Pretrial Diversion: The Premature Quest for Recognition

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PRETRIAL DIVERSION: THE PREMATURE QUEST FOR RECOGNITION

Raymond T. Nimmer*
Patricia Ann Krauthaus**

Pretrial diversion has been one of the most enthusiastically promoted criminal justice reforms of recent years. There are more than forty well-funded diversion programs in operation dealing with more than 10,000 criminal defendants each year.1 Three federal commissions have referred favorably to diversion2 and grant programs of both the Justice Department and the Department of Labor which have actively fostered the creation and

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The authors were, respectively, project director and project assistant director of the recently completed American Bar Foundation study of pretrial diversion. Mr. Nimmer was a consultant to the Courts Task Force of the National Commission on Criminal Justice Standards and Goals relating to standards for pretrial diversion and is currently a member of the Task Force on Diversion and Plea Bargaining of the National Study Commission on Defense Services. The article is based on observations and other data derived from that study and on a review of recent published materials relating to pretrial diversion. It reflects, however, the opinions of the authors and not those of the American Bar Foundation or of the agencies that provided financial support for the underlying study. The study report was published by the American Bar Foundation as R. Nimmer, Diversion: The Search for Alternative Forms of Prosecution (1974).

1 What follows is an incomplete list of states and cities in which diversion programs exist. In many of the cities, more than one program is in operation.


Administrative: Syracuse, N.Y.; N.Y. City (all boroughs); Rochester, N.Y.; Nassau County, N.Y.; Philadelphia, Pa.; Cleveland, Ohio; Minneapolis, Minn.; Des Moines, Iowa; Chicago, Ill.; Atlanta, Ga.; San Jose, Cal.; Santa Rosa, Cal.; Hayward, Cal.; San Bernardino, Cal.; Baltimore, Md.; Honolulu, Hawaii; Washington, D.C.; New Haven, Conn.; San Antonio, Tex.; Boston, Mass.; Miami, Fla.; Genessee County, Mich.; Jersey City, N.J. (Hudson County); Newark, N.J.

expansion of diversion programs. Several states are considering legislation to establish diversion as a formal element of the criminal justice system and federal legislation is currently pending.

Many advocates of diversion claim that the concept has been empirically established as an effective reform. Their conclusions are typically based on program self-evaluative studies which, on their surface, appear to suggest the successful achievement of reform goals. In fact, however, these studies offer little reliable support for the suggested conclusion. Amid the general enthusiasm, several observers have begun to question both the concept of diversion and its record of goal achievement. Although the questioning is often no more than tentative, it nevertheless suggests that a variety of issues should be closely examined before diversion can be safely implemented on a broad basis. Current data does not support the belief that diversion achieves its stated goals, and further, suggests the possibility that diversion may in fact be detrimental to defendants' interests.

I. DEFINITION AND BACKGROUND OF DIVERSION

"Diversion" refers to procedures whereby defendants are given the option to participate in some specified course of conduct in lieu of prosecution. Adequate compliance with the specified obligations imposed by the

6 See, e.g., B. COHEN, PROJECT OPERATION MIDWAY (1972); E. DEGRAZIA, REPORT ON PRETRIAL DIVERSION OF ACCUSED OFFENDERS TO COMMUNITY MENTAL HEALTH TREATMENT PROGRAMS (1972); GEORGIA DEPT. OF LABOR, ATLANTA PRETRIAL INTERVENTION PROJECT FINAL REPORT (1973); NATIONAL COMMITTEE FOR CHILDREN AND YOUTH, FINAL REPORT: PROJECT CROSSROADS (1971); VERA INSTITUTE OF JUSTICE, THE MANHATTAN COURT EMPLOYMENT PROJECT: FINAL REPORT (1972).
8 But see Vorenberg & Vorenberg, Early Diversion from the Criminal Justice System: Practice in Search of a Theory, in PRISONERS IN AMERICA 151 (L. Ohlin ed. 1973). This article focuses on pretrial diversion within the adult criminal justice system. See D. CRESEY & R. MCDERMOTT, DIVERSION FROM THE JUVENILE JUSTICE SYSTEM (1973); E. LEMERT, INSTEAD OF COURT: DIVERSION IN JUVENILE JUSTICE (1971); NATIONAL INSTITUTE OF LAW ENFORCEMENT AND CRIMINAL JUSTICE, NEW
diversion program most often leads to dismissal of charges. The specified obligations may range from a general requirement of "good behavior" to participation in in-patient treatment programs.

A. Informal Practices

The variety of informal devices by which police, judges and prosecutors dispose of marginally serious cases constitutes the bulk of all diversion programs. In this informal context, diversion resembles screening; that is, a decision by an official not to pursue charges against an alleged offender. In 1967, a presidential commission estimated that one-third to one-half of all criminal cases were disposed of by screening and in some crime categories the screening rates may be substantially higher. In many instances the difference between informal diversion and screening amounts to little more than meaningless, verbal conditions attached to the dismissal of charges. Although the rationale for attaching artificial conditions varies, it often involves the belief that the imposed conditions will alter the de-

APPROACHES TO DIVERSION AND TREATMENT OF JUVENILE OFFENDERS (1973). We also do not discuss diversion of public drunkenness offenders. See R. NIMMER, TWO MILLION UNNECESSARY ARRESTS (1971).


Along with the growing enthusiasm about diversion there has been a rapidly expanding volume of literature on the topic. See references cited in notes 2-8 supra. See also Brakel, Diversion from the Criminal Justice Process: Informal Discretion, Motivation and Formalization, 48 DENVER L.J. 211 (1971); Brakel & South, Diversion from the Criminal Process in the Rural Community, 7 AM. CRIM. L.Q. 122 (1968); Harlow, Diversion from the Criminal Justice System, 2 CRIM. & DELINQ. LIT. 136 (1970); Newman, Corrections of the Future: Some Paradoxes in Development, in COLLECTED PAPERS: CONFERENCE ON CORRECTIONS IN CONTEXT 3 (D. Baker ed. 1972); Robertson, Pre-trial Diversion of Drug Offenders: A Statutory Approach, 52 B.U.L. REV. 335 (1972); Note, Addict Diversion: An Alternative Approach for the Criminal Justice System, 60 GEO. L.J. 667 (1972).


fendant's future conduct, while outright dismissal would not affect the
tendency toward deviance.

In many courts, informal diversion serves as a dispositional channel for
a significant percentage of all cases filed. For example, in Philadelphia, over
10 percent of all cases are disposed of by informal diversion,\(^\text{15}\) while in
Chicago, 10 to 30 percent of all cases involving young adult defendants
are disposed of by informal diversion.\(^\text{16}\) Although informal diversion in
both cities incorporates supervision and counseling, only a minority of the
defendants in fact receive such services. For the majority, the conditions
imposed through diversion are unenforced. Such practices are generally
"lacking in formality, low in observability, and devoid of such institutional
elements as specialization of personnel and thorough data gathering and
reporting."\(^\text{17}\) They do not attempt to establish formal alternatives to prose-
cution, but rather, they merely implement personal, discretionary judgments.

