Judicial Control of Prosecutorial Discretion in Pretrial Diversion Programs

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INTRODUCTION

A program of pretrial diversion removes certain eligible suspects from the traditional criminal justice process and places them in programs that are designed to accomplish a basic goal of the criminal justice system, the "correctional reform and social restoration of offenders." Diversion does not guarantee a noncriminal disposition of a suspect's case, because the suspect is required to meet specific conditions before the prosecutor foregoes the right to bring the case to trial. To protect this right, the prosecutor usually insists on a waiver of the suspect's constitutional right to a speedy trial and statutory right to invoke the statute of limitations. Some prosecutors fully protect themselves by requiring a guilty plea or an admission of guilt before diversion. In return for the surrender of these rights and the consent to a restraint on liberty, the suspect avoids the stigma of a criminal conviction and

1. Nat'l Advisory Comm'n on Criminal Justice Standards and Goals, Corrections 77 (1973) [hereinafter cited as Corrections]. The Commission includes a similar definition of diversion. Id. at 73.


3. See Nat'l Pretrial Intervention Service Center of the A.B.A. Comm'n on Correctional Facilities and Services, Legal Issues and Characteristics of Pretrial Intervention Programs, 4 Cap. U.L. Rev. 37, 43-44 (1975) [hereinafter cited as Pretrial Intervention]. The sixth amendment right to a speedy trial attaches when a suspect becomes an "accused," which happens at a formal indictment or charge, e.g. United States v. Marion, 404 U.S. 307, 319 (1971), or at an arrest, e.g. Dillingham v. United States, 423 U.S. 64, 65 (1975). The term "accused" apparently has a different meaning when the sixth amendment right to the presence of counsel is involved. See Kirby v. Illinois, 406 U.S. 682, 689 (1972).

4. See Pretrial Intervention, supra note 3, at 68. The broad scope of the fifth amendment privilege applies to the diversion situation: "[I]t can be claimed in any proceeding, be it criminal or civil, administrative or judicial, investigatory or adjudicatory." Murphy v. Waterfront Comm'n, 378 U.S. 52, 94 (1964) (White, J., concurring).

5. See infra notes 26-28 and accompanying text.

6. The avoidance of the stigma of a criminal prosecution is an important goal of diversion. See Note, Pretrial Diversion from the Criminal Process, 83 Yale L.J. 827, 848 (1974).
benefits from the programs offered by the prosecutor. Thus, an exchange is inherent in diversion, which illustrates the close kinship between diversion and the more familiar bargained-for guilty plea.

No two diversion programs are alike, and they may operate at opposite ends of the pretrial criminal justice process. The Court Employment Project of New York City is a typical "late" diversion program that operates only after criminal defendants are formally charged. While their trials are adjourned for 90 or 180 days, the defendants participate in group and individual counseling, and they benefit from the Project's efforts at job and academic placement. Habitual and violent offenders are excluded, and addicts and alcoholics are covered by separate diversion programs. When the defendants have successfully completed their programs, the charges against them are dropped by the district attorney.

In contrast to late diversion programs, "early" diversion programs operate before any charges have been filed. The Citizen's Probation Authority (CPA) of Genesee County, Michigan, offers the same services and programs as the Court Employment Project of New York City, but it does not divert charged defendants, and it often diverts suspects before they have been arrested. In the pre-arrest situation, prosecutors and police confer on whether to issue an arrest warrant or to refer the suspect immediately to the diversion staff. If diversion is appropriate, contact with the suspect is made by a "Police Liaison and Training Officer," who interview the applicant to advise him of his Constitutional Rights, explains the purpose and nature of the CPA program, secures the

7. The programs offered can be quite extensive. See R. Nimmer, supra note 2, at 53-91, detailing programs offering employment, counseling, the resolution of family disputes, and the treatment of drug addicts and alcoholics.

8. See Note, supra note 6, at 843.


10. Id. at 168, 170.


cooperation of the client and refers him to a staff counselor.”\textsuperscript{13} If the “client” refuses to cooperate, the officer refers the case back to the prosecutor for further disposition.\textsuperscript{14}

Diversion emerged as a formal institution within the criminal justice system in 1967, when the President’s Commission on Law Enforcement and the Administration of Criminal Justice recommended the “\textit{early identification and diversion to other community resources of those offenders in need of treatment, for whom full criminal disposition does not appear required.”}\textsuperscript{15} Since that time, pretrial diversion programs have rapidly multiplied,\textsuperscript{16} spurred by the recommendations of the National Advisory Commission on Criminal Justice Standards and Goals\textsuperscript{17} and the National District Attorney’s Association.\textsuperscript{18} Despite the proliferation of pretrial diversion programs, the unusual legal problems these programs generate have received less attention than is warranted.\textsuperscript{19} This neglect may be partly due to the unquestioning acceptance of the claim made by prosecutors that pretrial diversion is simply an instance of their broad discretion not to charge or to drop charges against a convictable suspect.\textsuperscript{20}

