Journal of Dispute Resolution

Volume 1993 | Issue 2 Article 3

1993

Juvenile Diversion: An Alternative to Juvenile Court

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COMMENTS

JUVENILE DIVERSION: AN ALTERNATIVE TO JUVENILE COURT

I. INTRODUCTION

The first juvenile courts in this country were created to keep children from being tried and sentenced as adults in adult criminal courts and from being subjected to the rigors of formal, public adversarial proceedings.[1] The reformers who created juvenile courts hoped to handle all delinquents within the community itself on an informal basis and without the trappings of due process.[2] Using the concept of *parens patriae*[3] and developing it into the idea that the state had the power to act in place of parents of deviant or dependent children,[4] the juvenile courts used informal, discretionary procedures to diagnose the causes of, and prescribe cures for, juvenile delinquency on a personalized basis.[5] The juvenile court, by separating children from adults and by providing a rehabilitative alternative to punishment, acted as a diversionary program.[6] In effect, the creation of the juvenile court was a strategy to divert children to the more humanitarian and protective environment of the juvenile court, which would be more concerned with the individual minor than with the particular offense.[7]

Diversion of children from the judicial process is an old idea.[8] Today, diversion refers to a procedure that treats juveniles in an alternative community

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1. *See, e.g.*, THOMAS J. BERNARD, THE CYCLE OF JUVENILE JUSTICE 83-107 (1992); ANTHONY M. PLATT, THE CHILD SAVERS: THE INVENTION OF DELINQUENCY 137-45 (1977); Ira M. Schwartz, (IN)JUSTICE FOR JUVENILES: RETHINKING THE BEST INTERESTS OF THE CHILD 17 (1989).

2. SCHWARTZ, *supra* note 1, at 17.

3. "'Parens patriae,' literally 'parent of the country,' refers traditionally to the role of state as sovereign and guardian of persons under legal disability . . . ." BLACK'S LAW DICTIONARY 1114 (6th ed. 1990). *Parens patriae* originates from the English Common Law where the King had a royal prerogative to act as guardian to persons with legal disabilities such as infants, idiots, and lunatics. *Id.* "In the United States, the *parens patriae* function belongs with the states." *Id.*

4. Rayna H. Bomar, *The Incarceration of the Status Offender*, 18 MEM. ST. U. L. REV. 713, 718 (1988); Barry C. Feld, *The Transformation of the Juvenile Court*, 75 MINN. L. REV. 691, 695 (1991) [hereinafter Feld, Transformation].

5. Feld, Transformation, *supra* note 4, at 695; PLATT, *supra* note 1, at 143-45.

6. Frederick Ward, Jr., *Prevention and Diversion in the United States*, *in* THE CHANGING FACES OF JUVENILE JUSTICE 43, 43 (V. Lorne Stewart ed., 1978).

7. *Id.*

8. *See, e.g.*, JUVENILE OFFENDERS FOR A THOUSAND YEARS (Wiley B. Sanders ed., 1970).

program rather than adjudicating them in the juvenile court system.[9] Although guidelines are typically available, the hallmark of the process is official flexibility and discretion.[10]

II. THE JUVENILE COURT

A. History of the Juvenile Court

The concept of juvenile justice and the mitigating status of being a juvenile dates back thousands of years.[11] The Code of Hammurabi indicated that juvenile offenders were to be treated more leniently than adults.[12] Under ancient Saxon law, a child below the age of twelve could not be found guilty of any felony and a child between twelve and fourteen might be acquitted or convicted based on natural capacity.[13] Juvenile dealings in English common law were based on mitigating punishments for children.[14] Yet the first United States court dealing specifically with juveniles did not appear until 1899.[15] As the number of juvenile courts grew,[16] so did their jurisdiction.[17] The jurisdiction of juvenile courts soon encompassed all children who violated local or state laws or who were physically or morally neglected or abused.[18] Also included in the court's jurisdiction were status offenders: juveniles who commit offenses applicable only to children that would not be considered crimes if committed by adults.[19] In the "best interests" of these children, a juvenile court would act as a "benevolent

9. PAUL R. KFOURY, CHILDREN BEFORE THE COURT: REFLECTIONS ON LEGAL ISSUES AFFECTING MINORS 69 (1991).

10. Fred D. Zacharias, *The Uses and Abuses of Convictions Set Aside under the Federal Youth Corrections Act*, 1981 DUKE L.J. 477, 497; *see also* Note, *Pretrial Diversion from the Criminal Process*, 83 YALE L.J. 827, 827 (1974).

11. *See, e.g.*, BERNARD, *supra* note 1, at 21-30; Bomar, *supra* note 4, at 716-18; Jan C. Costello & Nancy L. Worthington, *Incarcerating Status Offenders*, 16 HARV. C.R.-C.L. L. REV. 41, 41-43, 43 n.3 (1981). *See generally* JUVENILE OFFENDERS FOR A THOUSAND YEARS (Wiley B. Sanders ed., 1970).

12. BERNARD, *supra* note 1, at 28.

13. Sanders, *supra* note 8, at 3; BERNARD, *supra* note 1, at 29.

14. BERNARD, *supra* note 1, at 29 (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 23 (1745)).

15. *See, e.g.*, BERNARD, *supra* note 1, at 89; PLATT, *supra* note 1, at 123-34; SCHWARTZ, *supra* note 1, at 150-51; Orm W. Ketcham, *The Development of Juvenile Justice in the United States*, *in* THE CHANGING FACES OF JUVENILE JUSTICE 9 (V. Lorne Stewart ed., 1978).

