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## An Analysis of State Pretrial Diversion Statutes

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# An Analysis of State Pretrial Diversion Statutes

## I. INTRODUCTION

Pretrial Diversion (PTD) is a formalized procedure whereby eligible criminal defendants have their prosecution suspended for a specified period. During this period, a defendant participates in a community based rehabilitation program, which may include counseling, education, supervision, and medical and psychological treatment.<sup>1</sup> If the defendant completes the program successfully, the charges against him are dismissed. Should he fail to complete the program, his case is returned to the normal channels of the criminal justice system.<sup>2</sup>

The benefits of PTD are threefold. The defendant profits because he receives needed treatment while avoiding the stigma of a criminal prosecution and possible conviction.<sup>3</sup> Society gains as individuals are rehabilitated and returned to the community as productive citizens.<sup>4</sup> Finally, the criminal justice system benefits because the court docket is unburdened and judicial resources are conserved for use in more serious cases.<sup>5</sup>

The origin of PTD may ultimately be found in the criminal procedures of parole and probation, and the traditional prosecutorial option to dismiss charges or decline to prosecute.<sup>6</sup> The initial impetus for the development of formal PTD programs came from a 1967 report prepared by the President's Commission on Law Enforcement and Administration of Justice.<sup>7</sup> Since that time, formal diversion programs have been established by city,<sup>8</sup> county,<sup>9</sup> and

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1. R. NIMMER, *DIVERSION; THE SEARCH FOR ALTERNATIVE FORMS OF PROSECUTION* (1974); NATIONAL PRETRIAL INTERVENTION SERVICE CENTER OF THE ABA COMMISSION ON CORRECTIONAL FACILITIES AND SERVICES, *LEGAL ISSUES AND CHARACTERISTICS OF PRETRIAL INTERVENTION PROGRAMS* [hereinafter cited as *LEGAL ISSUES OF PTD*], reprinted in 4 CAP. U. L. REV. 37 (1975); *Criminal Practice—Pretrial Intervention Programs—An Innovative Reform of the Criminal Justice System*, 28 RUTGERS L. REV. 1203, 1203-07 (1975); *Pretrial Diversion from the Criminal Process*, 83 YALE L. J. 827, 827-32 (1974).

2. See note 1 *supra*.

3. See note 1 *supra*.

4. See note 1 *supra*.

5. See note 1 *supra*.

6. *State v. Leonardis*, 71 N.J. 85, 93, 363 A.2d 321, 325 (1976).

7. THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* 134 (1967).

8. Three pilot programs, which preceded broader implementation of PTD as a method of rehabilitation, were the Manhattan Court Employment Project, the District of Columbia's

state governments.<sup>10</sup>

Much can be gained from the enactment of PTD statutes at the state level. First, state statutes impart a greater degree of uniformity, predictability, and evenhandedness to the diversion process.<sup>11</sup> Thus, the image of the state criminal justice system improves as the articulation of formal standards for diversion decreases the likelihood of decisions which are arbitrary or based on unacceptable criteria or inducements.<sup>12</sup>

Second, state PTD statutes help establish diversion as an ongoing process.<sup>13</sup> In so doing, the statutes guarantee that all defendants have equal access to diversion programs and create specialized programs which provide needed assistance to a greater number of individuals.<sup>14</sup>

Finally, state PTD programs may provide funding for community diversion programs—programs which may be the most effective way to rehabilitate defendants and return them to the community as productive citizens.<sup>15</sup>

Thus far, Arkansas, Colorado, Connecticut, Florida, Massachusetts, Tennessee, and Washington have enacted PTD statutes.<sup>16</sup> The statutes differ significantly in their handling of the following issues: (1) the appropriate roles for the prosecutor and the court with respect to the ultimate decision to divert a defendant, (2) the appropriate procedure for terminating a defendant's participation in PTD, and (3) the appropriate criteria for admission to PTD pro-

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"Project Crossroads" and the Flint, Michigan Citizens Probation Authority.

9. See note 215 and accompanying text *infra*.

10. See notes 19-41 and accompanying text *infra*.

11. *Criminal Practice—Pretrial Intervention Programs—An Innovative Reform of the Criminal Justice System*, *supra* note 1, at 1206-07.

12. *Commonwealth v. Kindness*, 247 Pa. Super. Ct. 99, 371 A.2d 1346 (1977).

13. THE NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, COURTS 33 (1973) [hereinafter cited as COURTS] stated:

But in many areas the need is for specific ongoing programs with well-defined procedures and criteria for selecting defendants to be diverted and for supplying them with services following diversion. Many problems underlying the commission of crimes are prevalent enough to justify specialized programs that provide assistance to many persons. An ad hoc approach to programs is much less efficient. In addition, defendants are entitled to equal access to diversion programs. This right can be respected only by the development of regular methods for determining the appropriateness of diversion in each case. In many cases diversion should be attempted only when an ongoing program of established value is available to handle the diverted offenders.

*Id.*

14. *Id.*

15. *State v. Leonardis*, 71 N.J. 85, 363 A.2d 321 (1976).

16. See note 19 and accompanying text *infra*.

grams.<sup>17</sup> This article analyzes the state statutory provisions dealing with each of these issues. In so doing, the article develops a broad conceptual framework which may offer some guidance to the draftsmen of future state PTD legislation.<sup>18</sup>

## II. EXISTING STATUTES

All of the state Pretrial Diversion statutes follow a similar pattern. Initially, the statutes define exactly which criminal defendants are eligible for diversion.<sup>19</sup> Typical provisions addressing eligibility provide that a defendant is eligible for PTD if he has no previous record of conviction,<sup>20</sup> has never participated in a PTD program,<sup>21</sup> and is accused of a crime that is not of a serious nature.<sup>22</sup> Further conditions require a defendant to waive his right to a speedy trial,<sup>23</sup> agree to a tolling of the applicable statute of limitations,<sup>24</sup> and consent to participation in the PTD program.<sup>25</sup> Arkansas conditions a defendant's eligibility on the entering of a guilty plea to the crime

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17. See notes 19-41 and accompanying text *infra*.

18. This article shares the view expressed in *LEGAL ISSUES OF PTD*, *supra* note 1, at 40-41:

This focus, then, on legal issues is meant neither to rigidify or unduly bureaucratize the promising alternative to prosecution presented by the [PTD] concept. The very scrutiny afforded here may seem calculated to that end—and, in some degree, this is inevitable. However, by virtue of its rapid growth and nature, pretrial intervention must be prepared to pass legal muster and enjoy an optimal legal environment. . . . To this end, open dialogue on legal issues and how to cope with them effectively may have much to offer for the future of the concept.

19. ARK. STAT. ANN. § 43-1232 (Supp. 1977); COLO. REV. STAT. ANN. § 16-7-401 (Supp. 1978); CONN. GEN. STAT. ANN. § 54-76p (West Supp. 1979); FLA. STAT. ANN. § 944.025(2) (West Supp. 1978); MASS. ANN. LAWS ch. 276A (Michie/Law. Co-op Supp. 1978); TENN. CODE ANN. § 40-2108 (Supp. 1978); WASH. REV. CODE ANN. § 9.95A.030 (1977).

20. ARK. STAT. ANN. § 43-1232 (Supp. 1977); CONN. GEN. STAT. ANN. § 54-76p (West Supp. 1979); FLA. STAT. ANN. § 944.025(2) (West Supp. 1978); MASS. ANN. LAWS ch. 276A, § 2 (Michie/Law. Co-op Supp. 1978); TENN. CODE ANN. § 40-2108(a) (Supp. 1978).

21. ARK. STAT. ANN. § 43-1234 (Supp. 1977); CONN. GEN. STAT. ANN. § 54-76p (West Supp. 1979); FLA. STAT. ANN. § 944.025(2) (West Supp. 1978).

22. CONN. GEN. STAT. ANN. § 54-76p (West Supp. 1979); TENN. CODE ANN. § 40-2908(a) (Supp. 1978).

23. COLO. REV. STAT. ANN. § 16-7-401(3) (Supp. 1978); CONN. GEN. STAT. ANN. § 54-76p (West Supp. 1979); FLA. STAT. ANN. § 944.025(2) (West Supp. 1978); MASS. ANN. LAWS ch. 276A, § 5 (Michie/Law. Co-op Supp. 1978); TENN. CODE ANN. § 40-2108(a) (Supp. 1978).

24. CONN. GEN. STAT. ANN. § 54-76p (West Supp. 1979); TENN. CODE ANN. § 40-2108(a) (Supp. 1978).

25. COLO. REV. STAT. ANN. § 16-7-401(1) (Supp. 1978); CONN. GEN. STAT. ANN. § 54-76p (West Supp. 1979); FLA. STAT. ANN. § 944.025(2) (West Supp. 1978); MASS. ANN. LAWS ch. 276A, § 5 (Michie/Law. Co-op Supp. 1978); TENN. CODE ANN. § 40-2108(a) (Supp. 1978); WASH. REV. STAT. ANN. § 9.95A.030 (1977).

for which diversion is being considered,<sup>26</sup> and Massachusetts limits eligibility to defendants between the ages of seventeen and twenty one.<sup>27</sup>

The statutes next authorize either the prosecutor or the court to place an eligible defendant on PTD.<sup>28</sup> If the court is so authorized, it simply defers further proceedings and sets conditions for the defendant's participation in the program.<sup>29</sup> Where the prosecutor has the authority to divert, he makes a motion to the court that the appropriate defendant be placed on PTD. If the motion is granted, the court will set the conditions for the program and order the defendant diverted.<sup>30</sup>

Tennessee mandates that the court and the prosecutor share responsibility for the decision.<sup>31</sup> Under Tennessee law, the defendant and the state attorney sign a memorandum of understanding stipulating the conditions of the defendant's participation in the program. If the memorandum is approved by the court, prosecution is suspended and the defendant placed on PTD. However, the court may withhold its approval only where the prosecutor has acted arbitrarily and capriciously,<sup>32</sup> where the defendant does not meet the statutory standards of eligibility, or where the memorandum was obtained by fraud.<sup>33</sup>

All of the existing state PTD statutes establish procedures to be followed once the defendant has participated in PTD for the specified period.<sup>34</sup> Most authorize a judicial hearing in which a court must determine whether the defendant has satisfactorily completed

26. ARK. STAT. ANN. § 43-1232 (Supp. 1977).

27. MASS. ANN. LAWS ch. 276A, § 2 (Michie/Law. Co-op Supp. 1978).

28. ARK. STAT. ANN. § 43-1232 (Supp. 1977); COLO. REV. STAT. ANN. § 16-7-401(1) (Supp. 1978); CONN. GEN. STAT. ANN. § 54-76p (West Supp. 1979); FLA. STAT. ANN. § 944.025(2) (West Supp. 1978); MASS. ANN. LAWS ch. 276A, § 2 (Michie/Law. Co-op Supp. 1978); TENN. CODE ANN. § 40-2108 (Supp. 1978); WASH. REV. CODE ANN. § 9.95A.030 (1977).

