Notre Dame Law Review

Volume 51 | Issue 1 Article 4

10-1-1975

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Andrew W. Maron

CONSTITUTIONAL PROBLEMS OF DIVERSION OF JUVENILE DELINQUENTS

*Andrew W. Maron**

I. Introduction

Juvenile delinquency is unquestionably one of America's serious problems. Federal, state, and local governments as well as the academic community and many private individuals have struggled with little success against rising juvenile crime. The total number of juveniles arrested in 1973 for all offenses was 1,717,366, or more than one-fourth of the total persons apprehended in the United States.[1] Between 1960 and 1973, the number of juveniles arrested increased 144 percent[2] while the population of the United States increased only 16 percent.[3]

Since the end of the 19th century, the primary answer to the nation's juvenile delinquency problem has been the juvenile court system. This system was criticized in the 1960's for failing to provide constitutional protections to juveniles that were afforded to adults. The criticism culminated with the United States Supreme Court decisions of *Kent v. United States*[4] and *In re Gault*[5] which applied many constitutional due process safeguards to the juvenile courts.

At about the same time as these decisions were having an impact on the juvenile courts, another idea for change to the juvenile justice system was gaining impetus: pretrial diversion. The President's Commission on Juvenile Delinquency and Youth Crime in 1967[6] recommended that "dispositional alternatives to juvenile court adjudication must be developed."[7] This interest in diversion of juvenile cases naturally resulted from the realization that since *Kent* and *Gault*, the only significant differences between juvenile courts and adult criminal courts are in the informal pretrial stage and postadjudication disposition.[8] If juveniles are to be treated in any way different from adults, therefore, the difference must come at these two stages of the juvenile justice system.

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* Captain, U.S. Army Judge Advocate General's Corp; Assistant Staff Judge Advocate, Ft. Lewis, Wash; LL.M., University of Virginia Law School, 1975; J.D., University of South Carolina Law Center, 1974; B.S., U.S. Military Academy, 1967.

The author gratefully acknowledges the advice and assistance of Captain Steven Todd, U.S. Army Judge Advocate General's School, and Professor Charles Whitebread, University of Virginia Law School.

The opinions and conclusions expressed herein are those of the author and do not necessarily represent the views of either The Judge Advocate General's School, the United States Army, or any other governmental agency.

1 U.S. NEWS & WORLD REPORT, Dec. 16, 1974, at 33, col. 1.

2 *Id.*

3 *Id.*; U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF UNITED STATES: 1974, at 5 (1974).

4 383 U.S. 541 (1966).

5 387 U.S. 1 (1967).

6 TASK FORCE ON JUVENILE DELINQUENCY, PRESIDENT'S COMM. ON LAW ENFORCEMENT & ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: JUVENILE DELINQUENCY AND YOUTH CRIME (1967) [hereinafter cited as TASK FORCE REPORT].

7 *Id.* at 2.

8 *See generally* Ralston, *Intake: Informal Disposition or Adversary Proceeding*, 17 CRIME & DELINQ. 160, 167 (1971) [hereinafter cited as Ralston].

Diversion is an alternative to juvenile court adjudication that operates at the pretrial stage. It is "the channeling of cases to non-court institutions or systems in instances where the cases would ordinarily have been processed by the juvenile court."[9] Though diversion processes vary greatly, they all are relatively informal, for constitutional protections applicable to formal adjudicative proceedings have not been applied to diversion. It is arguable, then, that diversion deprives youth of many fundamental rights, particularly the right to counsel and the right to a probable cause determination prior to the diversion decision. Whether these rights should be applied is a proper subject for analysis.

II. The Background: Juvenile Courts and Diversion

In the 18th century, juveniles were treated exactly like adults. Not until 1825, when New York City's House of Refuge was opened, were children separated from adult criminals and given corrective treatment rather than punishment.[10] Other reforms followed gradually and sporadically during the 19th century, including the creation of state juvenile reform and industrial schools, the development of probation, the requirement for separate hearings for children's cases, and the use of foster homes and other social dispositions.[11]

A. *The Development of the Juvenile Court System*

In 1899, Illinois passed the Juvenile Court Act, creating the first statewide court especially for children. The idea of the juvenile court spread with amazing speed. Within 12 years, 22 states enacted similar statutes, and by 1925 all but two states had followed Illinois' example.[12] Today there is a juvenile court act in effect in every state and territory of the United States and the District of Columbia.[13]

The juvenile court was a reaction to criticism of combining juvenile delinquents and adult criminals in the same judicial and penal system. The separate court, it was thought, would promote rehabilitation. The child would receive special treatment in surroundings and from persons devoted to rehabilitation instead of punishment.[14] The juvenile court's role was not to ascertain guilt or innocence but to determine what should be done in the "best interest" of the child.[15] This unique court system was based on the theory of *parens patriae*,

9 Nejelski, *Diversion of Juvenile Offenders in the Criminal Justice System,* in CRIMINAL JUSTICE MONOGRAPH: NEW APPROACHES TO DIVERSION AND TREATMENT OF JUVENILE OFFENDERS 83 (1973).

10 TASK FORCE REPORT, *supra* note 6, at 3; Fox, *Juvenile Justice Reform: An Historical Perspective,* 22 STAN. L. REV. 1187, 1190 (1970) [hereinafter cited as Fox]. The latter reference presents a detailed examination of juvenile judicial history.

11 TASK FORCE REPORT, *supra* note 6, at 3; Note, *The Constitution and Juvenile Delinquents,* 32 MONT. L. REV. 307 (1971).

12 These states are Maine and Wyoming. TASK FORCE REPORT, *supra* note 6, at 3; Schultz, *The Cycle of Juvenile Court History,* 19 CRIME & DELINQ. 457, 465 (1973).

13 *In re* Gault, 387 U.S. 1, 14 (1967).

14 Comment, *Children's Liberation—Reforming Juvenile Justice,* 21 KAN. L. REV. 177 (1973) [hereinafter cited as *Children's Liberation*].

15 *In re* Gault, 387 U.S. 1 (1967); Shioutakon v. District of Columbia, 114 A.2d 896 (D.C. Mun. Ct. App. 1955). *See* TASK FORCE REPORT, *supra* note 6, at 3; Comment, *Alternative Preadjudicatory Handling of Juveniles in South Dakota: Time for Reform,* 19 S. DAK. L. REV. 207, 208 (1974) [hereinafter cited as *S. Dak. Juveniles*].

which permits the state to act *in loco parentis* over wayward children. The state's duty as "parent" is to direct the child along the proper path to a productive and lawful adulthood.[16]

Since the state, acting through the juvenile court, had the best interests of the child at heart, *parens patriae* became the basis for not granting constitutional rights to children. Under this theory of a benevolent state, it was simply unnecessary for juveniles to receive notice of the charge prior to court appearance, an adversary hearing, a lawyer, the right to confront and cross-examine witnesses, the right against self-incrimination, and other constitutional safeguards guaranteed to adult criminals.[17] This denial of constitutional rights was challenged periodically in state courts, but each time appellate courts upheld the legality of the system. For instance:

> [A] juvenile proceeding . . . is a protective proceeding entirely concerned with the welfare of the child, and is not punitive. The procedures supercede the provisions of the criminal law. The inquiry is directed to the proper care, custody, guidances, control, and discipline of the child, and not to his guilt or innocence as a criminal offender. . . . For that reason, a juvenile proceeding may properly dispense with formal constitutional requirements relating to criminal proceedings.[18]

B. *The Constitutional Status of Juvenile Courts*

In 1966, the United States Supreme Court finally considered the adequacy of juvenile court procedures.[19] *Kent v. United States*[20] was the first case to reach the Court; it involved the interpretation of a statutory provision in the District of Columbia Code which permitted waiver of a child's case from juvenile court to adult court.[21] The Court felt that a waiver of this magnitude must be judged by the standards of fourteenth amendment due process. Waiver to adult court therefore could not take place "without ceremony—without hearing, without effective assistance of counsel, without a statement of reasons."[22] Technically speaking, though, *Kent* did not rest on constitutional grounds; the fourteenth amendment was not explicitly applied, only used as a yardstick. Nor did *Kent* affect the adjudicatory phase of the juvenile court. Yet, the Court did express

16 *See generally In re* Gault, 387 U.S. 1, 16 (1967). *See also* Fox, *supra* note 10, at 1192; *S. Dak. Juveniles, supra* note 15, at 208; Comment, *In re Gault: Understanding the Attorney's New Role*, 12 VILL. L. REV. 803 (1967); Comment, *Juvenile Justice and Pre-Adjudication Detention*, 1 U.C.L.A.-ALASKA L. REV. 154 (1971).

17 Paulsen, *Kent v. United States: The Constitutional Context of Juvenile Cases*, 1966 SUP. CT. REV. 167, 174 [hereinafter cited as Paulsen].

18 State v. Owens, 197 Kan. 212, 220, 416 P.2d 259, 267 (1966). *Accord, Ex parte* Sharp, 15 Idaho 120, 127, 96 P. 563, 564 (1908); Commonwealth v. Fisher, 213 Pa. 48, 56-57, 62 A. 198, 200-01 (1903).

19 For a brief but excellent synopsis of Supreme Court decisions concerning rights of juveniles, see *S. Dak. Juveniles, supra* note 15. *Cf.* M. PAULSEN & C. WHITEBREAD, JUVENILE LAW AND PROCEDURE 10-22 (1974) [hereinafter cited as PAULSEN & WHITEBREAD].

20 383 U.S. 541 (1966).

