PRETRIAL ISSUES

Pretrial Practices: A Preliminary Look At The Data

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PRETRIAL ISSUES

Pretrial Practices: A Preliminary Look at the Data

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INTRODUCTION

Many reforms have been advocated and implemented within the criminal justice system over the past 20 years. Among the most pervasive have been the development and institutionalization of formal pretrial release and diversion programs in many jurisdictions. Since the funding of the pioneer programs in the early 1960's, 1/ hundreds of release and diversion programs have been established in most major cities and in many other jurisdictions throughout the country. In the Pretrial Services Resource Center's 1979/80 Directory of Pretrial Services, 121 release and 133 diversion programs are listed, although these totals underestimate the scope of pretrial activity in the United States. 2/

As pretrial programs were established, they were guided, at least in theory, by similar goals and legal principles--although it was recognized that the specific objectives and general procedures must be modified to fit local circumstances and political realities. Founders of early programs shared the goals of improving the criminal justice system and of providing important services to defendants entering that system. Today, however, the reality is that many programs have adopted different approaches, have been set up with different purposes, and operate in ways which differ both from the principles that guided the initial development of the pretrial field and from various national standards which have subsequently been published related to the pretrial discipline.

This does not necessarily mean that such variations should never occur. Programs must adapt to differences in local conditions; and even the various national standards differ in some substantive areas.

1/ Some of the earliest release programs were the Manhattan Bail Project, the D.C. Bail Agency, and projects in Connecticut, Denver, and Chicago. The early diversion programs included the Citizens Probation Authority in Flint, Michigan and two projects funded by the Department of Labor (Project Crossroads in Washington, D.C. and the Manhattan Court Employment Project). The Department of Labor subsequently established similar programs in nine other cities.

2/ Although this Directory provides the most comprehensive listing and description of pretrial programs currently available, these totals considerably understate the total number of release and diversion programs that actually exist. First, there is only one listing provided for the statewide release system in Kentucky, although there are actually 56 separately staffed programs serving each community in the state, as well as separate diversion programs in 3 of those communities. Second, most jurisdictions have developed some mechanism to insure that the process of pretrial release screening occurs even when they have not established a separate agency (this includes staff of larger agencies who provide pretrial services among other responsibilities, but without a separate pretrial budget). Third, the Directory does not include Treatment Alternatives to Street Crime (TASC) programs that, in some instances, provide release and/or diversion services to the jurisdiction in which they are located. (A separate TASC Directory is currently being compiled by the Resource Center.) Finally, juvenile pretrial programs are not included.

But this does suggest that a fresh look at the current state of pretrial services is in order: to begin to assess to what extent there are variations in practices and philosophies within the field; and to address where the variations seem justifiable and where, on the other hand, they suggest that problems may exist.

The Purpose

This edition of Pretrial Issues attempts to use program data to start that process of pretrial program assessment.

Several reports were published in the 1970's, based on surveys of the pretrial field. 3/ These reports were valuable in describing the field at that time. Although changes have occurred in the field since then, there have been no recent "state of the art" updates. Even though national standards and goals have been developed and published since those earlier surveys were conducted, there has been no systematic attempt to assess the extent to which pretrial program practices are consistent with those standards.

The efforts of various national organizations to develop pretrial release and diversion standards have been based on legal principles, program experience, and research. As such, they serve as the best point of reference against which program practices can be assessed at this time.

This paper attempts to look at some assumptions based on national standards and to describe the existing level of adherence to them. This is a time when many programs have become structural parts of local criminal justice systems, when various states are contemplating--or have already established--statewide systems to deliver release and/or diversion services, and when budget crises are forcing programs to more carefully justify their existence. As such, it becomes especially important at this time to take stock of the current status of the pretrial field and to see where changes may be needed or questions need to be raised.

3/ See, for example, National Center for State Courts, Policymakers' Views Regarding Issues in the Operation and Evaluation of Pretrial Release and Diversion Programs: Findings from a Questionnaire Survey, Denver, Colorado, 1975; Office of Economic Opportunity, The Pretrial Release Program: Working Papers, Washington, D.C., 1973; P. F. Healy, National District Attorneys Association, National Prosecutor Survey, Chicago, Illinois, 1977; American Bar Association, Sourcebook in Pretrial Criminal Justice Intervention Techniques and Action Programs, Washington, D.C., 1975.

The Data Base

During the summer and fall of 1979, the Pretrial Services Resource Center staff conducted extensive interviews with the known pretrial release and adult diversion programs in the country. The questions raised covered a wide range of areas such as program procedures, policies, and levels of operation. Some of that information was included in the 1979/80 Directory, after having been verified for accuracy by the program directors. This paper looks at some of the questions raised, particularly focusing on those which relate to specific standards and practices within the discipline. 4/

Of the 121 release programs surveyed, 119 provided sufficiently complete information to be included in the analyses which form the basis of this paper; similarly, 131 of the 133 diversion programs are included here. The analyses which follow are based primarily on the numbers and percentages of those programs, unless otherwise noted.