16. Robert W. Sweet, Jr., *Deinstitutionalization of Status Offenders: In Perspective*, 18 PEPP. L. REV. 389, 395 (1991).

17. *Id.*

18. *Id.*

19. Ward, *supra* note 6, at 46; Costello & Worthington, *supra* note 11, at 42.

treatment agency" and seek to rehabilitate the children rather than punish them.[20] Therefore, there was no need for the adversary system or lawyers to challenge the court's authority through appellate review.[21]

By separating juvenile offenders from adult offenders, the juvenile courts also rejected the jurisprudence and procedures of adult criminal prosecution.[22] Courtroom procedures were modified to eliminate any implication of a criminal proceeding,[23] and the atmosphere of the courtroom was deemphasized and informal in order to encourage trust and cooperation on the part of the alleged offender.[24] Hearings were confidential, access to court records limited, and children were found to be "delinquent" instead of "guilty of a crime."[25] Emphasis was placed on identifying the causes of the child's misbehavior and on prescribing individualized treatment.[26]

As a result of this emphasis, juries and lawyers were excluded from juvenile proceedings, as were the formal rules of evidence and formal procedures.[27] Juveniles were seen to receive a tradeoff: the juvenile courts provided children with less procedural protection than the criminal courts provided adults, but children were receiving the compensating benefit of the juvenile court system looking after their best interests,[28] even though a juvenile "sentence" might be longer than an adult sentence.[29]

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20. Barry C. Feld, *The Juvenile Court Meets the Principle of Offense: Punishment, Treatment, and the Difference it Makes*, 68 B.U. L. REV. 821, 838 (1988). *See also* McKeiver v. Pennsylvania, 403 U.S. 528, 550 (1971). The term "best interests of the child" is a nebulous and ill-defined standard that opens a plethora of considerations. Christian Reichol Van Deusen, *The Best Interests of the Child and the Law*, 18 PEPP. L. REV. 417, 419 (1991).

> Implicit in this phrase 'best interests of the child' is a consideration of all options and the selection that best serves the child. The selection of an alternative that is not in the best interests of the child would be detrimental to the child because it contravenes the very terminology used. For instance, if one were to put a child into an alternative placement that is not in the best interest of the child, when there is a better alternative available, the court system would then be acting to the detriment of the child.

Id. at 419-20 n.13.

21. Ketcham, *supra* note 15, at 14.

22. Feld, *supra* note 20, at 825.

23. *Id.*

24. *See* PLATT, *supra* note 1, at 144-45 for descriptions of juvenile courtrooms.

25. Feld, *supra* note 20, at 825.

26. SCHWARTZ, *supra* note 1, at 151.

27. Feld, *supra* note 20, at 825.

28. BERNARD, *supra* note 1, at 113; *see* discussion of Kent v. United States, 383 U.S. 514, 555 (1966), *in In re* Gault, 387 U.S. 1, 14-17 (1967).

29. *See, e.g., In re* Gault, 387 U.S. 1 (1967). In *Gault*, a 15 year old was committed as a juvenile delinquent to a state industrial school "for the period of his minority [age 21] unless sooner discharged by due process of law" for allegedly making a lewd phone call. *Id.* at 7-8. If he had been an adult, the maximum penalty for this offense would have been a $5 to $50 fine or imprisonment for not more than two months. *Id.* at 9.

Juvenile court personnel were given maximum discretion to decide cases to allow for flexibility in diagnosis and treatment.[30] As lawyers and judges began leaving the juvenile court system for employment elsewhere,[31] the courts became more dependent on social workers,[32] who used the principles of psychology and social work to guide their decision making.[33] These reformers set about establishing a clinical-type juvenile court based upon "a medical model which saw social deviance as a preventable or curable disease."[34] A basic tenet of the medical model was that traditional legal process was "an impediment to the effective treatment of social pathology."[35] Social workers and juvenile court personnel found it easy to cloak their actions.[36] Through socialization of court procedure, the juvenile court came to specialize in "treatment without trial."[37] The juvenile court acted in this way for nearly fifty years before there were any serious inquires into its workings.[38]

B. Supreme Court Adjustments on Juvenile Courts

In the late 1960s and early 1970s, the United States Supreme Court issued a number of decisions that expanded the rights of children in juvenile court proceedings. The Court began extending due process rights to juveniles in *Kent v. United States*.[39] The Court no longer accepted the premise that children should not have constitutional rights because of the special nature of the juvenile court.[40] According to the *Kent* Court, "the child receives the worst of both worlds: that he [or she] gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children."[41] Although *Kent* involved no specific constitutional issues, the Court began focusing on the actual performance of the juvenile courts, not just on their good intentions.[42]

The following year, the Supreme Court's decision in *In re Gault*[43] granted additional due process rights to juveniles facing commitment to a juvenile

30. Feld, *supra* note 20, at 825.
31. Ketcham, *supra* note 15, at 14.
32. *Id.*
33. Feld, *supra* note 20, at 825.
34. Francis B. McCarthy, *Pre-Adjudicatory Rights in Juvenile Court: An Historical and Constitutional Analysis*, 42 U. PITT. L. REV. 457, 457 (1981).
35. *Id.* at 457-58.
36. Ketcham, *supra* note 15, at 14.
37. Sweet, *supra* note 16, at 396.
38. Ketcham, *supra* note 15, at 16; Sweet, *supra* note 16, at 400; ANNE RANKIN MAHONEY, JUVENILE JUSTICE IN CONTEXT 24 (1987).
39. 383 U.S. 541, 562 (1966).
40. *Id.* at 555-56.
41. *Id.* at 556.
42. BERNARD, *supra* note 1, at 113.
43. 387 U.S. 1 (1967).

