Monograph on

... AND CHARACTERISTICS OF PRETRIAL INTERVENTION PROGRAMS

Prepared by

NATIONAL PRETRIAL INTERVENTION SERVICE CENTER

of the

American Bar Association
Commission on Correctional Facilities and Services

Washington, D.C. April 1974

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FOREWORD

This monograph represents one of several technical assistance projects of the National Pretrial Intervention Service Center undertaken in response to the technology transfer function assigned to it by the U. S. Department of Labor under Manpower Grant No. 21-11-73-32. What it attempts to do is offer the lay person a legal perspective as to the scope, authorization, procedures and constitutional issues of pretrial intervention programs.

Programs of pretrial intervention represent a unique approach to criminal justice reform whereby rehabilitation and treatment opportunities are made available to selected defendants in lieu of criminal prosecution. In this context, the "early diversion" concept was first tried in the mid 1960's and has since grown dramatically through a succession of demonstration programs. Yet, we find little attention given the consequences of by-passing the criminal trial process to allow for the intervention sequence and its regimen of community correctional services. The Center, therefore, deemed it timely and a matter of professional responsibility to examine the practice in terms of the legal implications of pretrial intervention alternatives.

Developing most of this monograph on Legal Issues and Characteristics of Pretrial Intervention Programs was an arduous and challenging undertaking. Although there is an absence of definitive case law on the pretrial intervention technique, there exists a significant body of legal doctrine on criminal pre-trial issues and events, which has analytical relevance to diversionary placement procedures. These are discussed in the first four legal issues. Since we discovered that few projects have policy guidelines for operational procedures, the next four legal issues presented discuss the implications of entry and exit decisions in pretrial intervention. The concluding section of the monograph is devoted to situations we found to be of concern to administrators and planners of pretrial intervention programs with whom Center staff has maintained a continuing dialogue. Thus, we feel that the monograph breaks new ground and will prompt continuing cross currents of dialogue on the subject of pretrial intervention legal issues among the diverse communities interested in this reform measure.

A word of caution to readers. None of the legal issues addressed are considered dispositive of the several constitutional law questions bearing on the early intervention concept. Certainly, the absence of case law on the subject serves to put such a thought to rest. What was attempted here is the isolation, definition and analysis of those legal issues thought to have relevance in the planning and execution of pretrial intervention programs. The monograph should be regarded as a preliminary analysis. We envisage supplements or revisions to the monograph to permit further synthesis and explication as legal doctrine and experience with the technique develops.

Special recognition goes to Michael R. Biel, Esq., the principal author of this monograph, which he developed in his capacity as Assistant Director of the National Pretrial Intervention Service Center. For their sage advice and legal analysis of the resultant work product, our deep

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The views expressed and positions taken in the monograph are those solely of the Center staff and do not purport to represent the conclusions of the individuals named above or the official policy of the American Bar Association, National District Attorneys Association (Center co-sponsor) or the U. S. Department of Labor.

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NATIONAL PRETRIAL INTERVENTION SERVICE CENTER

LEGAL ISSUES AND CHARACTERISTICS OF PRETRIAL INTERVENTION PROGRAMS

INTRODUCTION

The pretrial "intervention" or "diversion" program represents one of the most promising correctional treatment innovations in recent years. Adaptable both to adult and juvenile correctional populations, the concept has received increasing recognition and endorsement as a rehabilitative technique for early and youthful "offenders".[1] As discussed in this monograph, the technique is to be distinguished from informal diversion practices (e.g., police referrals, juvenile intake adjustments) in that pretrial intervention programs are based on (i) formalized eligibility criteria, (ii) required participation in manpower, counselling, job placement and educational services for defendants placed in the programs, and (iii) utilization as a real alternative to official court processing, i.e., dismissal of formal charges for successful participants.

The pretrial diversion concept typically calls for stopping the prosecution clock on less serious or first felony complaints before or after arrest and prior to the arraignment stage, although there is no indication that more serious alleged offenders could not be successfully diverted. Those selected for the program are offered counselling, career development, education and supportive treatment services. If the participant responds for a measurable period (e.g., 3-6 months), either the Court or the prosecutor, or both, depending on the authorization of the project, are asked to approve dismissal of the case prior to trial and adjudication. If the participant fails to meet program obligations, prosecution is resumed on the referral criminal charge. There are, of

1. Pretrial intervention was a major recommendation of the President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society, p. 134 (1967) and the President's Task Force on Prisoner Rehabilitation, The Criminal Offender - What Should Be Done, p. 22 (1970). American Bar Association's Standards Relating to the Prosecution Function, Sec. 3.8 and Defense Function, Sec. 6.1, both recommended diversion of selected offenders. Standards for the concept appear in the Courts Report and Corrections Report of the National Advisory Commission on Criminal Justice Standards and Goals (1973).

course, many variations on this basic theme as to the scope and procedures in the pretrial intervention sequence.

The three original pilot programs were the Manhattan Court Employment Project, the District of Columbia's "Project Crossroads" and the Flint, Michigan Citizens Probation Authority.[2] In terms of demonstration feasibility, all three were sufficiently successful to be institutionalized in local government agencies with funding support at extended capacities. They continue to operate today with slight modifications in program design and operational techniques.

In 1971, a "second round" of demonstrations was launched with Department of Labor manpower funds to replicate the Manhattan and Crossroads prototype in eight more major cities, and with positive results.[3] From this point on, a steadily increasing number of metropolitan areas began to structure and launch programs, typically with grant allocations from Justice Department Crime Control funds.

Today, it is estimated that at least 35 major urban areas have active pretrial intervention (PTI) programs served by full-time, funded staffs (professional and paraprofessional), receiving full court and prosecutor cooperation, and providing assistance to more than 10,000 diverted defendants annually. A Federal PTI program is on the horizon, defined by legislation working its way through both Houses of the Congress.[4] Programs have been formalized by court rules in two states, and it is likely that the first state legislation pertaining to such programs will be enacted in the coming year.[5] Also, PTI administrators have joined with

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2. The Flint, Michigan program was actually the first formalized pretrial intervention program, having been instituted in 1965 by Prosecutor Robert F. Leonard. Operation Crossroads and the Manhattan Court Employment Projects were instituted in 1968 with Department of Labor manpower funds.

3. Sites included Atlanta, Georgia; Baltimore, Maryland; Boston, Massachusetts; Cleveland, Ohio; Minneapolis, Minnesota; Newark, New Jersey; San Antonio, Texas; and the California Bay Area.

4. "The Community Supervision and Services Act", S. 798, has passed the Senate unamiously; H. R. 9007, "Diversionary Placement" is now before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House Judiciary Committee.

5. Pennsylvania Rules of Criminal Procedure, R. 175 et. seq., "Accelerated Rehabilitation Disposition," and New Jersey Supreme Court Rules Governing Criminal Procedure, R. 3:28, "Defendant's Employment Program," formalize pretrial intervention through Court rule. In Massachusetts, H. 2199 as revised, establishes "A Procedure for the Pre-Trial Diversion of Selected Offenders to Programs of Community Supervision and Service".

ROR (pretrial release) program chiefs to establish their own national professional association (National Association of Pretrial Services Agencies).

The pretrial intervention programs have thus far reported consistently better results with "graduates" than defendants handled by normal prosecution procedures. Participant recidivism (rearrest) rates are lower, job placement and stability results are better. And, although there is something to be desired in terms of the rigor of such evaluative assessments, PTI project performance has to a limited extent, been validated against control as well as comparison groups. Concededly, those chosen for PTI participation are "better risks". But are they also representative of individuals who perhaps otherwise would have travelled through a costly prosecutive and often ineffective correctional system?

While PTI program models and procedures may vary from jurisdiction to jurisdiction, most of the legal issues, nonetheless, remain, as they are systemmatic in nature and are generally a result of the process as a whole rather than particular procedures. It is not the purpose of this monograph to suggest a model PTI program, for each locality must adapt their program to available resources, their particular criminal procedure, and according to the receptivity of the community to this alternative to traditional criminal prosecution.

All indications are that the nation will be hearing more about the manpower services-oriented pretrial diversion concept and that local communities, courts and criminal proseuctors will be encouraged to consider initiation of action programs.

In this context, and notwithstanding the obvious benevolence of the PTI programs, it is appropriate to pause and consider such elements as scope, authorization, defendants' rights and other legal dimensions and issues of the PTI technique. This is the focus of the monograph.

Enclosed are complimentary copies of publications of the National Pretrial Intervention Service Center, as per your request.

If additional copies are required, please contact Ms. Evette Hinkle at the address below.

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I. WHAT ARE THE MAJOR LEGAL ISSUES AND CONSIDERATIONS ASSOCIATED WITH PRETRIAL INTERVENTION PROGRAMS?

As the PTI movement has expanded from its origins in the late 1960's, there has been increasing concern on the part of program administrators (and quite likely within the associated legal community as well, -- i.e., courts, prosecutors, and defense attorneys) about potential legal issues and difficulties. This has been rooted less in frustration or debilitating legal restrictions experienced than, perhaps, the informality and lack of legal barriers that have characterized the launching of most programs. We have yet to see a PTI program authorized by statute (although some related deferred prosecution arrangements are provided for in legislation). Only two of two dozen major programs are defined or regulated by court rule and even these were launched before the rules were developed and promulgated.

Indeed, it has been amazingly simple, from the criminal justice system viewpoint, to implement a PTI program once the necessary desire and commitment were obtained from prosecutors and judges. The watchword has been informality and flexibility -- and current programs have largely existed without legal difficulty or challenge. This has, undoubtedly, been helpful to the fledgling movement and, to some extent, a measure of the responsibility and professionalism with which PTI programs have been implemented by criminal justice officials, program administrators and treatment personnel. Yet, it is always useful to examine the legal

ramifications of new programs which provide for significant variations in the handling of defendants and offenders within the criminal justice system. Despite their considerable advantages to the accused defendant, PTI programs should present no exception. After all:

-- the accused remains under control of the criminal justice system, his community liberty being dependent on conformity with the rules and program requirements of the intervention program;

-- the accused remains fully subject to prosecution and criminal sanctions (fine, probation, incarceration) for alleged criminal conduct if he (i) fails to meet the program requirements for successful termination or (ii) in some cases, fails to convince the prosecutor or judge that a positive determination as to the foregoing merits dismissal of the prosecution;

-- the accused, in order to physically participate in the program, must waive or at least postpone assertion of certain constitutional rights and privileges available to those accused of crime; and

-- the public interest in a safe and secure community and competent administration of the criminal justice machinery demands that the risks of informal processing be well thought through, be legally justifiable, and serve society's goals as well as the interests of the defendant.

This focus, then, on legal issues is meant neither to rigidify or unduly bureaucratize the promising alternative to prosecution presented by the PTI concept. The very scrutiny afforded here may seem calculated to that end -- and, in some degree, this is inevitable. However, by virtue of its rapid growth and nature, pretrial intervention must be prepared to pass legal muster and enjoy an optimal legal environment if it is to make the difficult transition from "experiment" to "institutionalized technique." To this end, open dialogue on legal issues and how to cope with them effectively may have much to offer for the future of the concept.

The monograph deals with legal issues through a series of "critical questions" that have been raised in one form or another and are much on the minds of those concerned with the movement. These are not unusual in character and could be readily identified by any attorney familiar with the criminal justice process. They deal with:

-- constitutional rights to be cognizant of in any postponement of prosecution and trial for defendants who have formally entered the prosecution process;

-- basic authorizations and rules with respect to techniques for disposition of accused offenders without trial and conviction;

-- the relationship of PTI programs to current concepts and rules concerning pretrial release of defendants;

-- constitutional requisites in establishing criteria, in selection and in terminating individuals afforded the benefit of special programs such as pretrial intervention;

-- the inevitable and important issue of right to counsel; and

-- a variety of collateral issues of particular importance to program administrators.

The conclusions, often tentative, which are drawn rely on very little direct authority, as the concept of pretrial intervention is an innovation not easily susceptible to traditional criminal justice system categorization, and the monograph is quick to point out areas where, although issues may be raised, the answers are highly uncertain.

A conscious attempt has been made to structure this analysis as a guide and tool for program administrators and non-lawyers -- hence, the limited use of technical footnotes -- without sacrificing a basic commitment to document major legal conclusions. The wide diversity of jurisdictions and program characteristics already involved in the PTI movement makes any generalization a difficult and hazardous task. It

is hoped that readers will remain sensitive to this difficulty and help carry forward the needed dialogue on this subject by introducing new dimensions and implications to the questions considered based on their own experience.

II. MUST AN ACCUSED WAIVE HIS RIGHT TO A SPEEDY TRIAL AND THE APPLICABLE STATUTE OF LIMITATIONS TO QUALIFY FOR PARTICIPATION IN A PROGRAM?