21 Waiver of juvenile court jurisdiction occurs when the juvenile court judge, in accordance with statutory provisions, orders the transfer of a child to the regular court for trial under the ordinary rules of criminal procedure. Waiver is generally restricted to instances where the child has committed a serious offense. For a more lengthy discussion of waiver of juvenile jurisdiction, see PAULSEN & WHITEBREAD, *supra* note 19, at 132-49.

22 Kent v. United States, 383 U.S. 541, 554 (1966).

skepticism of the theory and operation of juvenile courts, and *Kent* thus indicated that the Court favored applying the Constitution to juvenile proceedings.[23]

Any doubts about the constitutional status of *Kent* were resolved the next year by the Court's decision in *In re Gault*,[24] the most important decision involving the constitutional rights of children. *Gault* held that the adjudicatory (fact-finding) stage of the juvenile court process must be governed by due process standards. Children were to be accorded the right to notice of the charges against them,[25] the right of counsel,[26] the privilege against self-incrimination,[27] and the right to confront and cross-examine witnesses.[28] However, Justice Fortas, who wrote the Court's majority opinion, carefully limited the scope of *Gault* to the adjudicatory stage of the proceeding, leaving open the question whether due process applied to prejudicial and postadjudicatory stages of the juvenile process.[29]

Most surprising about *Kent* and *Gault* was the Court's scathing repudiation of the effectiveness of the juvenile court in carrying out its stated goal of rehabilitation. Citing the high recidivism rate, the serious stigma resulting from an adjudication of delinquency, and the lack of difference between judicial processes in juvenile and adult cases, the Court questioned the desirability of separate juvenile courts.

> There is evidence, in fact, that there may be grounds for concern that the child receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children.[30]

Two other Supreme Court cases since *Kent* and *Gault* have decided important juvenile constitutional issues. *In re Winship*[31] provided increased protection to juveniles at the adjudicatory stage. The court held that before a child could be convicted of delinquency for committing an act which would be a crime if committed by an adult, the state was required to prove the juvenile's guilt beyond a reasonable doubt.[32] In *McKeiver v. Pennsylvania*,[33] however, the Court refused to grant the right of trial by jury to juveniles. The Court was concerned that if jury trials were required in juvenile adjudicatory hearings, the proceedings would become indistinguishable from adult criminal trials. Jury trials, concluded the Court, would convert juvenile hearings into true adversary proceedings and destroy the "intimate, informal protective proceeding[s]"[34] that seemed to be the goal of juvenile court statutes.

Kent, Gault, and *Winship,* then, granted progressively greater constitutional

23 *Id.* at 556.
24 387 U.S. 1 (1967).
25 *Id.* at 33.
26 *Id.* at 41, 56.
27 *Id.* at 55.
28 *Id.* at 57.
29 *Id.* at 13.
30 Kent v. United States, 383 U.S. 541, 556 (1966).
31 397 U.S. 358 (1970).
32 *Id.* at 370.
33 403 U.S. 528 (1971).
34 *Id.* at 545.

status to the adjudicatory stage of the juvenile court process. And while *McKeiver* refused further expansion, it still did not foreclose incursions into the juvenile justice system:

> If the formalities of the criminal adjudicative process are to be superimposed upon the juvenile court system, there is little need for its separate system. Perhaps that ultimate disillusionment will come one day, but for the moment we are disinclined to give impetus to it.[35]

McKeiver, therefore, warns the juvenile courts that they must better accomplish the goals of *parens patriae* or the Court may again intervene and supply juveniles with the full array of due process safeguards available to adults in criminal trials.[36]

C. *The Movement for Diversion*

Even as the juvenile court system was developing, diversion became common practice. The names and processes[37] varied considerably among jurisdictions, but the concept of handling juvenile cases informally, without resort to the juvenile courts, caught on spontaneously. By 1926, diversion was so well established that the National Probation Association recommended that it become a formalized element of juvenile justice:

> [I]t is better for as many cases as possible to be adjusted without a formal court hearing. The system of handling cases informally, usually through the probation department, is well recognized and in many courts half or more of the cases are adjusted in this way. . . . [T]he system has grown so widespread and is so generally recognized as beneficial that the committee believes it should be recognized in the law.[38]

As the years passed, more and more states utilized diversion until by 1968 over 52 percent of all delinquency cases (474,000 out of 899,000) referred to juvenile courts were disposed of nonjudicially.[39]

In 1967, the use of diversion received a dramatic boost from the report of the President's Commission on Law Enforcement and Administration of Justice:

> The formal sanctioning system and pronouncement of delinquency should be used only as a last resort.
>
> In place of the formal system, dispositional alternatives to adjudication must be developed for dealing with juveniles, including agencies to provide and coordinate services and procedures to achieve necessary control without unnecessary stigma. Alternatives already available, such as those related to court intake, should be more fully explored.[40]

35 *Id.* at 551.
36 *See S. Dak. Juveniles, supra* note 15, at 221.
37 For an in-depth discussion of the history of intake, see Wallace & Brennan, *Intake and the Family Court,* 12 BUFF. L. REV. 442 (1963) [hereinafter cited as Wallace & Brennan].
38 NATIONAL PROBATION ASS'N, A STANDARD JUVENILE COURT LAW 15 (1926), cited in Wallace & Brennan, *supra* note 37, at 444-45.
39 OFFICE OF JUVENILE DELINQUENCY & YOUTH DEV., U.S. DEP'T OF HEALTH, EDUC. & WELFARE, JUVENILE COURT STATISTICS: 1968, at 12 (1968), cited in Gough, *Consent Decrees and Informal Service in the Juvenile Court: Excursions Toward Balance,* 19 KAN. L. REV. 733, 739 (1971) [hereinafter cited as Gough].
40 TASK FORCE REPORT, *supra* note 6, at 2.

This conclusion was based on the realization that the juvenile court was not fulfilling its rehabilitative role.[41] In fact, the Commission concluded that juvenile contact with the court usually harmed the child more than it helped him.[42]

As one alternative to juvenile court adjudication, the President's Commission recommended the establishment of Youth Service Bureaus.[43] The Youth Service Bureaus would oversee diversion programs in each community and offer a broad range of services to young people. Additionally, the Commission recommended that juvenile courts utilize "preliminary conferences" and "consent decrees" to arrange out-of-court settlements or adjustments for the child.[44] The aim of all these efforts was to free the child from the stigma of a juvenile court adjudication while ensuring proper attention and treatment.

These recommendations were embraced quickly by commentators, juvenile courts, and government agencies. In 1970, the federal government's Youth Development and Delinquency Prevention Administration adopted a national strategy for the prevention of juvenile delinquency.[45] Its first objective was to "divert youth away from the juvenile justice system into alternate programs."[46] More importantly, Congress joined the diversion movement with passage of the Juvenile Justice and Delinquency Prevention Act of 1974.[47] This statute provided federal assistance to juvenile delinquency programs across the nation, and announced that it was the "declared policy of Congress . . . to divert juveniles from the traditional juvenile justice system and to provide critically needed alternatives . . . ."[48]

The Commission's recommendation for Youth Service Bureaus was also rapidly adopted. The development of these bureaus became a policy of the Youth Development and Delinquency Prevention Administration of the Department of Health, Education, and Welfare. In this regard, the Law Enforcement

41 It is interesting to note that the President's Commission, in its Task Force Report, and the Supreme Court, in *Kent* and *Gault*, came to this realization at approximately the same time.

42 In illuminating fashion the President's Commission summarizes its findings:

> What emerges then, is this: In theory the juvenile court was to be helpful and rehabilitative rather than punitive. In fact the distinction often disappears . . . . In theory the court's action was to affix no stigmatizing label. In fact, a delinquent is generally viewed by employers, schools, the armed forces—by society generally—as a criminal. In theory the court was to treat children guilty of criminal acts in noncriminal ways. In fact it labels truants and runaways as junior criminals.
>
> In theory the court's operations could justifiably be informal . . . because it would act only in the best interests of the child. In fact it frequently does nothing more nor less than deprive a child of liberty without due process of law . . . . In theory it was to exercise its protective powers to bring an errant child back into the fold. In fact there is increasing reason to believe that its intervention reinforces the juvenile's unlawful impulses. In theory it was to concentrate on each case the best of current social science learning. In fact it has often become a vested interest in its turn, loathe to cooperate with innovative programs or avail itself of forward-looking methods.

TASK FORCE REPORT, *supra* note 6, at 9.

43 *Id.* at 19.

44 *Id.* at 21.

45 Gemiganani, *Diversion of Juvenile Offenders from the Juvenile Justice System*, in CRIMINAL JUSTICE MONOGRAPH: NEW APPROACHES TO DIVERSION AND TREATMENT OF JUVENILE OFFENDERS 8 (1973).

46 *Id.* at 31.

47 42 U.S.C. § 5601 *et seq.* (1970).

48 42 U.S.C. § 5602(b) (1970).

Assistance Administration has distributed numerous federal grants to states and local communities to create and operate Youth Service Bureaus.[49] By 1972, over 170 bureaus were in operation throughout the United States.[50]

D. *Diversion Today: Sequence and Procedure*

The Commission's report endorsing diversion has had substantial impact; in various ways, diversion has become integral to juvenile justice in the United States. The decision whether or not to divert a case from the juvenile courts is very important to the youth. It can mean the difference between a juvenile court hearing, with the possibility of confinement to an institution, and outright release. Between these extremes, diversion may include release with an official reprimand, referral to a social service agency, or supervision by the court or police. This important decision may be made either by police or juvenile courts.

