PRE-TRIAL DIVERSION

...UMENTS

HEARINGS

BEFORE THE

SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES, AND THE ADMINISTRATION OF JUSTICE

OF THE

COMMITTEE ON THE JUDICIARY HOUSE OF REPRESENTATIVES

NINETY-THIRD CONGRESS

SECOND SESSION

ON

H.R. 9007

TO AMEND TITLE 18, UNITED STATES CODE, TO PERMIT A FEDERAL COURT, UPON THE RECOMMENDATION OF THE UNITED STATES PROSECUTOR, TO PLACE CERTAIN PERSONS CHARGED WITH FEDERAL CRIMES IN PROGRAMS OF COMMUNITY SUPERVISION AND SERVICES

S. 798

TO REDUCE RECIDIVISM BY PROVIDING COMMUNITY-CENTERED PROGRAMS OF SUPERVISION AND SERVICES FOR PERSONS CHARGED WITH OFFENSES AGAINST THE UNITED STATES, AND FOR OTHER PURPOSES

FEBRUARY 6 AND 7, 1974

Serial No. 30

Printed for the use of the Committee on the Judiciary

U.S. GOVERNMENT PRINTING OFFICE

30-202 WASHINGTON : 1974

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PRE-TRIAL DIVERSION BILLS

WEDNESDAY, FEBRUARY 6, 1974

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES,
AND THE ADMINISTRATION OF JUSTICE
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 10:15 a.m., in room 2226, Rayburn House Office Building, Hon. Robert H. Kastenmeier [chairman of the subcommittee] presiding.

Present: Representatives Kastenmeier, Danielson, Drinan, Railsback, Smith, and Cohen.

Also present: Herbert Fuchs, counsel; William P. Dixon, counsel; Bruce A, Lehman, counsel; and Thomas E. Mooney, associate counsel.

Mr. KASTENMEIER. The Subcommittee on Courts, Civil Liberties, and the Administration of Justice has convened this morning to hear testimony on legislation designed to offer an alternative to our present method of handling certain offenders in our criminal justice system. This is commonly called pretrial diversion.

The bills before us today, H.R. 9007, introduced by my colleague, Mr. Railsback, and S. 798, introduced by Senator Burdick, attempt to reduce recidivism by treating certain offenders in a manner which will provide the best opportunity for their rehabilitation. The legislation permits certain offenders, with the concurrence of the Federal court, the prosecutor, and the defendant to be placed in a community-based probationary program for a certain period of time instead of being tried for the offense with which he has been charged. Upon the satisfactory completion of this probation the charges will be dismissed and the defendant will not stand trial for the offenses charged.

There are many differences between the two bills before us today and I am certain our witnesses will discuss them. These include differences as to the offenders who are eligible for such treatment, the procedures for dismissal of the charges, termination of probation, and supervision of the defendant. Additionally, another bill has recently been referred to this subcommittee, H.R. 10616, which would permit a similar diversion system for Federal misdemeanors which may be handled by a U.S. magistrate. While that bill is not specifically before us today, much of today's testimony, I am sure, will relate to that bill as well. H.R. 9007, S. 798, and a report from the Administrative Office of the U.S. Courts, follow:

[H.R. 9007, 93d Cong., 1st sess.]

A BILL To amend title 18, United States Code, to permit a Federal court, upon the recommendation of the United States prosecutor, to place certain persons charged with Federal crimes in programs of community supervision and services

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (*a*) part II of title 18 of the United States Code (relating to criminal procedure) is amended by inserting after chapter 207 the following new chapter:

"Chapter 208.—DIVERSIONARY PLACEMENT

"§ 3171. Placement under community supervision

"(a) PLACEMENT BY COURT.—Upon the recommendation of the attorney for the Government, the court may place any individual charged with a criminal offense under a program of community supervision, pursuant to conditions set by the court, if the court believes (1) that the individual may benefit by such placement and (2) that such placement is not contrary to the public interest.

"(b) TIME OF PLACEMENT.—The court may place an individual under community supervision pursuant to this chapter at the earliest practicable time.

"(c) PLACEMENT CONTINGENT UPON WAIVER OF CERTAIN RIGHTS.—No individual may be placed under community supervision pursuant to this chapter unless he has voluntarily agreed in writing to such placement and knowingly and intelligently waiver, for the period of such release, his right to speedy trial provided by the sixth article of amendment to the Constitution. For purposes of any applicable period of limitations with respect to the criminal offense with which an individual is charged, there shall be excluded from such period the time during which such individual is under community supervision pursuant to this chapter with respect to such offense.

"§ 3172. Community supervision by probation officers

"In carrying out community supervision pursuant to this chapter, United States probation officers are authorized to perform the following functions under the direction of the court—

"(1) upon the request of the attorney for the Government, collect, verify, and report promptly to the court and to the attorney for the Government information concerning the potential eligibility for placement under community supervision of any individual charged with a criminal offense and recommended appropriate placement conditions for such individual;

"(2) supervise individuals placed under community supervision pursuant to this chapter;

"(3) with the approval of the Director of the Administrative Office of the United States Courts, operate or contract for the operation of, appropriate facilities and services (including, but not limited to, addict and alcoholic treatment centers, counseling services, and placement in private homes);

"(4) inform the attorney for the Government and the court of all apparent violations of conditions of community supervision pursuant to this chapter (including arrests) and recommend to the court appropriate modifications of such conditions;

"(5) utilize, with their consent, the services, equipment, personnel, information, and facilities of Federal, State, and local and private agencies and instrumentalities with or without reimbursement therefor;

"(6) request individuals, organizations, and public or private agencies to perform such duties with respect to individuals placed under community supervision as may be necessary;

"(7) assist persons placed under such community supervision in securing employment and medical, legal, or social services, when necessary or appropriate; and

"(8) perform such other functions as the court may specify.

Functions performed by probation officers under this Act shall be in addition to any functions performed by such officers under section 3655 or under any other authority.

"§ 3173. Period and effect of placement

"(a) INITIAL PERIOD AND EXTENSION.—An individual placed under community supervision pursuant to this chapter shall be placed for an initial period of ninety days. Upon the recommendation of the attorney for the Government and after consultation with the probation officer to whom such individual has been assigned, the court may extend such initial period for an additional period of nine months.

"(b) DEFERRAL OF CHARGES.—During the period of an individual's placement under community supervision pursuant to this chapter, the criminal charges against the individual shall be deferred. The court may terminate such placement at any time and authorize the attorney for the Government to resume such charges.

"(c) DISMISSAL OF CHARGES.—Upon termination of an individual's initial or extended period of community supervision pursuant to this chapter, the court may (after consultation with the attorney for the Government and the probation officer who supervised such individual) dismiss the charges against such individual. Such dismissal shall forever bar prosecution for the offense charged, any offense based on the same conduct or arising from the same criminal episode, and other offense required to be joined with the offense.

"§ 3174. Additional probation officers

The court may appoint such additional probation officers as may be necessary to absorb the increased workload resulting from the operation of this chapter.

"§ 3175. Definitions

"(a) For purposes of this chapter, the term—

"(1) 'court' means any United States district court;

"(2) 'criminal offense' means any criminal offense triable in any court established under the laws of the United States other than an offense triable by court-martial, military commission, provost court, or other military tribunal; and

"(3) 'community supervision and services' includes, but is not limited to, medical, educational, vocational, social, and psychological services, corrective and preventive guidance, training, counseling, provision for residence in a halfway house or other suitable place, and other rehabilitative services designed to protect the public and benefit the individual.".

(b) The table of chapters for part II of such title 18 is amended by inserting after the item relating to chapter 207 the following new item:

"208. Diversionary placement ..... 3171."

SEC. 2. There are authorized to be appropriated out of any money in the Treasury not otherwise appropriated, such sums as may be necessary to carry out the provisions of this Act.

[S. 798, 93d Cong., 1st sess.]

AN ACT To reduce recidivism by providing communitycentered programs of supervision and services for persons charged with offenses against the United States, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Community Supervision and Services Act."

SEC. 2. Congress hereby finds and declares that the interests of protecting society and rehabilitating individuals charged with violating criminal laws can best be served by creating new and innovative alternatives for treatment and supervision within the community; that in many cases, society can best be served by diverting the accused to a voluntary community-oriented program; that such diversion can be accomplished in appropriate cases without losing the general deterrent effect of the criminal justice system; that the retention of the deferred charges will serve both as a deterrent to committing further offenses and as an incentive to complete rehabilitative efforts; that alternatives to institutionalization (which provide education, job placement, training, and other social services) made available to persons accused of crime who accept responsibility for their behavior and admit their need for such assistance can equip such persons to lead lawful and useful lives.

SEC. 3. As used in this Act, the term—

(1) "eligible individual" means any person who is charged with an offense against the United States and who is recommended for participation in a

program of community supervision and services by the attorney for the government in the district in which the charge is pending;

(2) "program of community supervision and services" may include, but is not limited to, medical, educational, vocational, social, and psychological services, corrective and preventive guidance, training, counseling, provision for residence in a halfway house or other suitable place, and other rehabilitative services designed to protect the public and benefit the individual;

(3) "plan" includes those elements of the program which an eligible individual needs to assure that he will lead a lawful lifestyle;

(4) "committing officer" means any judge or magistrate in any case in which he has potential trial jurisdiction or in any case which has been assigned to him by the court for such purposes; and

(5) "administrative head" means a person designated by the Attorney General as chief administrator of a program of community supervision and services, except that each such designation shall be made with the concurrence of the chief judge of the United States district court having jurisdiction over the district within which such person so designated shall serve.

SEC. 4. The administrative head of each program of community supervision and services shall, to the extent possible, interview each person charged with a criminal offense against the United States within the district to which such head is appointed whom he believes may be eligible for diversion in accordance with this Act and suitable for such program and upon further verification by such head that the person may be eligible, shall assist such person in preparing a preliminary plan for his release to a program of community supervision and services.

SEC. 5. The committing officer may release an eligible individual to a program of community supervision and services if he believes that such individual may benefit by release to such a program and the committing officer determines that such release is not contrary to the public interest. Such release may be ordered at the time for the setting of bail, or at any time thereafter. In no case, however, shall any such individual be so released unless, prior thereto, he has voluntarily agreed to such program, and he has knowingly and intelligently waived, in the presence of the committing officer, any applicable statute of limitations and his right to speedy trial for the period of his diversion.

SEC. 6. (a) The administrative head of a program of community supervision and services shall report on the progress of the individual in carrying out his plan to the attorney for the Government and the committing officer at such times and in such manner as such attorney or officer deems appropriate.

(b) In any case in which an individual charged with an offense is diverted to a program pursuant to this Act and such diversion is terminated and prosecution resumed in connection with such offense, no 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 program, 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.

SEC. 7. (a) In any case involving an eligible individual who is released to a program of community supervision and services under this Act, the criminal charges against such individual shall be continued without final disposition for a twelve-month period following such release, unless, prior thereto, such release is terminated pursuant to subsection (b) of this section, or such charge against such individual is dropped in accordance with subsection (c) of this section. In any case in which such release is not terminated or such charge is not dropped within such twelve-month period, such charge so continued shall, upon the expiration of such twelve-month period, be dismissed by the committing officer.

(b) The committing officer, at any time within such twelve-month period referred to in subsection (a) of this section, shall terminate such release, and the pending criminal proceedings shall be resumed, if the attorney for the Government finds such individual is not fulfilling his obligations under the plan applicable to him, or the public interest so requires.

(c) If the administrative head certifies to the committing officer at any time during the period of diversion that the individual has fulfilled his obligations and successfully completed the program, and if the attorney for the Government concurs, the committing officer shall dismiss the charge against such individual.

SEC. 8. (a) The chief judge of each district is authorized, in his discretion, to appoint an advisory committee for each program of community supervision and services within his district. Any such committee so appointed shall be composed of

the chief judge, as chairman, the United States attorney for the district, and such other judges or individuals within such district as the chief judge shall appoint, including individuals representing social service or other agencies to which persons released to a program of community supervision and services may be referred under this Act.

(b) It shall be the function of each such committee so appointed to plan for the implementation of any program of community supervision and services for the district, and to review, on a regular basis, the administration and progress of such program. The committee shall report at such times and in such manner as the chief judge may prescribe.

(c) Members of a committee shall not be compensated as such, but may be reimbursed for reasonable expenses incurred by them in carrying out their duties as members of the committee.

SEC. 9. In carrying out the provisions of this Act, the Attorney General shall—

(1) be authorized to—

(A) employ and fix the compensation of such persons as he determines necessary to carry out the purposes of this Act;

(B) utilize, on a cost-reimbursable basis, the services of such United States probation officers and other employees of the executive and judicial branches of the Government, other than judges or magistrates, as he determines necessary to carry out the purposes of this Act;

(C) employ and fix the compensation of, without regard to the provisions of title 5, United States Code, governing appointments in the competitive service and the provisions of chapter 51 and subchapter III of chapter 53 of such title relating to classification and General Schedule pay rates, such persons as he determines necessary to carry out the purposes of this Act;

(D) acquire such facilities, services, and materials as he determines necessary to carry out the purposes of this Act; and

(E) enter into contracts or other agreements, without regard to advertising requirements, for the acquisition of such personnel, facilities, services, and materials which he determines necessary to carry out the purposes of this Act;

(2) consult with the Judicial Conference in the issuance of any regulations or policy statements with respect to the administration of any program of community supervision and services;

(3) conduct research and prepare reports for the President, the Congress, and the Judicial Conference showing the progress of all programs of community supervision and services in fulfilling the purposes set forth in this Act;

(4) certify to the appropriate chief judge of the United States district court as to whether or not adequate facilities and personnel are available to fulfill a plan of community supervision and services, upon recommendation of the advisory committee for such district;

(5) be authorized to provide technical assistance to any agency of a State or political subdivision thereof, or to any nonprofit organization to assist in providing programs of community supervision and services to individuals charged with offenses against the laws of any State or political subdivision thereof;

(6) provide for the audit of any funds expended under the provisions of this Act;

(7) be authorized to accept voluntary and uncompensated services;

(8) be authorized to provide additional services to persons against whom charges have been dismissed under this Act, upon assurance of good behavior and if such services are not otherwise available; and

(9) be authorized to promote the cooperation of all agencies which provide education, training, counseling, legal, employment, or other social services under any Act of Congress, to assure that eligible individuals released to programs of community supervision and services can benefit to the extent possible.

SEC. 10. For the purpose of carrying out the provisions of the Act, there are authorized to be appropriated for the fiscal year ending June 30, 1974, and for each fiscal year thereafter, the sum of $2,500,000.

Passed the Senate October 4, 1973.

Attest:

FRANCIS R. VALEO,
Secretary.

ADMINISTRATIVE OFFICE OF THE U.S. COURTS,
SUPREME COURT BUILDING,
Washington, D.C., October 10, 1973.

Hon. PETER W. RODINO, JR.,
House of Representatives,
Washington, D.C.

DEAR CONGRESSMAN RODINO: I write in response to your letter of September 20 concerning H.R. 9007, a bill to permit a Federal court to place certain persons charged with Federal crimes in programs of community supervision and services. This bill was referred to the Administrative Office for an expression of views.

At the April 5–6 meeting, the Judicial Conference of the United States considered similar legislation in S. 798, which provides that a committing officer, on recommendation of the attorney for the Government, may release a person charged with an offense against the United States by diverting him to a voluntary program of community supervision and services. The Conference approved this bill in principle, however, expressed the view that the federal probation system should be designated as the agency to provide the programs of supervision and services rather than an agency of the Department of Justice and that the Congress should authorize sufficient funds for the federal probation system to provide these services. The Conference further recommended that Section 3(4) of the proposed bill be amended so as to define "committing officer" as any judge or magistrate "in any case in which he has potential trial jurisdiction or in any case which has been assigned to him by the court for such purpose."

In our view H.R. 9007 incorporates the changes to S. 798 recommended by the Conference.

Sincerely yours,

WILLIAM E. FOLEY,
Deputy Director.

I am pleased to call as the first witness before the subcommittee this morning my distinguished subcommittee colleague from Illinois, the Honorable Tom Railsback.

TESTIMONY OF HON. TOM RAILSBACK, A REPRESENTATIVE IN CONGRESS FROM THE 19TH CONGRESSIONAL DISTRICT OF THE STATE OF ILLINOIS

Mr. RAILSBACK. Thank you, Mr. Chairman, and members of the subcommittee.

I want to begin by saying that I think it is refreshing that this subcommittee is trying to continue operating and trying to legislate despite our other awesome responsibilities relating to impeachment. In other words, I certainly favor what the Chairman is doing, that is going ahead with legislation despite the fact that we have this other responsibility.

Mr. Chairman, in the interest of conserving the subcommittee's time, I ask unanimous consent that the full text of my prepared statement appear in the hearing record, as if I had read it, and I will attempt to briefly summarize if I may, consisely, if I can, my thoughts on this subject.

Mr. KASTENMEIR. Without objection, your full statement will be received and made a part of the record.

[The complete statement of Mr. Railsback follows:]

STATEMENT OF HON. TOM RAILSBACK

Mr. Chairman and Members of the Subcommittee: Today, I am testifying in support of legislation which would permit a Federal court, upon the recommendations of the U.S. prosecutor to place certain persons charged with Federal crimes in programs of community supervision. These bills would authorize the courts to establish programs of non-criminal disposition for certain Federal of-

fenders. A person would be eligible for deferred prosecution only on the recommendation of the attorney for the government which then must be approved by the court. Such a person would have to voluntarily agree to enter the pre-trial diversion program and waive any applicable statute of limitations and his right to speedy trial for the period of his diversion. If the person fulfilled his obligations under the program the charges against him would be dismissed. Prosecution of the pending criminal charges could be resumed when the court or prosecutor found that the person was not fulfilling his obligations under the program.

For the information and use of the Subcommittee, I had prepared a comparative analysis of the three bills pending before the Subcommittee: H.R. 10616, introduced by our distinguished Chairman of the Full Committee at the request of the Judicial Conference; S. 798, introduced by Senator Burdick, which passed the Senate October 4th, 1973; and H.R. 9007 which is identical to H.R. 9201, both of which I introduced with seventeen co-sponsors. The way H.R. 9007 is intended to work is as follows:

First, soon after the arrest of an individual charged with a criminal offense, the attorney for the government would request a probation officer to gather information and report promptly to him and the Court concerning the potential eligibility for placement of that individual into a program of community supervision;

Second, the U.S. prosecutor would review the recommendation of the probation officer and if he agreed, and if the recommendation was for placement in a program, then the prosecutor would go to the accused and advise him of his eligibility for diversion from prosecution and that if he wanted to participate in the program he would have to waiver, for the period of his diversion, any statute of limitations and his right to a speedy trial;

Third, the prosecutor would then go to the Court and the Court would approve or disapprove any pre-trial diversion agreement. Once the prosecutor, the accused and the court agreed, the accused would enter the program for no fewer than 90 days and no more than 12 months. If the accused successfully completes the program, the court may dismiss the charges.

A dismissal of charges shall bar prosecution for the offense charged, any offense based on the same conduct or any conduct arising from the same criminal episode and a bar from the prosecution of any other offense required to be joined with the primary offense. If the accused does not want to continue in the program, he can withdraw at any time. Under H.R. 9007 the prosecutor cannot terminate a placement. If a prosecutor wishes to withdraw an accused from a program and resume prosecution he must petition the Court and only the Court can terminate a placement and the resumptioin of prosecution.

The legislation which I introduced, H.R. 9007, is more closely aligned with Senator Burdick's bill, S. 798. As the comparative analysis chart points out, the bills differ in a number of areas. However, the difference between S. 798 and H.R. 9007 can be narrowed to two primary differences.

The *first* primary difference concerns administration of the diversion programs. S. 798 vests such authority in the *Attorney General* through the appointment of "administrative heads" in each judicial district. H.R. 9007 vests such authority in the *District Courts* to be administered through our existing probation service with the court serving as a buffer between the Department of Justice and the person charged with the criminal offense. The courts would be an objective but interested third party. The Department of Justice is the *accuser* and the *accused* may well be reluctant to enter into any program controlled by the accuser.

In addition S. 798 would create a new level of Federal employees called an "administrative head" selected by the Attorney General with the approval of the Chief Judge of the district within which such person so appointed shall serve. H.R. 9007 would place the programs of diversion from the criminal process within our existing probation service structure which is controlled and managed by the district courts. This is the recommendation of the U.S. Judicial Conference. In our existing probation system we have the experience and expertise to develop effective and meaningful diversion programs at a minimum expense to the taxpayer.

The *second* primary difference between S. 798 and H.R. 9007 concerns the authority of the prosecutor once an accused enters a program of diversion. Under S. 798 criminal proceedings can be resumed when the prosecutor finds that the accused is not fulfilling his obligations under his plan or when the public interest so requires. Under H.R. 9007 the Court may terminate such

placement at any time and authorize the prosecutor to resume criminal proceedings. This, in my opinion, is important to the accused because it assures him of a fair administration of the diversion plan. This is not to say that there wouldn't be a fair administration if the prosecutor could withdraw a person from a program, but in this business the appearance of fairness is as important as the result of fairness.

Eary diversion from the criminal justice system has received strong support from the Judicial Conference of the U.S., the American Bar Association ,the Department of Justice, the National District Attorneys Association, and the Chamber of Commerce of the U.S. In 1967, the President's Commission on Law Enforcement and Administration of Justice adopted a standard in its final report, *The Challenge of Crime in a Free Society*, which endorsed the concept "of early diversion programs. It recommended that prosecutors undertake "[e] arly identification and diversion to other community resources of those offenders in need of treatment, for whom full criminal disposition does not appear required."

The A.B.A. Section of Criminal Law supports the idea of pre-trial diversion because it embodies provisions of the following Standard for Criminal Justice:

The prosecution function

3.8 Discretion as to non-criminal disposition.

(a) The prosecutor should explore the availability of non-criminal disposition, including programs of 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.

(b) Prosecutors should be familiar with the resources of social agencies which can assist in the evaluation of cases for diversion from the criminal process.

The defense function

6.1 Duty to explore disposition without trial.

(a) Whenever the nature and circumstances of the case permit, the lawyer for the accused should explore the possibility of an early diversion of the case from the criminal process through the use of other community agencies.

In addressing the First National Conference on Corrections in Williamsburg, Virginia in 1971, the then Attorney General John N. Mitchell said:

"Let us recognize that corrections should begin, not with the prisons, but with the courts. 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. The Federal criminal justice system has already used this formula in many juvenile cases—the so-called Brooklyn plan. I believe this program could be expanded to include certain offenders beyond the juvenile age, without losing the general deterrent effect of the criminal justice system."

As recently as October, 1973, the National Advisory Commission on Criminal Justice Standards and Goals recommended diversion from the criminal justice process. That Commission also recommended releasing many criminals from prison and developing alternatives to incarceration for others. "These changes must not be made out of sympathy for the criminal or disregard of the threat of crime to society," but "They must be made precisely because that threat is too serious to be countered by ineffective methods."

Deferred prosecution was first used by the U.S. Attorney for the Eastern District of New York in 1936. At that time the U.S. Attorney and the chief probation officer were concerned with the handling of juvenile offenders and were seeking a method of avoiding the demoralizing influences of the court procedure on young offenders. The decision whether to defer prosecution was made by the U.S. Attorney on the basis of a complete investigation by the probation officer. This was the beginning of what became known as the *Brooklyn Plan*. More generally the concept of early diversion started to gain popular support in the mid-1960's. At that time Vera Institute of Justice at New York University had undertaken a series of research studies which culminated in the recommendation and support of the concept of pre-trial diversion. The Vera Institute's most successful venture prior to that was in the area of bail reform. Their research and study formed the basis for what became the Bail Reform Act of 1966. In 1966 two very successful pilot projects were started based on the early diversion concept; one of which was called the Manhattan Court Employment Project and the other entitled Project Crossroads located in Washington, D.C. which was sponsored by the National Council on Children and Youth.

Both of these projects ran for 3½ years with funding from the U.S. Department of Labor, and both have now become a part of the local court services function in Manhattan and Washington, D.C. Both of these programs divert felony and misdemeanor cases following arrest, but before arraignment, and both offer employment placement services, vocational training and educational placement, along with counseling by trained paraprofessionals.

In these two pilot projects the liklihood of future recidivism was substantially reduced for participants in comparison with a matched group of non-participants processed through the court in the normal fashion. In the Manhattan project, 154 persons entered the program and of these, 152 successfully completed the program. The number of recidivists among this group were 24 or 15.8 percent. The non-participant group processed through the Court in normal fashion number 91 with 29 recidivists for 30.1 percent. In the Washington, D.C. project, 191 persons entered Operation Crossroads and 140 successfully completed the program. Among this group there were 31 recidivists or 22.2 percent. The non-participant group process through the court in normal fashion number 105 with 48 recidivists or 45.7 percent.

RECIDIVISM OVER 15 MONTHS FOLLOWING INITIAL COURT CONTACT[1]

Group	Total number[2]	Number of recidivists	Percent recidivists
Participants	191	60	31.4
Favorable (charge dismissed)	140	31	22.2
Unfavorable	51	29	56.8
Controls	105	48	45.7
Charges dismissed	50	22	44.0
Other disposition	55	26	47.3

[1] Arrests recorded by Metropolitan Police Department, District of Columbia.
[2] Not included are 9 participants and 2 controls whose names could not be located in Police Department files.

Source: Project Crossroads: A final report to the Manpower Administration, U.S. Department of Labor, p. 35 (Washington, D.C. 1971).

In Operation Crossroads a cost benefit analysis was prepared in order to compare the cost of the project with the cost savings in terms of:

1. An immediate reduction in costs to the criminal justice system through successful diversion of cases to the program;
2. increased productivity as reflected in higher wages and more regular employment; and
3. a reduction in future social costs from crime by lowering recidivism rates.

The benefits to the public were $2 for every dollar invested. For the benefit and use of the Subcommittee I've attached as part of my statement a rather brief but detailed discussion of this cost-benefit analysis.

The results achieved by these pilot projects in terms of recidivism reduction were so encouraging that Department of Labor funded a number of "second round" projects in the cities of Baltimore, Boston, Newark, Cleveland, Minneapolis, San Antonio and San Francisco in late 1970. A "third round" of similar projects is now being funded from Law Enforcement Assistance Administration (L.E.A.A.) funds in scores of cities around the country. The Dade County Pretrial Intervention Project, Miami, Florida reported that the per case cost for successfully diverted first offenders was $695 as compared to the costs of dealing with first offenders by use of probation which was $804 or by incarceration at a cost of $1,401. The Atlanta, Georgia pre-trial diversion project compared the average cost per person completing their program of $1,263 with the average cost per felony conviction in Fulton County, Georgia, of $4,483.

We know the per capita cost of Federal probation supervision in the community for fiscal year 1972 was $384.83 a year. The average 1972 per capita cost for confinement in the Federal Bureau of Prisons institutions was $5,200 a year. Under H.R. 9007 the per capita cost will be no more than the 1972 probation figure and it may well be less. However, it was introduced with an open-ended authorization because at that time I was unable to obtain a dollar figure from the Administrative Office of U.S. Courts. When the Judicial Conference testifies I expect to receive an estimate on what it would cost to maintain such a program within our

present probation system. I believe such a figure will be considerably less than the 2.5 million dollar figure contained in S. 798.

Prosecution need not be the only method of dealing with antisocial conduct. Experienced prosecutors have long exercised their discretion to defer prosecution under certain conditions. However, I do not believe that it is used extensively primarily because prosecutors and the Courts do not have the time, the staff, the money, the facilities or the programs to handle effective and meaningful non-criminal disposition of cases. Therefore, the prosecutors have little alternative but to prosecute and the Courts to sentence. We must try and evaluate cases before rather than after conviction.

This legislation is necessary in order to provide the prosecutors and the Courts with the facilities, the money and the support to develop alternatives to our criminal justice system with its expenditure of precious time and money and circumvent the doubtful success of the correctional institutions. But of greater importance, is the development of programs which provide an individual with the opportunity of becoming productive both to himself and to society.

Mr. RAILSBACK. Also, Mr. Chairman, I have a brief comparison of the major provisions of the House and Senate bills under consideration, as well as H.R. 10616, all of which relate to pretrial diversion, and I ask unanimous consent to have that appear as part of the record, along with a benefit-and-cost analysis of Project Crossroads contained in the final report of the Manpower Administration, Washington, D.C., 1971, which I think would be of help to us in our consideration of these various bills.

The CHAIRMAN. Without objection, the nine-page comparison which you referred to will be made a part of the record; and also the Project Crossroads report, which you also alluded to, will be made a part of the record.

[The nine-page comparison, and Project Crossroads report follows:]

PROJECT CROSSROADS: A FINAL REPORT TO THE MANPOWER ADMINISTRATION, U.S. DEPARTMENT OF LABOR (WASHINGTON, D.C. 1971)

BENEFIT-COST ANALYSIS [1]

This chapter presents a summary of the results of a benefit-cost analysis of Project Crossroads. The program was designed as an alternative to the traditional judicial and correctional systems for individuals with no previous adult (18 years or over) convictions. Four hundred and sixty adult individuals participated in the program between September 1968 and April 1970. Through intensive counseling, job placement, remedial education and other services—over a three month period, following arrest but prior to trial—the program attempted to alter behavior patterns before individuals became accustomed to crime as a way of life. If, at the end of the 90-day period, the defendant had shown satisfactory progress, the court would, upon Crossroads' recommendation, dismiss the charges.

The program focused on youths arrested for a property crime and facing the probability of their first criminal conviction, and for whom there was a high probability of recidivism. While the crimes are non-violent, lesser offenses, it is believed that most serious offenders begin in this manner, get involved in the court and prison system, obtain a criminal record, and have a very difficult time "going straight." [2]

It is not assumed that the program, through counseling, remedial education, and placement services, will totally eliminate the urban crime problem. There is undoubtedly a significant population of individuals who are not likely to be "reformed" by manpower or other types of programs, or by the general amelioration of social and economic conditions. On the other hand, it is assumed here that there exists a sizeable population whose perceptions of the advantages and disadvantages of alternative life styles can be altered by this type of program. The hypothesis of this analysis is that the program will yield returns in terms of (a)

[1] John F. Holahan, Economist-Consultant; Ph.D. Candidate, Georgetown University; Research Associate, D.C. Department of Corrections.

[2] President's Commission on Law Enforcement and Administration of Justice, Task Force on Assessment of Crime. *Crime and Its Impact, an Assessment* (Washington, D.C.: U.S. Government Printing Office, 1967) pp. 79–80.

an immediate reduction in costs to the criminal justice system through successful diversion of cases to the program, (b) increased productivity as reflected in higher wages and more regular employment, and (c) a reduction in future social costs from crime by lowering recidivism (rearrest) rates.

One of the most difficult problems encountered in program evaluations of this type is ascertaining what would have happened to program participants in the absence of the program. Estimates of programs are frequently made by comparison of program participants with a control group. Ideally, the two groups are matched for several sociodemographic characteristics and are selected simultaneously or from the same time period as the experimental group. It is rarely possible, however, to perfectly match the two groups.

In this study, the control group was selected randomly from court records from the 6-month period prior to the beginning of Crossroads operations in September 1968. Individuals were selected on the basis of their similarity to the participant group on the four major enrollment criteria: age, no prior adult convictions, offense category, and eligibility for personal bond. There were three factors which were impossible to control, and thus may be sources of bias: (1) project participants have to agree to enter the program, (2) permission to enroll must be given by the U.S. Attorney's Office, and (3) participants are interviewed by a project counselor before enrollment.

Selection of the control group from an earlier point in time than the participant group presented no serious problem for measuring the diversion and reduced recidivism benefits of the program. Information on case dispositions and incidence of rearrests for both groups was available from police and court records. However, the time difference did present serious problems for the measurement of the employment and earnings benefit, primarily because individuals were extremely difficult to contact. Thus, it became necessary to use the employment records of Crossroads participants prior to project enrollment as an indicator of their performance after the program. Adjustments were made to this data for inflation and increased age, both of which would normally cause earnings to be higher one year later even in the absence of a Crossroads program.

The benefits from the program were principally reductions in the amount of crime and its attendant social costs. The project works with individuals involved in property crimes, which are basically involuntary transfers of wealth. A theft of goods or cash is not an economic loss to society but, rather, constitutes a redistribution of ownership of wealth or monetary claims on wealth. Although there is a loss to the victim, there is no net reduction in social welfare, ignoring physical injury, property damage, etc., if that loss is equal to the gain of the perpetrator or ultimate consumer. Thus, while a program which reduces crime will yield benefits to potential victims, these are not properly considered social benefits.

While the value of property stolen should not be considered a loss to society as a whole, this does not mean that forced transfers of wealth have no social costs. Rather, they include the foregone productivity of the thief, assuming this would be in socially acceptable employment. The social costs also include the private and public resources which are expended to prevent crime and to adjudicate, punish, and rehabilitate criminals. This would include private expenditures on locks, alarms, lights, security guards, insurance, etc., and public expenditures on police, courts, and correctional systems. These expenditures employ human and material resources which could be employed elsewhere in the absence of crime. To the extent that these resources could be used productively elsewhere, they are a cost to society in their present use. Finally, one must also include the fear, avoidance of normal activity, community disruption, and so forth, which though impossible to qualify, are nonetheless very real costs of crime.

It is not possible to measure many of these costs of crime, and thus the estimates of the benefits from the program are understated. Estimates were made of the value of property stolen per crime and if the costs of police, courts, corrections, probation, and parole services. These were developed on a per-crime or per-offender, rather than total cost, basis. They were then used in measuring the resource savings or benefit from successful diversion of the cases from the courts and from reduction in recidivism rates.

The three principal, measurable social benefits derived from Project Crossroads were: the diversion benefit, the recidivism reduction benefit, and the earnings benefit. The diversion benefit was defined as the immediate return to society from enrollment of defendants in the program. Participants who were favorably terminated from the project had their cases dismissed in court. The value to

society from diverting cases from the criminal justice system depends on the number of cases that otherwise would not have been diverted, the expected cost of adjudication, and the expected costs of sentence. The expected cost of adjudication depended on the costs of each type of judicial proceeding weighted by the probability that that type of trial would have been chosen. The expected costs of sentence depended on the costs of different types of dispositions, including acquittal, prison, etc., weighted by the probability that each disposition would have occurred.

The results of the analysis showed that 85.7% of Crossroad participants had their cases dismissed at termination, as opposed to 40.7% of the control group; 25.8% of the control group received probation sentences, as opposed to about 5% of the program participants; and 11.2% of the control group received prison sentences, while only 2.6% of the Crossroads group were sentenced to prison. The expected cost of judicial proceedings was applied to the project differences in number of persons receiving pleas, court trials and jury trials. The expected costs of sentences were applied to the projected differences in the number of persons receiving and probation sentences of different lengths.

The estimated value of judicial savings attributable to Project Crossroads, calculated with the above data and the estimates of costs of judicial proceedings and sentences, is presented in Table I.

TABLE I.—*Reduced Judicial and Correction Costs From Diversion of Cases to Program*

Pleas	$7,060.05
Nonjury trials	7,348.12
Jury trials	19,440.00
Probation	10,369.44
Prison	71,276.64
Total	115,494.25

Crossroads has provided a second benefit if it has in fact reduced recidivism. Most studies of recidivism show remarkably high rates, indicating that the traditional judicial and correctional processes are not particularly effective in rehabilitating offenders. A recent FBI survey of offenders released in 1968 found that 60% to 75% were rearrested within five years.[3] While these rates vary with age, the crime, the disposition, individual court sentencing policies, and the community to which released, the fact remains that recidivism is a major factor in rising crime rates. If the recidivism rate of Crossroads participants, during enrollment and after leaving the project, is lower than it would have been had they not participated in the project, it can be said that society has benefited.

In order to quantitatively measure this benefit, it was necessary to know something of the value to society from reducing recidivism rates by a given percentage. This required use of the estimates on the costs of different crimes, police services, various types of judicial proceedings and various types of sentences. Furthermore, it was necessary to construct a flow model to predict the probability of each judicial event and each type of disposition for each crime. With this information we could calculate the expected costs of recidivism and thus the benefit from the program to the extent that it reduces recidivism. The expected cost of recidivism is an average of the cost of each possible type of judicial proceeding and sentence weighted by the probability of the event occurring. For example, the estimate of the cost of recidivism, given the crime of robbery, includes the probability of release before trial and the attendant cost, the probability of jury trial and lengthy prison term and their attendant costs, etc. The probability of further rearrests and their expected costs are also included.

The flow model was calculated for four crimes, robbery, burglary, larceny, and auto theft. It was assumed when work began on this model that Crossroads and control group recidivists would commit one of these four property crimes. The results showed that 71% and 69% of the Crossroads and control group recidivists, respectively, did so. The results provided in Table IV provide the expected benefit, by crime of preventing the recidivism of one individual who, had he recidivated, would have commited robbery, burglary, larceny, or auto theft. These estimates can then easily be applied to a program reducing recidivism by 20, 50, 100, etc., individuals by simple multiplication. The estimate of the recidivism benefit, by crime, is provided below.

[3] Federal Bureau of Investigation, *Uniform Crime Reports, 1968*, (Washington, D.C.: U.S. Government Printing Office, 1969), p. 37.

TABLE IV

Robbery	$9,582.07
Burglary	7,285.35
Larceny	5,992.96
Auto theft	7,245.76

The data from the Crossroads and control samples was then applied to the estimates provided by the model. Investigation of police department records was conducted by the Metropolitan Police Department to determine the incidence of recidivism in the two samples. The overall recidivism rate for the Crossroads and control groups were 26% and 36.4%, respectively. These recidivism rates do not include arrests outside the District of Columbia jurisdiction. While extrajurisdictional offenses could result in higher recidivism rates, there is no reason to believe that the differential between the two groups would be altered. The differences between the two recidivism rates, 26% and 36.4% is not quite significant at the .05 level. The test for the significance of the difference between the two sample percentages yields a T-value of 1.86.

The estimated present value of the recidivism reduction benefit at three alternative interest rates, is provided in Table V.

TABLE V.—*Present value of reduced recidivism*

Percent:	
5	$216,963.00
10	198,448.00
15	182,634.00

A third quantifiable benefit derived from the project is that from increased earnings of participants. The true social benefit is the increase in each individual's material contribution to social welfare. It is assumed that earnings are a valid measure of an individual's productivity and that this, in turn, is a reflection of his contribution to social welfare.

The project employment staff developed and maintained contacts with area employers, both public and private, training programs, and with the public employment service. The benefits derived from providing job information and placement assistance to participants, thereby reducing the number and length of unsuccessful job searches and thus increasing earnings over a given period of time. The counseling of participants may have served to increase motivation, resulting in fewer job changes and shorter periods between jobs. If individuals were placed in training programs or in employment providing on-the-job training, skills and productivity may have increased, providing still further benefit.

Furthermore, if the overall effect of a program is to reduce recidivism, it is likely that employment rates will be higher, both in the present and the future. Reductions in time spent in prison increase the non-institutional population from which the labor force is drawn. Reduction in time spent pursuing a criminal career while out of prison will most likely be associated with higher labor force participation rates and lower unemployment rates.

There is no way of discerning if the effect of the program was one of a reduction in overall unemployment or of displacement of other workers. If, in fact, the gains to participants reduced the opportunities for others, use of earnings data overstates the net social benefit from the program. On the other hand, many participants would have had the burden of a conviction record, had the program not existed. Earnings for these participants would have been lower the year after the program than assumed here.

It is difficult to determine if there was any long term effect of job placement and counseling services. If there was no change in the skills or productivity of the participants, they will, after a given period of time, be in the same position in the labor market as they otherwise would have been. On the other hand, if increased motivation and productivity have occurred, participants will be in a superior position in the labor market than otherwise long after termination from the project. In this study we make the possibly conservative assumption that there is no effect beyond one year. Earnings beyond one year are assumed to be the same as they would have been in the absence of the program, except for the adjustment of higher employment rates due to reduced recidivism. It was estimated on the basis of available data that the 10.4% difference in recidivism was associated with a 2.6% difference in the level of employment. This is the same, conceptually, as reducing the cost of crime; the cost, in this case is the foregone earnings of criminal offenders.

It was estimated that earnings of the 460 participants were $45,854 greater during the counseling period than they would have been, and $102,577 greater the year following termination from the program. The estimated total differential in earnings, projected over 5 years to include the gain due to reduced recidivism, was $225,869.

The benefit-cost ratio is an investment criteria which states that decision makers should invest in those projects for which the ratio of the present value of benefits to the present value of costs is greater than unity. The total benefit from the program is the sum of the present values of each benefit. The diversion benefit accrued in year zero for foregone court proceedings and over the first year or two for foregone sentences. The other benefits (earnings, reduced recidivism could be expected to accrue over several years. All costs were incurred in year zero. Future benefits were discounted because income or benefits to be received in the future do not have the same value as the same benefits or income received in the present. In this study benefits were discounted at interests rates of 5%, 10%, and 15%. Benefit-cost ratios at each rate of discount are presented in Table VI.

TABLE VI.—PRESENT VALUE OF SOCIAL BENEFITS FROM PROJECT CROSSROADS

	5 percent	10 percent	15 percent
Diversion	$109,995	$104,995	$100,430
Earnings	190,282	170,729	156,074
Recidivism	216,964	198,448	182,634
Total benefit	517,240	474,172	439,138
Total cost	233,256	233,256	233,256
Benefit-cost ratios	2.2	2.0	1.8

An investment which has a benefit-cost ratio exceeding unity can be considered a socially worthwhile or "profitable" expenditure. The use of alternative discount rates here indicates that the benefit-cost ratio is not sensitive to changes in the rate. Thus, the benefit-cost ratios presented above indicate that the Crossroads program has been an efficient use of society's resources.

Many of the benefits from the program were not estimated. The value of the remedial education program was not measured. The benefit estimates do not include private expenditures for crime prevention equipment and manpower, or the extent of migration, avoidance of normal activity, use of less efficient means of transportation, and community disruption which may be foregone with reduction in recidivism. Omission of these factors may result in seriously underestimating the benefits from this type of program. On the other hand, the measurement of the program's value depends on the ability to successfully control for the performance of participants in the absence of the program. The difficulties in developing control groups for accurate measurement of the earnings and recidivism benefits were discussed above.

The effectiveness of a program such as Project Crossroads cannot be analyzed without consideration of the staff which administered it or the general social and economic environment in which it is adopted. It is important to remember that this is not merely an analysis of the economic feasibility of an alternative to the normal judicial and correctional processes, but a measurement of the effect of a program at a certain point in time, in a unique locale, and with a specific staff. Whether such a project is a worthwhile innovation depends not only on its conceptual validity but also on these other factors. Such a program adopted during a recession, in a depressed area, or with inadequate personnel would not meet with as much success as one adopted under more favorable conditions. To more thoroughly test the value of the innovation, the Crossroads concept should be introduced into other cities with different economic and social conditions, and conducted with different personnel.

These results suggest that alternative approaches to the traditional judicial and correctional processes can be effective. However, this does not mean that this type of program is better than other alternatives to the status quo. Other policies or programs which offer alternatives to the existing structure may have benefit-cost ratios which exceed those found here and under certain budgetary constraints should be adopted rather than this program.

There is also no evidence that this program is the best possible pre-trial diversion program. Some alternative mix of counseling, job placement, remedial education and other services over a longer time period may yield higher benefit-cost ratios.

BRIEF COMPARISON OF MAJOR PROVISIONS OF HOUSE AND SENATE BILLS RELATING TO PRETRIAL DIVERSION

	H.R. 10616 (Rodino)	H.R. 9007 (Railsback)	S. 798 (Burdick)
What type of program is authorized?	Pretrial "probation" program for offenders charged with certain "minor" Federal offenses.	Pretrial diversion program offering community-centered supervision and services for offenders charged with Federal crimes. Specifically excludes those charged with offenses triable by court-martial, military commission, provost court or other military tribunal.	Same as H.R. 9007.
Who decides defendant eligibility?	U.S. Magistrate, with the consent of the U.S. Attorney and the defendant.	U.S. District Court, upon recommendation of U.S. Attorney and with the written consent of the defendant.	U.S. Magistrate or District Judge ("committing officer"), upon recommendation of U.S. Attorney and with the consent of the defendant.
When can the defendant be placed in the program and for how long?	Prior to trail, or prior to acceptance of plea of gulity or nolo contendere—for a period not exceeding 18 months.	"At the earliest practicable time"—for an initial period of 90 days, which may be extended to 1 year.	At the time of the setting of bail or at any time thereafter—for a period up to 1 year, with no minimum stated.
What criteria must the court consider before placing a defendant in program?	Not specified.	The court must investigate whether the individual could benefit by placement; and whether the placement would be contrary to the public interest.	Same as H.R. 9007.
What are the requirements of the defendant before he can be admitted to a program?	(1) He must voluntarily agree to participate.	(1) Same as H.R. 10616 (except consent must be in writing).	(1) Same as H.R. 10616.
	(2) No similar provision.	(2) Defendant must waive any applicable statute of limitations and his right to a speedy trial for the period of diversion.	(2) Same as H.R. 9007, except specifies must waive rights in presence of committing officer.
	(3) No similar provision.	(3) No similar provision.	(3) Defendant must draw up a plan, with the help of the local director, concerning the services the defendant will need and the efforts he will make to succeed in society when the period of supervision ends. The plan must be approved by the Attorney General before the defendant can be admitted to program.
What are the procedures for the dismissal of charges?	If the defendant successfully completes "probation", he will be discharged and the proceedings against him will be dismissed (by the court).	Upon termination of the individual's initial or extended period of community supervision, the court (after consulting with the U.S. Attorney and supervising probation officer) may dismiss the charges.	Similar to H.R. 9007 except: (1) Dismissal of charges is mandatory if local director certifies defendant has fulfilled his obligations, and U.S. Attorney approves. (2) Charges may be dismissed at "any time during the period of diversion" (no minimum as in H.R. 9007).
What are the procedures for the resumption of charges?	If probation is revoked, proceedings against the defendant are to be resumed, although the proceedings would take place before another magistrate or judge.	The court may terminate a defendant's placement at any time and authorize the U.S. Government to resume charges.	The court or magistrate ("committing officer") may terminate a defendant's placement at any time and authorize the United States to resume charges, if—(1) individual is not fulfilling his obligations under the plan applicable to him, (2) if the public interest requires his dismissal, and (3) if the U.S. Attorney approves.

BRIEF COMPARISON OF MAJOR PRIVISIONS OF HOUSE AND SENATE BILLS RELATING TO PRETRIAL DIVERSION—Continued

	H.R. 10616 (Rodino)	H.R. 9007 (Railsback)	S. 798 (Burdick)
What provision is made for protecting the rights of a defendant participating in the program?	If probation is revoked and proceedings against the defendant are resumed, they would take place before another magistrate or judge of the court.	If charges against the defendant are dismissed, he cannot be prosecuted from that time on for the offense charged, or for any offense based on the same conduct or arising from the same criminal episode, or connecting charge.	If the defendant's participation in the program is terminated and prosecution resumed, no statements he has made while participating in the program, no information contained in any report, and no other information concerning his participation would be admissable on the issue of guilt in the proceeding. Provides for automatic dismissal of charges at the end of a 12-month period if (1) charges against him have not already been dropped, or (2) prosecution resumed.
What is the supervisory structure of the program?	Under the general authority of U.S. Probation Office, "subject to such terms and conditions as the magistrate may then, or from time to time, prescribe".	Under the general authority of U.S. Probation Office "under the direction of the court" (district court).	Under the general authority of the U.S. Attorney General. Creates "administrative heads" in the Federal court districts who carry out local administrative duties. Creates local "advisory committees" to assist. The Attorney General may call upon U.S. probation officers for help or any other personnel of the executive or judicial branches (except judges).
Who supervises the defendant on the local level?	U.S. probation officers	Same as H.R. 10616	Does not specify, although creates "administrative heads" for the districts, who would serve as the local directors of the program. These are persons designated by the Attorney General in concurrence with the chief judge of the U.S. district in which the director will serve. Also authorizes the Attorney General to use the services of personnel from the U.S. Probation Office or other appropriate agencies to carry out the program.
What are the duties of the local supervisors?	Not specified	U.S. probation officers are responsible for: (1) collecting background information on the potential eligibility of defendants for placement.	"Administrative heads" of program are responsible for: (1) interviewing each person charged with a Federal offense within their district for potential eligibility for program; and assisting those eligible in preparing preliminary plans for their release to the program.

		(2) supervising those placed on program, and informing the U.S. Attorney of all apparent violations.	(2) Same as H.R. 9007.
		(3) assisting those on program in securing employment and medical, legal, or social services.	(3), (4), (5)—Similar to H.R. 9007, but under the general authority of the Attorney General. The Attorney General may utilize the services of the probation officers or personnel in other agencies to provide these services and facilities.
		(4) operating or contracting for the operation of appropriate community facilities and services, including addict and alcohol treatment centers, counseling services, and placement in private homes (with the approval of the Director of the U.S. Administrative Courts).	
		(5) utilizing services, equipment, personnel, information, and facilities of other Federal, State, local, and private agencies in helping individual.	
Is there any community involvement in the administration of the program?	None specified	None specified	Authorizes the chief judge of each Federal district to appoint an "advisory committee" for each program of community supervision and services. The committee shall plan for the implementation of the program in their district, inform the Attorney General of the availability of services, and review its administration and progress. The committee is to include the chief judge of the district as the chairman, and the U.S. Attorney. It may also include other judges of the district, members of the bar, representatives of agencies in the community providing services to defendants, and any other interested citizens. The members could receive no pay but could be reimbursed for expenses.
What provisions are made for acquiring and operating facilities and services needed for program?	None specified	Authorizes U.S. probation officers, with the approval of the Director of the Administrative Office of U.S. Courts, to operate, or contract for, the operation of appropriate treatment facilities and services.	Similar to H.R. 9007, except authorizes U.S. Attorney General (rather than probation officers) to acquire, operate, or contract for the operation of these facilities and services.
		The probation officers are also authorized to utilize the equipment, facilities, and personnel of other Federal, State, and local agencies (with their consent).	Attorney General is authorized to utilize, on a cost-reimbursable basis, the services of U.S. probation officers and other employees of the executive and and judicial branches of the Government (except judges)—equipment and facilities not specifically mentioned.

BRIEF COMPARISON OF MAJOR PROVISIONS OF HOUSE AND SENATE BILLS RELATING TO PRETRIAL DIVERSION—Continued

	H.R. 10616 (Rodino)	H.R. 9007 (Railsback)	S. 798 (Burdick)
Can additional personnel be hired to meet manpower needs of program?	No provision	Provides the court may appoint such additional probation officers as are necessary to absorb increased workload resulting from program. Authorized to utilize, with their consent, the personnel of Federal, State, and local and private agencies and instrumentalities with or without reimbursement.	Attorney General is authorized to employ and fix the compensation of such persons as he determines necessary to carry out the program. Authorizes Attorney General to utilize, on a cost-reimbursable basis, the services of U.S. probation officers and other employees of the executive and judicial branches (except judges). Also authorized to enter into contracts or agreements for the acquisition of personnel, and to accept voluntary and uncompensated services.
Are any followup services to be provided to defendants after they successfully complete diversion program?	None specified	None specified	Attorney General is authorized to provide additional services to persons against whom charges have been dismissed, upon assurance of good behavior, and if appropriate services are not otherwise available.
Is there any provision made for the coordination of services?	No provision	Probation officers are authorized to request individuals, organizations, and public or private agencies to assist individuals placed under community supervision.	Similar to H.R. 9007—authorizes Attorney General to promote the cooperation of all agencies which provide educational, training, counseling, legal, employment, or other social services—to assure participant can benefit to the maximum extent from the the program.
Is there provision for the conduct of research or preparation of reports on program?	No provision	No provision	Attorney General is authorized to conduct research and prepare reports for the President, Congress, and the Judicial Conference, indicating the progress of all programs.
Is any assistance available to States to operate pretrial diversion programs?	No provision	No provision	Authorizes Attorney General to provide technical assistance to any State or locality or any nonprofit organization to provide community-based supervision and services to individuals charged with State or local offenses.
Do these bills amend Federal legislation?	Amends section 3401 of title 18, United States Code (relating to trial by U.S. Magistrates) by adding a new subsection (H.R. 10616).	Amends part II of title 18, United States Code by inserting a new chapter (H.R. 9007) after chapter 207 (relating to release procedures).	No amendments specified.
What appropriations are authorized?	None	"Such sums as may be necessary."	For fiscal year 1974, and for each fiscal year thereafter, $2,500,000.

Mr. RAILSBACK. Mr. Chairman, and members of the subcommittee, H.R. 9007, which is identical to H.R. 9201, both of which I introduced with 17 co-sponsors, is intended to work as follows:

First, soon after the arrest of an individual charged with a criminal offense, the attorney for the Government would request a probation officer to gather information and report promptly to him and the court concerning the potential eligibility for placement of that individual into a program of community supervision.

Second, the U.S. prosecutor would review the recommendation of the probation officer and if he agreed, and if the recommendation was for placement in a program, then the prosecutor would go to the accused and advise him of his eligibility for diversion from prosecution, and that if he wanted to participate in the program, he would have to waive, for the period of his diversion, any statute of limitations and his right to a speedy trial.

Third, the prosecutor would then go to the court and the court would approve or disapprove any pre-trial diversion agreement. Once the prosecutor, the accused and the court agree, the accused would enter the program for no fewer than 90 days and no more than 12 months. Let me say, Mr. Chairman, that in reflecting about the 90 days, I am not wedded to that 90-day minimum requirement. If the accused successfully completes the program, the court may dismiss the charges. A dismissal of charges shall bar prosecution for the offense charged, any offense based on the same conduct, or any conduct arising from the same criminal episode, and bar from prosecution any other offense required to be joined with the primary offense. If the accused does not want to continue the program, he can withdraw at any time. Under H.R. 9007, the prosecutor cannot terminate the placement. This is one of the significant differences in the various pieces of legislation. If a prosecutor wishes to withdraw an accused from a program and resume prosecution, he must petition the court and only the court can terminate a placement and the resumption of prosecution.

The legislation which I have introduced, H.R. 9007, is more closely aligned with Senator Burdick's bill, S. 798. As the comparative analysis chart points out, the bills differ in a number of areas. However, the difference between S. 798 and H.R. 9007 can be narrowed to two primary differences.

The first primary difference concerns administration of the diversion program. S. 798 vests such authority in the Attorney General through the appointment of "administrative hands" in each judicial district. H.R. 9007 vests such authority in the district courts to be administered through our existing probation service with the court serving as a buffer between the Department of Justice and the person charged with the criminal offense. The courts would be an objective but interested third party. The Department of Justice on the other hand is the accuser and the accused may well be reluctant to enter into any program controlled by the accuser.

In addition S. 798 would create a new level of Federal employees called an "administrative head" selected by the Attorney General with the approval of the chief judge of the district within which such person so appointed shall serve. H.R. 9007 would place the programs of diversion from the criminal process within our existing probation service structure which is controlled and managed by the district courts. This is the recommendation of the U.S. Judicial Conference.

In our existing probation system we have the experience and expertise to develop effective and meaningful diversion programs at a minimum expense to the taxpayer.

The second primary difference between S. 798 and H.R. 9007 concerns the authority of the prosecutor once an accused enters a program of diversion. Under S. 798 criminal proceedings can be resumed when the prosecutor finds that the accused is not fulfilling his obligations under his plan or when the public interest so requires. Under H.R. 9007 the court may terminate such placement at any time and authorize the prosecutor to resume criminal proceedings. This, in my opinion, is important to the accused because it assures him of a fair administration of the diversion plan. This is not to say that there wouldn't be a fair administration if the prosecutor could withdraw a person from a program, but in this business the appearance of fairness is as important as the result of fairness.

In closing, Mr. Chairman, this subcommittee knows full well that if we are to make any inroads against crime we must crack the cycle of recidivism. This, I believe, is the real value of pretrial diversion because it is focused at individuals before they are engulfed by the system.

Prosecution need not be the only method of dealing with anti-social conduct. Experienced prosecutors have long exercised their discretion to defer prosecution under certain conditions. However, I do not believe that it is used extensively primarily because prosecutors and the courts do not have the time, the staff, the money, the facilities or the programs to handle effective and meaningful noncriminal disposition of cases. Therefore, the prosecutors have little alternative but to prosecute and the courts to sentence. We must try and evaluate cases before rather than after conviction.

This legislation is necessary in order to provide the prosecutors and the courts with the facilities, the money, and the support to develop alternatives to our criminal justice system with its expenditure of precious time and money and circumvent the doubtful success of the correctional institutions. But of greater importance is the development of programs which provide an individual with the opportunity of becoming productive both to himself and to society.

Mr. KASTENMEIER. I want to commend my colleague for the leadership that he has taken in connection with this particular concept, which has great potential in terms of our criminal justice system. And he appears here today, notwithstanding the death of a close relative, and we appreciate the fact that you are here, assuming this leadership role as you have in so many other areas of criminal justice.

I have just two or three questions.

You have highlighted the differences between the two bill. I notice in H.R. 10616 that if the defendant's probation is terminated and the prosecution of the initial charges resumed, subsequent proceedings would take place before a different magistrate or judge than the one who initially approved the pretrial intervention. How do you feel about that sort of provision?

Mr. RAILSBACK. I think maybe, Mr. Chairman, that would be a good amendment to H.R. 9007.

Mr. KASTENMEIER. In the Senate bill, there is a provision that if the prosecution is later resumed because the defendant failed to meet the conditions of his probation, no statements he has given his probation

officer, or other information concerning his participation in the program would be admissible on the issue of guilt in a criminal proceeding. How do you feel about that particular provision?

Mr. RAILSBACK. Mr. Chairman, I would approve of affording that kind of a protection to an accused as far as any statements that he may have made, or any information, that he may have volunteered. However, I am not sure that I would go as far as S. 798 which would exclude information and records that may have been given or made by somebody other than the accused. In other words. I approve generally of what I think Senator Burdick was trying to do. I am inclined to think that maybe the protection should be limited to any actions or statements made by the accused during his period of being under community service, help, or treatment. That is just my off-hand comment. Senator Burdick's bill may be a little too broad.