The Format

The paper is designed around certain Assumptions that are posited regarding pretrial program practices. Seven diversion and six release Assumptions are presented, plus one Assumption that relates to both release and diversion program practices. The focus of the Assumptions is on pretrial programs and the practices they have some control over, rather than on the criminal justice system as a whole.

The Assumptions are taken from national standards and goals relating to pretrial, including those published by the National Association of Pretrial Services Agencies (NAPSA), the American Bar Association (ABA), the National District Attorneys Association (NDAA), and the National Advisory Commission (NAC) Reports on Criminal Justice Standards and Goals. Following each Assumption is a short description of the rationale underlying it. The rationales for the particular Assumptions draw heavily on commentaries included in the published standards and goals. The rationale is followed by a tabular presentation of the survey results that reflect the program responses relevant to the particular Assumption being discussed. This graphic demonstration is followed by a brief analysis of the findings.

The last section of the paper summarizes the overall findings and briefly suggests some of the implications of the survey.

4/ A more detailed analysis of pretrial practices, based on information provided by those programs included in the national Directory, will be published later this year in a Resource Center publication in the Alternatives series.

DIVERSION

As previously noted, the Assumptions discussed below relate to the practices of individual diversion programs. However, it is recognized that the practices of those programs are shaped in part by decisions made by others within the criminal justice system.

Assumption #1

Cases should not be diverted that would otherwise have little or no penetration into the criminal justice system. To guard against this, at least two conditions should exist: a) diversion should occur only after the filing of formal charges; b) diversion should only occur after the defendant has consulted with counsel.

A. Diversion should occur only after the filing of formal charges.

Most national standards emphasize that diversion prior to the formal filing of charges is premature and inconsistent with the voluntary nature of the diversion decision. Formal filing of charges helps to assure that the diversion process is not used as a "dumping ground" for cases which lack sufficient merit to support full prosecution, or for those cases in which the prosecutor would elect not to prosecute due to the minor nature of the charge or various extenuating circumstances. Diversion is after all designed to be an alternative to full prosecution. If full prosecution is not warranted, it is argued that there is no need for an alternative to be offered. When the formal filing of charges has occurred, this potential problem is eliminated. Moreover, this helps assure that the limited resources of the diversion program's budget are focused on those cases/persons for whom those resources were intended.

PROGRAMS DIVERTING VARIOUS PROPORTIONS OF CASES PRIOR TO FILING OF FORMAL CHARGES

Proportion of Cases Diverted Before Formal Filing of Charges	# of Programs	% of Programs
None	64	48.9
1-25%	18	13.7
26-50%	7	5.4
51-75%	5	3.8
76-99%	18	13.7
100%	14	10.7
Unknown	5	3.8
TOTAL	131	100.0

As can be seen in the table, almost half of all the diversion programs surveyed comply with this standard. That is, 48.9% of the programs do not divert anyone prior to the filing of formal charges, and more than 60% of all programs divert fewer than 25% of the defendants in those programs prior to formal charges being filed. On the other hand, 10.7% of the programs divert all of their cases prior to formal charges being filed, and almost one-quarter of all of the programs divert more than 75% of their cases prior to charges being filed. Perhaps the most provocative way of looking at these data is to recognize that almost half of all the programs divert at least some people prior to formal charges having been filed, despite the potential for abuses inherent in such practices.

B. Diversion should only occur after the defendant has consulted with counsel.

National standards take the position that the assistance of counsel is important in order to help the defendant understand the legal issues involved and the potential impact of his/her decision concerning the choice of the diversion option versus the possible prosecution of the case. Involvement of counsel helps to assure that the defendant's decision to enter a diversion program will be voluntary and will be as informed and responsible a choice as possible. It is particularly important that counsel be present to aid the defendant in making an informed and voluntary choice concerning the waiver of specific constitutional rights such as the right to speedy trial, the right to trial by jury, and other rights that are generally required to be waived prior to entry into a diversion program.

While the Supreme Court has not definitively ruled on the question of counsel availability at diversion intake per se, there is little question of this necessity if the decision is made after charges are formally filed. In such cases, counsel would have to be available, since the diversion decision represents a "critical stage" in the processing of the case. 5/

PROGRAMS REQUIRING FORMAL AGREEMENT FROM COUNSEL PRIOR TO DIVERSION

Counsel Agreement Required	# of Programs	% of Programs
Yes	77	58.8
No	54	41.2
TOTAL	131	100.0

5/ See United States v. Ash 413 U.S. 300 (1973).

In more than 40% of the diversion programs surveyed, there is no formal requirement that counsel must be present and agree to a decision to officially divert a defendant. This may not be as troubling as it first appears. Many of the programs that do not require counsel agreement do offer the potential client the opportunity to have counsel present to discuss the decision and its potential ramifications. If the the defendant knowingly waives this option, legal requirements would appear to be satisfied. However, without the specific requirement for such presence of counsel, some defendants may be diverted inappropriately, subject to the types of concerns addressed above.

