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Federal Pretrial Diversion Programs: Past, Present, and Future

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The mass incarceration phenomenon in our country is well-documented. As of the end of 2021, there were more than 1,200,000 incarcerated individuals in the United States. That's fewer than 10 years earlier, when there were more than 1,700,000 incarcerated, but it is more than twice as many as the 503,000 that were incarcerated in 1970—a growth rate far exceeding that of the United States population during that time.

Globally, the United States has the highest incarceration rate of any country in the world. Even in absolute numbers, only China, with just fewer than 1,700,000 incarcerated individuals last year, has more than the United States—but with a total population that is over four times as large.

Incarceration in the federal criminal system, which is a small part of the full incarceration picture in the United States, has similarly skyrocketed in recent decades. From 1980 to 2013, the federal prison population increased from 25,000 to 219,000 individuals—a nearly nine-fold increase.

And while the federal prison population decreased in recent years—dropping to 155,000 by 2020—the latest data shows that it is creeping up once again, rising to 158,000 in 2023. This uptick occurred despite the fact that thousands of individuals were released early from federal prisons due to COVID during that time.

Much of the increase in incarceration is the result of increasingly harsh criminal penalty provisions enacted in the 1980s, 1990s, and 2000s, applicable to a wide variety of criminal conduct—including narcotics trafficking, violent crime, and financial crime, among others.

Courtesy Photos

Alan Vinegrad, left, and Zora Franicevic of Covington & Burling.

A series of federal laws—including, most notably, the 1986 Anti-Drug Abuse Act, the 1994 Violent Crime Control and Law Enforcement Act, and the 2002 Sarbanes-Oxley Act, which collectively were responsible for the spike in mandatory minimum prison sentence provisions and increased maximum penalties—saw to that.

The advent of the Sentencing Guidelines in 1987 contributed mightily to the incarceration explosion as well. Indeed, increased punishment (along with more consistent sentencing) was a purpose of the Guidelines. Concomitantly, parole was abolished. These changes all but assured more incarceration, and longer terms of incarceration.

And that's what happened. Under the Guidelines, prison sentences became far more common, rising from 53% of all cases in 1987 to 89% of all cases in

2022; and lengthier as well, rising from an average of 39 months in 1987 to 56 months in 2022.

The often-overlooked Congressional directive to the Commission to make clear, in the Guidelines, that non-prison sentences for first-time offenders not convicted of a violent crime or otherwise serious offense are generally appropriate, took a notable back seat. To the contrary, system actors embraced (explicitly or otherwise) the notion that prison was the presumptive answer to crime.

The efficacy of a prison-centered approach is, at the very least, questionable. While a recent study by the U.S. Sentencing Commission concluded that recidivism is lower for federal defendants sentenced to five or more years in prison, but not for defendants receiving lower sentences; other studies, by contrast, criticize the reliability of that study and point to other research concluding that longer sentences do not reduce recidivism or actually have a criminogenic effect.

Either way, this country's high recidivism rate strongly suggests a flaw in our punishment model. Recent data shows that 44% of persons released from United States prisons return within a year, and 70% return within five years. (Norway's five-year rate is reportedly between 20% and 25%.)

Given the acknowledged historical deficiencies in our federal prison system—from inadequate facilities to insufficient staffing to overcrowding to deficient vocational and educational programming, to name a few—prisons run the risk of becoming breeding grounds for more crime, rather than simply a means to deprive people posing public safety risks of their liberty and to deter others from following in their footsteps.

And with mass incarceration came significant racial disparity in how federal defendants are punished. According to a recent RAND Corporation study of more than 500,000 federal sentences over a 15-year period, Black and Hispanic defendants received average sentences approximately 19 months and five months longer, respectively, than other defendants.

An earlier Sentencing Commission report identified a 20% gap between sentences imposed on Black and White defendants. And this is only for sentences, and does not fully account for reported racial disparities in how defendants are arrested and charged.

To be sure, changes in federal sentencing law, emanating from each of the federal government's three branches, have ameliorated (or will) the harshness of federal sentencing to some degree. Among them: the 1994 "safety valve" law that allows for lower sentences for low-level, non-violent narcotics offenses (or, at least, sentences not constrained by mandatory minimum prison terms); the 2005 U.S. Supreme Court decision (*U.S. v. Booker*) rendering the Guidelines advisory, thus allowing judges to vary from them (which they have, with increasing frequency); the 2018 First Step Act, which expands the availability of prison vocational programs and, in turn, reduces the amount of time actually served, and expands "safety valve" eligibility in mandatory minimum narcotics cases; 2023 amendments to the so-called compassionate release sentencing guideline, allowing for sentence reductions and release from prison in a significantly greater number of extenuating circumstances; and clemency grants during the Obama and Biden Administrations, focused on people convicted of low-level drug offenses.