This Comment argues the contrary position: that the discretion to divert suspects from the criminal justice process is a significant extension of the prosecutor’s discretion to bargain with suspects and therefore requires close judicial supervision. Section I of the Comment analyzes the conflict between prosecutorial and judicial roles and concludes that diversion at any stage requires \textit{both} prosecutorial discretion and judicial supervision. Section II explores the dimensions of this expanded discretion and the kind of

\begin{footnotes}
\item[13] Id. at 77-78.
\item[14] Id. at 78.
\item[16] See Pretrial Intervention, supra note 3, at 38. Unfortunately, the most recent data on the growth of diversion programs is a decade old.
\item[17] See Corrections, supra note 1, Standard 3.1.
\item[18] See Prosecution Standards, supra note 2, at 150.
\item[19] The best recent analyses of the legal problems involved in diversion are quite dated. See Pretrial Intervention, supra note 3; Non-Trial Disposition, supra note 11; Note, supra note 6.
\end{footnotes}
judicial scrutiny it makes necessary. Section III analyzes discretion and its control when the denial or termination of discretion is involved. Finally, Section IV reviews and summarizes the proper adjustment of prosecutorial and judicial roles in pretrial diversion.

I. THE CONFLICT OF PROSECUTORIAL AND JUDICIAL ROLES IN DIVERSION

A. The Judicial Role in Early Diversion

When the government initiates contact with a suspect through an arrest, prosecutorial discretion and judicial supervision share a common starting point. Whether an arrest is followed by a prompt hearing or a warrant is issued prior to an arrest, the prosecutor's authority to restrain a suspect's liberty depends upon a demonstration of probable cause to a judicial officer. Since pretrial diversion also involves a restraint on liberty, one would expect that probable cause would continue as the threshold for the prosecutorial discretion to divert. However, a few prosecutors have established programs that divert suspects before an arrest has occurred or a warrant has issued, thus avoiding the requirement that they demonstrate probable cause. The United States Supreme Court indicated that such a procedure is constitutionally invalid in *Gerstein v. Pugh*, where Justice Powell, writing for the majority, noted:

Because the probable cause determination is not a constitutional prerequisite to the charging decision, it is required only for those suspects who suffer restraints on liberty other than the condition that they appear for trial. There are many kinds of pretrial release and many degrees of conditional liberty. We cannot define specifically those that would require a prior probable cause determination, but the key factor is significant restraint on liberty.

21. *See Gerstein v. Pugh*, 420 U.S. 103, 114 (1975). The suspect has the right to be free from arrest until the police have probable cause to believe he has committed a crime. He also has the right to have a neutral magistrate make this determination. The standard, of course, is the same. Id. at 120.

22. *See infra text accompanying notes 26-28.*

23. *See Diversion from the Judicial Process, supra note 9, at 266, and Non-Trial Disposition, supra note 11, at 462.*


25. Id. at 125 n.26. Since the fifth amendment does not require a showing of probable cause before charging, it appears that the only constitutional limit on the discretion to initiate prosecution would stem from the substantive limitations of the due process clause of the fourteenth amendment. Prosecuting, and especially bargaining for guilty pleas or diversion,
In fact, most diversion programs do involve substantial and prolonged restraints on liberty. For instance, the Citizen's Probation Authority of Genesee County, Michigan, typically requires that the diverted suspect remain within the state, report regularly to a counselor, and avoid other known law violators. Participants may also be required to keep a job, stay in school, or make restitution to the victims of the crime. Since participation in this program can last up to one year, there is little doubt that diversion programs of this sort cannot constitutionally operate without a showing of probable cause.

B. The Prosecutorial Role in Late Diversion

The previous discussion demonstrates that the discretion to divert must be accompanied by judicial control, no matter how early in the criminal justice process diversion occurs. At the later stages of the criminal justice process, there are cases which hold that diversion becomes solely a judicial responsibility. In the case of People v. Superior Court of San Mateo County, the California Supreme Court invalidated a statutory diversion scheme that assigned to the district attorney the responsibility of determining whether defendants charged with possession of drugs met the statutory criteria for diversion. Once possession was established, the probation department conducted a background check to determine the defendant's suitability for diversion. A judicial hearing followed in which the court could order the diversion of the defendant with the concurrence of the district attorney. It was that "veto power" in the district attorney which the court found repug-

when no charge could be maintained against the suspects, would constitute a major invasion of privacy rights.