Assumption #2

There should be few automatic exclusions from eligibility for diversion, except for a) those cases which would not routinely penetrate into the criminal justice system and b) cases in which the community demands full prosecution.

One of the most difficult issues concerning diversion is deciding who should not be allowed to be diverted. Programs frequently have "blanket" exclusion policies, which generally are of three types: 1) exclusion by specific type of charge, 2) exclusion by past criminal record, or 3) exclusion by demographic variables. The standards relevant to this Assumption recommend that, while certain cases should probably not be diverted, that decision should be made on an individual case-by-case basis.

Where charge alone is the basis for exclusion, at least one State Supreme Court has found this to be constitutionally suspect. 6/ However, many authorities have supported the exclusion of certain charges, especially those of a more serious and/or violent nature. Where the exclusion is based on demographics (defendant's sex, age, etc.), there seems to be little defense against legal challenge, unless the program can show a compelling state interest that requires such discrimination. Where the exclusion is based on a potential client's prior record, there appears to be clearer legal justification. 7/ However, no national standards take the position that prior record alone should be the basis for non-admittance.

6/ See State v. Leonardis 71 N.J. 85 (1976).

7/ See Marshall v. United States 414 U.S. 417 (1974).

PROGRAMS WITH AUTOMATIC EXCLUSIONS,
BY TYPE OF CHARGE

Types of Exclusions	# of Programs Excluding	% of Programs Excluding
All misdemeanors	2	1.5
All misdemeanors, as well as violent felonies	34	25.9
All felonies	16	12.2
Violent felonies only	40	30.5
None of these automatically excluded*	39	29.9
TOTAL	131	100.0

* Although some of this group do exclude those charged with other selected offenses not included here, such as sale of drugs.

As can be seen in the table, most of the diversion programs surveyed have adopted a policy of excluding certain types of charges. This is particularly true in the case of violent felonies, with more than two-thirds of the programs automatically excluding defendants with such charges. On the other hand, it is interesting to note that almost 90% of the programs admit at least some defendants charged with felonies. 8/ In fact, more than one-quarter of all the programs deal only with defendants charged with felony offenses. Almost 30% of the programs make no blanket exclusions for any of the types of charge groupings listed above, although many of these do exclude defendants on various other specific charges. A total of only six programs have absolutely no automatic exclusions of particular types of charges (not counting the 21 New Jersey programs which exclude all "non-indictable" offenses).

A preliminary examination of the survey responses indicates that about 30% of the programs have no automatic exclusions based on prior criminal record. (A more detailed description of program eligibility exclusions, including prior record and demographic groupings, will appear in the forthcoming bulletin on the survey responses discussed earlier.)

8/ It should be noted in this context that definitions of "felony charges" vary across jurisdictions. In some cases, those charges may reflect "overcharging" practices at the pre-diversion level.

Assumption #3

Entry into a diversion program should not be conditioned on a guilty plea, and an informal admission of guilt or moral responsibility should be required only in rare circumstances.

Since diversion programs attempt to provide an alternative to criminal justice processing, the requirement of a guilty plea for admission is viewed by the NAPSA standards as being of little use to either the criminal justice system or the defendant. Moreover, there is the concern that the defendant may enter the plea without awareness of the potential legal consequences. While most standards agree with the precept of not requiring an admission of guilt, the NDAA's standards take the position that such an admission may be necessary to "safeguard the case of the prosecutor".

Concerning informal admissions of guilt or moral responsibility, the NAPSA standards propose that in certain instances such an admission may be allowable as part of a specific client service plan (but not as a condition of enrollment). However, the accompanying commentary makes it clear that the necessary combination of circumstances would be "atypical". Other standards identify no distinction between a formal and informal guilty plea.

PROGRAMS REQUIRING GUILTY PLEAS OR INFORMAL ADMISSION OF GUILT AS A CONDITION OF PROGRAM ADMISSION

Required Admission of Guilt	# of Programs	% of Programs
Guilty Plea	8	6.1
Informal Admission of Guilt	42	32.1
No Admission Required	81	61.8
TOTAL	131	100.0

As can be seen from the table, few programs actually mandate a plea of guilty as a precondition for admission. However, almost 40% of all of the programs surveyed require either a guilty plea or an informal admission of guilt. This appears to be in direct contradiction to the suggested NAPSA standards in that, even where informal admission is considered acceptable, the standards suggest that such admission should only be as part of a service plan, rather than as a requirement for program admission. More than 60% of all programs responding appear to be in compliance with the generally accepted standards that neither a formal nor informal admission of guilt be required for diversion to take place.

Assumption #4

Financial restitution and/or community service volunteer work should not be required as a condition of admission to diversion.