B. Programmed Diversion

Contemporary interest in diversion centers on structured programs that
in fact do involve intensive counseling in a diversion format.\(^\text{18}\) These new
programs, as distinguished from the more prevalent informal practices,
have been defined as a "systematic diversion alternative—a program with
pre-defined eligibility, referral, service delivery and disposition procedures,
based on the voluntary participation of the accused."\(^\text{19}\) This definition
emphasizes formal procedures, but such distinctions are matters of degree,
rather than substance.\(^\text{20}\) Instead, the chief distinctions lie in the funding
and the counseling emphasis in the new programs. Most new programs are
established and maintained by large grants or legislative appropriations
whereas informal diversion functions with, and often as a reaction to, ex-
cessive caseload and limited resources.\(^\text{21}\) Further, the emphasis of the new
programs is to utilize the diversion structure to maximize counseling per-

\(^{15}\) See Chatfield & Spector, Pretrial Diversion: New Concept in Criminal Justice,
60 A.B.A.J. 1089, 1092-96 (1974). See also Note, Addict Diversion: An Alternative
Approach for the Criminal Justice System, 60 GEO. L.J. 667 (1972). The Philadelphia
program is something of a hybrid in that the receipt of grant funds has enabled the
provision of actual supervision and counseling to a minority of the diverted
population.

\(^{16}\) See Social Service Department, Cook County Municipal Court, Boys Court 5

\(^{17}\) Brakel, Diversion from the Criminal Justice Process: Informal Discretion,
Motivation and Formalization, 48 DENVER L.J. 211, 227 (1972).

\(^{18}\) See National Commission for Children and Youth, Final Report: Project
Crossroads (1971) [hereinafter cited as Crossroads Report]; Vera Institute of
[hereinafter cited as MCEP Report]. See generally Vorenberg & Vorenberg, supra
note 8.

\(^{19}\) ABT Associates, supra note 3, at 17. See also National Pretrial Intervention
Service Center, Legal Issues and Characteristics of a Pretrial Intervention Program (1974); D. Skoler, Protecting the Rights of Defendants
in Pretrial Intervention Programs 1 (1974).

\(^{20}\) See R. Nimmer, supra note 10, at 95-103.

\(^{21}\) See, e.g., Speech by Senator Burditt, at National Conference on Pretrial Interven-
formance and not, as in informal diversion, merely to avoid inappropriate prosecution.\textsuperscript{22}

In addition to well-funded, caseload-balanced services, the new programs are characterized by innovative counseling approaches. For example, one program offers intensive probationary counseling to selected defendants.\textsuperscript{23} In other programs, vocational counseling and placement services\textsuperscript{24} delivered by paraprofessional counselors are employed.\textsuperscript{25} The vocational emphasis reflects the philosophy of these programs that, in many instances, criminal deviance is motivated by economic deprivation.\textsuperscript{26}

Contemporary enthusiasm for diversion emphasizes that there is substantial achievement of counseling goals. This achievement, if it occurs in fact, is partially based on the innovative counseling provided. However, the effectiveness of innovative counseling is not necessarily an inherent benefit of diversion, but might be duplicated in post-conviction programs.\textsuperscript{27} Any claim that diversion provides counseling benefits must be based on three premises which are unrelated to the type of counseling involved. The first premise is that counseling is more effective if the client is induced to cooperate. In diversion, cooperation is motivated by the threat of reinstated prosecution if the client does not cooperate and the promise of dismissal if he does. In contrast, post-conviction counseling can only offer shortened supervision and the threat of probation revocation; a conviction has already occurred and cannot be avoided. A second premise is that the trauma of arrest creates a disruption that facilitates effective counseling. Diversion programs are allegedly able to exploit this disruption because counseling occurs without the delay involved in either an adjudicated verdict of guilt or a negotiated guilty plea.\textsuperscript{28} A third premise involves labeling or deviance reinforcement theory.\textsuperscript{29} Historically, concepts of the impact of criminal law on deviant conduct have emphasized punishment as a deterrent.\textsuperscript{30} More recently, however, social scientists have emphasized the negative effects of punishment and of the social and personal stigma

\textsuperscript{22} See S. REP. No. 93-417, 93d Cong., 1st Sess. 7 (1973).
\textsuperscript{23} B. Cohen, Project Operation Midway (1972); Nassau County (N.Y.) Probation Department, Operation Midway (pamphlet, 1973).
\textsuperscript{24} See ABT Associates, supra note 3; Note, Pretrial Diversion from the Criminal Process, 83 Yale L.J. 827 (1974).
\textsuperscript{25} See Boston Court Resources Project, The Selection of Advocates and Screeners for a Pretrial Diversion Program (1972); MCEP Report, supra note 18, at 43.
\textsuperscript{26} See ABT Associates, supra note 3, at 1-2. This emphasis derives from the early, extensive involvement of the United States Labor Department in diversion planning and implementation. Id.
\textsuperscript{28} But see Cunningham, Crisis Intervention in a Probation Setting, 37 Fed. Prob. 16 (1973).
resulting from a criminal conviction. These effects may not only impede counseling, but may also lead to further deviance.

These premises raise many questions. For example, to what extent does the stigma of an additional conviction affect a defendant who has several prior convictions? To what extent does the speed of intervention required to exploit crisis intervention in counseling conflict with the jurisprudential concepts of deliberate justice? Does the arrest trauma affect a defendant's ability to exercise a voluntary choice to participate in diversion? Is not criminal deviance produced by influences far beyond economic problems? These and other issues have seldom been addressed and less frequently answered. Instead, the general efficacy of diversion has been hastily and uncritically accepted. In order to examine these issues it is necessary to briefly review the operant structure of current diversion programs.

II. PROGRAM STRUCTURE

A. Entry Process

Most current programs follow either of two formats for identifying and selecting clients depending upon whether or not the defendant must initiate his own participation in the program. Both formats involve (1) a defendant's decision to seek participation, (2) screening by program staff, and (3) a decision by system officials, usually either a judge or a prosecutor. The primary difference between the two formats is the manner in which the defendant enters the screening process. Most programs employ a screening staff to identify potentially eligible defendants from court records, to contact them, and to encourage their participation. In other programs, however, the initial contact occurs only after a formal motion by the defense.

1. Defense Decision—Regardless of the format, the entry process involves a defendant's decision. While a defendant's interest in counseling plays some role, his decision primarily involves a balancing of the probable payoffs of the available alternatives. The alternatives consist of either seeking out and accepting diversion or rejecting diversion in favor of traditional processing in the criminal courts. The elements balanced in this decision include the length of supervision, the conditions of supervision, and the perceived labeling consequences attached to each option.

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31 See, e.g., H. Becker, Outsiders (1963); E. Lemard, Social Pathology (1951); E. Schur, Labeling Deviant Behavior (1971).
32 See sources cited in note 31. The extent to which this premise has been documented has recently been questioned in the corrections literature. See, e.g., Mahoney, The Effect of Labeling upon Youths in the Juvenile Justice System: A Review of the Evidence, 8 LAW & SOC. REV. 583 (1974).
34 See Robertson, Pre-Trial Diversion of Drug Offenders: A Statutory Approach, 52 B.U.L. REV. 335 (1972).
36 Id. at 704-07. See also R. Nimmer, supra note 10, at 99.
Diversion will be sought out only if its probable consequences are less harsh than those probable under traditional prosecution.

