 7 (1959).

[62] *Hearings on Corrections—Federal and State Parole Systems—Before Subcomm. No. 3 of the House Committee on the Judiciary*, 92d Cong., 2d Sess., ser. 15, pt. 7, at 650 (1972)(testimony of Robert Brooks). *See also* Morrissey v. Brewer, 408 U.S. 471, 478 (1973)(parole referred to as an "enforcement lever").

[63] At least one article has suggested that the lure of parole leads to role-playing by inmates which stifles the purposes of rehabilitation. *See* Kastenmeier and Eglit, *Parole Release Decision-Making: Rehabilitation, Expertise, and the Demise of Mythology*, 22 AM. U.L. REV. 477, 518-19 (1973).

[64] Foote, *The Sentencing Function*, in Annual Chief Justice Earl Warren Conference on Advocacy, *Final Report—A Program for Prison Reform*, Recommendation XV (1972).

[65] *See generally* Kastenmeier and Eglit, *Parole Release Decision-Making: Rehabilitation, Expertise, and the Demise of Mythology*, 22 AM. U.L. REV. 477, 516 (1973); Note, *Parole: A Critique of Its Legal Foundations and Conditions*, 38 N.Y.U.L. REV. 702, 705-07 (1963); Warren, *Probation in the Federal System of Criminal Justice*, 19 FED. PROB. 3 (Sept. 1955).

[66] Richard J. Hughes, the former governor of New Jersey, once estimated that the cost of imprisonment is about $5000 per inmate per year, while an excellent parole system could be operated at a cost of $100 per inmate per year. *See* THE COUNCIL OF STATE GOVERNMENTS, SUMMARY—TWENTY-FOURTH ANNUAL MEETING OF THE CONFERENCE OF CHIEF JUSTICES 24 (1972). For some other revealing statistics *see* TASK FORCE, *supra* note 19, at 194. *See also* Richmond, *Measuring the Cost of Correctional Services*, 18 CR. & DEL. 243 (1972).

[67] Some commentators have even suggested that economics is the primary determinant in the parole grant decision. *See* Note, *Parole Revocation in the Federal System*, 56 GEO. L. J. 705 n.4 (1968); *Comment, Due Process and Revocation of Conditional Liberty*, 12 WAYNE L. REV. 638, 640 (1966).

[68] This pressure has resulted in a higher parole grant frequency in some states. In Georgia, however, although the prison population has been increasing, the percentage of paroles granted has been declining. *See* Tables II, V, *infra*.

[69] *See*, FOX, *Why Prisoners Riot*, 35 FED. PROB. 9 (March 1971); DONNELLY, GOLDSTEIN, & SCHWARTZ, CRIMINAL LAW (1962).

[70] *See* G. GIARDINI, THE PAROLE PROCESS 155 (1959); *Hearings on H. R. 13118 Before Subcomm. No. 3 of the House Comm. on the Judiciary*, 92d Cong., 2d Sess., Ser. 15, pt. VII-

A, at 499-513 (1972). *But see* IV U.S. ATTORNEY GEN. SURVEY ON RELEASE PROCEDURES—PAROLE 132-34.

[71] UNITED STATES BOARD OF PAROLE, BIENNIAL REPORT, July 1, 1968-June 30, 1970, at 13.

[72] *See* GIARDINI, THE PAROLE PROCESS 148 (1959).

[73] MODEL PENAL CODE § 305.13(1)(Tent. Draft No. 5, 1956). *See* MODEL PENAL CODE § 305.14, Comment (Tent. Draft No. 5, 1956). This presumption has since been endorsed in NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, FINAL REPORT 300 (1971). The National Commission added to the presumption a provision which states that once an inmate has served the longer of five years or two-thirds of his sentence he should be paroled unless the board is "of the opinion that his release should be deferred because there is a high likelihood that he would engage in further criminal conduct." *See* ILL. REV. STAT. 38-1003-3-5(c) (1973). *See also* F. Bixby, *A New Role for Parole Boards*, 34 FED. PROB. 24, 27 (June 1970)("The evidence that prolonged incarceration works against successful re-entry places the burden on showing why an eligible should not be paroled rather than why he should."); The presumption has also been recommended in CORRECTIONS, *supra* note 11, at 400-01.

[74] The authors of the Code suggest that continued correctional treatment, medical care, or vocational and other training in prison might be factors to consider in determining whether continued incarceration would contribute to successful rehabilitation.

[75] The presumption proposed lacks vitality, however, because judicial review to enforce compliance with statutory criteria is precluded. *See* MODEL PENAL CODE § 305.19 (Proposed Official Draft 1962).

[76] The reality of the situation may be, however, that parole board members often decide according to personal idiosyncracies or leanings. *See* text accompanying note 82 *infra*.

[77] These two reasons are the "traditional" reasons for granting parole. *See* text accompanying notes 6-10 *supra*.

[78] *See* text accompanying note 59 *supra*.

[79] This is not meant to suggest the authors feel that reasons upon denial of parole are unnecessary, but only that inconsistency and arbitrariness cannot be reduced solely because of specified reasons. *See* text accompanying notes 36-39 *infra*.

[80] Following is a list of the considerations used by the Georgia Board of Pardons and Paroles:

1. The inmate's ability and readiness to assume obligations and undertake responsibilities.
2. The inmate's family status, including whether his relatives display an interest in him or whether he has other close and constructive associations in the community.
3. The type of residence, neighborhood, or community in which the inmate plans to live.
4. The inmate's employment history and his occupational skills and training (including military training).
5. The inmate's vocational, educational, and other training (including that attained since incarceration).
6. The adequacy of the inmate's plans or prospects upon release.
7. The inmate's past use of narcotics or past habitual and excessive use of alcohol.
8. Any recommendations made by the sentencing court.
9. The inmate's conduct during his term of imprisonment.
10. The inmate's behavior and attitude during any previous experience of probation or parole, and the recency of such experience.
11. The availability of community resources to assist the inmate.
12. Circumstances of the offense for which the inmate is then serving a sentence.

13. Any protests or recommendations filed with the Board regarding the inmate's suitability for parole.
14. Any record which the inmate may have of past offenses.
15. Any noticeable attitudinal change since the offense for which inmate was incarcerated.
16. The physical and emotional status of the inmate.
17. The inmate's reputation in the community.
18. The inmate's positive efforts on behalf of others.
19. Any other relevant factor.

See ANNUAL REPORT *supra* note 57, at 3. These considerations are similar to the considerations proposed in MODEL PENAL CODE § 305.13(2) (Tent. Draft No. 5, 1956).

[81] *See, e.g.*, Glaser, *The Efficiacy of Alternative Approaches to Parole Prediction*, 20 AM. SOC. REV. 283-87 (1955); Gottfredson, *Comparing and Combining Subjective and Objective Parole Predictions*, CAL. DEPT. OF CORRECTIONS RESEARCH NEWSLETTER, 11-17 (1961). *See also* P. B. Hoffman and H. M. Goldstein, *Do Experience Tables Matter?* 64 CRIM. L. C. 339 (1973) (". . . there is substantial range and variation in. . . estimates of parole outcome, even with representative cases.").

[82] Platt, *The Judge and the Probation Officer—A Team for Justice*, 16 FED. PROB. 3. 4-5 (Dec. 1952).

[83] The authors of the Model Penal Code observed that "parole decisions rest on the intuition of the paroling authority." MODEL PENAL CODE § 305.14 at 98, Comment (Tent. Draft No. 5, 1956).

[84] One commentator describes the parole grant decision as follows:

> . . . parole board members review a file on an inmate, interview him, and then apply some theory of human behavior or perhaps merely intuitive judgments in evaluating the information which they have gathered.

O'Leary, *Issues and Trends in Parole Administration in the United States*, 11 AM. CRIM. L. REV. 97, 108 (1972). *See also* Thomas, *An Analysis of Parole Selection*, 9 CR. & DEL. 173, 175-177 (1963).

[85] D. GLASER, THE EFFECTIVENESS OF A PRISON AND PAROLE SYSTEM 291 (1964) [hereinafter cited as GLASER].

[86] For studies on the relative success of parole prediction tables *see* Gottfredson, *Comparing and Combining Subjective and Objective Parole Predictions*, CAL. DEPT. OF CORRECTIONS RESEARCH NEWSLETTER, 11-17 (1961); Savides, *A Parole Success Prediction Study*, CAL. DEPT. OF CORRECTIONS RESEARCH NEWSLETTER, 4-10 (1961); Hoffman and Goldstein, *Do Experience Tables Matter?* 64 J. CRIM. L.C. & P.S. 339 (1973). *See generally* L. J. POSTMAN, ed., PSYCHOLOGY IN THE MAKING (1962); P. E. MEEHL, CLINICAL VERSUS STATISTICAL PREDICTION (1954). *But see* Von Hirsch, *Prediction of Criminal Conduct and Preventive Confinement of Convicted Persons*, 21 BUFF. L. REV. 717 (1972); Wenk, Robison, and Smith, *Can Violence Be Predicted?*, 18 CR. & DEL. 393 (1972). *See generally*, Kozol, Boucher, and Garofalo, *The Diagnosis and Treatment of Dangerousness*, 18 CR. & DEL. 371 (1972).

[87] *See* DRESSLER *supra* note 14, at 149. Parole prediction was first used in Illinois in 1933. *Id.* at 148.

[88] *See* GLASER *supra* note 85, at 291.

[89] *See* Sklar, *Law and Practice in Probation and Parole Revocation Hearings*, 55 J. CRIM. L.C. & P.S. 175, 196 (1964).

[90] *See, e.g.*, Hayner, *Why do Parole Board Members Lag in the Use of Prediction Scores*, 1 PACIFIC SOCIO. REV. 73 (1958). *cited in* R. CARTER & L. WILKINS, eds., PROBATION AND PAROLE: SELECTED READINGS (1970).

[91] *See* GLASER *supra* note 85, at 291.

[92] *See* note 87 *supra* and accompanying text.

[93] *See generally* O'Leary, *Issues and Trends in Parole Administration in the United States*, 11 AM. CRIM. L. REV. 97, 109 (1972).

[94] Other uses have been made of parole prediction. *See* O'Leary, *Issues and Trends in Parole Administration in the United States*, 11 AM. CRIM. L. REV. 97, 110 n. 51 (1972). One particularly beneficial use is that parole prediction may be used to determine the efficacy of a particular rehabilitation program. *See* H. MANNHEIM & L. WILKINS, PREDICTION METHODS IN RELATION TO BORSTAL TRAINING (1955).

[95] *See generally* NATIONAL COUNCIL ON CRIME AND DELINQUENCY, GUIDES FOR PAROLE SELECTION, 35-37 (1963).

[96] GLASER, *supra* note 85, at 304.

[97] Prediction devices and scores should never be used alone. Prediction instruments are an aid to judgment, not a substitute for judgement.
T. C. Esselstyn, quoted in Evjen, *Current Thinking on Parole Prediction Tables*, 8 CR. & DEL. 215, 227 (1962).

[98] *See, e.g.*, GA. CODE ANN. § 77-525 (1973); ALA. CODE tit. 42, § 10 (1959); S. C. CODE ANN. § 55-611 (1973 Supp.).

[99] *See generally* Moreland, *Model Penal Code: Sentencing, Probation and Parole*, 57 KY. L.J. 51, 80 (1968).

[100] GA. CODE ANN. § 77-525 (1973). These requirements have been affirmed in regulations by the Board of Pardons and Paroles. *See* Administrative Rules, *supra* note 35, ch. 475-3-.06. There are special procedures for inmates who are eligible for parole and who have committed sex offenses.*See* GA. CODE ANN. § 77-539 (1973).

[101] Because inmates are given good time in Georgia, misdemeanants, if they keep all their good time, are not considered for parole. Only those misdemeanants serving consecutive misdemeanant sentences and those misdemeanants who have forfeited some of their good time will be considered.

[102] *See* Compagna v. Hiatt, 100 F. Supp. 74, 80 (N.D. Ga. 1951); Mathews v. Everett, 201 Ga. 730, 41 S.E.2d 148, 149 (1947). *Cf.* Brown v. Kearney, 355 F.2d 199 (5th Cir. 1966) (federal prisoner); Randall v. State, 73 Ga. App. 354, 36 S.E.2d 450, *cert. denied*, 329 U.S. 749 (1946) (pardon); Muckle v. Clarke, 191 Ga. 202, 12 S.E.2d 339 (1941) (pardon).

The question of the nature of parole might have been mooted by *Morrissey v. Brewer*, 408 U.S. 471, 484 (1972), when the Supreme Court rejected the concept that "constitutional rights turn upon whether a governmental benefit is characterized as a 'right' or as a 'privilege.'" The Court instead chose to consider parole in terms of whether an individual has suffered any "grievous loss."

[103] GA. CODE ANN. § 77-525 (1973). *See also* Administrative Rules, *supra* note 35, ch. 475-3-.05(1). Thus, inmates who have escaped from prison are not considered for parole until their return to custody. *See* Administrative Rules, *supra* note 35, ch. 475-3-.05(3).

[104] Administrative Rules, *supra* note 35, ch. 475-3-.05(1).

[105] There is one group of inmates not afforded automatic parole consideration. The exception results from GA. CODE ANN. § 77-309(1)(1973) which provides that the Department of Offender Rehabilitation does not have authority, jurisdiction, or responsibility over a certain class of misdemeanants—those misdemeanants sentenced under GA. CODE ANN. § 27-2506(1). They fall under the sole authority and jurisdiction of the county correctional institution or other place of incarceration. *See* GA. CODE ANN. § 27-2506(1)(1972).

According to GA. CODE ANN. § 77-511 (Spec. Supp. 1974), the Board of Pardons and Paroles has the power to grant paroles to any inmates convicted of offenses against the state and the duty to determine which prisoners may be released on parole. Misdemeanants sentenced under § 27-2506(a), however, are not treated on an equal basis with all inmates. Whereas most inmates receive automatic parole consideration, § 27-2506(a) inmates must request parole consideration. *See* Administrative Rules, *supra* note 35, ch. 475-3-.05(1). The

apparent reason for the different treatment accorded those misdemeanants is that because they are not under the control of the Department of Offender Rehabilitation, the Parole Board does not receive their names and therefore cannot consider them for parole until a request is submitted.

[106] GA. CODE ANN. § 77-525 (1973). *See also* Administrative Rules, *supra* note 35, ch. 475-3-.05(2).

[107] GA. CODE ANN. § 77-525 (1973).

[108] Administrative Rules, *supra* note 35, ch. 475-3-.05(3). Although this regulation actually says "to the jurisdiction of this Board," meaning the Board of Pardons and Paroles, the jurisdiction of the Board of Pardons and Paroles is not delineated in either the Georgia Constitution or by statute. Apparently the authors of the Rules and Regulations meant that an inmate will not be reconsidered for parole until one year after the date of his return to the custody of the Department of Corrections.

[109] Administrative Rules, *supra* note 35, ch. 475-3-.05(4),(5). These two provisions are almost identical, apparently a drafting oversight. The only differences are that one provision is in the singular and the other is in the plural, and that in one the Board must vote unanimously to consider a case for early re-parole consideration while the other provision does not specify that the vote must be unanimous.

[110] TASK FORCE, *supra* note 19, at 62. Although in Georgia exceptions to parole eligibility requirements may be granted in proper cases, exceptions are rarely granted.

[111] TASK FORCE, *supra* note 19, at 62.

[112] NATIONAL COUNCIL ON CRIME AND DELINQUENCY, GUIDES FOR PAROLE SELECTION 32 (1969).

[113] This of course assumes that all good time allowances have been retained by the inmate. If good time allowances have been forfeited, the inmate would become eligible for parole; however, such forfeiture of good time would most likely hinder the inmate's chances of being granted parole.

[114] For another problem with parole of misdemeanants see note 105, *supra*.

[115] However, these plans would not make all misdemeanants eligible for parole. The minimum eligibility date of three months would still act as a bar to those inmates with very short sentence lengths. This report does not suggest that the administrative burdens which would be imposed on the system by opening parole up to *all* misdemeanants would be worth the benefits that would result. For instance, an inmate with a two-month sentence would be eligible for parole well before the time that his file could be processed, *even if* the file was begun at the inmate's reception date in prison.

[116] Although parole can be granted before the minimum parole eligibility date through the use of an "exception," these are rarely granted.

[117] *See, e.g.* Eichman, *The Impact of the Gideon Decision Upon Crime and Sentencing in Florida: A Study of Recidivism and Socio-Cultural Change,* RESEARCH MONOGRAPH, NO. 2, TALLAHASSEE, FLORIDA: DIVISION OF CORRECTIONS (1966); Jaman and Dickover, *A Study of Parole Outcome as a Function of Time Served,* RESEARCH REPORT NO. 35, SACRAMENTO, CALIFORNIA DEPARTMENT OF CORRECTIONS (1969); Mueller, *Time Served and Parole Outcomes by Commitment Offense (Unpublished Manuscript, Sacramento, California Department of Corrections) (1966). Most of these studies were criticized, however, because they compared groups with different sentence lengths. But see* Pabst, Koval and Neithercutt, *Relationship of Time Served to Parole Outcome for Different Classifications of Burglars Based on Males Paroled in Fifty Jurisdictions in 1968 and 1969,* 9 J. RESEARCH IN CR. & DEL., 99 (1972) (no relation found between the time spent in prison and subsequent criminality).

[118] Berecochea, Jaman and Jones, *Time Served in Prison and Parole Outcome: An Experimental Study, Report Number 1, Sacremento, California Department of Corrections at 25 (1973).*

The study compared a sample of 494 male inmates who had their prison terms reduced by six months, a 16% reduction in average time served, with a sample of 515 male inmates whose prison terms were not reduced. *Id.* at 5. Recidivism, for purposes of the study included any return to prison, as well as long prison sentences and absconding from parole. *Id.* at 1. Although it can be argued that the sentence length reduction used in the study was too short and that the study sample was not necessarily representative of all California parolees, the conclusion that there were no significant differences in one year parole success is inescapable.

[119] NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, WORKING PAPERS C-196 (1973).

[120] CALIFORNIA ASSEMBLY COMMITTEE ON CRIMINAL PROCEDURE, DETERRENT EFFECTS OF CRIMINAL SANCTIONS, PROGRESS REPORT 25, 35 (1968).

[121] For the exact number of parole cases reviewed in past years, see table IV *supra*.

[122] *See* GA. CODE ANN. § 77-525 (1973); Administrative Rules, *supra* note 35, ch. 475-3-.06(1).

[123] For good time allowances, *see* GA. CODE ANN. § 77-320(b) (1973). Misdemeanants sentenced to less than one-year sentences are released before six months.

[124] It is interesting to note that in 1943, after the State Board of Pardons and Paroles had announced that it would not consider applications for parole in any misdemeanor cases, the General Assembly passed the following resolution:

> Whereas, it was the intent of the General Assembly in the Act creating the State Board of Pardons and Paroles that such Board should consider all applications for pardons and paroles in all causes and cases:
>
> Now, therefore, be it Resolved: That the Chairman and members of the State Board of Pardons and Paroles be, and they are hereby directed and instructed that it is the wish and intent of this General Assembly that ALL matters pertaining to pardons and paroles be considered by said Board, including *misdemeanor cases*, as well as felony cases.

1943 Ga. Laws 1718 (emphasis added).

[125] *See* GA. CODE ANN. § 77-525 (1973); Administrative Rules, *supra* note 35, ch. 475-3-.06(3),(4).

[126] The disparity between one-third of a sentence and the nine month minimum time served requirement increases as the sentence length decreases.

[127] *See* GA. CODE ANN. § 77-525 (1973); Adminstrative Rules, *supra* note 35, ch. 475-3-.06(3),(4).

[128] *See* Table VII *supra*.

[129] Several states have adopted similar plans. *See, e.g.*, MD. ANN. CODE 1 art. 41, § 122 (1973); MONT. REV. CODE ANN. § 95-3214(1) (Supp. 1973); NEV. REV. STAT. § 213.120 (1973); N. C. GEN. STAT. § 148-58 (1974); S. D. COMPILED LAWS ANN. § 23-60-6 (1967); VA. CODE ANN. § 53-251 (1974).

[130] *See generally*, Berecochea, John E., Jaman, Dorothy R., and Jones, Welton A., *Time Served in Prison and Parole Outcome: An Experimental Study*, REPORT NUMBER 1, CALIFORNIA DEPARTMENT OF CORRECTIONS, (1973).

[131] *See* note 188 *supra*. This same study also indicated that the rate of recidivism might be reduced by shorter prison terms.

[132] *See* note 118 *supra* and accompanying text.

[133] *See* Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROB. 401, 439-40 (1958).

[134] UNITED STATES BOARD OF PAROLE BIENNIAL REPORT, JULY 1, 1968—JUNE 30, 1970 at 13 (emphasis added).

[135] FLA STAT. § 947.16 (1974). *See also* FLORIDA PAROLE AND PROBATION COMMISSION, 33D ANNUAL REPORT at 12 (1973).

Minnesota also has a similar system. MINN. STAT. § 609.12 (1963) provides for parole eligibility at any time. Prisoners with life sentences are not eligible until after service of twenty years. *See also* IOWA CODE § 247.5 (1969); KY. REV. STAT. ANN. § 439.340 (1973); ORE. REV. STAT. § 144.075 (1973).

[136] For example, although Florida has approximately 80% more people on parole than Georgia, the revocation rate is comparable. At the end of fiscal year 1973:

	Florida	Georgia
Prison Population	10,346	8,878
Number on Parole	4,516	2,600
Number Revoked	527	265
Revocation Rate	11.6%	10.2%

Statistics from FLORIDA PAROLE AND PROBATION COMMISSION, 33D ANNUAL REPORT, 1973 and ANNUAL REPORT, *supra* note 57.

[137] FLORIDA PAROLE AND PROBATION COMMISSION, 33D ANNUAL REPORT, 1973 at 12-13.

[138] The purpose of parole prediction is to identify each inmate as belonging to a group with a known parole success rate. The Parole Board then must determine, based on their training and experience, whether the particular inmate under consideration belongs to the success group or failure group, and make the parole decision accordingly. *See* text accompanying notes 81-98 *supra*.

[139] In Florida when a pre-sentence investigation report is not made, the Parole Board uses a post-sentence investigation report, which seems similar to reports presently utilized in Georgia. *See* text accompanying notes 45-48 *supra*.

[140] TASK FORCE, *supra* note 19, at 64. As to the goal of expanding the information available to the board, one member of the New York parole authority has written that the answers to board questions are generally known before the questions are asked. It is inmate attitudes which are being sought. Oswald, *Decisions! Decisions! Decisions!*, 34 FED. PROB. 27, 29 (Mar. 1970).

As to the second goal, the same writer feels that the interview fulfills the need to impress a parolee with the sincerity of an individualized treatment program. *Id.* at 28. Also,

> [t]here is a certain vital quality to an individual's appearance before the Board of Parole. It clears many misconceptions from the viewpoint of the prospective parolee and the Board. It develops a personal, face-to-face relationship that allows response, reaction, and presentation on the part of the individual being heard, and an opportunity for the Board to evaluate each of these, together with the attitude exhibited by the individual in the setting.

Id. at 29.

[141] O'Leary and Nuffield, *A National Survey of Parole Decision-Making*, 19 CR. & DEL. 378, 384 (1973). The other two states without parole grant hearings are Texas and Hawaii. *Id.*

[142] Not all potential parolees receive interviews. *See* text accompanying note 150, *infra*. To determine the inmates to be interviewed, a lot of all inmates eligible for parole consideration is prepared, and then those inmates who do not meet the criteria for interviewing are excluded.

[143] Telephone interview with Silas Moore, Parole Review Officer, Georgia State Board of Pardons and Paroles, September 19, 1974.

[144] Administrative Rules, *supra* note 35, ch. 475-3-.02(1).

[145] These jurisdictions included forty-seven states, the District of Columbia, the United States Parole Board, and separate women offender systems in California and Indiana.

[146] O'Leary and Nuffield, *A National Survey of Parole Decision-Making*, 19 CR. & DEL. 378, 386 (1973) (Table VI).

[147] The number of members conducting the proceeding varied greatly, from the full board to one member. *Id.* at 385 (Table IV).

[148] *See* note 150 *infra*.

[149] If the offender can have a representative who is free to pursue information, develop resources, and raise questions, decisions are more likely to be made on fair and reasonable grounds. The inmate will be more likely to feel that he has been treated fairly and that there is definitely someone who is "on his side." CORRECTIONS, *supra* note 11, at 423.

[150] "Rarely can one read a case folder of an inmate of a State correctional institution without developing some predisposition not to release." Also, "[i]t is not unusual for a person, who appears on paper to constitute a good parole risk, to talk himself out of parole by venting his inner attitudes or his total lack of personal insight as to his problems under questioning by Board members." Oswald, *Decisions! Decisions! Decisions!*, 34 FED. PROB. 27, 28 (Mar. 1970).

[151] See the comments of one parole board member mentioned at note 140 *supra*.

[152] Telephone interview with Silas Moore, Parole Review Officer, Georgia State Board of Pardons and Paroles, September 4, 1974.

[153] There were 98 of these interviews in April, 1974, 97 in May, 1974, and 58 in June, 1974. In comparison, there were 4702 parole cases reviewed by the Board in fiscal year 1974, or about 392 per month.

[154] In this respect, note that the authors of the Model Penal Code felt that:

It is not necessary that an entire board should sit at such hearings. Experience indicates in fact, that some prisoners are considerably more at ease and are able, therefore, to present their cases better, if only a single member sits at the hearing.

MODEL PENAL CODE § 305.10, Comment at 88-89 (Tent. Draft No. 5, 1956).

[155] *See* text accompanying note 143 *supra*.

[156] *See e.g.*, CORRECTIONS, *supra* note 11.

[157] O'Leary and Nuffield, *Parole Decision-Making Characteristics: Report of a National Survey*, 8 CRIM. L. BULL. 651, 661 (1972).

[158] *Id.* The National Prisoner Statistics place the percentage a little higher, at 72%. *See* NATIONAL PRISONER STATISTICS: PRISONERS IN STATE AND FEDERAL INSTITUTIONS FOR ADULT FELONS, 1970 p. 43 (1970).

[159] *Id.*

[160] The tabulator of the data explained the surprising finding by pointing out that the states which tended to allow counsel were the smaller states with less "full-blown" correctional systems. *Id.*

[161] Even in states which permit counsel, representation is extremely rare because counsel is not provided for indigents. O'Leary and Nuffield, *A National Survey of Parole Decision-Making*, 19 CR. & DEL. 378, 386 (1973).

[162] The Supreme Court has characterized the traditional parole board as "a 'neutral and detached' hearing body." Morrissey v. Brewer, 408 U.S. 471, 489 (1972).

[163] The Supreme Court, in Morrissey v. Brewer, 408 U.S. 471 (1972), delineating the requirements of due process in a parole *revocation* hearing, did not require or recommend counsel at such a hearing. 408 U.S. at 489. Note that the revocation hearing usually is adversarial; someone, usually a parole supervisor, is advocating revocation. *But see* Administrative Rules, *supra* note 35, ch. 475-3-.08(5). If due process does not require counsel there, it must not require counsel at the parole grant proceeding.

[164] It is safe to assume that the presence of attorneys would considerably lengthen the time of the interviews. For one area desperately needing financial resources, see the discussion of parole supervision at text accompanying notes 388-402 *infra*.

[165] The rules state that "[t]he Board will hear from relatives," etc. Actually the relatives, friends, and attorneys usually see a parole review officer rather than a Board member. Telephone interview with Silas Moore, Parole Review Officer, Georgia State Board of Pardons and Paroles, September 19, 1974. The rehabilitative goal would probably be better served if all visitors could talk with a Board member—the inmate would be more likely to feel that his case was receiving the full attention of those who make the decisions.

[166] O'Leary and Nuffield, *A National Survey of Parole Decision-Making*, 19 CR. & DEL. 378, 386 (1973) (Table VI).

[167] If the interview were recorded verbatim, there would obviously be no need for the parole review officer's notes. Actually, there would be little need for the parole review officer's notes at all; any assistance required by the interviewing Board member could be provided by a lower paid clerical aide. The parole review officers thus would be freer to use their special correctional training and skill more advantageously.

[168] Administrative Rules, *supra* note 35, ch. 475-3-.05. *See also* ANNUAL REPORT, *supra* note 57, at 2.

[169] As the Chief United States Probation Officer for the Northern District of Illinois stated:

> I believe it is very important to the morale of the offender to have some idea when he is denied parole what he must do to receive favorable action at a later date. The prisoner who believes he has taken advantage of everything the prison offers to equip him for parole is entitled to some explanation when parole is denied.

Quoted in Vachss, *Parole as Post-Conviction Relief, The Robert Lewis Decision*, 9 N. ENG. L. REV. 1, 35 (1973) (testimony before the House Judiciary Committee on H. R. 13118, The Parole Improvement and Procedures Act on March 1, 1972).

