Diversion Programs for Adults

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EXECUTIVE SUMMARY

This is a review of evaluated programs to divert adult offenders from further involvement with the criminal justice system. It focuses on “programmatic” diversion efforts and is organized according to the stage in the criminal process at which the diversion initiative occurs. Because of the paucity of evaluations of adult diversion, some findings from the juvenile literature are included. In addition, some ideas from other jurisdictions which may not have been evaluated are reviewed for their possible utility in Canada.

Although there are very few sound evaluations available in the area, they do point strongly to a number of findings, which are echoed in the juvenile literature. Some studies suggest that cases which are “diverted” through a formalized police procedure might never have been arrested, but the existence of the formalized procedure creates a record of police contact which follows the offender. Cases which are diverted post-charge are more likely to be dismissed on successful completion of the program. However, controlled studies indicate that large proportions of offenders “diverted” at this stage would not have been fully prosecuted, convicted or given a significant sanction if they had proceeded through the usual course of the justice system. Rather, attempts to formalize the discretion to divert cases tend to “widen the net” of social control. A lengthier and more intensive intervention with the offender will often result from diversion than from the more traditional process.

Diversion programs tend to be seen and used as a “break” given to first offenders, younger offenders, those suspected or accused of minor offences, and those who are considered to present little if any future risk. Cases which may be difficult to prove in court also appear more likely to be diverted, as are cases of mentally disordered offenders. For offenders who do not fit these categories, diversion is less likely to be seen as appropriate.

At the sentencing stage, efforts to divert “prison-bound” offenders from jail also face challenges in identifying offenders who are truly “prison-bound”, obtaining services for them which will make a difference in sentencing, and convincing judges that the severity of their offence should not result in a jail term. Serious offenders for whom a community sentence plan is rejected by the sentencing judge may face a more severe penalty than if no plan had been presented. Nonetheless, there is some evidence to suggest that diversion at the sentencing stage may have a beneficial impact on some offenders’ likelihood of being sentenced to the community.

Many diversion programs which are “programmatic” have faced problems common to correctional initiatives, in that the intervention may not be suited to a large proportion of the client group, may not be well implemented, and may fail to

make a difference in the areas which they are intended to address. The few studies which have compared the recidivism of diverted cases to that of a suitable control group have tended to find no significant differences. Expansion of criminological knowledge about the design of effective programs may increase the success of diversion programs in the future.

Expectations that diversion programs will reduce justice system costs have not been supported in the literature. Most programs affect only a very small proportion of criminal cases, some studies have shown that diverted cases experience the same number of court appearances as their controls, and no instances were found of diversion programs which resulted in reductions of justice system expenditures. Indeed, some studies suggest that diversion can increase justice system workloads and that the diversion alternative is more expensive than the traditional alternative.

Studies of the use of incarceration in different countries suggest that it is not crime rates which account for differences in imprisonment rates. While certain factors such as unemployment and public opinion can affect imprisonment rates, it is a nation's internal criminal justice policies which are the most important determinant of imprisonment use. Thus, Canada is in a position to affect current trends in the use of incarceration and other criminal sanctions.

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Diversion Programs for Adults

PART I. Introduction

This is a report on evaluated programs to divert adult offenders from further involvement with the criminal justice system. For purposes of the review, "diversion" was defined very broadly, and included the most common use of the term (meaning the avoidance of full prosecution through a screening process which occurs after the laying of a charge), as well as processes which occur prior to the laying of a charge and the avoidance of more intrusive measures (such as imprisonment or parole revocation) following conviction.

Diversion has always been a feature of criminal justice, since with certain exceptions, the exercise of discretion is permitted and even encouraged at most stages of the justice system. The present review, however, for the most part concentrates on specific, evaluated efforts to reduce further system insertion for a targeted group of persons who come to the attention of justice officials.

The review excludes purely descriptive accounts of adult diversion projects, and concentrates on "programmatic" initiatives. Thus, the report covers only those evaluated studies of adult diversion programs which were intended to address offenders' risks and needs through program intervention. This eliminated alternative forms of punishment in the community (such as "shock incarceration" to short-term "boot camp" programs) and alternatives which were purely incapacitative in nature (such as house arrest or electronic surveillance).

Purposes of Diversion

Over the years, a number of differing objectives have been established for diversion initiatives. Palmer (1979:14) suggested that broadly, there were five goals of diversion: "(1) avoidance of negative labelling and stigmatization, (2) reduction of unnecessary social control and coercion, (3) reduction of recidivism, (4) provision of services (assistance) and (5) reduction of justice system cost". Other analysts have added or elaborated, pointing to the objectives of reversing the uneven imposition of serious sanctions onto those who are already socially disadvantaged, avoidance of the harsh and criminogenic impacts of prison in particular, informing and providing a range of alternatives for decision-makers to choose from, providing a "more satisfying justice" for victims and communities, and dealing with the social, economic and personal factors associated with crime, in preference to the often punitively-oriented alternative.

These are ambitious goals, and Palmer noted that they were not necessarily congruent. Decker (1985:208) suggested that because of the existence of

“multiple goals, ineffective ranking of priorities, and competing objectives, many diversion programs are likely to produce outcomes at variance with their ideal”.

These issues will appear repeatedly in the studies surveyed in this review. Competing objectives are commonly cited as a key problem. For example, the goal of providing assistance to accused may be in direct opposition to the goal of reducing system costs and labelling. The need to set priorities among various goals also appears frequently in the literature in discussions of “net-widening”. For example, the desire among diversion and criminal justice staff to see offenders placed in programs which may assist them to stay out of trouble in the future may conflict with the goal of reducing the catchment of social control and intervention “nets”.

It is also worth stating that, in the years following the initial enthusiasm for diversion as envisaged by Palmer, many jurisdictions saw a distinct change in the dimensions of the “alternatives” debate. In the late 1960s and early 1970s, there had even been an active controversy as to the relative merits of “true diversion” (screening out, without further consequences) versus “conditional diversion” (to a program different from traditional processing). By contrast, the late 1970s ushered in a return to a conservative arc of the endless criminal justice cycles of liberal and conservative reform. In the latter period, the central questions became more ones of whether existing justice system elements should be tightened and toughened, rather than whether they should be avoided by large numbers of delinquents and adult offenders. Thus, the “alternatives” debate in the U.S. in particular is now about intensive probation, “shock incarceration”, electronic surveillance, probation supplemented by day reporting centres with daily drug testing of offenders, and parole release to “home arrest”. These “intermediate punishments” and other reforms have virtually monopolized the American “community corrections” scene, to the extent that there is less research being conducted on diversion and programmatic alternatives now than twenty years ago.

Evaluation of Adult Diversion

Two decades ago, as enthusiasm for diversion was at its peak in North America and elsewhere, early reviews of the research and evaluation literature routinely lamented the paucity of controlled research in the area. A typical lament is offered by Mullen (1975:1): “Regrettably, enthusiasm for diversion has grown with surprisingly little validated support from the evaluation literature. Thus, [a review of the evaluation literature on diversion] is largely a commentary on the unknown.”

Despite the intervening years, the above statement is as true today as it was when originally written. There are still only a handful of rigourous, comprehensive evaluations in the field of adult (or even juvenile) diversion which

address the key questions of interest to policy-makers and program specialists. In part, this is due to the rapid decline in the number of controlled diversion projects begun after the mid-1970s and the increased funding and attention to programs aimed at greater control of offenders.

Most “evaluations” are merely descriptions of the process and the flow of cases through the program. These kinds of studies do not allow us to assess many of the key questions in diversion because they do not have a control group or some other method for comparing what happened *in* the diversion program with what would have happened *without it*. Thus, for example, they cannot address one of the most important questions in diversion, which is: would the offender who is “diverted” actually have faced, in the more usual course of business, an outcome which was much different? Or to take another example, the recidivism rate of the diverted offenders looks impressive (or does not), but would a comparable group of offenders who proceeded through the more usual course of business have done any worse (or any better)?

Some evaluations describe several different diversion/treatment modalities and compare their success rates to one another, but also fail to address the questions which are central to the diversion conundrum because they do not discuss the dispositions and outcomes of comparable cases passing through the traditional justice system.

Other evaluations address the “key questions in diversion” but fail to describe the diversion program itself in sufficient detail to give us a picture of what really occurred in the program. Since some studies show that a large proportion of offenders placed in treatment programs actually receive little or no treatment of the type intended, it is important to examine this aspect as well, in order to draw inferences about whether, on the one hand, the treatment was delivered as intended but failed to “make a difference”, or, on the other hand, no difference was found because the program did not deliver the treatment. Diversion studies which measure the actual delivery of treatment are rare. Studies which show the “intermediate” effects of the treatment – did the offenders improve their cognitive skills, did they get a job during the program – are even more rare.

Many evaluations follow only those offenders who successfully completed the diversion program. While this is useful information, it is also important to know how many of the offenders accepted into the program actually completed it – if it was 98%, our conclusions about the program will be different from our conclusions if it was 15%. A similar deficiency in many evaluations is in giving an imperfect understanding of the proportion of the total criminal caseload and the eligible caseload who were accepted by the program, and the reasons why some were rejected.

There are a number of reasons for the paucity of good evaluative research. Sound evaluation requires expertise and care in the creation of methods for

comparing the results of the experiment to what would have occurred had the experimental process not been in place. This kind of expertise (and the time to exercise it) is rarely available to program administrators and workers. The use of external evaluators can be expensive. Then again, for program personnel, the key interest is in getting the job done and making the service available to as many clients as the workload can handle; withholding services from some potential clients in order to form a "control group" for research is the furthest thing from their mission.

However, the important questions about diversion which policy-makers must answer include the following:

- would diverted clients likely to receive a significant sanction (such as imprisonment) if they had proceeded through the normal course of the justice system, or might they have received a minor intervention, or even not been prosecuted?

- what proportion of the total criminal cases in the jurisdiction were, or feasibly could be, diverted to the alternative, and are they more than just minor cases?

- were the diverted clients assisted by the services (if any) provided to them?

- following the diversionary outcome, did the diverted cases fare better, worse, or about the same as comparable cases which proceeded through the more usual processing of the justice system?

- what savings are produced, if any, to the justice system and the public purse through the operation of the diversion initiative?

These five key questions are central to any comprehensive understanding of whether any given initiative will fulfill the objectives of diversion.

Much has been said about whether "alternatives" in justice are being held to a higher standard than the more routine actions of the traditional justice system. To some extent, this concern is justified. If an alternative program produces outcomes which are at least as good as (or no worse than) those produced by the more usual route, alternative program administrators may still find themselves in a constant struggle to justify and maintain their funding, especially if they are seen by the formal criminal justice system as an adjunct, an "add-on", or a short-term experiment. Nonetheless, this concern does not relieve policy-makers and researchers of the burden of asking probing questions about the real impact of the alternative.