29. CONN. GEN. STAT. ANN. § 54-76p (West Supp. 1979); MASS. ANN. LAWS ch. 276A, § 2 (Michie/Law. Co-op Supp. 1978); WASH. REV. CODE ANN. § 9.95A.030.

30. COLO. REV. STAT. ANN. § 16-7-401(1) (Supp. 1978); FLA. STAT. ANN. § 944.025(2) (West Supp. 1978); TENN. CODE ANN. § 40-2108 (Supp. 1978).

31. TENN. CODE ANN. § 40-2108 (Supp. 1978).

32. This phrase is not defined by Tennessee statutory or case law. A possible example of arbitrary or capricious action by a prosecutor may be the stipulation of unreasonable conditions in the memorandum of understanding.

33. TENN. CODE ANN. § 40-2108 (Supp. 1978).

34. ARK. STAT. ANN. §§ 43-1232-1233 (1977); COLO. REV. STAT. ANN. § 16-7-401(2) (1978); CONN. GEN. STAT. ANN. § 54-76p (West Supp. 1979); FLA. STAT. ANN. § 944.025 (West Supp. 1978); MASS. ANN. LAWS ch. 276A, § 7 (Michie/Law. Co-op Supp. 1978); TENN. CODE ANN. § 40-2108 (Supp. 1978); WASH. REV. CODE ANN. § 9.95A.030 (1977).

the program.<sup>35</sup> If he has done so, the charges against him will be dismissed.<sup>36</sup> If, however, his conduct has been unsatisfactory, his case will be returned to the normal channels of the criminal justice system for prosecution.<sup>37</sup> By contrast, Florida authorizes the PTD program administrator to decide whether the defendant has successfully completed the program,<sup>38</sup> and Tennessee allows the prosecutor to make this decision.<sup>39</sup>

Finally, some of the statutes authorize termination of a defendant's participation in PTD at any time during the diversion period, should the defendant be found to have violated a condition of the program. In Colorado, Massachusetts, and Washington, the decision to terminate before completion is made by the court.<sup>40</sup> In Florida and Tennessee, the prosecutor makes this decision.<sup>41</sup> Arkansas and Connecticut do not indicate who makes this decision.<sup>42</sup>

### III. THE APPROPRIATE ROLES FOR THE PROSECUTOR AND THE COURT WITH RESPECT TO THE ULTIMATE DECISION TO DIVERT A DEFENDANT

#### A. GENERALLY

There are several issues with which all state PTD statutes deal. Most fundamentally, the statutes must determine the appropriate roles for the prosecutor and the court with respect to the ultimate decision to divert a defendant. Judicial discretion to deny diversion is not at issue, and all of the existing statutes authorize the court to prevent diversion under various circumstances.<sup>43</sup> Rather, the real

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35. ARK. STAT. ANN. §§ 43-1232-1233 (1977); COLO. REV. STAT. ANN. § 16-7-401(2) (1978); CONN. GEN. STAT. ANN. § 54-76p (West Supp. 1979); WASH. REV. CODE ANN. § 9.95A.030 (1977).

36. ARK. STAT. ANN. § 43-1233 (1977); COLO. REV. STAT. ANN. § 16-7-401(2) (1978); CONN. GEN. STAT. ANN. § 54-76p (West Supp. 1979); MASS. ANN. LAWS ch. 276A, § 7 (Michie/Law. Co-op Supp. 1978); WASH. REV. CODE ANN. § 9.95A.030 (1977).

37. ARK. STAT. ANN. § 43-1232 (Supp. 1977); COLO. REV. STAT. ANN. § 16-7-401(2) (Supp. 1978); CONN. GEN. STAT. ANN. § 54-76p (West Supp. 1979); MASS. ANN. LAWS ch. 276A, § 7 (Michie/Law. Co-op Supp. 1978); WASH. REV. CODE ANN. § 9.95A.030 (1977).

38. FLA. STAT. ANN. § 944.025(5) (West Supp. 1978).

39. TENN. CODE ANN. § 40-2108(d) (Supp. 1978).

40. COLO. REV. STAT. § 16-7-401(2) (Supp. 1978); MASS. ANN. LAWS ch. 276A, § 6 (Michie/Law. Co-op Supp. 1978); WASH. REV. CODE ANN. § 9.95A.030(4) (1977).

41. FLA. STAT. ANN. § 944.025(4) (West Supp. 1978); TENN. CODE ANN. § 40-2108(d) (Supp. 1978).

42. ARK. STAT. ANN. § 43-1231 (Supp. 1977); CONN. GEN. STAT. ANN. § 54-76p (West Supp. 1979).

43. ARK. STAT. ANN. § 43-1232 (Supp. 1977); COLO. REV. STAT. ANN. § 16-7-401(1) (Supp. 1978); CONN. GEN. STAT. ANN. § 54-76p (West Supp. 1979); FLA. STAT. ANN. § 944.025(2) (West Supp. 1978); MASS. ANN. LAWS ch. 276A, § 2 (Michie/Law. Co-op Supp. 1978); TENN. CODE ANN. § 40-2108(b) (Supp. 1978); WASH. REV. CODE ANN. § 9.95A.030 (1977).

dispute centers around court authority to divert a defendant without the consent of the prosecutor. Three distinct resolutions of this issue are possible. Under the first approach, courts divert defendants without the prosecutor's consent.<sup>44</sup> The second approach would never permit a court to divert a defendant without the consent of the prosecutor.<sup>45</sup> The final approach allows court-ordered diversion, but only if the prosecutor has abused his discretion in refusing to divert.<sup>46</sup> Which approach is preferred depends upon whether diversion is perceived primarily as a prosecutorial or a judicial function.

A state's choice between these approaches can have great practical significance. As the goal of diversion is the successful rehabilitation of criminal defendants, diversion programs can succeed only if the decision to divert is made by individuals in the best position to evaluate a defendant's potential for rehabilitation. Proponents of the prosecutorial function approach draw attention to the fact that the prosecutor routinely determines the best disposition of criminal charges. The type of information utilized in such determinations is very like that required to select defendants for participation in PTD. Therefore, they contend, prosecutors are well equipped to assume this additional duty. In contrast, proponents of the judicial function approach assert that the courts, which regularly evaluate defendants in assessing their suitability for probation, are better suited to the task of diversion.

#### B. THE JUDICIAL FUNCTION APPROACH

The Connecticut, Massachusetts, and Washington PTD statutes follow the judicial function approach.<sup>47</sup> Proponents of this approach perceive diversion as part of the judicial function of sentencing, and believe that conditioning the court's power to divert on the consent of the prosecutor violates the doctrine of separation of powers.<sup>48</sup> For the following reasons, the judicial function approach is most valid.

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44. CONN. GEN. STAT. ANN. § 54-76p (West Supp. 1979); MASS. ANN. LAWS ch. 276A, § 2 (Michie/Law. Co-op Supp. 1978); WASH. REV. CODE ANN. § 9.95A.030 (1977).

45. COLO. REV. STAT. ANN. § 16-7-401(1) (Supp. 1978); FLA. STAT. ANN. § 944.025(2) (West Supp. 1978).

46. TENN. CODE ANN. § 40-2108(b) (Supp. 1978).

47. CONN. GEN. STAT. ANN. § 54-76p (West Supp. 1979); MASS. ANN. LAWS ch. 276A, § 2 (Michie/Law. Co-op Supp. 1978); WASH. REV. CODE ANN. § 9.95A.030 (1977).

48. *People v. Superior Court of San Mateo County*, 11 Cal. 3d 59, 520 P.2d 405, 113 Cal. Rptr. 21 (1974); *Commonwealth v. Kindness*, 247 Pa. Super. Ct. 99, 371 A.2d 1346 (1977) (dissenting opinion).

The judiciary has always been responsible for selecting the method of correction most appropriate for a particular criminal defendant. The prosecutor's discretionary authority is restricted to deciding whether to arrest or charge the accused.<sup>49</sup> Exercise of that discretionary power may lead to an information<sup>50</sup> or indictment.<sup>51</sup> Once, however, either of these events occurs, "the case has left the prosecutor's realm, and has entered the court's. From the moment of such entry, it is the court's discretion, not the prosecutor's, that controls the ultimate disposition of the case."<sup>52</sup> Diversion occurs at a point in the criminal process at which the judiciary has traditionally possessed the power to determine the course of the case.<sup>53</sup> It adds to the alternatives of imprisonment, fine, and post-conviction probation the new alternative of pre-conviction probation. Thus, diversion should be viewed as a judicial ascertainment of a method of correction.

The similarities between probation and diversion provide additional support for the judicial function approach. Like the decision to grant probation, the decision to divert is based upon a detailed evaluation of the defendant's personal characteristics and background.<sup>54</sup> Both probation and diversion are intended to provide a second chance to defendants who are "minimally involved in crime and maximally motivated to reform."<sup>55</sup> In most cases, the range of conditions which may be imposed on a diverted defendant is similar or identical to that which may be imposed on a defendant placed on probation.<sup>56</sup> In fact, diversion may be viewed as a specialized form of probation, comparable to pre-conviction rehabilitation pro-

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49. *People v. Superior Court of San Mateo County*, 11 Cal. 3d 59, 520 P.2d 405, 113 Cal. Rptr. 21 (1974); see *LEGAL ISSUES OF PTD*, *supra* note 1, at 48-52, for a discussion of diversion before information or indictment.

50. *BLACK'S LAW DICTIONARY* 701 (5th ed. 1979): "An accusation exhibited against a person for some criminal offense, without an indictment. An accusation in the nature of an indictment, from which it differs only in being presented by a competent public officer on his oath of office, instead of a grand jury on their oath."