[170] The vast majority of decisions have rejected attempts at importing due process into the parole grant decision. *See, e.g.*, Menechino v. Oswald, 430 F.2d 403 (2d Cir. 1970), *cert. denied*, 400 U.S. 1023 (1971); Padilla v. Lynch, 398 F.2d 481 (9th Cir. 1968); Briguglio v. New York State Bd. of Parole, 24 N.Y.2d 21, 246 N.E.2d 512, 298 N.Y.S.2d 704 (1969). *Cf. In re* Tucker, 5 Cal. 3d 171, 486 P.2d 657, 95 Cal. Rptr. 761 (1971). *But see* United States *ex rel* Harrison v. Pace, 357 F. Supp. 354 (E.D. Pa. 1973).

[171] Porter, *Criteria for Parole Selection*, Proc. Am. Correc. Ass'n. 227 (1958).

[172] 58 N.J. 238, 277 A.2d 193 (1971). In New Jersey, the Parole Board had broad discretion in determining whether to grant or deny parole. By virtue of a Board rule against disclosure, the reasons for denial were never given. The court in *Monks* invalidated this rule and ordered the Board to promulgate a:

> carefully prepared rule designed generally towards affording statements of reasons on parole denials, while providing for such reasonable exceptions as may be essential to rehabilitations and the sound administration of the parole system.

Id. at 199.

[173] *Id.* This same line of reasoning was followed in *United States ex rel. Harrison v. Pace*, 357 F. Supp. 354 (E.D. Pa. 1973), where the court concluded that "the rudiments of procedural due process are not observed unless the administrative body details the reasons for its findings." *Id.* at 356. *See also* United States *ex rel.* Johnson v. New York Bd. of Parole, 363 F.Supp. 416 (E.D.N.Y. 1973); Johnson v. Heggie, 362 F.Supp. 851 (D. Colo. 1973). *Cf.* Goldberg v. Kelley, 397 U.S. 254 (1970); Drown v. Portsmouth School Dist., 435 F.2d 1182 (1st Cir. 1970), *cert. denied* 402 U.S. 992 (1971).

[174] *See, e.g.*, Monks v. New Jersey State Parole Bd., 58 N.J. 238, 277 A.2d 193 (1971). A recent survey indicated, however, that only eleven parole boards of the fifty-one surveyed maintained written records for the reasons behind a parole decision. O'Leary and Nuffield, *A National Survey of Parole Decision-making*, 19 CR. & DEL. 378, 387 (1973) (Georgia was not included in this survey).

[175] Monks v. New Jersey State Parole Bd., 58 N.J. 238, 277 A.2d 193, 199 (1971).

[176] *See e.g.,* Vachss, *Parole as Post-Conviction Relief, The Robert Lewis Decision,* 9 N. ENG. L. REV. 1, 14 (1973); Fox, *Why Prisoners Riot,* 35 FED. PROB. 9 (1971); McGee, A STATEMENT CONCERNING CAUSES, PREVENTIVE MEASURES, AND METHODS OF CONTROLLING PRISON RIOTS AND DISTURBANCES (May, 1953); DONNELLY, GOLDSTEIN, AND SCHWARTZ, CRIMINAL LAW 207 (1962).

[177] Vachss, *Parole as Post-Conviction Relief, The Robert Lewis Decision,* 9 N. ENG. L. REV. 1, 21 (1973).

[178] *See* Administrative Rules, *supra* note 35, ch. 475-3-.05.

[179] When voting for or against parole, the Georgia Parole Board members support their votes by checking reasons on the standard ballot form. Standard denial paragraphs correspond with each of the ballot checklist items; when an inmate is denied parole, the reasons checked on the ballot by the Board members are translated into these standard paragraphs for inclusion in the letter to the inmate. Telephone interviews with Silas Moore, Parole Review Officer, Georgia State Board of Pardons and Paroles, September 4 and September 19, 1974. Below is the list of standard paragraphs which may be selected and combined to form a denial letter:

1. The Board has reviewed your case for parole consideration. While it is recognized that you have taken steps toward self-improvement and solution of personal problems, other factors must be weighed.

Please understand that this decision takes into account what is considered not only to be your best interest, but also the best interest of all Georgians. Because the nature of your offense is very serious, the decision of the Board is to deny parole at this time.

We realize that you can do nothing more about past behavior except continue to put sincere effort toward self-improvement. Your present institutional record is favorable. We urge you to continue this progress and effort to help yourself.

2. The Board has given careful consideration to your case for parole; however, we regret to inform you that parole has been denied for the following reasons(s):

3. The welfare of the public is of vital concern when deciding whether to grant parole. Therefore, the Board reviews every aspect of a person's case before rendering a decision. Due to the *serious nature and circumstances of your offense* the Board feels parole would not be best at this time.

4. Your *past record on parole* indicates a lack of willingness to abide by the rules of parole.

5. Your *past record on probation* indicates a lack of willingness to abide by expected rules. There are doubts that you could follow parole restrictions at this time.

6. Parole is a privilege earned by those who the Board feels would best take advantage of another chance. Your previous arrest record indicates a *pattern of crime* which leaves doubt as to your *present* ability to live by the laws of society.

7. Although the Board does not necessarily see you as an "alcoholic," investigation indicates that alcohol use has resulted in serious trouble for you in the past. This fact is seen as a handicap which leaves doubts as to your ability to live a responsible, productive life at this time.

8. Due to your past record of *drug involvement,* the Board feels you need to put forth further effort in solving your drug related problems.

9. Your *prior work record* indicates that you have difficulty maintaining steady and gainful employment. This fact leaves doubt as to your present ability to live productively in society.

10. Your *attitude* indicates that you do not realize the seriousness of your past behavior or the need for self improvement. You are urged to work towards becoming a mature and responsible individual.

11. Your institutional record indicates you have not *used your time* effectively for self-improvement. More effort is urged to take advantage of activities which will be of benefit to you.
12. Recorded institutional *disciplinary action* taken against you was viewed unfavorably by the Board.
13. Your *escape(s)* leaves serious doubt as to your willingness to control your impulses and shows a continuing disregard for the law.
14. Your *attempted escape* causes serious doubt as to your willingness to control your behavior and shows a continuing disregard for the law as well as institutional rules.
15. Your parole plan shows that you do not have *acceptable employment* possibilities.
16. Your parole plan shows that the *place of residence* you have selected will not help you succeed on parole.
17. Neither your given *employment nor residence plan* for parole is adequate to insure success on parole.
18. Investigation shows you are viewed negatively by your community. The Board feels the *community attitude* at this time could only make your efforts to succeed difficult.
19. The Board recognizes individual needs that you should have assistance with when paroled. Regretfully, the resources in your community are not adequate to assist you. The Department of Offender Rehabilitation is working around the state to upgrade community services by the time you are to be reconsidered or released.
20. The Board notes that clemency action at this time would not necessarily result in your release due to the detainer against you. You may want to work toward the disposal of this matter.
21. Your *work release* record shows you do not readily take proper advantage of the opportunities. Until it is felt you are able to live a mature and responsible life style the Board cannot grant parole.
22. The Board realizes that parole denial is serious to each individual. For this reason all information is fully reviewed, and all factors weighed. Your record indicates that it would be difficult for you to succeed on parole at this time. We realize that you can do nothing more about past behavior except continue to put sincere effort toward self-improvement.
23. Your case will be considered again for parole in
24. You will be discharged by the Department of Corrections when you complete your sentence.

25. Sincerely,
FOR THE BOARD:

Administrative Assistant

cc Warden
Correctional Counselor
Parole Supervisor
File

26. The Board realizes that not every institution has all the recommended programs to help with your particular needs. However, it is advised that you take advantage of any available programs and work with correctional staff in promoting self-help programs.
27. Your record shows you have made little effort to improve yourself. Before one is paroled he must have a sincere change in attitude. This is necessary if you are going to accept responsibilities and learn to work effectively with others. The Board

hopes that you will now examine your problems and work toward solving them.
28. The Board realizes you have taken the first steps toward recognizing and solving problems which led to your incarceration. This effort shows that you are trying to make a sincere attempt at a new life. With continued progress it is felt that you will be fully capable of dealing with the expected responsibilities and obligations of society.
29. The Board has taken notice of your sincere efforts toward self-improvement. You have been effectively working on the problems which led to your incarceration. We are glad to see this improvement but because of the above reasons parole would not be best at this time.
30. Below are areas which the Board believes may accelerate your rehabilitation and possible parole.
31. Below are areas which the Board believes may accelerate your rehabilitation.
32. EDUCATIONAL TRAINING
33. JOB TRAINING
34. ALCOHOL TREATMENT
35. DRUG TREATMENT
36. COUNSELING
37. BETTER USE OF SELF-IMPROVEMENT PROGRAMS
38. CONSTRUCTIVE USE OF LEISURE TIME AND RECREATION
39. ATTITUDE OF CO-OPERATION WITH STAFF AND INMATES
40. INSTITUTIONAL ATTITUDE CHANGE TO HELPING YOURSELF BECOME A RESPONSIBLE PERSON
41. COUNSELING FOR BETTER INSIGHT INTO YOUR PROBLEMS WITH INCREASED ABILITY TO SOLVE AND HANDLE THESE PROBLEMS
42. DEVELOPMENT OF PERSONAL GOALS WHICH WILL LEAD TO A MATURE LIFE STYLE
43. After careful review of your case, the Board has determined that it cannot grant you parole at this time for the following reasons:
44. While the Board did not feel you were ready for parole at this time, they have selected you for parole-reprieve consideration. If you are interested in participating in this program, please read carefully the enclosed criteria and fill out the application.
If released under this program, you will be required to abide by the conditions set forth in this letter. The Board feels these conditions are necessary to assure you have a successful parole-reprieve.
45. Your record of *emotional instability* indicates that you have not consistently used good judgment when faced with problems.

[180] *See* GA. CODE ANN. § 77-533 (1973); Administrative Rules, *supra* note 35, ch. 475-3-.09(1).

[181] In a situation where the Board allows access, the documents in the file will be declassified. *See* GA. CODE ANN. § 77-533 (1973); Administrative Rules, *supra* note 35, ch. 475-3-.09(1),(4).

[182] 371 F. Supp. 1246 (D.C. Cir. 1973).

[183] The court pointed out that the danger of errors included such things as filing errors and omissions, mistaken identity, reliance upon outdated and superceded information, reliance upon conflicting, unclear, and unsubstantiated testimony, and unreliable psychological and other similar test data. *Id.* at 1248.

[184] *See, e.g.*, Gagnon v. Scarpelli, 411 U.S. 778 (1973); Morrissey v. Brewer, 408 U.S. 471 (1972); Scarpa v. United States Bd. of Parole, 477 F.2d 278 (5th Cir.), *vacated and remanded* 414 U.S. 809 (1973).

[185] *See, e.g.,* Gagnon v. Scarpelli, 411 U.S. 778 (1973); Morrissey v. Brewer, 408 U.S. 471 (1972). *See generally* Cohen, *Due Process, Equal Protection, and State Parole Revocation Proceedings*, 42 U. COLO. L. REV. 197 (1970).

[186] Morrissey v. Brewer, 408 U.S. 471, 477 (1972).

[187] This notion could be refuted by examining the almost total absence of decisions relating to the parole grant process. This report can only counter with the cliche that "Rome was not conquered in one day."

[188] *See* text accompanying notes 6-13 *supra*. *See generally* Comment, *Freedom and Rehabilitation in Parole Revocation Hearings,* 72 YALE L. J. 368 (1962).

[189] *See* Morrissey v. Brewer, 408 U.S. 471, 478 (1972).

[190] *See* text accompanying notes 6-13 *supra*.

[191] *See* Fleming v. Tate, 156 F.2d 848, 850 (D.C. Cir. 1946) where the court, in determining a parolee's rights in a revocation hearing before the District of Columbia parole board, said:

> The parole system is an enlightened effort on the part of society to rehabilitate convicted criminals. Certainly no circumstance could further that purpose to a greater extent than a firm belief on the part of such offenders in the impartial, unhurried, objective, and thorough processes of the machinery of the law. And hardly any circumstance could with greater effect impede progress toward the desired end than a belief on their part that the machinery of the law is arbitrary, technical, too busy, or impervious to facts. The crisis in the rehabilitation of these men may very well be the treatment which they receive when accused of an act violative of the terms of what must be to them a precious privilege.

[192] *See* text accompanying notes 11-13, *supra*.

[193] 408 U.S. 471 (1972). The parolees in *Morrissey* had had their paroles revoked on the basis of written reports of their supervising officers without any hearing prior to revocation.

[194] *Cf.* Goldberg v. Kelly, 397 U.S. 254 (1970) (due process requires a hearing before discontinuance of welfare benefits).

[195] *Morrissey* at 487 *citing* Goldberg v. Kelly, 397 U.S. 254, 271 (1970).

[196] The Court added the caveat that if the hearing officer determined that an informant would be endangered by disclosure of his identity, then the informant did not have to be subjected to confrontation. 408 U.S. at 487.

[197] The members of this body need not be judicial officers or lawyers. *Id.* at 489.

[198] *Id.* at 480.

[199] *Id.* at 489-90.

[200] 411 U.S. 778 (1973). The probationer in *Gagnon* had had his probation revoked without benefit of counsel and without a hearing. *See generally,* Note *Indigent's Right to Appointed Counsel at Probation Revocation in Appropriate Cases,* 23 EMORY L. J. 617 (1974).

[201] 411 U.S. at 790. The Court said that counsel should be provided even when the violation is a matter of public record or uncontested.

[202] *Id.* at 790-91.

[203] *Id.* at 791.

[204] The only mention of *Morrissey* by a Georgia court was in the dissenting opinion of Justice Gunter in Reece v. Pettijohn, 229 Ga. 619, 193 S.E.2d 841 (1972). This decision, however, dealt with probation revocation hearings. *Gagnon* has not yet been cited.

[205] GA. CODE ANN. § 77-518 (1973) provides that:

> If any member of the board shall have reasonable ground to believe that any parolee . . . has lapsed into criminal ways, or has violated the terms and conditions of his parole . . . in a material respect, such member may issue a warrant for the arrest of such parolee . . . . Said warrant, if issued by a member of the board, shall be returned before him, and shall command that the parolee . . . be brought before

him, at which time he shall examine such parolee . . . and admit him to bail conditioned for his appearance before the board, or . . . commit him to jail pending a hearing before the board . . . .

[206] *See* text accompanying note 216 *infra*.

[207] GA. CODE ANN. § 77-519 (1973) provides:

As soon as practicable after the arrest of a person charged with the violation of the terms and conditions of his parole . . . , such parolee . . . shall appear before the board in person and a hearing shall be had at which the State of Georgia and parolee . . . may introduce such evidence as they may deem necessary and pertinent to the charge of parole violation . . . .

[208] Balkcom v. Sellers, 219 Ga. 662, 135 S.E.2d 414 (1964). *See generally* GA. CODE ANN. § 77-517 (1973).

[209] *See* GA. CODE ANN. §§ 77-515, 77-518 (1973).

[210] 219 Ga. 59, 131 S.E.2d 551 (1963).

[211] The authors of this report sent a questionnaire to all the Unit Coordinators (the chief probation/parole officers) of each judicial circuit in Georgia, and to the chief probation officer in each county which maintains a probation department separate from the state system. Forty-two of the forty-eight questionnaires mailed were returned, including thirty-nine of the forty-two Unit Coordinators. The answers were as of July 31, 1974. The responses to this questionnaire will hereinafter be cited as Unit Coordinator Questionnaire.

Out of 32 responses to the Unit Coordinator Questionnaire, 3 indicated that between 0-25% of parole delinquency reports resulted in a preliminary hearing, 1 indicated the percentage to be between 26-50%, 7 between 51-75%, and 21 between 76-100%.

Out of 31 responses to the Unit Coordinator Questionnaire, 2 indicated that between 0-25% of parole delinquency reports resulted in revocation, 8 indicated between 26-50%, 16 indicated between 51-75%, and 5 indicated between 76-100%.

[212] GA. CODE ANN. § 77-518 (1973).

[213] *Id. See* Administrative Rules, *supra* note 35, ch. 475-3-.08(1).

[214] There were 12 preliminary hearings held in April, 1974; 14 in May, 1974; and 17 in June, 1974. Earlier statistics are unavailable. Parole Board Monthly Statistics (1974).

[215] The average length of time between the arrest and the preliminary hearing was estimated to be about thirty days. The average length of time between the preliminary hearing and the final hearing was estimated to be fourteen days. Interview with Rob Haworth, Executive Officer, State Board of Pardons and Paroles, July 26, 1974.

[216] Administrative Rules, *supra* note 35, ch. 475-3-.08(3).

[217] Administrative Rules, *supra* note 35, ch. 475-3-.08(2).

[218] *Id.*

[219] *Id.*

[220] Out of 29 responses to the Unit Coordinator Questionnaire, *supra* note 211, 2 indicated that the parolee's supervisor appears at between 51-75% of all parole preliminary hearings, and 27 indicated between 76-100%. No other responses were received.

[221] Administrative Rules, *supra* note 35, ch. 475-3-.08(4).

[222] Out of 27 responses to the Unit Coordinator Questionnaire, *supra* note 211, 9 indicated that parolees call witnesses between 1-25% of all parole preliminary hearings, 8 indicated between 26-50%, 1 indicated between 51-75%, and 9 indicated between 76-100%.

[223] Administrative Rules, *supra* note 35, ch. 475-3-.08(4). The parolee may not cross-examine an informant if the safety of the informant would be jeopardized. *Id. Cf.* Morrissey v. Brewer, 408 U.S. 471 (1972).

[224] Out of 27 responses to the Unit Coordinator Questionnaire, *supra* note 211, 18 indicated that parolees are represented by counsel between 0-25% of all parole preliminary hearings, 5 indicated between 26-50% of the time, 0 indicated between 51-75%, and 4 indicated between 76-100%.

[225] Because of the importance of the report, the Parole Review Officer tape records the preliminary hearing to insure the accuracy of his report. These tape recordings are for the sole use of the Parole Review Officer and are never made available to either the Board or the parolee. The written report, which is submitted to the Parole Board, becomes a permanent part of the parolee's file.

[226] This summation is made from the tape recording mentioned in note 225 *supra*.

[227] It is interesting to note that this recommendation is usually followed. Interview with Silas Moore, Parole Review Officer, Georgia State Board of Pardons and Paroles, in Atlanta, Georgia, July 9, 1974.

[228] For example, parole can be revoked but consideration for reparole be set at a time earlier than the one year time period established in Administrative Rules. *See* Administrative Rules, *supra* note 35, ch. 475-3-.05(4),(5).

[229] Out of 30 responses to the Unit Coordinator Questionnaire, *supra* note 211, 4 indicated that between 26-50% of parole preliminary hearings result in final hearings, 11 indicated between 51-75%, and 15 indicated between 76-100%.

[230] Upon notice of an adjudication of guilt in a court of record, the Executive Officer will prepare a revocation order—a final hearing is not required. *See* GA. CODE ANN. § 77-519 (1965); Administrative Rules, *supra* note 35, ch. 475-3-.08(5). This practice might appear to be violative of the standards recently established in Morrissey v. Brewer, 408 U.S. 471 (1972), where the Supreme Court held that minimal due process requirements for parole revocation require both a preliminary and final hearing. *See* text accompanying notes 193-99 *supra*. A careful reading of *Morrissey*, however, indicates that although the Court did not limit the holding to technical parole violations, as were the facts in the case, it seems likely that so long as the parolee has been otherwise accorded due process, parole can be revoked without a hearing. The Court, near the end of the majority opinion, intimated this result:

> Obviously a parolee cannot relitigate issues determined against him in other forums, as in the situation presented when the revocation is based on conviction of another crime.

Id. at 490. Thus, if a parolee has been convicted of a new offense or has pleaded guilty to a new offense, due process requirements would seem to have been satisfied.

[231] Administrative Rules, *supra* note 35, ch. 475-3-.08(5).

[232] *Id.* These hearings are open to the public.

[233] Administrative Rules, *supra* note 35, ch. 475-3-.08(7).

[234] Administrative Rules, *supra* note 35, ch. 475-3-.08(5),(6)(a).

[235] Out of 26 responses to the Unit Coordinator Questionnaire, *supra* note 211, 18 indicated that at between 0-25% of all parole revocation final hearings the parolee is represented by counsel; 5 indicated the parolee was represented at between 26-50% of all final hearings, and 3 indicated between 76-100%.

[236] Out of 23 responses to the Unit Coordinator Questionnaire, *supra* note 211, 15 indicated that parolees call their own witnesses at between 0-25% of all final revocation hearings, 4 indicated between 26-50%, and 4 indicated between 76-100%.

[237] Administrative Rules, *supra* note 35, ch. 475-3-.08(6)(d).

[238] Administrative Rules, *supra* note 35, ch. 475-3-.09(8). The revocation order contains, *inter alia*, the violations with which the parolee is charged and the decision of the Board.

[239] *See* table VIII *supra*.

[240] It should be noted, however, that a *full* revocation is not always the result. Sometimes the Parole Board will revoke and set a reconsideration date at an earlier time than the normal reconsideration date of one year. *See* note 109 *supra*.

[241] *See* Appendix.

[242] This recommendation is consistent with a later recommendation that the terms and conditions of parole be limited to those which are essential and enforceable. *See* text accompanying note 361 *infra*.

[243] *See* text accompanying notes 363-367 *infra*.

[244] *See* text accompanying note 367 *infra*.

[245] The authors of the Model Penal Code suggested several sanctions which were alternatives to a full revocation. *See* MODEL PENAL CODE § 305.19 (Tent. Draft No. 5, 1956).

[246] *See generally* CORRECTIONS, *supra* note 11, at 404-07.

[247] *See* GA. CONST. Para XI: GA. CODE ANN. § 77-511 (Spec. Supp. 1974).

[248] In other words, *all* of the three members at each hearing must vote the same way or a deadlocked vote results.

[249] Although the final revocation hearing is recorded and this recording is available to the Board members, this report contends that this is not the same as attendance at the actual hearing. The demeanor of witnesses, the general atmosphere of the hearing, and other similar intangibles are not available.

[250] For instance, if only one Board member were present, the decision reached would be largely according to his own idiosyncracies and tendencies. *See* note 84 *supra*.

[251] For a discussion of the merits of giving reasons in another situation--denial of parole—*see* text accompanying notes 168-179 *supra*. The arguments for giving reasons in that situation are basically the same as with parole revocation.

[252] *See* Gagnon v. Scarpelli, 411 U.S. 778 (1973).

[253] The problem raised by this recommendation is: Who will provide the funds for indigents' attorneys? *See* text accompanying notes 224 and 235 *supra*. Although financial considerations are always factors in deciding policy issues, they should be less persuasive when the issues involve incarceration.

[254] CORRECTIONS, *supra* note 11, at 312.

[255] DRESSLER, *supra* note 14, at 16.

[256] AMERICAN BAR ASSOCIATION PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO PROBATION, 9 (1970).

[257] B. KAY AND C. VEDDER, PROBATION AND PAROLE, 69 (1963). [hereinafter cited as KAY AND VEDDER].

[258] *Id.*

[259] Probation is designed to promote rehabilitation. *See* Burns v. United States, 287 U.S. 216, 220 (1932); Springer v. United States, 148 F.2d 411 (9th Cir. 1945).

[260] *See* text accompanying notes 6-10 *supra*.

[261] *See* text accompanying notes 117-20 *supra*.

[262] While Georgia statistics are difficult to locate, statistics have indicated that incarceration of an offender costs the average state about ten times as much as does probation. TASK FORCE, *supra* note 19, at 28. Subtracting from probation costs the taxes a working probationer pays to the state, the difference becomes even greater. *See also* Richmond, *Measuring the Cost of Correctional Services,* 18 CR. & DEL. 243 (1972).

[263] For a discussion of the early English practices of benefit of clergy, judicial reprieve, recognizance, bail, and filing of cases, see DRESSLER, *supra* note 14, at 16-20; KAY AND VEDDER, *supra* note 257, at 5-9.

[264] The English forerunners of probation generally related to the suspension of punishment only, while probation today relates to a combination of the suspension of punishment and the personal supervision of the probationer. KAY AND VEDDER at 4.

[265] *Ex Parte* United States, 242 U.S. 27 (1916).

[266] *Id.* at 51-52.

[267] *E.g.*, Missouri (1897); Vermont (1898); Illinois, Minnesota, and Rhode Island (1899); New Jersey (1900). *See* DRESSLER *supra* note 14 at 28. Georgia's statewide probation act was enacted in 1913. 1913 Ga. Laws 112.

[268] *Id.* at 29.

[269] KAY AND VEDDER *supra* note 257, at 23-24; TASK FORCE, 1 *supra* note 19, at 27.

[270] GA. CODE ANN. § 27-2702 *et. seq* (1972).

[271] GA. CODE ANN. § 40-35162.5 (Supp. 1974); § 77-506(a) (1973).

[272] GA. CODE ANN. § 40-35162.6 (Supp. 1974).

[273] GA. CODE ANN. § 27-2709 (1972).

[274] *See* text following note 31 *supra*.

[275] *See* GA. CODE ANN. §§ 27-2701 to -2732 (1972).

[276] It is correct to say that the process usually begins there, for often, in a plea bargaining situation, probation may be discussed or tentatively arranged before a plea is formally entered. Additionally, the Unit Coordinator Questionnaire, *supra* note 211, indicated that in at least 26 of 42 judicial circuits the pre-sentence report is sometimes begun prior to the plea or conviction.

The Georgia Code provides that any original jurisdiction court, except juvenile courts, municipal courts, and courts of ordinary, may hear and determine the question of probation, where a defendant has been found guilty by verdict or plea, or has pleaded *nolo contendere*. GA. CODE ANN. § 27-2709 (1972).

[277] Probation is prohibited for offenses punishable by death or life imprisonment. GA. CODE ANN. § 27-2709 (1972). Even in cases where probation is not legally prohibited, the nature of the crime or the fact of habitual criminality may practically preclude the consideration of probation as an alternative sentence.

[278] In practice, the investigation is occasionally begun prior to conviction or plea in at least 25 of Georgia's 42 judicial circuits. Unit Coordinator Questionnaire, *supra* note 211.

[279] The Code specifies that the court *may* refer the case to a circuit probation supervisor for investigation and recommendation. GA. CODE ANN. § 27-2709 (1972). Any doubt that the statutory wording does not give the judge total discretion in the use or non-use of pre-sentence reports was dispelled in Harrington v. State, 97 Ga. App. 315, 319, 103 S.E.2d 126, 129 (1958), wherein the court upheld a probation revocation attacked on the ground that no pre-sentence report had been prepared prior to his probation grant.

[280] The following table shows the responses of the Unit Coordinators to the questions: In approximately what percent of felony (misdemeanor) cases which result in convictions or guilty pleas does the court request a pre-sentence report?

Approximate Percent of Cases in Which a Pre-Sentence Report is Requested:	Felony Cases	Misdemeanor Cases
100%	8 circuits	0 circuits
90-99%	7	0
80-89%	1	1
70-79	0	0
60-69%	1	2
50-59%	2	1
40-49%	1	1
30-39%	0	1
20-29%	5	5
10-19%	4	8
1-9%	7	10
0	3	10
Total Number of Circuits Responding	39 Circuits	39 Circuits

Generally those circuits using the reports frequently in felony cases also use the reports frequently in misdemeanor cases; three circuits, however, use the report in every felony case but not at all in misdemeanor cases.

[281] GA. CODE ANN. § 27-2503 (Spec. Supp. 1974). The pre-sentence hearing was formerly required by § 27-2534, which was repealed and replaced by the current § 27-2503. Under the old law, the sentencing was done by the jury. Effective July 1, 1974, the judge decides the sentence, except in cases in which the death penalty may be imposed.

[282] GA. CODE ANN. § 27-2503 (Spec. Supp. 1974).

[283] GA. CODE ANN. § 27-2727 (1972).

[284] *Id.*

[285] GA. CODE ANN. § 27-2728 (1972).

[286] One study revealed that ten judges *in the same Georgia Circuit* varied as to the percentage of cases in which they sentenced the defendant to some confinement, from 35.9% to 61.3%. The percentages of sentences involving *only* confinement ranged from 18.1% to 42.0% of the cases. It should be noted that no inconsistency within a court was found—i.e., no racial, sexual or other invidious discrimination. Atlanta Journal and Constitution, Aug. 11, 1974 at 2B. But the wide variations from court to court, even within the same circuit, are cause for concern.

[287] GA. CODE ANN. § 27-2527 (1972).

[288] GA. CODE ANN. § 27-2709 (1972).

[289] The judges interviewed by the authors indicated that they consider many factors in the probation decision, including the crime itself, the previous criminal record, family, educational, and employment background, and the presence or absence of mental or emotional problems.

[290] *See* note 286 *supra*.

