Table of Contents

Section 1: Background Research and Information

Section 2: Law Office 12's Recommendations

EXECUTIVE SUMMARY

INTRODUCTION

The legislative recommendations of Law Office 12 (the "Law Office") are motivated by a desire to correct fundamental problems in the Commonwealth's juvenile justice system. Our research has shown that in recent years our juvenile justice system has become increasingly adversarial, moving closer to a system that resembles the adult criminal system. Recent research strongly supports our argument that a "get tough" approach to juvenile crime fails to adequately address the needs of communities and their youth. Additional research into the juvenile justice system's disparate effect on minorities only emphasizes our point that this system is dysfunctional and the need for change is long overdue.

To remedy these problems, our client has asked us to prepare legislative recommendations for creating a youth diversionary program based on principles of restorative justice. If we are to remain true to the basic tenets of restorative justice, our diversionary program must not pit one side against another in the adversarial manner, typical of youth courts.

A. RESTORATIVE JUSTICE RESEARCH

The project's initial research focused on gaining an intimate knowledge of the foundations and practices of restorative justice. After surveying the major works of restorative justice thinkers and practitioners and doing extensive field research, we narrowed our research down to what we saw as the most powerful and effective methods of restorative justice: victim offender mediation, family group counseling sessions, and healing circles. The field research was particularly important to our understanding of restorative justice. While at first we speculated that our diversionary program would employ a single method of restorative justice,

our field research contacts – from practitioners at the Social Justice Academy in Boston to the Director of the Center for Restorative Justice and Peacemaking at the University of Minnesota – made clear the need to maintain a variety of options for restorative justice methods. This need for a diversity of methods stems from one of the foundational principles of restorative justice: that addressing harms must be done in a thoughtful and individualized manner. Allowing the youth tribunal to select from three different restorative justice methods empowers the tribunal to design a personalized approach.

Finally, our research into restorative justice turned to its major critiques. We looked at the potential pitfalls of a youth justice process based on principles of restorative justice. We found that legitimate concerns exist, for example: which harms can be properly addressed by restorative justice, the needs of the impacted party, the ultimate effectiveness of a restorative justice approach, and the potential hazardous effects of "institutionalizing" restorative justice. While recognizing the seriousness of these concerns, we found that by using the utmost care and precision in designing our program, each can be adequately addressed.

B. YOUTH COURTS RESEARCH

Another major research area was youth courts, how existing ones function and what model would work best for our project. The idea behind a youth court is for youths to run an entire court proceeding. Youths take on the roles of lawyers, judges, bailiffs etc. and proceed through a case much in the same way a traditional court would. The youth court research subcommittee split the research into topics, including types of offenses handled in existing youth courts; the role of the judiciary, parents and schools; the rights of juveniles; youth court models and dispositional and sentencing options.

After researching the general models and principles of youth courts, the group split into

new subcommittees to research other states' youth court legislation. It was immediately apparent that Massachusetts is in the minority of states that have no legislation regarding youth courts. We concentrated our research on two states in particular, Colorado and Alaska. Both of these states have successful youth courts, and Alaska specifically has a well-developed program that we looked at while developing our model.

While this initial research was incredibly helpful in looking at how youth courts operate, and how states have implemented youth courts through legislation, the Law Office decided to depart from the traditional youth court model. Our client was explicit in that she wanted a restorative-justice based youth court. After looking at currently operating models, we realized that the adversarial nature of the youth courts would not fit within the principles of restorative justice.

A youth court is essentially a traditional court, with youth filling all of the roles that adults normally play. In the "adult judge" youth court model, which is the model that a majority of states use, an adult makes the final dispositional decision. This model is not in line with our client's goal of having a completely youth run process. We decided to adopt the "youth tribunal" model, but modified it so that it was in line with our client's vision and principles of restorative justice.

In the youth tribunal model of a youth court, there is no jury, and youth attorneys address a panel of judges. Instead of attorneys addressing judges in an adversarial model, we wanted to promote an open dialogue among all involved parties to reach a joint resolution regarding what restorative process the parties should participate in. Furthermore, we decided we wanted the resolution to be determined during the restorative process, thereby making the youth tribunal an intermediate step between the diversion and the restorative process.

C. CURRENT MA JUVENILE JUSTICE SYSTEM

As the final step in our research, we considered how exactly the diversionary program could fit into the Commonwealth's current juvenile justice system. This task was divided into two main areas: CHINS and delinquency proceedings. Our research proceeded in a similar fashion for both of these areas. First, several members of our team engaged in a careful parsing of the relevant Massachusetts statues and an examination of recent case law affecting the operation of the juvenile justice system. At the same time, we were in contact with a number of important players in the Massachusetts juvenile justice system. This field research was critical to our understanding of how the diversionary program will fit into the existing system, and the wide variety of perspectives we encountered shaped our recommendations. For example, while Judge Jay D. Blitzman of the Middlesex Juvenile Court strongly suggested that we create a point of diversion at the pre-adjudication stage of a delinquency proceeding, Frederick White Jr., Director of Community Relations at the Department of Youth Services ("DYS"), opined that it was unlikely that a youth would admit responsibility prior to being adjudicated delinquent.

The last stage of this research was to synthesize the information gleaned from our field research contacts with our analysis of the statutory language and pertinent case law. The product of this synthesis is a number of detailed and specific recommendations for points of diversion to the restorative justice youth tribunal. While we appreciate the political and practical difficulties involved in turning these recommendations into actual legislation, we are also encouraged by the breadth of possibilities we see for the realization of a restorative justice diversionary program.

D. THE MODEL

i. Rationale

After doing our preliminary research, we developed a model of our diversionary program.

We split the pieces of the model up to do extensive research into the feasibility of our first model. This research included looking into other states legislation, the procedures of the existing Massachusetts juvenile justice system, and interviews with experts in various fields.[1] After further research, numerous discussions among Law Office members and three revisions we came up with the final model as presented in our deliverable.

Many difficult choices were made along the way. One was how many sources of intake we wanted in our model and if they would be legally possible. Another was points of diversion, and where exactly we could divert youths into our program. Finally we had to decide how to protect the rights of youths in the implementation of the model.

We decided that we wanted as many sources of intake and points of diversion as would be legally feasible. We did not want to limit the use of the diversionary program and wanted to ensure that youths that could benefit from diversion would have the opportunity.

ii. Explanation of Model/Recommendations

Intake

The first level of the model displays intake possibilities. Our final model allows for petitions into our diversionary program from CHINS and delinquency proceedings. In addition we recommended the creation of a new petition[2] under the existing CHINS program that would allow a multitude of parties (parents, school administrators and superintendents) to petition directly to the diversionary program, thus avoiding the juvenile justice system altogether. In terms of points of diversion, we recommended that youths be diverted prior to CHINS proceedings and both pre- and post-adjudication in delinquency proceedings.

[1] Interviews included individuals involved in the Massachusetts juvenile justice system, representatives of other state's diversionary programs, and organizations that currently facilitate restorative justice practices. See Appendix D: Interview Notes.
[2] "CHINS diversionary petition"

YOUTH TRIBUNAL

If the youth is diverted into the program, she will be involved in a youth tribunal proceeding. The youth tribunal is composed of a supervised handful of youths who will deliberate with the diverted youth and the impacted parties to decide which restorative justice process will best address the harm.

RESTORATIVE JUSTICE PROCESSES

Following the decision made in the youth tribunal, the responsible and impacted parties will participate in one of three restorative processes: Victim-Offender Mediation, Family Group Counseling or a Healing Circle. Outsourcing to existing youth organizations that utilize restorative justice practices is an option in our final model. We want our model to be as cost-effective as possible and involve the community in the reparations of harm. We felt that by allowing for outsourcing we could achieve both of these ends.

POST-RESOLUTION/COMPLIANCE

We realized that once a resolution has been reached, we need a way to ensure that the responsible party completes what is required by the resolution. We have recommended ways of keeping the youth accountable for the completion of the resolution: evidence of the completion, final meeting with a youth representative and approval by the source of diversion. By keeping the responsible party accountable for the resolution she agreed to, we can assure the community that our program is not a "free pass" on crime.

PROTECTING DUE PROCESS RIGHTS

After deciding on our final model, we began discussing how we would protect the rights of youths throughout the diversionary process. After researching case law ruling on the constitutional rights of youths, consultation with our faculty advisor, and further research into

restorative justice principles, we realized that restorative justice inherently protects due process rights. Youths have to consent to take part in the diversionary program and can leave at any time. Furthermore, all records from the diversionary program will be sealed as an additional safeguard. Between the voluntary nature of restorative justice and the sealing of all records from the diversionary program we were able to make sure that each and every right will be protected.

CONCLUSION

We are confident that our proposed restorative justice diversionary program can affect real change for the youth of Massachusetts. By providing an alternative to the traditional juvenile justice system, the diversionary program that focuses on the root causes of harms will alleviate the Commonwealth's overburdened juvenile justice system and provide much needed relief to communities struggling with troubled youth. Because we see the opportunity for lasting, systemic change, it is the sincere desire of the Law Office to see our recommendations come to life in the Commonwealth of Massachusetts.

LEGISLATIVE TALKING POINTS

- **There is a problem with the juvenile justice system**
    - The negative social responses that follow a youth's conviction in the current MA juvenile justice system often isolate the juvenile from her family and community, and this isolation can lead to further incidents of deviant behavior as the juvenile loses investment in her community.
    - In Massachusetts even after more punitive laws were put in place juvenile crime continued to rise, this suggests that more punitive laws are not the answer to our juvenile crime problem.
    - Incarcerating juveniles in detention facilities costs the state from $35,000-70,000 per bed per year, in 2006, 1302 juveniles were in custody in MA
    - Punitive laws do not solve the issue of juvenile crime, and they funnel youth offenders into the adult system, removing their chance for rehabilitation.
- **This is the change we need**
    - Peer-Based system
        - A peer-based system allows the justice system to use peer influence in a positive manner.
            - Empirical analysis of recidivism of juveniles in Alaska and Missouri suggests there is a significant decrease in recidivism for youths who go through a youth court system in comparison to those who go through the traditional system.
            - Alaska saw a 17% decrease in recidivism, Missouri saw a 19% decrease.
    - Restorative Justice
        - Restorative justice looks at crime through a new lens, crimes are linked to the harms the cause, the impact they have on others, and the way in which they violate relationships.
        - A wide array of stakeholders are allowed to participate in restorative justice processes which allow offenders to take responsibility for the harm they caused, repair the harm, and reintegrate into the community.
    - Restorative justice can be achieved in many ways. Three of the most effective are:

        Victim Offender Mediation - a face to face mediated encounter between the responsible party and the impacted party, the end result is a resolution in which the responsible party repairs the harm caused and both parties better understanding each other's situation.
        - *Family Group Counseling Sessions* - Similar to Victim Offender Mediation in that the end result is a resolution which results in the responsible party repairing the harm she has caused, however in Family Group Counseling Sessions the offender's family is involved either as a victim, other stakeholder, or greater support structure.
        - *Healing Circles* - A community directed method of addressing its safety needs; a healing circle is ideal when a responsible party has inflicted harm

upon a number of people. Healing circles allow for numerous stakeholders to be present and thus can address underlying issues in the community that lead to the offense as well as set up support structures to avoid future problems.