Although this report focusses on evaluative studies, the rarity of sound evaluations in the adult diversion area required some consideration of studies in

the juvenile area, to the extent that they were relevant. Other interesting ideas which have not yet been subject to rigourous analysis were also referenced. Thus, a certain amount of speculation about other ideas which might be tried or expanded in Canada is included.

The discussion which follows is organized according to the stage in the criminal justice system at which the programs occurred. This is certainly not the only possible way to organize the material. Depending on the audience, it could have been organized according to the type of "programmatic" intervention offered, according to the issues, chronologically in an attempt to trace the development of thought and programming in the area, according to the type of research design, or in any number of other ways. The method chosen was intended to reflect the varying system constraints which pertain to the different stages of the justice system, and the orientation towards a particular stage which characterizes the work experience of so many justice system officials.

PART II. Pre-Charge Diversion

Although police diversion is usually not "programmatic", and formal police diversion often targets juveniles in preference to adults, police diversion is worth noting because it serves to introduce some of the key issues in the diversion field generally. Much of the discussion which follows is based on studies of police diversion of juveniles and what can be learned from these studies.

Diversion by police is, of course, a daily occurrence, possibly even in countries like Germany where police are mandated to investigate and report in writing to prosecutors on all penal code violations. However, some studies suggest that attempts to encourage police diversion and make it more formal have the unintended effect of increasing the number of offenders who come to the official attention of the justice system and creating a permanent record of their contacts.

An article entitled, "Police diversion: an illusion?" by Dunford (1977), although focussed on juvenile diversion, is useful for its cautionary lessons, and is echoed in his later evaluation of two programs for police diversion of juveniles to "programmatic" alternatives (Dunford et al., 1982). Dunford suggests that there are several reasons to exercise care in considering police diversion of juveniles to programs intended to assist them. First, youth who would otherwise have been simply screened out by police are placed in programs because police are of the view that they are in need of corrective treatment. This in itself may or may not be undesirable, but Dunford also suggests that many "diverted" youth receive no services at all, despite the intention to deliver service, and others receive so little, or receive service which is so irrelevant to their needs that no useful purpose is served. Many youth service agencies are under such pressure to be cost-efficient that they will accept large numbers of clients even though they are under-resourced to serve even a minority of them. The service which they could

provide theoretically to youth who really need it thus becomes diluted by the sheer numbers accepted.

Diverted youth, Dunford finds, are subject to more record-keeping than they would have been if screened out. They are breached for non-criminal violations of program conditions and actually are subject to detention more than their counterparts in the traditional justice system. Dunford suggests that the principal distinction between youth diversion and traditional processing is the relative differences in due process safeguards. Finally, his random-assignment evaluation (1982) found no significant differences in rearrests between youth who were diverted with services, those diverted without services ("lectured and released"), and those processed through the justice system. Self-reported recidivism showed the same pattern. This study actually evaluated four very different juvenile diversion programs, offering a range of services aimed variously at case advocacy, crisis intervention, referral to and brokerage with a number of different service agencies, and direct counselling.

Lerman (1975: 6-7), in a study of youth diversion programs in California, also questions their impact on decarceration:

> An examination of social costs and benefits indicates that community treatment can also include an appreciable amount of deprivation of liberty. A detailed presentation of the evidence … discloses that offenders placed in the CTP [Community Treatment Project] experimental group experienced more detention stays than those youth placed in the regular CYA [California Youth Authority] parole program (control group). CTP parole agents were much more likely to bring their wards physically to a lock-up facility for reasons that did not pertain to renewed delinquency. The reasons given included violations of treatment expectations, accommodation to community complaints, administrative convenience, diagnostic purposes, and the prediction and prevention of "acting out" behavior. The broad scope of reasons, the loose procedures for initiating a lock-up, the failure to distinguish between serious and non-serious deviance, and other practices produced an array of discretionary decisions that appear to be arbitrary and unfair.

Ditchfield (1976) studied police cautioning of criminal offenders in England and Wales. Used principally for juveniles, "formal" police cautioning was officially encouraged in the 1969 *Children and Young Persons Act*. Regarded as an alternative to prosecution, formal police cautioning almost invariably takes the form of an oral warning by a senior uniformed police officer. It is to be used only where the offender admits his guilt, police believe they have a provable case, and the complainant does not insist on a prosecution.

This practice has been tracked in official statistics since 1954. Using time series data for all of England and Wales, Ditchfield found that from 1969 to 1974, the

use of cautioning doubled in absolute numbers and significantly increased as a proportion of total outcomes of police-juvenile encounters (i.e., as opposed to going to court). However, the numbers of juveniles found guilty in court remained virtually unchanged despite the "undoubted increase in juvenile crime" during the period. Ditchfield concluded that the use of cautions has therefore been at least partly diversionary.

However, because of the increased formality of the procedure and the more systematic police procedures for dealing with juvenile offenders, Ditchfield (1976) suggested that the increase in cautioning may have had an "inflationary" impact on the recorded numbers of known offenders. Shopkeepers and social service agencies, knowing that cautions were being encouraged, may have been more willing to call police where previously they might not have. Furthermore, police may have used the formal caution where previously only an informal warning or other NFA ("no further action") would have been taken. Those areas in the country where cautioning was used most also recorded the largest increases in the numbers of "known offenders".

For adults, Ditchfield found that the formal caution was used mostly for shoplifting and other minor theft. He also found an inverse relationship between cautioning rates and court rates of discharge of adult offenders found guilty. In other words, the outcome for minor adult cases may simply, as a result of the active use of cautioning, be decided at an earlier stage. However, Ditchfield questioned whether police cautioning was cheaper than discharge. In urban areas, courts are nearby and cautioning can actually take more police time than a court appearance where a non-salaried magistrate is the adjudicator. In addition, fines paid in magistrates' courts partially offset the costs to the justice system.

Sanders (1988), wrote a later and very critical review of police cautioning of both juveniles and adults in England and Wales. "Informal" cautioning at the police station, endorsed in Home Office guidelines in 1985, creates a permanent police record which is available to the prosecution, although informal cautions are not part of the annual cautioning statistics. A formal caution, invoked at a higher level of police authority, can be cited by the prosecution in later court appearances, and a formal caution is more likely than an unofficial warning to be followed by a second formal caution. While in and of itself, this might not be a matter for concern, Sanders suggested that there are difficulties with the way in which police use cautions.

From his reading of cautioning reports and conversations with police and Crown officials, Sanders (1988) suspects that net-widening is a reality, since cautioning is an alternative not just to prosecution, but to NFA (taking "no further action"). Police sometimes use cautioning where the evidence in the case is weak and the accused may be willing to accept a caution in order to end the incident. Sanders also found wide and unjustified disparity in the use of cautioning within and between offences and police forces. The interests and needs of victims, he

suggests, are rarely taken into account. It may be that prosecution would serve victims better by, for example, opening up the possibilities of restitution. Since cautioning does not lead to referrals for service in this system, moreover, help which the accused may need is not arranged.

Pre-charge Diversion: Discussion

What can be inferred from this brief review of a few studies of police diversion? First, there is reason to believe that formalizing the use of police discretion to divert may in fact increase "labelling" and widen the net, creating a formal record which would not otherwise exist, and which will follow the offender, possibly affecting future dispositions in ways which are unintended. This is not to say that this effect is necessarily undesirable if the intent is to enhance police information about offenders. However, if the intent is to bring about "true diversion", the effect may be counter-productive.

Second, diversion without "programmatic" or other consequences may fail to serve what Sanders (1988:528) refers to as the "expressive" and "utilitarian" aims of prosecution, including denunciation of offences and reconciliation with victims. This view proceeds from a set of assumptions which are the reverse of the view that penetration into the justice system tends to be destructive. Sanders' view rejects that premise as unproven at best, and goes back to questions around the fundamental aims of the law. Of course, no single theoretical view can encompass all the variants of offences and offenders which present themselves. For example, Sherman and Berk (1984) found, in a study which subsequent researchers have had difficulty replicating (Garner, Fagan & Maxwell 1995), that domestic assault offenders had a lower repeat-incidence rate when they received counselling (19%) than when they were separated from their victims (24%), but formal arrest was even more effective (10%).

Third, there is little evidence from the juvenile literature that police diversion to "progammatic" alternatives has had the intended impact of effectively diagnosing and serving the needs of youth. For various reasons, including staff selection and training, caseloads, funding restrictions, and other difficulties in delivering effective treatment programs, the hoped-for impacts have not materialized (see, e.g., Dunford, 1982). In fact, the detection of recidivism may be enhanced by increased contact with program staff, violations of the conditions of diversion may lead to higher rates of detention, and the failure to live up to program expectations may increase the offender's chances of receiving a stiff penalty if returned for processing in the justice system.

Diversion of the Mentally Ill from Justice Processing

Although no rigourous evaluations were found of programs for diverting the mentally ill from pretrial detention and later justice processing, some process descriptions serve to shed light on the more effective approaches.

There is no question of the importance of diverting mentally disordered persons from the justice system. Questions of diminished criminal responsibility aside, the justice system is ill-equipped to deal effectively with such persons, including problems of treatment, safety, and control which they present in the correctional population. Their diversion into settings where their needs can be better met and the risks which they present to themselves and others can be better contained is therefore considered generally desirable by jail administrators and other justice system officials. Unfortunately, with the deinstitutionalization of much of the mental health system, mentally disordered persons have increasingly found themselves in the justice system. Estimates of the percentages of seriously mentally disordered persons in local jail systems at any given time vary markedly, from three percent to 16 percent. Early identification of mental disorders in arrested persons and appropriate action are critical to an integrated response to these situations.

Steadman et al. (1995) paid field visits to 12 jail diversion programs rated as highly effective and six rated not highly effective by the local jail administrator, the mental health system official closest to the program, and the program director. Based on their observations, six characteristics were found present in all the effective programs. First, there was close communication and cooperation among the mental health system, justice system and social service system at the local level; formal interagency agreements were considered “essential” by half the program directors. One noteworthy program used an interdisciplinary team of 10 members who work intensively with up to 100 forensic clients at a time. Also involved closely in the workings of the program were representatives of the judiciary, the public defender’s office, prosecutors, probation, and the jail services supervisor.

Second, there must be regular meetings of representatives of the three systems, both at the service delivery level and at the policy/administration level. Third, it is helpful to have a designated person who is responsible for liaison among the three systems; this person is the “glue” that holds the various program components together. Fourth, there must be strong leadership which eventually turns informal cooperative relationships into institutionalized ways of working together. Fifth, jail inmates must be assessed early in the process – an initial medical assessment within 24 hours and a more in-depth mental health screening within 48 hours were recommended. Sixth, there must be active case management at all stages including intake, linkages with needed services, information and advice to the courts, monitoring of service delivery, client advocacy and direct service provision. The researchers found (1995: 1634) that very few of the programs which paid careful attention to linkages with community-based services “had any mechanism to ensure that the initial linkage was

maintained". They suggest that this is a final characteristic of long-term effectiveness.