In mandating either community service (unpaid volunteer work in a variety of settings) or restitution, there is the danger that a defendant's agreement to them could be interpreted as a form of admission of guilt which could negatively affect the defendant's case if it is returned to the court upon non-completion of the diversion program. On the other hand, incorporation of restitution and/or community service on a case-by-case basis as part of a service plan, when applicable--rather than as a mandated precondition for program enrollment--is likely to minimize this possibility and is therefore generally considered to be more acceptable.

There is a particular concern with the use of financial restitution in that it may lead to denial of equal protection considerations where poor defendants are involved. Symbolic or partial restitution may be acceptable in such cases, as long as such plans are tailored for each individual as part of that person's service plan, rather than being a required condition of program admission.

PROGRAMS REQUIRING FINANCIAL RESTITUTION OR COMMUNITY SERVICES AS A CONDITION OF PROGRAM ADMISSION

Requirement	# of Programs	% of Programs
Financial Restitution	49	37.4
Financial Restitution and/or Community Service	40	30.5
Community Service	1	.8
Not Required	41	31.3
TOTAL	131	100.0

In more than two-thirds (68.7%) of all diversion programs surveyed, either financial restitution or community service (or a combination of both) is required as a condition of admission into the program. Although this requirement is not always followed, particularly in cases where the alleged crime did not actually involve money or property being stolen or any indication of vandalism, the fact remains that restitution and/or community service is a condition for acceptance into the program. That is, rather than the use of restitution or community service being the exception, as suggested by the standards, their use has become the norm in most of the programs.

Assumption #5

Rearrests should not be automatic grounds for termination from the program.

The rationale here is that the decision to terminate should be based not only on the rearrest itself, but also on the facts and circumstances surrounding the rearrest and the person's record of performance while in the program. Among the factors to be considered should be the weight of the evidence associated with the rearrest charge. The standards in no way suggest that rearrests should never lead to termination from the program; in fact they indicate that such termination will be appropriate in certain instances. However, what is clearly suggested is that the rearrest itself, or even a conviction on that rearrest, should never by themselves be automatic grounds for termination without review proceedings which consider all the factors noted above.

PROGRAMS REQUIRING TERMINATION UPON REARREST OR CONVICTION

Automatic Grounds for Termination from Program	# of Programs	% of Programs
Rearrest while in program	19	14.5
Felony rearrest while in program	1	.8
Conviction on rearrest	47	35.9
Neither rearrest nor conviction	64	48.8
TOTAL	131	100.0

National standards notwithstanding, more than half of the diversion programs surveyed do in fact automatically terminate program participants based on either a rearrest while in the program or a conviction upon that rearrest. Most of those programs which do automatically terminate participants do so only upon conviction on the rearrest. The 64 programs which do not automatically terminate defendants indicate that rearrests and/or convictions may lead to an unfavorable termination from the program, but the final decision is based on circumstances surrounding the individual case.

Assumption #6

Successful completion of a diversion program should automatically lead to dismissal of the charges.

The underlying assumption here is that pretrial diversion is premised in large part on the removal of the defendant's case from the criminal justice system and that it is therefore an alternative to traditional prosecution. Accordingly, to offer the successful program participant

anything less than a dismissal of the pending charges makes the diversion option no alternative to prosecution at all, but instead merely a step which may or may not affect the subsequent processing of the case--regardless of performance during the program. The NAPSA diversion standards go even further in arguing that successful completion should be accompanied by a dismissal with prejudice, since that is the only legal assurance that the charges cannot at a later time be instituted against the defendant.

PROGRAMS LEADING TO AUTOMATIC DISMISSAL OF CHARGES UPON SUCCESSFUL COMPLETION OF PROGRAM REQUIREMENTS

Dismissal of Charges	# of Programs	% of Programs
Charges automatically dismissed	114	87.0
Generally dismissed, but with rare exceptions*	8	6.1
Generally dismissed, but could be reopened**	7	5.4
Charges not generally dismissed	2	1.5
TOTAL	131	100.0

* Including program recommending reduced charge/sentence; and/or judge choosing not to dismiss, despite successful program completion and program recommendation to dismiss.

** Such as if rearrest occurs within specified period of time.

As seen in the table, successful completion of program requirements does lead to automatic dismissal of charges in nearly all programs. When the survey was undertaken, there was no attempt to differentiate the extent to which charges are actually dismissed with prejudice, as recommended by the NAPSA standards. Thus the total number of programs leading to automatic dismissal of charges includes those where charges are dismissed with and without prejudice, as well as those where diversion occurred prior to the filing of formal charges and where, given the successful completion of the program, no charges will ever be formally filed. On the other hand, it is of some concern that there are several jurisdictions which do not automatically dismiss the current charge(s) upon successful completion of diversion, and in some cases even hold open the possibility of charges being reinstituted if there are subsequent rearrests within some period of time after the diversion program has been successfully completed.

Assumption #7

Records related to diverted cases should be sealed or expunged upon successful completion of the program.

