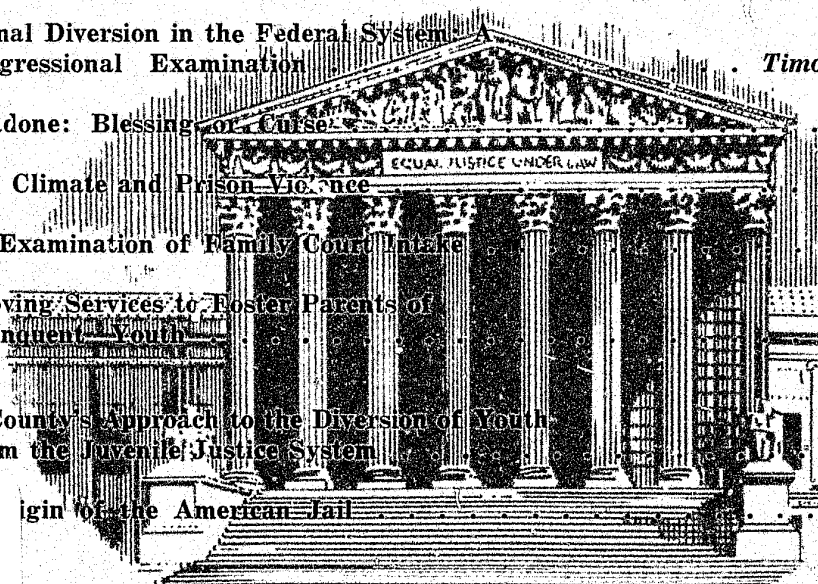
Federal Probation



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However, I think that it is essential that the present role of the Parole Commission be retained for determining actual duration of confinement in the 25 percent of all criminal sentences that involve actual imprisonment of more than 1 year. This will ensure a harmonious coordination between the sentencing and parole functions, and would be a wise reaffirmation of the principle of applying checks and balances to the exercise of discretion. The Congress should also mandate by legislation the Commission's procedure of setting a presumptive release date at the outset of commitment, while retaining the Commission's flexibility to provide continued review of each case. Such a provision would increase the factor of certainty without sacrificing considerations of individual justice. Legislation of this nature would preserve the gains made by Congress in the development of the Parole Commission and Reorganization Act of 1976, while achieving a realistic and workable solution of the problems of uncertainty and unwarranted sentencing disparity.

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Criminal Diversion in the Federal System: A Congressional Examination

BY TIMOTHY KEVIN MCPIKE

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THIRTEEN years ago the first formal pretrial diversion programs were established.

In June and September of 1977, the Subcommittee on Improvements in Judicial Machinery of the Senate Judiciary Committee held hearings on S. 1819, the Federal Criminal Diversion Act of 1977, a bill to establish formal diversion programs in each Federal judicial district. The bill was sponsored by Senator Dennis DeConcini (D. Ariz.) who, as a county attorney, instituted the first pretrial diversion program in Arizona. The 1977 Act, while similar in form to several previous attempted Federal packages, is notable for the theory and policy positions taken by the subcommittee. A discussion of those positions first requires a brief history of the diversion concept.

Early Developments in Formal Diversion

One of the first formal diversion programs was established by District Attorney Robert F. Leonard of Genesee County, Michigan, in 1965. This and other early programs emphasized the rehabilitation of the alleged offender by providing services to correct skill, educational, or psychosociological deficiencies that were believed to be the impetus for commission of the crime. Diversion from the system—being snatched from the jaws of the court—was thought to be a catalyst stimulating in the alleged offender a desire to change (or at least offering the vehicle for such change at the most psychologically propitious time). This hypothesis was important, constituting the first recognition of the psychological impact of arrest, detention, and booking procedures.

In 1967, the President's Commission on Law Enforcement and the Administration of Justice endorsed the diversion concept. In that same year, the Department of Labor sponsored two demonstration projects: Project Crossroads in Washington, D.C., and the Manhattan Court Employment Project. As diversion gained acceptance with local prosecutors more federally funded projects were

instituted: In 1971 the Department of Labor sponsored nine additional projects, and the Department of Justice began funding several urban programs. By 1973 diversion programs were so widespread that the American Bar Association initiated a resource clearinghouse, the National Pretrial Services Resource Center, for pretrial diversion and early release programs.

In 1974 the Department of Justice issued guidelines for U.S. attorneys to operate pretrial diversion programs, undoubtedly in response to the introduction of legislation on the subject in the 92nd and 93rd Congresses. This legislation in turn was spurred by the apparent successes of local projects funded with Department of Justice and Department of Labor monies.