This formulation is significant because, in most current programs, many defendants reject diversion in favor of prosecution. For example, in one study, less than 5 percent of all potentially eligible defendants sought diversion because the program, which applied to drug offenses, required periods of counseling that exceeded the probable sentence upon conviction, because the drug counseling involved undesirable conditions and resulted in an undesirable label of "drug dependency," and because conviction could often be avoided under normal prosecution.\(^\text{37}\)

Similar considerations can be inferred from a study of the Manhattan Court Employment Project (MCEP) in which only 14 percent of a sample of potentially eligible defendants entered the program, a second 14 percent simply rejected program participation, and an additional 15 percent entered a plea of guilty, rather than enter the program.\(^\text{38}\) The rate of guilty pleas in lieu of diversion underscores a final point. To many defendants, the potential of avoiding a conviction is not determinative. Instead, primary emphasis is placed on the length and conditions of supervision. MCEP requires a counseling interval of three to four months of closely supervised counseling.\(^\text{38}\) These data suggest that the negotiated guilty plea involved lesser supervision.\(^\text{40}\)

2. Staff Screening—Defendants desiring to participate in the diversion program are screened by program staff. Commonly, defendants with drug or alcohol involvement or involvement in another counseling program are excluded from participation.\(^\text{41}\) In addition, most programs exclude applicants on the basis of age, prior record, crime charged, and employment status.\(^\text{42}\) The existence of such standards is often cited as a primary difference between the new diversion programs and informal diversion. Although

\(^{37}\) See Robertson, supra note 34.

\(^{38}\) Zimring, Measuring the Impact of Pretrial Diversion from the Criminal Justice System, 41 U. Chi. L. Rev. 224, 230 (1974). In contrast, over 40 percent of all potential eligibles petition for diversion in Operation Midway in Nassau County, New York and over 50 percent of all persons applying for diversion are accepted by the program. Unlike most other diversion programs, Midway applies only to defendants who are facing prosecution on felony charges and against whom preliminary screening has been completed and an indictment returned. Data obtained from an ongoing American Bar Foundation study of Operation Midway, to be published in 1976.

\(^{39}\) See generally MCEP REPORT, supra note 18.

\(^{40}\) Zimring, supra note 38.

\(^{41}\) The exclusion of defendants with a history of drug involvement is, of course, not followed in those diversion programs structured as primarily or exclusively applicable to defendants charged with drug offenses. In such programs, however, the emphasis tends to be on persons involved with marijuana, rather than heroin, and persons lacking long histories of addiction. For long-standing addicts, diversion may occur, but generally involves an institutional treatment alternative. See generally Robertson, Pre-trial Diversion of Drug Offenders: A Statutory Approach, 52 B.U.L. Rev. 335 (1972); Note, Addict Diversion: An Alternative Approach for the Criminal Justice System, 62 Geo. L.J. 667 (1972); Note, Diversion of Drug Offenders in California, 26 Stan. L. Rev. 923 (1974).

\(^{42}\) See, e.g., Court Employment Program, The Court Employment Project (pamphlet, 1973).
these standards allegedly remove or control discretion, they in fact serve only to exclude defendants who do not meet the criteria. Defendants who do meet the formal criteria must conform to additional discretionary screening standards. In most programs these discretionary decisions tend to select young adult, first offenders charged with nonserious (often property) offenses.\footnote{See generally ABT ASSOCIATES, supra note 3, at 20-29; R. NIMMER, supra note 10, at 96-105; Note, Pretrial Diversion from the Criminal Process, 83 YALE L.J. 827, 832-36 (1974).} Furthermore, a common discretionary standard is that the defendant be motivated for counseling. This motivational standard may be salient from a counseling perspective, but it injects broad, uncontrolled personal judgment into the screening process.

Among the influences on staff discretion is the judicial and prosecutorial overview under which the programs function. All defendants selected for the program must be approved by either a judge or prosecutor and the program's continued existence often depends on the continuing approval and cooperation of these officials. In response, staff decisions reflect predictions about whether the officials will allow diversion.\footnote{See R. NIMMER, supra note 10, at 101-03. In short, there is clearly a delicate balance to be achieved between the court's view of a particular defendant as a diversion possibility and a project's interest in the same defendant as a recipient of intensive counseling and manpower services. } This prediction process impacts on the quality of the selection enterprise from a counseling perspective, frequently giving predominance to prosecution policy to the exclusion or minimization of issues related to counseling impact. The central question often becomes whether the case is acceptable on policy bases instead of whether the defendant is likely to benefit from counseling.

\[I\]n some sites [there is a movement] away from the tendency to view the participant in terms of . . . artificial charge distinction. . . . In other sites, however, the . . . emphasis [is] on achieving the diversion of defendants rather than [on] matching defendant service needs to the program's service capabilities. As a result . . . significant numbers of defendants are enrolled who had no apparent need for the full range of services offered.\footnote{ABT ASSOCIATES, supra note 3, at 29. The prediction process is not immutable, however, and defendants beyond current parameters of the judge or prosecutor are occasionally selected. In such instances, debate between staff and officials determines whether the defendant is diverted but the frequency and adversary nature of the debates is muffled by the need to retain cooperative relations with the prosecutor. R. NIMMER, supra note 10, at 102.}

The resultant tendency is to select defendants defined as less serious from a prosecution perspective. For example, many diversion programs were initiated with a formal restriction to misdemeanor cases, but this restriction was later abandoned.\footnote{See generally MCEP REPORT, supra note 18. See R. NIMMER, supra note 10, at 53-58. The seriousness of the crime charged may not be a relevant criterion for predicting counseling impact. See generally Statements of Ennis Olgati and William Henschel in Hearings on S. 3309 Before the Subcomm. on Penitentiaries of the Senate Comm. on the Judiciary, 92d Cong., 2d Sess. (1972).} Even with the expansion into felony cases,
however, the emphasis is on nonviolent crimes involving defendants with a minimal or no prior record. Selections also emphasize low or moderate risks from a counseling perspective. In part, this derives from a need to establish credibility in the program by producing low recidivism rates.

3. Official's Decisions—As the above implies, discretionary decisions by judges and prosecutors are often framed in terms of prosecution policy. Is the alleged crime serious? Is a conviction likely? Is the defendant an individual against whom a criminal conviction is desirable or necessary? Some judgments are exercised at the outset of the program as officials and program personnel establish mutually acceptable eligibility criteria, while other judgments are made on a case-by-case basis.

B. Program Participation

There are four general counseling approaches. The first emphasizes job counseling and placement and was used in the two initial diversion programs in Washington and New York and was subsequently adopted in a nine-program series funded by the Department of Labor. In most programs, no psychological testing or counseling is conducted and the vocational counseling, in light of the low achievement level of most clients, relates primarily to basic job retention skills. The counseling interval involves repeated referrals to potential employers until the client obtains and holds a job. Such counseling terms usually range between three and six months.