The underlying basis for this assumption is that successful completion of a diversion program should leave the participant with no criminal record of any kind related to the particular charge that led to diversion. The NAPSA standards make a distinction between expungement and sealing of the records. The standards suggest that expungement is not a satisfactory solution for ensuring the privacy of the arrest and diversion participation information. They opt for sealing of records rather than their total destruction, indicating that there may be legitimate limited needs for such information by the criminal justice system at some future date.

PROGRAMS LEADING TO EXPUNGEMENT OR SEALING OF RECORDS FOLLOWING SUCCESSFUL PROGRAM COMPLETION

Extent to which Records are Expunged/Sealed	# of Programs	% of Programs
Always	28	21.4
Can be, but not always	70	53.4
Never	26	19.8
Don't know or NA	7	5.4
TOTAL	131	100.0

The survey made no distinction between the sealing and expungement of records, so that the data in the table include those programs which do either or both. Almost 20% of all programs surveyed indicated that records are never sealed or expunged, thereby indicating that the privacy of these documents is questionable. Only slightly more than 20% of the programs indicated that the records are always sealed or expunged. On the other hand, more than half of the programs indicated that the records are generally either sealed or expunged, although that is not always the case. Typically this means that the burden for having the records sealed or expunged rests with the defendant and/or his or her attorney. In many of these cases a formal court motion must be filed in order for the records to be sealed or expunged--frequently at some cost to the defendant. Thus in most programs, provisions are made for assuring the protection of the records, but some action by the defendant is necessary.

RELEASE

The Assumptions discussed below are related to the specific practices and actions of individual release programs, and not to what happens before or after the release program intervenes on behalf of those defendants awaiting trial. Thus, there is no attempt in the following discussion to deal with issues such as usage of citation mechanisms, the extent to which judicial officials follow the recommendations of release programs, the extent to which defendants are released on money bail or are detained throughout the pretrial period, etc. The focus is strictly on the 119 release programs referred to earlier, and on the practices over which they have specific control.

Assumption #1

No group of pretrial detainees should be automatically excluded from being interviewed by a release agency solely on the basis of the offense charged.

Both the NAPSA and ABA release standards argue very strongly that no one should be denied consideration for release strictly because of the specific offense with which the defendant has been charged. The standards and case law that exist suggest that release determinations must be based on individual assessments of each defendant, according to various factors and criteria - such as community ties, previous record, etc., rather than arbitrarily excluding certain groups of defendants based strictly on the offense charged.

Some authorities have pointed out that capital cases are excluded from consideration for release where "proof is evident or the presumption great", and that release programs should not therefore waste time interviewing such cases. However, since the determination as to what constitutes "proof evident or presumption great" is a judicial decision, the release agency should not anticipate that the decision will be against the defendant, i.e., that such proof or presumption exists. If it is determined that it does not exist, the judicial officer still must decide on appropriate release conditions and needs information from the release agency in order to make an appropriate decision.

The NAPSA standards recommend that release agencies should interview everyone who is detained. The ABA standards focus primarily on felony defendants, suggesting that all misdemeanants should be released at the earliest point possible, and therefore prior to agency interviews, through release mechanisms such as citation. The ABA standards add that interviews are not necessary in those cases where the prosecution does not oppose release on personal recognizance or where the defendant, upon the advice of counsel, waives the right to such an

interview. Thus there are slight procedural differences in emphasis of the two sets of standards, but the intent of both is quite clear: no defendant should be detained without an independent inquiry into his/her circumstances, followed by a specific presentation based on those circumstances to a judicial officer.

PROGRAMS AUTOMATICALLY EXCLUDING PRETRIAL DETAINEES FROM BEING INTERVIEWED, BASED ON CHARGE ALONE

Types of Exclusions	# of Programs	% of Programs
None--everyone is interviewed	21	17.7
No exclusions based on charge alone	33	27.7
All misdemeanors	14	11.8
All misdemeanors plus other specific charges	3	2.5
All felonies	3	2.5
All felonies plus other specific charges	1	.8
Miscellaneous specific charges	44	37.0
TOTAL	119	100.0

More than half (54.6%) of all release programs surveyed do exclude some defendants from being interviewed on the basis of the charge alone. In only 17.7% of the programs are there no automatic exclusions. In another 33 programs (27.7%) there are some exclusions, but none based on the charge alone. 9/

Of those programs that exclude based on the charge alone, most exclude for a variety of specific charges (37% of all programs). These exclusions are most typically for violent felonies such as murder, rape, aggravated assault, armed robbery, kidnapping, etc. Several programs also exclude those who have been charged with parole or probation violations and/or with escape from jail or prison. As can be seen, relatively few programs exclude large categories of charges such as all misdemeanors or all felonies. It cannot be determined from the survey data alone whether those programs excluding all misdemeanors are in jurisdictions where most if not all of the misdemeanor cases are previously released through citation or other similar mechanisms. But clearly there are substantial numbers of programs which do exclude categories of defendants without examining the total pattern of circumstances associated with each individual defendant.