But many argue that more sentencing reform is needed—to ensure that our system is not "tough" on crime, but "smart" on crime. A smart approach entails that, in appropriate cases, and consistent with public safety, punishments other than incarceration are utilized to achieve the goals of sentencing. Federal pretrial diversion programs are a relatively recent, and important, step in that direction.

This article will explore the development of these programs, with a particular emphasis on how effective they have been in reducing recidivism; challenges in making the empirical case for their success; and the potential future of these programs.

History of Pretrial Diversion Programs

Pretrial diversion programs began more than 30 years ago, in state courts—sometimes aptly described as the "laboratories" of our legal system. Florida is credited with having the first, a Miami-Dade County drug court formed in 1989—with substance abuse, mental health, veteran, and other specialized courts created across the nation thereafter. There are now thousands of such courts in the United States.

The basic concept is simple: to identify and rectify the root cause of certain individuals' criminal behavior

by providing them appropriate counseling and treatment, helping them obtain or continue their education and employment, providing other programmatic services tailored to their particular circumstances, and closely supervising their participation in the program. The goal: to prevent these individuals from reoffending and make them more productive members of society—rather than just locking them up in prison.

Ample data indicates that these programs have worked. Several examples illustrate the success of pretrial diversion: a 1997 study of DWI offenders in El Paso County, Texas showed that non-participants in its pretrial diversion program had a 47% greater risk of rearrest than participants; a 1997 study of Indiana County misdemeanor offenders showed that only 9% of pretrial diversion participants had further contact with the court system, as opposed to 39% of non-participants; a 2012 study of Michigan mental health courts showed that only 6.3% of participants who successfully completed the diversion program were charged with a new offense, as compared with 16.5% of those who did not; and a 2020 study of seven Maine counties' drug treatment courts showed that the recidivism rates for participants ranged from 12% (six months after completing the program) to 20% (18 months after), as compared to 31% to 47% for non-participants.

And in the birthplace of diversion courts, Miami-Dade County, data for its mental health program in 2022 showed that participants recidivated at a "far lower rate" than non-participants. The program also enabled the government to close a correctional facility, saving $12 million a year.

Federal Pretrial Diversion Programs

While federal prosecutors have long had the authority to "divert" cases—either by deferring prosecution or referring them to state or local authorities—the advent of formal pretrial diversion programs in the federal system is a more recent phenomenon.

Like many of their state counterparts, federal diversion programs generally focus on defendants with particular challenges, such as substance use disorders or mental health conditions, or of particular backgrounds, such as veterans or young adults.

Federal defendants who successfully complete these programs are generally not prosecuted in the normal fashion–through a guilty plea or trial and, if convicted, sentencing–but instead are either not sentenced to prison or not convicted at all.

Federal diversion programs got off to a slow start. Among the earliest federal diversion programs are the Eastern District of New York's Special Options Services (SOS) program (created in 2000) and the Central District of Illinois' Pretrial Alternatives to Detention (PADI) program (2004). But there was little else. The DOJ's disdain for these programs didn't help: after the Supreme Court held in 2005 that the Guidelines were advisory and not binding, DOJ told Congress one year later that drug courts were an "inappropriate and unnecessary program for the federal criminal system."

Notwithstanding DOJ's position, federal diversion programs grew. 2010 to 2013 saw the advent of the District of South Carolina's BRIDGE program, the Southern District of California's Alternative to Prison Solutions (APS) program, the District of New Hampshire's Law Abiding, Sober, Employed, Responsible (LASER) Court, the Central District of California's Conviction and Sentence Alternatives (CASA) program, the Eastern District of New York's Pretrial Opportunity Program (POP), the Western District of Washington's Drug Reentry Alternative Model (DREAM) program, and the District of Connecticut's Support Court.

Thereafter, the expansion of these programs continued, to the point where, according to the U.S. Sentencing Commission, there are now 56 federal pretrial diversion programs—15 of which double as reentry courts. A total of 35 federal districts have one or more of these diversion programs—just over a third of the 94 federal districts.

Recent federal government policies have further encouraged the expansion and use of alternatives to incarceration. For example, President Joe Biden issued an Executive Order in May 2022, calling for the creation of a multi-agency committee of federal leaders to "advanc[e] alternatives to arrest and incarceration" and "expand[] the availability of diversion and restorative justice programs."

Following on the heels of that pronouncement, Attorney General Merrick Garland directed every one of the 93 United States Attorney's Offices in the country to "develop an appropriate pretrial diversion policy."

The pretrial diversion directive was then added to the Justice Manual, the Department of Justice's set of official policies, which is binding on all federal prosecutors. And as part of that process, the department's pretrial diversion policy was greatly expanded as well.

