DIVERSION PROGRAMMING IN CRIMINAL JUSTICE

The use of discretionary authority and the development of diversionary programs have long occupied a central place in the administration of criminal law. Increasingly, however, these concepts are being systematically linked and formally structured at various points in the contemporary administration of criminal justice. Any attempt at developing nontraditional program alternatives within a criminal justice system will inevitably deal with the issue of the discretionary authority held by public officials in that system, especially in terms of the variety of ways such authority can be used to divert out of the system those individuals implicated in it. Discretionary authority exists whenever the effective limits on the powers of a public official issues that individual free to make a choice among possible courses of action or inaction and all of the criminal statutes calling for sanctions can be altered or nullified by the application of any one of several sets of discretionary power—the discretion of the police to arrest, the discretion of the prosecutor not to charge, the discretion of the parole board to release prior to expiration of any sentence, the discretion of the judge to rule in favor of suspended sentence or probation, the discretion of the parole board to release prior to the completion of a sentence.

The formal diversion of offenders has recently been popularized by the President's Commission on Law Enforcement and Administration of Justice:

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**Diversion Programming in Criminal Justice: The Case of Minnesota**

**By Joe Hudson, Ph.D., Bury Galaway, William Henschel, Jay Lindgren, and Jon Penton**

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D.C. to conviction as compared to postconviction diversion can be regarded as diversionary. To a great extent, the diversion process results from a local, system's perspective for the offenders in need of treatment, for whom full criminal disposition does not appear warranted. As compared to the inferential nature of prior diversionary attempts, the contemporary approach refers to some form of structured and formal intervention into the criminal justice process as a result of which the individual is referred for treatment or supervision to a community agency which is at least partially outside of traditional criminal justice establishments.

Two ways in which the term "diversion" is used can be identified: The first is "true" diversion in which any direct action on the part of a criminal justice office is avoided except that of referring the individual for some kind of action to agencies outside of the criminal justice system. True diversion occurs, the individual is clearly placed outside of the official realm of the justice system and is immune from receiving any of the system labels. Examples of true diversion programs are those involving special categories of offenders such as drunks, addicts, and the mentally ill who are diverted from processing in the criminal justice system as a result of transfer to the jurisdiction of public health authorities. The initial concept of the juvenile court is an example of true diversion from the criminal justice system for a special class of offenders.

The second, and more common, use of the term "diversion" refers to minimizing the offender's penetration into the juvenile or criminal justice systems. By this definition any action short of serving a full sentence in the official justice process as a result of which the individual is transferred or ordered to the community for some kind of action is considered diversionary. The concept of diversion will be analyzed in this article in relationship to several projects currently existing in Minnesota. These projects will be discussed in relation to diversion at the level of the police, the pretrial level, the level of the court, and the level of the parole board. Each of these programs will be viewed in relation to the following questions:

1. (How) is discretion operationalized and assured? Included here are questions about what the nature of the discretionary process is and specifically what the discretion being exercised is.

2. (How) is discretion operationalized? Specifically, who has authority to make discretionary decisions and on what basis are these decisions made?

3. (To) what is the offender diverted? Specifically, what program components are utilized to provide services to the diverted offender and also insure a reasonable level of public protection?

Police Level Diversion

One of the more widely accepted and implemented recommendations of the President's Commission on Law Enforcement and Administration of Justice has been the establishment of youth service bureaus to divert youth out of the juvenile justice system. The Commission recommended the expanded use of community agencies for dealing with delinquents nonjudicially and close to where they live and suggested that a primary function of youth service bureaus would be to provide services to the juvenile offender and also ensure a reasonable level of public protection.

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referred reason (64 percent) was for employment or job related problems while 17 percent of the referrals were for reasons which could, conceivably, have led to juvenile court involvement, including drug related reasons (8 percent), juvenile status offenses (5 percent), and criminal behavior (8 percent).

The argument could be made that the agency is intervening on a preventive level in dealing with the problems of youngsters before they become involved in the juvenile justice system. There are, however, two major problems with this argument. One is that it treats the concepts of diversion and prevention as synonymous. Clearly, however, this contradicts the original concept of the youth service bureau which, while it included preventive components, was to be distinguished from other wideranging delinquency prevention programs. Secondly, a position that the YSB prevents youngsters that would otherwise get caught up in the juvenile justice system from entering the system is difficult to evaluate without a research design that raises serious ethical, fiscal, and public relations problems. For example, the random assignment of youngsters to the program.

How is discretion exercised in referrals received from the police? In this jurisdiction the juvenile division of the police department has the discretionary authority for the disposition of each case. At the same time, while the police exercise discretion in the decision to refer or not, the youth and his parents also exercise discretion in accepting the referral, or choosing whether to accept the referral or the alternative of juvenile court processing. The program imposes two conditions on all referrals: The referral must be acceptable to the young person and his parents and they must agree to cooperate with the bureau staff.