26. See Non-Trial Disposition, supra note 11, at 458 n.27.
27. Id.
28. Id. at 454.
29. This was also the conclusion of the author of Non-Trial Disposition, id. at 461-62.
30. See, e.g., State v. Leonardis, 73 N.J. 360, 376, 375 A.2d 607, 615 (1977) (diversion programs established according to the rules of the Supreme Court of New Jersey were subject to judicial review which, although limited, included the power to overrule a prosecutor's decision not to divert). See also Pace v. State, 566 S.W.2d 861, 870 (Tenn. 1978) (Henry, C.J., concurring), which described diversion as "essentially judicial in character." Id. at 870.
31. People v. Superior Court of San Mateo County (On Tai Ho), 11 Cal. 3d 59, 520 P.2d 405, 113 Cal. Rptr. 21 (1974).
32. This is a general summary of sections 1000-1000.2 of the CAL. PENAL CODE (West Supp. 1981).
nant to the provisions of the California Constitution dealing with the separation of powers.\textsuperscript{33}

[\textit{W}hen the jurisdiction of a court has been properly invoked by the filing of a criminal charge, the \textit{disposition} of that charge becomes a judicial responsibility. It is true that acquittal or sentencing is the typical choice open to the court, but in appropriate cases it is not the only termination. With the development of more sophisticated responses to the wide range of antisocial behavior traditionally subsumed under the heading of "crime," alternative means of disposition have been confided to the judiciary. . . . [\textit{C}ivil commitment to the narcotics addict rehabilitation program is a disposition which may be viewed as a specialized form of probation. . . . it too is an exercise of the judicial power.\textsuperscript{34}]

Thus, the California Supreme Court held that once charges are filed, the doctrine of separation of powers binds the prosecutor to divert those who are recommended by the probation department and approved by the court.\textsuperscript{35} It is important to realize that this holding mandates judicial control whether the prosecutor decides to grant or refuse diversion. In the latter case, the prosecutor can only resort to his traditional powers to screen a suspect out of the criminal justice process, plea bargain with him, or bring him to trial.\textsuperscript{36} The holding of the California Supreme Court takes these choices away from the prosecutor whenever an arraigned suspect is deemed to be eligible for diversion under the statutory criteria.

This wholesale abolition of traditional prosecutorial options is an unnecessarily harsh response to the legal problems associated with diversion. Unless the prosecutor decides to \textit{grant} diversion, there is no threat to the judicial sentencing function\textsuperscript{37} or the legiti-

\begin{itemize}
\item \textsuperscript{33} See \textit{CAL. CONST.}, art. III, \textsection3.
\item \textsuperscript{34} People v. Superior Court of San Mateo County, 11 Cal. 3d at 66, 520 P.2d at 410, 113 Cal. Rptr. at 26.
\item \textsuperscript{35} The court reasoned that the statute creating diversion for charged defendants essentially provided for a judicial disposition for those who are or might be diverted under its provisions. Despite the broad sweep of some of the court's language, it is clear that it is diversion, and not accusation, which makes the disposition inherently judicial. \textit{Id.} at 66-67, 520 P.2d at 410, 113 Cal. Rptr. at 26. If it were the accusation, the holding of the court would require the prosecutor to try every charged defendant.
\item \textsuperscript{36} The decision to plea bargain is a subcategory of the decision to prosecute, involving the prosecutor's discretion to select the charge. \textit{See} F. MILLER, \textit{PROSECUTION: THE DECISION TO CHARGE A SUSPECT WITH A CRIME} 169 (1970). The classic statement of the prosecutor's basic choice between prosecuting and screening out is made in Baker, \textit{The Prosecutor—Initiation of Prosecution}, 23 J. OF CRIM. L. CRIMINOLOGY & POL. SCI. 770 (1933).
\item \textsuperscript{37} Courts are always free to place the prosecuted and convicted defendants on probation, which is the post-conviction equivalent of diversion. \textit{See} Commonwealth v. Kindness,
mate interests of suspects. By refusing to divert, the prosecutor confines himself to his traditional options, and the liberty of the suspect is secure until a judge passes sentence. Thus, the discretion to grant diversion and the discretion to refuse diversion need not stand or fall together. Nevertheless, the rationale adopted by the California Supreme Court in People v. Superior Court of San Mateo County made the all-or-nothing approach inevitable. In searching for a violation of the doctrine of separation of powers, the court had to interpret the California Constitution to mean that only a judge could grant or refuse diversion to eligible suspects.

Therefore, any rival discretion in the prosecutor had to be unconstitutional, even though the prosecutor might exercise that discretion in the suspect's favor by screening him out of the criminal justice process.