1. Police Screening

The vast majority of all juvenile cases are referred by law enforcement agencies.[51] A youth's initial contact with the judicial system is usually the police officer who has taken the child into custody, either as a result of his own observance of the criminal act or in response to a citizen complaint. The police officer has a wide range of alternatives in dealing with the apprehended child. He may warn and release the child, refer him to juvenile court, or divert the child to a social agency.

In larger police departments, apprehending officers refer the child to a department juvenile officer, who is assigned full-time to youth matters. These officers possess greater expertise in juvenile delinquency than the average police officer, and generally have investigative facilities to preliminarily examine the case and the child's background. They also have increased discretion on deciding what action to take with the child's case.[52]

This decision-making process, often termed the "stationhouse adjustment," deprives the youth of many rights that are considered fundamental in other areas of the law. It is made by nonlegal personnel (the juvenile officer), is usually conducted without legal counsel, generally does not acknowledge a right to silence, and concludes in a nonappealable decision.[53] Even if the child is released, he has gained a "police contact" record.

In some cities, the department juvenile officer makes his diversion decision

49 In 1971, for example, approximately $15 million of federal funds were distributed to various Youth Service Bureaus in the nation. U.S. DEP'T OF HEALTH, EDUC. & WELFARE, YOUTH SERVICE BUREAUS: A NATIONAL STUDY 3-4, 66-67 (1973) [hereinafter cited as YOUTH BUREAUS STUDY].

50 *Id.*

51 Note, *Juvenile Delinquents: The Police, State Courts and Individual Justice,* 79 HARV. L. REV. 775, 776 (1966) [hereinafter cited as *The Police*].

52 Kleczek, *Procedure in the Illinois Juvenile Court System,* 6 JOHN MARSH. L.J. 48, 51 (1972) [hereinafter cited as Kleczek].

53 Note, *Juvenile Court Intake: Form and Function,* 5 WILL. L.J. 121, 123 (1968) [hereinafter cited as *Juvenile Intake*]. For a brief discussion of the lack of appeal from police screening, see *The Police, supra* note 51, at 785.

in a "police hearing." In these hearings, the officer determines which cases require the attention of the court. In reality, this latter system is merely a more formal (and therefore more impressive to the child) "stationhouse adjustment";[54] the procedural rights of the youth, or lack of them, are no different.

2. Intake by the Juvenile Court

When a case is forwarded to the juvenile court from the police (or by any other method of initiating a complaint against a child), it is handled first by the intake department. Since early in their history, juvenile courts have had intake departments which exercised discretion whether or not to hear a case; this was the earliest form of diversion. This discretion has continually expanded, and now intake may be defined as:

> [A] process of examining and evaluating the circumstances of every case referred to the court. It is directed initially at ascertaining which cases require no action, which require referral to other agencies, which can be benefitted and adjusted by treatment without judicial action, and which need judicial action.[55]

Although all juvenile courts have intake departments, the intake process is handled in a variety of ways.[56]

> In some courts, intake has the form of a judicial hearing, often before a referee. In others, it is an extended process involving what is tantamount to a complete diagnostic study. In still others, it is a mechanical process in the clerk's office providing little if any selectivity.[57]

Despite expanded police screening methods, diversion by intake departments remains high. The average court intake office diverts approximately one-half of all cases referred to it.[58]

The intake officer's decision is, of course, crucial to the child. The alternatives include outright dismissal of the petition, informal probation administered by the intake staff,[59] and referral to a social agency. The decision is usually made

54 *The Police, supra* note 51, at 779. In whatever manner diversion by the police is effectuated—by the apprehending officer, by a specially designated juvenile officer, or by a police hearing—there is little doubt that the practice is common. A 1965 study in Chicago revealed a 66 percent diversion rate, while a 1970 survey of Los Angeles County showed diversion rates for its precincts ranging from two to 82 percent. FBI statistics for 1961-65 disclose that between 45 and 55 percent of all juveniles taken into custody by the police were not referred to court. *See* Stratton, *Crisis Intervention Counseling and Police Diversion from the Juvenile Justice System: A Review of the Literature,* 25 JUV. JUSTICE 44, 48 (1974).

55 ADVISORY COUNCIL OF JUDGES OF THE NAT'L PROBATION & PAROLE ASS'N, GUIDES FOR JUVENILE COURT JUDGES 24 (1957), cited in *Juvenile Intake, supra* note 53, at 124.

56 Note, *Informal Disposition of Delinquency Cases: Survey and Comparison of Court Delegation of Decision Making,* 1965 WASH. U. L.Q. 258, 279 [hereinafter cited as *Informal Disposition*].

57 Sheridan, *Juvenile Court Intake,* 2 J. FAMILY L. 139, 146 (1962) [hereinafter cited as Sheridan].

58 CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH, EDUC. & WELFARE, JUVENILE COURT STATISTICS: 1963, at 11 (1964), cited in *Juvenile Intake, supra* note 53, at 124.

59 In some jurisdictions, the intake officer has the ability to impose "informal probation" on the juvenile, in an attempt to rehabilitate the youth without judicial involvement. Such

following an intake conference or hearing,[60] in which the officer or "referee" meets with the child, his parent or guardian, the petitioner (police officer or citizen complainant), his probation officer (if the child has one from a previous juvenile court contact), and occasionally an attorney.[61] The intake officer may make his dispositional decision based upon a wide variety of reasons, and, as with police screening, the decision is nonappealable.

III. Constitutional Problems of Diversion

Less than a decade ago the idea of constitutional rights for children was foreign to the legal profession. Under the *parens patriae* principle, juvenile court proceedings were not criminal trials, but civil inquiries to determine the mode of rehabilitation. The constitutional rights normally afforded an accused adult had no place in these proceedings.[62] During the period 1966-71, this reliance on *parens patriae* to deny constitutional rights to juveniles was significantly altered by the United States Supreme Court.

As discussed earlier,[63] the Court's decisions in *Kent v. United States,*[64] *In re Gault,*[65] *In re Winship,*[66] and *McKeiver v. Pennsylvania*[67] established basic constitutional parameters for juvenile courts.[68] *Kent* introduced the requirement of due process and fundamental fairness to the juvenile system. *Gault* specifically applied the due process clause of the fourteenth amendment to the adjudicative stage of juvenile justice.[69] In *McKeiver,* the Court refused to require trial by jury in juvenile courts, but allowed that further extension might be necessary in the future.[70]

In light of this breakdown of the *parens patriae* principle, which previously isolated the juvenile system from constitutional scrutiny, diversion may be vulnerable to constitutional challenge. Although *Gault* was limited to adjudicative proceedings, it is only since *Gault* that diversion has become paramount in juvenile justice. The diversion decision now is crucial, and the lack of procedural safeguards begs to be rectified. Other aspects of the diversion system have also

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informal probation may consist of any number of requirements, restrictions, or duties that the juvenile must comply with, such as reporting to a probation officer, securing employment, or attending educational classes. Because this practice of "informal probation" has come under increasing criticism in recent years, the restrictions have become more moderate and less frequently applied. *See* Wallace & Brennan, *supra* note 37, at 446; *The Police, supra* note 51, at 789.

60 For a discussion of how one jurisdiction conducts its intake hearings, see *Informal Disposition, supra* note 56, at 272-77.

61 *The Police, supra* note 51, at 789.

62 *In re* Gault, 387 U.S. 1, 14, 17 (1967).

63 *See* text accompanying notes 19-36 *supra.*

64 383 U.S. 541 (1966).

65 387 U.S. 1 (1967).

66 397 U.S. 358 (1970).

67 403 U.S. 528 (1971).

68 For a review and analysis of these decisions, see McKeiver v. Pennsylvania, 403 U.S. 528, 531-34 (1971). *Cf.* Kay & Segal, *The Role of the Attorney in Juvenile Court Proceedings: A Non-Polar Approach,* 61 GEO. L.J. 1401, 1406-09 (1973) [hereinafter cited as Kay & Segal]; Note, *Interrogation of Juveniles: The Right to a Parent's Presence,* 77 DICK. L. REV. 543, 546-50 (1973) [hereinafter cited as *Parent's Presence*]; *S. Dak. Juveniles, supra* note 15, at 209-11.

69 387 U.S. 1, 30-31 (1967).

70 *See* text accompanying note 35 *supra.*

been criticized for failing to sufficiently respect the rights of children.[71] In this context, therefore, it is important to analyze diversion from a constitutional perspective. Can diversion, as currently practiced, withstand constitutional challenge under recent Supreme Court expositions of constitutional doctrine?

A. *Due Process at the Preadjudication Stage*

The series of decisions ending in *McKeiver* leave the constitutional status of the juvenile justice system somewhat unclear. It is not the "discretionary, paternalistic process of the pre-*Gault* era,"[72] nor is it the "rigid, highly regularized adversary procedure of the adult criminal process."[73] In *McKeiver,* Justice Blackmun described the unsettled situation:

> [I]t is apparent that:
>
> 1. Some of the constitutional requirements attendant upon the state criminal trial have equal application to that part of the state's juvenile proceeding that is adjudicative in nature . . . .
>
> 2. The Court, however, has not yet said that *all* rights constitutionally assured to an adult accused of a crime also are to be enforced or made available to the juvenile in his delinquency proceeding.[74]

1. Fundamental Fairness

In this unsettled situation, where some rights apply and some do not, there is a need for a standard by which the applicability of a particular right can be measured. From the fourteenth amendment requirement of due process, a standard of "fundamental fairness,"[75] recognizing the "essentials of due process and fair treatment,"[76] emerges as a test[77] for analyzing the juvenile court system. *Kent, Gault, Winship,* and *McKeiver* reveal that the fundamental fairness standard is composed of four factors:[78] (1) the right must be a vital one,[79] (2) the right must remedy some defect in the juvenile system,[80] (3) the right cannot compel the states to abandon any substantive benefits of the juvenile process,[81]

71 *See* TASK FORCE REPORT, *supra* note 6, at 10; Tappan, *Unofficial Delinquencies,* 29 NEB. L. REV. 547, 556-58 (1950) [hereinafter cited as Tappan]; Wallace & Brennan, *supra* note 37, at 443-45; *The Police, supra* note 51, at 780-89.

