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Pretrial Diversion from the Criminal Process: Some Constitutional Considerations

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Notes

Pretrial Diversion from the Criminal Process: Some Constitutional Considerations

The concept of pretrial diversion has emerged within recent years as a major issue in the ongoing debate over solutions to one of our most perplexing social problems, the soaring crime rate. The promise of a more humane system of criminal justice to solve this problem has given added impetus to diversion's popularity.

Diversion is a procedure for the "disposition of a criminal complaint without a conviction, the noncriminal disposition being conditioned on either the performance of specified obligations by the defendant, or his participation in counseling or treatment."[1] An accused meeting certain eligibility criteria is offered an opportunity to agree to participate in a rehabilitative program while his prosecution is suspended. If he successfully completes the program, the charge is dismissed. If he fails, he is channeled through the regular criminal process.

Amidst a flurry of recent studies indicating diversion can be successful in reducing recidivism, scant attention has been given to its legality. Traditional principles concerning judicial supervision, assistance of counsel, the right to a speedy trial, and the privilege against self-incrimination which inhere in the regular criminal process, have been glossed over in the haste to implement a promising new concept. The constitutional domestication of pretrial diversion would protect individual liberties that ultimately shield a free society while preserving the benefits shown to accrue to communities having established diversion programs.

This note will focus exclusively upon diversion to community-based rehabilitation programs, which normally involve counseling, training, and job placement for periods up to one year. Solutions for the constitutional shortcomings of intake procedures of recently established programs, as well as a means of implementing a model diversion program in Indiana, will be proposed.

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[1] R. NIMMER, DIVERSION: THE SEARCH FOR ALTERNATIVE FORMS OF PROSECUTION (1974).

DIVERSION: GOALS AND BENEFITS

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 for a three month to one year period and are placed in a community-based rehabilitation program. The rehabilitation program may include counseling, training, and job placement. If 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.[2]

Pretrial diversion's most immediate goal is the reduction of recidivism.[3] In theory, diversion acts to reduce recidivism in three ways: (1) An accused is put into a community-based treatment program that maintains the stable ties which he has with his family, his community, or his employment, instead of severing them as incarceration does.[4] (2) The attempt at rehabilitation is begun while the offender still feels the impact of his arrest instead of after the long delays now present in our criminal justice system.[5] Immediately after arrest the offender is believed to be in the best psychological state for rehabilitation efforts because his sense of guilt is greatest, he has not had time to rationalize his behavior, and his ties with the community are still intact.[6] (3) The offender avoids the criminal stigma which not only burdens his acceptance by society but acts as a "self-fulfilling and internalizing perception" encouraging him to act out his social role as a criminal.[7] Experience with recent diversion programs appears to bear out the predicted reduction in recidivism.[8]

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[2] Note, *Pretrial Diversion from the Criminal Process,* 83 YALE L.J. 827 (1974).

[3] *See* S. REP. No. 417, 93d Cong., 1st Sess. (1973) [hereinafter cited as S. REP. No. 417]; *see also* Statement of Robert Leonard, prosecuting attorney of Genesee County, Michigan, in *Hearings on S. 798 Before the Subcomm. on National Penitentiaries of the Senate Comm. on the Judiciary,* 93d Cong., 1st Sess., at 412 (1973) [hereinafter cited as *Hearings on S. 798*].

[4] *See* S. REP. No. 417, at 7.

[5] *See id.* at 13.

[6] *See id.*

[7] *See id.* at 12.

[8] The Manhattan Court Employment Project designed in 1967 by the Vera Institute of Justice and Project Crossroads of Washington, D.C., funded by the Department of Labor, were two early manpower model diversion projects in which recidivism rates of the groups that successfully completed the rehabilitation programs were compared with control groups. The Manhattan Project found that the recidivism rate in the diverted group was 15.8 percent, while the rate in the control group was 30.1 percent. Statement of Ennis J. Olgiati, Director of the Court Employment Project, in *Hearings on S. 3309*

Another important goal of pretrial diversion is said to be the economizing of judicial and prosecutorial resources. By diverting an accused early in the criminal process, the costs of the subsequent formal proceedings are avoided. The time saved can be then applied to prosecution of more serious or recidivist offenders.[9]

Prosecutors might see diversion as an additional option beyond traditional alternatives of charge or dismissal.[10] Courts and legislators may view diversion as a mechanism for modifying the present employment of the criminal sanction against criminal conduct only marginally deserving of the criminal stigma yet showing need of rehabilitation.[11] Diversion adds a new dimension to the legal system's arsenal of responses to conduct defined as dangerous to the welfare of society. Diversion also has the potential for expansion to more serious crimes where rehabilitation can be effective. Society and the individual also benefit when offenders who may just be beginning a pattern of criminal behavior are diverted into productive lawful employment.[12]

Before the Subcomm. on National Penitentiaries of the Senate Comm. on the Judiciary, 92d Cong., 2d Sess. 45–52 (1972) [hereinafter cited as *Hearings on S. 3309*]. Project Crossroads also found favorable results: a 22.2 percent rearrest rate for the diverted group as compared to a 45.7 percent rate for the control group. S. REP. No. 417, at 7. *See also* Statement from the Project Crossroads, in *Hearings on S. 3309,* at 88–91. It was the apparent success of these initial projects that prompted the Department of Labor to fund a second round of model diversion projects. S. REP. No. 417, at 9. One commentator, however, has severely criticized the validity of the methodology employed in assessing the recidivism rates in the earlier model programs. Note, *supra* note 2, at 847–48 nn.112 & 113.

[9] *See* REPORT OF THE NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, COURTS (1973) [hereinafter cited as NATIONAL ADVISORY COMM'N, COURTS], *reprinted in Hearings on S. 798,* at 520–21.

[10] STATE OF MICHIGAN OFFICE OF CRIMINAL JUSTICE PROGRAMS, DEFERRED PROSECUTION AND CRIMINAL JUSTICE: A CASE STUDY OF THE GENESEE COUNTY CITIZENS PROBATION AUTHORITY (1972) [hereinafter cited as A CASE STUDY OF C.P.A.], *reprinted in Hearings on S. 798,* at 440, 443. *See also* PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 133 (1967) [hereinafter cited as CRIME COMM'N REPORT].

[11] NATIONAL ADVISORY COMM'N, COURTS at 520.

[12] Offsetting the benefits of diversion are the potential dangers inherent in such a system. One commentator posits this concern:

> The extensive diversion of offenders may also tend to divert legislative attention from other aspects of needed judicial reform. Relief from the stigma of a criminal record through diversion must not prevent reformation of statutes dealing with expungement of criminal records. Legislative efforts must continue to prevent arbitrary discrimination by employers—both public and private—in the hiring of persons with criminal records. And efforts should continue to restrict the availability of criminal records to persons outside the criminal justice system.

Statement of J. Gordon Zaloom, Project Director, Hudson County Pretrial Intervention Project, in *Hearings on S. 3309,* at 105. Also, diversion should not be viewed as an alternative solution to the present controversy concerning the decriminalization of victimless criminal behavior. *Id.*

One troubling statement made by the National Advisory Commission is worthy of

History of Diversion Programs

Pretrial diversion is a new concept only in the sense that programs now employing this term follow formal procedures and apply standardized eligibility criteria for the purpose of making the diversion decision on a large scale. The basic concept of diversion, however, is not new. Prosecutors have long employed diversion on an individual basis by deferring prosecution upon the condition that the offender seek psychiatric assistance, if it appeared that a mental disturbance had contributed toward the criminal conduct.[13] Prosecutions were often suspended if the accused agreed to seek out employment, enter the military, or undergo some form of rehabilitative treatment.[14] Typical of the trend towards a more organized diversion procedure was the development of the juvenile court system, whose goal was to divert juveniles into rehabilitation without attaching the stigma of a criminal conviction. A major difficulty with these programs was that while the offender was effecively diverted from the stigma and harshness of the criminal sanction, he was likewise diverted from the assertion of constitutional safeguards which attach in the course of the normal criminal process.[15]

Large-scale diversion, other than in the juvenile justice system, is a recent innovation whose constitutionality has not yet been established in the courts. The first such program was inaugurated in 1965 in Genesee County, Michigan, under the name Court of No Record.[16] In 1968 it evolved into its present structure under the name Citizens' Probation Authority (C.P.A.).[17] The formation of diversion programs was spurred by the publication in 1967 of a study undertaken by the President's Commission on Law Enforcement and the Administration of Justice, which recommended diversion as a possible

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extensive debate before legislators, judges, or prosecutors decide to make diversion a permanent part of our criminal justice system:

> Many of the same objectives sought through diversion can be accomplished if the sentencing judge had authority to sentence a convicted offender to a diversion program and the jurisdiction had an expungment statute to permit removal of formal records of conviction following successful participation in such a program.