[291] The State of Ohio has promulgated such lists. *See* OHIO REV. CODE ANN. § 2951.02 (Page Special Supp. 1973). The criteria are as follows:

> (A) In determining whether to suspend sentence of imprisonment and place an offender on probation, the court shall consider the risk that the offender will commit another offense and the need for protecting the public therefrom, the nature and circumstances of the offense, and the history, character, and condition of the offender.
>
> (B) The following do not control the court's discretion, but shall be considered in favor of placing an offender on probation:
>
> 1. The offense neither caused nor threatened serious harm to persons or property, or the offender did not contemplate that it would do so.
> 2. The offense was the result of circumstances unlikely to recur.
> 3. The victim of the offense induced or facilitated it.
> 4. There are substantial grounds tending to excuse or justify the offense, though failing to establish a defense.
> 5. The offender acted under strong provocation.
> 6. The offender has no history of prior delinquency or criminal activity, or has led a law-abiding life for a substantial period before commission of the present offense.
> 7. The offender is likely to respond affirmatively to probationary treatment.

8. The character and attitudes of the offender indicate that he is unlikely to commit another offense.
9. The offender has made or will make restitution or reparation to the victim of his offense for the injury, damage, or loss sustained.
10. The imprisonment of the offender will entail undue hardship to himself or his dependents.

. . . .

(D) The following do not control the court's discretion, but shall be considered against placing an offender on probation:

1. The offender has recently violated the conditions of any probation, parole, or pardon previously granted him.
2. There is a substantial risk that while at liberty during the period of probation the offender will commit another offense.
3. The offender is in need of correctional or rehabilitative treatment that can best be provided by his commitment to a penal or reformatory institution.

(E) The criteria listed in divisions (B) and (D) of this section shall not be construed to limit the matters which may be considered in determining whether to suspend sentence of imprisonment and place an offender on probation.

[292] For a similar suggestion in another area, *see* text accompanying notes 352-355, *infra*.

[293] *See* text accompanying notes 81-97 *supra*.

[294] Although commentators most often discuss *parole* prediction tables, they often mention the equal potential for application to probation. *See, e.g.,* GLASER, *supra* note 85, at 289, 291.

[295] *See* text accompanying note 96 *supra*.

[296] *See* CORRECTIONS, *supra* note 11, at 576; TASK FORCE, *supra* note 19, at 18.

[297] This evidence would include such things as the offender's motivation, and his residential, educational, employment, and emotional background.

[298] GA. CODE ANN. § 77-512 (1972). In practice, in almost all cases in which a pre-sentence report has been prepared, it is used by the Parole Board in lieu of a pre-parole social investigation report. *See* text accompanying note 45 *supra*. When a pre-sentence report is prepared for a defendant who clearly deserves some incarceration time, the preparation is not a waste of resources. In addition to aiding the judge in determining the appropriate length of incarceration or the appropriate mix of incarceration and probation (split-sentence), and aiding the institution charged with rehabilitation, preparation of the report relieves the probation/parole supervisors from later conducting a similar pre-parole investigation.

[299] *See, e.g.,* ALA. CODE tit. 42, § 21 (1958) (defendant cannot be placed on probation until a pre-sentence investigative report is considered by the court); S. C. CODE ANN. § 55-592 (1962) (same, if the services of a probation officer are available); FLA. R. CRIM. P. 3.710 (no sentence *other than* probation can be imposed for a first offender or for a defendant under 18 unless a report has been considered by the court).

[300] *See* note 280 *supra*, for the frequency of use in Georgia.

[301] *Cf.* TASK FORCE, *supra* note 19, at 18. The variance in sentencing in Georgia is described *supra* note 286.

[302] *See* CORRECTIONS, *supra* note 11, at 184 & 576, and the studies cited therein.

[303] *See* note 280 *supra*.

[304] *See* text accompanying notes 388-390 *infra*.

[305] *See, e.g.,* CAL. PENAL CODE § 1203 (West Supp. 1975) (in every felony case eligible for probation consideration); N. J. CT. (CRIM.) R. 1 3:21-2 (unless the defendant requests, and the prosecutor agrees, that it not be made); N. Y. CRIM. P. LAW 390.20 (1971) (Report is required in every felony. Also, the court may not sentence a misdemeanant to probation, to a reformatory, or to an aggregate sentence greater than 90 days without a report).

[306] *See* note 298 *supra.*

[307] *See* CORRECTIONS, *supra* note 11, at 184-85.

[308] This is form CBS-1B, a copy of which is in the Appendix.

[309] ALA. CODE tit. 42, § 23 (1958) (in no case will the defendant and his counsel be denied the right to inspect the report); CAL. PENAL CODE § 1203(a) (West Supp. 1975) (the report must be made available to the parties at least two days before the hearing and five days if the defendant so requests, and if the defendant does not have an attorney, the probation officer who prepared the report must discuss its contents with the defendant); MINN. STAT. § 609.115(4) (1971) (the report is open to the prosecutor and defense attorney, either of whom can call for a hearing in chambers on any matter in issue, but confidential sources are not disclosable absent the court's directive); FLA. R. CRIM. P. 3.713 (the court must disclose the information to the parties at a reasonable time prior to sentencing).

In *State v. Kunz,* 55 N.J. 128, 259 A.2d 895 (1969), the New Jersey Supreme Court ordered disclosure as a matter of "rudimentary fairness."

[310] Unit Coordinator Questionnaire, *supra* note 211.

[311] *See, e.g.,* CORRECTIONS, *supra* note 11, at 189; THE PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 20 (1967).

The defendant's "right to know" is not necessarily a legal right; due process does not require disclosure in every case. *See, e.g.,* United States v. Murphy, 497 F.2d 126 (5th Cir. 1974). *But see* State v. Kunz, 55 N.J. 128, 259 A.2d 895 (1969) (disclosure a matter of "rudimentary fairness"). The Federal Rules of Criminal Procedure, Rule 32(c)(2), permits disclosure at the discretion of the trial judge. United States v. Miller, 495 F.2d 362 (7th Cir. 1974), struck down one judge's blanket policy of no disclosure—Rule 32(c)(2) required the discretion to be used. *See also* Shelton v. United States, 497 F.2d 156 (5th Cir. 1974) (disclosure should have been made in the particular case).

[312] *See* MODEL PENAL CODE § 7.07(5) (Proposed Official Draft, 1962):

> Before imposing sentence, the Court shall advise the defendant or his counsel of the factual contents and the conclusions of any pre-sentence investigation or psychiatric examination and afford fair opportunity, if the defendant so requests, to controvert them. The sources of confidential information need not, however, be disclosed.

[313] CORRECTIONS, *supra* note 11, at 577.

[314] GA. CODE ANN. § 27-2709 (1972). The only exceptions are for the offenses of abandonment and bastardy, for which the probation period may last until the child is 21 and 14, respectively.

[315] Florida is a notable exception, allowing probation for up to two years beyond the maximum prison term. FLA. STAT. ANN. § 948.04 (1973).

[316] N.J. STAT. ANN. § 2A:168-1 (1971); S.C. CODE ANN. § 55-594 (1962).

[317] N.Y. PENAL LAW § 65.00 (1967).

[318] *Id.*

[319] Only one circuit out of the 38 responding indicated that no probationers were serving sentences in excess of five years. In some circuits, it was estimated that up to forty or fifty percent of probationers were serving such sentences. Unit Coordinator Questionnaire, *supra* note 211.

[320] Thirty-three out of 39 respondents to the Unit Coordinator Questionnaire, *supra* note

211, agreed with that idea. Thirty-one favored a five-year maximum, although many would set it *lower*.

[321] Interview with W. A. Cooper, Unit Coordinator for the Gwinnett Circuit, Georgia Department of Offender Rehabilitation, at Lawrenceville, Georgia, July 30, 1974.

[322] For example, of 725 probation revocations in fiscal year 1974, 50 were total revocations and 675 were partial revocations. Statistics supplied by Georgia Department of Offender Rehabilitation.

[323] 408 U.S. 471, 488 (1972). *Gagnon v. Scarpelli* specifically held the *Morrissey* requirements applicable to probation revocation. 411 U.S. 778, 782 (1973). *See also* Mempha v. Rhay, 389 U.S. 128 (1967); Hinton v. State, 127 Ga. App. 853, 195 S.E.2d 472 (1973). For a discussion of the *Morrissey* requirements *see* text accompanying notes 193-210, *supra*.

[324] GA. CODE ANN. § 27-2713 (1972). In addition, the sentencing court retains jurisdiction over all probationers during the time originally prescribed for the sentence to run. GA. CODE ANN. §§ 27-2709 to -2714 (1974). *See also* Todd v. State, 107 Ga. App. 771, 131 S.E.2d 201 (1963).

[325] Out of 36 responses to the Unit Coordinator Questionnaire, *supra* note 211, 5 indicated that between 0-25% of probation delinquency reports result in final revocation, 8 indicated that between 26-50% result in final revocation, 10 indicated between 51-75%, and 13 indicated between 76-100%.

[326] However, out of 25 responses to the Unit Coordinator Questionnaire, *supra* note 211, all indicated that the probationer's supervisor always attends and testifies at the hearing.

[327] Out of 26 responses to the Unit Coordinator Questionnaire, *supra* note 211, 13 indicated that the probationer calls witnesses 0-25% of the time, 6 indicated that witnesses are called 26-50% of the time, 1 indicated between 51-75%, and 6 between 76-100%.

[328] Out of 27 responses to the Unit Coordinator Questionnaire, *supra* note 211, 8 indicated that counsel was present between 0-25% of the time, 2 indicated that counsel was present between 26-50% of the time, 2 indicated between 51-75%, and 15 indicated between 76-100%.

[329] Out of 21 responses to the Unit Coordinator Questionnaire, *supra* note 211, 1 indicated that between 0-25% of probation preliminary hearings result in final hearings, 4 indicated that between 26-50% result in final hearings, 4 indicated between 51-75%, and 12 indicated between 76-100%.

[330] GA. CODE ANN. § 27-2713 (1972).

[331] However, out of 31 responses to the Unit Coordinator Questionnaire, *supra* note 211, all indicated that the probationer's supervisor always attends and testifies at the hearing.

[332] Out of 34 responses to the Unit Coordinator Questionnaire, *supra* note 211, 7 indicated that the probationer is represented by counsel between 0-25% of the time, 1 indicated between 26-50% of the time, 3 indicated between 51-75%, and 23 indicated between 76-100%.

[333] *See, e.g.*, Reece v. Pettijohn, 229 Ga. 619, 193 S.E.2d 841 (1972); Dutton v. Willis, 223 Ga. 209, 154 S.E.2d 221 (1967). The Supreme Court has also refused to adopt a per se rule that counsel is required in probation revocation hearings. Instead, the question is to be determined on a case-by-case basis. Gagnon v. Scarpelli, 411 U.S. 778 (1973).

[334] Out of 31 responses to the Unit Coordinator Questionnaire, *supra* note 211, 11 indicated that probationers present witnesses in 0-25% of the hearings, 9 indicated 26-50%, 4 indicated 51-75%, and 7 indicated 76-100%.

[335] No oaths were administered in any of the hearings attended by the authors of this report.

[336] For example, in *Cross v. State*, 128 Ga. App. 774, 197 S.E.2d 853 (1973), the court reduced the period of probation but required that the remainder be served in a penal institution.

[337] 127 Ga. App. 853, 195 S.E.2d 472 (1973); *see* Morgan v. Foster, 208 Ga. 630, 68 S.E.2d

583 (1952); Cross v. Huff, 208 Ga. 392, 67 S.E.2d 124 (1951). *See also* Chastain v. State, 75 Ga. App. 880, 45 S.E.2d 81 (1947).

[338] *See* GA. CODE ANN. §§ 27-2705 to -2713 (1972). *See, e.g.*, Cooper v. State, 118 Ga. App. 57, 162 S.E.2d 753 (1968); Sellers v. State, 107 Ga. App. 516, 130 S.E.2d 790 (1963).

[339] *See, e.g.*, Rainwater v. State, 127 Ga. App. 406, 193 S.E.2d 889 (1972); Turner v. State, 119 Ga. App. 117, 166 S.E.2d 582 (1969); Cooper v. State, 118 Ga. App. 57, 162 S.E.2d 753 (1968); Sellers v. State, 107 Ga. App. 516, 130 S.E.2d 790 (1963); Sparks v. State, 77 Ga. App. 22, 47 S.E.2d 678 (1948); Olsen v. State, 21 Ga. App. 795, 95 S.E. 269 (1918).

[340] *See* Rowland v. State, 124 Ga. App. 494, 184 S.E.2d 494 (1971); Dickson v. State, 124 Ga. App. 406, 184 S.E.2d 37 (1971); Sellers v. State, 107 Ga. App. 516, 130 S.E.2d 709 (1963); Bryant v. State, 89 Ga. App. 891, 81 S.E.2d 556 (1954).

[341] Hinton v. State, 127 Ga. App. 853, 195 S.E.2d 472 (1973).

[342] *See, e.g.*, Manning v. United States, 161 F.2d 827 (5th Cir.), *cert. denied*, 332 U.S. 792 (1947); *Ex parte* Maguth, 103 Cal. App. 572, 284 P. 940 (1930). *See generally Probation and Criminal Justice* 31 (Glueck ed. 1933).

[343] Comment, *Discretionary Power and Procedural Rights in the Granting and Revoking of Probation*, 60 J. CRIM. L. C. & P.S. 479, 485 (1969).

[344] *See* United States v. Murray, 275 U.S. 347 (1928).

[345] Of course, once this determination is made, broad discretion is required to determine what sanction, if any, should be imposed. *See* text accompanying note 356 *infra*.

[346] Comment, *Discretionary Power and Procedural Rights in the Granting and Revoking of Probation*, 60 J. CRIM. L. C. & P. S. 479, 485 (1969).

[347] Most studies have indicated this to be the case. *See, e.g.*, 1966 Ann. Rep. Admin. Office of the United States Courts 127 (1966); TASK FORCE, *supra* note 19.

[348] *See, e.g.*, K.C. DAVIS, DISCRETIONARY JUSTICE (1969). Indeed, too much discretion in the revocation process may mean not only inconsistent law, but no law at all; the very nature of law implies governance through a generally applicable set of rules.

[349] *See, e.g.*, Gagnon v. Scarpelli, 411 U.S. 778 (1973); Morrissey v. Brewer, 408 U.S. 471 (1972).

[350] *See, e.g.*, Burns v. United States, 287 U.S. 216 (1932). The theory behind the broad grant of power was usually that probation was a mere privilege. *See* Escoe v. Zerbst, 295 U.S. 490 (1935); State v. Duncan, 270 N.C. 241, 154 S.E.2d 53 (1967). *See generally* Note, *Legal Aspects of Probation Revocation*, 59 COLUM. L. REV. 311, 319 (1959).

[351] *See* Sklar, *Law and Practice in Probation and Parole Revocation Hearings*, 55 J. CRIM. L. C. & P. S. 175 (1964).

[352] GA. CODE ANN. § 27-2713 (1972), the probation revocation section, provides only the procedural requirements for revocation.

[353] Gay v. State, 101 Ga. App. 225, 113 S.E.2d 223 (1960). *See* Georgia v. State, 99 Ga. App. 892, 109 S.E.2d 883 (1959); Simmons v. State, 96 Ga. App. 718, 101 S.E.2d 111 (1957); Allen v. State, 78 Ga. App. 526, 51 S.E.2d 571 (1949).

[354] For a similar problem in another area *see* note 177 *supra*.

[355] AMERICAN BAR ASSOCIATION PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO PROBATION § 5.1(1) (1970).

[356] *Id.* at §5.1(b):

> It would be appropriate for standards to be formulated as a guide to probation departments and courts in processing the violation of conditions. In any event, the following intermediate steps should be considered in every case as possible alternatives to revocation: (i) a review of the conditions, followed by changes where necessary or desirable; (ii) a formal or informal conference with the probationer to re-emphasize the necessity of compliance with the conditions; (iii) a formal or informal warning that further violations could result in revocation.

[357] GA. CODE ANN. § 77-517 (1973).

[358] *Id.* Although this statute appears to impose these duties on the Board, the Board has specified what constitutes violations for only *three* of the many terms and conditions imposed on parolees—residence, employment, and leaving the state. In addition, these violations are defined in a now outdated pamphlet. *See* Georgia State Board of Pardons and Paroles, *Policies, Rules, and Regulations* 31 (1971).

[359] *See* "Statement of the Conditions Under Which This Parole is Granted," in Appendix.

[360] *See* GA. CODE ANN. § 77-517 (1973).

[361] The Model Penal Code has indicated a dislike for optional conditions because of the possibility of "loose" and "unrealistic" conditions. MODEL PENAL CODE § 305.17, Comment (Tent. Draft No. 5, 1956).

[362] Comment, *The Parole System,* 120 U. PA. L. REV. 282, 307 (1971).

[363] Revocations for such harmless violations may also be subject to reversal by the courts. In *Arciniega v. Freeman,* 404 U.S. 4 (1971), the Supreme Court in a *per curiam* opinion reversed a revocation based on the parolee's association with other ex-convicts. The evidence offered below to support the charge was that the parolee worked at a restaurant-night club which employed other ex-convicts. The Court did not believe that the particular parole condition was intended to apply to incidental contacts in the course of legitimate employment, nor did it believe that occupational association alone would constitute the "satisfactory evidence" required by the parole board's regulations. Otherwise, a parolee would be subject to imprisonment whenever an employer who is willing to employ ex-convicts hires more than one.

[364] DRESSLER, *supra* note 14, at 238.

[365] *See* CORRECTIONS, *supra* note 11, at 412-13. For example, the state of Washington has recently reduced the number of standard conditions to four.

[366] For the result of one of the rare Supreme Court cases in this area, see note 363 *supra.*

[367] For an interesting study on how real these differences may be, *see* GLASER, *supra* note 85, at 429.

[368] Some conditions imposed in other states have been unconstitutional. *See, e.g.,* McGregor v. Schmidt, 358 F. Supp. 1131, 1138 (W.D. Wisc. 1973) (right to travel); Hyland v. Procunier, 311 F. Supp. 749, 750 (N.D. Cal. 1970) (prohibiting parolees from making public speeches has a "chilling effect" on freedom of speech). *But see* Birzon v. King, 469 F.2d 1241 (2d Cir. 1972); Hyser v. Reed, 318 F.2d 225 (D.C. Cir. 1963), *cert. denied,* 375 U.S. 957 (1964); Himmage v. State, 88 Nev. 296, 496 P.2d 763 (1972); People v. Sickler, 61 Misc. 2d 571, 306 N.Y.S.2d 168 (1969).

[369] In general, the conditions which have been struck down have been those which are unreasonable, impossible to perform, or unfair. *See, e.g.,* People *ex rel.* Pring v. Robinson, 409 Ill. 105, 98 N.E.2d 119, *cert. denied,* 342 U.S. 879 (1951); Still v. State, 256 A.2d 670 (Me. 1969); State v. Brantley, 353 S.W.2d 793 (Mo. 1962); Crooks v. Sanders, 123 S.C. 28, 115 S.E. 760 (1922).

At least one commentator has expressed doubt concerning the legal validity of a regulation which requires that a prospective parolee waive his right to an extradition hearing in the event of arrest in another state. *See* Arluke, *A Summary of Parole Rules,* in KAY AND VEDDER, 1 *supra* note 257, at 115. This issue has been decided in several states, all of which have held the condition valid. *See, e.g.,* Reed v. State, 251 A.2d 549 (Del. 1969); State *ex rel.* Swyston v. Hedman, 288 Minn. 530, 179 N.W.2d 282 (1970); Schwartz v. Woodahl, 157 Mont. 479, 487 P.2d 300 (1971).

[370] *See* CORRECTIONS, *supra* note 11, at 412-13, 433-34.

[371] GA. CODE ANN. § 27-2711 (1972). This section lists ten conditions which *may* be imposed: (1) avoid injurious and vicious habits; (2) avoid persons and places of disreputable or harmful character; (3) report to the probation officer; (4) permit the supervisor to visit the

probationer at home or elsewhere; (5) work faithfully at suitable employment; (6) remain within a specified location; (7) make reparation or restitution to aggrieved persons; (8) support legal dependents; (9) violate no laws and be of general good behavior; (10) agree to waive extradition. GA. CODE ANN. § 27-2723 (1972) further provides that the probationer has a duty to keep his supervisor informed as to his whereabouts.

[372] These standard conditions are: (1) Do not violate the criminal laws of any governmental unit; (2) Avoid injurious and vicious habits—especially alcoholic intoxication and narcotics and other dangerous drugs unless prescribed lawfully; (3) Avoid persons or places of disreputable or harmful character; (4) Report to the Probation-Parole Supervisor as directed and permit such Supervisor to visit him (her) at home or elsewhere; (5) Work faithfully at suitable employment insofar as may be possible; (6) Do not change his (her) present place of abode, move outside the jurisdiction of the Court, or leave the State for any period of time without prior permission of the Probation Supervisor; (7) Support his (her) legal dependents to the best of his (her) ability.

[373] *Gay v. State*, 101 Ga. App. 225, 113 S.E.2d 223 (1960), held that a court has the authority to impose conditions not specifically enumerated in the Code. *See* George v. State, 99 Ga. App. 892, 109 S.E.2d 883 (1959). One interesting optional condition that was imposed on a lawyer who forged a warranty deed was that he not engage in the practice of law for one year. *See* Yarbrough v. State, 119 Ga. App. 46, 166 S.E.2d 35 (1969).

[374] 124 Ga. App. 190, 183 S.E.2d 413 (1971). *See also* Dunahoo v. State, 124 Ga. App. 471, 184 S.E.2d 359 (1971).

[375] "While few young men would choose to serve a sentence rather than cut their hair, even fewer would finish with a sense of respect for criminal justice." 124 Ga. App. at 195.

[376] Morgan v. Foster, 208 Ga. 630, 631, 68 S.E.2d 583, 584 (1952). *See* Rowland v. State, 124 Ga. App. 494, 184 S.E.2d 494 (1971).

[377] Rowland v. State, 124 Ga. App. 494, 184 S.E.2d 494 (1971); Bryant v. State, 89 Ga. App. 891, 81 S.E.2d 556 (1954).

[378] MODEL PENAL CODE § 301.1 (Proposed Official Draft, 1962). *See also* MODEL PENAL CODE § 301.1 (Tent. Draft No. 2, 1954).

[379] *See, e.g.*, MODEL PENAL CODE § 301.1, Comment 6 (Tent. Draft No. 2, 1954) ("While conditions . . . may be abusively imposed, we think a model statute must acknowledge such authority and rely for proper safeguards on the general requirement that the conditions be reasonable and likely to assist the defendant to lead a law-abiding life."

[380] AMERICAN BAR ASSOCIATION, PROJECT ON STANDARDS FOR CRIMINAL JUSTICE: STANDARDS RELATING TO PROBATION § 3.2(b) (1970).

[381] *Id.* at 47.

[382] *See generally* DiCerbo, *When Should Probation Be Revoked?* 30 FED. PROB. 12 (June 1966).

[383] State v. Moretti, 50 N.J. Super. 223, 244, 141 A.2d 810, 823 (1958).

[384] DRESSLER, *supra* note 14, at 159.

[385] GLASER, *supra* note 85, at 423.

[386] *Id.*

[387] One supervisor indicated that termination occurs very infrequently. Interview with Jerry Holladay, Probation-Parole Supervisor, Georgia Department of Offender Rehabilitation, in Atlanta, Georgia, July 17, 1974.

[388] Unit Coordinator Questionnaire, *supra* note 211.

[389] *Id.* One judicial district reported that one of its supervisors had a caseload of 220!

[390] The determination of what constitutes a manageable level varies depending on the supervisor and the individuals who must be supervised. California feels that 35 probationers and parolees per supervisor is manageable. *See* California Department of Corrections, *Work*

Unit Program, 1971 (1971). Several responses to our Unit Coordinator Questionnaire, *supra* note 211, indicated that 75 might be a manageable caseload.

[391] This data was compiled from the "Georgia Probation-Parole Supervisor's Monthly Report, July, 1974" (State Form CBS-10) [hereinafter referred to as *Monthly Reports*].

[392] *Data compiled from Monthly Reports, supra* note 391.

[393] For example, the Community Treatment Project of the California Youth Authority assigned supervisors to caseloads of ten. The special program had a recidivism rate of 39 percent compared to a 61 percent recidivism rate for the regular program. *See* Warren, *The Case for Differential Treatment of Delinquents*, 381 ANNUALS 47 (1969). *See also* Adams, *Some Findings From Correctional Caseload Research*, 31 FED. PROB. 48 (Dec. 1967).

[394] *See* CORRECTIONS, *supra* note 11, at 409, 428.

[395] This additional delay results from the time consumed by procedures such as the preliminary hearing, which precede the final revocation. *See* text accompanying notes 211-29 *supra*.

[396] Interview with Jim Hudgins, Chief Probation-Parole Supervisor, Georgia Department of Offender Rehabilitation, in Smyrna, Georgia, July 19, 1974.

[397] The Unit Coordinator Questionnnaire, *supra* note 211, revealed that although only one judicial circuit had actually implemented intensive supervision, eleven circuits planned to implement it by Fall, 1974.

[398] For an evaluation of intensive supervision in California, *see* ADAMS AND HOPKINSON, INTERIM EVALUATION OF THE INTENSIVE SUPERVISION CASELOAD PROJECT, CALIFORNIA DEPARTMENT OF CORRECTIONS (1964).

[399] GA. CODE ANN. § 27-2712 (1972).

[400] *Id.*

[401] Out of 37 responses to the question of how often the recommendation is followed, 27 Unit Coordinators indicated that it is followed 90% or more of the time. Unit Coordinator Questionnaire, *supra* note 211.

[402] Even when the progress report is made, the required recommendation is not always included. Unit Coordinator Questionnaire, *supra* note 211.

[403] Pownall, *Employment Problems of Released Prisoners*, 3 MANPOWER 26 (Jan. 1971). *See also* GLASER, *supra* note 85, at 311-361.

[404] For example, crimes such as robbery, burglary, forgery, theft, and embezzlement, clearly have monetary motives.

[405] This section of the report deals with post-release aid and assistance; therefore, programs for *incarcerated* individuals are discussed only briefly. *See* text accompanying notes 421-427 *infra*.

[406] For example, 55 per cent of the Georgia offender population require vocational training, and 31 percent of all incarcerants academically achieve below the fourth grade level. *See* GEORGIA DEPARTMENT OF OFFENDER REHABILITATION REPORT, 1972-73 (1973).

[407] *See generally* Sullivan, *Changes in Corrections: Show or Substance?*, 3 MANPOWER 1, 6 (Jan. 1971) [hereinafter cited as Sullivan] ("If society is serious about social reintegration of ex-offenders, transitorial management programs and facilities must have the capacity to establish and reinforce the rights of prisoners and ex-inmates to work.").

[408] *See, e.g.*, CORRECTIONS, *supra* note 11, at 411; TASK FORCE, *supra* note 19, at 32-34.

[409] A steady job at a low level with low pay and low prestige will not produce feelings of pride and achievement in the ex-offender, and may tend to confirm the offender's view that there is no future for him in legitimate work and force him back to crime. *See* Sullivan, *supra* note 407, at 6.

[410] *See, e.g.*, GA. CODE ANN. § 77-514 (1973).

[411] An offer of employment is a commitment signed by an employer stating that he will hire the parolee upon release.

[412] *See generally* TASK FORCE, *supra* note 19, at 68-9.

[413] 29 U.S.C. § 871(c) (1974).

[414] These programs were initiated in Arizona, Georgia, Massachusetts, Oklahoma, and Pennsylvania.

[415] Increasing numbers of correctional programs and personnel have been devoted to developing resources and services to reduce the social isolation of incarcerated offenders, facilitating social reintegration of released offenders, and giving offenders new, realistic, but noncriminal access to the world of work and to the opportunity structures of a society that tends to equate capacity for self-management with having a legitimate job and money in one's pocket.

Sullivan, *supra* note 407, at 2.

[416] 42 U.S.C. § 2571 *et seq.* (1973) (hereinafter referred to as MDTA).

[417] 29 U.S.C. § 801 *et seq.* (1974).

[418] *See* note 403 *supra*.

[419] For example, note the success of the Atlanta pretrial intervention program discussed at the text accompanying notes 431-434 *infra*. For a full discussion of pretrial intervention see Chapter I.

[420] Although these were originally funded by the United States Department of Labor, an increasing number of these programs are now coming under the sponsorship of the Georgia Department of Labor.

[421] The training received varies from carpentry and auto repair to accounting and mechanical drafting.

[422] UNITED STATES DEPARTMENT OF LABOR, CORRECTIONAL MANPOWER PROGRAMS 5 (1973) [hereinafter cited as CORRECTIONAL MANPOWER PROGRAMS].

[423] The Georgia Training and Development Center, the Georgia Rehabilitation Center for Women, and the Savannah, Valdosta, and Walker County Area Vocational Training Schools have these programs.