McDonald and Teitelbaum (1994) assessed a privately run day treatment program in Milwaukee which had many of these characteristics. Offenders were ordered into the program as a condition of pre-trial release, probation, or some other court order. The average client was a man with two prior arrests, a diagnosed major mental illness, and an average of 75 days in a psychiatric facility in the previous two years. Priority was given to "referrals that represent a genuine alternative to incarceration". The program offered a range of services, including required daily attendance, the provision of medications, individual psychotherapy and group therapy, and assistance with housing, money management and health and social assistance.

Some indirect measures were found of the program's success at diverting some of the estimated 1000 mentally ill arrestees annually (the program has the capacity to serve about 250 clients at any given time, and the average stay in the program was 18 months). During 1992, the program accepted 67 clients; 30 others were referred to other community-based support programs, and 40 others "remained in custody through the end of the year and therefore were not eligible for admission to the program" (1994:5), apparently because of the program's capacity limits. Another indication of the catchment of this program was in the discharge status of the 84 persons who left the program in 1992. Of these, 57% performed successfully in the program until the end of their legal obligation (three-fifths of these declined the offer of a referral to another, less structured program afterwards), 18% were jailed for a new offence or a violation of the terms of their court order, 14% were transferred to a residential treatment facility, and 11% died, disappeared or moved to another state.

An unattributed article entitled "Diverting the Mentally Ill from a County Jail" (1987) describes the Alternative Community Treatment Program (ACT) in Orange County, California. This program also had a close collaborative relationship with the justice, mental health and social service systems, and "active case management". It attempted to divert from county jails inmates with three or more incarcerations for "minor law violations" within the previous 12 months, a primary diagnosis of a major mental disorder, and a substantiated history of chronic dysfunction due to the mental disorder. During 1984/85, 58 inmates were served by the program, for an estimated net reduction of 989 jail days (how the estimate was obtained was not detailed). Dispositions included 22 referrals to inpatient facilities, 23 to outpatient mental health, one to a halfway house, one to a drug abuse service, and four to temporary shelters.

These studies tend to suggest that it is possible to divert from pretrial detention seriously mentally disordered persons and place them in more appropriate settings, although how long some of them will remain out of jail is an open question. Effective strategies involve close working relationships between mental

health, social service and justice administrators, processes for early identification of mentally disordered offenders, active case management and long-term follow-through on service delivery to meet offenders' needs.

PART III. Deferred Prosecution

More evaluative research work has been done in the area of deferred prosecution than in any other diversion area. Doubtless this is because of the hopes placed on the viability of diversion at this stage, and the relatively visible and structured processes which attend this stage. A typical deferred prosecution would involve an agreement between the prosecutor and the defendant, post-charge, to suspend proceedings for a period of time during which some kind of intervention with the accused occurs. Following successful completion of this program or process, the case is referred back to the prosecution and a decision made as to dismissal or withdrawal of the charges. The key benefit to the accused is the avoidance of a criminal conviction.

Among the key questions for policy-makers in assessing the operation and impact of deferred prosecution processes are:

- how are cases screened for potential deferred prosecution? In particular, what kinds of offences are involved and what kinds of risks do the accused present?
- what would have been the likely outcome of the case had prosecution not been deferred?
- what proportion of accused choose not to accept the alternative, and why?
- what proportion of the total criminal caseload are ultimately streamed into the alternative?
- what kinds of assistance or other intervention are the accused given, and to what extent do they benefit from it?
- what proportion of deferred cases succeed within the program, and for what reasons do accused "fail"?
- what is the impact on cases which succeed or fail, in terms of case dismissal and judicial outcome?
- are successfully deferred cases more or less likely to recidivate than in-program failures or cases which proceed directly to court?
- what is the cost of operating the alternative, and what are the savings to the justice system?

Answers to these key questions will determine whether the process for deferred prosecution will make a real difference to offenders, victims and the justice system, and to the kinds of differences experienced.

What kinds of adult cases are screened for deferred prosecution?

A number of studies have described the types of adult cases selected for deferred prosecution. In the main, these findings confirm data from the juvenile field: it is the less serious and less "risky" cases which tend to be selected for this alternative. This includes a considerable proportion of cases which would not have been fully prosecuted if the diversion program had not existed.

Pretrial diversion (PTD) programs largely began in the juvenile justice system, and many programs continue to serve juveniles exclusively. Adult pretrial programs arose out of the experience initially gained through work with juveniles. To this day, the criteria governing many formal pretrial programs exclude from eligibility repeat (or persistent) offenders, addicts and alcoholics, offences against the person, and serious felonies. Most such programs, however, tend to make exceptions to these exclusions on a case-by-case basis.

A majority of persons selected for diversion tend to be accused of theft (shoplifting is an especially common offence) or drug possession. They also tend to be first- or second-time offenders. Many, however, have significant life problems which can affect their likelihood of criminal activity including low educational levels, a history of unemployment or underemployment, poor social adjustment and the like. Given the problems exhibited by these potential clients, it is not surprising that many prosecutors and diversion staff adopt the view that affording them the help which is supposedly available through the program is preferable not just to prosecution, but also to taking no action whatever. Especially where potential clients are young and not criminally experienced, moreover, workers understandably believe that it is these persons for whom an intervention now could make a significant preventive difference.

Whatever the reasons, evaluations of pretrial diversion have tended to identify a large proportion of diverted cases which would not have received a significant sentence, or would not even have been prosecuted. This conclusion is reached through research designs which identify (or attempt to identify) a "matched" comparison group or, more rarely, designs which identify a group of cases accepted for diversion and then randomly assigned to diversion or to the traditional prosecutorial process.

Austin (1980), in an evaluation of a pretrial diversion program in San Pablo, California which "closely resembled probation" (plus community service for 22% of participants), found that 90% of diverted clients had their charges ultimately dismissed and 3% received some jail time. This compared favourably to a randomly selected control sample of accepted cases, of whom 7% were dismissed, 21% were jailed (for an average of 14 days), 28% were fined, and 10% were given probation for an average term of 12 months.

Few other evaluations have reported such dramatic differences in dismissal rates, although the differences are significant for some. Pryor et al. (1977), in a well-controlled study, used four control groups for their evaluation of a project in

Rochester, New York. This program was aimed at educational upgrading and employment for defendants. The first control group was individually matched to the experimentals, and virtually identical in key respects. The second group had been accepted into the project but rejected by prosecutors. The third control was judged by program staff to be “not in need of service”, and the fourth was individually matched to the “not in need” group. Among the experimentals (those favourably terminated and those unfavourably terminated, taken together), there was a 79% dismissal rate; this compared to rates of 36%, 32%, 46% and 41% respectively for the control groups. The difference for the third control group, those assessed by program staff as “not in need of service”, was particularly interesting inasmuch as this group received no service, but did receive a positive recommendation to the court.

Many pretrial diversion programs are globally referred to as “court employment programs” (CEPs) because they concentrate on finding work for the accused. One such CEP, the Manhattan Court Employment Project (Vera Institute, 1972), was a pretrial program for unemployed and underemployed offenders between 16 and 60 who had never served more than a year in a penal institution and who were considered unlikely to be sent to jail on the current offence. Once accepted, clients were given assistance with vocational testing, counselling, education, training, job placement and emergency loans. Zimring (1974), in a re-analysis of the data using his own control group (which was not completely comparable), found 52% of defendants who were accepted into the program ultimately completed the program successfully and had their cases dismissed. A virtually identical proportion (51%) of the matched comparison group had their charges ultimately dismissed, not pursued, or the defendant was acquitted. Only seven percent of the comparison group was given a jail term.

Similar results were seen in the comparable Project Crossroads (reported in Rovner-Pieczenik, 1974). In this evaluation, 54% of the comparison group were not convicted and only six percent were ultimately jailed. However, defendants who entered the program were considerably more likely (85%) to complete it successfully and have their case dismissed. Likewise, case outcomes for the comparison group in an evaluation of the New Haven Pretrial Diversion CEP program (as reported in Rovner-Pieczenik, 1974) suggested that 30% of the program intake would not have been convicted, and none would have been jailed. However, 73% of those who were admitted to the program received a dismissal.

Difficulties with evaluative designs may actually under-represent the problem. That is, comparison groups which are matched by researchers on age, offence, prior record, and other relevant dimensions are unable to control for the less tangible factors which may affect both admission into the alternative program and downstream justice decisions, as well as recidivism. Thus, diversion program staff usually apply a set of additional screening criteria which will not be reflected in a retrospective attempt to construct a control sample based on variables found

in paper files. Additional screening criteria can include anything from apparent enthusiasm for the program to drug usage. As will be seen later, the proportions of cases excluded by program staff, prosecutors and others is often quite sizable. Especially where the alternative program is seen as a benefit to potentially deserving clients, there is a natural tendency for program staff to select the most promising clients according to a wide variety of factors.

Nonetheless, a number of evaluations suggest that deferred prosecution programs do confer a benefit on some participants, in that they increase the likelihood of case dismissal. However, the few available studies suggest that perhaps a third to one-half of participants would have had their charges dismissed anyway during the normal course of business. There is no question that, to the extent that these persons undergo sometimes extensive intervention programs, they are subject to what Austin and Krisberg (1981) call "wider, stronger and different nets". As Hillsman (1982:381) says,

> The diversion literature tends to evoke an image of criminal courts that prosecute and convict most cases brought before them, even the less serious ones. Yet the pictures drawn of these courts from a variety of empirical sources … undermine this image. … [M]ost jurisdictions (particularly lower courts where diversion is most common) dispose of many cases with discharges, relatively small fines or other relatively lenient outcomes even when they are not dismissed outright. … Diversion tends to occur in contexts where some proportion of cases (and perhaps a fairly large one) is already screened out or disposed of with some degree of leniency.

What proportion of accused choose not to accept the alternative, and why?

Some studies have examined diversion clients who were accepted into a deferred prosecution alternative, but who did not participate, choosing instead to go to court. The proportions of clients who meet the criteria for diversion but refuse it can be substantial. In one CEP, Baker-Hillsman and Sadd (1980) found that fully a third of the defendants chose not to accept the alternative. This program has been operating in one form or another for many years, and an earlier review (Zimring, 1974) suggested that the defendant refusal rate might be closer to 14%. Perhaps the thirty-year history of the program had caused defendants in that jurisdiction to understand the comparative advantages of diversion better than they did in the beginning.