The Constitutional Right to a Speedy Trial

The right to a speedy trial is guaranteed by the Sixth Amendment and is applicable to the states through the Fourteenth Amendment.[1] In addition to the Federal constitutional right, the constitutions of forty-eight states expressly guarantees this right or have provisions which can be interpreted to provide such a guarantee.[2] Generally, these have been defined more precisely than the Sixth Amendment guarantee and they apply with equal strength to a defendant accused of a crime in a particular state.

The Sixth Amendment clearly vests after prosecution is instituted through indictment or information.[3] However, there is some confusion as to whether it also commences after arrest and before formal charges are filed.[4] Notwithstanding, the due process clause of the Fifth Amendment or the applicable statute of limitations would bar undue delay after

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1. Klopfer v. North Carolina, 386 U. S. 128 (1961).
2. Note, Speedy Trial: A Constitutional Right in Search of a Definition, 61 Geo. L. J. 657, 659 (1973).
3. United States v. Marion, 404 U. S. 307 (1971).
4. In Marion, the Supreme Court indicated in dicta that the Sixth Amendment right might attach even at the time of arrest, when a person is held to answer for any charge. 404 U. S. at p. 311.

arrest but before indictment or formal charges are filed.[5] Thus, an accused in those diversion projects where formal charges are deferred for the duration of the term of the program would also have a constitutional or statutory right to a speedy trial. Even where such a right was appropriately waived during such term, it would become operative again if the defendant were returned for charging and prosecution.

Specific Time Limits which Define the Right

Some states have provided a time limit which, if exceeded without cause, would constitute a denial of a speedy trial.[6] In Barker v. Wingo, 407 U. S. 515 (1972), the Supreme Court rejected the notion of an inflexible time rule in favor of an ad hoc balancing test in which the conduct of the prosecution and the defendant is weighed, assessing such factors as the length and reason for delay, the defendant's assertion of the right[7] and the prejudice to him. If the right to a speedy trial has been unnecessarily denied or violated and the defendant has thereby been

5. Id. See also, Rule 48(b) of the Federal Rules of Criminal Procedure, which proscribes unnecessary delay in presenting the charge to a grand jury or filing an indictment against a defendant who has been held to answer in the District Court.

6. E.g., Cal. Pen. Code, Sec. 1382 (60 days from filing of information to trial); 19 Pa. Stat. Ann. 781 (1964) (6 months from commitment). The President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society, (1967) has proposed that the period from arrest to trial for felonies be not more than 4 months. p. 155. The American Bar Association Standards Relating to Speedy Trial, 2.1, recommends that the right to a speedy trial be expressed by rule or statute in terms of days or months.

7. The Court specifically rejected the "demand - waiver doctrine" which required the defendant in some circuits and states to demand his right to a speedy trial upon penalty of waiver. 407 U. S. at p. 529.

prejudiced by the delay in preparing his defense, the only remedy is dismissal of charges.[8]

The Necessity and Legitimacy of Waiver

Given the length of the term of most pretrial intervention programs, from ninety days to six months or a year, a defendant would be required to waive his right to a speedy trial in order to participate. This right may be easily waived, either expressly by actual written consent of the defendant to the necessary delay caused by the term of participation in the program,[9] or constructively by the defendant's acquiescence to the delay through his consent to participate. While Barker v. Wingo held that a defendant's failure to demand a speedy trial does not waive his right, the Supreme Court did indicate that the absence of demand is one of the factors to be considered in an inquiry into the deprivation of the right.[10] In recognizing that the defendant has no duty to bring

8. Strunk v. U. S., Supreme Court No. 72-5521 (1973).

9. Most pretrial intervention projects require eligible defendants to expressly waive their right to a speedy trial during the time or term of their participation. The form used by the United States District Court for the Northern District of Ohio, Eastern Division, is illustrative. It reads in part:

> I understand that to participate in this Program, I must waive (give up) certain rights. I intentionally, willingly and freely waive the following rights:
>
> 1. My right to a speedy trial on the charges in the above-named case.
>
> 3. My right to be prosecuted for the charges in the above-named case within the period set by the statute of limitations for those crimes.

10. 407 U. S. 517, at 527-28 (1972).

himself to trial, the Court nevertheless refused to place sole responsibility on the Courts and prosecutor, holding in effect that the defendant still has some undefined duty to enforce his rights.[11] Thus, a defendant's acquiescence to the delay necessary for participation, his failure to request a speedy trial and his consent to the necessary continuances of the criminal prosecution of the charges against him would be a sufficient constructive or implied waiver of his right to a speedy trial.[12] It would be inconsistent for a defendant to, on the one hand, agree to participate in a program which might make a trial unnecessary, and on the other hand, object to the denial of his right to a trial. He could, of course, stand on his right to a speedy trial and refuse pretrial intervention, in which case the prosecutor would have no alternative but to commence prosecution. Additionally, the defendant would not absolutely foreclose the right to a speedy trial if he were unsuccessful in the program. In that event, he would be returned to normal criminal prosecution and such right would obviously be revived.

An additional problem is posed where the term of participation may be more than a year, as where the defendant could be diverted for a term corresponding to the maximum sentence which could be conferred in the

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11. "The defendant's assertion of his speedy trial right, then is entitled to strong evidentiary weight in determining whether the right is being deprived. We emphasize that failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial." 407 U. S. at 531-32.

12. The American Bar Association Standards Relating to Speedy Trial, Sec. 2.3(c) suggests that continuances granted at the request, or with the consent of the defendant be excluded from computation of the delay resulting in the denial of the right to a speedy trial. In Barker, the Court determined that the defendant did not want a speedy trial, as evidenced by his failure to object to continuances. 407 U. S. at 535-36.

event of conviction, or where the project may seek an additional or extended term of services because participation is less than satisfactory but short of unsuccessful. Since the constitutional right to a speedy trial is personal, it may be waived in virtually any circumstance if voluntarily done. Thus, there is no absolute bar to intervention for periods of a year or more. However, to facilitate the voluntary waiver and to avoid any claim of denial of the right, this possibility of extended duration and its consequences must be fully explained to the participant, and in the case where the project may petition for extended terms, the participant should be required to again waive his right prior to the additional term.

Procedures and Steps for an Effective Waiver

If the defendant agrees to waive his right to a speedy trial, certain safeguards are helpful to insure that the waiver is voluntary, intentional and intelligent. At the very least, the options must be fully explained to the potential participant. This should include an explanation (i) of the duration of the program and its consequences in terms of the possible unavailability of witnesses if prosecution is resumed, (ii) that the project may be able to apply for an additional term or terms if participation is less than satisfactory, (iii) that there may be no guarantee that charges will be dismissed upon successful completion of the term (in those programs where applicable), and (iv) that the defendant may be returned to face criminal prosecution if terminated for cause. It should also be made clear that the participant will be required to waive the right to a speedy trial and the applicable statute of limitations. In this regard, it is highly advisable that the

participant execute a written waiver of the right and the statute of limitations, or that the waiver be part of the official record so as to protect against a claim of the denial of the right or violation of the statute in the event of subsequent prosecution.

Counsel in the Waiver Process

It is well established that the Sixth and Fourteenth Amendments guarantee the right to effective assistance of counsel at or after the time judicial proceedings have been initiated against a defendant, either by way of formal charges, information, indictment, preliminary hearing or arraignment.[13] Therefore, in those pretrial intervention programs where diversion occurs after formal charges have been initiated, potential participants would have an absolute right to the assistance of counsel when the program is explained to them and when they exercise their election to participate and thereby waive their right to a speedy trial and the applicable statute of limitations.

It is not clear whether a potential participant has a right to counsel when diversion occurs prior to the bringing of formal charges by way of arraignment, indictment or information. The language of the Supreme Court in Kirby v. Illinois, 406 U. S. 682 (1972) would seem to answer the question in the negative. In holding that there is no right to assistance of counsel during a pre-indictment line-up, the Court stated that it is the point of formal charges that marks the commencement of "criminal prosecution" to which alone the explicit guarantees of the

13. Powell v. Alabama, 287 U. S. 45 (1932); Coleman v. Alabama, 399 U.S. 1 (1969); Kirby v. Illinois, 406 U. S. 682 (1972).

Sixth Amendment are applicable.[14]

However, while a pre-indictment identification is not considered a "critical stage" in a criminal prosecution which would warrant the assistance of counsel,[15] the diversion intake proceeding may be based upon the practical recognition that a defendant's bid for diversion may become the most determinative single phase in the processing of his case. A defendant does have a substantial interest in the intervention decision, both because intervention could mean dismissal of charges if he elects to participate and because he may be electing to forego trial by jury and proof of his guilt in exchange for some supervisory control by the project. It thus could be seen as a "critical" stage which would warrant assistance of counsel.

Whether there is a constitutional requirement of counsel, it is nevertheless advisable to have counsel present, both to protect the defendant and the prosecution, as where there is a subsequent claim that the defendant's rights have been transgressed. Additionally, the

14. 406 U. S. at 690-91. "The initiation of judicial criminal proceedings...is the starting point of our whole system of adversary criminal justice. For it is only then that the government has committed itself to prosecute, and only then that the adverse positions of the government and defendant have solidified. It is then that a defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law. It is this point, therefore, that marks the commencement of...'criminal prosecution'..."

15. Both United States v. Wade, 388 U. S. 218 (1966) and Mempha v. Rhay, 389 U. S. 128 (1967) recognized a right to counsel at any "critical stage" in the prosecution of a defendant where substantial rights of the defendant were affected. It is not clear whether Kirby has mitigated these holdings, except insofar as they apply to pre-indictment identifications and possibly other stages, unidentified, occurring before formal charges are brought.

burden of providing counsel to assist the potential participant at the time of referral to a program is not great. In any event, counsel should be provided where the defendant appears to be incapable of speaking and understanding effectively for himself, as counsel then would be necessary for an informed and voluntary decision to accept or reject diversion. Also, counsel may be necessary to assess whether there may be any possible prejudice resulting from delay of a speedy trial given the possible disappearance of important witnesses, both for and against, or informants.

Statute of Limitations

All criminal codes prescribe periods of limitations where the state is barred from commencing prosecution if too long a period has passed after the commission of a crime. Typically, these run from two to ten years, depending on the gravity of the crime. It is theoretically conceivable, although doubtful, that the statutory period of limitations might run out where the pretrial intervention period is extended over a long period of time. Here too, an intelligent election to participate in a pretrial program will probably require a waiver or tolling (suspension) of the statute during participation. This would have the same effect as other delays sought by a defendant (such as continuances, waiver of the right to a speedy trial during term of participation) which results in such a suspension. Where there is a voluntary election and formal charges have not been brought, an explicit waiver of the statute of limitations would probably be necessary. Where a defendant has been formally charged, then the statute of limitations problem is eliminated, for prosecution has been commenced. After that point, the issue becomes one of a speedy trial.

III. WHAT ARE THE RESPECTIVE ROLES OF PROSECUTOR AND COURT IN PRETRIAL INTERVENTION PROGRAMS?

The Decision to Divert

Incident to the constitutional separation of powers, the executive branch of government -- or the prosecutor -- controls the institution of criminal proceedings.[1] In so doing, the prosecutor has the discretion to bring or not to bring formal criminal charges against any alleged offender. The precise limits of this discretion have never been clearly defined, in part because of the difficulty in doing so. Courts, nevertheless, interpret this discretion broadly, checked only by the requirements of due process and equal protection of the laws.[2]

The prosecutor's power to divert to such systematic programs as a PTI project could arguably be seen as inconsistent with the legislative function, under the separation of powers doctrine, of defining classes of offenders and the treatment appropriate to each class. However, the basic concept of the prosecutor's broad discretion in the charging

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1. United States v. Gainey, 446 F. 2d 290 (D. C. Cir. 1971); Newman v. United States, 382 F. 2d 479 (D. C. Cir. 1969); United States v. Cox, 342 F. 2d 167 (5th Cir.) cert. den. sub. non. Cox v. Hauberg, 381 U. S. 935 (1965); In re Petition of United States, 306 F. 2d 737 (9th Cir. 1962).