National Advisory Comm'n, Courts at 531.

[13] ABA Project on Standards for Criminal Justice, Standards Relating to the Prosecution Function and the Defense Function 91 (tent. draft 1970) (commentary to Standard 3.8 of the Prosecution Function).

[14] *Id.*

[15] *In re* Gault, 387 U.S. 1 (1967).

[16] Statement of Robert Leonard, Prosecuting Attorney of Genesse County, Michigan, in *Hearings on S. 798, supra* note 3, at 410; S. Rep. No. 417, at 7.

[17] A Case Study of C.P.A. at 443.

solution to the problem of recidivism.[18] The Department of Labor began funding model diversion programs in seven metropolitan areas,[19] among which was the Hennepin County Pre-Trial Diversion Project in Minneapolis, started in 1971, operating under the name Operation De Novo. In 1972, the Supreme Court of Pennsylvania established by court rule a diversion procedure called "Accelerated Rehabilitative Disposition" (A.R.D.), modeled after an existing program in Philadelphia.[20] At the federal level, the Senate adopted the Community Supervision and Services Act in 1973, proposed as Senate Bill Number 798, although the bill died in committee in the House.[21] Although the four programs named above—C.P.A., De Novo, A.R.D. & Senate Bill No. 798—do not exhaust the list of variations of diversion programs that have been instituted recently, they are representative of the differing ways in which diversion programs can overlook—or assure—the safeguarding of the accused's constitutional rights in the course of the diversion process.

How the Diversion Process Operates

Although procedures for channeling defendants through the regular criminal process vary among jurisdictions, the intake stage usually begins with an arrest followed quickly by police booking, detention and the filing of a charge. Most states have statutes requiring an arrested person be brought before a magistrate within a reasonable time[22] for the purposes of informing him of the charge, his constitutional rights, appointing counsel if he is indigent,[23] and setting bail. This stage is

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[18] Crime Comm'n Report at 134.

[19] *Statement of Operation De Novo Pre-Trial Diversion Project,* in *Hearings on S. 3309,* at 63–64 [hereinafter cited as *Statement of De Novo*].

[20] Pa. R. Crim. P. 175–85 (1975). The rules are reprinted in *Hearings on S. 3309,* at 143–47.

[21] *See* S. Rep. No. 417, *supra* note 3.

[22] In Indiana any officer arresting for the commission of a felony or a misdemeanor shall take the accused before a magistrate. Ind. Ann. Stat. § 35-1-8-1 (Code ed. 1975). Another statute commands any city police officer making an arrest "forthwith to bring the person arrested before the city court, or court having jurisdiction of the offense, to be dealt with according to law." Ind. Ann. Stat. § 18-1-11-8 (Code ed. 1974).

[23] Indiana provides by statute: "The defendant shall not be called upon to plead until the court has advised him of his right to retain counsel and his right to be provided with counsel at public expense if he is financially unable to retain counsel as provided by law." Ind. Ann. Stat. § 35-4.1-1-2 (Code ed. 1975). Elsewhere it is provided that a preliminary charge be prepared when one accused of a felony has been arrested and detained:

> [The officer] shall forthwith take such person before the magistrate, justice, municipal, city, criminal or circuit judge, and shall cause [a preliminary charge] to be prepared forthwith before the court hearing such matters . . . , and said person so accused shall be entitled to a hearing thereon.

Ind. Ann. Stat. § 35-4-1-1 (Code ed. 1975). The person charged "shall at said hearing

often called the initial appearance.[24] The next stage is the preliminary hearing where a judge or magistrate determines whether probable cause exists to "bind over" the accused for trial.[25] After the binding over, the prosecutor files his information or the grand jury may issue an indictment.[26] At arraignment the defendant must enter his formal plea.[27] If it is "not guilty" the case moves toward trial.[28]

Diversion removes the accused at an early stage of the criminal process.[29] Diversion programs vary upon which stage removal occurs. The C.P.A. program (Michigan) diverts persons before the arrest

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be apprised of the facts concerning the felony" and "that anything he may say may be used against him" and shall also be advised "that he is entitled to legal counsel." *Id.* After the hearing at which the accused has the opportunity to advance any explanation, justification, excuse, alibi or denial, "[t]he court shall thereupon rule in discharge or commitment." "Any person so committed on any such preliminary charge shall be entitled to bail . . . ." *Id. Cf.* IND. CONST. art. 1, § 17 (bail).

[24] *See* FED. R. CRIM. P. 5.

[25] *See* IND. ANN. STAT. §§ 35-1-8-1, 35-3.1-1-1, 35-4-1-1 (Code ed. 1975).

[26] "All prosecutions of crimes shall be instituted by the bringing of an information or indictment by the prosecuting attorney, in a court with jurisdiction over the offense charged." IND. ANN. STAT. § 35-3.1-1-1 (b) (Code ed. 1975).

[27] *See* IND. ANN. STAT. § 35-4.1-1-1 (Code ed. 1975).

[28] For a general description of the criminal process existing among the state jurisdictions see Y. KAMISAR, W. LAFAVE, & J. ISRAEL, MODERN CRIMINAL PROCEDURE 4–15 (4th ed. 1974).

[29] A recent commentator has carefully summarized the various formal eligibility criteria which nonaddict, adult diversion programs use for the intake decision. In general these are:

> *Residency.* The accused must be a resident of the city or county in which the program operates.
>
> *Age.* There is usually a minimum age requirement of 16 or 17 years and there may also be an upper age limit of 25 to 45 years.
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> *Charge.* This criterion varies from program to program. In general new programs begin cautiously, limiting admission to those charged with misdemeanors. As they mature and gain the confidence of criminal justice officials, the criteria are expanded to cover nonviolent felonies. Motor vehicle law violators, narcotic addicts, and prostitutes are normally excluded.
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> *Prior arrests.* Some programs admit only accused first offenders; others will admit persons with a record of one prior misdemeanor conviction; and still others require only that the accused be a 'non-habitual offender.' Programs usually begin with accused first offenders and gradually broaden their eligibility standards to encompass those with prior records.
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> *Unemployment.* Since the Department of Labor which funded the early programs emphasized a manpower approach to rehabilitation, subsequent programs also adopted under or unemployment as a condition for eligibility. However this requirement is not consistently enforced.

Note, *supra* note 2, at 832–33.

In addition, most diversion programs require their participants to assume moral responsibility for their alleged offenses. Under C.P.A. an accused must make a statement admitting guilt to his C.P.A. staff worker, on the theory that the admission itself is of therapeutic value. A CASE STUDY OF C.P.A., *supra* note 10, at 497. No written statements are required. The Senate Report on S. 798 recognized that an "informal acknowledgement of personal responsibility meets the needs of rehabilitation," but rejected the notion that a formal guilty plea be required. S. REP. No. 417, at 14.

and charge stages.[30] This earliest of diversion models is called the prosecutor's model because removal occurs before any judicial input can occur.[31] The prosecutor and his staff have total control of all stages of the diversion process from intake to successful completion of the rehabilitation program or termination from the program of the unsuccessful. They are also totally responsible for advising the accused of his constitutional rights and taking action to implement these rights.