Federal Legislation Prior to S. 1819

Diversion legislation in the 92nd and 93rd Congresses took several forms. Senator Quentin Burdick (D. N.D.) sponsored legislation that provided an administrator for a screening, service delivery, and supervision program with decision-making shared by the court and prosecutor. The bill established minimum program eligibility standards and granted the Attorney General broad powers to implement diversion. Congressman Tom Railsback (R. Ill.) introduced a less detailed bill designating the Administrative Office of the U.S. Courts as administrator of the Federal programs. Congressman Rodino (R. N.J.) sponsored legislation to permit pretrial probation with no statutory eligibility standards. None of these survived to conference.

The theoretical construct behind these legislative attempts was the rehabilitation cost-benefit concept of diversion. The Senate report on the Burdick bill accepted the rehabilitation-catalyst theory explicity:

> 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. This happens, beyond anyone's control, despite our knowledge that the success of these efforts is directly correlated to the time span between their implementation and initial contact.
>
> 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. This person is far more easily dealt with than the hardened product of some jail or prison.

While this report did later describe diversion as "another tool for the prosecutor" (the approach later to be taken in the 95th Congress), the report and hearings on the Burdick bill read as a whole clearly grounded rationale for diversion in its supposed rehabilitative and economic effects. It was assumed that diversion would reduce court backlog by reducing the number of cases brought to trial, focus prosecutorial resources on more serious cases, prevent defendants becoming hardened through contact with formal justice processes, facilitate future good behavior by preventing the stigma of a criminal conviction, and return the offender as a productive member of society by providing social services.

Reassessment in the 95th Congress

During hearings on the 1977 Act, S. 1819, the impact of diversion programs on the justice system was reassessed. Both testimony and literature on the subject questioned the assumption of the Burdick bill.

Diversion was called to task because most program designs resulted in selecting those defendants least likely to recidivate, screening out those most in need of rehabilitation and thus guaranteeing program "success." Civil libertarians were rightly concerned that government supervision before an adjudication of guilt was being used with minimal or nonexistent procedural protections, a direct result of the lack of court involvement with the diversion process. Economists demonstrated that much of the economic benefit of diversion was merely cost shifts from the court and prosecutor to diversion agencies. Social scientists, re-evaluating prior research, discovered inherent flaws in test design that invalidated many early claims about the impact of diversion on recidivism rates.[1]

The conclusion about the early claims for di-

[1] The most widespread design flaw was a lack of similarity between control and test groups. Ideally, the only variable between the two should be completion of the diversion program by the test group. While some current studies are attempting to correct this error, the equal protection question inherent in deferring prosecution against one of two similar groups solely for the purpose of research is substantial. While the prosecutor has the discretion to offer or deny diversion based on a rather subjective evaluation of the defendant's character, i.e., whether prosecution would be in the best interests of the public, equal protection requires at least a minimally rational relationship between the prosecutor's reasons for denial and the stated goals of diversion. Arguably, denying diversion to a defendant who would otherwise qualify solely for the purpose of establishing a control group denies equal protection. Conversely, if a prosecutor has another articulable reason for denying diversion we return to a dissimilarity between groups, invalidating the experiment. Current research attempts to avoid this dilemma by utilizing an "overflow" control group—composed of those who would be diverted but for a lack of resources limiting the number of defendants the diversion program can accept. This solves the problem only if we believe that the system can prosecute more easily than it can divert, an unlikely situation given the backlog of most courts. Otherwise, the overflow control group becomes a sham to avoid the equal protection dilemma. An empirically pure evaluation may be impossible because of this basic conflict between the requisites of due process and the scientific method.

version was best expressed by one witness, Ms. Madeline Crohn, director of the National Pretrial Services Resource Center:

> . . . [O]ver enthusiastic claims have deeply hurt the diversion concept. Imagine the proposed task: to reduce crime and help the courts and protect the community and successfully reintegrate an often indigent, disenfranchised segment of the population into a "productive lifestyle." In other words, a panacea. To be measured against such a vast undertaking is a setup for failure on some if not all counts.

The first diversion programs were the outgrowth of *ad hoc* practices police, prosecutors, and courts had employed for years. As theorists became captivated with rehabilitation and cost-benefit ratios, the pragmatic facts had been overlooked: some cases are too serious to ignore, but not serious enough to prosecute. To ignore them declares that the conduct involved will be tolerated. To prosecute them is legalistic overkill.