Mr. KASTENMEIER. In your bill you provide for the appropriation of such sums as may be necessary. Could you give us a little better guide as to what you anticipate the innovation of your program would cost on an annual basis?

Mr. RAILSBACK. Let me begin by saying that whatever sums are necessary to carry out the programs will be small compared to incarceration. In other words, by comparison, I think that whatever sums we decide are necessary, from an economic standpoint, those sums are going to be much less than what it would require to prosecute and incarcerate someone. I really believe that. I do not have an exact figure and the reason I do not have an exact figure, if we go with the approach of H.R. 9007 rather than Senator Burdick's bill we will be using the existing probation system, although I have a provision that would authorize the appointment of more probation officers if necessary.

Secondly, in my bill, if we are to use community services I think that we are going to have to take advantage of a provision that provides for contracting out services. In other words, if you have a private halfway house, or a private community treatment center, I think that the Probation Service should be in a position to contract for services with those private homes or private community treatment centers. In other words, say we have in Madison, Wis., a particular facility that is not Government-controlled, but that has worked very well and has been doing a good job rehabilitating young people. I think we want to be in a position to have the authority to contract with that facility.

I must confess that at this time I am not prepared to come up with an exact figure.

Mr. KASTENMEIER. Well, I am informed that the Judicial Conference is appearing tomorrow and will offer some estimates which will be very useful.

Mr. RAILSBACK. Yes, that would be helpful.

Mr. KASTENMEIER. The Senate bill calls for an annual authorization of up to $2.5 million, and I gather that the Judicial Conference's estimate of your bill will be somewhat slightly less.

Mr. RAILSBACK. Do you have any estimates, counsel?

Mr. KASTENMEIER. I yield to counsel, if counsel wants to make any further comment.

Mr. MOONEY. I am informed by the Judicial Conference that when they appear tomorrow they intend to offer a detailed estimate of the

cost of H.R. 9007, an audit will be less than the $2.5 million figure contained in the Senate bill. I believe they suggested that it will come just over the $2 million mark.

Mr. RAILSBACK. Well, the only apprehension I have, and I think tomorrow when they come before us that we are going to have to examine about this, I feel very strongly that we are going to want to really use the contract provisions, so that the probation system, which is already overworked, and our probation officers are already overworked, and I hope that they are not just discounting the need to really let some of these other agencies handle this on kind of a reasonable, contractual basis. But I think otherwise, we are really in trouble, if we try to limit ourselves and, frankly, that sounds like a low figure to me.

Mr. KASTENMEIER. Well, as I have said before, I personally commend you for taking this leadership and we will, of course, in the course of the hearings develop other matters and perhaps through colloquy you can further edify the committee.

Mr. RAILSBACK. Thank you, Mr. Chairman.

Mr. KASTENMEIER. I yield to the gentleman from Massachusetts.

Mr. DRINAN. I want to echo what the chairman said about your initiative, Mr. Railsback, and commend you for it and I hope the version of this, hopefully your version, will go through.

Just two or three points.

I take it that in your bill the defendant, or the prospective defendant, must also waive the statute of limitations, but as I read 3171–C, it is not entirely clear. It simply states here in your bill that the statute of limitations will be stopped. But, I assume that you indicate that he must waive this. You see my point that it is not entirely clear, that he must waive knowingly and intelligently for the period of his release his right to a speedy trial. But then the next sentence simply states that the statute of limitations must also be waived. It may be a technical point but I think it is sort of important.

Mr. RAILSBACK. Yes, I see what you mean.

Mr. DRINAN. Now, how do you feel about the Justice Department's testimony that will come later, where they point out apparently a further difference between your bill and that of Senator Burdick's and they insist this, that the Department of Justice has supported a requirement that a defendant be disqualified from consideration for pretrial diversion in the absence of his admission of guilt or his failure to accept the responsibility for the wrong conduct on which his charges are based? You make no provision for that and apparently Senator Burdick's bill is clearer on that, although I have not found the actual language. Would you want to comment on that question?

Mr. RAILSBACK. Yes. I want to say that it is my understanding, first of all, that the Justice Department has come around to supporting, the concept of pretrial diversion, for which I am very grateful. I disagree with the idea that a person who has the potential to be rehabilitated should have to, in any way, indicate his guilt. You know, the way I feel about that. What we are trying to do is what is being done under some State laws with respect to young juvenile offenders. We try to keep away the stigma of guilt. The concept of the pretrial diversion is to help the person avoid the stigma of guilt altogether and try to provide some direction to their lives and to try and provide some counseling for them, some help for them and give them some hope. I think that

we would be making a mistake to require that they admit their wrongdoing or their misconduct.

I also want to say that I do not think it is necessary because what you have is a situation where a young person, if he wants, can contest the charges if he is innocent. He has that option. We are not depriving him of his right to a trial. He does not have to participate in any way with the pretrial diversion program. The mere fact that he is willing to participate in a pretrial diversion program, shows a willingness on his part to admit that he needs help. I think that in itself is important, and I do not think we want to attach in anyway the stigma of guilt.

Mr. DRINAN. Therefore, you would expressly reject what the Justice Department is going to say this morning, that:

> We believe it would be advisable to reenforce this with a statement of congressional intent that defendants who are insistent upon their innocence would not be eligible for placement under a community supervision program?

Mr. RAILSBACK. This is one area where we simply just disagree completely, and I have made that very clear publicly. I left such a provision out of my bill.

Mr. DRINAN. All right. Thank you.

Now, tell us more, if you would, Mr. Railsback, about the type of defendant or prospective defendant that would get into this? You say young people, but would you describe them more? I think of drug offenders but tell us more of the type of people. I do not think that is defined really, is it, in the bill?

Mr. RAILSBACK. I will tell you how I became interested in this in the first place. I attended a conference at Ditchly in England, and there was a fellow there, an American, who headed up the Baltimore pretrial diversion program by the name of Eddie Harrison. We talked, and I learned a little about his program. In the Baltimore program, I think they have a large number of underprivileged, disadvantaged blacks, for instance. I am not sure whether they are all blacks but, anyway, a substantial number I am sure have had drug problems. I think maybe he is going to be a witness? Is Eddie Harrison going to be a witness?

Mr. MOONEY. He will submit a statement for the record.

Mr. RAILSBACK. He is going to submit a statement. Well, anyway, I think that what we are trying to do is take somebody that has not had good counseling, has not had any direction in his life, has not had the advantages that other people have had who can be helped if somebody is willing to provide him with some hope. Incidentally, one of the other provisions of my bill does provide for job counseling and job placement. I would say it is that kind of a person that I am interested in helping. Somebody that if he had some direction in his life may be able to straighten out and pull himself together. Putting him into our criminal justice system, from what I have seen, instead of helping him is more apt to make him a hardened criminal.

Mr. DRINAN. Well, I was discussing your bill very favorably with some penology people in Massachusetts recently, and they had a copy of your bill and they were sophisticated, and more than one made the suggestion that the type of individual or the classification of these individuals might well be spelled out more in the bill, lest some administering official come along and say to some man who is 30 or 40 that this program is not intended for you. And, according to them, and as I read your bill, there is no defense to that, there is a broad discretion

upon the part of the supervising officials here to give or to deny. Would you respond to that?

Mr. RAILSBACK. Let me see if I understand. You mean, you are afraid that the bill might be limited if we don't say in the bill to whom we want it to apply.

Mr. DRINAN. That it would be arbitrary, that it would be administered in a different way in different parts of the country according to the penology philosophy, so to speak, of the people.

Mr. RAILSBACK. I would certainly have no objection, for instance, to a finding of fact in the bill itself.

Mr. DRINAN. Or in the report.

Mr. RAILSBACK. Or in the report, either way. Probably in the report we can make legislative history. This legislation is not going to do any good unless the prosecutors want to use it, and I think we want to make it very clear that we want them to use it, and really take a good look at every case to see if it can be used.

Mr. DRINAN. And I am afraid they would feel if they use it in one case, or one class of cases, they will be opened to charges that they did not like bank robbers, but that felons involved with drugs are all right.

Mr. RAILSBACK. I see. Yes.

Mr. DRINAN. I think that is a very serious problem. But, I want to commend you once again for this, and I hope that with additional clarification we can build a record here so that this will be very useful and used by U.S. attorneys and district court judges and the Attorney General.

Thank you very much.

Mr. KASTENMEIER. The gentleman from Maine, Mr. Cohen?

Mr. COHEN. Thank you, Mr. Chairman, I want to join in, and associate myself with, the chairman's remarks concerning Congressman Railsback, and I hesitate to use the word, but aggressive leadership in the field of penal reform, correctional reform. You really have taken a very aggressive and assertive role in this cause, and I think you ought to be commended, particularly in view, as the chairman has pointed out, of your own personal distressing circumstances today involving the death of your brother, and the fact that you would be here to make this statement today.

I will not be terribly critical of the bill since I am one of the cosponsors.

Mr. RAILSBACK. I was going to remind you of that.

Mr. COHEN. But, I would like to ask a couple of questions. In the Senate version it authorizes the chief judge of the district court to appoint an advisory committee. I think you will recall that we had an advisory committee for each program of community supervision and service to plan and implement these diversion programs. You may recall during the hearings that we held on the LEAA last year about amending the LEAA statute to allow for the infusion, at least, of community participants in that program, and also the recommendations of the National Advisory Commission on Criminal Justice, Standards, and Goals, which also wants to have more community involvement in a criminal justice system, and I am wondering whether you think this might be a good idea to include an advisory committee in this bill?

Mr. RAILSBACK. I am kind of inclined to say yes. I think the value in having an advisory committee might be to see that an otherwise apathetic prosecutor would be encouraged to use the program or at least somebody would be looking to see how often he is using a pretrial diversion program. I think that many prosecutors would use it without any kind of prodding at all, and I think some prosecutors have already used it. But, on the other hand, I think it might be a good idea from the standpoint of involving the community and also exerting some kind of an interest or pressure, to see that the program is used.

Mr. COHEN. Following up on a question of Congressman Drinan, he mentioned the broad definition I guess in section 3171(a), that that program would apply to any individual charge and he indicated that perhaps you would like some more specific criteria for eligibility spelled out, if not in the statute, in the report itself. But, I believe the Judicial Conference supports leaving this to the discretion of the attorney and the court on a case-by-case basis. And you are suggesting that we just move away from that and perhaps get into more specific criteria for eligibility?

Mr. RAILSBACK. I am not particularly interested in excluding anybody from the pretrial diversion program. But I can tell you that the purpose of the bill is to combat the first offender recidivist problem where we have something like 72 to 75 percent of our first-time youthful offenders that we can predict are going to be back in prison within 5 years. I think that is the saddest indictment of our whole criminal justice system. This bill is really one effort to try to do something about keeping young people that might be helped out of our criminal justice system.

I do not know if that answers your question, but I guess I meant what I said when I said I think there has to be an emphasis on people that can be helped, and I am thinking particularly of young people.

Mr. DRINAN. Would the gentleman yield on that?

Mr. COHEN. Yes, I yield.

Mr. DRINAN. If I may follow up, in the Senate report, it states in the beginning here:

> This may be utilized when such diversion can be accomplished in appropriate cases without losing the general deterrent effect of the Criminal Justice System.

But then it defines eligible individuals, it does not add very much. It says this:

> Eligible individual means any person who is charged with an offense against the United States and who is recommended for participation in a program of community supervision and services by the attorney for the government in the district in which the charge is pending.

Mr. Railsback, would you be inclined to even add, at least in the report, that this is designed not exclusively but primarily, for the first offender and almost create a certain presumption that in some of those cases this particular diversion should become operational?

Mr. RAILSBACK. I am certainly willing to support an emphasis along those lines. In other words, I am not exactly sure of the language or what language we should have and maybe it is going to be easier for us after we hear from some of the other witnesses. But, that really is the primary thrust of this bill and it is meant to be.

Mr. DRINAN. Thank you.

Mr. COHEN. Just a couple more questions: Do you feel that the bill conforms with the Supreme Court decision *In re Gault* back in 1967, which would require the representation of juvenile offenders with counsel and, if so, at the initial diversion stage and also at the revocation stage?

Mr. RAILSBACK. I think they may have to have counsel.

Mr. COHEN. At both stages?

Mr. RAILSBACK. Possibly.

Mr. COHEN. Where you have parents and guardians of juvenile defendants, would they have to sign in writing, as well, as far as any release advice on the part of the juvenile or the conditions of the plan of release?

Mr. RAILSBACK. I think in those cases where the offenders are under the age of majority, or I think where the parents have not been divested of their legal responsibility, that they probably would have to give permission in writing. That is my own inclination, but I have not, to tell you the truth, had the time to fully research that point.

Mr. COHEN. Nor had I until today. Just one final point, and I think I know the answer but, anyway, just for the record, what do you think should be done in terms of keeping or the destruction of records for those people who have successfully completed this diversion plan? Should they be expunged from the record?

Mr. RAILSBACK. I would really favor that. In Illinois, my recollection is we passed a Juvenile Code that was meant to, for instance, keep names out of the papers of people under age 18, who had committed criminal offenses. In other words, we tried to stay away from the guilt stigma that would attach for the rest of their lives. And in a case where a person is discharged under this program, all charges are dismissed, then I really see no reason to have a record on him.

Mr. COHEN. Thank you very much. I do not have any further questions, but only to once again commend you for your leadership in this area.

Thank you.

Mr. RAILSBACK. Thank you.

Mr. KASTENMEIER. We thank our colleague for his appearance.

And now I would like to call up the Associate Deputy Attorney General, the Honorable Garry Baise, representing the Department of Justice.

Mr. Baise, you are most welcome. You have a brief statement and I would urge you to proceed from it, and also if you would, sir, identify your colleagues.

TESTIMONY OF HON. GARY BAISE, ASSOCIATE DEPUTY ATTORNEY GENERAL DEPARTMENT OF JUSTICE; ACCOMPANIED BY HUGH DURHAM, CHIEF, LEGISLATIVE AND LEGAL SECTION, OFFICE OF LEGISLATIVE AFFAIRS, DEPARTMENT OF JUSTICE AND RAY NELSON, BUREAU OF PRISONS

Mr. BAISE. Thank you, Mr. Chairman.

On my right is Mr. Hugh Durham from the office of Legislative Affairs, Department of Justice and on my left, Mr. Ray Nelson from the Bureau of Prisons in the Department of Justice.

Mr. Chairman and members of the subcommittee: I appreciate the opportunity to express the views of the Department of Justice on H.R.

9007 and S. 798. These bills would provide a means whereby certain arrested criminal offenders in the Federal district courts could be placed under a plan of community treatment prior to being brought to trial. Upon successful completion of the program, the charge would be dismissed. Failure to respond to the program would result in the resumption of prosecution.

Diversion of criminal defendants, or the practice of not proceeding to the trial and sentencing of some offenders, is not a new idea. There are several areas of decisionmaking in the criminal justice system where the process of arrest, prosecution, trial, and adjudication may be interrupted. These decisions may be based on a number of factors including, of course, a recognition that incarceration may be of more harm than good for some individuals as well as for society.

On the other hand, legislative recognition of diversion is a relatively modern concept and one which we of the Department of Justice welcome. Administratively, a pretrial diversion plan has been in operation in some districts for a number of years—the familiar Brooklyn plan in various parts of the country and another system in the Eastern District of Pennsylvania—and there is some question as to whether or not it is necessary to have congressional approval of these activities.

However, we think there are a number of benefits. However, Federal legislation can assure both sufficient funding for a successful nationwide program and greater public acceptance of the practice as a rehabilitative corrections measure. A formalized method of interrupting the prosecution of certain defendants can provide more uniform treatment than has previously been afforded, standards and guidance for those involved in the process, and a more available means of evaluating the success or failure of the concept in practice. Perhaps of equal importance, legislation, such as that which we are discussing today, can provide for a criminal matter to be brought to trial and adjudicated if the defendant fails to respond to a program of rehabilitation within the community.

While we support a system of pretrial diversion for certain criminal defendants, we are convinced that the Congress and those involved in the criminal process must proceed with caution and that legislation must be carefully designed to afford the greatest protection to society and to the individuals concerned, as well as to provide for the most effective integration of the plan within the judicial and corrections system. In our view, several of the provisions contained in S. 798 provide a preferable means of achieving these goals.

Both these bills would give authority to the Federal district courts to release certain individuals to a program of community supervision with suspension of prosecution for a period of not more than 1 year.

Without going into detail on all the provisions of the bills before you, I would like to point out the major difference which leads us to prefer S. 798, as presently drafted.

H.R. 9007 would permit the court to set the conditions for release, dismiss the charges, or authorize resumption of the prosecution of charges without reliance on either the guidance of the attorney for the Government or specific criteria. While the recommendations of the Government attorney would be required prior to the initial or extended release, the charges could be dismissed after consultation with him but not necessarily with his assent or that of the probation officer

supervising the defendant. It is our view that the traditional concept of prosecutorial discretion is eroded in this respect. S. 798 would require the concurrence of the attorney for the Government in each phase of the release program thereby enabling the Government to retain to a greater extent the authority to determine whether or not a charge should be prosecuted.

Furthermore, the House bill has no provision that the court's decision regarding the ultimate disposition of charges be based upon the success or failure of the defendant under the rehabilitative scheme. We believe that disposition should be dependent upon the results of the supervised release. Aside from the basic need for legislative limitations in this respect, the absence of criteria for the court would dilute the value of release records for the purposes of later evaluation and assessment of the program.

Under the provisions of proposed section 3173(a) in H.R. 9007, an individual would be placed under community supervision for an initial period of 90 days. Supervision could be provided by the court for an additional 9 months if recommended by the attorney for the Government. We believe this provision to be unduly restrictive and support the provision of S. 798 for supervision for up to 1 year, initially, without requiring an extension by the court.

In commenting on legislation on this subject, the Department of Justice has supported a requirement that a defendant be disqualified from consideration for pretrial diversion in the absence of his admission of guilt or his failure to accept responsibility for the wrongful conduct on which the charges are based. While we have always recognized the difficulties inherent in such a requirement, we feel that successful rehabilitation is problematic for those individuals who maintain their innocence or who wish to plead not guilty. Proposed section 3171(a), in requiring the recommendation of the attorney for the Government prior to initial release under supervision, could provide a satisfactory solution to our problem in this regard. However, we believe it would be advisable to reinforce this with a statement of congressional intent that defendants who are insistent upon their innocence would not be eligible for placement under a community supervision program.

Finally, with regard to the administration of funds to be appropriated for counseling, supervision, and other services for persons diverted from prosecution, the Department prefers the language of S. 798.

Under the terms of S. 798, diversion services would be provided with the flexibility necessary to meet the requirements and resources of each district in which the program is administered. Services could be provided directly, either through utilization of U.S. probation officers on a cost-reimbursable basis or through contract with existing agencies and organizations capable of providing such services.

The responsibility for the delivery of these services should rest in the Department of Justice, which supervises the U.S. attorneys and administers the Federal Bureau of Prisons, with the necessary staff and expertise to provide or contract for them. The Bureau of Prisons has experience in this area through similar responsibilities both with the administration of title II of the Narcotic Addict Rehabilitation Act and of community treatment programs throughout the country.

In conclusion, let me reiterate our support of the concepts and objectives embodied in H.R. 9007 and S. 798. With over two-thirds of the people wihin the corrections system on probation or parole, the central question is no longer whether or not to treat certain offenders within the community, but when and how to do so most successfully. The recently published Report on Corrections of the Natioinal Advisory Commission on Criminal Justice, Standards, and Goals states that evidence "suggests that diversion may warrant consideration as the preferred method of control for a far greater number of offenders." With a diligent effort to carry out the purposes of a pretrial diversion plan, and with full utilization of the resources available, we believe that this program can be of real benefit to rehabilitative efforts.

I will be happy to answer any questions the committee may have about our position on any aspects of the bills I have not addressed. And the gentlemen accompanying me are also available for assistance in this regard.

Thank you.

[Mr. Baise's prepared statement appears at p. 57.]

Mr. KASTENMEIER. Thank you, Mr. Baise.

Just so I have it clear, do you actually support S. 798 without qualification or with qualification, or what is it you support?

Mr. BAISE. We would support S. 798 as it is presently drafted at this time, yes.

Mr. KASTENMEIER. Do I understand you, that as presently drafted you would oppose H.R. 9007, notwithstanding the fact that you support the general concepts and objectives?

Mr. BAISE. I think there would be certain provisions we would still be opposed to, as outlined in my testimony. But, to say that if this were the only alternative offered to the Department of Justice at this time, would we be opposing it, no, I think we would not be in a position of just flatly opposing it. We would say, yes, we would accept your bill with reservations.

Mr. KASTENMEIER. In other words, you would support H.R. 9007, amend it in certain ways?

Mr. BAISE. That is true because we believe that strongly in the overall concept of pretrial diversion that we certainly would not want to see the bill destroyed or the concept destroyed because of those differences.

Mr. KASTENMEIER. I am wondering about one thing. It is really a question that I have not really thought through very extensively, and that is to be eligible should a person accept the fact that he is guilty, or pronounce the fact that he is guilty? One could theoretically get into the position, I suppose, of an innocent person being in a situation where it is doubtful he could prove his innocence in a trial for one reason or another, yet his option would be not to go into this program. He may have other difficulties, but to go through with a trial in which he may be found guilty, and thereupon be incarcerated, I wonder whether this serves the purposes of the justice system.

Mr. BAISE. Well, I think you have to look at it in a certain framework, of course. Here you have the U.S. attorney attempting to make a decision on whether or not he is going to prosecute an individual. You have the individual saying, "I am innocent." Well, the U.S. attorney is going to have to make a decision on whether or not he really

believes that charge, and if he does believe that, then why should the U.S. attorney recommend that this person be committed to the pretrial diversion program, when in the final analysis he comes to the conclusion, well, the man is not innocent, and we should not force him into going into a year's time of work and expending the taxpayers' money.

Mr. COHEN. Mr. Chairman, could you yield on that question?

Mr. KASTENMEIER. Yes.

Mr. COHEN. I would like to ask you, sir, in your experience, how often do prosecutors take into account whatever the defendant charged with a crime happens to say about his innocence? Do you not base your decisions to go before a grand jury on what information you have, and rarely regard what the defendant says about his innocence?

Mr. BAISE. It is going to be based on the evidence, sure. But, also you have to take into consideration, Congressman Cohen, that there is a large percentage of cases which are given to the Department or are brought to the Department's attention because of lack of manpower, or resources, or the evidence may not be strong enough that they are never prosecuted in the first place. And yet, at this point, you just turn that person right back into society. Here we may have an occasion to give this person the kind of assistance that can be provided under the pretrial diversion program, as was suggested by Mr. Railsback earlier. You may be able to give him some job guidance, counseling, and then you may give him psychiatric aid, you may be able to give him medical aid.

Mr. COHEN. I understand that, but I think what the chairman is getting at in terms of it is something novel to us, I think, to suggest that it is essential for either rehabilitation or diversion that you have, in essence, a plea or an acknowledgement of guilt. You know, it was not too long ago that we went through a proceeding where we witnessed nationally where there was a plea of nolo contendere on a very serious charge, and I wonder what would be the Justice Department's theory about that?

Mr. BAISE. It was a plea of guilty?

Mr. COHEN. Yes. But, nevertheless, there was great reservation on the part of that individual in saying, "Yes, I did it." And I would assume that he would still be capable of being rehabilitated without a plea of guilty.

Mr. BAISE. I would hope that he would be capable of being rehabilitated, yes, sir.

Mr. COHEN. I have no further questions.

Mr. BAISE. To be a member of our society who could contribute something in his remaining years. But, I think it is also important to stress here that we are not seeking to have that person give us a plea of guilty. We are suggesting that in your congressional intent portion of this legislation, that you allude to the fact that if a person continues to maintain his innocence, it may not be necessary for us to allow him to go forward in this program.

Mr. COHEN. I have done a fair share of prosecution work, as well as criminal defense work, and I have just found that there is a great reluctance on the part of most of those accused of crime to admit their guilt to begin with, and if this program is to be successful, I think that we just have to not count that as a significant factor, and that

you do not make a decision, I never did, on the basis of defendant's counsel saying that he maintains his innocence, and you would say, well, I have the facts and I know differently or at least I think I have a case. And I think we ought to proceed on that basis.

I am sorry, Mr. Chairman.

Mr. KASTENMEIER. Well, I appreciate my colleague's comments. But, I was interested in the question of whether it was thought necessary from a narrow prosecutorial point of view, or whether it has to do with some sort of a philosophic notion that only when an individual acknowledges his guilt, or perjures himself, so to speak, should we give him preferred treatment, or what else? I was just trying to explore that.

Mr. BAISE. I just think we believe that he ought to admit that maybe he has done something wrong here, based on the evidence that we would have; therefore, be in a frame of mind that would be more conducive to rehabilitation. But, I think we agree on the fact that we should not force him into this guilty plea position.

Mr. KASTENMEIER. Along that line, Mr. Baise, you make a comment that we support a system of pretrial diversion for certain criminal defendants. My question is, what certain criminal defendants?

Mr. BAISE. Getting back to the category question?

Mr. KASTENMEIER. Yes. Let me just amplify that a bit further. You talked about the familiar Brooklyn plan and another system in the eastern district of Pennsylvania. What is your experience or that of others in terms of categorical or guideline standards for certain criminal defendants? Which defendants?

Mr. BAISE. Well, our position at the Department would be to allow the U.S. attorney to have flexibility in determining what type of defendant he wants to bring into this program. The only study that I have come across, which was brought out in the Senate hearings, which gives you any breakdown on the type of defendants is the Genesee County study in Michigan. That gives the type of defendant that the prosecutor there considered to be eligible for pre-trial diversion programs, and also it brought out a couple of interesting facts that I think we have all tended to think in terms of the juvenile being involved in the pretrial diversion program, or the first-time offender. Well, the study in Genesee County points out that 27 percent of their offenders were second and third time offenders and 30 percent of the people were over age 25. So, we are not talking about, you know, the 19, 20, or 21 year old here necessarily. So, we would just say, give us as much flexibility as possible. Do not tie us down to any particular statutory crime because getting back to an earlier statement by the other gentlemen of whom may be eligible for rehabilitation, take the embezzler at age 50. He may be subject to rehabilitation under a 1-year program such as this.

Mr. KASTENMEIER. Yes. I am not necessarily urging that you set down categories but I am wondering whether there is an intent——

Mr. BAISE. I do not think there is any particular category that we would want to see legislatively included, no.

Mr. KASTENMEIER. I yield to the gentlemen from Massachusetts.

Mr. BAISE. Excuse me, Mr. Chairman. The listing of the types of crimes involved in the Genesee project is on page 457 of the hearings of the Community Supervision and Services Act dated May 27, 1973,

and it indicated that the largest number of offenders involved in that program, 100 larceny from a building, and then there is a drop down to 20 indecent exposure, and 17 breaking and entering, 16 larceny from auto, and then it just goes down to 5, 4, 3, and 1. So, far as I know, this is the best evidence of the type of offender that has been diverted under the program in that county.

Mr. KASTENMEIER. The gentleman from Massachusetts?

Mr. DRINAN. Thank you very much, Mr. Chairman.

I am wondering in your testimony what is precisely the role of the U.S. attorney? You insisted that he be present at every moment and that at no point in time, as I read your testimony, can the judge or anybody else except the U.S. attorney have any discretion over this matter. Would this not really inhibit the U.S. attorney, that if they are responsible first, last, and always, for these cases, are they not likely to be inhibited by saying that it is easier for them, it is safer for me to send this man through the ordinary course of events to trial, and possibly to a prison rather than to take this experimental approach?

Mr. BAISE. I would hope, no, because if you send a man to trial that is just going to demand more and more and more time.

Mr. DRINAN. My question is, is not this an inhibition that Mr. Railsback's bill seeks to present? It seeks to give the judge the critical decision as to the continuance of this program, and yet you insist that the U.S. attorney be involved at every moment.

Mr. BAISE. Yes, I guess that is just where we disagree. We believe this is basically a prosecutional decision and the U.S. attorney ought to have that right to be present.

Mr. DRINAN. That is not my question.

My question is, would this not inhibit them from using this?

Mr. BAISE. Inhibit the U.S. attorneys from using it? I do not think so.

Mr. DRINAN. Give a little facts, will you?

Mr. BAISE. I just do not think that the U.S. attorney would be inhibited from utilizing the program. It comes down to a judgmental factor.

Mr. DRINAN. Do you have any evidence of that?

Mr. BAISE. No.

Mr. DRINAN. It is just your opinion?

Mr. BAISE. Yes.

Mr. COHEN. Would the gentleman yield?

Mr. DRINAN. Yes.

Mr. COHEN. I was just wondering, to follow up on the same line of questioning, that you could draw an analogy where you have someone in the mental institution, for example, on a finding of guilt was placed in a mental institution as opposed to incarcerated, and then you have a petition on behalf of the person to be released. It seems to me that in this case it is ordinarily opposed by county attorneys, district attorneys and, as a matter of form, that the court ultimately makes the determination as to whether or not society would be safe. If that decision were left with the district attorney or the U.S. attorney, the changes are that he would not take that societal risk in releasing the person from the institution itself. They would be less inclined to do so, at least that is what my experience was. We were always opposed to such releases, and put the burden upon the institution or the person

seeking the release, and the court made the decision, and, therefore, the State's attorney was not in a spot saying we are going to turn this person loose who might be a pyromaniac or whatever, because the doctor says he is safe enough to go back into society. The inclination, it seems to me, always was to oppose it and put the burden on the court and not the attorney himself.

Mr. DRINAN. I thank the gentleman from Maine for an excellent answer to my question.

On page 5 of your testimony, Mr. Baise, you get very moralistic here, and this has been gone over before. But do you think that you actually increase or strengthen S. 798 in the moralistic tones that it says here, that the accused person must accept responsibility for his behavior and admit the need for such a system, and then you go on and say that defendants who are insistent upon their innocence would not be eligible for placement. Well, it seems to me that you are inducing people to say that sure, I am guilty, and I, therefore, should not have done it in order to get out of jail, and that when you say that there is a requirement that the defendant be disqualified from even consideration for pretrial diversion in the absence of an admission of guilt, or his failure to accept responsibility for the wrongful conduct, you go beyond S. 798, it seems to me.

Mr. BAISE. Well, Congressman Drinan, as the testimony indicates, all we are suggesting at this point is that you include in your congressional history a statement about this point. If you do not, then the Department of Justice would be able to accept S. 798, but ours is just a suggestion that the person, if he continues to stoutly maintain his innocence, brings us back into a position, or the U.S. attorney back into a position, of saying either I am going to prosecute or I am going to turn the man loose. Do you feel that you absolutely cannot go along with including such a statement in the history?

Mr. DRINAN. I am just asking, you understand, that I do not understand why you go into that.

Mr. BAISE. The reason we believe that the man ought to indicate to us that he is either not innocent, or has some repentant type attitude, is that we believe that if an individual believes that he has done something wrong, that he is a better candidate for rehabilitation at that point.

Mr. DRINAN. I have been in penal work for 15 years or more and if a prisoner, or an inmate, or an accused, thinks he can get freedom by confessing guilt and saying he will never do it again, he will. This is a very unreliable type of thing and to insist, and to force, and to intimidate him, and to shame him and humiliate him—and say—admit guilt before we even consider you for this—seems to me fundamentally unrealistic.

Mr. BAISE. Again, we have not requested that this be included in the actual statute itself. We are asking for guidance from the legislative branch in this area.

Mr. DRINAN. That is not what your statement says.

Mr. BAISE. I believe it does. It says: "However, we believe it would be advisable to reenforce this with a statement of congressional intent."

Mr. DRINAN. Prior to that, sir, you say that the Department of Justice "has supported a requirement that a defendant be disqualified from consideration for pretrial diversion in the absence of his admis-

sion of guilt, or his failure to accept responsibility for the wrongful conduct on which the charges are based," at the top of page 5. I wonder if Mr. Nelson would comment on the position of the Bureau of Prisons and could he give us just a ball-park figure of how many people he would feel would be consistent for pretrial diversion and how many would make it?

Mr. NELSON. Mr. Congressman, judging from the legislative intent of S. 798, they anticipated approximately 10 percent of the cases filed could be deferred to pretrial diversion. In 1973, there were approximately 40,000 cases in the United States filed. That would be about 4,000.

Mr. DRINAN. 4,000?

Mr. NELSON. That is correct. That would amount to about 4,000 cases.

Mr. DRINAN. How do you arrive at the 10 percent?

Mr. NELSON. That was the legislative intent of S. 798, in their testimony and their background work where they indicated that they set a target for approximately 10 percent.

Mr. DRINAN. Could you spell out the category? Who was in the 10 percent?

Mr. NELSON. They did not spell out the categories.

Mr. DRINAN. Well, roughly, did they?

Mr. NELSON. No.

Mr. DRINAN. I recall their testimony some months ago. Would they be all first offenders mostly?

Mr. NELSON. Well, they were concentrating and I think the legislative intent again was the first offender was to be concerned but, again, they did not want to restrict it or limit it to strictly the specific classification of first offenders.

Mr. DRINAN. Is the 10 percent a minimum or a target or what?

Mr. NELSON. We extracted it——

Mr. DRINAN. Who is we?

Mr. NELSON. The staff of the Bureau of Prisons who were working on our proposal here. We extracted this from the testimony on the Senate bill wherein the counsel to the Committee on Penitentiaries had listed target cities and listed the number of clients they anticipated under this bill and from that we determined that 10 percent was the figure they were using and we applied this across-the-board to 1973.

Mr. DRINAN. So of the 40,000 accused, 4,000 roughly would go into pretrial diversion?

Mr. NELSON. Yes, sir. That is what we are assuming is the intent of the Senate and the intent of the Congress.

Mr. DRINAN. Tell me this: Of those 40,000 how many actually go to the Federal prison, roughly?

Mr. NELSON. Let me see. Of the 40,000 that gets me approximately—in fact, I can give you the figure that 47 percent of those that are convicted will end up in a Federal prison. The remainder will be on probation.

Mr. DRINAN. Now, I am just trying to figure out the makeup of this 40,000 accused of Federal crimes and how many of those eventually go to a prison; how many go on parole and probation and that sort of thing, and finally, how many of them never darken the doors of the Federal prisons?

Mr. NELSON. I just have to say that I do not have that specific information. I will be glad to get that information, but I do not have it.

Mr. DRINAN. It would be helpful, at least to me, because I do not know the group that we are talking about; that if somebody is accused of a Federal crime, ordinarily, it is pretty serious and that they do have various ways of pretrial diversion now, as you know better than I, parole and probation, and that type of thing. But, I just do not know the group, the 10 percent that we are talking about, from what category they would come. So, any further information on that, on how realistically this would affect Federal prison population would be helpful to me at least.

Mr. KASTENMEIER. I think, following up on the gentleman's from Massachusetts observation, it would be very useful if the Justice Department could give us figures from the past several years of the total filings, plus disposition in terms of incarceration, probation or whatever. And, furthermore, what percentage, whether it is 10 percent or whatever, projecting into the future, if either of these bills is enacted, or whether your present programs are continued, what number would be diverted? This is so we can comprehend the scope of the legislation and of present dispositions in the Federal system.

Mr. BAISE. Mr. Chairman, I have seen and reviewed this study by the Bureau of Prisons where they come up with this 4,000 figure based on the 40,000 total and I think we would have to admit that we are all in sort of a twilight zone here trying to determine what offenses we are going to be talking about. That is the reason we are asking in our request to you to keep the legislation in the broadest sort of way so that we have a great deal of flexibility here in the first year or two in making determinations on what crimes to consider and what individuals we bring into the program.

Mr. KASTENMEIER. I appreciate that and I was not asking for categories of offenses or even types. But, merely as opposed to all those again who are arrested or charged with Federal crimes, what disposition is made of the grand total.

Mr. BAISE. Yes, we can do that.

Mr. KASTENMEIER. And how many presently appear to be qualified for pretrial diversion under the present system and whether either of these bills change that in terms of projections of numbers and, if so, how much. This would be very helpful to us.

Mr. BAISE. We will attempt to do our best on that.

[Subsequently, on March 15, 1974, the Department of Justice supplied the following information:]

DEPARTMENT OF JUSTICE,
Washington, D.C., March 15, 1974.

HON. ROBERT W. KASTENMEIER,
Chairman, Subcommittee on Courts, Civil Liberties and the Administration of Justice of the Committee on the Judiciary, House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: I am writing with regard to the supplementary information requested by your Subcommittee on Courts, Civil Liberties and the Administration of Justice relative to the February 6, 1974 hearing on H.R. 9007 and S. 798. During the Justice Department's testimony several questions were asked about the numerical composition of the candidates whom we anticipate would be eligible for a pre-trial diversion program. Information was also requested concerning the disposition of criminal charges filed in U.S. District Courts by major offense categories during fiscal year 1973. Since we did not have this specific information at hand at the time of our testimony we are submitting it herewith in accordance with the Subcommittee's request.

Predicting the precise number of pre-trial diversion program participants during the initial year is an uncertain process at best. The fact that eligibility for

the program is the prerogative of some 90 U.S. Attorneys and a larger number of judges and magistrates, precludes any exact methodology for identifying this target group.

A very reasonable approach to this problem, however, was made by the staff of the Subcommittee on National Penitentiaries of the Senate Committee on the Judiciary in July, 1972. Their method involved identifying the criminal cases filed in 36 of the major judicial districts in 1968 and 1969 by offense category of defendants who had no prior criminal record. From this group they assumed that approximately 20% of the first offenders who were charged with non-violent crimes could reasonably be considered as candidates for this diversionary program. The number of candidates identified through this procedure amounted to approximately 10% of the total number of criminal cases filed in the selected districts in both 1969 and 1968.

The 10% factor was used by the Bureau of Prisons as a rule of thumb for projecting pre-trial diversion eligibles not because of its irrefutable methodology but because it was considered to represent the legislative intent of the Senate. The methodology could, of course, be refined to take into consideration the fact that approximately 25% of the criminal cases filed would be terminated by dismissal or acquittal and would generally not be considered as part of the universe of pre-trial diversion eligibles. This refinement would in effect reduce the universe of eligibles in fiscal year 1973 from approximately 40,000 to 30,000 which in turn reduces the number of anticipated eligibles from 4,000 to 3,000. The fallacy with such calculations is that the validity of the methodology is based upon a series of fundamental critical assumptions which may or may not relate to actual practice.

The attached table was prepared to provide the information requested concerning the number of criminal cases filed in fiscal year 1973 and their eventual dispositions. This table was prepared from information contained in the 1973 Annual Report of the Director of the Administrative Office of the United States Courts. It contains the actual number of criminal cases filed in the U.S. Judicial Districts of the 50 states and the District of Columbia by major offense category and projects the dispositions based upon the rates of dispositions for the criminal cases terminated in fiscal year 1973.

Finally, I would like to take this opportunity to reiterate the Department's position with regard to the administration of funds to be appropriated for counseling, supervision and other services for persons diverted from prosecution. We prefer the language of S. 798.

Under the terms of S. 798, diversion services would be provided with the flexibility necessary to meet the requirements and resources of each district in which the program is administered. Services could be provided directly, either through utilization of U.S. Probation Officers on a cost-reimbursable basis or through contract with existing agencies and organizations capable of providing such services.

The responsibility for the delivery of these services should rest in the Department of Justice which supervises the United States Attorneys and administers the Federal Bureau of Prisons with the necessary staff and expertise to provide or contract for them. The Bureau of Prisons has experience in this area through similar responsibilities both with the administration of Title II of the Narcotic Addict Rehabilitation Act and of community treatment programs throughout the country.

Thank you for affording us the opportunity to provide additional information regarding this matter.

Sincerely,

W. VINCENT RAKESTRAW,
Assistant Attorney General.

TABLE 1.—CRIMINAL CASES FILED IN U.S. DISTRICT COURTS DURING FISCAL YEAR ENDED JUNE 30, 1973, BY MAJOR OFFENSE CATEGORIES AND PROJECTED DISPOSITION

[Excludes Puerto Rico, Virgin Islands, Canal Zone, and Guam]

Major offense category	Total defendants [2]		Not convicted		Convicted and sentenced									
					Total [2]		Imprisonment		Probation		Fine only		Other	
	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent
Total	39,521	100	9,880	25.0	29,641	75.0	14,860	37.6	12,726	32.2	1,580	4.0	474	1.2
General offenses:														
Homicide	125	100	29	23.1	96	76.9	71	56.7	24	19.2			1	1.0
Robbery	1,558	100	304	19.5	1,254	80.5	1,144	73.4	111	7.1			2	.1
Assault	630	100	190	30.1	440	69.9	225	35.7	184	29.2	22	3.5	9	1.4
Burglary—Breaking and entering	215	100	33	15.4	182	84.6	105	48.8	76	35.4			1	.4
Larceny and theft	3,435	100	684	19.9	2,751	80.1	1,213	35.3	1,467	42.7	52	1.5	21	.6
Embezzlement	1,541	100	170	11.0	1,371	89.0	344	22.3	1,002	65.0	20	1.3	6	.4
Fraud	3,008	100	740	24.6	2,268	75.4	818	27.2	1,239	41.2	162	5.4	48	1.6
Auto theft	1,949	100	343	17.6	1,606	82.4	1,125	57.7	468	24.0	8	.4	6	.3
Forgery and counterfeiting	4,031	100	746	18.5	3,285	81.5	1,637	40.6	1,624	40.3	12	.3	12	.3
Sex offenses	162	100	58	35.5	104	64.5	74	45.7	28	17.4	2	1.4		
Narcotics	8,580	100	1,862	21.7	6,718	78.3	4,384	51.1	2,231	26.0	17	.2	94	1.1
Weapons and firearms	2,221	100	575	25.9	1,646	74.1	753	33.9	822	37.0	56	2.5	16	.7
Miscellaneous general offenses	2,725	100	842	30.9	1,883	69.1	1,006	36.9	758	27.8	98	3.6	22	.8
Special offenses:														
Immigration	2,182	100	229	10.5	1,953	89.5	1,215	55.7	408	18.7	120	5.5	212	9.7
Liquor, Internal Revenue	894	100	127	14.2	767	85.8	301	33.7	447	50.0	18	2.0	1	.1
Selective Service Act	3,027	100	2,179	72.0	848	28.0	224	7.4	611	20.2	6	.2	3	.1
Other special offenses	3,230	100	798	24.7	2,432	75.3	355	11.0	1,127	34.9	901	27.9	45	1.4

[1] Projected dispositions are based on actual dispositions of cases disposed of during fiscal year 1973.
[2] Figures in rows may not equal total columns due to rounding-off procedures.

Source: Tables D3, D4, and D5, "1973 ANNUAL REPORT OF THE DIRECTOR," Administrative Office of the U.S. Courts, Washington, D.C.

TABLE 2.—PROJECTED CRIMINAL CASES RESULTING IN CONVICTION AND IMPRISONMENT AMONG CASES FILED IN U.S. DISTRICT COURTS DURING FISCAL YEAR ENDED JUNE 30, 1973, BY PROJECTED SENTENCE LENGTH [1]

[Excludes Puerto Rico, Virgin Islands, Canal Zone, and Guam]

Major offense category	Total defendants imprisoned [2]		Sentence length									
			Split sentence [3]		1 yr and 1 day and under		Over 1 yr and 1 day to 3 yr		3 to 5 yr		5 yr and over	
	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent
Total	14,860	100	2,437	16.4	2,868	19.3	2,467	16.6	3,507	23.6	3,581	24.1
General offenses:												
Homicide	71	100	4	5.1	1	1.7	5	6.8	14	20.3	47	66.1
Robbery	1,144	100	35	3.1	7	.6	33	2.9	151	13.2	917	80.2
Assault	225	100	33	14.8	59	26.0	33	14.8	58	25.6	42	18.8
Burglary—Breaking and entering	105	100	6	5.6	17	16.1	11	10.5	43	41.1	28	26.6
Larceny and theft	1,213	100	233	19.2	189	15.6	213	17.6	375	30.9	203	16.7
Embezzlement	344	100	143	41.5	51	14.8	55	16.1	72	20.8	23	6.8
Fraud	818	100	257	31.4	210	25.7	153	18.7	118	14.4	79	9.7
Auto theft	1,125	100	99	8.8	74	6.6	237	21.1	507	45.1	208	18.5
Forgery and conterfeiting	1,637	100	284	17.4	214	13.1	334	20.4	493	30.1	309	18.9
Sex offenses	74	100	8	11.1	11	14.3	15	20.6	20	27.0	20	27.0
Narcotics	4,384	100	491	11.2	750	17.1	640	14.6	1,153	26.3	1,346	30.7
Weapons and firearms	753	100	121	16.1	126	16.7	201	26.7	191	25.3	114	15.2
Miscellaneous general offenses	1,006	100	150	14.9	348	34.6	180	17.9	140	13.9	188	18.7
Special offenses:												
Immigration	1,215	100	303	24.9	618	50.9	200	16.5	45	3.7	49	4.0
Liquor, Internal Revenue	301	100	124	41.3	75	24.9	68	22.7	29	9.6	5	1.6
Selective service	224	100	92	41.2	34	15.0	57	25.4	35	15.8	6	2.7
Other special offenses	355	100	64	18.0	135	37.9	42	11.7	65	18.4	5	14.0

[1] Projections as to number imprisoned and sentence length are based on actual dispositions of cases disposed of during fiscal year 1973.

[2] Figures in rows may not equal total columns due to rounding-off procedures.

[3] A split sentence is a sentence on a 1-count indictment of 6 mo or less in a jail-type institution, followed by a term of probation, 18 U.S.C. 3651. Included in these figures are mixed sentences involving confinement for 6 mo or less on 1 count, to be followed by a term of probation on 1 or more other counts.

Source: Tables D3 and D5, "1973 Annual Report of the Director," Administrative Office of the U.S. Courts, Washington, D.C.

Mr. DANIELSON. Mr. Chairman, may I ask a question? Is there any reason, since you have a statistical division, why you would not give a breakdown on the types of offenses? There are certain types of business offenses which are criminal in nature, but have no violence of factor or anything attached. I think that would be useful.

Mr. BAISE. Yes, we can give you that cold breakdown of just individuals involved. Fine tuning it to the extent that we would all like to have it would be maybe a little more difficult.

Mr. KASTENMEIER. The gentleman from Massachusetts?

Mr. DRINAN. Thank you very much.

Mr. KASTENMEIER. The gentleman from Maine?

Mr. COHEN. Thank you, Mr. Chairman.

Let me say for the record and for those in attendance that I am always flattered whenever I am able to provide an enlightenment to Congressman Drinan's dilemmas. It is not often I can, but occasionally. I think that the point he makes on contrition for a sin as the beginning of redemption and that is an accepted religious tradition. But what he is saying is that it is not an acceptable tenet as far as penal work.

Mr. DRINAN. I wish that your tenets were as good as your law.

Mr. COHEN. I would like to turn to page 5 of S. 798. Do you have a copy of Senator Burdick's bill?

Mr. BAISE. Yes, I do.

Mr. COHEN. I would just like to get your opinion about this, what appears to be a very broad immunity in terms of the top of the page, where it says:

> No statements made by the defendant while participating in such a program, no information contained in any such report made with respect thereto, and no statement or other information concerning his participation in such programs shall be admissible on the issue of guilt of such individual in any judicial proceeding involving such offense.

And I am wondering whether the Department of Justice also supports that and whether or not that imposes any undue burden, in your opinion, on the prosecution but, more importantly, I guess, what about the use of statements about his innocence?

Mr. BAISE. Well, to answer your first question, we would concur with that statement. And in answer to your second question, do we think it would put an undue burden on the prosecutor, no, we do not. We think that if there is a burden, he should then meet it at this point, and he should not take advantage of any rehabilitative statements or steps taken by the individual, so that is where we would go along with that.

Mr. COHEN. And there would be nothing to preclude the use of such statements or report bearing upon his innocence to be introduced in any criminal proceeding then?

Mr. BAISE. I do not see any problem with that, no.

Mr. COHEN. That is all I have.

Thank you for your testimony.

Mr. KASTENMEIER. The gentleman from California?

Mr. DANIELSON. I have no questions. And I have been in another meeting and I am late. I am sorry that I missed the earlier portion, but I will try to make up for it.

Mr. KASTENMEIER. We are happy to have you in any event.

Does counsel have any questions?

Mr. DIXON. Just one.

Mr. Baise, you stated one of the reasons why you support the Senate version is because there is no provision in the House bill that the court's decision regarding the ultimate disposition of the charges be based upon the success or failure of the rehabilitative scheme. I think you may be mistaken on that, and I would like to call your attention to page 5 of the Senate bill. The scheme provided there requires that the charges shall be dismissed upon the expiration of 12 months if the probation has not been dropped earlier. There is a requirement that they shall be dismissed after 12 months, whereas the House bill on page 5 provides that they may be dismissed by the Court after 12 months, only following a consultation with the probation officer and the U.S. attorney. So, it is, therefore, the House version which does not mandate the dropping of charges. The Senate version does. Did you mean to say you favored the House version there, rather than the Senate version?

Mr. BAISE. No; I think we want to favor the Senate version because we believe that we will have reports which will have to be turned over to the judge before he makes the decision and the House bill says it may be dropped at the end of 12 months. We think that the program ought to be ended at the 12-month period. I tried to determine on what grounds, both in the other testimony and in the department that we chose 12 months, and it just appears that the reason for that is fairly arbitrary; that you get much beyond that period of time and the offender may want to take his chances in going through with the trial. If you get under that period if time, you may not have sufficient time to rehabilitate him so we feel that 12 months is sufficient and you ought to cut off the program at that point.

Mr. DIXON. Thank you.

Mr. KASTENMEIER. Thank you very much, Mr. Baise, for your testimony on behalf of the Justice Department this morning and both of your colleagues.

Mr. BAISE. Thank you.

Mr. KASTENMEIER. Next the Chair would like to call Mr. Phillip Ginsberg, the public defender of Seattle-King County office of public defender, and Marshall Hartman, national director, National Legal Aid and Defender Association. Are either present?

Mr. HARTMAN. Yes, Congressman. I am Marshall Hartman of the National Legal Aid and Defender Association. Mr. Ginsberg placed a call that he was delayed on an Amtrak train, caught somewhere between New York and Washington. And I spoke to him yesterday and he told me he was leaving on the 6:30 train from New York, but he is not here yet, and I am prepared to testify. However, I wonder if there are other witnesses so you could pass us to the end?

Mr. KASTENMEIER. Yes; we can call another witness and if he does not appear by then, you can testify.

Mr. HARTMAN. Yes, sir.

Mr. KASTENMEIER. At this time the Chair would like to call Mr. Robert F. Leonard, prosecuting attorney, Genesee County, Flint, Mich.

TESTIMONY OF ROBERT F. LEONARD, ESQ., PROSECUTING ATTORNEY, GENESEE COUNTY, FLINT, MICH.

Mr. KASTENMEIER. Mr. Leonard, you have a 37-page document here, and I wonder if you could summarize it a bit.

Mr. LEONARD. Yes, I do not propose to read it.

Mr. KASTENMEIER. We would like to accept your statement in full, and it will be made a part of the record and you may proceed as you wish.

[Mr. Leonard's statement appears at p. 59.]

Mr. LEONARD. Mr. Chairman, and members of the committee, first, let me express my appreciation for being invited to appear today to talk about a very important matter: Diversion from the criminal justice system. First, let me also say that I regret that this is not a committee on how airlines treat passengers, because I would like to testify on that also. I normally do not appear before a committee in a ski sweater and a beard, but, unfortunately, they have not found my baggage yet coming in here, and I had to come in from California. So, if you have a chance in this committee to discuss the treatment of passengers by airlines, I would like to testify in the future.

Mr. DANIELSON. May I assist the gentleman? I come in from California pretty often, and I recommend the old satchel-type briefcase and carry it all with you.

Mr. LEONARD. I usually do that but, unfortunately, I was out there 4 or 5 days, and I had two or three speeches on the west coast, so I had to take more things with me. So, again, I apologize for my appearance.

Mr. KASTENMEIER. It is quite all right.

Mr. LEONARD. Let me first observe what the chairman has observed. I have given you, I think, kind of an extensive discussion of our position on diversion. I had the pleasure of appearing before Senator Burdick's committee last spring to discuss the Senate bill and, at that time, also, I entered a prepared statement, and some of it is in this statement I have given you.

But, I have also tried to compare the two bills and made certain observations regarding the bills. Let me start by saying that we have been in the business of diversion now since about 1965. At the present time, we are processing over 1,000 offenders a year and probably we will be increasing that, as time goes on. The whole basis of diversion, in my estimation, is the prosecutors's discretion.

I am also somewhat concerned with legislation which deals with the prosecutor's discretion, as we have in this piece of legislation, although I support the concept of the legislation and its general content, primarily because it would provide services that prosecutors need for diversion. However, I have some serious questions about some of the provisions of the bill, particularly, as it relates to what I deem to be infringements on the prosecutor's discretion; that is, the constitutionality of the bill as it relates to the separation of powers. We are in the executive branch of the Government, and I would submit

that it is the common law prerogative of a prosecutor to decide who is going to be prosecuted and what the charge is going to be. I believe that too often certain legislative acts manifest a deep suspicion of prosecutors in trying to take some of these prerogatives away from them. It may well be that some of this is justified, but notwithstanding whether it is justified or not, it seems to me that we have to abide by the constitutional mandate, and that is, we are a member of the executive branch and have certain prerogatives and those prerogatives are important to us. We intend to fight for them.

So saying, I am here to discuss what I believe might be infringements on these prerogatives based on this particular bill. I support the bill, and its basic general concept: diversion. I have lived with it now since I have been a prosecutor. We initiated the program of deferred prosecution, which is a diversion program back in 1965 so, obviously, I support it. I believe probably that our program is the first official, organized diversion program in the United States, and I do not think that is a particular achievement, but the fact of the matter is we have a great deal of experience with it.

The National District Attorneys Association has published a "Prosecutors Manual on Screening and Diversion Programs," and it is here, and our program is discussed within it, pursuant to a research investigation of the program done by the University of Michigan for the State Plannng Agencies of the LEAA, and this manual is available to anybody who would want it.

I think that there is a very important distinction that you have to make, and I have heard it made in some of the testimony today. There is a substantial difference between a diversionary program for juvenile offenders and adult offenders. I am not sure of the breakdown in the Federal Government, but in the State of, say, Michigan, people under 17 years of age are juveniles and, therefore, are not generally susceptible to prosecution as an adult in the criminal courts. The method of handling juveniles is substantially different in our State. In the strictest sense, we do not employ an adversary proceeding generally in juvenile court. We do have some contested cases, but generally there are very few contests in juvenile court. Therefore, diversion in the juvenile setting is different. Intake is very important, and specific diversion units are very important, as they relate to juveniles.

When you refer to adult proceedings, you are talking about a different concept where the prosecutor is more directly involved in making decisions on who shall be prosecuted and what the charge will be. Again, we talk about diversionary units. Our whole program is conceived with the utilization of many community resources. I think that too often in the past those within the criminal justice system have been perhaps somewhat arrogant in deciding that they know better how to handle the problem of crime and what to do with criminals, and how to solve their various possible psychological problems. As a result, those within that system seem to say to the rest of the community, which has various resources, experience, and expertise, that once that person commits that crime, do not bother us any more, it is our "ball game." You stay away from us. We know how to handle it, and the handling was done, as history indicates, very poorly. Either they were sent to prison, where the rehabilitation rate is very, very poor, or they were placed on probation, where supervision was some-

what less than adequate. The result, in my opinion, is that we have not accomplished the desired objectives through the traditional criminal justice system.

I have been in the prosecutor's office 17 years, 11 years as the elected prosecutor. It long ago became clear to me that we have a tendency to "overkill" in the criminal justice system. We put too many people in the system itself, and we should be more concerned about selecting out those individuals who can be better served by community resources, so that we can "open up" the criminal justice system. Those of us who talk about wanting to help the individual, certainly have to look at the other negative aspects, such as the impact that "mass-produced" criminal cases have on the criminal justice system. As I said, I think we have a tendency to "overkill." Many of the cases that are in the criminal justice system can be removed from it in many ways. Primarily, it is my opinion that the best way is diversion, so that the criminal justice system is opened to the cases that should be tried, either by juries or by judges, such as violent crime, public corruption, organized crime, and consumer fraud. Those are the types of crimes that we should certainly deal with in the criminal justice system.

Now, our program results in a diversion of about 30 percent of the felony charges we file every year, which causes our county court system and criminal docket to be the most current in the State of Michigan. There is no question that our judges are very supportive of our diversion program because they feel that it has a direct cause relationship to the fact that we are the most current system in the State. At the same time, the discretion and the decisionmaking powers in the criminal justice system, as it relates to diversion in our community, are solely the prosecutor's. He decides who will be prosecuted and what the charges will be.

We have set up a very refined criteria, and, that is, if a person is charged, and if he fits under these criteria, and also under our general criteria (which were commented on by the U.S. Justice Department in referring to our program), he is eligible for diversion, with the general criteria being eligibility only for first offenders, and nonviolent crimes. Now, there are exceptions to that rule. There have to be because there may have been people who are now being charged with second and third offenses, and if we had had a diversion program initially, when they were charged the first time, we could have put them into the program. So, we have to decide and determine what cases will go into the program on an individual basis, including some possible mutliple offenders.

We have a diversion unit which is independent of the prosecutor's office. The head of the diversion unit has 11 people who work for him as counselors, chosen independently by him. The policies that will be followed, obviously, must be a joint determination by the prosecutor's office and the diversion unit, because they are assisting us and helping us in exercising our discretion. When an individual is chargeable, he is eligible for diversion, and I say that because sometimes they are not even charged, and that is one of the key features of the program: to try to avoid the arrest of the individual and the accumulation of records which follows. We want to try to prevent that, and we have fairly well organized our police departments so that they now recognize which cases will be subject to diversion and which ones probably

will not. The individual who may be arrested for burglary, if it is late at night, obviously has to be taken in. At least in our jurisdiction he does. But, the very next day, the police officer is in our office and makes out a form in relation to that case, if and when it fits into the criteria for immediate screening by the prosecutor to the diversion unit. Then, it is sent to the diversion unit where one of the 11 counselors begins a more intensive workup to determine whether the individual has the background and history which would make him acceptable for our diversion program. That is, whether there are any factors which we should be aware of that would cause him not to be acceptable for the program.