This interpretation of the judicial power proved to be as unworkable as it was unusual. Prosecutors in California have apparently avoided the holding of the case simply by conducting their diversion program prior to any charging. In addition, it is not necessary to deny the prosecutor's role in order for the court to maintain ultimate responsibility for the disposition of the charge. The charges will only be disposed of when the arraigned suspect


See infra text accompanying notes 43-76.

Of course, a suspect may suffer a deprivation of liberty if he is arrested and held for trial, but this requires that the judge make a finding of probable cause. See supra note 21 and accompanying text.

One court has argued that the California Supreme Court did not rely on the inherently judicial nature of diversion, but on the narrower legislative grant of power to the courts to discuss a case in the interests of justice. See Commonwealth v. Kindness, 247 Pa. Super. 99, 105, 371 A.2d 1346, 1348 (1977). However, if the judicial power over diversion is a matter of legislative grace, it is hard to see how a later legislative reduction of that power could violate the doctrine of separation of powers. In fact, this interpretation is inconsistent with the language of the opinion and its consideration of the issue of severability, both of which indicate that once diversion is provided for, it is an inherently judicial function that is constitutionally immune from a prosecutor's veto. Finally, the power to dismiss a prosecution in the interests of justice would not explain the court's holding that the court has power to divert even those suspects that the prosecutor wants to screen out of the criminal justice process.

See Diversion from the Judicial Process, supra note 9, at 133-36, where four California diversion programs are listed that operate before arrest. See also State v. Greenlee, 228 Kan. 712, 620 P.2d 1132 (1980), where a Kansas prosecutor declined to follow the statutory diversion scheme and implemented one of his own. In this case, the prosecutor's contention that the statutory diversion scheme was unconstitutional was rejected, and the court directed the prosecutor to comply with the statute. Id. at 717, 620 P.2d at 1138.
has successfully completed the program of diversion or has merited termination from the program and resumption of prosecution. If the court maintains control over these events, it has not abandoned any of its responsibilities concerning disposition of the charge.\footnote{See infra notes 91-92 and accompanying text for an example of a statutory diversion scheme that implements this reasoning.} The prosecutor's proper role in the diversion decision need not be denied, therefore, even when that decision is made after an arraignment or formal charge. The prosecutorial discretion to divert and the judicial control of that discretion should operate together whenever diversion occurs. However, diversion alters the bargaining power of the prosecutor and the responsibilities of the court, and these changes must be carefully examined in order to understand the prosecutorial and judicial roles in diversion.

## II. THE NATURE OF THE PROSECUTORIAL AND JUDICIAL ROLES IN DIVERSION

### A. The Prosecutor's New Power

While diversion presents a new option to prosecutors, its form is somewhat similar to that of the familiar plea bargain. However, there are substantial differences between the old plea bargain and the new diversion bargain. Constitutional rights are still exchanged for prosecutorial concessions,\footnote{See supra notes 3-8 and accompanying text.} but the bargain has been removed from the context of a criminal prosecution, and the stakes involved have been radically altered. A prosecutor's offer of diversion is much harder to resist than an offer of leniency in return for a guilty plea,\footnote{See NAT'L ADVISORY COMM'N ON CRIMINAL JUSTICE STANDARDS AND GOALS, TASK FORCE REPORT: THE COURTS 9 (1967).} which insures that the diversion bargain will have a broader impact on suspects than the plea bargain. At the same time, diversion bypasses the traditional criminal justice process and, with it, the traditional judicial controls on prosecutorial bargaining.

Diversion is the irresistible bargain because it gives the prosecutor a bigger carrot and stick than he has in plea bargaining. In diversion, the prosecutor can offer a complete escape from the

\footnote{Diversion always involves an escape from the criminal justice process' adjudicatory stage. See Corrections, supra note 1, at 73. Early diversion may mean a complete bypass of the criminal justice process. See supra note 11.}
criminal justice process, not just a lesser charge or a lighter sentence.\textsuperscript{46} At the same time, the prosecutor will protect the diversion program by prosecuting those suspects who refuse to divert, even if they would have been screened out before the diversion option became available.\textsuperscript{47} With incentives like these, an offer of diversion will rarely, if ever, be refused. Thus, the prosecutor will now be able to divert, and not screen out, those for whom he feels any criminal disposition is inappropriate. By the same token, he will be able to divert, and not try, those who would have refused an offered plea bargain.\textsuperscript{48}

Diversion not only promises to expand the scope of prosecutorial bargaining, it also removes the bargain from the judicial scrutiny that accompanies traditional plea bargaining. A bargained for guilty plea is an integral part of the criminal justice system, and is allowed only after a judge has determined that the suspect's waiver of fifth and sixth amendment rights is voluntary.\textsuperscript{49} A diversion bargain, on the other hand, aims at a complete avoidance of the criminal justice system. In fact, some forms of diversion may involve none of the constitutional rights associated with a guilty plea. A suspect diverted before arrest has no sixth amendment right to a speedy trial,\textsuperscript{50} and may accept and complete the diversion program without making any incriminating statements.\textsuperscript{51}

\textsuperscript{46} The prosecutor's usual weapons in traditional plea bargaining are sentence concessions, reduced charges to crimes "reasonably related to the accused's conduct," and the dismissal of multiple charges. See Prosecution Standards, supra note 2, Standard 16.1 B.