[424] Federal funds were acquired by Georgia during June, 1973, to expand the training in the area technical schools to an additional 75 inmates. MANPOWER SERVICES DIVISION OF THE GEORGIA DEPARTMENT OF LABOR, CORRECTIONAL MANPOWER PROGRAM (1973).

[425] GEORGIA DEPARTMENT OF OFFENDER REHABILITATION REPORT 1972-73 (1973).

[426] Vocational education is most prominent at the Georgia Industrial Institute and the Georgia Training and Development Center. At the Georgia Industrial Institute the Georgia Department of Education offers many vocational courses including plumbing, small engine repair, upholstery, woodworking, welding, barbering, masonry, auto mechanics, and food service training. The training programs at the Georgia Training and Development Center are not as extensive but vary from drafting and graphic arts to motorcycle repair. *Id.*

[427] There are over one thousand inmates enrolled in the basic education programs throughout the state. *Id.*

[428] *See* CORRECTIONAL MANPOWER PROGRAMS, *supra* note 422, at 4.

[429] Over a quarter of a million dollars in bonding coverage were provided for ex-offenders during 1973 in Georgia under this program. MANPOWER SERVICES DIVISION OF THE GEORGIA DEPARTMENT OF LABOR, CORRECTIONAL MANPOWER PROGRAM (1973).

[430] Over 4,200 ex-offenders have enhanced their employment prospects through the program, while the default rate on the bonds has been only 1.6%. *See* CORRECTIONAL MANPOWER PROGRAMS, *supra* note 422, at 4.

[431] *See* note 434 *infra*.

[432] Pretrial intervention projects have been started in Atlanta, Baltimore, Boston, Cleveland, Minneapolis, Newark, San Antonio, and San Francisco.

[433] CORRECTIONAL MANPOWER PROGRAMS, *supra* note 422.

[434] During 1973, the Atlanta project enrolled 478 participants with 332 successfully completing the program. Recommendations were submitted to the prosecutor that these 332 cases be disposed of by means other than trial. The prosecutor accepted all but two of these recommendations. Of the persons successfully completing the program, 199 had been arrested and charged with felonies prior to acceptance into the project. The present recidivism rate under the Atlanta program is only 5.2%. Interview with John Dick, Supervisor of the Correctional Manpower Program of the Georgia Department of Labor, Atlanta, August 29, 1974. However, this recidivism rate is for a *select* group of individuals and should neither be compared to the overall recidivist rate for all offenders nor ignored. The rate is merely a good indication of the effectiveness of the particular program.

[435] The employment service models are examples of concentrated employment resources. CORRECTIONAL MANPOWER PROGRAMS, *supra* note 422, at 5.

[436] The models operate in Arizona, Georgia, Massachusetts, Oklahoma, and Pennsylvania. *Id.*

[437] *Id.*

[438] *Id.*

[439] MANPOWER SERVICES DIVISION OF THE GEORGIA DEPARTMENT OF LABOR, CORRECTIONAL MANPOWER PROGRAM (1973).

[440] *Id.*

[441] There are four pre-release centers. They are located at Jackson, Alto, Reidsville, and Walker Prisons.

[442] Interview with John Dick, *supra* note 434.

[443] Upon release from Georgia state or county correctional institutions, an inmate is provided with the names and addresses of all local service offices and representatives.

[444] Evaluation units operate at Jackson, Walker, Alto, and Reidsville. Interview with John Dick, *supra* note 434.

[445] During 1973, 4,701 inmates were tested, evaluated, and had a plan of action recommended by the units. MANPOWER SERVICES DIVISION OF THE GEORGIA DEPARTMENT OF LABOR, CORRECTIONAL MANPOWER PROGRAM (1973).

[446] The states which have received these grants are Florida, Illinois, Maryland, Michigan, New Jersey, North Carolina, South Carolina and Texas.

[447] CORRECTIONAL MANPOWER PROGRAMS, *supra* note 422, at 6.

[448] *Id.*

[449] CORRECTIONAL MANPOWER PROGRAMS, *supra* note 422, at 8.

[450] *See* Stanton, *Is It Safe to Parole Inmates without Jobs?*, 12 CR. & DEL. 147, 150 (1966).

[451] As one interviewee noted, "nine out of every ten dollars in corrections should go into pretrial programs." Interview with John Dick, *supra* note 434.

[452] Interview with John Dick, *supra* note 434.

[453] The power is granted by the Georgia Constitution:

> The State Board of Pardons and Paroles shall have power to grant reprieves, pardons and paroles, to commute penalties, remove disabilities imposed by law, and may remit any part of a sentence for any offense against the State, after conviction except in cases in which the Governor refuses to suspend a sentence of death . . . .

GA. CONST. art. V, § 1. The power to determine procedures is given to the Parole Board by statute:

> . . . The Board shall adopt rules and regulations governing the granting of other forms of clemency which shall include pardons, reprieves, commutation of penalties, . . . and the remission of any part of a sentence, and shall prescribe the procedure to be followed in applying for them.

GA. CODE ANN. § 77-525 (1973). The same code section also specifically permits the granting of exceptions to parole eligibility requirements. As for parole, a majority of the five-member

Board is required for other cases of clemency. GA. CODE ANN. § 77-513 (1973).

[454] Telephone interview with Silas Moore, Parole Review Officer, Georgia State Board of Pardons and Paroles, Atlanta, September 4, 1974. *See* Administrative Rules, *supra* note 35, ch. 475-3-.10.

[455] Administrative Rules, *supra* note 35, ch. 475-3-.10(1)(d).

[456] *Id.* at ch. 475-3-.10(1)(b).

[457] 1972 Ga. Laws 579-85 (codified at GA. CODE ANN. § 77-342 to 344 (1973)).

[458] *See* note 454 *supra*.

[459] *Id.*

[460] *See* note 485 *infra* and accompanying text.

[461] *See* note 454 *supra*.

[462] Administrative Rules, *supra* note 35, ch. 475-3-.10(8).

[463] *See* GA. CODE ANN. § 77-525 (1973).

[464] Administrative Rules, *supra* note 35, ch. 374-3-.06(4).

[465] *See* ANNUAL REPORT, *supra* note 57, at 5.

[466] The Board has indicated that a rehabilitative program which might satisfy this requirement is admission, within three months of regular parole consideration, into a college, technical school, or other educational facility. The Board will also consider recommendations from the Department of Offender Rehabilitation that an inmate can and will improve his situation if given an early release, has already made substantial progress towards rehabilitation, and will abide by rules of a free society. *Id.* at 4-5.

[467] *Id.* at 5.

[468] Administrative Rules, *supra* note 35, ch. 475-3-.06(4). This requirement is in accordance with GA. CODE ANN. § 77-542 (1973), which requires a written record of all contracts between Board members and persons acting on behalf of inmates. This section further requires that an indexed file of all contracts be maintained and that a copy be kept with the names and addresses of the individuals contacting the Board and the reason for the contact.

[469] GA. CODE ANN. § 77-516.1 (1973). When considering an exception for an inmate, any co-defendants are considered simultaneously. *See* ANNUAL REPORT, *supra* note 57, at 5. This policy seems to have stemmed, at least partially, from the "Judd Case" where one inmate was granted an exception and a co-defendant was not considered. For a news account of this case see *Atlanta Constitution*, June 17, 1962, § A, at 1.

[470] *See* note 454 *supra*.

[471] Administrative Rules, *supra* note 35, ch. 475-3-.10(2)(c).

[472] *See* note 454 *supra*.

[473] *See* note 454 *supra*.

[474] The program is described briefly in Administrative Rules, *supra* note 35, ch. 475-3-.10(1)(e).

[475] Split sentencing is widely used in Georgia. *See* note 286 *supra*.

[476] In Georgia, the Parole Board cannot consider, under their routine eligibility rules, an inmate who has served only 30 days. See text accompanying notes 89-101 and Table VII *supra*.

A "remission to probation," similar to shock probation and split-sentencing, can be initiated by the judge, and is not subject to regular parole eligibility dates. Telephone interview with Silas Moore, Parole Review Officer, Georgia State Board of Pardons and Paroles, Atlanta, September 4, 1974. The ultimate decision, however, belongs to the Parole Board. See text accompanying notes 459-62 *supra*.

[477] *See* OHIO REV. CODE ANN. § 2947.061 (Page Supp. 1972). Two other states presently use shock probation. *See* IND. ANN. STAT. § 9-2209 (Burns Supp. 1972); KY. REV. STAT. ANN. § 439.265 (Supp. 1972).

[478] OHIO REV. CODE ANN. § 2947.061 (Page Supp. 1972).

[479] The following table is the result of the seven year study:

Year	Number of Shock Cases	Shock Cases Recommitted	
		Number	Percent
1966	85	5	5.8
1967	183	26	14.2
1968	294	18	6.1
1969	480	48	10.0
1970	632	68	10.7
1971	907	83	9.2
1972	1292	115	8.9
TOTALS	3873	363	9.4

Source: Ammer, *Shock Probation in Ohio,* 3 CAP. U. L. REV. 33, 36 (1973).

[480] *See* notes 287, 288 *supra.*

[481] State v. Poffenbaugh, 140 Ohio App. 2d 59, 237 N.E.2d 147 (1968). If a hearing is held, the presence of the petitioner is not necessary. 70 OP. OHIO ATT'Y. GEN. 89 (Baldwin 1970).

[482] State v. Poffenbaugh, 140 Ohio App. 2d 59, 63, 237 N.E.2d 147, 150 (1968).

[483] *Id.* 140 Ohio App. 2d at 64, 237 N.E.2d at 152.

[484] IND. ANN. STAT. § 9-2209 (Page Supp. 1972).

[485] *See* Auldridge v. Womble, 157 Ga. 64, 120 S.E. 620 (1923); Porter v. Garmony, 148 Ga. 261, 96 S.E. 426 (1918); Stockton v. State, 70 Ga. App. 17, 27 S.E.2d 240 (1943); Matthews v. Swatts, 16 Ga. App. 208, 84 S.E. 980 (1915).

[486] *See* text accompanying note 478 *supra.*

[487] *See* note 484 *supra.*

CHAPTER FOUR

The Juvenile Justice System in Georgia

Chapter Four on juveniles examines the Georgia juvenile justice system, as statutorily authorized and as practically administered; at those points where decisions are made which directly or indirectly affect the possibility that a child will enter or remain in a government-run secure institution. Statutory and procedural changes will be proposed to reduce the utilization of secure institutions where such a reduction would be in the best interests of the public and the juveniles who come into contact with the system. This chapter is divided into two sections. First, a chronological overview of the system describes how a juvenile is handled as he passes through the system. It covers custody and referral to the juvenile court, the court's jurisdiction, detention, the choice between informal adjustment and formal adjudication, dispositional hearings, and the dispositional placements available to the court. Second, these areas are analyzed to show how the statute or administrative practices can be improved to reduce the use of secure insititutions.

I. Overview of the Present Juvenile Justice System

A. *Introduction*

The structure of the juvenile court system is set out in the Juvenile Court Code of 1971[1] which supercedes the 1951 Juvenile Court Act.[2] The new Code is largely based on the Uniform Juvenile Court Act of 1968[3] which incorporated the Supreme Court's recent procedural requirements for juvenile hearings,[4] and shifted the emphasis in the juvenile court system from punishment to rehabilitation and restoration to normal community life.[5] The Georgia Code section describing the purpose of the Juvenile Court Code states that a child is to be given care conducive both to his own welfare and the best interest of the State, preferably in his own home, and resembling as nearly as possible the care his parents should have given him.[6]

Before going into a description of the chronological sequence that a child follows when referred to the juvenile court, it will be helpful to set out a few definitions. The Juvenile Court Code defines a *child* as an individual under the age of 17 or an individual who committed an act of delinquency before reaching the age of 17 and is still under

21.[7] A basic distinction is made in the Code between a delinquent child, an unruly child, and a deprived child. A *delinquent child* is one who has committed a delinquent act and also is in "need of treatment or rehabilitation;"[8] a *delinquent act* is one which would be a crime if the actor was an adult, or a violation of the terms of probation.[9] An *unruly child* is in need of supervision, treatment, or rehabilitation and has (1) been habitually truant, (2) been habitually disobedient of his parents and ungovernable, (3) committed an offense applicable only to children, such as consuming liquor, (4) been a runaway from home, or (5) violated a curfew.[10] A *deprived child* either has been abandoned, has no parents or other custodian, or is found to be without proper parental care or control.[11] A *petition* is a written request to the court to make a formal adjudication and disposition of the case.[12]

B. *Custody and Referral*

There are a number of ways a child can be taken into custody in addition to being arrested by a policeman under the general laws of arrest. A child may be taken into custody by a policeman or an authorized court officer who has reasonable grounds to believe that (1) the child is unruly or has committed a delinquent act, (2) the child is ill, injured, or in immediate danger from his surroundings, or (3) has run away from home.[13] An officer who takes a child into custody has three basic alternatives: he may immediately release the child to the parents on their promise to bring the child before the court at the proper time; he may take the child to a court-designated detention center, shelter care facility, or medical facility, and give prompt written notice of such action to the parents and the court;[14] or he may take the child to intake officers at the juvenile court.[15] In a proper case the officer may also take the child before a superior court if that court has concurrent jurisdiction over the case.[16]

A child may also be referred to the court without having been taken into custody by an officer.[17] The claimant who might make such a referral could be a parent, school official, or a private citizen, such as an irate neighbor or a person who believes that the child's parents are depriving the child of proper parental care. Such a claimant can bring the matter to the attention of an intake officer, but a claimant cannot file a petition unless the intake officer deter-

mines that a formal adjudication of the matter will be in the best interests of the child and the public.[18]

C. *Jurisdiction*

The juvenile court has original jurisdiction over cases where a child is alleged to be delinquent, unruly, or deprived. This jurisdiction is exclusive except that the superior court has concurrent jurisdiction over delinquency cases which would be punishable by death or life imprisonment if tried in a superior court.[19] The juvenile court may also commit a mentally ill child, give judicial consent for marriage, employment or military service, terminate the legal parent-child relationship, and decide certain custody and support cases.[20] An initial determination whether the juvenile court has jurisdiction over each case should be made by an officer who takes the child into custody[21] and by the intake officer who handles the case.[22]

D. *Detention*

The Code contemplates that in instances where the child cannot be returned to the parents pending an adjudication, one of two placements will normally be used by the court: either a detention center or a shelter care facility. A detention center is a secure institution designed to hold juveniles temporarily, while a shelter care facility is a residential facility without secure confinement. When a person who has taken a child into custody presents the child at the courthouse, a detention center, or a shelter care facility, the intake officer must make an immediate investigation and release the child to his parents unless one of three criteria for holding the child is established: (1) detention or shelter care is necessary to protect the child, other persons, or property; (2) the child is likely to abscond or be physically removed from the jurisdiction of the court; or (3) the child has no parent or other custodian able to care for him and return him to court.[23] The last situation may arise when parents refer their child to the court and refuse to take the child home.[24] An informal detention hearing before the court must be held within 72 hours of the child's initial placement in detention.[25]

The Code also specifies and distinguishes places where delinquent, unruly, and deprived children may and may not be held.[26] Georgia maintains nine detention centers called Regional Youth

Development Centers (R.Y.D.C.) which are used for short-term detention of children awaiting institutional placement after adjudication and disposition,[27] and there are county operated detention centers in Chatham, Clayton, DeKalb and Fulton counties.[28] Both state and county detention centers must be operated pursuant to regulations[29] published by the State Board of Human Resources which has restricted the powers of detention staff and has provided for work, recreation, and education adapted to the individual needs of the child.[30] The state has also begun a program called Attention Homes which provides a community alternative to detention centers for non-serious or first-time offenders who do not need secure confinement, by paying private citizens to maintain beds for such children in their homes.[31]

E. *Informal Adjustment and Adjudication*

After the referral to the court, the determination of jurisdiction over the matter, and the decision either to release the child or detain him,[32] the intake officer must determine whether the case should be made to prevent further penetration into the juvenile justice system by means of an informal adjustment of the case.[33]

As is the case with its adult counterpart, pre-trial intervention,[34] participation in an informal adjustment must be voluntary.[35] The Code further requires that the intake officer determine that the *admitted* facts bring the case within the court's jurisdiction, and that an informal adjustment, rather than a formal adjudication, would best advance the interests of the public and the child.[36] The main criteria for diversion rather than adjudication appear to be (1) the seriousness of the offense, (2) the juvenile's prior record, and (3) the availability of help or services needed by the juvenile through an informal adjustment.[37] The scope of permitted informal adjustments, which is somewhat vaguely restricted by the Code to the giving of "counsel and advice,"[38] is analyzed in the second part of this chapter in the section dealing with informal adjustment.[39]

If the case is not dismissed or informally adjusted by the intake officer, a petition is filed requesting a formal adjudication, and a hearing on the facts of the case must be held within 30 days, or within 10 days if the child is in detention.[40] The general public is excluded from the hearing, which is held before the judge[41] without

a jury;[42] the child has the right to be represented by counsel,[43] to introduce evidence to be heard in his own behalf, to cross-examine witnesses against him, to exclude evidence which was illegally seized, to invoke the privilege against self-incrimination, and to the safeguard that out-of-court confessions must be corroborated in delinquency cases.[44] In a delinquency or unruly case the standard is proof beyond a reasonable doubt that the alleged acts occurred; the standard for finding that a child is deprived is proof by clear and convincing evidence.[45]

F. *Disposition*

A separate hearing must be held after the fact-finding or adjudicatory hearing, to determine whether it can be established by clear and convincing evidence that a delinquent or unruly child is in need of supervision, treatment, or rehabilitation.[46] The judge may conduct this dispositional hearing immediately after adjudicating the facts, or he may adjourn the proceedings and order court service workers or probation officers to make a sociological study of matters relevant to determining which available dispositional alternative should be utilized in the case.[47] He may place the child in detention for a reasonable time while awaiting a report of the sociological study.[48] At the close of this hearing the judge announces the disposition of the case, that is, the treatment that will be given the child.

The Code limits the dispositional alternatives open to the judge depending on whether the child has been found to be deprived, delinquent, or unruly. If the child is deprived, the court may transfer legal custody to certain parties other than the parents, but may not confine the child in any facility designated or operated for delinquents.[49] If the child is found to be a delinquent, and thereafter determined to be in need of treatment, the court may place him on probation, in a locally-operated institution or camp, or may commit him to the state;[50] an unruly child may also be treated as delinquent, except that commitment to the state may be used only as a last resort.[51] The Code also allows a child who has been adjudicated delinquent or unruly under the juvenile system to be transferred to the adult Department of Corrections if the juvenile judge finds that the child is not amenable to treatment or rehabilitation; the Department of Corrections must place the child in a facility of greater security and protection than a juvenile training school, but still

accord him individual rehabilitative treatment like other juveniles.[52]

II. Analysis

Whereas Part I of this chapter was intended to give the reader a basic familiarity with how the juvenile justice system in Georgia works, Part II will analyze the system and suggest improvements which could reduce the number of juveniles likely to be confined in detention centers and training schools and, in addition, make the system more closely achieve its goal: restoring children "whose well-being is threatened . . . [to the status of] secure, law-abiding members of society"[53] by giving them care conducive to their welfare and the best interests of the State.[54] The analysis will be selective, concentrating on the issues likely to have a significant effect on the population of secure institutions used to hold juveniles.

A. *Jurisdiction: Should the Unruly Jurisdiction be Abolished?*

Some commentators have called for an end to the juvenile court's participation in the resolution of unruly cases which do not involve criminal activity.[55] Because a large proportion of the cases referred to and adjudicated by the juvenile courts are unruly cases[56] which may involve the child's secure detention or commitment to a training school,[57] the removal of these cases from the jurisdiction of the court could be expected to reduce the number of children confined in these institutions. Arguments in favor of removal which will be discussed are that the juvenile justice system has a harmful effect on children; the coercive power of the state has no beneficial effect in unruly cases; unruly-type problems are school and parental rather than state responsibilities; and community-based programs can handle the problems of unruly children without the intervention of the courts.

1. Harmful effects of the system

It is evident that detention centers and training schools can have a detrimental effect on a child. In In re *M.*[58] the California Supreme Court noted that securely confining children pending adjudication was the worst producer of habitual criminals of all of the parts of the juvenile justice system.[59] In Georgia about 5% of those taken into

custody were detained longer than three days,[60] either in jail or in a detention center.[61] Unruly children are likely to be detained because in cases where the parent brings the child to court and refuses to take the child home, the judge has no alternative to detention other then scarce shelter care facilities.[62] Pre-adjudication detention is likely to be perceived by the child as punishment and can thus have a detrimental effect on his self-image and attitudes;[63] the child may enter detention with a problem at home or school and come out as a delinquent.[64] This effect is more pronounced upon first offenders and when detention is custodial in nature with little counseling.[65] A child who breaks a rule in detention may be placed in isolation or maximum security;[66] such treatment would intensify the child's feeling of punishment and the harm to his self-image.[67] Training school attendance presents the problem of further "reinforcement of [the child's] sense of personal deficiencies as part of the treatment process [which] has profoundly negative consequences."[68]

There is also evidence that the adjudicatory process itself has a harmful effect on children.[69] One detriment of this process is the stigma which society attaches to a child who has been labelled "unruly."[70] This stigma causes discriminatory treatment by employers, government agencies, educational institutions,[71] and private treatment programs,[72] and has not been reduced by labeling the child "unruly" rather than "delinquent."[73] The system also leaves its mark on the child's self-concept, an indicator of involvement in delinquent behavior,[74] which may be an important determinant of whether rehabilitation is at all possible.[75]

A recent study discovered that intake personnel made questionable uses of the unruly jurisdiction to the detriment of the children involved.[76] Many children whose cases could have been handled by the use of deprived petitions were handled as unruly. Thus, instead of the intake officer filing a deprived petition *against the parents,* who were at fault, the parents were allowed to file unruly petitions against the children for actions arising out of a poor home environment.[77] The choice of the unruly petition in these cases was attributed to the extra delays and formalities involved in deprivation cases, the relative ease of accusing and handling children rather than adults, and the tendency of intake officers to go along with the parents' desires.[78] Other children were handled as unruly when the

facts would have supported a delinquency petition; this was attributed to the ease of proving an unruly violation compared with proving a criminal act.[79]

Based on these and other observations[80] the study concluded that because judges cannot control the vast discretion judges must exercise under the parent-initiated jurisdiction, the juvenile court system should treat cases as either neglected or delinquent, or should not treat them at all:

> The service it mandates for the youth often seems incongruously small return on the court's investment of time and labor, especially in light of the imposition on the youth and his family . . . . [T]he disposition ultimately reached often appears to be inappropriate . . . those . . . subject to some type of regulating disposition are not greatly benefited.[81]

There are two ways in which it may be argued the juvenile court is uniquely able to help unruly children: the deterrent threat of use of the system's powerful sanctions and the "aura of the judicial robe" with its power to instill respect for the law.[82] Parents, however, have more powerful sanctions with which to threaten their children, such as corporal punishment,[83] and it is argued that the value of the "aura" of the judge is outweighed by the negative effects of the system such as stigmatization.[84] Researchers who studied juvenile offenders in a Mid-Western city concluded that the likelihood that a juvenile offender will adopt a criminal career increases with the severity of societal reaction to the juvenile behavior that has been labeled deviant.[85] Therefore, attempts to imprint the severity of the occasion upon the mind of a young offender by utilizing the judicial aura and threats of sanctions may be counter-productive; in fact some professionals who work with juveniles are of the opinion that threats to impose sanctions are ineffective with juveniles.[86] According to this view coercion should be abandoned in favor of attitude change programs which have been successful in "bringing about an understanding of the need for governing rules and laws."[87]

Senator Birch Bayh has summed up the effect of the juvenile justice system:

> Once a young person enters the juvenile justice system he will probably be picked up again for delinquent acts, and eventually he will graduate to a life of adult crime.[88]

2. Parental Authority

One question which must be answered in order to determine the proper scope of the jurisdiction of the juvenile court is the delineation of the court's role in resolving family disputes and shoring up parents' legal powers. It is argued that court action is needed to keep teenagers from roaming the streets responding to no authority;[89] that hardcore runaways unamenable to counseling will endanger themselves and be a burden on society unless the compulsion of the state is used;[90] that it is unreasonable to tell a sincere parent that nothing can be done;[91] that when an impasse between parent and child is reached, some authority must resolve it, and that authority should be a court because someone's rights will be curtailed;[92] and that removing court authority would give children the legal right to disobey parents, not attend school, and leave home at will.[93]

Contrary to this approach, one commentator has suggested that if the child is not emotionally ill, is in school, and his needs are cared for the state should not stand behind the parent in "beyond control" disputes. If the child is truant, lacking basic needs or emotionally ill he should be treated as neglected or deprived.[94] Another commentator has questioned the existence of the state's moral obligation to force upon children certain maturation processes and finds it irrational to hold immature children to higher legal standards of behavior than adults.[95] Another commentator has argued that there exists a fundamental right to be a child and therefore to misbehave within the limits of non-criminal behavior.[96]

The burden of controlling and raising a child falls primarily on the parents. In reviewing a child's indefinite commitment to the State for uttering profane language in school, the Georgia Court of Appeals stated:

> To bring all students accused of this or similar deeds of misconduct before the courts would be taking advantage of the real purpose of and necessity for the Juvenile Court Act and *would place burdens on the courts which rightfully belong to parents and school officials.* It is only when such corrective measures are totally without avail that the courts should be asked to invoke the sometimes awesome consequences of the law.[97]

Parents have been given the power to carry out their burden of child

control and upbringing by Georgia law[98]—this power is not solely based on juvenile court legislation. In an unruly case, the court does not decide the justice or reasonableness of a parent's command; it need only be shown that the child has been habitually disobedient of his parents' reasonable and lawful commands and is ungovernable.[99] Neither is the court able to deprive a child of any substantial rights vis-a-vis the parent because the parent has such comprehensive control over the child's actions.[100] Therefore, it seems inaccurate either to characterize the situation, as have some commentators,[101] as a legal impasse calling for the intervention of an outside judicial authority to determine whose rights should prevail, or to conclude that removal of unruly cases from the court's jurisdiction removes the parent's power to compel obedience to reasonable parental commands. The impasse occurs when the parent fails to effectively use his power; he needs help in exercising the power, not a reaffirmation of its existence.

The finding of fact which the court may make at a juvenile adjudicatory hearing is, therefore, that the parents have failed to maintain control of the child through the effective use of the power vested in them and that the parents need help. But in a parent-initiated case they have by the act of petitioning the court admitted that need. One must question the necessity of a formal judicial hearing to re-establish that fact; adequate help through the community should be available to parents of unruly children. If the unruly child's case is formally adjudicated, he will most likely be placed on probation; the help available will be counseling by a probation officer of the same character that could have been given without the intervening judicial process; if adjudicated and sent to training school,[102] the child may be harmed rather than helped.[103]

Characterizing the parents' resort to an unruly petition as a failure does not imply that the child has been statutorily deprived.[104] Where the parents exercise "proper parental care or control . . . or other care or control necessary for [the child's] physical, mental, or emotional health or morals . . .,"[105] but the child does not respond, it seems clear that the case falls under the unruly jurisdiction.[106] The scope of the unruly definition, however, may include children who are by definition both deprived and unruly, since the unruly child's disobedience and ungovernability may be the result

of a lack of proper parental care. The intake officer is not required to file the deprived petition in preference to the unruly petition.[107] Where conditions of deprivation exist as well as unruly behavior, it would seem most conducive to the child's welfare and the interests of the state[108] to give the child another chance in a better environment by filing the deprived petition, which could result in the temporary removal of the child from the custody of its parents,[109] rather than allowing the possibility of the child's being branded "unruly" and exposed to dispositions designed for delinquent children.[110]

Whereas the deprived jurisdiction is designed to remove the child from a poor environment, the unruly jurisdiction (purified by removal of all cases where there is also deprivation) deals with problems in an *adequate* family environment. In this situation the best interest of the state is to preserve the family by strictly following the stated preference of the Code that the child be cared for and given guidance while in his own home.[111] Communities waste judicial time and resources and risk the detrimental effects of the court system[112] when the normal, publicly accepted manner for a parent to obtain help remains the juvenile court petition rather than community services.

Another problem is parental abuse of the purpose of the unruly jurisdiction. By its very nature the system allows parents to focus the blame for the situation on the child while saving face with the community by covering up their own failure.