9/ In most of those 33 cases, the automatic exclusion is based on the fact that a defendant is already being held on a warrant from another jurisdiction, has a prior record of failure-to-appear, or is on probation or parole. In four programs, the absence of a local address automatically excludes a detainee from being interviewed.

Assumption #2

No pretrial detainees should be precluded from receiving a recommendation for own recognizance (OR) release solely due to charge or any other factor not directly related to the possibilities of non-appearance or pretrial crime.

The availability of an interview, established in Assumption #1, is of diminished worth if there is no possibility of it leading to a positive recommendation for own recognizance release.

The NAPSA standards specifically call for recommendations that are, for example, "charge blind". The ABA on the other hand simply requires that recommendations be according to "detailed guidelines". Both emphasize the need for "individualized" release assessments. The NAPSA standards state that "release recommendations should be individualized and should take into consideration factors relevant to appearance and pretrial crime as applied to the individual defendant". 10/ In other words, just as there should be no blanket exclusions from being interviewed for release consideration, there should also be case-by-case review of the eligibility for OR release among those who are interviewed, as opposed to reliance upon blanket exclusions from such recommendations.

PRIMARY CIRCUMSTANCES WHICH AUTOMATICALLY EXCLUDE THOSE INTERVIEWED FROM BEING ELIGIBLE FOR OWN RECOGNIZANCE RELEASE RECOMMENDATION

Reasons for Automatic Exclusion*	# of Programs Excluding	% of Programs Excluding
Inability to verify information provided at interview	34	28.6
Prior record of FTA	28	23.5
No local address	27	22.7
Warrant from another jurisdiction	16	13.4
Outstanding warrants/same jurisdiction	12	10.1
On parole	12	10.1
Prior record of pretrial arrests	12	10.1
On probation	11	9.2
On pretrial release (prior charge)	9	7.6
No automatic exclusions	38	31.9

* Programs frequently exclude defendants for more than one reason, so the totals exceed 119.

10/ National Association of Pretrial Services Agencies, Performance Standards and Goals for Pretrial Release and Diversion: Release, Washington, D.C., 1978, Standard XI, Commentary, p.64.

Of the 119 programs, almost one-third have no automatic exclusions from OR recommendation eligibility. However, the policy of almost 70% of the programs automatically excludes certain categories of interviewed defendants from being eligible for OR release recommendations. 11/ Some of these people may be recommended for other types of non-financial or financial release, but the programs indicate that by policy they do not recommend OR release for any defendants with the stated characteristics. A smaller number of programs also excludes defendants for other reasons; those listed in the table are simply the exclusions most frequently noted by the programs. It is interesting to note that among the most frequent reasons for automatic exclusions, none are specific-charge related, and most are based on prior criminal activity of some type.

Assumption #3

Pretrial release agencies should make specific recommendations concerning the release decision to the court or designated judicial officer.

All national standards emphasize the need for an independent investigation of facts relevant to the pretrial release decision. The ABA, NAPSA and NDAA standards strongly suggest that the agency not only gather such facts, but also make a recommendation to the court concerning the most appropriate release decision. Preference is stated for the filing of written reports with the court which state the specific recommendation and the reasons supporting it. Only in cases where the prosecutor advises the release agency that (s)he does not oppose release on personal recognizance is there considered to be less need for such recommendations.

PROGRAMS WHICH MAKE SPECIFIC RELEASE RECOMMENDATIONS TO COURT

Type of Information Presented	# of Programs	% of Programs
Release recommendations made to court	104	87.4
Release recommendations made to prosecutor	1	.8
Information only presented to court (no specific recommendations)	7	5.9
Miscellaneous (e.g., recommendations when requested)	4	3.4
No answer	3	2.5
TOTAL	119	100.0

11/ And, as noted earlier, all but 21 programs exclude some defendants from even being interviewed. Thus, in almost all release programs, certain types of defendants are automatically excluded from being considered for an own OR recommendation.

This standard is one of the most accepted and adhered to of all the release or diversion standards. Almost 90% of all release programs surveyed do make specific release recommendations to the court (this includes some which have the authority to effect releases on their own in certain cases).

Assumption #4

Recommendations should be based on objective factors.

Both the ABA and NAPSA standards urge the use of objective criteria as the basis for release recommendations. The NAPSA standards take a very clear-cut position on this, whereas the ABA standards are slightly less definitive, indicating that recommendations should be based on objective factors "whenever possible". The point is that the spirit of the standards indicates that, no matter how labeled, recommendations should be based on objectively determined factors to insure the equal protection of defendants interviewed.

The pretrial field has long distinguished between "objective" and "subjective" recommendation schemes. However, in practice it appears that the distinction is becoming more and more hazy: Programs with objective recommendation schemes can often award "discretionary points"; while subjective recommendation schemes in practice can be rigid, albeit unwritten, in their application. This should be recognized in interpreting the data below.