- A system which embodies restorative justice in a peer-based system is ideal. The suggested model includes:
  - Several possible points of intake
  - Numerous points of egress to the main system
  - Notice and several steps to ensure volition of the responsible party and parents
  - Preparation meetings with both responsible and impacted parties prior to any meetings
  - Highly trained youth with adult oversight at all levels
  - Three options for restorative justice processes allow flexibility for each case and individual. These are the aforementioned Victim Offender Mediation, Family Group Counseling, and Healing Circles.
  - Safeguards within the system to ensure accountability

- **Our recommendations will work**
  - Rights of Youth- protected at all stages those which have been identified as particularly important include:
  - *Life, Liberty and Property*- will not be at risk in this program in any situation.
  - There will be no resolutions which allow loss of life or liberty, any resolutions involving loss of property will have to be expressly agreed to by the responsible party before the resolution is approved.
  - Volition protects many rights- Consent forms are required by parents as well as responsible parties before they are able to enter the system.
    - *Right against self incrimination*- All records from the diversionary system will be inadmissible in future juvenile justice proceedings. Language should be incorporated into the statute protecting these records.
    - *Double Jeopardy*- The diversionary program will not be determining guilt so this will not be an issue.
    - *Presumption of innocence, right to confront witnesses, right to unanimous jury verdict, right to be present, right to appeal*- These rights are not an issue because guilt is not determined in the diversionary program, further the process is fully volitional and once again all records will be sealed.
    - *Right to Counsel*- This right will have to be waived prior to entering the diversionary program. Waiving the right to counsel is not uncommon. It is critical to facilitating a well functioning restorative justice program.
    - *Right to Notice*- Notice about the program will be provided via a letter to responsible parties as well as their parents prior to any hearing at which diversion will be discussed.
    - *Right to a hearing*- If the restorative justice diversionary program fails for any reason the responsible party will return to auspices of the referring agency, all constitutional rights will be guaranteed by that system thus a hearing will not be necessary.

- *Immunity from liability*- It is recommended that volunteers in the system be immune from any civil suits brought against them during the fulfillment of their duties so as to not deter participation. This immunity exists in Vermont and Alaska's systems.

Section 1: Background Research and Information

INTRODUCTION

A. THE CLIENT

Our client, Senator Karen E. Spilka (the "Senator"), has been working with the Legal Skills in Social Context program at Northeastern University School of Law for a number of years. The collaborations she has had with law offices before ours have been primarily focused on reforming the Massachusetts juvenile justice system. This consistent point of collaboration with NUSL students is reflective of the Senator's firm advocacy for children and families throughout the commonwealth.

As former Chair of the Joint Committee on Children and Families, Senator Spilka has been a central figure in legislative initiatives regarding welfare and Child in Need of Services ("CHINS") reform. In pursuit of effective legislative reforms, the Senator has focused her efforts on striking a balance between providing support to children and their families and increasing cost efficiencies. Additionally, she worked to reverse cuts in local aid and assisted cities and communities facing difficult financial situations. The most recent iteration of the Senator's reform efforts is to develop a youth court system based on restorative justice principles.

The Senator, is deeply concerned with the state of the juvenile justice system in Massachusetts, and the impacts that it has on her constituents as well as state citizens overall. She is expressly concerned with what seems to be the unintended impacts of CHINS proceedings. The Senator has asked us to address the problems with juvenile status and minor offense adjudications.

Informed by her experience as a trainer for adult and school-based peer-mediation

programs and other conflict resolution strategies, Senator Spilka has come across the use of restorative justice methods in providing viable alternatives to more punitive justice system regimes. In light of increasingly widespread state legislative efforts to create youth-led diversionary programs from the juvenile justice system, we have been asked to draft legislative recommendations for such a program to be implemented statewide. She has requested that we create a diversionary program that addresses the needs of the victim, community, family, school and youth in a fashion that will provide for holistic rehabilitation, reducing recidivism, and increasing public safety.

The Law Office began our work by researching the values, benefits and pitfalls of youth courts and restorative justice programs both as abstract best-practices and as implemented by other states and non-profits. We also conducted interviews with various field contacts involved with this work about how they would shape a program like this, what types of harms would be most effectively addressed in a diversionary program, how a program would work with existing juvenile justice processes, etc. From this research we designed a diversionary program[3] that capitalizes on the benefits of various modes and learns from states that have implemented similar programs in the past. Some of the values we worked to incorporate into our system include: positive peer pressure youth empowerment, giving impacted parties a voice in the process, encouraging responsible parties to be personally accountable for their actions, promoting active learning and growth, increased ability for support and accountability through broader individual participation, and breaking down citizen/justice system barriers.

B. RESTORATIVE JUSTICE

Restorative justice, as defined by Black's Law Dictionary, is "an alternative delinquency sanction that focuses on repairing the harm done, meeting the victim's needs, and holding the

[3] See infra Section 2, Part I.

offender responsible for his or her actions."[4] Restorative justice defines harms as injuries to individuals and communities. By doing so, its emphasis on repairing harms necessarily involves the directly impacted party, as well as community members and other key stakeholders.[5]

Howard Zehr, the preeminent American scholar on restorative justice, outlines the basic principles in what he calls "the three pillars" of restorative justice. The first pillar is that "restorative justice focuses on harm," second, those "wrongs or harms result in obligations," and third, "restorative justice promotes engagement and participation."[6] In essence, these three main points embody a single overarching idea that restorative justice looks at the harm caused and incorporates all the actors involved in order to repair the harm. This idea contrasts with the traditional juvenile justice system that looks at the offender in isolation and focuses only on the offense and subsequent punishment.

C. YOUTH COURT BENEFITS

Youth courts are an alternative process for adjudicating youth offenses or harms. They utilize a peer-based model based on the traditional adversarial criminal justice process. There are currently 1,255 youth courts in 49 states and the District of Columbia.[7] The methods in which teens participate in youth courts depend on the model adopted. Youth courts can typically be classified into one of four types of models: adult judge, youth judge, youth tribunal and peer jury. Typically all positions within the court, except for the role of the judge, are filled by teens. This includes attorneys, jury members, clerks and bailiffs. This type of peer-based justice is based on the desire of youth courts to channel peer pressure in a positive manner. By including a youth's

[4] BLACK'S LAW DICTIONARY 1340 (8th ed. 2004).
[5] Shay Bilchik, Office of Juvenile Justice and Delinquency Prevention, Guide for Implementing the Balanced and Restorative Justice Model 5 (1998), available at http://www.ncjrs.gov/pdffiles/167887.pdf.
[6] Howard Zehr, The Little Book of Restorative Justice 11 (2002).
[7] http://www.youthcourt.net/content/view/7/14/.

peers in the justice process youth courts send a message that the youth community does not condone the responsible party's behavior. This in turn encourages the youth to refrain from offensive behavior.

The proposed restorative justice diversionary program begins with a revamped intake process. The youth goes before a youth tribunal that determines the type of restorative justice method that is appropriate. The tribunal will also consult with the impacted party to determine if she is interested in being involved in the process. The restorative justice options the tribunal will decide between include: Victim-Offender Mediation, Family Group Conferencing and Healing Circles.[8] Additionally, an option of outsourcing to local non-profits will also be available.[9] After the responsible party has participated in the appropriate restorative process, a member of the diversionary program will follow up to ensure compliance.

[8] See infra Section 1, Part III.
[9] See infra Section 2, Part II(B).

I. THE PROBLEMS IN THE JUVENILE JUSTICE SYSTEM

A. INTRODUCTION

Juvenile courts in Massachusetts, which resemble the adult adversarial system, currently fail to recognize fundamental differences between youths and adults, and therefore fail to adequately address youth needs. The adversarial nature of this system frequently pits one family member against another and leads to polarizing outcomes, damaging family and community relationships.[10] The traditional system also stigmatizes youths by criminalizing them leading to negative sanctions from the community.[11] The social responses that follow a youth's conviction often isolate the youth from her family and community, and this isolation can lead to further incidences of deviant behavior as the youth loses investment in her community.[12]

B. HISTORICAL DEVELOPMENT OF THE JUVENILE JUSTICE SYSTEM

i. Early Development

The first juvenile court, founded in Chicago in 1899, was based on the belief that "children below a certain age were incapable of possessing criminal intent" and that they were unable to fully understand the consequences of their actions.[13] The court also operated under the assumption that juveniles "were generally more amenable to rehabilitation than adult criminals."[14] With these basic tenets in mind, the courts treated each offender individually,

---

[10] Robert G. Madden, From Theory to Practice: A Family Systems Approach to the Law, 30 T. Jefferson L. Rev. 429, 434-435 (2008).
[11] Anne Rankin Mahoney, The Effect of Labeling on Youths in the Juvenile Justice System: A Review of the Evidence, 8 Law & Soc'y Rev. 583, 584 (1974).
[12] Id.
[13] Maggie Gertz, The Road Less Traveled: Using ADR to Help First-Time Juvenile Offenders, 8 Cardozo J. Conflict Resol. 339, 345 (2006).
[14] Sacha M. Coupet, What to Do with the Sheep in Wolf's Clothing: The Role of Rhetoric and Reality about Youth Offenders in the Constructive Dismantling of the Juvenile Justice System, 148 U. Pa. L. Rev. 1303, 1313 (2000).

looking at the circumstances that led her to commit the offense and then "prescrib[ing] the appropriate treatment for the particular offender."[15] Judges were also given broad discretion to provide what they thought was the appropriate "help and guidance" in order to prevent the offender from proceeding "down the path of chronic crime."[16] They employed a range of dispositional options to achieve this goal including warnings, probation supervision, and training school confinement.[17]

This rehabilitative method of juvenile justice became widely accepted during the early decades of the twentieth century, and by 1925 all but two states had legislation creating juvenile courts with broad judicial discretion and a focus on rehabilitation.[18] Although the early twentieth century focused on rehabilitation in the juvenile system, this focus began to shift.