51. *BLACK'S LAW DICTIONARY* 695 (5th ed. 1979): "A formal written accusation originating with a prosecutor and issued by a grand jury against a party charged with a crime."

52. *Commonwealth v. Kindness*, 247 Pa. Super. Ct. 99, 118, 371 A.2d 1346, 1355 (1977) (dissenting opinion); see *People v. Superior Court of San Mateo County*, 11 Cal. 3d 59, 65, 520 P.2d 405, 410, 113 Cal. Rptr. 21, 26 (1974): "When the decision to prosecute has been made, the process which leads to acquittal or sentencing is fundamentally judicial in nature."

53. *People v. Superior Court of San Mateo County*, 11 Cal. 3d 59, 66, 520 P.2d 405, 410, 113 Cal. Rptr. 21, 26 (1974).

54. See notes 141-222 and accompanying text *supra*.

55. *People v. Superior Court of San Mateo County*, 11 Cal. 3d 59, 66, 520 P.2d 405, 410, 113 Cal. Rptr. 21, 26 (1974).

56. *Id.*



grams which have been established for narcotic addicts.<sup>57</sup> Diversion can therefore be considered as another in a series of sophisticated judicial responses to anti-social behavior.

Finally, it is clear that a major purpose of PTD is rehabilitation of the criminal defendant.<sup>58</sup> Diversion programs were initially established in response to the apparent inability of the criminal justice system to achieve this goal. Intended for defendants highly motivated for rehabilitation,<sup>59</sup> PTD is designed to provide participants with appropriate counseling, education, supervision, and medical and psychological treatment.<sup>60</sup> The programs further their rehabilitative goal by giving successful participants the opportunity to escape the stigma of involvement with the criminal justice system.<sup>61</sup> Because of this focus on rehabilitation, diversion is comparable to parole and probation, and should be viewed as a judicial function.

One sound method of implementing the judicial function approach was suggested by the Supreme Court of California in the companion cases of *People v. Superior Court of San Mateo County*,<sup>62</sup> and *Sledge v. Superior Court of San Diego County*.<sup>63</sup> Under the court's method, the district attorney would initiate the diversion process, conducting a preliminary investigation of the defendant to determine whether he met the eligibility standards prescribed by the PTD statute.<sup>64</sup> If it appeared that the defendant may be eligible, the probation department would be assigned the task of further investigating the defendant's background to see whether he would benefit from diversion.<sup>65</sup> Finally, considering the

57. *Id.*

58. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* 134 (1967).

59. *People v. Superior Court of San Mateo County*, 11 Cal. 3d 59, 520 P.2d 405, 113 Cal. Rptr. 21 (1974); see *State v. Leonardis*, 71 N.J. 85, 363 A.2d 321 (1976).

60. See COLO. REV. STAT. § 16-7-402 (Supp. 1978); FLA. STAT. ANN. § 944.025 (1) (West Supp. 1978); Mass. Ann. Laws ch. 276A, § 1 (Michie/Law. Co-op Supp. 1978).

61. It may be argued that, in order best to enable the successful divertee to escape the stigma of involvement with the criminal justice system, PTD statutes should provide for mandatory expungement of records. Otherwise, the individual's participation in PTD is a matter of public record and, from the defendant's point of view, a key advantage of PTD, to wit, keeping his involvement with the criminal justice system confidential, is lost. Only the Arkansas PTD statute mandates expungement, ARK. STAT. ANN. §§ 43-1233-1235. For a fuller discussion of the expungement issue, see *LEGAL ISSUES OF PTD*, *supra* note 1, at 83.

62. 11 Cal. 3d 59, 520 P.2d 405, 113 Cal. Rptr. 21 (1974).

63. 11 Cal. 3d at 70, 520 P.2d at 412, 113 Cal. Rptr. at 28 (1974).

64. 11 Cal. 3d at 59, 520 P.2d at 405, 113 Cal. Rptr. at 21; 11 Cal. 3d at 70, 520 P.2d at 412, 113 Cal. Rptr. at 28.

65. 11 Cal. 3d at 59, 520 P.2d at 405, 113 Cal. Rptr. at 21; 11 Cal. 3d at 70, 520 P.2d at 412, 113 Cal. Rptr. at 28.

report of the probation department along with any other relevant information, the court would make the ultimate diversion decision.<sup>66</sup> In this manner, the court would be able to take full advantage of the prosecutor's and probation department's techniques of information gathering and general expertise in the criminal justice field, while retaining final say regarding whom to divert.<sup>67</sup>

Arkansas has implemented the judicial function approach by conditioning the defendant's participation in PTD upon the entry of a guilty plea.<sup>68</sup> Arkansas courts evaluate each defendant who pleads guilty, to determine his suitability for PTD. However, by conditioning eligibility on a guilty plea, Arkansas programs become post-plea or post-trial in nature, and can no longer be properly characterized as pre-trial diversion. The defendant is no longer motivated by the desire to avoid the stigma of involvement with the criminal justice system. Rather, the sole aim is to avoid the imposition of a sentence.

In addition, if the divertee's participation in a PTD program proves unsuccessful, most statutes provide for an adjudication on the merits.<sup>69</sup> By contrast, under the Arkansas statute, the defendant must concede on the merits before the option of diversion is available to him.<sup>70</sup> While conditioning participation in diversion on a guilty plea may be constitutional,<sup>71</sup> such programs should not be classified as PTD programs.

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66. 11 Cal. 3d at 59, 520 P.2d at 405, 113 Cal. Rptr. at 21; 11 Cal. 3d at 70, 520 P.2d at 412, 113 Cal. Rptr. at 28.

67. See note 80 and accompanying text *infra*.

68. ARK. STAT. ANN. § 43-1232 (Supp. 1977).

69. ARK. STAT. ANN. § 43-1232 (Supp. 1977); COLO. REV. STAT. § 16-7-401(2) (Supp. 1978); CONN. GEN. STAT. ANN. § 54-76p (West Supp. 1979); FLA. STAT. ANN. § 944.025 (West Supp. 1978); MASS. ANN. LAWS ch. 276A (Michie/Law. Co-op Supp. 1978); TENN. CODE ANN. § 40-2109(a) (Supp. 1978); WASH. REV. CODE ANN. § 9.95A.030(b) (1977).

70. ARK. STAT. ANN. § 43-1232 (1977): "Upon violation of a term or condition, the court may enter an adjudication of guilt and proceed as otherwise provided." *Id.*

71. For a discussion of the constitutionality of conditioning diversion on a guilty plea, see LEGAL ISSUES OF PTD, *supra* note 1, at 68-72. Parts of that discussion read as follows:

[One significant] justification advanced for the legitimacy of requiring a guilty plea as a condition of admission to a pretrial intervention program is the constitutionality of plea bargaining. The Supreme Court in *Brady v. United States* [397 U.S. 742 (1970)], held that a plea of guilty which would not have been entered except for the defendant's desire to avoid a possible death penalty and to limit the maximum penalty to life imprisonment or a term of years was not for that reason unconstitutionally compelled within the meaning of the fifth amendment. This decision was affirmed in *North Carolina v. Alford* [400 U.S. 26 (1970)], where a plea to second-degree murder was found to be voluntary and not improperly induced, notwithstanding the defendant's protestation of innocence.

Thus, applying this reasoning to the voluntariness of a plea of guilty in order

## C. THE PROSECUTORIAL FUNCTION APPROACH

Colorado and Florida PTD statutes follow the prosecutorial function approach, requiring the prosecutor's consent before any defendant can be diverted.<sup>72</sup> This approach considers diversion to be an extension of the prosecutorial charging function. Diversion ordered by a court without the consent of the prosecutor is thought to undermine this function and violate the separation of powers doctrine.<sup>73</sup> More specifically, the prosecutor is vested with the discretionary authority to dispose of criminal charges. Since the decision to divert may result in the dismissal of charges, diversion is merely one of several alternatives available to the prosecutor for the disposition of criminal charges.<sup>74</sup> Viewed in this light, the decision to divert is no different from the decision to *nolle prosequi*,<sup>75</sup> indict, prosecute, or plea bargain.<sup>76</sup>

Three additional arguments have been offered by proponents to justify the prosecutorial function approach. First, adherents claim that the nature and source of the information required to make a diversion decision are akin to those generally relied upon by the district attorney when disposing of criminal charges.<sup>77</sup> For example, the district attorney may look for prior convictions or the existence of parole or probation violations.<sup>78</sup> The source of the information may be law enforcement files kept on the defendant, or oral reports

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to gain entrance to a pretrial intervention program, a plea which would not have been entered except for the defendant's desire to avoid criminal prosecution or gain entrance to a program that promises possible dismissal of charges, is not for that reason unconstitutionally compelled within the meaning of the fifth amendment. If the plea represents a voluntary and intelligent choice among the alternative courses of action, it is voluntary and constitutionally sufficient.

In light of *Brady and North Carolina v. Alford*, it would seem that the requirement of a guilty plea as a condition precedent to diversion is valid.

*Id.* at 68-72.

72. COLO. REV. STAT. § 16-7-401(1) (Supp. 1978); FLA. STAT. ANN. § 944.025(2) (West Supp. 1978).

73. *Shade v. Commonwealth of Pennsylvania*, 394 F. Supp. 1237, 1241 (M.D. Pa. 1975).

74. *Id.*

75. 21 AM. JUR.2d, *Crim. Law* 512 (1965): "A nolle prosque is a formal entry of record by the prosecuting attorney by which he declares that he is unwilling to prosecute a case, or that he will not prosecute the suit further." *Id.*

76. LEGAL ISSUES IN PTD, *supra* note 1, at 47-51.

77. *Sledge v. Superior Court of San Diego County*, 11 Cal. 3d 71, 73-74, 520 P.2d 412, 414-15, 113 Cal. Rptr. 28, 30-32 (1974). This case dealt with CAL. PENAL CODE §§ 1000-1000.4 (West Supp. 1979), which established PTD programs for selected defendants charged with narcotics offenses.

78. *Sledge v. Superior Court of San Diego County*, 11 Cal. 3d 71, 73, 520 P.2d 412, 414, 113 Cal. Rptr. 28, 30 (1974).

of the defendant's conduct given by law enforcement officers, witnesses, accomplices, or the defendant himself.<sup>79</sup> Although much of this information may eventually come before the court, none of it is known to the court at the time of the diversion decision.

