CRIMINAL PROCEDURE—PRETRIAL INTERVENTION PROGRAMS —NEW JERSEY COURT RULE 3:28 INTERPRETED TO PERMIT ANY DEFENDANT, REGARDLESS OF OFFENSE CHARGED, TO BE CONSIDERED FOR ADMISSION TO A PRETRIAL INTERVENTION PROGRAM—*State v. Leonardis*, 71 N.J. 85, 363 A.2d 321 (1976), *reaff'd on other grounds on rehearing*, 73 N.J. 360, 375 A.2d 607 (1977).

Frank Leonardis was arrested and indicted for unlawful possession of a controlled dangerous substance.[1] In a separate matter, Stephen Rose was indicted for both conspiracy to possess and distribute a controlled dangerous substance and possession of marijuana.[2] The two alleged offenders independently sought admission to the pretrial intervention program (PTI) of Bergen County.[3] Both applications were summarily rejected pursuant to the established program policy of excluding applicants charged with the sale of controlled substances as it was considered to be a "heinous offense."[4]

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[1] *See* State v. Leonardis, 71 N.J. 85, 90, 363 A.2d 321, 323 (1976), *reaff'd on other grounds on rehearing*, 73 N.J. 360, 375 A.2d 607 (1977). Leonardis was allegedly in possession of marijuana in violation of N.J. STAT. ANN. § 24:21-19(a)(1) (West Cum. Supp. 1977–1978). 71 N.J. at 90, 363 A.2d at 323. Although the court noted that Leonardis was arrested for unlawful possession, he was also charged with other related offenses.

[2] State v. Leonardis, 71 N.J. 85, 90, 363 A.2d 321, 323 (1976), *reaff'd on other grounds on rehearing*, 73 N.J. 360, 375 A.2d 607 (1977). Rose was charged under the same statute as Leonardis, as well as under N.J. STAT. ANN. § 24:21-24 (West Cum. Supp. 1977–1978). 71 N.J. at 90, 363 A.2d at 323.

[3] State v. Leonardis, 71 N.J. 85, 90, 363 A.2d 321, 323 (1976), *reaff'd on other grounds on rehearing*, 73 N.J. 360, 375 A.2d 607 (1977). The Bergen County program, as well as all other county pretrial intervention programs, is authorized pursuant to New Jersey Court Rule 3:28. *See* 71 N.J. at 90, 363 A.2d at 323. The rule requires that each county obtain the approval of the supreme court before instituting a PTI program. N.J.R. 3:28(a). For a history of the development of Rule 3:28, see note 44–49 *infra* and accompanying text.

[4] State v. Leonardis, 71 N.J. 85, 107, 363 A.2d 321, 333 (1976), *reaff'd on other grounds on rehearing*, 73 N.J. 360, 375 A.2d 607 (1977). The pertinent section of the Bergen County PTI project's exclusionary criteria states:

"Persons who come within the following criteria must ordinarily be excluded:

A. *Type of Offense*:

1. *Heinous Offenses*: Atrocious Assault and Battery where the victim is seriously injured; Homicide; Mayhem; Forceable Rape; Assault and Battery on a Police Officer involving injury; Armed Robbery where the victim is injured; Sale of a Controlled Dangerous Substance. Although these offenses may not prejudice some employers, there is the additional factor of society's expectation in cases of this nature which may require exclusion."

71 N.J. at 90 n.3, 363 A.2d at 324 n.3 (quoting from Bergen County Probation Depart-

Subsequently, Leonardis and Rose "filed separate motions for . . . order[s]" compelling the director of the Bergen County PTI program to approve their applications.[5] In denying the motions, which were heard jointly,[6] the court noted that the exclusion from PTI of those accused of heinous crimes neither denied a fundamental right nor differentiated among individuals on the basis of a suspect classification.[7] Defendants then filed motions for leave to appeal which were denied;[8] however, corresponding petitions to the supreme court were granted.[9]

A third petitioner, Frederick John Strychnewicz, indicted in Hudson County, was charged with "possession of and possession with intent to distribute hashish."[10] Despite the willingness of the officials of the Hudson County PTI program to accept Strychnewicz's application,[11] the prosecutor's office refused to consent to the place-

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ment, *Bergen County Pre-Trial Intervention Project, Exclusion Criteria* A(1) (available from Bergen County Probation Department, Hackensack, N.J.)).

Defendant Rose, a Connecticut resident, was originally rejected by the Bergen County program because he was not a resident of that county. 71 N.J. at 90 n.2, 363 A.2d at 323 n.2. At the time of the incident, however, he was a boarding student at Fairleigh Dickinson University in Teaneck, and, on that basis, the trial judge granted a motion directing a reconsideration of his application for the program. *Id.* Rose was then notified of a second denial of admission because he was " 'not qualified.' " *Id.*

The practice of automatically excluding out-of-state residents from admission into New Jersey's PTI programs was declared unconstitutional in State v. Nolfi, 141 N.J. Super. 528, 538, 358 A.2d 853, 859 (Law Div. 1976). For a discussion of the *Nolfi* decision, see notes 56–62 *infra* and accompanying text.

[5] State v. Leonardis, 71 N.J. 85, 91, 363 A.2d 321, 324 (1976), *reaff'd on other grounds on rehearing*, 73 N.J. 360, 375 A.2d 607 (1977).

[6] State v. Leonardis, 71 N.J. 85, 91, 363 A.2d 321, 324 (1976), *reaff'd on other grounds on rehearing*, 73 N.J. 360, 375 A.2d 607 (1977).

[7] *See* State v. Leonardis, 71 N.J. 85, 91, 363 A.2d 321, 324 (1976), *reaff'd on other grounds on rehearing*, 73 N.J. 360, 375 A.2d 607 (1977). Through an oral opinion, the lower court judge declined to grant the defendants' petitions stating

> "that there is no fundamental right to pretrial intervention at all as long as the eligibility criteria [sic] does not discriminate against what we might call a constitutional protective [sic] class such as one founded on race or wealth. But the State need only demonstrate the criteria is [sic] relevant and has basis for which the classification is made."

Id. (brackets in original).

[8] State v. Leonardis, 71 N.J. 85, 91, 363 A.2d 321, 324 (1976), *reaff'd on other grounds on rehearing*, 73 N.J. 360, 375 A.2d 607 (1977).

[9] State v. Leonardis, 71 N.J. 85, 91, 363 A.2d 321, 324 (1976), *reaff'd on other grounds on rehearing*, 73 N.J. 360, 375 A.2d 607 (1977).

[10] State v. Leonardis, 71 N.J. 85, 92, 363 A.2d 321, 324 (1976), *reaff'd on other grounds on rehearing*, 73 N.J. 360, 375 A.2d 607 (1977). Strychnewicz was indicted under N.J. STAT. ANN. §§ 24:21-19(a)(1), -20(a) (West Cum. Supp. 1977–1978). 71 N.J. at 92, 363 A.2d at 324.

[11] Brief on Behalf of the State of New Jersey at 1, State v. Leonardis, 73 N.J. 360, 375 A.2d 607 (1977).

ment.[12] The defendant then filed a motion in the Superior Court of New Jersey, Law Division, seeking an order compelling the prosecutor to furnish a written statement of the reasons for that office's refusal to allow his placement into PTI.[13] The defendant's motion was granted.[14] In response, the prosecutor petitioned the appellate division for leave to appeal, which was denied.[15] The New Jersey supreme court, however, ultimately granted a similar petition.[16] Although the three appeals did not concern identical issues, the court consolidated the Strychnewicz appeal with the pending Rose and Leonardis cases[17] "to consider . . . certain aspects of the pretrial intervention programs . . . established in Bergen and Hudson Counties," and in particular, "the fundamental nature and fairness of PTI."[18]

Justice Pashman, writing for a unanimous court, in *State v. Leonardis (Leonardis I)*[19] initially noted that the specific issues raised by the Leonardis and Rose appeals need not be reached in view of the "fundamental deficiencies . . . inherent in the Bergen County PTI program."[20] The court's primary criticism of the Bergen County program was directed toward the "restrictive impact" which the exclusionary criteria had on admissions.[21] According to the court, the at-

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[12] *See* State v. Leonardis, 71 N.J. 85, 92, 363 A.2d 321, 324 (1976), *reaff'd on other grounds on rehearing*, 73 N.J. 360, 375 A.2d 607 (1977). Rule 3:28(b) requires, as a condition for a defendant's admission to an intervention program, the consent of the prosecuting attorney. *Id.*; *see* notes 45–48 *infra*.

[13] State v. Leonardis, 71 N.J. 85, 92, 363 A.2d 321, 324 (1976), *reaff'd on other grounds on rehearing*, 73 N.J. 360, 375 A.2d 607 (1977).

[14] State v. Leonardis, 71 N.J. 85, 92, 363 A.2d 321, 324 (1976), *reaff'd on other grounds on rehearing*, 73 N.J. 360, 375 A.2d 607 (1977).

[15] State v. Leonardis, 71 N.J. 85, 92, 363 A.2d 321, 324 (1976), *reaff'd on other grounds on rehearing*, 73 N.J. 360, 375 A.2d 607 (1977).

[16] State v. Leonardis, 71 N.J. 85, 92, 363 A.2d 321, 324 (1976), *reaff'd on other grounds on rehearing*, 73 N.J. 360, 375 A.2d 607 (1977).

[17] State v. Leonardis, 71 N.J. 85, 89, 363 A.2d 321, 323 (1976), *reaff'd on other grounds on rehearing*, 73 N.J. 360, 375 A.2d 607 (1977).

[18] State v. Leonardis, 71 N.J. 85, 89, 363 A.2d 321, 323 (1976), *reaff'd on other grounds on rehearing*, 73 N.J. 360, 375 A.2d 607 (1977).

[19] 71 N.J. 85, 363 A.2d 321 (1976), *reaff'd on other grounds on rehearing*, 73 N.J. 360, 375 A.2d 607 (1977).

[20] *Id.* at 110, 363 A.2d at 334. The defendants did not specifically contest the exclusionary criteria, but rather application of these criteria by the Bergen County program. *See id.* The criteria stipulated that individuals charged with certain offenses were " 'ordinarily' " to be excluded. *Id.* In practice, however, such individuals were "automatically" excluded, without even cursory consideration. *Id.* Thus, the actual issue raised by the appeals was "whether [the defendants] respective cases were among those which 'ordinarily' would have been excluded." *Id.*

[21] *Id.* at 111–12, 363 A.2d at 334–35.

tendant effect of the criteria was to undermine the overall rehabilitative purpose of PTI.[22] Thus, the court invalidated the criteria, holding that defendants could not be precluded from applying for admission into a pretrial program based upon exclusionary classifications.[23]

In contrast, the issue raised by the Strychnewicz appeal —whether a prosecutor may decline to articulate his reasons for refusing to consent to a defendant's admission into a PTI program—was expressly addressed by the court.[24] In an effort "[t]o delimit the exercise of discretion" on the part of the prosecutor, and to assist in judicial review of PTI decisions, the court concluded that a written explanation of such prosecutorial decisions is required.[25] In addition, the court held that a defendant is entitled to a judicial hearing at each stage of PTI where "admission, rejection or continuation" is at issue.[26]

Subsequent to the *Leonardis I* opinion, the court's action was challenged as an infringement upon the powers of the executive and legislative branches of government.[27] The court, in *State v. Leonardis (Leonardis II)*,[28] reaffirmed its original opinion.[29] It held that the *Leonardis I* decision could be sustained under both its rule-making and adjudicatory powers, and determined that its actions did not unduly infringe upon the functions of the other governmental branches.[30] Thus, no separation of powers violation existed.[31]

The pretrial intervention concept is essentially the formal embodiment of heretofore informal diversionary practices within the criminal justice system.[32] Such diversionary practices are premised

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[22] *Id.*

[23] *Id.* at 112, 363 A.2d at 335.

[24] *See id.* at 92, 113–14, 363 A.2d at 324, 326.

[25] *Id.* at 121–22, 363 A.2d at 340–41. An analogous issue was decided in Monks v. New Jersey State Parole Bd., 58 N.J. 238, 277 A.2d 193 (1971). Certification by the supreme court was granted on the issue of whether a parole board should be required to provide a statement of reasons for parole denials. *Id.* at 242, 277 A.2d at 195. The court concluded that considerations of fairness necessitate a statement of reasons for denials of parole in order to provide a basis for judicial reexamination. *Id.* at 246–49, 277 A.2d at 197–99.

[26] 71 N.J. at 122, 363 A.2d at 341.

[27] State v. Leonardis, 73 N.J. 360, 367, 375 A.2d 607, 610–11 (1977).

[28] 73 N.J. 360, 375 A.2d 607 (1977).

[29] *Id.* at 384, 375 A.2d at 619.