72 Kay & Segal, *supra* note 68, at 1409.

73 *Id.*

74 403 U.S. 528, 533 (1971).

75 *Id.* at 543.

76 Kent v. United States, 383 U.S. 541, 562 (1966).

77 *But see* Comment, *Miranda Warnings to Juveniles in Jersey: The Worst of Both Worlds Revisited,* 26 RUTGERS L. REV. 358 (1973). The writer there proposes the Court use a "balancing test." Under it the Court would balance the "aspects of the juvenile process which are beneficial to the juvenile . . . against the rights which must be accorded defendants in criminal trials." *Id.* at 366.

78 *See Parent's Presence, supra* note 68, at 548. *See also In re* S., 73 Misc. 2d 187, 189, 341 N.Y.S.2d 11, 13 (Fam. Ct. 1973).

79 *E.g., In re* Winship, 397 U.S. 358, 363 (1970) (the "reasonable doubt" standard).

80 *E.g.,* Kent v. United States, 383 U.S. 541, 554 (1966) (hearing is required prior to waiver of juvenile court jurisdiction over child to adult court in order to remedy a past defect in the juvenile process—the forfeiture of important statutory rights of the juvenile without due process protections).

81 *E.g., In re* Gault, 387 U.S. 1, 21 (1967) (the rights granted to juveniles do not require state to abandon any benefits to children).

and (4) the right must not be disruptive of the unique nature of the juvenile process.[82] If these criteria are met, due process requires that the right in question be applied to the juvenile system.

Although *Gault* was limited to adjudications, it did not preclude extending rights to other stages of the process:

> We do not . . . consider the impact of these constitutional provisions upon the totality of the relationship of the juvenile and the state. We do not even consider the entire process relating to juvenile "delinquents." For example, we are not here concerned with the procedural or constitutional rights applicable to the *pre-judicial stages of the juvenile process,* nor do we direct our attention to the post-adjudicative or dispositional process.[83]

To determine the rights of the child at other stages[84] in the juvenile process, it seems reasonable to apply the "fundamental fairness" test. Yet the Court did not explicitly state that this test was applicable to all phases of the juvenile system, and indeed implied that it did not.

> These [problems] relate to the proceedings by which a determination is made as to whether a juvenile is a "delinquent." . . . *As to these proceedings,* there appears to be little dissent from the proposition that the Due Process Clause has a role to play.[85]

In light of this language, and because the Court's discussion in the other juvenile cases deals[86] only with the adjudicative stage, it may be argued that the due process "fundamental fairness" test is inappropriate for the pretrial phase.

A number of commentators, however, disagree and find an implication to the contrary in several Court decisions.[87] In *Haley v. Ohio*[88] and *Gallegos v. Colorado*[89] (involving the inadmissibility of coerced pretrial confessions) and *Kent v. United States*[90] (involving the requirements of a waiver hearing), the Court granted constitutional rights to juveniles at other than the adjudicative phase of juvenile court. Additionally, several federal courts, at both the district and circuit levels, have held the fundamental fairness standard of due process applicable to the preliminary hearing stage of the juvenile process.[91]

This latter conclusion is more reasonable. Concern for fairness should compel the Court not to restrict its examination to just the adjudication hearing. Unfair procedures can deprive a child of his rights at all stages in the juvenile justice system. For this reason, the "fundamental fairness" test should apply to the pretrial stage.

82 McKeiver v. Pennsylvania, 403 U.S. 528, 544 (1971) (jury trial would be disruptive of the juvenile process).
83 387 U.S. at 13 (emphasis added).
84 This is other than the adjudicatory stage.
85 387 U.S. at 13 (emphasis added) (footnote omitted).
86 McKeiver v. Pennsylvania, 403 U.S. 528, 543 (1971); *In re* Winship, 397 U.S. 358 (1970).
87 Kay & Segal, *supra* note 68, at 549; *S. Dak. Juveniles, supra* note 15, at 211-12.
88 332 U.S. 596 (1948).
89 370 U.S. 49 (1962).
90 383 U.S. 541 (1966).
91 *E.g.,* Brown v. Fauntleroy, 442 F.2d 838 (D.C. Cir. 1971); Cooley v. Stone, 414 F.2d 1213 (D.C. Cir. 1969); Black Bonnett v. South Dakota, 357 F. Supp. 889 (D.S.D. 1973).

2. Fundamental Fairness Applied to the Pretrial Stage of the Juvenile System

Assuming that the fundamental fairness test applies, what constitutional rights attach at the preadjudicative stage of the juvenile system? There are two approaches to this question. First, the test may be applied to constitutional rights *in toto* as they would affect juveniles. If the four criteria are satisfied, it can be argued that all constitutional rights that apply to adults should apply as well to children. Second, the test may be applied right-by-right to determine individually which rights are constitutionally required at pretrial.

Advocates of the former approach generally believe that all constitutional rights possessed by adults should be granted to children. Their argument has been based either on a literal reading of the Constitution—the Constitution does not say that it applies *only to adults*[92]—or on the equal protection clause.[93] This argument, however, has not persuaded courts, and the weight of authority is that all constitutional rights possessed by adults are not available to children.[94]

The rights possessed by adults[95] at the pretrial stage are notice,[96] probable cause determination prior to arrest,[97] counsel,[98] privilege against self-incrimination,[99] freedom from unreasonable search and seizure,[100] freedom from excessive bail,[101] and due process of law.[102] Of these rights, at the present time only the

92 Justice Black, concurring in *Gault*, declared:

> [W]here a person, infant or adult, can be seized by the State, charged, and convicted for violating a state criminal law, and then ordered by the State to be confined for six years, I think the Constitution demands requires that he be tried in accordance with the guarantees of all the provisions of the Bill of Rights made applicable to the States by the Fourteenth Amendment . . . .

387 U.S. at 61.

Justice Douglas, dissenting in *McKeiver*, explained: "The Fourteenth Amendment . . . speaks of denial of rights to 'any person,' not denial of rights to any 'adult person.' . . ." 403 U.S. at 560. *Cf.* Carver & White, *Constitutional Safeguards for the Juvenile Offender*, 14 CRIME & DELINQ. 63, 70-71 (1968) [hereinafter cited as Carver & White].

93 *Children's Liberation, supra* note 14, at 191-96. Concurring in *Gault*, Justice Black stated:

> [I]t would be a plain denial of equal protection of the laws—an invidious discrimination—to hold that others subject to heavier punishment, because they are children, be denied these same constitutional safeguards.

387 U.S. at 61.

94 In McKeiver v. Pennsylvania, 403 U.S. 528 (1971), Justice Blackmun, writing for the majority, noted:

> The Court, however, has not yet said that *all* rights constitutionally assured to an adult accused of a crime are also to be enforced or made available to the juvenile in his delinquency proceeding.

Id. at 533 (emphasis supplied).

95 For a discussion of the rights possessed by adults at the pretrial stage, see *In re* Gault, 387 U.S. 1, 29 (1967).

96 *In re* Oliver, 333 U.S. 257 (1948).

97 U.S. CONST. amend. IV. *See* Beck v. Ohio, 379 U.S. 89 (1964); Brinegar v. United States, 338 U.S. 160 (1949).

98 U.S. CONST. amend. VI, made applicable to the states by Gideon v. Wainwright, 372 U.S. 335 (1963).

99 U.S. CONST. amend. V, made applicable to the states by Malloy v. Hogan, 378 U.S. 1 (1964).

100 U.S. CONST. amend. IV, made applicable to the states by Mapp v. Ohio, 367 U.S. 643 (1961).

101 U.S. CONST. amend. VIII.

102 United States v. Wade, 388 U.S. 216 (1967) (proper identification procedures); Miranda v. Arizona, 384 U.S. 436 (1966) (in-custody protection from coerced confessions); Escobedo v. Illinois, 378 U.S. 478 (1964) (waiver of rights must be voluntary); Rochin v. California, 342 U.S. 165 (1952) (no coercive confessions). *See also* Skoler, *The Right to*

right to counsel[103] and bail[104] are not constitutionally required for children. The right to a probable cause determination[105] and reasonable searches and seizures[106] are generally applicable to children, but may be modified slightly by the juvenile process. The right to notice,[107] privilege against self-incrimination,[108] and due process of law[109] are applicable to children.

To determine if these "adult" rights should apply *in toto* to juveniles at the pretrial stage, each part of the four-part "fundamental fairness" test must be examined. There is little doubt that these rights are "vital." If they are vital to an adult, they are even more vital to a child facing possible incarceration or other stigma of contact with the system. The first criteria therefore would seem to be satisfied.