institution.[44] In rejecting the traditional rationale of *parens patriae* for refusing to extend constitutional rights to children, the Court observed that "unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure" and concluded that the denial of procedural rights frequently resulted in arbitrariness rather than individualized treatment.[45] The juvenile court system's failure to live up to its initial ideals provoked the Court to mandate the incorporation of elementary procedural safeguards into the juvenile court.[46] The Court asserted that the right to advance notice of charges,[47] the right to a fair and impartial hearing,[48] the right to assistance of counsel,[49] the opportunity to confront and cross-examine witnesses,[50] and the privilege against self-incrimination[51] were essential to the determination of truth and the preservation of individual freedom.[52] The Court noted that there are valuable aspects of the juvenile court system,[53] and as a result, upheld the juvenile court status to process and treat juveniles separately from adults.[54]

In subsequent children's rights decisions, the Supreme Court continued the procedural convergence between juvenile and criminal courts.[55] In *In re Winship*,[56] the Court decided that proof of delinquency must be established "beyond a reasonable doubt," rather than by a lower civil standard of proof, even though a juvenile delinquency proceeding is a civil proceeding.[57] In *Breed v. Jones*,[58] the Court held that the Fifth Amendment's prohibition of double jeopardy prohibited adult reprosecution of a youth previously adjudicated delinquent on the same charges in juvenile court.[59] However, the Court has not made the rights of an accused juvenile delinquent co-extensive with those of adult criminal defendants. In *McKeiver v. Pennsylvania*,[60] the Supreme Court denied a constitutional right to jury trials in delinquency proceedings.[61] The Court held

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44. *Id.* at 19.
45. *Id.* at 18-19.
46. *Id.* at 31-57.
47. *Id.* at 33.
48. *Id.* at 39.
49. *Id.* at 41.
50. *Id.* at 42-43.
51. *Id.* at 55.
52. *Id.* at 20.
53. *Id.* at 22.
54. *Id.*
55. *See* Feld, Transformation, *supra* note 4, at 718-22.
56. 397 U.S. 358 (1970).
57. *Id.* at 368.
58. 421 U.S. 519 (1975).
59. *Id.* at 541. *But see* Swisher v. Brady, 438 U.S. 204 (1978). In *Swisher*, the Court ruled that there was no double jeopardy where a finding of nondelinquency by a master or referee could be appealed to the juvenile court judge. *Id.* at 216. The Court said that the whole process constituted one proceeding. *Id.* at 218.
60. 403 U.S. 528 (1971).
61. *Id.* at 545.

that the due process standard of fundamental fairness in a juvenile context required nothing more than accurate fact-finding, which a judge could do as well as a jury.[62] In *Schall v. Martin*,[63] the Court rejected the idea that secure, pretrial detention is a form of punishment infringing on the liberty interest of children because "juveniles, unlike adults, are always in some form of custody."[64] The thrust of this line of decisions is that "juveniles had to be given sufficient due process rights to ensure the accuracy of fact finding in the adjudicatory hearing."[65]

Each Supreme Court decision focused on the adjudicatory stage of the delinquency proceeding and said little about constitutional protections in pretrial stages.[66] In the Court's *Gault* opinion, Justice Fortas noted:

> [W]e do not in this opinion consider the impact of these constitutional provisions on the totality of the relationship of the juvenile and the state. For example, we are not here concerned with the pre-judicial stages of the juvenile process.[67]

By leaving the scope of constitutional protections unresolved in the pretrial stages of a juvenile proceeding,[68] the Court has silently endorsed the juvenile courts' flexibility and discretion in pretrial stages.[69] However, that endorsement is tempered by the fact that a juvenile adjudication must be fundamentally fair to ensure accurate fact-finding.[70] Thus, it appears that the fundamental fairness standard of adjudication extends to pretrial juvenile proceedings.

III. THE JUVENILE JUSTICE AND DELINQUENCY PREVENTION ACT: ITS RELATION TO DIVERSION

Pretrial diversion by the juvenile court first took hold among scholars in the 1960s when it was found that many offenders could be handled as well in community-based programs as in institutions.[71] "At the same time, the shortcomings and frequent inequities of the juvenile court system had become increasingly apparent,[72] as had the often negative effects of

62. *Id.* at 543.
63. 467 U.S. 253 (1984).
64. *Id.* at 265.
65. BERNARD, *supra* note 1, at 138.
66. McCarthy, *supra* note 34, at 459.
67. *Gault*, 387 U.S. at 13.
68. McCarthy, *supra* note 34, at 462.
69. *See Gault*, 387 U.S. at 31, n.48; Zacharias, *supra* note 10, at 497.
70. *McKeiver*, 403 U.S. at 543.
71. TED PALMER & ROY V. LEWIS, AN EVALUATION OF JUVENILE DIVERSION xxiv (1980).
72. *Id.*; *see also Gault*, 387 U.S. at 18-19; WILLIAM S. DAVIDSON II, ET AL., ALTERNATIVE TREATMENTS FOR TROUBLED YOUTH: THE CASE OF DIVERSION FROM THE JUSTICE SYSTEM 6 (1990).

institutionalization."[73] One such negative effect involves "labeling".[74] The labeling theory states that as society labels a person a "deviant," that person begins to act as a "deviant" should act.[75] Therefore, to avoid the effect of labeling, juveniles with the potential of being processed in juvenile court could be diverted to other less harmful agencies.[76] Thus, by the late 1960s, juvenile diversion became a major correctional movement.[77]