The weakness of this argument is that, although the prosecutor may be in the best position to gather information necessary to making an informed diversion decision, this alone does not justify the prosecutorial function approach. While the prosecutor may justifiably be granted the authority to perform the initial screening of potential diverttees, the diversion decision entails much more. Evidence gathered during the initial screening process must be evaluated for its materiality, relevance, credibility, and persuasiveness, to determine whether it "justifies the conclusion that the defendant would be benefited by diversion into a program of education, treatment, or rehabilitation."<sup>80</sup>

The prosecutor, in performing that initial screening, is not required to assess the reliability or significance of information uncovered in his investigation. All relevant criteria will have been specified by the legislature. He need only compare a defendant's situation to the eligibility requirements of the PTD statute, and determine whether the defendant must be automatically excluded. The subsequent evaluation of defendants who pass this initial screening is properly a judicial function.

The second justification for the prosecutorial function approach focuses on the district attorney's power to enter a *nolle prosequi*. PTD and *nolle prosequi* are analogized because both result in the eventual dismissal of charges. "The authorities are virtually unanimous that the historical power to 'nol pros' belonged at common law solely to the Attorney General and remains an exclusive prosecutorial power in the absence of a state constitutional or statutory provision to the contrary."<sup>81</sup> Although many states, by constitution or statute, require the consent of the court before a prosecutor may enter a *nolle prosequi*,<sup>82</sup> such provisions do not confer on the court the power to enter a *nolle prosequi* without the consent of the prosecutor. Therefore, by analogy, in the absence of a constitutional or statutory provision to the contrary, the power to place a defendant on PTD belongs exclusively to the prosecutor.

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79. *Id.* at 73-74, 520 P.2d at 414, 113 Cal. Rptr. at 30.

80. *Id.* at 74, 520 P.2d at 415, 113 Cal. Rptr. at 31.

81. *Commonwealth v. Kindness*, 247 Pa. Super. Ct. 99, 105, 371 A.2d 1346, 1349 (1977).

82. TENN. CODE ANN. § 40-2101 (1975).

However, PTD and *nolle prosequi* have dissimilar purposes. The prosecutor may decide to enter a *nolle prosequi* for various reasons. He may wish to use the testimony of one jointly indicted defendant to convict another. He may need to replace a lost or deficient indictment. The state's evidence may be insufficient, or the case simply without merit. While rehabilitation is perhaps the major purpose of PTD, it does not appear to be a primary factor in the *nolle prosequi* decision.<sup>83</sup>

This is not to say that the prosecutor, in exercising the charging function, is never concerned with rehabilitation. Some prosecutors have long deferred prosecution upon "a firm arrangement for the offender to seek psychiatric or other similar assistance where his disturbed mental condition may have contributed to his behavior."<sup>84</sup> A prosecutor may also defer prosecution of a defendant who has "agreed to enter the military service or who has obtained new employment or in some other manner has embarked on what can broadly be considered to be a rehabilitative program."<sup>85</sup> However, rehabilitation is accorded far less emphasis when deciding whether to continue prosecution than when determining the best disposition of a criminal case. Therefore, because of the similarity of purpose between diversion and the judicial sentencing function, and the dissimilarity of purpose between diversion and the prosecutorial charging function, the dispute over the authority to place an individual on PTD should be resolved in favor of the judiciary.

The third asserted justification for the prosecutorial function approach is that conditioning diversion on the prosecutor's consent does not undermine the judicial sentencing function. According to this argument, a prosecutor's refusal to consent to diversion in no way undermines the court's authority to place a defendant on probation if he pleads guilty or is so adjudicated.<sup>86</sup> Therefore, conditioning diversion on the consent of the prosecutor does not interfere with the court's power to determine the mode of correction, and requiring prosecutorial consent does not violate the separation of powers doctrine.<sup>87</sup>

This argument, however, assumes that diversion is a prosecutorial function without attempting to substantiate the contention.

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83. 22A C.J.S. *Crim. Law* § 461 (1961).

84. THE AMERICAN BAR ASSOCIATION PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION 91 (1970).

85. *Id.*

86. *Commonwealth v. Kindness*, 247 Pa. Super. Ct. 99, 371 A.2d 1346 (1977).

87. *Id.* at 104, 371 A.2d at 1348.

Indeed, the assumption is essential to the validity of the argument. In so assuming, the argument simply fails to address the issue of which branch of government should ultimately be responsible for the decision to divert.

#### D. THE HYBRID APPROACH

The final approach, followed by the Tennessee PTD statute,<sup>88</sup> views the diversion process as a hybrid of the prosecutorial charging function and the judicial sentencing function. Tennessee gives the prosecutor the responsibility for initiating diversion procedures, while the court is responsible for reviewing the prosecutor's decision, and formally granting diversion. With respect to the reviewing power of the court, a defendant cannot be diverted over the prosecutor's veto unless the court finds that in failing to divert a defendant, the prosecutor has abused his discretion.<sup>89</sup> If the court finds such an abuse of discretion, it may order diversion over the prosecutor's objection.<sup>90</sup> In addition, the court must approve the prosecutor's recommendation to divert a defendant, unless the prosecutor is found to have acted arbitrarily, fraudulently, or unlawfully.<sup>91</sup>

Advocates of this approach contend that diversion is at least a quasi-judicial function, and offer two justifications for allowing judicial review of the prosecutor's decision. The first is simply that once the charging function is complete, disposition of the case becomes a judicial function. Since diversion is one way to dispose of a criminal charge, the courts have the power to review the prosecutor's decision and, if appropriate, order diversion over a prosecutorial veto.<sup>92</sup>

The second justification relies on the traditional adjudicatory powers of the court. Judicial review of diversion decisions is considered lawful because it is "consistent with the traditional role which courts have exercised in safeguarding individuals from abusive governmental action,"<sup>93</sup> for "the prosecutor is not immune from the ban against arbitrariness in governmental decision-making."<sup>94</sup> Thus, in

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88. TENN. CODE ANN. § 40-2108 (Supp. 1978); see *Pace v. State*, 566 S.W.2d 861 (Tenn. 1978); see also *State v. Leonardis*, 73 N.J. 360, 375 A.2d 607 (1977); Note, *Criminal Practice—Pretrial Intervention Programs—An Innovative Reform in the Criminal Justice System*, 28 *RUTGERS L. REV.* 1203 (1975).

89. TENN. CODE ANN. § 40-2108 (Supp. 1978).

90. *Id.*

91. *Id.*

92. *State v. Leonardis*, 73 N.J. 360, 375 A.2d 607 (1977).

93. *Id.* at 376, 375 A.2d at 615.

94. *Id.* at 377, 375 A.2d at 616.

reviewing diversion decisions, the court is simply exercising the commonly performed judicial function of reviewing the rationality of a decision made by another governmental branch.

As is mentioned above, under the hybrid approach, judicial review of the decision to divert is limited. Cases dealing with this approach have emphasized that, because the prosecutor has a duty to enforce the law, great deference will be given to his eligibility decision.<sup>95</sup> The cases also state that before the court will review the prosecutor's decision not to divert, the petitioning defendant must bear the almost impossible burden of showing gross abuse of prosecutorial discretion.<sup>96</sup> It is assumed that, although limited, this amount of review is sufficient to protect the judicial sentencing element of diversion.

The effect of granting the prosecutor primary responsibility for making the diversion decision while severely limiting the judiciary's authority to review that decision, is virtually to eliminate the effectiveness of the judicial check on the prosecutor's eligibility decision. The elimination of this check allows the prosecutor almost total discretion in deciding whom to divert. For all practical purposes, the hybrid approach and the prosecutorial function approach are identical. Therefore, as in the case of the prosecutorial approach,<sup>97</sup> the judicial function is preferable to the hybrid approach.

#### E. A POSSIBLE ALTERNATIVE ANALYSIS

It is clear that diversion contains elements of both the judicial sentencing function and the prosecutorial charging function.<sup>98</sup> Thus far, in determining the appropriate roles for the prosecutor and the court with respect to the initial decision to divert, the courts have stressed the separation of powers analysis in endorsing one approach or the other.<sup>99</sup>

Arguably, the courts are placing too much emphasis on the separation of powers analysis. The separation of powers doctrine does not always require absolute division between the branches.<sup>100</sup>

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95. *Id.* at 381-83, 375 A.2d at 617-19.

96. *Id.*

97. See notes 72-87 and accompanying text *supra*.

98. See notes 48-87 and accompanying text *supra*.

99. See notes 48-87 and accompanying text *supra*.

100. *State v. Leonardis*, 73 N.J. 360, 370-71, 375 A.2d 607, 612-13 (1975).

It is important to note that the separation of powers doctrine does not require an *absolute* division of power among the three branches of government, or as Chief Justice Vanderbilt stated, "division of government into three . . . water-tight compartments." Vanderbilt, *The Doctrine of Separation of Powers and its Present-Day*

If an issue presents public policy considerations which are of equal importance to the courts and the prosecutor, cooperation between them seems desirable.<sup>101</sup> With respect to PTD, public policy considerations shared by the courts and the prosecutor include preventing future involvement by the defendant in criminal activity, protecting the public welfare, making the criminal justice system more equitable, reducing backlog on court dockets, and freeing judicial resources for the handling of more serious cases.<sup>102</sup>

Because these public policy considerations are uniform, they should not be controlling when determining the appropriate roles for the courts and prosecutor. Rather, the focus should be on how the diversion process protects the participant, and the issue should be one of guaranteeing the due process rights of the defendant.

Implementation of the judicial function approach is one means of protecting the defendant's due process rights. This approach assures the defendant of a hearing at which a court will evaluate the evidence relevant to a determination regarding the defendant's participation in diversion.<sup>103</sup>

Alternatively, it may be possible to protect the defendant's due process rights without resorting to a formal court hearing. A statute containing the following provisions would accomplish this task: (1) definition of the category of cases eligible for diversion, (2) a statement of the criteria to be applied in deciding whether a specific case falls within the defined category of eligible cases, (3) "procedure by which it may be determined whether the specified criteria are satisfied,"<sup>104</sup> and (4) a procedure for judicial review of the diversion decision.<sup>105</sup>

The hybrid approach, which has been adopted by Tennessee, appears to follow the above criteria.<sup>106</sup> However, interpreting the statute in *Pace v. State*,<sup>107</sup> the Tennessee Supreme Court again re-

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*Significance* 50 (1953). . . . This same theme—approving cooperative effort among the three branches of government—was expressed by Justice Jackson in *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579 . . . (1952): "[W]here the constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government."