At the present time, we accept about 75 percent of those people who are diverted by the initial screening process. The second screening process is done by the diversionary units, by the professionals themselves. At that time, after between 7 and 10 days, the recommendation is returned to us as to what should be done with the offender.

Now, the reason for that is that we have to make the ultimate decision. We cannot give to another agency, an outside agency, the decisionmaking power of the prosecutor. That is, the prosecutor has to decide who will be prosecuted. We must make that decision, even where our decision may be based, to a great extent, on the recommendation of the diversionary unit. In all of the years that we have been involved with the program, I think it has only been on one or two occasions where we have rejected the recommendation, and we have processed now, in the 8 or 9 years we have had the program, over 4,500 individuals. We reply very heavily on their proven expertise, their thorough investigation, and their considered judgment.

Mr. DANIELSON. Mr. Chairman, may I ask a question at this point?

Mr. KASTENMEIER. Yes, of course.

Mr. DANIELSON. You mention that the diversion unit is independent of the prosecutor's office, and you have alluded to that two or three times. Would you give us just a little outline of how it is set up, how it is governed, financed, budgeted, operated, and so forth?

Mr. LEONARD. Obviously, I used the term "independent" because the director runs his own program. And, I mentioned to you that, obviously, the issues of policy and what cases are going to be handled, and what cases will not be handled, have to be made in a joint decision with the prosecutor.

Mr. DANIELSON. How is he selected?

Mr. LEONARD. Well, he is selected by me. He is selected by me, and that is what I want to discuss. He has to be selected by me. Now, I could put him "out of business" by just deciding not to divert any more people to the program.

Mr. DANIELSON. What you have really done, you have set up sort of an autonomous unit within your office?

Mr. LEONARD. It is semiautonomous and is in liaison with my office. I still have some control in the sense that it is my discretion which the unit is helping me exercise, and I have placed it in the position where the program is independently funded. Its director develops his own programs, and its own concepts on rehabilitation. He does not have to discuss those with me. He does, on many occasions, since the program, if there is any failure in it, such would reflect on me, because it is a program that we initiated. So, I have to have some input.

Mr. DANIELSON. When you go before your own funding agency, is his budget——

Mr. LEONARD. Separate.

Mr. DANIELSON. Separate from yours?

Mr. LEONARD. Absolutely separate.

Mr. DANIELSON. And he makes a separate presentation?

Mr. LEONARD. Correct. He says what he needs. Of course, if he wants some help from me, and there is a little political "insighting" that is necessary, then I am going to make contacts with friends of mine whom I might influence into giving assistance to him, and that has been done in the past. But, he makes his own independent budget requests, and he runs his own operation. It is outside of our office in another building. We obviously have a very good working relationship, however.

Mr. DANIELSON. Is his selection of personnel subject to your approval or veto?

Mr. LEONARD. Not at all. He selects his own people.

Mr. DANIELSON. Thank you.

Mr. DRINAN. Mr. Chairman?

Mr. KASTENMEIER. Yes.

Mr. DRINAN. May I ask a question tying in your comments now with the Federal law that is proposed? Would you feel under the Federal law, and you are familiar with the Senate and the House versions, would you feel that it does not apply to juveniles, since in your testimony—and as we know, the Federal Government has had a program of pretrial diversion for juveniles since at least 1946—would you feel that you would just continue that which is conducted without any statutory guidelines from the Congress?

We are not talking about juveniles accused of Federal crimes at all. Would that be your understanding?

Mr. LEONARD. That is my understanding of that bill.

Mr. DRINAN. I am sorry the Department of Justice left before they had this excellent testimony, because this is essential, that we are not talking about juveniles either in the Railsback bill or the Burdick bill?

Mr. LEONARD. That is my understanding. We are talking about adult offenders.

Mr. DRINAN. Now, you make a good case here and this is the best criticism and constructive criticism of the Federal bills I have seen, and on pages 30 and 31, you make out a case that we really should leave it in the office of the U.S. attorney, and that testimony is persuasive although my mind goes both ways. But, would you feel that at the Federal level, knowing the setup of how the U.S. attorney's office works and all, are there any places in the law that you would make an exception on the basis of your vast experience, make an exception to the total jurisdiction being vested at every point in the U.S. attorney's office?

Mr. LEONARD. You see, I have no serious objection, as I testified on the Burdick bill, that the court have an interplay with this. In other words, I think, as I recall the Burdick bill, the court would oversee it generally. In other words, if there is obviously a violation or an abuse of the prosecutor's discretion, they might put a stop to it. But, if there were no such obvious abuse, they would just approve it, as in form more or less, and then process it through. But I think that it is a

healthy thing in the sense that as far as the community is concerned, they should have confidence that the judge and the prosecutor are assisting each other in making the decision, so that there is no violation of equal protection of the laws although we do not have such judicial involvement in our State, and, as a prosecutor, I would not be prone to give the judge too much involvement with the exercise of prosecutorial discretion.

Mr. DRINAN. On that precise question of equal protection and civil liberties questions, if A is given pretrial diversion by the U.S. attorney and B is denied it, cannot B have a cause of action as unequal protection?

Mr. LEONARD. No. Let me just first say that the American Bar Association has a committee on this diversion concept, and I am a member of it, and there has been a recent study done on that issue. And I, unfortunately, thought I had brought it with me, but I do not have it. I will certainly get it for the committee.

Mr. DRINAN. I am familiar with it. What is the answer?

Mr. LEONARD. The answer is that I do not think that there is any question that there would be no per se denial of equal protection to B.

Mr. DRINAN. Why not?

Mr. LEONARD. It is a discretionary power of the prosecutor to decide who is going to be prosecuted, or what allegation can be made in every case, or whether not to prosecute. That is the reason for the prosecutor having the discretionary power. He has to make those decisions based on what he thinks is in the best interest of the criminal justice system, and of the community, and there absolutely is no legal power that can force a prosecutor in making these decisions, unless there is a total, absolute, and obvious discriminatory abuse of his discretion, such as where there are both a black and white person who could be tried, and he makes some comment such as "I am going to try the black person and not the white person, because I think blacks should be in jail and whites should be somewhere else" or something like that. That, obviously, is a violation of equal protection and a purposely discriminatory abuse of his discretion. I certainly believe that something like that could be successfully challenged. But, where the prosecutor makes a good faith determination that this is the best way to handle this case and we do that frequently when we have multiple defendants involvd in criminal cases—differential treatment of offenders is quite legally proper.

Mr. DRINAN. Maybe you could solve it by the principles that you enunciate here on page 32, where you say that in both the Senate and House versions they wait too long before this whole operation gets into effect.

Mr. LEONARD. That is a very important part of it.

Mr. DRINAN. Now, this is essential and this point has not been made up to now, that in both bills this cannot happen until the time that bail is set, and after he has been formally arrested. Now, you suggest something very intriguing, that in your program you do not even allow the arrest to occur. This individual has been, I take it, apprehended and quasi-accused and, at that moment you begin the pretrial diversion so that you defend against the possibility of the allegation and the unequal treatment by just preventing it. Would you tell us how that could apply in the U.S. attorney setup?

Mr. LEONARD. May I make just some preliminary comments, because this is a very important philosophical point in the diversion concept,

Father. First, I think you have to recognize that there are various types of diversion before trial: Before arrest, after arrest, before arraignment, and what have you. We feel very strongly that diversion must occur immediately upon apprehension, even before booking, if possible. And then, as I have stated previously, we have fairly well "trained" our police agencies to recognize a case that obviously or probably is going to be diverted. In many cases, they may arrest the person and just give the individual what we call "an appearance", and then tell them to appear in the prosecutor's office for initial screening on a certain day, or the same day, so that there is no booking, and no fingerprinting, and all of that is avoided, because that is one of the major objectives of the program: To avoid the criminal record and the stigma caused by the criminal record. So, obviously, if the individual is first booked and printed and later released, you lose the crucial impact and destroy this objective. The President, in the State of the Union message, mentioned what happens with all of these computers, and what is going on all over the country, with the criminal justice programs, and with everything coming to Washington. You can punch a button and you can find instant information, which is a very dangerous thing in a democratic society. So, our thrust is to try to keep the diverted individual totally out of the criminal justice system, so that he will not be "branded" or "labelled," as best we can.

Now, if it happens—and I do not know that the Federal Government has this kind of a bill, but we have it in Michigan—if it happens that they do get into the system, there ought to be a statute that requires the return of those arrest records—and everything else that would "label" the individual—within a certain period of time after the dismissal, or the nolle prosequi, or the acquittal. And if such return is not made, then the person who refuses to do so should be subject to criminal prosecution. We have a similar statute in Michigan, and it makes our diversionary program much more effective. We can go to the police agency and demand that they return arrest records; and if they do not return them we will write a letter and remind them of their statutory duty.

Mr. DRINAN. Well, could you get down to the nuts and bolts. You say that everything should be precharge, preprosecution and extra courtroom?

Mr. LEONARD. That is right.

Mr. DRINAN. But in the apprehension of a person accused of a Federal crime, they have a statutory right to get to the magistrate as soon as possible. Are you suggesting even before that happens that they get to somebody within the U.S. attorney's office and he begins to divert them?

Mr. LEONARD. If it is feasible I think it should happen, and I believe that it is feasible. I remember talking on the Burdick bill and the argument was that the arrangement was rather quick, and it was only a day or two delay. I think that is lost time. I feel that the individual should not even be exposed to a jail if he is the type of person we will decide should be diverted. Why should he even be exposed to the acts that go on in prison or in a jail even for a night? It seems ridiculous and ironically self-defeating to put him there. So, what we suggest is that the person should be diverted as soon as he is arrested, and that can be done right at the jailhouse with a screening procedure and setup. I think that San Jose, Calif., may be doing this now, where they have someone

from the prosecutor's office right there determining whether a person fits the criteria for diversion and should be diverted out. So, I believe it can be done right then and there even before booking.

Mr. KASTENMEIER. On that point, if the gentleman will yield?

Mr. DRINAN. Yes.

Mr. KASTENMEIER. What are the criteria for diversion?

Mr. LEONARD. We will not divert accused murderers, for example, under basic criteria.

Mr. COHEN. Could I interrupt you for a moment?

Mr. KASTENMEIER. In other words, dangerous persons are included?

Mr. LEONARD. Well, generally, that is the rule, but, I mentioned murderers in particular because we have diverted some armed robbers, where the peculiar circumstances have justified it. I can recall a case where a young man, married a couple of years, became very depressed because he had lost his job, and he was sitting out in front of a grocery store where he had gone in before to try to get credit to bring some groceries home. A woman came out and he stuck his hand in his pocket and held her up, took her purse and went home. He told his wife what he had done, and both of them agreed that it was just something he could not do. He looks in the woman's purse, takes it over to her house, having found out her address, knocks on the door and says: "Here is your purse. I am the fellow that just robbed you and you can have your purse." She says, "Well, I have called the police." And he said. "Well, I might as well sit here and wait for them." He had never been in trouble before. He could have been charged with a potential life penalty crime, since his act was technically an armed robbery in Michigan. Again, we diverted that individual.

Mr. DRINAN. Who is "we"?

Mr. LEONARD. Well, my office based on the diversion unit recommendation.

Mr. DRINAN. Who does the initial one? The officer of the law makes the initial screening?

Mr. LEONARD. No, the prosecutor, the original screening process when they first come into the office, that is the first screening process in it, and, of course, it differs in different States. It might be somewhat confusing. We make the decision on who shall be charged, and when they come into the office they make out a form, if the case and the offender fit the criteria. If they do not fit the general criteria, there may still be additional factors, I mentioned, and about 25 percent of our cases, in fact, are not just first offenders, but are second and third offenders. That decision may be made after defense counsel asks us to consider it, or a minister or priest as the case may be, asks us to consider it, and we will go back in and rethink it, and then send it over to the second screening, which is the diversion unit. So, the first screening is done by the prosecutor. In this particular case, I recall the defense attorney coming in and asking us to consider it for diversion. Under those specific circumstances, we did. And that points out the danger of per se excluding specific crimes for diversion by categories. I think the prosecutor should have a great deal of leeway and flexibility in making all of these decisions.

Mr. KASTENMEIER. On the question of criteria, this can be important because it could differ from one place to another or from one jurisdiction to another if it is left utterly flexible. Furthermore, it could also

relate in terms of motivation of the prosecutor. On the one hand whether he has too many cases to prosecute and cannot handle them all, and whether he is diverting cases to unload, which the courts also appreciate, or something on the other side of that coin, in terms that he may enter into the criteria, particularly if it is so flexible that it lets a murderer be diverted, if that is all there is to the criteria.

Mr. LEONARD. But I think what is important here, Congressman, is the fact that prosecutors have that discretion right now. They make those decisions every day. My particular philosophy certainly is not followed in every jurisdiction in the country. For example, I do not prosecute people who are arrested for herion addiction, or mere possession or use of any drug. We have another diversion and treatment program for such persons. It is a separate diversion program that we are now talking about in regard to nonviolent felonies because my other philosophy is that the problem of the bare possession or use of drugs is not a criminal justice problem, but it is truly a medical problem. The people who sell drugs or profit from them will and should be prosecuted, and that is properly a law enforcement problem. Now, that is my decision and that is my philosophy. I was elected and reelected with that philosophy. That is my philosophy.

Now, you are going to have those differences in philosophy throughout the United States in every jurisdiction. A lot of prosecutors do not agree with me on that, but that is going to happen in diversion, anyway, so, you cannot uniformly say that this prosecutor and that prosecutor are going to handle diversion exactly the same way, because you are talking about their discretion, and that has much to do with individual philosophy, and different individuals.

Mr. KASTENMEIER. Well, I appreciate that you have made clear that you want to protect the discretion of the prosecutor. But, to the extent that others are looking at the programs prospectively, or even examining the experience, it is useful for us to consider what are these criteria, should they exist, or do they exist, and how is this discretion exercised?

Mr. LEONARD. Let me just make one other observation on the problem with criteria. I believe that criteria are important. The concept of diversion is not new. The mechanics are new. The prosecutor has been doing this from the beginning of his historical origin. But, you know, when we started with criteria, they stated originally that you could not have any juvenile record, no prior record at all. We needed to do that in order, we felt, to get the support for diversion of the community, because it was originally kind of revolutionary in the sense that were formalizing it for the first time, so we thought we had to be very, very strict and limited, so that the community would support the program. I think our community generally does at this time, so we can now be a little more flexible. But, originally, we talked about prior juvenile records as precluding eligibility for diversion. We later learned after some experience that that type of criterion discriminated against the blacks, for example, primarily because we would look at the prior juvenile records and find curfew violations much more evident in black areas than in white areas. I think that this might have been a reflection of the attitude of some police officers toward the black community, but a lot of it was also economics.

You talked to the police officers as to why this was, and they would say: we would take the white youngster home who was picked up for

curfew violation back to his neighborhood, we would drop him off, and his mother or his father or both of them were there. But, when we take the black child home, both parents would be working, so we could not drop him off, and so we would have to take him to the juvenile home or someplace else. And so immediately a record began for the black youth, and he would have been excluded thereby from the diversion program in the future. So, as a result, we had to become more flexible in our consideration of prior juvenile records as an exclusionary criterion. Now, juvenile records are not anymore that highly weighed in our program, other than where they indicate clearly a matter of prior anti-social activity, and then we will consider them. But, I think that that is one of the dangers of too firm and rigid rules. I believe that there ought to be great flexibility in the prosecutor, and that he should be given encouragement. If the court wishes to have some involvement in it, I have no serious objection to that, as long as the decisionmaking process is kept with the prosecutor, because he has the responsibility of deciding and making those decisions. There is one other factor that I would like to mention before I forget: we have got to recognize that there are tremendous community resources that are already paid for by the Government. Some of them are public, some of them are private, and some are Community Chest resources, available to our community, which we have never used before. Now, our diversion unit utilizes all of those resources in counseling, work development, and in skill development, and we even have programs for scholarships if an individual cannot afford to go to college, and he is obviously someone who would like to go to college. We will provide scholarships for them, and we will get the funding from some of the trust funds in the community.

All of these resources and facilities are there. We have just never used them in the past, and it seems to me that diversion is the mode and procedure to use them.

Mr. KASTENMEIER. Does the gentleman from Maine have any questions?

Mr. COHEN. No. I just had a point, Mr. Chairman. I think you stated originally that in terms of eligibility, what you draw as your distinction would be a first offender of a non-violent crime. Is that the basic guideline you use?

Mr. LEONARD. The basis, general, and original guidelines, yes.

Mr. COHEN. I was just wondering, would that exclude assault cases?

Mr. LEONARD. Generally.

Mr. COHEN. Simple assault?

Mr. LEONARD. But keep in mind that the original concept of diversion took into account our community, the attitudes of our community, and we had to move slowly. And this is a political issue, a political question that we had to move slowly on, so that we could not include this, although in my estimation, assault cases, at least many assault cases, can be included in diversion. So, that is why I would say do not limit it absolutely to non-violent crimes because we are trying to work on this now. Many of our assaults, our burglaries or armed robberies, or our purse-snatches and similar cases, are directly related to drug addiction. I also recognize the fact that most of the problems that are created in our community and which are sent to prison with the offender only coming back to our community worse than they have been, so I am of the philosophy that we really should be doing more in the local com-

munity with minimal security confinement, and treatment. Those problems are our problems, and we have to solve them in our own local community.

If an individual is an addict, and he commits an armed robbery, and if that addiction is really the basis of his anti-social behavior, then we can correct that addiction problem in our own community, and, it seems to me, that is where we should be doing it. At the present time, we are trying to develop in our county jail such a unit, and we are working with the Odyssey House in New York. We have an Odyssey House in Flint, Mich. But, we are considering one where we might divert even armed robbers, and it is very difficult to tell the community that you are not going to prosecute an armed robber, and that you are going to put him back on the street. But, if you tell them—"Look, this guy has an addiction problem, and we are going to keep him off the streets, we are not going to send him to prison, but we are going to put him in an institution, or put him in a rehabilitation center where he is going to get treatment, and then when he comes out he will not have the drug addiction problem, and we will counsel him on work, and we are going to work on that." Then, maybe in 2 or 2½ years, we can take him out and we will get him a job, and work with him and dismiss his armed robbery charge"—then, I do not believe that they will have any objections.

Mr. COHEN. What distinction do you draw between the handling of juveniles and adult offenders?

Mr. KASTENMEIER. The Chair observes that the House is in session and we will be called in just a few minutes. We have two more witnesses and we would appreciate it if you would be brief in your answers.

Mr. LEONARD. Our diversion program is only for felony offenders, and I think what we have to recognize is that it does not mean that misdemeanors should not be diverted. It's just a question of money and finances that we have, and where we think we can do the most good. We do not have a juvenile diversion program because a juvenile is, in our jurisdiction, usually under the sole auspices of the probate court. They make all of the decisions in regard to juvenile prosecutions: which ones will be charged, which ones will be filed on, and which ones will be released without filing. But, there are some jurisdictions that have juvenile diversion, and I would just recommend to you for your reading, "Diversion from the Juvenile System", which is written by Dr. Percy and Dr. McDermott, of the University of Michigan, and which is a LEAA-funded project. This is really an outstanding work on diversion for juvenile offenders. We do not have such diversion because we do not get involved in deciding who will be prosecuted and who will not in the juvenile system in Michigan.

Mr. COHEN. Thank you very much.

Mr. KASTENMEIER. On behalf of the committee, the Chair would like to express our gratitude for your most valuable testimony based on your long experience and your special insight into the question before us.

Thank you very much for coming.

Mr. LEONARD. Thank you very much.

Mr. DANIELSON. May I inquire, I know that Mr. Leonard came in kind of late today, and is he going to be back tomorrow, or is this the last chance we are going to hear from you?

Mr. LEONARD. Well——

Mr. DANIELSON. I am not asking you to stay over, I am just trying to find out.

Mr. KASTENMEIER. No, this completes Mr. Leonard's testimony.

Mr. DANIELSON. Well, I wish you were here longer. I will restudy your presentation.

Mr. KASTENMEIER. Yes. As I pointed out at the outset, Mr. Leonard has a 37-page statement and I invite every Member to read it thoroughly.

Mr. LEONARD. I would have liked to have commented on the question of a plea of guilty or an admission of guilt as related to diversion programs. That is a very interesting area.

Mr. DRINAN. Thank you.

Mr. KASTENMEIER. Thank you.

Mr. DANIELSON. Thank you very much.

Mr. KASTENMEIER. The Chair would now like to call Mr. Philip Ginsberg, Public Defender, Seattle-King County Defender Association; and Mr. Marshall Hartman, National Director, National Legal Aid and Defender Association, Chicago, Ill.

TESTIMONY OF PHILIP GINSBERG, PUBLIC DEFENDER, SEATTLE-KING COUNTY DEFENDER ASSOCIATION, AND MARSHALL HARTMAN, NATIONAL DIRECTOR, NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, CHICAGO, ILL.

Mr. KASTENMEIER. Gentlemen, we have Mr. Ginsberg's statement which is a 15-page statement with some——

Mr. GINSBERG. Attachments.

Mr. KASTENMEIER. (continuing). Accompanying material, and without objection it will be received and made a part of the record, including the article which you have written, called "Pre-Trial Diversion and Deferral Programs: The Lady or the Tiger?" And also, "Pre-Trial Diversion: Bilk or Bargain?" by Nancy Goldberg. Those will be received and made a part of the record.

[Mr. Ginsberg's prepared statement, with attachments, appears at p. 72.]

Mr. KASTENMEIER. Mr. Ginsberg, may I say that the Chair is mindful that travel in this country is difficult and perilous. The preceding witness arrived without his clothes, and you arrived late. But, nonetheless, we will carry on. And you are most welcome, Mr. Ginsberg, and Mr. Hartman, and you may proceed, sir.

Mr. GINSBERG. Fine. Thank you very much.

I appreciate the opportunity to be here. I took the precaution of wearing all of the clothes I brought, so I did not face the same problem as Mr. Leonard.

Perhaps I could be most helpful to the committee by picking up on his comments. I was very impressed with his statement. I will assume that all our materials have been read or understood and I will not belabor them.

There are three different times in a lawsuit, in criminal proceedings, when there can be some form of deferral or diversion. I think what Mr. Leonard is talking about is the cream-of-the-crop type of diversion.

Mr. KASTENMEIER. Pre-charge.

Mr. GINSBERG. Pre-charge, and I think I basically would share most of his comments with one exception and, that is, one addition perhaps. You have to make counsel available even at the cream-of-the-crop level, because there is always a possibility of running into Miranda situations.

However, we have also dealt with the cream-of-the-crop probably fairly well, certainly in enlightened districts like in Mr. Leonard's, and I think like Seattle-King County. I would like to spend a minute talking about other areas, where there can be useful diversion without any intrusion on due process and the adversary system, and still achieving the same benefits that are outlined under the two bills.

One more departure, I prefer some of the provisions in the House bill because it does leave the court some power. If a defendant is not working out in the program the case still gets back to the court where under the Senate bill, all aspects of discretion are left exclusively in the hands of the Attorney General or the U.S. attorney.

Mr. KASTENMEIER. The Chair would observe that I think both of the preceding witnesses, Mr. Leonard and Mr. Baise of the Justice Department tended to prefer extensive prosecutorial discretion in terms of the advance of the system, unlike anyone else who might not necessarily have the same point of view.

Mr. GINSBERG. Well, the thrust of my comments deal with the role of the individual, that is the defendant, and the aim here is to do many things, and primarily, as I take it, is to try to do better with recidivism. My feeling is that if you involve the defendant significantly you are going to have a better chance at having better results than recidivism. By involvement, I mean that the defendant should have some role in defining the program, the community program. In our office, in the Public Defender's Office in Seattle-King County, most of the discretion on diversion initiates with the defendant. He is not sought out unilaterally by the prosecutor, but rather he and defense counsel, and we use an ex-offender to develop a program, and pursuant to local court rule, we present to the court the program at the appropriate time. I started originally by saying there were different levels during a criminal proceeding when diversion might be appropriate, and we discussed the cream-of-the-crop.

This bill really talks about deferred prosecution that is at a second stage when you can have a meaningful diversion, and the third stage is deferred sentencing and that has proved to be quite workable, and I would like to say it has proved to be effective. We do not have the data yet but I am hoping that our program will run long enough to have some meaningful evaluation. The reason that I prefer the deferred sentence over deferred prosecution is you avoid the inherent coercion potential with deferred sentencing that you have with deferred prosecution. There is danger that the decision on bail might be influenced by the decision whether or not to accept or reject a community program. There is a greater fear in my mind that the innocent defendant will opt out for a program rather than maintaining his presumption of innocence and proceeding to trial. You avoid both of these risks by a deferred sentencing situation. In other words, you do not look to community alternatives, you do not look to diversion until after you have completed the adjudication process.

Mr. KASTENMEIER. That contemplates a trial in each case?

Mr. GINSBERG. Or a plea.

Mr. KASTENMEIER. Or a plea.

Mr. GINSBERG. But I do not think you should prejudge the merits. I am concerned that the basic rights that are still very important under the fourth, fifth, and sixth amendments may be seriously devalued if there is never any review or opportunity to have purely legal defenses resolved. I am also concerned about the defendant who has an actual factual defense of I did not do it. But, I think there should be room for court review of the fourth, fifth, and sixth amendment defenses and the whole area of due process.

So, my first point would be that I prefer use of deferred sentencing rather than deferred prosecutions. I think it achieves all of the benefits in terms of genuine rehabilitation.

The second point I would like to make is on the role of the defendant in planning an alternative. We think that there is a better chance for the rehabilitation program to work if it is one that is voluntary and is consistent with the potential and ability of the defendant. We lawyers have the responsibility to be active at disposition. We have delegated part of that responsibility to a large extent to paraprofessionals who are ex-offenders on our staff and the reason being that we think that paraprofessionals are less likely to superimpose their judgments on what is best for the defendant. If the defendant can be meaningfully required to say what he wants to do, and to put it in general form, then our office has the capability of translating that general intention into a program. As Mr. Leonard said, there are numerous existing community resources, hundreds and hundreds and myriads of them if you put them all together in terms of residential, mental health, and job training or education programs. But, if the defendant is the place you begin in defining a program, I think you have a better chance of ending up with a genuine rehabilitation.

Both bills look to the Attorney General or the U.S. attorney to define the program. I would question, not being disrespectful, but I would question the ability of the Attorney General or even a probation officer to meaningfully create a program for the typical offender.

I am going rather quickly because I am impressed with the hour of the day and your other responsibilities, and I hope that I have not understated anything.

Mr. KASTENMEIER. I appreciate that very much. As a matter of fact, we are taking up on the House floor a matter of great interest to this committee, as well as the Congress and the country. The first order of business will be the question of whether this committee, that is the Judiciary Committee, shall have subpoena power in terms of the question of impeachment of the President.

Mr. Ginsberg, let me ask just one other question:

There are some people, as I understand it, who express apprehension about the precharge program insofar as they feel that it may lead to poorer police practice because if police officers anticipate precharge diversion, they will not be as assiduous in guaranteeing the rights necessarily of the person involved nor, indeed, of practices which are normally brought to light in the consequence of a trial or any final disposition of such a matter in the criminal justice system. Is that something you are aware of?

Mr. GINSBERG. Yes, I am. I tried to allude to that. If you have deferred prosecution or precharge diversion, there is that risk, the risk that produced the *Mapp* decision, and the risk is greater now with the recent decision with regard to the legitimate traffic stop, or the appearance of a legitimate traffic stop being the justification for a total search, the decision 2 months ago. When I referred to precharge diversion, I am talking about pure diversion. Under precharge diversion, as I outlined it in my article in the Washington State Bar News, there is no program. The person is simply kicked totally out of the system without the stick. The carrot is to get him out and there is no stick. There is no program. So, I do not think if we limit it that way, I do not think we are going to face the problem of sloppy police practices if the officers know that the charge is simply to be kicked out and the defendant walks out without any supervision or any kind of control. I think that he is less likely to be aggressive to the extent of overlooking due process, if you leave diversion at the sentencing level. In other words, if you defer sentencing then the defendant has had the opportunity to raise all of the constitutional questions dealing with the police conduct that I am concerned about, and I am glad you asked because I was not clear. I would apparently disagree with Mr. Leonard in that if you are going to kick someone out of the system, kick them out all of the way from the system and the cream-of-the-crop probably does not need a whole lot of program. The man that he mentioned, the armed robbery with the young man, he does not need to be in the program at all. Kick him all the way out of the program because he has resources and he has the internal stability to make it. I am more worried about the people who would not get the blue chip treatment, and I think you should expend your resources, and predicate that upon the full use of the due process, adversary system.

Mr. KASTENMEIER. I yield to the gentleman from California.

Mr. DANIELSON. I am listening. I have no questions. I do not want to waste the time here. I would rather absorb information.

Mr. KASTENMEIER. The gentleman from Maine, Mr. Cohen?

Mr. COHEN. Well, I do not know that I have any other questions, either. Perhaps just one point, Mr. Chairman.

I am concerned, as you are, about the notion of it going to the charge phase. It seems to me that gets us back into the plea bargaining area where you have to go through that process. We had earlier testimony about the admission of guilt being a precondition to qualifying and it seems to me that one of the great benefits of this program is to channel our resources and to expedite this whole process to get someone back into a rehabilitative program without all of the ordeal, and the charge and the defense lawyers and the plea bargaining process. And so I have some great reservations about that.

Mr. DANIELSON. Mr. Chairman, I have one question, if I may.

As I understood it, you questioned whether the prosecutor could structure a program of diversion and would be the proper one to prescribe the program. To whom would you delegate this?

Mr. GINSBERG. There are two alternatives, sir. I think to entrust the same part of our system to the prosecutor with the decision to change as well as the disposition decision is a mistake. It is probably an unwarranted delegation of power. The two alternatives I would suggest are, in theory and I think in practice, the attorney for the defendant and

the defendant have a relationship—the attorney-client relationship. I think that is where ideally the discussion for diversion should be initiated. That would avoid the problem of confidentiality of Miranda. It also would be taking advantage of the traditional attorney-client relationship, meaning the attitude of trust. Then if the attorney and client are in agreement you obviously have to involve the prosecutor or the U.S. attorney and the court so it is a three-party arrangement. That is set forth in a recent statute enacted in the State of Washington called the Adult Probation Subsidy Act where all three parties have to agree to the alternatives.

The one I have a reservation about is an independent third party. I have doubt that there is really such an entity as a federally funded independent third party. There has always been a dilemma that every good probation officer has of wearing two hats.

Mr. DANIELSON. It does not bother you to involve the judicial department in what is, basically, an executive function?

Mr. GINSBERG. No. I think disposition is a judicial function. The judge is supposed to hear propositions or proposals or motions from the defense and the prosecution and traditionally has made rulings on disposition on sentencing, to a large extent. The only authority that the court really has for 90 percent of or most of our criminal justice filings is in sentencing. So, I would say, sir, that is the traditional source of discretion.

Mr. KASTENMEIER. Mr. Hartman, did you want to add something?

Mr. HARTMAN. I wanted to comment, if I have the indulgence of the committee. I thought I would just add a few words.

Mr. KASTENMEIER. Very briefly. We have a quorum call on.

Mr. HARTMAN. I think we are substantially in agreement. Mr. Ginsberg and I represent the same organization. But, just to put a general thrust on the picture and also to just mention a few specifics, I would like to do that in a few seconds, if I could.

The general thrust that I am going to make is that I have a great cynicism about the whole prospect of pretrial diversion, and just to put it in a framework, I appeared on the program related to plea bargaining called "The Advocates," in which the prosecutor stated that often if he had a weak case or if they had a motion to suppress which might be granted, that that might be a case that he might divert out of the system. Now, with this occurrence then is the discussion that was had this morning about whether we are wasting resources on people that ought not to be in the system at all. And so, with that caveat I think we have to really reexamine whether we want a system of pretrial diversion, which might even come past that.

Just to look specifically at the bill, I want to touch on one matter which has not been touched on too much, and that is the matter of revocation. I think that Mr. Ginsberg clearly stated our position that the public defender ought to be in on the process at the very beginning, and there ought to be no pretrial diversion where a prosecutor really talks to the defendant. I think that is really improper coercion. And you have the situation also with the question of revocation, where it seems to me, especially where the prosecutor is allowed to terminate a person's involvement in a program, that that violates the kind of system contemplated in other areas of the law. For example, now in probation and parole areas, there is a right to have counsel. In *Goldberg* v. *Kelly*

and *Gagnon* v. *Scarpelli*, and other cases similar to that there was a right to hearing, either welfare or probation, and we suggest when there is going to be some kind of revocation there ought to be some standard set out, and at least there ought to be some kind of hearing by the court as to whether or not the person could be revoked.

I think the committee for its time and I hope that our caveat, in closing, is that perhaps further study ought to be given to this whole area before this specific bill is passed.

Mr. KASTENMEIER. As I understand it then, Mr. Hartman, you and your association have reservations about these two bills and on balance, at this time, tend to oppose them. But, Mr. Ginsberg, I assume that you said that on balance, you inferred that on balance you would take the House bill with reservations. Is that not your position, sir?

Mr. GINSBERG. There are some things in the House bill I prefer over the Senate bill. The Senate bill makes clear that confidentiality will be maintained and that provision is not in the House bill. The House bill, however, does give the defendant and the court the chance to review the revocation situation and my suggestion is I think pretrial diversion can be workable. I prefer, and I think we have proven that diversion at the sentencing phase is more consistent with the American criminal justice system and the adversary system.

I would suggest the bill be expanded and talk about diversion at all levels, precharge, deferred prosecution, and deferred sentencing. I think you are going to preserve all of the system, plus achieve or at least try to do a better job on recidivism where we are all failing, if we utilize pretrial sentencing. I have grave doubts and concerns about the constitutionality and the inherent coerciveness in deferred prosecution.

Mr. KASTENMEIER. Thank you, Mr. Ginsberg and Mr. Hartman, for your contributions this morning on the set of bills and the proposals before us on pretrial diversion. We appreciate both of your reputations in the field and the difficulties attendant to your actually appearing this morning.

This concludes our testimony this morning until tomorrow at 10:30 in this room, at which time we will continue the hearings on bills relating to pretrial diversion.

[Whereupon, at 12:25 p.m., the hearing was adjourned to reconvene on Thursday, February 7, 1974, at 10:30 a.m.]

[The Statement referred to at p. 29 follows:]

TESTIMONY OF GARY BAISE, ASSOCIATE DEPUTY ATTORNEY GENERAL, OFFICE OF THE DEPUTY ATTORNEY GENERAL

Mr. Chairman and members of the Subcommittee:

I appreciate the opportunity to express the views of the Department of Justice on H.R. 9007 and S. 798. These bills would provide a means whereby certain arrested criminal offenders in the Federal district courts could be placed under a plan of community treatment prior to being brought to trial. Upon successful completion of the program, the charges would be dismissed. Failure to respond to the program would result in resumption of prosecution.

Diversion of criminal defendants, or the practice of not proceeding to the trial and sentencing of some offenders, is not a new idea. There are several areas of decision-making in the criminal justice system where the process of arrest, prosecution, trial and adjudication may be interrupted. These decisions may be based on a number of factors including, of course, a recognition that incarceration may be of more harm than good for some individuals as well as for society.

On the other hand, legislative recognition of diversion is a relatively modern concept and one which we welcome. Administratively, a pretrial diversion plan has been in operation in some districts for a number of years—the familiar Brooklyn Plan in various parts of the country and another system in the Eastern District of Pennsylvania—and there is some question as to whether or not it is necessary to have Congressional approval of these activities. However, Federal legislation can assure both sufficient funding for a successful nationwide program and greater public acceptance of the practice as a rehabilitative corrections measure. A formalized method of interrupting the prosecution of certain defendants can provide more uniform treatment than has previously been afforded, standards and guidance for those involved in the process, and a more available means of evaluating the success or failure of the concept in practice. Perhaps of equal importance, legislation, such as that which we are discussing today, can provide for a criminal matter to be brought to trial and adjudicated if the defendant fails to respond to a program of rehabilitation within the community.

While we support a system of pre-trial diversion for certain criminal defendants, we are convinced that the Congress and those involved in the criminal process must proceed with caution and that legislation must be carefully designed to afford the greatest protection to society and to the individuals concerned, as well as to provide for the most effective integration of the plan within the judicial and corrections system. In our view, several of the provisions contained in S. 798 provide a preferable means of achieving these goals.

Both these bills would give authority to the Federal district courts to release certain individuals to a program of community supervision with suspension of prosecution for a period of not more than one year.

Without going into detail on all the provisions of the bills before you, I would like to point out the major difference which leads us to prefer S. 798, as presently drafted.

H.R. 9007 would permit the court to set the conditions for release, dismiss the charges or authorize resumption of the prosecution of charges without reliance on either the guidance of the attorney for the Government or specific criteria. While the recommendations of the Government attorney would be required prior to the initial or extended release, the charges could be dismissed after consultation with him, but not necessarily with his assent or that of the probation officer supervising the defendant. It is our view that the traditional concept of prosecutorial discretion is eroded in this respect. S. 798 would require the concurrence of the attorney for the Government in each phase of the release program thereby enabling the Government to retain to a greater extent the authority to determine whether or not a charge should be prosecuted.

Furthermore, the House bill has no provision that the court's decision regarding the ultimate disposition of charges be based upon the success or failure of the defendant under the rehabilitative scheme. We believe that disposition should be dependent upon the results of the supervised release. Aside from the basic need for legislative limitations in this respect, the absence of criteria for the court would dilute the value of release records for the purposes of evaluation and assessment of the program.

Under the provisions of proposed Section 3173(a), in H.R. 9007, an individual would be placed under community supervision for an initial period of ninety days. Supervision could be provided by the court for an additional nine months, if recommended by the attorney for the Government. We believe this provision to be unduly restrictive and support the provision of S. 798 for supervision for up to one year initially, without requiring an extension by the court.

In commenting on legislation on this subject, the Department of Justice has supported a requirement that a defendant be disqualified from consideration for pretrial diversion in the absence of his admission of guilt or his failure to accept responsibility for the wrongful conduct on which the charges are based. While we have always recognized the difficulties inherent in such a requirement, we feel that successful rehabilitation is problematic for those individuals who maintain their innocence or who wish to plead not guilty. Proposed Section 3171(a), in requiring the recommendation of the attorney for the Government prior to initial release under supervision, could provide a satisfactory solution to our problem in this regard. However, we believe it would be advisable to reinforce this with a statement of Congressional intent that defendants who are insistent upon their innocence would not be eligible for placement under a community supervision program.

Finally, with regard to the administration of funds to be appropriated for counseling, supervision and other services for persons diverted from prosecution, the Department prefers the language of S. 798.

Under the terms of S. 798, diversion services would be provided with the flexibility necessary to meet the requirements and resources of each district in which the program is administered. Services could be provided directly, either through utilization of U.S. Probation Officers on a cost-reimbursable basis or through contract with existing agencies and organizations capable of providing such services.

The responsibility for the delivery of these services should rest in the Department of Justice which supervises the United States Attorneys and administers the Federal Bureau of Prisons with the necessary staff and expertise to provide or contract for them. The Bureau of Prisons has experience in this area through similar responsibilities both with the administration of Title II of the Narcotic Addict Rehabilitation Act and of Community treatment programs throughout the country.

In conclusion, let me reiterate our support of the concepts and objectives embodied in H.R. 9007 and S. 798. With over two-thirds of the people within the corrections system on probation or parole, the central question is no longer whether or not to treat certain offenders within the community, but when and how to do so most successfully. The recently published *Report on Corrections* of the National Advisory Commission on Criminal Justice Standards and Goals states that evidence "suggests that diversion may warrant consideration as the preferred method of control for a far greater number of offenders." With a diligent effort to carry out the purposes of a pre-trial diversion plan, and with full utilization of the resources available, we believe that this program can be of real benefit in rehabilitative efforts.

I will be happy to answer any questions the committee may have about our position on any aspects of the bills I have not addressed.

[The statement referred to at p. 41 follows:]

STATEMENT OF ROBERT F. LEONARD, PROSECUTING ATTORNEY, GENESEE COUNTY, MICH.

Deferred Prosecution and Community-Centered Diversionary Programs: The Genesee County, Mich. Experience, and Comments on S. 798, H.R. 9007—Proposed Federal Legislation

INTRODUCTION

The successful implementation of a felony diversionary program of deferred prosecution in Genesee County, Michigan, a county of nearly 500,000 people, has taken place over the course of the last decade, since the concept was initiated by me in 1965. The Genesee County Citizens Probation Authority has been the first and foremost expression of a large-scale program of diversion. A year-long university research study conducted in 1972 under the auspices of the State Planning Agency of the Michigan Office of Criminal Justice Programs revealed the basic concepts of deferred prosection probation, as developed and practiced by my office through the Citizens Probation Authority, to be a dramatic success and of tremendous benefit to both the public at large and to every person and official who has any connection with the operation of the criminal justice system in Genesee County, Michigan.[1]

Legislators and judges on both the state and federal levels throughout the United States, as well as the general public, have all long since recognized the patent major defects and deficiencies which exist in the present operation of the criminal justice system in America—some of the more significant defects which are:

(1) the "assembly line" processing of accused persons in our courts in an attempt to ameliorate the hopelessly clogged criminal dockets of our courts; (2) the commingling in our jails and prisons of truly hardened and non-correctable violent criminal sociopaths with non-violent, youthful, and misguided offenders, the latter who, but for their often inevitable entry into prison under the standard and traditional criminal warrant process, might have been able to avoid stepping onto the treadmill of recidivism and future criminal conduct; (3) the lengthly delays between the time when an offender commits a criminal act and the ultimate time when he is required to "pay the price" for his act

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[1] See State Planning Agency, Office of Criminal Justice Programs report: *Deferred Prosecution and Criminal Justice*, Grant No. 2-10-05-0730-01.

to society, which only insure that said offender will learn no lesson at all from his ultimate punishment because he has long since forgotten or rationalized away his prior conduct, and thus cannot understand the meaning or reason for his final penalty; (4) the indelible and permanent labelling of many such nonserious "lawbreakers" as "criminals" and "ex-cons," who will retain such a stereotyped designation for the rest of their lives, along with the concomitant social stigma, ostracism, disgrace, and loss of status as a full-fledged citizen in our society; (5) the tremendous expense and cost of funding programs of post-conviction probation, which fail to adequately supervise probationers because of intolerably high caseloads, and which thus fail to stem the unnecessarily high rates of recidivism demonstrated by such probationers; (6) the "marketplace" atmosphere existing in our criminal courts as a result of the necessary evil of "plea-bargaining," which prosecutors and courts have been forced to engage in and employ for the practical and real reasons of economy, expediency, lack of manpower, and lack of the huge financial resources which would be required to try every case to conclusion on the most serious offense actually committed by the offender.

There has indeed been much proper and warranted criticism of all of the above-described ills in our standard and traditional system of criminal justice—a system which has been crying out for change, for innovative, positive, and thoughtful new approaches and solutions to all of the above serious concerns.

The Genesee County Citizens Probation Authority is a model diversionary program of deferred pre-prosecution probation, which has successfully served as a unique and innovative partial solution to all of the above defects in the operation of the criminal justice system, as well as to the most fundamental problem which confronts all of us—the ever-increasing rise of crime throughout the United States.

By selectively diverting certain non-violent and non-serious offenders to voluntary programs of preprosecution probation before any formal criminal warrant is issued or any formal criminal charges are lodged against them, many of those accused persons who would otherwise fall into the "assembly line" system in the courts are effectively diverted, thereby operating to help un-clog and diminish the criminal caseload dockets of our courts so that the more serious crimes can be dealt with, such as rape, murder, consumer fraud, public corruption, and organized crime. Our program has been an important factor contributing to Genesee County being the leading jurisdiction in the state of Michigan in maintaining up-to-date court dockets.

Second, by diverting such selected offenders at this initial stage, they are effectively kept out of the jails and prisons, and thus kept away from the bad influence and example of the truly hardened, violent, and sociopathic criminals who would influence them to a life and pattern of serious and repeated future criminal conduct.

Third, by expeditiously diverting such offenders to a voluntary program of probation in this pre-charge context, where they must immediately acknowledge their responsibility for their prior law-breaking actions, such offenders will not have time to forget or rationalize their conduct, and will much more likely internalize the "lesson" that the violation of the laws of society entails immediate and unrewarding consequences, and further, that society demands that the offender account for and accept the responsibility for his conduct and refrain from similar conduct in the future.

Fourth, by so diverting such offenders they avoid the indeliable stigma of "criminal" or "ex-con," which would not only operate to penalize them in many collateral social contexts throughout their future lives, but would, moreover, stand in their minds as a selffulfilling and internalized perception, and which might further encourage them to act out their social roles as "criminals" and effectively discourage them from rehabilitating themselves in the future.

Fifth, by so diverting such offenders from the criminal justice system into such programs of pre-prosecution probation, the presently over-burdened caseloads and expenses of post-conviction probation can both be significantly reduced, which at the same time society loses nothing in the way of protection by the mere *per se* shifting of selected offenders from one form of probationary supervision (i.e., post-conviction) to another form of the same (i.e., pre-prosecution probation).

Sixth, by so diverting such offenders from the criminal justice system and thereby reducing the overwhelming caseloads and dockets of our criminal courts, the often criticized practice of "plea-bargaining" will be reduced proportionally, since these offenders will in most cases never have to be brought to the formal

criminal prosecution stage. Consequently, many of the remaining formally prosecuted cases will thus be freed from the real pressures of too scarce manpower, time, and resources which presently compel "plea-negotiation," and will instead proceed to trial and conclusion on the original more serious and justified charge as placed by the prosecution.

Seventh, and perhaps most important, the studies and evidence which have been made and compiled in relation to the Genesee County model system of diversionary pre-prosecution probation indicate that such diversionary programs offer one of the potentially most hopeful and optimistic new solutions and approaches toward the treatment of offenders through a system of *preventive* rehabilitation, as contrasted to the standard and traditional criminal justice system's wholly *post facto* attempts to rehabilitate offenders. As our recent history and empirical evidence have demonstrated, traditional methods have proven to be dismally ineffective in attaining perhaps the number one priority goal we now face in this country—the stemming of the ever-increasing national growth rate of crime.

There are many other persuasive reasons which recommend the implementation of diversionary programs of preventive rehabilitation, such as our program of deferred pre-prosecution probation, throughout the nation. Indeed, recommendations for the initiation of such programs have been made over the last few years by many of the nation's leading scholars and authorities in the field of criminal justice administration and jurisprudence, such as the former President's Commission on Law Enforcement and Administration of Justice, which urged the creation of such diversionary programs in 1967, in its final report, based upon a two-year study, entitled *The Challenge of Crime in a Free Society.*

Aside from the fundamental concept of preventive rehabilitation which underlies all diversionary programs of pre-prosecution probation, another major supporting and essential concept is that of *total community involvement* in the solution of the problem of crime. The successful diversion of selected offenders from the standard criminal warrant process and criminal justice system is based to a great extent upon the continuing existence of many diversified and viable alternative community-based methods of treatment and support for the offender: vocational training and education, job placement and financial aid, psychological and medical care, peer-group therapy and counseling, marriage and family counseling, learning disability tutoring, and so on. For example, in Genesee County, Michigan, certain selected youthful drug offenders are diverted from formal criminal prosecution, and, in lieu thereof, voluntarily attend community-based drug problem treatment centers and so-called "drop-in" centers, where they are counseled by, and relate to, previously trained members of their own more influential peer group in relation to solving their own drug problems.

These examples demonstrate the pressing need to involve the *entire community* in the fight to prevent and deter both crime and the formation of would-be hard-core criminals before the standard criminal justice system process of "arrest-warrant-court-prison" is invoked. The problem of crime in this country, and the dealing with it, can no longer be confined and isolated to the police, prosecutors, courts, and corrections officials alone. Such confinement and isolation of the crime problem have proven not enough. The community as a whole must act as a single, unified and conglomerate entity in this effort. This kind of integrated and community-wide involvement and support is absolutely essential to the success of such diversionary programs.

DISCUSSION

By way of background, let me now discuss generally the basic scope and structure of my diversionary program of deferred pre-prosecution probation, as well as some of the other basic underlying considerations which led to my initiation of such a program in the mid 1960's.

The first three years of this decade have found the concepts of American justice brought under the magnifying glass of public scrutiny. Among other things, the seventies have brought an examination of our prisons and jails, the laws, and our very legal system itself. The very basic concepts of the American justice system itself—the practices of the courts and the workings of the prosecution—have all become subject to careful re-evaluation. As this controversial examination of our justice system has begun, one thing has become clear—meaningful changes are needed. The United States Supreme Court has been so impressed with the need to change, that it has ruled that, what was once considered absolute and immutable, the very size of the jury may indeed be altered by the states in criminal trials. For some communities, and especially for some indi-

viduals, the last few years have become a public echoing of what they had been calling attention to since the mid-sixties.

As early as 1965, my office began to closely examine its responsibility to the individuals involved in the system as well as to the public whom the system served. How could both best be served? Under American law, the prosecutor traditionally has possessed the almost totally independent right to decide how any individual case will proceed. My office decided that the key to serving the public, as well as best providing for the individuals involved, lay in the broadly recognized discretionary powers of the prosecutor. Two conclusions were reached. *The first was that true justice meant options.* The second was that the prosecutor's office should take a leading role in developing innovative programs, identifying individuals, and providing resources to create those options. Since 1965, my office has been working toward these ends and re-shaping and making flexible the criminal justice systems as it operates in Genesee County, Michigan.

Why "options?" Traditionally, the accused went to trail facing only three possibilities: (1) he would either be set free; or, (2) if convicted, be sentenced to jail or prison; or, (3) placed on post-conviction probation. Research has left little doubt about the failure of the jails and prisons to provide proper care, let alone effective rehabilitation. Finally, the public has begun to realize what many people working in the criminal justice system have known for a long time: for those whose behavior can be changed, jails and prisons generally do not produce positive changes.

The traditional post-conviction probation program also leaves the justice system with the little behavioral modification powers. Officers with huge caseloads, hazily-defined roles, and too few opportunities for meaningful interaction, can hardly be asked to provide rehabilitative services. One only has to spend time working with even the most effective of probation officers to learn the frustration of being unable to provide the kind of services needed to make post-conviction probation a truly meaningful experience.

Additional problems beset the post-conviction probation system that are also beyond its control. While behavioral modification is a very personal experience, the criminal justice system is impersonal to say the least. The probation officer is a part of the criminal justice system. Lawbreakers tend to see the probation period as strictly "putting in their time", rather than as an opportunity to modify their behavior or examine their attitudes and actions in a positive way. Second, the whole concept of time works against the regular justice system's attempt to provide rehabilitation. Many psychologists and criminal justice theorists have pointed out the crucial need for lawbreakers to be dealt with *while they feel the full impact of the consequences of their actions.* Yet, court backlogs, trial delays, and large probation caseloads usually mean weeks and often months before even the first consideration of their behavior is attempted. This happens, beyond anyone's control, despite our knowledge that *the success of behavioral modification attempts is directly correlated to the time span between their implementation and initial arrest.*

My office thus began to search for practical solutions to some of these problems about nine years ago. I began to make some critical distinctions within the framework of the prosecution system that have since led to an effective community effort to provide realistic answers in dealing with lawbreaking behavior. Among these critical distinctions and definitions was my primary insistence on the significant difference between a "lawbreaker" and a "criminal." We must not assume that all deviant behavior must or even will become criminal behavior. This concept is now accepted countrywide and makes clear the need to provide affirmative action to prevent the first-time or non-serious offender from developing into the hard-core criminal who will be perpetually in conflict with society. It is the failure to provide such a course of effective action that is the most incriminating criticism of the penal system in this country.

Another important definition involves the whole concept of *community-services* involvement in the justice system. My office has insisted that many community agencies outside of the realm of criminal justice *per se*, which are better qualified or in a better position to give effective treatment, become involved in the process of taking appropriate measures with certain offenders or certain potential offenders. Our attitude in this regard has changed the whole public view of our office. My office is no longer viewed as merely "that place which puts people away." It is felt to be rather a place where citizens can expect sincere and constructive thought to be given on any individual case as to what disposition will best benefit society and the individual involved. Briefly, it means a prosecutor

who prosecutes cases when warranted, but who also seeks diversion from the traditional justice system when that is warranted.

What have been the results of such consideration of these problems and of my philosophy as Prosecutor in Genesee County, Michigan?

Two distinct concepts have emerged, and from these, a series of programs. The two basic concepts are *deferred* prosecution, and its corollary, *preventive* prosecution and rehabilitation.

Deferred prosecution deals with first offenders or those who do not have any established pattern of criminal behavior. The programs involved provide options to the prosecution immediately after arrest. All of the programs and individuals involved work hard toward having the arrested person take a careful look at his behavior and the consequences of it. The system then provides services that allow the prosecutor's office to see that realistic behavior modification actually does take place.

The unique preventive prosecution approach is correspondingly designed to deal with people involved with activities, or who have personal problems, which would probably result in their being arrested. It is also thus intended to begin working with deviant behavior *before* that behavior results in the person becoming involved in the justice system. Dealing in areas like drug abuse, this approach recognizes that the criminal justice system does not have the facilities and resources to deal adequately with the problem, and further takes into account all of the advantages of immediate intervention: reduced time and expense, lessened hostility toward authority figures, and the removal of criminal arrest anxiety in both the individual and his family.

The end result of both of these concepts is a criminal justice system that provides options to a prosecutor which are both realistic and controllable, and which directly effect lower recidivism rates. It has meant the symbiotic involvement and union of both community services designed to serve the needs of individuals, and of community agencies given the task of protecting the public. As I have often said, we feel we have adopted new courses of action that can make both the needs of society and the needs of individuals come together and benefit both at the same time.

The deferred prosecution program in Genesee County, Michigan, has been designed to bring direct official and community action in positive ways to accused lawbreakers immediately after arrest. The program's thrust has been a cooperative effort between the criminal justice system and those community resources which are in a better position to create behavior modification. In addition to the obvious advantage of lack of delay, the program also has the advantage of being able to provide professionals and paraprofessionals who are better equipped than the traditional justice system personnel to give individual attention to personal problems or social pressures that may cause deviant behavior. In addition, the program saves considerable expense as a result of avoiding trial and the regular post-conviction probation period, as well as the considerable expense of a penal institution. The program attempts to eliminate the stigma of past mistakes by maintaining itself as a "court of no record," and also diminishes the use of "plea bargaining and negotiating" a practice which has been severely criticized.

Our program has two distinct segments. The first segment—the Citizens Probation Authority—is a diversionary, pre-prosecution probationary system which I have already mentioned. The Citizens Probation Authority does not handle drug-related cases, which are handled in the other segment of deferred prosecution. The accused is asked if he would like to freely volunteer for the program. If he chooses not to, he is placed in the regular criminal justice channels. If he freely chooses the Citizens Probation Authority, an investigation of his entire background takes place and a "treatment program" is established. It should be pointed out that, as soon as the accused volunteers for the program, all activities, interviews, investigation and counselling are handled completely by the Citizens Probation Authority—separate and distinct from the criminal justice system.

The Citizens Probation Authority has its own professional staff and the individual treatment programs involve either paid or volunteer social workers, therapists, counselors or concerned citizens with an appropriate background. Treatment programs last no longer than one year. The Citizens Probation Authority derives its financial support from L.E.A.A. local trust funds, the Emergency Employment Act, and the Genesee County Board of Commissioners. Our office actively seeks funding sources for the Citizens Probation Authority.

The other segment of our deferred prosecution is another type of diversionary pre-prosecution probation plan. It is an excellent example of the justice system working in conjunction with community agencies. This segment involves persons of any age arrested for possession of drugs and narcotics. Again, individuals are eligible who have been arrested for the first time, or who have no established record of anti-social behavior. Accused persons involved in a drug possession case, can volunteer to be referred to the Genesee County Regional Drug Abuse Commission. The G.C.R.D.A.C. is the coordinating agent for all drug education, treatment, and rehabilitation units in the county.

My office refers an accused person to the justice system liaison officer at the Commission. The Commission staff then conducts appropriate interviews and counseling sessions to determine what counseling or treatment program would be the most appropriate. Legal contracts are entered into by my office and the treatment modalities offering, among other things, monthly reports on the rehabilitation progress of the individual.

Also, the Commission reports back to the prosecutor's office when the individual treatment program has been terminated either successfully or unsuccessfully. Unsuccessful terminations result in a return to the regular criminal justice channels. The treatment or counseling is done at a Commission-affiliated agency.

Have these diversionary programs worked? In the past seven years, the number of cases placed on adult probation through the Genesee County Circuit Court has continued to steadily decline proportionately, while the number of cases placed with the Genesee County Citizens Probation Authority has continued to steadily increase. The probation violation rate for clients of the Citizens Probation Authority has averaged under 5%, with many of those being only technical violators rather than actual recidivating offenders. The program is currently supervising over 1000 offenders a year.

In 1972, the drug diversionary segment processed 150 cases. Fourteen offenders graduated from programs. Twenty-five offenders requested prosecution rather than treatment, and the remainder continued treatment. Only two of 150 cases were arrested again during the year.

Many programs sound good on paper. Why is deferred prosecution working in Genesee County? There are several important reasons. The nature of the relationship between the agencies and the prosecutor's office is crucial. Because the case can always be tried at a future date, the prosecutor does not interfere in any way with the treatment process, thereby encouraging new and innovative approaches to treatment which are often discouraged by formal statutory requirements, departmental regulations, and bureaucratic inhibitions. The attitude is one of letting those who know their job—do it!