As noted in the Supreme Court cases, the juvenile court system was in need of reform due to practices that were contrary to the rehabilitative goal of the juvenile court.[78] In addition, nearly forty percent of the children in the juvenile justice system had committed no criminal act, by adult terms, and were in the system only because they were status offenders.[79] Serious reform was first publicly contemplated with the release of a report by the President's Commission on Law Enforcement and Administration of Justice in 1967.[80] The Commission encouraged several steps to improve the administration of juvenile justice, including diversion of first time and petty offenders away from legal processing and into non-judicial community agencies as an alternative to formal juvenile justice proceedings.[81] In response to the problems posed by the juvenile process, Congress passed the Juvenile Justice and Delinquency Prevention Act [JJDP] in 1974.[82] The JJDP emphasized the use of programs "to divert juveniles from the traditional juvenile justice system and to provide critically needed alternatives to institutionalization."[83]

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73. DAVIDSON, ET AL., *supra* note 72, at 6; PALMER & LEWIS, *supra* note 71, at xxiv. *See generally* HOWARD JAMES, CHILDREN IN TROUBLE (1969).

74. PALMER & LEWIS, *supra* note 71, at xxiv; *see also* Albert R. Roberts, *The Emergence and Proliferation of Juvenile Diversion Programs, in* JUVENILE JUSTICE 77, 79-80 (Albert R. Roberts ed., 1989).

75. *See, e.g.*, Roberts, *supra* note 74, at 79-80; DAVIDSON, ET AL., *supra* note 72, at 15.

76. Roberts, *supra* note 74, at 80 (quoting L.T. EMPEY, AMERICAN DELINQUENCY: ITS MEANING AND CONSTRUCTION 410 (1982)).

77. PALMER & LEWIS, *supra* note 71, at xxiv.

78. In 1974, Congress found that "understaffed, overcrowded juvenile courts, probation services, and correctional facilities are not able to provide individualized justice or effective help." *See* 42 U.S.C. § 5601(b)(2) (1988); Bomar, *supra* note 4, at 728 n.111.

79. Sweet, *supra* note 16, at 405 (quoting S. REP. NO. 1011, 93d Cong., 2d Sess. 22-24 (1974)). A status offender is a juvenile who has committed offenses, applicable only to children, that would not be crimes if committed by adults. Ward, *supra* note 6, at 46; Costello & Worthington, *supra* note 11, at 42.

80. President's Commission on Law Enforcement and Administration of Justice, *The Challenge of Crime in a Free Society*, Washington, D.C. (1967), at 46.

81. *Id.* at 85. *See, e.g.*, Andrew J. DeAngelo, *Diversion Programs in the Juvenile Justice System: An Alternative Method of Treatment for Juvenile Offenders*, 39 JUV. & FAM. CT. J. 21, 22 (1988); Sweet, *supra* note 16, at 398-99.

82. 42 U.S.C. §§ 5601-5778 (1988) [hereinafter JJDP].

83. 42 U.S.C. § 5602(b)(2) (1988). The Act also created the Office of Juvenile Justice and Delinquency Prevention. *Id.* § 5611(a). This office is the only federal agency with responsibility in the area of delinquency. EDMUND F. MCGARREL, JUVENILE CORRECTION REFORM 9 (1988).

The passage of the JJDP provided a major boost to the development of social services for diverted youth.[84] It brought nationwide attention to the concept of diversion, and it was the impetus for subsequent federal funding of diversion programs.[85] National awareness made diversion a viable alternative to official processing on a nationwide scale.[86] By the mid-1970s, hundreds of diversion programs had appeared across the country.[87]

Pretrial diversion has been defined as:

> [A] formalized procedure authorized by legislation, court rule, or most commonly, by informal prosecutorial consent, whereby persons who are accused of certain criminal offenses and meet preestablished criteria have their prosecution suspended . . . and are placed in a community-based rehabilitation program. The rehabilitation program may include counseling, training and job placement. If the conditions of the diversion referral are satisfied, the prosecution may be *nolle prossed* or the case dismissed; if not, the accused is returned for normal criminal processing.[88]

Juvenile diversion can be further defined as any process that is used by components of the criminal justice system (police, prosecution, courts, corrections) whereby youths avoid formal court processing and adjudication.[89]

Pretrial diversion can serve a number of goals, including the reduction of negative labeling and stigmatization, unnecessary social control and coercion, recidivism, and justice system costs.[90] By maintaining the youth's ties with his family and the community, diversion avoids the potential effect of a formal delinquent label which could adversely affect his self-image and contribute to subsequent delinquent behavior.[91] Studies show that diversion programs are

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84. Roberts, *supra* note 74, at 81, 88.

85. Arnold Binder, *Juvenile Diversion, in* JUVENILE JUSTICE 169, 174-75 (Albert R. Roberts ed., 1989).

86. Roberts, *supra* note 74, at 88.

87. Binder, *supra* note 85, at 175.

88. Note, *Pretrial Diversion from the Criminal Process*, 83 YALE L.J. 827, 827 (1974) (emphasis added).

89. Roberts, *supra* note 74, at 78. "In theory . . . diversion is the process of removing a juvenile from the system all together with or without referral to another social agency. In practice, diversion has come to mean minimizing the penetration of a juvenile into the system with referral to a program within the structure or to a program closely related to it." Edward J. Latessa, et al., *Juvenile Diversion: Factors Related to Decision Making and Outcome, in* JUVENILE JUSTICE POLICY: ANALYZING TRENDS AND OUTCOMES 145, 148 (Scott H. Decker ed., 1984) (quoting A. RUTHERFORD AND R. MCDERMOTT, NATIONAL EVALUATION PROGRAM - PHASE I ASSESSMENT: JUVENILE DIVERSION (1975)).