Most of the other diversion programs divert the accused at the initial appearance or bail hearing stage, but there is much diversity among these programs in the amount of judicial supervision over intake. In programs such as Operation De Novo the judge does nothing more than grant a continuance if the accused agrees to be diverted.[32] Under

[30] The Citizens Probation Authority (C.P.A.) is an autonomous agency, funded by the Genesse County Board of Commissioners (Flint, Michigan), which has a professional staff of counselors to rehabilitate those persons referred by the prosecutor's office. Counseling services cover such areas as finances, education, employment training, marriage and the family. A CASE STUDY OF C.P.A. at 444, 449.

Under the C.P.A. diversion program, a number of assistant prosecutors are assigned the task of initially screening out those persons who may be good subjects for deferred prosecution. The assistant prosecutors keep in close contact with local police agencies so that a C.P.A. referral can be made in a proper case before an arrest warrant is necessitated. The prosecutor then refers the accused (client) to a Police Liaison and Training Officer (PLATO) for an interview. *Id.* at 471. PLATO then

> [advises] the accused of his Constitutional rights, explains the nature of the CPA program, secures the cooperation of the client and refers him to a staff counselor for a work-up on the personal and social history of the client. Cases not meeting CPA criteria or who voluntarily withdraw from participation at the intake stage are referred back to the prosecutor for further disposition.

Id. at 471. An accused who successfully completes the C.P.A. program is never charged with a crime and often was not arrested prior to intake. He does not see a judge or the inside of a courtroom. The typical C.P.A. participant does not have the advice of retained or assigned counsel during the intake process. (This is seen as a substantial cost saving for the county.) *Id.* at 482, 488. Typically the accused accepts a one-year "voluntary" probation program while prosecution is held in abeyance. The diversion agreement may be revoked and formal prosecution of the case initiated if the "client" commits a new offense. The decision to revoke is made by the C.P.A. staff, but the prosecutor makes the final determination. Although a C.P.A. counselor discusses the alleged new offense with the "client," there is no opportunity for an adversarial hearing or the assistance of counsel. *Id.* at 472.

[31] NATIONAL DISTRICT ATTORNEYS ASS'N, DEFERRED PROSECUTION (1974). The subject matter consultant for this manual is currently the Director of the Genesee County Citizens Probation Authority. It is therefore no coincidence that the diversion model proposed by the National District Attorneys Association is nearly identical to C.P.A.

[32] *Statement of De Novo, supra* note 19, at 65; Statement of William B. Henschel, in *Hearings on S. 3309, supra* note 8, at 56.

The Hennepin County Pre-trial Diversion Project (Minneapolis, Minnesota) was initially an 18-month experimental program begun in 1971 and funded by the U.S. Department of Labor as one of several "second round" programs. *Statement of De Novo, supra,* at 68. The program is patterned after the Manhattan Court Employment Project and Project Crossroads in Washington, D.C. *Id.* at 71. Staff counselors for the rehabilitation program include professionals and ex-offender paraprofessionals who are believed better qualified in breaking down the communications impasse between an offender

Senate Bill No. 798, the judge plays a more important role, determining whether the accused voluntarily agrees to such program and knowingly and intelligently waives the statute of limitations and the right to a speedy trial, and whether the accused's release is in the public interest.[33] Under A.R.D. the judge makes a further inquiry on a closed record. He must hear the facts of the case as presented by the prosecutor and any victim and such information as the defendant or his attorney may present. The defendant's statements may not be used against him in any subsequent proceeding. Only then may the judge grant diversion after stating the conditions of the program and after the defendant acknowledges his agreement.[34] In effect, before

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and traditional counselor. *Id.* at 68. The program staff provided an intense six-month period of personality development and vocational training. *Id.* at 64.

Program screeners interview defendants after arrest but just prior to arraignment—usually in the courtroom. If the defendant meets the eligibility criteria and agrees to participate, the screener informs the prosecutor. If the prosecutor decides to accept the defendant for diversion he informs the judge, who grants a continuance for six months. Once diverted, the defendant signs an agreement to cooperate with the project and to waive his right to a speedy trial. He is then assigned to a counselor. The judge's only function in the intake process is to grant the continuance and, if the defendant successfully completes the program, to dismiss the charges. *Id.* at 69. Although program procedures state that prospective participants shall have an opportunity to consult with counsel, the screening procedures in reality do not permit the advice of assigned counsel. *Id.* at 72. *Cf.* Note, *supra* note 2, at 841. *Cf. also* R. NIMMER, *supra* note 1, at 53–65.

[33] S. REP. No. 417, at 2. In October, 1973, the U.S. Senate passed bill S. 798, which would have authorized and established procedures for pretrial diversion programs for each federal court district. The Senate Judiciary Committee held lengthy hearings on the subject of pretrial diversion, in which representatives from diversion projects throughout the country explained their programs and commented on the proposed bill. *See Hearings on S. 3309* and *Hearings on S. 798, supra* note 3. S. 798, the revised form of S. 3309, was the products of these hearings.

The bill attempted to preserve the tradition of prosecutorial discretion while safeguarding the interest of the defendant and society during the intake procedure by imposing certain judicial controls. Under S. 798 the U.S. attorney could recommend a person charged with an offense be released to a program of community supervision and services for up to 12 months, during which the charge is continued by a judge or magistrate. The chief administrator of the program would have the duty to screen each person charged with an offense and make recommendations to the U.S. attorney. The judge or magistrate could release the accused at the bail hearing or thereafter. S. REP. No. 417, at 2, 3. Thus the U.S. attorney would retain the discretion to initiate diversion—but subject to a judicial veto. S. 798 did not expressly provide for the right to counsel at the intake process, but the Judiciary Committee's report stated that "defense counsel would play an important role here." *Id.* at 6. The bill also forbade the use at any criminal proceeding of any statements or information given by the defendant during the intake process or program on the issue of his guilt. *Id.* at 2, 3.

The judge or magistrate could terminate the accused's release to the program "if the attorney for the Government finds such individual is not fullfilling his obligations under the plan applicable to him, or the public interest so requires." *Id.* at 3. The language authorizing revocation arguably required the accused be granted a hearing before the U.S. attorney since it required the attorney to "find" the facts which merit revocation.

[34] PA. R. CRIM. P. 175–85 (1975). The rules are reprinted in *Hearings on S. 3309*, at 144–47. The Supreme Court of Pennsylvania in 1972 promulgated rules 175 to 185 which authorize a diversion procedure called "Accelerated Rehabilitative Disposition"

granting diversion the judge in A.R.D. determines probable cause and a factual basis for believing the accused committed the crime.

Diversion programs also vary in the extent of the opportunity for effective assistance of counsel at the intake stage for indigent accuseds. Under the prosecutor's model an indigent need not be afforded the assistance of counsel because he is diverted at a stage preceding the initial appearance before a magistrate or judge.[35] However, an accused is permitted counsel if he provides his own. Under Operation De Novo, counsel is appointed at the intake stage but there is no opportunity for intelligent advice of counsel before the accused must decide on diversion.[36] Under Senate Bill No. 798, the same problem would exist if the accused is diverted at the bail hearing at which counsel is appointed.[37]

The stage of the criminal process at which diversion occurs has determined whether the accused receives constitutional safeguards. The diagram illustrates the stages of the criminal process at which diversion occurs in various programs. The balance of this note will discuss the need for diversion to occur after the charge, judicial supervision and assistance of counsel.

THE CHARGE AS A PREREQUISITE TO DIVERSION

Under the traditional criminal process the initiation of criminal proceedings triggers the attachment of constitutional rights to protect the accused from a miscarriage of justice. The sixth amendment right to counsel has been held to apply only to those events occurring after

(A.R.D.). The rules establish elaborate judicial control over the diversion intake and revocation process to safeguard the rights of the defendant.

The prosecutor in his discretion may move the court that a case be considered for diversion either before or after the indictment or information stage. A hearing on the prosecutor's motion is held in open court in the presence of the defendant, his counsel, the prosecutor, and any victims of the alleged offense.