Increases in overall crime rates in the late 1960's and early 1970's led to heightened concern with juvenile crime and its future impact on society at large.[19] Essentially, there was a commonly held opinion that juvenile crime was a public concern because juvenile offenders would eventually become adult offenders.[20] By 1974, public attention of this kind led to the creation of the Commission on Law Enforcement and Administration of Justice ("the Commission").[21] With the express role of critically examining the juvenile justice system, the Commission's first report stated that it fell far short "as a means of handling minor offenders."[22] The Commission found the principal shortcoming of the juvenile justice system was that it did

---

[15] Gertz, supra note 13, at 345.
[16] Coupet, supra note 12, at 1312.
[17] Howard N. Snyder & Melissa Sickmund, U.S. Dep't. of Justice Office of Juvenile Justice and Delinquency Prevention, Juvenile Offenders and Victims: 2006 National Report 96 (2006).
[18] Coupet, supra note 12, at 1312.
[19] Clare E. Lyon, Alternative Methods for Juvenile Sentencing Youthful Offenders, 4 Ave Maria L. Rev. 211 (2006) citing Charles W. Colson, Justice That Restores 5-6 (Inter-Varsity Press 2001) (Since 1960, crime has increased dramatically--overall crime has increased by 300% and violent crime has risen by nearly 500%.)
[20] Id.
[21] Cynthia Conward, The Juvenile Justice System: Not Necessarily in the Best Interests of Children 33 New Eng. L. Rev. 39 (1999).
[22] Id. citing James C. Howell, Juvenile Justice and Youth Violence 47 (Sage Publications, Inc 1997).

not impact overall crime rates and did not reduce juvenile recidivism.[23]

In light of this critical deficiency, the Commission recommended that communities establish neighborhood youth agencies to re-integrate "deviant" youths into educational and family settings, as an alternative to isolation in detention facilities.[24] The Commission further recommended significant restraints on confinement and encouraged early intervention of services outside the juvenile justice system.[25] Despite such recommendations however, beginning in the 1970's and continuing well into the 1990's, many states began enacting statutes to impose harsher sentencing for juveniles, exacerbating many of the problems identified by the commission.[26]

ii. Moving Toward an Adversarial System

The most important case impacting the juvenile justice system at this time was In Re Gault.[27] The holding of this case established juvenile entitlement to many of the same due process rights as adults and thus, at least theoretically, increased the protection of juveniles entering the system. However, combined with other social factors, this procedural entitlement actually increased the adversarial nature of the system and created more problems than it solved.[28] After juveniles were granted more due process rights, many people began to feel that if juveniles were going to be given the protection that adults receive, they should also be subject to the same types of punishments.[29]

---

[23] Id.
[24] Conward, supra note 21.
[25] Id.
[26] See e.g. Hutto v. Davis, 454 U.S. 370, 373 (1982) quoting Rummel v. Estelle, 445 U.S. 263, 275 (1980). (YG)
[27] In Re Gault, 387 U.S. 1, 4-6 (1967) (A landmark decision for juvenile justice, Gault established due process rights for juveniles that had previously been thought to be unnecessary such as right to counsel, written notice, protection from self incrimination, and the opportunity to confront and cross-examine witnesses. These rights in addition to several others will be further discussed infra Section 1, Part V).
[28] Megan Sulok, Extended Jurisdiction Juvenile Prosecutions: To Revoke or Not To Revoke, 39 Loy. U. Chi. L.J. 215, 231 (2007).
[29] Gertz, supra note 13 at 348.

This type of sentiment went hand in hand with a perceived increase in juvenile crime. During the 1980's and early 1990's, media coverage declared that there was a "juvenile crime epidemic,"[30] and as a consequence the public demanded a tougher, more punitive juvenile system.[31] As crime rates rose, "widespread and sensationalized" coverage of serious and violent crimes committed by juveniles resulted in the advent of "get tough" policies across the country.[32]

The media coverage, however, has not been entirely accurate. The focus tended to be on the most high profile and violent incidents that excite the public's fear but are in reality the minority of juvenile cases.[33] An ABC poll conducted in 2000 found that 81% of people reported forming opinions regarding the seriousness of crime based on news media.[34] Therefore, it stands to reason that if the majority of media coverage of juveniles is in relation to violent crimes, the public point of view is unlikely to change. In reality, however, juvenile crime has been decreasing nationwide since 1994.[35] Furthermore, juvenile crime statistics show that the vast majority of offenses are not violent in nature. In 2003, only 4.2% of juvenile arrests were for violent crimes.[36] Additionally, while the amount of juvenile crime increased, there was also an increase in the overall juvenile population of the United States.[37] In other words, the rate of juvenile crime did not increase substantially, but rather the greater number of juveniles gave the

---

[30] See e.g. Laura Myers, Youth Arrests Seen Doubling over 15 Years, Boston Globe, Sept. 8, 1995, at 3; Jules Crittenden, Leaders Unite to Battle Youth Crime Epidemic, Boston Herald, Dec. 3, 1994, at 13; Fox Butterfield, Grim Forecast is Offered on Rising Juvenile Crime, N.Y. Times, Sept. 8, 1995, at A16; Peter Applebome, Juvenile Crime: The Offenders are Younger and the Offenses More Serious, N.Y. Times, Feb. 3, 1987, at A16.

[31] Sulok, supra note 28 at 231.

[32] Danielle Oddo, Removing Confidentiality Protections and the "Get Tough" Rhetoric: What Has Gone Wrong with the Juvenile Justice System?, 18 B.C. Third World L.J. 105, 105-6 (1998).

[33] Coupet, supra note 14 at 1330.

[34] Ernestine Gray, The Media: Don't Believe the Hype, 14 Stan. L. & Pol'y Rev. 45, 48 (2003).

[35] Id.

[36] Snyder, supra note 17 at 125 (violent crimes in this instance include murder and non-negligent manslaughter, forcible rape, robbery, and aggravated assault. Property offenses (burglary, larceny-theft, motor vehicle theft, and arson) account for approximately 21% of total offenses and other crimes such as vandalism, drug possession, drunkenness, disorderly conduct, vagrancy, and curfew violations account for an additional 41%. Percentages calculated by authors based on data representing estimates of the total number of juvenile arrests in 2003).

[37] Id. at 2 (the juvenile population was at a 30 year low in 1984 and has been steadily increasing since that point).

impression that juvenile crime was increasing drastically.[38]

Nonetheless, this portrayal by the media continues to increase public concern about juvenile crime. It has also led people to the opinion that the rehabilitation method does not work sufficiently.[39] In response several states have drastically changed their juvenile crime bills and a majority of states have passed harsher and more punitive reform measures focusing on retribution rather than rehabilitation.[40]

During the 1990's, youth felony statutes were enacted enabling juvenile courts to impose waivers placing juvenile offenders into adult jurisdiction for violent offenses.[41] In Massachusetts, the Youthful Offender statute went into effect in 1996, with the backing of Governor Weld. It automatically transfers more juveniles to the adult court and imposes harsher sentences upon them.[42] While its provisions apply to felony convictions and to violent crimes it has a far broader impact on all youths adjudicated or in danger of being adjudicated in the juvenile justice system.[43]

iii. The Myth of Retributive Punishment

While the juvenile justice system has became more adversarial, studies show that it is failing to decrease the rate of juvenile crime in any meaningful way. Between 1986 and 1995, when harsher and more retributive punishments were on the rise, juvenile arrests for violent crimes increased 67% and 4,223 youth under age 20 were killed by gun violence in 1997.[44] Further social science research also indicates that a "retributive 'just deserts' response" is not the

---

[38] Sulok, supra note 28 at 238.
[39] Coupet, supra note 14 at 1317-18.
[40] Id.
[41] Conward, supra note 21 (while waivers were intended specifically for murder and manslaughter, the inclusion of general "violent offense" led to broader implementation of waivers).
[42] Oddo, supra note 32 at 105-106.
[43] Executive office of public safety programs division, prepared by the Massachusetts Statistical Analysis Center, Implementation of the Juvenile Justice Reform Act: Youthful Offenders in Massachusetts (2001).
[44] Geraldine Kearse Brookins & Julie A. Hirsch, Innocence Lost: Case Studies of Children in the Juvenile Justice System, 71 J. Negro Ed. 205 (2002).

"most effective long-term intervention to reduce or prevent juvenile crime."[45] Congressional findings also show that recidivism is not decreasing, and youth offenders continue to "account for a high percentage of arrests and that gang violence is increasing."[46] In other words, the "get tough" approach has failed to decrease the problem, and continuing in such a manner is detrimental for the juveniles in the system and society in general.[47]

Many youths who are adjudicated for property and drug convictions are increasingly transferred to adult courts.[48] Furthermore, with regard to minor and status offenses, the incorporation of parole and probation violations into the youthful offender statute carries with it overwhelming repercussions.[49] Without explicitly including minor status offenses, this upward departure in sentencing effectuates an increase in *all* juveniles being susceptible to adjudication as adults.[50] When the possibility of being waived into adult court correlates not only with violent or otherwise delinquent crimes, but also probation and parole violations, any and all convictions including those for minor and status offenses can lead youths into the adult criminal justice system creating devastating impacts on their lives, denying them the opportunity for rehabilitation.[51]

---

[45] Coupet, supra note 14 at 1307.
[46] Gertz, supra note 13 at 349.
[47] Id. at 368.
[48] Erin M. Smith, In a Child's Best Interest, 10 Law & Ineq. 253, 270 (1992).
[49] Id. at 270; see also Mass. Gen. Laws Ann. ch. 119, §58; Com. v. Lucret, 792 N.E.2d 141, 142 (Mass. App. Ct. 2003).
[50] Smith, supra note 48 at 271.
[51] On a national level, juvenile punitive sentencing trends reached their peak when they culminated in the imposition of capital punishment for juveniles. In the 1989 case of Standford v. Kentucky, 492 U.S. 361 (1989), the U.S. Supreme Court upheld the constitutionality of the death penalty for juveniles. The majority opinion in this case stated that the imposition of capital punishment for minors did not "offend the evolving standards of decency" and thus did not constitute cruel and unusual punishment under the Eighth Amendment.

The claim rejected in this case was based on the notion that capital punishment was cruel and unusual given the possibility for rehabilitation of young offenders. Pointing to data from Office for Juvenile Justice and Delinquency Prevention ("OJJDP") reports indicating higher rates of recidivism for juveniles adjudicated as adults, defense counsel adamantly sought to have the youths remain in juvenile facilities, rather than having adult sentences imposed. Examining various state legislative trends and statutes, the court stated that since the majority of states permitting capital punishment for crimes committed at age 16 or above, public standards of decency reflected a general acceptance of harsher punishments for juveniles. The holding of Standford v. Kentucky was eventually

C. Disparate Effects On Minorities

It is clear through extensive research and studies, that minority youths are greatly overrepresented in all levels of the juvenile justice system. In Massachusetts, African Americans account for 17% of the juvenile population, 29% of youth arrested, 59% of youth arraigned, and 57% of juveniles committed to secure facilities.[52] National statistics essentially mirror those of Massachusetts. As of 2002, 77.9% of the American juvenile population was white compared to 16.4% African American.[53] However, African American youth accounted for 28% of juvenile arrests.[54] African American youth accounted for an even greater number of juvenile arrests for certain types of crime including robbery (63%), murder (48%), motor vehicle theft (40%), and aggravated assault (38%).[55]

Additionally, as juveniles progress through the juvenile justice system the disparities appear to increase. In addition to making up 28% of juvenile arrests nationally, African Americans account for 30% of referrals to juvenile court, 37% of juveniles detained, 34% of youth formally processed by the juvenile court, 30% of adjudicated youth, 35% of youth judicially waived to criminal court, and 58% of youth admitted to state adult prison.[56]

These statistics show institutionalized racial disparity within the current juvenile justice system, and this disparity indicates that some sort of reform is needed. Addressing these inequalities are outside the scope of our recommendations. However, the diversionary option

---

overruled in 2005 in Roper v. Simmons, 543 U.S. 551 (2005). While a significant success, Simmons did not deal with a number of complex constitutional issues that continue to be a critical concern in juvenile adjudication processes.