90. PALMER & LEWIS, *supra* note 71, at 207.

91. Timothy S. Bynum & Jack R. Greene, *How Wide the Net? Probing the Boundaries of the Juvenile Court, in* JUVENILE JUSTICE POLICY: ANALYZING TRENDS AND OUTCOMES 129, 130 (Scott H. Decker ed., 1984). *See also* DAVIDSON, ET AL., *supra* note 72, at 185-86. Interventions by the

reducing the number of repeat offenders.[92] In addition, in the long run, diversion programs are cheaper than expanding juvenile police, courts, and corrective functions.[93] Diversion offers the possibility of reallocating funds and resources to community programs that may satisfy a more rational public policy than traditional static juvenile corrections programs.[94] Thus, the state saves both time and money that can be concentrated on other critical issues.[95]

Moreover, diversion adds a dimension to the legal system's responses to conduct defined as dangerous to the welfare of society.[96] As an additional option beyond the alternatives of charge and dismissal, diversion programs may expand the juvenile justice system to include children who otherwise would have been ignored or handled less intrusively.[97] A number of youths whose cases would formerly have been dismissed or handled in a consent fashion are now receiving diversion.[98] As a result, the creation of juvenile diversion programs often has led to a supplemental, rather than an alternative, form of processing juvenile court cases.[99] Despite this problem, it has been argued that so-called "net widening" has increased the likelihood that youths in need of services will have access to them.[100]

Others assert that "widening of the net" is not an issue because diversion programs are outlets for the youth's frustrations, thus avoiding future violence.[101] The argument continues that the net should be wider to assure that minor offenders

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legal system seemed to lead to increased family conflict, and thus, to increased delinquency. *Id.*

92. *See, e.g.*, DAVIDSON, ET AL., *supra* note 72, at 99, 121, 228 (citing William S. Davidson, et al., *Diversion Programs for Juvenile Offenders*, 13 SOCIAL WORK RESEARCH AND ABSTRACTS, 46-49 (1977)); PALMER & LEWIS, *supra* note 71, at 87-90, 165-67; William S. Davidson and R. Redner, *Diversion from the Justice System, in* FOURTEEN OUNCES OF PREVENTION 123-37 (R. Price et al., eds., 1988); Kenneth W. Macke, *Pretrial Diversion from the Criminal Process: Some Constitutional Considerations*, 50 IND. L.J. 784 (1975); Roberts, *supra* note 74, at 86-88. *But see* Bynum & Greene, *supra* note 91, at 131 (quoting M.W. Klein, *Deinstitutionalization and Diversion of Juvenile Offenders: A Litany of Impediments, in* CRIME AND JUSTICE: AN ANNUAL REVIEW OF RESEARCH 162-63 (N. Morris & M. Tonry eds., 1979)); Ward, *supra* note 6, at 49-50.

93. *Contemporary Studies Project: Funding The Juvenile Justice System In Iowa*, 60 IOWA L. REV. 1149, 1238 (1975).

94. *Id.*

95. Bynum & Greene, *supra* note 91, at 142; DeAngelo, *supra* note 81, at 24; Macke, *supra* note 92, at 785.

96. Macke, *supra* note 92, at 785.

97. CHARLES H. SHIREMAN & FREDERIC G. REAMER, REHABILITATING JUVENILE JUSTICE 134 (1986). *But see* Finn-Aage Esbensen, *Net Widening? Yes and No: Diversion Impact Assessed Through a Systems Processing Rates Analysis, in* JUVENILE JUSTICE POLICY: ANALYZING TRENDS AND OUTCOMES 115, 126 (Scott H. Decker ed., 1984).

98. PALMER & LEWIS, *supra* note 71, at xxvi; Bynum & Greene, *supra* note 91, at 141.

99. Bynum & Greene, *supra* note 91, at 131 (citing RUTHERFORD AND BENGUR, COMMUNITY BASED ALTERNATIVES TO JUVENILE INCARCERATION (1976)).

100. *Id.*

101. Elizabeth W. Vorenburg, *A State of the Art Survey of Dispute Resolution Programs Involving Juveniles*, AMERICAN BAR ASSOCIATION, DISPUTE RESOLUTION PAPER SERIES NO. 1, July, 1982, at 33.

do not get off without some kind of retribution, such as community service.[102] If the diversion process produces long-lasting behavioral changes, the significance of "widening the net" is not negative.[103]

Generally, public agencies refer cases to diversion: the juvenile court, the prosecutor, the police, or by the juvenile officer handling the case.[104] When the prosecutor removes a child to a diversion program, the prosecutor and his staff usually have total control of all stages of the diversion process, from intake to successful or unsuccessful completion of the program.[105] The prosecutor, however, is completely responsible for advising the accused of his constitutional rights and taking action to see that those rights are not violated.[106] In programs where the diversion of the accused occurs before the juvenile court, either at an initial appearance or at a bail hearing, the judge hears the facts of the case as presented by the prosecutor or the juvenile officer.[107] Then, the defendant or the defendant's attorney has an opportunity to present any information about the incident.[108] If diversion is granted, the judge states the conditions of the program and the accused must acknowledge agreement.[109]

Cases referred to diversion by prosecutors or by the police raise serious due process questions. This stems from the lack of judicial oversight that accompanies these decisions to detain, release, and divert.[110] The basic provisions of procedural due process include notice, a meaningful opportunity to be heard, and an impartial decisionmaker.[111] Police decisions about whether a youth should be released, detained, or placed in a diversion program are autonomous, and subject to no judicial review. Prosecutors' decisions are not subject to judicial reversal, except when the decision is found to deny equal protection of the laws or other constitutional safeguards.[112] These referrals appear to be lacking a meaningful opportunity to be heard by an impartial decisionmaker.