[30] *Id.* at 375–77, 375 A.2d at 615.

[31] *Id.* at 372, 375 A.2d at 613.

[32] *See, e.g.*, R. ROVNER-PIECZENIK, PRETRIAL INTERVENTION STRATEGIES: AN EVALUATION OF POLICY-RELATED RESEARCH AND POLICYMAKER PERCEPTIONS 2–3 (National Pretrial Intervention Service Center, ABA Commission on Correctional Facilities and Services, November 1974) [hereinafter cited as PTI STRATEGIES]; Note,

on the belief that it is not always necessary, and in fact may often be detrimental, to pursue formal courtroom prosecution for every criminal violation.[33] While diversion was an approved practice within the criminal justice system,[34] the informal mechanisms employed under

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Pretrial Intervention Programs—An Innovative Reform of the Criminal Justice System, 28 RUTGERS L. REV. 1203, 1205–06 (1975) [hereinafter cited as *Innovative Reform*]; Note, *Pretrial Diversion from the Criminal Process*, 83 YALE L.J. 827, 828 (1974) [hereinafter cited as *Pretrial Diversion*].

A police officer's initial decision not to arrest a suspect is a common example of diversion. For a discussion of police diversion, see Goldstein, *Police Discretion Not to Invoke the Criminal Process: Low-Visibility Decisions in the Administration of Justice*, 69 YALE L.J. 543 (1960). Diversion also occurs when the prosecutor, acting pursuant to his authority, terminates a case without prosecution. For a critique of the discretionary role of the prosecutor, see Kaplan, *The Prosecutorial Discretion—A Comment*, 60 NW. U.L. REV. 174 (1965). A more subtle, yet "highly structured" diversionary practice, is accomplished "by the laws of criminal irresponsibility (insanity pleas)." Brakel, *Diversion from the Criminal Process: Informal Discretion, Motivation, and Formalization*, 48 DEN. L.J. 211, 213 (1971). Statutory bases have also been used to incorporate diversion techniques. For examples of this approach, see F. MILLER, PROSECUTION 272–73 (1970).

[33] NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, COURTS 33 (U.S. Gov't Printing Office 1973) [hereinafter cited as COURTS]; THE TASK FORCE ON THE ADMINISTRATION OF JUSTICE, THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 4 (U.S. Gov't Printing Office 1967) [hereinafter cited as TASK FORCE REPORT].

The practice of diverting cases is not novel. Estimates vary, but approximately "one-third . . . [to] one-half" of all arrest cases are thought to be disposed of in some nontrial manner by police, prosecutors and judges. TASK FORCE REPORT, *supra* at 4. Various factors, such as problems of proof, the availability of alternatives and the taxing demand on court resources, lie behind use of the diversion process. Brakel, *supra* note 32, at 216–17.

[34] *See, e.g.*, TASK FORCE REPORT, *supra* note 33, at 4; Brakel, *supra* note 32, at 211–12; Goldstein, *supra* note 32, at 552–54. For an outline of diversion practices, see note 32 *supra*. *See generally* K. DAVIS, DISCRETIONARY JUSTICE (1969).

In an address before the National Conference on Corrections held in 1971, then Attorney General John Mitchell stated: "In many cases, society can best be served by diverting the accused to a voluntary community-oriented correctional program instead of bringing him to trial." Address by John Mitchell, National Conference on Corrections (1971), *reprinted in* [1971] 10 CRIM. L. REP. (BNA) 2240.

The initial impetus for acceptance of a diversionary concept can be traced to a study done by the Commission on Law Enforcement and the Administration of Justice, [hereinafter referred to as the President's Commission], which was established in July of 1965 by executive order of President Johnson. Exec. Order No. 11,236, 3 C.F.R. 329 (1965). One of its principal functions was to:

> (1) Inquire into the causes of crime and delinquency, measures for their prevention, the adequacy of law enforcement and administration of justice, . . . and make such studies, conduct such hearings, . . . as it deems appropriate for this purpose.

Id. Pursuant to this order, the President's Commission conducted an extensive nationwide survey which ultimately documented the criminal justice system's inability to reduce crime. THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY (U.S. Gov't Printing Office

1967) [hereinafter cited as CHALLENGE OF CRIME]. The President's Commission made several recommendations, including the use of diversionary practices. *Id.* at 133–34. Although the President's Commission did not specifically propose "diversion . . . for the general offender population," the reasoning employed by the President's Commission was found to be readily applicable to court-based programs. PTI STRATEGIES, *supra* note 32, at 5; *see* CHALLENGE OF CRIME, *supra* at 133–34.

Endorsement of the diversion concept by numerous sources rapidly followed publication of the President's Commission report. *See* ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION 84 (Approved Draft 1971) [hereinafter cited as ABA STANDARDS, THE PROSECUTION AND DEFENSE FUNCTIONS]; NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, CORRECTIONS 73–96 (U.S. Gov't Printing Office 1973) [hereinafter cited as CORRECTIONS]; COURTS, *supra* note 33, at 21–41.

The National Advisory Commission on Criminal Justice Standards and Goals [hereinafter referred to as the Standards and Goals Commission] made findings similar to those of the President's Commission. CORRECTIONS, *supra* at 1, 74–76, 159. According to the Standards and Goals Commission's studies, rehabilitation programs that existed in penal institutions had demonstrated that a person's receptiveness to treatment while incarcerated did not necessarily guarantee that socially acceptable behavior would follow once the person returned to the community. *Id.* at 75. In fact, data had demonstrated "that prisoners who receive special 'treatment' in [an] institution . . . have about the same recidivism rates as those who do not." *Id.* It was therefore theorized that treatment services would have a more positive impact if the person involved were not exposed to a prison environment. *Id.* at 76.

The United States Department of Labor, having experimented with numerous "manpower," *i.e.*, employment, projects dealing with prisoners and ex-offenders, also came to the conclusion that because of the debilitating effect of the trial process and imprisonment, a more positive response to rehabilitation could be obtained by pretrial diversion. PTI STRATEGIES, *supra* note 32, at 6–7. In 1967, the Department of Labor funded two pilot pretrial diversion projects based on its manpower employment model—the Manhattan Court Employment Project in New York City and Project Crossroads in Washington, D.C. *Id.* at 8. These pretrial intervention programs attempted to divert the accused prior to institution of criminal proceedings. *Id.* at 7. The Department of Labor projects were provisionally set up on a three year experimental basis. Zaloom, *Pretrial Intervention Under New Jersey Court Rule* 3:28, 2 CRIM. JUST. Q. 178, 179–80 (1974). At the end of that time, evaluations were prepared which confirmed many earlier predictions concerning the benefits of pretrial intervention. *See* PTI STRATEGIES, *supra* at 8. Encouraged by these findings, the Department of Labor and the Law Enforcement Assistance Administration (LEAA) provided funds for the establishment of eight additional programs around the country. *See id.*; Zaloom, *supra* at 180; *Innovative Reform*, *supra* note 30, at 1208. The cities chosen as project sites were Atlanta, Baltimore, Boston, Cleveland, Minneapolis, Newark, San Antonio, and the California Bay Area (Hayward, San Jose, Santa Rosa). *Id.* at 1208 n.34. The reported successes of these " 'second round' " programs led to the rapid growth of PTI, particularly in urban areas. *Id.* at 1208. At present, approximately one hundred similiarly structured programs are in operation throughout the fifty states, the District of Columbia, Puerto Rico, and the Virgin Islands. *See* NATIONAL PRETRIAL INTERVENTION SERVICE CENTER, ABA COMMISSION ON CORRECTIONAL FACILITIES AND SERVICES, PRETRIAL CRIMINAL JUSTICE INTERVENTION TECHNIQUES AND ACTION PROGRAMS (2d ed. June, 1975) [hereinafter cited as TECHNIQUES AND ACTION PROGRAMS].

In New Jersey, the State Law Enforcement Planning Agency (SLEPA), in 1970, financed this state's first PTI program—the Newark Defendants' Employment Project (N.D.E.P.). *See* Zaloom, *supra* at 182. That same year, the New Jersey supreme court adopted rule 3:28 entitled "Defendant's Employment Program," which authorized the use of such programs. N.J.R. 3:28 (1970).

this approach began to engender much criticism.[35] Essentially, the argument advanced was that the absence of procedural safeguards allowed for the arbitrary exercise of official discretion.[36] Accordingly, recommendations proposed the establishment of formal diversionary programs operating under standardized guidelines.[37]

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[35] *See, e.g.*, COURTS, *supra* note 33, at 3; TASK FORCE REPORT, *supra* note 33, at 4. The wide range of discretion with regard to "nontrial dispositions" gave rise to criticism that such unguided discretion created opportunities for improprieties. *Id.*, *supra* at 4. Diversion in the form of prosecutorial discretion, for example, has been sharply criticized by Professor Davis. K. DAVIS, *supra* note 34, at 188–214. He noted that "[t]he affirmative power to prosecute is enormous, but the negative power to withhold prosecution may be even greater, because it is less protected against abuse." *Id.* at 188. Davis observed that the absence of review may lead to such abuse, commenting that "[t]he top prosecutors of federal, state, and local governments are typically subject to little or no checking either by higher officers or by reviewing courts." *Id.* at 207. He further indicated that a structuring of the prosecutorial system would protect against misuse of power and allow for "procedural protections." *See id.* at 194–98. *See also* ABA STANDARDS, THE PROSECUTION AND DEFENSE FUNCTIONS, *supra* note 34, § 3.4 & Commentary, at 83–85; LaFave, *The Prosecutor's Discretion in The United States*, 18 AM. J. COMP. L. 532, 547 (1970).

[36] CHALLENGE OF CRIME, *supra* note 34, at 133.

The criticisms of the discretionary power of the prosecutor, made by the President's Commission, illustrate misgivings concerning unbridled decision-making authority. While recognizing the value of the discretionary powers of the prosecutor, the President's Commission cautioned that "prosecutors exercise their discretion under circumstances and in ways that make unwise decisions all too likely." *Id.* Various deficiencies such as the "lack of [both] sufficient information," and standards and procedures for making prosecutorial decisions, were cited by the President's Commission as flaws within the discretionary process. *Id.*; *see* K. DAVIS, *supra* note 34, at 196–97; COURTS, *supra* note 33, at 2–4; TASK FORCE REPORT, *supra* note 33, at 4. The ABA, in its commentary on the role of prosecutor, advised: "The prosecutor should establish standards and procedures for evaluating complaints to determine whether criminal proceedings should be instituted." ABA STANDARDS, THE PROSECUTION AND DEFENSE FUNCTIONS, *supra* note 34, § 3.4(b), at 83.

The use of standards is not intended to be restricted to prosecutors; rather that office's obligations entail "establish[ing] orderly procedures for the screening of cases initiated by the police." *Id.* & Commentary, at 84. The Standards and Goals Commission proposed specific criteria to help law enforcement officials in selecting the individuals for whom diversion would be most appropriate. COURTS, *supra* at 17–23. Among the criteria regarded by that Commission as relevant were the potentially detrimental effects of criminal proceedings on the accused, and the role of the criminal system in protecting the community against future criminal acts. *See id.* at 20–23. *See generally* CORRECTIONS, *supra* note 34, at 76; COURTS, *supra* at 33, Goldstein, *supra* note 32, at 544–46.

[37] *See* COURTS, *supra* note 33, at 2, 30. In commenting upon the need for a formalized structure for the diversion process, the Standards and Goals Commission noted that

> [t]he underlying cause of the problems in diversion programs is that these programs have developed informally because of inadequate resources to prosecute cases and to treat convicted offenders. These standards seek to alleviate these conditions and to meet the needs summarized above by encouraging recognition of diversion as an appropriate and legitimate alternative within the

Increasing court backlogs, substantially due to a rise in crime in recent decades,[38] have prompted a formalization of diversionary procedures.[39] In conjunction with the rising crime rate, the absence of viable prosecutorial options for dealing with defendants has also contributed to increasingly unmanageable caseloads in trial courts,[40] which, in turn, hindered "the effective prosecution of more serious offenses."[41] Authorities, cognizant of the need to alleviate overcrowded court calendars, proffered, as a possible solution, pretrial intervention programs.[42] The general format of such programs pro-

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criminal justice process. These standards also seek to encourage the development of the most promising programs, and to structure the programs without depriving them of their flexibility.

Id. at 30; *see* Goldstein, *supra* note 32, at 553–54. *See generally* K. DAVIS, *supra* note 34, at 196–214.