The second reason for our success is the spirit and nature of the treatment agencies themselves. Because they are responsible only to their clients, they see themselves as helping, not punishing, and most clients see the process in the same light. Methods vary from individual counseling to group sessions, and in cases involving acute behavioral problems, therapy.

Another key to the success of Genesee County's deferred prosecution program is our office itself. We have actively sought diversionary approaches. My staff has continued to work for expansion of community resources, cooperation among agencies, and has successfully sought funding for criminal justice system programs and community resource support options. We have worked consistently to remain flexible and have constantly asked for evaluation from those in the programs themselves and also from outside agencies. Deferred prosecution hasn't solved all the problems of the criminal justice system in Genesee County, Michigan, but it has brought *confidence*— a confidence from a criminal justice system that looks for realistic options, and more confidence in the criminal justice system itself from those who get caught up in it or work with it.

We have in our diversionary programs put into direct operation the very goals and objectives for the American criminal justice system which were unequivocally recommended for implementation by the President's Commission on Law Enforcement and Administration of Justice some two years after we had already begun our endeavors. As that Commission indeed first stated in 1967:

The Commission's second objective—the development of a far broader range of alternatives for dealing with offenders—is based on the belief that, while there are some who must be completely segregated from society, there are many instances in which segregation does more harm than good. Furthermore, by concentrating the resources of the police, the Courts, and correctional agencies on the smaller number of offenders who really need them, it should be possible to give all offenders more effective treatment. * * *

*Prosecutors deal with many offenders who clearly need some kind of treatment or supervision, but for whom the full force of criminal sanctions is excessive; yet they usually lack alternatives other than charging or dismissing. In most localities programs and agencies that can provide such treatment and supervision are scarce or altogether lacking, and in many places where they exist, there are no regular procedures for the court, prosecutors, and defense counsel to take advantage of them. * * **

It is more fruitful to discuss, not who can be tried and convicted as a matter of law, but how the officers of the administration of criminal justice should deal with people who present special needs and problems. In common prosecutorial practice this question is and the Commission believes should be, decided on the basis of the kind of correctional program that appears to be most appropriate for a particular offender. The Commission believes that, if an individual is to be given special therapeutic treatment, he should be diverted as soon as possible from the criminal process by making specialized diagnostic referral services more readily available to the police and the courts.

The Commission recommends: Prosecutors should endeavor to make discriminating charge decisions, assuring that offenders who merit criminal sanctions are not released and that other offenders are either released or diverted to noncriminal methods of treatment and control by:

Establishment of explicit policies for the dismissal or informal disposition of the cases of certain marginal offenders.

*Early identification and diversion to other community resources of those offenders in need of treatment, for whom full criminal disposition does not appear required. * * **

The effect of these recommendations might well be to alter the responsibilities of the prosecutors and require more effort on their part early in the case. But these procedures also would result in the early elimination of many cases from the process and thus relieve the system from some of its caseload burden without sacrificing the proper administration of justice. The additional investment of manpower and talent would not appear as great as that required to make existing practice work with equal effectiveness.

*Of course, implementation of this recommendation is heavily dependent on the availability to the prosecutor of adequate factual information on offenders and of appropriate facilities and programs in the community for the diagnosis and management of offenders who are diverted. * * **

The measuring of the success of our diversionary programs in Genesee County has not been made solely by me, by my staff, or by those who directly work in administering the programs. Indeed, as has been hereinbefore mentioned, in July of 1972, the final report of an independent and interdisciplinary joint research team, which had made an intensive and thorough study and evaluation of every aspect of the Genesee County Citizens Probation Authority, was published.

This case study of the C.P.A., entitled *Deferred Prosecution and Criminal Justice* and funded by the State of Michigan—Office of Criminal Justice Programs, is well worth looking at, as it is the joint objective product of researchers from separate and distinct fields of study who evaluated the operation of the C.P.A. from every significant perspective.

The following is the "Summary of Major Findings" in that case study and research report:

Section B: Program Effectiveness

1. Qualitative analysis of CPA case records illustrates the successful utilization of social therapy as a sanctional process to achieve social control and rehabilitation.

2. CPA case records provide a rich source of criminological-social data on a relatively specific population, which with further analysis through time could provide important information to guide development of public policy to most effectively treat the offender who is the 'law-breaker' rather than a 'criminal.' CPA experience and success substantiate the view that deferred prosecution is a vital element in the criminal justice system.

3. Although CPA is frequently referred to as a 'first-offender' program for young adult offenders, 27% of the research sample had prior juvenile and/or adult arrest records and 30% were over age 25.

4. Clients expressed satisfaction with CPA and acceptance of its structure and goals. Although clients see the need for increased contact with counselors, clients particularly emphasized the interest and empathy shown by counselors. Further, clients generally reported that the CPA treatment program, counseling and/or

referrals to other community agencies, had contributed to improving their life situations.

5. The community goal of social control is well served by a policy that distinguishes between 'lawbreakers' and 'criminals,' and a program designed specifically for the 'lawbreaker' which emphasizes rehabilitation rather than punishment.

6. The 40–50% referral ratio of CPA clients to other community agencies is consistent with the CPA treatment concept of the widest possible utilization of available community resources.

7. Re-arrests and incidence of probation violation are very low for the CPA program, even in light of the initial expectation that such rates would not be high. Whether the low rates of recidivism and probation violation can be explained by CPA's referral criteria and/or treatment program, the desired end result is attained to the degree that former clients tend strongly not to become involved with the law again.

8. Because CPA functions without the hierarchial and statutory constraints of traditional corrections agencies, CPA is more readily adaptive to new concepts of client treatment and to the changing demands of an explosive growth rate.

9. Of key importance to a deferred prosecution program is the coordination of police agencies and the prosecutor's office with CPA in the referral and intake process. A major part of the success of CPA is attributed to meeting this need through the utilization of a federally funded Probation Liaison and Training Officer (PLATO project).

Section C: Cost Considerations

1. CPA is well managed: the agency maintains a qualitatively high level of performance even under the adverse conditions of excessive counseling caseloads; the administration of the program demonstrates careful budget management.

2. The CPA deferred prosecution program undoubtedly represents one of the most economical probation field services in the United States. Although total program expenditures have increased each year, per-client costs have declined from $126.00 in 1968 to $65.00 in 1971, far below even the 1965 national average of $198.00 reported by the President's Crime Commission. This is accounted for by high counselor caseloads, rapid caseload turnover as a result of shorter probation periods, and the payment by clients of a $100.00 Probation Service Fee.

3. The flexibility of the deferred prosecution approach in handling felony or misdemeanor cases has further financial import in view of the recent ruling of the United States Supreme Court extending the right of indigent misdemeanants to court-appointed counsel.

4. CPA's existence brings reduction in the workloads of police, prosecution, courts and adult corrections. A significant number of probationary cases, which prior to 1967 would have been processed through the courts to Adult Probation, are now being handled by CPA.

Section D: Legal Aspects

1. The Citizens Probation Authority type of deferred prosecution represents a proper exercise of prosecutoral discretion.

(a) CPA procedures correct three deficiencies found by the President's Crime Commission to be frequently present in the normal exercise of prosecutorial discretion:

(1) *Lack of sufficient information.*—CPA operates as a supplement to the prosecutor's office impairing neither the legal justifications of prosecutorial discretion nor the prosecutor's final control over the charge/no charge decision. Rather, CPA enhances the knowledge and expertise necessary for a just decision-making process.

(2) *Lack of clear standards.*—The program provides a rational and well-articulated process for deciding which offenders become subject to full criminal sanctions and which to more informal disposition, a process which assumes great importance if one subscribes to the position that not all offenders can or should be processed through the conventional criminal justice system.

(3) *Lack of established procedures.*—CPA standardizes the operation of prosecutorial discretion throguh the promulgation of rules and regulations, to the end not of expanding the scope of discretion but of exercising that discretion more intelligently.

(b) The extent to which the prosecutor in the exercise of his charge decision makes referrals to CPA for their recommendation is on firm legal ground and is beneficial to the decision process.

(c) Referral of multiple and adult offenders is not an abuse of discretion, for it has been shown that such referral as practiced by CPA does not endanger the community and thus does not violate the public interest. * * *

Two further attributes of deferred prosecution deserve mention:

(1) Diversion from the Criminal Justice process at the warrant stage, with further prosecution held in abeyance, offers the accused the most prompt disposition of his case.

(2) Although police diversion of cases from arrest and prosecution ("a stationhouse release") is commonly practiced throughout the United States, this approach can lead to the serious impairment of an equitable judicial process and an effective deterrent system. Deferred prosecution remedies these defects by standardizing procedures and giving accountability to the diversionary process, while at the same time offering a rehabilitative treatment program. * * *

In "Section D: Legal Aspects" and in Chapter 8—"Constitutional and Legal Questions on the Deferred Prosecution Process," this exhaustive research report concludes with a thorough, pervasive, and painstaking legal analysis of all of the various legal considerations surrounding the implementation and utilization of a systematized program of deferred prosecution alternative diversionary probation, such as the paradigmatic Genesee County Citizens Probation Authority. Perhaps the report's most significant major legal conclusion to be found here is that the "*Citizens Probation Authority type of deferred prosecution represents a proper exercise of prosecutorial discretion.*"

The report also made the following prospective assertion:

The Court of No Record—Citizens Probation Authority anticipated by two years the 1967 recommendations for deferred prosecution by the President's Commission on Law Enforcement and Administration of Justice, and by six years the 1971 recommendations for nation-wide implementation of deferred prosecution by the First Annual Conference on Corrections, Williamsburg, Virginia. Other jurisdictions are now evidencing considerable interest in the Genesee County experience. Neighboring Lapeer County, Michigan, has reported satisfaction with its self-supporting, volunteer staffed program in operation for the past two years. San Bernardino County, California, is reported to be geared to 1972 implementation of a combined professional-volunteer model of the Citizens Probation Authority. It may reasonably be anticipated that citizens' desire for involvement in the Criminal Justice process will find legitimate and needed expression in Citizens Probation Authorities throughout the United States in the years ahead.

The following assumptions would appear to underlie creation of CPA and of any program designed to selectively divert persons charged with crimes from the criminal court process:

(1) Certain types of criminal offenses, or situations in which criminal offenses are committed, may represent isolated instances in the life histories of persons charged with such offense, and are not best handled by processes designed to deal with "criminals."

(2) Exposure of a person who has not demonstrated a pattern of criminal behavior to processes designed to deal with "criminals" may at best fail to help the person and at worst influence him in the direction of a life-style linked to criminal activity.

(3) Prevention of future criminal behavior on the part of persons who have not demonstrated a pattern of criminal activity does not require a punitive approach; in fact, a punitive approach may induce the opposite result and contribute to the person's identifying himself in a role which fosters future criminal activity.

(4) A program diverting selected criminal offenders from the usual criminal court process carries a very limited risk for society. Careful screening should result in a low recidivism rate, which should be further lowered if the agency's counseling and problem-solving efforts are successful.

(5) Diversion of those who are not habitual criminals from the regular criminal court process should increase the effective use of resources in the criminal court process, by lightening caseloads of police, prosecution, and the courts. The Adult Probation Program similiarly should benefit through increased capability to focus its resources on more serious cases.

(6) Prosecutorial discretion in disposing of offenses includes the authority to establish a program for the systematic and large-scale diversion of offenders from the Criminal Justice process.

(7) Programs that divert persons charged with crimes from the normal criminal court process should lower the overall cost of administering the Criminal

Justice process. Cost per case in the CPA program should be substantially lower than in existing alternative processes.

At the federal level, the technique of deferred prosecution of selected *juvenile* offenders has enjoyed wide acceptance since first advocated by the U.S. Attorney General in a bulletin issued in 1946. Significantly, there is no present federal legislation on the subject. Basically, the U.S. Attorney, in the exercise of his discretion, defers prosecution of selected juvenile offenders and places under the supervision of probation officers for definite periods of time, usually a year. The decision whether to defer prosecution is made by him on the basis of a pre-sentence report prepared by probation officers. The U.S. Attorney reserves the right to terminate probation and reinstate criminal action at any time. Insofar as this federal practice relies upon pre-prosecutorial diversion in the sole discretion of the U.S. Attorney, pursuant to the recommendation of probation officers, the federal program is very similar to that of CPA.

However, two significant differences exist between the two approaches: (1) the ages of the offenders is higher in CPA because 'juveniles' are not included, and; (2) there is more standardization of the criteria for inclusion in the CPA program than in the federal program. The operation of the federal system of deferred prosecution serves to underscore the vast power embodied in the notion of prosecutorial discretion.

A client's participation in CPA takes place before he is actually charged with an offense, often even before formal arrest. Any offender who meets certain criteria, for example, that his suspected offense be a non-violent crime and not represent a continuing pattern of anti-social behavior, is referred by the prosecutor's office to CPA for an interview and investigation. If, on the basis of these preliminary contracts, CPA counselors determine that the program of probation and counseling, as opposed to traditional criminal prosecution, would offer appropriate treatment, and, if the suspect voluntarily agrees, the prosecutor will allow the offender to participate in the customary probationary treatment period of up to one year under the supervision of CPA. Given satisfactory completion of probation, which may include a requirement of restitution to the victims of a crime, prosecution is dismissed, and any arrest or booking records are given to the probationer. CPA may, after careful analysis of both the individual's potential and the facts of the case, decide at the referral stage that voluntary probation would not be appropriate treatment; the case is then referred back to the prosecutor's office with a recommendation for further consideration and decision by that office. Anyone referred to CPA has the right to withdraw from the program at any time, with the understanding that his case then becomes subject to prosecution. Additionally, probation may be revoked by the prosecutor's office, upon recommendation of CPA, if the client violates the terms of his probation.

To the extent the above procedure demonstrates a mutual cooperation between the prosecutor and CPA in the initial stages of the charging function, it would appear to be clearly consistent with the traditional legal basis of prosecutorial discretion. In fact, the impartiality of the prosecutor in ultimately making his final charge decision is not impaired, and ultimate control of the charge decision always resides in the prosecutor. One basis of prosecutorial discretion is the traditional and well-founded jurisprudential concept that an elected and responsible official is more capable of making impartial decisions concerning the advisability of bringing charges against an offender than is a private complainant—the person who in effect made the charge decision under the old English system of criminal justice. Permitting CPA contributions of information relevant to the desirable goal of insuring intelligent and enlightened charge decisions by the prosecutor does not vitiate the impartiality of the prosecutor or the prosecutorial process. A prosecutorial decision made in conjunction with the helpful and valid information supplied by a politically neutral CPA staff would clearly tend to be made in a more impartial manner than would the decision of the prosecutor acting without any such assistance.

It might be argued that this very impartiality makes the CPA staff insensitive to public opinion regarding the types of persons who ought to participate. Judicial deference to the judgment of public prosecutors has often been justified by the belief that the prosecutor, especially an elected state prosecutor, makes charge decisions that accurately reflect community values. But this objection has no force since: (1) the CPA worker is protected from improper pressures concerning individual cases; (2) the CPA program itself was established by the prosecutor, and; (3) the CPA program is always under the prosecutor's ultimate control, and thus, through his elected office, provides for sensitivity to community values.

Thus, CPA operates merely as a supplement to the prosecutor's office. It impairs neither the legal justification of prosecutorial discretion nor the prosecutor's final control over the charge/no charge decision. Rather, CPA enhances the knowledge and expertise necessary for a just decision-making process.

The prosecutor and CPA together standardize the operation of prosecutorial discretion through the promulgation of rules and regulations to the end of exercising that discretion more intelligently. The prosecutor still makes an individualized, case-by-case determination of whether or not to prosecute; CPA enables him to have more and better information about the suspect at the time the decision is made, and also offers the prosecutor a useful and effective alternative to traditional criminal prosecution, which has now become so necessary in the fight against crime.

COMMENTS ON PROPOSED FEDERAL LEGISLATION S. 798—H.R. 9007

Recently proposed Senate Bill No. 798, the would-be "Community Supervision and Services Act," is, in my opinion, a laudable and commendable statement of intent to further foster the implementation and growth of diversionary programs of alternative pre-prosecution probation in the federal criminal justice system.

I find myself in total accord with the Bill's statements in Sec. 2. thereof, namely:

Congress hereby finds and declares that the interests of protecting society and rehabilitating individuals charged with violating criminal laws can best be served by creating new and innovative alternatives for treatment and supervision within the community; that in many cases, society can best be served by diverting the accused to a voluntary community-oriented program; that such diversion can be accomplished in appropriate cases without losing the general deterrent effect of the criminal justice system; that the retention of the deferred charges will serve both as a deterrent to committing further offenses and as an incentive to complete rehabilitative efforts: that alternatives to institutionalization (which provide for the education, job placement, training, and other social services) made available to persons accused of crime who accept responsibility for their behavior and admit their need for such assistance can equip such persons to lead lawful and useful lives.

I would wholeheartedly endorse and recommend the above declaration of Congressional intent.

As is further stated in Sec. 3. of the proposed Act:

As used in this Act, the term—

(1) "eligible individual" means any person who is *charged with an offense against the United States and who is recommended for participation* in a program of community supervision and services *by the attorney for the government* in the district in which the *charge is pending;* (emphasis supplied)

(2) "program of community supervision and services" may include, but is not limited to, medical, educational, vocational, social, and psychological services, corrective and preventive guidance, training, counseling, provision for residence in a halfway house or other suitable place, and other rehabilitative services designed to protect the public and benefit the individual;

(3) "plan" includes those elements of the program which and individual needs to assure that he will lead a lawful lifestyle;

(4) *"committing officer" means and judge or magistrate* in any case in which he has potential trial jurisdiction or in any case which has been assigned to him by the court for such purposes;

(5) *"administrative head" means a person designated by the Attorney General as chief administrator of a program of community supervision and services,* except that each such designation shall be made with the concurrence of the chief judge of the United States district court having jurisdiction over the district within which such person so designated shall serve. (emphasis added).

As is further stated in Sec. 5 of the proposed Act:

SEC. 5. *The committing officer may release an eligible individual to a program of community supervision and services if he believes that such individual may benefit by release to such a program and the committing officer determines that such release is not contrary to the public interest. Such release may be ordered at the time for the setting of bail, or at any time thereafter.* * * * (emphasis supplied)

Sec. 7 of the proposed Act continues:

SEC. 7. (a) In any case involving an eligible individual who is released to a program of community supervision and services under this Act, the criminal charges against such individual shall be continued without final disposition for a twelve-month period following such release, unless, prior thereto, such release is terminated pursuant to subsection (b) of this section, or such charge against such individual is dropped in accordance with subsection (c) of this section. In any case in which such release is not terminated or such charge is not dropped within such twelve-month period, *such charge so continued shall, upon the expiration of such twelve-month period, be dismissed by the committing officer.*

(b) *The committing officer, at any time within such twelve-month* period referred to in subsection (a) of this section, *shall terminate such release*, and the pending criminal proceedings shall be resumed, *if the attorney for the Government finds* such individual is not fulfilling his obligations under the plan applicable to him, or the public interest so requires.

(c) If the administrative head certifies to the committing officer at any time during the period of diversion that the individual has fulfilled his obligations and successfully completed the program, *and if the attorney for the Government concurs, the committing officer shall dismiss the charge against such individual.* (emphasis added)

Sec. 9 of the proposed Act delegates certain authority and power to the U.S. Attorney General to carry out the various provisions of the Act, including the authority to:

(5) be authorized to provide technical assistance to any agency of the State or political subdivision thereof or to any nonprofit organization to assist in providing programs of community supervision and services to individuals charged with offenses against the laws of any State or political subdivision thereof; * * *

(9) be authorized to promote the cooperation of all agencies which provide education, training, counseling, legal, employment or other social services under any Act of Congress to assure that eligible individuals released to programs of community supervision and services can benefit to the extent possible.

Although I find the operational set-up of the proposed Act to be remarkably similar and parallel to the Genesee County experience with diversionary programs of pre-prosecution probation in basic conceptual terms, which I would indeed wholeheartedly endorse and recommend, I, nevertheless, find certain phases and portions of the Bill perhaps contrary to its very basic purpose. My limited objections in this regard relate to those portions of the Bill's provisions, *supra*, which have been emphasized and underlined.

My basic criticism here is that, although the U.S. Attorney must make the initial recommendation for participation in a diversionary program by the individual accused (see Sec. 3(1), *supra*), it is strictly the unilateral decision of the federal judge or magistrate to discretionarily release the accused individual to such a program (cf., Sec. 3(4) and Sec. 5, *supra*). Such diversionary release can only be made on or after the time for the setting of bail, but not before (cf., Sec. 5, *supra*). And, only the federal judge or magistrate has the power to, at any time, terminate such diversionary release, although that power can only be, and must be, exercised when the U.S. Attorney finds that the diverted individual is "not fulfilling his obligations under the plan applicable to him, or the public interest so requires" (cf., Sec. 3(4) and Sec. 7(b), *supra*). Only the federal judge or magistrate himself dismisses the pending charge against the diverted individual after successful completion of the diversionary program (cf., Sec. 3(4) and Sec. 7(c), *supra*), although the concurrence of the U.S. Attorney is also needed.

I would respectfully suggest that the following changes be effected in the above-discussed provisions for the following reasons:

(1) I do not believe that it is in the best interests of achieving the laudable goals of such diversionary programs to delay such diversionary release of the accused individual *up until the time when his bail is set or thereafter, and after he has been formally arrested, charged, and has had formal criminal prosecution, in effect, commenced against him.* The effect of such delay can only be to deter the effective rehabilitation of the individual in a subsequent diversionary program, after he has already been effectively stigmatized as a "criminal," after he has already had sufficient time to rationalize away his conduct, and after he may have had the opportunity to receive the bad influence and advice of other criminals while incarcerated for the period after his arrest. Such delay can only be self-defeating of the very worthy purposes of diversionary release itself.

(2) I do not believe that the diversionary release decision should be made in

the formal and "punitive" atmosphere of the courtroom solely by the federal judge or magistrate, after formal prosecution proceedings have been commenced against the accused individual. Leaving the diversionary release decision *per se*, as well as the concomitant decision of terminating the duration of such periods of diversionary release, to the federal judge or magistrate alone (even though the concurrence of the U.S. Attorney be also required), would also, in itself, be self-defeating of the very goals which are here sought to be achieved, for the same reasons which I have stated under (1), *supra*. The accused individual's appearance in the formal, criminal courtroom setting before the judge, who is certainly perceived by the individual to be the purveyor of "punishment", will certainly operate to deter the rehabilitation of that individual by reinforcing his self-perception of himself as a "criminal" who is being "punished" for his wrongful conduct (albeit in a more lenient manner).

(3) It is my sincere opinion and belief that the basic diversionary release decision *per se*, and the other decisions concomitant to it, should be made instead solely by the U.S. Attorney, with the aid and assistance of the community-service agency or agencies wholly outside of and divorced from the judge-courtroom-formal charge-criminal context and atmosphere. This has been the practice of pre-prosecution probation in Genesee County, Michigan, and, as has been discussed at length previously, this is the practice which has worked with eminent success for us to insure the rehabilitation of diverted offenders and to pronouncedly reduce their rate of recidivism. It is my basic belief that all such diversionary decisions should and must be kept in a totally pre-charge, pre-prosecution, and extra-courtroom ambiance, and should be made on a case-by-case basis by the federal prosecutor under the broad legal aegis of his prosecutorial discretion and authority. Only after a diverted individual has failed to meet the conditions of his probation or has voluntarily withdrawn from a diversionary program should he be brought back into the standard and traditional channels of the criminal justice system at the sole behest of the prosecutor, who at all times is properly and legally in control of the criminal charging decision. Furthermore, it is my considered belief that the basic and initial decision to divert an accused must be had as soon as is feasibly and intelligently possible after the commission of his alleged acts of misconduct, and that any delay of that decision until such an arbitrary time as the setting of bail can only be self-destructive of the basic rehabilitative and anti-recidivistic purposes of every program of diversionary release and treatment.

The same comments I have made above in regard to S. 798 apply equally with respect to the proposed provisions of H.R. 9007, the House proposal which would include a new chapter 208 in Title 18 of the United States Code entitled "Diversionary Placement," and which would "* * * permit a Federal court, upon the recommendation of the United States prosecutor, to place certain persons charged with Federal crimes in programs of community supervision and services." (Title of Bill).

Although I again would wholeheartedly endorse the Bill's recognition and adoption of the concept of diversionary placement and deferred prosecution, I have the same basic criticisms of its proposed mode of *procedural implementation* which I have addressed earlier to the provisions of proposed S. 798: (1) H.R. 9007 also leaves the diversionary decision solely to the discretion of the federal court, not the prosecutor (even though the diversionary *recommendation* of the U.S. Attorney is a necessary condition precedent) (see proposed § 3171 (a)); (2) H.R. 9007 does improve upon S. 798 by providing that diversion by the court shall take place "* * * at the earliest practicable time," rather than only upon or after the setting of bail by the court (see proposed § 3171 (b); (3) H.R. 9007 also provides that the diversionary programs and probation officers are under the sole "direction" of the court and not the prosecutor (see proposed § 3172); (4) H.R. 9007 gives the court and not the federal prosecutor the sole discretionary decision to extend the initial 90-day time period of community supervision up to a one-year maximum (even though the prior extension "recommendation" of the U.S. Attorney is required) (see proposed § 3173(a)); (5) H.R. 9007 also gives the *court* and not the federal prosecutor the *sole* and *unilateral* power to "* * * terminate such placement at any time and *authorize* the attorney for the Government to resume such charges." (see § 3173(b) as proposed).

This statutory provision would usurp and abrogate the long-recognized and traditional common law and unilateral power and control of the prosecutor, federal or state, over the legal decision of whether or not to prosecute a given offender, which has been based on the doctrine of the constitutional separation

of powers. By giving here to the court alone the sole power to "authorize" the re-institution of formal criminal charges against any prior diverted offender, the statute usurps and abrogates both the doctrines of prosecutorial discretion and separation of powers, and effectively *confers executive power and control on the court, which is solely a judicial body.* Such "conditioning" of the prosecutor's proper and sole executive discretion *by requiring prior judicial "authorization"* for the prosecutor to decide to file formal criminal charges (or "resume" such charges) does extreme violence to basic constitutional, legal, historical, and well-recognized jurisprudential principles. It destroys the separation of executive from judicial power in a most basic and significant manner. Proposed § 3173(b) must be amended to allow the federal prosecutor to *unconditionally* decide in his own independent exercise of discretion whether or not to terminate diversionary placement and "resume" formal criminal prosecution against any offender; (6) H.R. 9007 also gives the court, and not the prosecutor, sole authority and power to dismiss the charges against the offender who has successfully completed a program of diversionary supervision (even though prior "consultation" with the prosecutor is required) (see proposed § 3173(c)).

I must re-emphasize here that my only objections to S. 798 or H.R. 9007 are strictly related to matters of procedural implementation and the question of division of power and control between prosecutor and court, as it affects both legal concerns (i.e., the doctrines of prosecutorial discretion and separation of powers), and the practical concern for the effective success of diversionary programs (i.e., whether *prosecutor-authorized and pre-charge* diversionary programs are more likely to effectuate the desired goals of rehabilitation and reduced recidivism than are *court-authorized* and *post-charge* programs, as proposed in both S. 798 and H.R. 9007). I believe strongly that prosecution-authorized and pre-charge diversionary programs will satisfy both of these concerns and goals, legal and practical, much more satisfactorily than will the court-authorized and post-charge variety.

The concept, validity, and necessity of and for diversion, however, should and must be sanctioned and approved by the Congress of the United States. All procedural and implementational questions to the side, this body should and must give its *approval* to the *basic concepts* of diversion, deferred prosecution, and community-supervised programs by supporting the passage and adoption of S. 798—H.R. 9007. I certainly and unequivocally would urge, support, and recommend such approval, passage, and adoption of these proposed legislative measures. The time has come for the U.S. Congress to give formal, statutory recognition, sanction, and approval to the basic concepts of diversion. The public welfare and safety, and the increasing threat posed by crime and recidivism, demand that this now be done.

CONCLUSION

Although the concept of deferred prosecution probation and diversion from the criminal justice process is and can be operationally initiated in some different ways and with some different variations, yet the laudable ideological and social goals of such programs (i.e., to reduce crime, to better protect society, to facilitate the operation of the criminal justice system, to run that system both more efficiently and less expensively, etc.) remain consistent, undeviating, worthwhile, and common to all such programs.

The alarming national increase in crime, and the patent failure of the present criminal justice system and standard criminal warrant process to cope with or halt this rise, demand innovative, thoughtful, and effective revisions in procedures on the part of those in government who are in the best position to take positive and constructive action in this regard.

[The information referred to at p. 52 follows:]

TESTIMONY OF PHILIP GINSBERG, CHIEF DEFENDER, SEATTLE, WASH., MARSHALL J. HARTMAN, NATIONAL DIRECTOR OF DEFENDER SERVICES, NLADA, AND NANCY ALBERT GOLDBERG, DEPUTY DIRECTOR OF DEFENDER SERVICES, NLADA.

The National Legal Aid and Defender Association (NLADA) is particularly pleased to accept this Subcommittee's initiation to appear before it today on this most important legislation, H.R. 9007 and S. 798, entitled the Community Supervision and Services Act. NLADA is the only national, non-profit organization whose primary purpose is to assist in providing effective legal services for the poor. Its members include the great majority of defender offices, coordinated assigned counsel systems, and legal assistance programs in the United States.

LEGISLATIVE PURPOSE

NLADA commends the authors of S. 798 for the high goals and principles enunciated in the preamble to this legislation. These goals include creating new and innovative alternatives to incarceration e.g. community rehabilitation programs, job training, etc. The same goals are implicit in the companion bill H.R. 9007. Penologists have long agreed that our penal institutions fail to rehabilitate offenders, but instead serve as schools for crime which only serve to teach those inmates who are eventually released from prison how to prey upon the public.

However, there is a pseudo-Aristotelian dichotomy in the reasoning that there are only two alternatives, i.e., that either we send offenders to prison or we enact pre-trial diversion programs such as that suggested by this proposed legislation. There is a third alternative which we must not overlook, and that is giving each accused individual a trial in a court of law as envisaged by the Sixth Amendment to the Bill of Rights with all of the constitutional protections which our U.S. Supreme Court has seen fit to apply to criminal proceedings, and when and if the individual is found guilty in a court of law, we may then place that individual in a community supervision and treatment program. To accord this special treatment only to persons willing to "accept responsibility for their behavior" or to those who have not yet been adjudicated guilty may well result in expending resources to rehabilitate persons who are in fact innocent of crime by chilling their desire to take the risk of a trial.

Requiring individuals to accept moral blame or responsibility prior to acceptance for deferral of prosecution is reminiscent of the plea bargaining system which has been so widely criticized of late for its degradation of the criminal justice system. Pre-trial diversion and plea bargaining are similar in that they are both short-cuts to conventional adjudication and are intended to save the taxpayer dollar by affording some defendants less than the full panoply of constitutional rights to which they are entitled by law. That is not to say that these defendants may not be benefited by many diversionary programs; however, we must be extremely watchful whenever justice becomes low in visibility and highly imbued with non-reviewable discretion whether by prosecutor, police, court or any other agency.

We would like to discuss a number of problems posed by H.R. 9005 and the companion bill, S. 798. Some of the problems which concern us are the placing of the responsibility for the initial decision and/or investigation for diversion within the prosecution function, the effect of diversion upon possible police misconduct, the question of whether admissions of guilt or responsibility are to be required of the subjects, the issues surrounding the reinstitution of charges, the effect of a speedy trial waiver, the participation of defense counsel, incursions upon the right to privacy, the lack of proven success in reducing recidivism, the potential regressive effects upon the criminal justice process where diversion is utilized in connection with bail and pretrial release procedures, and, in general, the potential abuses inherent in a system of justice which unlike the much-criticized plea bargaining system, is low in visibility and unreviewable.

WHO INITIATES THE DIVERSION RECOMMENDATION

In H.R. 9007 it is the attorney for the Government who requests that an individual be considered for placement in a community supervision, or diversion, program. Placing the authority to initiate the investigation into the individual's suitability for diversion, and subsequently, the responsibility for recommending diversion, within the office of the prosecutor has a number of serious drawbacks. First, it tends to remove the element of voluntariness from the subject's decision to accept the program and to waive his right to speedy trial as well as a number of other constitutional rights which are impliedly waived by entering into the program. Even if no explicit threats are made to him by the prosecutor he may anticipate harsher sentencing recommendations by the prosecutor for refusing to accept the prosecutor's deal. Second, there is the danger that prosecutors may divert those against whom they have a weak case or a case based upon illegally obtained evidence. Were the initial screening for diversion to take place within some other agency, the opportunity for selecting out only weak cases for diversion would be diminished. If the facts of the case are insufficient to prove guilt in a court of law, the chances are increased that diversion will be utilized for innocent defendants. A third and very basic reason why prosecutors should not initiate the diversion decision is the sanctity of the attorney-client privilege

which protects communications made in confidence. When the prosecutor becomes privy to information regarding the client's suitability for diversion he may also uncover information relevant to the defendant's case and bearing upon the question of guilt or innocence. Defendants being interviewed by diversion project personnel tend to discuss matters relevant to their case, as they have difficulty in distinguishing which information is strictly relevant to determining their eligibility.

The same defect exists with regard to confidentiality of information whenever the initial interviewing is done prior to adjudication at the request of or by anyone who is not in the employ of the defendant's attorney. This information may be subpoenaed by the court unless it is a privileged communication. While the law does provide for an attorney-client privilege, there is no such privilege between social worker and client. This is one of the reasons why the ABA Standards Relating to Sentencing Procedures and Alternatives recommend that pre-sentence investigations be deferred until after an adjudication of guilt. Should the individual be found ineligible for the program or should the individual refuse to accept the program, the prosection may be in possession of information obtained in violation of the defendant's privilege against self-incrimination. While S. 798 attempts to ensure that information may not be used upon resumption of the prosecution against a defendant whose diversion was terminated, there are no protections in the statute—and perhaps it is impossible to build in adequate protections—for the individual who is interviewed for admission into the program but never in fact participates in it. The problems here may be similar to the difficulties experienced in changing the law to provide only "use immunity" in exchange for testimony before a grand jury instead of the former practice of guaranteeing full "transactional immunity" e.g. there would be an enormous burden placed upon the prosecution to prove that none of the proscribed information led to information that was used in the prosecution. The most adequate protection is simply not to take such information from the defendant prior to trial. If such information is to be taken prior to adjudication it is NLADA's position that a defender or defense lawyer should be apprised immediately of the possibility of diversion so that he may be present at the initial interview.

If there is to be any diversion at all, it would be best handled either by an independent agency or a public defender office. Control by prosecutors in particular adds to the inherent coercion to accept the deal offered by the state. In plea bargaining, the abuses are less pronounced as the defense attorney may initiate plea bargaining discussions. In some areas of the country, for example, Seattle, Washington,[1] the initial interviewing and diversion recommendations are done by a paraprofessional within the public defender's office. This is beneficial not only because of the protection of the attorney-client privilege, but because of the greater likelihood that the defendant's decision to participate in the diversion decision will be truly voluntary and due to a real desire on the part of the defendant to participate in a particular rehabilitative program. Thus, the participation is also more likely to be successful.

EFFECT UPON FREEDOM FROM UNREASONABLE SEARCHES AND SEIZURES

It is interesting to consider what the effect of diversion would be upon police misconduct. In a trial situation, evidence obtained by breaking into a person's house without a warrant would be excluded and, if no other substantial evidence existed, the case would be dismissed. However, if the person was subsequently enrolled in a diversion program the policeman's objective of obtaining grounds for an arrest would have been reached. Police would be encouraged to continue making similar illegal searches and seizures so long as they eluded challenge in court. Institutionalization of pre-trial diversion as an alternative to conventional adjudication may thus engender social effects which are both undesirable and unexpected.

DIVERSION AND ADMISSIONS OF GUILT OR RESPONSIBILITY

While H.R. 9007 imposes no requirement of admissions of guilt, S. 798 treads very heavily upon the Fifth Amendment privilege against self-incrimination by offering diversion only "to persons accused of crime who accept responsibility for their behavior and admit their need for such assistance." This requirement

[1] See the attached article by Philip Ginsberg describing the Seattle diversion program and the attached article by Nancy Goldberg which discusses which agencies are in control of diversion programs.

is similar to the requirements imposed by the Gennessee County, Michigan, prosecutor's diversion program which has been criticized. Requiring a prospective divertee to admit guilt adds an element of coercion to the program which is constitutionally suspect, since diversion may result in dismissal of the prosecution. By withholding diversion from individuals who refuse to admit guilt or "moral responsibility" an unconstitutional chilling of the right to trial is accomplished. It is NLADA's position that no diversion program should require a defendant to violate his privilege against self-incrimination by pleading guilty or accepting moral blame. Such a requirement would pose a serious threat to our entire constitutional framework.

REINSTITUTION OF CHARGES

Both H.R. 9007 and S. 798 contemplate the termination of placement under community supervision of an individual who has failed in the program and resumption of the prosecution against him. Suppose the person has been placed in a drug program and he antagonizes the administrator of the program. According to the terms of H.R. 9007 a person could spend up to one year in the program. Once he has already "served" one year of his life in the drug program, does reinstitution of the prosecution smack of double jeopardy? H.R. 9007 is particularly troublesome in this regard, as sec. 3172(4) appears to provide that the same judge that revokes the defendant's participation in a diversion program may be the one who later sentences him after trial. NLADA recommends that the statute provide that the same judge who revokes the program shall not hear the case.

S. 798 permits resumption of criminal proceedings upon the extremely flexible grounds that, "the attorney for the Government finds such individual is not fulfilling his obligations under the plan applicable to him, or the public interest so requires." Considering the fact that an individual is susceptible to receiving punishment twice for the same offense, at a minimum, the statute should require credit for time served in the diversion program and a full-scale hearing prior to revocation of diversionary status at which the defendant is entitled to representation by counsel and to confront and cross-examine his accusers. Moreover, the hearing officer should be an impartial magistrate and not in the employ of the prosecutor's office as has been proposed in some quarters. A full-scale, two-stage hearing was required in the recent U.S. Supreme Case of *Morrisey* v. *Brewer*. Such a hearing is required whenever a substantial deprivation of rights is involved. (*Goldberg* v. *Kelly*.)

The system of pretrial diversion makes serious inroads upon the principle established in *North Carolina* v. *Pearce* that the defendant may not be given a harsher sentence once he has already been sentenced. Diversion may present a defendant with a "damned if you do, damned if you don't" situation: he may fear harsher sanctions if he refuses to agree to enrollment in a diversionary program, and at the same time be afraid to participate in such a program lest he face the risk of an increased sentence after trial should be "fail". As an example, during a recent discussion of diversion sponsored by the Illinois Academy of Criminology, a juvenile court judge was asked whether he took a youth's revocation of diversion into consideration in imposing "sentence" upon the youth. He replied, naturally if we have already had experience with the youth and he failed to work out in the program, the penalties imposed should be greater. According to a recent unpublished study, defendants who are terminated from pre-trial diversion programs are given the highest priority for prosecution and their failure to remain in the program is taken into account by judges in making sentencing determinations.

SPEEDY TRIAL

H.R. 9007 explicitly, and S. 798 impliedly, require the defendant to waive his right to a speedy trial in order to participate in the program. In S. 798 there is a constructive waiver of the right since the individual must acquiesce to having his case continued for a period of twelve months. Suppose, however, that the defendant proved unsuccessful in the program and the prosecution were to be reinstituted after one month. The statutes are silent on the question of whether the right to a speedy trial would be revived in this instance. It would be beneficial to include in the statute a provision to the effect that whatever rights of speedy trial the defendant had prior to enrolling in the diversion program would automatically be revived, without his being required to demand them, upon recommencement of the prosecution.

NEED FOR DEFENSE COUNSEL

In order that the diversion program may withstand a constitutional test, the accused must knowingly and voluntarily waive his Sixth Amendment "right to a speedy and public trial by an impartial jury." In order that such a waiver be fully voluntary and intelligently made, the assistance of defense counsel is necessary. U.S. Supreme Court decisions, from *Gideon* v. *Wainwright* and *Argersinger* v. *Hamlin* (right to counsel at trial) through *Coleman* v. *Alabama* (counsel at preliminary hearing) and most recently, *Gaynon* v. *Scarpelli* (counsel at parole and probation revocation hearings) require the presence of counsel at each critical stage of the proceedings. In order to participate in the diversion program, the accused waives his right to a preliminary hearing, to confront and cross-examine his accusers, to a speedy trial, and to have a jury make determinations of fact; he may also forego the privilege against self-incrimination, and the applicable Statute of Limitations. In addition to giving up the opportunity to prove himself innocent, he may be bypassing sentencing alternatives entailing a much lesser degree of supervision, such as probation. Since diversion may be the most critical, in fact, the only stage of the proceedings, for a defendant to forego his opportunity to put the state to the burden of proving his guilt, counsel must certainly be required at this stage. This view accords with that of the National Advisory Commission on Criminal Justice Standards and Goals, Courts Standard 2.2, which states, "Emphasis should be placed on the offender's right to be represented by counsel during negotiations for diversion and entry and approval of the agreement." The *Prosecutor's Manual on Screening and Diversionary Programs*, describing the diversionary program in Genesee County, Michigan states at p. 107, "given that most cases that would go to trial in the absence of CPA [Citizens Probation Authority] would require appointed counsel, paid from public funds, a further probable saving is realized by the CPA's case rarely involving defense counsel (Legal Aid)."

It is NLADA's position that counsel should be provided to the defendant at every stage of the diversion determination process, from initial questioning through the final decision to enter the program, and that this right must be plainly spelled out in the legislation even though the provision of counsel may be implicit in current federal procedures.

INCURSIONS UPON THE RIGHT TO PRIVACY

The United States has made the right to privacy peculiarly its own pet privilege. It was a result of persecution in other countries such as England, Germany, and Russia that many of our citizens fled to this land. Diversion programs of necessity make serious incursions upon the right to privacy in the home, since social workers, as part of their role in a diversion program, typically enter the home, interview members of the defendant's family, and ask many personal and embarrassing questions concerning life-style, morals, etc. We may well ask whether new concepts such as diversion, which come about as a panacea for financial anaemia in the criminal justice system, are not the first step toward Big Brotherism and "1984".

LACK OF DEMONSTRATED EFFECTIVENESS IN REDUCING RECIDIVISM RATES

The present proposed legislation appears to be premature in that there has as yet been inadequate data showing that pretrial diversion programs accomplish positive results in reducing recidivism rates. This is because the clients typically accepted by these programs have been low-risk arrestees who most likely would not have been recidivists in any case. The eligibility criteria for most programs have excluded offenses involving violence and have, by and large, been limited to first offenders. Even in programs which have accepted persons charged with felony offenses, these were frequently in reality felonies only because of overcharging and would probably have gone to trial as misdemeanors.

Studies comparing recidivism rates have failed to employ control groups of individuals charged with the same type of crime as those enrolled in diversion programs. Thus, figures purporting to "prove" that pre-trial diversion has reduced recidivism are misleading. A great deal more study is needed of the effectiveness of these programs before we reach the stage where a legislative basis is in order. It is NLADA's position that legislation should not be enacted until there has been an opportunity to study more programs and to conduct more scientific evaluations and comparisons of programs.

S. 798, Sec. 5, provides for the release of an arrested person to a community supervision program while awaiting trial. While H.R. 9007 has no comparable provision, the bill does not exclude the possibility that persons awaiting trial may be placed in diversion programs. NLADA strongly opposes the placing of persons intending to assert their innocence at trial in a diversion program.

First, this practice contravenes the basic American principle of justice that the accused person is presumed innocent until proven guilty. A person taken into a diversion program, on the other hand, is presumed to be in need of treatment. Not only does imposing such treatment fly in the face of the presumption of innocence, but it also may prove highly offensive to the innocent defendant and place unnecessary burdens upon the taxpayer dollar. Imagine the mental anguish for example, of the innocent young person wrongly accused of possessing narcotics who is forced to attend a narcotics rehabilitation program attended by hard narcotics users.

Secondly, pretrial diversion for those awaiting trial runs counter to the intent of the Federal Bail Reform Act of 1966 and to the U.S. Supreme Court's decision in *Stack* v. *Boyle*. In 1951, the high court held that the only purpose of imposing bail was to assure the defendant's appearance at trial. The Federal Bail Reform Act followed in 1966, setting forth minimum conditions of release on recognizance which could be imposed. However, the principle was clear that no conditions of release could be imposed unless they bore a reasonable relationship to assuring the defendant's appearance in court. Firmly wedded to these conditions was the presumption that a person who had not been adjudicated quality should not be deprived of his liberty prior to trial. It would be difficult to justify the corrective treatment given to the accused in a diversion program on the grounds that it was necessary to assure his appearance in court. Moreover, as diversion programs require varying degrees of deprivation of liberty, it is necessary to exercise extreme caution to ensure that these programs do not become a subtle form of preventive detention.

Finally, there is a great deal of inherent coercion in a program permitting diversion at the stage of pretrial release determinations. It is difficult to imagine a defendant who has just been arrested knowingly, intelligently and voluntarily coming to a decision to accept a diversion program. An arrestee needs to be released to discuss the matter with family and friends as well as counsel before he can come to an intelligent decision. Moreover, in many cases the defendant may be informed that he will remain in custody unless he "cooperates" so that he can be released to a community supervision program. The threat of jail as the alternative to diversion will surely remove the element of voluntariness from any pretrial intervention program. It is for these reasons that NLADA opposes the use of pretrial diversion for defendants who intend to assert their innocence at trial and urges that placement in a community supervision program not be utilized as a condition of pretrial release.

In summary, NLADA is concerned about the likelihood of wasting society's resources as a result of diversion programs requiring rehabilitation services and close supervision over persons who have not been demonstrated to be in need of rehabilitation. NLADA is concerned about the likelihood of wasting society's resources as a result of diversion programs requiring rehabilitation services and close supervision over persons who have not been demonstrated to be in need of rehabilitation. NLADA is also concerned about taking the determination of guilt out of the daylight of the criminal justice process and placing it in a low visibility posture where abuses of discretion are not readily seen or subject to review. Instead of adversary proceedings in a court of law, the trend toward diversion may place control over the fate of an accused in the hands of well-intentioned social engineers, and may weaken our constitutional guarantees to a mere filament. Finally, reliance upon diversion to cure the ills of our criminal justice system may stem the pressure for needed reforms in sentencing and criminal codes. As federal defender Lew Wenzell stated at the NLADA's 51st annual Conference last October, "Panaceas such as a plea bargaining and diversion are simply a substitute for having the legislature take a real look and see that, as a matter of fact, the criminal law is much too broad. We're trying to control too much conduct with it. Diversion, like plea bargaining, is like trying to cure a cancer with a band-aid."

NLADA wishes to reserve its judgment on the long-range merits of any specific pre-trial diversion system pending further study and evaluation of existing and new diversion programs. Moreover, it is the position of NLADA that

passage of a federal statute at this time would tend to hamper the flexibility needed to enable the planners of diversion programs to experiment with various models and to determine which model produces the best results. At the present time, research in this field is being conducted by the American Bar Foundation, the ABA Commission on Correctional Facilities and Services, the University of Chicago's Center for Studies in Criminal Justice, the American University research project, the National Center for State Courts under grants from the federal government and the National Science Foundation, and by the National Legal Aid and Defender Association in light of its recently published survey of the defense of indigents entitled *The Other Face of Justice*. We urge that Congress postpone its judgment until these and other studies currently underway have been completed so that their results can be taken into consideration.

PRETRIAL—DIVERSION AND DEFERRAL PROGRAMS: THE LADY OR THE TIGER?

(By Phillip H. Ginsberg[1])

The criminal justice system is under attack from all segments of society. The public, no longer willing to accept the ever-increasing crime rate and the high rate of recidivism among past offenders, is demanding to know why the criminal justice system cannot control crime. Numerous studies, in attempting to analyze the system's problems, have exposed shocking examples of its inadequacies. The need for reform is obvious—unfortunately, there is little agreement on the methods of reform.

Within the court system a number of issues have been identified which seem to bear a relationship to the problem of crime prevention and control: (1) in many urban jurisdictions, the tremendous backlog of cases; (2) the lack of consistency in sentencing policy, whereby different defendants whose circumstances and crimes are similar often receive grossly disparate sentences;[2] and (3) the potential for injustice and abuse of discretion inherent in plea bargaining.

Some observers consider the problems of the urban courts so great that total breakdown of the criminal justice system will result if drastic reforms are not instituted.[3]

One reform method which is gaining popularity is diversion or deferred prosecution. Although these terms are often used interchangeably, it is important to note the distinctions between diversion and deferred prosecution. The concept of diversion (or total diversion) means that a defendant who qualifies according to established guidelines is "kicked out" of the system almost immediately after arrest. In a total diversion program, no conditions (other than to avoid future arrests) are imposed on the defendant and his or her conduct is not monitored. After a period of time in which the proceedings have been stayed (typically three months to a year), the case is dismissed if the defendant has had no further arrests.

Deferred prosecution means that the prosecution of the case is suspended according to an agreement between the defendant and the prosecuting attorney which is approved by the court. By the terms of the agreement, prosecution is suspended on the condition that the defendant follow a prescribed course of conduct for a specified period of time similar to a probation program. Successful completion of the program results in dismissal; failure results in a reinstatement of the proceedings.

Experimental diversion or deferred prosecution programs seem to have been well received in New York (Manhattan Court Employment Project) and Washington, D.C. (Project Crossroads). Other programs, patterned after those experiments, have begun in at least nine other major cities.

Among the significant findings of the two original programs were that: (1) the administration of justice became more flexible and responsive to individual defendants through emphasizing rehabilitation early in the adjudication process; (2) when qualified defendants are taken out of the criminal justice system as quickly as possible, damaging contacts with the system avoided (*e.g.*, long periods of pre-trial detention); (3) the motivational impact of arrest is maximized

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[1] The author gratefully acknowledges the effective assistance of Joseph W. Duffy (MPA), Director of the Defender Association's Corrections Counseling Program.

[2] For a discussion of this question, see Frankel, Marvin E., *Criminal Sentences*, 1973, New York.

[3] See *Philadelphia Inquirer* series, "Crime & Injustice," 1973.

if defendants are offered treatment soon after arrest; and (4) courts and criminal justice personnel generally are not compelled to spend valuable time with less serious cases or with defendants who are good rehabilitation candidates, thereby alleviating the backlog of cases.

LAW PRACTICE TO BE AFFECTED

Presumably, the favorable results achieved in New York and Washington, D.C., had some influence on the Washington State Legislature's decision to enact the "Adult Probation Subsidy Act." (CH 123, Laws of 1973, 1st Exec. Session.) The act provides *inter alia* a monetary incentive to counties which establish deferred prosecution programs as a part of a total community corrections program. Because it appears that diversion and deferred prosecution programs will soon be a part of the local criminal justice system, it is important to consider their impact on current practice. In the remainder of this discussion, the King County system of criminal justice will be used as a model in weighing the values and benefits of diversion and deferred prosecution against the dangers to individual clients and to the rights of all defendants.

Currently, there are three advantages available to felony defendants in King County which may distinguish this jurisdiction from many others. The first is the liberalized standard for personal recognizance release issued by the State Supreme Court in the 1973 Court Rules CrR. 3.2). The major consequence of the implementation of this rule is that few defendants are detained before trial in the county jail for lack of bail money. Only those considered high risk either in terms of the chances of failing to appear or in terms of danger to the community or to themselves, are detained.

BENEFITS MORE WIDESPREAD

The obvious benefits of PR release are now available to a greater number of persons. Defendants who are out of custody can participate more actively in the preparation of their defense. The pressure to plead guilty, created by long periods of pre-trial incarceration, is removed. Defendants have the opportunity to "prove" themselves during the pre-trial period by working, participating in rehabilitation programs and avoiding further arrests. Significantly, no formal program is imposed.

The second unique characteristic of the King County system is the use of deferred sentences. By deferring the imposition of sentence for a designated period (typically, one to three years), courts give defendants the opportunity to clear their record through satisfactory performance on probation. The combination of liberalized PR release standards and frequent use of deferred sentences has significantly reduced the contact many defendants (particularly first and minor offenders) have with the criminal justice system.

COUNSELING IS AVAILABLE

Additionally, in King County, all indigent felony defendants have the services of the Public Defender's Corrections Counseling Project available to them. Through this program, counselors act as advocates for clients in finding, selecting and gaining acceptance by community programs and resources. No programs are imposed; the client is provided with extensive information about resources and then makes his or her choice with the advice of the attorney and the counselor. Programs developed in this manner are presented to the courts at sentencing in the defense presentence report. Community programs developed by the project staff have been accepted by the court in 70% of the cases.

This project has several characteristics which distinguish it from typical social service or corrections programs. The counselors work within the scope of the attorney-client privilege. The use of ex-offenders as counselors helps to increase communication with clients who often are suspicious of professionals. Furthermore, counselors who have experienced what the defendant is experiencing pursue their work more actively than many professionals might. Finally, defendants are able to weigh all of their possible options during the pre-trial period, particularly as to whether to plead or go to trial, while considering the rehabilitation opportunities which are open to them. Better informed and more positive decisions can be made by clients within the client-counselor-attorney relationship because of the absence of any official pressure to make a particular choice.

EFFECT OF DIVERSION PROGRAMS

What impact, then, will diversion programs have on present King County practice? Total or "pure" diversion programs (as defined above) presumably will be directed toward the "cream of the crop" or the defendants who clearly do not need the sanction of criminal conviction and sentence to avoid future criminal activity. Therefore, most candidates for diversion would receive deferred sentences under current practice. If diversion were accomaplished efficiently (eliminating all court appearances) and without the imposition of conditions, such a program would probably be preferable to the present practice of granting deferred sentences.

There are, however, serious risks in diversion programs. There is, for example, the prospect that the beneficial results of liberal PR guidelines will be lost if defendants are held in jail for an extensive evaluation prior to being accepted for diversion. The PR decision should be independent of the diversion decision.

Furthermore, defendants who are candidates for diversion are asked to make extremely important decisions about their rights soon after arrest. Although advice of counsel will be required before such decisions are made, it is questionable whether there will be time for any relationship between the client and the attorney to develop prior to the time the defendant must decide whether to waive speedy trial and sign an informal confession. Innocent defendants may be tempted to accept diversion and waive their rights rather than risk trial. Waiver of speedy trial may adversely affect a defendant's ability to prepare his defense if he is later prosecuted because of failure in the diversion program.

DEFENDANTS' RIGHTS JEOPARDIZED

Although the dangers to the defendant if diverted are significant, deferred prosecution poses an even more serious threat to the constitutional safeguards provided to criminal defendants. Of greatest concern is the defendant's loss of ability to effect the disposition of the case. Early in the adjudication process, defendants are asked to waive their rights and accept a state-sanctioned program which may continue for a period of years. Throughout the period of deferral, the defendant faces the threat that prosecution may be reinstated and that a more severe sentence may result. It is possible that the duration of the deferral program may be longer than the period of confinement under present practice if convicted. Similarly, a defendant who receives a two-year deferred prosecution, completes 18 months but then leaves the program, may face double punishment if prosecution is recommended. (It is unlikely that a defendant will knowingly waive his Fifth Amendment right to be protected from double jeopardy when he or she agrees to deferred prosecution.) In order to gain treatment, the defendant is being asked to waive the presumption of innocence, as well as self-incrimination and speedy trial protections.[4]

SELECTION OF DEFENDANTS A PROBLEM

One of the threshold problems with deferred prosecution is how defendants will be selected. Because there are no scientific tests available for predicting success in rehabilitation programs, what guidelines will decision-makers have in selecting candidates for deferred prosecution? Can a prosecutor who has never met the defendant make an intelligent decision on eligibility? Will a probation officer be able to communicate effectively enough with a defendant to make a reasonable decision? Is it fair to defer only on certain charges without concern for the individual client?

The answers to these questions do not appear to be readily available, and the prospect of discrimination cannot be ignored. For example, the guidelines for client selection for deferred prosecution programs established under the Washington State Audit Probation Subsidy Act (*supra*) merely exclude "dangerous offenders."[5] Clearly more detailed standards or considerations should be developed.

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[4] See Barr, Carl, "Will Urban Courts Survive the War on Crime," Vol. 4, No. 18, *Criminal Justice Newsletter*, September 1973.

[5] The National Advisory Commission on Criminal Justice Standards & Goals (*Courts*, Wash. D.C., 1973, pg. 20) recommends the publication of detailed guidelines to determine eligibility for deferred prosecution and strict enforcement of the published guidelnes.

PROBLEMS SEEN IN PROGRAM CHOICE

Another serious problem inherent in deferred prosecution programs is the imposition of the rehabilitation program. Will defendants have an adequate opportunity to participate in the selection of a program? For example, the guidelines for the operation of deferred prosecution published by the State Department of Social & Health Services include the following statement: While the selection of offenders to participate in deferred prosecution programs is to be made by local officials on the basis of whatever screening procedures and criteria they deem appropriate, the Department suggests that the prosecuting attorney and the court may want to take advantage of recommendations by professional "intake" staff if such exist, mental health professionals or other consultants, police, and any other appropriate source of information about the offender. A pre-hearing investigation, patterned after the presentence report, is strongly suggested. Such a report should contain objective statements and observations about the offense, the prior record, family situation, education, employment, financial status, physical and mental health, and other relevant factors.[6]

If the police, the Prosecutor, and the State Probation Department are participating actively in the decision about programs, is there not a probability that surveillance and control will receive greater emphasis than rehabilitation?

A COUNSELOR'S VIEW

William E. Absher, an ex-offender, who has served time in prison and who now is a corrections counselor in the Defender office, made the following rather strong comments about deferred prosecution programs: I am reluctant to entrust a decision as to whether or not to defer and how much or how little social service is needed to a civil service employee. Our prime concern lies with the welfare and best interest of our clients. I just don't feel that civil service employees can be objective enough to make these decisions. . . . In effect, I see this (deferred prosecution) plan as another insidious step in putting more power in the hands of the state, resulting in further erosion of the adversary system.