*Id.* at 370-71, 375 A.2d at 612-13.

101. *Id.*

102. See notes 3-5 and accompanying text *supra*.

103. See notes 48-71 and accompanying text *supra*.

104. *Commonwealth v. Kindness*, 247 Pa. Super. Ct. 99, 130, 371 A.2d 1346, 1361 (1977) (dissenting opinion) (a statement of reasons filed by the prosecutor).

105. *Id.* at 130, 371 A.2d at 1361-62 (an informal proceeding before a judge).

106. See notes 31-33 and accompanying text *supra*.

107. 566 S.W.2d 861 (Tenn. 1978).



lied on the separation of powers analysis when it held that diversion is solely a judicial function, and that the judicial function is adequately protected by a limited scope of interlocutory review of the prosecutor's decision.<sup>108</sup> In so holding, the court passed up the opportunity to analyze placement in diversion programs in terms of protecting the due process rights of the participant.

#### F. SUMMARY

Pretrial Diversion programs should follow the judicial function approach, and authorize the courts to make the decision regarding whom to divert. Courts are in the best position to evaluate a defendant's potential for rehabilitation, and judicial consideration protects the due process rights of defendants. Furthermore, the courts are accustomed to undertaking this type of evaluation, as it is similar to the analysis required when placing a defendant on probation. Finally, PTD occurs at a point in the criminal process at which the judiciary traditionally has control of the case. Thus, the judicial function approach provides a solid conceptual framework for diversion vis-a-vis the separation of powers doctrine.

#### IV. THE APPROPRIATE PROCEDURE FOR TERMINATING A DEFENDANT'S PARTICIPATION IN PTD

All PTD statutes must decide whether a hearing should be required before a defendant's participation in PTD can be terminated. In contrast to the issue of who should divert, cases and commentaries have analyzed the termination issue in terms of due process, and have concluded that a termination hearing should be required.<sup>109</sup>

According to this view, "[a]ttendant [in the] loss of diversionary status are relative disadvantages in a subsequent prosecution: the possibility of a negative pre-sentence report if the divertee is subsequently convicted, as well as the obvious sanction of incarceration."<sup>110</sup> Thus, a termination hearing is required because the loss of diversionary status "threatens a 'grievous loss'"<sup>111</sup> for which

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108. *Id.*

109. *United States v. Thornton*, 344 F. Supp. 249 (D. Del. 1972); *United States v. Taylor*, 305 F. Supp. 1150 (E.D.N.Y. 1969); *LEGAL ISSUES IN PTD*, *supra* note 1, at 74-79.

110. *LEGAL ISSUES IN PTD*, *supra* note 1, at 74.

111. *Joint Anti-Facist Refugee Committee v. McGrath*, 341 U.S. 123, 168 (1951) (concurring opinion). "This Court is not alone in recognizing that the right to be heard before being condemned to suffer a grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society." *Id.*

procedural fairness becomes essential.”<sup>112</sup> This position was adopted in *United States v. Taylor*<sup>113</sup> and *United States v. Thornton*,<sup>114</sup> cases which dealt with a federal PTD program for drug addicts. The necessity for a termination hearing had not been addressed in the statute which established the program.

*Taylor* involved a defendant who was dismissed from the program at a very early stage because a program director and a psychiatrist determined that he was not likely to be rehabilitated.<sup>115</sup> The court emphasized that Taylor’s successful completion of the program would have resulted in a dismissal of the charges against him, while a determination that he was unlikely to be rehabilitated resulted in his having to face a criminal charge and possible imprisonment.<sup>116</sup> Thus, the court concluded that because of the importance of these interests to the defendant, fair procedure required that he be given the benefit of a termination hearing.<sup>117</sup>

In *Thornton*, the defendant’s participation in the PTD program was terminated because he violated several of the program conditions.<sup>118</sup> The court stressed that the stakes were very high for the diveree, while the burden imposed on the government by the requirement of a termination hearing was “very slight.”<sup>119</sup> In such a situation, “even the most rudimentary concepts of due process would require that the Court exercise some judgment in ruling on . . . a termination.”<sup>120</sup> In sum, these cases view the loss of diversionary status as a grievous loss requiring appropriate procedural protection.

In addition, it should be noted that a hearing is required before probation or parole can be revoked.<sup>121</sup> The purpose of the hearings is to insure that the loss of liberty which may result from termination of probation or parole is not improperly imposed.<sup>122</sup> Similarly,

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112. *Id.*

113. 305 F. Supp. 1150 (E.D.N.Y. 1969).

114. 344 F. Supp. 249 (D. Del. 1972).

115. 305 F. Supp. at 1151 (The defendant was found to have an uncooperative attitude.).

116. *Id.*

117. *Id.*

118. 344 F. Supp. at 250 (The defendant refused to participate in the program as an out-patient after his in-patient status was terminated.).

119. *Id.* at 251.

120. *Id.*

121. *Gagnon v. Scarpelli*, 411 U.S. 778 (1973) (probation); *Morrissey v. Brewer*, 408 U.S. 471 (1972) (parole).

122. LEGAL ISSUES IN PTD, *supra* note 1, at 74; *see also Morrissey v. Brewer*, 408 U.S. 471, 482 (1972):

a threatened loss of liberty results from the prosecution which occurs after the revocation of PTD. Therefore, by analogy, revocation of PTD should require a termination hearing.

Despite the strong arguments which support requiring a termination hearing, only the Colorado, Massachusetts, and Washington PTD statutes mandate this procedure.<sup>123</sup> In Florida and Tennessee the prosecutor makes the termination decision.<sup>124</sup> The Arkansas and Connecticut statutes do not address the issue.<sup>125</sup>

There is little justification for not requiring a termination hearing. From the due process standpoint, the interest of the government in summary adjudication does not outweigh the grievous loss which threatens the defendant.<sup>126</sup> From the practical standpoint, procedural compliance with the right to a hearing imposes virtually no burden on the government. Such a hearing must lead to a final evaluation of any contested relevant facts and considerations,<sup>127</sup> and provide the divertee with an opportunity to show that he did not violate the condition, or, if he did, that the violation does not warrant revocation.<sup>128</sup> However, "[i]n almost all . . . cases, affidavits or depositions [are] sufficient to raise the issues in their proper perspective."<sup>129</sup> In other words, the hearing may be informal.

Regardless of the approach (judicial or prosecutorial) followed by a particular PTD statute, the procedures necessary to hold a termination hearing need not be complex. When the judicial ap-

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We see, therefore, that the liberty of a parolee, although indeterminate, includes many of the core values of unqualified liberty and its termination inflicts a "grievous loss" on the parolee and often on others. . . . By whatever name, the liberty is valuable and must be seen as within the protection of the Fourteenth Amendment.

*Id.* at 482.

123. COLO. REV. STAT. § 16-7-401(2) (Supp. 1973); MASS. ANN. LAWS ch. 276A, § 6 (Michie/Law. Co-op Supp. 1979); WASH. REV. CODE ANN. § 10.05.090 (1976).

124. FLA. STAT. ANN. § 944.025(5) (West Supp. 1978); TENN. CODE ANN. § 40-2108(d) (Supp. 1978).

125. ARK. STAT. ANN. § 43-1231-1235 (Supp. 1977); CONN. GEN. STAT. ANN. § 54-76p (West Supp. 1979).

126. LEGAL ISSUES IN PTD, *supra* note 1, at 76:

The procedural standards for parole and probation revocation set forth by the Court in *Morrissey* and *Gagnon* should be the minimum standards by which due process termination actions are gauged. These decisions recognize a legitimate state interest in economy and efficiency during the proceedings. However, this interest must be balanced against the demands of essential fairness . . . .

*Id.* See also *Morrissey v. Brewer*, 408 U.S. 471, 483 (1972) "[T]he state has no interest in revoking parole without some informal procedural guarantees."

127. *Id.* at 490.

128. *Id.* at 488.

129. *United States v. Thornton*, 344 F. Supp. at 251.

proach is followed, the court "is the logical instrument to make the finding to terminate."<sup>130</sup> When the prosecutorial function is followed, procedural compliance is slightly more difficult, as review of revocation "should still presumably be more a judicial function than one exercised by the prosecutor's office or [PTD] personnel."<sup>131</sup> This does not mean, however, that a judicial officer must make the termination decision. All that is required is a neutral hearing officer.<sup>132</sup> This could be any official in the prosecutor's or administrator's office who was not involved in the decision to terminate the defendant's participation in PTD.

While the cost of requiring a termination hearing is slight, the danger in not requiring such a hearing can be substantial. The revocation procedure followed by the Florida PTD statute illustrates this point.<sup>133</sup> The Florida statute follows a strict prosecutorial approach. The judiciary is responsible only for affirming the district attorney's decision to divert, and extending the duration of the program when requested by the prosecutor and the program director.<sup>134</sup> Resumption of pending criminal proceedings can be undertaken at any time if the program administrator or the state attorney finds that the divertee is not fulfilling his obligations under the plan, or if the public interest so requires.<sup>135</sup> In addition, after the defendant has completed the program, the prosecutor may revert the case to the normal channels of prosecution if he or the program administrator decides that the defendant's participation has been unsatisfactory.<sup>136</sup> Thus, a defendant can submit to the restrictions of a PTD program for a substantial length of time and then be prosecuted as if he had never participated, with no opportunity to contest the prosecutor's determination that his participation was unsatisfactory. He is threatened with a grievous loss, and afforded little or no due process protection. The state has no legitimate interest in terminating the defendant's participation in PTD without proper procedural safeguards.

This situation is even more unfair in light of the fact that diver-

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130. LEGAL ISSUES IN PTD, *supra* note 1, at 77.

131. *Id.*

132. *United States v. Thornton*, 344 F. Supp. 249; *United States v. Taylor*, 305 F. Supp. at 1150; LEGAL ISSUES IN PTD, *supra* note 1, at 77.