[38] It has been posited that the steadily increasing crime rate was the result, in part of overcriminalization in the system. Overcriminalization is the excessive reliance by society upon the criminal law to encourage compliance with what is deemed to be appropriate societal behavior. *See* TASK FORCE REPORT, *supra* note 33, at 98–99, 106. Those offenses referred to as "victimless crimes," such as drunkenness, vagrancy and non-support, are often considered unnecessarily subject to criminal sanctions. *See id.* at 106–07. Ironically, the inordinate categorization of such types of behavior as criminal, in order to deter crime, may have had the effect of "interfer[ing] with the operation of the criminal law and inhibit[ing] the development of solutions to underlying social problems." *Id.* at 98. Arguably, this overreliance upon criminal law has hindered the effectiveness of courts by significantly increasing the number of cases to be processed. *See* PTI STRATEGIES, *supra* note 32, at 4. TASK FORCE REPORT, *supra* at 98–99. For a more detailed discussion of the notion of overcriminalization, see Junker, *Criminalization and Criminogenesis*, 19 U.C.L.A. L. REV. 697 (1972); Skolnick, *Criminalization and Criminogenesis: A Reply to Professor Junker*, 19 U.C.L.A. L. REV. 715 (1972); Kadish, *More on Overcriminalization: A Reply to Professor Junker*, 19 U.C.L.A. L. REV. 719 (1972).

[39] *See* COURTS, *supra* note 33, at 1–4.

[40] PTI STRATEGIES, *supra* note 32, at 3–4.

[41] PTI STRATEGIES, *supra* note 32, at 4. The flexibility of diversionary procedures are viewed as beneficial in that, unlike the essentially rigid trial process, they are adaptable to individual situations. *See* COURTS, *supra* note 33, at 28; PTI STRATEGIES, *supra* at 4; TASK FORCE REPORT, *supra* note 33, at 4; Comment, *Pretrial Diversion: The Threat of Expanding Social Control*, 10 HARV. C.R.-C.L. L. REV. 180, 193 (1975).

[42] *E.g.*, COURTS, *supra* note 33, at 33. There, it was said: "Diversion often occurs not because of a desire to help the offender or to protect society, but because of the pragmatic realization that there are not enough resources to pursue formal prosecution." *Id*; *see id.* at 1–3. In addition, similar views have been expressed before Congress:

> By selectively diverting certain . . . offenders to voluntary programs of preprosecution probation . . . , many of those accused persons who would otherwise fall into the "assembly line" system in the courts are effectively diverted, thereby operating to help un-clog and diminish the criminal caseload dockets of our courts so that the more serious crimes can be dealt with, such as rape, murder, consumer fraud, public corruption, and organized crime.

Pre-Trial Diversion: Hearings on H.R. 9007 and S. 798 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary,

vides for the suspension of criminal trial proceedings against participating defendants on condition that they participate in certain supervised rehabilitative activities.[43]

In 1970, the New Jersey supreme court pioneered in the field of diversion by sanctioning the pretrial intervention concept for the state through the promulgation of court rule 3:28.[44] The rule, in its

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93d Cong., 2d Sess. 60 (1974) (statement of Robert F. Leonard) [hereinafter cited as *Hearings on H.R. 9007 and S. 798*].

[43] *See, e.g.*, COURTS, *supra* note 33, at 27; Note, *Addict Diversion: An Alternative Approach for the Criminal Justice System*, 60 GEO. L.J. 667, 672 (1972) [hereinafter referred to as *Addict Diversion*]; *Pretrial Diversion*, *supra* note 32, at 827.

Pretrial intervention programs share many common characteristics, yet even within a particular state, projects may vary substantially. In New Jersey, for example, county programs may operate through either the probation department or the Trial Court Administrator's Office. N.J.R. 3:28(b).

[44] *See* N.J.R. 3:28 (1970). The original rule, entitled "Defendant's Employment Programs," was adopted for the purpose of authorizing the Newark Defendant's Employment Program. PRESSLER, CURRENT N.J. COURT RULES, R. 3:28 & Comment. It was unclear whether non-employment based programs, were eligible for approval under the rule. SUPREME COURT COMMITTEE ON CRIMINAL PROCEDURE, REPORT, *reprinted in* 96 N.J.L.J. 449, 462 (1973). Amendments were, therefore, adopted which clarified the rule, making it applicable to other types of programs such as drug and alcohol rehabilitation. *See* N.J.R. 3:28(a), (d) (1973). These amendments were as follows:

> (a) In counties where a defendant's employment or counseling program or other diversionary program including *a drug or alcoholic detoxification program* is approved by the Supreme Court for operation under this rule, the Assignment Judge shall designate a judge or judges to act on all matters pertaining to the program.
>
> . . . .
>
> (d) Where proceedings have been postponed against a defendant for a second period of 3 months as provided in paragraph (c)(2), at the conclusion of such additional 3-month period, provided that, *in drug detoxification cases* the judge may wait such further period as he deems necessary to enable him to make an informed decision, the designated judge may not again postpone proceedings but shall make a disposition in accordance with paragraph (c)(1) or (3).

Id. (emphasis added).

That portion of the 1970 rule which provided that a single judge be delegated to act on PTI matters, has been retained. *See* N.J.R. 3:28(a). In 1974 the rule was again amended, vesting the assignment judge with the sole responsibility of handling PTI matters involving defendants accused of committing heinous crimes. N.J.R. 3:28(a) (1975). This section reads as follows:

> (a) In counties where a pretrial intervention program is approved by the Supreme Court for operation under this rule, the Assignment Judge shall designate a judge or judges to act on all matters pertaining to the program, with the exception, however, that the Assignment Judge shall him or herself act on all such matters involving treason, murder, kidnapping, manslaughter, sodomy, rape, armed robbery, or sale or dispensing of narcotic drugs by persons not drug-dependent.

Id. Another 1974 amendment mandates that all statements and admissions made by the defendant while a pretrial participant, and any program reports, are inadmissible at subsequent hearings. The rule states in pertinent part:

present form, provides that a recommendation be made by the program director to the judge on behalf of the potential participant, requesting an adjournment of further court proceedings for an initial three-month period.[45] If the postponement is granted, the candidate is required to engage in community-based services offered through the program during the three-month interval.[46] At the end of the initial period, the court must choose one of three options: dismissal of pending charges,[47] a final three-month adjournment,[48] or return of

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(4) During the conduct of hearings subsequent to an order returning the defendant to prosecution in the ordinary course, no program records, investigative reports, reports made for a court or prosecuting attorney, or statements made by the defendant to program staff shall be admissible in evidence against such defendant. No such hearing with respect to such defendant shall be conducted by the designated judge who issued the order returning the defendant to prosecution in the ordinary course.

N.J.R. 3:28(c)(4) (1975).

The aspects of rule 3:28(c)(4), guaranteeing to an individual confidentiality regarding information obtained by a PTI program, have not been the subject of a legal challenge. However, an analogy can be made to the case of State *ex rel.* J.P.B., 143 N.J. Super. 96, 362 A.2d 1183 (App. Div. 1976), wherein the court held that incriminating statements made by a juvenile during a group counselling session were inadmissable at a subsequent court proceeding. *Id.* at 100–07, 362 A.2d at 1186–89. The youth made the statements while confined at a state institution and was assured at that time that the statements would remain confidential. *Id.* at 100–01, 362 A.2d at 1186. The court determined that exclusion of the statements was consistent with fundamental fairness and due process. *Id.* at 107, 362 A.2d at 1189.

In conjunction with the confidentiality provision of rule 3:28, rule 1:38 ensures confidentiality of all pretrial program records by protecting them from public inspection. N.J.R. 1:38(f). In addition, New Jersey court procedure mandates that criminal defendants initially appearing in municipal courts in counties where intervention programs exist, must be informed of the existence and the application process for PTI. N.J.R. 3:4–2.

[45] N.J.R. 3:28(b) authorizes the following:

(b) Where a defendant charged with a penal or criminal offense has been accepted by the program, the designated judge may, on the recommendation of the Trial Court Administrator for the county, the Chief Probation Officer for the county, or such other person approved by the Supreme Court as program director, and with the consent of the prosecuting attorney and the defendant, postpone all further proceedings against said defendant on such charges for a period not to exceed 3 months.

Id. The consent of the prosecutor is a prerequisite at all stages of PTI. *See* N.J.R. 3:28(b), (c)(1)(2), (d).

[46] *See* N.J.R. 3:28.

[47] N.J.R. 3:28(c)(1) provides the following:

On recommendation of the program director and with the consent of the prosecuting attorney and the defendant, dismiss the complaint, indictment or accusation against the defendant, such a dismissal to be designated "matter adjusted—complaint (or indictment or accusation) dismissed."

Id.

[48] N.J.R. 3:28(c)(2) provides the following:

On recommendation of the program director and with the consent of the

the accused to the formal trial process.[49]

Since its inception, there has been a limited amount of litigation concerning PTI.[50] In the case of *State v. Nolfi*,[51] certain aspects of the Hudson County PTI program, which had been established pursuant to New Jersey Court Rule 3:28, were challenged on equal

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prosecuting attorney and the defendant, further postpone all proceedings against such defendant on such charges for an additional period not to exceed 3 months.

Id. Pursuant to rule 3:28(d), however, drug rehabilitation defendants may be continued in the program for as long as one year. *Id.* Section (d) of the rules states:

Where proceedings have been postponed against a defendant for a second period of 3 months as provided in paragraph (c)(2), at the conclusion of such additional 3-month period the designated judge may not again postpone proceedings but shall make a disposition in accordance with paragraph (c)(1) or (3), provided however that in cases involving defendants who are dependent upon a controlled dangerous substance the designated judge may, upon recommendation of the program director and with the consent of the prosecuting attorney and the defendant, grant such further postponements as he or she deems necessary to make an informed decision, but the aggregate of postponement periods under this rule shall in no case exceed one year.

Id.

[49] N.J.R. 3:28(c)(3) provides in pertinent part:

On the written recommendation of the program director or the prosecuting attorney or on the court's own motion order the prosecution of the defendant to proceed in the ordinary course.

Id. The offender is entitled to a termination hearing where it is recommended that he be returned to the regular court process. *Id.* Section (c)(3) continues:

Where a recommendation for such an order is made by the program director or the prosecuting attorney, such person shall, before submitting such recommendation to the designated judge, provide the defendant or his or her attorney with a copy of such recommendation, shall advise the defendant of his or her opportunity to be heard thereon and the designated judge shall afford the defendant such a hearing.

Id.

[50] The number of cases dealing with pretrial intervention in New Jersey has been minimal. State v. Joyner, No. 1127-76, slip op. at 4-5 (N.J. Super. Ct. Law Div. Feb. 22, 1977) (prosecutor shall be present at rejection hearing); State v. White, 145 N.J. Super. 257, 260, 367 A.2d 469, 471 (Law Div. 1976) (PTI review does not contemplate the admission of materials or evidence not previously submitted, for such would amount to "a trial *de novo*") (italics in original); Irons v. Coleman, No. L-1540-76 P.W., slip op. at 15 (N.J. Super. Ct. Law Div. Oct. 22, 1976) (absence of a PTI program in a county not a denial of equal protection); State v. Kowitski, 145 N.J. Super. 237, 242-43, 367 A.2d 459, 461-62 (Law Div. 1976) (basing availability of PTI solely on the county in which the crime is committed denies equal protection); State v. Singleton, 143 N.J. Super. 65, 68, 362 A.2d 626, 628 (Law Div. 1976) (" 'essential fairness' " dictates that completion of an intervention program bars a second proceeding on the same facts); State v. Nolfi, 141 N.J. Super. 528, 536-37, 358 A.2d 853, 857-58 (Law Div. 1976) (denial of admission to a PTI program solely on the basis of nonresidency held unconstitutional); State v. Rice, 137 N.J. Super. 593, 603, 350 A.2d 95, 101 (Law Div. 1975) (assignment of a defendant to a pretrial program is not "a 'final determination' " of criminal charges for purposes of bail forfeiture).

[51] 141 N.J. Super. 528, 358 A.2d 853 (Law Div. 1976).

protection grounds. There, a New York resident charged with a disorderly persons offense in Hudson County applied for pretrial intervention.[52] The accused was summarily denied admission on the grounds that he did not satisfy the program's residency requirements.[53] On appeal,[54] the defendant claimed that the Hudson County PTI program policy of automatically excluding out-of-state residents was unconstitutional.[55] The defendant argued that summary denial based on residency violated his right to equal protection, since he was an eligible applicant in all other respects.[56] He further maintained that a compelling state interest had to be shown to justify his exclusion because "[t]he fundamental rights [of] preserv[ing] . . . an untarnished criminal record and the right to avoid incarceration" were involved.[57]

Judge Walsh, in upholding the defendant's equal protection

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[52] *Id.* at 533, 358 A.2d at 856. Defendant sought admission into PTI at his initial municipal court appearance. *Id.*

[53] *Id.* Based upon the information before the court, Nolfi was an eligible candidate for intervention in all respects except residency. *See id.* at 537, 358 A.2d at 858.