The rules require the judge to ask the defendant on record whether he understands that diversion gives him an opportunity for dismissal of the charge, that he may be tried if he fails the program, and that he must waive his right to a speedy trial and the right to invoke the statute of limitations.

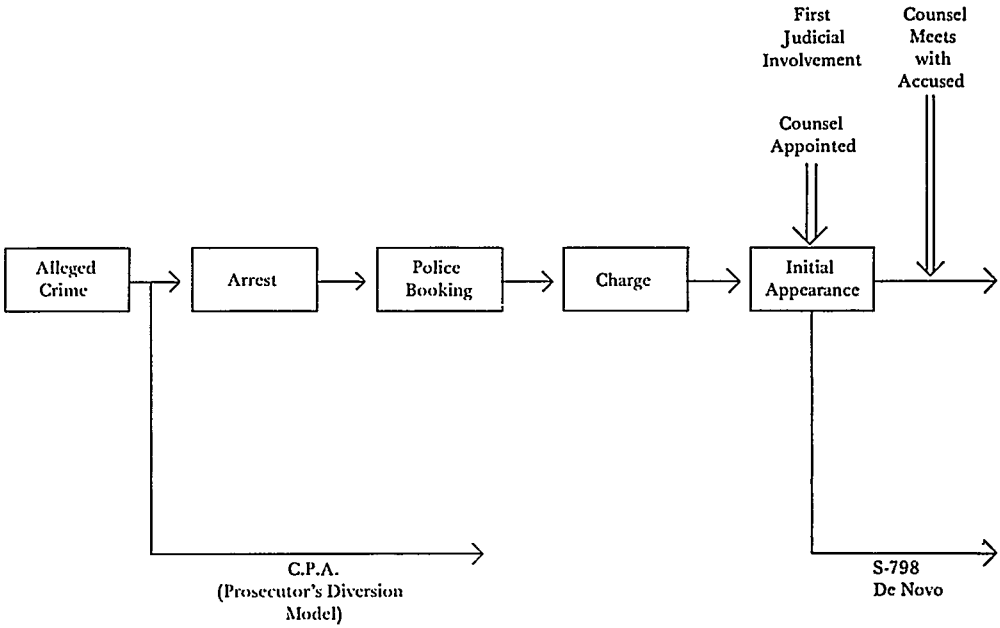
The Pennsylvania rules also establish a judicially controlled procedure for the revocation of a diversion agreement. The prosecutor may file a motion alleging the defendant has violated a condition of the program. The defendant is granted a hearing at which the judge may decide to terminate his program. The rules do not mention a right to counsel at the revocation hearing. Under the rules the prosecutor's discretion in deciding whether to divert is preserved, but the judge has a veto power over the diversion intake. The prosecutor has the discretion to initiate a revocation hearing, but only the judge may revoke after due process of law. *Id.*

[35] *See* NATIONAL DISTRICT ATTORNEYS ASS'N, DEFERRED PROSECUTION 43-45 (1974); A CASE STUDY OF C.P.A. at 482.

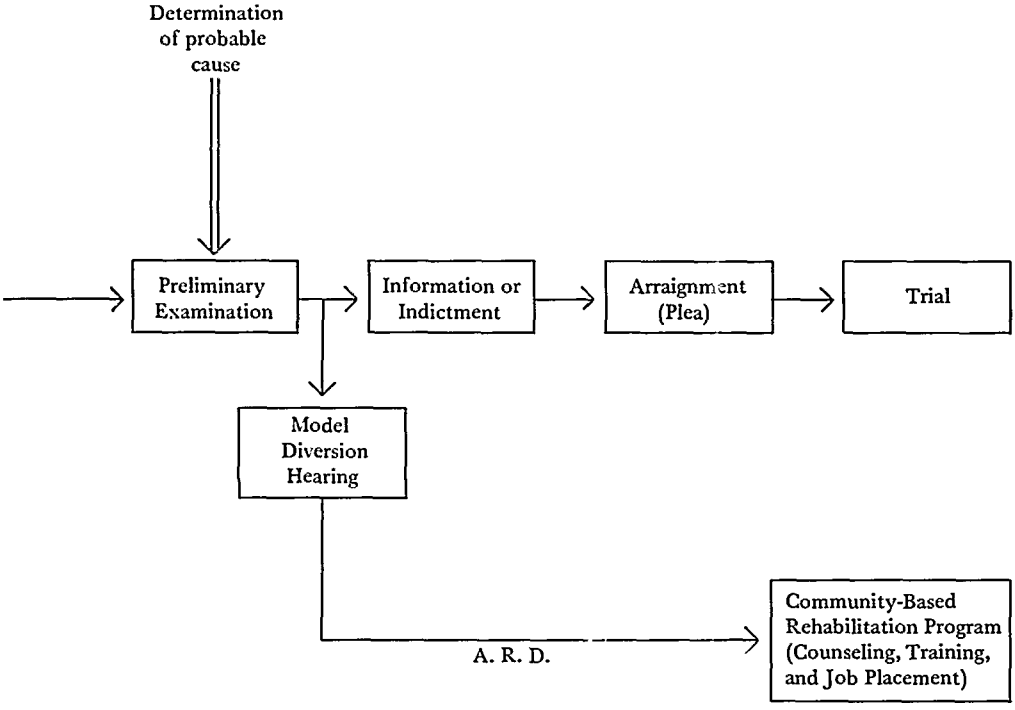
[36] *Statement of DeNovo* at 72; Note, *supra* note 2, at 841.

[37] *See* FED. R. CRIM. P. 44.

DIVERSION FLOW CHART



The chart above indicates the relationship among existing or proposed diversion programs, the chain of events in the criminal process leading to adjudication, and the points along this chain at which the intervention of the court or the accused's attorney serves to protect the accused's constitutional and statutory rights. The progression of events from the alleged commission of a crime to adjudication represents the normal criminal process. Procedural safeguards, here indicated in terms of judicial supervision of the prosecutor's decision to proceed towards trial and in terms of the accused's access to appointed counsel, are indicated at the stage of the proceedings at which they occur. Arrows dropping away from the main sequence represent the diversion programs discussed in the text, each leading to the rehabilitation program indicated at lower right. For purposes of this note,



the significant differentiating feature of these diversion programs is the stage of the normal criminal process at which the accused is diverted.

Procedures for safeguarding constitutional and statutory rights, most significantly those involving judicial supervision and access to counsel, have been imposed upon particular stages of a state's criminal process by a case-by-case analysis of the function of the particular stage and the purpose of the constitutional right sought to be imposed at that stage. Diversion, however, circumvents those stages and thereby may bypass the attaching of constitutional safeguards assumed to inhere in the normal flow of events from arrest to trial. The procedural safeguards shown above—judicial supervision and access to counsel—serve to protect the entire range of statutory and constitutional rights available to the accused.

the "initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment."[38] The sixth amendment right to a speedy trial has been held to attach at the "formal indictment or information or else the actual restraints imposed by an arrest and holding to answer a criminal charge. . . ."[39] The fourth amendment right to a probable cause hearing has been held to attach whenever a person is significantly restrained in his liberty while awaiting trial.[40]

Under C.P.A. an accused enters a diversion program without being charged or even arrested. The rationale given by supporters of this policy is that the criminal stigma of a formal accusation is avoided which thereby aids the accused towards rehabilitation. But the accused unwittingly pays a high price for this "benefit" by foregoing all of the constitutional safeguards that would unquestionably be due him if he were charged.

For diversion programs generally, the formal charge is an essential tool for all of the parties in the criminal process. Defense counsel can more effectively advise his client of the strengths and weaknesses of the prosecutor's case in relation to a specific charge. It is doubtful he can give his client the effective assistance of counsel in the absence of a charge. The charge allows the defendant to better assess the seriousness of his sitution by revealing the potential sentence, whether he faces a misdemeanor or felony, and the degree of social stigma if he is convicted. The judge cannot determine whether probable cause exists in the absence of a charge. The prosecutor is induced to examine more carefully the merits of his case if he must bring a specific charge relating to his evidence.[41]

Although the courts have not held that there is a constitutional right to be charged with a crime, C.P.A. presents the issue in a novel context. Under C.P.A. the accused agrees to accept the restraints upon his liberty and intrusions into his privacy involved in the rehabilitative program in exchange for abeyance of prosecution.[42] These restraints

[38] Kirby v. Illinois, 406 U.S. 682, 689 (1972).