Beyond these problems, there is the concern for how a defendant's success or failure in the deferred prosecution program is to be judged. Here again, objective standards are difficult to develop; thus, there will be a great deal of discretion by those who supervise the defendant. There may be danger of arbitrary or discriminatory findings of failure which will have serious consequences for the defendant.

It is significant that most deferred prosecution programs emphasize employment as a condition of the program. Although it may be true that lack of suitable employment is a cause of crime, this emphasis may lead to the imposition of traditional middle-class values on program participants. Failure or refusal to accept such values, although not in itself a wrongful act on the defendant's part, may lead to his or her "failure" in the program and reinstatement of prosecution. On a related point, what provisions will be made for allowing defendants to change programs if the original plan does not meet their needs?

DANGER IN GROUPING DEFENDANTS

An additional problem is raised by the prospect of deferred prosecution programs serving both felons and misdemeanants. The Adult Probation Subsidy Act (Supra, § 7) extends the incentive to create deferral programs to misdemeanor offenders. Such a proposal involves the danger that, by being treated in the same manner as felony offenders, misdemeanants may be stigmatized more than their offense warrants. Although many if not most felons were at some time involved in misdemeanor offenses, a significant number of misdemeanants never return to the criminal justice system after their first offense. Any attempt to group the two classes of offenders for rehabilitation purposes should be carefully scrutinized.

Finally, there is the serious question whether deferred prosecution will reduce the opportunity for court review of police practices. By removing the requirement of proof from the system of administering justice, are we not inviting the police to make unlawful arrests knowing that many defendants will accept deferred prosecution rather than risk trial.[7]

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[6] Department of Social and Health Services, 10–1–73.

[7] See Zaloom, J. Gordon, "Pretrial Intervention Programs Should Not Postpone CJ Reform," Vol. 4, No. 20, *Criminal Justice Newsletter*, Oct. 15, 1973.

CONCLUSION

Although many defendants may well benefit from diversion and deferral programs in a progressive jurisdiction, the need for these programs is at best a close question. Such programs represent only a temporary or partial answer to the problems of the criminal justice system, and should not be seen as the ultimate reform solution. In all jurisdictions, the defense bar and specifically Defenders should participate in the drafting of enabling legislation and guidelines which will protect against the deterioration of due process by seemingly well-motivated social engineers.

When diversion or deferral programs are established, the exercise of discretion by the administration and staff of the programs must be carefully and effectively monitored. Every defendant must have counsel before the decision to accept a diversion or deferred program is made. Without counsel there can be no knowing waiver of constitutional rights, and the opportunity for official pressure to influence a defendant's decision is increased. In all instances, safeguards must be established to insure that a defendant may freely choose without prejudice to decline diversion or deferral and to attempt to establish his or her innocence at trial.

Finally, it is imperative that all lawyers clearly and cogently advise their clients that diversion and deferral programs are only intended for defendants who are guilty. If the rights of criminal defendants are not effectively protected, particularly in the face of tempting diversion-deferral programs, the rights of all persons will ultimately suffer.

PRE-TRIAL DIVERSIONS: BILK OR BARGAIN?

(By: Nancy E. Goldberg,[1] Deputy Director of Defender Services—NLADA)

A SURROGATE FOR PLEA BARGAINING

At the national conference held in Washington, D.C. in January, 1973 to promulgate the new standards of the National Advisory Commission on Criminal Justice Standards and Goals, a great deal of furor was prompted by the Commission's recommendation that the system of plea bargaining be abolished within the next five years. During one session, a participant wishing to speak in support of the Commission's recommendation was shouted down by the prominent jurist chairing the session in a fashion alien to either Robert's, Sturgis' or any other Rules of Order. The Chairman of that session, like many lawyers across the country, doubted the feasibility of abolishing plea bargaining in light of the already clogged dockets in our nation's courts. They fear a paralysis of the criminal justice system resulting from the requirement that every case be accorded a full-fledged trial in a court of law.

A second look at the overall Commission standards relating to adjudication, however reveals a corollary standard which, if implemented, would remove much of the increased burden flowing from the abolition of plea bargaining from the courts. Chapters 1 and 2 of the volume entitled "Courts" of the Standards recommend that priorities be placed on the screening and diversion of offenders out of the criminal justice system in lieu of court proceedings, wherever possible. In terms of eliminating the courts' burden to try a much larger number of cases, pre-trial diversion may be regarded as a "surrogate" for plea bargaining.

Pre-trial diversion is a relatively new concept which is still in the process of evolution. Essentially, diversion involves a decision not to prosecute an arrestee on the condition that the arrestee does something in return, such as enrolling in a rehabilitative program. Of course, the police and prosecutors have traditionally exercised broad discretion in determining whether or not to arrest or to prosecute in any given case. Today, police and prosecutors are given another alternative to nonarrest or nonprosecution. Experimental programs are being developed to funnel the individual into treatment and rehabilitative programs in a community setting. This is seen as an alternative to processing him through the courts and eventually to prison, where rehabilitative programs may be either nonexistent or ineffective. For example, today, a patrolman on the beat who spots a skid row

[1] The author is indebted to Marshall J. Hartman, National Director of Defender Services, NLADA for his invaluable advice and suggestions.

alcoholic may take the person to the nearest detoxification center,[2] rather than simply arrest the offender or ignore the public intoxication laws.

WHO RUNS DIVERSION PROGRAMS

A proliferation of ideas and projects for developing methods of diversion from the criminal justice system have begun to develop. Given the likelihood that pre-trial diversionary programs are part of a growing trend, some attention ought to be paid to the question of which agencies are in charge of exercising the discretion to divert individuals from the traditional channels. And some attention, also, ought to be paid to the related question of who are the planners of the new systems being established to take on the administrative role of funneling individuals into diversionary programs.

It has been presumed that a large part of the discretion in making decisions to divert individuals must rest with the police, e.g. the example discussed above involving the decision to place a person in the custody of a detoxification center.[3] One of the suggestions contained in the commentary to the National Advisory Commission's Standards relating to diversion was that a policeman be authorized to take a suspected misdemeanant to a mental health facility instead of making an arrest whenever the policeman believed the person to be mentally ill. The mental health facility would then have the authority to seek nonvoluntary commitment of the individual. It is not clear from the commentary what due process safeguards would be employed at the facility prior to commitment.[4] In this situation, police officers would, evidentially, be charged with the responsibility for making initial determinations regarding the public's mental health.

In a number of areas, the prosecutor's office, which has long held the responsibility for deciding whether or not to prosecute a given offender, is the agency responsible for the initial determination to divert a defendant. This is probably the most predominant form of diversion program throughout the country. However, diversion through the prosecutor's office may be nonvoluntary, due to the implicit threat that the prosecutor might otherwise seek the maximum penalty allowed by law. The coercive element is discussed in the *Prosecutor's Manual on Screening and Diversionary Programs*, prepared by the National District Attorney's Association, which cites four factors as contributing importantly to the success of prosecutorial diversion programs. Two of these factors are: a) that "although 'constructive coercion' may be present in the client's decision to accept the program, the decision is made voluntarily"; and b) that "although admissions of guilt are not required, in accepting 'moral responsibility' for his behavior the client is immediately confronted with the reality of his behavior and its possible legal and social consequences."

Another agency frequently operating diversion programs is the probation office, operating as an arm of the courts. For example, Operation Midway, an LEAA-funded program in New York, functions as part of the probation department. An arrestee who agrees to participate in the program receives extensive counseling and supervision while his prosecution is suspended for one year. If the divertee is successful in meeting the requirements of the rehabilitation program, the charges pending against him may be dismissed after the year's time has elapsed.

The ABA Commission on Correctional Facilities and Services has recently begun work on developing new pre-trial diversion programs in 10 to 15 cities. This project was funded by a manpower grant from the U.S. Department of Labor, and is being guided by an advisory board termed the National Pre-trial Intervention Service Center.

Prior to funding the ABA Commission's program, the U.S. Department of Labor funded a number of demonstration programs in pre-trial diversion including

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[2] Nimmer, in *Two Million Unnecessary Arrests* (American Bar Foundation, 1971), stated that, at that time, five cities had established detoxification centers, and proposals for similar programs were under consideration in many other cities.

[3] See Brakel and South, ABF Monograph No. 6, "Diversion from the Criminal Process in the Rural Community, (1969)." With regard to diversion of the mentally ill by policemen, the authors, describing diversion in a rural area of Illinois, found that "police officers were either unaware or unconcerned with the inherent difficulty in defining and determining mental illness . . . In general, the police feel confident that they know who is a 'real nut' and who is not. When asked how they handle the mentally ill, police officers reply that they prefer to take them to the state hospital rather than locking them in jail." (p. 129)

[4] *Courts Report*, National Advisory Commission on Criminal Justice Standards and Goals, p. 35 (1973).

the Manhattan Court Employment Project in New York City, Project Crossroads in Washington, D.C. and Operation de Novo in Minneapolis.[5] These demonstration programs are being studied and evaluated to provide information to the National Pre-trial Intervention Service Center in establishing the new pre-trial diversion programs.

One of the more innovative concepts involving pre-trial diversion, the intake service center, was developed by the National Clearinghouse for Criminal Justice Planning and Architecture under an LEAA grant.[6] This concept is being developed as part of a "Correctional Master Plan" for Hawaii. In Hawaii, the intake service center will operate as part of the court system. Arrestees are to undergo a series of diagnostic examinations to determine their suitability for enrollment in a rehabilitative program in lieu of prosecution in the courts. Determinations regarding an individual's eligibility to enroll in a diversionary program may be quasi-judicial in nature.

At the 51st annual conference of the National Legal Aid and Defender Association held October 24th–27th, 1973, a group of panelists were assembled to discuss pre-trial diversion. The group included Joseph A. Trotter, the former Assistant Director of Project Crossroads, Edith Flynn, who worked on the development of the intake services center concept for Hawaii through the National Clearinghouse for Criminal Justice Planning and Architecture, Donald Tsukiyama, the Public Defender of Hawaii who, as deputy director of the LEAA state planning agency of Hawaii, worked with the Clearinghouse on the "Correctional Master Plan," and defenders Phil Ginsberg of Seattle and Lew Wenzell of San Diego, both of whom direct programs within defender offices themselves which provide pretrial assistant to arrestees in securing pretrial release and planning alternatives to incarceration.

Mr. Trotter, describing his observation of the first pretrial diversion projects funded by the Department of Labor in 1967–68, noted that, for the most part, they had no contact with the defense function.

I had occasion to go around to 8 or 9 jurisdictions in the two or three years I was with Project Crossroads and in all of the jurisdictions I visited, except one, which were setting up programs, neither the public defender nor the defense bar were represented in negotiations whereby the criteria for these programs were established. . . . I personally doubt very much whether you can divorce the prosecutorial dominance in controlling the establishment of diversion programs or in running them because in almost every instance I know of, the foundation for implementing programs has been prosecutorial discretion.

However, Mr. Trotter urged that defenders begin to play a broader role in the formation and implementation of future pre-trial diversion programs in order to adequately safeguard the rights of defendants.

The organizational structure of Project Crossroads, the second pre-trial diversion program established in the country and a model for many of the subsequent programs, was defined by Mr. Trotter as "court-based," i.e., client intake took place at point of prosecutorial decision-making or subsequent to that point. The project, which was established as a wholly independent agency, was restricted to handling misdemeanor cases. In order to gain acceptance for their project, Mr. Trotter explained that his group approached the U.S. Attorney's office, the Board of Judges, and the Superior Court in the District of Columbia. He asked them if they would be willing to have an outside agency take off their books defendants who met certain criteria, and work with them in the community for a period of 90 days, involving them in intensive rehabilitative programs. The criteria for eligibility in the program were worked out in cooperation with the U.S. Attorney's office. Included as eligible candidates were persons qualified for release on recognizance and charged with a misdemeanant offense not involving violence, so long as there was no prior conviction and so long as the offense did not involve possession of marijuana. The project's paraprofessional staff interviewed eligible defendants in cell-blocks prior to presentment in court, but after the staff had obtained their arrest records and complaint papers. At the initial interview, the defendants were asked whether they wished to participate in an intensive diversion program, in spite of the fact that they could otherwise be free on their own recognizance in the pre-trial period and had a better than 60% chance of acquittal. Mr. Trotter explained:

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[5] See 18 *American Bar News*, 10 (August, 1973).

[6] See Moyer, "The Intake Service Center Concept," *American County News*, (July, 1973), and *Intake Service Center: A Place and a Process*, National Clearinghouse for Criminal Justice Planning and Architecture.

We were asking them to trade in the possibility of immediate freedom and a relatively unhassled existence in the community in the pretrial period, which could last for up to a year's time, for a commitment to our program for three months during which they would be required to participate in counseling, have people come into their homes and talk to them and their families, to get a job or get back into school, or both, and to endure three months of a close relationship with people who may not understand their problems with the understanding that, if they didn't comply, prosecution would in fact be recommended against them.

As a routine matter, the project staff conferred with the U.S. Attorney before accepting a client to determine whether the U.S. Attorney had any objection to the project's acceptance of the individual. In the event that the divertee, for some reason, did not work out in the program, an attempt was made to keep the information obtained by the project out of the case jacket during preparation for trial. The U.S. Attorney gave his commitment, in writing, not to utilize any of the information that the project staff had provided in a subsequent prosecution. However, it was generally noted in the presentence report that the individual had participated in Project Crossroads.

Eventually, there was legislative action by Congress transferring Project Crossroads from the administrative auspices of an outside agency and making it a component of the District of Columbia Superior Court.

The intake service center concept as applied to pre-trial diversion of adults was developed by the National Clearinghouse for Criminal Justice Planning and Architecture. The Clearinghouse was established several years ago with LEAA funding at the University of Illinois. Its original purpose was to add a new dimension, architectural planning, to correctional institutions. The project was later expanded to include substantive planning in the corrections area, under the theory that "form follows function." Dr. Flynn, addressing defenders assembled from across the country during the recent NLADA conference, explained:

We experienced the criminal justice system as a "nonsystem." There was incredible fragmentation in criminal justice. . . . We realized that we couldn't make any progress in corrections until we started talking about the courts system and you find out the incredible organizational maze in which even the best-trained mice would get lost, let alone men. . . . The intake service center was born out of the consideration that something had to be introduced that approaches the problem of coming up with a systematic way of dealing with diversion of the alleged or convicted offender.

The Clearinghouse project is unique in that it involves architects and sociologists as opposed to lawyers working in what most people view as lawyers' domain—the processing of criminal cases. Seeing the need to organize what appeared to be a disorderly, uncoordinated system, this group wound up planning functions as well as form.

In addition to seeking to systematize the criminal justice system, a primary goal of the Clearinghouse in developing the intake service center concept was to modify behavior patterns of individuals coming in contact with the criminal justice system at an early stage. Their approach was to diagnose the individual's problem and treat that problem before a criminal career sets in.

Dr. Flynn described the early intervention concept in the following manner:

We want to interfere before the labeling occurs and the damage occurs. We're working in the juvenile area as well as with adults and the problem becomes even stickier because you have the familiar phenomenon of due process involved on the one hand and the best interests of the child and the court syndrome on the other.

The intake service center has certain concepts and functions. . . . First of all, it is designed to perform assessment services for pre-trial intake screening on a voluntary basis. . . . The services of the intake service center should be performed as much as possible on a non-residential basis. Persons should not be detained unless their detention is necessary to protect society.

While there are approximately 30 formal pre-trial diversion programs operating throughout the country and many informal programs, it should be noted that the intake service center concept which was designed by the Clearinghouse has, to the best of this author's knowledge, not been implemented in any jurisdiction. However, Hawaii appears to be in the gradual process of implementation within the next few years.

SOME RESERVATIONS ABOUT PRE-TRIAL DIVERSION AND THE NEED FOR SAFEGUARDS

The concept of intake offices is not wholly new to the criminal justice system. A similar device, although operating on a somewhat more informal basis than that planned by the National Clearinghouse, has been utilized in the juvenile justice system as a result of the recommendations of the President's Commission on Law Enforcement and the Administration of Justice. That Commission issued a report in 1967 calling for the diversion of children from the formal juvenile justice system in order to avoid unnecessary stigma.[7]

Donal R. Cressy and Robert A. McDermott, Professors at the University of California at Santa Barbara, in their study entitled *Diversion from the Juvenile Justice System*, describe intake procedures observed in three communities. Commenting upon the actions taken by intake officers, the authors note, "His decisions are generally held to be too sensitive to be bound by specific criteria, and the officer is left free to exercise his discretion, so that the criteria for diverting juveniles vary greatly from officer to officer. Any intake officer's diversion decisions depend principally on his own general correctional philosophy, knowledge of alternative services, informal relations with other probation officers and personnel of outside agencies, and the types of juvenile case he receives, or thinks he receives.[8]

Rosemary Sarri, Project Co-Director of the National Assessment of Juvenile Corrections at the University of Michigan at Ann Arbor, testified before the House Select Committee on Crime regarding diversion of juveniles. She suggested that agencies responsible for diverting juveniles from the juvenile system be separated from the courts. A similar concern was reflected in Dr. Flynn's remarks before the NLADA conferees. She observed:

"In the design concept of intake service, we were envisoning a very neutral agency outside the criminal justice process. We didn't want to associate it with corrections because of all the taint that corrections brings. We were very leary of the courts because of invasion of privacy of a person who has not yet been adjudicated guilty. We obviously did not want it operated out of the law enforcement branch. This left us in a position of talking about a center outside of the criminal justice system, perhaps functioning under the umbrella of a social service agency. . . . However, I think you will find that the ultimate location of such a program is going to be a political decision. A curious thing will happen. Just about everyone in the criminal justice system will want that intake service center. . . . There is no question that the public defender has to be involved."

Ms. Sarri, in her congressional testimony, analogized diversion to an informal bargaining system and cautioned that there might be an adverse effect of participation in diversionary programs should be individual be charged with an offense in the future. Would participation in these programs result in an implication that the individual was guilty? How would such a "record" after sentencing for a subsequent charge?

A number of other concerns regarding pre-trial diversion spring to mind. What about the incursions upon the right to bail implied in the Eighth Amendment when a defendant is kept in custody for the purpose of conducting diagnostic tests of because officials believe him to "dangerous?" Would the individual's files and statements made to officials responsible for diversion such as intake officers be susceptible to inspection by the court, the prosecution, or others not protected by the attorney-client privilege? Are certain legal rights of the defendant such as the privilege against self-incrimination, the right to confront and cross-examine one's accusers, speedy trial, and the right to trial by a jury of one's peers, be compromised by pre-trial diversion? Would the defendant be questioned concerning his guilt or innocence or possibly even asked to admit to guilt as part of a pre-trial diversion procedure? Would the defendant pass up an opportunity for probation by enrolling in a lengthy rehabilitative program? What occurs when the individual fails to fulfill the requirements of his diversionary program; will his failure result in formal adjudication entailing harsher sanctions that would

[7] See *The Challenge of Youth Service Bureaus* (Youth Development and Delinquency Prevention Administration, HEW, 1973) for a discussion of juvenile diversion programs throughout the country.

[8] Cressy and McDermott, *Diversion from the Juvenile Justice System* (National Assessment of Juvenile Corrections, University of Michigan, 1973, at p. 12.) The authors conclude, "The faddist nature of diversion has produced a proliferation of diversion units and programs without generating a close look at whether the juvenile subject to all this attention is receiving a better deal. It is quite possible that participating personnel have revamped terminology and procedures without seriously altering what happens to the juvenile." (p. 59).

have otherwise been imposed? The defendant may be faced with a "damned if you do; damned if you don't" situation: he may fear harsher sanctions if he refuses to agree to enrollment in a diversionary program, and at the same time be afraid to participate such a program lest he be faced with the risk of an increased sentence after trial should he "fail."

What is the effect of taking an essentially judicial function out of the criminal justice system? Kenneth C. Davis, Professor of Law at the University of Chicago and expert on administrative procedures, in his treaties on Administrative Law, warned against abuse of discretion in low-profile procedures of administrative agencies. Wherever deprivation of a person's liberty is at stake, the visibility of procedures and the due process protections which our constitution requires must be carefully preserved.

In Minnesota, the Hennepin County Department of Court Services received an LEAA grant to determine how information obtained from pre-trial diversion projects, such as Operation de Novo, could be better utilized by the courts. In a progress report on the grant, the purpose of his study was explained as follows: "It was decided that we should explore moving pre-sentence investigations to earlier points in the history of felony cases so that information could be available for more of the pre-trial decisions noted above. The immediate purpose to be served by moving the pre-sentence investigation process to an earlier time sequence was to provide for the availability of defense attorneys at the time that plea discussions are conducted."

This procedure is directly contrary to the standards recommended by the American Bar Association. Standard 4.2 of the Standards Relating to Sentencing Alternatives and Procedures recommends that pre-sentence reports should not be initiated until there has been an adjudication of guilt. The commentary to Standard 4.2 states:

There are at least four reasons why the pre-sentence investigation should not be undertaken until after the adjudication of guilt. The most fundamental is that the investigation will undoubtedly represent an unwarranted invasion of the defendant's privacy if he is later acquitted. The defendant's friends, employers and relatives must be questioned, and embarrassing questions asked. The second reason relates to the use of the defendant as a source of information. Most reports depend in large part on information acquired from the accused, and later verified by independent investigation. The defendant can be placed in an awkward position if he is expected to talk to a probation officer before he goes to trial. The third reason stems from the fact that much of what is contained in the pre-sentence report is not admissible at the trial on the question of guilt. There is a chance that it may come to the attention of the court before guilt is determined. See, e.g., *Calland v. United States*, 371 F. 2d 295 (7th Cir. 1966). The possibilities of prejudice are obvious. And finally, there is a convincing economic argument against the compilation of a report which may never be used. There are few probation offices which can afford the luxury of such a practice.[9]

Thus, the coordination of information collection obtained by pre-trial diversion projects with the courts themselves in order to facilitate the plea-bargaining process, as contemplated by the Minnesota Criminal Court Information and Diversion Study,[10] may involve serious incursions upon the requirement of proof beyond a reasonable doubt.[11]

The privacy of information in this era, when data banks contain information on most U.S. citizens, is at best difficult to ensure, even if protected by statute. Information obtained during interview of an arrestee for purposes of determining eligibility for a pre-trial program may subsequently be used against him at trial or during plea-bargaining, regardless of the admissibility of the information as evidence.

Phillip Ginsberg, participating in the NLADA annual conference pre-trial diversion panel, voted some of these concerns:

First, I talk about the innocent defendant. We know about the Supreme Court case of *Alford v. North Carolina* where the Court said that it was all right for a person to plead guilty. If you dangle in front of an innocent defendnat a "free ride," most innocent defendants, particularly indigent defendants may take

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[9] ABA Project on Minimum Standards for Criminal Justice, Approved Draft, 1968.

[10] State of Minnesota Governor's Commission on Crime Prevention and Central, Progress Report, Grant No. 14–18–50–07–119 (72), dated 4/30/73.

[11] Proof of guilt beyond a reasonable doubt was held to be required by the Fifth Amendment in *In re Winship*, —— *U.S.* ——.

the bait. . . . If innocent defendants plead guilty, or, in effect plead guilty, by accepting a diversionary program, we may find that, in a few years, we have total emasculation of what we regard as fairly essential rights. If you feel that your client either on a factual basis, or on a legal basis, via the Fourth or Fifth amendments, would not be found guilty, you should try to change his mind.

On deferral of due process, we may find that we're going to have the decisions and discretion no longer in the hands of judges, prosecutors, or defense counsel, but in the hands of the people who run programs. Think about the people in your jurisdiction who are the probation and parole offices. Maybe you have a good jurisdiction. . . . If we entrust the future of a lot of people in these diversion and deferral programs to the traditional probation or parole person, how quickly will they blow the whistle. How much flexibility will they have to say, this particular program did not work out, not because the defendant was wrong, but because the program wasn't right. . . .

I am concerned about double jeopardy, e.g. a person who goes into a two year drug program on a diversion or deferral basis, completes 23 months, and because he antagonizes the administrator of the drug program or the probation officer, has his case reinstated. He then faces jeopardy, and I think that violates the Constitution . . . We can't disbar these people as we would disbar a lawyer.

Eligibility . . . my colleague to my left was saying that the people who are eligible shouldn't be charged with crime at all, if you only let alcoholics in and exclude violence or drugs. . . .

I am also worried about the sanctions. For example, a person who would only get 6 months in shoplifting might get into a diversion or deferral program with 3 or 4 years of onorous activity. . . . I notice in some of the programs I'm reading about there is a "pooling" of misdemeanor and felony defendants. . . .

The last one I'm very concerned about is police practices. If a policeman doesn't have to worry about judicial review of his conduct, is he more likely to make bad arrests? . . . How much control will there be in the court where an arrest is made for purposes of harassment?

THE ROLE OF DEFENDERS

Pre-trial diversion, whether it takes place within the framework of intake centers, independent bail agencies, prosecutor's offices, probation departments, by judicial decision at preliminary arraignments, or by on-the-scene policemen, may involve serious consequences for the "divertee." The decision to cooperate in a pre-trial diversion program is, in some respects, similar to a plea bargain in that the decision may result in the waiver of essential rights. In order to ensure that any decision by a prospective divertee is truly voluntary, counsel must become involved from the very outset. The National Advisory Commission has recognized the importance of this protection Standard 2.2 of the Courts Standards provides that, as the first rule of procedure for diversion programs, "Emphasis should be placed on the offender's right to be represented by counsel during negotiations for diversion and entry and approval of the agreement." [12]

In some jurisdictions, e.g. Seattle and the District of Columbia, initial screening as well as counseling and planning for alternatives to incarceration take place within the defender office itself. As part of the National Defender Survey, conducted by the National Legal Aid and Defender Association under an LEAA grant, each defender office was asked whether they had staff personnel who were specifically assigned to develop rehabilitation programs for their clients as an alternative to incarceration, and, if not, whether their office had an arrangement with social service agencies in their area for providing such services. Twelve offices replied that they did have staff to develop rehabilitation programs, while 155 said they did not. Fifty-seven offices replied that they had an arrangement with social service agencies, and 78 had no such arrangement. Three said there were no such agencies in their area.[13] It would be quite feasible and, in many respects, more desirable for defender offices to serve as the agency primarily and initially responsible for pre-trial diversion. While decisions relating to the suspension of proceedings must necessarily rest with the court, there is no reason why the defender office cannot provide counselling services and make referrals to community rehabilitative programs for its clients. The defender office would

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[12] Supra, n. 3 at 39.

[13] *The Other Face of Justice*, Report of the National Defender Survey, National Legal Aid and Defender Association (1973).

have a greater incentive to ferret out suitable diversionary programs for its clients than would the prosecutor.

Among other benefits, the defender office would have the confidence and cooperation of the client, as there would be no hint of prosecutorial coercion in such a setting. The confidentiality of information related by the client pertaining to his case and his pre-trial diversion needs would be preserved. Persons considering diversionary programs would most likely have greater flexibility in selecting the programs most suited to their needs if they are processed through a defender office, as opposed to an impersonal intake center. In addition, they would be able to avoid being subject to possibly unconstitutional forms of testing and diagnosis which might be prescribed by a court-operated intake center. Pre-trial diversionary functions could be readily included in a defender office by providing for the necessary para-professional staff and facilities in the public defender's budget.

Phillip Ginsberg, in his unpublished summary, "Diversion and Deferral Programs, The Lady or The Tiger," prepared for the NLADA conference, noted that defendants counseled by the ex-offender counseling staff at the Seattle Public Defender Office are given the opportunity to "prove" themselves during the pre-trial period by working, participating in rehabilitation programs and avoiding further arrests. The counsellors act as advocates for the clients in finding, selecting, and gaining acceptance by community programs and resources. However, no programs are imposed; the clients are provided with extensive information about resources and then make their own choices. As a result of liberalized personal release guidelines in the Seattle-King County courts and deferred sentencing, the majority of first and minor offenders are able to minimize their contacts with the criminal justice system. Mr. Ginsberg observed that the effectiveness of the program is indicated by the fact that project recommendations are adopted by the courts in more than 70% of the cases.

During his oral comments at the panel discussion, Mr. Ginsberg voiced his objections to what might be considered a step in the direction of Orwell's "1984":

> Your client may not be guilty . . . my reason for saying that these well-intentioned programs administered and directed by outsiders may be dangerous is that I don't think that the client is going to have control. I don't think that the defense counsel is going to have control. I think that well-intentioned social engineers are going to have control, and that bothers me, as it would be a significant departure from where we are now.

CONCLUSION

Whatever the procedural safeguards employed, the advisability of the trend towards increasing the use of pre-trial diversion as a substitute for more traditional methods of adjudication is itself open to question. The diversion of individuals into programs designed to cure persons of criminal traits prior to a judicial determination that criminal activity actually took place may run counter to our basic precept that a person is presumed innocent until guilt has been proven beyond a reasonable doubt. This paper does not question the value of community based alternatives to incarceration in correctional institutions for convicted offenders. Most students of today's correctional institutions agree that they do little to correct, and may in fact serve as schools for crime.[14] The question of whether low-visibility procedures for diversion into correctional programs in the absence of a formal adjudication of guilt may result in more serious abuses than the plea bargaining system ever entailed.

At a very minimum, no such procedures should be sanctioned unless defense counsel is made an integral part of those procedures. This would require extensive changes in the present system of providing counsel for indigent defendants in most jurisdictions. According to the National Defender Survey, in a typical case, counsel is not provided until formal arraignment. Defenders and assigned counsel are rarely appointed in time to become involved in matters such as diversion or even bail hearings. More than half of the judges presiding in assigned

[14] The final report of the Annual Chief Justice Earl Warren Conference on Advocacy, entitled, "A Program for Prison Reform" (1972), notes that, "Indeed, the release of the majority of the prison population, coupled with the provision of community release programs and services, would not increase the danger to the public, and ultimately would enhance public safety." (Recommendation No. III, p. 9). Professor Junius Allison, who studied penal systems in Scandinavia under a Ford Foundation grant, found that, except for dangerous offenders, treatment and supervision in the communities was preferred to incarceration in that part of the world. [See Allison, "Can Corrections Correct?," 31 NLADA *Briefcase* 411 (1973)].

counsel jurisdiction reported to the Survey that court-appointed counsel are not present at bail hearings.

There are many desirable reforms in the criminal justice system which would, like pre-trial diversion, ease the caseload of the courts in general, in addition to making way for the abolition of plea bargaining. Decriminalization of "victimless crimes" would alleviate much of the clogging of court calendars. The removal of most traffic offenses from the criminal justice system would likewise lighten the courts' burden.

One of the rationales propounded for pre-trial diversion is that it results in more humane treatment for divertees than prison experience. However, excessive reliance upon diversion as a means to more humane treatment may in fact result in a lessening of the pressure for essential criminal code reforms such as decriminalization and more realistic sentencing provisions.[15] Much of what is hoped to be accomplished by diversion may in fact be better accomplished by revising our eixsting laws.

Lew Wenzell, an experienced trial attorney with the San Diego Federal Defender's office summarized his concerns about the proliferation of pre-trial diversion experiments:

Diversion, like plea-bargaining, is like trying to cure a cancer with a band-aid. That is not to say we ought not to engage in anything that can benefit our clients. But aren't we really just caving in to the fact that the criminal justice system, more and more, is being called upon to do things it absolutely should not be called upon to do. Panaceas such as plea-bargaining and diversion are simply a substitute for having the legislatures take a real look and see that, as a matter of fact, the criminal law is much too broad. We're trying to control too much conduct with it. Perhaps, in your testimony before Congress or your legislature, you should consider whether by advocating diversion, you're thwarting any potential for the criminal justice system to spend its time on what really needs to be done.

The author of this paper does not take any stand on whether or not the current trend towards increasing the use of pre-trial diversion as an alternative to more traditional forms of adjudication is desirable. More experience with these programs and further study will be needed to make a determination of their value. What this paper does intend is to raise questions about such programs while they are still in the developmental stages. As plea-bargaining and trials become displaced by less formal diversionary procedures, the dollar cost of our criminal justice system may decrease. However, students of the criminal justice system and taxpayers alike would do well to consider whether, in the long run, pre-trial diversion will be a bilk or bargain.

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[15] Allison, *ibid.*, found sentences in Scandinavia to be much shorter than sentences for comparable offenses in the U.S. In addition to shorter sentences, state statutes should be revised so as to implement the recommendations of the ABA standards that a wide range of alternatives be available to the sentencing court. [See American Bar Association Standards Relating to Sentencing Alternatives and Procedures (Approved Draft, 1968), Standard and 2.1].

PRETRIAL DIVERSION BILLS

WEDNESDAY, FEBRUARY 7, 1974

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES,
AND THE ADMINISTRATION OF JUSTICE OF THE
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 10:35 a.m., in room 2226, Rayburn House Office Building, Hon. Robert M. Kastenmeier, chairman, presiding.

Present: Representatives Kastenmeier, Danielson, Drinan, Railsback, and Cohen.

Also present: Herbert Fuchs, counsel; William P. Dixon, counsel; Bruce A. Lehman, counsel; and Thomas E. Mooney, associate counsel.

Mr. KASTENMEIER. The committee will come to order this morning for a continuation of our hearings on H.R. 9007 and S. 798 on pretrial diversion bills.

We are very pleased and honored to have this morning the Honorable William J. Campbell, Senior District Judge, Chicago. With Judge Campbell are two of his associates whom I will call on the Judge to introduce to the committee.

Judge, you are most welcome to abbreviate your statement in which case your statement in its totality will be accepted for the record.

TESTIMONY OF HON. WILLIAM J. CAMPBELL, SENIOR DISTRICT JUDGE, CHICAGO, ILL., ACCOMPANIED BY WAYNE JACKSON, DIRECTOR, FEDERAL PROBATION SERVICES, AND DONALD CHAMLEE, ASSISTANT CHIEF OF PROBATION, ADMINISTRATIVE OFFICE OF THE U.S. COURTS

Mr. CAMPBELL. Thank you. If it may be inserted at this point in the record, I would appreciate it. I might say it represents completely the views of the Judicial Conference of the United States, at the instance of whose chairman, the Honorable Chief Justice and Chief Judge Murrah, the Director of the Federal Judicial Center, join in this presentation on behalf of the Judicial Conference of the United States, and I would like it inserted in the record with your kind permission as their statement as well as my own.

Mr. KASTENMEIER. Without objection, that shall be done.

(The statement referred to appears at p. 113.)

Mr. CAMPBELL. Thank you, sir.

Those with me are Mr. Wayne Jackson, who is the Director for the Federal Probation Services in the administrative office of the U.S.

Courts, and his assistant, Mr. Don Chamlee. They are responsible for a great deal of the statistical data which is contained in the statement which the chairman has just inserted.

Perhaps for the sake of prompting questions—I certainly do not intend to read the statement, your having so graciously included it in the record. I will hit just one or two of the high spots in summary of the statement so that we can open the subject matter of it for questioning by the committee if you wish to question me.

I would like to observe that since 1936 we have been operating in the Federal courts a system of deferred prosecution. The Federal probation system has been the backbone of this operation, and has cooperated with the Department of Justice in the administration of a limited program of deferred prosecution which is informally known in our circles as the Brooklyn plan. Under this plan the U.S. attorney may hold in abeyance—and I point out he has the control of the situation—he may hold in abeyance prosecution of a defendant, usually a juvenile, contingent upon his good behavior. More recently adults have been included in the program. The program usually lasts not exceeding 8 months and is supervised from its very inception by the U.S. probation officer. The prosecutor either closes the case upon satisfactory completion of a definite term or processes his original complaint where there is a subsequent delinquency.

The exercise of discretion by the prosecutor has not been, in our experience with the plan, at all arbitrary. It turns in every case on a complete social investigation made by the probation officer at his request and at the inception of the prosecution.

Of course, he always has, after receiving such a report from our probation officer, the courts have made our officers available to the prosecutor for this purpose. He also has that other act of Congress with which you are familiar, 18 U.S.C. 5001, under which he is authorized to divert any Federal offender under 25 years of age for local handling and sometimes that happens if the prosecutor, on the basis of the report of the probation officer, has felt that that is indicated.

Now, deferred prosecution, I should like to point out to the committee, can be traced back first to 1936, as I indicated, in our own court at the Eastern District of New York wherein the prosecutor in that district at that time sought a method of avoiding the demoralizing effect of court procedures for juvenile offenders. It received great impetus from the chief judge of that district, a distinguished namesake of mine, to whom I wish I could claim relationship, the Honorable Marcus B. Campbell, for many years chief judge of the Eastern District of New York.

Between 1936 and 1946 more than 250 juvenile offenders in our court in Brooklyn were handled under this plan, and it is significant to note that of all these 250 only 2 violated and had to go through with the rest of the prosecution.

The success of the plan was so outstanding that in 1946 the then distinguished Attorney General, later Justice of the Supreme Court and head of the Federal Judicial Center, the Honorable Tom C. Clark, brought the plant to the attention of the Judicial Conference of the United States in his annual report as Attorney General. He requested our conference to consider this problem and to consider a favorable report on extending its use to other districts throughout the United States.

The report of the committee is referred to in our statement and is also before your committee, and they found it extremely valuable and that its use should be encouraged. Since that time that has been encouraged. The committee, however, reported and recently the Judicial Conference of the United States has found that although it is an excellent plan and has worked very successfully in the selected case that the various prosecutors have brought it, nonetheless, the most patent flaw in the scheme of deferred prosecutions is that it does not have specific sanction in any statute.

It is with great gratification that the Judicial Conference of the United States, and I personally as its representative here, not the attention which the Congress is giving to this very important tool in the Federal judicial machinery.

Now, no statutory authority has existed for the successful use of the plan since 1936 right down to date except in the Canal Zone. Apparently they, in their act, authorized this in the Canal Zone Act of 1962, acting obviously on the success of the administration by the probation officers in our courts in the mainland.

In 1949 probation officers were urged by the administrative office of the U.S. courts to lend their full support to this deferred prosecution plan if it met the approval of the court in their district and to offer their full services to the U.S. attorney in each district for the continuance and enlargement of its use.

In 1946 the Attorney General first urged all of his U.S. attorneys to use this deferred prosecution in worthy cases. The Department's statement in that regard is attached to the statement you have just kindly inserted in the record.

The most recent policy statement of the Department is also attached, that was on June 29, 1964, in the Department's memorandum No. 377.

Now, by definition, the plan is not available for use in adult cases. It was started for juveniles only. Departmental policy, however, does not object to special consideration being given in other ways to unusual cases involving adult offenders, and so it has grown to be used in special adult cases by the various U.S. attorneys throughout the country, but still in a very small and limited number.

Now, conditions of supervision provided by the Department of Justice in 1964 are also attached to the memorandum under exhibit 8 attached to my presentation, and I would refer again to the fact that the supervision is carried on voluntarily by the courts through its probation department.

We urge our probation officers, as I have previously said, not only to cooperate with the U.S. attorneys in giving all the supervision they ask, but also encouraging the use of this in many other cases.

Now, supplementing this policy, the Department has subsequently provided the great service of the FBI in the form of what is called flash notices in the event of violation of the condition of deferred prosecution, and to bring them immediately to the attention of the U.S. attorney so that the deferred prosecution can be stopped and prosecution commenced in certain cases.

Now, I attached to the statement also, which I shall not bore you with at this point, but which is there for reference, the statistical review of deferred prosecution as we have administered it thus far.

It commences on page 10 of the attached statement and shows the growth in the use of deferred prosecution and the number of per-

sons under court probation. It is interesting to note that the percentage of increase in those given deferred prosecution, although they are few in number, almost equals exactly the percentage of increase in the number of persons put on probation for all crime by the Federal court.

Table 1 on page 11 shows the deferred prosecution workload, the latest year the statistical report shows for 1973 fiscal year there were 689 persons treated under this deferred prosecution plan, and at the close of the fiscal year those and some additional ones total 786 were still under supervision by our probation officers reporting regularly to the U.S. attorneys.

Tables 2 and 2B demonstrate trends in the proportion of persons under deferred prosecution supervision. Table 2B in particular shows a trend toward the use of deferred prosecution for older defendants, which I think is significant. Although the plan is intended only for juveniles, that has grown in use by the prosecutors into the adult field.

Tables 3A and 3B reveal that there has been little change in the proportion of persons under deferred prosecution supervision with prior criminal records; that remains constant for the period that is shown on review.

Tables 4A and 4B report the offense for which deferred prosecution was granted, and trends therein since 1968. The offense category of largest growth, it is interesting to note, since 1968 is in the larceny, theft, interstate transportation of stolen property category, and the percentage of success in that is the same, which is very significant, in my judgment, since that is the large increase in Federal crime.

For persons granted deferred prosecution, the only available measure of effectiveness we have found is the means by which the person is removed from supervision.

Table 5 analyzes removal from deferred prosecution for the fiscal years 1964, 1968, 1972, and 1973, and these are years for which comparable figures are available and they are reported and attached to the report.

Table 5 of the statistical information reveals that for the 4 years in question, 93 percent or more of the persons removed from deferred prosecution completed their term satisfactorily. I believe this is particularly significant in view of the category of offenses which you will note from the preceding tables and in view also of the fact that it now includes adults as well as juveniles.

The successful completion rate has improved over the years, and in fiscal year 1973, 98.4 percent of the persons removed from supervision completed their term successfully. Eighty-eight members of this group or 13.6 percent were removed from their period of deferred prosecution prior to the full term expiration date.

Now, in view of that successful use of this deferred prosecution over these years by the prosecutors throughout the United States, practically on their own, with of course the approval of the Attorney General, the question naturally arises, and it was debated in our Judicial Conference of the United States, what is the need for legislation? Well, the first need, and as I say, we are particularly gratified that the Congress recognizes it in considering this legislation, is the modest number of persons who are under deferred prosecution. Currently it represents only 1.4 percent of the total people under supervision

by the Federal probation service. Of a total of 54,346 persons under all forms of supervision by our probation service at the close of fiscal year 1973, only 786, as I have previously mentioned, are still under the deferred prosecution supervision.

Now, we feel on the basis of our experience in dealing with this, and on the reports that we have from the various chief judges throughout the United States in the district courts, with most of whom I have talked personally on this prior to testifying here, that the lack of clear legal authority for deferred prosecution is the cause of this inhibiting of its growth. Many feel, many prosecutors still feel in spite of the department's strong statement on the subject, and in spite of the attitude of many of the courts, that it is a questionable practice in the absence of specific legal authority by the Congress. Even more than that is the factor of risk. Deferred prosecution, as I have said heretofore is being used by the U.S. attorneys selectively. Our observation has been that largely it applies pretty much to what you would call the cream of the crop. The judges feel, and the judicial conference joins in this, that a salutary program such as this should be extended to all offenders, not only the cream of the crop, but the poor fellow, too. We would like to see this uniformly applied, certainly the discretion should remain in the U.S. attorney but give him statutory authority to use it generally. As it is now, I think he is rather timid in using it because he wants the cases to succeed and he will only pick those that are almost certain to succeed with the capable supervision of our probation service. I think the element of risk should be extended so that it applies equally to all persons, particularly first offenders of all age groups.

Therefore, more extensive use, in my judgment, and in the judgment of our judicial conference, is in the public interest. In order to accomplish this, we feel two things are needed: First, clear legal authority such as the two bills before you, H.R. 9007 and Senate 798, would provide; and, secondly, a positive program which our probation service could effect and put in uniformly if there were statutory authority. We are doing it now on more or less an ad hoc basis, and it works very successfully, as I have indicated. But if our probation service had the statutory directive to do this it could adopt a national program of great impetus to the use of deferred prosecution and of great materiality to its extension and success.

The goal of deferred prosecution is to intervene as early as possible following an offense to get it in the hands of the probation officer as quickly as possible where remedial work can be done rather than to drag it through the processes of the courts.

Diverting a person to a program of deferred prosecution avoids the attendant negative labels of judgment, conviction, sentence, jail, or prison that so often result unfortunately in a revolving door of residivism.

In our judgment the enactment of a bill to provide an expanded program of pretrial diversion would be a mandate to the courts to use deferred prosecution and to the prosecutors as well for a broader range of offenders. A program could provide the courts with major dispositional alternatives. Indeed, it might well eliminate a great deal of the objection there is now to plea bargaining, because in most of the cases in which plea bargaining is now used, in my judgment after some 33 years of experience as a judge and some 3 to 4 prior to

that time as U.S. attorney, in my judgment most of these that are now the subject of pretrial plea bargaining would be diverted if the Congress would give authority for such a program. It would save all of this terrible bandying about of these people that results from the criminal process.

Properly administered, a program of deferred prosecution should be the offender's one and only experience with the criminal justice system. I think our success in it on the present voluntary basis without statutory authority over this number of years indicates this is not a wild assertion on my part or on the part of the Judicial Conference of the United States. I think we could eliminate from the whole system of prosecution of offenders a great volume of people whose only contact would be that of a very beneficial nature with a probation officer.

Now, of course, in order to do the job, adequate resources are necessary. In our judgment offenders in a program of deferred prosecution should be placed in caseloads of a probation officer not exceeding 35 per officer. This will provide intensive supervision and services and assure prompt action to protect the community in the event one should violate. The execution of the plan will also require an adequate investigative staff to provide careful screening of the candidates. There must be scrupulous attention to screening offenders so that only those who meet carefully defined standards are placed in this category.

Information developed by the probation officer under our present use of the plan has resulted frequently in complete dismissals, sometimes in referrals to mental hospitals, medical facilities, vocational training programs and social agencies, in other words, truly diverting the alleged offenders before they ever become a defendant, getting him into something that will help him and straighten him out rather than making him another convict.

Now, of course, to do this there must be a modest increase in the investigative workload of probation officers. In order to give you some idea of what that would be we have conducted a survey of the 50 chief probation offices across the United States which reveals an estimate that if H.R. 9007 is enacted, those districts, those 50 districts estimated that 1,326 persons under a program of community supervision and services would be certain to result in the first year. So we estimate that at least 2,000 persons in the first year of the operation of H.R. 9007 would be the result.

Table 6 gives the breakdown of the districts on the basis of our estimate.

Now, in order to give you some idea of the estimated manpower and costs that a good man under H.R. 9007 would require to supervise on deferred prosecution 2,000 people, we have prepared on page 31 of my statement an estimate. We feel it would require 57 positions in grade JSP–9 and 6 supervisors in JSP–13, with 30 clerk-stenographers in JSP–5. It also provides for certain nonrecurring furniture and equipment items, bringing a total of $2,191,500 in the first year.

If I might respectfully suggest in passing, as the former chairman of the Committee on the Budget of the Judicial Conference of the United States that prepared and submitted for many years to the Congress our request for appropriations for probation officers as well as for the courts, this is a mere pittance when compared with the number of lives that will be humanely treated and saved as a result of a

deferred prosecution plan rather than being subjected to the normal criminal processes.

Bear in mind I am not criticizing the normal processes. I am not criticizing my own courts and I am not criticizing the Department of Justice or the Bureau of Prisons. I am merely trying to point out on behalf of the Judicial Conference a very valuable alternative that will be of great benefit to the entire population.

We feel that these 93 additional personnel would be necessary for a program of 2,000 if the plan is implemented correctly. We also feel if the program gets a good start, we may expect ready acceptance by all the courts and a rapid expansion of the number of persons handled in this manner.

The program can only be successful if the quality of services provided in the program remains at a high level.

Diversion is a wise investment but it will continue to be so only if diversion continues to represent the best in services to individuals, and that means, gentlemen of the committee, more participation by a greater number of probation officers who are able to give individual personal attention to these unfortunate victims of crime.

I would like to divert for one moment, if I might, on the record to pay the respect and appreciation of the judiciary to four members of this committee, its distinguished chairman, Congressman Kastenmeier, our good friend, Congressman Railsback from that great State of Illinois, Congressman Cohen and Smith for the great effort they extended to increasing back to our original request on the floor of Congress the number of probation officers that we asked for, the increase we asked for last year. They were sorely needed. I would like to assure these four fine members of your distinguished committee that their services are well appreciated by the judiciary and well appreciated by the people whom these probation officers are now serving.

Mr. KASTENMEIER. We thank you for your comments.

Mr. CAMPBELL. Thank you, sir.

Now, on several recent occasions to which some of which I have already adverted, the Judicial Conference of the United States has made public expression of its views concerning plans for pretrial diversion such as the two bills now before you, H.R. 9007 and S. 798. All of these actions by the Judicial Conference I would like to point out should be taken as consistent with each other, as we instruct the juries in criminal cases, and as consistent support in principle of pretrial diversion as embodied in the two bills, with particular reference to H.R. 9007.

The chairman of the House Judiciary Committee has been advised by the administrative office of the U.S. courts on behalf of our Judicial Conference that the bill H.R. 9007 includes the changes recommended by the conference in April 1973. Specifically and most important, this bill, H.R. 9007, as contrasted with S. 798, provides that the program of community supervision services be preformed by the U.S. probation officers. I think the experience of deferred prosecution thus far has demonstrated that without the probation officers handling it, it will not be effective. Indeed, they are in it now at the invitation of the Department of Justice and at the volunteering of their services by the judiciary. That has worked successfully. Your bill H.R. 9007 continues this successful operation, and I believe that is the salient and most important difference between that bill and the Senate bill.

Perhaps the committee is concerned with whether the law needs to conform to the Supreme Court decision in Galt, which calls for representation by counsel of juvenile defendants. I think that counsel should be provided for all defendants in the Federal criminal process, whether deferred prosecution or otherwise. I do not think we should any longer try to administer the Federal judicial system or the criminal justice administration without adequate counsel at all stages, even including investigative under deferred prosecution, representation by counsel.

The question might also arise as to whether parents or guardians of a juvenile can consent. I would suggest that can be left to the discretion of the individual judges or their officers assigned to this.

Another point to be considered in this regard, the Judicial Conference feels, you might want called to your attention is whether U.S. magistrates might hear these cases and release persons on a plan of supervision and services. In my judgment, for what it is worth, and it is shared by a majority of the Judicial Conference of the United States, I think this would be an excellent use of the office of magistrate which was just created by the Congress recently. In fact, I would strongly recommend to the committee that the initial court handling of any of these diversion cases be solely by the magistrates so that they do not get into the stigma of a trial. I would also give the magistrates jurisdiction to release them after satisfactory completion, thus being spared a further prosecution. It would also keep the court independent of the handling of it in the event there should be a trial for violation later on and the U.S. attorney decides that he wants to indict him anyway and does indict him, then none of the proceedings before the magistrate would be part of the trial and you would not have the problem of the judge who first put him on deferred prosecution presiding over his trial. You would have a completely independent point of view, which of course the trial judge should have in approaching any prosecution.

Now, the question also arises under both bills as to who should determine who is eligible to participate. I strongly recommend that that decision be left with the prosecutor. I think that is where it belongs. After all, it is a waiving of the prosecutorial function. I do not think the courts, probation officers or anyone else should interfere with that function, lawful function of the Department of Justice.

I think, in conclusion, in this statement I have tried to report just the highlights that you may want for questioning me, and whether there is need for this legislation. You can tell by what I have said already, in my judgment and that of the Judicial Conference the answer is emphatically yes.

The second question is what are the relative merits of the two bills under consideration, H.R. 9007 and S. 798. This, of course, is more difficult. We do not want—the judiciary never wants to be in the position of telling the Congress what to do or of comparing the action of one House with that of the other. We point out, as I think I have in my statement thus far, the very laudatory provisions of your bill, H.R. 9007 as contrasted with the Senate's bill in that it leaves the handling of these cases where that has been effectively demonstrated it belongs, and that is in the probation service. Both bills provide for an expanded and adequately staffed program for deferred prosecution. I think the House bill provides the better of the two systems.

Without gainsaying any of the provisions of S. 798, H.R. 9007 does clearly assign the responsibility where, in our judgment, it belongs. The probation system in our considered judgment is the logical home for deferred prosecution. That is where your bill H.R. 9007 puts it.

Gentlemen of the committee, the time for expansion of this proven function in our judgment is here. In proposing a plan of deferred prosecution the subcommittee has already dealt with the one real danger, the likelihood that deferred prosecution will be expanded without advance provision for additional manpower. This would be a tragedy. It is heartening to us in the judiciary to see that H.R. 9007 anticipates this danger and makes it clear that the probation system cannot assume the added responsibilities until funds for the purpose are appropriated.

I have attached as an appendix to my statement selected excepts of reactions of various probation officers in citing individual successful cases under deferred prosecution to date. I recommend that you might want to look them over.

Thank you for listening to me, and please let me have any questions that you would like to ask.

Mr. KASTENMEIER. Thank you, Judge Campbell, for a very thorough explanation of the position of the Judicial Conference and your own on this question.

I will be brief. We have a number of other witnesses to hear from.

You refer to the historical development of pretrial diversion or deferred prosecution and suggested originally it was used for juveniles or only for first offenders, the cream of the crop. It was also suggested as being used increasingly for adults. Do you agree with the provision of H.R. 9007 which allows the use of pretrial diversion for any offender?

Mr. CAMPBELL. Yes, I do. In fact, I think it is most salutary.

Mr. KASTENMEIER. A second question which we dealt with yesterday is should there be any understood, if not statutorily expressed, criteria by which individuals qualify for this diversion program?

Mr. CAMPBELL. I would warn, on the basis of my personal experience, which as I have indicated is over several years, I would warn against tying the hands of the prosecutor in that way. I think that we should leave the discretion entirely in the prosecutor. Indeed, I am such a proponent of the authority of the office I formerly held in the northern district of Illinois that I even favor, as I think I have sent copies of my remarks to the members of this committee, I even favor abolition of the grand jury in favor of complete prosecutorial discretion in the prosecutor himself. I would not favor hampering that authority by setting down any hard and fast guidelines or national standards that he is to follow.

Mr. KASTENMEIER. One other question. As a precondition, perhaps a qualifying precondition, the Justice Department suggested that the individual selected for the program ought to acknowledge guilt, the crime with which he might be charged or was in fact charged. Do you think that that is a necessary element in terms of his qualifying for pretrial diversion?

Mr. CAMPBELL. No, Mr. Chairman, I do not. I think that the U.S. attorneys have demonstrated in their use of this plan since 1936

that if the person is treated by the probation office it does not require an acknowledgement of guilt. They have already had successful experience with that, and I would advise against it for their own protection in the subsequent prosecution if one should develop. I think such a plea or such an admission might well be held unconstitutional, if attempted to be referred to in a subsequent trial for those who are unsuccessful on deferred prosecution. I would advise strongly against requiring such an admission.

I think on the other hand you have to keep some sort of a docket of who was placed on it, and if you give this authority to the magistrate rather than to the trial judge, I think he can keep such a docket and it is not part of any criminal prosecution and it does not require any admission of guilt. It requires merely a referral under your bill.

Mr. KASTENMEIER. One last question, and this really is tangential, but the fact is we will be taking up amnesty in a month or so as a question.

I notice in your statistics, page 19, for offenses of the Selective Service Act, 1968–73 comparisons, that you have but six in 1968 and but four in 1973.

Mr. CAMPBELL. Yes, sir.

Mr. KASTENMEIER. The question goes to this class of persons as first offenders, young people, who would on the surface seem to qualify clearly in terms of good risk for the program and yet there were so few. Was there a consensus effort to screen out selective service violators?

Mr. CAMPBELL. I would say so. We are referring here, of course, to the conduct of the U.S. attorneys. Our probation service could only take those that the U.S. attorney gave us. The U.S. attorney did not give us very many selective service cases, and purely from my own observation, I do not know anything official about it, but I would say that is a correct reflection of the attitude of the Department of Justice toward those violators at the time referred to in the 2 years in our statistical table.

I think the Department was urging the prosecution of every one of those cases on the U.S. attorneys, and I think that is the reason they have diverted so few.

I think if you compare the attitude of the various courts, the various district courts toward those offenders, you will find expression more along the lines of recognizing that they are in many instances young and sincere offenders in the treatment they have received in the courts.

But the statistics to which you refer, Mr. Chairman, are only those referred to us and our probation service by the U.S. attorneys who I think were under direction that all such cases should be prosecuted.

Mr. KASTENMEIER. Thank you very much.

I yield to the gentleman from the great State of Illinois.

Mr. RAILSBACK. Well, I want to say that I am of course delighted to have you here. I remember when I was a freshman Member of Congress back in 1967 when I heard you testify at that time, and I was very impressed. I do not know whether you and your colleagues stayed up last night to prepare your testimony, but you covered about everything that we raised yesterday, including such things as the applicability of Gault and whether the same judge that diverts should end up trying if the accused has to leave the program, and you also covered a point that

we are interested in about whether the program should be primarily directed toward the youthful first-time offenders, which I think most of us feel it should but we do not want to exclude anyone.

I want to say to my colleagues on the subcommittee that Judge Campbell served many years as the Chief Judge of the Northern District of Illinois with a great deal of distinction. I doubt if there is a judge that is any better known in the great State of Illinois than Judge Campbell, and I am glad to see that he is still as energetic as ever and as persuasive as ever.

I wanted to ask your feelings about a reference on page 31 of your formal statement which relates to contractual services, which I think might be very important. I want to comment that I am glad that you had a reference in there, and I think in your budget you allow $750,000 as an estimate for contractual services.

Mr. CAMPBELL. That is right.

Mr. RAILSBACK. I just wonder, up until now if the probation officers have been able to contract for, say, shelter care homes or residential homes.

Mr. CAMPBELL. No, unless they are owned or operated by the Department of Justice. Of course, the Bureau of Prisons works very closely with the probation service in making any of its facilities available. Other than that, the probation officers usually have had to get local community services for this and at no expense to the Federal Government, but provided for by private charity.

Now, under a properly funded program the Federal Government should no longer properly statutorily authorize such a program. We feel that the Federal Government—indeed we cannot impose that much further on the local facilities. On the basis of the experiences our officers have had in the cases they have supervised in the past, we feel that an overall allowance of $375 a case would cover the need of contractual services. That is where we arrived at the item of $750,000 in the budget, assuming 2,000.