In fact, diversion is nothing more than another disposition option properly applicable to a small group of cases for which dismissal, plea bargaining, or full prosecution would be inappropriate. These are the historical reasons for development of the concept. They remain the only provable justification for continuation of the practice. Certainly if other benefits accrue, as some data suggest, these are reasons to sanction diversion. However, the failure of diversion to accomplish these other goals would not negate the demonstrated necessity to expand case disposition options.

The Basis for Statutory Programs

It is apparent that pragmatic reasons exist for perpetuation of the diversion concept. The question is then raised: why codify a developing concept and preclude further refinement? Diversion has undergone substantial improvements in 13 years. However, it is not apodictic that a statutory framework would cause diversion to stagnate, since other statutory areas of the law evolve through interpretation and amendment. Rather, the pertinent concerns are: (1) is there a demonstrated need for a statutory framework, and (2) if so, how can legislation be structured to facilitate further refinements?

The Senate hearings identified four situations demonstrating a need for legislation: prosecutorial resistance to diversion, lack of uniformity among existing programs, confusion about the proper roles of court and prosecutor, and a lack of protection for constitutional rights in established programs.

Although the President's Commission had advocated diversion in 1971 and the Justice Department had established guidelines in 1974, fully one-third of all Federal districts were without programs at the time of the Senate hearings. Testimony concerning cost and time factors strongly indicated that if diversion is to reduce court backlogs and be cost efficient to a significant degree diversion will have to be utilized widely, i.e., in almost all suitable cases. However, the reluctance of prosecutors to turn over prosecutable cases to social agencies and prosecutorial conservatism have caused a laconic growth in Federal programs. Congress has to act to make diversion work.

The lack of minimal uniformity among existing Federal programs also indicates a need for statutory enactment. As an adjunct of prosecutorial discretion, diversion in each district cannot be controlled by Department of Justice regulation, and the guidelines on occasion have been ignored. For a strong Federal program to exist uniform minimum entry standards are needed, providing continuity between administrations and allowing the transfer of divertees between districts.

A lack of agreement about the proper roles of the court and prosecutor in diversion programs is a third situation requiring legislative resolution. Existing program designs range from those providing no judicial oversight to those usurping all prosecutorial discretion.

The fourth situation indicating a need for legislation is a lack of procedural protections for constitutional rights of the accused. Despite good faith attempts to establish such procedures, programs excluding judicial oversight are inherently deficient in adequate protections. The prosecutor and defendant being "natural adversaries," external oversight is requisite.

The committee report on S. 1819 has conceptualized diversion as a function of the prosecutor's discretion to decline or dismiss prosecution. This has a major advantage. It posits diversion by analogy within existing procedural structures and established case law, reducing the volume of litigation innovations usually produce. Most important, it is theoretically and historically supportable.

While these advantages are attractive, possible dangers also inhere. Diversion is a perfect analogue to neither plea bargaining nor dismissal. Lack of sensitivity to areas of difference may well result in unforeseen results as diversion is subject

to closer judicial scrutiny. For example, Professor Dan Freed of Yale rejects this depiction entirely and argues persuasively that diversion is essentially a judicial function.

Particular Features of S. 1819

S. 1819 sets minimum eligibility standards for Federal diversion programs. The first requirement is that the case against the defendant be "prosecutable." The report on the bill (Senate Report 95-753) states that "a prosecutable case is one which is reasonably certain to result in conviction, e.g., it is not flawed by constitutional violations or insufficient evidence making conviction improbable." Other standards include: the alleged offense must not have involved the threat or infliction of serious bodily harm; it must be reasonably forseeable that the person will not commit violent acts if released; the individual must not have exhibited a continuing pattern of criminal behavior.

The bill also allows further restrictions on eligibility to be implemented by the Attorney General and United States attorney for the Federal district, and requires that the prosecutor recommend the individual to the program for him to be eligible.

The legislation suggests a wide variety of supervision is appropriate for a diversion program: medical, educational, vocational, social, and psychological services, corrective and preventive guidance, residence in a halfway house, restitution, or community service. The section states that the list is not exclusive, but that elements must be agreed upon in advance in a written, signed agreement. Diversion plans may not exceed a 1-year duration except for making restitution.

The Attorney General, in consultation with the local planning group established by the Speedy Trial Act, designates an agency in each district to act as the diversion administration agency. The agency reviews the charges against all persons arrested or indicted and interviews those likely to be eligible. The U.S. attorney then makes a determination of eligibility. If necessary, the diversion agency makes a further investigation and makes a final recommendation to the U.S. attorney. If the defendant agrees to diversion, he and his attorney negotiate the terms of the agreement with the diversion agency. All parties appear before the magistrate who advises the defendant of his rights and of those he waives by accepting diversion, questions the defendant to insure the waivers are voluntary, and oversees the signing of the agreement.