The second approach utilizes a professional staff and extensive, wide-ranging counseling. The most notable illustration is Operation Midway in Nassau County, New York, which focuses on indicted, young adult defendants. Operation Midway counseling is delivered by trained caseworkers with caseloads of twenty-five clients. Both individual and group therapy are used as are referrals to job training and other programs. The

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47 A reverse pattern, involving later limitations on crime seriousness may occur. For example, in Operation Midway, the initial focus was young adult felony defendants and exclusion was not mandated even if a prior felony record existed. See generally B. Cohen, Project Operation Midway (1972). Recent revisions in the New York Penal Code, requiring incarceration for second felony offenses in specified instances, have led to increased sensitivity to a prior record exclusion.

48 See R. Nimmer, supra note 10, at 96-98.

49 See generally ABT Associates, supra note 3; Crossroads Report, supra note 18; MCEP Report, supra note 18.

50 ABT Associates, supra note 3, at 63-76; R. Nimmer, supra note 10, at ch. 7. In a study of nine diversion programs using this counseling approach, 15 percent of all clients were never placed in a job and an overall ratio of about two referrals per placement obtained. In two programs over 60 percent of all clients required multiple referrals before placement was achieved. Id. at 65. See also MCEP Report, supra note 18, at 7.

51 MCEP Report, supra note 18.

52 See National Pretrial Intervention Service Center, Descriptive Profiles on Selected Pretrial Criminal Justice Intervention Programs (1974).

53 See generally B. Cohen, Project Operation Midway (1972); Nassau County (N.Y.) Probation Department, Operation Midway (pamphlet, 1973).

54 R. Nimmer, supra note 10, at 69.

55 Id. at 70-72.
counseling term ranges between twelve and eighteen months.\textsuperscript{56}

These two approaches are applied to general client populations. In contrast, the third and fourth methods have been adapted to specialized populations. One, in Washington, D.C., applied to defendants who had apparent mental illness problems.\textsuperscript{57} In that program, clients received no counseling but were referred to a variety of community-based mental health programs.\textsuperscript{58} The other method applies to drug-dependent populations\textsuperscript{59} and involves admission to participating drug treatment programs which provide services on either an in-patient or out-patient basis.\textsuperscript{60}

C. Termination Practices

In most programs, supervision between program entry and termination is almost exclusively a counseling function at the discretion of the program staff, subject to the guidance of general policies. Following expiration of the specified counseling interval, diversion clients are terminated as successful if so considered by the counseling staff. The decision is discretionary and premised on whether the staff believes that the client has adequately cooperated with counseling and placement activities.\textsuperscript{61} Rates of successful completion may vary from 30 to 90 percent among current programs.\textsuperscript{62}

The clientele terminated as unsuccessful are returned to normal prosecution channels. The decision to terminate unfavorably is also made at the virtually uncontrolled discretion of program staff. Although a variety of criteria, such as rearrest while in the program, may be used in the decision process,\textsuperscript{63} the chief reason for unfavorable terminations is failure to cooperate\textsuperscript{64} and a determination that the client has not cooperated is seldom reviewed or contested.\textsuperscript{65} In contrast, a staff decision that the client

\textsuperscript{56} Id.


\textsuperscript{58} Id. at 1-2.


\textsuperscript{60} R. Nimmer, supra note 10, at ch. 10.

\textsuperscript{61} ABT ASSOCIATES, supra note 3, at 79.

\textsuperscript{62} See generally ABT ASSOCIATES, supra note 3, at 78 (for nine programs, completion rates ranged from 89 percent to 64 percent); COURT EMPLOYMENT PROJECT, QUARTERLY REPORTS (1970-74); D. Freed, E. DeGrazia & W. Loh, The New Haven Pretrial Diversion Program: A Preliminary Evaluation 71 (unpublished, June 1973) [hereinafter cited as D. Freed].

\textsuperscript{63} R. Nimmer, supra note 10, at ch. 7; Note, Pretrial Diversion from the Criminal Process, 83 YALE L.J. 827, 850 (1974).

\textsuperscript{64} See ABT ASSOCIATES, supra note 3, at 78 (48 percent of all unfavorable terminations in nine programs); D. Freed, supra note 62, at 71. The judgment about client cooperation supersedes, in most cases, any formally announced criteria. For example, in a nine program study, one-third of all participants rearrested during the program participation were not terminated. Note, supra note 63, at 850.

\textsuperscript{65} But see ABT ASSOCIATES, supra note 3, at 83.
has successfully completed counseling results in a recommendation for dismissal that is reviewed by the prosecutor and judge. In most programs, dismissals are granted routinely, although the decision is a discretionary one and involves an interaction between counseling staff and criminal justice officials. In several programs fewer than 50 percent of all successful clients receive dismissals. The remainder receive minimal sentences and charge concessions in return for a plea of guilty.

III. EVALUATIVE COMMENTS

Contemporary support for diversion assumes that current programs serve important criminal justice objectives. In general, contemporary assumptions are that diversion ameliorates the harsh consequences of criminal prosecution, that it provides an effective counseling environment, and that it is a cost beneficial mode of case processing. Each of these assumptions is, however, of questionable validity based on data currently available and the remainder of this paper is directed toward an articulation and examination of these assumptions. Before proceeding, however, it is desirable to make two preliminary points.

First, the new programs are desirable from the standpoint of metropolitan courts and prosecutors' offices. As the existence of informal diversion and extensive screening suggests, officials often make use of dispositions that do not involve formal convictions. Caseload pressure creates a need to follow priorities among cases and to achieve maximal efficiency in cases that are not sufficiently serious to warrant extensive time and effort. The diversion programs provide an outlet for such nonserious cases and the outlet is highly useful. Since entry and supervisory periods are conducted primarily by program staff, prosecutors and judges have only minimal contact with the diverted case and are free to deal with other cases.

Second, any current assessment of diversion must account for the relative newness of the programs. Current programs have adequate funding and aggressive, enthusiastic staffs. Most exhibit an almost missionary zeal that is uncharacteristic of correctional programs that have become routinized components of the justice system. Both the funding and the enthusiasm may be transitory.

[One of the] cardinal weaknesses in the diversion movement...[is] the total absence of uniformity among programs and their

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67 The rates vary dramatically. In most programs, less than 10 percent of successful clients do not receive a dismissal. However, in Operation Midway the dismissal rate was approximately 50 percent. R. Nimmer, supra note 10, at 72. In a San Antonio program the rate was 14 percent and in three California programs, rates of dismissal were 85 percent, 76 percent and 34 percent. ABT Associates, supra note 3, at 80-81. The different rates of dismissal reflect local discretionary policies followed by criminal justice officials. In most programs, the prosecutor controls the dismissal decision while in others, the judiciary controls. This distinction does not, apparently, affect the dismissal rate, but rather, the principal distinction is in the individual decision-makers.
failure to date to transcend dependence upon the personalities of the principal actors, project directors and prosecutors, and the peculiarities of the locality in which the programs exist. 69

A. Amelioration of Prosecution

A basic premise is that diversion represents a lenient disposition in contrast to the harsh consequences of prosecution, both in terms of stigmatizing labels and in terms of length and type of supervision. Upon analysis, however, it appears that diversion may tend toward the opposite result for some clients. Table 1 summarizes the potential results relevant to severity of disposition, assuming that all successful diversion clients receive dismissal of charges.