[39] United States v. Marion, 404 U.S. 307, 320 (1971).

[40] Gerstein v. Pugh, 420 U.S. 103 (1975).

[41] *See generally* NATIONAL ADVISORY COMM'N, COURTS, *supra* note 9, at 530–31.

[42] Under the prosecutor's model the accused must sign an application for voluntary probation in the Deferred Prosecution Program. The accused agrees not to "leave the city/county/state without obtaining written permission" from his counselor, not to "knowingly associate with persons who violate the law," to "report to [his] counselor and participate in counseling sessions as required," to "cooperate with any agency to which [he is] referred," to "pay a Probation Service Fee" and to "pay any restitution required for [the offense charged], as directed by [his] counselor." NATIONAL DISTRICT ATTORNEYS ASS'N, DEFERRED PROSECUTION 58 (1974).

occur without a judicial determination of probable cause. In *Gerstein v. Pugh* the Supreme Court held, in a case involving a defendant unable to raise bail, that the fourth amendment requires a judicial determination of probable cause to justify a significant restraint on liberty pending trial.[43] The Court added that "[e]ven pretrial release may be accompanied by burdensome conditions that effect a significant restraint of liberty."[44] Participation in a rehabilitative diversion program may pose more burdensome restraints upon liberty than pretrial release restrictions upon an accused's travel, association or place of abode.[45]

It is true that a C.P.A. divertee is not subject to a court's contempt power if he breaches a condition of the agreement, whereas under conventional pretrial release procedures an accused could be held in contempt for violating a condition of release.[46] However the C.P.A. divertee participates in the diversion program because of the threat of prosecution and perhaps also in ignorance of alternatives. The results are the same in terms of loss of liberty under both pretrial release agreements and the so-called voluntary diversion agreement of C.P.A. The rationale of *Gerstein v. Pugh* appears to mandate a judicial determination of probable cause before the accused enters a diversion program. The issue of probable cause cannot be resolved in each instance without a formal charge. Thus *Gerstein v. Pugh* strongly suggests that formal charging is a constitutional requirement of any diversion procedure.

The question of whether the Constitution requires charging in the diversion procedure also arises in the context of an accused's waiver of his right to a speedy trial. That right cannot be knowingly and intelligently waived without knowledge of the charge upon which one could be tried. In *United States v. Marion*[47] the Supreme Court refused to reverse a conviction on a charge which the prosecutor brought over three years after the case was fully investigated. The defendant had argued that the belated charge violated his right to a speedy trial. The Court said that it is "a formal indictment or information or else the actual restraints imposed by arrest and holding to answer a criminal charge

[43] Gerstein v. Pugh, 420 U.S. 103 (1975). "[The probable cause determination] is required only for those suspects who suffer restraints on liberty other than the condition that they appear for trial." *Id.* at 125 n.26.

[44] *Id.* at 114.

[45] *See* the Bail Reform Act of 1966, 18 U.S.C. §§ 3041, 3141–43, 3146–52, 3568 (1970). The Court in *Gerstein* identified the provisions of 18 U.S.C. §§ 3146(a)(2), (5) (1970) as examples of potentially "significant restraint on liberty." 420 U.S. at 114.

[46] *See* Brown v. Fogel, 395 F.2d 291, 293 (4th Cir. 1968); 18 U.S.C. § 3151 (1970).

[47] 404 U.S. 307 (1971).

that engage the particular protections of speedy trial provision of the Sixth Amendment."[48] But this is so because until arrest or charge, "a citizen suffers no restraints on his liberty and is not the subject of public accusation. . . ."[49] As with the right to a probable cause hearing, the right to a speedy trial evidently attaches when the state seeks to restrain one's liberty. The restraints involved in the diversion program would necessarily bring the right to speedy trial into play. Again an accused could not waive this right without knowledge of the charge to which the right attaches.

Judicial Control of Diversion Intake—A Proposed Model Hearing

There are four possible functions of judicial control exercisable over the diversion intake process: (1) judicial veto power over the prosecutor's decision that the accused is a fit subject for community rehabilitation; (2) judicial review of the prosecutor's decision not to divert; (3) judicial determination of probable cause; (4) judicial determination of whether the accused's acceptance of the diversion agreement is made voluntarily, knowingly, and understandingly.

First: A judicial veto power over the prosecutor's decision to divert is designed to doubly protect society's interest that no person be diverted who may be a danger to the community or whose offense merits the full sanction of the criminal process. The interest of the accused generally does not come into play in the exercise of this veto power. Under C.P.A. this judicial power is not exercised because it is believed that diversion is solely the prerogative of the prosecutor. Most other diversion programs, however, have this feature of judicial control. Senate Bill No. 798 provides that the judge may release the accused to the diversion program if it is not contrary to the public interest.[50] Under A.R.D. the judge has the discretion to permit diversion after hearing the facts of the case upon a closed record.[51] Under other programs the judge impliedly has such a veto power when he exercises his discretion in granting the continuance.

Second: Generally diversion programs do not give the judge authority to review the prosecutor's decision not to divert an individual.[52]

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[48] *Id.* at 320.

[49] *Id.* at 321.

[50] S. Rep. No. 417, *supra* note 3, at 2.

[51] Pa. R. Crim. P. 179 (1975).

[52] *But see* the Connecticut Accelerated Rehabilitation Act, effective October 1, 1974, which permits the court to invoke diversion on motion of the defendant or on motion of a state's attorney. Before an amendment in 1974 the Act had originally placed the

It is believed that such authority would improperly invade the prosecutor's traditional discretion. The U.S. Senate made painstakingly clear when it amended the predecessor of S. 798 that the U.S. attorney had the discretion to recommend individuals for diversion.[53] Under A.R.D. the prosecuting attorney has the discretion to move the court that the case be considered for diversion.[54] C.P.A. likewise preserves this aspect of prosecutorial discretion, but its supporters have failed to distinguish the absolute discretion not to divert from the unfettered discretion to divert. One commentator has argued in favor of giving judicial control over the prosecutor's decision not to divert.[55] Although this would protect an accused desirous of a diversion opportunity from an arbitrary decision, the net benefits must be weighed against changing a fundamental precept of our criminal process—the prosecutor's discretion.

Third: A judicial determination of whether probable cause exists to believe the accused committed a crime appears to be constitutionally mandated regardless of whether the accused is formally charged prior to diversion. Under Senate Bill No. 798 a person cannot be recommended for diversion without first being charged.[56] Unquestionably *Gerstein v. Pugh* mandates a probable cause hearing before the accused is released to the type of federal diversion program as anticipated by S. 798.[57] It would be the high-water mark of constitutional manipulation to argue that C.P.A. can avoid the probable cause hearing by the simple device of refusing to charge.

Fourth: The fourth possible function of judicial control over the diversion intake could be patterned after the constitutional function of a judge when a plea of guilty is accepted. In *Boykin v. Alabama*[58] the Supreme Court held that the record of a guilty plea hearing must show that the defendant voluntarily waived at least three constitutional rights: the privilege against self-incrimination, the right to trial by jury, and the right to confront one's accusers. In *North Carolina v. Alford*,[59] where the defendant's plea of guilty was accepted by the judge in spite of his assertions of innocence, the Supreme Court held that a

power to initiate diversion solely within the discretion of the state's attorney. CONN. GEN. STAT. REV. § 54-76p (Supp. 1975); Sullivan, *Connecticut's Accelerated Rehabilitation Act*, 49 CONN. B.J. 77 (1975).

[53] S. REP. No. 417, at 5.

[54] PA. R. CRIM. P. 175 (1975).

[55] Note, *supra* note 2, at 844.