[52] Robin Dahlberg, The American Civil Liberties Union, Disproportionate Minority Confinement in Massachusetts: Failures in Assessing and Addressing the Overrepresentation of Minorities in the Massachusetts Juvenile Justice System 1 (2003).

[53] Snyder, supra note 17 at 2.

[54] National Council on Crime and Delinquency, And Justice for Some: Differential Treatment of Youth of Color in the Justice System 3 (2007).

[55] Snyder, supra note 17 at 125.

[56] National Council on Crime and Delinquency, supra note 54 at 3.

must be offered irrespective of race or ethnicity. It is our hope that going forward efforts are made to address this glaring problem.

II. YOUTH COURTS AND RESTORATIVE JUSTICE

A. WHY A YOUTH DRIVEN SYSTEM

In implementing this new diversionary program we looked to youth and teen courts throughout the country to inform the recommendations we are making. Over the last two decades youth courts have become relatively commonplace and are accepted as viable alternatives to the juvenile justice system. While what we recommend is not structured like a "traditional" youth court, there are a number of benefits of youth courts that will carry over.

One of the primary benefits of youth courts that will be included in our system through both the restorative justice practices and the youth tribunal is positive peer pressure. Social development during the teen years involves strong peer influence. Studies show that this peer influence frequently surfaces when delinquent behavior in one teen engenders delinquent behavior in others.[57] Teen courts attempt to use the same strong peer influence in a positive manner "send[ing] a strong message to youth in the community that their peers do not condone law-breaking behavior."[58] "Proponents [of this viewpoint] argue that a teen court setting channels a negative, unavoidable life experience like peer pressure into positive energy."[59] A 2005 study conducted by the American Youth Policy Forum ("AYPF") reinforces this idea. The study reported that 96% of respondents view positive peer pressure as an important factor that

[57] Tracy Godwin, American Probation and Parole Ass'n, Peer Justice and Youth Empowerment: An Implementation Guide for Teen Court Programs 7 (1996) available at http://www.ncjrs.gov/pdffiles/peer1.pdf.
[58] Id.
[59] Julieta Kendall, Can It Please the Court: An Analysis of the Teen Court System as an Alternative to the Traditional Juvenile Justice System, 24 J. Juv. L. 154, 159 (2004).

works to prevent "offending behavior among youth."[60]

Studies of the effectiveness of youth courts appear to support the belief that positive peer pressure can reduce offending behavior. The study by the AYPF "indicated that 34,083 youths had completed peer imposed sanctions successfully within the previous year."[61] Similarly, the first significant empirical analysis of recidivism in youth courts, published in 2002 by the Urban Institute, compared teen courts with the traditional juvenile justice system in Alaska, Arizona, Maryland, and Missouri.[62] In both Alaska and Missouri, there was a significant statistical difference in favor of the youth courts.[63] In Arizona, the recidivism rates favored the teen court as well but did not rise to the level of statistical significance.[64] Finally, in Maryland the teen court had a slightly higher recidivism rate but again, the difference was statistically insignificant and was actually comparable to the recidivism rates of the other states.[65] In other words, in two of the four sites the youth courts had significant impacts on the recidivism rates of the youth involved and in a third the rate did favor youth courts and the fourth state did not favor the youth court but the rate of recidivism was similar to that in the other states. While these results are not entirely conclusive, they do suggest that there is merit in the belief that positive pressure from a youth's peers can help keep them out of delinquency.[66]

B. RESTORATIVE JUSTICE: ITS UNIQUE APPROACH

Although not explicitly present in the legislation of youth courts, restorative justice

[60] Sarah S. Pearson & Sonia Jurich, American Youth Policy Forum, Youth Court: A Community Solution for Embracing At-Risk Youth 18 (2005).
[61] Id. at 15.
[62] Jeffrey A. Butts, et al., Urban Institute Justice Policy Center, The Impact of Teen Court on Young Responsible Parties 22 (2002) (a study compared recidivism rates after six months for between 100 and 150 youths in both the traditional justice system and the youth court system in each of the four states).
[63] Id. at 27-28 (In Alaska, 23%of youth in the traditional system recidivated compared with only six percent in the youth court. In Missouri, the rates were similar: 28% recidivated in the traditional system compared to nine percent in the youth courts).
[64] Id. at 28 (Fifteen percent of youth in the traditional system recidivated while only nine percent did in the youth court).
[65] Id. (Four percent of youth in the traditional system recidivated while 8% did in the youth court).
[66] Id. at 37.

principles have nonetheless been incorporated into the ways in which those youth courts function.[67] Mainly, the role that young adults take on through their participation in youth courts gives them the opportunity to assess and determine wrongs as they understand and experience them.[68] By placing everyone involved on an equal footing, this opportunity empowers the youths in a way that is integral to restorative justice processes.[69] Unlike youth courts, or other court alternatives however, it is important to note that restorative justice is not a program. Restorative justice is rather a set of principles, where the transformative power lies in a fundamentally different approach to what we call "crime" and how we address its impacts.[70]

Restorative justice defines crime by the harm that it causes others and in some cases the actor herself.[71] Through a restorative justice lens, all crimes can be linked to harm(s) impacting people and a violation of relationships.[72] In other words, instead of focusing on the wrong act itself, as the traditional justice system tends to do, restorative justice turns its focus onto the *impact* of the act. Furthermore, where the traditional criminal justice system defines crimes as a violation of state imposed laws, regulations or rules, restorative justice sees the relationships that are violated as those that exist between the responsible party, his family, community and the impacted party.[73] These shifts in perspectives and understanding are what enable the unique process of reparation, characteristic of restorative justice practices.

---

[67] See e.g. Miss. Code Ann. § 43-21-751; Minn. Stat. Ann. § 299A.296 ("Teen Court Pilot Program Act" and Minnesota Department of Public Safety amendments to § 299A).

[68] In our early Key informant interview with restorative justice practitioners Saroeum Phoung and Doug Reynolds, we discussed the significance of allowing young people to articulate experiences, as they understand them. The critical process of repairing harms and impacts that certain actions cause requires this expression and a space for it to be heard. Interview with Saroeum Phoung, Point One North, and Doug Reynolds, The New Law Center, in Boston, MA (Jan. 7, 2009).

[69] Tracy M. Godwin, National Youth Court Center and the America Probation and Parole Ass'n, The Role of Restorative Justice in Teen Courts: A Preliminary Look 1 (2001).

[70] Id. at 2.

[71] Zehr, supra note 6 at 12.

[72] Godwin, supra note 69 at 1.

[73] Where the traditional criminal justice system defines crimes as a violation of state imposed laws, regulations or rules, restorative justice sees the relationships that are violated as those that exist between the responsible party, his family, community and the impacted party.

As an integral part to its unique approach, restorative justice uses terms that are markedly distinguishable from those used in the traditional justice systems. First, as mentioned above, crimes are referred to instead as harms. Offenders are referred to as "responsible" parties, a more appropriate name given their goal in taking responsibility for their actions. Victims are referred to as impacted parties, drawing a direct connection in relation to the harm caused and the violated relationship between themselves and the responsible party. Lastly, additional parties that are brought into the process of repairing harms are referred to as stakeholders. These stakeholders may include family members of the responsible and impacted parties, teachers and other authority figures, as well as community members. Their participation in the actual process of reparation is contingent upon the nature of the harm caused and the scope of its impact. Our proposed model legislation will use a community of peers system to reach a decision for what the appropriate process is to repair the particular harm caused. In repairing the harm, our proposed youth tribunal will assess the needs of both the impacted party and the responsible party, and choose from one of three processes commonly used to facilitate restorative justice practices.

III. IMPLEMENTING RESTORATIVE JUSTICE AS A SOLUTION

Our proposed model will implement three restorative justice methods: Victim Offender Mediation, Family Group Conferencing and Healing Circles. These methods vary in their implementation depending on the type of harm being addressed.[74] We hope this will provide a flexible framework to address the wide array of harms that are presently processed in the juvenile justice system.

A. VICTIM-OFFENDER MEDIATION

The principle goal of a Victim Offender Mediation session ("VOM") is to hold the

[74] Zehr, supra note 6 at 52.

responsible party accountable for her behavior.[75] In essence, VOMs are a safe, face-to-face encounter between the impacted party[76] and the responsible party, where the impacted party is able to articulate how the responsible party's actions impacted her, in her own words.[77]

We believe that this opportunity is significant for several reasons. The first is that it provides a space where the impacted party can speak directly to the responsible party. This gives the impacted party a voice that she is otherwise denied in the traditional juvenile justice process.[78] As a result, the responsible party learns the impact of her actions from the impacted party's testimony of her experience. The responsible party has the opportunity to take responsibility by understanding the true impact of her actions.[79] Thus, where the traditional juvenile justice system would isolate the responsible party, a VOM session provides an opportunity for a meaningful agreement to be made between the impacted party and the responsible party that allows the impacted party to have a voice and role in the process of repairing the harm.[80]

When dealing with juvenile crime, enabling youths to come to an agreement and develop a plan to address the impact of their actions provides them with a critical opportunity for learning and growth. Because a significant amount of juvenile crime involves youths as the impacted parties as well as the responsible parties, this process is meaningful for both parties. For the impacted party, it demonstrates that the unique experience she suffered and the impact it may have on her well-being is something worthy of time and attention. For the responsible party, it not only provides the opportunity to take full responsibility for her actions, but also to begin the

---

[75] Shay Bilchik, Office of Juvenile Justice and Delinquency Prevention, Guide for Implementing the Balanced and Restorative Justice Model 10 (1998), available at http://www.ncjrs.gov/pdffiles/167887.pdf.
[76] See infra Section 2, Part II.
[77] Zehr, supra note 6 at 46; see also Bilchik, supra note 75 at 10.
[78] Bilchik, supra note 75 at 10.
[79] Id.
[80] Id.

process of rehabilitation by working to amend the harm. Lastly, it provides both the impacted party and responsible party with the opportunity to learn from their experience, and actively participate in their own growth and development process as young adults.[81]

B. FAMILY GROUP COUNSELING SESSIONS

Similar to VOMs, Family Group Counseling sessions ("FGCs") often involve a face-to-face encounter between the impacted party and responsible party. As an adapted form of a VOM, FGC sessions can serve to increase the responsible party's accountability by involving those who are close to the responsible party as stakeholders in her rehabilitation.[82] As witnesses to the agreements made between the impacted party and responsible party, family members can provide support and hold the responsible party accountable for the agreements made during a mediation session.