2. United States v. Cox, supra; Pugach v. Klein, 193 F. Supp. 630 (S. D. N. Y. 1961); see generally, K. Davis, Discretionary Justice, (1969) and LaFave, The Prosecution Discretion in the United States, 18 Am. J. Comp. L. 532 (1970).

function is well recognized. The decision to divert individuals to a pretrial intervention program before they are formally charged by way of indictment, information or arraignment would seem to rest solely and legitimately within this properly-exercised discretion.[3] Prosecutors have long engaged in large-scale diversion on an ad hoc, informal basis and, in this role, may have been influenced by improper considerations of class, racial or other prejudices or by political pressure. A pretrial intervention program standarizes this discretion through its rules and regulations and eligibility criteria and exposes it to public view and understanding. The end goal is not one of expanding the scope of discretion, but of exercising it more intelligently and fairly.[4]

The Court would not ordinarily have a role in the initial decision

3. Arguably, it may be incorrect to equate the prosecutor's sole discretion in the charging function with sole discretion - not properly subject to court review - to divert or not to divert an uncharged person. It is one thing not to charge and let the accused go totally free, but it may be quite another to withhold a charge, and hence not invoke the jurisdiction of the court system, on condition that an uncharged, untried, unconvicted person submit to a correctional program. However, if the prosecutor does not have this authority, it would be doubtful whether any office (judicial, legislative) would possess the authority. Prosecutors have, traditionally, withheld the imposition of charges in exchange for an accused's promise to enlist in the Armed Forces or seek mental health counselling. The American Bar Association's Standards Relating to the Prosecution Function, 3.4(a), recognizes that the decision to institute criminal proceedings should initially and primarily be the responsibility of the prosecutor.

4. ABA Standards Relating to the Prosecution Function; 3.4(b) states that the prosecutor should establish standards and procedure for evaluating complaints to determine whether criminal proceedings should be instituted, which with Standard 3.8 advocating non-criminal disposition could imply standards and procedures for the diversion of defendants from the criminal process as well.

to divert a particular offender if it occurs prior to the charge decision (formal charging through arraignment, indictment or information). This is because of the prosecutor's sole discretion in the charging function, except upon a legal challenge (e.g., equal protection, due process) of the prosecutor's decision not to divert.[5]

Post-Charge Intervention

Post-charge intervention, occurring at or after arraingment, indictment or charge by way of information, presents a difficult dilemma. It brings into play both judicial and executive functions and interests. Pretrial intervention is a hybrid procedure not susceptible of traditional criminal process categorization. It has a quasi-probationary element, given the possible dismissal of charges upon successful participation, and probation is an element of the sentencing function which is vested in the judiciary. Also, where intervention occurs after charges have formally been brought, jeopardy has attached; once this occurs, the traditional prosecutorial function is only advisory to the judicial function of determining if prosecution is to be continued, deferred or dismissed.[6]

5. Discussed in Section IX, infra.

6. For example, while the prosecutor has the sole power to move for a nolle prosequi, it will only be effected with the consent of the Court, State v. Kavanaugh, 52 N. J. 7, 243 A. 2d 225 (1968); State ex. rel. Lotz v. Hover, 174 Ohio St. 380, 189 N. E. 2d 443 (1963); Commonwealth v. Di Pasquale, 431 Pa. 536, 246 A. 2d 430 (1968); but c. f. State v. Sokol, 208 So. 2d 156 (Fla. App. 1968) and State ex. Inf. Dalton v. Moody, 325 S. W. 2d 21 (Mo. 1959). In the Federal system, a judge cannot, of his own volition, dismiss an indictment or information unless he is petitioned by the U. S. Attorney, or the government has violated protected rights of the defendant, either prior to or at arrest or by an unconscionable delay on bringing the case after formal charges have been filed.

The prosecutor, on the other hand, does control the institution and prosecution of criminal cases. If a decision is made pursuant to pretrial intervention criteria to divert an alleged offender, with the possibility of the dismissal of criminal charges, the prosecutor should arguably have more than an advisory function. The rationale of prosecutorial discretion is the traditional and well-founded concept that an elected and thereby responsible public official is more capable of making impartial decisions concerning the advisability of charging and fully prosecuting an alleged offender than is an appointed official who presides over the prosecution.[7] Additionally, as a practical matter, the decision to divert should, in part, emanate from his office, for it is the prosecutor who has the information on hand to make the determination based upon project standards.

Final resolution of the court-prosecutor conflict of functions and interest must await the evolution of the separation of powers doctrine as it affects this element of the criminal process. There is some case law which is beginning to delineate the respective roles of the prosecutor and court in the decision to divert alleged offenders to a program of pretrial intervention. The California Supreme Court has recently ruled invalid a legislative grant of power to the prosecutor creating an effective veto over the trial judge's decision to award lenient sentences to convicted narcotics offenders with a prior criminal

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7. Pugach v. Klein, supra, and Moses v. Kennedy, 219 F. Supp. 762 (D. C. 1963). However, in some jurisdictions, prosecutors may be appointed and judges elected, so that this concept may have limited applicability.

record.[8] The Court noted that:

> "(w)hen the decision to prosecute has been made, the process which leads to acquittal or to sentencing is fundamentally judicial in nature.
> ...
> The judicial power is compromised when a judge, who believes that a charge should be dismissed in the interest of justice, wishes to exercise the power to dismiss but finds that before he may do so he must bargain with the prosecutor". 3 Cal. 3d at p. 94.

Following Tenorio, the same Court found unconstitutional, as a violation of the separation of powers doctrine, a section of the California Welfare and Institutions Code conditioning the commitment of persons convicted of certain crimes to a narcotic addict treatment program upon the consent of the prosecutor.[9]

In United States v. Gillespie,[10] a Federal prosecutor petitioned successfully for commitment of an addict under Title I of the Narcotic Addict Rehabilitation Act of 1966 ("NARA"), which provides for civil adjudication and commitment of addicts in lieu of prosecution. Such a commitment in effect accomplishes the same aims as pretrial intervention. Following the petition, however, the Federal attorney proceeded to obtain an indictment, which was against the usual practice of holding criminal

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8. People v. Tenoria, 3 Cal. 3d 89, 89 Cal. Rptr. 249 (1970). See also, Esteybar v. Municipal Court, 5 Cal. 3d 119 (1971), where a California Penal Code section requiring the consent of the prosecutor before a court could exercise the power to determine that a charged offense was to be tried as a misdemeanor rather than a felony was declared unconstitutional; and People v. Clay, 19 C.A. 3d 964 (1971), again declaring the veto power of the prosecutor over the determination to grant probation unconstitutional.

9. People v. Navarro, 7 Cal. 3d 248.

10. 235 F. Supp. 1236 (W. D. Mo. 1972).

charges in abeyance in such cases. In ordering the indictment dismissed, the Court held in effect that the U. S. Attorney is without discretion to refuse to file a NARA I petition on behalf of an addict otherwise eligible under the statute.[11] In relying upon the legislative history of NARA, which did not contain an express limitation on the exercise of the prosecutor's discretion to charge, the Court inferentially restricted the discretionary powers of the prosecutor to charge and thus prevent the civil commitment of addicts under NARA, and thereby expanded the discretionary powers of the Court to determine when this commitment is proper.

The foregoing opinions recognize that under most circumstances, the decision to charge or not is a valid function of the prosecutor and defining classes of offenders and the treatment or punishment appropriate to each are functions of the legislature. However, the process which leads to acquittal, dismissal of charges, and sentencing, or the exercise of sentencing discretion, is inherently a judicial function. Therefore, once formal charges are filed by way of arraignment, indictment, or information, determining the ultimate disposition of the case is primarily a judicial function, regardless of the advisory role assigned to the prosecutor by the Court.[12]

Since it is unclear legally which branch of government should

11. 345 F. Supp. at 1238.

12. One inescapable conclusion of these cases is, ideally, the paramount role played by the legislature in pretrial intervention, a function that, in practice, has not been exercised by that body. Although the legislature has the power to define classes of offenders and the treatment or punishment appropriate to each class, which presumably includes determining the priority and eligibility for pretrial intervention, no programs in operation today have been legislatively authorized.

properly exercise the power to divert after formal charges have been filed, and presented with almost co-equal interests in the judiciary and prosecutor, the best alternative might be equal responsibility in the decision to divert. Practicably, the prosecutor would decide initially who is to be diverted, and the Court would insure, sanction and add to the proper exercise of that discretion. This, in fact, is the practice in some jurisdictions where there exists a pretrial intervention program occurring after arraignment.[13]

The Court may also properly authorize a project to service as special referrals, without prosecutorial approval, those ineligible defendants who may be in need of job counselling and other supportive services but who would not be actual participants subject to dismissal of charges upon a successful term in the project. These special referrals would not be divertees from the criminal process and would require prosecutorial approval to make them so. Often, these individuals have been convicted or have pleaded guilty to a criminal offense and participation in the program is a condition of their probation.

Delegation of the Decision to Divert

It may be that a prosecutor-initiated program is so designed that the project's administrator determines which defendants will be diverted,

13. For example, this is the practice in the District of Columbia with Project Crossroads, now a part of the Superior Court system in the District. The prosecutor, with the aid of Project personnel, screens those applicants eligible and presents his recommendations to the Court, which will grant the necessary continuance and order intervention where proper and will act upon any claim of an improper prosecutorial determination of non-eligibility.

subject to prosecutor veto, or at least provides the prosecutor with the recommendation upon which he relies in exercising his discretion. To the extent that this procedure demonstrates mutual cooperation between the prosecutor (or court, if appropriate) and the project, it is consistent with the traditional legal basis of prosecutorial (or court) discretion. If, however, in such a prosecutor-initiated program, a decision made by an administrator is completely independant of the prosecutor, as where (i) final approval of the prosecutor is not necessary, or (ii) the prosecutor has not set forth explicit, published criteria to guide the decision-maker, or (iii) the project is not considered part of the office of the prosecutor, then diversion is not consistent with the constitutional separation of powers. The impartiality and discretion of the prosecutor in ultimately making his decision to divert and controlling the charge decision must not be compromised.[14]

Permitting contributions by project personnel of information relevant to the prosecutor's intelligent and impartial diversion decision would not impair the role of the prosecutor. Indeed, it might allow that decision to be made in a more intelligent manner than would the decision of the prosecutor acting without such assistance.

A final problem arises out of the practice of some programs of giving veto power over the diversion decision to persons other than the

14. It is theoretically doubtful whether a legally valid procedure for the delegation of the charge decision could be instituted without the specific authorization of the legislature. United States Constitution, Article I, Section 8, Clause 18: "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Office thereof".

prosecutor or judge, as for example to the arresting officer or victim of the crime. Conditioning the decision to divert on the concurrence of others raises serious issues of due process, as well as the doctrine of separation of powers. It makes the fate of an otherwise eligible defendant dependant on the unfettered exercise of the subjective discretion of individuals who never have had the constitutional authority to determine which individuals are to be charged once an arrest is made.

Decision to Terminate Unsuccessful Participants

Constitutional law would seem to require that a divertee may not be terminated as unsuccessful unless he is afforded a hearing. Although there are no cases directly on this point, the developing law on administrative due process requires that a person may not be deprived of substantial rights by an executive official without an opportunity for a hearing and the ability to present his side of the case. Such deprivations have been ruled to include the termination of welfare benefits, the expulsion from a public school or college, or the revocation of probation or parole.[15] The return of an accused defendant from PTI program participation to prosecution and trial would seem, by this standard, an equally serious deprivation. Those responsible for developing termination proceedings under PTI programs would be well advised to allow for this right of administrative due process.

Since a hearing requires an independent examiner, the prosecutor does not have sole discretion in this matter and indeed his recommendation of termination and the reinstitution of criminal proceedings may be

15. See Section VIII, Note 7 and accompanying text.

overridden. Without doubt, the prosecutor's recommendations will carry much weight, but the actual determination lies within the properly-exercised discretion, as defined by project standards and regulations, of the hearing officer who, in circumstances where formal charges have been filed and are deferred, is the judicial officer to whom the diversion project traditionally certifies its recommendations. The prosecutor is entrusted here with the decision to apply for termination, based upon periodic reports by the project, but the actual decision to terminate resides in the hearing officer. The same is true where the prosecutor disagrees with the project's recommendation of dismissal of charges for successful completion of the PTI program and, instead, proceeds with prosecution. Where there is no court involvement, the prosecutor's office or the program staff may be entrusted with the hearing if the hearing officer is independent from those in the office who conducted the investigation and concluded that application for termination was proper.[16]

Successful Participants

In those circumstances where prosecutor and the project recommends favorable termination and dismissal of the charges, formal judicial action is required to certify that dismissal, as in any case. Where, however, a successful divertee was never formally charged, either by

16. By analogy, in Morrissey v. Brewer, 408 U. S. 471, 485 (1972), the Supreme Court recognized that when parole is to be revoked, the determination at a preliminary hearing that reasonable grounds exist for revocation should be made by someone not directly involved in the case. The independent officer need not be a judicial officer. The analogy to PTI terminations is obvious.

indictment or information, judicial certification is not necessary. The function may properly be performed by the prosecutor, as he does in any case where he exercises his discretion not to formally bring charges. In this circumstance, there would be no right to a termination hearing by an independent officer, as the need for such a hearing is obviated.