Whether the grant of these rights would remedy some defect in the juvenile system is less certain. Those who feel that any juvenile court contact leaves a social stigma contend that all these rights are essential to fair treatment by the juvenile system. Those who believe that the rehabilitative aspects of the juvenile court system outweigh any stigma explain that the defects in the present system are not significant enough to necessitate such major changes.

The latter two criteria, whether the grant of constitutional rights will cause the abandonment of a benefit or be disruptive of the juvenile process, raise conflicting answers. The benefit to be protected is the informal, flexible treatment that juveniles receive at pretrial stages of the judicial court system.[110] The only court to study this issue was concerned solely with the right to counsel for juveniles at the pretrial stage, and it concluded that such a right would be "disruptive of the juvenile process."[111] By implication, then, if the right to counsel is disruptive, the grant of rights *in toto* would also disrupt the process. However, one juvenile court experimented with a system in which the child was granted all *Gault* rights—notice, privilege against self-incrimination, and counsel—at the pretrial stage.[112] This court concluded: "The application of *Gault* to the pre-adjudicative stage of the juvenile process has not destroyed the purpose of the juvenile court but has insured procedural uniformity and the accountability of court personnel."[113]

In general, conclusions concerning the application of "fundamental fairness" to constitutional rights *in toto* depend upon subjective judgements about the effectiveness of the rehabilitative programs of the juvenile system. Those who support the court's informality and flexibility contend that extending constitutional rights to children will destroy the uniquely juvenile aspects of the

Counsel and the Role of Counsel in Juvenile Court Proceedings, 8 J. FAMILY L. 243 (1968), reprinted in 43 IND. L.J. 558 (1968) [hereinafter cited as Skoler].

103 *In re* S., 73 Misc. 2d 187, 341 N.Y.S.2d 11 (Fam. Ct. 1973).

104 Note, *The Constitutionality of Pre-Trial Juvenile Proceedings in Texas—Especially Detention,* 14 S. TEX. L.J. 434, 447 (1973) [hereinafter cited as *Pre-Trial Proceedings*].

105 PAULSEN & WHITEBREAD, *supra* note 19, at 73-78.

106 *Id.* at 80-89.

107 *In re* Gault, 387 U.S. 1, 47 (1967). *See* Carver & White, *supra* note 92, at 65-67.

108 387 U.S. at 47, 55. *See Parent's Presence, supra* note 68, at 549.

109 PAULSEN & WHITEBREAD, *supra* note 19, at 89-109.

110 *In re* S., 73 Misc. 2d 187, 191, 341 N.Y.S.2d 11, 15 (Fam. Ct. 1973).

111 *Id.*

112 Ralston, *supra* note 8, at 167.

113 *Id.* at 166.

system.[114] Those who distrust the juvenile court's informal treatment of youths explain that granting constitutional rights will not destroy the court's rehabilitative mission, but improve protection of the children. Neither argument is ultimately persuasive, but existing authority, particularly *McKeiver,* casts doubt on legal arguments that all constitutional rights should be extended to preadjudicative stages. Legal challenges are more likely to be successful when aimed at the failure to provide particular constitutional rights in diversion proceedings.

B. *The Right to Counsel During Diversion*

A particular constitutional right that has not generally been recognized at the pretrial stages of juvenile processing is the right to counsel. The sixth and fourteenth amendments guarantee the right to effective assistance of counsel.[115] The difficult question has been when does this right to counsel attach. The Supreme Court has held that a person accused of a crime "requires the guiding hand of counsel at every step in the proceeding against him,"[116] and that therefore the constitutional principle is not limited to the presence of counsel at trial. More specifically, the Court in *United States v. Wade*[117] declared that counsel is required at any "critical stage" in the prosecution of a defendant where substantial rights are affected.[118] The Court explained that to determine whether the case in question involved a "critical stage":

> [W]e scrutinize *any* pretrial confrontation of the accused 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 effective assistance at the trial itself. It calls upon us [the Court] to analyze whether potential substantial prejudice to defendant's rights inheres in the particular confrontation and the ability of counsel to help avoid that prejudice.[119]

Utilizing this test, the Court has held that the Constitution requires counsel at an arraignment,[120] a pretrial custodial interrogation,[121] pretrial lineup,[122] and a preliminary hearing.[123]

However, in *Kirby v. Illinois,*[124] the Court appeared to limit the "critical stage" test when it explained that "the right to counsel attaches only at or after the time that adversary judicial proceedings have been initiated against [the defendant]."[125] Holding that counsel was not required at a preindictment show-up, the Court stated that such judicial proceedings begin upon the occurrence of a

114 73 Misc. 2d at 191, 341 N.Y.S.2d at 15.
115 Argersinger v. Hamlin, 407 U.S. 25 (1972); Gideon v. Wainwright, 372 U.S. 335 (1963).
116 Powell v. Alabama, 287 U.S. 45, 69 (1932).
117 388 U.S. 218 (1967).
118 *Id.* at 224.
119 *Id.* at 227.
120 Powell v. Alabama, 287 U.S. 45 (1932).
121 Miranda v. Arizona, 384 U.S. 436 (1966).
122 United States v. Wade, 388 U.S. 218 (1967).
123 Coleman v. Alabama, 399 U.S. 1 (1970).
124 406 U.S. 682 (1972).
125 *Id.* at 688.

"formal charge, preliminary hearing, indictment, information, or arraignment."[126] A further limitation on a "critical stage" was recently added in *Gerstein v. Pugh*.[127] There, the Court held that counsel was not constitutionally required at a probable cause hearing addressed precisely to the issue of pretrial detention (as distinguished from a probable cause hearing which contained elements of a preliminary hearing as well as the pretrial custody determination).[128]

The effect of *Kirby* and *Gerstein* on the right to counsel at the pretrial diversionary stage *prior* to charges being initiated is uncertain.[129] *Kirby* indicates that the right to counsel does not attach until the decision has been made to prosecute; any actions prior to that stage do not require the presence of defense counsel. The Court explained in *Kirby*:

> The initiation of judicial criminal proceedings 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 position of government and the 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. It is this point, therefore, that marks the commencement of the "criminal prosecution" to which alone the explicit guarantees of the Sixth Amendment are applicable.[130]

On the other hand, the holding in *Wade*, that counsel is required in any "critical stage" of the prosecution, still applies. The basis for the Court's decision in *Wade* was that: "[T]he accused is guaranteed that he need not stand alone against the state at any stage of the prosecution, *formal of informal*, in court or out, where counsel's absence might derogate from the accused's right to a fair trial."[131] *Kirby*'s holding that a preindictment identification was not a "critical stage" in the criminal prosecution does not necessarily foreclose a finding that pretrial diversion is a critical stage. Indeed, the Court has declared that a child has a constitutional right to counsel at a waiver proceeding,[132] which is a pretrial occurrence. The Court in *Gault*, however, specifically refused to rule on whether the right to counsel applies at other stages of the juvenile system;[133] thus the constitutional status of the right to counsel at pretrial diversion is uncertain.[134]

126 *Id.* at 689.
127 420 U.S. 103 (1975).
128 *Id.* at 108.
129 Where pretrial diversion occurs after formal charges have been initiated, the defendants clearly have the right to counsel. ABA COMM'N ON CORRECTIONAL FACILITIES & SERVICES, LEGAL ISSUES AND CHARACTERISTICS OF PRETRIAL INTERVENTION PROGRAMS (1974) [hereinafter cited as ABA COMM'N].
130 406 U.S. at 489-90 (1972).
131 388 U.S. 218, 226 (1967) (emphasis added).
132 Kent v. United States, 383 U.S. 541, 561-62 (1966).
133 *In re* Gault, 387 U.S. 1, 31 n.48 (1967). Some states require the appointment of counsel immediately after the juvenile is taken into custody. *See* statutes cited in Ferster, Courtless & Snethen, *Separating Official and Unofficial Delinquents: Juvenile Court Intake*, 55 IOWA L. REV. 864, 892 (1970) [hereinafter cited as Ferster]. Only one state, however, specifically requires counsel at the diversion proceeding. *See* COLO. REV. STAT. ANN. § 19-3-101 (1973).
134 Most of the adult diversionary programs in operation in the United States today do not provide counsel for the defendants. *See* Balck, *Deferred Prosecution: The Juvenilization of the Criminal Justice System*, 38 FED. PROBATION 46, 48 (1974); Note, *Pretrial Diversion from the Criminal Process*, 83 YALE L.J. 827, 840-42 (1974).

1. Arguments Against Juvenile Right to Counsel at Diversionary Stage

Arguments opposing right to counsel at pretrial diversion are: (1) *Kirby* holds that there is no such right; (2) *Wade* does not apply at pretrial diversion, for the right to a fair trial is not endangered and therefore does not involve a "critical stage"; and, (3) an examination of the right to counsel at this stage in accordance with the four-part "due process" test reveals that the grant of counsel would disrupt the juvenile system.

The first of these arguments proceeds by applying *Kirby* to the diversion process. In most instances,[135] the diversion decision is made prior to initiation of the formal criminal process when the right to counsel attaches according to *Kirby*. The police decision to refer a case to juvenile court or dispose of it in another way, the intake official's decision to forward the case to trial or divert it to some informal program, and the community social service agency decision to terminate a child's informal treatment and refer the case to juvenile court are all made before the criminal process begins.

Examination of *Kirby* also rebuts the argument that *Wade* requires counsel at the diversion decision because diversion is a "critical stage." *Kirby* specifically distinguished the ruling in *Wade* and *Gilbert v. California*:[136] "The rationale of those cases was that an accused is entitled to counsel at any 'critical stage' of the *prosecution*."[137] The key word, as emphasized by Justice Stewart, is "prosecution." Where, as in pretrial diversion, the formal prosecution stage of the criminal process has not started, then the right to counsel does not attach.