[54] New Jersey court rule 3:24 provides that

> [e]ither the prosecuting attorney or the defendant may seek leave to appeal to the county court from an interlocutory order entered before trial by a court of limited criminal jurisdiction . . . . The court may . . . elect simultaneously to grant the motion and decide the appeal on the merits on the papers before it.

Id.

[55] 141 N.J. Super. at 533–34, 358 A.2d at 856.

[56] *See id.* at 533–34, 537, 358 A.2d at 856, 858. Nolfi further maintained that the exclusionary criteria were violative of the privileges and immunities clause of the Constitution. *Id.* The court interpreted this clause to read as follows:

> [T]hat a state may grant any privilege to its citizens that it sees fit, but those same rights, privileges and immunities are, by this clause, secured to all citizens of all other states when they come within the borders of that state.

Id. at 538, 358 A.2d at 858. According to the *Nolfi* court, the privilege involved was the opportunity to avoid a criminal conviction and its attendant effects. *Id.* To deny a defendant admission into a PTI program solely on the basis of residency was, therefore, deemed to be violative of the privileges and immunities clause. *Id.*, 358 A.2d at 859.

[57] *Id.* at 534 n.4, 358 A.2d at 856. This contention was never reached since the court categorized PTI as a privilege rather than a right. *Id.* at 534, 536, 358 A.2d at 856–57. In deeming PTI a privilege, the court was careful to note that such a classification would not impede an equal protection challenge. *Id.* at 536, 358 A.2d at 857. *But see* State v. Leonardis, 73 N.J. 360, 390–91, 375 A.2d 607, 622–23 (1977) (Conford, J., temporarily assigned, concurring) (promulgation of formal rules governing pretrial intervention creates a right to apply for admissions). Another fundamental right which Nolfi could have asserted is the right to interstate travel. 141 N.J. Super. at 534 n.4, 358 A.2d at 856. The exclusionary provision, in effect, would compel a defendant seeking entrance into PTI, to move into a state offering such a program. This possibility gave rise to the tenable argument that a fundamental right was involved. *Id.*; *see* Shapiro v. Thompson, 394 U.S. 618, 634 (1969) (a compelling state interest must be shown in order to constitutionally justify an infringement upon the exercise of one's right to travel).

claim, looked to "whether the challenged distinction rationally further[ed] some legitimate, articulated state purpose."[58] The effect of the exclusionary provision was to create two intrinsically similar classes—one consisting of residents, the other of nonresidents.[59] The court, in rather cursory fashion, found no rational basis for the establishment of the separate classes.[60] Such a classification permitted an uneven application of the law by discriminating against out-of-state residents.[61] These individuals, though suitable candidates for PTI, would not be eligible merely because of their nonresident status,[62] a factor having no bearing on their rehabilitative potential.[63] Furthermore, while participation in a pretrial intervention program was not considered a matter of right, it was, nonetheless, viewed as a significant privilege.[64] The county's policy was, therefore, "declared null

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[58] 141 N.J. Super. at 536, 358 A.2d at 857. Since a fundamental right was not involved, the classification at issue need only have a rational basis to be constitutionally valid. *See id.*; Shapiro v. Thompson, 394 U.S. 618, 634 (1969).

[59] 141 N.J. Super. at 536, 358 A.2d at 857–58.

[60] *See id.* The prosecutor, as representative of the Hudson County PTI program, claimed that the automatic exclusions were justified, since there had been an increased number of applications and there existed only limited resources with which to operate the program. *Id.* at 535, 358 A.2d at 857. Nolfi took the position that if the program could not be sufficiently funded to avoid constitutional deficiencies, then it should not be allowed to operate. *Id.*

The prosecutor also raised the possible extradition problems which might occur if a participant did not successfully complete the program. *Id.* The court retorted that identical situations occur when out-of-state residents are released on bail; it is simply "a fact of legal life in criminal proceedings." *Id.* at 535–36, 358 A.2d at 857. The prosecutor further contended that difficulties would arise because certain agencies which worked with the Hudson County program would not accept out-of-state residents. *Id.* at 535, 358 A.2d at 857. The court implied that the Hudson County PTI program could not sanction its own procedures by reference to similar practices utilized by other agencies. *Id.*

[61] *See id.* at 536, 358 A.2d at 857–58. The court, in determining that the distinction was discriminatory, noted that " '[w]hen the law lays an unequal hand on those who have committed intrinsically the same quality of offense * * * it has made as an invidious a discrimination as if it had selected a particular [group] for oppressive treatment.' " *Id.* at 536, 358 A.2d at 858 (quoting from Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535, 541 (1942)).

[62] *See* 141 N.J. Super. at 536–37, 358 A.2d at 857–58. Although there is no information in the opinion concerning the defendant's background, the court stated that Nolfi was an appropriate person for diversion. *See id.* at 537, 358 A.2d at 858. Judge Walsh commented that the defendant was likely to be rehabilitated and therefore came within the ambit of PTI's purpose. *Id.*

[63] *See id.* at 536–37, 358 A.2d at 857–58.

[64] *See id.* The notion of privilege differs from that of a right. One court has stated:

> There is inherent in the very word " 'privilege' " the idea of something apart and distinct from a common right which pertains to all citizens or exists in all subjects. It connotes some sort of a special grant from sovereignty, some

and void," with the result that PTI would have to be made available to eligible out-of-state residents.[65]

Leonardis I is the first New Jersey supreme court case to consider the validity of exclusionary practices arising under rule 3:28.[66] Prior to its examination of such practices, however, the court addressed the threshold jurisdictional question of its authority to hear an appeal arising from a denial of admission into an intervention program.[67] The state argued that courts, in general, lacked jurisdiction to review determinations made under rule 3:28 since there was no express provision in the rule for appellate review.[68] Speaking for the court, Justice Pashman rejected the state's contention, noting that rule 3:28 was promulgated pursuant to the supreme court's constitutional power to adopt rules concerning both the administration and the procedure of the New Jersey courts.[69] Relying upon former Chief Justice Weintraub's statement that " 'the power to make rules imports the power to enforce them,' "[70] the court reasoned that its "rule-making authority" included the power of review in the present matter, despite the absence of any express right of appeal in rule 3:28.[71]

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type of necessary special permission or consent which the sovereign in its discretion might have withheld or failed to provide.

State *ex rel.* Botkin v. Welsh, 61 S.D. 593, 618, 251 N.W. 189, 200 (1933). However, constitutional guarantees are not based upon the classification of a governmental entitlement as a "right" or a "privilege." *See, e.g.*, Bell v. Burson, 402 U.S. 535, 539 (1971) (state is restrained from suspending driving privileges without procedural due process); Goldberg v. Kelly, 397 U.S. 254, 262 (1970) (fact that welfare benefits are a statutory privilege, and not a right, will not defeat constitutional challenge).

[65] 141 N.J. Super. at 536–38, 358 A.2d at 857–59.

[66] 71 N.J. at 106–07, 363 A.2d at 332. For other cases dealing with various aspects of diversion, see note 50 *supra*.

[67] 71 N.J. at 108, 363 A.2d at 333.

[68] *Id.* at 107–08, 363 A.2d at 333. Although rule 3:28(c)(3) provides for a hearing after the initial three-month period if prosecution is recommended, the state argued that such hearings could not be considered appellate review. 71 N.J. at 108, 363 A.2d at 333. The prosecutor contended that this procedure was required only where candidates initially met the eligibility criteria but were later rejected by the program director or prosecutor. *Id.* The matters of Leonardis and Rose were distinguishable, in that both defendants failed to meet even the basic prerequisites for entry into a PTI program. *Id.*

[69] *Id.* For a discussion of the court's rule-making power, see note 118 *infra* and accompanying text.

[70] 71 N.J. at 109, 363 A.2d at 334 (quoting from *In re* Mattera, 34 N.J. 259, 272, 168 A.2d 38, 45 (1961)).

[71] 71 N.J. at 108–09, 363 A.2d at 333. Despite the general proposition that due process does not require appellate review for criminal cases, a review was deemed appropriate. *Id.* at 108, 363 A.2d at 333; *see* McKane v. Durston, 153 U.S. 684 (1894). The court pointed out that the interpretation of a court rule, not a statute, was at issue. 71 N.J. at 108, 363 A.2d at 333.

Prefatory to resolution of the jurisdictional question, the court found it necessary to examine the development of pretrial intervention, focusing on the basic premises of the concept.[72] As a result of this examination, Justice Pashman concluded that there existed two general purposes common to PTI programs.[73] In the court's view, the primary purpose of PTI is to rehabilitate the offender.[74] The "expeditious disposition" of criminal cases,[75] although a welcome " 'collateral benefit' " of the diversionary process,[76] was deemed to be a secondary and subordinate goal.[77]

In view of the major underlying purpose of PTI, the court determined whether or not the program procedures challenged by the *Leonardis I* appeals furthered this goal. The court noted that the eligibility criteria for PTI programs should be sufficiently flexible to divert the optimum number of cases.[78] At the same time, a degree of selectivity, designed to admit only "those . . . who have the best prospects for rehabilitation," should be maintained.[79] Thus, the summary exclusion of defendants charged with a heinous offense[80] was found to

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[72] 71 N.J. at 92–107, 363 A.2d at 324–32.

[73] *See id.* at 96–97, 363 A.2d at 326–27. For an explanation of the development of pretrial intervention, see notes 32–49 *supra* and accompanying text.

[74] 71 N.J. at 96, 363 A.2d at 326–27; *see Addict Diversion*, *supra* note 43, at 673.

[75] 71 N.J. at 96, 363 A.2d at 327.

[76] *Id.* at 98 n.8, 363 A.2d at 328.

[77] *Id.* at 96–100, 363 A.2d at 326–29. The belief that the rehabilitative purpose of PTI is superior to the facilitation of court processing is, perhaps, not as conclusive as the *Leonardis* court suggests. In the case of State v. Nolfi, 141 N.J. Super. 528, 532, 358 A.2d 853, 855 (Law Div. 1976), *discussed at* notes 53–62 *supra* and accompanying text, it was stated that rehabilitation and efficient court procedure were equally important goals of PTI. *See generally Innovative Reform*, *supra* note 32, at 1204; *Pretrial Diversion*, *supra* note 32, at 827.

[78] 71 N.J. at 100–02, 363 A.2d at 329–30.

[79] *Id.* at 100, 363 A.2d at 329. Justice Pashman recommended that an "individualistic approach" be taken when selecting participants for PTI. *Id.* at 100–01, 363 A.2d at 329. This type of approach has been applied at the sentencing level, and it has been suggested that it "is equally appropriate at the charging stage." LaFave, *supra* note 35, at 534. Professor LaFave has noted that there are situations where prosecution may not be desirable. These occur, for example, when the nature of the violation does not outweigh the excessive cost of trial, or when the harm done is not particularly serious and may be corrected. *Id.* at 534–35; *see* F. Miller, *supra* note 32, at 260–80; Goldstein, *supra* note 32, at 549.

[80] 71 N.J. at 110–11, 363 A.2d at 334–35. The practice of restricting diversionary alternatives to certain categories of offenders is not unusual. *See, e.g.*, 28 U.S.C. §§ 2901–2906 (1970) (narcotics addicts, if not charged with a violent crime or dispensing of drugs, and having no more than two prior felony convictions); CONN. GEN. STAT. ANN. § 19-484 (West 1969) (limited to "drug-dependent person[s]"); Dangerous Drug Abuse Act, ILL. ANN. STAT. ch. 91-1/2, §§ 120.1–.13 (Smith-Hurd Cum. Ann. Pocket Part 1977) (narcotics addicts charged with non-violent offenses who have no more than two prior convictions of a violent crime); MASS. ANN. LAWS ch. 276A, §§ 1–9 (Michie/Law.

"accord misplaced emphasis to the offense," thereby thwarting the rehabilitation function upon which PTI is premised.[81]

Justice Pashman observed that in the rejections of Rose and Leonardis, no attempts were made to ascertain any factors pertinent to their rehabilitative potential.[82] The trial judge was unaware, at the time he reviewed the defendants' applications, that Leonardis was fully employed and had never been involved with the criminal court system, or that Rose was a full-time student.[83] Such factors, germane to a defendant's rehabilitative prospects, would necessarily be overlooked if PTI programs were allowed to rely exclusively on the nature of the alleged offense in determining admissions.[84] Consequently, the court held that the categorical denial of admission into a program based upon the mandatory application of exclusionary criteria could not be countenanced, for such a procedure failed to take account of the rehabilitative aims of pretrial programs.[85]

Consideration was then given to the remaining issue, namely, whether a prosecutor may refuse to particularize his reasons for failing to consent to a defendant's request for admission into a PTI program.[86] The court determined that to require the prosecutor to record his reasons for pretrial denials was consistent with the rehabilitative goals of PTI, and "further[ed] their implementation."[87]

Co-op 1977 Cum. Supp.) (participants must be between ages of seventeen and twenty-one exclusive, without a prior criminal record or pending criminal cases); WASH. REV. CODE ANN. §§ 9.95A.010–.900 (1976 Pocket Part) (excludes misdemeanor offenses); PA. R. CRIM. P. 175 to 185 (non-violent offenders).