133. FLA. STAT. ANN. § 944.025(4) (West Supp. 1978) (Presumably, the phrase "if the public interest so requires" refers to circumstances where diversion must be terminated in order to protect the public from criminal acts.).

134. *Id.*

135. *Id.* at § 944.025(4) (West Supp. 1978).

136. *Id.* at § 944.025(5) (West Supp. 1978).

sion and its revocation are pre-conviction measures. This would imply that the divertee is entitled to the same procedural and substantive safeguards as any other pretrial defendant.<sup>137</sup> By contrast, the procedure established by the Florida PTD statute does not even provide the procedural safeguards that surround the post-sentencing procedures of revocation of parole and probation.<sup>138</sup>

This is not to say that all of the statutes which fail to require a termination hearing violate due process. Some courts, in dealing with diversion statutes, may choose to read the statutes as mandating basic due process protections. Indeed, the courts have done just that when dealing with state probation and parole statutes.<sup>139</sup> In addition, although the statute was silent on the issue, the courts in *Taylor* and *Thornton* read the federal pretrial addict diversion statute as requiring a termination hearing.<sup>140</sup>

However, state legislatures should not rely on active courts to write due process protections into diversion statutes. With so much at stake for the defendant at so little a cost to the state, PTD statutes should require a hearing before a defendant's participation in PTD can be terminated.

## V. CRITERIA FOR ADMISSION

### A. GENERALLY

Each state must establish eligibility criteria for PTD programs.<sup>141</sup> The most commonly employed criteria, or conditions of eligibility, limit participation in PTD programs to defendants who have no prior convictions,<sup>142</sup> no prior involvement with PTD,<sup>143</sup> are

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137. LEGAL ISSUES OF PTD, *supra* note 1, at 74:

Indeed, there is a strong argument that pretrial intervention termination proceedings should be surrounded by even more stringent procedural safeguards than those observed in the revocation of parole or probation. Where the latter are both post-sentencing procedures, and thus not considered stages of the criminal trial process, diversion and its termination are pre-conviction measures. Therefore, the divertee should enjoy the same procedural and substantive safeguards as any pre-trial defendant.

*Id.*

138. FLA. STAT. ANN. § 944.025 (West Supp. 1978); see notes 19-41 and accompanying text *supra*.

139. *Morrissey v. Brewer*, 408 U.S. 471 n.15, 788-89 (1972).

140. *United States v. Thornton*, 344 F. Supp. 249; *United States v. Taylor*, 305 F. Supp. 1150.

141. See notes 150-222 and accompanying text *infra*.

142. See notes 150-70 and accompanying text *infra*.

143. See notes 171-76 and accompanying text *infra*.

not charged with a crime involving violence,<sup>144</sup> and are residents of a particular state.<sup>145</sup> The Massachusetts PTD statute also limits eligibility in terms of the defendant's age.<sup>146</sup> Most of these provisions have successfully withstood constitutional attack.<sup>147</sup> The constitutional challenges are usually based on the equal protection clause as embodied in the due process clauses of the fifth and fourteenth amendments, although in some cases the privileges and immunities clause has been utilized.<sup>148</sup> Whatever the sources of the constitutional challenge, the courts have applied a rational basis test.<sup>149</sup> Therefore, when considering the desirability of these restrictions, analysis should center on the rationality of each condition on eligibility. By so doing, excessive conditions which tend to exclude a significant number of defendants can be eliminated.

### B. THE PRIOR CONVICTION PROVISION

Under the Florida and Massachusetts PTD statutes, only first offenders are eligible for PTD.<sup>150</sup> In Arkansas and Tennessee, only defendants with no prior felony convictions are eligible.<sup>151</sup> The purpose of the limitation is to protect the public welfare by excluding from PTD individuals who: (1) are less likely to be rehabilitated,<sup>152</sup> (2) would present a great danger to society if diversion failed,<sup>153</sup> or (3) would not be deterred from committing future crimes by the desire to maintain a clean record.<sup>154</sup>

If the purpose of the prior conviction condition is to protect the public welfare by excluding individuals who are less likely to be rehabilitated, a rational basis must exist for concluding that defen-

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144. See notes 177-202 and accompanying text *infra*.

145. See notes 150-222 and accompanying text *infra*.

146. MASS. ANN. LAWS ch. 276A, § 2 (Michie/Law. Co-op Supp. 1979).

147. See notes 150-222 and accompanying text *infra*.

148. See notes 150-222 and accompanying text *infra*.

149. See notes 150-222 and accompanying text *infra*.

150. FLA. STAT. ANN. § 944.025(2) (West Supp. 1978); MASS. ANN. LAWS ch. 276A, § 2 (Michie/Law. Co-op Supp. 1979).

151. ARK. STAT. ANN. § 43-1232 (Supp. 1977); TENN. CODE ANN. § 40-2108(a) (Supp. 1978).

152. See *Marshall v. United States*, 414 U.S. 417, 425 (1974). This case dealt with the Federal Narcotic Addict Rehabilitation Act of 1966 (NARA), 18 U.S.C. §§ 4251-55 (Supp. 1979). Although this statute is a post-conviction statute, the Court's discussion of the purposes for imposing conditions on eligibility in rehabilitation programs is applicable to PTD programs.

153. *Marshall v. United States*, 414 U.S. 417 (1974).

154. *United States v. Hamilton*, 462 F.2d 1190, 1194 (1st Cir. 1972) (dealing with the Federal Narcotic Addict Rehabilitation Act of 1966, 18 U.S.C. §§ 4251-55).

dants with prior convictions are less susceptible to rehabilitation. It is arguable that a prior conviction shows that the defendant has a greater difficulty in conforming his behavior to societal rules and laws. Thus, the defendant is not only less likely to benefit from treatment in a PTD program, but his participation in such a program may also jeopardize the successful treatment of others.<sup>155</sup>

However, this rationale assumes a lower susceptibility to rehabilitation on the part of all individuals with prior convictions. In so doing, it ignores the fact that the entire diversion concept is based upon the *individual's* potential for rehabilitation.<sup>156</sup> The condition excludes defendants without considering such significant factors as the defendant's past experience with rehabilitation programs, his willingness to undergo treatment in PTD, the possibility that he suffers from a psychological abnormality that is related to his crime and can be treated by PTD, and "any likelihood that the crime was significantly related to any other condition or situation such as unemployment or family problems that would be subject to change by participation in a diversion program."<sup>157</sup> In other words, the prior conviction condition uses a quantitative test to achieve a qualitative result.<sup>158</sup>

The condition also irrationally disregards intervals of crime-free behavior. All prior convictions or felonies are counted, and intervening periods of good behavior are ignored.<sup>159</sup> A defendant in his mid-twenties would be ineligible for PTD if, ten or fifteen years previously, he had been convicted of a crime as a juvenile.

It is also argued that the prior conviction condition is a rational way to exclude from PTD hardened criminals who pose a great danger to society.<sup>160</sup> However, this is subject to virtually all of the

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155. See *Marshall v. United States*, 414 U.S. 417, 425-26 (1974).

156. *State v. Leonardis*, 71 N.J. 85, 96-102, 363 A.2d 321, 327-30 (1976). "Thus, PTD proponents and program administrators have criticized attempts to define admission criteria according to criminal status or the particular crime with which the defendant is charged. . . . Greater emphasis should be placed on the offender than on the offense." *Id.*; see THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY at 134 (1967); COURTS, *supra* note 13, at 27-31.

157. COURTS, *supra* note 13, at 32.

158. *Marshall v. United States*, 414 U.S. 417, 435 (1974) (dissenting opinion).

159. *United States v. Bishop*, 469 F.2d 1337, 1345 (1st Cir. 1973). This case also dealt with the Federal Narcotic Addict Rehabilitation Act of 1966, 18 U.S.C. § 4251 *et seq.* The court stated, "any intervening period between felonies of good behavior or attempts at rehabilitation are ignored; a person is thought to harden as a criminal merely because he accumulates a fixed number of judgments, regardless of changes in his personality or personal circumstances over time." 469 F.2d at 1345.

160. See *Marshall v. United States*, 414 U.S. 417, 425 (1974): "It is quite clear that in adopting the two-prior-felony exclusion, Congress sought . . . to exclude those whose records

attacks levied against the less rehabilitative potential rationale just discussed. It excludes from participation an entire class of defendants without considering the potential for rehabilitation of the individuals involved.<sup>161</sup> It also fails to consider intervening periods of good behavior.<sup>162</sup>

In addition, this rationale is subject to criticism because it fails to consider the nature and circumstances of the defendant's crime. For example, if an individual commits two crimes, both of which are the result of a treatable psychological defect, it is irrational to conclude that he is a hardened criminal and should be automatically excluded from diversion.<sup>163</sup> This argument is particularly forceful in jurisdictions such as Massachusetts and Tennessee, where a previous conviction for a misdemeanor is enough to preclude participation in PTD.<sup>164</sup> This is not to say that no defendants with only one prior misdemeanor or felony conviction are hardened criminals. However, such a determination should be made on a case by case basis.

One ground for the condition may be that, conceivably, PTD statutes reduce the specific deterrent effect of criminal sanctions by reducing the severity of the defendant's punishment.<sup>165</sup> As a corollary, it must be assumed that in the vast majority of cases, the restrictions which may be imposed on a defendant through PTD are a sufficient general deterrent to criminal activity, as there is no proof that the amount of criminal activity has increased due to the existence of PTD statutes.<sup>166</sup> Nonetheless, it seems likely that: "(1) persons who have [previously committed crimes] are demonstrably less amenable to deterrence than those who have not, and (2) reducing the law's deterrent force to them would create an unacceptable risk to the social order."<sup>167</sup> Thus, although there is no proof that diversion reduces the general deterrent effect of the law, the prior conviction condition is a rational way to guarantee that "offenders [will] be carefully selected for diversion to assure that diversion

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disclosed a 'history of serious crimes'." *Id.*; LEGAL ISSUES OF PTD, *supra* note 1, at 65-67.