### TABLE 1

**SUPERVISION AND LABELING OUTCOMES**

<table>
<thead>
<tr>
<th>Diversion</th>
<th>Prosecution</th>
</tr>
</thead>
<tbody>
<tr>
<td>Successful</td>
<td>Unsuccessful</td>
</tr>
<tr>
<td>Label Effects</td>
<td>Arrest record</td>
</tr>
<tr>
<td>Supervision Term</td>
<td>3-18 month counseling</td>
</tr>
</tbody>
</table>

This table compares the leniency of disposition by diversion with disposition by prosecution. For example, diversion produces a benefit in terms of labeling effects only for successful clients who would otherwise have been convicted. The benefit would consist of the difference between an arrest record and a record including both arrest and conviction. The magnitude of the benefit would vary according to the client's social environment, the charge on which the client would otherwise have been convicted, and whether the client had a record of prior convictions. For unsuccessful participants and for defendants who would otherwise have escaped conviction, no labeling benefit occurs.

One assumption of literature favorable to diversion is that all clients entering a diversion program would otherwise have been convicted. 70

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70 For example, the author of one article contends:

A . . . factor which would appear to account for the inception and acceptance of the pretrial intervention strategy is its compatibility with the realities of the criminal court system. . . . [A] substantial majority of individuals arrested and charged with criminal offenses have, in fact, committed the acts alleged. . . . [T]he presumption of innocence
fact, however, 40 to 50 percent of all arrests do not result in conviction. More on point, in several studies of defendant populations comparable to diversion clients, between 20 to 50 percent received dismissals without diversion.\(^{71}\) It might be argued that the defendant's voluntary choice to enter the program will exclude from the results all individuals who otherwise would be able to avoid conviction. The argument, however, assumes that defendants will make accurate evaluations of evidence even though such evaluations may not be feasible at the point that a decision must be made. Further, since many dismissals are based on policy decisions, the argument assumes that the defense can predict the exercise of prosecutor discretion. Empirically, the argument is rebutted by the frequent dismissals from prosecution received by unfavorably terminated diversion clients.\(^{72}\)

In fact, diversion may be used to increase the range of cases in which state control is exercised within the criminal justice system.\(^ {73}\) Since the prosecutor controls the potential outcomes that affect the defendant's choice, by increasing the length of the potential sentence, the prosecutor can make contesting charges less attractive to the defendant. Thus, even if there is a perceived probability of avoiding conviction, any tendency to submit to prosecution might be overridden by the comparative risks involved. If, for example, the probability of avoiding conviction is 50 percent but the likely sentence on conviction is three years incarceration, a defendant could rationally opt for a three month diversion program. As a result, diversion could become a dumping ground for cases in which evidence of guilt is uncertain.\(^ {74}\) Ultimately, diversion would become a more potent form of plea bargaining in which the prosecutor would be able to use the possibility of obtaining a dismissal to further induce the defendant to forego challenging the charges filed.\(^ {75}\)

The potential for abuse and the fact that current diversion programs may extend state control to defendants who otherwise would not have been convicted suggest the necessity of safeguards to ensure that diversion is limited to defendants who are probably guilty and who, in fact, would

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\(^{71}\) D. Freed, supra note 62, at 76 (29 percent of a comparison group were ultimately dismissed); Statement by J. Trotter in *Hearings on S. 3309 Before the Subcomm. on National Penitentiaries of the Senate Comm. on the Judiciary, 92d Cong., 2d Sess.* 111 (1972) (over 50 percent of unfavorable terminations in Project Crossroads); Zimring, *Measuring the Impact of Pretrial Diversion from the Criminal Justice System*, 41 U. Chi. L. Rev. 224, 237 (1974) (51 percent of a comparison group of potential eligibles).

\(^{72}\) See Statement by J. Trotter, supra note 71.


\(^{74}\) F. Miller, Evaluation of Research on Pretrial Diversion 88 (unpublished manuscript, 1974).

\(^{75}\) Goldberg, *Pretrial Diversion: Bilk or Bargain*, 31 *NLADA BRIEFCASE* 490, 491 (1973).
likely have been convicted. In this respect, the necessary safeguards will not be met by merely requiring that the defendant plead guilty before entering the program. Plea negotiation could readily be structured to obtain this result without actually testing whether conviction would have occurred in the absence of a diversion program.

Returning to Table 1, we can now compare the severity of the supervision under diversion programs with traditional prosecution. Diversion increases the supervision of defendants who would not have been convicted. It also increases supervision for unfavorably terminated defendants, unless the term served in the diversion program is subtracted from the eventual sentence. Diversion counseling is a less severe form of supervision only for favorably terminated clients who would have been convicted as a result of prosecution. In order to argue for diversion, advocates often assume that many diversion clients would otherwise receive incarceration. To assume incarceration, however, is even less tenable than to assume a conviction. The prosecutorial, judicial, and program policies which focus diversion on less serious cases produce client populations which are less likely to receive incarceration than would a random sample of cases. Since, in most courts, incarceration occurs in much less than one-third of all cases a reasonable assumption is that few, if any, diversion clients would have received incarceration.

A plausible comparison can be made between diversion counseling and anticipated terms of probation. In this comparison, two suggestive observations are relevant. First, since diversion clientele are selected from among the less serious cases, the expected term of probation would be brief. Second, diversion counseling is more intensive with more frequent contact between counselor and client than in traditional probation. As a result, judgments on the relative severity of the supervision imposed might involve a trade-off between lengthier terms of less supervised conduct (probation) and briefer terms of intensely supervised behavior (diversion). For exam-

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76 There is, in fact, some indication that unfavorably terminated clients receive less favorable handling in subsequent prosecution. See Note, Pretrial Diversion from the Criminal Process, 83 Yale L.J. 827, 851 (1974).
78 Freed reports the following dispositions for a comparison group of defendants in New Haven:

- dismissal — 22%
- fine — 37%
- suspended sentence — 18%
- unknown — 23%

No incarceration sentences were found. D. Freed, supra note 62, at 79.

Zimring reports the following for a comparison group in New York:

- not convicted — 51%
- fine — 11%
- probation — 6%
- unconditional discharge — 3%
- conditional discharge — 15%
- jail — 7%
- unknown — 7%

Zimring, supra note 71, at 237.
ple, in Operation Midway in Nassau County, New York, clients received intense supervision and counseling for an average of fifteen months, while a group of potentially eligible nonparticipants received an average term of 4.5 years probation with less intense supervision. Which set of dispositions is more severe?

It is occasionally argued that diversion, while involving more intense supervision, includes effective, qualified counseling, while probation involves simply supervision. Although the effectiveness of diversion counseling is discussed in part III B infra, it is relevant here to note that an emphasis has developed on good counselor intentions which parallels arguments in support of juvenile court informality that state control is justified as in the client's best interest. The argument has been questioned in the juvenile court system and should be questioned here. Labeling control as being in the client's best interest does not ensure that it is.