\textsuperscript{47} See Note, supra note 6, at 842 n.81, which indicates that prosecutors sometimes adopt this strategy.

\textsuperscript{48} Suspects who refuse to plead guilty as part of a plea bargain do so because they are innocent or are willing to take their chances of acquittal at trial. See Note, supra note 6, at 835, which points out that diversion only saves court resources if it can dissuade suspects like these from going to trial.

\textsuperscript{49} See Brady v. United States, 397 U.S. 742, 748 (1970). A guilty plea always involves a waiver of fifth and sixth amendment rights. Id.

\textsuperscript{50} See supra note 3 and cases cited therein. This assumes that diversion itself would not be held to be a substitute for a civil arrest, thus giving rise to the sixth amendment right. In United States v. MacDonald, 531 F.2d 196, 203 (4th Cir. 1976), rev'd on other grounds, 435 U.S. 850 (1978) (interlocutory appeal), the United States Court of Appeals for the Fourth Circuit held that a "military arrest," although substantially less burdensome than a usual police arrest, could trigger the right to a speedy trial. This holding was not argued or considered when the Supreme Court eventually reversed on the merits. 456 U.S. 1, 9-10 n.10, (1982).

\textsuperscript{51} Most diversion programs emphasize candor in the initial interview, so incriminating statements are likely at this stage. See Diversion from the Judicial Process, supra note 9, at 77. This raises the interesting question of the applicability of Miranda prophylactic
Thus, from a prosecutor's perspective, diversion is the perfect bargain. It is almost certain to be accepted, and it need not involve the waiver of those constitutional rights that provoke the intense judicial scrutiny which accompanies a plea bargain.

B. The Judge's New Responsibilities

While diversion may be the perfect bargain for prosecutors, it poses grave risks to the constitutional rights of suspects. Although diversion does not always involve the waiver of fifth and sixth amendment rights which accompanies a guilty plea, it always involves a restraint on liberty, and the greater attractiveness of the diversion bargain makes coercion a greater threat than it is in a plea bargain. Yet, while the risks are greater, there are no effective safeguards within the criminal justice system. A coerced confession can be excluded, and a delayed prosecution dismissed, but the restoration of a coerced suspect's liberty is more problematic. Even if an appropriate remedy could be fashioned, it is very unlikely that it would be pursued. A suspect who has been coerced into diversion by the threat of prosecution will not withdraw from the program and seek redress when he knows that such an action will probably produce the very prosecution he fears. In addition, rights to the diversion intake interview. Under the doctrine announced in Rhode Island v. Innis, 446 U.S. 291 (1980), the official questioner need only engage in words or actions that he "should know are reasonably likely to elicit an incriminating response." Id. at 301. With its emphasis on candor from a suspect who may eventually be prosecuted, the initial interview with the diversion staff meets this definition of "interrogation." Therefore, if the suspect is also in custody, any statements made cannot be used by the prosecutor as part of his case-in-chief on a resumed prosecution unless he can show that the suspect's Miranda rights were "scrupulously honored." See Miranda v. Arizona, 384 U.S. 436, 478-79 (1966).

52. See supra notes 26-28 and accompanying text.

53. This is especially true when diversion is offered to someone in custody. See Diversion from the Judicial Process, supra note 9, at 72.

54. A coerced confession is excluded for all purposes at trial. See Harrold v. Oklahoma, 169 F. 47, 50 (8th Cir. 1909) (defendant who testified on his own behalf could not be cross-examined on involuntary confession not mentioned in direct testimony). The same is not true for violations of the Miranda prophylactic rules. See Harris v. New York, 401 U.S. 222, 226 (1971) (statements which are inadmissible by prosecutor's case-in-chief may be used to impeach defendant's trial testimony).

55. See Strunk v. United States, 412 U.S. 434, 440 (1973) (dismissal of case is the appropriate remedy where unnecessary delay has occurred in criminal prosecution).

56. If a diverted suspect is later convicted, his lost liberty could be restored by a reduction in his sentence. For those who are not convicted, their loss of liberty apparently cannot be remedied.
legal aid societies lack standing to assert the rights of suspects coerced into diversion. Thus, the loss of liberty will probably be permanent, for the same coercion that creates the loss makes it unlikely that those aggrieved will choose to seek redress.