Mr. RAILSBACK. I think that is very important, because we always have to fight the battle of the budget for the probation officers, for one thing. It looks to me like this is going to be a continuing battle. You mention somewhere in your statement that a proper caseload would be something like 35 cases, which I would agree with. If we run into a situation where the probation officer simply has case loads that are numerically more than that, and in some cases they have been substantially larger than the 35 cases, then I think it would be helpful to have this contractual authority if there are good facilities within a community to pay them for helping.

Mr. CAMPBELL. Precisely.

Mr. RAILSBACK. There is a difference in Senate bill 798 and H.R. 9007 as far as who can really terminate an accused or a person's participation in this kind of a community services program. I am a little bit concerned about Senator Burdick's leaving it apparently to the attorney for the Government to actually decide when a release should be terminated, and it seemed to me we purposely avoided that. I am very much aware that the attorney's recommendation is certain to carry a great deal of weight with the court. But I still would prefer to leave it to the court.

Mr. CAMPBELL. I think he would be.

Mr. RAILSBACK. I am inclined to think so, too. It would seem to me it would be more judicious to let the judge decide, taking into account the recommendation.

Mr. CAMPBELL. I think you are absolutely correct in that, and it is one of the differences in the two bills that the Judicial Conference did discuss. We would much rather have that final determination, a judicial act for two reasons: first of all, to protect both the prosecutor and the defendant in that a specific charge has now been discharged. Well, that is a far cry from further prosecution, and the defendant is entitled to that. If we leave it merely to a voluntary action on the part of the U.S. attorney, that is not accomplished.

Second, if you invest this authority of deferred prosecutions to defer in the first place and to discharge in the latter instance, in the U.S. magistrate rather than in the district judge, I think you will have a completely independent officer who has time to really supervise the work of these cases and the final hearing would be, I would anticipate, a motion from discharge of supervision which would be brought largely at the instance of the probation officer. Now, they come to the U.S. attorney frequently before the period has expired and say, "Look, he is doing so well, he has got a job, back with his family, why don't we discharge him from supervision?" In every instance the U.S. attorney has agreed. So I think you would be following the same procedure and giving it the additional sanction and approval of a judicial fiat if you invested that power in the U.S. magistrate on motion either by the U.S. attorney or by the defendant's attorney or on his own motion by the probation officer, which is the way it is now done.

Mr. RAILSBACK. I thank you for your statement. I really think that makes good sense, too, and hope that we are successful.

Mr. CAMPBELL. I would strongly advise it.

Mr. KASTENMEIER. The gentleman from California, Mr. Danielson.

Mr. DANIELSON. I have but one question.

I am mindful and understand your feeling that the magistrate should have a part to play in terminating the supervision, but when placing this person on supervision you have mentioned before that you believe in investing great discretion in the U.S. attorney.

Mr. CAMPBELL. Complete.

Mr. DANIELSON. What role would the magistrate have at that stage?

Mr. CAMPBELL. None at all except to make the order of reference to the probation officer by which he has the legal authority and to carry out the program that will be recited in your statute.

Mr. DANIELSON. The discretion would rest with the U.S. attorney.

Mr. CAMPBELL. Completely, and I think it should stay there.

Mr. DANIELSON. I thought I misunderstood you.

Mr. CAMPBELL. I agree with you 100 percent on that. I do not think that the prosecutor should ever lose the right to chose which cases shall be deferred, which ones shall be prosecuted, whether to proceed by information or indictment. All of this should be left solely in the hands of the prosecutor.

Mr. DANIELSON. And the inception of the magistrate's function would be pro forma, to establish a docket and to issue the order?

Mr. CAMPBELL. To the probation officer which gives him the legal authority to do that which the U.S. attorney asks him to.

Mr. DANIELSON. But that would be in response to the U.S. attorneys——

Mr. CAMPBELL. Yes, sir.

Mr. KASTENMEIER. The gentleman from Maine, Mr. Cohen.

Mr. COHEN. Thank you, Mr. Chairman, and thank you.

Congressman Railsback never fails to remind us he does come from the great State of Illinois.

Mr. CAMPBELL. I am happy to hear that.

Mr. COHEN. Now that he has been endorsed by a man of your distinction, I think he will be insufferable for the next few months.

Also, I find it somewhat difficult being the freshman minority member of the Committee on the Judiciary, since I am called upon to ask questions when they have already been asked. I guess I have lamented about this before. I was pleased to hear your response to Chairman Kastenmeier's question about the Justice Department's position on the admission of guilt as a condition precedent to rehabilitation.

I only want to ask one question that we raised yesterday, and that dealt with Senate bill S. 798 and that is on the use of the advisory committee at the local level to sort of supervise and make periodic recommendations and so forth. I believe the Judicial Conference has endorsed that proposition and it is not in the House bill. You would support that, I would assume?

Mr. CAMPBELL. I support it with a little reservation. I think an advisory committee is a very fine thing, and each probation officer in his own district has such a committee at the present time. They draw very heavily on all local resources, the probation office has that as a matter of national policy that they do so.

I have only this hesitancy about it. I naturally support an advisory committee. I think that the Senate bill provides that it be at least approved by, if not appointed by, the chief judge of the district court of each district, and not to sell my own people down the river or anything of the kind, but I do not think in the field of social work we should have too much judicial interference. We have judicial supervision now. The probation system operates as an arm of the courts. It is under the courts. We appoint probation officers. They hold office at our pleasure. We have enough authority over them.

Now, if the advisory committee were to be merely a committee as the Senate bill, I am afraid, suggests, made up of judges of the court, I do not think it would add anything to the present system because we already have that.

If, however, it would mean the channeling of all the community resources into the probation office, then I think it is helpful. Now, that of course again depends on the administration in each district by each chief judge.

But answering your question in the overall, I share the opinion of the Judicial Conference and of the Senate that it is helpful to have such a committee. I do not know how by statute you can guide how they are going to appoint, but I hate to hobble the probation officer in deferred prosecutions.

Mr. COHEN. Just one final question. I have not really looked at all the statistics you provided in your statement, but what is the average csaeload per probation officer in this system?

Mr. CAMPBELL. We have reduced it now with the help of you gentlemen who got us the additional officers.

Sixty-seven under supervision by each officer as a national average, plus 37 presentence investigations per officer, and 51 for Bureau of

Prisons, the military courts, and so forth. We do their work without compensation.

Mr. COHEN. Thank you very much.

Mr. KASTENMEIER. The gentleman from Massachusetts, Mr. Drinan.

Mr. DRINAN. I want to say you gave the best testimony I have heard in my 3 years in Congress, and well and forcefully.

Why on page 30 is the great State of Massachusetts omitted?

Mr. CAMPBELL. Well, it is probably because Drew up there was keeping his probation officers so busy that he did not have time to answer my letter.

Mr. DRINAN. Why is the great State of Wisconsin omitted?

Mr. CAMPBELL. The great State of Wisconsin is probably omitted for the same reason.

Mr. DRINAN. Usually you have direct and cogent information.

Mr. KASTENMEIER. The committee is very grateful to you, Judge Campbell, and both the gentlemen accompanying you, Mr. Jackson and Mr. Chamlee, for appearing here this morning.

Mr. CAMPBELL. Thank you very much, Mr. Chairman.

I gather I am excused. I thank you for your kindness.

Mr. KASTENMEIER. If it is all right with the next two witnesses, I would like to ask you to come up together, Dr. Bertram S. Brown, who is accompanied by Mr. Hopkins, and Mr. Miller, who both are associated with the American Bar Association and represent other points of view as well.

Gentlemen, you may proceed and then we will proceed with the questioning, but I would like you both to present your testimony in tandem.

TESTIMONY OF DR. BERTRAM S. BROWN, DIRECTOR, NATIONAL INSTITUTE OF MENTAL HEALTH, ACCOMPANIED BY ARNOLD J. HOPKINS, ESQ., ASSISTANT DIRECTOR, AMERICAN BAR ASSOCIATION COMMISSION ON CORRECTIONAL FACILITIES AND SERVICES

Dr. BROWN. Mr. Chairman, it is a great pleasure to testify before the States of Massachusetts, Wisconsin, Illinois, Maine—if I left anybody out, God help me.

You may wonder why a psychiatrist and the Director of the Mental Health Institute comes to be testifying as a representative of the Commission on Correctional Facilities and Services of the American Bar Association. Gov. Richard J. Hughes, now chief justice of the New Jersey Supreme Court, a friend and colleague for many years, wanted to join in the discussion of these pretrial diversion measures in his capacity, chairman of the ABA Corrections Commission, but because of his new duties was unable to and asked me to represent the commission.

My own career in criminal justice matters started in Massachusetts as a young psychiatrist in training. I worked in Walpole and Concord Prisons, as a staff person in the division of legal medicine. Since then I have spent 20 years in this particular aspect of human suffering and behavior.

I have also appeared before the Judiciary Committee many times on our narcotic addict rehabilitation program before Don Edward and Chuck Wiggins and many members of the House Judiciary Committee.

More specifically, and I think related to the Federal leadership role of this bill, I became closely associated with Daniel L. Skoler when he was with the Law Enforcement Assistance Administration. During President Johnson's days, we had a program known as the White House Governors' Conference, where we flew around to 40 of the 50 States on Air Force 1, trying to see what the nature of the problems were—he, from the LEAA, and I, from the National Institute of Mental Health. Dan Skoler as you may know is now executive director of the ABA Commission on Corrections.

I might also say accompanying me is Mr. Arnold J. Hopkins. I first met Mr. Hopkins when he was a classification officer at Patuxent Institution for Defective Delinquents in Maryland. Mr. Hopkins is assistant staff director of the ABA corrections program and director of the National Pretrail Intervention Service Center.

That is a rather long introduction to the statement, but I thought between Father Drinan there and us, we might not need any lawyers.

It is a privilege to appear before this subcommittee on behalf of the American Bar Association Commission on Correctional Facilities and Services in support of legislation titled, H.R. 9007 and S. 798, authorizing pretrial diversion alternatives to court processing of certain criminal cases. Joining me in the discussion of legislative proposals H.R. 9007 and S. 798 is Arnold J. Hopkins, assistant staff director of the ABA Commission on Correctional Facilities and Services, who also has responsibility for administration of our National Pretrial Intervention Service Center.

It is with interest that I have observed the evolution and dynamics of the early diversion concept from my position as Director of the National Institute of Mental Health and affiliation with the corrections reform program of the American Bar Association. The intervention technique is not regarded as a new approach. We heard in 1936 in terms of diversion from the former witness, and you can see it in the approach to mental health services. My close association with the drafting and implementation phases of the Federal Community Mental Health Services Act enables me to be reflective on its contemporary application in the context of the criminal justice reform movement.

H.R. 9007 authorizing court-sanctioned community diversion placement procedures and the companion legislation S. 798, the Community Supervision and Services Act, represent, in our opinion, progressive and achievable criminal justice objectives. Moreover, we sense that many local jurisdictions eagerly anticipate the enactment of Federal pretrial diversion legislation that clearly signals public policy and leadership in the pursuit of viable alternatives to standard criminal justice programs and practices. I mentioned this in my informal remarks, and I do not know whether that has come up before, but the passage of this legislation, while it may impact hundreds and thousands of our cases in the State courts, also sets a model both practically and symbolically. Several community efforts demonstrating local pretrial diversion alternatives have achieved their experimental goals and now must consider the strategy and techniques by which project institutionalization—by which I mean the legislative hearing process—can succeed. As well, innovators persuaded by the record of tested diversion programs seek guidance from the subcommittee as deliberations on the cited legislative proposals are undertaken, thus enabling local gov-

ernment planning and program development priorities to achieve fruition.

Consequently, it is refreshing for me to observe a visionary Congress engage its vast expertise in the promulgation of legislation in the matter of pretrial diversion. Such a pronouncement will, I submit, greatly facilitate the initiation of criminal justice diversion to all levels of government, thereby allowing the concept to achieve significant national impact. Thus, a unique intergovernmental approach to the unnerving criminal recidivism rate is on the threshold of becoming a reality.

The ABA Commission on Correctional Facilities and Services views the two pretrial diversion measures to be examined by this subcommittee as important law reform efforts to strengthen the administration and performance of our criminal justice apparatus. While recommendations and standards developed by authoritative commissions abound, the matter of their translation and application to existing criminal justice systems and services requires considerable stimulation.

It is precisely this posture of the criminal justice reform movement that prompted the establishment of the ABA corrections reform program. As you know, Mr. Chairman, it was at the behest of Chief Justice Warren E. Burger that we began this effort.

In Washington you never know when your subordinate will become your boss. Chief Judge Bazelon, on the District of Columbia Appeals Court, had Justice Burger on his court, the next day he had Chief Justice Burger as his boss. Chief Justice Burger has taken a massive leadership role in corrections reform and has continually been supportive of the work of our Commission.

Now in its third year of operation, the Commission has designed and implemented a succession of national action programs to pursue promising correctional reform and offender treatment opportunities. I share the enthusiasm of our chairman, Chief Justice Richard J. Hughes of the New Jersey Supreme Court, and Commission colleagues for the dispatch and professionalism with which our corrections reform program has been administered. We are also pleased with the ongoing support we have received from the ABA, sister professional organizations, the corrections community, and the organized bar.

I profess a special advocacy and interest for the work of one Commission project. That is our National Pretrial Intervention Service Center, which I have the good fortune of serving as chairman of the advisory board. This project best exemplifies the interdisciplinary approach used by the Commission to stimulate change in the corrections process. Its mission of expanding the pretrial diversion concept by assisting localities in planning and program development efforts together with the operation of a national clearinghouse service, has provided excellent perspective for commentary on the two Federal pretrial diversion bills.

Under a $153,430 manpower grant from the U.S. Department of Labor, the Center was activated in March 1973 to stimulate the establishment of pretrial intervention alternatives to criminal adjudication modeled after the Labor Department funded experimental programs in New York (Manhattan court employment project) and the District of Columbia (Project Crossroads). Here the emphasis was on manpower services as a resource to achieve social and economical stability for selected criminal defendants with the expectation of reducing

recidivism outcomes. The success rate in terms of diverted criminal careers was gratifying in that successful participants of the Crossroads and Manhattan demonstration projects were two to three times as unlikely to reappear as offender statistics than persons processed through the conventional criminal justice sequence. We have all sorts of data which we ask to submit for the record rather than take time in verbal testimony.

In view of the solid performance of Project Crossroads and the Manhattan court employment project, the Labor Department has to date invested $4.2 million for support of a cluster of second-round demonstrations in nine cities to further test and analyze the pretrial intervention technique. Reports from these projects operating in Boston, Baltimore, Atlanta, San Antonio, Minneapolis, Cleveland, and the three California cities of Hayward, San Jose, and Santa Rosa suggest similar results in the reduction of recidivism. Our best estimate is that from 1968 to date, upward of 11,000 persons have enrolled in these pretrial intervention projects, three-quarters of the total admissions have been favorably terminated—that is, with charges dismissed—and of that number, approximately 7 percent have recidivated over a 3-month followup period. A more detailed accounting of divertee characteristics and performance results appears in the third annual progress report on the pretrial intervention program, prepared by Abt Associates of Cambridge, Mass., for the U.S. Department of Labor—March 1973.

In statements of July 20, 1972, and March 27, 1973, before the Subcommittee on National Penitentiaries, the views of the Commission on S. 798 were presented. The ABA house of delegates approved the recommendation for enactment of this legislation offered by the section of criminal law at the midyear meeting in February 1973. We were heartened to learn that the Community Supervision and Services Act was unanimously passed by the U.S. Senate on October 4, 1973, and take this opportunity to recognize the leadership and commitment by Senator Quentin N. Burdick in that most significant accomplishment. The report to accompany S. 798 prepared by the Senate Committee on the Judiciary has our total endorsement. I was particularly gratified to note the accommodations made by the Justice Department on issues pertaining to the mandatory guilty plea. These were apparently reconciled by the inclusion of statutory language in section 2 declarations—general expectation that participants would accept responsibility for their behavior—and the requirement of confidentiality of statements made by individuals in the diversion process—section 6(b)—which I might note was the only subject I did not hear come up in the extraordinarily comprehensive testimony of the last witness.

On comparative analysis of pretrial diversion legislation proposed in S. 798 and H.R. 9007, we find no substantial substantive differences though the former bill, it is recognized, represents a more comprehensive and flexible legislative framework. Legislation is an art of draftsmanship and we view H.R. 9007 as a basic authorizatoin for diversionary placement by the U.S. District Court with procedures for the disposition, but less detail on matters pertinent to administration of services. Otherwise the objectives of both bills from our action perspective are identical, including pertinent provisions on administration and functional aspects of the diversionary placement authorization.

There are, however, several salient provisions in S. 798 which ought to be commented upon on the basis of our experience in technical assistance activities of the ABA Pretrial Intervention Service Center. We find a healthy variation in deferred prosecution projects operating in approximately 20 jurisdictions. Programmatically, the regimen of community supportive services represents a mix of manpower and counseling emphasis. However, project variations exist in diversion authority, administering agency, intervention point, and operational schemes. The flexibility in design of demonstration models is an important factor to preserve so as to allow for alternatives in service agency selection, staffing patterns, utilization of existing resources, and delivery of services plans that are influenced by eligibility criteria, project site, financing options, and manpower availability. For these reasons we favor the strategy of flexibility in project function and resource utilization provided for in section 9 of S. 798. The proposed section 3172 of H.R. 9007 adds the screening, supervision, and servicing of diversionary placement cases to normal probation officer functions and, in this respect, may be unnecessarily restrictive, given the variety of options available within and outside the criminal justice system to perform these functions—for example, pretrial release projects established in 75 cities, employment service agencies, community treatment groups, and so forth. Again from my 10-year perspective, we must be most careful not to lock in other elements, to allow for new manpower and to allow no one bureaucracy to take hold of an important program, as I think this is. It may well be that Federal probation officers already have excessive caseloads, as is the case in many State agencies, and therefore would be unable to supervise additional diversion placements. In that situation, H.R. 9007 may unintentionally limit servicing alternatives and thereby frustrate the full implementation or expansion of diversionary placement projects. There is a cost factor in using only probation officers to supervise and service divertees that should be considered which is guarded against under the staffing options proposed in the Community Supervision and Services Act. Paraprofessionals employed as diversion counselors and job developers are working effectively in most pretrial intervention projects in operation today and at considerably less cost than staffing exclusively with professionals. The feasibility of utilizing various paraprofessionals has been the subject of a National Institute of Mental Health research project. The results have been so promising that 20 positions have been established as a line item in the budget, a very important advance in Federal manpower schemes and increasingly replicated in State facilities. The utility of this team approach in legal, medical and educational services is gaining prominence. The forementioned stricture would seem to impair utilization of this staffing resource.

Other features included in S. 798 that might be provided for in H.R. 9007 would be: (i) Confidentiality of admissions made during the diversion process, (ii) periodic reporting of participant progress to prosecuting attorney and referral judge, (iii) guidelines for termination of unsuccessful diversionary placements, and (iv) establishment of program advisory committees to provide oversight and policy.

It is our position that as projects demonstrate their utility, steps be taken to formalize the process and procedure for diversionary placement so as to insure institutionalization of the technique. We find a

variety of approaches used in the sanctioning of pretrial diversion opportunities. New Jersey and Pennsylvania have court promulgated rules of procedure, Massachusetts has legislation pending in the senate—S. 1592—which prescribes diversion procedures and administrative services, and Washington recently enacted subsidy legislation—S. 2491—which provides State stipends to local units of government diverting defendants to community services programs at $448 per referral. Absent these examples, the authority for conducting pretrial diversion projects is based on prosecutorial discretion in the charging function with use of extrajudicial and third-party custody arrangements for placement of adult/juvenile diversion cases. Formalized operational agreements and administrative policies do not exist for many pretrial intervention projects making them vulnerable to accountability inquiries.

Turning to the legal issues in the diversionary process, a discussion of certain fundamental constitutional safeguards appears in the Senate Judiciary Committee report on S. 798 at pp. 13–16. Most prominent of the diversion legal issues is the desirability or nondesirability of a mandatory guilty plea as a condition precedent to participant enrollment. The ABA position on this issue was eloquently stated by Keith Mossman, Chairman of the section of Criminal Justice in Testimony on S. 798 before the National Penitentiaries Subcommittee. Mr. Mossman indicated the ABA was not persuaded that a required plea of guilty had rehabilitation value and suggested this concept should not be written into the statute. Chairman Hughes responded in kind via his letter of February 8, 1973, to Senator Burdick. S. 798, as amended, declares in section 2 that diversion alternatives to institutionalization be "made available to persons accused of crime who accept responsibility for their behavior," a consideration agreed to by the Justice Department as having the effect of excluding individuals who choose to plea not guilty from entering the diversion program. We find no fault with this provision.

Other diversion legal aspects dealing with (i) equal protection guarantees on eligibility criteria, (ii) nondisclosure of defendant admissions while in a program, (iii) due process in termination hearings for unsuccessful partcipants, and (iv) assistance of counsel will be addressed in the forthcoming technical assistance publication by our National Pretrial Intervention Service Center.

One of our functions is to gather the best material on the issues to date and that is a forthcoming publication that will be of use in thinking through these difficult issues.

Mr. Chairman, our Commission is of the mind that pretrial diversion is an idea whose time has come, that has been building at least since 1936, probably longer than that. There exists persuasive evidence of the concept's viability in reducing criminal recidivism by enabling participants to get into a life-style of worthwhile employment and stability with the help of manpower services and training. And, too, the criminal justice system benefits through greater flexibility in its operation and increased effectiveness as a rehabilitation vehicle. The community gains from decriminalization achievements, as well as from improved employability and productivity of the diversion "graduate."

Let me hasten to add that pretrial diversion is no panacea but rather it represents but one approach conceived to estop, or at least slow down, the revolving door of crime today.

After careful study and analysis of S. 798 and H.R. 9007, we believe both legislative proposals offer a sound basis for introducing the pretrial diversion capability in the U.S. District Court System. However the conference committee comes out, we wish the legislation well.

[Mr. Brown's statement appears at p. 130.]

Mr. KASTENMEIER. Thank you, Dr. Brown, for that excellent testimony.

Now we would like to go to Mr. Herbert S. Miller. He is here today as chairman of the American Bar Association's Criminal Justice Section's Committee on Corrections and Rehabilitation of Offenders.

We have your statement, Professor Miller, and you may—if you care to summarize it, you may do so. In any event, we want to hear what you have to say.

TESTIMONY OF HERBERT S. MILLER, ESQ., CHAIRMAN OF THE CRIMINAL JUSTICE SECTION, AMERICAN BAR ASSOCIATION

Mr. MILLER. I am delighted to be here.

I will simply submit the statement for the record and simply highlight some points.

[Mr. Miler's statement in full appears at p. 133.]

Mr. MILLER. I do not appear as a representative of the Criminal Justice Section, but as a representative of the American Bar Association. The position accomplished in this testimony started out with my committee on corrections and rehabilitation. We approved S. 798 unanimously at the committee level with certain amendments. The matter was thoroughly discussed by the criminal justice section and then forworded to the house of delegates, and the house of delegates unanimously approved the authority of the criminal justice section. So I am here on behalf of the American Bar Association.

Mr. KASTENMEIER. You are chairman of the Committee on Corrections and Rehabilitation of Offenders.

Mr. MILLER. Of the criminal justice section, yes, sir.

Mr. KASTENMEIER. But you are speaking for the American Bar Association as a whole.

Mr. MILLER. Correct, Mr. Chairman.

I will not go into the fact that there is simply no opposition to the concept expressed in both of these bills. I haven't heard any, and I would simply like to go into some of the issues that I think are of direct concern to this committee.

Probably we spent as much time discussing the whole question of whether or not there should be a guilty plea accompanying this legislation as any other question. There was unanimity at my committee level and at the Criminal Justice Council level that there should be no requirement of a guilty plea in this legislation, that we were most persuaded by one of the members of the council, who was vociferous to including this in this legislation. In our opinion the plea negotiation, the process has nothing to do with diversion. They are two completely separate things and should be kept separate.

This leads into some other issues which go to the heart of what this legislation hopes to accomplish.

I think the key difference between the two bills is in the prosecutorial discretion that is exercised on termination of diversion program, either by dismissing the case or resuming criminal proceedings.

This question was discussed quite extensively and it was again the unanimous feeling of my committee and the section endorsed by the ABA that the initiating process, the initiating of a diversion program and initiating any termination should be done by the U.S. attorney, but that in both instances, the institution of the diversion process or its termination should be real oversight by the court, complete oversight by the court. It is our feeling that the discretionary power exercised by the U.S. attorney in this area is quite different from the discretionary power exercised in deciding to prosecute a cast to begin with and deciding whether or not to plead out a case or in deciding whether or not to go to trial, that this discretion is quite different, that here there is going to be a program of supervision of this person. There are going to be conditions laid upon this person who we still presume to be innocent, who has not been convicted and that therefore there should be court oversight of such conditions.

We think that S. 798 as it now stands requires the concurrence of the attorney for the government before the court can terminate either by dismissing or resuming proceedings.

Mr. RAILSBACK. Can I ask a question right there?

Mr. MILLER. Yes.

Mr. RAILSBACK. I am afraid you are misreading that or I am misreading it. Talking about section 7(b) of the Senate bill 798 where it says:

> The committing officer within subsection (a) of this section shall terminate such release and the criminal proceedings shall be resumed if the attorney for the Government finds such individual is not fulfilling his obligations under the plan applicable to him or the public interest so requires.

I think if the prosecuting attorney says without giving any reason or anything else "terminate," the judge terminates. It is mandatory language.

Mr. MILLER. I think in terms of the resumption of the prosecution that is correct. That should remain basically with the U.S. attorney.

Mr. RAILSBACK. I find it even more peculiar that in this case where they terminate it is not even required there be any kind of concurrence by the administrative head. They do not provide for any kind of recommendation from the administrative head. It would seem more reasonable to leave some concurrence from the administrative head as far as termination is concerned. Do you see what I mean?

Mr. MILLER. Both the court and the United States attorney are going to pay substantial attention to whomever it is supervising the person, whether the administrative head or the probation officer.

Mr. RAILSBACK. He is not required to in the case of a termination and is required to in the case of a dismissal. That doesn't make any sense to me.

Mr. MILLER. I think on the issue of whether or not to resume prosecution it would be made by the prosecutor. I think on the issue whether to terminate—one is the termination to resume prosecution and the other is termination to dismiss. There are some differences there. In the case of the termination to dismiss, the court makes that decision with the concurrence of the prosecutor.

I believe that the decision to resume prosecution, as the decision to initiate prosecution, is a unique prosecution function.

I would like to very briefly discuss the other major difference in the two bills, and that is in the administrative structure.

Perhaps the real major difference that S. 798 provides for greater flexibility than 9007. It not only provides for the administrative head, but in section 9 of S. 798 there is provision to make contractual arrangements with the Federal probation office.

I might add that the American Bar Association, in its standards on probation, standards relating to probation, indicated that the use of the probation service for early diversion programs would be eminently feasible and desirable in a number of cases. The argument is that 798 provides greater flexibility and would not lock in what is still an experimental program to one way of providing supervision.

I will discuss briefly and comment on the whole question of standards. The American Bar Association has just completed a 10-year project on the standards of the administration of justice, all the way from the standards for the police officers. There is a volume on the prosecution and defense function which provides extensive standards guiding prosecutors and defense attorneys in the performance of their role, and it is the American Bar Association's view that the kind of discretions exercised should not necessarily be restricted but that standards as guidelines to the exercise of such discretion are not only desirable but extremely necessary, and this would apply to an early diversion program, both as to the initiation of an early diversion program or the termination.

Mr. KASTENMEIER. As a statutory matter, do you think?

Mr. MILLER. I think the way we would approach it that S. 798 in the establishment of the advisory committees and the requirement that the Attorney General issued rules and regulations and policy statements together with the advisory committee would provide a vehicle by which standards could be worked out and on this committee a wide variety of people sit. Defense attorneys are not allowed and if there is such a committee, they should be included.

One other issue and I will stop. The question of the information that is gathered by an investigator, whoever it may be, and its subsequent use in any criminal proceedings, the American Bar Association has a standard on presentence investigations which is analogous to this investigation which they said should not be instituted until guilt, and if prior to guilt there are two conditions which must be made. First, the man must consent to this being started and he must have the advice of counsel. There should be specific language for the counsel to advise the defendant. The second thing, the standard we have adopted was that that information at that presentence investigation should in no way be used in any further criminal proceedings which might determine guilt. The adoption of this standard in legislative language would be very desirable.

I think that completes my statement.

Mr. KASTENMEIER. Thank you very much, Mr. Miller and Dr. Brown.

I regret only that we do not have more time for colloquies here on various aspects of it, but I think both your statements are superb and added to that of the Judicial Conference will serve as a basis for our moving on this legislation.

We appreciate your contributions and that of your parent organization.

With that, and with a vote up presently, the subcommitte stands adjourned with respect to legislation before it on pretrial diversion.

[Whereupon, at 12:10 p.m., the subcommittee was adjourned.]

(The statement referred to at p. 91 follows:)

TESTIMONY OF WILLIAM J. CAMPBELL, SENIOR UNITED STATES DISTRICT JUDGE

Mr. Chairman and members of the Subcommittee I am pleased to have the opportunity to comment on two legislative proposals, H.R. 9007 and S. 798, both of which would provide programs of community supervision and services for the federal criminal justice system.

Since 1936 the federal probation system has cooperated with the Department of Justice in the administration of a limited program of deferred prosecution informally known as the "Brooklyn Plan." I believe a recitation of our experience with this plan of deferred prosecution will be helpful to the Subcommittee in evaluating the legislative proposals.

In the federal system, the U. S. attorney may hold in abeyance prosecution of a defendant, usually a juvenile, contingent upon his good behavior. All legal processes are suspended for a definite period of time, generally not exceeding 18 months. The United States probation officer supervises the defendant during this period. Thereafter the prosecutor either administratively closes the case upon satisfactory completion of the definite term, or processes the original complaint forthwith, where there is a subsequent delinquency.

This program is restricted to those persons deemed amenable to such treatment. It is used in only a limited number of cases and a high degree of selectivity is exercised by the prosecutor and the probation officer.

This exercise of discretion does not turn on a haphazard first impression or sympathetic emotional reaction. It turns on a social investigation at the source, comparable to the presentence investigation which takes place after conviction. If the investigation indicates that the degree of culpability of the offender is not too aggravated and there is a realization on his part of the character of the acts and that they are wrong; if the community influences are sufficiently strong in moral, ethical attributes, and on the basis of previous good conduct, deferred prosecution may be granted.

Under the provisions of 18 U.S.C. 5001 the United States attorney is authorized to *divert* any federal offender under 21 years of age to local authorities for handling. In our opinion this is the method of choice for most offenders in this age category. The extent to which diversion is practiced is not known, however, its potential impact is considerable. In fiscal year 1970 approximately 5,000 offenders under age 21 were received in federal courts.

Deferred prosecution is generally considered only if diversion is not possible or feasible. Probation officers assist United States attorneys in carrying out either practice.

HISTORY OF DEFERRED PROSECUTION

Deferred prosecution can be traced back to its use by the United States attorney for the Eastern District of New York in 1936. At that time he and the chief probation officer were concerned with the handling of juvenile offenders and were seeking a method of avoiding the demoralizing influences of the court procedure for selected juvenile offenders with substantial backgrounds, good home influences, and no prior convictions. The decision to defer prosecution was made by the United States attorney on the basis of a complete investigation by the probation officer.

The plan received the strong endorsement of the court in the Eastern District of New York. The chief judge of that district, Marcus B. Campbell, expressed his support in this way:

"Whether or not a prosecution of a juvenile should or should not be instituted is a matter exclusively within the prerogative of the district attorney—it is his sole responsibility. Our court is concerned only when, by due process of law, in the form of a proceeding in juvenile delinquency a matter is placed on the trial calendar and moved for trial. Then and then alone does it become the responsibility of the court.

"Any service which can be consistently rendered by the Probation Bureau of the district attorney, as an aid in determining the degree of culpability of an alleged offender, and which does not effect (sic) the efficiency of the Probation Bureau, and which does not encroach upon the prerogatives of the district attorney, would appear to be in no way objectionable."[1]

[1] Quoted in "Deferred Prosecution: Provisional Release of Juvenile Delinquents," by Conrad P. Printzlein, *The Federal Bar Journal*, VII, 3, April 1946, page 281.

Between 1936 and 1946 more than 250 juvenile offenders in Brooklyn were handled by deferred prosecution. Only two had to be reported as violators and proceeded against under the Federal Juvenile Delinquency Act.[2]

At the October 1946 meeting of the Judicial Conference of Senior Circuit Judges, Mr. Justice Tom C. Clark, then Attorney General, called attention to the serious problem of juvenile delinquency. He referred specifically to "the so-called *Brooklyn Plan*," the popular name for the program in the Eastern District of New York. The attorney general told the Conference that under the plan the juvenile offender, "if he gives promise of being amenable to correction, is placed under supervision directed by the United States attorney, and prosecution is deferred and later dispensed with if the offender makes a satisfactory record." [3]

The attorney general requested the Conference to authorize the appointment of a committee to consider the problem of juvenile delinquency and its treatment in the hope that a more formal, workable plan of similar nature could be devised.

Pursuant to resolution of the Conference, the Chief Justice appointed the Committee on Probation with Special Reference to Juvenile Delinquency. The report of this Committee was presented to the Judicial Conference at its September 1947 session. The Conference accepted the report and directed that it "be circulated throughout the judiciary as information, and for purpose of discussion at the judicial conferences of the various circuits." [4] The report pointed out that, in the opinion of the Committee, the plan of deferred prosecution "is extremely valuable, and that the use of it should be encouraged." [5]

On criteria for its use, the Committee had this to say:

"Your Committee thinks, for example, that the plan should never be used except for first offenders, and in cases where there is a reasonably good home background, or adequate substitute. Your Committee doubts that deferred prosecution ought to be used where there is a strong likelihood that the juvenile has sustained delinquency traits and, although technically a first offender, is actually a recidivist who has been caught for the first time." [6]

After indicating that deferred prosecution should be used only for the most select offenders the Committee said:

"Once the decision to employ the plan has been taken, this Committee sees no objection whatever to supervision by the probation officer of the juvenile involved. . . .

"Every successful application of the deferred prosecution scheme is quite apt not only to rehabilitate the offender but also to reduce the work of government agencies, and, therefore, the expense of investigating and prosecuting such cases. To your Committee this suggests that the government gets value received, to put the matter on the lowest plane, in return for whatever time is spent by the probation officer in any sort of successful supervision of juvenile offenders." [7]

On the subject of legality, the Committee report said:

"Seemingly, the most patent flaw in the scheme of deferred prosecution lies in the fact that it has not specific sanction in any statute. It may, therefore, happen that some prosecutors will be at first reluctant to use this method, even in a most deserving case. But this defect in the procedure is more apparent than real, because any United States attorney has the right to decline prosecution in a proper case, especially when the attorney general has sanctioned this course after a review of the facts. And it seems doubtful that any statute, however carefully worded, could ever be a substitute for good judgment and competent administration of the office of prosecutor, which, after all, are the qualities principally involved in the safe use of the scheme of deferred prosecution." [8]

No statutory authority for supervision by probation officers of persons on deferred prosecution has been provided to date, except in the Canal Zone.[9] In July

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[2] Ibid., page 282. See also Printzlein, "Deferred Prosecution for Juvenile Offenders," *Federal Probation*, March 1948, page 17.
[3] Report of the Judicial Conference of Senior Circuit Judges, October 1–4, 1946, page 4.
[4] Conference Report, page 16.
[5] "Report of the Committee on Probation with Special Reference to Juvenile Delinquency." *Federal Probation*, March 1948, page 7.
[6] Ibid., page 7.
[7] Ibid., page 7.
[8] Ibid., page 7.
[9] Section 512, Title 3, Canal Zone Code (1962) provides: "The probation officer shall . . . perform such duties with respect to unofficial probation as the United States attorney directs. . . ."

1949, however, probation officers were urged by the Administrative Office to lend their full support to the deferred prosecution plan if it met the approval of the courts concerned.

In 1946 the Attorney General first urged United States attorneys to use deferred prosecution in worthy cases. During succeeding years the plan has been supported strongly by several attorneys general. The most recent policy statement of the Department of Justice was made on June 29, 1964, in Department of Justice Memorandum No. 377 (see Exhibit A).

In this memorandum the Assistant Attorney General, Civil Rights Division, pointed out to United States attorneys that the deferred prosecution procedure is a rehabilitative method of major importance as an alternative to the Federal Juvenile Delinquency Act. As criteria for use of the procedure the Department said in the memorandum it was requisite "that the violation of law be relatively non-serious; that the juvenile's previous behavior and background be good; and that the prospect for rehabilitation be favorable."

The United States attorneys were asked to request the probation officer to make an investigation and report to assist in determining whether deferred prosecution is warranted. The memorandum also pointed out that overly long periods of supervision of juveniles selected for deferred prosecution are neither favored nor productive. It cautioned that "As a general rule 18 months is considered an ample maximum time, and longer periods should not be set except in very unusual circumstances."

In connection with the use of deferred prosecution for offenders beyond 18 years of age the Department policy is stated in the memorandum as follows: "By definition, the plan is not available for use in adult cases. . . . Departmental policy . . . does not object to special consideration being given in other ways to unusual cases involving adult offenders under a variety of circumstances, but the 'Brooklyn Plan' itself should not be extended to persons over 18 years of age."

Conditions of supervision were also provided by the Department of Justice in June 1964. These are attached to the memorandum (see Exhibit B). The Department thus formalized conditions which had been in informal use for many years. They are similar to the conditions under which convicted persons are granted probation.

Supplementing this policy was a statement from the Department of Justice with reference to the filing by probation officers of FBI flash notices on deferred prosecution cases. The flash notice to the FBI is a fingerprint notification requesting that probation officers be informed when a person under supervision is arrested again. The policy of the Department of Justice is this:

"We believe that flash notices should not be used in cases under the Brooklyn Plan. Since the flash notice could not be used unless the juvenile's fingerprints had been obtained, that is, unless he had been arrested, and since it is hoped that the number of Brooklyn Plan juveniles who are arrested will be kept to the minimum, there would be few juveniles under the Brooklyn Plan in whose cases it could be used. Further there appears little actual need for the flash notice. These youths are selected risks, and their probation under recently announced standards is to be of short duration, capable of further shortening at the discretion of the United States attorney with the advice and recommendation of the probation officials. The percentage of juveniles who succeed under the Brooklyn Plan is, as you know, very high."[10]

STATISTICAL REVIEW OF DEFERRED PROSECUTION

Table 1 shows the growth in the use of deferred prosecution supervision for the 10-year period 1964–1973. The number of persons under deferred prosecution supervision has increased 41.4% during this period, an average of 4.1% a year. During the same period the total number of persons under court probation has increased at a comparable rate, from 25,542 to 36,327, or 42.2%.

[10] Letter to Probation Division from Assistant Attorney General, Civil Rights Division, dated July 24, 1964, and distributed to probation officers in Administrative Office Memorandum No. 393, August 13, 1964.

TABLE 1.—DEFERRED PROSECUTION WORKLOAD FEDERAL PROBATION SYSTEM, 1964–73

	Persons received for supervision	Persons under supervision at close of fiscal year
1964	472	556
1965	449	524
1966	486	557
1967	510	542
1968	511	533
1969	460	465
1970	621	617
1971	566	647
1972	703	767
1973	689	786

Source: Annual report of the Director of the Administrative Office of the U.S. Courts.

Tables 2A and 2B demonstrate trends in the population of persons under deferred prosecution supervision. Table 2B in particular shows a trend toward use of deferred prosecution for older defendants. In 1968 only 3.6% of the persons under supervision were 25 years of age or older at the time received for supervision. By 1973 the proportion had climbed to 10%.

The meaning of this trend is not clear in view of the fact that the trend in all other classes of supervision—magistrate probation, parole, military parole, and mandatory release—has been toward a higher proportion of younger offenders. In 1968, 25.3% of the persons on court probation were 24 years of age or under when received for supervision. By 1973 this proportion had increased to 38.9%.

TABLE 2A.—PERSONS UNDER DEFERRED PROSECUTION SUPERVISION ON JUNE 30, 1968, AND JAN. 23, 1973, SHOWING AGE GROUP

Age at time received for supervision	1968	1973
Total	533	699
24 and under	514	629
25 to 39	13	54
40 and over	6	16

TABLE 2B.—PERSONS UNDER DEFERRED PROSECUTION SUPERVISION ON JUNE 30, 1968, AND JAN. 23, 1973, SHOWING AGE DISTRIBUTION BY PERCENT

Age at time received for supervision	1968	1973
Total	100.0	100.0
24 and under	96.4	90.0
25 to 39	2.5	7.7
40 and over	1.1	2.3

Source: Census of persons under supervision of the Federal probation system, Jan. 23, 1973, Administrative Office of the U.S. Courts.

Tables 3A and 3B reveal there has been little change in the proportion of persons under deferred prosecution supervision with prior criminal records. In particular Table 3B shows there has been only a small change since 1968 in the proportion of persons with a previous record of probation supervision. The proportion of persons with prior prison or jail records continues to be less than 2%. By comparison in 1973, 22.5% of all persons on court probation had a prior record of jail or prison.

TABLE 3A.—PERSONS UNDER DEFERRED PROSECUTION SUPERVISION ON JUNE 30, 1968, AND JAN. 23, 1973, SHOWING PRIOR CRIMINAL RECORD

Prior criminal record	1968	1973
Total under supervision	533	699
Prior record not reported	63	72
Total with prior record reported	470	627
No prior record reported	411	532
Total with prior record	59	95
Juvenile record	9	12
Probation record	41	72
Jail record	7	6
Prior prison record	2	2

Source: Census of persons under supervision of the Federal probation system, Jan. 23, 1973, Administrative Office of the U.S. Courts.

TABLE 3B.—PERSONS UNDER DEFERRED PROSECUTION SUPERVISION ON JUNE 30, 1968, AND JAN. 23, 1973, SHOWING DISTRIBUTION OF PRIOR CRIMINAL RECORD BY PERCENT

Prior criminal record	1968	1973
Total with prior record reported	100.0	100.0
No prior record reported	87.5	84.8
Total with prior record	12.5	15.2
Juvenile record	1.9	1.9
Probation record	8.7	11.5
Jail record	1.5	1.4
Prior prison record	.4	.3

Source: Census of persons under supervision of the Federal probation system, Jan. 23, 1973, Administrative Office of the U.S. Courts.

OFFENSE

Tables 4A and 4B report the offense for which deferred prosecution was granted and trends since 1968. A wide range of offense categories are represented. The offense category of largest growth since 1968 is larcency/theft/interstate transportation of stolen property. As is true of court probationers the category of auto theft has shown a substantial decline, largely due to a change in prosecution policy that favors local prosecution rather than federal. Postal law violations have dropped. Most other offense categories have remained stable or grown modestly.

TABLE 4A.—PERSONS UNDER DEFERRED PROSECUTION SUPERVISION ON JUNE 30, 1968, AND JAN. 23, 1973, SHOWING MAJOR OFFENSE

Offense	1968	1973
Total, all offenses	533	699
Assault	1	10
Auto theft	71	14
Burglary	21	32
Counterfeiting	6	13
Embezzlement	10	34
Escape/bail jumping		2
Forgery	42	68
Fraud (other than postal)	4	4
Immigration laws	2	
Larceny/theft/I.T.S.P	39	181
Liquor laws	28	21
Marihuana	18	61
Narcotics, including controlled substances (other than marihuana)	1	30
Postal laws, other than theft	126	101
Robbery	1	8
Selective Service Act	6	4
Sex offenses	3	
Weapons/firearms	3	25
Federal Regulatory Laws (Agriculture, Federal Drug Administration, Federal Labor Standards, Custom laws, Migratory Bird Act, Civil Rights, etc.)	26	21
All others not classified above	125	70

Source: Census of Persons, under supervision of the Federal probation system, Jan. 23, 1973, Administrative Office of the U.S. Courts.

TABLE 4B.—PERSONS UNDER DEFERRED PROSECUTION SUPERVISION ON JUNE 30, 1968, AND JAN. 23, 1973, SHOWING DISTRIBUTION BY MAJOR OFFENSE BY PERCENT

Offense	1968	1973
Total, all offenses	100.0	100.0
Assault	.2	1.4
Auto theft	13.3	2.0
Burglary	3.9	4.6
Counterfeiting	1.1	1.9
Embezzlement	1.9	4.9
Escape/bail jumping		.3
Forgery	7.9	9.7
Fraud (other than postal)	.8	.6
Immigration laws	.4	
Larceny/theft/I.T.S.P	7.3	25.9
Liquor laws	5.3	3.0
Marihuana	3.4	8.7
Narcotics, including controlled substances (other than marihuana)	.2	4.3
Postal laws, other than theft	23.6	14.4
Robbery	1.2	1.1
Selective Service Act	1.1	.6
Sex offenses	.6	
Weapons/firearms	.6	3.6
Federal Regulatory Laws (Agriculture, Federal Drug Administration, Federal Labor Standards, Custom laws, Migratory Bird Act, Civil Rights, etc.)	4.9	3.0
All others not classified above	23.5	10.0

Source: Census of Persons, under supervision of the Federal probation system, Jan. 23, 1973, Administrative Office of the U.S. Courts.

For persons granted deferred prosecution the only available measure of effectiveness is the means by which the person is removed from supervision. Table 5 analyses removals from deferred prosecution for fiscal years 1964, 1968, 1972, and 1973, years for which comparable figures are available. The interesting columns are those reporting the percent of persons removed for satisfactory and unsatisfactory completion of supervision. A satisfactory completion includes termination of the period of supervision, early discharge, termination after extension of the period of supervision, and other causes such as death. Unsatisfactory completion is removal from supervision for failing to comply with the terms of deferred prosecution and resumption of prosecution.

Table 5 reveals that for the 4 years in question 93 percent or more of the persons removed from deferred prosecution completed their term satisfactorily. The successful completion rate has improved over the years and in fiscal year

1973, 98.4 percent of the persons removed from supervision completed their term successfully. Eighty-eight members of this group, 13.6 percent, were removed from their period of deferred prosecution prior to the full term expiration date.

How much faith can be put in these outcome figures? We believe very few serious violations of the conditions of supervision escape the probation officers' attention. Probation officers work closely with persons on deferred prosecution and maintain frequent contact with their families. Most persons on deferred prosecution come from stable families and probation officers usually enjoy the full cooperation of the family. The probation officers' intimate knowledge of the community and close working relationships with local law enforcement are convincing evidence that probation officers become aware of such violations as do occur.

TABLE 5.—PERSONS REMOVED FROM DEFERRED PROSECUTION SUPERVISION FOR FISCAL YEARS 1964, 1968, 1972, AND 1973

Year	Total removed	Satisfactory completion of supervision		Unsatisfactory completion of supervision	
		Total	Percent of total removed	Total	Percent of total removed
1964	402	376	93.5	26	6.5
1968	541	516	95.4	25	4.6
1972	638	628	98.4	10	1.6
1973	657	647	98.5	10	1.5

Source: Division of Information Systems, Administrative Office of the U.S. Courts.

NEED FOR LEGISLATION

Given the success record of deferred prosecution set forth above a logical question is, "What is the need for legislation?" This need can be described in several terms. First is the relatively modest number of persons under deferred prosecution. Deferred prosecution represents only 1.4% of the federal probation supervision workload. Of a total of 54,346 offenders under all forms of supervision at the close of fiscal year 1973, only 786 persons were under deferred prosecution supervision.

A second factor is growth. While persons under deferred prosecution increased by 47.2% from June 30, 1968 to June 30, 1973; persons on U.S. magistrates probation increased 885.5%. The magistrate caseload has increased dramatically under the new expanded legal authority.

The lack of clear legal authority for deferred prosecution has inhibited its growth. There are districts in which the U.S. attorney does not use deferred prosecution because the court and the probation officer believe it is a questionable practice in the absence of legal authority.

More important than legal authority, however, is the factor of risk. It is obvious from Table 5 that the favorable outcome rates suggest that deferred prosecution is used selectively, or in other words, for the "cream of the crop." Consultation with probation officers confirms that only the best risks are placed on deferred prosecution.

Assuming acceptance of the principle of deferred prosecution, the facts indicate it could be used much more extensively than it is at present. For that to take place, however, at least 2 things are needed: (1) clear legal authority such as H.R. 9007 and S. 798 would provide, and (2) a positive program to deal with the increased numbers of persons who are currently excluded from consideration because of the high standards of the selection process.

The goal of deferred prosecution is to intervene as early as possible following an offense—positive intervention with a maximum range of resources: counseling, vocational training, contract services, temporary housing, or whatever is needed for the offender to "get a new show on the road."

Diverting a person to a program of deferred prosecution avoids the attendant negative labels of judgment, conviction, sentence, jail, or prison that so often result in a revolving door of recidivism. A major early effort at prevention of additional crimes takes more resources in time, money, and programs than are currently available to the federal probation system. These must be provided concurrently with the legal authority to act.

EXPECTED IMPACT OF LEGISLATION

The enactment of a bill to provide an expanded program of pretrial diversion would be a mandate from the Congress to use deferred prosecution for a broader range of offenders. Many of the offenders who now receive probation or short term jail sentences would be candidates for a pretrial diversion program. The program would provide the courts with a major dispositional alternative. Properly administered, a program of deferred prosecution should be the offenders' one and only experience with the criminal justice system.

The federal probation system has been reluctant to encourage expansion of any plan of pretrial diversion in the absence of specific authority and especially without adequate resources to do the job right. Offenders in a program of deferred prosecution should be placed in caseloads not exceeding 35 per probation officer. At this ratio probation officers will provide intensive supervision and services during the period of the program and the necessary surveillance to assure prompt action to protect the community in the event of further violations of the law.

Execution of the plan will also require an adequate investigative staff to provide careful screening of candidates. Our experience with the presentence investigation process leads us to conclude that to make any program or community supervision of offenders work satisfactorily there must be scrupulous attention to screening offenders, and placing only those who meet carefully defined standards. To do any less is to invite failure of the program and run unnecessary risk for the public.

Information gathered by the probation officer investigating possible deferred prosecution could serve not only to assist the U.S. attorney and the judicial officer but will be available for any presentence investigation that may subsequently be made. Moreover the value of a social investigation prior to prosecution has proven itself many times. In districts where presentence investigation prior to conviction is the rule information developed by the probation officer has resulted in dismissals and referrals to mental hospitals, medical facilities, vocational training programs, and social agencies. In summary while some of the investigative information may have more than one use there would be a modest increase in the investigative workload of probation officers.

ESTIMATED WORKLOAD

A survey of 50 chief probation offices across the United States revealed estimates of the number of cases per district if H.R. 9007 is enacted. As Table 6 shows those districts estimate 1,326 persons under a program of community supervision and services. A nationwide total of 2,000 persons is a safe projection. This would be in addition to those currently under deferred prosecution supervision.

TABLE 6.—ESTIMATE BY DISTRICT OF PERSONS UNDER EXPANDED DEFERRED PROSECUTION

District	Estimate	District	Estimate
Alabama (north)	120	Michigan (west)	12
Arizona	200	Montana	50
California (central)	120	New York (south)	12
California (south)	20	North Carolina (mid)	50
Florida (north)	20	Oklahoma (north)	12
Florida (mid)	150	Oklahoma (east)	20
Georgia (north)	84	Oregon	20
Georgia (south)	3	Puerto Rico	75
Illinois (north)	103	South Carolina	20
Kentucky (east)	6	Texas (south)	6
Kentucky (west)	63	Vermont	6
Louisiana (mid)	6	Wyoming	30
Louisiana (west)	100		
Maine	5	Total	1,326
Michigan (east)	15		

ESTIMATED MANPOWER AND COSTS

With 2,000 persons under supervision in 35 person caseloads the manpower requirement is 57 positions in grade JSP–9. These 57 positions require 6 supervisors in grade JSP–13 and 30 clerk-stenographers in grade JSP–5.

The cost figures follow:

57 probation officers grade JSP–9 at $12,167	$693, 519
6 supervising probation officers grade JSP–13 at $20,677	124, 062
30 clerk-stenographers grade JSP–5 at $8,055	241, 650
	1, 059, 231
Related benefits 9%	95, 269
Subtotal	1, 154, 500
Miscellaneous expenses	74, 400
Furniture and equipment (nonrecurring)	55, 800
Travel (57 probation officers)	57, 000
Pre-employment investigations (nonrecurring)	99, 800
Purchase of contract services $375/case [1]	750, 000
Total	2, 191, 500

[1] Contract services will be needed for maximum effectiveness of an early intervention strategy. These services may include: (1) payment for temporary placement in a group home or other residential/treatment facility; (2) short term psychiatric or family counseling; (3) purchase of material necessary to obain employment—required clothing, safety equipment or tools; (4) training necessary to obtain employment such as a specialized course in mechanical repair or heavy equipment operation; or other services directly related to rehabilitation.

These 93 additional personnel are necessary to assure that an expanded plan is implemented correctly. This is a new program and must be done right. There must be adequate staff for intensive supervision and a modest increase in investigative duties. Contract services will be monitored carefully to insure delivery of services and protect against abuses. If the program gets a good start we may expect ready acceptance by all the courts and rapid expansion of the number of persons handled in this manner.

The successful diversion programs in other jurisdictions have been quality programs. An expanded program in the federal government can only be successful if the quality of services provided the people in the program remains at a high level. Diversion is a wise investment but it will continue to be so only as diversion continues to represent the best in services to individuals.

ACTIONS OF THE JUDICIAL CONFERENCE

On several recent occasions the Judicial Conference of the United States has made an expression of views concerning plans of pretrial diversion such as H.R. 9007 and S. 798 provide. At the meeting October 28–29, 1971, the Conference considered two bills on speedy trial legislation referred by the House Judicial Committee, H.R. 6045 and H.R. 7108, 92nd Congress. While the Conference approved the objectives of Title II of H.R. 6045 and Title III of H.R. 7108, it took the position that the services which should be performed through pretrial agencies as provided in the bills could be more effectively performed and administered through the probation officers of each court provided Congress furnishes the necessary funding for the additional probation officers needed to render these services and also provided that the operation and contracting for the operation of such facilities as halfway houses or community treatment centers are made executive functions to be performed by an executive branch agency.[11]

At the meeting April 5–6, 1973, the Conference approved in principle S. 798 which provides that a committing officer on recommendation of the attorney for the government may release a person charged with an offense against the United States by diverting him to a voluntary program of community supervision and services. At that time S. 798 made no reference to performance of this function by U.S. probation officers. The Conference expressed the view that the federal probation system should be designated as the agency to provide the programs of supervision and services rather than an agency of the Department of Justice and that the Congress should authorize sufficient funds for the federal probation system to provide these services. The Conference further recommended that Section 3(4) of the proposed bill be amended so as to define "committing officer" as any judge or magistrate "in any case in which he has potential trial

[11] Report of Proceedings of the Judicial Conference of the United States, October 28–29, 1971, p. 39.

jurisdiction or in any case which has been assigned to him by the court for such purpose." [12]

On September 13–14, 1973, the Conference approved a draft bill to amend Section 3401 of Title 18, U.S. Code, to authorize a U.S. magistrate to place a defendant in a minor case on probation prior to conviction. The decision to invoke this authority would be discretionary with the magistrate, and the consent of both the United States and defendant would be required. The authority granted would be specifically limited to those cases within the magistrate's own trial jurisdiction, and the probationary term would be limited to 18 months.

All these actions should be taken as consistent with each other and as consistent support in principle of the concept of pretrial diversion as embodied in H.R. 9007 and S. 798.

With particular reference to H.R. 9007, the chairman of the House Judiciary Committee has been advised by the Administrative Office of the United States Courts that the bill includes the changes recommended by the Conference in April 1973. Specifically this bill provides that the program of community supervision and services be performed by the U.S. probation officers.

PROCEDURAL CONSIDERATIONS

The following comments relate to aspects of H.R. 9007 the Subcommittee may wish to consider.

Section 3171 of the bill indicates that the court may place an individual charged with a criminal offense under community supervision "at the earliest practicable time." Presumably this means the individual could appear in response to a summons after a complaint had been filed. This raises the question of the role to be played by counsel in these proceedings. In many instances this plan may be used for juveniles, as the Brooklyn Plan is now. While Brooklyn Plan procedure is relatively unstructured, the Subcommittee should consider whether the law needs to conform to the Supreme Court decision *In re Gault* 387 U.S. 1 (May 15, 1967) which calls for representation by counsel for juvenile defendants. The second stage of that question is whether counsel should be provided for *all* defendants regardless of age.

The Subcommittee should also consider whether parents or guardians of a juvenile defendant must consent in writing to the conditions of the plan of release. Another consideration is whether the defendant and counsel should make such written agreement.

Another point to be considered in this regard is whether U.S. magistrates may hear these cases and release persons to a plan of community supervision and services. Our interpretation of the bill is that presently the matter is in doubt. The Subcommittee may wish to consider whether magistrates should be authorized to act under the proposed statute. Such authorization would guarantee use of the plan at the earliest possible stage of the criminal proceedings.

Hearings on S. 798 raised the question of the need in the statute for specific criteria of eligibility. H.R. 9007 leaves to the authorities involved the determination of who is eligible to participate. There can be no substitute for careful judgment and sound discretion, exercised on a case by case basis and with the benefit of a thorough background investigation. The history of the Brooklyn Plan shows that these kinds of selections can be made. The Brooklyn Plan has been used for highly selected cases under carefully regulated circumstances. While the plan of community supervision and services should expand its consideration to a broader range of eligible subjects, careful selection must still be exercised.

The Subcommittee may wish the legislative history to reflect whether the judge or magistrate that heard the diversion proceeding may try the case if diversion fails. Another issue that needs policy guidance is whether extrajudicial statements by the defendant may be used if the case ultimately goes to trial. Finally the courts would like guidance from the legislative history as to how violators should be retaken.