In Dade County, Rovner-Pieczenik (1974) reported that 48% of candidates refused to participate, although this figure was no doubt inflated by the fact that defendants were invited to participate by mail. A quarter of Operation Midway's screened-in cases declined to participate (Miller, reported in Zimring, 1974), similar to the "no-show" rate observed by Austin (1980). Goetz (1978), in a review of the early stages of an adult diversion program in Nanaimo, British Columbia found that only 4% of defendants rejected the alternative, mostly it would appear on advice of counsel that they could do better taking their chances in court.

In many cases, it would appear that the reasons for nonparticipation can be traced to the relatively intrusive nature or lengthy duration of the alternative, as opposed to the accused's perceived outcome in court. Diversion programs typically are designed to run from three to six months, or up to a year for completion of conditions like restitution or community service. Austin (1980) found that the control group's court-mandated outcomes were lenient, both on an absolute level and when compared with the degree of constraint imposed on the participants in the diversion program. The diversion regime was briefer, however, than the probation sentences given to controls. Similar conclusions were reached by Nimmer (1982), as quoted in Hillsman (1982), and much of the juvenile diversion literature, Bohnstedt (1978), for example, in a review of juvenile diversion programs, found that diversion meant more contact in at least half the cases.

What proportion of the total criminal caseload are ultimately streamed into the alternative?

Some evaluations have attempted to estimate the percentage of all cases which were diverted by the deferred prosecution alternative. Roesch and Corrado (1983: 388) suggest that most diversion projects affect only one or two percent of the "total criminal court case load", largely perhaps because of the "limits on the number of defendants that could be served at a given time". Baker-Hillsman and

Sadd (1981), in an assessment of a CEP in New York, suggest that two percent of eligible defendants were affected. An earlier stage of the same project found that 1.2% of all arraigned felony and misdemeanor cases were diverted (Zimring, 1974). New Haven affected 2% of the total criminal caseload in the court. Austin's (1980) study of San Pablo proves the exception; he estimated that 17% of arrests and 25% of charges were diverted to the program. The reasons for this difference were not clear.

Some programs screen out a majority of the cases initially referred to them. Austin's (1980) study and Zimring's (1974) review of Vera's CEP found rates of screening-out by diversion and/or criminal justice staff of 81% and 85%, respectively. Austin found screening-out decisions to be based on a loosely-conceived collective notion and perceptions of moral character, motivation to change, and criminal intent. Pryor et al. (1977) found a staff screening-out rate of 40%, based mainly on "lack of motivation" among rejected defendants.

It would appear that the limited coverage of most diversion programs is actually a function of at least three factors: the limits on the time and budgets of assigned personnel (including limits on the services which are available to assist accused persons who are diverted); limits on their own and justice system officials' willingness to accept cases which seem "less deserving"; and the perception of some defendants that they could "do better" in court.

What kinds of assistance or other intervention are accused persons given, and to what extent do they benefit from it?

Some evaluations have attempted to assess the extent to which diversion clients have profited from the programs, quite apart from the question (addressed below) of whether recidivism rates were affected by program participation.

Most well-evaluated programs have shown modest, if any, lasting benefits to clients from the diversion services offered them. Most programs have not even attempted to measure "lasting benefits", contenting themselves instead with measuring effects at program termination (which may only be three to six months after initial client contact). This kind of assessment is not only time-limited, but particularly vulnerable to "regression towards the mean", a statistical phenomenon which, for example, would tend to show artificially higher rates of improvement for defendants who, at the time of arrest, were probably at a very low ebb in their personal lives. These defendants have "nowhere to go but up".

In a macro-analysis of the results from all nine "second-round" CEP projects funded by the U.S. Department of Labor, Abt Associates (1974) compared the pre-program and post-program employment situation of "favourables" - those clients who succeeded in the diversion program. (Of course, this tells little about how the diverted clients as a whole fared after the program, since some failed to complete the program because of recidivism during the program or for failure to

cooperate in the program.) While 33% of the "favourables" were employed at intake, 58% were employed at program termination. During the year prior to program intake, according to clients' accounts, "favourables" were employed 45% of the year, and in the year following program termination, the same group were employed 60% of the time. There was also an average 30-cent wage increase for "favourables" over the two-plus-year period. These differences were statistically significant, but it can be argued they could be explained on the grounds of "regression towards the mean" as well as maturation – these predominantly young males may have matured during the two-plus years covered by the research period. In addition, Rovner-Pieczenik (1974) suggests that the job market and minimum wage in many areas improved during the research period, which could also account for the differences observed.

Other studies have reported similar results for programs aimed at vocational and educational upgrading. Crossroads, a project in Washington, D.C., reported 44% employment at intake and 70% employment at termination for all participants (favourables and unfavourables); New Haven reported 38% employment at intake and 68% employment at termination for all participants. Vera's Manhattan Court Employment Project reported 31% employment at intake for the entire group of participants, and 79% employment at termination for program-favourables only. However, a later controlled study (Baker-Hillsman and Sadd, 1981) of the Vera CEP in Manhattan and Brooklyn showed no differences between experimental and control groups in employment rates or earned income after four and twelve months. Defendants were mostly provided with low-paying, menial jobs. There was no impact reported on vocational or educational status for defendants who were not working.

In a study summarized by Galvin et al. (1977b) of Vera Wildcat, a program of six to 24 months of subsidized work for "deep end" repeat offenders with a history of hard drug use, a 40% employment rate two years after program departure was reported. In addition, there was little return to hard drug use (although the program made no direct efforts to work on offenders' drug involvement). By contrast, a British study (Pointing, 1986) of a program of three months' supported work for probationers with a "poor or non-existent" work history but no history of hard drug usage, showed no impact on later work.

Some studies found, based on psychological testing, that participants' self-esteem, self-confidence and self-control increased during the period of the program. In general, however, few evaluations report on the delivery, quality and intermediate results of the services offered in much detail.

What proportion of cases succeed within the program, and what proportion are unfavourably terminated?

Wide variation in rates of unfavourable termination from the programs were found: from 9% to 52% in the evaluations which made this clear (and many do not). These differences do not appear to be particularly explainable from the profiles of the offenders entering them. The exception is Austin's (1980) less serious and more pro-social offenders, of whom only 9% were unfavourably terminated. Rather, terminations appeared to be related more to the degree to which defendants were required to fulfill specific and regular obligations: those who were required to attend training daily had more opportunities to "fail" than those who were under a regime which more closely resembled regular probation, for example.

However, a number of studies (Abt Associates, 1974; Mullen, 1975) have called for less unstructured discretion in the exercise of the termination decision, pointing to the prevalence of reasons linked to "motivation" in termination records. "Motivation", of course, may be a convenient short-hand for a host of perceived behavioural defects in performance.

Are successfully diverted cases more or less likely to recidivate?

Less is known about this question, perhaps, than any other, because of the difficulties of constructing control groups which are truly comparable. A majority of the evaluations in the area which have used techniques for controlling or comparing findings to the diverted group have, in fact, been criticized for weaknesses in methodology (see, e.g., Hillsman, 1982).

The soundest study found in the literature is Pryor et al.'s (1977) review of a three-month program aimed primarily at employment and educational upgrading. They found that 24% of the PTD clients were rearrested after one year (19% of the program favourables and 44% of the unfavourables). This compared to 37% of the individually matched controls, 35% of the cases accepted by the program staff but screened out by prosecutors, 9% of the cases judged "not in need of service", and 19% of their matches. Of course, one year is not an ideal follow-up period; these differences in treatment outcomes could shrink or disappear after two or three years. Interestingly, staff were apparently accurate in their judgments about cases who were not "in need of service": these cases performed best of all. No explanation is offered for the recidivism differences between them, however, and their individually matched controls.

Austin (1980) found no statistically significant differences in recidivism between the experimentals, who were sent to a probation-like program, and randomly selected controls. No other studies were found in which much, if any, confidence can be placed in the comparison. Baker-Hillsman and Sadd (1981) found no

differences between their experimentals and controls in the likelihood of rearrest, the number of new arrests, or the severity of the new offence after four months and after twelve months.

What is the cost of operating the diversion program, and what are the savings to the justice system?

A very wide variance was found among the reported per-client cost for the programs, from a low of $370 to a high of $1020. Some studies report costs per successful client only; in others, it is not clear what forms the client base for the calculation. Other studies report total cost figures for the program only. Many studies suggest a comparison between the cost of the diversion program and the cost of imprisoning its clients (usually employing the average cost, not the marginal cost, of incarceration). One study suggested that the relevant comparison is between the cost of the program and the value of the wages earned by its employed clients! Probably the best simple cost comparison is by Austin (1980), who compared the per-client cost for diverted offenders to the per-client cost for a control group, finding that diversion cost twice as much.

Of course, costing is *not* simple when one considers all the possible factors which could be taken into account. These factors include offences theoretically prevented by treatment (or by being taken off the street and imprisoned), medical costs to victims, taxes paid by offenders who are put to work, relative numbers of court appearances (often found not to be much different for diverted offenders as compared to controls), and so on. In addition, there is no general agreement as to how to deal, in such costing, with certain fixed costs, such as administration.

For all the studies found, however, the bottom line (where it was addressed) was that no savings to the justice system were observed from the diversion program, if by “savings” is meant that probation officers or other officials were released because of reduced workload, courts were closed, or jails relieved of overcrowding. No other result can reasonably be expected from the fact that most programs reach only two or three percent of the cases in the jurisdiction.

Rather, the budget of the diversion program was an additional cost, albeit one which may have benefits. Touche Ross (1976), in fact, found that costs to probation more than doubled after the introduction of a program to divert drug offenders from trial to treatment. This was largely a result of probation officers’ having to conduct extra work in investigations, referrals, monitoring and special counselling programs.

Invoking the Process: An Add-on or a Mandatory Step?

One of the process issues which will dramatically affect the numbers of accused considered for deferred prosecution is the manner in which potential cases are invoked. Some pretrial diversion programs are operated as part of the offices of the prosecution, the courts, or probation. Great variety exists concerning how the screening process is invoked. It may be automatically triggered by virtue of certain case characteristics, or it may be instituted at the discretion of a given prosecutor, diversion staff member, or other functionary.

Other programs, however, are operated as an "add-on"; they are not part of a prosecutorial office and do not operate as a routine consideration by prosecutors and other justice officials. A large number of the programs which have been evaluated are, or began as, initiatives by private organizations which have had to establish their credibility with mainstream justice officials. Following this initial period, the screening process may continue to operate as an adjunct to prosecutorial decisions around proceeding on the charge. The result is that there may be a less than perfect collaboration between prosecutors and those who screen cases for possible deferred prosecution. This will affect the success of the initiative, but some commentators (e.g., McDonald, 1986) suggest that private programs, working from intake referred to them by the defence bar, will have the greatest impact on court caseloads and on marginal cases.