IV. MAY ENTRANCE INTO A PRETRIAL INTERVENTION PROGRAM AND ADHERENCE TO ITS REQUIREMENTS BE A CONDITION OF RELEASE ON BAIL?

Release to a pretrial intervention program usually occurs after or apart from bail proceedings, or involves defendants whose eligibility for the program would warrant release on their own recognizance (ROR) and not to a third-party custodian.

There are circumstances, nevertheless, where release to a program could be a condition of release on bail. The law is coming to recognize the legitimacy of imposing special conditions beyond or instead of money bail, such as unsecured appearance bonds, third-party supervision, restrictions on travel and associations, or any other condition deemed reasonably necessary to assure future appearances.[1] Referral to a pretrail intervention program as a condition of release on bail is especially opposite in the case of addict diversion.[2] In either case, however, it

1. See generally, Bail Reform Act of 1966, 18 U.S.C. 3146 et. seq., and the American Bar Association Standards of Pretrial Release, Sec. 5.2(6)(i). In the early history of the Washington, D. C. Project Crossroads, a number of participants were released to the third-party custody of the Project as a condition of release on bail under 23 D. C. Code 709, which applied the Bail Reform Act to the District of Columbia.

2. See, Commonwealth ex rel Zakarewsky v. Aytch, No. 1094, Ct. of Com. Pl. of Phila. County (June Term 1972) for application of the bail provisions of Rule 4001 of the Pennsylvania Rules of Criminal Procedure to release to a drug referral program; see also, the Special Action Office for Drug Abuse Prevention (SAODAP) outline for Treatment Alternatives to Street Crimes (TASC), authorized by P. L. 92-255, where pretrial diversion of identified addicts to TASC Programs and adherence to its standards may be a condition of release on bail.

is clear that under the Eighth Amendment provision that "(e)xcessive bail shall not be required" and in those states which provide for release on bail, whether it be considered an absolute right or discretionary, the only justifiable function of bail conditions is to assure a defendant's future court appearances.[3] Thus, when release to a pretrial intervention program is a condition of release on bail, the only proper inquiry is the relevance of that condition to assuring future appearances and whether the condition is excessive, since the least restrictive condition assuring future appearances is the one to be imposed.[4]

PTI Participation as a Bail Condition

It is conceivable that a court could determine, when considering a defendant's release on bail, that release to a non-addict intervention program would be the least restrictive condition necessary to assure his future appearance. Such a determination would take into account the nature of the offense charged, the defendant's family and community ties, his character and mental condition and his prior record. However, in most projects, the restrictive eligibility criteria (no prior record, not charged with a serious offense, residency, etc.) would warrant release on defendant's own recognizance or his execution of an unsecured appearance

3. Brady v. U. S., 368 U. S. 852 (1961); Stack v. Boyle, 342 U. S. 1 (1951); United States v. Kirkman, 426 F. 2d 747 (4th Cir. 1970); United States v. Alston, 420 F. 2d 176 (D. C. Cir. 1969); In re Smiley, 66 Cal. 2d 606, 427 P. 2d 179 (1967); Commonwealth v. Caye, 447 Pa. 213, 290 A. 2d 244 (1972); Gusick v. Boies, 72 Ariz. 233, 233 P. 2d 446 (1951); People ex rel Klein v. Kroeger, 25 N. Y. 2d 527, 255 N. E. 2d 552 (1969). Congress has incorporated the holding of Stack v. Boyle in the Bail Reform Act of 1966, 18 U. S. C. 3146.

4. Stack v. Boyle, supra.

bond and would preclude any further conditions attached to his release. In such cases, it would be improper for the court to treat the pretrial intervention project as a third-party custodian, except in those states where there is no right to bail. As these programs proceed to broaden eligibility criteria to permit the diversion of defendants charged with more serious felony offenses and prior records, and persons with significant chemical-use histories, the supervision and counselling assistance of a pretrial intervention program may well be seen as a condition that might turn the balance in the "future court appearance" determination.

Determination in Addict Diversion

In addict diversion, the considerations relative to a defendant's likelihood of appearance at future court proceedings and the nature of his addiction might well lead to a reasonable conclusion that the supervision afforded by the diversion program is the "least restrictive condition" which could be placed on the defendant. It would be necessary to show in each individual instance that the addict, possibly because of past history, lack of community ties through residence and employment, is not likely to appear at future proceedings. Certainly, this will not always be true and an addict's release to the program merely because of his addiction could be challenged by a defendant who does not voluntarily wish diversion on grounds that the status per se of addiction is not susceptible to distinguishing him for purposes of the criminal justice system sanctions.[5] Additionally, addict intervention

5. Robinson v. California, 370 U. S. 660 (1962), which held it unconstitutional to impose sanctions solely on the basis of one's status as an addict.

programs usually encompass treatment as well as supervision; therefore, for the defendant who wishes to challenge release to the program, supervision should not necessarily include treatment, especially, if treatment includes methadone maintenance, unless it too can be shown to be reasonably necessary to assure future court appearances.

Voluntariness of PTI Participation and Bail Conditions

Many addict and virtually all non-addict programs are based upon the premise that participation is essentially voluntary. Except where a participant is required to plead guilty as a condition of his diversion, the persons for whom diversion projects are designed have only been accused of criminal conduct and have not been convicted. Therefore, the only justification for official intervention through the diversion option is that they voluntarily agree to participate in the program. This is true notwithstanding that supervision by a pretrial intervention program may be a condition of release on bail, for supervision does not necessarily imply treatment, counselling and performance expectations of defendants beyond their mere monitoring. To provide as a project ground rule that active participation in a pretrial program may be imposed as a condition of pretrial release (the limited option of PTI or detention) or as a condition of ROR would qualify defendant's participation and quite possibly taint defendant's waiver of the right to a speedy trial, discussed previously. Generally, diversion should occur after or at least apart from the bail hearing as as to preserve the voluntary nature of a defendant's participation.

V. CAN A VIOLATION OF PROGRAM GUIDELINES RESULT IN PRETRIAL (JAIL) CONFINEMENT?

Federal System

Unless release to a pretrial intervention project is a condition of pretrial release, unsuccessful termination from the Project should not automatically warrant the defendant's pretrial detention. His failure in the program could not legally be seen as reflecting on whether he will appear for future appearances, for participation in the program was not a condition of his release in the first place, the violation of which is the only basis for incarcerating a defendant after his release short of rearrest.[1]

Where release on bail is conditioned on referral to a pretrial intervention project and the defendant has failed to adhere to the program's guidelines, the Court, under authority of the Bail Reform Act, could

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1. Bail Reform Act, 18 U.S.C. 3146(c). However, subsection (e) of 3146 does allow the judicial officer ordering the release of a person to amend his order to impose additional conditions of release. Conceivably, an unsuccessful termination could warrant additional conditions of release which, if the defendant were not able to meet them, would result in his confinement. But only as long as there was an indication that these additional conditions were reasonably necessary to assure future appearances. This would require some change in defendant's circumstances, and such change would doubtfully be caused by unsuccessful participation if that participation were not a condition of his release in the first place. The Court's power to amend and revoke bail and commit a defendant to custody should be invoked only when and to the extent justified by the danger which defendant's conduct presented, Bitter v. U. S., 389 U. S. 15 (1967).

revoke his release and set other more stringent conditions, which if not met, would result in jail detention. To do this, the committing officer would have to determine that the condition set initially or other less restrictive conditions would not reasonably assure the future appearance of the defendant.[2] It may seem tenuous to say that violation of project standards indicates a greater risk of flight before trial, warranting more restrictive conditions, especially where the project's eligibility criteria allow the selection of low-risk offenders only.[3] Nonetheless, the condition of release to the pretrial intervention project at least formally relates to securing future appearances and any violation of this condition formally reflects adversely upon defendant's likelihood to appear. Since discretion in setting conditions of release is with the Court and is rarely disturbed on appeal, the chances of avoiding jail detention rest primarily with the committing officer and his review of whether less restrictive conditions will suffice now that pretrial intervention participation has terminated. The Court's power to commit a defendant to custody should be invoked only when and to the extent justified by the danger which the defendant's conduct presented to the issue of whether he will appear at future court proceedings.[4]

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2. See, United States v. Gamble, 265 F. Supp. 1192 (D.C. Tex 1969) and U. S. C. 3146(e); see generally, American Bar Association Standards of Pretrial Release, Secs. 5.6, 5.7 and 5.8.

3. The possible exception to this general statement is where participation is terminated because of the participant's failure to appear for program services, which would directly relate to whether there is a great risk of flight before trial.

4. Bitter v. U. S., op. cit.

State and Local Courts

In those states where there is an absolute right to bail, the court again would be warranted in imposing more restrictive conditions or money bail on an unsuccessful participant, which if not met, would result in incarceration. It must be shown, however, as in the Federal system, that the more restrictive conditions of release or imposition of a money bail are the only reasonable conditions which could assure the defendant's future appearances. In most cases, however, some form of bail, either a money bond or secured appearance bond, would be in order and the question thus presented is the excessiveness of the amount of bail. In those few states without a right to bail, or in states where release on bail is discretionary, the court may automatically incarcerate a defendant who violates a condition of his release without inquiring as to whether the risk of flight has been thereby increased.

General Conclusions

The answer as to whether an unsuccessful pretrial intervention program participant can be returned to pretrial confinement is generally in the affirmative, given an assumed inability to meet more restrictive pretrial release conditions, such as secured appearance bonds or money bail. However, there is no legal bar to subsequent release on recognizance and, since most programs do screen for relatively safe risks, such release would seem in order provided the ground for program failure is not the commission of a serious or violent crime or failure to appear to participate in diversion activities.

VI. CAN ESTABLISHMENT AND ADMINISTRATION OF ELIGIBILITY CRITERIA ABRIDGE CONSTITUTIONAL RIGHTS OF DUE PROCESS AND EQUAL PROTECTION OF THE LAWS?

The Constitution requires that citizens may not be denied the "equal protection of the laws" (Fifth and Fourteenth Amendments). This mandate has been interpreted to invalidate the extension of beneficial government or government-sponsored programs in a discriminatory or arbitrary manner as between different classes or groups of individuals who are nonetheless similarly situated in respect to their right to or qualification for the programs. The discussion here will examine whether and to what extent various kinds of eligibility criteria may raise "equal protection" challenges.

Differences in Geographical Coverage

A county, state or federally-created pretrial intervention program should have general applicability to all persons within the class of eligibles, as defined by program eligibility criteria, throughout the geographical unit. The enabling authority (statute, court-rule or memoranda of agreement) for the program, however, may legally permit applicability to be discretionary with subdivisions or limit its application in certain areas within the geographical unit where the underlying reason is that extension to other areas would not be administratively and/or economically feasible. This could be based on a judgment that there was

not a sufficient number of eligible participants or sufficient services for such an extension.[1]

Absent considerations of the kind described above, an alleged offender within a subdivision of a geographical unit for which a pretrial intervention program has generally been created might successfully challenge the subdivision's lack of a program as violative of his right to the equal protection of the laws.[2] While absolute territorial uniformity is not a constitutional requisite under the Fifth and Fourteenth Amendments,[3] there must be some reasonable basis for the lack of uniformity which results in unequal treatment of persons similarly situated in different parts of the territory or jurisdiction.[4] The fact that

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1. Since no fundamental right to what are essentially "experimental" pretrial intervention programs is involved and no suspect classification based upon wealth, race or religion is excluded by normal eligibility requirements, the government need only demonstrate that a resulting classification which might discriminate against persons similarly situated is rationally related to a legitimate state interest. Rodriquez v. San Antonio School District, 93 S. Ct. 1278 (1973). Economics and/or administrative unfeasibility would, in all probability, be a reasonable basis for restricting total applicability of pretrial intervention in a geographical unit. See also, Dandridge v. Williams, 397 U. S. 471 (1970), where the State of Maryland was justified in reducing the amount of payments per child under the Aid to Dependent Children Program to those children in a family over a certain number, on the ground that it is proper for the states to conserve their limited welfare fund, notwithstanding the resulting discrimination to large families.

2. While the Fifth Amendment applicable to federal action does not specifically encompass the right to the equal protection of the laws as provided by the Fourteenth Amendment in regard to state action, unjustified discrimination would be violative of the Fifth Amendment due process clause. Bolling v. Sharp, 347 U. S. 497 (1954).