[81] 71 N.J. at 112, 363 A.2d at 335. The notion of concentrating on the individual involved, rather than on the crime committed, had been advanced previously. During his tenure as chairman of the ABA Commission on Correctional Facilities and Services, Chief Justice of the Supreme Court of New Jersey, Richard J. Hughes, observed that "diversion of the 'offender' rather than the offense charged emphasizes individual needs as the determining factor in participant eligibility." *The Community Supervision and Services Act: Hearings on S. 798 Before the Subcomm. on National Penitentiaries of the Senate Comm. on the Judiciary*, 93d Cong., 1st Sess. 382 (1973) (statement of Richard J. Hughes) [hereinafter cited as *Hearings on S. 798*].

[82] 71 N.J. at 111–12, 363 A.2d at 335. The practice of not providing pertinent background information about defendants was disturbing to the court, and was considered one of the deficiencies in the Bergen County program. *See id.*

[83] *Id.* at 111, 363 A.2d at 335. The court suggested that the following criteria be given consideration in assessing an applicant's rehabilitative potential: "the defendant's willingness to avoid conviction . . . , the motivation behind the commission of the crime, the age and past criminal record of the defendant and his current rehabilitative efforts." *Id.* at 112, 363 A.2d at 335. These factors were subsequently incorporated in the PTI guidelines by the court. *See* notes 97–98 *infra* and accompanying text.

[84] *See* 71 N.J. at 112, 363 A.2d at 335.

[85] *Id.* at 111–13, 363 A.2d at 334–36.

[86] *Id.* at 92, 113–14, 363 A.2d at 324, 336.

[87] *Id.* at 114, 363 A.2d at 336. In reaching this decision, the court relied upon the

Furthermore, this requirement would have a significant effect on a defendant's ability to challenge a denial of admission into a program, since the *Leonardis I* court granted defendants the right to a hearing in the event of such a denial.[88] In addition, the availability of a record would facilitate judicial review of PTI admission procedures, as well as provide a source of information for evaluating an "essentially experimental" program.[89]

The issues presented by the *Leonardis I* appeals evidenced the deficiencies in the Bergen and Hudson county programs. The court noted, however, that such defects were not unique to the two counties, but rather existed in programs throughout the state.[90] The court found that the diversity of the programs and the lack of review of prosecutorial discretion were the major causes of the problems in New Jersey's PTI programs.[91] In order to resolve these shortcomings, the court recommended adoption of a uniform statewide system.[92]

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conclusion of the Standards and Goals Commission which reported that:

> If diversion programs are to perform as they are intended, then the decisions of those referring to these programs must be subject to review and evaluation. . . .
>
> The first step in establishing accountability is to disclose the basis of decisions. Too often the rationale for discretionary decisions is undisclosed and unstated. Simply requiring written statements for each decision forces the process to become more open while it also permits administrative or judicial review. Review can be through the courts, the legislature, or whatever source seems most appropriate in seeing that goals have been achieved and standards complied with.

CORRECTIONS, *supra* note 34, at 96.

It should be noted that under certain circumstances, the prosecutor may not be required to submit reasons for a PTI denial. 71 N.J. at 119, 363 A.2d at 339. When a prosecutor believes that there is good cause for withholding certain sensitive information, he may request an *in camera* hearing. *Id.* The prosecutor must then present evidence demonstrating the prejudicial nature of the information, leaving the judge to determine whether the state's justification for witholding the data outweighs the defendant's need for a statement of reasons. *Id.*

[88] *See* 71 N.J. at 122, 363 A.2d at 341. In granting defendants the right to a hearing if denied admission to PTI, the court reasoned that inclusive in its power to enforce court rules is "the power to review decisions made pursuant to those rules." *Id.* at 114, 363 A.2d at 336. *See generally id.* at 108–09, 363 A.2d at 333–34; notes 107, 118 *infra*.

[89] 71 N.J. at 114–15, 363 A.2d at 336. Although the court recognized the novelty of the PTI concept, it commented that the notion has been firmly established in New Jersey. *Id.* at 114, 363 A.2d at 336. Notwithstanding the fact that PTI is well founded in this state, the court acknowledged the value of "experimentation, evaluation, assessment and modification of programs." *Id.* Justice Pashman was also careful to note that, given the experimental status of PTI programs, shortcomings in projects were to be expected. *Id.* at 120, 363 A.2d at 339. For a narration of the general history of PTI and its development in New Jersey, see notes 33–35 *supra*.

[90] 71 N.J. at 110–11, 363 A.2d at 334.

[91] *Id.* at 120–21, 363 A.2d at 339–40.

[92] *See id.*

Pursuant to this objective, the court, subsequent to its decision in *Leonardis I*, issued guidelines which set forth procedures to be followed by PTI programs within the state.[93] These guidelines explicate further the conclusions reached by the *Leonardis I* court.[94]

Under the guidelines, an individual's eligibility for pretrial intervention is based primarily upon his "amenability to the rehabilitative process," rather than upon the offense with which he is charged.[95] This does not imply, however, that the offense is to be viewed in a cursory manner. Where the crime charged involves any of the following: organized criminal activity, continued criminal enterprise, violence against another individual, or breach of public trust, admission to PTI "should generally be rejected."[96] There must also be "an apparent causal connection between the offense charged and the [defendant's] rehabilitative need";[97] however, the court does not pro-

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[93] ORDER IMPLEMENTING GUIDELINES FOR OPERATION OF PRETRIAL INTERVENTION IN NEW JERSEY (Sept. 8, 1976), *reprinted in* 99 N.J.L.J. 865 (1976) [hereinafter referred to as PTI GUIDELINES]. The preliminary guidelines issued in *Leonardis I*, were, in fact, mandatory modifications for programs presently in existence. 71 N.J. at 121, 363 A.2d at 340. These standards were incorporated into the court's PTI Guidelines.

[94] *Compare* 71 N.J. at 121–22, 363 A.2d at 340–41, *with* PTI GUIDELINES, *supra* note 93, Guidelines 2, 3(i), 8. Although the guidelines are in substantial agreement with the *Leonardis I* holding that PTI programs should be available to all offenders regardless of the offense charged, nevertheless, guideline 3(d) does allow for the automatic exclusion of individuals "charged with ordinance, health code and other similar violations." PTI GUIDELINES, *supra*, Guideline 3(d).

[95] PTI GUIDELINES, *supra* note 93, Guidelines 2, 3(i); *see* 71 N.J. at 112, 122, 363 A.2d at 335, 340.

The idea of "amenability to correction" appears to be synonymous with the "whole person" concept, used as a sentencing technique. 71 N.J. at 122, 363 A.2d at 840; State v. Green, 62 N.J. 547, 566–67, 303 A.2d 312, 322–23 (1973). The "whole person" theory is premised on the court obtaining a complete informational background on the defendant prior to disposition. *See* 62 N.J. at 566–67, 303 A.2d at 322–23. *Compare id. with* 71 N.J. at 112, 363 A.2d at 335.

[96] PTI GUIDELINES, *supra* note 93, Guideline 3(i). Apparently, there is a rebuttable presumption that defendants accused of these offenses are unsuitable for PTI. Such individuals, however, are not precluded from consideration, and may present relevant information concerning their possible admission. *Id.* For discussion of the court's interpretation of guideline 3(i), see note 95 *supra*.

[97] PTI GUIDELINES, *supra* note 93, Guideline 1(a). PTI Guideline 1(a) states the purposes of PTI, the primary purpose being

> [t]o provide defendants with opportunities to avoid ordinary prosecution by receiving early rehabilitative services, when such services can reasonably be expected to deter future criminal behavior by the defendant, and when there is an apparent causal connection between the offense charged and the rehabilitative need, without which cause both the alleged offense and the need to prosecute might not have occurred.

Id.

vide any insight as to how program personnel or courts are to make such specific determinations.[98]

In the event of a denial of admission into a PTI program, a defendant has the opportunity to contest this determination by "demonstrating his amenability to the rehabilitative process."[99] As provided by *Leonardis I*, the defendant is to receive a written statement of the reasons for non-acceptance and is entitled to an informal hearing on the matter.[100] According to the court's directive, the offender, at that hearing, must demonstrate that the denial was "arbitrary or capricious."[101] In addition, he also bears the burden of showing that the decision rejecting his application constituted an abuse of discretion.[102]

Simultaneously with the promulgation of these guidelines, the court granted a motion by the attorney general for a rehearing on certain issues arising as a consequence of the *Leonardis I* opinion.[103]

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[98] PTI GUIDELINES, *supra* note 93, Guideline 2. The guidelines mandate that certain factors such as age, residence, jurisdiction, and prior record of convictions, be considered. *Id.* Guideline 3(a)–(c), (e). It is also suggested that, where it is likely that a disposition of minimal effects will result, the defendant should not be diverted. *Id.* Guideline 3(d). The criteria additionally provide that "defendants who demonstrate sufficient effort to effect necessary behavioral change and show that future criminal behavior will not occur" are eligible. *Id.* Guideline 2. The practicability of so amorphous a guideline, however, is questionable, since program personnel and lawyers alike will find it extremely difficult to guarantee the behavioral change of an individual.

[99] *Id.* Guideline 2.

[100] *Id.* Guideline 8; *see* 71 N.J. at 119, 122, 363 A.2d at 339, 341.

[101] PTI GUIDELINES, *supra* note 93, Guideline 8.

[102] PTI GUIDELINES, *supra* note 93, Guidelines 2, 3(i), 8. The placing of such an onerous burden on the defendant indicates that the court intended such reviews only in unusual situations. This position finds support in the second *Leonardis* opinion. There, the court stressed that decisions of prosecutors in PTI matters should be viewed with deference, and should only be overruled in extreme circumstances. 73 N.J. 360, 381, 384, 375 A.2d 607, 619 (1977); *see* State v. Joyner, No. 1127–76 (N.J. Super. Ct. Law Div., Feb. 22, 1977) (prosecutor shall be present at rejection hearing); State v. White, 145 N.J. Super. 257, 260–61, 367 A.2d 469, 471 (Law Div. 1976) (PTI review does not contemplate the admission of materials or evidence not previously submitted, for such would amount to a "trial *de novo*") (italics in original).

[103] 73 N.J. 360, 366–67, 375 A.2d 607, 610–11 (1977). *Leonardis I* was decided on July 21, 1976. 71 N.J. at 85, 363 A.2d at 321. At that time defendants' appeals, requesting reexamination of their applications, were reversed and remanded for reconsideration consistent with the court's modifications. *Id.* at 122, 363 A.2d at 341. On August 24, 1976, the attorney general moved not only to intervene as amicus curiae, but also to allow the filing of a petition for clarification beyond the normal time period and for a stay of judgment. Brief and Appendix on Rehearing on Behalf of Defendant-Appellant at 1, State v. Leonardis, 73 N.J. 360, 375 A.2d 607 (1977) [hereinafter cited as Brief for Appellant]. In an order dated September 8, 1976, the supreme court granted leave to intervene and consented to a rehearing on the limited issues stated in its order. Order,

The challenge to the *Leonardis I* holding concerned the question of whether, in view of the separation of powers doctrine, the court was empowered to divert a defendant over an objection from the prosecutor's office.[104] In order to properly resolve the question raised, the court determined that it was necessary to examine the constitutionality of rule 3:28.[105]

The adoption of PTI in New Jersey via court rule was questioned as being an encroachment upon the executive and legislative branches, since the rule affected substantive as well as procedural areas of the law.[106] The rule-making power of the court is limited to "practice and procedure";[107] as such, the procedural aspects of PTI, allowing for the expeditious disposition of cases, were found to be clearly within the court's power.[108] However, it had been contended that because of the rehabilitative purposes of PTI, rule 3:28 affected not only court

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State v. Leonardis, No. M-1234 (Sup. Ct., filed Sept. 8, 1976). The issues reserved for rehearing were:

> 1. The power of the Supreme Court, in the exercise of its adjudicative function, to declare the authority of the Courts of this State to divert a criminal proceeding, after a hearing, without the consent of the prosecutor, in the light of the doctrine of separation of powers;
>
> 2. The power of the Supreme Court, in the exercise of its rule making power, to declare the authority of the courts of this State to divert a criminal proceeding without the consent of the prosecutor;
>
> 3. In respect of both of the foregoing, whether there is any distinction between proceedings post-indictment and pre-indictment.

Id.