Previously, the policy provided minimal guidance or justification for when pretrial diversion would be appropriate; indeed, the clearest guidance provided by the policy was a list of offenses that did *not* qualify for pretrial diversion (for example, national security and public corruption offenses).

Now, the policy explains the many benefits of the pretrial diversion programs: to "protect the public by reducing rates of recidivism, conserve prosecutive and judicial resources, and provide opportunities for treatment, rehabilitation, and community correction" and to "provide, where appropriate, a vehicle for restitution to affected communities and victims of crime." And the directive explicitly identifies defendants who are young offenders, veterans, or have substance abuse or mental health challenges as ones that U.S. Attorneys may prioritize for such programs.

The Sentencing Commission has correspondingly expressed renewed interest in pretrial diversion programs. In 2017, the Commission issued a report stating that, while it had been urged "to amend the guidelines manual to encourage such programs and provide the option of a downward departure to a non-incarceration sentence for defendants who successfully participate in them," these programs (according to the Commission) "cannot yet be evaluated empirically to determine whether the programs meet their articulated goals as effectively as, or more effectively than, traditional federal sentencing and supervision options."

There matters stood for the ensuing four years, while the Commission lacked a quorum to make further pronouncements on the subject. But in 2022, a newly and fully constituted Commission announced that the study of pretrial diversion programs was a priority; moreover, in August 2023, it further adopted as a priority making information about such programs more readily available, both through its website as well as workshops and seminars it intends to conduct.

Do the Programs Work?

Some of the benefits of federal pretrial diversion programs are obvious. Defendants receive necessary treatment for conditions that contributed to their criminal conduct. They are closely supervised, to ensure they obtain or continue their education or employment and otherwise stay out of trouble. Their loved ones and community are not deprived of their financial, familial, and other positive contributions. They are in a better position to make any necessary restitution to victims.

But do these programs better ensure that defendants who participate in them won't commit new offenses later? That, after all, is (or should be) a major objective of the criminal justice system—especially in light of the country's outsize recidivism rate.

A growing body of data suggests that, with respect to recidivism and cost, these programs appear to be working. Various studies of federal diversion programs, from 2011 to 2023, reflect that, by and large, participants in pretrial diversion programs have lower recidivism rates compared to comparable non-participants—and save a lot of money in the process.

For example, a 2011 study of a drug treatment pretrial diversion program in the District of Massachusetts showed that only 6.8% of diverted defendants had a new charge over a 24-month period, compared with 10.8% of non-diverted defendants.

A 2016 study of seven districts by the Department of Justice's Office of Inspector General found that, while there was insufficient data to evaluate the overall effectiveness of the pretrial diversion program, the program with the largest sample size—the Central District of Illinois, with 39 participants—showed a significantly lower rate of recidivism for program participants (23%) as compared to the recidivism rate for federal defendants sentenced to prison (41%). Notably, it also found that diversion of participating defendants saved between $7.7 million to $9.7 million.

A 2017 study of the Eastern District of New York's two pretrial diversion programs—the Pretrial Opportunity Program (POP) and the Special Options Services Program (SOS)—showed that only three of 32 successful SOS program participants were rearrested, and only one of 18 successful POP program participants were re-arrested—both dramatically lower than the national average.

Further, the study reflects that the Southern District of California's Alternative to Prison Sentence Diversion Program estimated a recidivism rate of just 3.2% for 476 program participants, with cost savings of $10.4 million.

Other, more informal data points the same way. In a 2022 comment letter to the U.S. Sentencing Commission, the Northern District of Illinois's head of Pretrial Services reported that there were no arrests among the 20 most recent graduates of its Alternatives to Incarceration (ATI) court.

In another such letter, two Southern District of New York judges reported that recidivism among graduates of their Young Adult Opportunity Program (YAOP) was "gratifyingly low," with outcomes that were "nothing short of extraordinary." Indeed, since the program's inception in 2015, only four of 65 graduates have been rearrested. And an evaluation of the District of Connecticut's drug court revealed that diverted defendants were less likely to be rearrested (33% v. 47%) or to fail a drug test (42% v. 56%).

By far the most robust study of federal diversion programs was one conducted by the Pretrial Services Chiefs of the Eastern District of New York and the District of New Jersey, in conjunction with the John Jay College of Criminal Justice.

The study examined recidivism rates and other metrics for approximately 1,000 participants in 13 federal pretrial diversion programs across the country, including in California (Northern and Central Districts), Hawaii, Illinois (Central and Northern), Massachusetts, Missouri (Eastern), New Hampshire, New Jersey, New York (Eastern and Southern), Rhode Island, and Washington (Western).

The results of the study, published in December 2021, concluded that individuals were "significantly less likely to be rearrested on supervision" than statistically "matched" (comparable) non-participants—.068% for successful participants, compared to 11.54% for non-participants.