Critics charge that when the prosecutor or the police initiate the diversion procedure, the youth is subtly and implicitly coerced into the program.[113] Police or prosecutors in effect function as both judge and jury when offering the youth an ultimatum.[114] If failure to participate or to reach an agreement to participate

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102. *Id.*

103. *Id.* at 37.

104. PALMER & LEWIS, *supra* note 71, at 163-64; DeAngelo, *supra* note 81, at 24; Macke, *supra* note 92, at 789.

105. Macke, *supra* note 92, at 789.

106. *Id.*

107. *Id.* at 790.

108. *Id.*

109. *Id.*

110. SHIREMAN & REAMER, *supra* note 97, at 135.

111. *See, e.g,* Vorenburg, *supra* note 101, at 30 (quoting P. Rice, *Due Process*, THE MOOTER, Summer, 1979, at 45).

112. Oyler v. Boles, 368 U.S. 448, 456 (1962).

113. *See* SHIREMAN & REAMER, *supra* note 97, at 135; Vorenburg, *supra* note 101, at 29.

114. SHIREMAN & REAMER, *supra* note 97, at 135.

will require a court appearance, there is a strong possibility that the youth is being coerced to participate in the program.[115] Thus, the possibility exists that a truly innocent youth who is fearful or who would have some difficulty establishing a defense may accept the sentence of diversion as the path of least resistance.[116] On the other hand, many community-based programs attempt to talk to all parties and carefully explain the process before seeking their consent to participate in an informal resolution, thus avoiding even the appearance of coercion.[117]

"If youths are going to be deterred from future mischief, they must be shown that juvenile justice agencies have teeth."[118] If apprehended youths are referred to diversion programs without a requirement of participation and without penalties for failure to participate successfully, the signal is that the police and the courts are not taking juvenile justice seriously.[119] The real solution to youths' problems depends on the youth's willingness to participate in voluntary programs designed to provide them with insight into their difficulties and other benefits.[120]

IV. TYPES OF PROGRAMS

There is not one "best" way to divert youths.[121] The diversion program into which a juvenile is placed depends upon the youth and upon the objectives of the diversion.[122] For diversion to be particularly useful, several diversion alternatives should be available.[123] Since the types of diversion programs vary as much as the children who participate in them, there is not enough room to mention them all. However, a brief description of some programs is in order.

Police Probation. This program is based upon informal police supervision where the youth is to stay out of trouble and the police officer is there to act as a probation officer.[124] As mentioned earlier, this program has the potential to be coercive if the police officer will file or threatens to file a juvenile petition if the juvenile does not comply with the terms of the officer's probation.[125]

Community Service. This program "is a method of allowing juveniles to work off their sentences by doing unpaid social service work."[126] Community

115. Vorenburg, *supra* note 101, at 29.
116. SHIREMAN & REAMER, *supra* note 97, at 135.
117. Vorenburg, *supra* note 101, at 29.
118. SHIREMAN & REAMER, *supra* note 97, at 145.
119. *Id.*
120. *Id.*
121. PALMER & LEWIS, *supra* note 71, at 207.
122. *Id.*
123. *Id.*
124. Arnold Binder and Virginia Binder, *Juvenile Diversion & the Constitution,* 10 J. CRIM. JUST. 1 (1982); DeAngelo, *supra* note 81, at 24.
125. Binder & Binder, *supra* note 124, at 11.
126. Sharon Silberman, *Community Service as an Alternative Sentence for Juveniles,* 12 NEW ENG. J. ON CRIM. AND CIV. CONFINEMENT 123, 131 (1986).

service is particularly useful for juveniles because it gives them a chance to make decisions and take responsibility.[127] In addition, the juveniles "feel they are contributing to the community in concrete ways, . . . particularly where personal talents are [used]."[128] One judge has said of community service, "[an offender who serves in his community] will acquire a greater sense of social responsibility [by] working to help others become more productive members of society and therefore will be integrated into a productive social role as a result."[129]

In a program known as "*vision quest*," minors participate in diverse activities such as camping or canoeing in the wilderness in conjunction with programs that are directed at assisting youths with specific problems.[130] Individual self-esteem grows with the successful completion of seemingly difficult tasks.[131] These programs attempt to instill in juveniles the sense that within themselves, they have the power to change their own behavior and their environment.[132]

Youth Aid Panels. These panels are composed of members of the community who devote time and service providing alternative dispositions in lieu of formal processing by the juvenile justice system.[133] The main purpose of the panel is to solve problems, rather than to determine guilt or innocence.[134] The primary goal of the panel is to demonstrate the community's concern for the child's behavior and welfare and to remove the conflict between youths and authority figures.[135]

Restitution Programs. In clear cases, a youthful offender may provide direct restitution to victims for damage done or provide some symbolic restitution such as community service.[136]

Presently, ninety-seven percent of jurisdictions include restitution among their possible dispositions in juvenile cases and fifty-two percent use formal restitution programs.[137] These programs benefit both the juveniles and their victims. Juveniles benefit by being held accountable for their actions and by being allowed to directly participate in the restitution process.[138] Victims benefit by receiving some redress for their losses, and by confronting their antagonists.[139]

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127. *Id.* at 143.

128. *Id.* at 139-40.