A report on Balanced and Restorative Justice Practice Implementation, published in 1998 for the Office of Juvenile Justice and Delinquency Prevention ("OJJDP"), stated that one of the fundamental problems with the traditional justice system's approach to responsible parties is that of interpreting accountability as punishment.[83] This punishment isolates the responsible party from her family and community through detention sentences. According to the report, acknowledging responsibility is often a painful experience, particularly for young adults and children.[84] Putting youths in detention facilities as a form of punishment provides them with little to no support. This separation makes the responsible party doubt that her loved ones and community will accept her after she accepts responsibility.[85] Thus, it deprives the responsible party of the incentive to accept responsibility for the harm she has caused. In short, where the

[81] Id.
[82] Zehr, supra note 6 at 48.
[83] Bilchik, supra note 75 at 9.
[84] Id.
[85] Id.

traditional juvenile justice system places a premium on punishment, and deprives responsible parties of critical attention, FGCs convey to the responsible party that she will have support throughout the accountability process and that she will not be interminably stigmatized or isolated as a result of her actions.[86] Furthermore, when used in combination with other comprehensive restorative justice practices, such as healing circles, the responsible party is equipped with tools necessary to develop as a young adult and become an active member in her community and society at large.

In dealing specifically with CHINS adjudication proceedings, FGCs play a critical role in providing a process in which to address harms involved in cases brought by petitioning parents. CHINS proceedings, as they now stand, lack an alternative method of dealing with the concerns of parents and guardians. The only option given to concerned parents is to file intake petitions, and to have their children processed through CHINS adjudication proceedings. This option has been attributed to the drastic increase in the number of youth involved in CHINS processes. In contrast, FGCs provide a space for parents and their children to communicate directly, as opposed to being separated and placed in adversarial roles against one another.[87]

C. HEALING CIRCLES

Healing circle practices are a community-directed method of addressing the community's safety needs.[88] Generally, circles of this kind are used for harms that have impacted a number of people who should be brought into the restorative process as key stakeholders. In order to address the issue of community safety, which is the issue underlying all methods of dealing with crime, peacemaking circles aim to examine the root causes of offenses. This process is critically

[86] Id.
[87] Interview by Law Office 12 members with Senator Karen Spilka, Mass. State Senator, and Mary Anne Padien, General Counsel to Senator Karen Spilka, in Boston, Mass. (Oct. 6, 2008).
[88] Bilchik, supra note 75 at 10.

important in dealing with the disparate consequences that the traditional juvenile justice process has had for communities of color and poor communities. Because circles allow for the active participation of the largest and most diverse number of stakeholders, they provide an opportunity for community members who are in direct contact with juvenile crime and the justice system, to voice their concerns.[89]

Traditional mediation processes include the offender, the victim and occasionally their parents. In contrast, a circle may include various community members who were impacted by the harm, including peers, teachers, neighbors, police, social workers, etc. The purpose behind an inclusive method is to define a solution that will repair the harm and address underlying causes by making multiple parties accountable to each other. It has been argued that one of the biggest harms of the current system is that trust between the community and law enforcement has eroded.[90] Just as restorative processes require the offender to be accountable in new ways, it should also require our authority figures to be accountable to the youth by finding solutions that mitigate harms, rather than creating new ones.[91]

Another unique benefit of circles is that the seating arrangement physically eliminates existing social hierarchies between the participants, and puts them on equal footing throughout the process.[92] There is no head of the table, or positions of power. Furthermore, the process is designed to give each party the chance to speak. Everyone must listen to the speaker and try to understand her position.

---

[89] Law Office 4, Peer Justice System - An Alternative Model (May 2007) (unpublished student deliverable on file with the Northeastern University School of Law).
[90] Interview by Liz Nettleton with Saroeum Phoung, Consultant, Point One North Consulting LLC, in Boston, Mass. (Feb. 9, 2009).
[91] See id.; see also Interview by Liz Nettleton with James Bell, Director of the W. Haywood Burns Institute, in Boston, Mass. (Feb. 13, 2009).
[92] Law Office 4, supra note 89.

There are six unique components to circles, intended to foster trust and understanding.[93] First, the "circle-keepers" open the process, welcoming and inviting the participants. Just one keeper can facilitate circles but it is preferable that two or more be present, depending on the size of the group.[94] The keepers sit across from each other, and keep the dialogue going. They try to build trust between participants and ensure that relevant issues are addressed and solutions are created.[95] Their presence is the second element that enhances circle process.

The third is the talking piece. Only the person holding the piece should speak. The piece is passed clockwise around the circle. A participant has the option to pass it if they do not wish to speak.[96] This is the element that fosters constructive communication and makes circles uniquely inclusive, in that, each party has a chance to speak and to do so at their level of comfort. The circle keepers are not mediators. They begin and end the process, but they do not lead the conversation, rather the participants decide on a set of guidelines.[97] Often this includes addressing each other with respect, as well as various other details. If the guidelines are breached, the keepers step in to urge the parties to find a solution and continue the conversation.

The fourth and fifth components provide that specific objects be allowed into the circle. There is often a centerpiece that includes the elements that contribute to life: fire, water, earth, and of course, air is already present. Circles involve rituals to create safety and structure.[98] The participants can create their own rituals or adapt existent rituals to suit their needs. In an interview with a local practitioner, he advised that the keepers ask the participants for permission

[93] Interview by Liz Nettleton with Saroeum Phoung, Consultant, Point One North Consulting LLC, in Boston, Mass. (Feb. 9, 2009).
[94] Id.
[95] Roca, Inc., Circle Keepers Manual 3 (2004).
[96] Interview by Liz Nettleton with Saroeum Phoung, Consultant, Point One North Consulting LLC, in Boston, Mass. (Feb. 9, 2009).
[97] Id.
[98] Roca, Inc., supra note 95 at 3.

when introducing rituals that may be unfamiliar.[99]

A local practitioner, Saroeum Phoung, works for the consulting company Point One North, in Lynn, MA. His organization provides training for circle process and he has personally led many circles. He emphasizes that circles must be consensual throughout the process, so that each person feels comfortable and safe. To contribute to this goal, each party is asked to bring an object that is "sacred" or special to them. It should be something that gives them hope and strength. Each person is asked to explain the meaning of her sacred object to the group. This element furthers the understanding between the participants because they learn what is important to the individuals present, and begin to know one another on a more personal level. This strengthens the ties between the individuals, which encourages them to be considerate when forming a solution at the end of the process. Circle keepers must get input from each party as to what they believe should be the solution. If the parties don't agree, keepers must "identify areas of disagreement, encourage participants to understand one another's perspectives," and work to build consensus, until a decision is reached that each is "able to live with."[100]

The final element of circle process is the closing. The keepers bring the process to conclusion in a positive way that brings some finality to the process, but that makes participants want to return.[101] The most successful circles give keepers the responsibility of following up with participants to verify that they are supported in resolving the harm, and to plan further circles, if necessary.[102] Practitioners note that restorative justice processes, and especially circles, are very time-consuming and emotionally challenging, but the positive outcomes make

[99] Interview by Liz Nettleton with Saroeum Phoung, Consultant, Point One North Consulting LLC, in Boston, Mass. (Feb. 9, 2009).
[100] Roca, Inc., supra note 95 at 14 (2004).
[101] Interview by Liz Nettleton with Saroeum Phoung, Consultant, Point One North Consulting LLC, in Boston, Mass. (Feb. 9, 2009).
[102] Roca, Inc., supra note 95 at 15.

the investment well worth it.[103]

D. CONCLUSION

By allowing for the participation of a wide array of stakeholders, restorative justice processes are increasingly recognized as providing a much-needed alternative to the juvenile justice system.[104] The OJJDP, as well as other national and international juvenile justice agencies, recognize the critical alternatives that restorative justice practices provide in order to increase public safety and protect communities.[105] As a part of its overall mission to coordinate and provide national resources to prevent "juvenile victimization and respond appropriately to juvenile delinquency," the OJJDP has embraced restorative justice as an effective and necessary method to achieve their goals since 1998.[106]

OJJDP has increasingly supported the integration of restorative justice principles and processes into any and all programs that aim to address problems in juvenile delinquency.[107] Due to national sentencing trends there is a rising concern regarding the national rates of juvenile detention for minor offenses and drug related offenses. In light of this, the OJJDP and others have become even more adamant about the use of restorative justice alternatives in their efforts to decrease the numbers of arrests, detentions and recidivism rates while also promoting public safety and the protection of communities.[108]

---

[103] Telephone interview by Sarah Volante and Liz Nettleton with Anne Warner Roberts, Senior Fellow, Center for Restorative Justice and Peacemaking of Univ. of Minn. (Feb. 9, 2009).
[104] See Bilchik, supra note 75 at 10; see also Godwin, supra note 69.
[105] Bilchik, supra note 75 at 1.
[106] Id. at 10.
[107] Id.; see also Godwin, supra note 69.
[108] "The Center on Juvenile and Criminal Justice more recently reported that America imprisons more than 1 million non-violent responsible parties, more than half the country's prison population. With less serious offences, it is important to provide high-risk youth an opportunity for positive change through life skills, life planning, coaching and community restorative processes. We must give youth in conflict with the law a chance to make restitution for their negative behavior within their community, thereby allowing them to begin the process of reintegration into that community." Barbara Benoliel & Terance Brouse, Tough on Crime Policies Actually Make Less Sense, Toronto Star, Dec. 6, 2007.

IV. BENEFITS OF RESTORATIVE JUSTICE

A. RESTORATIVE JUSTICE IS REAL JUSTICE

Several critics have questioned the effectiveness of restorative justice.[109] These critics argue it is impossible to "restore" impacted parties because the pain they suffered as a result of the harm is too great.[110] Critics ask whether the impacted parties actually receive the justice they deserve.[111] These critiques underestimate the merits of the restorative process.