On that same day, the court outlined specific guidelines for the operation of PTI programs, to be applied on a statewide basis. These were in addition to those set forth in the *Leonardis I* opinion. *See* notes 93–102 *supra* and accompanying text. Also intervening as amici curiae were the Passaic County Prosecutor and the Honorable Ervan F. Kushner, Presiding Judge of the Municipal Court of Paterson. 73 N.J. at 367, 375 A.2d at 611. Oral arguments were presented to the court on November 8, 1976. *Id.* at 360, 375 A.2d at 607. The resulting opinion, written by Justice Pashman, was decided on May 31, 1977. *See id.* For an analysis of the court's decision, see notes 118–20, 125 *infra* and accompanying text.

[104] 73 N.J. at 366–67, 375 A.2d at 610–11. For an outline of the specific issues argued on rehearing, see note 103 *supra*.

[105] 73 N.J. at 367, 375 A.2d at 611.

[106] *See id.* at 369–70, 375 A.2d at 612.

[107] *See id.* at 368, 375 A.2d at 611.

The court's rule-making power derives from article VI, section 2, of the New Jersey consitution. The section provides in pertinent part:

> 3. The Supreme Court shall make rules governing the administration of all courts in the State and, subject to the law, the practice and procedure in all such courts.

N.J. CONST. art. VI, § 2, para. 3. For an interpretation of the grant of authority, see note 118 *infra*.

[108] 73 N.J. at 368, 375 A.2d at 611.

procedure, but also concerned areas traditionally left to the legislature.[109] The court recognized, however, that the functions of the three branches of government were not so compartmentalized that there was no overlapping of authority.[110] As long as the " 'essential integrity' "[111] of each remained unimpaired, the actions of any one branch would not be considered an unconstitutional infringement upon the others.[112] Therefore, despite the fact that rule 3:28 may have an impact on substantive rights, the court concluded that there had not been interference with the other governmental branches to the extent of constituting a violation of the separation of powers doctrine.[113]

The *Leonardis II* court then addressed itself to the issue of whether, in light of the doctrine of separation of powers, the judiciary could review prosecutorial denials of admissions into pretrial programs.[114] On this question the attorney general contended that the requirement of judicial review of prosecutorial PTI determinations, as mandated in *Leonardis I*, went beyond the court's rule-making power and was an encroachment upon the functions of the executive branch.[115] This contention was founded upon the premise

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[109] *Id.* at 369–70, 375 A.2d at 611–12. An example of pretrial legislation is a proposed bill entitled The Prosecutive Discretion Act introduced in the New Jersey legislature and forwarded to the Judiciary, Law, Public Safety and Defense Committee of the New Jersey Assembly where it is now under consideration. N.J. Assembly Bill No. 1648 at 1, 3 (introduced Mar. 3, 1976); *see* 64 N.J. Legis. Index A42 (June 27, 1977). The bill proposes "to enable County Prosecutors to employ a system of pre-trial diversion in cases involving certain selected first time offenders." N.J. Assembly Bill No. 1648, Statement, at 3.

[110] 73 N.J. at 370, 375 A.2d at 612. *See generally* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587–88 (1952) (President does not have the power to seize property to settle labor disputes, the law-making power sought having been delegated to Congress).

[111] 73 N.J. at 372, 375 A.2d at 613 (quoting from Massett Building Co. v. Bennett, 4 N.J. 53, 57, 71 A.2d 327, 329 (1950)).

[112] 73 N.J. at 372, 375 A.2d at 613.

[113] *Id.* The *Leonardis II* court pointed out further that PTI is a remedy in the criminal process, and that the judiciary is empowered to fashion such remedies. *Id.* at 369–70, 375 A.2d at 612; *see* State v. Carter, 64 N.J. 382, 392, 316 A.2d 449, 455 (1974).

[114] *See* 73 N.J. at 375, 375 A.2d at 615.

[115] Brief on Behalf of the State of New Jersey *Amicus Curiae* at 4, State v. Leonardis, 73 N.J. 360, 375 A.2d 607 (1977) [hereinafter cited as Brief of *Amicus Curiae*].

The court in Morss v. Forbes, 24 N.J. 341, 132 A.2d 1 (1957), carefully examined the nexus between the executive branch and the county prosecutor's office. There, the prosecutor was described simply as "a local official." *Id.* at 373, 132 A.2d at 19. On that basis, it was posited that the prosecutor was not in a position to advance any separation of powers claims. *Id.* at 372–73, 132 A.2d at 19; *see* Brief for Appellant, *supra* note 103, at 7 n.5, 8. This contention, however, has been largely dissipated by passage of the Criminal Justice Act of 1970, 1970 N.J. Laws ch. 74, at 275 (codified at N.J. STAT. ANN.

that the executive branch is fundamentally responsible for determining which cases should be subject to prosecution.[116] Any interference with this function by the courts would constitute an infringement upon the separation of powers doctrine, unless evidence were made available which demonstrated that there had been "an oppressive and manifest abuse of office" on the part of a government official.[117] The court rejected the attorney general's contention and reaffirmed its decision in *Leonardis I*, holding that the authority for diversion existed pursuant to both the court's adjudicatory function and its rule-making powers.[118] Therefore, the court found that the doctrine of separation of powers had not been violated in this instance.[119]

Reiterating the position taken by the court in *Leonardis I*, Justice Pashman noted that the decision to divert a defendant from criminal prosecution represents a " 'quasi-judicial' " function.[120] Such a

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§§ 52:17B-97 to -117 (West 1970)). *See In re* Investigation Regarding Ringwood Fact Finding Comm., 65 N.J. 512, 528, 324 A.2d 1, 10 (1974). This Act substantially alters the relationship between the attorney general and county prosecutors by delegating to the attorney general more direct responsibility in the supervision of county prosecutors. N.J. STAT. ANN. §§ 52:17B-103 to -107 (West 1970). As a consequence, the county prosecutor can no longer be considered purely a "local official." *See id.* 65 N.J. at 528–29, 324 A.2d at 10.

[116] Brief of *Amicus Curiae*, *supra* note 115, at 4.

[117] *Id.*

[118] 73 N.J. at 375–76, 375 A.2d at 615.

The court's rule-making power has been evaluated in light of the doctrine of separation of powers. Winberry v. Salisbury, 5 N.J. 240, 71 A.2d 406, *cert. denied*, 340 U.S. 877 (1950), is a leading case interpreting the rule-making provision of the New Jersey constitution. In that case, Chief Justice Vanderbilt framed this power in the context of procedural law. He stated:

> the rule-making power as to practice and procedure must not invade the field of the substantive law as such. While the courts necessarily make new substantive law through the decision of specific cases coming before them, they are not to make substantive law wholesale through the exercise of the rule-making power.

5 N.J. at 248, 74 A.2d at 410. The distinction between procedural and substantive law, however, has not been clearly defined. *See* Busik v. Levine, 63 N.J. 351, 364, 307 A.2d 571, 578 (1973). Yet despite such ambiguity, it is generally conceded that a rule of procedure may affect substantive law and still be considered a valid exercise of the court's rule-making power. *Id.*

[119] 73 N.J. at 369–75, 375 A.2d at 611–14; *cf.* People v. Superior Court of San Mateo, 11 Cal. 3d 59, 66, 520 P.2d 405, 409–10, 113 Cal. Rptr. 21, 25–26 (1974) (decisions to divert defendants into pretrial programs not part of prosecutorial charging function). *But cf.* Sledge v. Superior Court of San Diego, 11 Cal. 3d 70, 76, 520 P.2d 412, 416, 113 Cal. Rptr. 28, 32 (1976) (district attorney's authority to *preliminarily* determine pretrial intervention eligibility valid, since not within scope of judiciary).

[120] 73 N.J. at 378–79, 375 A.2d at 616 (quoting from State v. Leonardis, 71 N.J. at 115, 363 A.2d at 337). The court's description of PTI as a quasi-judicial function, is couched in terms indicating a belief that diversion is outside the scope of the prosecutor's charging function, 73 N.J. at 378–79, 375 A.2d at 616–17.

"It is one thing not to charge and let the accused go totally free, but it may be

characterization of PTI obviates any controversy that the overruling of a prosecutor's decision to deny admission into a program violates the separation of powers doctrine.[121] However, assuming arguendo that diversion decisions are not quasi-judicial functions, the majority nevertheless determined that its power to enforce court rules includes the power to divert a defendant into a PTI program despite prosecutorial objection.[122] This stance was somewhat qualified by the court's statement that it would not exercise such discretion in the absence of actions evidencing a clear failure to adhere to statewide guidelines.[123] In fact, Justice Pashman commented that "[j]udicial review should be available to check only the most egregious examples of injustice and unfairness."[124] Furthermore, Justice Pashman noted that the judiciary's traditional role of protecting "individuals from abusive governmental action" necessitated a finding that the court's adjudicatory powers included the authority to conduct such re-

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quite another to withhold a charge, and hence not to invoke the jurisdiction of the court system, on condition that an uncharged, untried, unconvicted person submit to a correctional program."

Id. at 379, 375 A.2d at 617. *See* People v. Fusco, 85 Misc. 2d 147, 154, 378 N.Y.S.2d 902, 908 (Nassau County Ct. 1975) (referrals to diversionary programs are judicial acts similar to sentencing); People v. Superior Court of San Mateo, 11 Cal. 3d 59, 65, 520 P.2d 405, 410, 113 Cal. Rptr. 21, 26 (1974) (once decision to prosecute is made, "case is 'before the court' for disposition").

[121] 73 N.J. at 376, 375 A.2d at 615.

Professor Freed has observed that PTI procedures are essentially "judicial decisions prescribing controls over future conduct, rather than . . . prosecutorial decisions regarding whether to charge a person with a criminal offense, or to prosecute or nolle a case after the charge or indictment has been filed." *Hearings on H.R. 9007 and S. 798*, *supra* note 42, at 151 (statement of Daniel J. Freed). In his estimation, diversion "constitutes a pretrial sentence," since the person involved is arrested and agrees to certain restrictions without contesting the charge. *Id.* In addition, there exists a possibility that the individual may be prosecuted in the future if he does not satisfactorily comply with PTI regulations. *Id.* Consequently, Professor Freed considers it inappropriate for pretrial diversion to be completely under the auspices of the prosecutor where it could develop into "diversion bargaining." *Id.* at 152. A "diversion bargaining" system places "both the prosecut[orial] and sentencing functions on the prosecutor." *Id.* The prosecutor would be empowered to place restrictions on a defendant without having to persuade a court of the individual's guilt or of the necessity of placing such restrictions on the individual. *See id.*; Comment, *supra* note 41, at 201.

The Fifth Circuit has determined that judicial review of prosecutorial decisions is violative of the separation of powers doctrine. United States v. Cox, 342 F.2d 167, 171 (5th Cir.), *cert. denied*, 381 U.S. 935 (1965).

[122] 73 N.J. at 375, 375 A.2d at 615.

[123] *Id.* The court's position regarding prosecutorial review is not limited to denials of pretrial intervention; it is also applicable where a defendant's admission into a program is improper. *Id.*

[124] *Id.* at 384, 375 A.2d at 619.

views.[125] This authority does not constitute a violation of separation of powers, as its exercise is premised solely upon "a showing of patent and gross abuse" of prosecutorial discretion.[126]

Having resolved the jurisdictional challenges to *Leonardis I*, the

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[125] *Id.* at 376, 375 A.2d at 615. The notion of protecting individuals from abuses of discretion has had its primary application in actions involving administrative agencies. Appellate review has been extended to numerous types of administrative agency decisions. *See, e.g.*, Monks v. New Jersey State Parole Bd., 58 N.J. 238, 246–48, 277 A.2d 193, 197–98 (1971) (state parole board required to give statement of reasons for parole denials); Borough of Fanwood v. Rocco, 33 N.J. 404, 414–15, 165 A.2d 183, 188–89 (1960) (judicial review of municipal liquor licensing practices); Abbotts Dairies, Inc. v. Armstrong, 14 N.J. 319, 332–33, 102 A.2d 372, 379 (1954) (milk price-fixing orders subject to judicial review). *See generally* 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 16.05 (1958).

Prosecutorial decision-making is also not immune from judicial review by virtue of the separation of powers doctrine. *See* 73 N.J. at 377, 375 A.2d at 616. In fact, the very purpose of the doctrine is to insure against just such unchecked power. This is particularly relevant to the area of PTI, where the *Leonardis I* court expressed concern over "the virtually untrammeled discretion . . . vested in prosecutors associated with the PTI programs." 71 N.J. at 121, 363 A.2d at 340. *See In re* Investigation Regarding Ringwood Fact Finding Comm., 65 N.J. 512, 515–16, 324 A.2d 1, 2–3 (1974) (prosecutor's decision not to discontinue proceedings involving election law violation held subject to court review).