[56] S. REP. No. 417, at 2.

[57] *See* Gerstein v. Pugh, 420 U.S. 103, 114, 117, 125 n.26 (1975); *see also* text at notes 43-46 *supra*.

[58] 395 U.S. 238 (1969).

[59] 400 U.S. 25, 37-38 (1970).

defendant may "voluntarily, knowingly, and understandingly" consent to the entry of a guilty plea without admitting his participation in the crime if there is a "strong factual basis for the plea demonstrated by the State."[60]

Under the statutes of Indiana a court cannot accept a plea of guilty from a defendant without first determining that he understands the nature of the charge and advising him of various consequences of his plea including waiver of the three constitutional rights enunciated in *Boykin v. Alabama*.[61] The Indiana courts must also determine that the plea is voluntary and that there is a factual basis for the plea.[62]

The impact upon an accused who agrees to accept a diversion program is similar to that of a defendant who pleads guilty to a crime, and therefore similar safeguards should be applied. At the guilty plea hearing a defendant waives his privilege against self-incrimination, his right to a jury trial, and the right to face his accusers. Acceptance of the plea results in a conviction whereby a sentence may be imposed, *i.e.*, probation, prison, or a fine. By way of comparison, when an accused accepts a diversion agreement he is usually required to accept moral responsibility for the alleged offense, he will be required to formally waive his rights to a speedy trial and to the invocation of the statute of limitations. This agreement results in the accused's participation in a community-based rehabilitation program where he accepts substantial restraints on his liberty and intrusions into his privacy often more severe than those imposed under formal probation.

The divertee's agreement to accept moral responsibility for the alleged offense is in effect a self-incriminating statement. Other incriminating statements are likely to be induced by the divertee's contact with counselors of the rehabilitation program. In the absence of a statute in the particular jurisdiction making such statements inadmissible at a subsequent trial in the event the divertee is terminated from the program, such statements could be used by the prosecution to aid in a conviction. Even where such a statute exists, incriminating statements could be used to impeach the accused if he takes the witness stand at his own trial.[63] The trier of fact at a subsequent trial might perceive an accused's participation in a terminated rehabilitation program as a damaging admission of guilt. The acceptance of moral responsibility and participation in a diversion program might effectively ensure the accused's con-

[60] *Id.* at 38.
[61] IND. ANN. STAT. § 35-4.1-1-3 (Code ed. 1975).
[62] IND. ANN. STAT. § 35-4.1-1-4 (Code ed. 1975).
[63] *Cf.* Harris v. New York, 401 U.S. 222 (1971).

viction upon termination from the program even in jurisdictions with immunity statutes because testimony from an accused who is actually innocent could be effectively impeached by such evidence. The constitutional privilege against self-incrimination should be adequately protected by requiring a judicial determination that it is waived voluntarily, knowingly, and understandingly.

Because the waiver of the right to a speedy trial is only a postponement of the right to a trial, it may be seen as a less serious decision than a waiver of a right to a trial which has the element of finality. But the results of both types of waivers may be in fact the same if postponement of trial means that exculpatory witnesses are no longer available because of death, absence from the jurisdiction, or if testimony becomes unavailable because of faded memories.

Although the privilege against self-incrimination by itself does not require a judicial determination of its voluntariness prior to its actual waiver[64] and the right to a speedy trial can be waived by simply failing to assert it,[65] it is the aggregate effect of these waivers in the diversion context resulting in probation-like restraints upon liberty that make a compelling argument that voluntariness of the diversion agreement should receive the same judicial protection as is constitutionally required for acceptance of a guilty plea.

Senate Bill No. 798 provided that an accused shall not be released to a diversion program unless he has "voluntarily agreed to such program, and he has knowingly and intelligently waived, in the presence of the [judge or magistrate], any applicable statute of limitations and his right to speedy trial for the period of his diversion."[66] A.R.D. has a similar requirement.[67] The National Advisory Commission recommends that the court should approve a diversion agreement "only if it would be approved under the applicable criteria if it were a negotiated plea of guilty."[68]

A model diversion hearing designed to adequately safeguard the constitutional rights of an accused before diversion as well as to protect society's interest in crime deterrence would require at a minimum a judicial determination of whether (1) the accused is a fit subject for community-based rehabilitation, (2) probable cause exists to believe the accused committed the crime charged, and (3) the accused volun-

[64] *See* Miranda v. Arizona, 384 U.S. 436, 467–79 (1966).
[65] *See* Barker v. Wingo, 407 U.S. 514 (1972).
[66] S. REP. No. 417, *supra* note 3, at 2.
[67] PA. R. CRIM. P. 178, 179 (1975).
[68] NATIONAL ADVISORY COMM'N, COURTS, *supra* note 9, at 530.

tarily, knowingly, and intelligently agrees to the conditions of the diversion program and waives the right to a speedy trial.

THE ASSISTANCE OF COUNSEL AT DIVERSION INTAKE

Counsel should be provided at diversion for three reasons. First, the advice and assistance of counsel at diversion intake is essential to prevent the innocent from being diverted, by virtue of their ignorance of alternatives and lack of legal skill, and accepting restraints upon their liberty and intrusions into their privacy involved in community-based rehabilitation. Diversion of the innocent not only violates the constitutional rights of the accused but also jeopardizes the integrity of the diversion process itself.

Second, counsel would assist the judge in an intelligent decision on whether the accused is a proper subject for a diversion program.

Finally, the advice of counsel before diversion would protect the rights of the accused in case diversion is terminated and a trial becomes necessary. Diversion intake, whether acomplished by the model diversion hearing or some less meaningful procedure, is for the accused a "critical stage"[69] in the process toward the trial which ultimately

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[69] The United States Supreme Court has held that the sixth and fourteenth amendments require the assistance of counsel at all "critical stages" of the criminal process. Gerstein v. Pugh, 420 U.S. 103 (1975); United States v. Ash, 413 U.S. 300 (1973); Kirby v. Illinois, 406 U.S. 682 (1972); Coleman v. Alabama, 399 U.S. 1 (1970); United States v. Wade, 388 U.S. 218 (1967); White v. Maryland, 373 U.S. 59 (1963); Hamilton v. Alabama, 368 U.S. 52 (1961).

The analysis the Court has employed in determining the contours of the "critical stage" test were outlined in *Wade, supra,* where a post-indictment lineup was held to be a critical stage, thus entitling the accused to assistance of counsel. Focusing on the nexus between a defendant's rights at trial and police and prosecutorial conduct before trial that may render these rights illusory, the Court scrutinized "this pretrial confrontation of the accused [the lineup] to determine whether the presence of his counsel is necessary to preserve the defendant's basic right to a fair trial as affected by his right meaningfully to cross-examine the witnesses against him and to have the assistance of counsel at the trial itself." 388 U.S. at 227. This approach was followed in *Coleman v. Alabama, supra,* where the Court, quoting the language from *Wade* given above, found that Alabama's preliminary hearing was likewise a critical stage in which the defendant must be given assistance of counsel. More closely defining "critical stage" to exclude nonadversarial steps in the prosecutor's preparation of the case (*e.g.,* post-indictment display of photographs to witnesses to aid in identification), the Court in *Ash v. United States, supra,* regarded a critical stage as one in which the accused himself is present at a "trial-like adversary confrontation." 413 U.S. at 317. Thus, identifying pretrial events affecting the accused as "critical stages" proceeds from a functional analysis: an "examination of the event in order to determine whether the accused required aid in coping with legal problems or assistance in meeting his adversary." *Id.* at 313. The limiting factor in this functional analysis is that if "confrontation with counsel at trial can serve as a substitute for counsel at the pretrial confrontation," *id* at 316, then presence of counsel would not be critical.

In Gerstein v. Pugh, 420 U.S. 103 (1975), the Court held that the initial judicial determination of probable cause to arrest was not a "critical stage" requiring the presence

threatens him if he fails or quits the diversion program. At diversion intake the accused for the first time is on notice that the government believes he has committed a crime. He is suddenly faced with the awesome decision of either attempting to exonerate himself of any wrongdoing or of undergoing rehabilitation and thereby waiving and possibly prejudicing his right to a fair trial.