Goldberg v. Kelly involved a similarly self-insulating government deprivation. In that case, the suspension of welfare benefits without a hearing created a constitutionally unacceptable risk that eligible recipients would be deprived of their means of existence while waiting for redress, thus rendering the temporary loss permanent. In diversion, the conferral of an apparent government benefit without a hearing poses a similar risk that diversion participants will suffer a permanent loss of liberty. The distinction between conferral and suspension of government benefits has apparently no significance in the procedural due process area, for in Smith v. Organization of Foster Families, the Supreme Court concluded that the liberty interest asserted by foster families in their privacy and autonomy could be threatened by the conferral of an apparent government benefit—the reuniting of foster children with their natural parents. The liberty of the diverted suspect is threatened by a government benefit in just the same way that the liberty interest that foster children share with their new families is threatened by a return to their natural parents. In Smith, the Supreme Court held that the procedures providing for pre-removal conferences and post-removal hearings adequately protected the asserted liberty interest. In the diversion situation, only similar provisions for independent review can adequately protect the liberty interest of suspects from being coerced by prosecutorial bargaining.

Since judges already supply this independent review when prosecutorial bargaining takes the form of a plea bargain, they should perform the same function in the case of a diversion barr-

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57. For a case denying standing to a legal aid society that sought to assert the rights of a suspect coerced into diversion, see Hiscock Legal Aid Soc'y v. Hennessy, 101 Misc. 2d 1046, 1048, 422 N.Y.S.2d 616, 618 (Sup. Ct., Onondaga County 1974), aff'd 78 A.D.2d 775, 435 N.Y.S.2d 549 (4th Dep't 1980).


59. Id. at 264.


61. Id. at 842 n.45, where Justice Brennan, writing for the majority, allowed for an identity of interest between the foster parents and children.

62. Id. at 856.
gain, focusing their inquiry on the voluntariness of the suspect's action. In the plea bargaining area, the Supreme Court has held that the coercion inherent in prosecutorial bargaining is dissipated when a suspect is fully informed of the consequences of his decision and is aided by counsel. Recognizing the need for a fully informed consent, a report prepared for the Committee for Court Administration of the Appellate Divisions of the First and Second Judicial Departments of New York concluded that the diversion participant must be made to understand that there is no guarantee that his charges will be dismissed, and that if prosecution is resumed his defenses may be impaired by unavailability of witnesses or lapses in witnesses' memories. If he is ultimately convicted or pleads guilty after having been terminated from the program, the fact of his failure to make a satisfactory effort toward rehabilitation will appear on his pre-sentencing report. Equally important, the defendant must fully understand the nature of the rehabilitative efforts which will be required of him. He should also be made to understand the consequences of waiving the statute of limitations and the right to a speedy trial.

Where diversion is conducted prior to a formal charge, the suspect must be made aware of the charge contemplated by the prosecutor before he can realize the consequences of delaying the preparation of his defense. Finally, the suspect should be warned that participation in diversion might be used against him in a resumed prosecution as evidence of consciousness of guilt.

The judge should also conduct an inquiry into whether the suspect has incriminated himself in any way before being offered diversion. If the suspect has already confessed or entered a guilty

63. The standard for determining the voluntariness of the surrender of fourteenth amendment rights is different from that involved in the consideration of the voluntariness of a guilty plea. The presence of the sixth amendment right to a speedy trial in the latter case leads to a higher standard. See Schneckloth v. Bustamonte, 412 U.S. 218, 238 n.25 (1973). Since diversion usually involves waiver of the sixth amendment right to a speedy trial, the higher standard would be appropriate. In pre-arrest diversion, however, there is no sixth amendment right, and so a lower standard would be appropriate. See supra note 3.


65. DIVERSION FROM THE JUDICIAL PROCESS, supra note 9, at 71.

66. If diversion is voluntary, evidence of the participation could be admitted even if the fifth amendment privilege applies to acts that imply a consciousness of guilt. For the fifth amendment privilege to apply, however, participation in diversion would have to be "of a testimonial or communicative nature." See Schmerber v. California, 384 U.S. 757, 760 (1966).