Beyond that, the study also showed that diverted defendants were employed more frequently (55.4% v. 47.9% of the time) and had fewer positive drug tests (8.7% v. 18.3%) than non-diverted defendants. Moreover, of the smaller percentage of program participants who were sentenced to prison, their average term was a fraction of the average for non-participants—3.9 months versus 33.3 months.

Issues with the Data

While the results of these studies are certainly encouraging, issues with the data counsel for cautious, rather than unbridled, optimism. For example, inherent in the data is the fact that the participants in diversion programs were not selected at random. Rather, they were presumably selected because of their suitability for the program and their agreement to participate in it. For these reasons, they were arguably more likely to succeed—including by not committing further crimes—than the general population of defendants.

Consistent standards are essential if data are going to be meaningfully assessed and compared. For example, how does one measure recidivism—an arrest, or a conviction? And over what time period—during the period of supervision, or after? And, if after, how long after? How are comparison groups defined—by nature of the offense, prior criminal history, or socioeconomic or other factors? Can results of diversion programs be meaningfully compared if these criteria vary from program to program?

Also, do the studies account for confounding factors—explanations for the results that are independent of the participants' involvement in the diversion program? If so, which factors are accounted for, and are those factors consistent across jurisdictions?

In addition, are the results of these studies statistically valid? Are the sample sizes large enough? How is this measured—by individual program, or all programs collectively? If the latter, are the programs sufficiently consistent with each other to warrant that?

To be clear, data does not tell the entire story. Success stories abound. To take one recent example, at the Rewriting the Sentence II summit on alternatives to incarceration that took place in Washington, D.C. in mid-October, presented by the Center for Justice and Human Dignity, three individuals described how the criminal justice system spared them a well-nigh inevitable term of imprisonment in favor of a diversion program that provided them the treatment or hands-on guidance and support that they needed. The result? One, a former homeless woman with a substance use disorder and a litany of prior arrests, became a receptionist at the Salt Late City Mayor's Office and is now

the Executive Director of Clean Slate Utah, a non-profit dedicated to helping state residents clear their records and access greater opportunities.

Another, a man who suffered from untreated mental illness and stole a six-figure sum of equipment, is a successful farmer and father. And a third, a young man charged with participating in a large-scale drug trafficking ring, is a technology support manager at a prominent non-profit organization and owns a home.

In fact, the executive director of the organization that hosted the summit is in recovery from a substance use disorder and was incarcerated in federal prison (this was before the advent of federal diversion programs), but then graduated from college and law school, worked in the White House's Office of National Drug Control Policy and the Washington State Department of Corrections, and has become a leading advocate for reform of both our sentencing and prison systems.

Such anecdotal evidence surely has a legitimate place in the discussion of alternatives to incarceration. But data does as well. And this data should be empirically and statistically reliable if it is to serve as the basis for potentially wide-scale federal sentencing reform. This includes data on not only recidivism but also the potential financial benefits of diversion programs as compared to prison.

Even the most comprehensive study of federal diversion programs—the 2021 study summarized above—makes these points clear. The 2021 study concluded that "[e]valuation of these programs is hindered by the lack of standardization" and "[m]ore research is needed" on recidivism, program selection criteria, and the financial implications of these programs.

Importantly, the 2021 study of recidivism was limited to whether defendants were rearrested *while under supervision*, because data regarding defendants' *post*-supervision criminal conduct was not available at that time. Since then, the study group has gained access to that data for the defendants who were the subject of their 2021 report, and plans to publish the results of their additional recidivism analysis in the coming months.

Future of the Program

For the short term, at least, federal diversion programs are here to stay. All federal prosecutors are now required to have pretrial diversion policies, and recent federal pronouncements reflect a commitment to using them more often in order to address over-incarceration.

The Sentencing Commission is active in this space as well, through a promise of greater transparency that, based on a recent review of its website, is already on the way to being fulfilled. More and more courts are embracing this sentencing alternative.

Beyond that, data regarding the success and financial benefits of diversion may dictate whether these programs have a longer life and expand beyond where they currently operate. Appropriate standardization of diversion programs, especially with respect to data inputs and collection and program criteria, may help ensure a more reliable basis for empirically measuring their success.

But this won't happen on its own. The DOJ should ensure full and faithful implementation of the Attorney General's pretrial diversion policy directives by U.S. Attorney's Offices around the country (as well as in Main Justice).

The courts (including judges, pretrial services officers, and probation officers) should coordinate their efforts to ensure, to the maximum extent possible, consistent and standardized criteria for data inputs and collection and measurement metrics.

The Commission should pursue its 2022-23 priority of continuing to study court-sponsored diversion programs. And representatives of these stakeholders, along with others (the defense bar, victim advocates, and academics, among others), should work *together* to achieve these laudable goals.

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