[126] 73 N.J. at 376, 375 A.2d at 615. In a concurring opinion, Judge Conford outlined a different basis for concluding that there was no separation of powers violation. *Id.* at 384, 375 A.2d at 619 (Conford, J., concurring). He suggested that the majority had not confronted the specific issue reserved for consideration, namely, whether the decision to divert a defendant is a judicial responsibility or a function of the executive branch. *Id.* at 386, 375 A.2d at 620. Judge Conford analyzed the court's authority to review prosecutorial decisions in terms of the prosecutorial charging function, which he divided into two component parts—the "decision to prosecute" and the "decision to desist from prosecution." *Id.* at 387, 375 A.2d at 621 (emphasis deleted). When a determination not to proceed with prosecution is involved, as for example in a *nolle pros*, the matter is subject to judicial review. *Id.* at 387–88, 375 A.2d at 621. Since there is an affirmative duty on the prosecutor to prosecute, when he acts in this capacity, his decisions are subject to public scrutiny. However, when he fails to prosecute, since there is no duty to desist from prosecution, virtually no opportunity for such scrutiny exists. Therefore, the possibility for abuse is greater and public policy considerations justify judicial review. *See* 73 N.J. at 388, 375 A.2d at 621.

Having concluded that the court has the authority to review prosecutorial decisions concerning termination of criminal proceedings without trial, Judge Conford went on to find that as an outgrowth of this authority, the court had the power to promulgate standards and guidelines governing such decisions. *Id.* According to Judge Conford, these guidelines may be used by courts as a measuring standard when reviewing claims of prosecutorial arbitrariness. *Id.* at 390, 375 A.2d at 622. In addition, "the formal existence of such [guidelines] creates a species of new right on the part of the defendant," *i.e.*, the right to apply and be considered for PTI. *Id.* at 391, 375 A.2d at 622–23. The existence of such a right assures fairness in treatment, which in turn is guaranteed by a judicial review process. *Id.*; *see* Avant v. Clifford, 67 N.J. 496, 520–21, 341 A.2d 629, 642–43 (1975); Monks v. New Jersey State Parole Bd., 58 N.J. 238, 246–48, 277 A.2d 193, 197–98 (1971).

court, thereby, affirmed the validity of the PTI procedures and guidelines established by that decision. Furthermore, the court expounded upon its original opinion by noting that while an individual may not be denied *consideration* of his application for PTI solely on the basis of his offense, it may be appropriate, under certain circumstances, to deny *admittance* solely on that basis.[127] Thus, the court recognized that once an examination of a defendant's background has been made, the offense charged may still be the ultimate factor in a decision denying entry into a program.

The *Leonardis* holdings, and similarly the guidelines, are premised upon the court's view that rehabilitation is the basis for pretrial diversion.[128] However, it is important to consider, when analyzing these decisions, that the state's power to impose penal restrictions is premised upon the notion of culpability.[129] Diversionary strategies are fundamentally preadjudication measures;[130] there is no determination of guilt or innocence.[131] While the benefits of reforming

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[127] 73 N.J. at 382, 375 A.2d at 618.

[128] 71 N.J. at 92–107, 363 A.2d at 324–32.

[129] The PTI model de-emphasizes proving the offense and attempts to reconcile its approach by claiming that the aim of the process "is to 'help' rather than to 'punish.' " Allen, *Criminal Justice, Legal Values and the Rehabilitative Ideal*, 50 J. CRIM. L.C. & P.S. 226, 231 (1959). A critic of this approach has commented that "one may rightly wonder as to the value of therapy purchased at the expense of justice." *Id.* In fact, reports have shown that dispositions for control groups used in project evaluations were often dismissals. *Hearings on H.R. 9007 and S. 798*, *supra* note 42, at 145 (statement of Daniel J. Freed).

[130] *See* CHALLENGE OF CRIME, *supra* note 34, at 134; *Addict Diversion*, *supra* note 43, at 673; *Pretrial Diversion*, *supra* note 32, at 827–28.

[131] A plea of guilty is not a prerequisite to diversion in New Jersey. Zaloom, *supra* note 34, at 198; PTI GUIDELINES, *supra* note 93, Guideline 4. However, in certain jurisdictions either an acknowledgment of responsibility or a guilty plea, is a condition to participation. NATIONAL PRETRIAL INTERVENTION SERVICE CENTER, ABA COMMISSION ON CORRECTIONAL FACILITIES AND SERVICES, MONOGRAPH ON LEGAL ISSUES AND CHARACTERISTICS OF PRETRIAL INTERVENTION PROGRAMS 47 & n.8 (April 1974) [hereinafter cited as MONOGRAPH ON LEGAL ISSUES]; Alford, *Accelerated Rehabilitative Disposition: The Newest Facet of the Criminal Justice System (The Allegheny County Program)*, 13 DUQ. L. REV. 499, 512–13 (1975); Zaloom, *supra* at 198.

At hearings on federal pretrial legislation, the Assistant Attorney General of the United States objected to the omission of a provision excluding "individuals who maintain their innocence," on the premise "that the individual must, in some way, recognize his wrongful conduct before he can be successfully rehabilitated." *Hearings on S. 798*, *supra* note 81, at 397 (statement of Mike McKevitt). This stance has since been described as "represent[ing] a penitential rather than a rehabilitative philosophy." Zaloom, *supra* at 198. The propriety of a guilty plea requirement has been justified by comparing it with the constitutionality of plea bargaining. A guilty plea entered to avoid a harsher penalty has been held to be constitutionally permissible. North Carolina v. Alford, 400 U.S. 25, 31 (1970). Therefore, a guilty plea entered solely to enable one to participate in a PTI program and thus avoid prosecution, should be constitutionally permissible as

defendants are apparent, the sudden expansion of diversion, which essentially contradicts the basic tenet of criminal law that one is innocent until proven guilty, is significant.

The court, by emphasizing the rehabilitative objectives of PTI,[132] in essence, is supporting the theory that an individual's need for social assistance is of greater concern than a person's culpability.[133] Furthermore, in stressing the primacy of rehabilitation, the court overlooked, to a large extent, the equally important objective of the "expeditious disposition" of criminal cases.[134] Although the court acknowledged that the efficient processing of criminal cases was "central to the PTI concept,"[135] it in fact may be argued that this goal constituted the primary impetus to development of the diversionary concept.[136]

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well. *See generally id.* (guilty plea entered to avoid more stringent punishment does not constitute a coerced plea, especially where competent counsel so advised); Brady v. United States, 397 U.S. 742, 758 (1970) (guilty plea voluntarily and intelligently made, not rendered involuntary within the meaning of the fifth amendment when motivated by a desire to avoid death penalty). Countering the requirement of an admission of guilt, or its equivalent, are constitutional arguments that such a prerequisite entails a waiver of the defendant's fifth amendment protection "against self-incrimination, as well as his rights to a trial by jury and to confrontation of witnesses." MONOGRAPH ON LEGAL ISSUES, *supra* at 44–45 (footnote omitted); *see* Boykin v. Alabama, 395 U.S. 238, 242 (1969) (plea of guilty synonymous with confession, thus constituting waiver of fifth amendment privilege). Similar arguments have been raised where restitution, as opposed to a guilty plea, is required in order to gain admittance into a PTI program. MONOGRAPH ON LEGAL ISSUES, *supra* at 61–63. In addition, it has been contended that a restitutional requirement is violative of equal protection. *See* Alford, *supra* at 513.

[132] 71 N.J. at 96, 98–99, 363 A.2d at 326–28. Other attempted reforms in the criminal justice system have also been predicated on a rehabilitative model, yet have engendered much criticism. *See, e.g.*, Comment, *supra* note 41, at 204–09; Zaloom, *supra* note 34, at 179–80; *Hearings on H.R. 9007 and S. 798*, *supra* note 42, at 149 (statement of Daniel J. Freed).

One such court reform is indeterminate sentencing, which like the diversion system, "tailor[s] the punishment to fit the criminal rather than the crime." Comment, *supra* at 207. The length of incarceration depends upon the amount of time needed for rehabilitation of the individual, rather than upon the type of crime committed. *Id. See generally* R. CLARK, CRIME IN AMERICA 222–24 (1970). The juvenile court system also developed as an informal diversionary system, the dominant purpose of which was to rehabilitate youthful offenders. Comment, *supra* at 204–05; Zaloom, *supra* at 179. The Supreme Court, however, has invalidated much of juvenile court procedure, finding it violative of due process guarantees. *See, e.g., In re* Winship, 397 U.S. 358, 358–61 (1970); *In re* Gault, 387 U.S. 1, 1–20 (1967).

[133] *See* Comment, *supra* note 41, at 183. To a large extent, diversion strategies assume guilt. COURTS, *supra* note 33, at 33 (statement that "[d]iversion of an offender assumes that some act justifying criminal intervention has occurred").

[134] 71 N.J. at 98 & n.8, 99–100, 112, 363 A.2d at 328, 329, 335. For discussion of the purposes underlying PTI, see note 77 *supra* and accompanying text.

[135] 71 N.J. at 98, 363 A.2d at 328.

[136] Arguably, the primary impetus for diversion was not rehabilitation, but rather the

The inability of courts to handle the ever increasing number of criminal cases influenced authorities to seek alternative methods of processing cases.[137] This led to the adoption of formal diversionary programs.[138] It appears, however, that the use of these programs was intended for situations where the traditional criminal process would otherwise have produced harsh results.[139] The individuals to be diverted were not those who needed to be reformed, but rather those for whom prosecution would serve no useful purpose and for whom the effects of such prosecutions would in fact prove detrimental.[140] Although it may be contended that some of these individuals were in need of assistance, it becomes clear that the primary purpose for such programs was not the individual's rehabilitation.[141]

The *Leonardis I* court has not only given the goal of efficiency in court procedures a secondary role, but by its decision, it has concomitantly created an administrative backlog in PTI programs.[142] By holding that the automatic exclusion of persons from PTI does not further the rehabilitative aims of diversionary programs, the court, in effect, has extended the opportunity for participation in PTI to all

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fact that the rigid application of criminal justice procedures, at least with regard to certain individuals, resulted in harsh treatment. *See* Zaloom, *supra* note 34, at 179; Comment, *supra* note 41, at 180; *Innovative Reform*, *supra* note 32, at 1206. It was argued that formal diversionary options would make the criminal justice system more efficient. Klapmuts, *Community Alternatives to Prison* 305–10 (Nat'l Council on Crime & Delinquency 1973) (*reprinted from* CRIME & DELINQUENCY LITERATURE (June 1973)). Hence, it appears that diversion was initially intended for persons charged with less serious offenses. *See* COURTS, *supra* note 33, at 32. While some of these persons may have been in need of some sort of assistance, the inappropriateness of prosecuting them provided the initial impetus for diversion. *See Hearings on H.R. 9007 S. 798*, *supra* note 42, at 144 (statement of Daniel J. Freed); COURTS, *supra* at 31; Brakel, *supra* note 30, at 212–13; *Innovative Reform*, *supra* at 1204; *Pretrial Diversion*, *supra* note 32, at 827–28.

[137] For a discussion of the impetus for the implementation of such alternatives, see notes 38–42 *supra*.

[138] *See* COURTS, *supra* note 33, at 33.

[139] *See, e.g., Hearings on H.R. 9007 and S. 798*, *supra* note 42, at 144 (statement of Daniel J. Freed); COURTS, *supra* note 33, at 28; Comment, *supra* note 41, at 180. For an outline of the bases for diversion, see notes 33–37 *supra*.

[140] *See* COURTS, *supra* note 33, at 28, 32–33.

[141] *Id.* at 30.

[142] From January, 1976, through May, 1976, the Hudson County Pretrial Intervention Project processed 454 applications. HUDSON COUNTY PRETRIAL INTERVENTION PROJECT, MONTHLY REPORTS (Jan.–May 1976) (available from Hudson County Pretrial Intervention Project, Jersey City, N.J.). For the same months in 1977, the program handled 595 cases, an increase of approximately 31%. *Id.* (Jan.–May 1977). There have also been at least 75 rejection hearings during the period from September, 1976, to July, 1977. Telephone interview with Rita K. Douglas, Project Director, Hudson County Pretrial Intervention Project (July 10, 1977).

criminal defendants.[143] As a result, pretrial programs are overburdened with both applications and participants.[144] In addition, while not formal evidentiary hearings, the pretrial rejection hearings mandated by *Leonardis I* are still time consuming and costly, resulting in increased judicial responsibilities.[145]

An issue left unresolved in *Leonardis I*, although raised by both the Leonardis and Rose appeals, is whether the PTI exclusionary criteria constituted a discriminatory classification which infringed upon equal protection rights.[146] Classifications resulting in unequal treatment may only be justified upon a showing by the state of a rational basis for its action.[147]

The precise issue of whether certain exclusionary criteria are related to a person's rehabilitative prospects was decided by the Supreme Court in *Marshall v. United States*.[148] The defendant in *Marshall* was precluded, on the basis of a "two-prior felony exclu-

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[143] 71 N.J. at 112, 363 A.2d at 335.