129. United States v. Carlson, 562 F. Supp. 181, 185 (N.D. Cal. 1983).

130. John L. Roche, *Juvenile Court Dispositional Alternatives: Imposing a Duty on the Defense,* 27 SANTA CLARA L. REV. 279, 284 (1987). *See also* Albert R. Roberts, *Wilderness Experiences: Camps and Outdoor Programs, in* JUVENILE JUSTICE 194, 196 (Albert R. Roberts ed., 1989).

131. Steven F. Scott, *Outward Bound; An Adjunct to the Treatment of Juvenile Delinquents: Florida's STEP Program,* 11 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 420, 430-31 (1985).

132. *Id.*

133. DeAngelo, *supra* note 81, at 25.

134. *Id.*

135. *Id.* at 26.

136. SHIREMAN & REAMER, *supra* note 97, at 146.

137. Harry Mika, et al., *Mediation Interventions and Restorative Potential: A Case Study of Juvenile Restitution,* 1989 J. DISP. RESOL. 89, 90.

138. *Id.* at 91.

139. *Id.* at 95.

V. PRE-ADJUDICATORY PROBLEMS AND DIVERSION

Although *Gault* gave children certain constitutional protections, juveniles rarely invoke their constitutional rights, and younger juveniles, those under age sixteen, almost never do.[140] Today, many hearings proceed without the presence of any lawyers and many children do not know enough to insist on their right to counsel.[141] Many states require that an "interested adult" be present when a juvenile is questioned, with the rationale that the adult will make sure the juvenile's rights are protected.[142] One study found that only twenty percent of parents agreed that their children had the right to withhold information from the police.[143] More often than not, the "interested adult" is more interested in having the juvenile admit to the offense.[144] The result is that the majority of juveniles admit the offense due to the influence of criminal justice officials who urge them to tell the truth.[145] Thus, the right against self-incrimination is rarely used in practice.[146] Once a child has admitted the offense, there is no occasion to exercise the rights to notice, counsel, confrontation and cross-examination of witnesses, and evidence beyond a reasonable doubt.[147]

"Most state juvenile codes provide neither special procedural safeguards to protect juveniles from the consequences of their own immaturity nor the full panoply of adult criminal procedural safeguards to protect them from punitive state intervention."[148] With the convergence of the juvenile and the criminal court system, it has been argued that juveniles must be protected not by the state, but from the state.[149] To do this, some commentators suggest extending all adult constitutional rights to children in juvenile court,[150] merging the juvenile system with the adult system,[151] and even abolishing the juvenile court system completely.[152] Most constitutional problems with juvenile offenders arise in

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140. Gary B. Melton, *Taking Gault Seriously: Toward A New Juvenile Court*, 68 NEB. L. REV. 146, 171 (1989) (citing T. GRISSO, JUVENILES' WAIVER OF RIGHTS: LEGAL AND PSYCHOLOGICAL COMPETENCE 180-82 (1981)).

141. MARK JACOBS, SCREWING THE SYSTEM AND MAKING IT WORK: JUVENILE JUSTICE IN THE NO FAULT SOCIETY 163 (1990).

142. BERNARD, *supra* note 1, at 141.

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.* at 142.

147. *Id.* at 145.

148. Barry C. Feld, *The Juvenile Court Meets the Principle of the Offense: Legislative Changes in Juvenile Waiver Statutes*, 78 J. CRIM. L. & CRIMINOLOGY 471, 529-30 (1987).

149. *See, e.g.*, Melton, *supra* note 140, at 180.

150. *See, e.g.*, SCHWARTZ, *supra* note 1, at 160.

151. *See, e.g.*, Robert O. Dawson, *The Future of Juvenile Justice: Is It Time to Abolish the System?* 81 J. CRIM. L. & CRIMINOLOGY 136 (1990).

152. *See, e.g.*, Katherine Hunt Federle, *The Abolition of the Juvenile Court: A Proposal for the Preservation of Children's Legal Rights*, 16 J. CONTEMP. L. 23 (1990).

the pretrial phase of the juvenile process. These problems could be alleviated by the extension of *Gault* to pretrial phases of juvenile proceedings.

VI. DIVERSION PROCESS MODEL

Due process problems in diversion programs occur primarily because the juvenile is diverted from the juvenile court before appearing in front of a judge.[153] Diversion was not created to be, and should not be, a method of circumventing the procedures designed to protect a child's constitutional rights.[154] To ensure that diversion programs are constitutional, some new procedures should be put into place. The protections that *Gault* gives to juvenile hearings should be extended to the pretrial phase of juvenile proceedings.

When a juvenile is put into a diversion program, the youth's acceptance of diversion should be voluntary. Diversion should not be confused with the concept of plea bargaining.[155] To start, juveniles should not be required to admit guilt in order to enter and participate in diversion programs.[156] Granted, the specter of subtle coercion will never be completely removed from the process because of the choice between diversion or adjudication;[157] however, the voluntariness of participation should be emphasized.[158] Thus, cases that are regularly dismissed should be dismissed if the youth declines diversion. At any stage of the diversion process, the child should have the right to return to court for an adjudicatory hearing.[159] The child must be made aware of that right and must be able to exercise that option without being disadvantaged for having attempted diversion.[160]

When a juvenile case comes to the attention of the authorities, the juvenile should have access to an attorney before any step to divert is taken.[161] Although *Gault* does not provide the right to an attorney in the pretrial proceedings, another Supreme Court decision has ruled that adults have a right to counsel at a "critical stage" of prosecution.[162] The Pretrial Intervention Services Center has linked these two cases and argued that "the decision to enter a juvenile pretrial intervention program appears to be a 'critical stage' within the meaning of *Wade*."[163] Although a youth can currently waive the right to an attorney,[164]