3. Salsburg v. Maryland, 346 U. S. 545 (1954).

4. Shapiro v. Thompson, 394 U. S. 618 (1969). "We recognize that a State...may legitimately attempt to limit its expenditures, whether for public assistance, public education or any other program. But a State may not accomplish such a purpose by invidious distinctions between classes of its citizens". 394 U. S. at 624.

pretrial intervention may be experimental is not sufficient reason for the different treatment, for the jurisdiction having once created the program must apply it to all persons within the class who are similarly situated, absent an economic or administrative justification for unequal applicability.[5]

If the enabling authority for a diversion program, however, were to allow the subdivisions within the jurisdiction the discretion to establish pretrial intervention programs,[6] and certain subdivisions do so, there would be no denial of the right to the equal protection of the

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5. See, Griffin v. Illinois, 351 U. S. 12, reh. den. 351 U. S. 958 (1956) where a full, direct appellate review could only be had by furnishing the Appellate Court a bill of exceptions, which often required a transcript which had to be purchased and which therefore denied indigents access to the Appellate Court. In holding this provision unconstitutional, the Court opined that while a state is not required by the Constitution to provide a right to appeal, having once done so as matter of right and not discretion, it then must do so in a way that does not discriminate against some convicted defendants. While a pretrial intervention program which has limited applicability in a particular geographical unit does not create a discriminatory classification based upon wealth as in Griffin, for which a compelling state interest in maintaining the classification must be shown, a discriminatory classification nevertheless is created by the limited applicability of the program. The principle announced in Griffin that once a jurisdiction has given its citizens a right, it must be allowed to be exercised in a non-discriminatory manner would seemingly compel the jurisdiction to demonstrate that there is a reasonable basis for the discriminating classifications caused by limited applicability.

6. E.g., Rule 3:28 of the New Jersey Supreme Court Rules Governing Criminal Practice, which establishes the procedure for the diversion of offenders "(a) In counties where there exists a defendant's employment or counselling program approved by the Supreme Court for operation under this rule..." Indeed, a Court of general jurisdiction within a total state court system could probably be considered a separate jurisdiction if it were to launch a pretrial intervention program. In fact, virtually all operative programs today were created for application in a particular urban county or metropolitan area rather than in the total court system or pursuant to a systematic state authorization.

laws of those similarly situated (charged with the same kind of offense) in subdivisions that did not create such a program. In such cases, no subdivisions have been mandated to create a program, so that its population would have no right to benefits. The fact that a program exists in another subdivision would not be viewed as determinative of such a right.[7]

Specific Eligibility Criteria

Once a pretrial intervention program is established, an issue is raised as to whether the eligibility criteria deny a defendant who is thereby excluded from participation the equal protection of the laws. Obviously, this will depend on the nature of the particular eligibility criterion in question. The equal protection guarantee does not require that all persons be dealt with identically, but rather that any distinction drawn have some relevance to the purpose for which the program and classification were created, and that the distinction drawn does not arbitrarily exclude certain classes of defendants.[8]

If the distinction results in discrimination against a classification based upon race, religion or wealth, or interferes with the exercise of fundamental constitutional rights, the government must show that a compelling state interest is advanced by the distinction. If the distinction discriminates against certain classes of people similarly situated, or interferes with the exercise of a non-fundamental right, the

7. See, Salsburg v. Maryland, 346 U. S. 545 (1954), where the Supreme Court upheld varying county criminal procedure on the ground that these procedures were discretionary with the counties.

8. Baxstrom v. Herold, 383 U. S. 107 (1966).

government need only demonstrate that the distinction promotes a rational state interest.[9]

Criteria Relating to Race and Sex

Classifications or eligibility criteria based upon the sex of the defendant would seem to be patently offensive to the due process and equal protection guarantees. It is too late in the day to justify a general and direct sexual distinction based upon differing needs of male and female defendants and the difficulty of servicing one or the other. Even assuming that the sexes require different services because of different needs, denying pretrial intervention to either would still run afoul of due process and the equal protection guarantees. Classifications which discriminate against the sexes are a priori constitutionally suspect, so that the state must demonstrate that the classification which results in exclusion serves a compelling, as opposed to reasonable, state interest. The state interest advanced by the relative ease of serving males or avoiding the difficulty of providing services to females in pretrial intervention would not seem compelling enough to override the resulting discrimination against women. The only possible justification for such differing treatment would be a program where eligibility requirements would indirectly result in the virtual exclusion of a particular sex, such as one designed to provide pretrial services to prostitutes. Of course,

9. See, Sherbert v. Verner, 374 U. S. 398 (1963) and Shapiro v. Thompson, 394 U. S. 618 (1969) for further amplification. For a discussion of which rights are "fundamental" (essentially those guaranteed either expressly or impliedly by the Bill of Rights); see generally, Note, Developments in the Law -- Equal Protection, 82 Harv. L. Rev. 1065 (1969).

if a male were arrested for such an offense, he likewise should be eligible for the program.[10]

The same principles proscribing direct classification based upon the sex of the defendant would apply if classifications were established which denied eligibility based upon race.

Exclusion Based on Non-Residency

Requiring defendants to be residents of the jurisdiction wherein the intervention program operates does recognize a real difficulty in serving the non-resident. An intervention program normally anticipates extensive weekly contacts and counselling with the participant, which may, of necessity, exclude the participation of certain non-residents. Also, non-residents may not be eligible for certain community services to which the PTI program refers. However, if a non-resident who is alleged to have committed a crime for which pretrial intervention is possible is ameanable and able to report to the project when necessary, is eligible for special community services, and can maintain employment within the jurisdiction (if employment is a component of program supportive services), his automatic exclusion might be constitutionality suspect. A requirement that the potential participant must have resided within the jurisdiction for a stated period of time prior to his alleged offense would

10. It should be noted that certain early diversion programs excluded coverage of women, based largely on grounds of low female caseloads and a purported administrative difficulty in providing services to the females (e.g., Project Crossroads in the District of Columbia). This condition has been eliminated and today no known PTI program excludes coverage of one or the other sex. However, most programs do exclude eligibility of those charged with prostitution on the grounds that it requires, of the staff, a special capability to understand and deal effectively with the specialized problems and needs of alleged prostitutes, for which a program has neither the time, expertise or money.

quite likely be unconstitutional,[11] and exclusion from pretrial intervention because of present non-residency, without more being shown, would seemingly be constitutionally suspect on the same grounds.

Projects would be better advised to proceed on a case-by-case basis to determine if non-residents are available for project services. Mere non-resident status, standing alone, would not necessarily impair the defendant's availability.

Criterion Relating to Age

Some projects restrict eligibility to youthful offenders, making those over a certain age ineligible for intervention. While there may be an arguable equal protection challenge to this criterion, an authorization for pretrial intervention is generally free to recognize "degrees" in possible benefits and may confine eligibility to classes where the need is deemed to be paramount. Except for the suspect classifications based upon race or sex, if the program attacks the evil where it is the

11. See, Shapiro v. Thompson, 394 U. S. 618 (1969), which held unconstitutional state requirements of residency for any particular period of time in order to qualify for welfare payments. The Court rejected the State's arguments that the limitation of welfare benefits to those regarded as contributing to the State (residents) was proper, that the waiting period requirement facilitated budget and number predictability, and that the State could reserve its benefits for its "established" residents. While the holding in Shapiro was based upon the interference of a citizen's fundamental right to travel, which is not involved here, denying a defendant access to a program of a jurisdiction's criminal justice system because of non-residency would also seem to violate what might be a fundamental right of access to the process, for which a compelling state interest in the denial must be shown. Even if access to the process by admission to an "experimental" program were not considered a fundamental right, the State would still have to demonstrate that the denial of admission advances a reasonable State interest.

most felt, it would seem constitutionally sufficient.[12]

There is a special basis for affording the benefits of pretrial intervention to the young, for they are still in their formative years and have traditionally been considered more susceptible to correctional treatment.[13] Additionally, society would suffer greater harm and carry a greater burden from recidivism in youth than in older offenders, for there is a longer life in which to recidivate -- and one of the stated goals of pretrial intervention is the reduction of recidivism.

Criteria Relating to Employment Status

An eligibility criterion based upon unemployment, underemployment or unemployability would also seem justified on grounds similar to those

12. See, West Coast Hotel Co: v. Parrish, 300 U. S. 279 (1937) where the Court sustained a State regulation of women's wages and hours on the grounds that women were a special class, receiving the least pay and with relatively weak bargaining power, and since they therefore were susceptible of being abused as a class, the State could properly legislate against this particular abuse and protect and advance the interest of this particular class. While the specific holding of West Coast Hotel Co. may be subject to some criticism today in regard to its treatment of women as a special class deserving of special protection, the principle that the State may direct its law-making power to correct particularly greater evils that affect certain classes is nonetheless sound, especially where no action would "cast a direct burden...upon the community". 300 U. S. at 381. See also, Minnesota ex. rel. Pearson v. Probate Court, 309 U. S. 270 (1940: "As we have said, the Legislature is free to recognize degrees of harm, and it may confine its restrictions to those classes of cases where the need is deemed to be the clearest. If the law persumably hits the evil where it is most felt, it is not to be overthrown because there are other instances to which it might have been applied". 309 U. S. at 274-75.

13. See, Dowd v. Stuckey, 222 Ind. 100, 51 N. E. 2d 947 (1943), upholding special confinement and parole conditions for youthful offenders. Also, Minnesota ex rel Pearson v. Probate Court, op. cit.

operative in age classifications. Here, the needs of the unemployed, underemployed or the unemployable and the risk to and burden of society are greater because of their economic circumstances. Also, the legislature or whomever authorizes a pretrial intervention program may undertake reform one step at a time, and there is no requirement that it attempt to provide for all classes or circumstances if the classification initially created by the reform effort is legitimate and reasonable.[14]

The above rationale is lessened somewhat, however, by the fact that most programs include other supportive services of equal importance to employment counselling and placement. Additionally, employed defendants may want to increase their employability through training or better jobs, the desire for which assumes increased significance in light of the fact that individuals who are arrested often lose their present employment either because their post-arrest confinement makes continued employment impossible or because of reluctance on the part of employers to continue employing those they may see as "criminals" or untrustworthy. Rather than a hard and fast exclusion of defendants who are employed, the authorization for programs should disregard employment exclusions altogether or allow the staff, where employment counselling is paramount, to proceed on a case-by-case, discretionary basis in selecting those who

14. See, McDonald v. Bd. of Election Comm'rs., 394 U. S. 802 (1969), where the Court denied an equal protection challenge by detained, unsentenced inmates to an Illinois statute granting absentee ballots to, among others, those medically incapacitated or observing religious holidays, but not to the class of petitioners. In upholding the statute's classifications, the Court noted that the statute was not an arbitrary scheme but a laudable state policy of adding, over a 50 year period, groups to the absentee coverage. "That Illinois has not gone still further as perhaps it might, should not render void its remedial legislation, which need not, as we have stated before, 'strike at all evils at the same time'". 394 U. S. at 809.

have a genuine need or desire for such counselling, notwithstanding present employment.

Repeated or Serious Offenses

Eligibility criteria prohibiting pretrial intervention for defendants with prior criminal convictions or those charged with certain offenses, usually violent or serious crimes, pose a significant dilemma. Such exclusions are in part based upon the assumption that these offenses are (i) somehow less susceptible to short-term rehabilitation, especially in the case of multi problem individuals who have demonstrated prior history of criminal recidivism; (ii) more dangerous to society and thus should not be given the benefit of possible dismissal of charges; or (iii) that society's retributive interest in prosecution of these offenders should not be avoided.

Legitimate criticism has been levelled against rigid eligibility criteria which preclude from participation alleged offenders who may have the greatest need for individualized assistance and early rehabilitative efforts. Further, that the offense charged in itself reveals anything of probably significance about the personality or criminal career of the accused is open to question. There is little evidence to support the proposition that multiple offenders or especially those charged with more serious crimes are less susceptible to early and relevant rehabilitation or any of the other goals advanced by the intervention concept. Thus, the most compelling reason for excluding those defendants, apart from the risk to community safety during the participation period, may be one based upon public policy. Their PTI participation would be a highly-charged political issue, given current emphasis on law and order

and legitimate public conern with personal safety. The fact that the public might disapprove of the diversion of "high risk" offenders is certainly a highly significant factor to be weighed in deciding to exclude this class. All diversionary programs must not only maintain complete credibility in the public mind, but must also have and maintain total public support and full-scale community involvement, participation and effort if they are to be truly successful.

It seems clear that multiple or violent offenses may properly be excluded from pretrial intervention without running afoul of equal protection considerations on the same grounds that justify the selective intervention of youthful eligibles or the unemployed.[15] Since there is no fundamental right to intervention or rehabilitation, and as long as the eligibility criteria do not discriminate against a constitutionally suspect and thus protected class such as one founded on race or wealth, the state need only demonstrate that the criteria are reasonable and have some relevance to the basic purpose for which the classification is made. Indeed, the Supreme Court so held in Marshall v. United States,[16] which involved a claim that the provisions of Title II of the Narcotic Rehabilitation Act of 1966 (NARA), 18 U.S.C. 4251-4255, deny due process and equal protection by excluding from discretionary rehabilitative commitment in lieu of penal incarceration, addicts with two or more prior felony convictions or offenders convicted of crimes of violence.[17] The Court found that Congress could rationally assume that an addict with a

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15. See footnotes 10 through 13 and accompanying text.