Hillsman (1982:376) in fact suggests that prosecutors may, in many instances, operate from entirely different perspectives from those which supposedly inspire the drive to divert cases from court:

> … [P]rosecutors actively rejected from diversion eligible defendants who were "convictable", and screened into the program cases where there were technical (evidentiary) problems or where the case would normally have been screened out because it was too minor… This decision strategy maximizes their various goals of convicting those who can be relatively easily convicted, and extending some form of supervision to as many other defendants as possible.

Hillsman goes on to speculate that defence attorneys do not object to this strategy because it is also in their interest to support it, since the strategy accomplishes the desired end (dismissal) and does so with a minimum of time spent in negotiation and without the need to use up "favours".

Considerable debate exists in the literature about the ideal placement for pretrial screening programs. Some commentators proceed principally from the view that diversion program staff must be, and be seen to be, independent from both prosecution and defence, in order to maintain both program goals and credibility with decision-makers and others. Many program directors suggest that ideally,

they should be seen as “in the justice system, but not of it”. Musheno (1982) proposes that small, community development-oriented organizations with clear communications lines may be less likely to expand the program’s catchment in ways which would promote net-widening. A review (Administrative Office of the U.S. Courts, 1979) of ten U.S. federal pretrial release service agencies found that the five independently structured programs appeared to have higher initial release rates, lower use of cash bail, lower pretrial detention rates, less use of supervised release, and lower pretrial rearrest rates. The programs which were run by probation departments, on the other hand, appeared to have slightly lower failure-to-appear rates. The same kinds of patterns may pertain to other pretrial services programs as well.

Some deferred prosecution programs operate from an initial screening process by prosecution officials, who then refer the case to staff of the diversion program for their own intake and screening process. Collaborative processes for joint screening of cases by prosecutors and diversion staff together may be closer to the ideal. In the Winnipeg Mediation Services, prosecution and diversion staff jointly review cases from the outset and make the screening decision together. This collaborative process also helps staff from both offices to gain a clearer understanding of each other’s objectives, needs and operations.

The need to involve prosecutors and judges in the initial process of goal-setting, goal-priorization and design of alternative processing has been repeatedly emphasized (e.g., Galvin, 1977; Decker, 1985; Moriarty, 1993). Moriarty (1993: 69) suggests that many criminal justice personnel are not familiar with the diversionary alternative. Surprisingly, he states, “experience in Massachusetts has demonstrated that a number of highly qualified members of the [defence] bar know next to nothing about pretrial diversion”.

Other System Considerations

For deferred prosecution initiatives, it is critical to be aware of other factors relevant to how the justice system operates. Perhaps key among these is the process of plea bargaining. Because deferred prosecution involves processes in which the plea-, charge- and sentence-bargaining processes are still open, it is important to be aware of how the existence of the diversion option affects plea negotiation and vice versa.

Unfortunately, few studies have examined this relationship in any detail. Galvin (1977:Vol.3:13) suggests, without elaboration, that “deferred prosecution can make the diversion program more of a handmaiden to plea bargaining than an option in its own right”. Rovner-Pieczenik (1974:145), in discussing the options for organizational placement of diversion programs, noted concerns that their placement in prosecutors’ offices ran the risk that “the potential abuses of plea bargaining are transformed and expanded into ‘diversion bargaining’”. Especially with naïve, first-time, and job-seeking offenders, lack of information about what

probably awaits them in the traditional system may both increase their desire to participate in pre-trial diversion and provide prosecutors with another mechanism for moving caseloads expeditiously through the courts.

Deferred Prosecution: Discussion

There is a great deal of room for better evaluative studies of adult diversion. In Feeley's (1983: 12) rather pessimistic assessment, "Nowhere are the failures of the diversion movement so glaring as in its evaluation." Little can be said with certainty about much of what has gone on, save that a sizable proportion of the cases who would normally have been dismissed, given a suspended sentence, or fined have been streamed instead into a relatively intensive experience.

On the other hand, it remains to be seen whether this is inevitable. Roesch and Corrado (1983) suggest that diversion has been hijacked and distorted from the original concept by pressures to fit it to pre-existing objectives and perspectives of the traditional justice system.

Among the challenges to pretrial diversion raised by the literature are the following:

Program targetting. Too many diversion programs end up diverting offenders who would not have penetrated the justice system very far. The challenge is to construct and maintain admission criteria which take probable dismissal rates into account and test the limits of what can, and should, be done with those who will not be dismissed. Little needs to be done to improve the performance of low risk offenders, and the resources of the system can be better used elsewhere.

Program placement. As noted above, it would appear that considerable differences are observed in the numbers and types of cases handled by programs, depending on the nature of their affiliation and working relationships with other parts of the justice system. In particular, considerable debate exists around whether prosecutors should screen cases at an early stage, whether diversion staff should work collaboratively with prosecutors, or if diversion staff should be most closely affiliated with the defence bar.

Due process considerations. Numerous critics have attacked the "consequences without conviction" reality of diversion. At the least, they argue, defendants being offered the diversion option should be informed about the true nature of their prospects if they proceed to court. The possibility that clients who fall within the parameters of the diversion program will suffer a harsher penalty as a result also needs to be addressed in an "informed consent" system.

Program quality. Much has been said about the appropriateness of the interventions offered to diverted clients. Too often clients are "cut to fit" the

program, not vice versa. Programs should have more flexibility in assessing case needs and designing responses to the individual.

Mediation and Arbitration Programs

Programs for mediation and arbitration of victim-offender conflicts which come to the attention of the justice system have a place in a discussion of "programmatic" diversion schemes, although that place is not without controversy. Even within the ranks of advocates for "restorative justice" in general and mediation in particular, some division of opinion has arisen as to whether it is even reasonable to speak of rehabilitative aims for victim-offender mediation (VOM).

Theoretical writings in the area, as in diversion generally, point to the negative impact of adversarial systems of justice and their attendant delays, "degradation ceremonies", and punishments (especially through imprisonment), and to the extent that VOM can mitigate these effects, it is argued, there may be a positive, long-term impact on the accused. More than that, however, some VOM advocates suggest that the mediation process may have positive rehabilitative effects inherent in it, from such aspects as giving the accused the opportunity to meet the victim, fully learn the impact of the offence on the victim, gain insight, participate in the decision about the consequences for his/her behaviour, and make reparation. Further, there may be a beneficial effect in reducing the "stigmatization" of clients. Many offenders apparently perceive the VOM process and outcome as fairer than do their counterparts who go through traditional justice processing (see, e.g., Davis et al., 1980).

Other VOM advocates and practitioners disagree, suggesting that, in the words of Marshall and Merry (1990:193), "Any short-term intervention like that offered by these schemes was unlikely to alter patterns of behaviour formed over a long period of time and influenced by strong community, family and peer-group forces."

Umbreit (1994:117), commenting on his finding of no significant difference in recidivism between experimentals and controls in four juvenile VOM programs in the U.S., says similarly:

> It could be argued that it is naïve to think that a time-limited intervention such as mediation by itself (perhaps four to eight hours per case) would be likely to have a dramatic effect on altering criminal and delinquent behavior, in which many other factors related to family life, education, chemical abuse and available opportunities for treatment and growth are known to be major contributing factors.

Indeed, the VOM process itself does not attempt to address criminogenic factors directly, although these may on occasion be addressed in the agreed-upon

conditions of the settlement between victim and offender. Most VOM agreements, however, confine themselves to terms such as an apology, restitution to the victim, community service or a donation to charity, an undertaking to behave civilly to one another, or a combination of the above (Davis et al., 1980; Marshall and Merry, 1990; Umbreit et al., 1994).

Nuffield (1997), in an evaluation of a deferred prosecution VOM program for adults in Saskatoon, found that only 12% of agreements contained a clause requiring the accused, or both the accused and the victim, to obtain counselling or some other therapy, to be assessed for therapy, or to research the available therapies. Her finding that accused who went through VOM had a higher recidivism rate than the controls (who had been screened into the program, but had not proceeded, principally because of victim or offender reluctance) seemed to be explained by the more extensive prior records of the experimentals. She speculates (1997:46) that "to expect mediation to reduce recidivism and prevent crime may be loading it up with more expectations than it was designed or funded to handle".

Dedicated Drug Treatment Courts

An innovation in the handling of "low-level" drug offenders in the U.S. since the late 1980s has been special drug courts. Although many of these are aimed solely at speedy prosecution of drug offenders, there are two dozen or more which target treatment. Variations exist in many program aspects, including the stage at which diversion is available (deferred prosecution or sentence consideration). The program is based on a number of premises. They include, for example, that freedom from drugs is a long-term goal, treatment should begin with detoxification immediately after the "crisis" occasioned by the arraignment, the judge should be actively and frequently in contact with the offender, the program should include attention to education, employment, and family issues, and relapses are to be expected and dealt with in court immediately without resort to lengthy imprisonment.

It is too early to tell what kinds of outcomes to expect from treatment-oriented drug courts, but their advocates are enthusiastic (see, e.g., Tauber, 1994; Dickey, 1994). The oldest established such court (since 1989), in Dade County, Florida, is a deferred prosecution scheme promising dismissal upon successful completion of the one-year treatment program. It targets felony drug possession defendants with up to three prior felony non-drug convictions and any number of prior felony drug convictions. The program includes counselling, acupuncture to assist with withdrawal pains, fellowship meetings, education and vocational services, along with active monitoring through urine testing and regular court appearances in which the judge inquires into progress. The program had an active caseload of about 1200 cases in 1993.

An evaluation by Goldkamp and Weiland (1993) used a comparison sample of similar drug offenders who had been processed in the years before the introduction of the drug court. Eighteen months after program completion, 28% of successful program graduates had been rearrested, about half the rate for the comparison group. New offences were also less serious, on average, than for the control group. The average time to rearrest for the favourables was 235 days. Bench warrants for clients who failed to appear in court or suffered a relapse in treatment were frequent; fully 54% of clients had at least one bench warrant during the program. Typically, the outcome was from two to eight days in jail, the number of days escalating with subsequent violations. About half the defendants presented with the option declined it, choosing to take their chances in court. Although the program attempted to avoid "net-widening", it is not clear how much was occurring. The program's net cost per completed case was $800 for one year. Most clients, however, contributed to the cost of their treatment, thus lowering the net cost.

PART IV. Diversion at the Sentencing Stage

Diversion at the sentencing stage can take many forms. They include postponement of sentencing pending a referral to an intensive, community-based intervention, and the administration of "new" sanctions such as victim-offender mediation and community service.

Alternate Sentence Planning Strategies

Alternate sentence planning programs, sometimes known as "client-specific planning" (CSP), provide an information/advocacy aid to prosecutors, sentencing judges and defendants. CSP, a term coined by Dr. Jerome Miller, recommends "prison-bound" convicted offenders for an intensive correctional experience in the community which is individually tailored to the risks and needs presented by each case. For that reason, alternate sentence planning is probably more appropriately called a strategy than a program since each program designed for an offender will be unique.