67. A prior sixth amendment waiver of the right to a speedy trial should not have the same coercive effect as a prior waiver of the fifth amendment privilege would have. All the
plea, voluntary consent to diversion becomes virtually impossible. A suspect who has not incriminated himself knows that if he refuses to bargain he only risks a possible renewed prosecution. A suspect who has incriminated himself, on the other hand, knows, or thinks he knows, that a refusal to bargain will result in a summary conviction and sentence. Under these circumstances, the prosecutor's offer of diversion can only be inherently coercive, and this should be the end of the court's inquiry. The court need not and should not reach the issue of whether the guilty plea could still be dismissed or the confession excluded, for the inquiry into voluntariness looks only to the suspect's mind, and not to the ultimate legal consequences of his actions. Once the suspect believes he has lost the ability to contest the charges against him, he cannot refuse the prosecutor's offer to drop the charges in return for a consent to diversion.68

Undoubtedly, the most important factor in dissipating prosecutorial coercion is the presence of counsel at the point of diversion. Since diversion involves the waiver of important rights and has an enormous bearing on the eventual outcome of the case, it is a "critical stage" that requires the appointment of counsel.69 Diversion can lead to a complete escape from the criminal justice system and it can also mean a more vigorous prosecution and a harsher sentence.70 The presence of counsel is essential to protect the rights of a suspect considering diversion, and the whole process will benefit from his involvement.71 He can advise his client about the quality and quantity of the evidence, the seriousness of the charge, and the chances for dismissal. He will also be able to assess the risks involved in diversion, including the chances of an unfa-

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68. The reverse of this situation also poses interesting problems. If a person has been diverted, should a later guilty plea or confession be accepted as voluntary? If no further diversion is contemplated, they should be as voluntary as any other confession or guilty plea, because the prosecutor's threat is unchanged—incriminate yourself or take your chances with prosecution. If more diversion is contemplated, a guilty plea or confession is more likely to be coerced, for now the threat is greater—incriminate yourself or lose the benefits of the diversion program.

69. A critical stage is defined as any point where "substantial rights of a criminal accused may be affected." Mempha v. Rhay, 389 U.S. 128, 134 (1967).

70. A harsher sentence can result from an unfavorable pre-sentencing report. See supra note 65 and accompanying text.

71. What follows in the text is summarized from Note, supra note 6, at 840-43.
favorable termination and a diversion program that would be more burdensome than the eventual sentence. As in all plea bargaining, counsel should be primarily concerned with the legal, rather than the moral, guilt of his client. If the suspect would probably be convicted, diversion should be urged by counsel. However, if acquittal seems likely, diversion should be resisted, unless the suspect has a particular need for rehabilitation or a desire to make amends for his crime.

Once a judge is involved in the diversion decision, the prosecutor may take the opportunity to fully protect his ability to try the defendant at a later date. He may ask that the judge approve a voluntary waiver of the statute of limitations, a waiver of the sixth amendment right to a speedy trial, or a waiver of the fifth amendment privilege against self-incrimination. If the suspect has been charged, the prosecutor may ask for approval of a guilty plea. By making any self-incrimination simultaneous with the consent to diversion, the prosecutor avoids the coercion inherent when incrimination precedes diversion, but such a procedure may involve the delegation of the judge’s sentencing function. Although the suspect in this case would enter diversion voluntarily, his simultaneous self-incrimination would make his continuation in the program involuntary. The diverted suspect is not really free to withdraw if he believes that such an action will result in a conviction and sentence.


73. Prosecutors claim that the guilty plea is essential because the delay involved in diversion can make a later prosecution more difficult. However, the suspect suffers precisely the same detriment to his defense. See Diversion from the Judicial Process, supra note 9, at 73-74.

74. See Note, supra note 6, at 843-44, which argues that all diversion is an encroachment on the sentencing function.

75. Indeed, Diversion from the Judicial Process, supra note 9, at 75, concludes that any plea of guilty renders diversion inherently coercive.

76. If the prosecutor bargains for simultaneous diversion and a guilty plea, he must rely on the one-time consent to the restraint on liberty, for continuing participation is coerced by the existence of the plea. This may raise problems of involuntary servitude under the thirteenth amendment. In Bailey v. Alabama, 219 U.S. 219 (1911), the threat of a prosecution for fraud based simply on a failure to pay one's debts was held to create involuntary servitude. If a diverted suspect has pleaded guilty, he faces a certain conviction if he fails to pay his "debt" to the prosecutor, and not merely the threat of a resumed prosecution.
III. DISCRETION AND CONTROL WHEN DIVERSION IS TERMINATED OR DENIED