The White Bear program is advised by 18 member board with 50 percent youth representation; the adult members of the board are representatives of diverse community interests. Staff services are provided by six salaried staff (four part-time paid and two contracted family counselors) and 39 volunteers.

A job placement program is one of the major programs provided by the program. While this service is available to all youth in the service area of the bureau, a special emphasis is placed on finding jobs for youngsters experiencing difficulty with the law on the assumption that employment will be a major factor in decreasing their delin-
From the perspective of the accused, the public criminal trial may be understood as one status degradation ceremony in a series of such ceremonies which begin at the time of contact with the police and terminate with the completion of the criminal penalty. Labeling theorists suggest that such ceremonies have important consequences for the deviant's concept of self and the manner by which he is defined by the community. Avoidance involves a decision not to prosecute an arrestee. For the police and the defendant, the decision is a complex process involving the de Novo staff, the prosecutor, and finally by a judge. Approximately 50 percent of all defendants who are screened by the program staff are ultimately recommended for diversion. In the first year of operation, the prosecutor concurred in approximately 26 percent of the cases and the defendant is diverted out of court and into the program.

Pretrial Diversion

Operación de Novo operates in the state of Minnesota under a board of directors composed of judges, prosecutors, and representatives of the local criminal justice system and supportive community agencies. PORT provides the court with an open residential facility as an alternative resource to traditional correctional facilities. When coupled with the objective of providing an alternative sentencing resource to prison, these pretrial diversion programs are a solution to major developments in contemporary corrections.

Sixty-five percent of the defendants diverted to Operation de Novo have improved their situations in a satisfactory manner either by obtaining and holding a job or by completing an educational or vocational training program which has resulted in the obtaining of a job. The information of interviews is compiled on a 3-6-month interval after a client has completed the program. These interviews are to secure information on current employment status and continued involvement in the criminal justice system. At the 6-month followup of 328 clients, criminal record checks have indicated only 17 (5.2 percent) have been charged with new offenses. A 6-month followup interview has been completed on 297 former clients and record checks for this population indicate that only 4.5 percent have been charged with new offenses. A 1-year followup interview has been completed on 161 former participants however this information is not yet available. Cost benefit data have not yet been compiled however preliminary cost figures indicate that the services average approximately $700.00 per diverted defendant.

Postconviction Diversion

Residential community corrections facilities located within or close to the community from which the offenders were recruited face a number of challenges;其中之一 is the planning process.
Diversion in the decision to divert to the PORT program is exercised by both the court and the program management. The sentencing judge has the ultimate decision on placement; however, admission is not a unilateral decision. The PORT program has autonomous authority to accept or reject any offender. Likewise, the individual offender has the right to accept or reject the opportunity to enter the program. Therefore, prior to entering the program, a potential candidate must agree to a contract with PORT, the program staff must agree to accept him, and the judge must agree to make participation in the program a condition of the probation sentence.

Court case intake occurs during the presentence investigation. The prospective resident lives in the program for 3 weeks and then decides whether or not to sign a contract and enter the program.

The contract states in specific, observable terms as a condition of the probation sentence. The contract is agreed to by the individual offender and as an added ingredient in the program's successful initiation and continuance. The initial organization of the program has autonomous authority and responsibility. The sentencing board and committees have made recommendations to the judge for early diversion of selected inmates out of the State-operated adult institutions.

The Minnesota Restitution Center is administered by the Minnesota Department of Corrections, which is seen as essential to the needs of the incarcerated offenders and opens the possibility for early diversion of selected inmates out of the prison and into community-based correctional centers. The Minnesota Restitution Center which is administered by the Minnesota Department of Corrections, is one such program.

Residential community correction facilities attempting to divert offenders from more secure institutional settings are confronted with problems of increased community viability and potential community reactions both in terms of adjustment problems by residents and renewed illegal acts. The PORT program has done little screening. Of the 145 referrals made during PORT's first 4½ years, 24 were not admitted; 19 of those 24 cases received regular probation and only 5 went to institutions.

Data indicate that PORT is offering a real diversion. The average volume of commitments to State-operated adult institutions from the Minnesota Restitution Center which is administered by the Minnesota Department of Corrections, is one such program.

The indeterminate sentence provides parole boards a considerable discretion on the release of incarcerated offenders and opens the possibility for early diversion of selected inmates out of the prison and into community-based correctional centers. The Minnesota Restitution Center which is administered by the Minnesota Department of Corrections, is one such program.