The similarity between the contemporary diversion movement and the prior movement to establish a juvenile court system arises in both the characterization of the counseling and in terms of the degree of discretion. Diversion counseling is wholly at the discretion of the counselor and involves little or no judicial review. The decision to terminate a client as unfavorable is discretionary and not generally reviewed. In this respect, recent Supreme Court decisions concerning due process in the juvenile court and decisions establishing that revocation of parole or probation requires a judicial hearing are relevant.

B. Counseling Benefits

Central to contemporary enthusiasm for diversion is the belief that it reduces recidivism. Although this belief is widely held, empirical data offer little or no support.

Prior to discussing several evaluative studies, it is necessary to mention a difficulty relating to current research on diversion counseling. Even if diversion clients demonstrate different post-program recidivism than do a control group of nonparticipating defendants, it is not clear what characteristic of the diversion program produces the difference. The argument

79 Data from an ongoing American Bar Foundation Study of Operation Midway to be published in 1976.


81 Occasionally, the similarity of the descriptive language is striking. Note, for example, the following description of a Philadelphia diversion court. "The approach is unique. The court has no interest in punishment or even in determining guilt. Rather, the concern is to save the defendant..." Specter, Philadelphia's Accelerated Rehabilitative Disposition Program, 60 A.B.A.J., 1092, 1092-93 (1974).

82 See Gagnon v. Scarpelli, 411 U.S. 778 (1973); Morrissey v. Brewer, 408 U.S. 471 (1972). In fact, at least one diversion program has recently instituted a hearing procedure to review unfavorable terminations. See ABT ASSOCIATES, supra note 3, at 83; H. PERLMAN, supra note 80, at 46-54.
has been that counseling in lieu of prosecution facilitates effective counseling. Evaluation studies have compared program clients to allegedly similar defendants submitted to traditional prosecution. Differential recidivism has led to the conclusion that the program is effective and, ultimately, to the generalization that the diversion concept is valid. However, there are numerous characteristics of a diversion program relevant to counseling impact that are sharply divergent from traditional correctional services. The correct test is whether the differential results can be obtained for similar clients in similar counseling formats that are located, respectively, in a preconviction and a postconviction setting. The effectiveness of diversion counseling is established only if differential recidivism relates directly to the timing of the counseling. If such a relationship is not established, counseling impact might be replicated by a similar, well-funded counseling program in a correctional, postconviction setting. The issue is important because, as was argued in part III A supra, the timing of diversion intervention produces undesired effects not present in a postconviction setting.

Current research has adopted a more blunt-edged approach. It compares the diversion program, including all of its innovative characteristics, to the conglomerate of dismissals, probation, and incarceration meted out by the traditional prosecution system. Even at this undifferentiated level, however, the research has failed to demonstrate that the diversion program is more effective.

The basic materials around which success claims have been built are found in the final reports of the Manhattan Court Employment Program (MCEP) and Operation Crossroads in Washington, D.C. Based in large part on the lower recidivism rates for participants reported in these studies, a Senate committee remarked:

"The real benefit of pretrial diversion is the final result: the individual who has completed a program of pretrial diversion is much less likely to commit another crime than the individual who goes through the criminal justice system in the normal way. . . . The likelihood of future recidivism was substantially reduced. . . ."

For example, some characteristics of a diversion program which are unique in comparison to traditional correctional services are: low counseling caseloads, abundant supportive services, innovative counseling techniques, specially selected counseling staffs, and voluntary client entry. Furthermore, the initial point of counseling contact may also affect variables related to labeling effects, crisis intervention effects, and the threat of prosecution as an incentive.

\[\text{\textsuperscript{83}}\] MCEP REPORT, supra note 18, at 47.

\[\text{\textsuperscript{85}}\] CROSSROADS REPORT, supra note 18, at 35.

<table>
<thead>
<tr>
<th></th>
<th>All Participants</th>
<th>Control Group of Nonparticipants</th>
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<tbody>
<tr>
<td>MCEP</td>
<td>20% (214)</td>
<td>32% (91)</td>
</tr>
<tr>
<td>Crossroads</td>
<td>30% (200)</td>
<td>43% (107)</td>
</tr>
</tbody>
</table>

\[\text{\textsuperscript{a}}\] MCEP involved a twelve-month follow-up on recidivism while Crossroads reported a fifteen-month follow-up.

\[\text{\textsuperscript{b}}\] Number of defendants in parentheses.

\[\text{\textsuperscript{86}}\] S. REP. No. 417, 93d Cong., 1st Sess. 7 (1973).
The conclusion that recidivism was reduced is unwarranted. For example, a recent review of diversion research presents a reanalysis of the Crossroads data that questions whether any general reduction of recidivism occurred, even assuming that the study design was valid. This analysis distinguished between rearrests occurring while the defendant was in the program and arrests occurring after the program. Based on this distinction, it appears that the differential during the post-program interval was not statistically significant, even though the in-program differential was significant. Thus, at best, the Crossroads data suggests a lower recidivism rate only during the period that participants are in close contact with the program. However, methodological deficiencies in both the Crossroads and the MCEP study render even this apparent result meaningless.

Both the Crossroads and the MCEP evaluations adopt a comparison group methodology. The basic rationale for contrasting the recidivism of participants to the recidivism of selected nonparticipants was to estimate what participant performance would have obtained had not the program intervened. It was, of course, essential that the nonparticipant group be similar to the participant group in all relevant respects. In both MCEP and Crossroads, the comparison group was selected from among defendants who would have been eligible for the program on the basis of court records concerning charge, age, and prior record but whose cases were filed prior to the implementation of the program.

Available evidence suggests that the comparison and participant groups did not represent similar populations. In practice, the court records served only for the initial screening stage in both programs. Before program entry, defendants were further screened by program staff in personal interviews and by the prosecutor. Furthermore, in the actual program the defendant had to elect to seek admission. In MCEP, 86 percent of all persons eligible on the basis of court records concerning charge, age, and prior record but whose cases were filed prior to the implementation of the program.

In Crossroads, this later screening was allegedly less intense, but still occurred. Furthermore, the participants were more motivated for counseling while comparison group members had unknown motivation.

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**Percentage of Persons Rearrested in Operation Cross-Roads by Timing of Rearrest**

<table>
<thead>
<tr>
<th></th>
<th>In-Program(a)</th>
<th>During One Year Post Program</th>
</tr>
</thead>
<tbody>
<tr>
<td>Participants</td>
<td>9% (200)(b)</td>
<td>21% (200)</td>
</tr>
<tr>
<td>Comparison</td>
<td>22% (107)</td>
<td>22% (107)</td>
</tr>
</tbody>
</table>

\(a\) The in-program period is the first three months for all participants.

\(b\) Number of individuals studied.