The fairness of a subsequent trial may be prejudiced because rights exercisable at diversion intake are irretrievably lost. Diversion always involves waiver of the right to a speedy trial, some type of acceptance of moral responsibility for the offense, and subsequent interaction with program counselors who expect and demand that the accused "come clean" with his social problem. Delay in the preparation for trial may mean exculpatory evidence is forever lost. Participation in a diversion program may lay the foundation for an effective impeachment at a subsequent trial where an accused asserts his innocence on the stand. Because the fairness of a subsequent trial cannot be guaranteed without counsel's presence at diversion intake, it is a critical stage of the criminal process at which the sixth amendment requires the assistance of counsel.[70]

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of accused's counsel, in part because of the nature of the hearing involved: the sole issue to be decided—probable cause—is whether there was proper cause to arrest—not whether there is sufficient evidence to take the accused to trial. *Id.* at 120. The Court identified several factors which take such a hearing out of the "critical stage" category: the hearing is by tradition nonadversary; the hearing performs a limited function; it was not among "those pretrial procedures that would impair defense on the merits if the accused is required to proceed without counsel," *id.* at 122, since the pretrial detention occasioned by the finding of probable cause would not disable the accused's counsel from ultimately building a case, and since the absent accused could not, through active participation without counsel, compromise himself before trial. *Id.* at 121–23.

The rationale of the "critical stage" appears to be that the accused may secure counsel before trial because he must have effective counsel at trial. Diversion, however, seeks to forgo trial; unlike the probable cause hearing in *Gerstein*, rights foreclosed by diversion cannot be vindicated at trial. If there is not, in fact, sufficient evidence to go to trial, or if the evidence is excludable as the result of an illegal search, or if the defendant has a credible affirmative defense, then a probable cause hearing need not be a critical stage for the litigation of these issues since the normal criminal process anticipates their resolution shortly thereafter. The accused's agreement to participate in diversion, however, has foreclosed the building of a defense, the calling of witnesses, the discovery of evidence. The divertee's agreement to forgo any trial at all, in exchange for conditional liberty, would seem to be a functionally "critical stage" under the rationale of the cases culminating in *Gerstein*.

[70] *See* note 69 *supra*. *But see* Kirby v. Illinois, 406 U.S. 682, 688 (1972), where the plurality opinion announced that "a person's Sixth and Fourteenth Amendment right to counsel attaches only at or after the time that adversary judicial proceedings have been initiated against him." *Cf.* Gerstein v. Pugh, 420 U.S. 103 (1975). But the significance of attaching the right to counsel to the initiation of formal judicial proceedings was assumed in *Kirby* to stem from the fact that, in the ordinary case, it is at this stage for the first time that the prosecutor commits himself to disposition of the case:

> The initiation of judicial criminal proceedings is far from a mere formalism.

The right to counsel also includes the right to the effective assistance of counsel.[71] Counsel should have a reasonable amount of time to consult with the accused, have an investigation conducted if necessary, and assess the case before he is required to advise his client on the merits of diversion. This should also include the discovery rights granted by the jurisdiction. The diversion programs established to date generally do not permit court-appointed counsel an adequate opportunity to assess the case against the accused. Under Senate Bill No. 798, for example, the accused may be diverted as early as the bail hearing (initial appearance before the magistrate), the first stage at which counsel may be appointed.[72] A diversion program requiring the accused to decide on whether to accept or reject a diversion agreement as early as the initial appearance (or equivalent) would deny him the effective assistance of counsel at a critical stage of the criminal process.

METHODS OF IMPLEMENTATION

Programs diverting persons from the criminal process have grounded their authority in prosecutorial discretion, court rule, or statute.

Prosecutorial Discretion

The C.P.A. program is not authorized by Michigan statute or court rule,[73] but is said to be merely a proper exercise of prosecutorial discretion[74] which is derived from the separation of powers clause of the Michigan constitution.[75] It is even claimed that legislative authorization of C.P.A. would be an encroachment upon the executive power of the prosecutor.[76] The supporters of C.P.A. do not address the

> It is the starting point of our whole system of adversary criminal justice. For it is only then that the government has committed itself to prosecute, and only then that the adverse positions of government and defendant have solidified. It is then that a defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law.

406 U.S. at 689. Yet diversion does not generally make judicial proceedings "the starting point of our whole system of adversary criminal justice"; it does not permit adverse positions to solidify; yet the accused faces the considered commitment of the prosecutor to act, if not to prosecute; and the accused faced with an offer of diversion faces a critical decision in which a knowledge of "the intricacies of substantive and procedural law"—and constitutional law—seems necessary.

[71] Powell v. Alabama, 287 U.S. 45 (1932).

[72] *See* FED. R. CRIM. P. 5; S. REP. No. 417, at 2 (bail hearing).

[73] A CASE STUDY OF C.P.A., *supra* note 10, at 486.

[74] *Id.* at 487, 488; *cf.* Comment, *Non-Trial Disposition of Criminal Offenders: A Case Study*, 5 J. LAW REFORM 453 ,456 (1972).

[75] A CASE STUDY OF C.P.A. at 488; Comment, *supra* note 74, at 454–56.

[76] A CASE STUDY OF C.P.A. at 488.

question of whether C.P.A. encroaches partially on a judicial function.[77] Although C.P.A. supporters admit that the "program is a sufficiently basic alteration of the prosecutor's standard operating procedures to bring into question the proper scope of the discretion . . . ,"[78] they present the following argument that C.P.A. does not expand traditional discretion:

> CPA actually regulates that discretion within proper bounds. Every prosecutor's office engages in large-scale diversion of offenders through plea-bargaining, refusal to prosecute, or similar practices. If there are no controlling criteria, this diversion takes place on an ad hoc basis and may be influenced by illegal factors such as class or racial prejudice or political pressure.[79]

It is one thing to argue that C.P.A. permits a more intelligent use of prosecutorial discretion and quite another to imply that discretion includes the unfettered power to induce restraint of an accused's liberty through the threat of prosection.

As a general rule the prosecutor's powers are not subject to judicial review except for abuse of discretion.[80] In practice this means he could not be compelled to charge, to dismiss a charge, or to reduce a charge by a third party or by a court.[81] But when the prosecutor's decision results in significant restraints upon an accused, the Constitution requires the courts to intervene for the protection of the accused's rights.[82] It is a constitutional precept that the prosecutor's responsibility to law enforcement is inconsistent with the duty of protecting the rights of the person he accuses.[83] Thus the prosecutor's discretion to initiate the criminal process or to terminate it must be separated from the power to determine whether an accused shall be restrained of his liberty. Although the ad hoc diversion practice resulting in restraint of liberty is well documented in the literature,[84] the occasion to challenge its unfettered exercise in the courts never arose because of its

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[77] *See* Comment, *supra* note 74.

[78] A CASE STUDY OF C.P.A. at 488; Comment, *supra* note 74, at 456.

[79] Comment, *supra* note 74, at 456.

[80] *See* Oyler v. Boles, 368 U.S. 448 (1962); Newman v. United States, 382 F.2d 479 (D.C. Cir. 1967); Moses v. Kennedy, 219 F. Supp. 762 (D.D.C. 1963); CRIME COMM'N REPORT, *supra* note 10, at 133; Baker, *The Prosecuting Attorney: Legal Aspects of the Office*, 26 J. CRIM. L.C. & P.S. 647 (1935). *See generally* F. MILLER, PROSECUTION: THE DECISION TO CHARGE A SUSPECT WITH A CRIME (1970).

[81] *See* F. MILLER, *supra* note 80.

[82] *See* Gerstein v. Pugh, 420 U.S. 103 (1975), holding that there must be a judicial determination of probable cause before a suspect can be significantly deprived of his liberty. *See also* notes 43–45, 69–70 *supra* & text accompanying.

[83] Gerstein v. Pugh, 420 U.S. 103, 117 (1975).