Parents use detention as a punishment by filing a petition and refusing to take the child home when they have every intention of dropping the charge before adjudication,[113] and parents can subvert the normal policies of intake departments by pressuring intake officers to allow adjudication in cases which could be best resolved at the intake stage.[114] According to Chief Judge D. L. Bazelon of the Court of Appeals for the District of Columbia Circuit, "immature and authoritarian parents *use* the court's jurisdiction"[115] and may, by refusing to take their child home, expose the child who has not committed a criminal offense to prolonged, detrimental detention.[116]

3. Schools

Schools as well as parents have responsibilities for the care and control of children. The Georgia Court of Appeals in *Young v.*

State[117] stated that schools have a duty to take affirmative action to solve behavior problems, and held that any request for court action before the school has totally exhausted the corrective measures it ought to be utilizing would be taking advantage of the real purpose and necessity for the Juvenile Court Act.[118] Thus the schools are in a position similar to the parents with respect to control over the child, and the same arguments apply to show that the goals of the juvenile justice system would be more effectively attained if schools, as well as parents, were able to obtain direct community services for their children rather than send them to court.[119]

Furthermore, the statutory premise that the court system is necessary and beneficial in the case of a child who is unruly because of truancy has been questioned by judges as well as social work professionals,[120] and the school system itself has been advocated as both the best place to deal with truancy and other behavioral problems and the best place for delinquency prevention.[121] The school systems, however, have not been as disposed to retain and work with children with behavior problems as they might be, one reason being that many schools have had serious discipline and drug problems.[122] Although some schools have advocated as both the best place to deal with truancy and other behavioral problems and the best place for delinquency prevention.[121] The school systems, however, have not been as disposed to retain and work with children with behavior problems as they might be, one reason being that many schools have had serious discipline and drug problems.[122] Although some school systems maintain a policy of working with truants for two years before referring them to the juvenile court, the punishment used during this period is suspension.[123] But when a child under sixteen years of age is either suspended or expelled, he finds himself on the street, unable to obtain a job or enter a vocational school until he becomes sixteen. Many such children get into trouble.[124] The schools frequently fail to screen their pupils to determine which should be placed in special classes, and a child misplaced in a regular class situation with which he cannot cope is likely to play hookey to avoid it. When such a child has been adjudicated unruly the juvenile court will often determine that the child should be placed in a special class, but the school should have accomplished this placement initially without the help of the court.[125]

4. Vagueness of the Unruly Provision

It is also possible to make a constitutional argument against the unruly jurisdiction because the provision defining an unruly offense[126] is so vague that it does not give children sufficient notice of that conduct which is proscribed.

In two recent cases challenging the constitutionality of statutes providing for juvenile offenses of the unruly type, opposite conclusions were reached by the two courts. The Supreme Court of Maine, in *S.S. v. State,*[127] held that the defining phrase, "living in circumstances of manifest danger of falling into habits of vice or immorality,"[128] though imprecise, gave a comprehensive normative standard with respect to vagueness, meeting the Supreme Court requirements.[129] The court stated that the parens patriae concept was sufficient justification for the state power to remove children from one environment to another chosen by the state,[130] and that in order to utilize the humanitarian juvenile court program to save deviant children from a life of adult crime, it was worthwhile to take away some due process rights the children would have in a criminal process.[131] Chief Justice Dufresne, however, in a strong dissent, stated that the state had the power to make it a juvenile offense for children to persistently disobey the reasonable commands of their parents, but that the parens patriae power does not allow the state to ignore the juveniles' constitutional right to reasonable precision in the definition of proscribed conduct.[132] He argued that the challenged statute is so vague that its test of misconduct is an almost boundless area for individual assessment of behavior, giving insufficient notice to the juvenile and unclear guidelines for police.[133]

The District of Columbia statute under scrutiny in *In re Brinkley*[134] described a Person In Need of Supervision as one "habitually disobedient of the reasonable and lawful commands of his parents, guardian, or other custodian, and . . . ungovernable."[135] While this definition is clearly more precise than that of the Maine statute it still leaves to the judge's discretion in each individual case that point at which the disobedience becomes "habitual" and the child "ungovernable" and an offender. The court rejected the classic juvenile law argument that less precision was required since a juvenile court disposition is not a "criminal punishment" and does not fall within the due process requirements of *In re Gault.*[136] The court

found the statute "not sufficiently precise to enable one desirous of conforming one's behavior to the law to know how to do so . . . this lack of specificity deprives those charged with the statute's administration of any meaningful guidelines."[137]

The Maine court and the District of Columbia court thus took opposite views concerning the juvenile court's alternating role—it must be the "benevolent redirector of straying children"[138] as well as the protector of society. Juvenile court judges have been given wide discretion to use a case by case approach; that is, to utilize the unique circumstances of each case to arrive at the disposition that best benefits the child and the community.[139] The discretion exercised determining whether a child is "habitually" disobedient and "ungovernable" is in fact a determination whether the child is in need of treatment, rehabilitation or supervision, and is essentially the same decision required after adjudication.[140] The issue is how the benefits of placing social discretion in the hands of the judge should be balanced with the juvenile's right to a precise definition of the proscribed conduct. It has been suggested that individual cases do arise where either the social aspect or the necessity of a fair determination of legal guilt predominates.[141] The Supreme Court's opinion in *In re Gault*[142] suggests that the latter aspect predominates and due process guarantees apply when the dispositional alternatives include serious deprivation of liberty such as institutionalization.[143] Therefore, since under the District of Columbia statute unruly children could be institutionalized,[144] the court was justified in holding the disputed language unconstitutionally vague.[145]

To meet the problem of vagueness the legislature could (1) clarify the definition of an unruly child to eliminate the uncertainty of "habitual" disobedience and "ungovernability;" (2) restrict the dispositional alternatives for unruly children so as to exclude institutionalization, a solution which again raises the question of whether the delivery of other types of treatment or counseling require any court intervention;[146] or (3) remove unruly offenses from the jurisdiction of the juvenile court.

5. Evaluation of Community Rehabilitation Efforts

The Senate Subcommittee on Juvenile Delinquency[147] concluded that available evaluations of community-based alternatives to juve-

nile detention and correctional facilities indicated that community-based programs "are as successful as traditional programs, usually more so and usually cost considerably less."[148] Many diversion programs could be used by schools or parents directly without filing a complaint, and successful programs dealing with detention or treatment of already-adjudicated unruly and delinquent children show that institutions are not always needed to solve juvenile problems. No claim is made that all community-based programs succeed; however, there is a dearth of literature on unsuccessful programs.

Of the 42% of all cases referred to Georgia juvenile courts in 1973 which were informally adjusted before adjudication, some involved referrals to community programs.[149] No recidivism figures are available for these cases. The state has provided community treatment for 28% of those who are committed after adjudication,[150] and the day teaching centers, community treatment centers, group homes, or similar programs, could meet the needs of parents and schools seeking help if such programs were available without the intervening court process.[151] The combined recidivism rate for these programs has been 10-15% and the cost as low as one quarter the cost of confinement in a training school.[152] The Attention Homes program[153] might also be helpful to families trying to work out their problems without the help of a court.

Massachusetts has made a massive commitment to the use of community-based services in all phases of the juvenile justice system.[154] The director of a phased-out detention center stated that the institution of shelter care cut the recidivism rate by 50%.[155] The state coordinators found that by purchasing services from private organizations they could provide better, cheaper services,[156] and a Harvard study indicated that community-based services in Massachusetts were not creating the hostile attitude common in children who had been in training school.[157] Palo Alto, California, has used a quasi-judicial panel of lay citizens to help resolve disputes involving juveniles; the recidivism rate is 7%.[158] St. Louis developed a successful stay-at-home plan for those who normally would be put in detention as dangerous or likely to abscond.[159]

6. Control and Administration of Community Services

The Task Force on the Courts of the National Advisory Commis-

sion on Criminal Justice Standards and Goals took the position that diversion of appropriate cases from the juvenile court could be handled by an administrative agency independent of the court.[160] Problems arise with this arrangement since the threat of an imminent accusatory proceeding tends to coerce the child to "volunteer" for a diversion program.[161] If the court's unruly jurisdiction were removed, however, an agency handling these children on direct referral from their parents would not have such potential for unauthorized coercion without a hearing, since there would be no possibility of detention or adjudication.

The National Council on Crime and Delinquency (NCCD) has determined guidelines for the creation of a theoretically noncoercive independent agency, called the Youth Service Bureau (YSB).[162] Acceptance of services from this Bureau would be voluntary, but once a case was referred to a YSB the agency would not have the power to transfer the case to the court if it could not deal with the child effectively or if the parents requested such a transfer.[163] The underlying theory of this approach is that in order to establish a relationship of confidence and trust that will motivate the child to accept the services he needs, the YSB must be completely independent of the justice system and must be an effective advocate for the child even if the parents' views differ from the child's.[164] The major YSB function would be to refer children who voluntarily accept help to the community services they need—for example, family counseling services, health and mental health services, employment and job training services, special education services, drug addiction rehabilitation services, foster homes, and group homes.[165] The YSB would also work to develop such services to meet the needs of the community.[166]

One commentator stated his fear that the YSB's concept might be used to exercise illegitimate authority over children, might further break down the family unit, or could become a catch-all for schools who would then not improve their own programs, and for police who in one community referred children to the YSB whom they would have otherwise sent home.[167] At the other extreme are those who would use the YSB as a filter for the court in unruly cases, making written referral from the YSB a prerequisite to court jurisdiction.[168] The President's 1967 Crime Commission argues that it might be necessary to give the YSB the power to refer to court those

with whom they could not deal effectively and stated that court referral by the YSB at the parents' request would be in accordance with the voluntary nature of YSB services.[169]

7. Conclusion

The harmful effect of the coercive juvenile justice system,[170] the theory that children do not respond to coercive treatment,[171] and the numerous indications in the above analysis that community services must be made available directly to parents, schools and the children themselves,[172] all lead to the conclusion that agencies similar to the YSB should be established. These agencies should be completely noncoercive and independent of the court, with no power to refer cases to the court or to suggest such action to parents.

Having so concluded, the answer to the question of whether the juvenile court's jurisdiction over unruly cases should be abolished, becomes a choice between two alternatives: (1) the court should have no unruly jurisdiction and the YSB and other community services become the last resort of parents and schools with unruly children, or (2) the YSB and the court should exist independently and handle whatever unruly cases happen to come their way. A formidable obstacle to the first alternative is the fact that society has chosen the policy of intervening whenever parents fail to properly socialize their children; one would not expect society to change this policy very readily. While some argue that the point of societal intervention should be criminal conduct (delinquency),[173] and that the child has no right to be treated as an adult,[174] these theories would leave no solution for the situation where a child is completely beyond his parents' control, will not cooperate with any community service agency, and ends up on the streets with no possible means of support.[175] Therefore, intervention would have to occur when the child's conduct was only unruly if the policy of intervention is to be maintained. When the State does intervene it must abide by the restrictions of the Fourteenth Amendment, both with respect to the deprivation of the child's liberty and the parents' right to control the child.[176] The proper place to resolve the question of intervention is a judicial forum. The following proposals therefore envisage a continued, *though strictly limited*, role for the juvenile court in unruly cases.

(1) The State should make available on a statewide basis agencies similar to the NCCD YSB to aid parents, schools and children in finding or purchasing the services needed to solve their problems. The agencies should be independent of the courts, accepting unruly referrals from police or intake units, parents, schools, and self-referrals by children, but never sending them to court or recommending such action to parents. The acceptance of services should be completely voluntary on the part of the child—that is, the YSB should have no judicial function.

(2) Court intake units should be permitted to accept unruly cases only when there has been a prior referral to the YSB. If so, intake should then decide in its discretion if the case requires the filing of a petition or another referral to the YSB or other community program.

(3) The Juvenile Court Code should require intake to file a deprived petition when the facts appear to sustain either a deprived or unruly petition. The child through counsel should be allowed to submit a motion to the judge to substitute a deprived petition for an unruly petition.

This proposal would insure that the primary responsibility for the child's behavior is put on the parents, as required by *Young v. State*;[177] it would also help to deter parents from misusing the court system by creating the possiblility that their conduct will be scrutinized as well as the child's.

(4) The child through counsel should be permitted to submit a motion to the judge alleging that he has not been given sufficient opportunity for the solution of his problems out of court. The judge then should scrutinize the actions taken by parents, school and YSB in the case and, if he determines that the motion should be granted for failure of those parties to fulfill their responsibilities, he should have the power to order the parents, school or YSB to take reasonable specific actions with respect to the child.

This proposal would also deter parental abuse of the system and would provide a check on the effectiveness of community action. Court power over parents in juvenile court cases has been proposed by Tom C. Clark, former Justice of the Supreme Court.[178]

(5) The judge should be able, after the above safeguards have

been utilized and indicate that the child's adjudication was the last resort, to use the coercive power of the state in any of the ways now provided for unruly children.[179] The only unruly children who should be put into training schools are those who need psychological counseling in a secure setting.

(6) The legislature must find a definition of "unruly" which is not unconstitutionally vague. It must give better notice of what conduct is proscribed than the present criteria of "habitual disobedience" and "ungovernability."

(7) Some of the above proposals require the initiative of the child and his counsel to bring the child's best interests to the attention of the court and to assure that the adjudication of an unruly child is the community's last resort. To make these proposals effective, the Georgia Juvenile Court Code should be amended to require that the child be represented by counsel. The court should have the power to direct the parents to pay the fee, or to simply assign counsel if the family is indigent. These powers have been added to the Federal Juvenile Delinquency Act[180] by the Juvenile Justice and Delinquency Prevention Act of 1974.[181]

B. *Detention*

A statutory and practical overview of juvenile detention in Georgia has been given[182] and the possible harmful effects of secure detention have been discussed.[183] The prevailing viewpoint is that secure detention should be used only when absolutely necessary to protect the community from a dangerous juvenile or when the child is likely to run away to avoid coming to court.[184] The National Council on Crime & Delinquency concluded that there is no need to detain more than 10% of those taken into custody.[185] The Georgia statute elects the "last resort" viewpoint by requiring that written notice and explanation be sent to the parents and the court if the child is not immediately released into the custody of parents or other custodian.[186] Analysis in light of this viewpoint indicates changes in the Georgia statute and its administration which would lead to the detention of fewer children in the best interests of both the children and the public.

1. Criteria for Detention

The Governor's Crime Commission's survey[187] revealed that in

half of the local juvenile jurisdictions which replied, police officers are authorized to decide whether or not the child should be detained. The President's Crime Commission Task Force on Corrections concluded that this decision should be made by court officers and never by police.[188] In Georgia there would seem to be no need for police detention determinations, because if the police officer takes the child to a detention center the intake officer at the center makes an immediate determination on the statutory criteria,[189] and if the police officer wishes to place the child in jail, a court order is necessary.[190] The intake officers should not be under police direction in this matter, nor should a juvenile judge make a general authorization for use of a jail as a place of detention.

The California Supreme Court has held that a juvenile court in that state may not establish the commission of a certain offense as a criterion for automatic detention.[191] The court interpreted the statute[192] to mean that the nature of the offense alone could not constitute a basis for detention and that such practice, which disregarded the other relevant facts,[193] deprived the child of consideration of whether detention would be in his best interests, a consideration required by law.[194] Since Georgia law also requires the juvenile justice system to give the child care conducive to his own welfare as well as that of the state,[195] and since the investigation required when the child is delivered to the court, detention center, or shelter care faciltiy would otherwise be meaningless,[196] the Georgia statute should also be construed to exclude automatic detention and similar arbitrary standards.

Under Ga. Code Ann. § 24A-1401, one of the few possible justifications for detention is the lack of a suitable parent or other custodian able to supervise the child and return the child to court when required. This provision allows children who are not dangerous and not likely to run away to be placed in detention centers. Where the only rationale for detention is to provide parental care and supervision, a detention center which is merely custodial and more like a jail than a home may violate the requirement of due process that custody must satisfy its original justification.[197] Since shelter care facilities provide a non-secure, home-like atmosphere, §24A-1401 should specifically restrict placement of those who are not dangerous or likely to run away, but who have no suitable place to go, to shelter care.[198]

2. Place of Detention

The President's Task Force on Corrections found widespread use of facilities designed primarily for delinquents to detain unruly and delinquent children together and concluded that "continued indiscriminate grouping constitutes a national disgrace."[199] In Georgia detention centers the two groups are almost always placed together.[200] While the Georgia statute[201] states that unruly children may not be placed in a §24A-1403(a)(3) facility ("a detention home or center for delinquent children"), it does allow detention of unruly children in a §24A-1403(a)(4) facility ("any other suitable place or facility designated or operated by the court . . ."). The issue, whether the latter provision allows judges to designate detention centers as suitable places even though such centers appear to be specifically excluded in the case of allegedly unruly children, has been decided thus far in favor of the use of detention centers.[202] In its *Standards and Guides for the Detention of Children and Youth in the State of Georgia*, the State Board of Human Resources stated: "This paragraph [§24A-1403(e)] of the Code specifically excludes a detention home or center . . . as a placement for deprived or unruly children."[203] While the *Standards* also state that unruly children may be admitted to a detention center under certain circumstances "in accordance with the Juvenile Code,"[204] if this is a reference to §24A-2201(e) which authorizes the court to detain any child after adjudication pending the child's dispositional hearing, there would be no contradiction between the two statements. The practice of detaining delinquents and unruly children together is also contrary to the Uniform Juvenile Court Act §16(d).[205]

On its face the statute is best interpreted to disallow detention of unruly children in detention centers. The problem facing the courts is the lack of separate facilities, particularly shelter care. The Attention Homes program[206] has shown that low cost effective shelter care can be purchased in the community; the program should be broadly expanded. Furthermore, if the recommended limitations on the courts' jurisdiction over unruly children[207] were adopted, the number of unruly cases would be greatly reduced.

In addition to expanded shelter care, the state should experiment with other community detention programs. In St. Louis, for exam-

ple, a radical experiment was successful in eliminating secure detention of juveniles who were expected to run away or get into more trouble.[208] Persons were hired who had no marketable job skills or educational background or experience; they were simply screened for personality indications that they would work well with juveniles. They were given no office and no paperwork—simply a maximum caseload of five and instructions to keep the accused children out of trouble and to make sure they arrived in court. Of the first 220 cases there were no runaways and only five minor offenses; the cost was half that of secure detention.[209]

C. *Informal Adjustment*

This section of analysis deals with informal adjustment, the process established by the Code to provide for the diversion from the juvenile justice system of those juveniles whose formal adjudication would not be in the best interests of the child or the public.[210] The Code puts the power to determine which juvenile cases should be adjudicated and which informally adjusted in the hands of the court but allows the judge to delegate this authority to an authorized person such as an intake officer.[211] If this court officer decides that the proper handling of a particular case is not adjudication, the complainant cannot force a formal adjudication without approval of the court officer.[212] As pointed out in the overview of the total juvenile court process, before attempting to bring about an informal adjustment of the case, the court officer who has been delegated the authority to make such an attempt must first determine that the admitted facts bring the case within the jurisdiction of the court, and the officer must obtain the voluntary consent of the complainant, the juvenile and the parents.[213] Some common forms of informal adjustments sought by Georgia court officers are: (1) to leave the case open with the consent of the parties for a period of time conditioned on the continuing good behavior of the juvenile; (2) to work out a voluntary behavior contract[214] between the parties; (3) to persuade the parties to accept a referral to a community counseling service; or (4) simply to talk with the parties to help them resolve the dispute so that the complainant drops the charge.[215] While it is generally agreed both in Georgia and nationally that as many juvenile cases as can be properly diverted should be diverted before formal adjudication,[216] some controversy still remains concerning

the issues of whether a program such as informal adjustment can really be voluntary in dealing with a child, whether there is a possibility of serious abuse by the court officers running the program, and whether, when an informal adjustment fails,[217] the court officer should then be permitted to file a petition for a formal adjudication based on the same complaint when no new facts have come to light which would form the basis of a separate and new complaint.

Participation in any pre-adjudication diversion program, whether it be one for adults or for juveniles, must be voluntary since the court officer does not have constitutional authority to compel participation without a hearing.[218] The question is whether participation by a child in an informal adjustment program can in fact be voluntary in light of the threat of the sanctions of the juvenile court system and the actual setting in which such an agreement is made, that is, where the child is in conference with several adults who are suggesting a course of action.[219] One suggested solution to this problem is to restrict the scope of informal adjustment so that a child would never be compelled to attend a certain place at a certain time or to produce any documents,[220] a solution which would eliminate such informal adjustment procedures as the voluntary behavior contract. On the other hand, it has been pointed out that the coercion involved in soliciting the voluntary participation of a child in an informal adjustment agreement is insubstantial compared with that involved in an adult plea bargaining situation where the accused actually pleads guilty to an offense.[221] The Georgia Code informal adjustment provision is not specific in delineating the scope of possible informal adjustment agreements, stating only that the court officer "may give counsel and advice to the parties with a view to an informal adjustment,"[222] limiting the period of this counsel and advice to three months, unless extended by the court for up to an additional three months.[223] While this language is designed to avoid compulsion,[224] it does not appear to prevent the child from entering into voluntary agreements on his own behalf with parental consent:

> If the child and his parents enter into a behavior contract, negotiated by the intake officer, and certain terms of restriction are made a part of that contract and the juvenile has agreed to (or in many instances, he actually imposes these restrictions on himself) these terms, then the intake officer is merely serving as a mediator between the parties, rather than as a dispenser of these restrictive terms.[225]

Because the court officer can only act as a mediator between the parties, the statute is constitutional in that it does not deprive the child of liberty without due process, and since the behavior contract is a useful tool in accomplishing the general goal of maximum diversion,[226] its use should not be prohibited.

The primary possibility of abuse of the informal adjustment provision by court officers is the arrangement of an informal adjustment where the case should be dismissed.[227] The danger is that a child "will be placed under an authoritative regimen to which he has agreed without anybody ever determining that there is any basis for any authoritative handling at all,"[228] or that the state will arrange an informal adjustment because, although the court has jurisdiction, the case against the child is too weak to win at a formal adjudication.[229] The Georgia Code appears to provide for these possibilities by requiring the court officer to determine that the admitted facts bring the case within the court's jurisdiction before attempting an informal adjustment,[230] and by assuring that the consent of the parties to an informal adjustment is given with full knowledge of their right to choose the alternative of a formal adjudication[231] (at which time the parties could raise the issue of a court officer's abuse of discretion in determining the question of jurisdiction or simply win if the state's case is too weak to support a finding of guilt). It would be better, however, if the child did not have to go through an adjudication where there is no jurisdiction or the state has a weak case;[232] the judge, under whose control and direction the court officers work, should review informal adjustment practices frequently to prevent such abuse.[233]

If the court officer who has the power to arrange an informal adjustment also has the power to terminate it if it fails to settle the differences between the parties, and if that officer can file a petition for formal adjudication based on the same facts and the same complaint which gave rise to the informal adjustment agreement, two problems arise: (1) possible legal double jeopardy,[234] and (2) the judge at the formal adjudication may be prejudiced in finding whether or not the alleged acts were committed by the fact that an informal adjustment was attempted but failed.[235] The Georgia informal adjustment provision does not state whether an informal adjustment must be the final disposition of the case,[236] and, therefore, since the court officer is not specifically prohibited from filing a

petition based on the original complaint, it would appear that all the conditions for filing that complaint[237] would be present, despite the fact that an unsuccessful informal adjustment happened to intervene between the complaint and the filing of the petition. Therefore it appears that the officer could proceed with the filing of the original complaint. Furthermore, although the Code prohibits the use of incriminating statements in subsequent fact-finding hearings[238] (as distinguished from dispositional hearings) it does not prevent the fact-finding judge from knowing whether or not informal adjustment has been attempted. Because (1) this information could have great prejudicial effect on the judge's finding of the guilt or innocence of the juvenile on the original charge, (2) the double jeopardy problem has concerned as distinguished a body as the National Council of Crime and Delinquency's Council of Judges,[239] and (3) the serious juvenile offenses are not normally considered for informal adjustment,[240] the Georgia Code informal adjustment section should stipulate that once an informal adjustment agreement has been reached, no petition for formal adjudication may be filed based on the facts that gave rise to the original complaint.[241]

The relevance of the above discussion of informal adjustment practices to the problem of reducing the institutional population lies in the fact that a maximization of diversion from the court system means that fewer children will be institutionalized. The conclusions that the behavior contract should remain available as an informal adjustment alternative, that the possibility of abuse of the informal adjustment process by court officers is not so great as to threaten the beneficial use of the process, and the recommendation that court officers be prohibited from terminating an informal adjustment agreement and filing a petition for formal adjudication on the same facts as the original complaint, all arguably promote the best interests of an effective and fair informal adjustment procedure and reduce the possibility that certain juveniles will be formally adjudicated and possibly put into secure institutions.

D. *Probation*

The purpose of juvenile probation is to provide adult supervision to juveniles who have been adjudicated delinquent or unruly, but who have not been placed in a state Youth Development Center (YDC). At the dispositional hearing,[242] one of the several choices

available to a court which finds a juvenile to be delinquent or unruly is to place him on probation under the supervision of a court-appointed probation officer, or of the head of a community rehabilitation center.[243] Official probation is not reserved for specific offenses and the court usually exercises its discretion in this matter. The Georgia Juvenile Code does not prescribe conditions of juvenile probation. The judge will set general conditions[244] while the probation officer may set additional, more specific conditions which are deemed to be desirable for the individual involved.

Under certain circumstances, the probation order may be modified or vacated. If the juvenile is charged with a serious violation of probation conditions, the probation order may be revoked. The person who has legal custody or supervision of, or an interest in, the child may petition the court to determine whether probation should be revoked. After the modification petition is filed the court must set a time for a hearing and serve notice on all involved parties.[245] If the court finds that there has been a violation of probation, the court may commit the offender to the Department of Human Resources (DHR) for placement in a State Youth Development Center.[246] Minor infringement of the probation conditions may be treated extra-judicially within the probation worker's discretion and seldom results in commitment.

The order of probation, which may be effective for two years, can be terminated early by the judge when it appears that its purpose has been accomplished.[247] On the other hand, probation can be extended beyond two years if a party or the court enters a motion for another hearing prior to the expiration of the original term. The parties affected must receive notice of and reasons for the hearing. In order to extend probation the court must find that the purpose of the first order could not be met without an extension.[248]

The adjudicated juvenile may appeal his probation to the Court of Appeals or to the Supreme Court of Georgia in the same manner as appeals taken from a superior court decision.[249]

The court has the power to appoint probation officers, although the Georgia Juvenile Court Code does not establish any particular qualifications. The established criteria for officers differ only slightly between the county-run probation departments and the state-organized Court Services probation system.[250]

The duties of the probation worker include providing the court with reports, recommendations on potential offenders, and information on investigations. The worker receives and examines complaints to determine whether proceedings against the child should be instituted. He gives the necessary supervision and assistance to the child and may take the child into custody for the protection of the child or to keep the child within the jurisdiction of the court; the child may also be detained upon court order.[251]

Under section 7(5) of the Uniform Juvenile Court Act, a probation officer does not have the powers of a law enforcement officer.[252] Georgia's statute, on the other hand, states that such an officer may not conduct accusatory proceedings.[253] Although the Uniform Act provision seems to be a significantly broader restriction on the probation officer, the Georgia courts have construed the Georgia provision also to prohibit probation officers from exercising the powers of law enforcement officers.[254]

The limitation on the powers of the probation officer allows him to avoid the conflicts that would result if an officer, who has gained the trust of the juvenile, were later required to prosecute the child. The Delinquent Offender and Juvenile Court Law Study Commission also felt that such duality might constitute a denial of due process.[255]

Prior to the hearing on the need for treatment or rehabilitation and disposition,[256] the court may require the probation worker to make a social study of the juvenile and to submit it in writing to the court. However, if the allegations of the petition are not admitted and notice of the hearing has not been given, the duty of the probation officer is deferred until the court has heard the petition upon notice of hearing and has found the child to be unruly or delinquent.[257]

Several of the larger counties have made submission of the social study a standard part of the process leading to the dispostional hearing.[258] Some counties compile these reports far less frequently and only when requested to do so by the court.[259] When used, the content of the report generally reflects information gathered from interviews in the community, with family members, and with the juvenile. Medical and psychiatric reports may also be used.

The primary function of the probation worker is to meet with and counsel the juveniles. These sessions take place in school, in the child's home, in the probation offices, or in other mutually agreed places. The frequency of such meetings is said to depend upon individual need. Those juveniles in a crisis situation may receive counseling once or twice a week, although the majority of probationers meet once or twice a month. Some juveniles, however, are placed on unsupervised probation or informal probation.[260]

The case load of the probation worker, of course, affects the quality of supervision. The probation services which are provided directly to juvenile offenders by the worker include individual, group and family counseling in areas of communications and personal relationships. Vocational or school problems are handled along with placement in facilities outside the home and referrals to various agencies and resources.[261] The role of the probation worker may be said, therefore, to be that of a liason among community members, courts, juveniles and families.