88 MCEP Report, supra note 18, at 55-60.

89 R. Nimmer, supra note 10, at 64-65. See also Zimring, supra note 71.

90 R. Nimmer, supra note 10, at 64-65.

91 Id.

92 Zimring, supra note 71, at 230.

93 F. Miller, supra note 74, at 45.
The participant group was closely screened to exclude individuals with drug addiction and other problems while the comparison group was not so screened. The overall result is a comparison of dissimilar groups.\textsuperscript{94} Despite these deficiencies, the two original studies serve as primary bases of support for diversion counseling. Their implications are seemingly buttressed by data compiled by most other diversion programs which also claim low rates of rearrest for successful participants.\textsuperscript{95} While used as support for a conclusion about diversion counseling, these data in fact show only that carefully selected, motivated defendants exhibit low rates of recidivism—a conclusion that is potentially independent of the treatment that they are subjected to.

Three additional studies of recidivism should be noted. Each began with the intention of utilizing a randomly assigned control group. The first study involves Project De Novo in Minneapolis.\textsuperscript{96} Project De Novo follows the job counseling format, but its counseling may extend for twelve months rather than the three months in most such programs.\textsuperscript{97} The evaluation was conducted by ABT Associates as one segment of a study monitoring nine programs.\textsuperscript{98} The De Novo study began with a random assignment model,\textsuperscript{99} but this approach was abandoned midway through the study.\textsuperscript{100}

\begin{table}[h]
\centering
\begin{tabular}{|c|c|c|c|}
\hline
Age & Potential Eligibles\textsuperscript{a} & Weekend & Difference \\
\hline
16-17 & 47 (71)\textsuperscript{b} & 38 (61) & -9 \\
18-20 & 41 (81) & 40 (105) & -1 \\
21-29 & 31 (141) & 25 (171) & -6 \\
30+ & 15 (60) & 17 (102) & +2 \\
All ages & 34 (353) & 29 (439) & -5 \\
\hline
\end{tabular}
\caption{Percentage of Persons Eligible for MCEP Who Were Rearrested Within One Year After Normal Counseling Period}
\end{table}

\textsuperscript{a} Includes those selected for diversion treatment.
\textsuperscript{b} Number of persons studied.

Although only 14 percent of the potential eligibles entered the diversion program, Zimring found no improved performance in groups having higher percentage concentrations of participants. \textit{Id.} at 233-34.\textsuperscript{95} MCEP and Crossroads data are for initial years of operation only. More recent rearrest information include: Operation Midway reporting 10 percent rearrest of all favorable terminations (B. \textit{Cohen}, \textit{supra} note 47); Dade County, 1.6 percent (Petersen, \textit{supra} note 69, at 98); and Philadelphia, 16.8 percent in 1971 and 7.7 percent in 1972 (Specter, \textit{supra} note 81, at 1094). See also \textit{ABT Associates, supra} note 3, at 100-02.\textsuperscript{96} \textit{ABT Associates, supra} note 3.\textsuperscript{97} See \textit{R. \textit{Nimmer}, supra} note 10, at ch. 7; Henschel \& Skrien, \textit{Operation De Novo}, 1972 \textit{Hennepin Lawyer} 26 (May/June).\textsuperscript{98} \textit{ABT Associates, supra} note 3, at 91-115.\textsuperscript{99} \textit{Id.} at 107-10.\textsuperscript{100} \textit{Id.}
As a result, only a portion of the comparison group was obtained by random assignment, and over one-half were obtained by a search of court records.\textsuperscript{101} The overall group is thus subject to the same deficiencies noted for MCEP and for Crossroads. Although ABT found that control and participant groups were demographically similar,\textsuperscript{102} they could not control for similarity of motivation or underlying addiction problems.

Even with this limitation, the conclusions suggested in the ABT report are questionable. In an initial comparison, the study manually searched criminal records to derive recidivism data, but no significant differences in recidivism were found.\textsuperscript{103} In a second effort, the study drew random samples of fifty successful participants, fifty failures, and fifty of the original sixty-seven person control group.\textsuperscript{104} For an initial three month interval, recidivism data was obtained from three sources: manual search of local records, local computerized court records search, and statewide computerized criminal records search.\textsuperscript{105} A comparison using all three sources found no significant difference between the comparison group and participants.\textsuperscript{106} A comparison that utilized the two computerized sources did, however, show a sharp differential.\textsuperscript{107} For the fifteen month interval following this initial three months, only the computerized records were used.\textsuperscript{108} The ABT report presents tests of statistical significance for each comparison and notes that all are “significant,” except the “all source” comparison (the most complete) and the ten to fifteen month interval.

The two other studies are more plausible, but provide only limited support for a conclusion about counseling impact. The first was conducted in Des Moines, Iowa, and it encompasses not only diversion counseling but also a bail review program designed to reduce pretrial confinement.\textsuperscript{109} The study design was initiated under a random assignment model.\textsuperscript{110} Applicants were fully screened, and eligible defendants were then randomly assigned

\begin{center}
\begin{tabular}{lcccccc}
\hline
 & All Sources & & & & & \\
 & 1-3 & 1-3 & 4-6 & 7-9 & 10-15 & 16-21 \\
\hline
Participants & .21 & .08 & .05 & .07 & .10 & .08 \\
Controls & .30 & .28 & .28 & .24 & .20 & .19 \\
\hline
\end{tabular}
\end{center}

a Number of months after beginning of study.

\textit{Id. at 111.} Interestingly, the report also indicates that, as between favorable and unfavorable terminations “there is clearly a strong argument . . . that over the long-term, unfavorables are rearrested no more often than favorables.” \textit{Id. at 182.}

\textsuperscript{109} See F. Miller, \textit{supra} note 74, at 50.

\textsuperscript{110} Id.
to the counseling program and normal prosecution.\footnote{111} Although the differential was reported as statistically significant under a Fischer test,\footnote{112} the results may be questioned. The random procedure was not routinely followed\footnote{113} and a test of demographic data indicated that the two groups were dissimilar on variables potentially relevant to recidivism.\footnote{114} The differential may have resulted from deviations from the random procedure. More likely, it is a result of the small size of the control group. Random assignment does not imply that similarity of composition will invariably occur, but only that systematic bias is not introduced. The probability of similar groups increases as their numerical size increases.

The final study\footnote{115} was conducted in Dade County, Florida. The Dade County program was similar to the other job placement programs. The study followed a random assignment procedure, placing 20 percent of all eligible applicants into a control group.\footnote{116} Based on demographic data, the control group was similar to the participant group.\footnote{117} Although the study represents some proof of counseling impact, at least two problems are present. First, one year after the program began rearrests were examined and reported for all control group members, but only for participants in the diversion program who had completed the program. As a result, the different periods of time and exposure to rearrest may explain the difference in rearrest rates. Second, the differential might be partly explained by control group reaction to being informed that, although eligible, they would not be diverted.\footnote{118}

Beyond this limited and misleading data on recidivism, diversion programs also cite data on employment of participants to document their counseling impact.\footnote{110} At best, the data document improvement during the

\begin{center}
\textbf{PERCENTAGE OF PERSONS REARRESTED IN DES MOINES}
\end{center}

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<tr>
<th></th>
<th>Participants</th>
<th>Controls</th>
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<tr>
<td></td>
<td>20 (157)\footnote{112}</td>
<td>31 (35)</td>
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\footnote{112} Number of persons studied.