Consideration needs to be given to the records that will be kept when the plan of community supervision and services terminates successfully. The effect of such records on any subsequent prosecution is also an issue in which the legislative history can be helpful to the court. The Subcommittee may wish to consider the possibility of expunction procedures similar to those set forth for first time

[12] Conference report, p. 25.

offenders under Title 21, U.S. Code, Section 844. Judicial interest in this issue stems from the fact that most current forms of post-conviction relief—pardon and setting aside the conviction—offer little surcease from the disabilities of conviction. In too many instances the stigma remains.

CONCLUSION

The Subcommittee has placed two questions: (1) Is there need for an expanded plan for deferred prosecution, specifically authorized by law and funded at a level to provide a broad range of intervention and supportive programs; and (2) What are the relative merits of the two bills under consideration, H.R. 9007 and S. 798?

To the first question the answer is an emphatic yes. There is a need for legislation and an expanded program. This statement should stand as support for that proposition.

The second question is more difficult. Both bills will provide an expanded and adequately staffed program of deferred prosecution. In both instances the result will be greatly improved intervention strategies, allowing professionals to move in early and head off a potential career in crime.

There is a constraint operating on anyone who would argue against S. 798. Persons concerned at all with improvement in criminal justice are cautious to express any criticism of the work of the Senate Subcommittee on National Penitentiaries. Their pioneering effort in the field of deferred prosecution is just one example of the many instances that Subcommittee has shown abiding interest in criminal justice reform.

The Judicial Conference has concluded that the proposed programs of deferred prosecution should be operated by the U.S. probation system. If there can be any criticism of S. 798 it is that the bill may not go far enough in making deferred prosecution an affirmative responsibility of the probation system. Without gainsaying any of the provisions of S. 798, H.R. 9007 does clearly assign the responsibility where it belongs.

The probation system is the logical home for deferred prosecution. All but one of the kinds of functions proposed in H.R. 9007 now are performed by probation officers. They collect, verify, and report information on offenders; they review and modify reports and recommendations; they recommend to judges and magistrates appropriate conditions for the release of offenders; they supervise persons released by judicial authority; they inform the courts of apparent violations of release conditions; they utilize the services, personnel, and facilities of other agencies, public and private, instrumental to the reintegration of offenders into law abiding society; they advise the courts of availability and capacity of these agencies; and they assist persons placed under supervision in the community in securing employment and medical, legal, and social services as necessary.

Probation officers do not operate or contract for the operation of *facilities* such as addict and alcoholic treatment centers, or private home placements, nor should they. As indicated above the Judicial Conference has expressed the view that these are executive functions and should be performed by an executive branch agency.

H.R. 9007 clearly intends that probation officers would have available the authority and the funds to purchase *services* for a broad range of needs. Experience has demonstrated time and again that many avenues open to ordinary citizens are closed to offenders. Resources that are necessary and should be available to facilitate the offender's readjustment to a law abiding life are denied to the very person that needs them most. Asking, even demanding, that other agencies—public and private—fulfill their responsibilities to offenders has met with little success. For corrections the best way to deal with this subtle discrimination is to pay for the needed services. Any program of early and intensive intervention to prevent criminal careers must be able to purchase contract services where these are lacking or unavailable to offenders. These services may meet a broad range of offender needs: shelter, psychiatric or psychological problems, employment, training, medical services, etc. Unfortunately, the Judicial Conference has not made an expression of views on this aspect of the legislative proposal. Therefore, I am unable to make an official comment on its merits.

Because probation officers now are engaged in functions analogous to those proposed for the plan of community supervision and services it is logical that

they should assume this further role. The record of the probation system is good. Under the already existing Brooklyn Plan of deferred prosecution the probation system has demonstrated the ability to (1) obtain protection for the community identical to that afforded when the accused is prosecuted and placed on probation, and (2) simultaneously turn a substantial number of offenders away from further contact with the criminal justice system.

The time for expansion of this proven function is here. In proposing an expanded plan of deferred prosecution the Subcommittee has already dealt with the one real danger—the likelihood that deferred prosecution will be expanded without advance provision for adequate additional manpower. That would be a tragedy. It is heartening to see that H.R. 9007 anticipates this danger and makes it clear that the probation system cannot assume the added reponsibilities until funds for the purpose are appropriated.

Appendix

As part of the previously mentioned sample of 50 probation offices the Probation Division of the Administrative Office solicited the reactions of probation officers to H.R. 9007. Selected excerpts from these reactions follow, as well as several accounts of probation officer experience in supervising persons released under the Brooklyn Plan.

Quotes from various probation officers are as follows:

1. William R. Hays, Chief Probation Officer, Louisiana, Western

"Let me say that I wholeheartedly approve of H.R. 9007 since it can be a most effective tool for the non-criminally oriented situational offender."

2. O. Leon Garber, Chief Probation Officer, North Carolina, Middle

"I particularly like the provision in the Bill that it will cover anyone, regardless of age. Certainly there are some offenders in later years of life who get involved in a relatively minor offense for the first time, and probably their reputation is more valuable to them often times than that of a young person who does not realize the value of reputation and the stigma which goes along with a felony conviction.

"It is my feeling that an initial period of supervision of one year to eighteen months would be proper, and more flexible so that early termination could be accomplished at any time."

3. Stanley K. Kellogg, U.S. Probation Officer, California, Central

"The writer has supervised and has been a firm believer in Deferred Prosecution (Brooklyn Plan) for the past 25 years. It is the writer's firm opinion that Deferred Prosecution could be used to a much greater extent if the legislation is passed extending the plan, regardless of age, to all defendants meeting certain criteria. Deferred Prosecution would be an immense saving in money, time for the courts, as well as preserving human dignity in handling and supervising individuals through local community resources and treating specified problems."

4. Ralph K. Kistner, Supervising Probation Officer, New York, Eastern

"I believe the period of supervision, as reflected in Section 3173 of three months, with a possible extension of a further nine months, is far too brief a period of time to make an adequate evaluation or to formulate and implement a rehabilitative program. A period of 18 months would be more realistic, with the stipulation that if prior to the 18 months the defendant has shown himself to be a law-abiding individual, he could be discharged prior to that time. I feel this is a very worthy program and we should get fully involved in its proper enactment."

5. John T. Connolly, Chief Probation Officer, New York, Southern

"I am pleased to learn that this technique which we have long believed in and had success with is being extended to include adults as well as juveniles."

Probation officer experience supervising persons released under the Brooklyn Plan is described in the following paragraphs. Names of defendants have been changed to disguise their identity.

Case No. 1

Mr. Kellven is now an attorney-at-law. When 21, in his senior year at ——— ———. University, he was also employed as a mail clerk for the ——— ——— Bank. In November 1966, he stole ten rolls ($10 per roll) of quarters from a tellers cage. The shortage was discovered the following day. When confronted about this since he had been observed in the cage, he denied

any knowledge of the matter. However, later he submitted a letter of resignation with a check for $100 admitting the theft.

Kellven was placed on probation under deferred prosecution for fifteen months in March 1967. He graduated from ———— University and entered ———— University Law School. He completed his probation supervision successfully in June 1968. Subsequently, he obtained his law degree, passed the Bar, and currently enjoys a successful law practice.

JOHN E. HORNBERGER,
Supervising Probation Officer,
Middle District of Florida.

Case No. 2

In May 1969, Alice Barron received six months deferred prosecution supervision resulting from her theft as a postal employee. While serving as a postal clerk, she issued two money orders out of sequence for her own personal use. One money order was for $100.00 and the other one was for $58.00. She did not pay for the $100.00 money order but did pay for the $58.00 money order, about two months after she had issued it for herself. When questioned by the United States Postal Inspectors, she did admit responsibility for her actions. She had no prior arrest record.

Alice was 29, divorced, and living alone. She had completed two years with the United States Navy and had received an Honorable Discharge from the —— ———— Naval Hospital, where she had completed almost two years of a three year Nurses Training Program. Her recommendations from the Naval Hospital were very good.

When she was referred to the Probation Office for the investigative report, she was very depressed and discouraged. Since being discharged from the United States Navy, she had been employed in various factory employment and with the U.S. Post Office for about two years. She had made an application for welfare assistance. We discovered she really wanted to complete her nursing program and was eligible for GI benefits to complete her education. On one occasion, we drove her to ———— Junior College and met with her and a school counselor. She was accepted as a student and she began her studies in February 1969. She was happy and worked hard. In June 1969, she was elected by her fellow students to President of the Nursing Activities. She also worked part-time at the school and her income supplemented the GI benefits. She graduated from ———— Junior College and became a licensed Registered Nurse in June 1970. She did continue her education and is now teaching nursing courses.

Alice was an intelligent and aggressive young lady but had lost interest in achieving worthwhile goals at the time she was referred to the Probation Office. She responded well to counseling and had the ability and drive to achieve her goals. If she had not had the opportunity of deferred prosecution, her future might have been different. A formal arrest record could have created problems when she became a licensed registered nurse and later certified as a teacher. She was basically a law-abiding young lady but had committed an offense and the manner in which her case was handled was a big asset in her later success.

ANNE T. O'NEIL,
U.S. Probation Officer,
Chicago, Illinois.

Case No. 3

In November 1967, Hawkins and Dunster were arrested by the ———— City Police in possession of a car that had been stolen in an adjoining state. Hawkins was 16 years old at the time and Dunster was 17. Investigation revealed that these two young men were immature and, in fact, were in the sixth grade at the time of the theft. They had seen a drunken man get out of his car, go into a tavern, leave the keys in the car, and they decided to take the car for a ride. They crossed the mountain from Virginia into Kentucky, got lost, and asked several people how to get back home. When they were trying to get back home, they went up a one-way street the wrong way and were stopped by the City Police, and readily admitted they had taken the car. Diversion was attempted, but as their home county had no supervising juvenile officer, it was felt the best method of treatment was under deferred prosecution and supervision by a U.S. probation officer. They were placed on deferred prosecution for 1 year. Both these boys returned to school, made a good adjustment, and the charges against them were dismissed in April 1969.

O. ALLEN WILLS,
U.S. Probation Officer,
Eastern District of Kentucky.

Case No. 4

In June 1972, the United States attorney's office referred Ben Smith to the probation office as a candidate to be considered for deferred prosecution. The usual investigation was requested to determine if Mr. Smith was a fit subject for such handling. Investigation disclosed that on January 4, 1972, the Bank of Chicago deposited a registered letter which contained two Bank Americards. The letter was assigned to be delivered by substitute carrier Smith. The letter was not delivered and Smith was questioned. During the interview, he admitted forging the signature on the delivery receipt for the registered letter, taking the two cards from the letter, affixing the signature of John Doell on one card and using the card to purchase a stero component set. He stated that he then gave the component set and the two cards to a lifelong friend. He denied using the cards for any other purchases.

During the course of the first year of deferred prosecution Mr. Smith married and has assumed responsibility of supporting a wife. He has maintained acceptable and regular employment. For a long period of time he worked for the Model Cities Program teaching three days a week at the _____ School on the West Side of Chicago.

It appears that Mr. Smith's overall community adjustment has been good and the prognosis for a continued acceptable way of life seems good. Mr. Smith matured during his many conferences with the probation officer. He is still enrolled at _____ University obtaining credits and is hopeful of entering law school in the near future.

HENRY J. RATCLIFFE,
U.S. Probation Officer,
Northern District of Illinois.

Case No. 5

In August 1966, the United States attorney's office placed Alvin Banks on deferred prosecution supervision for a period of eighteen months. Banks had been arrested for theft of Government property. Specifically, the offense involved the defendant's entering a building at Fort Sheridan, Illinois, which contained explosives. He took from the building a hand grenade and a block of TNT. He indicated at the time of the arrest that he wanted these explosives to "have some fun with."

Mr. Banks at the time of the arrest was 19 years of age. He came from an above-average background. Both his parents were college graduates and he grew up in the _____, Illinois, area, an above-average suburban community.

During the period of deferred prosecution supervision, Alvin was encouraged to return to school and to seek part-time employment. He had a military obligation to fulfill. He enlisted in the Air Force Reserves and attended weekly meetings. He was called to active service for a period of six months at a U.S. Air Force installation in Texas. During the period of active duty, he continued his college by correspondence courses.

His relationship with his parents became better as time passed, he seemed less rebellious, and in view of the stability shown by his continuing in school and having served in the armed services, he seemed less anxious and insecure.

At the time of the expiration date in April of 1968, Alvin was still enrolled in school and was to receive his B.A. degree in June of 1968. He was planning on entering his father's organization working full time in the sales division. He was completing his Air Force Reserves training and hoped to be commissioned a Reserve Officer.

RICHARD FERME,
U.S. Probation Officer,
Northern District of Illinois.

Case No. 6

Nineteen-year-old Fred B. Lenon, in 1966 a student at the University of _____, obtained a counterfeit Selective Service card to misrepresent his age (as being older than his true age) so that he might gain admission to establishments selling beer. In September 1966, the United States attorney at Gainesville, Florida, placed Lenon on deferred prosecution probation for 36 months. His case was transferred to the U.S. probation officer at Tampa, Florida, his home city. He made a satisfactory adjustment causing the chief U.S. probation officer to recommend early termination. The U.S. attorney released him from probation some 20 months later.

Lenon subsequently graduated from the University of _____ in accounting and was not barred from qualifying to take the Florida Certified Public Accountants examination.

Had Lenon been processed in the traditional criminal manner he probably would have been barred from the examination.

ROBERT F. EVANS,
Chief Probation Officer,
Tampa, Florida.

Case No. 7

Robert V. Katz, age 23, was a law student at a university in Northern California. This young man came from an excellent family background. His father was a career officer in Naval Intelligence, and as a child, he traveled a great deal. His father was a strict disciplinarian and the young man always tried to live up to his father's expectations. He entered law school and did not have the funds to travel as before. He became involved with a fraudulent passport and used it for improper purposes. After thorough screening by the probation officer, it was determined that this man's law career and his whole future would have been jeopardized had he been indicted and prosecuted through regular courts. Katz, therefore, was granted deferred prosecution in March 1972.

Mr. Katz continued to attend law school and the matter successfully expired in March 1973. This young man had a lot of maturing to do and supervision helped him realize he had made a serious mistake. Deferred prosecution was the only answer in this matter, allowing a brilliant young man to continue his law studies without being affected by prosecution.

STANLEY KELLOGG,
U.S. Probation Officer,
Central District of California.

Exhibit A

DEPARTMENT OF JUSTICE,
Washington, D.C., June 29, 1964.

Memorandum No. 377

To: All United States Attorneys.
Subject: Juvenile Delinquency; Use of the Brooklyn Plan of Deferred Prosecution.

This Department regards the deferred prosecution procedure known as the Brooklyn Plan as a rehabilitative method of major importance as an alternative to the Federal Juvenile Delinquency Act. Our view is based both on the nature of the plan, which permits the juvenile who succeeds under it to escape the stigma of both a criminal and a juvenile record, as well as on the high ratio of success which has been reported by United States Attorneys in use of the plan. This memorandum is designed to restate the purposes for which the Brooklyn Plan of deferred prosecution is intended and to announce a standard form (No. USA–15) for use in these cases.

As indicated, the Brooklyn Plan is designed as an alternative to a proceeding under the Federal Juvenile Delinquency Act, by which the United States Attorney in selected cases defers for a definite period any legal process against a juvenile violator. By definition, the plan is not available for use in adult cases, which are, of course, within the Criminal Division's jurisdiction. Departmental policy (stated in the United States Attorneys' Bulletin, Vol. 10, No. 13, dated June 29, 1962) does not object to special consideration being given in other ways to unusual cases involving adult offenders under a variety of circumstances, but the Brooklyn Plan itself should not be extended to persons over 18 years of age.

The general requisites for guidance of discretion in use of the deferred prosecution plan are that the violation of law be relatively non-serious; that the juvenile's previous behavior and general background be good; and that the prospect for rehabilitation be favorable. In this decision the United States Attorney should request the United States Probation Officer for his District to make an investigation and report. If the United States Attorney determines that deferred prosecution is warranted he then should have the juvenile and his parents meet with him in his office, together with the probation officer and the interested law enforcement officer. The United States Attorney should carefully explain the plan under which

the juvenile will be placed on probation for a definite period of months with the written consent of the juvenile and his parent or guardian. Both the United States Attorney and the probation officer should sign the form.

It should be noted that overly long periods of supervision of juveniles selected for deferred prosecution are neither favored nor productive. As a general rule 18 months is considered an ample maximum time, and longer periods should not be set except in very unusual circumstances.

As shown in the form enclosed, the conditions to be observed by the juvenile on deferred prosecution may be similar to those under which adults are granted probation following conviction. A space is left on the form for "Special Conditions" in which the United States Attorney may insert such additional requirements as may appear desirable in a particular case, *e.g.*, circumscribing the limits beyond which the juvenile may not travel without prior permission of the probation officer. When the juvenile has successfully concluded his unofficial probation the case is closed and he has succeeded in avoiding a court record. Conversely, on misconduct occurring during his period of supervision a proceeding under the Juvenile Delinquency Act, based on the original violation may be begun.

The enclosed form (upon agreement with the Administrative Office of the United States Courts) supersedes the form which now appears in the United States Probation Officers Manual at Appendix A–9.3, and any special forms in use by United States Attorneys. An initial supply of 30 copies is being forwarded, and additional copies may be requisitioned in the usual manner. When a juvenile is selected for deferred prosecution, four copies of the form should be made; one each for the juvenile, his parent or guardian, the probation officer and the United States Attorney's file.

As observed above, the very satisfactory results achieved in use of the Brooklyn Plan commend its utilization freely in proper cases by United States Attorneys. The Civil Rights Division will welcome comments concerning use of the plan, including case histories and any problems on which assistance is desired.

BURKE MARSHALL,
Assistant Attorney General,
Civil Rights Division.

EXHIBIT B

Form No. USA-13
(Rev. 3-1-66)

DEPARTMENT OF JUSTICE

DEFERRED PROSECUTION OF A JUVENILE OFFENDER

TO:	FILE NO.
STREET ADDRESS	
CITY AND STATE	TELEPHONE NO.

It appearing that you are reported to have committed an offense against the United States on or about _____ which alleged offense is described in the attached Appendix A, and it further appearing, after an investigation of the offense, and your background, that the interest of the United States and your own interest will be served by the following procedure; therefore

On the authority of the Attorney General of the United States by _____, United States Attorney for the _____ District of _____, prosecution in this District for this offense shall be deferred for the period of _____ months from this date, provided you abide by the following conditions:

(1) You shall refrain from violation of any law (federal, state, and local). You shall get in touch immediately with your probation officer if arrested or questioned by a law enforcement officer.

(2) You shall associate only with law-abiding persons and maintain reasonable hours.

(3) You shall attend school, or work regularly at a lawful occupation. When out of work or unable to attend school you shall notify your probation officer at once. You shall consult him prior to job or school changes.

(4) You shall not leave your Judicial district without permission of the probation officer.

(5) You shall notify your probation officer immediately of any change in your place of residence.

(6) You shall follow the probation officer's instructions and advice.

(7) You shall report to the probation officer as directed.

The special conditions are as follows:

The United States Attorney may during the period of deferred prosecution (1) revoke or modify any condition of this deferred prosecution; (2) change the period of supervision; (3) discharge you from supervision; (4) prosecute you for this offense as an adult or proceed against you as a juvenile if you violate these conditions.

If you comply with these conditions during the period of supervision no criminal prosecution or juvenile proceedings will be instituted in this district.

_____ BY: _____
United States Attorney — Assistant United States Attorney

I hereby state that the above has been read to me. I understand the conditions of my deferred prosecution and agree that I will comply with them. There have also been read and explained to me, and I fully understand, the charges against me contained in the attached Appendix A.

_____ _____ _____
(Juvenile's signature) — (Date signed) — (Date of Birth)

_____
CONSENTED TO: (Signature of parent or guardian)

I will accept supervision of the above-named juvenile.

_____ _____
(Date) — (United States Probation Officer)

30-202—74——10

[The statement referred to at p. 110 follows:]

STATEMENT OF DR. BERTRAM S. BROWN, MEMBER OF AMERICAN BAR ASSOCIATION COMMISSION ON CORRECTIONAL FACILITIES AND SERVICES

Mr. Chairman, it is indeed a privilege to appear before this Subcommittee on behalf of the American Bar Association Commission on Correctional Facilities and Services in support of legislation titled H.R. 9007 and S. 798 authorizing pretrial diversion of alternatives to court processing of certain criminal cases. Joining me in the discussion of legislative proposals H.R. 9007 and S. 798 is Arnold J. Hopkins, Assistant Staff Director of the ABA Commission on Correctional Facilities and Services, who also has responsibility for administration of our National Pretrial Intervention Service Center.

It is with intense interest that I have observed the evolution and dynamics of the early diversion concept from my position as Administrator of the National Institute of Mental Health and affiliation with the corrections reform program of the American Bar Association. The intervention technique is not regarded as a new approach for its antecedents as a "community corrections" program can be observed in the history of decentralized mental health services. My close association with the Federal Community Mental Health Services Act in the drafting and implementation phases of the legislation enables me to be reflective on its contemporary application in the context of the criminal justice reform movement.

H.R. 9007 authorizing court-sanctioned community diversion placement procedures and the companion legislation S. 798. The Community Supervision and Services Act represent, in our opinion, progressive and achievable criminal justice objectives. Moreover, we sense that many local jurisdictions eagerly anticipate the enactment of Federal pretrial diversion legislation that clearly signals public policy and leadership in the pursuit of viable alternatives to standard criminal justice programs and practices. Several community efforts demonstrating local pretrial diversion alternatives have achieved their experimental goals and now must consider the strategy and techniques by which project institutionalization can succeed. As well, innovators persuaded by the record of tested diversion programs seek guidance from the Subcommittee on deliberations on the cited legislative proposals are undertaken, thus enabling local government planning and program development priorities to achieve fruition.[1]

Consequently, it is refreshing for me to observe a visionary Congress engage its vast expertise in the promulgation of legislation in the matter of pretrial diversion. Such a pronouncement will, I submit, greatly facilitate the initiation of criminal justice diversion opportunities at all levels of government, thereby allowing the concept to achieve significant national impact. Thus, a unique intergovernmental approach to the unnerving criminal recidivism rate is on the threshold of becoming a reality.

The ABA Commission on Correctional Facilities and Services views the two pretrial diversion measures to be examined by this Subcommittee as important law reform efforts to strengthen the administration and performance of our criminal justice apparatus. While recommendations and standards developed by authoritative commissions abound, the matter of their translation and application to existing criminal justice systems and services requires considerable stimulation.

It is precisely this posture of the criminal justice reform movement that prompted the establishment of the ABA corrections reform program. As you know, Mr. Chairman, it was at the behest of Chief Justice Warren E. Burger for involvement of the legal community in corrections improvement efforts that our Commission on Correctional Facilities and Services was created as a special public service function of the American Bar Association. Now in its third year of operation, the Commission has designed and implemented a succession of national action programs to pursue promising correctional reform and offender treatment opportunities. I share the enthusiasm of our Chairman, Chief Justice Richard J. Hughes of the New Jersey Supreme Court, and Commission colleagues for the dispatch and professionalism with which our corrections reform program has been administered. We are also pleased with the ongoing support we have received from the ABA, sister professional organizations, the corrections community and the organized bar.

[1] Guidance in the planning and development of pretrial diversion programs is provided in Chapter 3, Report on Corrections and Chapter 2, Report on Courts of the National Advisory Commission on Criminal Justice Standards and Goals (1973).

I profess a special advocacy for the work of one Commission project. That is our National Pretrial Intervention Service Center which I have the good fortune of serving as Chairman of the Advisory Board. This project best exemplifies the interdisciplinary approach used by the Commission to stimulate change in the corrections process. Its mission of expanding the pretrial diversion concept by assisting localities in planning and program development efforts, together with the operation of a national clearinghouse service, has provided an excellent perspective for commentary on the two Federal pretrial diversion bills.

Under a $153,430 manpower grant from the U.S. Department of Labor, the Center was activated in March, 1973 to stimulate the establishment of pretrial intervention alternatives to criminal adjudication modeled after the Labor Department funded experimental programs in New Yorfk (Manhattan Court Employment Project) and the District of Columbia (Project Crossroads). Here the emphasis was on manpower services as a resource to achieve social and economical stability for selected criminal defendants with the expectation of reducing recidivism outcomes. The success rate in terms of decrimnalization was gratifying in that successful participants of the Crossroads and Manhattan demonstration projects were two to three times as unlikely to reappear as offender statistics then persons processed through the conventional criminal justice process.[2] (See Final Reports of the Manhattan Court Employment Project, *1972* (61 pp.) and Project Crossroads, *1971* (81 pp.).)

In view of the solid performances of Project Crossroads and the Manhattan Court Employment Project, the Labor Department has to date invested $4.2 million for support of a cluster of second-round demonstrations in nine cities to further test and analyze the pretrial intervention technique. Reports from these projects operating in Boston, Baltimore, Atlanta, San Antonio, Minneapolis, Cleveland and the three California cities of Hayward, San Jose, and Santa Rosa suggest similar results in the reduction of recidivism. Our best estimate is that from 1968 to date, upwards of 11,000 persons have enrolled in these pretrial intervention projects, three-quarters of the total admissions have been favorably terminated, (i.e., with charges dismissed), and of that number, approximately 7% have recidivated over a three month follow-up period.[3] A more detailed accounting of divertee characteristics and performance results appears in the Third Interim Progress Report on the Pre-Trial Intervention Program, prepared by Abt Associates for the U.S. Department of Labor (March, 1973).

In statements of July 20, 1972 and March 27, 1973 before the Subcommittee on National Penitentiaries, the views of the Commission on S. 798 were presented.[4] The ABA House of Delegates approved the recommendation for enactment of this legislation offered by the Section of Criminal Law at the Midyear Meeting in February, 1973. We were heartened to learn that the Community Supervision and Services Act was unanimously passed by the U.S. Senate on October 4, 1973 and take this opportunity to recognize the leadership and commitment by Senator Quentin N. Burdick in that most significant accomplishment. The report to accompany S. 798 prepared by the Senate Committee on the Judiciary issued October 3, 1973 has our total endorsement. I was particularly gratified to note the accommodations made by the Justice Department on issues pertaining to a mandatory guilty plea. These were apparently reconciled by the inclusion of statutory language in Section 2 declarations (general expectation that participants would "accept responsibility for their behavior") and the requirement of confidentiality of statements made by individuals in the diversion process (Section 6(b)).

On comparative analysis of pretrial diversion legislation proposed in S. 798 and H.R. 9007, we find no substantial substantive differences though the former bill, it is recognized, represents a more comprehensive and flexible legislative framework. Simple legislation is an art of draftmanship and we view H.R. 9007 as a

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[2] These conclusions were based on one year follow-up studies of participants behavior following successful termination of Crossroads and Manhattan deferred prosecution cases. Results here were compared with defendants similarly situated who did not gain entrance to the diversion program.

[3] Source: Pretrial Intervention Program Third Annual Progress Report, (March, 1973). Post-program recidivism (rearrests) studies of 1,316 favorable terminations indicates 68 individuals were rearrested during the 3 months reporting period, 24 on felony charges. During the second 3 month post-program period, a total of 35 of the 806 respondents were rearrested, no felony charges associated with rearrests.

[4] Hearings on S. 3309 before the Subcommittee on National Penitentiaries of the Senate Judiciary Committee, 93d Congress, 1st Session, (July 18–20, 1972) and testimony on S. 798 reported in Hearings before the Subcommittee on National Penitentiaries of the Senate Judiciary Committee, 92nd Congress, 2nd Session, (March 27, 1973).

basic authorization for diversionary placement by the U.S. District Court with procedures for the disposition, but less detail on matters pertinent to administration of services. Otherwise the obectives of both bills are identical, including pertinent provisions on administration and functional aspects of the diversionary placement authorization.

There are however, several salient provisions in S. 798 which ought to be commented upon on the basis of our experience in technical assistance activities of the ABA Pretrial Intervention Service Center. We find a healthy variation in deferred prosecution projects operating in approximately twenty jurisdictions. Programmatically, the regimen of community supportive services represents a mix of manpower and counselling emphasis. However, project variations exist in diversion authority, administering agency, intervention point and operational schemes. The flexibility in design of demonstration models is an important factor to preserve so as to allow for alternatives in service agency selection, staffing patterns, utilization of existing resources, and delivery of services plans that are influenced by eligibility criteria, project site, financing options, and manpower availability. For these reasons we favor the strategy of flexibility in project function and resource utilization provided for in Section 9 of S. 798. The proposed § 3172 of H.R. 9007 adds the screening, supervision, and servicing of diversionary placement cases to normal probation officer functions and, in this respect, may be unnecessarily restrictive given the variety of options available within and outside the criminal justice system to perform these functions (e.g., pretrial release projects established in 75 cities, employment service agencies, community treatment groups, etc.).

It may well be that Federal probation officers already have excessive caseloads, as is the case in many state agencies, and therefore would be unable to supervise additional diversion placements. In that situation H.R. 9007 may unintentionally limit servicing alternatives and thereby frustrate the full implementation or expansion of diversionary placement projects. There is a cost factor in using only probation officers to supervise and service divertees that should be considered which is guarded against under the staffing options proposed in the Community Supervision and Services Act. Paraprofessionals employed as diversion counselors and job developers are working effectively in most pretrial intervention projects in operation today and at considerably less cost than staffing exclusively with professionals. The utility of this team approach in legal, medical and educational services is gaining prominence. The forementioned stricture would seem to impair utilization of this staffing resource.

Other features included in S. 798 that might be provided for in H.R. 9007 would be: (i) confidentiality of admissions made during the diversion process, (ii) periodic reporting of participant progress to prosecuting attorney and referral judge, (iii) guidelines for termination of unsuccessful diversionary placements, and (iv) establishment of program advisory committees to provide oversight and policy on diversionary placement actions.

It is our position that as projects demonstrate their utility, steps be taken to formalize the process and procedure for diversionary placement so as to insure institutionalization of the technique. We find a variety of approaches used in the sanctioning of pretrial diversion opportunities. New Jersey and Pennsylvania have court promulgated rules of procedure. Massachusetts has legislation pending (S. 1592) which prescribes diversion procedures and administrative services and Washington recently enacted subsidy legislation (S. 2491) which provides state subsidies to local units of governments diverting defendants to community services programs at $448.00 per referral. Absent these examples, the authority for conducting pretrial diversion projects is based on prosecutorial discretion in the charging function with use of extra-judicial and third-party custody arrangements for placement of adult/juvenile diversion cases. Formalized operating agreements and administrative policies do not exist for many pretrial intervention projects making them vulnerable to accountability inquiries.

Turning to the legal issues in the diversionary process, a discussion of certain fundamental constitutional safeguards appears in the Senate Judiciary Committee Report on S. 798 at pp. 13–16. Most prominent of the diversion legal issues is the desirability of a mandatory guilty plea as a condition precedent to participant enrollment. The ABA position on this issue was eloquently stated by Keith Mossman, Chairman of the Section of Criminal Justice in testimony on S. 798 before the Subcommittee on National Penitentiaries (see Hearing on The Community Supervision and Services Act, 93rd Congress, First Session, at p. 375). Mr. Mossman indicated the ABA was not persuaded that a required plea of guilty had rehabilitation value and suggested this concept

should not be written into the statute. Chairman Hughes responded in kind via his letter of February 8, 1973 to Senator Burdick (Hearing transcript at p. 380). S. 798, as amended, declares in Section 2 that diversion alternatives to institutionalization be "made available to persons accused of crime who accept responsibility for their behavior" a consideration agreed to by the Justice Department as having the effect of excluding individuals who choose to plea not guilty from entering the diversion program. We find no fault with this provision.

Other diversion legal aspects dealing with (i) equal protection guarantees on eligibility criteria, (ii) nondisclosure of defendant admissions while in a program, (iii) due process in terminaton hearings for unsuccessful participants, and (iv) assistance of counsel will be addressed in a forthcoming technical assistance publication by our National Pretrial Intervention Service Center.

Mr. Chairman, our Commission is of the mind that pretrial diversion is an idea whose time has come. There exists persuasive evidence of the concept's viability in reducing criminal recidivism by enabling participants to get into a lifestyle of worthwhile employment and stability with the help of manpower services and training. And too, the criminal justice system benefits through greater flexibility in its operation and increased effectiveness as a rehabilitation vehicle. The community gains from decriminalization achievements, as well as from employability and productivity of the diversion "graduate".

Let me hasten to add that pretrial diversion is no panacea but rather it represents but one approach conceived to estop, or at least slow down, the revolving door of crime today.

After careful study and analysis of S. 798 and H.R. 9007, we believe both legislative proposals offer a sound basis for introducing the pretrial diversion capability in the United States District Court System. We wish the legislation well.

[The statement referred to at p. 110 follows:]

STATEMENT OF HERBERT S. MILLER ON BEHALF OF THE AMERICAN BAR ASSOCIATION

Mr. Chairman and Members of the Subcommittee: My name is Herbert S. Miller, and I am Chairman of the Committee on Corrections and Rehabilitation of the Section of Criminal Justice of the American Bar Association. It is a pleasure to be here, Mr. Kastenmeier, to testify before your subcommittee on S. 798 and H.R. 9007.

At the outset I would like to say that the American Bar Association heartily endorses the concept of early diversion programs. Just three years ago, in February of 1971, the House of Delegates of the American Bar Association approved *Standards Relating to the Prosecution Function and the Defense Function*, as part of the American Bar Association Project on Standard for Criminal Justice.

As you probably know, the American Bar Association Standards for the administration of criminal justice are the result of a lengthy, balanced and careful drafting process. The seventeen approved Standards, including the *Standards Relating to the Prosecution Function and the Defense Function*, were drafted over a period of ten years by a balanced team of experienced trial and appellate court judges, prosecutors, defense attorneys, public defenders, general practitioners, law enforcement officials, law school deans and professors. The ABA Section of Criminal Justice has the nationwide responsibility for the implementation of the Standards. Over the past few years, the Section's implementation program has gained increasing momentum as more and more states across the country have launched statewide implementation efforts. A number of states have adopted in whole or in part the Standards by formal court rule or statute. Over 1500 appellate court opinions have cited the Standard.

The ABA Section of Criminal Justice supports S. 798 and H.R. 9007 because they embody provisions of the following Standards from those relating to the prosecution function and the defense function.

The Prosecution Function

3.8 Discretion as to non-criminal disposition.

(a) The prosecutor should explore the availability of non-criminal disposition, including programs of 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.

(b) Prosecutors should be familiar with the resources of social agencies which can assist in the evaluation of cases for diversion from the criminal process.

The Defense Function

6.1 Duty to explore disposition without trial.

(a) Whenever the nature and circumstances of the case permit, the lawyer for the accused should explore the possibility of an early diversion of the case from the criminal process through the use of other community agencies.

The fact that S. 798 and H.R. 9007 include the specific elements of the cited Standards is a tribute to them. These Standards were developed in a climate of deep concern over the burgeoning problems of crime and the correlative crisis in our courts occasioned by overwhelming caseloads, recidivism and a seeming incapicity of the system to respond to the challenges of our time. It should be emphasized that these seventeen volumes of the Standards, which include those relating to the prosecution function and the defense function, are designed to "treat the whole man"—to strengthen the entire criminal justice system. They are all interrelated—conceived as a group of components, each comparable with the others and all interdependent.

Earlier, in 1967, the President's Commission on Law Enforcement and Administration of Justice adopted a Standard in its final report, *The Challenge of Crime in a Free Society*, which also endorsed the concept of early diversion programs. It recommended on page 134 the following:

"Prosecutors should endeavor to make discriminating charge decisions, assuring that offenders who merit criminal sanctions are not released and that other offenders are either released or diverted to noncriminal methods of treatment and control by:

"Establishment of explicit policies for the dismissal or informal disposition of the cases of certain marginal offenders.

"Early identification and diversion to other community resources of those offenders in need of treatment, for whom full criminal disposition does not appear required."

More recently strong endorsement of early diversion programs came from the National Advisory Commission on Criminal Justice Standards and Goals which issued its report in January of 1973. Standard 3.1, Use of Diversion in the Corrections portions, provides in pertinent part as follows:

"Each local jurisdiction in cooperation with related State agencies should develop and implement by 1975 formally organized programs of diversion that can be applied in the criminal justice process from the time an illegal act occurs to a jurisdiction."

As a former trial attorney in the Criminal Division of the Department of Justice, I know first-hand and am conversant with the problems of prosecutorial discretion. I feel that S. 798 and H.R. 9007 are tools which will help the prosecutor in making the proper decision in the disposition of the case, that will aid in strengthening the overall administration of criminal justice.

There is no opposition to the concept of an early diversion program being implemented in the offices of prosecutors. The American Bar Association gave careful consideration to the concept and to S. 798. Initially, the Criminal Justice Section Committee on Corrections and Rehabilitation of Offenders unanimously recommended endorsement. The Governing Board of the Criminal Justice Section, the Criminal Justice Council, unanimously adopted the report of its Committee, and in February of 1973 the House of Delegates of the American Bar Association, its governing body, endorsed the concept of S. 798 without opposition. Attached to my testimony is a copy of the Criminal Justice Section Report and recommendations upon which this ABA endorsement was based.

Several matters were discussed quite thoroughly in the consideration of this legislation by the Section of Criminal Justice. One such issue was a suggestion by some persons that the individual being considered for release admit guilt as a condition of being admitted into the program. Constitutional problems involving self-incrimination, it was argued by the proponents of this suggestion, could be solved by a provision limiting the use of statements made as part of the rehabilitation process. The Section of Criminal Justice recommended against the inclusion of this requirement, and the ABA supported our Section. The argument for its inclusion is that such an admission is the first step in rehabilitation. The ABA is not persuaded of the validity of this contention. Moreover, the ABA believes this concept should not be written into the statute.

Another question which deserves further comment has been the length of time during which an individual could be kept on release to the program of community services and supervision. S. 798 and H.R. 9007 provide that there should be periods of 90 days established after which the administrative head of the program would

report to the court and the attorney for the government on the progress of the released individual. These 90-days periods may be renewed for a period up to one year in the aggregate. Some have suggested that a longer period is necessary. Testimony before the Senate indicated that a program in New Jersey recommended a six-month maximum. We believe that this would be too short a time in which to make a judgment concerning a charged person's ability to fulfill the obligations of a planned program. On the other hand, the three years suggested by some would be so long as to discourage some persons from entering the program. In addition, if three years is really needed, it might be best to proceed criminally and have the person placed on probation. In the view of the ABA, one year seems to be a reasonable compromise which permits sufficient time to evaluate a person's performance and not stretch out the boundaries of a justifiable supervision over an individual not yet convicted of a crime.

The American Bar Association does not believe that enactment of this legislation would affect the options now available to prosecuting attorneys, namely to dismiss charges outright, to negotiate a plea, or to proceed with a trial. It is the ABA's belief that these activities will continue even if this bill becomes law. There are many cases which for a number of reasons should be dismissed outright. There are other cases which deserve negotiation, and there are yet others which should go to trial. But somewhere in the welter of cases and varying considerations which underly prosecutorial discretion, there is a gray area—cases which should not be dismissed outright but yet should not be prosecuted without some intervention. The ABA believes that as to these cases both bills present great opportunities to professionalize existing practices which involve the continual exercise of discretion by prosecuting attorneys everywhere.

Some profess to believe that legislation of this significance should not be enacted at this time because insufficient hard evidence exists concerning its effectiveness and it operational viability, and that we should wait for more experience from different jurisdictions. However, the ABA believes that a sufficient number of experimental projects have been undertaken to warrant a major step forward and that the bill will help reduce the backlog of criminal cases in our courts; improve chances that some criminal defendants can be turned away from future crime: and reduce the expense to the taxpayers by providing job training and employment at lower cost. Moreover, the ABA believes the passage of a federal law formalizing pretrial diversionary practices would have substantial impact on many state and local jurisdictions and would encourage the institution of such programs throughout the United States. We believe the concept is fundamentally important, that its concept is widely supported, and that passage of this legislation would constitute a significant step forward in improving the administration of justice in the United States.

Mr. Chairman, the major thrust of both bills is to reduce recidivism by providing community-centered programs of supervision and services for persons charged with offenss against the United States. As a former prosecutor, and speaking for the American Bar Association, I heartily endorse this approach as a major crime prevention tool in the fight against crime.

While both bills accomplish this basic thrust there are some significant differences which deserve analysis. In considering S. 798 the Criminal Justice Section discussed at some length the exercise of prosecutorial discretion in selecting individuals who could participate in the diversion program. There was unanimous agreement that both the initiation of the diversion program and its termination, by dismissing the charges or resuming the prosecution, should occur only upon the recommendation of the attorney for the government, the United States Attorney

Section 3173(c) of H.R. 9007 appears to authorize the court to dismiss the charges against an individual. The court must consult with the attorney for the government and the probation officer who supervised the individual, but it could dismiss the charges after such consultation, rgeardless of the view of the attorney for the government. Section 7(c) of S. 798 requires the concurrence of the attorney for the government before the court dismisses the charges.

Section 3173(b) of H.R. 9007 states that the court may terminate the program of community supervision and services and authorize the attorney for the government to resume the deferred criminal prosecution. Section 7(b) of S. 798 provides for termination of the release and resumption of pending criminal proceedings by the court if "the attorney for the government finds such individual is not fulfilling his obligation under the plan applicable to him, or the public interest requires."

The American Bar Association believes that discretion to initiate a deferral of charges and thereafter decision involving their resumption or dismissal should rest with the U.S. Attorney.

In both bills programs are prepared and diverted offenders are supervised. In S. 798 a special office has been established and in H.R. 9007 the Federal probation office performs this role. In both cases their findings are available to the attorney for the government and the court. Obviously the reports they make will have impact on decisions to initiate or terminate the diversionary program.

Some may criticize the vesting of such discretion in the prosecuting attorney. Others may criticize these bills as taking away discretion. The American Bar Association is not impressed with either argument. Its view is that such an approach professionalizes and rationalizes an existing irrational and uninformed decision making process. In short, prosecutors at the federal levels are making such discretionary decisions now without adequate information about the individual and without any oversight by the court.

In both proposed bills the attorney for the government carries out the deferral and diversion under the close scrutiny of the court. In S. 798 the court makes the final decision on termination of the diversion after it is initiated by the attorney for the government.

The American Bar Association believes that the discretion to initiate must remain in the prosecution—that the requirement of voluntariness, a knowing and willing waiver of constitutional rights, and the oversight of the court throughout the entire diversionary process provide substantial safeguards to arbitrary action by an attorney for the government.

Another major difference in the two bills relates to the establishment of necessary investigative and supervisory services. S. 798 authorizes the attorney general to appoint, with the concurrence of the court, an administrative head of a community supervision and services department. Such a person would be appointed by the attorney general to operate under the discretion of the U.S. Attorney and be subject to rules and regulations promulgated by the attorney general.

H.R. 9007 provides for the existing probation office in a judicial district to perform the additional functions required by the terms of the act. It also provides for such additional probation officers as may be required due to the increased workload.

Perhaps the major difference in the two approaches is in the flexibility which S. 798 provides. In addition to appointing an administrative head who would oversee the operation of the diversionary program, Section 9(1)(B) of S. 798 authorizes the attorney general to utilize, on a cost-reimbursable basis, the services of such United States probation officers and employees of the executive and judicial branches of the government, other than judges or magistrates, as he determines necessary to carry out the purposes of the act.

In the American Bar Association *Standards Relating to Probation*, the ABA took cognizance of the fact that probation officers might be called upon to perform collateral services apart from the traditional function of a probation department. Section 6.3 of the Standards provides as follows:

"6.3 Collateral services.

"In appropriate cases, probation departments should be prepared to provide additional services which may be foreign to the traditional conceptions of providing presentence reports and supervising convicted offenders. Examples of such additional services include the preparation of reports to assist courts in making pretrial release decisions and assistance to prosecutors in diverting selected charged individuals to appropriate noncriminal alternatives."

In its commentary to this standard, the ABA commented that under proper standards and safeguards, the probation service might be in a position in a particular community to provide assistance in the collection and application of such information.

It is this commentary on standards and safeguards which points up a deficiency in H.R. 9007. An informational report prepared prior to the decision on diversion is similar to the probation report prepared for court prior to sentencing. In the American Bar Association *Standards Relating to Probation*, and *Standards Relating to Sentencing Alternatives and Procedures*, a standard was adopted which recommended that pre-sentence investigations not be initiated until an adjudication of guilt. Two exceptions were recognized. Standard 2.4 from the *Standards Relating to Probation* provides as follows:

"2.4 When prepared.

"(a) Except as authorized in subsection (b), the presentence investigation should not be initiated until there has been an adjudication of guilt.

"(b) It is appropriate to commence the presentence investigation prior to an adjudication of guilty only if:

"(i) the defendant, with the advice of counsel if he so desires, has consented to such action; and

"(ii) adequate precautions are taken to assure that nothing disclosed by the presentence investigation comes to the attention of the prosecution, the court, or the jury prior to an adjudication of guilt. The court should be authorized, however, to examine the report prior to the entry of a plea on request of the defense and prosecution."

Section 6(b) of S. 798 meets one of the exceptions provided for in Standard 2.4 wherein it states that:

"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."

Both S. 798 and H.R. 9007 meet the requirement of voluntariness expressed in Standard 2.4. But neither bill specifically requires the advice of counsel in such a matter. We believe that counsel would be appointed in the normal course of a proceeding and that the defendant would consult with counsel concerning a possible diversionary program. Nevertheless it might be useful to add language to either bill which would require, in specific terms, the advice of counsel before consenting to being placed in the diversionary program and having an investigative report prepared.

In connection with the kind of service agency for a diversionary program it should be noted that other pretrial service agencies may be established in federal districts should Title II of S. 754 be passed by the Congress. Title II would provide for the establishment of pretrial service agencies to implement the Federal Bail Reform Act of 1966.

Title II has been endorsed by the American Bar Association. In its commentary to this endorsement a suggestion was made that a number of federal districts be chosen for both the pretrial and diversion programs. We suggested that after a suitable period of review and evaluation a determination be made as to whether one single pretrial services agency could provide services for both pretrial releasees and those being diverted to community supervision and services. The structure provided for in S. 798 lends itself to this kind of approach.

One final word about S. 798. Section 9 contains provisions for research and evaluation of the diversion program and provides for the promulgation of rules and regulations and policy standards. We believe both provisions are salutary and should be included in whatever legislation this committee adopts.

[The following statements were submitted for the record:]

TESTIMONY OF RAYMOND T. NIMMER, RESEARCH ATTORNEY, AMERICAN BAR FOUNDATION, CHICAGO, ILL.

I would like to express my appreciation to the Committee for being permitted the opportunity to present for your consideration my reactions to the proposed House bill HR 9007 (S. 798), entitled the "Community Supervision and Services Act."

Before proceeding to the substance of my comments, it is appropriate to briefly outline the background from which they derive and the limitations under which they are expressed. I am a research attorney on the staff of the American Bar Foundation. The Bar Foundation is an institution actively engaged in the empirical study of law-related social phenomena. My experience with the general topic addressed by the proposed legislation derives primarily from two national research projects that I have conducted while at the American Bar Foundation. The first study examined innovative responses to the problems symptomized by and resulting from the over two million arrests made each year on the charge of public drunkenness. The second study was a general analysis of practices and performances related to the process of pretrial diversion in the criminal justice system, the topic with which the currently proposed legislation deals. I have provided the Committee staff with copies of the reports of these two studies. I should emphasize at this point, however, that the content of these

reports as well as the substance of the following testimony reflect my opinions and do not purport to portray an official position of the American Bar Foundation or of the agencies funding the two studies. Additionally, I have recently had the opportunity to serve as a consultant to the National Commission on Standards and Goals for Criminal Justice. In this role, I consulted with the Commission Task Force on the Courts in drafting standards relative to diversion.

After having reviewed the proposed legislation in light of my personal experience in this field, I have two general conclusions to suggest for the Committee's consideration. First, any legislation to establish diversion (community-based counseling and supervision in lieu of or, at least, preceding conviction) as an integral, permanent element of pretrial proceedings is at best premature and, at worst, detrimental to an orderly definition and development of appropriate practices for the pretrial stage of the criminal justice process. Second, should the Committee determine that legislation in this area is appropriate at this time, I would suggest that the current bill contains substantial deficiencies to the point that enactment in its current form is clearly undesirable.

A. ANY PERMANENT DIVERSION PROGRAM IS PREMATURE

Although diversion is not a new phenomenon in the criminal justice field, the current status of evaluative research concerning the counseling impact on defendants who elect to participate in a diversion program is primitive. For many years, diversion has existed on an informal, unstructured basis. In this traditional form, diversion consists of a decision on the part of a judge or a prosecutor to defer prosecution and/or conviction for selected defendants while they pass through a largely unsupervised waiting period. This form of diversion is essentially a coping response on the part of these officials who are faced with overwhelming caseloads. A primary purpose of this form of diversion is efficiency-oriented, and the decision to divert is, in most cases, tantamount to a decision to dismiss charges against the defendant. No studies have been conducted to examine the impact of these practices on the defendant.

In the mid-1960's diversion began to assume a second appearance. Stimulated by federal and other grant programs, a variety of well-funded counseling and treatment programs were established to accept defendants who had received deferrals of prosecution. Programs developed by the Vera Institute in New York and Project Crossroads in the District of Columbia were the forerunners of a rapidly spreading tendency to experiment with the provision of such services in the pretrial setting. These programs have attracted substantial, national interest and, with few exceptions, have conducted crude studies that allegedly document significantly effective counseling performance. Most of these studies were conducted by the staffs of the programs being evaluated.

There has occurred what might best be described as a snowball or bootstrap effect. With each new program and each new, quasi-scientific evaluation, the general theme has grown that diversion is a proven successful counseling format. It is only recently that more impartial, preliminary research and reflection about the diversion phenomenon has begun to question this reputation. Increasingly, observers such as Frank Zimring of the University of Chicago, James Vorenberg of Harvard and Dan Freed of Yale have suggested that the actual counseling impact of diversion is not known. The reports of the National Commission on Standards and Goals reaffirm this position in calling for extensive research on the phenomenon of diversion.

I will not belabor the deficiencies in most of the existing program-centered research on counseling impact. A good general review of this research is being compiled by Neil Miller of the National Pretrial Intervention Center. Instead, I will simply state the opinion that, judged by virtually any standard of research methodology, there currently exists no reliable documentation that counseling placed in a pretrial setting performs more effectively than post convictions counseling.

The thrust and the limitations of this observation should be clearly recognized. Most diversion programs report extremely low recidivism rates for individuals who have successfully completed the counseling program. Within the limits of current record keeping procedures in criminal justice, these statistics are undeniably accurate. However, they do not document diversion counseling performance. All diversion programs are extremely selective in choosing individuals to participate in counseling. They are, typically, restrictive not only in terms of crime charged and prior record characteristics of individual defendants, but also are highly selective in terms of the defendants' motivation for counseling. In

short, the clientele is not comprised of the typical defendant population, but of carefully selected individuals—persons who should perform better regardless of counseling approach.

It is also important to distinguish the lack of documentation of counseling performance from a general criticism of the manner in which most current diversion programs function. The clear impression gained from visiting many programs is that enthusiastic, competent counselors are working diligently and, potentially, accomplishing significant results. However, an element of reality must be engrafted into one's view of these current programs. Most are supported by grants that create desirable resource characteristics for the program. In evaluating counseling performance, it is necessary to separate these special funding characteristics from the unique placement of the counseling program. Stated simply, it is clearly possible that the competent, aggressive staff of programs such as those found in New York City are having a beneficial impact on their clients, but that a similar program, replicated without special funding and enthusiastic staff will perform no more effectively than traditional corrections programs.

Finally, my comments should not be understood to suggest that the lack of reliable evaluations is intentional on the part of programs desiring to justify their existence. It is, instead, circumstantial, a result of the practical limitations under which any new program functions. For example, the Manhattan Court Employment program has used outside researchers and, in response to the suggestion of its latest consultant, is currently developing a more rigorous evaluative study. However, the process of evaluation of counseling impact is a complex, costly and time-consuming undertaking. Most programs, whose primary obligation is to deal with clients, are unable to conduct such analyses.

Conceivably, the uncertainty as to counseling impact could be ignored if there were no potential detriments involved in proceeding to implement a diversion structure in the federal courts. However, there are clear potentials for harm. Most of these revolve around the effect on the defendant of undergoing supervisory and other procedures.

The period of counseling, whether it be three months, twelve months (as in the current bill) or two years, represents a substantial constraint on the individual's liberty and freedom of action. This constraint occurs because he has been allegedly implicated in a criminal act. Unless we assume that the filing of criminal charges is tantamount to a finding of guilt, the extent to which this procedure deviates from traditionally accepted limitations on the exercise of state control over an individual is obvious.

It can be argued that this control is justified by the defendant's election to endure it, counseling occurs only if the defendant voluntarily chooses it. However, without becoming legalistic, it is apparent that any such choice by the defendant is voluntary only in a limited sense. The defendant who is offered an opportunity to choose diversion is faced with the following options: he may elect to undergo lengthy counseling with the possibility of avoiding conviction, or he may submit himself to the uncertainties of the jury trial and other adjudicative procedures with the possibility of eventual conviction. The ever-present pressure may be to avoid the adjudicatory process.

It is important to recognize that the decision to be made by the defendant can be strongly influenced by the officials of the court. The extent to which the defendant will be willing to forego the diversion program will be determined by the extent to which the other alternative appears to be more onerous. For example, the offer of diversion could be accompanied by an overt or implicit threat to deny the defendant access to charge concessions in plea bargaining or to seek the maximum sentence on the charges against him. Under such pressure, defendants might be induced to accept diversion and to waive any challenge to the charges or to the procedures by which they have been brought before the court.

The diversion interval also involves a substantial delay of the disposition of charges against the defendant. It is in part, therefore, inconsistent with the much-discussed public interest in speedy trial. This inconsistency might be justified if a demonstrated counseling benefit existed.

In essence, I would suggest that the Committee consider the position that diversion, in its new form, is an experimental phenomenon. It carries a strong potential benefit, but should be subjected to rigorous evaluative research prior to being accepted as an integral part of the criminal justice process. At most, it should be added to the federal criminal justice system on an experimental basis, coupled with the provision of resources for intensive research and analysis of its impact.

B. EVEN ASSUMING THAT SOME STATUTE IS DESIRABLE AT THIS POINT, THE CURRENT BILL CONTAINS SERIOUS DEFICIENCES

As currently proposed, the statute contains a number of troubling characteristics, but the most apparent relate to its failure to provide guidelines, standards or criteria for the decisions made during participation in a diversion program and its failure to provide adequate safeguards to ensure defendant rights in the program.

As presently constructed, the initial decision concerning eligibility for diversion is made by the office of the prosecutor. This placement of initial decision-making authority is consistent with the dominant role played by prosecutorial officials in most programs. Elsewhere, this control derives from the implicit understanding that the decision to offer diversion is one element of the prosecutor's charging authority.

It is possible to question the advisability of the structure of the current proposal based on the fact that the intent of the bill is to create more effective counseling programs for individuals charged with violations of federal, criminal statutes. Since the initial decision to offer diversion is entrusted to the prosecutor, the bill establishes an environment in which this decision will commonly be made on criteria not directly related to counsel'ng variables. For example, a central element of prosecutorial decisions in diversion in state jurisdictions has been the policy consideration of whether the alleged offense constituted a serious criminal charge. The emphasis has been on admitting defendants to diversion only if prosecutor policy defined the charge as marginally serious. Thus, some individuals who might benefit from diversion counseling are denied admission to the program.

Other jurisdictions handle the process of identifying potential candidates in a manner that focuses the process more directly on the defendant and on counseling consideration. For example, a Nassau County, New York diversion program functions under general eligibility guidelines promulgated by the prosecutor, but individual decisions concerning entry are made principally by the counseling staff and the defendant. The diversion process is initiated on motion by the defense; the motion is reviewed by the counseling staff and reviewed by the prosecutor only if the defendant is found to present a counseling problem for which the program is able to provide assistance. This format not only alters the balance between defendant-counseling considerations and prosecutorial policy, but permits a considered judgment by the defendant with the assistance of defense counsel.

A second decision-making framework also involves the prosecutor only after the defendant and the counseling program have agreed that participation is desirable. In this process, potentially eligible defendants are contacted shortly after arrest by a member of the program staff. Contacts are made under general guidelines promulgated jointly by the program and the prosecutor. Again, the prosecutor has final authority to accept or reject diversion in individual cases.

Although these variations in procedure may appear insignificant, in practice, they can lead to radically different selections for the diversion program. As presently constituted, the structure of the current bill promotes a decisional process in which the unilateral policy decisions of the prosecutor are likely to become the over-riding consideration in diversion program eligibility. In the other two models, these policy decisions are more likely to be influenced by the defendant, his attorney and the counseling staff in individual cases.

The specifics of decisional procedure would be less troublesome if the proposed statute provided guidelines for the decisions that are to be made. With respect to the prosecutor and the staff of the program, no guidelines are provided as to the basis on which decisions are to be made. Instead, the process is entirely discretionary. Will prosecutors limit eligibility to first offenders; to individuals who plead guilty; to persons charged with minor crimes; to youthful offenders; to persons of a given political philosophy; to black or white offenders? Will the program staff restrict its judgment concerning eligibility to individuals not having drug problems; to persons who represent ideal counseling risks? The answers will vary, both among the various district courts and as regards individual defendants.

It is essential, in my opinion, that the statute provide guidance for these decisions. This guidance need not take the form of specific rules that can be mechanically applied to individual cases. It must, however, establish the essential considerations that are to be included in reaching individual decisions.

One outgrowth of the lack of standards is that there exists, on the face of the current proposal, no procedure for a defendant to challenge a decision that denies entry into a diversion program. Diversion is, in essence, treated as a privilege that the prosecutor may or may not offer to the defendant. Again, one need not assume a legalistic pose to argue that this procedure can result in unfairness to many individuals.