Recommended correctional strategies to maintain the offender in the community may include such diverse elements as intensive surveillance, including electronic monitoring, enrollment in treatment, educational or vocational programs, restitution or community service, new accommodation arrangements (such as group home placement), or even 24-hour supervision by a live-in monitor. The key to the process is to fit the sentence recommendations to the offender and the offence and manage the risk and needs in the community.

Because CSP tries to target serious offenders (e.g., those for whom a prison sentence is being recommended by prosecutors or those eligible for early

release from a prison sentence), its success rate in having community-based plans accepted by authorities tends to vary. Acceptance rates have varied from one-quarter to three-quarters of all cases, with many programs showing acceptance rates clustering around 50% (Yeager, 1995).

In the adult arena, there are a handful of evaluations which address some of the key diversion questions in relation to alternate sentence planning programs. Undoubtedly the most comprehensive is Clements' (1989) study of 117 felony cases for which CSPs were prepared. He compared CSP clients to 141 cases for which no CSP was prepared. Despite attempts to match the comparison group as much as possible, there remained observed differences. Many of the differences suggested that the experimentals were a more serious group. The CSP clients represented about four percent of the total criminal caseload in the courts studied.

Clements' data showed that the CSP clients were indeed convicted of serious charges; 55% were convicted of crimes against the person, and in 33% of all cases the victim had sustained an injury. 40% of the cases involved a weapon (handgun). In terms of criminal history, 64% of the cases had one or more prior convictions, 47% a prior felony conviction, and 38% had a prior custodial term.

Many of the experimental group would indeed have been "prison bound". Clements conducted a regression analysis, a statistical method, in order to show whether, controlling for other factors such as the seriousness of the offence, the fact of having had a CSP presented to the sentencing judge made a difference in sentencing outcomes. He found that it did, but only for those CSP cases whose plans were fully accepted by the court (one quarter of the CSP group). These 29 cases were significantly less likely to be imprisoned than the control group.

Another 28% of the CSP cases had their plan only partly accepted by the sentencing judge, and they were imprisoned at the same rate as the controls. The remaining 47% of the CSP group, for whom none of the recommendations of the CSP were accepted, however, received much higher rates of incarceration than the controls. Clements speculated as to whether a "dangerousness" label became attached to CSP clients for whom the judge did not share the view reflected in the plan. This may also be reflected in the fact that the average probation term of CSP clients was 17 months longer than that of the controls, and the number of conditions applied to them higher. Clements suggested that this is in keeping with the CSP view that many of the clients which CSP seeks to retain in the community actually require more control and assistance than do most probationers. However, this does not explain the differences between the experimental and control groups in this regard. Perhaps the CSP served to identify more of the client's needs and risks than does the average presentence report, and thus raises more warning flags for sentencing judges. Significantly, the overall variance in sentencing was accounted for almost entirely by the seriousness of the offence.

This last finding was also suggested in a study of the Restorative Resolutions program in Winnipeg (Bonta and Gray, 1996). This program targeted cases for whom the Crown has recommended at least nine months in prison. Additional criteria for the program were a history of incarceration and/or breach of probation. The 63 plans submitted to the courts in the first 30 months of the program were analysed. Nearly two-thirds (64%) of the clients were repeat offenders; 76% were unstable in their family or marital relationships; 51% had alcohol or drug problems; and 47% were assessed as having emotional difficulties. Finally, 39% were convicted of violent offenses.

Plans for 86% of the offenders were accepted in whole or in part, and all of these accepted cases were placed on probation. Offenders who had committed a violent crime, however, were less likely to have their plan accepted by the judge.

Another significant predictor of plan acceptance was Crown support for the plan. In 34 cases, the Crown supported the plan, and in all of these, the judge accepted the plan. Since many of these cases would have been instances in which the Crown had initially recommended at least nine months in jail, the CSP could have influenced the Crown's perception of the alternatives.

Bonta and Gray used data on medium-risk probationers to draw comparisons in a one-year follow-up of the CSP cases (which were assessed as being mostly medium-risk as assessed by the Manitoba Offender Risk-Need Scale). The 48 CSP cases for whom a one-year follow-up was available had an 85% success rate (no new arrests), as compared to 72% of the medium-risk probationers.

A number of evaluations of alternative sentence planning have been conducted in North Carolina (Institute of Government, 1990, 1987, 1986). Unfortunately, small sample sizes and shrinkage over time in those samples greatly reduces the generalizability of these studies, but they tend to suggest a positive effect of the programs in diverting offenders from incarceration. Another apparent indication is that CSP makes no difference in cases which may not be "prison-bound". Again, however, for that significant proportion of "prison-bound" CSP cases for whom the judge rejects the plan, there are indications that prison sentences may be significantly longer than for controls.

The Institute also conducted a study (1992) of recidivism among 37,933 non-traffic offenders in North Carolina who received various sentences in the state. The study showed that the 313 offenders sentenced to the "Community Penalties Program" (i.e., a rather intensive form of probation following the acceptance of a CSP) were extremely similar along critical factors to the 6,514 persons released from state prisons to regular parole. These factors included prior record, education, drug and alcohol involvement, and felony conviction. It seemed that the CSP group had indeed been "prison-bound". Interestingly, however, their recidivism rates after an average of 26.7 months was 36%, compared to 41% for

the parolees after the same period, and the CSP group were rearrested for violent crimes less often (6%) than the parolees (12%). These differences remained after controlling for risk-related factors.

Other studies of CSP programs for adults in Washington (Dash et al., 1970) Ottawa (Peters, unpublished,1983, summarized by Yeager, 1992) and Boston (Klausner and Smith, 1991) have been marred by small sample sizes and questions regarding the comparability of control groups.

These few available evaluations of alternative sentence planning for adult offenders suggest that the approach holds some promise for diverting offenders from prison and into a fairly intensive intervention in the community. However, the more intensive the intervention, the more likely that offenders are terminated early, detected in undesirable behaviours, and more heavily penalized in a later proceeding. For offenders whose CSP is rejected in the first instance by the sentencing judge, there may also be a heavy penalty to pay, perhaps more than they might otherwise have received. The proportions of cases where the CSP is rejected are sizable in many programs.

Some of the program aspects and issues raised by these studies echo those found earlier in diversion programs at other stages. They are:

Catchment issues. Targetting offenders who are truly “prison-bound” remains a challenge. The use of clear criteria can be supplemented by prediction instruments which estimate the probability of receiving a prison sentence and the risk of recidivism. Since there are some early indications that CSP may be superfluous for offenders who are not prison-bound, this is a resourcing issue as well as a diversion-effectiveness one. Then again, targetting offenders who are at very high risk to reoffend may be a resource-intensive exercise in futility. Klausner and Smith (1991) described a CSP program for women who committed offences which were in the main not extremely serious. However, their lifestyles were so dysfunctional that fully 72% were unsuccessful in the program. All of the program unfavourables and one favourable were incarcerated within a year, although it is not clear whether it was for failing to meet the terms of their sentence or for new offences.

Timing of Referrals. Alternative sentence planning is time-consuming. It can take 40 hours or more of staff time over a period of several weeks. For this reason, it is important to begin the process at the earliest opportunity. Dash et al. (1970) found that workers needed to become involved in the case immediately after defence counsel was appointed. This necessitated routine screening of court dockets and integrated working relationships with legal aid workers. This was not just because of the advance time needed (or because defence attorneys tended not to call in CSP workers until after they had developed their own strategy in the case), but because of the inseparability of pretrial plea- and sentence-negotiation processes. Dash et al. found that although the program

was aimed at sentences, if the fundamentals of the plan were available early in the process, they could actually increase the likelihood of case dismissal.

Structural placement of the program. A similar issue relates to the ideal organizational placement of the program. Some programs are an adjunct to or a project of the legal aid society or bar association. This seems to increase referrals, especially early referrals, prevent workers from unduly "anticipating" the reactions of judges and prosecutors, and enhance information-sharing with defendants and their counsel. Other programs distance themselves from the defence, aiming instead to present an independent assessment from all points of view. It remains to be seen where the balance of advantages and disadvantages lies.

Resistance from related interests. Many commentators (e.g., Yeager, 1995) have noted that privately-run CSP programs tend, at least at first, to meet opposition from professional groups, probation officers in particular, who may see the program as usurping and interfering with their function. CSP may place an added workload burden on probation and lead to sentence conditions which must be enforced by them, even if they disagree with their application. This can, in turn, lead to difficulties for CSP workers in carrying out their own mission. Yeager notes (1995:26) that in North Carolina, the Office of the State Auditor criticized the efforts of the probation office to "de-stabilize" the Community Penalties Program.

Cost. Alternative sentence planning is expensive, sometimes costing upwards of $2000 per plan. Offenders who are able to pay for this service will not be in the majority, and the cost for the others is likely always to be compared to the cost of presentence reports by probation officers, even though these may not be a comparable service. Since CSPs will not normally replace presentence reports, if they are to be subsidized for indigent offenders, they will represent an additional system cost.

Are Services Provided? Many CSP programs try to "turn around" significant elements of an offender's life before the time of sentencing, even securing a confirmed program placement ahead of time. Doubtless this can have a powerful effect at sentencing, but, depending on the offender, it can be a formidable task. Clements (1987) notes that attempts to secure a job for the offender and place him/her in a residential treatment centre before sentencing were frequently unfulfilled. For programs which do less of this early intervention work, there still remains the question of the capacity and suitability of community services, especially in the case of the clients who might otherwise be prison-bound.

Community Service Orders

There is some question as to whether a discussion of community service orders (CSOs) belongs in a review of "programmatic" alternatives to custody. Certainly, most examples of community service incorporate few if any of the traditional elements of correctional treatment, although its adherents point to the potentially reformative effects of regular attendance at a job site (if only for brief and/or intermittent periods), exposure to pro-social environments and other similar benefits. Pease and McWilliams (1980) suggest, in fact, that community service has been "all things to all men", and this is part of the problem. If community service is to be used as a form of punishment, then it is not always consistent with its implementation. This is demonstrated in examples of lack of consequences for nonattendance, or the nature of the work sometimes assigned.

If, on the other hand, community service is to be treated as a rehabilitative measure, problems are often encountered in finding work which is meaningful (or at the least, not boring make-work) and building contacts with persons who are likely to provide the offender with something of lasting value. Flegg et al. (1976), for example, found that CSO offenders mentioned the importance of the relationship with their work supervisor on the job. The correct supervisor could stimulate the offender's reappraisal of himself and others, provide a role model and give the offender confidence. But for most offenders experiencing community service, "the order will be a grind to the end, perhaps with some small benefit" (spoken by a CSO organizer quoted in Pease et al., 1977a).