Secondly, while the *Wade* "critical stage" holding can be used to support granting the right to counsel to juveniles at the diversion proceeding, opponents explain that this interpretation is incorrect. *Wade* holds that counsel must be provided "where counsel's absence might derogate from the accused's right to a fair trial."[138] The basis for the Court's holding is that "the presence of . . . counsel is necessary to preserve the defendant's basic right to a fair trial."[139] The Court's reason for insisting upon counsel for a criminal defendant is to ensure a fair trial. In juvenile pretrial diversion, however, any investigation and subsequent decision by police or officials will not affect the fairness of the child's trial. The diversion decision merely determines whether or not the youth will go to trial. This is especially true in those states which expressly prohibit the use of any admissions or confessions made by the child at the diversion proceeding as evidence at a later adjudicatory hearing.[140] The third argument applies the due process "fundamental fairness" test to right to counsel. The only case on this issue, *In re S.*,[141] decided by the Family Court of the City of New York, did not

135 It is usually only after the initiation of the criminal process—the filing of the petition—that diversion decisions are made by the prosecutor, court official, or judge.

136 388 U.S. 263 (1967).

137 Kirby v. Illinois, 406 U.S. 682, 690 (1972).

138 388 U.S. at 226. The Court identified a critical stage as "those pretrial procedures that would impair a defense on the merits if the accused is required to proceed without counsel." *Cf.* Gerstein v. Pugh, 420 U.S. 103 (1975).

139 388 U.S. at 227.

140 Ferster, *supra* note 133, at 889; Foster & Freed, *Family Law, 1973 Survey of New York Law*, 25 SYRA. L. REV. 401, 425 (1974) [hereinafter cited as Foster & Freed]. *Contra*, Skoler, *supra* note 102, at 568.

141 73 Misc. 2d 187, 341 N.Y.S.2d 11 (Fam. Ct. 1973).

discuss the first three criteria of the test, but based its decision on the last factor, disruption of the juvenile process. After examining the legal basis for this criterion, *McKeiver v. Pennsylvania,*[142] the court concluded:

> [T]he presence of counsel at informal intake would in effect convert that conference to a formal rigid adversary proceeding, halting the free exchange of ideas which is buttressed by statutory absolute privilege, and relegating this conference to the redundancy of a minor trial prior to a trial, thereby emasculating the innovative techniques of probation services.[143]

Thus, opponents of the right to counsel at the preadjudication diversion will contend that the presence of the attorney would disrupt the flexibility of the unique juvenile system, and therefore the right to counsel for juveniles should not attach.[144]

2. Arguments for Juvenile Right to Counsel at Diversionary Stage

Proponents of the right to counsel for juveniles also base their arguments on *Wade, Kirby,* and the "due process" test. They contend that the pretrial diversion is a "critical stage" within the meaning of *Wade,* and, further, that the presence of counsel would not disrupt the juvenile court process.

A central theme of the argument for the right to counsel at preadjudicative juvenile proceedings for juveniles is that *Kirby* and *Wade* should be liberally construed. What is important to understand, proponents argue, is the basis of the decision in *Wade,* that an accused should be provided counsel to protect his rights at any critically important stage in the criminal process. The Court's language demonstrates its desire for the protection that counsel can provide the accused. "[T]he accused is guaranteed that he need not stand alone against the state at any stage of the prosecution, formal or informal, in court or out."[145] If the Court is concerned with an adult "standing alone" against the state, they should be doubly cautious when a child stands alone against the prosecutor.[146]

Legal commentators are in near unanimous agreement that the diversion proceeding is a critical stage.[147] The diversion decision determines whether a petition will be filed and a formal delinquency hearing held,[148] whether the case will be dismissed or diverted to some unofficial resolution,[149] whether any official delinquency and resultant stigma will attach,[150] and whether, in jurisdictions

142 403 U.S. 528 (1972).
143 73 Misc. 2d at 191, 341 N.Y.S.2d at 15.
144 *See* note 39 & accompanying text *supra.*
145 388 U.S. at 224.
146 *See* Note, *Interrogation*—Parens Patriae v. Miranda: *Conflicting Interests,* 3 SETON HALL L. REV. 482, 489 (1972).
147 ABA COMM'N, *supra* note 129, at 11; Paulsen, *supra* note 17, at 189; Skoler, *supra* note 102, at 567; *Pre-Trial Proceedings, supra* note 104, at 443; Note, *The Need for Counsel in the Juvenile Justice System: Due Process Overdue,* 1974 UTAH L. REV. 333, 345 [hereinafter cited as *Need for Counsel*].
148 Skoler, *supra* note 102, at 567; *Need for Counsel, supra* note 147, at 346-48.
149 Comment, *The Role of the Attorney in Juvenile Court Intake Processes,* 13 ST. LOUIS U. L.J. 69, 80 (1968) [hereinafter cited as *Role of Attorney*]; *Need for Counsel, supra* note 147, at 346-48.
150 Skoler, *supra* note 102, at 567.

where the intake official makes the detention decision, the child will be confined until the court hearing.[151]

Furthermore, the diversion proceeding is "critical" because at this stage the child's privilege against self-incrimination is in jeopardy.[152] *Gault* held that juveniles were entitled to the constitutional protection against self-incrimination at any criminal interrogation:

> We conclude that the constitutional privilege against self-incrimination is applicable in the case of juveniles as it is with respect to adults . . . . The participation of counsel will, of course, assist the police . . . in administering the privilege.[153]

Once it is clear that juveniles have the right against self-incrimination, it is important to determine when this privilege attaches. *Miranda v. Arizona*[154] held that the right was effective at any "custodial interrogation." No court has considered whether a juvenile diversion proceeding is such a "custodial interrogation," but a convincing argument can be made that it is. At intake, the court officials question the child about the alleged offense. The child's answers may be used against him in a variety of ways. It may form the basis of the intake officer's decision to divert the case or refer it to court, clearly a crucial decision to the child. It may be used to impeach the youth's court testimony in any later trial, and, in most states, it may even be used against the child as a valid confession in a later court adjudication.[155] Again, the reason for granting the right to counsel to adults at pretrial custodial interrogations is equally applicable, if not more applicable, to children. It has been argued that because of their age and lack of education, children need greater protections than adults when confronted with official interrogation.[156]

The diversion proceeding should therefore be considered an exceptionally "critical stage" in the juvenile process. As such, counsel is necessary for the child so that his right against self-incrimination may be protected and so that he will not face the state "alone" when the crucial diversion decision is made. This conclusion is supportable even in light of the *Gault* decision requiring counsel only at the adjudicatory hearing. William Ralston summarizes:

> [T]he Court's statement that the decision did not extend to the preadjudication stages seems inconsistent with its holdings relating to the right to an attorney, the right against self-incrimination, and the general application of *Miranda,* as well as the Court's statement that the assistance of counsel is essential at every step of the delinquency proceeding against a child.[157]

151 *Id. See Pre-Trial Proceedings, supra* note 104, at 443-44; *Need for Counsel, supra* note 147, at 353-56.
152 *Need for Counsel, supra* note 147, at 346.
153 387 U.S. at 55.
154 384 U.S. 436 (1966).
155 Skoler, *supra* note 102, at 568. A few states, however, prohibit the use of a child's intake conversations in any later court hearing. *See* Ferster, *supra* note 134, at 890-91.
156 *Need for Counsel, supra* note 147, at 342-44, 346. *See also In re* Gault, 387 U.S. 1, 44-56 (1967).
157 Ralston, *supra* note 8, at 165.

As noted earlier,[158] one court has held that the *Kent-Winship-McKeiver* due process test does not justify the extension of the right to counsel for juveniles at the intake stage. Those who advocate the right to counsel for juveniles question the correctness of this ruling.[159] They contend that granting the right to counsel will not disrupt the juvenile process, but will improve it. The attorney can provide needed information to the intake officials concerning the personal aspects of each case, the child's behavior, attitude, home life, and future plans.[160] The counsel can more effectively present the views of the parents and child, who may lack refined communication skills.[161] Additionally, the lawyer may by his mere presence ensure that the intake staff or any other official does not take action contrary to the child's welfare or the law.[162]

One juvenile court has experimented with granting all the *Gault* rights, including the right to counsel, to juveniles at the intake stage. Its conclusion is this:

> The application of *Gault* to the pre-adjudication process has not destroyed the purpose of the juvenile court, but has insured procedural uniformity and the accountability of court personnel . . . . Parents and the accused child usually appreciate the fact that their case has not been prejudged by intake personnel and are more receptive to the interview. In most instances, they are pleased that their case can be adjusted without court action and agree to cooperate in any programs . . . .[163]

In addition to helping rather than disrupting the intake process, extending the right to counsel to the pretrial stage meets the other criteria of the "due process" test. It can be argued that the counsel's presence is vital, both to protect the child's legal rights and to present the youth's personal case. The presence of counsel would also remedy a defect in the juvenile process, that of making critical decisions without legal protections. Further, the right to counsel would not compel the abandonment of any substantial benefit to the juvenile; the process could operate with a variety of flexible and individualized treatment alternatives and still maintain the benefits of informality, including lack of a "criminal" record, no loss of civil rights, confidentiality, and flexibility in disposition.