Adult male property offenders are diverted from the Minnesota State Prison to the Minnesota Restitution Center in the fourth month following their admission to the prison. Considering that the average sentence of a man admitted to the Restitution Center is 5 years and that it is rare for the parole board to release inmates from prison only 4 months after admission, diversion is assured in the Restitution program. Because all the men admitted to the program serve 4 months of their sentence at the prison, the Restitution Center is not a complete diversion from the penal setting to the nonprison community. However, given the lengthy sentences received by the men selected for this program and the brief period of time spent in prison prior to diversion to the com-
community this does constitute a relatively radical break with the conventional practice of parole in Minnesota.

Discretion is exercised in two ways—in defining the characteristics of a group of men that can be considered for the Restitution Center program and in the selection of individual inmates to be offered the opportunity to enter the program. Efforts have been made to minimize the latter discretion in order to allow for random selection procedures which are necessary as part of the evaluation plan for the Center. Discretion in defining the characteristics of a population of men that can be considered for the program was exercised jointly by the parole board and the program developers. Five population criteria were defined which appeared to meet the parole board's needs to re­lease offenders that they consider non dangerous and the program's need to focus on offender's making restitution to crime victims: The present admission to the prison must be for a property crime, there can be no detainees filed, there must be no indication that the man was in possession of a gun or knife at the time the offense was com­mitted, the man must be committed from one of the metropolitan counties (to facilitate victim contact), and there must be a total of at least 5 years of free world living between any prior felony convictions for a crime against a person. Men admitted to the Restitution Center program participate in four program components in lieu of their institutional program. One program component centers around the restitution obligations including the developing of a restitution contract, implementing that contract, and maintaining direct contact with victims. A mandatory group program constitutes the second program component; all residents participate in twice weekly group meetings aimed at assisting resi­dents in the development of responsible behavior defined as completion of the restitution agreement, to follow through on commitments he makes to the Center, and to remain free from law violating behavior. The third program component involves the mobilization and utilization of community resources: Efforts are made to utilize em­ployment resources, chemical dependency, counsel­ing resources, marital counseling resources, etc. The phase structure provides a four program component; all men in the program move through phases involving increased privileges and freedom as the man increasingly accepts responsibility. Phases move from a fairly structured first phase to the fourth phase involving residing in the community under the supervision of the Center and returning for group meetings.

A program diverting incarcerated offenders out of the prison a few months after entering is po­tentially subject to considerable community pres­sure and opposition. Efforts were made to avoid community opposition by defining a population of low profile offenders for diversion—offenders who are unlikely to have engaged in crimes that might lead to notoriety. Secondly, the program has been located in the downtown area in a YMCA building; this was a necessary accommodation to neigh­borhood pressures about locating community cor­rections programs in residential areas. Thirdly, as the program becomes operational, an Advisory Board was assembled to assist with public inter­pretation of the program as well as advising on program development. The Advisory Board con­sists of influential businessmen, representatives of the criminal justice system, insurance industry, and other publics who are in a position to offer advice and assistance to the Center. After 16 months of operation, the Center has had minimal public criticism or attack.

The random selection procedures are incorpo­rated in an experimental design used to evaluate the program; at the same time the restitution group is randomly selected, a control group is also selected. Both groups of men will be followed for a total of 18 months after their release from prison in order to assess comparative outcomes on indicators such as recidivism, self and family sup­port, and a number of attitudinal scales. Likewise, cost data are being assembled in order to assess effectiveness in relation to cost.

Summary and Conclusion

The programs that have been presented in this article illustrate the use of discretion and diver­sion at key points in the criminal justice system: the level of the police, prosecuting attorney, court, parole board. In each of these cases, the focus has been on the way in which discretion is operational­ized, what the individual is diverted from, and the nature of the diversion program itself.

To a varying extent, the various programs pre­sented here illustrate the difficulty of clearly identifying what is or is not a diversion program. This is especially the case in preconviction pro­grams in which all that may be "diversionary" about the program is the name. This problem is compounded when rigorous evaluative measures are lacking. Without rigorous evaluation research, indirect evidence must be relied upon to document the diversionary nature of the program.

At the same time, while we may wish to believe that programs labeled as "diversionary" or "comm­unity-based" are more effective in achieving the desired result of rehabilitation, little reliable ev­i­dence can be produced in support of this belief. That such programs may be more humane, more economical, and do no worse than their conven­tional alternatives is justification enough for their continued support and expansion. Clearly, how­ever, the administrative discretion operationalized in most diversion programs has the potential for abuse. This is especially the case when clearly ar­ticulated and openly established program policies and procedures are lacking. Most diversion pro­grams are viewed as treatment or quasi-treatment alternatives to conventional processing by the criminal justice system. These programs, how­ever, have in common with the criminal justice system a governmental policy aimed at solving social problems by obtaining individual compli­ance to a given social structure. Given the assump­tions that most of these programs provide closer surveillance or supervision of their clients, have quicker reactions to client behaviors, and greater political leverage with community decisionmakers, what may begin as a benevolent program designed to help the offender could turn into a more op­pressive program than the conventional correc­tional alternative.
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