153. SHIREMAN & REAMER, *supra* note 97, at 135.
154. *See* KFOURY, *supra* note 9, at 71.
155. *Id.*
156. *Id.* at 71-72.
157. Vorenburg, *supra* note 101, at 29-30.
158. *Id.* at 30.
159. *See* KFOURY, *supra* note 9, at 71. *See also* State v. Quiroz, 733 P.2d 963 (Wash. 1989).
160. *See Quiroz*, 733 P.2d at 968.
161. *See In re* Gault, 387 U.S. at 36.
162. *See* United States v. Wade, 388 U.S. 218, 237 (1967).
163. Binder & Binder, *supra* note 124, at 18.

this right should be non-waivable for juveniles under sixteen.[165] The attorney can then act as liaison between the youth and the authorities. Commentators have argued for juveniles' need of legal assistance, stating "[w]ithout their presence and advocacy, procedures may be sloppy, insufficient attention may be given to individualizing juveniles, and poor quality investigations, recommendations, and service delivery may go unchallenged."[166] "Youngsters need advocates who argue their case and their best interests so that less is assumed or taken for granted."[167]

In the state of Washington, such a procedure is in place. In the preliminary stages of a juvenile proceeding, the juvenile is advised of the right to counsel, of the diversion process, and of the effects of diversion.[168] Once a juvenile has agreed to diversion, the diversion agreement informs the juvenile that he has the option of going to court. The agreement should include the information that charges may be dismissed, as well as explain the presumption of innocence and the right against self-incrimination.[169]

Once a juvenile decides to participate in a diversion program, a file containing all police reports, eyewitness accounts, and all other information known to the police, juvenile officer, or prosecuting attorney should be created. The juvenile's attorney should also have access to the file in order to add any statements by the juvenile offender or any prospective defense witnesses. On a set date after the diversion decision has been made, the juvenile court judge would conduct an intake hearing on the matter.[170] The intake hearing helps screen out for dismissal all frivolous and nonserious charges.[171] If the judge finds probable cause to suggest that the youth committed the offense for which he would have been charged, the judge may affirm the diversion decision. If, however, the judge does not find probable cause that the youth committed the offense, the judge would dismiss the diversion decision unless the youth or the youth's parents choose to keep the child in the diversion program.

Confidentiality in a diversion program must be kept at all times.[172] Anything a child in a diversion conference says to a counselor, volunteer, or any other person in a counseling role should not be admittable in court against the

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164. Fare v. Michael C., 442 U.S. 707, 726 (1979), *reh'g den.* 444 U.S. 887 (1979). The right to an attorney can be waived based on a 'totality of the circumstances test' including age, experience, education, background and intelligence, and the "capacity to understand the warnings given him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights." *Id.* at 725.

165. *See* SCHWARTZ, *supra* note 1, at 160-61.

166. H. Ted Rubin, *The Juvenile Court Landscape, in* JUVENILE JUSTICE 110, 139 (Albert R. Roberts ed., 1989).

167. *Id.*

168. *See Quiroz*, 733 P.2d at 965-66.

169. *Id.*

170. *See* FALCON BAKER, SAVING OUR KIDS 306 (1991).

171. *Id.*

172. *See* KFOURY, *supra* note 9, at 71.

child at a later time.[173] Thus, the juvenile's Fifth Amendment right against self-incrimination remains intact.

Diversion programs should have specific standardized criteria for determining program eligibility.[174] Presently, more than half of the juvenile cases referred to juvenile courts each year are for status offenses and minor crimes.[175] These are the kinds of cases that can be better handled through diversion than the juvenile court system because the "crimes" are often rooted in family problems.[176]

Thus, juvenile courts could concentrate their resources on cases involving serious delinquency. Specific eligibility criteria should be reviewed by juvenile justice officials and by community agencies involved in delivering services to young people.[177] Some factors that should be included in the determination are:

> the seriousness of the offense; the nature and number of prior juvenile justice contacts; the circumstances around the alleged conduct; the youth's age and maturity, school attendance and behavior, and family situation; the opposition of the complainant to diversion; the availability of appropriate services; and the needs of the child.[178]

VII. CONCLUSION

The idea of juvenile justice has moved full circle. Just as the juvenile court was created to divert children from the adult criminal courts, alternative diversion programs have been created to divert juvenile offenders from the juvenile courts. Although the primary goals of diversion, the reduction of recidivism and monetary cost savings for the juvenile court system, have been met, there are concerns regarding the constitutional rights of the children who are diverted from the juvenile justice system prior to appearing before a judge.[179] The concerns raised by the due process dilemma are less pressing after the original intake procedure has occurred.[180] Because of their success, diversion programs ought not be discontinued due to constitutional problems.

The solution is to incorporate traditional constitutional safeguards shielding the accused into pretrial diversion procedures. Such measures would prevent diversion of the innocent and protect the integrity of the diversion concept. Each accused juvenile should have a meaningful right to an attorney to ensure that he

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173. *Id.* at 72.
174. *Id.*
175. SCHWARTZ, *supra* note 1, at 162.
176. *Id.* at 171.
177. KFOURY, *supra* note 9, at 72.
178. *Id.*
179. *See* SHIREMAN & REAMER, *supra* note 97, at 135.
180. *Id.*

is apprised of the legal consequences of any diversion decisions. After diversion has been offered to and accepted by the juvenile, a judge should hold a hearing in which the case is reviewed for probable cause. With a probable cause hearing, due process concerns about a pretrial diversion decision, due to a lack of judicial oversight, are alleviated.

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