161. See notes 155-59 and accompanying text *supra*.

162. See notes 155-59 and accompanying text *supra*.

163. See *United States v. Bishop*, 469 F.2d 1337, 1345 (1st Cir. 1972) "All prior felonies are counted—whether a joyride by a peer-imitating teenager or a rape committed by a 35-year old sex deviate during the pendency of proceedings on which sentence is about to be imposed." *Id.*

164. See notes 19-41 and accompanying text *supra*.

165. See *United States v. Hamilton*, 462 F.2d 1190, 1192-94 (D.C. Cir. 1972).

166. *Id.*

167. *Id.* at 1193.



will provide protection against future crimes by that offender."<sup>168</sup>

Although it may be possible to justify the case of the prior conviction condition, state PTD statutes should omit the condition. This is not to say that the purposes underlying the condition are not valid. Restricting diversion to those defendants likely to be rehabilitated, refusing to divert hardened criminals, and guaranteeing the deterrent power of state law are certainly significant considerations. However, these interests can be protected without losing the primary focus of PTD, *to wit*, the individual's potential for reform. The concept of PTD "is more readily served by eligibility criteria whose focus is only on the defendant's needs and his amenability to correction. This individualistic approach . . . can best identify those persons who require rehabilitation and whose diversion would present a minimal threat to the interests of society."<sup>169</sup> If the state legislatures desire to include in PTD statutes guidelines for evaluating a defendant's potential for rehabilitation, the guidelines should focus on qualitative rather than quantitative factors.<sup>170</sup>

### C. THE PRIOR INVOLVEMENT CONDITION<sup>171</sup>

Under the Arkansas and Connecticut PTD statutes, defendants are ineligible for diversion if they have previously participated in a PTD program.<sup>172</sup> The purpose of these provisions is to insure that diversion eligibility is limited to those defendants likely to be rehabilitated.<sup>173</sup> Supposedly, by committing a crime after being treated in a PTD program, the defendant has demonstrated his unsuitability for diversion.<sup>174</sup>

The justification is valid if the pre- and post-PTD crimes are similar in nature and proximate in time. Arguably, a defendant charged with disorderly conduct shortly after completing treatment in a PTD program for disorderly conduct could accurately be labeled as unresponsive to diversion treatment with respect to this crime.

If interpreted too broadly, however, the basis of the prior participation provision becomes irrational. Failure to limit the condition

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168. COURTS, *supra* note 13, at 30.

169. State v. Leonardis, 71 N.J. 85, 100-01, 363 A.2d 321, 329 (1976).

170. For an example of quantitative facts, see note 158 and accompanying text *supra*.

171. The prior involvement condition is an example of a qualitative factor. See Marshall v. United States, 414 U.S. 417, 435 (1974) (dissenting opinion).

172. See notes 27-33 and accompanying text *supra*.

173. See notes 150-70 and accompanying text *supra*.

174. See notes 150-70 and accompanying text *supra*.

in terms of time precludes consideration of periods of good behavior on the part of the defendant.<sup>175</sup> Failure to limit the condition with respect to the nature of the offense may inaccurately cast the defendant's potential for rehabilitation in a negative light.<sup>176</sup> It does not necessarily follow that a defendant charged with disorderly conduct is not suitable for rehabilitation because he recently completed a diversion program for petty larceny. Indeed, the defendant may be fully rehabilitated with respect to his first crime, and prepared to undergo treatment for his second. Minimally, therefore, statutes which utilize the prior participation condition should limit its scope so as to preclude successive participation in PTD only when similar crimes are involved.

#### D. THE VIOLENT CRIME CONDITION

The Connecticut and Florida PTD statutes deny eligibility to defendants charged with crimes involving violence.<sup>177</sup> The violent crime condition is intended to protect the public welfare by excluding individuals who are less likely to be rehabilitated,<sup>178</sup> those who would present a great danger to society if diversion failed,<sup>179</sup> or those who are accused of crimes for which a high level of deterrence must be guaranteed.<sup>180</sup>

Supporters of the condition argue that, because of the nature of the crime committed, defendants accused of violent crimes are less amenable to rehabilitation than defendants charged with less serious crimes.<sup>181</sup> Thus, since rehabilitation is a major purpose of PTD, it is rational to exclude such defendants, as they are less likely to benefit from the programs.<sup>182</sup>

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175. See notes 150-70 and accompanying text *supra*.

176. See notes 150-70 and accompanying text *supra*.

177. CONN. GEN. STAT. ANN. § 54-76p (West Supp. 1979); FLA. STAT. ANN. § 944.025(2) (West Supp. 1978).

178. See *United States v. Palmer*, 369 F. Supp. 1030, 1031 (N.D. Cal. 1974) (This case deals with Title I of the Federal Narcotic Addict Rehabilitation Act, as amended, 28 U.S.C. § 2901 *et seq.* (1978). The Act establishes a PTD program for defendants who are found to be addicts.); see also *Marshall v. United States*, 414 U.S. 417 (1974).

179. See *United States v. Palmer*, 369 F. Supp. 1030, 1031 (N.D. Cal. 1974).

180. COURTS, *supra* note 13, at 30: "The Programs must not impair unjustifiably the deterrent impact of criminal punishment." *Id.* See *United States v. Leazer*, 460 F.2d 864 (D.C. Cir. 1972) (This case deals with the Federal Narcotic Addict Rehabilitation Act, as amended, 28 U.S.C. § 2901 *et seq.* 1976.).

181. *United States v. Palmer*, 369 F. Supp. 1030, 1031 (N.D. Cal. 1974).

182. *State v. Leonardis*, 71 N.J. 85, 96-102, 363 A.2d 321, 324-29 (1976); LEGAL ISSUES IN PTD, *supra* note 1, at 37-39; *Pretrial Diversion from the Criminal Process*, 83 YALE L.J. 827 (1974).

However, there appears to be "little evidence to support the proposition that . . . offenders . . . charged with more serious crimes are less susceptible to early and relevant rehabilitation or any other goals advanced by the intervention concept."<sup>183</sup> Similarly, "that the offense charged in itself reveals anything of probable significance about the personality or criminal career of the accused is open to question."<sup>184</sup> Thus, the violent crime condition excludes defendants without considering the individual's potential for rehabilitation. In so doing, the condition ignores the fact that, to operate properly, PTD requires that the individual's potential for rehabilitation be considered.<sup>185</sup>

A more satisfactory rational basis emerges when other interests are considered. Specifically, society's interest in public safety must be balanced against the individual's interest in rehabilitation.<sup>186</sup> In evaluating society's interest in public welfare, the prospect of failure must be taken into account before any diversion can take place.<sup>187</sup> It is rational to exclude from PTD defendants charged with violent crimes because such defendants pose the greatest threat to the public welfare if they are not rehabilitated.<sup>188</sup> Thus, in the case of violent offenders, society's interests simply outweigh the individual's.

Arguably, this approach does not ignore the individual's potential for rehabilitation. Rather it recognizes the fact that guesses about rehabilitative potential, however educated, are subject to inevitable error. "Until clinical means of prediction become very much more precise than they are now, it is certainly not irrational to opt for caution."<sup>189</sup>

Another basis for the violence condition becomes evident when society's interest in general deterrence is balanced against the indi-

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183. LEGAL ISSUES IN PTD, *supra* note 1, at 66.

184. *Id.* at 65.

185. See notes 150-70 and accompanying text *supra*.

186. United States v. Fersner, 465 F.2d 605, 606-08 (D.C. Cir. 1972). Discussing the violent crime condition of 18 U.S.C. 4251 *et seq.*, the court stated:

Both appellants assert that the violent crimes exclusion can only be based on a Congressional presumption that violent criminals are less amenable to ultimate rehabilitation than other criminals, a presumption which we held was not rational. . . . We think that appellants' view underestimates the number of interests which Congress weighed in enacting [this legislation]. Congress was not interested solely in assuring that those persons who were made eligible for . . . treatment would be able to benefit from it: Congress also considered, and quite properly, the factor of public safety.

465 F.2d at 606-08.

187. United States v. Fersner, 465 F.2d 605 (D.C. Cir. 1972).

188. *Id.*

189. *Id.* at 608.

vidual's interest in rehabilitation.<sup>190</sup> In addition to protecting itself from violent defendants that PTD fails to rehabilitate, society has a great interest in generally deterring other individuals from committing violent acts in the future.<sup>191</sup> Again, it has not been proven that the existence of diversion has any effect on deterrence.<sup>192</sup> However, this does not mean that it is irrational to guarantee that the general deterrent effect of criminal sanctions will not be diminished by the existence of diversion.<sup>193</sup> Given society's great interest in generally deterring violent acts, it is rational to insure this deterrence by excepting from participation in PTD defendants charged with such acts.<sup>194</sup>

At least one court has gone so far as to conclude that, to guarantee the deterrent effect of criminal sanctions, it is rational to exclude defendants charged with certain non-violent crimes.<sup>195</sup> In *Commonwealth v. Kindness*,<sup>196</sup> the Pennsylvania Superior Court upheld the exclusion from participation in PTD of all defendants charged with driving while intoxicated. The court rejected the claim that such exclusion violated equal protection by treating similarly situated intoxicated defendants differently, and held that the focus of the exclusion was on the act performed while intoxicated, not intoxication *per se*.<sup>197</sup> The court concluded that it was rational to

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190. COURTS, *supra* note 13, at 32:

The programs must not impair unjustifiably the deterrent impact of criminal punishment. [D]iversion is appropriate where there is a substantial likelihood that a conviction could be obtained and the benefits to society from channeling an offender into an available noncriminal diversion program outweigh any harm done to society by abandoning criminal prosecution. Among the factors that should be considered unfavorable to diversion are . . . any history of the use of physical violence toward others, [and] . . . any special need to pursue criminal prosecution as a means of discouraging others from committing similar offenses.

*Id.* at 32.

191. *Id.*

192. See notes 165-66 and accompanying text *supra*.

193. See COURTS, *supra* note 13, at 30.

194. Because protection of the public is not as strong a factor when violence is not involved, this general deterrence justification is less significant when applied to the more general prior conviction condition.

195. 247 Pa. Super. Ct. 99, 108-09, 371 A.2d 1346, 1350 (1977).

196. *Id.*

197. *Id.* at 108, 371 A.2d at 1350:

The question is whether the classification is a reasonable one. Appellant says it is an arbitrary one, arguing that it discriminates among intoxicated persons. He points out that an intoxicated person who is arrested for a misdemeanor or a felony is eligible for [PTD], unless the offense is driving an automobile. What he ignores is the fact that our penal statutes are not concerned with intoxication *per se*, but with the activity of the person in that condition.