If the defendant successfully completes diversion, the U.S. attorney files a dismissal of the indictment with the court. If the defendant fails to abide by the terms of the agreement, the prosecution may be reinstated. Administrative and judicial review of a decision to reinstate are provided.

Several features of the bill as introduced were dropped or modified during the hearing process: a provision that would have required victim consent to diversion was unanimously condemned by witnesses and was deleted; designation of the diversion agency was shifted from the district planning group to the Attorney General in consultation with the group; the original bill gave the eligibility determination to the magistrate, the final bill shifted this decision to the prosecutor.

An examination of the provisions of S. 1819 demonstrates the consistency with which the legislators attempted to conform diversion to existing law. Preindictment diversion, states the report, is an executive function shielded from judicial and legislative intervention by the separation of powers doctrine. Postindictment diversion, however, properly involves both the legislature and the court. The authority for judicial involvement comes from three sources: due process requirements of judicial review, the requirement of F.R. Crim. P. 48(a) that dismissal of an indictment be "by leave of court," and a provision of the Speedy Trial Act requiring judicial consent to a tolling of the Act's time limits for diversion [18 U.S.C. 3161(h)(2)]. Because a substantial body of case law exists on the first two sources, statutory diversion can be integrated with the Federal justice system with a minimum of litigation seeking new procedural rights for defendants denied or removed from diversion.

Court involvement is limited to three phases of the diversion process: assuring the adequacy of waiver of rights and voluntariness of entrance, review of a termination, and dismissal of the indictment. Acknowledging that this judicial involvement undercuts the goal of reducing the court's backlog, the committee responds that the primary goal is appropriate case disposition. Further, the committee finds a positive value decreasing the efficiency of the diversion option—the temptation to divert weak cases is reduced where diversion is less advantageous to the prosecutor than declination.

No procedures are established for judicial re-

view of a prosecutor's denial of diversion. The bill states that "a determination of eligibility or suitability by the attorney for the Government shall not be subject to review except as otherwise provided by law." The committee report reiterates that except for denial of diversion based solely on constitutionally suspect classifications no review is proper—there is no right to diversion beyond the right of equal protection.

Judicial review upon a termination from a diversion program is narrowly circumscribed to comport with due process while minimizing court time spent on review. Review is limited to a determination of whether any facts existed upon which the prosecutor *could* have found a violation of the diversion plan, a stiff standard intended to discourage frivolous appeals. The standard is equivalent to that for appellate review of a trial court's determination of a question of fact.

The requirement of F.R. Crim. P. 48(a) that dismissal of an indictment be by leave of court has been interpreted in *United States* v. *Cowan,* 524 F. 2d 504 (1975), where the Court stated:

> . . . the phrase "by leave of court" in Rule 48(a) was intended to modify and condition the absolute power of the Executive, consistently (sic) with the Framer's (sic) concept of Separation of Powers, by erecting a check on the abuse of Executive prerogatives. But this is not to say that the Rule was intended to confer on the Judiciary the power and authority to usurp or interfere with the good faith exercise of the Executive power to take care that the laws are faithfully executed. The rule was not promulgated to shift absolute power from the Executive to the Judicial Branch. Rather, it was intended as a power to check power. The Executive remains the absolute judge of whether a prosecution should be initiated and the first and presumptively the best judge of whether a pending prosecution should be terminated. The exercise of its discretion with respect to the termination of pending prosecutions should not be judicially disturbed unless clearly contrary to manifest public interest. (*at* 513)

The committee report states that court approval of a dismissal of charges should be given upon evidence that the defendant has satisfactorily completed the diversion program. No broadening of existing court involvement in dismissals was intended, and case law on the subject gives the court a perfunctory, supervisory role.

The final source of authority for court involvement, the Speedy Trial Act, is used by the subcommittee as the procedural device for judicial oversight of the voluntariness of the defendant's entrance into the program. The defendant's rights are read and the terms of the agreement explained in open court.

Several other provisions of the bill are worthy of note:

(1) The expansion of existing Federal pretrial services agencies to administer diversion programs was deferred to later Congressional oversight of the Speedy Trial Act that spawned the agencies. The legislation instead mandates the Attorney General to consult with each Speedy Trial Act District Planning Group and to then appoint an appropriate agency within the district. The pretrial services agencies seem the logical candidate for screening and administration, despite possible conflicts between confidentiality requirements of the Speedy Trial Act and reporting requirements of the diversion bill. However, Congress created the pretrial services agencies as an experiment to be thoroughly reviewed before further pretrial services agencies were created. Since administration of diversion programs in all districts would require premature expansion of both the number and the mission of the pretrial services agencies, the legislation leaves the option open for appointment of district pretrial services agencies as diversion administrators.