PROGRAMS USING OBJECTIVE AND SUBJECTIVE METHODS OF ASSESSING DEFENDANTS

Type of Assessment	# of Programs	% of Programs
Objective only	20	16.8
Subjective only	46	38.7
Objective with Subjective elements	45	37.8
No answer	8	6.7
TOTAL	119	100.0

The primary significance of the data in the table is that almost 40% of the surveyed programs indicate that they use only subjective criteria in their assessments of individuals prior to presenting information and/or recommendations to the court. Almost as many provide a combination of objective and subjective decision making procedures.

Assumption #5

Financial conditions should not be recommended by release agencies.

Criminal justice standards and case law are in agreement that use of the traditional money bail system, with its reliance upon financial capability to obtain release, may discriminate against indigent defendants. Moreover, every national effort to develop standards related to pretrial release has called for the complete abolition of surety bail bonding (bail bondsmen).

Research which has been done in this area generally indicates that non-financial forms of release are at least as effective as, if not more so than release on money bond. Furthermore, there is no compelling argument which suggests that indigent defendants are more likely to flee or to be rearrested while out on release than those defendants who can afford to make money bail. Moreover, the use of money bail is often predicated on fixed bail schedules related to specific charges, thereby negating the individuality of the release decision required by law. 12/ The net effect of all the above is to throw into serious question the fairness and practical value of the money bail system, despite the continued reliance on it throughout the country.

Accordingly, the NAPSA release standards argue strongly that all use of financial conditions of release should be completely eliminated. Although philosophically in agreement with the above points, the ABA standards stop short of calling for a complete abolition of financial bail. They agree that reliance on monetary conditions should be drastically reduced, but suggest that there are some cases in which only financial conditions will reasonably ensure the defendant's appearance at court. In such cases, the ABA urges that bail be set at the lowest level necessary to ensure such appearance, that consideration be given to the defendant's financial ability to post bail, that unsecured appearance bond be considered, and that percentage deposit be allowed. These standards go on to suggest that a complete prohibition of the use of financial conditions may result in the unnecessary pretrial detention of defendants who otherwise could safely be released on bail.

The NAPSA standards argue that one of the prime purposes of a pretrial release agency is to facilitate the use of non-financial release and to help assure that no defendant is detained pretrial as a result of an inability to make bail.

12/ See Stack v. Boyle 341 U.S. 1 (1951).

PROGRAMS RECOMMENDING BAIL FOR SPECIFIC DEFENDANTS

Type of Bail (Financial Conditions) Recommended	# of Programs	% of Programs
Recommend that bail be set	19	16.0
Recommend specific bail amounts	6	5.0
Recommend that bail be set and specific amounts	29	24.3
Make no recommendations related to bail	61	51.3
No answer	4	3.4
TOTAL	119	100.0

Despite the strong stand against the use of money bail and the attempt to persuade programs to push for increased use of non-financial release conditions, nearly half of all release programs surveyed continue to recommend that bail be set in certain circumstances and/or recommend specific bail amounts.

Assumption #6

The approach to determining release eligibility should be based on local research and periodic reassessment.

The NAPSA standards encourage pretrial release agencies to monitor their own operations to assure that the criteria used in determining release eligibility not be discriminatory. As noted above, the standards emphasize the desirability of having release recommendations based upon objective criteria, but there is a clear recognition that criteria and circumstances may vary over time, thereby leading to the need for reexamining the criteria on an ongoing basis. The standards also make clear that the bases for recommendations vary according to circumstances of individual jurisdictions.

PROGRAMS WHICH HAVE MADE CHANGES IN APPROACH TO DETERMINING RELEASE ELIGIBILITY BASED ON RESEARCH WITH PROGRAM DATA

Changes made	# of Programs	% of Programs
Yes	51	42.9
No	45	37.8
No answer	23	19.3
TOTAL	119	100.0

In answer to the question, "Have you made any changes in your approach to determining release eligibility since the program began, based on research with program data?", almost 40% of all programs surveyed indicated that they had not. In fact, the actual number of such programs is probably higher, given the assumption that at least some of the 23 programs for which no answer was given have also not made any changes. Moreover, when asked how the current scoring and/or weighting procedures were derived for the point scale (for those using some form of objective release decision-making scheme), only 11 programs indicated that their own research had been a factor. About half of all programs using an objective recommendation scheme indicated that they had adapted their procedures from another program, making some changes to fit local needs. The basis for making those adaptations, however, was not clear. Thus the overall conclusion appears to be that release recommendations are all too rarely based on local research and/or periodic reassessment.

DIVERSION AND RELEASE

Assumption #1

Pretrial programs should be able to demonstrate and justify their existence through impact and cost effectiveness research.