Nonetheless, there are a few studies which suggest that CSOs can in fact divert substantial numbers of offenders from custody. These are cases where the offence is considered to merit some additional punitive measure beyond probation, and the offender is not considered a risk to public safety. Pease et al. (1977b) estimated, through indirect measures, that some 46 to 50% of CSOs imposed in England in the early years of its growth were likely used in cases which otherwise would have received a custodial measure. Spaans (1995) arrived at the same proportional estimate with a more sophisticated matched comparison of CSO offenders and offenders given a short custodial sentence in the Netherlands. McDonald (1986) documents a lengthy but successful struggle to increase sentences of "prison-bound" offenders to community service in New York City. Ultimately, after various program adjustments, 52% of community service offenders were estimated by statistical modelling to have been removed from the "prison-bound" population.

How CSO offenders compare, in terms of recidivism, to similar offenders sent either to jail or to a community-based option, is a question which has not been fully explored. Pease et al. (1977b) found somewhat higher rates of recidivism for CSO offenders than for imperfectly matched comparison groups of offenders sentenced to custodial and non-custodial options. McDonald (1986) found higher recidivism rates for the CSO group in two boroughs of New York City, but lower rates in a third.

Day Reporting Centres

Day reporting centres (DRCs) have been in extensive use in England for a few decades, and are growing rapidly in the U.S. Parent's (1995) survey indicates that in 1990, there were 13 day reporting centres in the U.S., and by 1994 there were 114. Parent notes that there is as yet no systematic experimental or quasi-experimental research on DRCs in the U.S., and this may in part be as a result of the wide variation in their application. Depending on state law and policy, they may be available at virtually every stage of the justice process, and their varying profiles are reflected in the enormous variance in the average daily cost per attendee and the widely varying termination rates reported in the survey (from 14% to 86%). Parent notes that many DRCs are targetted at "nonserious, drug- and alcohol-using offenders who do not require residential treatment" (1995: 23), but also suggests that there is a recent trend towards placing at least as strong an emphasis on supervision as on treatment. The norm is a five to six month length of participation in the program.

In England, "probation day centres" service two distinct populations: voluntary clients who may or may not be offenders, and offenders who are required, as a condition of probation, to attend a day centre for up to 60 days. These latter so-called "4Bs" (after the section of the *Powers of Criminal Courts Act* of 1973 which conferred the authority for them) are persons who, it is intended, would otherwise be prison-bound, albeit for relatively short periods of time.

British day centres have a lesser concern with supervisory or control objectives. They focus instead on an intensive program of life skills, cognitive skills, counselling, vocational training, literacy and numeracy training, introduction to computer use, and the like. The emphasis varies from centre to centre.

For clients, it is an intense experience, one which requires almost daily full- or (for employed clients) part-time attendance. Vass and Weston's figures for referrals to Cedar Hill Day Centre suggest that 10% of clients turned down the option "either on the grounds that they could not participate in such activities or because going to prison seemed an easier and often quicker alternative" (1990:197). Vanstone (1986: 101-2) quotes a client who found the regime too taxing:

> I would not recommend this place. This place has messed me up. Of all the institutions I've been in I would not like to come to this place again if it were not for the threat of prison. There are too many personal discussions and so much distrust. It's very strenuous – you have to make an effort to control your behaviour. I'm up against authority here. I can't stand it. I'm anti-authority. It's not heavy but you still feel it.

While there are no experimental or quasi-experimental studies available to suggest precisely how many “4Bs” were in fact diverted from prison, a few studies have suggested that a substantial proportion were diverted. In the most extensive available study of the centres, Mair (1988) reviewed a sample of 867 clients (of both types). He found that they fit a profile of socially inadequate repeat offenders with 60% of the sample as “4Bs”. Of these, 88% were under 30; 87% were unemployed; 67% were convicted of burglary or theft, 11% of violence; 51% had a previous imprisonment; 43% had six or more previous convictions. Mair concludes (1988:17) that “probation day centres may indeed be playing a part as an alternative to custody for those who are given 4B orders”.

Vass and Weston (1990) and Vanstone (1986) agree, although also based on nonexperimental evidence. Vanstone cites data showing the similarity between prison populations and the population of one English day centre in terms of offence profiles, the number of previous convictions, and the number of previous imprisonments. A sample of social inquiry reports (presentence reports) for the same centre showed that in 79% of the reports, probation officers “raised the possibility of imprisonment”. In 83% of the cases in which the recommendation for day training was not followed, a custodial sentence was imposed. Vanstone also notes that recidivism rates of day centre clients after a year following program completion are comparable with those for released prisoners. Vanstone’s interviews with Pontypridd Day Centre clients indicated an average age at first sentence of 13 years, an average of 13 previous convictions, and, among 91% of the group, an average of four custodial sentences.

Vass and Weston (1990) examined the outcomes of 79 recommendations to the Cedar Hill Day Centre which were denied by the courts. Of these, 56% were given custodial sentences.

PART V. Post-incarceration Programs

An interesting departure from the norm was a program for “persistent petty offenders” described by Fairhead (1981). Recognizing the substantial contribution to prison populations made by persistent property offenders, officials identified a sample of 125 such offenders for intensive assistance in four areas: accommodation, employment, substance abuse and pro social contacts. These offenders were older (half were over 40), had extensive criminal records (half had 25 or more priors), tended to have few or no close acquaintances and to abuse alcohol, and “slept rough” or had no fixed abode. Reasoning that the first priority should be to place these released offenders in stable accommodation which was better than their accustomed living arrangements, program staff attempted to secure placements for each. In addition, prior to release, attempts were made to link each offender with a volunteer who would accompany them to the accommodation from the prison gate and would continue to provide assistance to supplement that of corrections staff.

A group of 125 persistent petty offenders was selected for intervention. It should be noted that these 125 offenders would, on any prediction scale, be considered high risk to reoffend. In addition to their lengthy records, most were rated as having “severe” problems in all four of the key needs areas. Only one of the 125 offenders agreed to be assisted by a volunteer, and all but eight refused the arranged accommodation, could not be placed, failed to show up, or stayed there for less than a month. In a nine-month follow-up, no significant differences in reconviction or reimprisonment was found between those who were assisted into accommodation (however briefly). However, there was a difference in the number of reconvictions and reimprisonment sentences per offender. Six out of the eight offenders who stayed in the arranged accommodation for at least a month were not reconvicted during the nine-month follow-up period. There is no record of further attempts to assist the group with substance abuse, pro social contacts and employment.

Juvenile Decarceration in Massachusetts and Other U.S. States

The juvenile diversion literature provides some noteworthy initiatives in decarceration. Best known among these is the dramatic deinstitutionalization of the juvenile justice system of Massachusetts during the early 1970’s by Dr. Jerome Miller, the then Commissioner of Youth Services. Aided by the Youth Services’ authority to assign offenders to whatever facility or program deemed the most fitting, Miller abruptly transferred virtually all juvenile inmates out of state facilities and aggressively contracted with community service-providers for a wide variety of alternative placements and programs, including group homes and non-residential programs (Miller, 1994).

In 1968, one year before Miller's tenure began, there were 2,443 commitments to Youth Services, 833 of whom were institutionalized and 1,610 were on parole following a period of commitment. In 1974, one year after Miller's departure, there were 2,367 commitments, of whom 132 were in state institutions, 941 were on parole, 399 were in private group care facilities, 171 were in foster care, and 724 were in other non-residential programs (Bullington et al., 1986:513).

Although there has been some retreat from Miller's original approach, the state retains one of the lowest juvenile incarceration and crime rates in the U.S. Juvenile arraignments fell 46% from 1974 to 1984 despite a 25% increase in the juvenile population of the state (Bullington et al., 1986:517). A study of 800 clients released from Youth Services care in 1984-85 showed a lower re-arraignment rate after 12 and 24 months than for youth released under the former training school system (Krisberg et al., 1989). However, there is some evidence that rates of temporary juvenile detention may have increased as longer-term stays decreased (Massachusetts Advocacy Center, 1980).

Obviously, the success of this kind of reform is dependent on a number of critical factors. The factors include a suitable sentencing/commitment authority, political support, the ability to assemble a sufficient number of effective community-based alternative programs, and the skill to deal with opposition from displaced state employees, political opposition, and public concern. These factors are present in few jurisdictions, and virtually none dealing with an adult correctional population. The funds previously devoted to institutions must be available to support the community-based alternatives to them, without regard for reaping cost savings from institutional budgets at the outset.

Indeed, Miller was unable to replicate his Massachusetts experience to the same degree during later tenures in Pennsylvania and Illinois. However, there have been a number of successful closures of individual juvenile institutions in various U.S. states, including Utah, Maryland, and Missouri (see Krisberg and Austin, 1993). Similar findings for deinstitutionalized juveniles have been found in other studies (e.g., Lerner, 1990; McGillis and Spangenberg, 1976).

PART VI. Ideas from the International Arena

This section presents a few ideas from the systems of other countries which could be added to the available options for diverting offenders. Unfortunately, little if any outcome studies are available on the impact of their implementation.

Day Fines

Day fines have been the norm in many European countries for decades. The principle is to make fines more just by tailoring the amount of the fine to the offender's ability to pay, thus resulting in widely varying amounts of fines which nonetheless would have an approximately equal impact on offenders with different incomes. The total fine is payable in a lump sum unless installments are authorized.

Some commentators (e.g., McDonald et al., 1992) have speculated that the introduction of day fines may increase the use of fines in preference to other forms of sentence, since in theory the day fine system makes the fine more appropriate for both rich and poor. For offenders with more financial resources, a day fine could have more "bite", and for the poor, the day fine should still be within their means. Day fines are premised, perhaps more than conventional fines, on an active expectation that the fine will be paid, rather than defaulted. Thus, day fines are considered to have a potential impact on the imprisonment in default of fine payment for low-income offenders. Since fines are the most common penalty in many justice systems, in wide use even for some serious crimes, their potential impact is enormous. A British Home Office study reviewed in Morgan and Bowles (1981) attributed the extent of defaulting to real financial hardship.

Of course, the calculation of day fines and the resultant fine levels need to be gauged accurately. Fogel (1988) cites a study that showed the same defaulting rates for day fines imposed in the first year of their availability in Germany as under the previous system three years before. In Finland, changes in 1976 to the method of computing day fines and in the number of day fines per offence reduced the number of default days.

An experiment by the Vera Institute in implementing day fines on Staten Island (McDonald et al., 1992) found that the average fines imposed were larger and collection periods were longer. The day fines, however, were collected in full as often as the lower, fixed fines. Many day fines for more financially secure defendants could have been higher if the statutory ceiling for them permitted it. In this experiment, judges were given the option of using day fines or the more traditional, fixed fines. In the first year, judges chose to use day fines in 70% of the cases. There was, however, no impact from the innovation on the relative use of fines, as compared to other forms of sentence.