In contrast to the judicial supervision that must accompany the discretion to divert, the prosecutor's discretion to deny diversion should be complete and unreviewable. If this supervision were extended to the prosecutor's choice to prosecute (including plea bargaining) or screen out rather than divert, the prosecutor's function would no longer be independent of that of the court. The mere presence of the diversion option should not drain the prosecutor of his authority to make the two choices traditionally committed to his discretion.77 In addition, due process does not compel the prosecutor to grant a hearing when he denies diversion to a suspect. In Menechino v. Oswald, the United States Court of Appeals for the Second Circuit held that a prisoner under consideration for parole release could not assert any procedural due process right to a hearing.78 The court held that an anticipated but unattained freedom of movement simply was not one of the interests protected by the fourteenth amendment, which is concerned with "presently enjoyed" rights.79 In the same way, potential diversion participants do not enjoy a freedom from prosecution until they are diverted. Before that point, they are involved in the process of prosecution.80 Therefore, the prosecutor's prior decision not to divert does not affect an interest that triggers the procedural due process right to a hearing.81

When a prosecutor seeks to terminate diversion and resume prosecution however, he must afford the participant a hearing to protect the "presently enjoyed" freedom from prosecution. Like the liberty of the parolee or probationer, this freedom is indeterminate, but sufficient to invoke the protections of procedural due process.82 The Supreme Court held in Morrissey v. Brewer that

77. See supra note 36.
78. 430 F.2d 403 (2d Cir.), cert. denied, 400 U.S. 1023 (1970).
79. 430 F.2d at 408.
80. For instance, they are involved in the process of bargaining with the prosecutor, which is a crucial stage of the prosecution.
81. Procedural due process requires that a balancing test be applied when such an interest is affected, such as the presently enjoyed right to the conditional liberty of parole. See Morrissey v. Brewer, 408 U.S. 471, 480-88 (1972).
82. It is no longer crucial under procedural due process to determine whether an individual's interest is a "right" or a "privilege." Indeterminate interests are also protected. See Goldberg v. Kelly, 397 U.S. 254, 262-63 (1970).
due process required both a preliminary hearing and a hearing providing most of the traditional due process components before parole could be finally revoked. The next term saw the holding extended to probation revocation in Gagnon v. Scarpelli. Since diversion is usually understood as pretrial probation, and resembles parole in its emphasis on rehabilitation, these cases indicate that diversion cannot be terminated without a hearing. Whether due process also requires the presence of counsel is not material, for the termination is as much, if not more, a "critical stage" of the prosecution as the initiation of diversion. Therefore, the sixth amendment requires that counsel be present at the termination hearing.

**CONCLUSION**

There are strict limits on prosecutorial discretion to divert at both the intake and the termination stages. Due process requires that a hearing be held at the intake stage because prosecutorial bargaining without immediate judicial review poses a great risk of an unremediable deprivation of liberty. To ensure that the consent to diversion is voluntary, a judge should advise the suspect of the consequences of his action, and refuse diversion if any self-incrimination has taken place. If diversion takes place prior to an arrest or the issuing of an arrest warrant, a judge should also make a determination of probable cause. If the prosecutor seeks to terminate diversion and resume prosecution, due process again compels him to conduct a hearing to protect the presently enjoyed freedom from prosecution. At this point, a judge should determine whether the suspect has lived up to his bargain. If he has, the prosecutor should be held to his promise and the prosecution dismissed.

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83. 408 U.S. at 486-88.
85. See Note, supra note 6, at 843.
86. In Gagnon v. Scarpelli, 411 U.S. 778 (1973), the proceeding was found to be of a sufficiently non-adversarial character so that due process did not require the presence of counsel. Id. at 789.
87. See supra text accompanying note 70.
88. This is also the conclusion of Diversion from the Judicial Process, supra note 9, at 37.
89. See Santobello v. New York, 404 U.S. 257, 262 (1971), where the Supreme Court held that one of the safeguards of plea bargaining must be the fulfillment of prosecutorial promises of leniency.
New York's Adjournment in Contemplation of Dismissal procedure closely follows these guidelines. The statute requires hearings and judicial approval at both the intake and termination stages of diversion, but it does not give the court the power to overrule a prosecutor's decision not to divert. The court imposes any conditions connected with diversion, and the consent of the defendant to these conditions must be specifically obtained. Once adjourned, the dismissal of the charges after six months is presumed to be in the interest of justice, and the prosecutor may rebut this presumption by pointing to specific instances of the defendant's failure to live up to the agreed upon conditions. Thus, New York's statutory diversion procedure harmonizes the rights of the accused and the legitimate interests of prosecutors while providing for a new response to the complex social phenomenon of crime.

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91. Id. (Practice Commentary).
92. The presence of other reforms of the criminal justice area, such as sentencing to community service, should not deter the development of diversion programs. Although both reforms propose to reduce the personal and societal costs of incarceration, they serve distinct purposes. A prosecutor's decision not to divert does not necessarily mean that incarceration is appropriate. For an interesting discussion of some of the legal issues involved in community-service sentencing, see Comment, Liability for Injuries to Offenders Sentenced to Community Service, 30 Buffalo L. Rev. 387 (1981) (particularly at 393 n.27).