Restorative justice is often critiqued as too soft on crime, and not providing "real justice." However, this argument reflects a bias that punitive remedies are “real” justice, and that restorative justice is not. Lode Walgrave writes that one goal of justice is restoring the moral balance of right and wrong.[112] Walgrave finds that a retributive justice system achieves this balance by “imposing suffering on the offender that is commensurate to the social harm he caused by his crime.”[113] In contrast, a restorative system seeks to remedy the initial harm, and compensate the suffering of the impacted party through restoration. Thus, the two systems address harms differently, but each seeks to restore a moral balance. The point at which the two processes differ is how the moral balance would best be restored. The traditional system inflicts equal harm on the responsible party while the restorative system asks her to understand and to repair the harm she has caused.

In either system, punishment is not meaningful unless the responsible party takes responsibility for her actions and understands the purpose behind her sentence. Restorative justice methods induce the responsible party to confront the consequences of her actions and to

---

[109] Harry Mika, et al., Listening to Victims: A Critique of Restorative Justice Policy and Practice in the United States, 68 Fed. Prob. 32, 34 (June, 2004).
[110] Id.
[111] Id.
[112] Lode Walgrave. Restoration in Youth Justice, 31 Crime & J. 543, 558 (2004).
[113] Id.

accept accountability. Precisely because it is voluntary, the results are more meaningful to the responsible party. Furthermore, because both the impacted party and the responsible party have a chance to tell their stories in a restorative process, parties feel restorative justice to be more "just" than the traditional system. A study conducted in Bethlehem, Pennsylvania, measured the feelings of parties involved in the restorative justice process. The study found that 96% of victims were "satisfied" where their cases were randomly assigned to conferences, compared to 79% satisfaction when cases were dealt with in court."[114] The study also found that 96% of victims felt that their cases were handled with fairness; 93% of victims felt that the offender was adequately held accountable for the offense; 98% of victims stated that conferences "allowed [them] to express [their] feelings without being victimized;" 96% believed that the offender had apologized; and 75% believed that the offender was sincere.[115] Ninety-four percent said they would choose a conference if they had to do it over again.[116] Restorative justice allows impacted parties to engage in a process that gives them a voice, and involves interaction with the responsible party leads to increased satisfaction with the justice system. Restorative justice gives a profound meaning to the justice that it serves by allowing harms - through its means of volition, storytelling and so on - to bear the true weight of their impact.

We propose that restorative justice be implemented as a supplement, rather than a substitute, to the traditional justice system. As one author put it, restorative justice "is not a substitution for criminal justice, but a contribution to the ongoing reshaping of social order."[117] It should be implemented as a tool in cases where it will help to restore the balance the harm has caused. Restorative justice methods may not be appropriate in all cases. Jurisdictions and

[114] John Braithwaite, Restorative Justice: Assessing Optimistic And Pessimistic Accounts, 25 Crime & Just. 1, 21 (1999).
[115] Id.
[116] Id.
[117] Ivo Aertsen, et al., Institutionalizing Restorative Justice (Willian Publishing 2006).

justice officials can each develop strategies and plans for implementing restorative justice where they see that it will be most effective.

i. Harms

The diversionary program will address lower-level harms. This choice has been made in hopes of building systematic trust in restorative justice practices, rather than as a reflection of its applicability to select levels of harms over others. Many advocates of restorative justice believe so earnestly in its effectiveness, that they find restorative justice methods should be directed at the more serious and persistent offenders and offenses.[118] Family group conferences in New Zealand apply to all harms, other than murder and manslaughter.[119] Even murder has been seen to under the auspices of restorative justice, as parents of murdered victims have agreed to partake in restorative practices.[120] Restorative practices, can and have been used in the resolution of a wide array of harms and need not be limited.[121]

There is the critique, however substantiated or not, that some types of harms are not appropriately addressed by restorative justice.[122] Most restorative practices are used for non-violent and less serious harms.[123] Florida has in fact mandated that all harms addressed in restorative justice processes must be non-violent.[124] One example of a harm not appropriate for restorative justice is said to be sexual assault. This is because it is a serious and extremely

---

[118] Allison Morris, Critiquing the Critics: A Brief Response to the Critics of Restorative Justice, 42 Brit. J. Criminology 596, 603 (2002).
[119] Walgrave, supra note 112 at 567.
[120] Id. at 575.
[121] Id. at 576.
[122] Marcia Neave, Professor, La Trobe University Law School, Restorative Justice: When is it Appropriate? (Oct. 6, 2004) (transcript available at http://www.lawreform.vic.gov.au/wps/wcm/connect/Law+Reform/Home/Newsroom/Speeches/LAWREFORM+-+Restorative+Justice+-+When+is+it+appropriate+%28speech%29).
[123] Walgrave, supra note 112 at 575.
[124] Fla. Stat. Ann. § 985.155(3)(b) (2007) ("The board has jurisdiction to hear all matters involving first-time, nonviolent juvenile offenders who are alleged to have committed a delinquent act within the geographical area covered by the board").

traumatic crime that often creates extreme power differentials between the parties and long lasting, deeply felt effects that may be best treated by professionals.[125] Also, when a person is impacted by a sexual assault, the responsible party has breached the impacted party's trust on a personal level, making it difficult for a process based on trust and openness between parties to function.[126]

This is not to say that sexual assault and other harms are by definition unsuitable for restorative justice practices. These more serious harms are actually in great need of restorative practices; the impacted parties and communities are hurt greatly by these harms and are in huge need of reparation.[127] In restorative justice the responsible parties are confronted with their responsibility directly by their community and the parties that they impacted.[128] Feelings of guilt, remorse, shame and embarrassment, as well as a new sense of understanding are felt directly by the responsible party.[129] With this dialogue, the impacted parties are given the chance to heal, as they are given the chance to understand why this grievous harm was committed against them.[130] Restorative justice can manage a wide array of harms and parties; the limiting factor is how well it is executed.[131]

B. INSTITUTIONALIZING RESTORATIVE JUSTICE

Restorative justice differs in many ways from our current adversarial system, it may prove difficult to obtain public acceptance in designing a justice process that implements restorative practices. Cooperation will need to be reached to integrate restorative justice into the

[125] Neave, supra note 122.
[126] Id.
[127] Walgrave, supra note 112 at 576.
[128] Id. at 576-577.
[129] Id. at 577.
[130] Id. at 578.
[131] Russell E. Farbiarz, Victim-Offender Mediation: A New Way of Disciplining America's Doctors, 12 Mich. St. U. J. Med. & L. 359, 362-363 (2008) (detailing proper performance by understanding the party's needs, abilities and proper facilitation in the realm).

existing system without co-opting it. As it stands now in attempting to place restorative justice in the existing criminal system, we run the risk of compromising some of restorative justice's foundational principles.

Restorative justice is traditionally a community-based practice including it as part of a bureaucratic, state-run system threatens to take away from the autonomy of the parties. The fear is that a bureaucratic system will run on something like autopilot and not take into consideration individual concerns and small details. For this reason, our research contacts have advised that all levels of the "community" should be involved.[132] This includes law enforcement, prosecutors, defense attorneys, judges, probation, as well as elected officials. Additionally, the legislation that is to be implemented must be adaptable in order to accommodate the unique needs of each set of participants.

One of our key contacts has noted that actors in the juvenile justice system are equally afraid that implementing restorative justice will compromise their present roles. Saroeum Phoung works as a consultant in Massachusetts, training people how to conduct healing circles. When asked what his biggest challenge has been in convincing judges, district attorneys, probation officers and police that restorative justice is necessary and legitimate, he said that many of these people are afraid to implement such changes, because they think it would eliminate their jobs.[133] Yet, Saroeum and other local practitioners do not want to replace the current system. He says, "we're not asking you to stop being a judge, we're asking you to be a better judge."[134] He argues restorative justice is about eliciting accountability, not just from the

[132] Telephone interview by Robert Barry and Erin Slone-Gomez with Oscar Reed, The Restorative Way, Inc. (Feb. 4, 2009); see also Interview by Liz Nettleton with Saroeum Phoung, Founder of Point One North, in Boston, Mass. (Feb. 12, 2009).
[133] Interview by Law Office 12 with Saroeum Phoung, Founder of Point One North, in Boston, Mass. (Jan. 9, 2009).
[134] Id.

person who caused the harm, but also from society as a whole. A diversionary restorative justice program may serve to reduce volume and shift existing paradigms but it is unlikely to supplant the courts or "eliminate" those jobs.

The current system has not been able to meet the demands it faces. The sheer volume of cases that enter the juvenile justice system has become a substantial problem. Reports show that courts struggle to provide each delinquent "adequate and fair treatment."[135] In some cases, juvenile defense attorneys are "handling more than 450 cases per year when national standards for juvenile cases call for caseloads not to exceed 200 annually."[136] The lack of adequate representation then increases the likelihood that the judge will act on a probation officer's report rather than take into account the delinquent's individual circumstances.[137] Mr. Phoung poignantly asks, "How can we ask these kids to be accountable to us, if we have not faced our accountability to them?"[138] In other words, if youth do not see that the system has their best interest in mind, we cannot reasonably expect youth to respect the law. The goal in implementing the recommended changes is to create a more just system that participants are satisfied with, and that creates results, in the form of increased safety in our communities. The challenge is to implement the proposed methods with care, and in a way that allows the actors to customize the process to their needs and create a balanced resolution.

C. CORRECT IMPLEMENTATION

Restorative justice is a voluntary process that entails discovering the factors underlying the causation of a harm, understanding them, and then reaching a solution that balances the

[135] Richard E. Behrman, et al., The Juvenile Court: Analysis and Recommendations. 6 The Juvenile Court 4, 10 (1996).
[136] Id.
[137] Id. at 11.
[138] Interview by Liz Nettleton with Saroeum Phoung, Founder of Point One North, in Boston, MA (Feb. 12, 2009).

different interests, and leaves each party with a sense that justice has been fulfilled.[139] In general, problems arise when the methods and goals of restorative justice are not embraced correctly.[140]

i. Voluntary Participation

An elemental principle of restorative justice is that participation must be voluntary. Victims and offenders should not be coerced into the program.[141] Restorative justice, in part, relies upon the good faith efforts of the involved parties to resolve a situation and its problems. If the offending parties do not want to be involved in working out a solution they should not take part in the youth tribunal. Responsible parties forced to meet with impacted parties may be resistant to the process, and thus hinder any chance of restoring that relationship. In such cases, it is preferable that they remain in the traditional justice system.