The same study also reported on a day fine experiment in Milwaukee, where day fines were used in two-week periods which alternated with traditional fines in succeeding two-week periods. The average day fine was lower than the average conventional fine, but again, for 22% of defendants who had a greater ability to pay, day fines might have been higher if the statutory limit permitted it. The two

schemes had the same default rate (61% for day fines and 59% for conventional fines), but those offenders who were given day fines were more likely to pay their fine in full (37% versus 25%). Among the lowest-income defendants, 33% paid day fines in full, as compared to 14% who were given conventional fines. There was no significant difference in rearrest rates over a nine-month follow-up period.

Prosecutorial Fines

Prosecutorial fines were found in Scotland ("fiscal fines"), Belgium, Sweden, and Germany, and no doubt exist elsewhere. In these jurisdictions, the prosecutor has the authority to levy a fine on consenting offenders who have not been convicted, in exchange for a dismissal of charges. The prosecutor must be able to demonstrate his/her ability to convict on the available evidence.

Judicial Waiver of Prosecution

Some European countries give explicit authority to prosecutors to waive prosecution in the public interest, even where there is evidence to convict and where the complainant wishes prosecution to proceed. Such an explicit authority could give Crowns the "comfort level" they require to withdraw or dismiss charges, even in instances where there is no specific diversion program to which accused can be referred.

Probation Subsidy

Results of probation subsidy in the U.S. have, in the main, been disappointing. California, Minnesota and Kansas, among others, have experimented with this concept. The notion is that the state (which controls prisons where offenders serve a year or more) encourages comprehensive justice planning, community development and reduced sentence lengths among local county authorities. The county has responsibility for local jails (housing offenders serving less than a year), many community services, and probation departments attached to local courts. The state provides grants to local counties which opt into the scheme for the purpose of encouraging reduced or community-based sentences. There is a "charge-back" for each offender sent to state prisons from the participating county.

Jones (1990) found, based on an indirect statistical prediction of sentences, that there may have been a small effect (nine percent) from probation subsidy on the numbers of cases retained in the community, albeit under more stringent conditions than for regular probationers. In an extensive study of Minnesota, Strathman et al. (1981) found slight effects in the intended direction for juveniles, and none for adults. In fact, there was an observed increase in the severity of community sanctions for adults.

However, the Minnesota study suggested that the program was implemented without proper planning, criteria for local implementation, guidelines, or delineation of the roles and responsibilities of local officials. With advances since that time in the availability of statistical information for predicting sentences, offender needs and risk, and in our knowledge about alternative sentence planning and other methods which incorporate strict criteria for usage, a more effective implementation of such programs is theoretically possible.

Perhaps the more relevant question is whether Canada's jurisdictional split is suited to the idea. In Canada, the parallel to American probation subsidy would be for the federal government to make grants to the provinces to enhance their community corrections capability to handle offenders who otherwise would be sentenced to two years' imprisonment or longer – probably with a cut-off for "charge-backs" at two years or on some other basis. Changes in this context may be doubly difficult because of the meaning now attached to the split by sentencing judges, who may view offenders whom they send to penitentiary as qualitatively different from provincial prisoners.

Minimum Sentences to Imprisonment

Several European countries, such as Germany and the Scandinavian countries, have a "floor" of one month on the length of custodial sentences. These are intended to reduce the use of very short-term custodial sentences in the first instance (i.e., as opposed to imprisonment in default of fine payment). Introducing such a "floor" in Canada would probably prove ineffective if not accompanied by an expansion in other relatively minor punitive options for sentencing judges. Otherwise, the impact might be simply to increase the use of jail terms of just over one month.

Criminal Policy and Incarcerated Populations

Criminologists have examined the imprisonment rates of different countries in an effort to determine what factors cause some countries to have very high rates of imprisonment and others, much lower rates. Two recent examples (Snacken et al., 1995 and Junger-Tas, 1994) have, like many before them, concluded that it is the criminal justice policies of a nation which are likely the most important determinant of incarceration rates.

Differences in crime rates between countries and over time do not account for differing imprisonment rates. While "external factors" like the age distribution, unemployment rate and income disparities within a society have been linked to prison populations, and "interfering factors" like public fear and opinion can affect them, it is the "internal factors" of criminal justice policy which most strongly impact them (Snacken et al., 1995: 40). Furthermore, these policies can change,

and can in turn change the patterns of imprisonment and other sanctions within the nation.

Finland and West Germany are two Western countries which in recent decades made deliberate efforts to reduce their use of imprisonment. Finland traditionally had a higher imprisonment rate than that of the rest of Scandinavia, but researchers and scholars were able to demonstrate that this status was due not to higher crime rates in Finland, but longer average prison sentences. Legislative changes were coupled with intensive courses and seminars with the judiciary, both in order to build consensus over required changes and to promulgate them. It appeared that the Finns were able to create consensus over the limited value of punishment as a deterrent and the impracticability of widespread incapacitation or treatment through carceral sanctions. Public drunkenness was decriminalized and the maximum penalties for property offences were reduced. The prison population dropped from 5600 in 1976 to 3500 in 1992. The use of fines increased greatly.

In West Germany after 1983, an apparent consensus developed around the desirability of reducing prosecutions, remands, and short-term incarceration sentences for young adults and juveniles. This seems to have had a small spillover effect on the treatment of older adults as well (Graham, 1990). The total remand population dropped by nearly 30% between 1982 and 1988. The adult prison population decreased from 38,500 to 35,600 between 1983 and 1986. In the same period, 17% fewer young adults and 1% fewer older adults were prosecuted, and the proportion of all convictions resulting in a custodial sentence also dropped by 19%. For adults, the reductions in the imprisonment rate seemed to have been a function of a decrease in shorter prison sentences; this impact has not been entirely offset by an increase in longer-term sentences.

The Germans made no legislative changes during this period, although in the years before, some changes were made which may have contributed to the climate of reform. In 1969, custodial sentences of one month or less were abolished and restrictions were placed on the use of sentences between one and six months. In 1974, the availability of suspended sentences was increased, and community service was introduced as an alternative to jail in default of fine payment. But Rutherford (1988) suggests that the key reason for the changes in the 1980s was an important conference of 200 justice officials and policy-makers, which served to coalesce the growing loss of faith in the rehabilitative and deterrent impact of imprisonment.

Snacken et al. (1995:42) concluded:

> …[E]ven if the criminal justice system cannot influence all elements that determine its functioning, it has sufficient leeway to refute the argument that changing prison populations are a pure product of external factors out of its reach. Fate is, at least partly, a matter of policy.

PART VII. Summary and Conclusion

Although there is an alarmingly small number of sound evaluations of adult diversion in the criminological literature, they do point strongly to a number of tentative conclusions, which in turn are supported by the more extensive juvenile literature in the area.

Most significantly, it still remains a major challenge for diversion programs to identify and work with clients who would, but for the existence of the "alternative", have received significant attention from the justice system. Rather, it appears that large proportions of "diverted" clients might never have been arrested, fully prosecuted, or given a significant sanction. To this extent, concerns that diversion "widens the net" of social control to a broader cross-section of offenders are well placed. Initiatives designed to formalize police discretion to divert offenders may be particularly vulnerable to this criticism.

Diversion programs tend to be used for first offenders, younger persons, minor offences, and clients who present less significant risks. These cases are felt to be more deserving of the "break" that diversion is considered to represent. Diversion of the mentally disordered from the justice system is also considered appropriate, given the limited capacity of the justice system to deal with the treatment, control and safety issues presented by these individuals. Older offenders who present fewer mental health problems and who represent a greater challenge from the standpoint of the offences they commit and their past criminal involvement are less likely to be considered suitable for diversion at pre-conviction stages. For these offenders, attention to sentencing alternatives after a conviction has been obtained is likely to be the most productive course of action.

Diversion programs must be designed to take into account the professional orientation and situational demands placed on the justice system workers with whom they work most closely. Prosecutors, for example, may instinctively screen out cases where a conviction is less likely and the probable sentence insignificant, while wishing to proceed with other cases which may actually be more suited to diversion. Agreement on objectives and productive working relationships among all involved parties is highly desirable.

Expectations that diversion programs will reduce justice system costs and will be more cost-effective than traditional processing by the justice system are open to

question. In part, this is a product of the narrow reach of most diversion programs. In the deferred prosecution area, most programs are able to deal with only two or three percent of cases charged. Moreover, diversion programs often represent a greater intervention in clients' lives than does the justice system outcome that they replace, and evidence of diversion programs which permit real reductions in justice system expenditures is lacking. The cost of operating diversion programs which will have a material impact on clients can be significant.

Many diversion programs which are "programmatic" suffer from problems common to corrections. The interventions they provide may be inappropriate to much of the client base they serve, may fail to deliver needed services, and may have difficulty demonstrating a downstream impact on recidivism. However, this is not to say that diversion interventions which are better designed and delivered than those which have been evaluated to date would not show better results.

Although "true diversion", as the early terminology had it, was aimed at keeping lawbreakers out of the justice system as much as possible and reducing if not eliminating intervention with them, the past three decades of justice upheaval have made it clear that diversion has become, and will continue to be, characterized by attempts to address clients' risk and need in some fashion. The further the offender's penetration into the system, moreover, the more likely the "alternative" will actually be an attempt to shore up and provide more treatment and more teeth to existing community-based responses.

To this extent, a more effective strategy for diversion must partake of the same approaches which are currently being advocated for enhancing correctional intervention generally. These approaches will thus include more selective and informed case management strategies with specified offender goals (see, e.g., Andrews, 1996; Austin and Baird, 1990), and selective application of structured approaches for offender change (Palmer, 1995; Robinson, 1995; Antonowicz and Ross, 1994; Anglin and Speckart, 1988; Gendreau and Ross, 1987).

In addition, diversion can benefit from the continuing expansion of our knowledge in the area of prediction, both of criminal risk and of justice system outcomes. This growing knowledge base can be used to refine the design of diversion screening techniques and program design.

Finally, it is worth noting that nations have a greater ability to influence their own criminal policies than is sometimes supposed. The factors which determine a country's imprisonment rate and use of other "alternatives" do not boil down to a simple equation of crime rates and public pressure. European countries and selected jurisdictions in the U.S. which have deliberately set out to reduce their reliance on imprisonment and other accustomed ways of doing business have found that it is possible to build consensus and strategies for successful change. With current concerns in Canada over the considerable and rising costs of the

justice system in general and imprisonment in particular, we are once again at a juncture where policy-makers may wish to decide to embark on a comprehensive strategy to influence rather than be driven by present trends.

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