If the child is committed to the state, the Department of Human Resources, in lieu of placing the child in a training school, may place him on probation and establish conditions which will be most conducive to assuring the juvenile's acceptable behavior in the future. Participation in moral, academic, vocational, physical, and correctional training and activities may be required.[262]

When the child is committed to the state, the county-organized probation departments no longer deal with him. Full supervision is transferred to the state Court Services program.[263]

1. Probation Recommendations

Georgia's juvenile probation is presently divided between the county probation departments and the state Court Services program. The example of Florida, however, may be followed as a method of ending such dichotomization. Florida has given the entire responsibility for planning, coordinating and developing a statewide program to train and rehabilitate children and to control and retard juvenile delinquency to a division in the Florida Department of Health and Rehabilitative Services.[264]

Although it is not recommended that Georgia specifically place all probationary services under the control of the DHR Division of

Youth Services, it is suggested that superior continuity and uniformity would result from the end of the existing dichotomy. At present, there are only seventeen counties with independent programs, so there would be no great administrative burden in effecting a gradual transfer of authority.

With respect to programming, Florida has also made statutory provision to allow the Division of Youth Services to assign work to juveniles and to reimburse them as a method of instilling financial responsibility.[265] Several states have initiated plans whereby the offender is required to reimburse the victim from wages earned. Georgia does not provide for either of these programs and should investigate the areas as a means of giving the juvenile a sense of both personal and financial responsibility.[266]

Comments made by personnel within the juvenile court system frequently note that Georgia's Code, while modern, is vague, and that greater clarification of procedures and responsibilities would be helpful. The DHR and county administrators have issued regulations but these do not appear to have been satisfactory to those who work within the system. For this reason, California's Welfare and Institutions Code has been examined. In California, the county welfare department is authorized to assume all or part of a probation officer's duties including receiving and maintaining custody of a juvenile, pending a hearing, from a probation officer.[267] This apparently increases the effective utilization of available manpower without detracting from the state probationary authority.

California further provides for a county or regional juvenile justice commission—seven to fifteen citizens who are appointed by a superior court with the concurrence of the juvenile court. The commission has free access to all the institutions, must inspect them annually, and may conduct investigations with the aid of subpoenas issued by the juvenile court judge.[268] In lieu of the commission, provision has been made for a probation committee which is to function as an advisory body to probation offices.[269]

The duties of probation officers are more detailed in California than in Georgia.[270] It should be noted that California gives all the power and authority conferred upon peace officers by law to the probation officer, assistant officers and deputy probation officers.

When the California probation officer investigates allegations and finds no cause of action, he is charged with informing the complainant of his decision and the reasons for it. If the allegations are substantiated, the probation officer must advise minors and their parents of their constitutional rights.[271] In this area, the Georgia law enumerates in various sections[272] the juvenile's rights but does not establish a definite point in time for the required warnings. The juvenile has the right to counsel at all stages of any legal proceedings. He has the opportunity to introduce evidence and to speak in his own behalf. He may cross-examine adverse witnesses. A child charged with a delinquent act need not be a witness against himself.

While the probation officer is not allowed to conduct accusatory proceedings, he has full power to take the juvenile into custody. It is recommended that the juvenile be told of his constitutional rights at the time he is taken into custody when the custody could result in court proceedings to restrain or remove his liberty.

Clarification of staff duties and functions is of primary importance to the effective use of juvenile probation. It is apparent that the required finances have not been made available in sufficient quantity to produce acceptable results.

Many counties have active volunteer programs.[273] It may be hoped that these groups will be able to expand their memberships and operations in efforts to reduce the caseload of official probation workers and to increase community awareness of existing juvenile situations.

The DHR should extend its search for non-professional workers and investigate all possible pools from which people may be drawn. Ex-offenders may be able to offer valuable insight to juveniles. Colleges and universities may be receptive to suggestions of offering credits to students in the social sciences who undertake limited probation work with juveniles.[274]

Para-professionals are already being used effectively in many areas. Mr. A. J. Moultrie, Director of Impact,[275] stated that the para-professionals on his staff have proved that they can deal capably with areas previously reserved for professionals.

Federal assistance should be sought on a continuing basis for the construction of halfway houses, group homes, recreational centers

and community activity centers. The foster homes and Attention Homes[276] projects should be expanded to facilitate placement of probationers who should not be required to return to the family homes for various reasons and for juveniles who are in aftercare but who also should not return to their homes. Programs of this type force a greater recognition of the facts and aid in dispelling popular myths about juveniles who have been placed on probation or who have been in a YDC.

Within the existing official probation system, the roles of the worker should be re-evaluated to place most, if not all, emphasis on the position as counselor rather than as investigator and paper-pusher. Obviously, this would also entail a reduction in caseloads. The greater mobility of the probation worker would increase his ability to put the juvenile in touch with people and agencies who can help with education and employment. The worker would have more time to provide personal attention, counseling and help.

While probation and community treatment programs are developing, it is essential that new treatment approaches and modalities be implemented. It is important to avoid stigmatizing the young offender in his own mind and in the mind of the community by refocusing attention on the pre-adjudication potentialities of juvenile law.

E. *Commitment to the State*

Until recently, when a child was "committed to the state," it was a matter of certainty that the child would be placed in a reform school or training school, the juvenile version of a prison.[277] Every state must face the tide of evidence that questions the rehabilitative effectiveness of this traditional method of "treatment" of serious juvenile offenders,[278] and every state must re-examine its procedures in light of the experience of Massachusetts which has terminated all of its state-operated secure institutions.[279]

Georgia juvenile court judges may commit a child to the state subject to certain conditions when, at the end of an adjudicatory hearing, the child is found to be delinquent or unruly.[280] When the court orders commitment, it relinquishes all authority over the child to the State Department of Human Resources (DHR).[281] A sizeable number of juveniles are committed each year, although most of

those whose cases are formally adjudicated are placed on probation.[282] A screening committee reviews each commitment and decides whether to place the committed offender in a training school[283] or in a community-based program.[284]

According to DHR, each Youth Development Center (training school) has an educational and vocational program, intensive treatment programs, and group treatment programs supervised by trained social workers and psychologists.[285] A training school, of course, is a radical change from a child's normal environment.[286] The recidivism rate in Georgia, furthermore, has been a disappointing 49 percent.[287] A nationwide study has determined that there is a general lack of vocational training, emotional therapy, mental health services and family counseling in training schools.[288] Many commentators, therefore, question the assumption that training schools provide "treatment and rehabilitation,"[289] and others claim that serious deleterious effects (for instance, the acquisition of delinquent attitudes) occur.[290]

The arguments for the use of community-based treatment programs as an alternative to training schools are: (1) increased treatment success and (2) lower cost. For example, the recidivism rate for Georgia's community programs which are provided to some committed juveniles has been 10-15 percent compared to 30-50 percent for the training schools.[291] The cost of these programs is as low as $1,500 per child per year compared with $6,000-9,000 per child per year in a training school in Georgia,[292] and similar reduced recidivism and costs have been reported for community programs elsewhere.[293] There is also encouraging evidence that community programs are no more dangerous to the community than traditional methods,[294] and that they do not create the hostile attitude toward society found among training school "graduates."[295] Support for development of community-based treatment programs is found among judges[296] as well as among social work professionals.[297]

In 1972, Massachusetts, faced with a training school recidivism rate of 75 percent and institutional costs of $10,000 per child per year, decided to close all the major training schools, leaving secure facilities only for those whose confinement was necessary to protect the community.[298] The care and treatment of the previously incarcerated youths was distributed among 250 private programs in the

community.[299] The Massachusetts plan is designed to provide specific direct or purchased[300] services to meet specific personal and familial needs, to encourage communities to take the responsibility for youth problems from the juvenile court and state government agencies, and to work for a better system of priorities in schools and other agencies.[301] Massachusetts has replaced the training schools with residential care, day care and intensive after-care counseling services.[302] The initial evaluations funded by the federal government have indicated that this new program has been successful in reducing recidivism by serious offenders.[303] Those who designed and effectuated the Massachusetts reform program claim that the only problems encountered were logistical—not problems involving any failure of the community placement alternatives to provide adequate services.[304]

Many judges see the wholesale closing of training schools as a critical limitation on the dispositional alternatives available to them, forcing them to transfer cases to adult criminal courts when confinement seems necessary.[305] These judges argue that training schools should be improved rather than abolished.[306] Many judges, however, while opposing the complete abolition of training schools, still favor the development of community alternatives for those youths who can be treated more effectively in the community.[307]

The success of community-based treatment and rehabilitation programs in Georgia, as well as in other states, indicates that Georgia should have no need in the future for expanded training school capacity.[308] It would be logical, therefore, for the state to expand its program of diverting committed youths to the community, with a view to reducing the training school capacity. It would seem advisable for Georgia to follow the Massachusetts plan, in purchasing treatment services from private citizens rather than relying completely on state-administered projects. All the community programs should be closely monitored to determine recidivism rates and cost. As long as they prove to be more effective than training school, they should continue. As the programs increasingly care for juvenile offenders, the state can close training schools which prove to be no longer necessary. This would free operating resources to finance more community programs or better treatment programs in the remaining secure institutions.

F. *Aftercare*

Juvenile parole or aftercare is the "release of a child from an institution at the time when he can best benefit from release and life in the community under the supervision of a counselor."[309] The purpose behind aftercare is to provide a structured program for the individual which will aid in his readjustment to community life. A proper readjustment will prevent a repetition of unacceptable behavior and circumvent a criminal career for the young offender by re-integrating him into society. Aftercare is supervised by the Youth Services Section of the Department of Human Resources.[310]

After adjudicating a juvenile as a delinquent or unruly child, the court may commit him to the state upon a determination that the child is in need of, and will be responsive to, treatment or rehabilitation.[311] The court also may place the juvenile in an alternative program rather than in confinement. The order of commitment may remain in force for two years or until the child is sooner released.[312] The order may be extended, however, upon reasonable notice and hearing if the court finds it necessary for the rehabilitation of the juvenile.[313]

The Director of Youth Services, John C. Hunsucker, aware that population problems exist in the state training schools, recently has issued new guidelines for early releases.[314] Status offenders, all non-serious first offenders, and children for whom Court Services or Special Projects have requested early release, are to be submitted for release review within sixty days of their admission to the YDC.[315] All other juveniles except serious offenders are to have their cases and progress reviewed after four months at a YDC.

Overcrowding has become more critical due to the increased commitment rate. During the 1974 fiscal year, commitment increased four percent.[316] Twenty-eight per cent of 2,213 juveniles were diverted from the institutions to various community and special projects.[317] Because of overcrowding, Mr. Hunsucker has urged the staff to be more flexible in their approval of release programs "even though the youth's behavioral adjustment and his home situation are less than ideal."[318]

While seventeen counties have independent staff to handle intake, detention and probation, the DHR's Court Services staff administers all aftercare in Georgia's 159 counties.

At present, there are 127 Court Service Workers (CSW) who are assigned on a service area basis to provide individual and group counseling and treatment. Yet, the total number of juveniles receiving services for the 1974 fiscal year was 15,782.[319] The Service utilizes such alternatives as local counseling centers, mental health centers, and the Department of Family and Children Services. When possible, Court Services attempts to place youths in vocational rehabilitation centers at the community level.

Aside from services provided by the Court Services sections, actual aftercare for juveniles who have been released from YDCs has been scant until recently. Twelve months ago, however, the Youth Services Impact Project was organized to provide intensive aftercare services to selected "target offenders" upon release.[320] While community treatment centers focus primarily on first offenders and day centers concentrate on children with trouble in school, the Impact Project deals exclusively with juveniles who have been charged with murder, rape, murder-rape, robbery or assault. In these cases, the Juvenile Code gives the juvenile court concurrent jurisdiction with the superior court.[321]

The project is called the "High Risk Juvenile Parole Project." This program and a number of other projects are known collectively as "Impact" and are the result of funding through a $20 million blanket grant that was awarded to the city of Atlanta by L.E.A.A. For the juvenile to receive services, his offense must have been between strangers rather than between persons who are acquainted or related since the latter do not frequently re-occur. The juvenile, however, need not be found guilty of one of the above offenses as long as he is found to have committed a lesser included offense.

The program is designed to prevent recidivism. The Director of the Project stated that the LEAA grant specified that services be given to approximately 200 juveniles. It is hoped that recidivism will be reduced by twenty percent but, because it is a new program, statistical compilations are not yet available. During the six month period the juvenile remains in the program, he receives intensive individualized counseling, while at the same time the overall program attempts to deal with the crux of many juvenile programs—the family situation. The staff at the Juvenile Parole Project consists of five professionals and three para-professionals.

These people come into contact with the juvenile at the time he is committed to the custody of the DHR, establishing rapport and planning for the creation and implementation of "release packages." These plans include a report that evaluates the home environment of the juvenile, as well as a discussion of the family, the neighborhood, the institutions with which the juvenile comes into contact, and the socio-economic situation which will confront the juvenile upon his release.

The staff participates in a version of informal group interaction. This has been extended beyond the discussion stage and is primarily a program which takes the group into the community to participate in activities provided there.

The staff prepares behavioral contracts which will operate among the child, the parents and the worker. The purpose is to establish what is expected of the child. If he has difficulty fulfilling these expectations, the worker will be available to give necessary aid. "Impact" attempts to plan with the child rather than for him. The child must know why he has selected a certain program and must be given a feeling that he should abide by it.

The project re-evaluates and researches techniques used to provide effective aftercare and rehabilitative programs. To this end, the Tennessee Self-Concept Test is given to the juveniles when they enter and when they leave the YDC to evaluate the child's self-image and his attitude towards other people. The YDC uses the results of the test to develop programs that deal with each child's specific problems and needs. If the child does not make satisfactory progress during incarceration, the test results are used to build an effective aftercare program. The test is in limited use now but expansion is intended.

There has been much discussion of establishing statutory maximum and minimum lengths of time a juvenile may be placed on probation and parole (aftercare). One primary objection to this proposal is that the indefinite period of supervision allows the court to fashion a flexible remedy for the youth in question. On the other hand, undue discretion may cause juveniles to remain in the system longer than necesary because of work loads confronting the supervisors.

Rebuffing attempts by the Justice Department to impose time limitations on juvenile probation and parole, the federal district judge in *United States v. Norcome*, 375 F. Supp. 270, 295 (D.D.C. 1974), observed:

> The court will not tolerate interference with its sentencing practices by the U.S. Department of Justice which seeks indirectly to impose mandatory minimum sentences and thus wholly disregard the intent of Congress with respect to sentencing matters. . . .

The *Norcome* court was concerned with an addition to the Code of Federal Regulations, "Prisoners, Youth Offenders, and Juvenile Delinquents: Parole, Statement of General Policy,"[322] which provides for the release of those who have violated the Federal Juvenile Delinquency Act.[323]

The pertinent provisions establish conditions which should be considered as guidelines to provide greater efficiency in release of juveniles from Georgia's institutions. It is suggested that the state legislature take into consideration the need for definitions as to the procedures used and the status of the juvenile parolee. The Regulations state that a committed juvenile who has shown that he has been rehabilitated will be eligible for parole at the time and under the conditions chosen by the U. S. Board of Paroles. The juvenile is deemed rehabilitated when, in the Board's judgment, the offender's conduct within the institution establishes that there is a reasonable probability that the juvenile will not commit further violations.[324] Juveniles and youth offenders do not apply for parole. Regular hearings, which may not be waived, are scheduled for each such person in order to review the case and the progress made.[325]

The Code of Federal Regulations also provides that there must be a satisfactory release plan. There should be an advisor in or near the juvenile's community and there should be satisfactory evidence of legitimate occupations. The juvenile will usually only be released to the place of his legal residence[326] and the details of the plan are to be verified by a field investigation by the U.S. Probation Officer of the district into which the release will be made.[327]

1. Parole: Aftercare Recommendations

As has been discussed above,[328] Georgia's aftercare services are

provided by DHR. The complexities of providing adequate and meaningful supervision to those juveniles who have been released from institutions go beyond merely providing adults who are competent supervisors and programs which attempt to open the community's resources. One must consider the institutions and the policies of those who hold administrative positions.

The presumptive goal of incarceration is the reformation of the juvenile's behavior patterns. This requires intensive and purposeful supervision within the institution, during probation, and within aftercare programs. When a juvenile is released, the period of time during which he will be supervised is rather amorphous. The difficulty is that the decision-maker who sets the time does not really have sufficient contact with the child to know how the juvenile has progressed. On the other hand, if this contact exists, effective sanctions for irresponsible decisions which can be meaningfully enforced do not exist. Although many of these decisions are made by a group within the agency, the problems of lack of contact still exist.

The status of the offender whose release is pending from one of Georgia's Youth Development Centers is extremely vague and, once the juvenile is within an aftercare program, complete freedom from supervision may result as a practical matter because of a worker's limited time in which to process the child.

Regulations within DHR cover many of the same procedures but these are subject to the fluctuating limitations of finances and space. It is commendable that the Youth Services Section is attempting to "reduce waiting lists to State Youth Development Centers,"[329] but the alleged purpose of incarcerating juveniles is not to process them into and out of a YDC as rapidly as possible.

Codification of the goals, purposes, and procedures will add an element of solidity, but not inflexibility, to the granting of parole to juveniles. When legislators and administrators are confronted with a law establishing standards, it will be less convenient to "issue an agency regulation" which may offer a temporary balm but not a solution.

The Juvenile Parole Project appears to be a most effective means of handling the need for aftercare for juveniles. The caseloads are small, the offices are located within the area to be served, the pro-

grams appear to have continuity from commitment to complete release, and a method of checking on the juvenile after release from the program exists. Unfortunately, the project is only scheduled to last another twelve months. It should be made a continuing program and expanded beyond the target offenders mentioned in the program description above. The motivation to spend the required money for improved operational conditions will come from increased public awareness and greater rewards for work. Such motivation may result from the practical application of research and survey projects. The system must implement stable criteria for judging the effectiveness of programs with continuity and planning.

G. *Conclusion*

The goal of reducing the number of juveniles placed in secure institutions has become more than a remedy for overcrowding of detention centers and training schools. It has been shown that the traditional method of trial and training school is ineffective and perhaps dangerous to both the community and the youth it effects.

To facilitate a reduction in the use of secure institutions for juveniles, recommendations have been made in the preceding pages for statutory changes and for the implementation or expansion of certain programs. The great majority of "unruly" cases should be prevented from reaching the juvenile justice system. The availability of non-secure community alternatives to detention should be increased so that children such as those whose parents simply will not take them home are not placed in detention centers. Paraprofessional supervision should be utilized in the areas of probation and aftercare and in lieu of detention. The state should plan for the eventual phasing out of most of its training school capacity.

A high priority must be placed on the development of effective community-based programs on a statewide basis to replace traditional methods where they have been shown to have failed to successfully re-integrate juvenile offenders into society. Programs such as Attention Homes, Impact, Day Centers, Group Homes, and Community Treatment Centers, now all experimental programs, should be analyzed, improved, and put into effect by both the state and private organizations hired by the state on the large scale now recommended by judges and social workers associated with the juvenile justice system in Georgia.

Congress recently passed the Juvenile Justice and Delinquency Prevention Act of 1974, authorizing the appropriation of up to $275,000,000 for distribution to the states.[330] The states are required to place heavy emphasis on community programs in their use of any funds they receive under the Act.[331] Georgia should take the necessary steps to qualify for its share of this money and actively encourage Congress to adequately fund the programs established by the Act.

Appendix A

The following are selected questions on detention and informal adjustment from an unpublished survey of 66 Georgia Juvenile Courts. The survey was conducted in June, 1974, by the Governor's Commission on Criminal Justice Standards and Goals Studies.

		Yes	No
1.	Is there a need in your jurisdiction for expanded shelter care facilities?	61	0
2.	Are unruly, deprived, or runaway children detained in a facility where delinquent youth are housed?	64	1
3.	Are citizen advisory boards established to pursue development of in-house and community-based programs and alternatives to detention?	5	1
4.	When a child is taken to detention by a police officer, does that officer have the authority to decide whether or not the youth should be detained or released?	29	29
5.	Is an effective release on recognizance program in operation?	39	9
6.	What percentage of juveniles taken into custody are detained longer than 72 hours? (replies averaged)	Approx.	5%
7.	Do intake personnel have the authority and responsibility to divert as many youth as possible to alternative programs such as mental health and family services, public welfare agencies, youth service bureaus, and similar public and private agencies?	50	16
8.	Do intake personnel seek informal service dispositions for as many cases as possible, provided the safety of the child and the community is not endangered?	46	14
9.	Does the probation agency provide pretrial intervention services to persons released on recognizance?	32	19
10.	Is informal probation in operation?	45	9
11.	Is informal adjustment in operation?	50	6

APPENDIX B

The following community-based programs are available as alternatives in lieu of institutionalization of juveniles committed to the Department of Human Resources. The descriptions are taken from the Youth Services Annual Report for FY 1974, July 31, 1974 (Mimeograph).

1. Day Center Program—There are three day centers located in the metropolitan area of Atlanta and one in Savannah. The day centers are designed primarily for the male offender between the ages of 12 and 15. Each child must have a home or residence in the general vicinity of the center and the committing judge must concur with the plan to place the child in a community-based program. The day center program offers a four-pronged approach to treatment: individualized education, guidance and counseling, recreational therapy, and cultural enrichment.

2. Group Homes Program—Youth selected for this program are those who have the potential for success in comunity-based programs but who are unable to live with parents, relatives, in foster homes, etc. The goal of the group home program is the successful re-integration of the child into the community. There are currently two homes for boys in Augusta, one for boys in Gainesville, and two homes for girls in Atlanta. The ideal number of children in each home is eight. New group homes are being implemented in Chatham, Clayton and DeKalb Counties. The homes serve a state-wide population.

3. Community Treatment Centers—These centers are located in Atlanta (2), Columbus, Gainesville, Griffin, Newnan, Thomaston, Thomasville, and Albany. Caseloads are kept small (maximum 15 per worker) to allow a worker ample time to work on an intensive basis with the child and his facility. Those youth in the program continue to reside in their homes while actively participating in the activities at the center. New programs are being implemented in Chatham, DeKalb, Clayton, Cobb, Richmond, Glynn, Houston, Bibb, Bartow and Walker Counties.

Chapter Four

[1] GA. CODE ANN. § 24A-101 *et seq.* (Supp. 1974).

[2] GA. CODE ANN. § 24-2401 *et seq.* (1971) (repealed, Acts 1971 at 709, 756).

[3] 9 U. L. A. 397 (1968).

[4] *In re* Gault, 387 U.S. 1 (1967). For a discussion of *Gault* see note 42 *infra*.

[5] *See* GA. CODE ANN. § 24A-101 (Supp. 1974).

[6] *Id.*

[7] GA. CODE ANN. § 24A-401(c) (Supp. 1974).

[8] GA. CODE ANN. § 24A-401(f) (Supp. 1974). Absent the latter finding the court can make no disposition of the case. § 24A-2302.

[9] GA. CODE ANN. § 24A-401(e) (Supp. 1974).

[10] GA. CODE ANN. § 24A-401(g) (Supp. 1974).

[11] GA. CODE ANN. § 24A-401(h) (Supp. 1974).

[12] GA. CODE ANN. § 24A-1601 *et seq.* (Supp. 1974).

[13] GA. CODE ANN. § 24A-1301 (Supp. 1974). Taking into custody is not an arrest except for the purpose of determining its validity. *Id.*

[14] GA. CODE ANN. § 24A-1402 (Supp. 1974).

[15] GA. CODE ANN. § 24A-602 (Supp. 1974). An intake officer (who is often also a probation officer) in the juvenile court system is somewhat analogous to a public prosecutor; he may, subject to the court's direction, decide which cases should go to "trial," be dismissed, or be informally adjusted, and which children should be held in detention or shelter care. GA. CODE ANN. §§ 24A-1601, 1401, 1001 (Supp. 1974).

In most Georgia counties the Youth Services Section of the State Department of Human Resources (D.H.R.) provides the judge with court service workers to provide intake, detention, and probation services. In 17 counties (Fulton, DeKalb, Cobb, Chatham, Richmond, Glynn, Dougherty, Clayton, Whitfield, Troup, Bibb, Muscogee, Hall, Clarke, Floyd, Spaulding and Upson), however, the county provides an independent staff.

[16] GA. CODE ANN. § 24A-1402(a)(3) (Supp. 1974). *See* note 19 *infra*.

[17] § 24A-801. COMMENCEMENT OF PROCEEDINGS.

A proceeding under this Code [Title 24A] may be commenced:

(a) by transfer of a case from another court as provided in section 24A-901; or

(b) as provided in section 24A-3101 in a proceeding charging a juvenile traffic offense; or

(c) by the court accepting jurisdiction as provided in section 24A-3002 or accepting supervision of a child as provided in section 24A-3004; or

(d) in other cases of alleged delinquency, unruliness or deprivation by the filing of a petition as provided in this Code. The petition and all other documents in the proceeding shall be entitled "In the interest of . . ., a child" except upon appeal, in which event the anonymity of the child shall be preserved by appropriate use of initials; or

(e) in other cases as provided by law.

GA. CODE ANN. § 24A-801 (Supp. 1974).

[18] § 24A-1601. PETITION—PRELIMINARY DETERMINATION.—A petition alleging delinquency, deprivation or unruliness of a child shall not be filed unless the court or a person authorized by the court has determined and endorsed upon the petition that the filing of the petition is in the best interest of the public and the child.

GA. CODE ANN. § 24A-1601 (Supp. 1974).

§ 24A-1602. PETITION—WHO MAY MAKE.—Subject to section 24A-1601, the petition alleging delinquency, deprivation or unruliness of a child may be made by any

person, including a law enforcement officer, who has knowledge of the facts alleged or is informed and believes that they are true.

GA. CODE ANN. § 24A-1602 (Supp. 1974).

[19] GA. CODE ANN. § 24A-301(a)(1)(A) (Supp. 1974). Under certain circumstances cases involving criminal offenses may be transferred to the appropriate court having jurisdiction of the offense. The Georgia Supreme Court recently held in *J.W.A. v. State,* 233 Ga. 683, —S.E.2d— (1975), that exclusive original jurisdiction over youthful delinquents except in capital felony cases is vested in the juvenile courts. The concurrent jurisdiction of the superior courts becomes effective when activated by a proper transfer from the juvenile courts, a process under GA. CODE ANN. § 24A-2501 (Supp. 1974) which must include a hearing and a finding that there are reasonable grounds to believe the child committed the act alleged, that the child is not amenable to treatment or rehabilitation through available facilities, that the child is not committable to a mental institution, and that the interests of the child and the community require that he be placed under legal restraint. 233 Ga. at 686.

[20] GA. CODE ANN. § 24A-301(a)(1)(D), (2)(A) and (C), (c) (Supp. 1974).

[21] *See* GA. CODE ANN. § 24A-1301(a)(3) (Supp. 1974).

[22] GA. CODE ANN. § 24A-602(b) (Supp. 1974).

[23] GA. CODE ANN. § 24A-1401, 1404 (Supp. 1974). For statistics on detention of juveniles in Georgia, see Appendix A.

[24] See note 192 *infra* and accompanying text.

[25] GA. CODE ANN. § 24A-1404(c) (Supp. 1974). Juveniles have the same right to bail as adults. GA. CODE ANN. § 24A-1402(c) (Supp. 1974). For the provisions pertaining to adult bail see GA. CODE ANN. § 27-901 *et. seq.* (Supp. 1974); GA. CONST. art. I, sec. 1, ¶9.

[26] § 24A-1403. PLACE OF DETENTION.

(a) A child alleged to be delinquent may be detained only in:

(1) a licensed foster home or a home approved by the court;

(2) a facility operated by a licensed child welfare agency;

(3) a detention home or center for delinquent children which is under the direction or supervision of the court or other public authority or of a private agency approved by the court;

(4) any other suitable place or facility, designated or operated by the court; or

(5) any appropriate place of security, only if the facility in paragraph (3) is not available and the detention is in a room separate and removed from those for adults and it appears to the satisfaction of the court that public safety and protection reasonably require detention and the court so orders.

(b) A child alleged to have committed an offense over which the superior court has concurrent jurisdiction under section 24A-301(b) shall be detained pending a committal hearing under Chapter 27-24 or indictment only in the facilities stated in paragraphs (1) through (5) of subsection (a) unless it appears to the satisfaction of the juvenile court that public safety and protection reasonably require detention in common jail and the court so orders.

(c) If a case is transferred to any other court for criminal prosecution under section 24A-2501, the child may be transferred to the appropriate officer or detention facility in accordance with the law governing the detention of persons charged with crime.

(d) The official in charge of a jail or other facility for the detention of adult offenders or persons charged with crime shall immediately inform the juvenile court if a person who is or appears to be under the age of 17 years is received at the facility and shall bring him before the court upon request or deliver him to a detention or shelter care facility designated by the court.

(e) A child alleged to be deprived or unruly may be detained or placed in shelter care only in the facilities stated in paragraphs (1), (2), and (4) of subsection (a).

GA. CODE ANN. § 24A-1403 (Supp. 1974).

[27] Annual Report of Youth Services Section, Department of Human Resources, for FY 1974, July 31, 1974 (Mimeograph).