16. ____U. S. ____, No. 72-5881, 14 Crim. L. R. 3077 (1974).

17. 18 U. S. C. 4251(f)(i),(4).

multiple-felony record or one who committed a violent crime would be less likely to benefit from rehabilitative treatment, having demonstrated greater difficulty in conforming his behavior to societal rules and laws.[18] Additionally, such a person might also pose impediments to the successful treatment of others, given the delicate and uncertain nature of addiction treatment which requires the full cooperation in the rehabilitative effort.[19] Finally, Congress could not be said to have acted unreasonably in concluding that an addict with multiple convictions was more "hardened" and thus a potentially greater risk to the community on early release than the addict who had committed one prior felony or more.[20]

While Marshall is confined to addicts, and the medical and scientific uncertainties of their treatment, similar policy choices in an experimental pretrial intervention program would seem to be proper. Legislative or administrative classifications need not be perfect or ideal, as long as they are reasonable. However, as PTI programs proliferate and leave the domain of "experimental", criteria which exclude the multiple or serious (alleged) offenders may be subject to increasing constitutional attack.

Different Treatment of Co-Defendants

Approval of pretrial intervention for one defendant would not necessarily be improper discrimination against his ineligible co-

18. Marshall v. U. S., ____ U. S. ____, 14 Crim. L. R. 3077, 3080 (1974).

19. Id.

20. Id., p. 3081.

defendant. This exclusion can be grounded on the right of a program to follow proper eligibility criteria and the principle that the mere failure to prosecute other alleged offenders is no basis for finding a denial of a prosecuted defendant's equal protection unless, of course, the discriminatory treatment is intentional or arbitrary.[21] The selection of participants is not in and of itself invidious, given the public benefit derived from their potential rehabilitation, and if the selection process does not unreasonably discriminate, it will be deemed properly exercised.

The foregoing rationale also supports the discretion exercised by the prosecutor where there are either no fixed eligibility criteria for a PTI program or where the criteria allow the selective diversion of certain, but not all defendants in the same class, as where, for example, a defendant charged with a serious offense is diverted but another charged with the same offense is not. Consistent with his discretion in the charging function and absent intentional discrimination, the prosecutor[22] may choose to divert any defendant who he believes may benefit from pretrial intervention services, and correspondingly has the power to exclude others. It should be recognized, however, that the absence of published or fixed criteria may subject a program more readily to claims of unwarranted discrimination, particularly where an aggrieved defendant can show a prima facie similarity in offense, background, etc., to other defendants admitted to a given PTI program.

21. Oyler v. Boles, 368 U. S. 448 (1962); Moss v. Homig, 314 F. 2d 89 (2 Cir. 1963).

22. Subject to the qualifications expressed in Section III, as to the Court's power to divert when it occurs after the filing of charges. In these circumstances, the Court would have the power ascribed to the prosecutor above.

VII. CAN A POTENTIAL PRETRIAL INTERVENTION PARTICIPANT BE REQUIRED TO PLEAD GUILTY IN ORDER TO BE ADMITTED TO A PROGRAM?

A project may be designed which requires a plea of guilty as a condition precedent to diversion, and often such a requirement is weighed and debated in the development of new projects. An admission of guilt may be considered a primary step in the rehabilitation of the offender and, in any event, obviates the risk of unavailable or ineffectual witnesses if prosecution were to be resumed because of unsuccessful participation.[1] Most operative PTI projects have chosen not to impose such a requirement and although a good case can be made as to the legal propriety of the guilty plea option, there are persuasive constitutional arguments the other way.

Essentially, a potential participant in a project requiring a formal admission of guilt would have to waive his right to plead not guilty, or his Fifth Amendment privilege against self-incrimination,[2] as well as his rights to a trial by jury and to confrontation of witnesses

1. See, Statement of James D. McKevitt, Assistant Attorney General for Legislative Affairs, before the Senate Subcommittee on Penitentiaries, Hearings on S. 798, "The Community Supervision and Services Act", pp. 392-398; see also, Drug Prevention and Control Act, P. L. 91-513, where, upon a plea of guilty (or trial) without entry of judgment, a defendant is placed on probation. If successful, the proceedings are dismissed and the defendant is discharged without an adjudication of guilty.

2. The Supreme Court in Boykin v. Alabama, 395 U. S. 238 (1969), equated a plea of guilty with a confession, which is a waiver of the Fifth Amendment privilege.

before he would be allowed entrance into the program. While an individual may waive these rights, the waiver must be intentional, voluntary and intelligent,[3] and not one induced by threat, coercion, improper inducement or promise of immunity.[4] Conditioning entrance into a pretrial intervention program upon a plea of guilty could be the type of subtle coercion or promise of immunity which the Constitution may render suspect. In a significant sense, it is not voluntary, for the plea must be made to gain entrance into a program which, potentially at least, promises dismissal of charges and thus immunity from further prosecution.

If a defendant elects to exercise his privilege to plead not guilty, he is denied diversion. This may be seen as an attempt to "chill" the exercise of constitutional right by penalizing individuals who choose to assert the right. Such a penalty, if found present in the situation described, would be in danger of being declared unconstitutional. The exercise of a fundamental right (privilege against improperly inducing self-incriminatory admissions) may not be interferred with unless the condition resulting in the interference promotes a "compelling" state interest -- and then only if the condition which chills the exercise of the privilege is the least oppressive procedure available.[5] Assuming,

3. Miranda v. Arizona, 384 U. S. 436 (1966); Jackson v. Benno, 378 U. S. 368 (1964); Johnson v. Zerbst, 304 U. S. 458 (1938).

4. Boykin v. Alabama and Miranda v. Arizona, op. cit.; State v. Preiss, 89 Ariz. 336, 362 P. 2d 660, cert. den. 368 U. S. 934 (1961).

5. Miranda v. Arizona, 384 U. S. 436 (1966) flatly recognizes the "fundamental" nature of the Fifth Amendment Privilege to our system of constitutional rule. In Shelton v. Tucker, 364 U. S. 479 (1960), the Court, in holding a state statute unconstitutional, as interferring with the fundamental First Amendment privilege of free association, stated: "In a series of decisions this Court has held that, even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that

then, that a plea of guilty serves a legitimate state interest, either as an element of rehabilitation [6] or a means of preserving effective prosecution, and that this interest is compelling, it could nevertheless be questioned whether the requirement of a guilty plea is the least restrictive method available to serve that state interest. Other alternatives could be: (i) a deferred plea, where at the time of diversion, the entry of a plea is continued to after the defendant's term in the program, at which time a plea will be entered only if the defendant is unsuccessful;[7] (ii) a conditional plea of guilty, where the defendant enters a plea of guilty but may withdraw it if he is unsuccessful in the program; (iii) a plea of nolo contendre (which, however, would support conviction and imposition of sentence in the event a participant was unsuccessful); (iv) requiring a potential participant to list his defenses and witnesses, which may not be deviated from in the event

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broadly stiffle fundamental personal liberties when the end can be narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose". 364 U. S. at 488.

For a general discussion of what are fundamental rights and the compelling and least restrictive state interest that must be demonstrated to support the infringement of these rights, see, Note, Developments in the Law-Equal Protection, 82 Harv. L. Rev. 1605 (1969).

6. The American Bar Association is not persuaded of the validity of the guilty plea as a necessary element of rehabilitation. See, Statement of Keith Mossman, Chairman, Criminal Law Section, American Bar Association, before the Senate Subcommittee on Penitentiaries, Hearings on S. 798, "The Community Supervision and Services Act", p. 375.

7. This is the practice of the Boston Court Resources Project. Arraignment, the time a plea is usually entered, is continued until after participation. If the defendant is successful, no plea is entered and the case is dismissed. If unsuccessful, the defendant may plead guilty or not guilty, as in any case.

prosecution is resumed; (v) stipulated testimony prior to diversion; or (vi) an informal and extra court acknowledgment of responsibility for the offense (a "moral plea of guilty" or assumption of responsibility).[8] These alternatives or a combination would serve the rehabilitative interest by not allowing the defendant to maintain his innocence, while at the same time, with the exception of (iii), would not require the forced waiver of his Fifth Amendment privilege. Also, the decision to accept diversion to a pretrial intervention program, which exercises an amount of government or government-sponsored control and which is somewhat quasi-probationary in nature, is an assumption of at least moral or personal responsibility for an alleged offense.

The proposition that a compelling state interest is advanced by a guilty plea in preserving effective prosecution by obviating the risk of unavailable witnesses or testimony dulled by the passage of time if prosecution had to be resumed is of questionable validity. Also, prosecutors have long been faced with this risk, and partly by their own choosing, as witnessed by a court backlog in nearly every jurisdiction in the land. Given the limited duration of most PTI programs, the argument that prosecution will be adversely affected without a plea is not well taken, at least insofar as it is to support a "compelling state interest" as justification for the forced waiver of the paramount Fifth Amendment privilege against self-incrimination. Moreover, the testimony of witnesses could be transcribed shortly after the arrest or diversion of an eligible defendant as security against the loss of

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8. This alternative procedural technique is employed in the operation of the Genesee County Citizens Probation Authority (Flint, Michigan), a pre-charge, prosecutor-authorized diversionary program.

recollection of witnesses in the event prosecution were to be resumed.[9]

Traditional Basis for a Plea of Guilty

Despite the foregoing reasoning, many commentators feel that, although unwise, the guilty plea requirement may be legitimately imposed as a prerequisite for admission to a PTI program. The basis here is twofold. One, the state may impose any condition of admission into a program which is essentially quasi-probationary or remedial in nature, just as the state may impose conditions on the judicial exercise of the probationary power. However, while this is true; the term "pretrial intervention" becomes a misnomer, for it then becomes a post-trial or post-plea program which withholds imposition of sentence and adjudication of guilt and promises dismissal of charges if informal probation is successful. While such programs are an important element of a stratified rehabilitative correctional system, they should not be erroneously and confusingly labelled "pretrial", for they take effect only after trial or after the need for a trial has been obviated by a plea of guilty. Therefore, if a plea of guilty is thought essential, there may be no need for the development of pretrial intervention programs, for many jurisdictions have statutory provisions for probation in contemplation of dismissal or probation with imposition of sentence and

9. Because of the Sixth Amendment right of a defendant to confront witnesses against him, the transcribed testimony could not be admitted as evidence where the witness is unavailable, unless the defendant had the opportunity to cross-examine at the time the testimony was transcribed.

adjudication of guilt withheld.[10]

The second, more significant, justification advanced for the legitimacy of requiring a guilty plea as a condition of admission to a pretrial intervention program is the constitutionality of plea bargaining. The Supreme Court in Brady v. United States, 397 U. S. 742 (1970) held that a plea of guilty which would not have been entered except for the defendant's desire to avoid a possible death penalty and to limit the maximum penalty to life imprisonment or a term of years was not for that reason unconstitutionally compelled within the meaning of the Fifth Amendment. This decision was affirmed in North Carolina v. Alford, 400 U. S. 26 (1970), where a plea to second-degree murder was found to be voluntary and not improperly induced, notwithstanding the defendant's protestation of innocence.

> "The standard (in judging whether a plea is entered voluntarily) was and remains whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.
> ...
> That he would not have pleaded except for the opportunity to limit the possible penalty does not necessarily demonstrate that the plea of guilty was not the product of a free and rational choice, especially where the defendant was represented by competent counsel whose advise was that the plea would be to the defendant's advantage".[11]

Thus, applying this reasoning to the voluntariness of a plea of

10. E.g., Cal. Penal Code, Sec. 1203.4 (West Supp. 1968); 11 Del. Code Ann., Sec. 4332(i) (Supp. 1968); Nev. Rev. Stat., Sec. 176.225 (1967); Tex. Code Crim. Proc. Ann. art. 42.12(7) (1966); Wash. Rev. Code Ann., Sec. 9.95.240 (1961); Wyo. Stat. Ann., Sec. 7-315 (1959).

11. 400 U. S. at 31.

guilty in order to gain entrance to a pretrial intervention program, a plea which would not have been entered except for the defendant's desire to avoid criminal prosecution or gain entrance to a program that promises possible dismissal of charges is not for that reason unconstitutionally compelled within the meaning of the Fifth Amendment. If the plea represents a voluntary and intelligent choice among the alternative courses of action, it is voluntary and constitutionally sufficient.