F. Miller, \textit{supra} note 74, at 50.

\begin{center}
\textbf{PERCENTAGE OF PERSONS REARRESTED IN DADE COUNTY}
\end{center}

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<tr>
<th></th>
<th>Participants</th>
<th>Controls</th>
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<tbody>
<tr>
<td></td>
<td>8.8 (161)\footnote{113}</td>
<td>20.6 (34)</td>
</tr>
</tbody>
</table>

\footnote{113} Number of Persons Studied.

The differential is significant in a test of chi square. Petersen, \textit{supra} note 69, at 97-99.\footnote{116} \textit{Id.} at 95.\footnote{117} \textit{Id.} at 98.\footnote{118} See generally D. Campbell \& J. Stanley, EXPERIMENTAL AND QUASI-EXPERIMENTAL DESIGNS FOR RESEARCH (1963). The Dade County study also suffers from problems inherent in the small size of the control group. R. Rovner-Precznek, \textit{supra} note 87, at 36.\footnote{115} See R. Rovner-Precznek, \textit{supra} note 87, at 55-73.
intensive placement activities while a client is in the program, with marked decay in subsequent months.\textsuperscript{120} No comparisons are made between participants and nonparticipants.\textsuperscript{121}

\textbf{C. Costs and Benefits}

In an effort to establish diversion as a useful and effective reform, supporters of several diversion programs have presented analyses described as cost-benefit assessments.\textsuperscript{122} Cost-benefit analysis attaches estimated dollar values to the projected impacts of a policy change and compares positively and negatively assessed changes. The analytical procedure requires a plausible basis for projection and an estimation procedure that approximates reality. In the diversion context, sufficient reliable data are not now available. For example, costs associated with recidivism rates and employment patterns would be highly relevant, but no basis exists on which to estimate them reliably.

In the absence of the necessary information, the only question that can reasonably be asked is whether the presence of a diversion program represents a net increase or decrease in the total dollars expended on case processing in the criminal justice system. Most cost-benefit analysis contrasts the per client expense of diversion counseling with the per defendant cost of court processing and the per client cost of either probation or incarceration.\textsuperscript{123} The comparison yields the conclusion that traditional processing is more expensive. However, the relevant issue should be whether it is cost-beneficial to maintain a criminal justice system including a diversion program. Since, absent marginal dollar savings, most diversion programs add an annual cost of over $200,000 to system expenditures, clearly documented benefits in recidivism, employment, or other client performance measures would be necessary for an affirmative answer.

\textbf{IV. Conclusion}

Cloaked in substantially more enthusiasm than the data warrant, pretrial diversion in the criminal justice system must be critically reassessed and reevaluated. The research and analysis to date are greatly deficient and do not answer the question whether diversion is desirable.

The dominant opinion that diversion is successful can be dissected into a number of subpremises. A brief review suggests that none of these subpremises are supported by currently available data.

\textit{Diversion counseling more effectively reduces recidivism than would a similar counseling format in a different context}. Since evaluation studies

\textsuperscript{120} ABT ASSOCIATES, \textit{supra} note 3, at 118.

\textsuperscript{121} Only the ABT study of Project De Novo presents comparative data, and the data is subject to the same criticisms about comparability of groups noted earlier. \textit{See} text accompanying notes 96-102 \textit{supra}.

\textsuperscript{122} \textit{See}, e.g., J. HOLOHON, \textit{supra} note 77; MCEP REPORT, \textit{supra} note 18, at 50; Peterson, \textit{supra} note 69, at 99-104.

\textsuperscript{123} \textit{But see} Note, \textit{supra} note 80, at 849-50. \textit{See generally} R. ROVNER-PRECZNEK, \textit{supra} note 87, at 92-102.
have not compared diversion counseling with similar counseling techniques in other settings, current research offers no support for this.

*Diversion counseling more effectively reduces recidivism than do normal modes of case processing and correctional services.* This issue has been addressed, but not answered. With one exception, current program evaluations contain irreversible errors. Only the Dade County data may offer some limited support if analyzed to account for differential exposure to potential rearrest and the small size of the control group.

*Diversion produces employment gains in comparison to similar correctional programs or in comparison to traditional case processing modes.* Again, there are no data on the first comparison and unreliable data on the second. The effect is unknown.

*Diversion reduces court congestion.* This statement may be accurate for informal diversion programs that handle sizeable proportions of a court’s caseload. For the new programs, the effect is most often limited to the less than 4 percent of the cases reached.²⁴

*Diversion is acceptable to the traditional legal system participants.* This statement could have been documented prior to the new diversion movement since informal diversion was an auxiliary from the perspective of judges, prosecutors, defense counsel, and defendants. For most new programs, experience documents that the concept is functional and utilized in 1 to 4 percent of a court’s caseload.

*Diversion produces no harmful effects on clients.* Although a firm answer is not available, diversion may result in control of some defendants who would otherwise not have been convicted. Further, current modes of acceptance and termination create a potential of abuse.

*Diversion ameliorates the severity of treatment imposed on defendants charged with crime.* This statement is accurate from the standpoint of formal labels only as applied to successful clients who receive dismissals and would otherwise have been convicted. Its accuracy in terms of the severity of supervision imposed is unknown.

*Diversion is a cost-beneficial reform.* No reliable data exists.

*Diversion reduces current system expenditures.* This conclusion is not supported as no documented cost savings have been identified. Arguably, the impact is the reverse.

As the summary reveals, empirical support for diversion is unimpressive. Most premises have not been reliably confirmed and several are even questioned. Nevertheless, contemporary enthusiasm remains high.

At the core of the diversion movement is a basic perceptual bias of immense importance to understanding current interest in criminal justice reform. The perception is that the current criminal justice system is an abject failure from virtually any major policy perspective that might be applied to its evaluation. Whether one emphasizes crime control, rehabili-

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²⁴ Some programs do, of course, exceed this limited percentage. For example, Operation Midway and a diversion program in Philadelphia currently divert over 10 percent.
tation, civil liberties, or other themes, the practice of criminal justice ap-
pears almost totally ineffective or even counterproductive. This perception
has represented contemporary wisdom for many years. It has created an
intense drive for change which, in turn, has been fueled by the availability
of federal and other funds to effectuate reforms. Yet the direction that such
change should take is a subject of political and philosophical debate. Ad-
vocates of rehabilitative perspectives press for changes opposed to those
that adherents to a punishment perspective advocate. Crime control view-
points collide with civil libertarian ideals. These debates frequently prevent
a policy consensus and, hence, a full commitment to any single course of
reform activity. Occasionally, however, as with respect to diversion, a rela-
tive consensus is reached. When this occurs, there is a rush to actualize
the reform design and to achieve change. There is little time taken for
circumspection or reflection. Critical review, if it comes, typically begins
too late to rationally inform and shape the reform enterprise. When con-
trasted to the political impetus that characterizes a consensus reform
movement, the processes of research, evaluation, and critique which
question underlying premises and emphasize data are predictably ineffec-
tual. The point is not only that hasty reform movements may cause harm
but that the failure to collect, examine, and integrate the lessons of critical
or objective data reduces the probability that the reform movement will
successfully achieve its own purposes or that the resulting change will in
fact represent improvement. A call for further research is not only
inevitable, evaluation in the context of pretrial diversion is urgently needed.