The proponents, then, would conclude that the due process test has been satisfied; that "fundamental fairness" requires that counsel be provided to children at the pretrial diversion stage. Alternatively, they would argue that the pretrial diversion proceeding is a "critical stage" under *Wade* and, therefore, counsel must attach at that time. Their arguments are convincing and supported by *Gault*. Despite the fact that the holding in *Gault* was limited to the adjudication stage of the juvenile process, the language of the decision displays the importance which the Supreme Court attributes to the assistance of counsel.

158 *See* text accompanying notes 136-37 *supra*.
159 Foster & Freed, *supra* note 140, at 425; Skoler, *supra* note 102, at 566-68.
160 *S. Dak. Juveniles, supra* note 15, at 218.
161 Paulsen, *supra* note 17, at 188-89.
162 *Role of Attorney, supra* note 149, at 71.
163 Ralston, *supra* note 8, at 167. This experiment took place in the Juvenile and Domestic Court of Falls Church, Va.

> The juvenile needs the assistance of counsel to cope with problems of law, to make a skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it. *The child requires the guiding hand of counsel at every step in the proceedings against him.*[164]

C. *Right to Probable Cause Determination Prior to Diversion*

One of the functions of intake is to determine if there is sufficient evidence to support a finding of probable cause that the juvenile committed the offense alleged. This determination is intended to ensure the dismissal of any case referred to juvenile court that lacks probable cause to believe the child committed the criminal act. However, since an intake official has practically absolute discretion in handling a case, it is to be expected that cases are either referred to court or diverted even though there may be no probable cause to believe the child committed the offense. This raises the issue whether a juvenile has a constitutional right to a probable cause determination prior to any diversion decision. No cases have directly considered this question, but decisions on an analogous issue, whether a child is entitled to a probable cause hearing prior to a juvenile court trial, are in conflict.[165]

1. Constitutional Right of Adults to Probable Cause Hearing

The fourth amendment, made applicable to the states by the fourteenth amendment, requires that no person shall be seized without probable cause. Probable cause in adult cases may be determined in two ways: (1) indictment or presentment by a grand jury or (2) information filed by the prosecuting attorney.[166] While the fifth amendment to the Constitution compels the federal government to use a grand jury indictment, this requirement has not been extended to the states.[167] The states therefore may use either a prosecutor's information or a grand jury indictment to charge a person with a crime.

Historically, an accused had no right to a probable cause hearing.[168] This has been altered slightly by a recent decision of the Supreme Court. In *Gerstein v. Pugh*,[169] the Court required a probable cause hearing for an accused charged by an information "as a prerequisite to extended restraint of liberty following arrest."[170] The Court had the opportunity to require a probable cause hearing for all persons charged by an information, but declined to do so. Despite its discussion of the evils of unilateral prosecutorial discretion, and its citation of cases

164 387 U.S. at 36 (emphasis added).
165 Brown v. Fauntleroy, 442 F.2d 838 (D.C. Cir. 1971); Cooley v. Stone, 414 F.2d 1213 (D.C. Cir. 1969). *Contra,* Black Bonnett v. South Dakota, 357 F. Supp. 889 (D.S.D. 1973); M.A.P. v. Ryan, 285 A.2d 310 (D.C. Ct. App. 1971).
166 25 VAND. L. REV. 434, 436 (1972).
167 Hurtado v. California, 110 U.S. 516 (1884). This is one of only two constitutional guarantees in the Bill of Rights that has not been made applicable to the states by the fourteenth amendment.
168 Beck v. Washington, 369 U.S. 541, 545 (1962); Lem Woon v. Oregon, 229 U.S. 586 (1913); People *ex rel.* Guggenheim v. Mucci, 32 N.Y.2d 307, 310-11, 298 N.E.2d 109, 113, 301 N.Y.S.2d 389, 393 (1973); M.A.P. v. Ryan, 285 A.2d 30, 313-14 (D.C. Ct. App. 1971).
169 420 U.S. 103 (1975).
170 *Id.* at 105.

in which the Court required that a neutral and detached magistrate make the probable cause decision,[171] the Court limited its ruling to only those persons charged by an information who are in pretrial detention.

Despite the Court's failure to find that a probable cause hearing is required for all persons, the Court has consistently warned against the power of a prosecutor to unilaterally refer a case to trial[172] without a probable cause determination by a neutral and detached magistrate.[173] Likewise, the Court has required that probable cause to issue a search[174] or arrest warrant,[175] or to compel the return to custody of a paroled individual,[176] be determined by an independent judicial official.

2. Constitutional Right of Juveniles to Probable Cause Hearing

As with adults, historically there has been no constitutional right to a probable cause hearing for juveniles.[177] Since the right to a grand jury indictment has never been constitutionally required for children,[178] this means that all juvenile petitions are completed and forwarded to trial based solely on the unilateral decision of the police and intake officials.[179] The issue arises whether this is permissible under the fourth and fourteenth amendments. Several federal courts have discussed the problem in recent years with conflicting results.[180]

Cooley v. Stone[181] and *Brown v. Fauntleroy*[182] held that a pretrial probable cause hearing is constitutionally required for arrested juveniles. *Cooley* ruled that such a right was required for children detained pending trial, while *Brown* extended the right to all juveniles regardless of whether they are in custody. The basis for *Cooley,* partly relied on by the *Brown* court, is:

> No person can be lawfully held in penal custody by the state without a prompt judicial determination of probable cause. The Fourth Amendment so provides and this constitutional mandate applies to juveniles as well as adults. Such is the teaching of *Gault* and the teaching of *Kent.*[183]

171 Shadwick v. City of Tampa, 407 U.S. 345 (1972); Coolidge v. New Hampshire, 403 U.S. 443 (1970); Albrecht v. United States, 273 U.S. 1 (1927).
172 McNabb v. United States, 318 U.S. 332, 342 (1942).
173 Coolidge v. New Hampshire, 403 U.S. 443 (1970); Giordenello v. United States, 357 U.S. 480 (1958); Mallory v. United States, 354 U.S. 449 (1957); McNabb v. United States, 318 U.S. 332 (1942).
174 United States v. United States Dist. Court, 407 U.S. 297 (1972).
175 Shadwick v. City of Tampa, 407 U.S. 345 (1972); Giordenello v. United States, 357 U.S. 480 (1958); Albrecht v. United States, 273 U.S. 1 (1927).
176 Morrissey v. Brewer, 408 U.S. 471 (1971).
177 People *ex rel.* Guggenheim v. Mucci, 32 N.Y.2d 307, 310, 298 N.E.2d 109, 113, 301 N.Y.S.2d 389, 393 (1973).
178 *Id.*
179 *See generally* Kent v. United States, 383 U.S. 541, 543 n.3 (1966); People *ex rel.* Guggenheim v. Mucci, 32 N.Y.2d 307, 310, 298 N.E.2d 109, 113, 301 N.Y.S.2d 389, 393 (1973).
180 Brown v. Fauntleroy, 442 F.2d 838 (D.C. Cir. 1971); Cooley v. Stone, 414 F.2d 1213 (D.C. Cir. 1969); Black Bonnett v. South Dakota, 257 F. Supp. 889 (D.S.D. 1973); M.A.P. v. Ryan, 285 A.2d 310 (D.C. Ct. App. 1971).
181 414 F.2d 1213 (D.C. Cir. 1969).
182 442 F.2d 838 (D.C. Cir. 1971).
183 Cooley v. Stone, 414 F.2d 1213 (D.C. Cir. 1969). *See* Brown v. Fauntleroy, 442 F.2d 838, 839 (D.C. Cir. 1971).

M.A.P. v. Regan,[184] which held that a probable cause hearing before trial is not required for children, pointed out that the *Cooley* rationale is presumptuous. *M.A.P.* explained that it has not been definitely declared that there is a constitutional right to a probable cause hearing for adults; therefore, there is no such right for juveniles.[185]

The alternative basis for *Brown* is more convincing. *Brown* noted that the probable cause hearing is constitutionally required, for "[the child] has the right to have the validity of the seizure [arrest] determined since he will be called to trial for conduct which led to the seizure."[186] *Brown* explained that "[u]nless probable cause is at the foundation of the status in which [the juvenile] is placed by the arrest, it is an unlawful status imposed by public authority."[187] The essence of this argument is that a pretrial probable cause hearing requirement derives from the constitutional necessity of probable cause for arrest. This argument especially applies to juveniles, since they are arrested and referred to juvenile court without grand jury indictment or any other type of probable cause determination.

M.A.P. disagreed with this *Brown* rationale as well, but not as convincingly. *M.A.P.* explained that the "purpose of a preliminary hearing is to determine whether there is probable cause to hold the accused and not whether there was cause to arrest him."[188] Therefore, *M.A.P.* reasons, the determination at a pretrial hearing is separate from probable cause for arrest. The court in *M.A.P.* is right in stating that a purpose of the preliminary hearing is to determine whether there is cause to detain the accused. But it is wrong in asserting that that is the only function, for another purpose of the preliminary hearing is to determine if there is sufficient cause to refer the case to trial. For juveniles, who are arrested and referred to trial without any probable cause determination, such a hearing is essential.

A remaining issue is whether the right to a probable cause hearing would satisfy the *Kent-Winship-McKeiver* "due process" test. The right to probable cause determination is "vital"; it is explicitly provided for in the fourth amendment to the United States Constitution. The grant of such a right would remedy the present untenable situation in which a child is bound over for trial or receives some informal disposition without a reasonable showing that he has committed the offense alleged. Additionally, extending the right to a probable cause determination would not disrupt the juvenile process nor prevent the child from receiving any of the benefits to be gained from the system. At most, the probable cause determination would be a minor inconvenience to the juvenile system and in no way affect its rehabilitative objective.