In light of Brady and North Carolina v. Alford, supra, it would seem that the requirement of a guilty plea as a condition precedent to diversion is valid. However, at the very least, the same procedural safeguards would be required where a defendant pleads guilty to gain entrance in a PTI program as where he pleads guilty in the usual circumstances. That is the Court must make a determination that the plea represents a voluntary and intelligent choice among the alternative courses of action, that no promises have been made to the defendant to induce his plea, and that the Court make an inquiry into the factual circumstances surrounding the offense to which the defendant has pleaded guilty.[12] Without such Court involvement and review, any other "plea" entered would appear to be without force, except perhaps as an admission or inclupating statement. Also, the defendant would be entitled as a matter of right to counsel. Formal judicial proceedings have been initiated, which under Kirby v. Illinois[13] is the standard by which the

12. Brady v. U. S., 397 U. S. 742 (1970) and North Carolina v. Alford, 400 U. S. 26 (1970).

13. 406 U. S. 682 (1972). See also, United States v. Wade, 388 U.S. 218 (1966), and Mempha v. Rhay, 389 U. S. 128 (1967), which recognizes a right to counsel at any "critical stage" in the prosecution where substantial right of the defendant are affected.

right to counsel is gauged.

Additionally, there may be elements in the pretrial intervention situation that are not present where a defendant pleads to a lesser offense, and which therefore may add a greater degree of unconscionable inducement to the delicate balance between what is voluntary and what is not. There is a greater inducement or reason to plead guilty to gain entrance to a PTI program than there is to plead guilty to a lesser offense. Successful participation in a program promises the dismissal of criminal charges, whereas pleading to a lesser offense promises a possibly lighter sentence or sanction nonetheless. Thus, there is theoretically a greater benefit to be derived in the former instance than in the latter, and this potential benefit may be sufficiently compelling as to cloud the exercise of a free and rational choice.

While the defendants in both Brady v. United States and North Carolina v. Alford choose to plead guilty to second-degree murder rather than face a possible death sentence if convicted on their plea of not guilty to first-degree murder, a choice which is as compelling, if not more so, than a plea of guilty to gain admission to a PTI program promising dismissal of charges, their choice nonetheless was between two alternatives of criminal prosecution. Theoretically, at least, the possibility of avoiding criminal prosecution altogether presents a much greater degree of compulsion or inducement than does the choices between two courses of prosecution.

Therefore, the fact that pretrial intervention presents the non-criminal disposition of charges, as opposed to mere alternatives of criminal prosecution, may be of enough impact to bring the plea requirement of a PTI program without the application of Brady and North Carolina v. Alford.

This assumption may be further weighed in light of the state's less than compelling rationale for the necessity of a guilty plea as a condition precedent to pretrial intervention. In both the Brady and North Carolina v. Alford situations, the state at least had sufficient reason to require the guilty plea to the lesser offense to satisfy the defendant's desire to avoid the heavier sanctions if convicted on the greater offense, having made the decision that some form of criminal prosecution was in the best interest of the community. That reason is obviously not present where there is an opportunity and eligibility for pretrial intervention.

VIII. MUST THERE BE A HEARING BEFORE A PARTICIPANT IS TERMINATED AS UNSUCCESSFUL AND RETURNED FOR RESUMPTION OF PROSECUTION?

The Parole and Probation Analogy

The Supreme Court has recently held that constitutional due process requires a hearing before parole or probation can be revoked.[1] A hearing will insure that the possible deprivation of liberty which may arise when convicted offenders who are being supervised in the community face the prospect of incarceration is not imposed improperly. These holdings would likewise indicate the necessity for a hearing before questionable participation in a diversion program could be terminated. Attendant on loss of diversionary status are relative disadvantages in a subsequent prosecution: the possibility of a negative pre-sentence report if the divertee is subsequently convicted, as well as the obvious sanction of incarceration. The prospect of termination thus threatens a "grievous loss" for which procedural fairness becomes essential.[2] Further, the concepts of diversion and probation are intimately related, both historically and functionally. Indeed, pretrial intervention has often been described as a form of "pre-trial probation". Therefore, the Supreme Court's observation in Gagnon v. Scrapelli that there is no

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1. Morrissey v. Brewer, 408 U. S. 471 (1972) (parole) and Gagnon v. Scarpelli, 411 U. S. 778 (1973) (probation).

2. Joint Anti-Facist Refugee Committee v. McGrath, 341 U. S. 123 168 (1951) (concurring opinion of Justice Frankfurter).

"difference relevant to the guarantee of due process between the revocation of parole and the revocation of probation"[3] should be applied with equal force to the revocation of diversionary status.[4]

Where participation was originally a condition of release on bail and failure to abide by that condition of release could result in jail detention, the parallel to Morrissey and Gagon is obvious. The very real threat of loss of liberty requires a due process hearing before the participant's status may be terminated.

General Due Process in Administrative Decision-Making

Apart from whether termination may result in incarceration, the Supreme Court case of Goldberg v. Kelley[5] and other administrative "due process" decisions may require a pre-termination hearing in all cases. In Goldberg, the Supreme Court rejected the argument that welfare stipends are benefits or a "privilege" to which the recipient has no

3. 411 U. S. 778 at p. 782.

4. Indeed, there is a strong argument that pretrial intervention termination proceedings should be surrounded by even more stringent procedural safeguards than those observed in the revocation of parole or probation. Where the latter are both post-sentencing procedures, and thus not considered stages of the criminal trial process, diversion and its termination are pre-conviction measures. Therefore, the divertee should enjoy the same procedural and substantive safeguards as any pre-trial defendant.

   In Mempa v. Rhay, 389 U. S. 128 (1967), a former probationer returned for deferred sentencing after revocation of probation was held to be entitled to appointed counsel as a matter of due process. Sentencing was deemed to be a "critical stage" of a criminal case warranting due process considerations. Likewise, the termination of diversionary status could be seen as a "critical stage" of the criminal case.

5. 397 U. S. 354 (1970).

right, and thus which can be terminated at will.[6] While the Court conceded that some governmental benefits may be administratively terminated without affording the recipient a pre-termination evidentiary hearing, it stressed that:

> "the crucial factor in this...is that termination of aid pending resolution of a controversy over eligibility may deprive an eligible recipient of the very means by which to live while he waits.
> ...
> The same governmental interest which counsel the provision of welfare, counsel as well its uninterupted provision to those eligible to receive it; pre-termination evidentiary hearings are indispensable to that end". 397 U.S. at p. 264.[7]

Analogizing to the PTI situation, the defendant who qualifies for a program can hope for, and is indeed usually promised, the eventual dismissal of charges upon successful participation. If declared unsuccessful, however, (s)he is faced with the risk of conviction, an unfavorable pre-sentence report and possibly loss of liberty.[8] The

6. The Court also rejected the "right-privilege" distinction as applied to a parolee's liberty, in Morrissey v. Brewer, 408 U. S. 471 (1972):

   > "It is hardly useful any longer to try to deal with this problem in terms of whether the parolee's liberty is a "right" or a "privilege". By whatever name the liberty is valuable and must be seen as within the protection of the Fourteenth Amendment". 408 U. S. at 482.

7. Other cases have reached similar results with respect to disqualification for unemployment compensation, Sherbert v. Verner, 374 U. S. 398 (1963); denial of a tax exemption, Speiser v. Randall, 357 U. S. 513 (1938); discharge from public employment, Slochower v. Bd. of Higher Education, 350 U. S. 551 (1956); and suspension from public education, Tinker v. Des Moines School District, 393 U. S. 503 (1969).

8. Absent prosecutor agreement or statutory privilege to maintain confidentiality of intervention experiences (see Section 6(b) of S. 798, The Community Supervision and Services Act pending congressional enactment.

defendant, therefore, has a substantial interest which would be adversely affected by termination. It is essential, then, that the defendant be afforded minimum due process considerations to protect against the unwarranted termination of diversionary participation and status. This interest seems hardly outweighed by the governmental interest in summary adjudication. Having authorized the diversionary alternative to prosecution, the state should not be able to arbitrarily and summarily revoke that authorization without meeting the requirements of elemental due process.[9]

Procedural Compliance with the Right to a Hearing

Whatever analogy may be most appropriate in serving as the basis for a right to a hearing, the procedural standards for parole and probation revocation set forth by the Court in Morrissey and Gagnon should be the minimum standards by which due process termination actions are guaged. These decisions recognize a legitimate state interest in economy and efficiency during the proceedings. However, this interest must be balanced against the demands of essential fairness, which in the parole and probation revocation proceedings require a preliminary "reasonable cause" hearing before a neutral referee before an individual's privileged

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9. As the Supreme Court noted in Goldberg:

> "The interest of the eligible recipient in uninterrupted receipt of public assistance, coupled with the State's interest that his payments not be erroneously terminated, clearly outweighs the State's competing concern to prevent any increase in its fiscal and administrative burdens." 397 U. S. at p. 266.

The parallel to the PTI situation is obvious.

status is even temporarily curtailed, as by arrest and deterntion. Then, if revocation is determined to be proper, a full revocation hearing is in order before the individual's status is formally revoked.

Since the termination of participation in a pretrial intervention program would generally not curtail the participant's liberty, as by arrest or detention it is doubtful whether a preliminary "reasonable cause" hearing is essential. Rather, the due process requisites could be satisfied in one proceeding. The elements of this hearing should include, as outlined in Morrissey:

> (a) written notice of the claimed violations...; (b) disclosure...of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a "neutral and detached" hearing body...; and (f) a written statement by the fact-finders as to the evidence relied on and reasons for revocation. 408 U. S. at 489.

Where the Court makes the decision to divert, it is the logical instrument to make the finding to terminate. In other cases, the revocation decision would still persumably be more a judicial function than one exercised by the prosecutor's office or PTI program personnel. While the Supreme Court expressed in Morrissey and Gagnon its concern to preserve the constitutional role of the non-judicial administrative panel in parole and probation revocation, this concern would seem inopposite for the termination of diversionary status. A "neutral" hearing officer is required Since the prosecutor's office and/or the program staff usually have gathered the facts upon which the decision to bring the termination proceeding is made, and indeed have made the decision to apply for termination, it is questionable whether their "neutrality" is

assured. The Court in Goldberg did recognize that prior involvement in some aspect of a case will not necessarily bar a welfare official from acting as a decision maker, but that official should not, however, have participated in making the determination under review. If the same guarantee could be made in a hearing conducted by the prosecutor's office or PTI staff personnel, then it would appear to be fair and proper.

As to the constitutional necessity of assistance to counsel in revocation proceedings, the Court in Gagnon concluded there was no absolute right to counsel but that it be furnished on a case-by-case inquiry of necessity. Thus, analogizing probation revocation to revocation of diversionary status, counsel should be provided when, after a request is made, the defendant enters:

> "...a timely and colorable claim (i) that he has not committed the alleged violation of the conditions upon which he is at liberty or (ii) that even if the violation is a matter or public record or is uncontested, there are substantial reasons which justified or mitigated the violation...and that the reasons are complex or otherwise dificult to develop or present...(T)he responsible agency also should consider, especially in doubtful cases, whether the probationer appears to be capable of speaking effectively for himself". 411 U. S. at 790.

There may, however, be a basis for a right to counsel, for a PTI termination hearing occurs at a "stage of a criminal proceeding where substantial rights of a criminal accused may be affected", the traditional test for the constitutional right to counsel.[10] Apart from the substantial interest the participant has in preserving his status, as well

10. See, Mempa v. Rhay, 389 U. S. 128 (1967).

as the real and potential disabilities attaching upon termination of that status, as mentioned above, other disabilities may arise which point to the need, if not the right, of effective assistance of counsel. For example, statements made by the participant, as where the basis for the hearing is a re-arrest or continued use of drugs, could be used in a subsequent prosecution unless barred by the authorization creating the PTI program and its operational procedures. Thus, even if there is no right to counsel, the need for his assistance may be imperative. The burden on the state in providing the opportunity for counsel would not be great, either (i) because the divertee may already have counsel, or (ii) because the right to counsel would in any event attach shortly thereafter if the defendant were to be prosecuted.

A final--and distinct--constitutional issue in the termination of diversion is raised by the common practice of treating a divertee's re-arrest as a per se disqualification from further participation. As noted above, there are strong equal protection arguments against mechanical exclusionary criteria which limit eligibility for diversion on the basis of past criminal convictions. These arguments apply, with even greater force, to program designs or policies which make diversionary status automatically terminable merely because of re-arrest without conviction. In individual cases, particular arrests during the diversionary period may amount to good cause for termination. This may be so, for example, where rearrest is followed by detention, or where the new charge lodged involves serious, alleged drug-trafficking violations. In both of these examples, a rational relationship could be found between disqualification for diversion and the circumstances of the new arrest. As a general matter, however, no administrative or therapeutic justification

appears for regarding all re-arrested divertees alike as a disfavored class, and especially not when they protest their innocence on the charges which have lead to re-arrest, and are to similarly be presumed innocent of the charges. To the contrary, there may be strong policy considerations favoring a practice of re-diverting many of these re-arrested divertees, at least where there is a showing that they have made substantial, although incomplete progress toward rehabilitation.