*Id.* at 108, 371 A.2d at 1350.

exclude defendants charged with driving while intoxicated, because driving an automobile is perhaps the most dangerous activity in which an intoxicated individual can engage.<sup>198</sup>

Quite apart from the justification rooted in society's interest in protecting public welfare, the violence condition may be mandated by political reality.<sup>199</sup> Participation of offenders charged with violent acts is likely to be a highly charged political issue.<sup>200</sup> Public opposition to the diversion of violent offenders may stem from notions of retribution, an emphasis on law and order, or a concern for public safety.<sup>201</sup> Regardless of the underlying reasons, public opposition is a significant factor to be weighed in deciding whether to exclude violent offenders from participation in PTD.<sup>202</sup>

#### E. THE RESIDENCY CONDITION

In recent years, some county authorized programs have limited participation to residents of the state in which the county is located.<sup>203</sup> None of the existing state PTD statutes limit eligibility to residents of any particular state.<sup>204</sup>

One suggested justification for the residency requirement is that extradition problems arise if an out-of-state resident fails to fulfill program requirements.<sup>205</sup> However, this overlooks the fact that, because the same problems exist when bail is set for an out-of-state resident, the criminal justice system is equipped to deal with this situation.<sup>206</sup>

A second rational basis for the requirement is that economic or

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198. *Id.*

199. LEGAL ISSUES OF PTD, *supra* note 1, at 66.

200. *Id.*

201. *Id.*

202. *Id.*

203. *State v. Nolfi*, 141 N.J. Super. 528, 533 n.3, 358 A.2d 853, 856 n.3 (1976): The residency requirements [for the PTD programs of Hudson County, New Jersey] were changed by the director of [PTD]. There are several "Guidelines for Exclusion." As of that date, one of the guidelines for automatic exclusion is nonresidence in this state. Thus, a defendant is now excluded from participation if he is a nonresident, even if from New Jersey environs.

*Id.*, 358 A.2d at 856 n.3.

204. ARK. STAT. ANN. § 43-1232 *et seq.* (Supp. 1977); COLO. REV. STAT. § 16-7-401 *et seq.* (Supp. 1978); CONN. GEN. STAT. ANN. § 54-76p (West Supp. 1979); FLA. STAT. ANN. § 944.025 *et seq.* (West Supp. 1978); MASS. ANN. LAWS ch. 276A (Michie/Law. Co-op Supp. 1978); TENN. CODE ANN. § 40-2107 *et seq.* (Supp. 1978); WASH. REV. CODE ANN. 9.95A.030 *et seq.* (1977).

205. *State v. Nolfi*, 141 N.J. Super. 528, 535, 358 A.2d 853, 857 (1976).

206. *Id.* at 536, 358 A.2d at 857.

administrative realities make it infeasible for PTD programs, community oriented in nature, to deal with non-residents.<sup>207</sup> The New Jersey Superior Court rejected this justification in *State v. Nolfi*,<sup>208</sup> and held that classifying defendants by state residency violated both the equal protection clause of the 14th amendment<sup>209</sup> and the privileges and immunities clause of article IV.<sup>210</sup> In so doing, the court failed to discuss some very real practical problems created by a non-resident's participation in PTD. For example, PTD usually calls for extensive weekly contacts between the defendant and a community agency.<sup>211</sup> In addition, non-residents may not be eligible for certain community services which form a part of the diversion program.<sup>212</sup> However, if the non-resident defendant is sufficiently motivated and able to report to the program when necessary, his participation if at all possible should not be precluded.<sup>213</sup> A non-resident's eligibility should be conditioned on his amenability to rehabilitation and ability to report for treatment.<sup>214</sup>

In a related issue, two court decisions establish that a state statute need not require each county to create its own PTD program.<sup>215</sup> However, while not required, such county programs are permissible. "[D]istinctions based on county areas are [not] necessarily so unreasonable as to deprive [a defendant] of the equal

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207. *Id.* at 535, 358 A.2d at 857.

208. 141 N.J. Super. 528, 358 A.2d 853 (1976).

209. *Id.* at 537, 358 A.2d at 858:

Defendant clearly falls within that group of offenders at whom the [PTD] program is aimed. To deny him admission to the Hudson County [PTD program because he is a non-resident], as was done instantar, is clearly a denial of equal protection of the laws under U.S. Constitution Amend. XIV.

*Id.* at 537, 358 A.2d at 858.

210. *Id.* at 538, 358 A.2d at 858-59:

In this case the Hudson [PTD program] grants to New Jersey residents charged with crimes in Hudson County the privilege of having the opportunity to escape the stigma of a criminal conviction. By operation of the Privileges and Immunities clause, the same opportunity must be given to a nonresident in the same situation, especially since the state has failed to show and the court is unable to discern a valid, substantial reason for the discrimination, beyond the mere fact that the defendant is a citizen of another state.

*Id.*, 358 A.2d at 858-59.

211. LEGAL ISSUES OF PTD, *supra* note 1, at 63.

212. *Id.*

213. *Id.*

214. *State v. Nolfi*, 141 N.J. Super. 528, 358 A.2d 853; LEGAL ISSUES OF PTD, *supra* note 1, at 63.

215. *San Antonio School District v. Rodriguez*, 411 U.S. 1, 54 n.10 (1973) ("This court has never doubted the propriety of maintaining political subdivisions within States and has never found in the Equal Protection Clause any *per se* rule of 'territorial uniformity'."). *Id.* *Commonwealth v. Kindness*, 247 Pa. Super. Ct. 99, 109-10, 371 A.2d 1346, 1350-52 (1977).

protection of the laws . . . ."<sup>216</sup> Although legally permissible, state PTD statutes should avoid creating county by county distinctions whenever possible. Differences among counties in the treatment of offenders accused of the same crime "contributes to an image of the criminal justice system as one in which decisions are made arbitrarily and inequitably."<sup>217</sup>

Arguably, one acceptable reason for allowing county by county distinctions is that independent PTD programs are economically infeasible for some counties.<sup>218</sup> The counties may have too few defendants suitable for diversion, or too few services suitable for diversion programs. However, in some counties this obstacle can be overcome if state statutes authorize counties to combine resources in establishing services for PTD programs. Thus, whenever economically feasible, state PTD statutes should require that PTD programs be created in every county.

#### F. THE AGE CONDITION

The Massachusetts PTD statute limits eligibility to defendants who are between the ages of 17 and 21.<sup>219</sup> This limitation may derive from the notion that younger offenders are more susceptible to rehabilitation than older offenders.<sup>220</sup> If this is accurate, the age condition limits PTD to defendants who are most likely to be rehabilitated.

In addition, the age condition arguably focuses PTD on a population to which it can bring the greatest benefit.<sup>221</sup> The legislature is not required to make a wholesale reform of the criminal justice system. Rather, it can institute reform one step at a time.<sup>222</sup> Thus, it is rational to begin reform by instituting diversion for youthful offenders because such offenders impose the greatest burden on so-

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216. *Salsburg v. Maryland*, 346 U.S. 545, 550-51 (1954).

217. *Commonwealth v. Kindness*, 247 Pa. Super. Ct. 99, 110, 371 A.2d 1346, 1351 (1977).

218. *LEGAL ISSUES OF PTD*, *supra* note 1, at 59-60.

219. *MASS. ANN. LAWS* ch. 276A, § 2 (Michie/Law. Co-op 1978).

220. *LEGAL ISSUES OF PTD*, *supra* note 1, at 64.

221. *Id.*; see also *COURTS*, *supra* note 13, at 32.

222. *LEGAL ISSUES OF PTD*, *supra* note 1, at 64, n.60:

See *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) where the court sustained a state regulation of women's wages and hours on the grounds that women were a special class. . . . While the specific holding . . . may be subject to some criticism today . . . the principle that the state may divert its law-making power to correct particularly greater evils that affect certain classes is nonetheless sound. . . .

*Id.*

ciety if they become recidivists.

Despite these justifications, the age provision is counter-productive in two respects. First, by automatically excluding defendants over the age of 21, the statute fails to consider the individual potential for rehabilitation of a major class of defendants. Second, the age condition prohibits the diversion of defendants who are accused of crimes which easily lend themselves to PTD treatment. For example, many counties have programs which are designed to help individuals control their abuse of alcohol. It would be a fairly simple matter for the court to refer defendants accused of driving while intoxicated to such programs. However, because of the age condition, most defendants and courts cannot take advantage of what would otherwise be an ideal situation for diversion. Thus, if at all possible, PTD programs should not limit participation by imposing age conditions.

#### G. SUMMARY

Although there are strong arguments for following an individual (qualitative) approach when dealing with any condition on eligibility for PTD programs, practical considerations may militate against such an approach. The cost of individual analysis may prove too great for some jurisdictions. Also, in certain types of cases, the results of diversion decisions which utilize individual analysis may not differ substantially from those restricted to quantitative conditions. Nevertheless, for the reasons discussed above, PTD programs should require individual analysis wherever financial circumstances permit.

#### VI. CONCLUSION

In 1968, the first formal PTD program was established on an experimental basis.<sup>223</sup> Since that time, attempts at conceptualizing diversion have been marred by confusion or dispute. While the theoretical conflict has lingered on, the experimental nature of diversion programs has waned. As the number of states adopting PTD statutes increases, a solid conceptual framework for diversion programs must be developed.<sup>224</sup>

With this goal in mind, this article classified PTD as a judicial

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223. See notes 8-10 and accompanying text *supra*.

224. *State v. Leonardis*, 73 N.J. 360, 315 A.2d 607 (1975); *Commonwealth v. Kindness*, 247 Pa. Super. Ct. 99, 371 A.2d 1346 (1977); *Pace v. State*, 566 S.W.2d 861 (Tenn. 1978).



function. Thus, PTD statutes should empower the courts to make the ultimate decision concerning a defendant's participation in diversion. In addition, such legislation should facilitate the ability of the court directly to guarantee the due process rights of the diverttee at every stage of the diversion process, including the process surrounding the involuntary termination of a diverttee's participation. Finally, PTD statutes should remain free of excessive conditions on eligibility, and thereby facilitate the ability of the court to administer diversion according to each individual's potential for rehabilitation. By adopting this conceptual framework, legislatures can utilize PTD statutes to advance both the individual's interest in rehabilitation and society's interest in promoting the public welfare.

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