(2) The length of each diversion plan must be established in advance, although the prosecutor may end the plan sooner. The customary 12-month maximum period employed by most state diversion programs was adopted. An extension to 18 months solely for purposes of making restitution was requested by the Department of Justice and agreed upon by the committee. The act provides that in appropriate cases the length of time served in compliance with an unsuccessful diversion plan may be subtracted from the length of a sentence upon conviction. All of these provisions were adopted from American Bar Association and National Association of Pretrial Service Agencies' standards.

(3) Protections for defendants' rights was given careful attention in the Diversion Act. As previously noted, the court oversees the defendant's waiver of sixth amendment rights and reviews termination decisions. All defendant disclosures made during the program are inadmissible except for purposes of impeachment in conformance with current law. The diversion plan is agreed upon with the advice of counsel. (One witness at hearings on the bill, a Federal public defender, was skeptical that this offered any protection since diversion is so advantageous that most defendants will accept automatically.)

(4) The legislation is more specific than pre-

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vious Federal efforts in several areas. Admission of statements for impeachment and extension of the diversion period for restitution are significant changes from the provisions of preceding legislation. In addition, the 1978 bill provides that diversion of an active case does not prevent the prosecutor from bringing additional evidence before a grand jury or pursuing the investigation of the defendant's involvement in the alleged crime.

The 1978 Federal Criminal Diversion Act represents a major conceptual shift away from rehabilitative and cost benefit justifications toward those of pragmatism and appropriateness. The 1978 Act is a more detailed, balanced, and carefully drafted package than previous congressional efforts. However the current legislation fares in the 95th Congress, the continuous introduction of diversion legislation and the increasing sophistication of the proposals indicate that a Federal diversion bill will eventually be enacted.

Methadone: Blessing or Curse*

BY GEORGE GUBAR, PH.D.**

METHADONE was first developed as a substitute for morphine to be used as an analgesic by the Germans during World War II. The drug was uncovered by an intelligence team of the U.S. Department of Commerce during an investigation of the German pharmaceutical industry shortly after the war. Methadone has been referred to by a variety of names (the Germans first called it dolophine) but in 1947, the Council on Drugs of the American Medical Association established "methadone" as the generic term for this compound.

Early clinical trials established methadone as an excellent pain killer which had many of the pharmacologic actions of morphine. In 1949, studies by Drs. Isbell and Vogel at Lexington, Kentucky, revealed that methadone had a marked addiction liability and therefore, these researchers would not consider it for use in the treatment of opiate addiction. They noted that methadone "in sufficient doses produces a type of euphoria which is even more pleasant to some morphine addicts than is the euphoria produced by morphine."

At the present time, the approved uses of methadone are limited to analgesia in severe pain (terminal cancer) and detoxification and maintenance treatment for narcotic addiction. The use of methadone has been greatly restricted because of the increasing incidence of illicit use and abuse in recent years.

By far, the greatest interest in methadone has centered around its use in the chemotherapy of narcotics addiction. In this regard, methadone is viewed as potentially a beneficial tool for *detoxification* and *long-term maintenance* of individuals addicted to heroin and other opiates. Methadone has been used in a variety of different ways in both modalities. The methadone regulations issued by the Food and Drug Administration in December 1972 define detoxification treatment as follows:

> "Detoxification treatment" using methadone is the administering or dispensing of methadone as a substitute narcotic drug in decreasing doses to reach a drug-free state in a period not to exceed 21 days in order to withdraw an individual who is dependent on heroin or other morphine-like drugs from the use of these drugs.

Most researchers have grouped detoxification into two major categories: *inpatient withdrawal* and *ambulatory* (or outpatient) *detoxification.* Both of these techniques require certain basic adjustments to make the treatment appropriate to the patient including modifications that take into

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*** This article is not being presented to advocate one position or the other concerning the long-standing controversy about the use of methadone in the treatment of opiate addiction.**

Rather, it is hoped that the facts and suggestions will assist persons to understand the controversy, and to consider the possible means by which treatment programs may be made more viable for both the opiate addict and the community.

Much of the material in this article regarding the background and therapeutic use of methadone was taken directly from an article titled *"Methadone: The Drug and Its Therapeutic Uses in the Treatment Of Addiction,"* National Clearing House for Drug Information, Series 31, No. 1, July 1974.

The material concerning the Monsignor Wall Social Service Center was prepared by Mr. Hubert Moran, September 1977.

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