IX. RELATED ISSUES

Restitution

Requiring restitution as a condition of participation of certain participants as provided by some pretrial intervention programs[1] might face the same constitutional objections as requiring a plea of guilty as a condition of participation: unless a compelling state interest in restitution can be shown, it could be argued that this requirement may "chill" the exercise of the constitutional privilege against self-incrimination by penalizing (excluding from pretrial intervention programs) those who choose not to provide restitution. And unless a participant has pled guilty to the offense charged, the rehabilitative interest or the interest in restoration of the property of the alleged victim which is to be served by restitution may not be such a compelling state interest as would warrant the coercion of self-incriminating admission through the promise of immunity (possible dismissal of charges). Unless the participant is required to plead guilty or enter a plea of

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1. Both the Genesee County, Michigan Citizens Probation Authority and Project DeNovo of Minneapolis, Minnesota require restitution by certain participants in those instances where restitution would be proper, given a particular offense, such as forgery or larceny. Restitution as a condition of probation in Michigan is authorized by statute, 28 Mich. Stat. Ann. 1133(3), and case law, People v. Good, 287 Mich. 110, 114-117 (1938), but it is unclear upon what authority the requirement of restitution is based in the pretrial intervention circumstance. The above mentioned statute and case law refer only to probation upon adjudication of guilty by virtue of a verdict or plea.

nolo contendere, he has not been convicted of any criminal offense which would warrant the imposition of this requirement and the resulting waiver of his privilege against self-incrimination.

There is another objection, however, which goes beyond the guilty plea situation. The restitution requirement may result in exclusion of indigents from participation in a diversion program, and thus raises the issue whether an otherwise eligible defendant is denied equal protection of the law by procedures that permit the diversion of similar, but non-indigent offenders. Numerous Supreme Court decisions indicate, in the context of criminal proceedings, that a statute or requirement fair on its face but which leads to one result for the wealthy and another for the poor may violate the equal protection clause unless the difference is reasonably related to a compelling state interest.[2] The denial of diversion because of the inability of an "offender" to make immediate restitution would clearly impose different consequences on two similarly situated categories of defendants. The state may be able to demonstrate that restitution in installments or according to one's ability to pay is a reasonable program criteria in most circumstances,[3] but this still does not ensure that an unskilled and unemployable offender will not be excluded because of his total inability to make restitution. Thus, to deny diversion because indigency and unemployability make restitution improbable

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2. See generally, Griffin v. Illinois, 351 U. S. 12 (1956), (State must furnish trial transcript to an indigent necessary for his appeal); Williams v. Illinois, 399 U. S. 235 (1970) and Tate v. Short, 401 U. S. 395 (1971), (Imposition of a fine as a sentence and an automatic conversion of it into a jail term solely because of ones inability to pay the fine immediately denies an indigent equal protection).

3. Williams v. Illinois, supra.

discriminates against the poor and may be a denial of the equal protection of the laws. Apart from the issue of restitution being constitutionally suspect as a violation of the privilege against self-incrimination, the adverse effect of the requirement on the indigent could be remedied by its waiver, reduction in amount or installment payments.[4]

Confidential Privilege of Communication Between Counsellor and Participant

If, in the process of creating a pretrial intervention project, a privilege of communication, qualified or otherwise, is recognized as essential or beneficial, the mechanism creating the project should so provide, for no privilege between counsellor and client existed in Common Law and none is recognized in most jurisdictions today.[5] There is no probationer/probation officer privilege or social worker/client privilege such as the law recognizes between attorney and client or doctor and patient. Thus, the staff of a pretrial intervention program may be compelled to disclose information confided to them by the participant which relates to the commission of a crime or similar matters

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4. In Operation DeNovo, which utilizes restitution in appropriate cases, payment of restitution will not be used as an admission in the event prosecution is resumed. Also, alternate service in lieu of money, installment payments and reduction in amount are authorized where appropriate, as well as a re-negotiation of the restitution agreement at a later date if the participant's charged circumstances would so warrant.

5. "The Community Supervision and Services Act", S. 798 (Sec. 6(b)), which has passed the Senate and which provides for pretrial intervention programs in Federal districts, also provides that any incriminating statements made by a defendant in his application and interview for diversion, as well as the fruits of these statements, may not be used in the event prosecution is resumed.

of prosecutorial interest. Legislation, court rule or the memoranda of agreement creating the pretrial intervention program would thus have to provide for the privilege if deemed desireable.

Communications of prosecutorial interest will be especially prevalent in addict diversion programs. By virtue of their special familiarity with their client's histories, the nature of the addicts' continuing status as criminal defendants, their possible identification as continuing drug users through urinalysis or self-identification, and because complete candor is promoted, the staff of such programs can expect to receive much information of a confidential nature, and likewise receive a variety of requests and demands for information.

Section 408 of the Drug Abuse Office and Treatment Act authorizing the Special Action Office for Drug Abuse Prevention to establish addict pretrial intervention programs[6] statutorily creates a qualified privilege of communications between the participant and his counsellor.[7] This privilege recognizes that the ability to assure participants of the confidentiality of their communications is essential to the success of the program. It accents the principle that honest and fully-disclosed communication is a key in understanding and administering to the rehabilitative needs of "offenders". Without such a privilege, a participant may be less than candid with those providing services to him, in fear that any communication may not only serve as the basis of unsuccessful

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6. 21 U. S. C. 1175 (1972).

7. Sec. 401.03 of the regulation promulgated by SAODAP to interpret Sec. 408 of 21 U.S.C. 1175 provides that "records of the identity, diagnosis, prognosis or treatment of any patient...shall be confidential, (and) may be disclosed only as authorized by this part..." 37 F. R. 24639.

termination but further prosecution as well. However, even Section 408 authorizes the disclosure by the Court of records maintained by treatment programs within the Act's coverage after "application showing good cause therefore".[8]

Of course, a totally unqualified privilege would limit the content of any report to the Court and restrict the Court's ability to make an intelligent decision as to whether the participant has successfully completed his term. Certainly, however, a qualified privilege protecting (i) staff/participant communications of prosecutorial interest after the defendant has been diverted but before completion of the term, or (ii) staff/participant communications to other persons or organizations, would not hamper the Court's function of determining whether participation has been successful.

Staff Utilization of Ex-Offenders on Parole

Existing pretrial intervention projects have found that ex-offenders are extremely valuable in counselling participants, for many have shared the same experiences, social status, residence, expectations and needs as participants. Counselling from one who has travelled the same route as

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8. 21 U. S. C. 408(b)(2). The recent "interpretive regulation" promulgated by the Special Action Office for Drug Abuse Prevention requires that in assessing whether "good cause" for compelled disclosures exist:

> "the Court must weigh the public interest and the need for disclosure against the injury
> (a) to the patient,
> (b) to the physician - patient relationship; and
> (c) to the treatment services."

37 F. R. 24639 (November 17, 1972).

the participant and thus who speaks the same language can have an immeasurable impact on the development and rehabilitation of his often younger client.

Administrators of pretrial intervention programs must be aware, however, that there may be impediments to the employment of ex-offenders on parole, for many states prohibit parolees from association with persons who have been charged with crimes, convicted of felonies or persons of "bad reputation" or "harmful characters".[9] Such a prohibition could effectively prevent the utilization of ex-offenders on parole as staff in the counselling of participants, as the latter may have prior records or, having been charged with a crime, are of "unsavory character" in the eyes of parole authorities. This situation is unfortunate and the law may be coming to recognize that such prohibitions are unconstitutional. In Arciniega v. Freeman, 404 U. S. 1 (1971), the Supreme Court found inapplicable a condition of parole forbidding association with other ex-offenders in the incidental contacts between ex-offenders in the course of work (restaurant) for a common employer. If such incidental contacts are to be permitted in non-correctional employment, it would seem even more proper in the corrections rehabilitation setting. Also, in many states, the prohibition against certain associations may be waived by the employer's parole officer, and administrators of projects should therefore take the necessary action to secure this waiver.

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9. Thirty-six (36) states, including the District of Columbia, and the United States Board of Parole either prohibit association and correspondence with undesirables or require the permission of the parole officer for such association. Survey of Parole Conditions in the United States, Resource Center on Correctional Law and Legal Services, American Bar Association, Commission on Correctional Facilities and Services (December, 1973).

The Record of Divertees

One of the advantages of pretrial intervention is the avoidance of possible conviction and incarceration and the stigmatic effect of such involvement. It is commonly recognized that a criminal record creates certain disabilities in securing employment, education or other social benefits. These, of course, vary from state to state, but a successful participant achieves a real benefit by avoiding conviction of a charged offense, particularly if a felony or serious crime is involved.

Apart from formal conviction, however, the very fact of participation in a pretrial intervention project may have negative implications, even though a participant has not been convicted of the alleged offense for which he is diverted. The negative implications of his conduct may be even greater than those whose charges are dismissed after or for want of prosecution. As a consequence of this disability, the mechanism creating the pretrial intervention program may and should provide for expungement, sealing or a qualifying notation of the records of successful participants,[10] and those entrusted with developing future programs should be aware of this possibility when formulating the ground rules of the program. However, certain state laws may prohibit complete expungement of arrest records, and statutory action would therefore be needed to allow for the expungement of a pretrial intervention participant's record.

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10. The proposed Massachusetts legislation authorizing statewide pretrial intervention, H. 2199 as revised, allows the Court in its discretion to order all official records relating to the arrest, arraignment, continuance and dismissal of a participant to be sealed. Sec. 7 Rule 3:28, Defendant's Employment Program, of the New Jersey Supreme Court Rules Governing Criminal Practice which authorizes pretrial intervention, provides that dismissals are to be designated as "matter adjusted - complaint (or indictment) dismissed". R. 3:28(c)(1).

In a very real sense, the general problem of the use of arrest records as evidence of criminal behavior or characteristics is a problem for divertees as well as others who were arrested but not convicted. Pretrial intervention projects should join with other segments of the law reform community in eliminating the use of arrest records in determining employment, licensing, loan or educational qualifications.[11]

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11. See, Removing Offender Employment Restrictions, ABA National Clearinghouse on Offender Employment Restrictions (rev. 1973), dealing with arrest records at pp. 7, 14-15 and expungement and sealing statutes at pp. 5-6, 12-13.

ABA NATIONAL PRETRIAL INTERVENTION SERVICE CENTER

The National Pretrial Intervention Service Center is supported by a $153,430 grant from the Manpower Administration, U.S. Department of Labor, awarded under the Manpower Development Training Act of 1962, as amended. Its objective is to advance the process of experimentation and expansion with the pretrial intervention concept of providing community correctional services to preadjudicated offenders in lieu of criminal prosecution. There are three major action components of the Center offering consulting, clearinghouse, and technology transfer services.

(a) *Feasibility Demonstration* — Involves the selection of 6 to 10 urban sites for planning responsive "early diversion" demonstration projects. To assist in the planning process $1,500 developmental grants will be made available to qualified communities selected on the basis of need, receptivity and potential resources for a pilot effort. Assistance will include guidance in the planning, program development, and evaluation elements of the intervention model from Center staff to planning grantees and servicing of technical assistance requests from others interested in formalized diversionary placement projects.

(b) *Clearinghouse Assistance* — This effort will collect, analyze, and disseminate a variety of descriptive materials on administrative and operational features of the pretrial intervention concept. Pertinent information and substantive data on existing projects will be maintained for user access and periodic reports issued on growth factors in the pretrial intervention movement. Dissemination documents to be developed here include a technical assistance planning manual; monographs on intervention legal issues, staff training, evaluation strategies, and manpower resources; descriptive profiles on operational models; and guidelines on policies and procedures for pretrial intervention projects.

(c) *Research Evaluation Study Unit* — Will examine and report on research studies in pretrial intervention demonstrations with emphasis on assessment methodology, technique, and utility as policy-related innovation. This activity is sponsored by the National Science Foundation through its RANN Grants Program.

National staff includes the Center Director, Arnold J. Hopkins, two full-time Assistant Directors Frank J. Jasmine and Michael R. Biel, Research Specialist, Dr. Roberta Rovner-Pieczenik, and Evette Hinkle the Secretary/Administrative Assistant.

Sponsoring units for this effort are the ABA Commission on Correctional Facilities and Services and National District Attorneys Association.

Center offices are located at: Suite 701, 1705 DeSales Street, N.W., Washington, D.C. 20036; (Phone: 202/659-9697). Additional staff assistance is provided under subcontract agreement with the National District Attorneys Association ("NDAA"). NDAA Coordination Staff is located at 211 East Chicago Avenue, Chicago, Illinois 60611 (Phone: 312/944-2667).

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