Under the fourth and fourteenth amendments, therefore, a probable cause hearing for juveniles should be required.

184 285 A.2d 310 (D.C. Ct. App. 1971).
185 *Id.* at 313-15.
186 442 F.2d at 842.
187 *Id.*
188 285 A.2d at 315.

3. Juvenile Right to Probable Cause Determination Prior to Diversion

While decisions on the juvenile's constitutional right to a probable cause hearing are in conflict, the better position is that a probable cause hearing is compelled by the fourth and fourteenth amendments, as declared by *Brown v. Fauntleroy*.[189] A remaining issue, crucial to the thousands of juveniles diverted each year from the juvenile court, is whether such a hearing must be held prior to any diversion decision by court intake personnel.

The initial reaction to this question is that no hearing need be conducted since diversion to some informal disposition is not an adjudicated court decision. A diversion decision results in no court trial, no determination of delinquency, and no juvenile court stigma. Diversion may, however, result in loss of liberty, loss of money, and the establishment of a police and court contact record. *Gerstein v. Pugh*,[190] citing the "significant restraint[s] on liberty"[191] imposed by pretrial detention and pretrial release conditions,[192] held that a probable cause hearing was necessary for an accused placed in custody after being charged by an information.[193] Even though juvenile preadjudication diversion does not result in penal custody, it generally does deprive the child of liberty in some manner. If pretrial release conditions are sufficient to require a probable cause hearing, then pretrial diversionary restrictions deserve similar procedures.

To the diverted child, the diversion decision is in effect the adjudication and disposition of his case. If he does not get a probable cause determination prior to the diversion decision, he will never get one. The result, then, would be a criminal charge and disposition, without a probable cause determination by a neutral and detached person. In view of these consequences, informal disposition should not occur unless a probable cause determination has been made.

IV. Further Recommendations for Protection of Juvenile Rights During Diversion

Constitutional doctrines describe a core of individual rights which the state is legally bound to respect, but these doctrines should not be regarded as more than a minimum standard for protection of individual rights. Scrutiny of the diversion process, therefore, should go beyond constitutional rights. Certain diversion practices, while not necessarily unconstitutional, are undesirable because they either unjustifiably infringe on the juvenile's liberty or hinder the juvenile system's goal of rehabilitation.

A. *Statutory Time Limits Must Be Placed on Diversion Programs*

One repeated criticism of the present diversion system is the lack of time limits on diversion programs.[194] Instances have been cited in which a child has

189 442 F.2d 838 (D.C. Cir. 1971).
190 420 U.S. 103 (1975).
191 *Id.* at 105.
192 *Id.*
193 *Id.*
194 Seymour, *Youth Service Bureaus*, 7 LAW & SOC'Y REV. 247, 269 (1972).

been kept on informal probation for several years,[195] or a case delayed for many months, while the intake officer decided whether to refer the case to juvenile court.[196]

These flagrant examples of improper use of diversion should be prevented, and recently state statutes have been amended to do just that.[197] The National Advisory Commission on Criminal Justice Standards and Goals has proposed a 30- or 60-day limit for reaching some type of diversion agreement, and recommends that the period of supervision be limited to six months.[198] It seems appropriate, therefore, to require that state juvenile statutes be amended to provide that the intake staff have 60 days to either informally divert a case, dismiss it, or refer it for court adjudication.[199] Additionally, state law should place a six-month limit on the duration of any diversion program.[200]

B. *Juvenile Statements Made During Diversion Conferences Must Be Prohibited from Use in Any Later Court Proceeding*

Statements made by a child during diversion conferences can be critically important. They are used to determine whether the child should be diverted from juvenile court and what type of program he should enter, and in most states they may be used against the child in a later court proceeding as a lawful confession, or to impeach the child's in-court testimony.

A few states prohibit the later in-court use of pretrial conference statements,[201] and others should follow suit. The goal of the juvenile justice system is rehabilitation, and diversion is now the recommended method of accomplishing that goal. This rehabilitation effort is hindered when statements made by the child in pretrial diversion discussions can later be used against him. With a constructive diversion program as the objective, the child is urged to talk and to cooperate fully with the intake staff. In this manner, an informal and personal diversion program can be agreed upon by the intake officer, child, parent, and counsel. To permit the child's statements to be used against him in court not only inhibits free and productive discussion, but is a practice that can only reduce the child's respect for the legal system. Using these statements against the child in subsequent juvenile proceedings should be statutorily prohibited.[202]

195 Wallace & Brennan, *supra* note 37, at 445.

196 *The Police, supra* note 51, at 790.

197 New York allows two months to reach an informal adjustment. N.Y. FAMILY CT. ACT § 734(c) (McKinney 1963). California intake staffs have six months in which to achieve an informal disposition. CAL. WELF. & INST'NS CODE § 654 (West 1975). Texas state law authorizes informal adjustment, but does not permit it to exceed six months. TEX FAM. CODE ANN. § 53.03 (1975).

198 NATIONAL ADVISORY COMM'N ON CRIM. JUSTICE STANDARDS & GOALS, CORRECTIONS Std. 8.2 (1973) [hereinafter cited as NAT'L ADVISORY COMM'N].

199 Ferster & Courtless, *The Intake Process in the Affluent County Juvenile Court,* 22 HASTINGS L.J. 1127, 1152 (1971) [hereinafter cited as Ferster & Courtless].

200 Gough, *supra* note 39, at 738; Comment, *The Consent Decree and New York Family Court Procedure in "JD" and "PINS" Cases,* 23 SYRA. L. REV. 1211, 1223 (1972) [hereinafter cited as *N.Y. Consent Decree*].

201 ILL. ANN. STAT. ch. 37, §§ 703-8(5) (Smith-Hurd 1972); N.Y. FAMILY CT. ACT §§ 334, 735 (McKinney 1963).

202 NAT'L ADVISORY COMM'N, *supra* note 198, at Std. 8.2; Gough, *supra* note 39, at 738; *S. Dak. Juveniles, supra* note 15, at 218.

C. *The Petitioner Should Not Be Permitted Absolute Authority to Refer a Child to Juvenile Court*

Most state laws permit a petitioner to refer a juvenile case to court no matter what other disposition is recommended by the police, intake staff, or probation service.[203] These provisions are justified by the principle of retribution: the victim of the child's act should have the right to require the juvenile to appear in court.[204]

This justification is insufficient, however, for two reasons. First, the juvenile court system does not exist to vindicate private wrongs,[205] but to rehabilitate juvenile offenders. Second, even the victim of a crime committed by an adult does not have the right to require the alleged perpetrator to appear in court; only a grand jury or magistrate has such authority.[206]

One article has suggested as a middle ground that the intake staff have authority to refuse to refer a case to court, and the frustrated complainant can protest such a decision in writing to the juvenile judge.[207] The Department of Health, Education, and Welfare's Model Act for Family Courts recommends that a frustrated petitioner be permitted to appeal to the juvenile court prosecutor.[208] These provisions are an improvement over the present situation, but they are too modest. When the intake staff makes a referral decision, it should not be subject to challenge by the petitioner. His interest in vindication is clearly subordinate to the juvenile system's rehabilitative objective, and juvenile court officers are qualified to judge the facts in that perspective.

V. Conclusion

Diversion has become the recommended technique in combating youth crime, and the advantages are manifest. It offers a flexible, innovative, and relatively informal approach to juvenile delinquency that allows emphasis on rehabilitation of the child and minimizes the stigma of criminality.

But diversion is not without its problems. Serious constitutional questions are raised by present diversion practices. With increased use of diversion should come procedural safeguards to ensure that the advantages of the technique do not run roughshod over the rights of the children. Foremost among the constitutional shortcomings of the present diversion system is that counsel is not available to the child during diversionary proceedings. When one-half of all cases referred to juvenile court are diverted, it clearly is a "critical stage"; the right to counsel should attach. Second, there should be an affirmative determination prior to any diversion decision that probable cause exists to believe that the apprehended child has committed the alleged offense. Not only is this requirement constitutionally mandated, but it is good police and court practice.

203 *E.g.*, N.Y. FAMILY CT. ACT § 734(b) (McKinney 1963).
204 *N.Y. Consent Decree, supra* note 200, at 1218.
205 *In re* R., 67 Misc. 2d 452, 454, 323 N.Y.S.2d 909, 911 (Fam. Ct. 1971).
206 *N.Y. Consent Decree, supra* note 200, at 1219.
207 Ferster & Courtless, *supra* note 199, at 1150.
208 OFFICE OF YOUTH DEV., U.S. DEPT. OF HEALTH, EDUC. & WELFARE, MODEL ACTS FOR FAMILY COURTS AND STATE-LOCAL CHILDREN'S PROGRAMS 64 (1974).

Certain nonconstitutional deficiencies in the juvenile system should also be corrected. Time limits should be set for making the diversion decision so that the juvenile offender does not languish in uncertainty. In order that juveniles not feel inhibited about discussing their alleged offense in diversionary conferences, prohibitions against subsequent use of statements made in these conferences should be legislated. And finally, to protect the rehabilitative purpose of the juvenile court system, petitioners should be stripped of their right to demand adjudication.

The idea of diversion is excellent. But the acceptance and effectiveness of the program are reduced by its insufficient respect for the rights of the child. By instituting these recommended constitutional and procedural safeguards, diversion should become an even more useful process in the effort to curb juvenile delinquency.