[84] *See* note 12 *supra.*

low visibility and informality. But the new pretrial diversion concept with its large staffs for methodical screening and its large scale rehabilitation programs raises this use of prosecutorial discretion from an academic question to a justiciable constitutional issue.

C.P.A.'s reliance upon prosecutorial discretion as its authority for the diversion intake without any judicial control after the discretionary decision is made presents serious constitutional difficulties. C.P.A.'s constitutional problems arise from its perception of the diversion process as solely an executive function instead of an integrated function of the executive and judicial branches.

In Indiana, a county prosecuting attorney holds a constitutional office[85] carved out of the office of the attorney general as it existed at common law.[86] He is vested with discretionary power to determine who shall be prosecuted and who shall not be prosecuted.[87] Judges and courts may not substitute their discretion for that of the prosecuting attorney.[88] A prosecutor may nolle pross by oral or written motion stating the reasons therefor and the court shall dismiss the charge.[89]

In light of the Indiana prosecutor's constitutional office, pretrial diversion programs set up in Indiana should preserve his discretion, which necessarily includes the discretion to initiate diversion. But his discretion should not be used to bypass the judicial function, as is done in the C.P.A. program.

Court Rule

Several pretrial diversion projects have been authorized by state supreme courts. The A.R.D. program of Philadelphia[90] and the Hudson County Pre-trial Intervention Project[91] are examples of programs using specific procedures promulgated by a state supreme court.

The Indiana Supreme Court in 1937 received rulemaking authority from the legislature over all practice and procedure in the state courts.[92] But the Indiana Supreme Court has held that it also has inherent power to prescribe rules,[93] a power which one commentator

[85] IND. CONST. art. 7, § 11 provides in part: "There shall be elected in each judicial circuit by the voters thereof a prosecuting attorney, who shall hold his office for four years . . . ."

[86] State *ex rel.* Neeriemer v. Daviess Cir. Ct., 236 Ind. 624, 142 N.E.2d 626 (1957); State *ex rel.* Williams v. Ellis, 184 Ind. 307, 112 N.E. 98 (1916).

[87] State *ex rel.* Spencer v. Criminal Ct., 214 Ind. 551, 15 N.E.2d 1020 (1938).

[88] State *ex rel.* Freed v. Martin Cir. Ct., 214 Ind. 152, 14 N.E.2d 910 (1938).

[89] IND. ANN. STAT. § 35-3.1-1-13 (Code ed. 1975).

[90] *See* PA. R. CRIM. P. 175–85 (1975).

[91] N.J.R. CRIM. P. 3.28 (1970).

[92] IND. ANN. STAT. §§ 34-5-2-1, -2 (Code ed. 1973).

[93] Epstein v. State, 190 Ind. 693, 128 N.E. 353 (1920).

has reasoned is derived from the "separation of powers" clause of the Indiana constitution.[94] In spite of the court's rulemaking power the legislature has often enacted procedural statutes even when statutes grant the rulemaking power to the courts.[95] The Indiana Supreme Court has held that the power to make rules of procedure is neither exclusively legislative nor exclusively judicial.[96] But a supreme court rule supersedes any statute which may conflict with it.[97] Thus the Indiana Supreme Court or the Indiana legislature could prescribe procedural rules for pretrial diversion.

The Indiana legislature has also granted to the trial courts "the power to establish rules for their own government, supplementary to and not conflicting with the rules prescribed by the Supreme Court, or any statute."[98] The supreme court has also held that a local court rule is void if it conflicts with a statute.[99]

Although a supreme court rule establishing procedures for the diversion of offenders would evidently be the preferred method of initiating pretrial diversion in Indiana, local county officials in cooperation with the circuit and superior court judges could draft diversion procedures for promulgation by the local courts. The Indiana legisture approved of the diversion concept in passing the Indiana Drug and Alcohol Abuse Act, which establishes procedures for the diversion of drug and alcohol abusers charged with a crime.[100] The Act also recommends that certain municipal courts may in their discretion establish an alcoholic rehabilitation program and promulgate rules for its operation.[101] The Act, however, requires that program treatment be given in lieu of penalties prescribed for persons convicted of alcohol-related offenses.[102] An extension of the drug abuse diversion concept to include non–drug abusers would not appear to conflict with any statute or supreme court rule.

Legislative Act

The legislatures of Connecticut, Illinois, Massachusetts, and New

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[94] Note, *The Court v. the Legislature: Rule-Making Power in Indiana,* 36 IND. L.J. 87, 88 (1960).

[95] *Id.*

[96] State *ex rel.* Blood v. Gibson Cir. Ct., 239 Ind. 394, 399, 157 N.E.2d 475, 477 (1959).

[97] Neeley v. State, —— Ind. ——, 305 N.E.2d 434 (1974).

[98] IND. ANN. STAT. § 34-5-2-2 (Code ed. 1973).

[99] State *ex rel.* Zellers v. St. Joseph Cir. Ct., 247 Ind. 394, 216 N.E.2d 548 (1966).

[100] IND. ANN. STAT. §§ 16-13-6.1-16, -30 (Code ed. Supp. 1974).

[101] IND. ANN. STAT. § 16-13-6.1-30 (Code ed. Supp. 1974).

[102] *Id.* § 16-13-6.1-16.

York have enacted drug addict diversion procedures.[103] The Narcotics Addict Rehabilitation Act of 1966 and section 404(b) of the Controlled Substances Act are federal examples of drug addict diversion programs authorized by statute.[104] However drug addict diversion programs often provide for civil commitment in lieu of prosecution instead of a "voluntary" community-based program.[105] Senate Bill No. 798 was the first congressional attempt at legislating procedures for nonaddict diversion.

If the Indiana legislature decides to enact nonaddict diversion procedures, the Indiana Drug and Alcohol Abuse Act would be a useful model. The Act sets out limiting criteria for diversion intake.[106] It preserves the prosecutorial discretion by requiring his consent to deferral of the trial, but it requires the court to make the final determination of whether an accused is a drug abuser and is likely to be rehabilitated through treatment.[107] The court is also required to advise the accused of the consequences of his election to accept the treatment program.[108] A questionable feature of the Act is the requirement that an accused consent to a trial by the court in order to be acceptable for diversion.[109]

CONCLUSION

Pretrial diversion to community-based rehabilitation programs may well prove essential in reducing crime, economizing judicial resources, and humanely treating lawbreakers desirous of becoming law-abiding; but traditional constitutional safeguards shielding the accused must be incorporated into diversion procedures to prevent diversion of the innocent and to protect the integrity of the diversion concept.

Early diversion from the criminal process bypasses the constitutional protections which normally come into play at later stages of the process. In the proposed model diversion program, intake is postponed until the accused is apprised of the charge, counsel has been retained or appointed with adequate time to assess the case, and a judicial hearing is held. At the model judicial hearing, the accused, his counsel, the prosecutor, and possibly witnesses are present, and the judge must

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[103] Note, *Addict Diversion: An Alternative Approach for the Criminal Justice System*, 60 GEO. L.J. 667, 676–77 (1972).

[104] 28 U.S.C. §§ 2901–06 (1970); 21 U.S.C. § 844(b)(1) (1970).

[105] Note, *supra* note 103, at 677 nn.48 & 49.

[106] IND. ANN. STAT. § 16-13-6.1-16 (Code ed. Supp. 1974).

[107] IND. ANN. STAT. § 16-13-6.1-17 (Code ed. Supp. 1974).

[108] *Id.*

[109] *Id.*

determine whether (1) the accused is a fit subject for community-based rehabilitation, (2) probable cause exists to believe the accused committed the crime charged, and (3) the accused voluntarily, knowingly, and intelligently agrees to the conditions of the program and waives the right to a speedy trial.

Implementation of a model diversion procedure in Indiana should be done by promulgation of rules of court or by legislation. Such rules or statute should preserve the prosecutor's authority under the Indiana constitution by allowing him the discretion to recommend diversion to the supervising trial court on a case-by-case basis.

KENNETH W. MACKE