It is imperative that any restorative justice program ensures that participation is voluntary, and undertaken in good faith.[142] One way to achieve this is by requiring thoroughly informed consent. An information process that details the nature of restorative justice methods, and the expectations of the participant, must be part of this consent process.[143]

ii. The Impacted Party's Role

Restorative justice focuses on repairing the harm and not on what should be done to the responsible party.[144] In this sense, even if the responsible party is not known, steps can be taken to restore the impacted party.[145] In the traditional adversarial approach to justice, the focus of proceedings has been placed on the responsible party and the harm against the state, with little to

[139] See supra Section 1, Part II.
[140] Mark S. Umbreit, et al., Restorative Justice in the Twenty-First Century: A Social Movement Full of Opportunities and Pitfalls, 89 Marq. L. Rev. 251, 299 (2005).
[141] Id.
[142] See infra Section 2, Part I(F).
[143] See infra Section 1, Part V(A)(i).
[144] Walgrave, supra note 112 at 552.
[145] Id. at 553.

no focus on the impacted party.[146] One critique of restorative justice techniques is that the focus on rehabilitation of the responsible party may overshadow the needs of the impacted party. This is antithetical to the tenets of restorative justice, which view harms in the totality of the circumstances from which they arise. According to these tenets, the needs of the impacted party must be held in high regard.[147]

The responsible parties and the impacted parties are both parts of the restorative justice equation for understanding and repairing harms. The participants in the restorative process must acknowledge the specific harms. This entails an actual inquiry of the impacted party, and not a speculative guess as to what is the harm. From the restorative justice perspective, the actual harms may range from emotional, to physical, to monetary damage. They may be healed by remuneration, dialogues leading to closure concerning traumatic events, or informing impacted parties that the responsible party has been educated about the harms she inflicted. Studies in fact show that impacted parties are more in need of emotional restoration, than monetary reparation.[148]

iii. Re-Victimization

In the case of restorative justice, re-victimization means to make fresh the feelings of the victimization, or to incite the fear of being victimized for a second time.[149] Restorative justice methods have been critiqued, in that they may cause impacted parties to feel re-victimized.

---

[146] Monya M. Bunch, Juvenile Transfer Proceedings: A Place for Restorative Justice Values, 47 How. L.J. 909, 919 (2004).
[147] See supra Section 1, Part II.
[148] Morris, supra note 118 at 604.
[149] Umbreit, supra note 140 at 298 (For example, in one drunk driving case, the wife of the victim was invited to take part in determining a settlement. To do so, she had to meet with the drunk driver. However, she was not prepared in advance and in consequence, the meeting renewed painful memories and led to her feeling re-victimized); see also Braithwaite, supra note 114 at 81 (In Canberra, Australia, a responsible party threatened a woman with a syringe filled with blood. The parties engaged in a restorative practice. Later the impacted party found a syringe in her car. Though the syringe was not linked to the responsible party the impacted party feared of another victimization).

There are several rebuttals to such a critique. First, restorative methods are less likely to cause impacted parties to feel re-victimized than the traditional system, in which they are "often misused as witnesses in the criminal investigation and then left alone with their grievances and losses."[150] For instance, the impacted party may have to testify at a trial, leading to the successful conviction of the responsible party. In the State's eyes, the situation may appear to be resolved, yet, for the impacted party, recounting the harm, may have renewed traumatic memories of the event. Furthermore, it is unlikely that the impacted party gained any understanding as to the motivations of the responsible party, nor has she had a chance to tell the responsible party the consequences of the harm she caused. For the purpose of the trial, she is only required to relate the facts, as opposed to sharing the resulting pain she may have suffered.

One of the principle goals of restorative justice is to empower the impacted parties.[151] Restorative justice methods provide the impacted party with a voice. If she is willing to participate, she can face the person who caused her harm and express exactly how it affected her. This opportunity is absent in the criminal justice system. Thus, when properly implemented, restorative justice has the capacity to empower, rather than harm the impacted party.[152]

Restorative justice methods can make use of surrogates.[153] The term surrogate is used here in the sense of a "stand-in" for one of the parties. In other words, if the impacted party feels it may be too hard for her to participate, someone else may represent her interests in the process.[154] To function properly, restorative justice requires the stakeholders to participate. Through the use of a surrogate, the responsible party is held accountable, and the impacted party

[150] Walgrave, supra note 112 at 5.
[151] Interview with Saroeum Phoung, Founder, Point One North (Jan. 9, 2009).
[152] Morris, supra note 118 at 600.
[153] Zvi D. Gabbay, Justifying Restorative Justice: A Theoretical Justification for the Use of Restorative Justice Practices, 2005 J. Dispute Resolution 349, 365-366 (2005).
[154] Id. (surrogacy works especially well to ensure that impacted parties that are fearful of re-victimization are kept fully out of the process while still allowing the responsible party a chance to heal).

can have her needs and feelings expressed by another, without interacting with the responsible party.

D. COST/BENEFIT ANALYSIS OF RESTORATIVE JUSTICE

In addition to repairing relationships, and challenging youth to develop conflict resolution skills, diverting youth from the punitive model can potentially save communities tens of thousands of tax dollars. Currently, legislators in the United States are focused on increasing punitive remedies. We recommend remedies, which research shows are more cost effective.

Last March, Harvard Law School's Charles Hamilton Houston Institute for Race and Justice prepared a study regarding the social and economic costs of using "suppression" methods to combat youth crime.[155] Here the term "suppression" refers to traditional law enforcement measures, such as arrest and incarceration. The study noted that last spring Congress was considering signing several "crackdown" bills into legislation. The bills proposed to expand the categories of gang-crimes and create longer penalties for offenders.[156] It provided one billion dollars to arrest and incarcerate more young people.[157]

Yet, even before considering these expansions, the cost of the punitive system was too high. According to a 2003 report produced by the National Center on Education Disability and Juvenile Justice, the costs associated with incarcerating youths in detention facilities ranged from $35,000 to $70,000 per bed, per year.[158] The Juvenile Offenders and Victims: 2006 National Report showed that over 96,000 young people were being held in custody in the United States, including 1,302 in Massachusetts.[159] If Massachusetts were to divert youth from the juvenile

[155] Charles Hamilton Houston Institute for Race and Justice, No More Children Left Behind Bars: a Briefing on Youth Gang Violence and Juvenile Crime Prevention (2008).
[156] Id. at 7.
[157] Id.
[158] Id. at 10.
[159] Snyder, supra note 17 at 201.

justice system to a model that does not include incarceration as a sentencing option, thousands of dollars would be saved for every youth that chose to participate. This is especially desirable, as "research by criminologists over the past several years has shown that punitive consequences do not, in fact, reduce criminal behavior and in some cases actually increase it."[160] On the contrary, our research above reveals statistics from youth courts and restorative justice that show reduced recidivism rates.[161] Therefore, where the traditional system exacerbates youth crime, the methods we are proposing reverse it.

To further the goal of creating cost effective change, our model includes mechanisms to keep any new related costs at a minimum. One of these mechanisms is the "outsourcing" option, which we have created in our model that allows the youth tribunal to divert participants to local organizations that have been implementing the recommended restorative justice methods for years.[162] This would save the state the cost of providing space for mediation sessions and of paying facilitators to conduct such sessions. Furthermore, our recommendations envision the principal actors at each stage will be volunteers. Colorado's youth court program is instructive for its use of volunteers. The program recruits youth volunteers between the ages of 14-18, to serve as attorneys, bailiffs and jury members. Trainings are held throughout the year.[163] Professional judges and lawyers also volunteer their time and oversee proceedings.[164] In this way, the youth court is run at little to no additional cost to the state. We hope to implement these same measures in the Massachusetts diversionary program.

Therefore, creating a low-cost diversionary program for youth would save the state the

---

[160] Federal Advisory Committee on Juvenile Justice, Federal Advisory Committee on Juvenile Justice Annual Recommendations Report to President and Congress of the United States 3 (2007), available at http://www.facjj.org/annualreports/ccFACJJ%20Report%20508.pdf.
[161] See supra Section 1, Part II.
[162] See infra Section 2, Part II(B).
[163] Colorado Springs Teen Court Web Page, Volunteers, http://www.csteencourt.org/.
[164] Id.

high costs associated with litigation and incarceration. At the same time, it saves our youth from the high costs that punitive measures inflict on their development.

V. CONSTITUTIONAL CONSIDERATIONS

A. RIGHTS OF YOUTHS

The rights of youths involved in the restorative justice diversionary program are of utmost concern.[165] Below, we engage in a brief discussion of the rights that are associated with a youth's involvement in the juvenile justice system. We then discuss how these rights function, and explain how our proposal safeguards these rights.[166]

There are a great number of due process rights that are protected by the Fifth[167] and Fourteenth Amendments of the United States Constitution.[168] These rights apply in circumstances in which an individual may be deprived of "life, liberty or property."[169] Our youth tribunal protects a youth's due process rights, and does not deprive her of "life, liberty or property." The responsible party cannot be deprived of life in a restorative justice program, because the death penalty is not an option. The responsible party will not be deprived of liberty, because the diversionary process is entirely volitional, and incarceration is not an option, unless the youth chooses to accept a traditional sentence. Finally, regarding property, the parties may decide that a material remedy is the most appropriate. For example, in instances where the

[165] Alaska Stat. § 47.12.400(c)(2) (2000) (The Alaskan Youth Court statute demands that nonprofit corporations operating youth courts must guarantee, "the constitutional rights of the minor that are guaranteed by the state and federal constitutions").
[166] These rights and the corresponding discussions will be referenced to in the explanation of the model.
[167] U.S. Const. amend. V.
[168] U.S. Const. amend. XIV.
[169] Mary Ellen Reimund, Is Restorative Justice on a Collision Course with the Constitution?, 3 Appal. J. L. 1, 19 (2004); Statutes have been enacted to protect infringement of such concerns by limiting dispositional options, such as those in Mississippi. Miss. Code Ann. § 43-21-753 (Dispositions of teen court limited to such options as, "perform[ing] up to one-hundred twelve (112) hours of community service, require offenders to make a personal apology to a victim, require offenders to submit a research paper on any relevant subject, attend counseling and make restitution or any other disposition authorized by the youth court."); The State of Washington limits the dispositional options of diverted juveniles. Wash. Rev. Code. § 13.40.080(2) (2004).

responsible party damaged the property of the impacted party, she may be asked to replace this property, or pay for a replacement. However, this is not an unconstitutional deprivation of property rights; she will not be demanded to give up her property. Such a decision would be part of a mutual agreement between herself and the impacted party. If the parties cannot form an agreement that is acceptable to them both, the responsible party has the ability to leave the program at any time.