This is an area which cannot always be completely controlled by the local individual program, because of funding and staffing constraints. Nonetheless, national standards and current fiscal realities emphasize the need for careful research and evaluation to determine how effectively pretrial programs operate and what impact they have on their participants and their respective criminal justice systems. The NAPSA standards comment on the relative lack of credible, methodologically sound evaluations in the diversion area and suggest that, ideally, assessments of each program should be conducted every five years or so by external (non-program) evaluators. Particular attention is paid to the desirability of impact and cost effectiveness evaluations of each program. Although there is no such explicit research emphasis among the national release standards, there is a clear recognition of the need for program evaluations.

TYPES OF FORMAL DIVERSION PROGRAM EVALUATIONS CONDUCTED IN THE PAST THREE YEARS

Type of Evaluation	# of Programs	% of Programs
None	53	40.4
In-house: program operations	18	13.7
External: program operations	33	25.2
In-house: impact, no comparison	6	4.6
External: impact, no comparison	13	9.9
In-house: impact, with comparison	8	6.1
External: impact, with comparison	13	9.9
Cost effectiveness	22	16.8
No response	11	8.4

About 40% of the diversion programs indicated that they had had no evaluations whatsoever, even of an in-house nature, over the past three years. The most frequent types of evaluations have addressed questions of how well the program operates, rather than program impact or cost effectiveness. Relatively few programs have had impact evaluations conducted, and only slightly more than half of those used any type of comparison group in their analyses. This becomes important because, without a comparison group against which to

contrast the performance of program participants, few valid definitive statements of the program's impact can be made. Although more evaluations have been conducted by organizations other than the programs themselves, the number of external evaluations is still relatively small. Moreover, relatively few programs (about 17%) have had a cost effectiveness evaluation done within the past few years. Again, in many cases this relative lack of program evaluations is not necessarily a negative reflection on the programs themselves. Adequate funding for evaluations often has not been made available through such groups as local and state criminal justice agencies. Unfortunately, the current reality of budget cutbacks suggests that the incidence of program evaluations is not likely to increase.

TYPES OF FORMAL RELEASE PROGRAM EVALUATIONS CONDUCTED IN THE PAST THREE YEARS

Type of Evaluation	# of Programs	% of Programs
None	29	24.4
In-house: program operations	21	17.6
External: program operations	39	32.8
In-house: prediction of FTA	16	13.4
External: prediction of FTA	29	24.4
In-house: prediction of pretrial crime	6	5.0
External: prediction of pretrial crime	22	18.5
In-house: activities impact	4	3.4
External: activities impact	8	6.7
Cost effectiveness	13	10.9
No answer	19	16.0

About one-quarter of the release programs indicated that they had had no evaluations conducted during the past two to three-year period. In general, there appeared to have been more release than diversion programs evaluated, although the reverse is true for cost effectiveness analyses. Several programs have had external evaluations conducted, and others have had in-house evaluations, of the program's ability to predict failure-to-appear and pretrial crime rates. However, based on the data noted earlier, questions must be raised as to how extensively these evaluations are being used by programs to make changes in their recommendation schemes. It may be that the evaluations have indicated to what extent the screening techniques predict, but without indicating what specific changes in predictive factors may be necessary.

SUMMARY AND CONCLUSIONS

This review has barely scratched the surface of some of the problems and issues facing pretrial programs as they exist today. Yet it can help highlight and focus attention on some of those issues which should be examined by those interested in seeing pretrial practices improved. Among the conclusions suggested by the above analyses are the following:

- There is a wide diversity among both release and diversion programs in terms of practices, policies and philosophies. In many instances, the programs differ--sometimes markedly--from standards which have been developed on pretrial practices, including those formulated by pretrial practitioners through their national organization, NAPSA.

- More specifically, only about half of the programs appear to have practices which completely adhere to the intent of the majority of the Assumptions addressed in this review. Moreover, in only 2 of the 14 Assumptions do as many as two-thirds of the programs appear to be "in compliance". Whether a program is "in compliance" is not necessarily by itself an indication of how "good or bad" the program is. Such a determination must ultimately be based on a variety of considerations, of which these Assumptions are only a part.

- However, these variations do suggest different interpretations and raise important questions about the future of the pretrial discipline. For example, they may reflect the extent to which programs have had to realistically adapt their practices and even principles to meet local situations. They may also suggest that some programs may be more conservative than necessary in implementing certain practices. It is also possible that there needs to be a reassessment of some of the Assumptions/standards themselves.

At this point, no value judgments are implied by the above comments. There are not enough data to draw definitive conclusions. Moreover, there is need for more direct input from pretrial practitioners as to what is practical, reasonable, and desirable, based on actual experience. As suggested above, it may be that a second look is needed at the reality and feasibility of actually implementing some of the "ideal" standards. In other cases, the questions may suggest a fresh look by individual programs at their own practices and possible ways that they can become more in compliance with the national standards.

In the final analysis, this review was not intended to provide ultimate answers about the pretrial field, but rather to help focus some of the questions that need to be raised about pretrial alternatives. For the important point is clear: there exist marked differences between pretrial standards and actual practices of pretrial programs in the United States, and further examination and perhaps significant changes are needed.

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