[144] *See* note 141 *supra*.

[145] *See* 71 N.J. at 122, 363 A.2d at 340; PTI GUIDELINES, *supra* note 93, Guideline 8. The court later imposed the rather onerous burden of demonstrating "arbitrary or capricious" prosecutorial actions upon defendants, PTI GUIDELINES, *supra* Guideline 8, thereby limiting the scope of review of the PTI rejection hearing. It perhaps would have been more practical, in terms of judicial economy, to simply grant the judiciary the discretion to decide whether a hearing was appropriate or inappropriate. For commentary on the PTI rejection hearings, see note 102 *supra*.

[146] 71 N.J. at 110–11, 113, 363 A.2d at 334–36.

Since the *Leonardis I* decision, two equal protection challenges concerning PTI have been decided, each reaching opposite conclusions. *See* Irons v. Coleman, No. L-1540-76 P.W., slip op. at 15 (N.J. Super. Ct. Law Div. Oct. 22, 1976) (absence of PTI program in a county not a denial of equal protection); State v. Kowitski, 145 N.J. Super. 237, 242–43, 367 A.2d 459, 461–62 (Law Div. 1976) (denying a person the opportunity of PTI solely because the defendant allegedly committed a crime in a county without a program found violative of equal protection guarantee).

[147] The equal protection doctrine provides that, where the discriminatory treatment involves a suspect classification or a fundamental right, only a "compelling state interest" will justify the disparity. Graham v. Richardson, 403 U.S. 365, 371–72, 375 (1971) (alienage, race and nationality are inherently suspect classifications and as such, must be supported by a compelling state interest); Shapiro v. Thompson, 394 U.S. 618, 634, 638 (1969) (fundamental right to travel interstate cannot be infringed in the absence of a compelling state interest). Distinctions in treatment not falling within those categories need merely be supported by a finding of rationality as the basis for the state action. San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 37 (1973) (education not a fundamental right, therefore public school financing plan need only be scrutinized under rational basis test). *Compare Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1076–1132 (1969) (discussion of the two-pronged equal protection analysis) *with* Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972) (proposition that approach to equal protection cases may be taking on different dimensions).

[148] 414 U.S. 417 (1974).

sion,"[149] from receiving benefits under the Narcotic Addict Rehabilitation Act (NARA).[150] The Court upheld the program's exclusionary criteria, deeming it rational to conclude that one "who has committed two or more prior felonies . . . is likely to be less susceptible of rehabilitation."[151] Since a certain "risk to society" is involved when attempting to reform addicts in the community, it was not irrational to exclude certain offenders, even though the primary purpose of the Act was rehabilitation.[152] Therefore, the mere possibility

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[149] *Id.* at 420.

[150] *Id.* at 418–20. The Narcotic Addict Rehabilitation Act (NARA) was enacted by Congress in 1966. Narcotic Addict Rehabilitation Act of 1966, Pub. L. No. 89-793, 80 Stat. 1438 (codified at 18 U.S.C. §§ 4251–4255, 28 U.S.C. §§ 2901–2906, 42 U.S.C. §§ 3411–3426 (1970)). Title I of the Act, 28 U.S.C. §§ 2901–2906 (1970), applies to certain addicts charged with felonies, and provides for their rehabilitative commitment prior to trial, with dismissal of charges upon completion of treatment. Title II, 18 U.S.C. §§ 4251–4255 (1970), contains similar provisions for those convicted of a federal offense. Title III, 42 U.S.C. §§ 3411–3426 (1970), concerns addicts seeking treatment who are not involved with the criminal court system. Congress had a two-fold purpose in adopting the exclusionary provisions of the Act; "first, to exclude from NARA treatment those less likely to be rehabilitated . . . , and second, to exclude those whose records disclosed a 'history of serious crimes.' " 414 U.S. at 425.

[151] 414 U.S. at 425. The specific issue—whether the commission of violent crime is rationally related to a person's potential for rehabilitation—has been decided affirmatively in the Ninth Circuit. United States v. Krehbiel, 493 F.2d 497, 497–98 (9th Cir. 1974) (relying on *Marshall*, NARA exclusions of defendants charged with violent crimes not a denial of equal protection).

Prior to *Marshall*, circuit courts had differed concerning the constitutionality of the NARA exclusion of applicants having two prior felony convictions. *See, e.g.*, United States v. Bishop, 469 F.2d 1337, 1346 (1st Cir. 1972) (NARA two-felony exclusion held unconstitutional on grounds that it "lack[ed] relevance to the purpose for which [it was] enacted"); United States v. Hamilton, 462 F.2d 1190, 1192–93 (D.C. Cir. 1972) (NARA two-felony exclusion held unconstitutional even where felonies not drug-related); Marshall v. Parker, 470 F.2d 34, 36 (9th Cir. 1972) (NARA two-felony exclusion held constitutional).

[152] 414 U.S. at 429–30; *see* COURTS, *supra* note 33, at 74. Attempting to reform addicts while they are in the community, as opposed to while they are incarcerated, represents a rather novel approach to drug rehabilitation. *See id.* at 426. Because of its experimental nature, this type of approach entails a certain degree of risk for society at large. *Id.* at 429–30. There is less of a deterrent effect operating on the drug offenders as well as a lessened degree of supervision over them. *See id.*

The PTI model, also considered experimental, is predicated on a similar type of approach as that used under NARA, *i.e.*, offenders remain in the community while they participate in a rehabilitative program with limited supervision. It would, therefore, appear that the risks observed in the NARA drug rehabilitation method are present in PTI as well.

Despite these risks, the New Jersey legislature, by enactment of the New Jersey Controlled Dangerous Substances Act, has also endorsed a pretrial intervention concept for dealing with drug offenders. N.J. STAT. ANN. §§ 24:21-1 to -45 (West Cum. Supp. 1977-1978). This statutory provision authorizes the suspension of court proceedings for first-time drug offenders, who are then expected to fulfill certain conditions of supervisory treatment. As with pretrial intervention, once the accused has complied with the

that some persons who might have been rehabilitated under the Act were precluded from treatment did not render the exclusion impermissibly discriminatory.[153]

By following a *Marshall*-type rationale, the *Leonardis I* court could have concluded that the exclusion from PTI of those charged with heinous offenses is a valid classification. Although the *Leonardis* case differs from *Marshall* in that the *Leonardis* exclusion was based on the type of offense committed rather than upon the degree of involvement with the criminal system,[154] it would still seem logical to conclude that persons committing certain serious offenses are less likely to be reformed.[155] Furthermore, society has an interest in its own self-protection which may seek rational expression through a desire to incarcerate and deter certain offenders, rather than through an attempt to rehabilitate them. Therefore, a finding that the interests of society outweigh the interests of the excluded offender is clearly supportable, even in light of the underlying rehabilitative purpose of PTI.[156]

With the elimination of restrictive admissions policies in county PTI programs, the *Leonardis I* court has placed added emphasis on the role of PTI in New Jersey's criminal justice system. In conjunction with this expansion of PTI, the court, cognizant of the largely

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terms of treatment, the charges are dismissed "without [a] court adjudication of guilt." *Id.* § 24:21-27(b). This disposition is not considered a conviction in the event of subsequent court appearances. *Id.* Application of the statutory provision is discretionary, in that the statute cannot be invoked where the defendant is deemed to be "a danger to the community" or where the available supervisory services are insufficient to guarantee public security. *Id.* § 24:21-27(c)(1)(2).

Recently, the supreme court broadly construed the statute as being applicable to a defendant regardless of whether that person was actually a user of drugs. State v. Alston, 71 N.J. 1, 5–6, 362 A.2d 545, 547 (1976). Immediately following *Alston*, in the case of State v. Sayko, 71 N.J. 8, 362 A.2d 549 (1976), the court discussed the degree of "discretion vested in a trial court" with regard to the granting of a suspension under the statute. *Id.* at 12, 362 A.2d at 551. Justice Sullivan, while acknowledging that judges have much latitude in making their decisions, advised that "the whole person concept" be utilized. *Id.* at 13, 362 A.2d at 552. For a definition of the "whole person concept," see note 95 *supra*. *See generally* State v. Green, 62 N.J. 547, 566–67, 303 A.2d 312, 322–23 (1973).

[153] 414 U.S. at 427–28. Chief Justice Burger, writing for the majority, stated "that the classification selected by Congress is not one which is directed 'against' any individual or category of persons, but rather it represents a policy choice." *Id.* at 428. The legislature did not intend that all addicts, by virtue of their addiction, would be included within the purview of the Act. *Id.* at 423. Congress reasoned that persons who have demonstrated anti-social behavior in the past would not only be unresponsive to treatment but might also disrupt the reformation of others. *Id.* at 425.

[154] *Compare* 71 N.J. at 90–91, 363 A.2d at 323–24 *with* 414 U.S. at 418.

[155] For cases dealing with exclusionary criteria, see note 150 *supra*.

[156] *See* 414 U.S. 427–28; note 151 *supra* and accompanying text.

unregulated network of programs in the state,[157] has established procedural guidelines to guarantee a modicum of fairness in the implementation of these programs.[158] While the court did not specifically refer to the concept of due process, by requiring prosecutors to provide a written statement of reasons and a hearing to defendants where admission to PTI is denied, the fundamental concepts of notice and opportunity to be heard have been incorporated into PTI procedures. Additionally, the court's provision for judicial review of PTI matters, as well as its promulgation of guidelines,[159] will insure a needed degree of uniformity and predictability for the PTI decision-making process.

Although the *Leonardis I* decision has withstood the challenge that it was violative of the separation of powers doctrine,[160] it is still questionable whether PTI will remain a viable concept in New Jersey. For despite reforms, the ultimate success of PTI must still be determined in light of the number of offenders actually rehabilitated.[161] In view of the fact that no investigation was made as to

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[157] 71 N.J. at 120–21, 363 A.2d at 340.

[158] *See id.* at 122, 363 A.2d at 340–41.

[159] *Id.* at 119–22, 363 A.2d at 339–41; PTI GUIDELINES, *supra* note 93. In discussing the need for judicial review of PTI decision-making procedures, the court analogized to administrative agencies. 71 N.J. at 115–16, 363 A.2d at 337–39. This approach resulted in the same conclusion—that judicial review was appropriate. *Id.* at 116, 363 A.2d at 337. The court's analysis, however, contained several references to cases where procedural protections were required on due process grounds, often under circumstances much like that of PTI. *See id.* at 116, 363 A.2d at 337. Some of the cases cited by the court are: Wolff v. McDonnell, 418 U.S. 539, 555–58 (1974); Gagnon v. Scarpelli, 411 U.S. 778, 791 (1973); Morrissey v. Brewer, 408 U.S. 471, 487–89 (1972); Goldberg v. Kelly, 397 U.S. 254, 260–61 (1970); Avant v. Clifford, 67 N.J. 496, 518–24, 341 A.2d 629, 641–45 (1975).

[160] 73 N.J. at 367, 375 A.2d at 610–11.

[161] While pretrial programs have been viewed as generally successful, PTI STRATEGIES, *supra* note 32, at 5–6, a few commentators have expressed doubts as to the validity of such a conception. *E.g.*, Zimring, *Measuring the Impact of Pretrial Diversion from the Criminal Justice System*, 41 U. CHI. L. REV. 224 (1974). In his article, Professor Zimring challenges the methods of evaluations used by various pretrial intervention programs. *Id.* at 228–35. He suggests that many statistics issued by such programs are misleading and, at best, inaccurate. *See id.* at 241. Although Professor Zimring acknowledged that diversion programs "are probably a healthy reform in the . . . criminal justice" system, he cautioned that, because of the paucity of reliable statistical data, "they are also oversold and widely misconceived." *Id.* at 241.

Professor Freed, also a critic of the diversion model, stated his opposition to federal pretrial legislation. *Hearings on H.R. 9007 and S. 798*, *supra* note 42, at 144–57 (statement of Daniel J. Freed). He remarked that, despite "notable accomplishments" of early diversion programs, *id.* at 144, there are yet insufficient findings to warrant the establishment of permanent federal PTI programs, *id.* at 145. In conclusion, Professor Freed cautioned that "[t]here is too much experience with reforms which have failed." *Id.*

whether PTI was capable of reforming defendants convicted of all types of crimes, perhaps a more pragmatic approach for the court to adopt would have been to limit PTI availability to a defined category of offenders until further evidence on PTI's effectiveness could be presented. If PTI fails to achieve its objectives, it will be reduced to a mere mechanical system for processing defendants, the effect of which will be to produce judicial condonation of dismissals without either an adjudication of the defendant's guilt or his rehabilitation.

Joyce M. Calefati