Overall, I would suggest that a procedure similar to that outlined above would be more appropriate and would better assure the protection of individual interests and equality of treatment. All defendants should be notified of the existence of the diversion program. Application for diversion should be made on a motion by the defense, reviewed by the counseling staff and the prosecutor under established guidelines, and submitted to a court hearing to determine eligibility.

Both inadequacies, the lack of standards and the absence of a procedure to challenge adverse decisions are present at the other stages of the diversion process. Under what mechanism is a plan for the defendant's conduct while in the program to be determined? Under what procedures and criteria is the decision to terminate the defendant as unsuccessful to be made? What effect should unsuccessful program participation have in sentencing decision following any eventual conviction? Under what procedures and criteria is it to be determined that the defendant has successfully completed the program?

A final area of concern relates to the provision of defense counsel in the decisional process leading to diversion. Clearly the decision to be made by a defendant is complex. He must balance the desirability of the diversion program, making assessments of the type of supervision, counseling and other ingredients of diversion, against the probable results of proceeding with the criminal charges against him, making assessments of the likelihood of conviction, the probable sentence if convicted as well as the probable, collateral effects of conviction. This balancing must be accomplished under pressures and with the background that both the prosecutor and the program staff are expressing their opinions and interests. Clearly, the case for ensuring that the decision be made with the advice of counsel is persuasive.

It should be recognized that the current structure of the bill does not ensure that defense counsel will be involved. There is no specification of the point at which eligibility is to be determined and, conceivably, the decision could be made at a point prior to the time at which defense counsel is provided. In view of this possibility, I would urge the statute specifically require that defense counsel be provided at every point of decision in the proposed process.

In conclusion, I would like to reiterate my general response to the proposed bill. First, it establishes as a permanent element of the justice system a counseling format whose impact has not been fully examined. It does this without providing for a substantial evaluative research element in the new program. Second, even assuming that the time is ripe for some legislation in this area, the current bill lacks essential standards and safeguards.

STATEMENT BY EDWARD DE GRAZIA, VISITING PROFESSOR OF LAW, UNIVERSITY OF CONNECTICUT; PROGRAM AND LEGAL DIRECTOR OF PROJECT ON PRE-TRIAL DIVERSION OF ACCUSED OFFENDERS TO COMMUNITY MENTAL HEALTH TREATMENT PROGRAMS, WASHINGTON, D.C., 1968–71; MEMBER OF THE BARS OF THE DISTRICT OF COLUMBIA AND THE U.S. SUPREME COURT

Students of the criminal process predict that "the prison or penitentiary as we know it will almost certainly have followed the death penalty, banishment, and transportation into desuetude before the end of the century." (Morris and Hawkins, *The Honest Politician's Guide to Crime Control* at 124, 1969). It is today widely recognized that institutional incarceration, far from being necessarily beneficial, is in fact usually deleterious to human beings. Experience throughout the world with "total institutions," prisons and mental hospitals alike, shows their adverse effects on the later behavior of their inmates. For some time, therefore, experimental development has been taking place, tending toward the eventual elimination of prison and the mental hospital in the forms we know them. The troubles are not, however, limited to our "total institutions." The courts, public prosecutor offices, probation and parole, all are failing to achieve their goals. The present criminal justice system is known to be failing to apprehend two-thirds of the people who commit reported crime. It is failing to bring to judgment half of those it apprehends. Most of the judgments result

not from adversary trials openly held before judges and juries, but from guilty pleas negotiated in private by prosecutors in ways which are not controlled by legal rules, precedents, or standards, and, effectively, are non-reviewable by the judiciary. Finally, in the District of Columbia, alone, thousands of persons annually who are accused of misdemeanor and felony offenses get their charges dropped for "non-meritorious" reasons, such as prosecutor overload, crowded calendars, and court congestion. (See the *Report* of The President's Commission on Law Enforcement and the Administration of Justice at 21 and the *Report* of the President's Commission on Crime in the District of Columbia.)

It is one thing to recognize that elemental structures within the criminal justice system are observing its correctional goals; it is another to invent, test, and incorporate in their place, more effective replacement parts. In 1968, the Center for Studies in Crime and Delinquency of the National Institutes of Mental Health (NIMH) made a research grant to the Georgetown University School of Medicine, Department of Psychiatry, to support a "pilot" study in Washington, D.C. which was designed to test the feasibility of one such innovation—the *diversion* of accused offenders into community mental health treatment programs. Although the *Crossroads* and *Manhattan Court Employment Projects* were carried out at the same time, neither of these diversion project involved the attempted diverion of mentally ill offenders. On the other hand, both S. 798 and H.R. 9007 anticipate the involvement of federal courts and community agencies in the delivery of needed and wanted medical and psychological services. Since no other diversion project is known subsequently to have engaged in the structured diversion of accused misdemeanants and/or felons to mental health services in the community, it would seem valuable for the Congress to have available to it, in connection with its consideration of the proposed legislation, the final report submitted to NIMH concerning the goals, methods, problems, results, and implications of the Washington, D.C. mental health diversion project.

I was program and legal director of that *Project* and author of the Report submitted to NIMH on January 19, 1972. The project's medical and co-director was Dr. James Foy, Professor of Psychiatry at the Georgetown University School of Medicine. Our other key staff are named in the Report which is being submitted herewith and is found in the Subcommittee's files. The Report of our project has already been studied by many individuals and groups concerned with the experience of pre-trial diversion to community programs, but it has been unavailable before now to the Congress and its committees. Among other distinguished groups who have studied the diversion process, the *National Advisory Commission on National Standards and Goals* quoted and relied upon this Report and its findings, for example in the volume on the *Courts* (Chapter 2, *Diversion* at pages 28–29 and 36). This study, which was conducted over a period of three years, was carefully designed and thoroughly evaluated in its principal research aspects, including those which demonstrated the ways in which mental health diversion could be accomplished more cheaply than prosecution, and with no less deterrent impact on divertible charged offenders. The Report deals with many of the same critical issues in diversion which S. 798 and H.R. 9007 are concerned to resolve in ways which will serve the "interests of protecting society and rehabilitating individuals charged with violating criminal laws."

The Report deals, for example, with the following issues: prosecutor involvement in decisions to divert and seek dismissals of pending charges; the role of defense lawyers; the role of judges; the role of victim-complainants; the willingness and ability of private and public agencies in the community to render needed mental health services to persons accused of crime; the methods developed to protect confidential data concerning the accuseds' mental problems; the autonomous structure of the diversion unit itself, making it possible to take cases from judges as well as prosecuting and defense attorneys, and/or to select cases itself; the handling of "speedy-trial" problems; and the ways in which voluntarism on the part of diverted persons can be assured. Finally, we showed that accused offenders can be diverted from the criminal process without requiring them to admit guilt.

We diverted one hundred and sixty-four accused exhibitionists, sodomists, drug-law violators, husband, wife, and child-abusers, petty thieves, arsonists, receivers of stolen property, destroyers of property, and others. We got two-thirds of those referred to us into public and private treatment programs, including psychotherapy. We found other needed social services and support for them, and we got their charges dismissed. The mental problems presented by our subjects included a full range of mental disorders.

I am glad to be in a position to provide the Congress with the details of our Project, which should also prove useful to the federal, state and local courts and community agencies who will begin to plan and develop diversion programs, once this proposed legislation is enacted. I heartily support the concept of diversion and its well-considered introduction into the courts and communities of the nation.

UNITED STATES DISTRICT COURT,
DISTRICT OF OREGON,
PROBATION OFFICE,
February 19, 1974.

Hon. ROBERT W. KASTENMEIER,
Member of Congress,
Chairman, Subcommittee #3,
2232 House Office Building,
Washington, D.C.

DEAR MR. KASTENMEIER: As President of the Federal Probation Officers Association, I write to let you know that there is strong support for H.R. 9007, the bill which would authorize programs of community supervision for certain persons charged with federal crimes. Moreover, there is persuasive evidence that the responsibilities involved should be assigned to the Probation Officers of the U.S. Courts.

Diversion and deferred prosecution plans are not new in the federal system. U.S.C. Title 18, Section 5001 authorizes diversion of persons under the age of 21 years to local authorities for proper handling; indeed, most juveniles accused of federal offenses have been, and are thus traditionally diverted (and properly so) from the federal system, frequently with the aid of United States Probation Officers. The practice of deferred prosecution with community supervision being provided by probation officers has been in effect for more than 30 years on an informal basis. It has been often referred to as the "Brooklyn Plan." Today there are nearly 800 juveniles and adults currently being provided such services. In an address on December 6, 1971, at the National Conference on Corrections at Williamsburg, Virginia, the Attorney General of the United States orally indicated his intent to expand the practice; and his successor recently authorized the procedure for a specific category of adult cases. Over the many years involved the investigation and supervision services have consistently been provided by probation officers, aided by existing community resources, with about 98% of the cases reaching a successful termination.

There are other equally persuasive reasons why this plan should remain within the Court's Probation System. It is one element of the justice system that has not required intervention in recent years to protect the rights of the offender. Indeed, its beneficial influence has extended forward in the justice system into the correctional area and back into the pre-trial arena. Not only is this a significant factor in and of itself, but where else, other than within the Court, can the sought after protective avoidance of the creation of a "record" be better assured? Further, it will be recalled that the American Bar Association has assiduously insisted that presentence type investigations should never be permitted, even remotely, to fall within the influence of the prosecutor. I suggest, with greatest concern before any such authorizing legislation might be passed, that painstaking care be taken to investigate the possible implications of allowing either the social investigations involved or the actual supervision of such persons to be placed in the same branch of government as the prosecutor. Beyond the fact that the tasks involved have been successfully performed for many years by probation officers with appropriate protections, their numbers have recently been increased and it is well known that their professional qualifications are unexcelled by any similar correctional body.

One other thing—and my writing at this time is influenced by this as much as anything else—I am increasingly concerned about the inability of big federal bureaucracy to deal with complex individual human problems. Two dedicated veteran Members of Congress from Oregon in recently announcing their intention not to run for a congressional seat again expressed this same concern. One added, "There are none of us in Congress anymore who can do the job right, no matter how hard we try." S. 798 would create another government agency, whereas H.R. 9007 would place the responsibility for the investigation and supervision of certain unconvicted offenders within a small section of the government

that has successfully performed the function for many years, whose officers are unsurpassed in their professional qualifications to do so, which can best protect the individual's rights, which can ensure that the objectives of the measure will be achieved with the aid of local services and can do so with a proven localized service delivery capacity that will add only a modest expense, comparatively, to the taxpayer.

If the tasks involved cannot be assigned as proposed in H.R. 9007, then let me be so bold as to suggest that we consider not legislating at all; rather, allow present informal methods to continue broadened by policy. Above all, let us not create another bureaucratic agency.

Sincerely yours,

WALTER EVANS.

STATEMENT OF DANIEL J. FREED, PROFESSOR OF LAW AND ITS ADMINISTRATION, YALE LAW SCHOOL

I appreciate the Subcommittee's invitation to submit for its hearing record a written statement on S. 798 and H.R. 9007—proposals which purport to translate recent experiments with pretrial diversion into the black letter law of federal criminal statutes.

Although I share some of the premises of the bills, and regard highly some of the programs whose accomplishments led to their introduction, I believe that any diversion legislation at this time is premature, and that enactment of the bills now before you would be a mistake. Because the overwhelming weight of crime commissions, courts, government officials, bar associations and others who have been heard from, is already on record in support, I feel an obligation to spell out my reasons for opposition in some detail.

I should state at the outset that pretrial diversion is a concept I long accepted as valid, with few questions. As a member of the Office of Criminal Justice in the Department of Justice in the mid-1960's, I worked closely with the National Crime Commission, and shared the widespread staff enthusiasm for the diversion concept which the Commission's final report recommended in 1967. I am a member of the Board of Trustees of the Vera Institute of Justice, whose Manhattan Court Employment Project was one of the pioneering pretrial diversion programs, launched in late 1967, whose growth and success continues today. I am also a member of the New Haven Pretrial Services Council which, with LEAA funds, has since mid-1972 sponsored a pretrial diversion program patterned after the Manhattan project and Washington, D.C.'s Project Crossroads.

My personal familiarity with these two applications of the diversion concept has instilled both admiration and skepticism for this important effort to reform the pretrial criminal process. That experience, coupled with several recent publications and forthcoming research which post-date the Senate hearings on S. 798 in March 1973, and the introduction of H.R. 9007 in June 1973, leads me to urge caution before Congress embraces in 1974 a concept which generated so much enthusiasm between 1967 and 1973. The availability of new and disquieting findings suggests that diversion legislation should be postponed, and that the bills before you raise hitherto under-recognized questions of fact, law and policy on which some searching reexaminations need to be conducted.

We should begin by acknowledging the affirmative side of the case for diversion, for it is an impressive one. It arose from recognition that the criminal law is overused, that too much conduct has been swept within its scope, that resulting caseloads in the criminal courts are excessive, that this burden impedes both the effective prosecution of serious crimes and the effective defense of accused persons, and that the current range and application of dispositional alternatives in the criminal process treats altogether too many persons either too harshly or too ineffectively.

Out of this background, two major themes have emerged for the reform of criminal justice administration: decriminalization through repeal of certain statutes, and diversion out of the criminal process of certain arrested persons for whom alternative programs seem preferable, both for the individual and society, to full scale criminal prosecution.

It is not out of hostility to these premises, but out of respect for them, that I believe the proposed legislation is wrong. Diversion programs have recorded some notable accomplishments. They have cumulatively avoided full prosecution of thousands of persons. They have restored or enabled the entry of many arrested persons to productive jobs. They have pioneered in a number of communities new

models for the delivery of training, employment, counseling and other services to persons involved with the criminal process They have attracted much funding, federal, state, local and private. They have demonstrated a way to introduce new kinds of professionals and paraprofessionals, including ex-offenders, into highly responsible, constructive roles in the service delivery side of the criminal process.

All of this acknowledges that pilot projects have taught, and are teaching much about useful directions in which the criminal process may be modified. None of it proves that the particular ways in which disparate programs have operated to date should either become permanent fixtures, or be adopted as models for federal and state statutes. There is too much experience with reforms which have failed—out of defective theories or deficient implementation, or both—for us to become careless and neglect to distinguish now between useful discoveries from diversion pilot programs, and useful ways to translate them into long-term improvements.

I intend to set out a number of illustrative conclusions which can *not* be validly drawn from the experience to date; a few procedures which ought *not* be replicated or accorded statutory sanction as in S. 798 and H.R. 9007; a range of questions which must be faced before the legislative die is cast; and several alternatives that merit exploration before public policy can safely move from delight over the early experiments with diversion into confidence that experience has formulated a model that is ready to be mass produced.

One set of arguments ought to be laid to rest at the outset. Repeatedly in testimony, and project reports, and the popular press, we find statements that pretrial diversion is cheaper than imprisonment, and that incarceration may be of more harm than good for some individuals as well as for society. Platitudes like these do a disservice to careful analysis of diversion to date. They have little if any relevance to the accomplishments of pilot projects or the hard issues presented by these bills. The overwhelming bulk of all persons diverted in experimental projects to date have been accused first offenders, or persons with slim prior records and currently minor charges. It is difficult to visit a project, or study a project report in detail, and fail to ask whether more than a tiny minority, if any, really face imprisonment in today's trial court, plea bargaining and sentencing system. To the extent that project reports were able to compile meaningful information, a not unusual finding was that the control group used for comparison with persons who entered the division program showed a high rate of outright dismissals (e.g. 44% of the controls in Project Crossroads were listed as "charges dismissed," Final Report, p. 35, 1971); and hardly any incarceration (e.g. in New Haven, not one person out of 134 dispositions in a "control" group went to jail; 38 were dismissed; 64 were fined $10–20; 32 received suspended sentences, Preliminary Evaluation, p. 79, 1973).

These small illustrations are not intended to disparage the useful service which these two diversion programs, and others, provide. They are offered as cautions against accepting headline stories and eye-catching arguments for statutory diversion without scrutinizing the sometimes dull, but often important, statistics on the inside pages of lengthy reports. I will note a few other illustrations in the course of this statement, but none should substitue for Congressional scrutiny of at least a representative sample of the many detailed reports that expose the inner workings, or malfunctions, of diversion pilot projects.

An analytical presentation of pretrial diversion wins early supporters when listeners and readers learn that its purpose is to offer job training, employment or other constructive aid to accused persons early in their encounters with the law enforcement or court process. But the difficulties begin to dawn as some nuts-and-bolts questions about program details unfold: e.g., what kind of aid? extended to which persons? on what conditions? with what consequences of success or failure? via what decision-making and review procedures?

The difficulties multiply rapidly when prospective participants, law enforcement officials and evaluation teams encounter some of the serious implications and controversies that inhere in a diversion program's operations: e.g., How can a prosecutor permit a lawful arrest for a serious crime to result in the immediate delivery of employment services to the defendant, instead of prompt prosecution and conviction? Why are so many categories of arrested persons excluded from eligibility? Why should a defendant who was unemployed prior to arrest be diverted, while an accused who had a job is considered ineligible, and referred for full prosecution? Should persons admitted to pretrial diversion

programs be presumed to be innocent or be required to acknowledge their guilt? Will persons who assert their innocence be barred from entry into job-finding programs? For what period of time will program participation be required, will compliance with all its rules be enforced, and will prosecution on the original charges be suspended, before the accused learns whether his case will be dismissed or prosecuted, and the prosecutor learns that the case will be dropped or must be tried? Are decisions concerning admission to and expulsion from programs, and ultimate dismissal or prosecution of charges, to be made by judges or to be retained within the traditional discretion of prosecutors? If the decision is to be made by the prosecutor, will his criteria be required to be published so that aggrieved persons may appeal from alleged failure to adhere to those guidelines?

In terms of delivery of services in the criminal process, what fundamental advantages distinguish pretrial diversion from postconviction probation? In terms of judicial administration, since so few criminal cases go to trial, how do negotiations between the prosecutor and the defense lawyer as to diversion and its pretrial consequences fundamentally differ from plea bargaining and its sentencing consequences? If it is like plea bargaining, will the agreement be written and the proceedings on its submission to the court be recorded along the lines of the ABA Standards and the Standards and Goals Commission on pleas of guilty? In terms of erasing the stigma of a criminal record, how do statutes and rules which permit arrests to be dismissed and records to be expunged after pretrial diversion differ from those which permit convictions to be annulled, or charges to be dismissed, or adjudication records to be expunged after post-plea or post-conviction probation?

Does valid research really prove that comparable persons diverted prior to adjudication rather than placed under similar programs after adjudication will have lower recidivism records? Should pretrial diversion agencies become an adjunct to the growing network of criminal justice bureaucracies, e.g., bail agencies, drug programs, alcohol programs, mental health organizations, or be consolidated as part of the prosecutor's office, the public defender's office, or the probation service?

The bills pending before your committee fail to answer most of these questions. They answer a number of others very unwisely, in my view. And they delegate complete and unguided discretion to the Attorney General or the probation service on a few on the basis of assumptions which are unclear or troublesome.

The dilemma of how to resolve questions like these is shared by many proponents, for it is quite evident that the term pretrial diversion means different things to different advocates. It does not at all identify a single concept with standard, well-tested procedures for carrying it out. Some indication of the disparity in philosophies and perspectives among diversion proponents (to say nothing about important details of operation) is reflected in the spectrum of descriptions adopted by different programs and important standard-writers: e.g.,

—"diversion *from* the criminal justice system"
—"pretrial intervention"
—"pretrial probation"
—"deferred prosecution"
—"preprosecution probation"
—"deferred preprosecution probation"
—"preventive rehabilitation"

This background, coupled with the hearing record published by the Senate and that now being compiled in the House, indicate that Congress is being asked to establish a federal model or framework for nationwide diversion at a time of significant uncertainty on matters of importance. Myriad projects, with varying rationales, criteria, procedures and accomplishments, are in various infant stages of operation, but a panoramic view shows no consensus on issues pertinent to the legislative determination of whether, and how, pilot diversion should become a permanent fixture in criminal justice administration.

Enactment in 1974 would of course serve two purposes: it would place the imprimatur of Congress on a high-minded reform, and it would authorize still more federal appropriations to finance diversion programs additional to those the Department of Labor and LEAA have already invested in heavily. But if S. 798 and H.R. 9007 are typical, enactment would, on inadequate evidence, endorse very dubious concepts and severe restrictions. In so doing, it would eliminate much of the flexibility which this complex innovation needs before careful evaluation can validly compare diversion with other criminal process and noncriminal alternatives, and can identify the ingredients of sound legislation.

As I discuss a few of the questions which experience to date raises but does not yet settle, I hope the Subcommittee will ponder one central question: What is to be gained by passing a diversion statute this year, when there is widespread experimentation and ample funding without it, and little evidence that either broader authorization or the imposition of restrictions is ripe for decision?

1. Reduced recidivism?

According to the Final Report of Project Crossroads (1971):

"From the point of view of improving the criminal justice system, a pre-trial diversion program which does not also reduce recidivism is of little value . . ." (p. 34).

This view is widely held, and a major argument advanced by diversion proponents is that their clients are "much less likely to commit another crime than the individual who goes through the criminal jutice system in the normal way." Senate Report 93–417, page 7. The Senate Judiciary Committee reached this conclusion on the basis of information furnished by a number of programs showing their recidivism rates to be low (p. 8), and by two experimental projects (Crossroads and the Manhattan Court Employment Project) which made comparative studies and found their recidivism rates to be 50% less than that of "a matched group of nonparticipants processed through the court in the normal fashion" (p. 7). These are impressive findings, but several subsequent research studies, which reexamined the methodology employed, have cast serious doubt on their validity.

For example, the Bureau of Evaluation of the New York City Human Resources Administration retained Professor Franklin E. Zimring of the University of Chicago to review the evaluation efforts of the Court Employment Project. While confirming a number of encouraging indications of project performance, including the fact that "rearrest rates among the successful Project participants were significantly lower than among either terminations or controls" (p. 26), the conclusion from these data that the Project reduces recidivism could not be substantiated. In a report dated November 1973, Professor Zimring stated (p. 43):

"As it stands, there is no firm foundation for believing that Project participants commit more or fewer subsequent offenses than they would if subjected to the alternative treatment of criminal justice system processing. Whether this lack of difference is due to the weakness of the research design or a lack of real Project impact is not known."

His report proposed a new study involving the random assignment of eligible defendants into the Project or a control group. The Vera Institute of Justice, accepting Professor Zimring's suggestion, has applied to the National Institute of Law Enforcement and Criminal Justice for funds to conduct such a recidivism study in New York City.

In the light of the methodological shortcomings uncovered in the Zimring report,[1] there have to my knowledge been no diversion evaluations in the United States, at least among those published to date, which could support the recidivism reduction conclusions reached by the Senate Judiciary Committee. Project Crossroads, for example, also prominently cited in the Senate Report and the Standards and Goals Commission Report, compared diversion participants with a control group consisting of persons who, on the paper record, were eligible to be considered by the project. The comparison was very favorable to the diverted group. But in that project, as in others, many screening steps intervened between paper eligibility and recruitment into project participation, e.g. staff interview, defendant willingness to participate, staff recommendation, prosecutorial consent (Project Crossroads, Final Report, page 2). Large numbers of the "eligibles" tended to drop out during this process, for a variety of reasons, leaving as project participants only those most likely to succeed. As a final example, the

[1] The technical details of the research problem are summarized at page 27 of the Zimring report:

"First, no inference about Project impact can be drawn from the fact that successful participants are rearrested less often than Project failures. Those who eventually succeeded were probably better risks than those who eventually failed, and probably would have experienced fewer arrests whether or not the Project had any impact on their propensity to commit future crimes.

"Second, no inference about Project impact can be drawn from the fact that Project successes have lower rates of rearrest than a control group of persons who would have been eligible for treatment. Assuming the control group is a perfect duplicate of persons who enter the Project, the correct comparison is between the Project's total rearrest rate (i.e., for both terminations and dismissals) and the control group rate, because the control group is composed of persons who would have failed in the Project as well as persons who would have succeeded."

evaluation of Flint, Michigan's Citizens Probation Authority diversion program, which is printed in the Senate Hearings on S. 798, at page 441, seems to acknowledge the same weakness in inferring *reduced* recidivism from the fact that a *low* recidivism rate (16.7%) was found among its clientele (Senate Report 93–417, page 8).

Construction of a valid group has thus been a difficult, and to date unrealized, accomplishment. But that is only half of the problem. Proving that diversion reduces recidivism, I suspect, will turn out to be an impossibility, and not a mere research technicality. I am skeptical whether—once valid controls are established—future legislation, or funding, will ever be able validly to be based on the recidivism reduction argument. The reason is that today's diversion programs appear to limit their recommendations, and prosecutors appear to limit their discretionary approvals of suspended prosecution, to defendants for whom—if convicted—imprisonment will represent both an undesirable and an unlikely sentence. Quite understandably, pilot programs and prosecutors are intentionally selecting defendants who seem very unlikely to recidivate, and likely to be helped by their services. The proponents of the pending legislation offer many indications for inferring that a similar selection process will be employed in the future as well. To say under these circumstances that the records of diverted defendants are and will be better than those of defendants who go "through the criminal justice system in the normal way" (S. Rep. 93–417, page 7) may be just another way of saying that diversion programs pick their clients wisely, and that the normal system is deficient.

The latter problem provokes an important question raised by diversion experience to date: since the useful and well-funded services provided by pretrial diversion programs typically exceed those being offered by post-conviction probation programs in the same jurisdictions, what evidence is there in the record to suggest that an equally low rate of recidivism for the same defendants could not be achieved if probation programs were equally funded and offered the very same services?

2. Pilot Projects vs. Long Term Programs

Doubts about whether diversion uniquely reduces crime are symptomatic of pervasive doubts about a number of other claimed long-term advantages. In the view of two well-informed observers, "the slipshod handling of evaluation and reporting . . . makes it unlikely that even several years from now we will know what the extent of the shift toward early diversion has been or what impact it has had on crime, criminal justice costs, efficiency, morale or rehabilitation."[2] These doubts are becoming widely shared. They arise from diverse sources, and apply to the contemporary diversion scene, to its historical antecedents in both the juvenile justice system and the traditional informal discretion of prosecutors, and to forecasts of where the concept may be heading by the end of the century.

From 1967 to 1973, national crime commissions, the Judicial Conference of the United States, the American Bar Association, the National District Attorneys Association, the Justice Department, the Chamber of Commerce and countless others recommended diversion from the criminal process for a variety of reasons and with a range of formats. But within the past year, with increasing frequency, sobering second thoughts have begun to appear.

In 1967, the President's Commission on Law Enforcement and Administration of Justice became the first major national organization to urge formal pretrial diversion programs. In 1973, James Vorenberg, former Executive Director of the Commission, co-authored a critical reappraisal. His assessment was summed up in these words:[3]

What is far more disturbing is that so little groundwork is being laid that would permit judgments about the worth of various diversion programs three, five, and ten years from now. The two principal reasons are (1) lack of research funds and (2) chronic reluctance of operating agencies to subject themselves to intensive and possibly critical evaluation.

It thus seems a fair guess that for many years the case for—or against—diversion will continue to be made on the basis of theory, the pressure of backlog in the system, rather superficial cost figures, and views as to the humaneness of more or less coercive treatment.

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[2] Vorenberg and Vorenberg, *Early Diversion from the Criminal Justice System: Practice in Search of a Theory* in Prisoners in America, pp. 151, 154 (L. Ohlin, ed.1973).
[3] *Id.* at 182.

Professor Donald Newman, of New York State's School of Criminal Justice in Albany, looked back to the early 1900's in drawing an analogy between adult diversion proposals now and juvenile diversion experience then, particularly in light of the Supreme Court's recent decision in *In re Gault*, 378 U.S. 1 (1967) :[4]

"The paradox and the dilemma of diversion proposals is presented by the model of the juvenile court. Here for some 60 years informality and diversion were the rule and yet when it was tested on the Supreme Court level it was found that the results did not justify the risks taken with our legal ideology. Can criminal justice promise more?

". . . The contrary argument to diversion is that any technique developed outside court scrutiny has a high probability of corruption and misuse, including the possibility that the net of criminal justice will be ever expanded under the guise of beneficence by informal and invisible means."

A critical analysis of juvenile diversion today emerged from a 1972 grant by the Law Enforcement Assistance Administration to the University of Michigan's National Assessment of Juvenile Corrections, funding a summer study in contrasting communities in a single State. See the June, 1973 report, *Diversion From the Juvenile Justice System*, by Donald R. Cressey and Robert A. McDermott.

The Subcommittee should also take account of the remarks of Dean Sheldon Messinger, School of Criminology, University of California at Berkeley, offered at a June 1973 Criminal Justice Conference in Chicago devoted to the subject *The Year 2000 and the Problems of Criminal Justice*:

"I expect . . . the police to develop some better measures of assuring us that they are not above the law. At the same time current emphasis on diversion, which I expect to continue, points in some part to a contrary trend, one that frees the police and others to channel the lives of persons without sufficient check on the strength of their grounds for assuming this power. By the year 2000 I expect we shall be very much concerned with this matter, having discovered once again that in the name of humanity and reformation we have increased the power of the agents of criminal justice over our lives."

These concerns will be placed in an exceptionally useful and detailed context, analyzing modern diversion practice in the adult criminal process against the background of discretionary techniques traditionally employed by law enforcement officials, in a major study by Raymond T. Nimmer soon to be published by the American Bar Foundation. Mr. Nimmer's two year examination of *Alternative Forms of Prosecution: An Overview of Diversion from the Criminal Justice Process* observes at page 2 of his January, 1974 manuscript:

"Most diversion proceeds without studies of impact, even of questionable methodology; its success remains largely a matter to be judged impressionistically.

"To anyone who approaches the topic without preconceived enthusiasm for diversion, it is immediately obvious that before promoting expanded usage, it is necessary to make an assessment of what has occurred and is now occurring under the heading of diversion."

Other assessments of pretrial diversion are now under way, and the availability of still further research will no doubt proliferate in the months ahead as LEAA and other governmental and private institutions place heightened emphasis on the need for quality evaluations of criminal justice system reforms. One still incomplete project should be of particular future interest to the Congress, since it concerns the American Bar Association which has been in the front ranks of diversion proponents in recent years.

The Association's interest has been manifest through the work of at least three of its subsidiaries. In March 1970, the landmark ABA Project on Standards for Criminal Justice urged prosecutors and defense attorneys to explore early diversion. See the *Standards Relating to The Prosecution Function and The Defense Function* (Prosecution Standard 3.8, Defense Standard 6.1). The Standards were approved by the ABA House of Delegates in February 1971. Shortly thereafter, the ABA established a farsighted Commission on Correctional Facilities and Services under the chairmanship of former Governor, now Chief Justice, Richard J. Hughes of New Jersey. Its charter was to pursue correctional reform and offender treatment opportunities throughout the United States. The Commission's strong interest in diversion in turn led to the creation in March 1973 of an

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[4] Newman, *Corrections of the Future: Some Paradoxes in Development*, in Collected Papers, Institute on "Corrections in Context: The Criminal Justice System and the Corrective Function" (U. of Wisconsin, 1972).

ABA National Pretrial Intervention Service Center, under a $150,000 grant from the U.S. Department of Labor. The Center's stated purpose is to stimulate the establishment of pretrial diversion or intervention alternatives to criminal adjudication. One month earlier, in February 1973, the ABA House of Delegates overwhelmingly endorsed, in concept, an earlier version of S. 798, on the recommendation of its Criminal Justice Section.

In mid-1973, in the wake of all three American Bar Association initiatives, and subsequent to the completion of Senator Burdick's Hearings on S. 798, concern over the quality of program evaluations generally led the National Science Foundation to award a number of important new research grants. One of these was a substantial grant to Governor Hughes' ABA Commission on Correctional Facilities and Services to study the *Evaluation of Research on Pretrial Diversion*. A preliminary version of this important assessment effort is currently in draft form, but remains to be completed. I do not know whether the ABA has shared with the Subcommittee any preliminary findings from the evaluation of diversion program evaluations, or whether its work is considered too tentative at this stage. But I would be surprised if either the ABA or the House of Representatives would at this time press for enactment of legislation to embody diversion in federal law without waiting for the results of that important study, and for a comparison of its eventual findings with other research efforts, such as those to which I have previously referred.

This recent and ongoing research on diversion constitutes but the latest stage in an evolutionary process of pretrial justice reform, whose outcome remains in doubt. Diversion has grown from a long-standing but informal and low-visibility discretionary practice of prosecutors and juvenile courts; to a widely-endorsed theory and formal reform concept beginning in 1967; to the subject of a wide variety of experimental projects and self-reports in the early 1970's; to the target of intensive and critical research in the past year or two.

As this research goes on, three preliminary findings seem appropriate, on the basis of known studies: First, several thoughtful, detached and detailed inquiries into diversion pilot projects in action raise sobering doubts about one or more aspects of the theory, the implications, the implementation, or the adequacy of research into the claimed advantages of diversion. Second, no research to date justifies the conclusion that pretrial diversion should be abandoned. And third, in light of the many open questions, no evidence currently justifies converting pretrial diversion from its status as a useful experiment to a long term, perhaps permanent, component of a criminal justice system.

On the contrary, before legislatures act, prudence suggests that the burden of proof ought to shift back to diversion's advocates to address in detail the hard questions which neither the early enthusiasm, the inadequate evaluations, nor the current rhetoric, has succeeded in answering.

3. Prosecutorial control?

The balance of this statement will touch on just a few of the elements of diversion programs or legislation to which further thought or experimentation ought to be given.

Both bills now before the Subcommittee give virtually total control to the prosecutor over *entry* into a pretrial diversion program. Section 3(1) of S. 798 provides that a defendant is to be eligible only if "recommended for participation . . . by the attorney for the government." A judicial officer will be able to reject an eligible defendant, but he will not be authorized to admit a person over the objection of the United States Attorney.

S. 798 would also accord the prosecutor control over *termination* of a defendant's participation in a diversion program. Expulsion of the accused must be ordered by a federal court under section 7(b) "if the attorney for the Government finds such individual is not fulfilling his obligations under the plan applicable to him." No standards are specified; no evidentiary showing need be made; the prosecutor's decision is to be final.

H.R. 9007 differs in the latter respect. Like S. 798, it makes "recommendation of the attorney for the Government" (Section 3171(a)) a prerequisite to judicial placement of the accused in a pretrial diversion program. But unlike S. 798, it places any decision as to termination of program participation within the court's discretion.

The House version seems clearly superior in the latter respect. But on an issue which remains highly controversial and of great importance, both bills seem to me to display undue deference to the Department of Justice in authorizing its attorneys to dictate to federal judges when they may, and when they may not, admit a defendant to a formal pretrial program authorized by statute.

The Senate Report, reflecting the strong views of the Justice Department and other prosecutors, equates prosecutorial control over diversion to "the discretion which prosecuting attorneys have historically had to bring, prosecute and dismiss criminal charges." S. Rep. 93–417, page 13. The Senate Judiciary Committee saw diversion as "merely another tool in the hands of the prosecutor" (p. 9), and noted that "Stripped of title and formal trappings, diversion has been practiced in the criminal justice system for years" (p. 5).

Historical precedents, in large part, support the Senate's description of the power of prosecutors. But the hasty leap to the conclusion that diversion would give prosecutors "merely another tool," and the implication that "titles and formal trappings" are of negligible significance, warrant very close examination.

A strong argument can be made for the proposition that a statute vesting total control in a prosecutor over a citizen's entitlement to the benefits of a formal, funded program in the judicial process would be unwise as a matter of policy and vulnerable to serious challenge as a matter of constitutional law. From a variety of sources emerge suggestions that the minimum ingredients for an acceptable diversion program should include the following: (1) published standards to guide the exercise of discretion by individual prosecutors as to defendants' entry, program requirements, and exit from diversion; (2) participation in the formulation of such standards by prosecutors, defense attorneys, corrections officials and judges; and (3) judicial review of entry and exit procedures to require a prosecutor's written reasons for not diverting an eligible defendant, and to guard against arbitrary decisions in the daily administration of program standards. All three requirements are suggested by Standard 2.2, Procedure for Diversion Programs, in *Courts* (National Advisory Commission on Criminal Justice Standards and Goals, 1973) a document often invoked by proponents of diversion legislation. None of these elements is mandatorily incorporated in S. 798 or H.R. 9007, and it seems curious that so few witnesses have called attention the omissions or recommended that they be remedied.

Perhaps even more fundamental, the Congress should examine with great care the question whether formal pretrial diversion programs are not much more akin to the sentencing powers and procedures of judges than to the traditional role of prosecutors: i.e. to judicial decisions prescribing controls over future conduct, rather than to prosecutorial decisions regarding whether to charge a person with a criminal offense, or to prosecute or nolle a case after the charge or indictment has been filed. Diversion must be recognized for the many essential respects in which it constitutes a pretrial sentence. A person (1) is arrested for a crime, (2) elects not to contest the charge, (3) submits to official supervision and control over his conduct, and (4) is subject to future invocation of criminal charges or sanctions if he fails to comply. At least two labels often attached to diversion candidly acknowledged the similarity to sentencing: pretrial probation, and pre-prosecution probation.

It might be argued that the increasing and apparently successful use of informal diversion in the federal system, usually referred to as the Brooklyn plan, represents a precedent for formal statutory authorization. The argument carries weight, but it by no means seals the case for federal legislation. Informal diversion is an intermediate step between the prosecutor's traditional charging and nolle process ("yes, we will prosecute," or "no, we will drop charges"), on one hand, and the more complex formal diversion and sentencing processes on the other. It nevertheless raises many of the same questions as formal diversion. No eligibility standards or guidelines are visible. Arbitrary denials, if any, are not reviewable. No federal statute has thus far conferred on prosecutors the total control envisioned by S. 798. And the constitutional validity of prosecutorial supremacy over pretrial diversion has not, to my knowledge, been adjudicated. What has been done informally on a limited, low visibility basis has thus not been approved formally either by Congress or the Supreme Court.

In determining whether to take that important leap, the Congress ought to closely cross-examine the Department of Justice on its past and proposed standards for pretrial diversion, and on its adamant resistance to judicial control over a process so intimately similar to judicial sentencing. In terms reminiscent of plea bargaining and sentencing, the Department for more than a year insisted upon defendants' "formal acknowledgment of wrongdoing, such as a plea of guilty" as a prerequisite to diversion program entry (S. Rep. 93–417, p. 16). The Department finally settled for the current provision of S. 798, Section 2, which limits the bill "to persons accused of crime who accept responsibility for their behavior and admit the need for such assistance." See also Standard 2.1, General Criteria for Diversion, in *Courts*, pp. 32–33 (Standards and Goals Commission, 1973).

The smallness of this concession was highlighted by the Department's statement to the Senate Committee "that the bill now gives the U.S. Attorney complete discretion with respect to all phases of the diversion program." S. Rep. 93-417, p. 16. That statement seems to be a gentle way of informing the Congress and the courts that diversion will be as narrowly or broadly defined and applied as the Department of Justice unilaterally desires, and that the legal and financial control vested in the Attorney General by S. 798 are considered sufficient to guarantee the Department a dominant role over the future of pretrial diversion.

The dangers which lurk in that kind of delegation of diversion control are not hard to imagine. Two co-defendants might meet all apparent eligibility standards only to have the prosecutor divert one and prosecute the other, without stated reasons, and subject to no judicial review. A defendant who is diverted may be arbitrarily terminated from the program, prosecuted more harshly than if he had not entered the program at all, and—if convicted—given no credit against sentence for time spent under diversion program control. If acknowledgments of "responsibility for their behavior" are preconditions—as in S. 798—for defendant entry into diversion, a fair trial for persons subsequently expelled from a program may become more difficult the salutary inadmissibility-of-statements provisions of Section 6(b) of S. 798. A fair trial may similarly be rendered difficult when pre-diversion investigation reports and recommendations, which in many respects will resemble presentence reports, are made available to prosecutors contrary to the policy which underlies Rule 32(c)(1) of the Federal Rules of Criminal Procedure:

". . . The report shall not be submitted to the court or its contents disclosed to anyone unless the defendant has pleaded guilty or has been found guilty."

In light of problems such as these, pretrial diversion under the prosecutor's control may eventually lead to diversion bargaining that will be more troublesome than plea bargaining, which itself is under increasing fire. A plea bargain at least results in an agreement to terminate the prosecution and leave the sentence up to the court. It is a transaction which settles the criminal charges, and acknowledges that the judge will make the decision on disposition. A diversion bargain, on the other hand, without plea or trial, in a sense confers both the prosecution and sentencing functions on the prosecutor: it enables him to delay prosecution, to impose a pretrial sentence on an unconvicted person, and to retain discretion as to later termination of the prosecution depending on whether he is satisfied with the manner in which the pretrial sentence was served.

While prosecutorial control over pretrial diversion is unwise, the converse—statutory subordination of the prosecutor's role—would also raise very troublesome questions. *United States* v. *Cox*, 342 F.2d 167 (5th Cir. 1965), cert. den. 85 S.Ct. 1767 (1967), makes it fairly clear that a court ordinarily may neither compel the United States Attorney to prosecute, nor refrain from prosecuting, a defendant. Compulsory diversion might well run afoul of that decision. If, for example, law enforcement officials believe that a person's alleged crime and prior criminal record are serious, and that trial and conviction are essential to valid purposes of criminal law, a program which thwarts those purposes by preventing prosecution could easily be viewed as contrary to the public interest. If, on the other hand, the arrested person appears to the United States Attorney to represent both a serious case for prosecution, and a case holding a substantial likelihood of success if diverted, the prosecutor's dilemma may be difficult indeed: Should he delay the case, try diversion, and risk losing evidence, witnesses and a conviction if diversion fails? Or should he oppose diversion, proceed with a perhaps lengthy prosecution, and thereby risk losing a timely opportunity to deliver useful services?

One possible resolution which the Subcommittee might consider would be legislation offering government prosecutors a series of choices. The offer might be tendered to the Department of Justice as an entity, or to the United States Attorney in each federal district.

First, the prosecutor, retaining his traditional power to prosecute or nolle, could elect not to exercise a new grant of statutory authority to attach pretrial conditions to nonprosecution, i.e. he could choose to veto establishment of a diversion program and district acceptance of funds appropriated for its operation. Second, he could elect to accept pretrial diversionary authority, but would be permitted to do so only upon agreeing to be bound by published rules specifying the categories of defendants entitled to diversion, the circumstances and conditions of entry and exit, and the parameters of such programs. Third, the rules governing diversion could become effective only if approved (or modified) by a

Board composed, as in Title II of S. 754, of the prosecutor, the United States District Court, the Federal Public Defender and a representative of the district's defense bar,[5] the chief probation officer and community representatives. Fourth, entry into diversion programs, and subsequent decisions as to modification, termination or dismissal, would all be made by judges or other judicial officers, after considering the applications of defendants, the recommendations of prosecutors, and pertinent information offered by other participants in the diversionary process.

Such a system would not impose pretrial diversion on any prosecutor's office, but would place ultimate control over prosecutor-endorsed programs in the judiciary. It would involve the defendant or his lawyer in the establishment of district programs as well as in access to them in individual cases, thereby attempting to ensure equality and visibility in the administration of diversionary authority. It would enable the Department of Justice, or its representatives, to determine whether the benefits of a flexible but reviewable pretrial disposition system outweighed, or were overbalanced by, the loss of control over decisions not to prosecute in situations meeting agreed upon diversionary guidelines.

My own hunch is that diversion prior to trial is not essential to helping offenders or accused persons, and that if prosecutorial control is the price to be paid, it would be preferable to abandon pretrial diversion in its present forms. An alternative in such circumstances might be to recognize that constructive aid to defendants awaiting trial can be offered on a voluntary basis without affecting the timing of a trial or a plea; that guilty pleas or acknowledgements by defendants of personal involvement should be prohibited as conditions of eligibility; that no reason exists in law or policy for offering richer opportunities under the label of pretrial diversion than will be available at the post-conviction probation stage; and that all such options should be equally available to defendants whether they plead innocent or guilty, and whether they ultimately go to trial or elect to forego trial.

4. Program auspices

H.R. 9007 designates the United States Probation Service as the diversion program operator. S. 798 designates the Attorney General, but would permit the Department—in consultation with each United States district court—either to operate the program itself in a district or to contract for others to do so. Reasonable arguments can be made for favoring either agency, but the same can be said of arguments in opposition. The evidence to date provides an inadequate foundation on which to make a federal statutory commitment to either, or to any of several other attractive possibilities. The record before the Senate Judiciary Committee clearly suggests that the full range of diversion administration possibilities was not adequately explored, and that the implications of settling on a single sponsor—Justice Department, Probation Service, or otherwise—at this time not been fully canvassed.

The Department of Justice may be a logical choice if one makes a number of assumptions: e.g., that prosecutorial control over diversion should be immutably established by statute; that the community corrections expertise of the Bureau of Prisons makes it an appropriate Justice Department supervisor of diversion, and that the Department would select the Bureau of Prisons rather than the Criminal Division as its designee; and that the administration of a Department-run diversion program would not be subordinated to its prosecutorial function. Subordination to prosecutorial pressures might, for example, induce the diversion staff to limit its recommendations to the most minor cases; or might condition diversion on subtle threats to deny plea bargaining concessions, or to prosecute and seek a maximum sentence, should the defendant elect to contest the charges against him instead of agreeing to diversion. None of these illustrations is intended to suggest that the Department would in fact misuse dual control over the prosecutorial function and the diversion function. Such an arrangement would, however, be open to misuse and nothing in the legislation would seem to preclude it.

In this connection, the Subcommittee might take note that the diversion program in Flint, Michigan, established in 1965 by Robert F. Leonard, Prosecuting Attorney for Genessee County, was transferred from prosecutorial control to become "a separate and distinct function of County management." The

[5] S. 798 strangely omits in Section 8(a), any mention of the public defender in the membership of a district's diversion program advisory committee, even though the Chief Judge and the United States Attorney are required members.

resolution set forth in Senate Hearings on S. 798, March 27, 1973, at page 507, provides in part as follows:

"Whereas, it has been deemed advisabe that the Citizens Probation Authority be divorced from the direction and control of the Prosecuting Attorney's office and placed under the direct jurisdiction of the Court Affairs Committee: Now, therefore, be it

"*Resolved*, That this Board of Supervisors authorize the establishment of the Citizens Probation Authority as a new department of the County, and directs that this department be placed under the jurisdiction of the Court Affairs Committee."

This transfer apparently took place in 1968 at the request of Prosecutor Leonard. Hearings, page 444.

Probation control over diversion program operation offers a somewhat more attractive alternative because federal probation officers are accustomed to supervising defendants in the community, have already developed pretrial supervision experience under the Brooklyn plan, and might more easily extend the same range and quality of job and counseling services to pretrial and convicted persons. This option, however, poses serious problems of its own. Pretrial probation tends to blur important distinctions between accused and convicted offenders. It imposes a role conflict on probation officers in attempting to distinguish between persons presumed innocent and persons found guilty. It may run afoul of the policy of Rule 32(c)(1), regarding nondisclosure of presentence reports prior to conviction, referred to previously. And it makes it difficult to include as staff members those talented paraprofessionals, including ex-offenders, whom early diversion pilot programs have identified as highly useful team members, but who do not meet traditional federal probation service standards.

In addition, the proponents of H.R. 9007 appear to be unaware of the possible constitutional impediments identified by the House Judiciary Committee several years ago to placing pretrial defendants under the supervision of federal probation officers. In House Report 1541, 89th Congress, 2d Session, reporting favorably on S–1357 which became the Bail Reform Act of 1966, the Committee struck a provision of the Senate passed bill that would have authorized such releases prior to conviction. The Report stated at page 3:

"Amendment No. 4 eliminates as one of the conditions upon which a defendant may be released the placement of the individual under the supervision of a probation officer. Since the probation officer is an arm of the court, who, under normal circumstances, only enters into a case after conviction, your committee is of the opinion that in order to avoid any possibility that any constitutional right of the defendant be invaded this provision should be deleted. It is obvious that if a probation officer assumes the responsibility for a defendant where a case has not yet been disposed of, he would necessarily make inquiry concerning the defendant."

There are certainly other possible choices for diversion program administration which warrant consideration by the Congress. Public defender offices are a viable alternative according to the experience of the Seattle public defender, Phillip H. Ginsberg, who has testified on behalf of the National Legal Aid and Defender Association.

Private organizations, such as the Manhattan Court Employment Project and Project Crossroads, have established notable records of contribution to the criminal process under the respective sponsorships of the Vera Institute of Justice and the National Committee for Children and Youth. The Court Employment Project is continuing today as a non-profit corporation. Project Crossroads was absorbed several years ago into the probation department of the Superior Court in Washington, D.C. Its performance since then has not, to my knowledge, been the subject of careful reexamination to determine how the change in auspices has affected project growth and reputation.

An independent, court-supervised Pretrial Services Agency, patterned along the lines of Title II of S. 754, the proposed Speedy Trial Act of 1973, now pending in the Senate, offers still another highly promising technique for integrating the totality of pretrial criminal justice functions under a single administrative roof.

With so many formats outstanding, and the pros and cons of each underexamined to date, the wisest choice—if any legislation were to be enacted at this time—might well be to spur flexibility rather than cement rigidity. Taking an invaluable lesson from its Criminal Justice Act of 1964, the Congress could place financial control under the courts, authorize a wide range of program administra-

tion options, and let a representative process in each district select the format it thinks best. An essential element of the statute would be a duty to report annually to Congress, the courts and the public, so that an informed consensus, or a range of issues ripe for decision, might emerge a number of years hence, as in the manner currently being evolved by the Senate Judiciary Committee in S. 754.

5. Stigmatization and Criminal Records

An oft-stated advantage of pretrial diversion is that it saves accused persons from the unnecessary stigma of a criminal conviction. It can thus forestall the prejudice which so often frustrates ex-offenders when they return to the community and seek employment.

While this is an undeniably important goal, the question whether *pretrial* diversion is either necessary or sufficient to accomplish it in more than a handful of cases deserves careful attention. A stigma can attach in many ways. It may derive from the fact of arrest, irrespective of subsequent disposition; or from the fact of conviction; or from the existence of a criminal record prior to the arrest which bought the accused into a new diversion program. It can even, as indicated below, arise from the requirements and circumstances of diversion programs themselves.

The criminal process can attempt to avoid stigmatizing a person, or to remove a stigma, in a variety of ways; the police may decline to arrest, or may take the person home or to a hospital, and enter no arrest on his or her record. The prosecutor may decline to prosecute, or nolle a charge, and remove the arrest record. Different statutes authorize erasure or expungement of criminal records by various means.

Neither S. 798 nor H.R. 9007 explicitly authorizes erasure or expungement of the criminal record of a diverted person, so that the stigmatization rationale, while laudable in purpose, lacks follow-through in the federal legislation. And there is reason to believe that the proponents have not fully thought through their own intentions in this respect.

For one thing, the terminology all too frequently employed in referring to the clients of pretrial diversion programs is "offenders": e.g.

—Prosecutor Robert F. Leonard, on behalf of the National District Attorneys Association (Sen. Rep. 93–417, page 12):

> "(B)y so diverting such offenders they avoid the indelible stigma of 'criminal' or 'ex-con' . . ."

—National Advisory Commission on Criminal Justice Standards and Goals, *Courts* (1973), page 28:

> "By taking the offender out of the criminal justice system before conviction, diversion imposes no stigma of conviction. . . ."

This language is no accident or oversight. The guilt, or probable guilt, of diverted defendants is an assumption set forth in Section 2 of S. 798, and candidly acknowledged by many proponents: e.g.

—Standards and Goals Commission, *Courts* (1973), page 33:

> "Diversion of an offender assumes that some act justifying criminal intervention has occurred. After the facts are clear or the defendant admits his guilt. In situations where it is not clear that guilt could be established, however, care must be taken that diversion is not invoked for individuals who have committed no crime."

—Associate Deputy Attorney General Gary Baise, U.S. Department of Justice (1974):

> "While we have always recognized the difficulties inherent in such a requirement, we feel that successful rehabilitation is problematic for those individuals who maintain their innocence or who wish to plead not guilty . . . [W]e believe it would be advisable to reinforce this with a statement of Congressional intent that defendants who are insistent upon their innocence would not be eligible for placement under a community supervision program."

These positions are troublesome and quite inconsistent with the objective of avoiding stigmatization, for they add up to a model of diversion that announces to participating defendants and to the outside world that only guilty, or probably guilty, persons participate in pretrial diversion programs. If the arrest record is not expunged, and the person's program enrollment is widely known, the implication of guilt will remain an indelible part of the record. If the accused has never been arrested before, this process may give him enough of a criminal record to taint him in many places, and with many employers. If on the other hand the

accused already had a prior criminal record, it may not make much difference either way, for a stigma has already attached. In either event the stigmatization rationale seems largely illusory under the proposed legislation.

There are several possible remedies the Subcommittee might examine, at least some of which I gather Senator Burdick's subcommittee has championed for several years. These deal with erasure, expungement and other forms of avoiding or removing stigmatizing records. Such proposals would be consistent with the recommendations for overcoming employment barriers in "Programs for Employment," a chapter in the National Advisory Commission on Criminal Justice Standards and Goals Report entitled *Community Crime Prevention* (1973).

Statutes or proposals to permit erasure of arrest records have become fairly common in recent years; those dealing with expungement of conviction records are rare. Yet since both types have precedents and are feasible, there may be nothing magic in the utilization of pretrial diversion, as opposed to postconviction probation, to place the defendant in a criminal process community program and later cancel the criminal record.

A pertinent recommendation is found in the ABA Criminal Justice Standards Project volume on *Probation*, in Standard 4.3:

"Every jurisdiction should have a method by which the collateral effects of a criminal record can be avoided or mitigated following the successful completion of a term on probation and during its service."

The forms such statutes may usefully take (as well as citations to them) are illustrated at pages 55–56 of the same volume:

"Some, with the consent of the defendant, defer the formal adjudication of guilt through the period of probation and discharge the defendant following successful service without ever declaring him guilty. . . . Others permit the withdrawal of a guilty plea and a dismissal of the charges following the successful service of all or part of a probation term. . . . Still others specifically provide in effect for annulment of the conviction following the fulfillment of the conditions of probation prior to or at its termination."

Similar options are identified in the ABA Standards on *Sentencing Alternatives and Procedures*, at pages 68–69:

"Strong support has been expressed, for example, for the power to place a consenting defendant on probation after the determination of guilt but prior to the formal entry of a judgment. The purpose of such a provision would be to offer the possibility upon successful completion of probation of avoiding the disabilities which attach to a felony conviction."

The Subcommittee therefore ought to consider whether a major purpose of pretrial diversion cannot be more simply and economically achieved by taking advantage of these statutory opportunities to avoid the stigma of a criminal record, coupled with the simultaneous opportunity to add and fund employment, counselling and other diversion-type programs for eligible defendants as part of the probation system *after* guilt has been resolved.

6. Conclusion

The ferment over pretrial diversion has opened many eyes to seemingly new ways of simplifying the criminal process and at the same time reducing some of its undesirable effects on arrested persons. Some of the techniques being developed are highly promising; others are quite problematical. This ambivalence is a frequent feature of reforms. What is disturbing is the extent to which the promotion of pretrial diversion in the past two years has been conducted in evangelical tones, as if a novel theory and its pilot adaptations have scored total successes, are free of blemishes, and raise few fundamental issues worth bringing to the attention of the Congress. A more sober approach is counselled by some of the lessons of recent reforms in various sectors of society, illustrated in criminal justice by the extent to which imperfections in pretrial release programs in the mid-1960's led to pressures for preventive detention within a very few years.

This statement for the Subcommittee's record has explored only a few of the issues and alternatives that warrant further study. In almost every respect, these issues emerge not from armchair theorizing far removed from the turmoil of urban criminal courts, but from the operations, observations and attempts to verify the actual daily performance and achievements of the court diversion projects themselves. Problems such as these are intimately related to the role of the Congress in scrutinizing the theory, the practicability, the cost, the fairness and the likely effectiveness of any proposed major reform in the judicial process.

In conclusion it might be appropriate to reemphasize or add just a few questions: Why are S. 798 and H.R. 9007 so often characterized as proposals for

"diversion *from* the criminal process" when their procedures, and their impact on prosecutors, defense attorneys, defendants, witnesses and judges, are inserted in the very midst *of* the pretrial criminal process? By definition, *every* diverted defendant under these bills will be the subject of a federal charge which has *not* been dismissed, and which *will* be prosecuted, after trial delay, by the full panoply of the criminal process, if their attempted diversion fails. What this means is that every failure may become a *double* burden on the federal courts: involving double duties by prosecutors, defenders, and judges and—if convicted—by probation officers or institutions charged with responsibility to correct or rehabilitate or otherwise help defendants.

If Project Crossroads, for example, counted 140 successes and 51 failures among its diverted clients (Senate Report 93–417, page 7) doesn't that mean that the 51 failures should have been counted twice in assessing the burden on the courts—through diversion, then through trial, and then through possible conviction and sentence? Did the cost-benefit analyses take this added burden on the courts into account?

Unless conservative criteria become the norm, and confine diversion programs to a very few low-risk persons who might otherwise have their cases dismissed, will not the extension of diversion programs to more troublesome defendants, to those in higher risk but still worthwhile categories, mean many more failures, more double processing, and more duplication of pretrial and post-conviction service programs? Will not pretrial diversion inevitably divert vitally needed funds from understaffed probation offices which have in the past, and will in the future, be dealing with the mass of convicted offenders—a group more seriously affecting the security of the community and more in need of assistance and supervision? Ought not decriminalization, and diversion *out* of the criminal process, and funding for higher quality probation for persons *convicted* in the process, be much higher priority targets of legislative attention than the insertion of a new midstream probation program, with all its due process implications whenever accused persons are denied admission or prematurely expelled, in what is already a very complex criminal process?

Without explorations such as these, how can the Congress legitimately decide that diversion *inside* the criminal process will cut court caseloads and achieve other desirable purposes more fairly and economically than a simpler system of speedy trials, diversion-type sentencing alternatives and the expungement of criminal records?

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