[28] A shortage of facilities in Gwinnett and Spaulding counties had led to the regular use of adult jails for juvenile detention. Youth Services plans to remedy this situation by (1) providing Gwinnett facilities at the Gainesville R.Y.D.C., (2) developing shelter care facilities in Gwinnett, (3) completing construction of a R.Y.D.C. in Metro Atlanta. Youth services policy is that a child should be taken to the next nearest R.Y.D.C. with an open space rather than use a jail. Interview with D. Wilkinson, Youth Services Section, August 15, 1974; *see* GA. CODE ANN. § 24A-1403(5) (Supp. 1974); note 26 *supra*.

[29] STATE BOARD OF HUMAN RESOURCES, STANDARDS AND GUIDES FOR THE DETENTION OF CHILDREN AND YOUTH IN THE STATE OF GEORGIA (1973).

[30] *Id.* Teachers are not required to have a college degree.

[31] Annual Report of Youth Services Section, D.H.R., for FY 1974, July 31, 1974 (Mimeograph). In the program's first six months 105 children were placed in homes for an average stay of 19.6 days. Two-thirds of these had been referred to the court on charges of being unruly, and while about 30% had run away from their own homes, only 14% ran away from the Attention Home. Memorandum from D. Wilkinson to D.H.R., March 15, 1974.

[32] GA. CODE ANN. § 24A-1701 (Supp. 1974).

[33] GA. CODE ANN. § 24A-1001. INFORMAL ADJUSTMENT.

(a) Before a petition is filed, the probation officer or other officer of the court designated by it, subject to its direction, may give counsel and advice to the parties with a view to an informal adjustment if it appears;

(1) the admitted facts bring the case within the jurisdiction of the court;

(2) counsel and advice without an adjudication would be in the best interest of the public and the child;

(3) the child and his parents, guardian or other custodian consent thereto with knowledge that consent is not obligatory.

(b) The giving of counsel and advice cannot extend beyond three months from the day commenced unless extended by the court for an additional period not to exceed three months and does not authorize the detention of the child if not otherwise permitted by this Code [Title 24A].

(c) An incriminating statement made by a participant to the person giving counsel or advice and in the discussion or conferences incident thereto shall not be used against the declarant over objection in any hearing except in a hearing on disposition in a juvenile court proceeding or in a criminal proceeding against him after conviction for the purpose of a presentence investigation.

GA. CODE ANN. § 24A-1001 (Supp. 1974).

While it is the policy of the Youth Services Section to minimize such penetration (that is, to maximize the use of informal adjustment), the intake officer makes informal adjustment decisions subject to the direction of the judge, and some Georgia judges dictate practices such as adjudicating every offense that would have been a crime if done by an adult (that is, most delinquency cases). Interview with Diana Fox, Court Service Worker, Lawrenceville, Georgia, August 8, 1974. Most Georgia juvenile courts, however, authorize intake officers to divert as many cases as possible. *See* Appendix A. In 1973, 42.3% of the delinquency and unruly cases referred to Georgia's juvenile courts were handled without adjudication. Statistics compiled by Youth Services Section. The national average in 1970 was 55%. DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, JUVENILE COURT STATISTICS (1972).

[34] For a discussion of pre-trial diversion see Chapter One, *supra*.

[35] GA. CODE ANN. § 24A-1001(a)(3) (Supp. 1974).

[36] GA. CODE ANN. § 24A-1001(a)(1),(2) (Supp. 1974). One of the reasons for diverting children is the possible harmful effect of the adjudication process on them. See notes 58-88 *infra* and accompanying text.

[37] *See* Sheridan, *Juvenile Court Intake*, 2 J. FAMILY L. 139, 149 (1962); ADVISORY COUNCIL OF JUDGES OF THE NATIONAL PROBATION & PAROLE ASSOCIATION, GUIDES FOR JUVENILE COURT JUDGES 38-41 (1957); Correspondence with Judge Rex Ruff, Juvenile Court of Cobb County, Ga., October 17, 1974.

A factor which has influenced courts and intake officers to divert more juveniles is the possible harmful effect of a formal adjudication and subsequent disposition. See notes 58-88 *infra* and accompanying text; Gough, *Consent Decrees and Informal Service Balance*, 19 U. KAN. L. REV. 733, 734 (1971).

[38] GA. CODE ANN. § 24A-1001 (Supp. 1974).

[39] *See* note 210 *infra* and accompanying text.

[40] GA. CODE ANN. § 24A-1701 (Supp. 1974).

[41] The Code provides that a referee may determine issues of fact in certain circumstances. GA. CODE ANN. § 24A-701 (Supp. 1974).

[42] GA. CODE ANN. § 24A-1801 (Supp. 1974).

[43] GA. CODE ANN. § 24A-2001 (Supp. 1974).

[44] GA. CODE ANN. § 24A-2002 (Supp. 1974). In the case of *In re Gault*, 387 U.S. 1 (1967), the Supreme Court held that where a finding of delinquency could result in incarceration in an institution, that juvenile hearing must measure up to the essentials of due process and fair treatment. A juvenile being adjudicated at such a hearing has the right to written notice of the specific charges sufficiently in advance of the proceeding to make reasonable preparations of a defense, the right to representation by counsel and to be advised thereof, the right of confrontation and cross-examination of witnesses, and the privilege against self-incrimination. 387 U.S. at 133, 130-34, 142.

[45] GA. CODE ANN. § 24A-2201 (Supp. 1974).

[46] GA. CODE ANN. § 24A-2201(c) (Supp. 1974). If there is no evidence to the contrary, the commission of a felony sustains a finding of a need for treatment or rehabilitation. GA. CODE ANN. § 24A-2201(b) (Supp. 1974).

[47] GA. CODE ANN. § 24A-2101 (Supp. 1974).

[48] GA. CODE ANN. § 24A-2201(e)(Supp. 1974).

[49] § 24A-2301. DISPOSITION OF DEPRIVED CHILD.

(a) if the child is found to be a deprived child, the court may take any of the following orders of disposition best suited to the protection and physical, mental and moral welfare of the child:

(1) permit the child to remain with his parents, guardian or other custodian, including a putative father, subject to conditions and limitations as the court prescribes, including supervision as directed by the court for the protection of the child;

(2) subject to conditions and limitations as the court prescribes, transfer temporary legal custody to any of the following: (i) any individual including a putative father who, after study by the probation officer or other person or agency designated by the court, is found by the court to be qualified to receive and care for the child; (ii) an agency or other private organization licensed or otherwise authorized by law to receive and provide care for the child; (iii) any public agency authorized by law to receive and provide care for the child; (iv) an individual in another state with or without supervision by an appropriate officer under section 24A-3002; . . .

(b) Unless a child found to be deprived is found also to be delinquent he shall not be committed or confined to an institution or other facility designed or operated for the benefit of delinquent children.

GA. CODE ANN. § 24A-2301 (Supp. 1974).

[50] § 24A-2302. DISPOSITION OF DELINQUENT CHILD.

If at the conclusion of the adjudicatory hearing the child is found to have committed a delinquent act, and subsequently is determined to be in need of treatment or rehabilitation, the court may make any of the following orders of disposition best suited to his treatment, rehabilitation and welfare:

(a) Any order authorized by section 24A-2301 for the disposition of a deprived child;

(b) Placing the child on probation under the supervision of the probation officer of the court or the court of another state as provided in section 24A-3003, or any public agency authorized by law to receive and provide care for the child, or the chief executive officer of any community rehabilitation center acknowledging in writing his willingness to accept the responsibility for the supervision of the child, under conditions and limitations the court prescribes;

(c) Placing the child in an institution, camp, or other facility for delinquent children operated under the direction of the court or other local public authority; or

(d) Committing the child to the Division of Children and Youth.

GA. CODE ANN. § 24A-2302 (Supp. 1974).

If subsection (d) is used the commitment is for two years unless the state discharges the child sooner or the court extends it after notice and a hearing. GA. CODE ANN. § 24A-2701 (Supp. 1974). The court has no furhter power over the child. GA. CODE ANN. § 24A-2801(b) (Supp. 1974). The state has a screening committee which determines whether the child will go to a training school (called "State Youth Development Centers"), or to one of the community-based treatment programs. Interview with Sara Schmidlin, Director of the Connection Center, Decatur, Georgia, August 28, 1974. In fiscal year 1974, 28% of the committed youths went to community-based programs, which include Day Centers, Group Homes, and Community Treatment Centers. Annual Report of Youth Services Section, D.H.R., for fiscal year 1974, July 31, 1974 (Mimeograph). These programs are described in Appendix B.

A child may stay in a local detention center for from two weeks to three months after commitment before being transferred into the state's custody. Interview with J. Winter, Public Defender, DeKalb County Juvenile Court, September 6, 1974.

[51] § 24A-2303. DISPOSITION OF UNRULY CHILD.

If the child is found to be unruly, the court may make any disposition authorized for a delinquent child except that, if commitment to the Division of Child and Youth be ordered, the court *shall first find that the child is not amenable to treatment or rehabilitation pursuant to subsections (a), (b), or (c) of section 24A-2302* [note 50 *supra*].

GA. CODE ANN. § 24A-2303 (Supp. 1974) (emphasis added).

[52] GA. CODE ANN. § 24A-2304 (Supp. 1974); A. W. A. v. State, 231 Ga. 699, 203 S.E.2d 512 (1974); Long v. Powell, Civil No. C74-872A (N.D.Ga., Feb. 7, 1975). In *Long*, it was held that § 24A-2304, though not unconstitutionally vague nor unconstitutional on its face, was unconstitutional as applied under an agreement between the Dept. of Corrections and D.H.R. made following the decision in *A. W.A.* Legal custody and the final decision on the release of the juvenile was retained by Corrections, but D.H.R. took physical custody of the juvenile and placed him in a normal juvenile training school. The *Long* court found that since the civil nature of a juvenile proceeding must be traded off for rehabilitation of the child rather

than punishment, it was a denial of due process to place the child committed under § 24A-2304 in a facility which the juvenile court had found under § 24A-2304 to be inadequate for treating him. *Id.*

[53] GA. CODE ANN. § 24A-101 (Supp. 1974).

[54] These are the goals of the Juvenile Court Code of 1971 set out in GA. CODE ANN. § 24A-101 (Supp. 1974).

[55] *Hearings on S.821 and S.3148 Before the Subcommittee to Investigate Juvenile Delinquency of the Committee on the Judiciary*, 92d Cong., 2d Sess. & 93d Cong., 1st Sess. 449 (1973)(views of the National Council of Jewish Women) [hereinafter cited as *Hearings*]; REPORT OF THE GOVERNOR'S COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS 11-12 (Georgia, 1974). S. NORMAN, THE YOUTH SERVICE BUREAU—A KEY TO DELINQUENCY PREVENTION 72, n.6 (1972) (this book apparently presents the position of the National Council on Crime and Delinquency); Bazelon, *Beyond Control of the Juvenile Court*, 21 JUV. CT. JUDGES J. 42 (1970); Glen, *Juvenile Court Reform: Procedural Progress and Substantive Stasis*, 1970 WIS. L. REV. 431, 444-46; Rubin, *Legal Definition of Offenses by Children and Youths*, 1960 U. OF ILL. L.F. 512, 515; Note, *Ungovernability: The Unjustifiable Jurisdiction*, 83 YALE L.J. 1383 (1974). *See* S. REP. No. 93-1011, 93d Cong., 2d Sess. 23 (1974).

[56] In 1973 in Georgia about 30% of those cases which were formally adjudicated (not including deprived cases or juvenile traffic offenses) were unruly cases. Calculated from figures supplied to the Department of Human Resources by the individual juvenile courts.

Nationally, the Juvenile Detention and Correctional Facility Census for FY 1971 found that 70% of the female adjudications and 23% of the male adjudications were for "status" (non-criminal) offenses, for an average of 32%. *Hearings*, *supra* note 55, at 688 (Table 7).

[57] See text at notes 58-67 *infra* for a discussion of detention and commitment of unruly children.

[58] 3 Cal. 3d 16, 473 P.2d 737, 89 Cal. Rptr. 33 (1970).

[59] 473 P.2d at 747 n.25.

[60] See Appendix A, question 6.

[61] Interview with D. Fox, Court Service Worker, Juvenile Court of Gwinnett County, in Gwinnett County, August 8, 1974.

[62] Bazelon, *supra* note 55, at 42; Appendix A, question 1.

[63] Interview with W. Ladson, Court Service Worker Coordinator, Fulton County, in Atlanta, August 16, 1974. *See* note 74 *infra*.

[64] *In re* M., 473 P.2d 737, 747 n.25 (1970); Bazelon, *supra* note 55.

[65] Interview with W. Ladson, Court Service Worker Coordinator, Fulton County, in Atlanta, August 16, 1974.

[66] Interview with J. Winter, Public Defender, Juvenile Court of DeKalb County, in Decatur, Georgia, September 6, 1974.

[67] *See Hearings*, *supra* note 55, at 73.

[68] *Id.* (Statement of A. Schuchter, Director of Planning, Massachusetts Department of Youth Services). *See* notes 285-90 *infra* and accompanying text for a discussion of the harmful effects of training schools.

[69] Paulsen, *The Changing World of Juvenile Law, New Horizons for Juvenile Court Legislation*, 40 PA. B.A.Q. 26, 33 (1968).

[70] *Id.*; 83 YALE L. J., *supra* note 55, at 1401; Comment, *Alternative Preadjudicatory Handling of Juveniles in South Dakota: Time for Reform*, 19 S.D.L. REV. 207, 212 (1974); Interview with D. Wilkinson, Georgia Dep't of Human Resources, Youth Services Section, in Atlanta, August 15, 1974.

[71] 19 S.D.L. REV., *supra* note 70, at 212.

[72] 83 YALE L.J., *supra* note 55, at 1393; Bakal, *The Massachusetts Experience*, in U.S. DEP'T OF HEALTH, EDUCATION AND WELFARE, DELINQUENCY PREVENTION RPTR. (April, 1973).

[73] *See* note 70 *supra*. Until recently in most jurisdictions the offenses now designated "unruly" were included under the "delinquent" label. Some jurisdictions now call these children "ungovernable," "incorrigible," or "person in need of supervision."

[74] W. RECKLESS, AMERICAN CRIMINOLOGY: NEW DIRECTIONS 135 (1973); Dinitz, Reckless & Kay, *A Self Gradient Among Potential Delinquents*, 49 J. CRIM. L.C. & P.S. 230, 233 (1958).

[75] Interview with D. Wilkinson, *supra* note 70. One writer suggests:

> [N]egative labels . . . create a deviant identity which is highly visible. They create damaging self-concepts and expectations for future behavior which may tend to perpetuate and intensify those very behaviors. . . . Negative labels may direct social action that insures the accuracy and permanence of the label. Finally, punishing labels drive people into deviant communities and subcultures which can further insulate their members from change.

Payne, *Negative Labels, Passageways and Prisons*, 19 CRIME & DELINQUENCY 33, 40 (1973).

[76] The study was done in New York, where unruly children are labeled persons in need of supervision (PINS) and deprived children are labeled neglected. 83 YALE L.J., *supra* note 55, at 1383.

[77] *Id.* at 1391-93. Thirty-seven per cent of the unruly cases could have been handled as deprivation cases. *Id.*

[78] *Id.*

[79] *Id.* at 1394.

[80] For instance, the malleability of intake officers in the hands of stubborn parents is shown by the fact that 80% of parent-initiated unruly cases where the parent was alleging promiscuity went to formal adjudication while only 50% of those charged with larceny (usually initiated by the victim or police rather than parents) were formally adjudicated. *Id.* at 1395 n.88.

[81] *Id.* at 1399.

[82] MIDONICK, CHILDREN, PARENTS AND THE COURTS (1972).

[83] The common law absolute right of the parent to abuse, discipline, punish or neglect his child has been modified only to the extent of giving the child some protection from extreme physical abuse or neglect. 24 EMORY L. J. 183, 184 n.5 (1975)(Note on *In re* Levi, 131 Ga. App. 348 (1974)).

[84] Comment, *The Juvenile Offender—Where Can We Send Him*, 2 FORDHAM URBAN L. J. 245, 264 (1974).

[85] Terry, *The Screening of Juvenile Offenders*, 58 J. CRIM. L.C. & P.S. 173, 180 (1967); *see Hearings*, *supra* note 55, at 420 ("as we try harder to socialize the deviant, we remove him further from the normal socializing process").

[86] Interview with S. Schmidlin, Director of the Connection Center, Decatur, Georgia, August 28, 1974; Impact, June-July, 1973, at 1, col. 4.

[87] Interview with S. Schmidlin, *supra* note 86; Impact, June-July, 1973, at 1, col. 4.

[88] S. REP. NO. 93-1011, *supra* note 55, at 44.

[89] Paulsen, *supra* note 69, at 33.

[90] Schroeder, *Developments in the Enforcement of Parental and State Standards in Juvenile Proceedings*, 10 IDAHO L. REV. 153, 181 (1974).

[91] *Id.*

[92] Sheridan, *Juveniles Who Commit Noncriminal Acts: Why Treat in a Correctional System?* 31 FED. PROB. 26 (March, 1967).

[93] Correspondence with a Georgia Juvenile Court Judge, September 30, 1974.

[94] Rubin, *supra* note 55, at 515.

[95] Glen, *supra* note 55, at 445.

[96] Howlett, *Is the YSB All It's Cracked Up to Be?* 19 CRIME & DELINQUENCY 485, 489 (1973).

[97] Young v. State, 120 Ga. App. 605, 606-07, 171 S.E.2d 756, 757 (1969) (emphasis added).

[98] GA. CODE ANN. §§ 74-105, 108 (1973); *see* note 83 *supra*.

[99] GA. CODE ANN. § 24A-401(g) (Supp. 1974).

[100] The child has a right to custody rather than liberty:

> If his parents default in effectively performing their custodial functions—that is, if the child is "delinquent" [or unruly]—the state may intervene. In doing so it does not deprive the child of any rights, because he has none. It merely provides the "custody" to which the child is entitled.

In re Gault, 387 U.S. 1, 17 (1967). *See* note 83 *supra*.

[101] *See* notes 92-93 *supra*.

[102] GA. CODE ANN. § 24A-2303 (Supp. 1974).

[103] *See* note 68 *supra* and accompanying text.

[104] GA. CODE ANN. § 24A-401(h) (Supp. 1974).

[105] *Id.*

[106] GA. CODE ANN. § 24A-401(g)(2) (Supp. 1974).

[107] The legislative history to the New York Family Court Act § 1012(f) (McKinney Supp. 1973) indicates the legislature intended that a deprived petition have priority over an unruly petition. 83 YALE L. J. *supra* note 55, at 1393 n. 77.

[108] GA. CODE ANN. § 24A-101 (Supp. 1974).

[109] GA. CODE ANN. § 24A-2301(a)(2) (Supp. 1974).

[110] GA. CODE ANN. § 24A-2303 (Supp. 1974).

[111] GA. CODE ANN. § 24A-101 (Supp. 1974).

[112] *See* notes 58-88 *supra* and accompanying text.

[113] 83 YALE L. J., *supra* note 55, at 1397.

[114] *Id.* at 1396.

[115] Bazelon, *supra* note 55, at 42 (emphasis added).

[116] *Id.*

[117] 120 Ga. App. 605, 607, 171 S.E.2d 765, 767 (1969).

[118] *Id.*

[119] *See* notes 100-03, 111-12 *supra* and accompanying text.

[120] Hammerman (Judge), *Baltimore Experiments with Truancy Program*, 21 JUV. CT. JUDGES J. 109 (1971); Interview with S. Schmidlin, *supra* note 86; Interview with W. Ladson, *supra* note 65.

[121] Interview with S. Schmidlin, *supra* note 86; Interview with W. Ladson, *supra* note 65; Impact, June-July, 1973, at 7, col. 3 (the city of Flint, Michigan schools' individualized educational program led to a 56% reduction in suspensions and expulsions, a 47% reduction in arrests, and a 35% reduction in detention).

[122] Interview with S. Schmidlin, *supra* note 86.

Although some school systems maintain a policy of working with truants for two years before referring them to the juvenile court, the punishment used during this period is suspension, and when a child under sixteen years of age is either suspended or expelled, he finds himself on the street, unable to get a job or enter a vocational school until he becomes sixteen. Many such children get into trouble.

[123] Interview with A. Workman, Solicitor, Juvenile Court of DeKalb County, September 18, 1974.

[124] Interview with S. Schmidlin, *supra* note 86.

[125] Interview with A. Workman, *supra* note 123.

[126] GA. CODE ANN. § 24A-401(g) (Supp. 1974).

[127] ____ Me. ____, 299 A.2d 560 (1973).

[128] 15 ME. REV. STAT. ANN. § 2552 (Cum. Supp. 1974). The Maine court construed habits of vice and immorality to mean criminal conduct. 299 A.2d at 569.

[129] The statute must not be so vague that persons of ordinary intelligence must guess at its meaning and differ as to its application. Cramp v. Board of Public Instruction, 368 U.S. 278, 287 (1971).

[130] 299 A.2d at 562-63.

[131] *Id.* at 568.

[132] *Id.* at 575 (Dufresne, C.J., dissenting).

[133] *Id.* at 578-79.

[134] J-1365-73, June 14, 1973 (D.C. Super.), reported in 20 CRIME & DELINQUENCY 169 (1974).

[135] D. C. CODE ANN. § 16-2301(8) (1973). This wording is similar to part of the unruly definition in GA. CODE ANN. § 24A-401(g) (Supp. 1974).

[136] 387 U.S. 1 (1967). These requirements are described in note 44 *supra*.

> There is no reason to assume [a child's] right . . . may be severed under a statute which is so vague as to permit institutionalization for even a minor breach of parental authority.

In re Brinkley, *supra* note 134, quoted in 20 CRIME & DELINQUENCY at 181 (1974).

[137] 20 CRIME & DELINQUENCY at 181 (1974).

[138] TASK FORCE REPORT, JUVENILE DELINQUENCY & YOUTH CRIME 7 (President's Commission 1967).

[139] Vinter, *The Juvenile Courts as an Institution*, in TASK FORCE REPORT, *supra* note 138, at 88.

The judge may even disregard the "guilt" of the child at the dispositional hearing and drop the charge that was proved at the adjudicatory hearing if he finds the child is not in need of treatment, rehabilitation or supervision, GA. CODE ANN. § 24A-2201(c) (Supp. 1974), and he has a broad choice of dispositional alternatives. GA. CODE ANN. § 24A-2201(b) (Supp. 1974).

[140] GA. CODE ANN. § 24A-2201(b) (Supp. 1974).

[141] Interview with J. Winter, *supra* note 66.

[142] 387 U.S. 1 (1967).

[143] *Id.* at 13, 34, 42.

[144] D. C. CODE ANN. § 16-2320(c),(d) (1973); *see* GA. CODE ANN. § 24A-2303 (Supp. 1974).

[145] This conclusion necessarily leads to the conclusion that *S.S. v. State* was wrongly decided.

[146] *See* notes 101-03 *supra* and accompanying text.

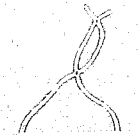
[147] S. REP. No. 93-1011, 93d Cong., 2d Sess. 44 (1974).

[148] *Id.* The Subcommittee called custodial incarceration in large state institutions "ineffective." *Id.* at 25.

[149] *See* notes 210-41 *infra* and accompanying text.

[150] Annual Report of Youth Services Section, Department of Human Resources, for FY 1974, July 31, 1974. (Mimeograph).

[151] The Connection Center, for example, is a day treatment center run by the Department of Human Resources. It primarily serves children in the 12-16 year age group who have been adjudicated delinquent or unruly by a juvenile court and committed to the state. Selection for the Connection is based on individualized criteria, and each child must have a home to live in nearby with at least one stable adult family member. Those who are dangerous to themselves or the community, or who have committed certain serious offenses are usually rejected. The Connection also accepts a limited number of special referrals of pre-delinquent children from schools or mental health agencies. The goal of the Connection is to prepare the children for a successful return to normal community life by bringing their educational level up to the proper level for their age and by changing their attitude toward breaking the law. Within a guided group interaction program the children set up rules, run their own program



and discipline those who break the rules. Classroom size is 5-6 children, and they advance much more quickly than in a normal school. The staff, including a full-time art teacher, tries to serve as parent/friend models. The program has had 98-100 per cent attendance. The cost per child per year is $1500 and over two years 14 out of 57 committed children served by the program were 'convicted' of further offenses. Interview with Sara Schmidlin, Director of The Connection Center, Decatur, Georgia, August 28, 1974.

[152] Interview with D. Wilkinson, *supra* note 70; Interview with S. Schmidlin, *supra* note 86.

[153] See note 31 *supra* and accompanying text.

[154] *See* Bakal, *supra* note 72. Massachusetts closed its training schools according to a plan described at note 298 *infra* and accompanying text.

[155] Impact, June-July, 1973, at 1, col. 4 (statement of C. Dunlap).

[156] Bakal, *supra* note 72.

[157] Impact, *supra* note 155, at 1, col. 2.

[158] 2 FORDHAM URBAN L. J., *supra* note 84, at 261. No details of the recidivism evaluation are given.

[159] Keve, *Juvenile Detention Without a Building*, in NEW APPROACHES TO DIVERSION AND TREATMENT OF JUVENILES 117 (1973)(U.S. Department of Justice Monograph).

[160] NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, COURTS 298 (1973).

[161] *Id.* The full Commission disagreed with the Task Force on this point.

[162] S. NORMAN, *supra* note 55.

[163] *Id.* at 16-17; *contra*, PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 83 (1967). Even if the YSB itself did not have the power to refer the child to the court, the parents presumably could withdraw the child and initiate a complaint with the court.

[164] S. NORMAN, *supra* note 55, at 16-17. As another commentator stated the rationale:

> If the referral . . . is backed by threat of referral to court, then the allegedly nonpenal agency is really an adjunct of the justice system and "diversion" a verbal fiction. On the other hand, if the agency's powers are based on nothing more than the ability of personnel to *persuade* youth to accept services, then the Youth Services Bureau would seem to be an excellent means of insuring both the right of the individual to receive treatment and his right to refuse services he does not view as helpful or necessary.

Klamputs, *Children's Rights—The Legal Rights of Minors in Conflict with Law or Social Custom*, CRIME & DELINQUENCY LIT., Sept., 1972, *quoted in* Howlett, *supra* note 96, at 490.

[165] S. NORMAN, *supra* note 55, at 86.

Although over one hundred YSB's had been funded when the guidelines were published, none had been subjected to thorough evaluation and comparison with existing juvenile court programs. *Id.* at 179. It is reported that in one community delinquency cases dropped 50%, in another probation caseloads dropped 30%; in Indiana the institutional population dropped 40% in the year fourteen YSB's were established, *id.* at vi; in South Bend, Indiana, the YSB is credited with a 24% reduction in the recidivism rate among referrals to the police juvenile bureau, *Hearings*, *supra* note 55, at 577; and in some places 85-90% of the juveniles referred to YSB's accepted offered services. 39 U. CINN. L. REV. 275, 284 (1970). Recently, the Congress authorized continued federal funding of YSB programs. 88 Stat. 1109, 93d Cong., 2d Sess. (1974).

There are five YSB's in Georgia designed to serve approximately 1200 youths. REPORT OF GOVERNOR'S COMMISSION, *supra* note 55, at 45 (recommending continued funding).

[166] *Id.* at 12-13.

[167] Howlett, *supra* note 96, at 490.

[168] 39 U. CINN. L. REV. 275, 284 (1970).

[169] President's Commission, *supra* note 163, at 83.

[170] See text at notes 58-67 *supra*.

[171] See notes 85-87 *supra* and accompanying text.

[172] See notes 100-03, 111-12, 119, 150-51 and accompanying text.

[173] *See* Rubin, *supra* note 55; Howlett, *supra* note 96.

[174] See the discussion of the parens patriae power in *S. S. v. State*, ____ Me. ____, 299 A.2d 560, 561-65 (1973); *cf.* note 100 *supra*.

[175] *See* Schroeder, *supra* note 90, at 181.

[176] See note 83 *supra*; GA. CODE ANN. § 74-108 (1973).

[177] 120 Ga. App. 605, 171 S.E.2d 756 (1969); see note 97 *supra* and accompanying text.

[178] *Hearings* at 217 ("[M]ost of the time the parents are to blame for the juvenile problem, either through their own conduct or their lack of proper conduct" and perhaps therefore should be penalized).

[179] Limiting the available dispositions is not suggested at this point because the position is taken that all children for whom probation or community placement is appropriate should not be dealt with by the juvenile court.

[180] 18 U.S.C. §§ 5031 *et seq.* (1969).

[181] 88 Stat. 1109, 93d Cong., 2d Sess. (1974); *see* S. REP. No. 93-1011, *supra* note 55, at 4, 56.

[182] *See* notes 23-31 *supra* and accompanying text.

[183] *See* notes 58-67 *supra* and accompanying text.

[184] *In re* M., 3 Cal. 3d 16, 473 P.2d 737, 89 Cal. Rptr. 33 (1970) (detention exception rather than the rule); *In re* G.M.B., 483 P.2d 1006 (Alaska 1971) (extraordinary remedy); NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, CORRECTIONS 257 (1973). The National Council on Crime & Delinquency (NCCD) suggests detention only when it is almost certain that the child will run away or commit a dangerous offense. Ferster, Snethen & Courtless, *Juvenile Detention: Protection, Prevention or Punishment?*, 38 FORDHAM L. REV. 161 (1969).

[185] Ferster, *supra* note 184, at 161.

[186] GA. CODE ANN. § 24A-1402(a)(2) (Supp. 1974).

[187] See Appendix A, question 4.

[188] NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, CORRECTIONS 250 (1973).

It is also argued that police tend to weigh narrow criteria, such as the nature of the offense, or the child's personality, too heavily rather than the statutory criteria. Interview with W. Ladson, Court Service Worker Coordinator, Atlanta, August 16, 1974.

[189] GA. CODE ANN. §§ 24A-1401, 1404(a) (Supp. 1974).

[190] GA. CODE ANN. § 24A-1403(a)(5) (Supp. 1974).

[191] *In re* M., 3 Cal. 3d 16, 473 P.2d 737, 89 Cal. Rptr. 33 (1970).

[192] CAL. WELF. & INST. CODE §§ 502, 635 (West, 1972). Section 502 is similar to GA. CODE ANN. § 24A-101 (Supp. 1974) and states the purpose of the Juvenile Court Law. Section 635 provides that the question to be answered at a detention hearing is whether "it is a matter of immediate and urgent necessity for the protection of such minor or the person or property of another that he be detained or that such minor is likely to flee the jurisdiction of the court . . ."

[193] Other relevant factors are whether the child is dangerous, whether he is likely to abscond from the court's jurisdiction, and whether he has a place to go where he will receive proper care and control. *Cf.* GA. CODE ANN. § 24A-1401 (Supp. 1974).

[194] 473 P.2d at 745-47.

[195] GA. CODE ANN. § 24A-101 (Supp. 1974).

[196] GA. CODE ANN. § 24A-1401 (Supp. 1974). *Cf.* 473 P.2d at 747, where the California court noted that automatic detention would be contrary to the legislature's desire for a meaningful detention hearing. The same reasoning applies to both Georgia's required investigation and the required detention hearing. GA. CODE ANN. §24A-1401, 1404(c)(Supp. 1974).

[197] *See* Wyatt v. Stickney, 325 F. Supp. 781 (M.D. Ala. 1971) (commitment to a mental hospital); *Juvenile Justice and Pre-Adjudication Detention*, 1 UCLA-ALASKA L. REV. 154, 161 (1972).

[198] *See* NATIONAL COUNCIL ON CRIME & DELINQUENCY, STANDARDS AND GUIDES FOR THE DETENTION OF CHILDREN AND YOUTH 17 (1961); National Juvenile Law Center, *Reviewing Pre-Detention Practice*, 4 CLEARINGHOUSE REV. 475 (1971); Correspondence with Judge T. Dillon, Juvenile Court of Fulton County, September 30, 1974.

[199] NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS & GOALS, CORRECTIONS 252 (1973). The Task Force based its position on its finding that (1) society has no right to treat non-criminals as criminals, and (2) that grouping negated any lessening of stigmatization and injury which might be attained by statutory provisions treating delinquents and unruly children differently. *Id.* at 252-53.

[200] *See* Appendix A, question 2.

[201] GA. CODE ANN. § 24A-1403(e) (Supp. 1974). This section is quoted in full at note 26 *supra*.

[202] There has been no appellate court decision on the point in Georgia.

[203] STATE BOARD OF HUMAN RESOURCES, STANDARDS & GUIDES FOR THE DETENTION OF CHILDREN AND YOUTH IN THE STATE OF GEORGIA at i (1973).

[204] *Id.* at 2.

[205] UNIFORM JUVENILE COURT ACT § 16(d): "A child . . . shall not be detained in a jail or other facility intended or used for the detention of adults charged with criminal offenses *or of children alleged to be delinquent*. 9 U.L.A. 397, 414-15 (1973) (emphasis added).

[206] *See* note 33 *supra* and accompanying text.

[207] *See* notes 168-81 *supra* and accompanying text.

[208] Keve, *Juvenile Detention Without a Building*, CRIMINAL JUSTICE MONOGRAPH—NEW APPROACHES TO DIVERSION AND TREATMENT OF JUVENILE OFFENDERS 117 (United States Department of Justice 1973).

[209] *Id.*

[210] GA. CODE ANN. § 24A-1001 (Supp. 1974).

[211] GA. CODE ANN. §§ 24A-1001, 1601 (Supp. 1974).

[212] GA. CODE ANN. § 24A-1601 (Supp. 1974).

[213] *See* note 36 *supra* and accompanying text.

[214] The restrictions on the child provided in the terms of a behavior contract vary with respect to the extent his liberty is curtailed, and the contract may include some contact with a probation officer or intake officer similar to that involved in normal post-adjudication probation. What is called a behavior contract here is sometimes called informal probation. *See* authorities cited note 215 *infra*.

[215] Interview with D. Fox, Court Service Worker, Gwinnett County Juvenile Court, August 8, 1974; Interview with J. Winter, Public Defender, DeKalb County Juvenile Court, September 6, 1974; Correspondence with Judge R. Ruff, Juvenile Court of Cobb County, October 17, 1974. For general discussion of juvenile diversion techniques see Gough, *supra* note 37; Ferster, Courtless & Snethen, *Separating Official and Unofficial Delinquents: Juvenile Court Intake*, 55 IOWA L. REV. 864 (1970); Comment, *Alternative Preadjudicatory Handling of Juveniles in South Dakota: Time for Reform*, 19 S.D.L. REV. 207 (1974).

[216] *See* note 33 *supra*.

[217] For instance, when the juvenile breaks the terms of a voluntary behavior contract.

[218] See the chapter on adult pre-trial intervention *supra*.

[215] Nejelski, *Diversion of the Juvenile Offender*, CRIMINAL JUSTICE MONOGRAPH—NEW APPROACHES TO DIVERSION AND TREATMENT OF THE JUVENILE OFFENDER 86 (United States Department of Justice 1973).

[220] 19 S.D.L. REV., *supra* note 215, at 220.

[221] Dembitz, *Ferment and Experiment in New York: Juvenile Cases in the New Family Court*, 48 CORNELL L. REV. 499, 514 n. 68 (1963). Plea bargaining also finds limited application in the juvenile system. Interview with J. Winter, *supra* note 215.

[222] GA. CODE ANN. § 24A-1001(a) (Supp. 1974).

[223] GA. CODE ANN. § 24A-1001(b) (Supp. 1974).

[224] *See* Commissioner's Note, UNIFORM JUVENILE COURT ACT § 10, 9 U.L.A. 397, 411 (1973), after which the Georgia informal adjustment section is substantially patterned.

[225] Correspondence with Judge R. Ruff, Juvenile Court of Cobb County, Georgia, October 17, 1974.

[226] *See* Ferster, *supra* note 215, at 882-84.

[227] Gough, *supra* note 37, at 741; Paulsen, *The Changing World of Juvenile Law, New Horizons for Juvenile Court Legislation*, 40 PENN. B.A.Q. 26, 35 (1968).

[228] PAULSEN, *supra* note 227, at 35.

[229] NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, COURTS 30 (1973); Gough, *supra* note 37, at 742.

[230] GA. CODE ANN. § 24A-1001(a) (Supp. 1974).

[231] *Id.*

[232] For a discussion of the possible harmful effects of formal adjudication, *see* notes 69-75 *supra* and accompanying text.

[233] GA. CODE ANN. § 24A-1001 (Supp. 1974).

[234] Ferster, *supra* note 215, at 884; NATIONAL COUNCIL ON CRIME AND DELINQUENCY, COUNCIL OF JUDGES, MODEL RULES FOR JUVENILE COURTS 15 (1969).

Although the Supreme Court in *In re Gault* did not consider the question of whether the Fifth Amendment Double Jeopardy Clause applies to juvenile cases, the fact that the Court *did* apply the Fifth Amendment privilege against self-incrimination would seem to indicate that the double jeopardy right would also apply to juvenile proceedings where commitment to an institution could result. 387 U.S. 1, 42.

[235] Ferster, *supra* note 215, at 886; Gough, *supra* note 37, at 738.

[236] GA. CODE ANN. § 24A-1001 (Supp. 1974).

[237] GA. CODE ANN. § 24A-801 (Supp. 1974).

[238] GA. CODE ANN. § 24A-1001(c) (Supp. 1974).

[239] N.C.C.D., *supra* note 234, at 15.

[240] While it could be argued that juvenile offenders could make an informal adjustment agreement and simply ignore it, the danger to the community is slight in that very rarely are juveniles accused of felonies or serious misdemeanors given an opportunity for an informal adjustment. Correspondence with Judge R. Ruff, Juvenile Court of Cobb County, October 17, 1974.

[241] *Accord*, Gough, *supra* note 37 at 738; 19 S.D. L. REV. *supra* note 210, at 221.

[242] See note 46 *supra* and accompanying text.

[243] GA. CODE ANN. §§ 24A-2301-04 (Supp. 1974).

[244] Examples of these conditions provided by the Gwinnett County Court Services Division are as follows:

1) not violating any federal, state, or municipal laws or ordinances;
2) periodic visits to the probation officer or Court Service Worker;
3) avoidance of undesirable people or places;
4) acceptance of curfews;
5) obedience to parents;

6) regular school attendance;
7) notification of the probation officer or CSW when leaving the state without the parents;
8) notification of the probation officer or CSW of address and job or school status.

[245] GA. CODE ANN. § 24A-2801 (Supp. 1974).

[246] For a discussion of commitment to the state, see note 274 *supra* and accompanying text.

[247] GA. CODE ANN. § 24A-2701(d) (Supp. 1974).

[248] GA. CODE ANN. § 24A-2701(c) (Supp. 1974).

[249] GA. CODE ANN. § 24A-3801 (Supp. 1974). In civil cases tried without a jury the findings of fact will be disturbed only if clearly erroneous. *See, e.g.*, Nussbaum v. Ross, 50 Ga. 628 (1874); Searcy v. Godwin, 129 Ga. App. 827, 201 S.E.2d 670 (1973).

[250] GA. CODE ANN. § 24A-601 (Supp. 1974). DeKalb County's criteria appear to be indicative of the probation systems which presently exist in the seventeen counties which have independent programs. To become a DeKalb County probation officer, the applicant must have a four year college degree in the social sciences and must complete a two week training course which includes counseling techniques, laws, procedure and agency policies. Interview with Robert Kettel, Chief Probation Officer, DeKalb County, August 7, 1974. The Court Services system is a division of the DHR's Youth Services Section and conducts state-funded, county-based probation and parole operations. Applicants are required to have a bachelor's degree, at least one year of experience in a related field, and a successful score on the State Court Services exam. A training program has been instituted but in-coming staff may still receive much instruction from present staff.

[251] GA. CODE ANN. § 24A-602 (Supp. 1974); GA. CODE ANN. § 24A-1301 (Supp. 1974).

[252] 9 U.L.A. 397 (1968).

[253] GA. CODE ANN. § 24A-602(c) (Supp. 1974).

[254] Huff v. Walker, 125 Ga. App. 251, 187 S.E.2d 343 (1972) (probation officer not authorized to obtain and execute a search warrant).

[255] See official comment to GA. CODE ANN. § 24A-602 (Supp. 1974).

[256] *See* note 47 *supra* and accompanying text.

[257] GA. CODE ANN. § 24A-2101 (Supp. 1974).

[258] *See* note 250 *supra*.

[259] *See* note 61 *supra*.

[260] *See* note 214 *supra*.

[261] Generally, the correctional agency is responsible for planning manpower needs and recruitment. One CSW, Diana Fox, Gwinnett County, stated that the number of positions allocated each year to the CSW program is determined by the Georgia legislature while the Youth Services Section, using statistics and case reporting, decides the areas of greatest need. Actual recruitment and hiring are done most frequently on the local level.

The following chart is indicative of those juveniles handled through the Court Services section.

Fiscal Year	Workers	Caseload	Average	% INCREASE in Caseload
1970-71	60	9,707	162	17.7
1971-72	73	10,641	146	10.0
1972-73	73	11,740	160	10.3
1973-74	127	15,782	124	34.4

Annual Report of Youth Services Section, D.H.R., for FY 1974, July 31, 1974.

Despite the high caseloads placed on probation workers, in a survey conducted by the Governor's Commission on Criminal Justice Standards and Goals, thirty-four of the respon-

dents felt that there were sufficient manpower and resources available to assure the courts that the use of probationary services would function adequately; seventeen disagreed with this conclusion.

Once the child is placed on probation, however, the same study indicated that only eighteen out of fifty-six respondents felt the probation system was organized to deliver a range of services by a range of staff; thirty-eight felt the system was not so organized.

[262] GA. CODE ANN. §§ 99-213(a), (d)(1), (e)(1) (1968).

[263] Where no county probation department exists, Court Services will also handle pre-commitment supervision. There appears to be a favorable attitude towards having the state assume all responsibility for probation and parole services rather than continuing the county-state dichotomy. In the recent Governor's Commission survey, forty respondents favored his approach while nineteen disapproved. It should be noted that there are seventeen independent county departments; a breakdown of the nineteen counties was not available.

[264] FLA. STAT. ANN. § 959.011(1) (1974).

[265] FLA. STAT. ANN. § 959.011(5) (1974).

[266] These programs of restitution have been primarily adult programs but the application to juveniles should be feasible. See also chapter on Restitution, *supra*.

[267] CALIF. WELF. & INST. CODE §§ 514, 516.5, 625.5 (West 1972).

[268] CALIF. WELF. & INST. CODE §§ 525, 530 (West 1972), 529 (Supp. 1974).

[269] CALIF. WELF. & INST. CODE §§ 540, 543 (West 1972).

[270] CALIF. WELF. & INST. CODE §§ 581, 584 (West 1972).

[271] CALIF. WELF. & INST. CODE §§ 653, 627.5 (West 1972).

[272] GA. CODE ANN. §§ 24A-2001, 2002, 602, 1301(b) (Supp. 1974).

[273] See chapter on volunteer probation workers.

[274] *See* note 302 *infra*.

[275] See note 59 *supra* and accompanying text.

[276] See note 31 *supra* and accompanying text.

[277] In Georgia they are called State Youth Development Centers (SYDC).

[278] See notes 286-89 and accompanying text *infra*.

[279] For a discussion of the Massachusetts experience see text accompanying notes 298-304 *infra*.

[280] In order to order commitment of the delinquent child, the judge must find the child is in need of treatment or rehabilitation (24A-2302); in order to find the child unruly, there must be an affirmative finding that the child is not amenable to treatment or rehabilitation by means other than commitment. GA. CODE ANN. § 24A-2303 (Supp. 1974).

[281] GA. CODE ANN. § 24A-2801 (Supp. 1974). DHR is the successor to the Division of Children & Youth named in the Code.

[282] In FY 1974, 2,213 juveniles were committed, a figure which may be compared with the total number (24,973) of adjudications in calendar year 1973. Annual Report of Youth Services Section, D.H.R., for FY 1974, July 31, 1974. For an analysis of probation practices see text at notes 242-70 *supra*.

[283] State Youth Development Center (S.Y.D.C.).

[284] The community-based programs are recent developments made possible by federal grants. They are described in Appendix B.

[285] Annual Report of Youth Services Section, D.H.R., for FY 1974, July 31, 1974.

[286] [H]owever euphemistic the title, . . . [an institution] for juveniles is an institution of confinement . . . . His world becomes 'a building with whitewashed walls, regimented routine and institutional hours . . . .' Instead of mother and father and sisters and brothers and friends and classmates, his world is peopled by guards, custodians, state employees, and 'delinquents' confined with him for anything from waywardness to rape and homicide.

In re Gault, 387 U.S. 1, 27 (1967)(footnotes omitted).

[287] This is the 1972 statistic. Henritze, *Juvenile Law and the Juvenile Court System*, 25 MERCER L. REV. 169, 174 n.28 (1974). The Supreme Court in *In re Gault* noted that "[t]he high rate of juvenile recidivism casts some doubt upon the adequacy of treatment afforded juveniles." 387 U.S. 1, 22 n.30 (1967).

[288] *Hearings on S. 821 Before the Subcommittee to Investigate Juvenile Delinquency of the Senate Committee on the Judiciary*, 92d Cong., 2d Sess., 93d Cong., 1st Sess. 449 (1973) [hereinafter cited as *Hearings*].

[289] The assumption is found in GA. CODE ANN. § 24A-2302 (Supp. 1974). Note, *Ungovernability: The Unjustifiable Jurisdiction*, 83 YALE L. REV. 1383, 1399-1400 (1974); PRESIDENT'S CRIME COMMISSION, THE CHALLENGE OF CRIME IN A FREE SOCIETY 80 (1967); Impact, June-July, 1973, at 1 col. 4 (secure institutions characterized by a social worker as "warehouses;" 10,000-15,000/child/year cost claimed to produce little benefit); S. REP. No. 93-1011, *supra* note 55, at 25 ("Custodial incarceration in large statewide institutions has proven to be ineffective as a treatment method.")

[290] Bazelon (Chief Judge, District of Columbia Circuit Court of Appeals), *Beyond Control of the Juvenile Court*, 21 JUV. CT. JUDGES J. 42 (1970); Hammerman (Judge), *Baltimore Experiments with Truancy Program*, 21 JUV. CT. JUDGES J. 109 (1971). The Director of Planning of the Massachusetts Department of Youth Services has described the systematic deficiencies of the traditional treatment approach:

> Probation/commitment experience generally fails to change antisocial behavior, improve control over impulses, remedy maladjustments and psychiatric disturbances, lessen anxieties and hostilities, improve work attitudes, self-concept or social responsibility. Moreover, treatment of delinquent behavior by juvenile corrections stresses the remedying of personal deficiencies in "therapeutic environments" which confirms to the children that being delinquent, like being poor, stems from a character disorder and lack of inner resources. Against the background of the psychological characteristics prevailing among delinquent youth, this reinforcement of the sense of personal deficiencies as part of the treatment process of course has profoundly negative consequences.

Hearings, supra note 288, at 73 (testimony of A. Schuchter).

[291] Interview with D. Wilkinson, Youth Services Section, D.H.R., Atlanta, August 15, 1974. Part of this difference may be attributable to the screening process whereby better risk cases are selected for community placement.

[292] Interview with Sara Schmidlin, Director of the Connection Center, Decatur, Georgia, August 28, 1974.

[293] Impact, February, 1974, at 4, col. 1 (Senate Subcommittee found same or lower recidivism rates with community-based programs); Comment, *The Juvenile Offender—Where Can We Send Him?*, 2 FORDHAM URBAN L.J. 245, 261 (1974); Sargeant, *Community-Based Treatment for Juveniles in Massachusetts*, CRIMINAL JUSTICE MONOGRAPH—NEW APPROACHES TO DIVSION AND TREATMENT OF JUVENILES 1-7 (1973) (U.S. Department of Justice).

[294] Impact, February, 1974, at 4, col. 1 (findings of the Senate Subcommittee to Investigate Juvenile Delinquency).

[295] Impact, June-July, 1973, at 1, col. 2 (Harvard study of Massachusetts community programs).

[296] One judge in Cobb County has observed:

> I firmly believe that treatment of a child within his or her community is the most desirable method of treatment, and that a proliferation of community based services can aid the juvenile court in properly rehabilitating the youngsters appear-

ing before it. However, . . . community based services . . . are not appropriate for every single child passing through the juvenile court system.

Correspondence from Judge Rex R. Ruff, Juvenile Court of Cobb County, Georgia, October 17, 1974; *see* Impact, February, 1974, at 3, col. 4 (letter to the editor from W. G. Whitlach, Juvenile Court Judge).

[297] Interview with D. Wilkinson, Georgia Department of Human Resources, August 15, 1974; Interview with Sara Schmidlin, Director of the Connection Center, Decatur, Georgia, August 28, 1974; Interview with Diana Fox, Court Service Worker, Lawrenceville, Georgia, August 8, 1974. Another argument for using community-based services rather than training schools is that the average stay in a Georgia training school of six months is not sufficient time to give each child the intensive supervision and counseling needed to gradually prepare the child for a successful return to the community. Interview with W. Ladson, Supervisor of Metro-Atlanta Court Service Workers, August 16, 1974. If most of the committed children were placed in community programs, they would avoid the detrimental effects of training school and those who *must* be kept in a secure facility for the protection of the community could be held long enough for effective treatment.

[298] In Massachusetts, it was necessary to keep only thirty juveniles confined for protection of the community. Sargeant, *supra* note 293, at 1-7.

[299] Target: Newsletter of Successful Projects Funded by L.E.A.A., August, 1974, at 2, col. 1.

[300] Massachusetts decided that services purchased regionally from private groups (YMCA, group home, drug centers) would be cheaper and more effective standards would be kept high by encouraging private groups to compete to provide services. In addition, the state may constantly re-evaluate the programs and discontinue those not maintaining high enough standards. *Hearings* at 66, (Testimony of Dr. J. Miller, Director of Dept. of Youth Services of Massachusetts); Bakal, *The Massachusetts Experience*, DELINQUENCY PREVENTION REPORTER, April, 1973.

[301] *Hearings* at 73.

[302] Residential care includes group homes, drug half-way houses, foster homes, private boarding schools and psychiatric hospitals; day care includes education, recreation and counseling programs; and after-care includes student volunteer programs. Bakal, *supra* note 297, at 8-9. As an alternative placement when training schools were closed, in order to provide a transitional period for re-integration into the community, some former inmates were placed with college students under the J.O.E. (Juvenile Opportunity Extension) and M.A.R.Y. (Massachusetts Association for the Re-integration of Youth) programs. Each youth lived in the dormitory with the student with whom he was paired, shared the student's academic, social, cultural and recreational life, and participated in special educational programs. Only four of the first M.A.R.Y. participants were involved with the police while living on campus. Kovach, note 295 *supra*; Target, note 296 *supra*.

[303] S. REP. No. 93-1011, *supra* note 55, at 35.

[304] *Hearings* at 68.

[305] The following resolution was passed at the Convention of the National Council of Juvenile Court Judges on July 19, 1973:

> RESOLUTION OPPOSING THE WHOLESALE AND ARBITRARY CLOSING INSTITUTIONS FOR THE TRAINING AND REHABILITATION OF TROUBLED CHILDREN
>
> WHEREAS, there is a growing trend of philosophy that all institutional treatment of children is harmful to them and that therefore institutional facilities for troubled children should be closed and such treatment eliminated, and
>
> WHEREAS, recognition of the shortcomings of particular institutions does not mandate, or even imply the abolition of such institutions, but rather that more

vigorous and intelligent efforts be made to correct any shortcomings that may exist; and

WHEREAS, wholesale arbitrary closing of institutions critically limits the dispositional alternatives available to the Juvenile Courts with the deleterious results of forcing such courts to transfer an increasing number of troubled, immature children to the Criminal Court; now, therefore,

BE IT RESOLVED, by the National Council of Juvenile Court Judges in annual meeting assembled at Louisville, Kentucky, that this Council strongly opposes the simplicism of the wholesale abolition of all institutions for the training and rehabilitation of troubled children, with its utter disregard of the danger to both the public and to the children of returning such children to the streets and the dissocial environment wherein the problems arose and can only be compounded; and

BE IT FURTHER RESOLVED, that this Council strongly supports the creation in each state of a complete spectrum of resources for helping children in trouble, starting with adequate diagnostic services and effective probation, ranging through foster homes and group homes programs, small community based treatment facilities to medium and maximum security institutions and in addition those specialized facilities needed to help children with serious physical, mental or emotional disabilities; and

BE IT FURTHER RESOLVED, that this Council completely rejects all proposals for simplistic solutions to the complex problems of helping children in trouble especially in the instance of closing institutions which greatly limits the flexibility of Court disposition, the need for which has always been a basic tenet of the Juvenile Court philosophy.

Impact, February, 1974, at 3, col. 4.

In the early period following the Massachusetts shut down, the Massachusetts Department of Corrections reported *no* increase in the number of juveniles sentenced to the adult correctional system. Impact, June-July, 1973, at 1, col. 2. The Georgia Juvenile Court Code gives the Superior Court concurrent jurisdiction with the Juvenile Court over certain offenses, GA. CODE ANN. § 24A-301 (Supp. 1974), and the juvenile judge may, after adjudication, turn the child over to adult corrections officials if the child is found not to be amenable to treatment or rehabilitation. GA. CODE ANN. § 24A-2304 (Supp. 1974). *But see* note 52 *supra*.

[306] Impact, February, 1974, at 3, col. 4.

[307] Impact, February, 1974, at 3, col. 4 (resolution of the National Council of Juvenile Court Judges); Correspondence from Judge R. Ruff, Juvenile Court of Cobb County, Georgia, October 17, 1974.

[308] *Accord*, Interview with D. Wilkinson, Youth Services Section, Department of Human Resources, Atlanta, August 15, 1974.

[309] TASK FORCE REPORT: CORRECTIONS 149 (1965).

[310] GA. CODE ANN. § 77-527 (1973).

Georgia's Juvenile Code says very little about parole or aftercare for juveniles. The chapter on pardons and paroles does not change or modify the administration of the laws by juvenile courts. GA. CODE ANN. § 99-211 (Supp. 1974).

[311] GA. CODE ANN. § 24A-2302, 2303 (Supp. 1974). See notes 277-308 *supra* and accompanying text.

[312] GA. CODE ANN. § 24A-2701(b) (Supp. 1974).

[313] GA. CODE ANN. § 24A-2701(b)(a)-(3). See note 52 *supra* and accompanying text for jurisdiction.

[314] D.H.R. memorandum, August, 1974.

[315] *Id.* Currently there are approximately 352 status and first offenders in Y.D.C.'s.

[316] Annual Report of Youth Services Section, D.H.R., for FY 1974, July 31, 1974.

[317] *Id.*

[318] See note 314 *supra*.

[319] See note 316 *supra*.

[320] Interview with Alton J. Moultrie, Director, Impact Project, Atlanta, September 27, 1974.

[321] GA. CODE ANN. § 24A-302(b) (Supp. 1974).

[322] 28 C.F.R. § 2 (1973).

[323] 18 U.S.C. § 5031 *et. seq.* (1970).

[324] 28 C.F.R. § 2.5 (1974).

[325] 28 C.F.R. § 2.12 (1974).

[326] This concept has been questioned in Dembitz, *Justice for Children—For Now and for the Future*, 60 A.B.A.J. 588 (1974).

[327] 28 C.F.R. § 2.19 (1974).

[328] *See* note 310 *supra* and accompanying text.

[329] *See* note 314 *supra*.

[330] 88 Stat. 1109, 93d Cong., 2d Sess. (1974).

[331] *Id.* Title II, Part B § 223(a)(10) of the Act requires the states to:

> (10) provide that not less than 75 per centum of the funds available to such State under section 222, whether expended directly by the State or by the local government or through contracts with public or private agencies, shall be used for advanced techniques in developing, maintaining, and expanding programs and services designed to prevent juvenile delinquency, to divert juveniles from the juvenile justice system, and to provide community-based alternatives to juvenile detention and correctional facilities. That advanced techniques include—
>
> (A) community-based programs and services for the prevention and treatment of juvenile delinquency through the development of foster-care and shelter-care homes, group homes, halfway houses, homemaker and home health services, and any other designated community-based diagnostic, treatment, or rehabilitative service;
>
> (B) community-based programs and services to work with parents and other family members to maintain and strengthen the family unit so that the juvenile may be retained in his home;
>
> (C) youth service bureaus and other community-based programs to divert youth from the juvenile court or to support, counsel, or provide work and recreational opportunities for delinquents and youth in danger of becoming delinquent;
>
> (D) comprehensive programs of drug and alcohol abuse education and prevention and programs for the treatment and rehabilitation of drug addicted youth, and "drug dependent" youth (as defined in section 2(q) of the Public Health Service Act (42 U.S.C. 201 (q));
>
> (E) educational programs or supportive services designed to keep delinquents and to encourage other youth to remain in elementary and secondary schools or in alternative learning situations;
>
> (F) expanded use of probation and recruitment and training of probation officers, other professional and paraprofessional personnel and volunteers to work effectively with youth;
>
> (G) youth initiated programs and outreach programs designed to assist youth who otherwise would not be reached by assistance programs;

(H) provides for a statewide program through the use of probation subsidies, other subsidies, other financial incentives or disincentives to units of local government, or other effective means, that may include but are not limited to programs designed to—

(i) reduce the number of commitments of juveniles to any form of juvenile facility as a percentage of the State juvenile population;

(ii) increase the use of nonsecure community-based facilities as a percentage of total commitments to juvenile facilities; and

(iii) discourage the use of secure incarceration and detention.

MISCOUNTED
SHOULD BE
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END

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