A closer look at the procedural safeguards and rights already afforded to youths in Massachusetts provides us with more concrete examples of how our youth tribunal will protect due process rights. Under current Massachusetts law, a CHINS proceeding is not criminal in nature.[170] Nevertheless, a youth who is subject to a CHINS proceeding is entitled to certain rights that are relevant to criminal matters. Such rights include: the right to exclude all statements made by the youth, or any other person, during any subsequent hearings for the purpose of adjudicating the youth a child in need of services;[171] the right to trial by jury;[172] the right to counsel;[173] the right to be present during a trial on the merits;[174] the right to have the fact-finder apply "beyond a reasonable doubt" as the standard of proof;[175] the right to a unanimous jury verdict;[176] and the right to an appellate review of the trial court proceedings.[177]

Similar to CHINS proceedings, delinquency proceedings are not criminal in nature.[178] Yet, the possibility of deprivation of liberty exists as a possible disposition.[179] As the Supreme Court has held in many cases, - such as in In re Gault - where deprivation of a youth's liberty is a

[170] Mass. Gen. Laws ch. 119, § 39E (2008).
[171] Id.
[172] Mass. Gen. Laws ch. 119, § 39E, 39I (2008).
[173] Mass. Gen. Laws ch. 119, § 39F (2008).
[174] Mass. Gen. Laws ch. 119, § 39G (2008).
[175] Id.
[176] Mass. Gen. Laws ch. 119, § 39I (2008).
[177] Id.
[178] Mass. Gen. Laws ch. 119, § 53 (2008).
[179] Mass. Gen. Laws ch. 119, § 58 (2008).

possibility, the youth is entitled to certain due process rights of the Fifth and Sixth Amendments, as applied to the States by the Fourteenth Amendment.[180] Those rights are the right of the youth and her parent or guardian to written notice of charges,[181] right to counsel,[182] the privilege against self-incrimination,[183] etc. Even though our model does not deprive a youth of her liberty, we recommend that these many of these same rights be included, with one very important addition.

i. Voluntary Participation

We emphasize the fundamental requirement that participation in this program must be free from coercion. A voluntary participant is the only participant that can effectuate a truly restorative resolution. Therefore, the program should do its best to ensure the voluntary nature of all those involved. This may be done through the use of detailed consent forms that stipulate many of the important factors of the process.[184] In this way, participants can make an informed decision regarding their desire to participate.

A great example of this process is Alaska's Youth Court intake. Alaska law mandates that entry into the youth court only be allowed with the full consent of the youth, and her parent, or guardian.[185] Similarly, a North Carolina diversionary program allows for the "juvenile court counselor" to create a contract with the youth, and her legal guardian, that stipulates in great detail many aspects of the diversion. Such contracts are required to detail the following:

---

[180] In re Gault, supra note 27 at 12 (Mass. Supreme Judicial Court affirmed in Commonwealth v. Rodriguez, 376 Mass. 632, 635 (Mass. 1978)).
[181] Id. at 33; see also Mass. R. Crim. P. 6(a)(1).
[182] Id. at 41; see also Marsden v. Commonwealth, 352 Mass. 564, 568 (Mass. 1967); Mass. R. Crim. P. 8; S.J.C. 3:10.
[183] Id. at 55; see also Commonwealth v A Juvenile (No. 1), 389 Mass. 128, 133-134 (Mass. 1983) (Acknowledging the right against self-incrimination for juveniles and discussing the "interested adult" rule which states that the juvenile and the juvenile's parent, or someone acting in loco parentis, were fully advised of the right against self-incrimination, that there has been a knowing and intelligent waiver of said right).
[184] See infra, Section 2, Part I(A).
[185] Alaska Stat. § 47.12.400(c)(3) (2000) ("The youth court may secure jurisdiction over the minor only with the consent of the minor and the agreement of the minor's legal custodian.")

> (1) State conditions by which the juvenile agrees to abide and any actions the juvenile agrees to take; (2) State conditions by which the parent, guardian, or custodian agrees to abide and any actions the parent, guardian, or custodian agrees to take; (3) Describe the role of the juvenile court counselor in relation to the juvenile and the parent, guardian, or custodian; (4) Specify the length of the contract, which shall not exceed six months; (5) Indicate that all parties understand and agree that: a. The juvenile's violation of the contract may result in the filing of the complaint as a petition; and b. The juvenile's successful completion of the contract shall preclude the filing of a petition.[186]

These conditions ensure that the youth is provided with a complete explanation of the procedure to follow, the roles of each of the parties, as well as the consequences of violating the contract.[187]

Another example can be found in Washington's diversion program. This program requires that a "written diversion agreement shall be executed stating all conditions in clearly understandable language."[188] To further ensure fully voluntary participation, there should be points of egress for youths who no longer wish to participate in the tribunal.[189]

We recommend that participants be fully informed about the process before it begins. Also, they must have the option to leave the youth tribunal, and any subsequent part of the process, at all times.

ii. Right to Notice

The right to notice is integral to a discussion of due process concerns. The right of notice comes from the Fifth, Sixth and Fourteenth Amendments.[190] It is founded in the belief, that in order to protect one's interests, one must know what interests are at risk of being lost.

In delinquency and youthful offender cases in Massachusetts, both state statue and federal jurisprudence guarantee the youth, and her parent, or guardian, the right to written notice of

[186] Alaska Stat. § 47.12.400 (2000).
[187] N.C. Gen. Stat. Ann. § 7B-1706(b) (West 2001).
[188] Wash. Rev. Code. § 13.40.080(7)(a) (2004).
[189] See infra, Section 2, Part II(F).
[190] U.S. Const. amend. V; U.S. Const. amend VI ("The accused shall enjoy the right to…be informed of the nature and cause of the accusation"); U.S. Const. amend. XIV.

charges.[191] In other systems, such as Washington State, notice must be sent to legal guardians and victims when a youth's case is referred to a diversion interview.[192] Additionally, before the youth enters the diversion program, the youth must enter into a contract that details the conditions of the diversion.[193]

We recommend following the federal and state statutory mandates, as well as the persuasive example of Washington. All of the parties involved in our diversionary program should be given written notice that fully explains their options, and the consequences of their choice to participate in the youth tribunal. Notice will be given to the parties via a letter sent out to responsible parties, and their parents, prior to a hearing, where the diversion will be discussed. The details and rationale for this hearing and letter are discussed in the explanation of the model diversion program.[194]

iii. Right to Counsel

The right to counsel is hallowed in American jurisprudence. It, too, finds its basis in the Constitution.[195] It is premised on respect for an individual's liberty, and the belief that it should not be deprived for any unfair or unjust reason. Injustice is averted by making counsel available, to help the uninformed person navigate the channels of the law. The Supreme Court stated in a central case that, "in addition to counsel's presence at trial, the accused is guaranteed that he

---

[191] In re Gault, supra note 27; see also Mass. R. Crim. P. 6(a)(1).

[192] Wash. Rev. Code. § 13.40.070(8) (2004)

> Whenever a juvenile is placed in custody or, where not placed in custody, referred to a diversion interview, the parent or legal guardian of the juvenile shall be notified as soon as possible concerning the allegation made against the juvenile and the current status of the juvenile. Where a case involves victims of crimes against persons or victims whose property has not been recovered at the time a juvenile is referred to a diversion unit, the victim shall be notified of the referral and informed how to contact the unit.

[193] Wash. Rev. Code. § 13.40.080(1) (2004)

> A diversion agreement shall be a contract between a juvenile accused of an offense and a diversion unit whereby the juvenile agrees to fulfill certain conditions in lieu of prosecution. Such agreements may be entered into only after the prosecutor, or probation counselor pursuant to this chapter, has determined that probable cause exists to believe that a crime has been committed and that the juvenile committed it.

[194] See infra, Section 2, Part I(A).

[195] U.S. Const. amend. V; U.S. Const. amend VI ("the accused shall enjoy the right to…Assistance of Counsel for his Defense"); U.S. Const. amend. XIV.

need not stand alone against the State at any stage of the prosecution, formal or informal, in court or out."[196] The Court went on to say that the guidance of counsel "at such critical confrontations, as at the trial itself, operates to assure that the interests of the accused will be protected consistently."[197]

The Massachusetts legislature has codified this right to counsel. Parties in CHINS proceedings are given the right to counsel.[198] Likewise, the Supreme Court and the Supreme Judicial Court of Massachusetts have guaranteed the right to counsel in delinquency and youthful offender proceedings.[199]

This right has been instituted throughout the nation. Colorado's Teen Court Statute incorporates many aspects of the traditional adversarial system, which guarantee long-established due process safeguards, such as the right to counsel.[200] Washington also statutorily affirms a "juvenile's" right to counsel before making the decision to enter the diversion program, and the right to counsel at any "critical stage of the diversion process."[201]

In the diversionary program, the responsible party will have the privilege to have counsel until she enters the program. If she is diverted from places such as CHINS or delinquency proceedings, she will already have the right to counsel. Her counsel will be able to assist her through the critical stages of these programs, and will be able to assist her in making a decision

---

[196] U.S. v. Wade, 388 U.S. 218, 226 (1967).
[197] U.S. v. Wade, 388 U.S. 218, 227 (1967).
[198] Mass. Gen. Laws Ann. 119 § 39F (2008).
[199] In re Gault, supra note 27 at 41; see also Marsden v. Commonwealth, 352 Mass. 564, 568 (Mass. 1967); Mass. R. Crim. P., Rule 8; S.J. Ct. 3:10.
[200] Colo. Rev. Stat. Ann. § 19-2-1104(2) (West 1999) ("The teen defendant may represent himself or herself or be represented by a teen defense attorney.")
[201] Wash. Rev. Code. § 13.40.080(11) (2004)

> The right to counsel shall inure prior to the initial interview for purposes of advising the juvenile as to whether he or she desires to participate in the diversion process or to appear in the juvenile court. The juvenile may be represented by counsel at any critical stage of the diversion process, including intake interviews and termination hearings. The juvenile shall be fully advised at the intake of his or her right to an attorney and of the relevant services an attorney can provide. For the purpose of this section, intake interviews mean all interviews regarding the diversion agreement process.

as to whether she should enter the diversionary program.[202] The same will apply to the impacted party. Once the parties the agreement to enter the program, however, part of that agreement specifies that they waive their right to counsel within the diversionary program. It must be stressed that this waiver is temporary; it only exists within the diversionary program. Once the parties exit the program, their right to counsel is reestablished.

Waiving the right to counsel is not an unusual occurrence in the law. The Supreme Court of the United States has deemed it a right.[203] In Massachusetts, the courts have consistently held that in criminal matters the defendant reserves the ability to waive her right to counsel. In Commonwealth v. Nicoll the court states that while the rights granted by the Sixth Amendment - of which, right to counsel is one - are important, "the accused is entitled to waive each of them."[204] It is important to distinguish that the holdings in cases like In re Gault and Marsden v. Commonwealth, which held that minors cannot waive the right to counsel, and only applies to delinquency and youthful offender proceedings.[205] Our program is unlike delinquency and youthful offender proceedings, in that the responsible party in our program does not face the possibility of being labeled "delinquent."

Also, Massachusetts holds that where there is parental or guardian consent, a minor can waive the right to counsel.[206] Because the parties involved in the program will be minors, the agreement to enter the program, including this waiver provision, will have to be signed by their parents as well. This parental consent validates a youth's waiver of her right to counsel.

---

[202] This concept fits with State of Minnesota requirements for a juvenile who wishes to waive her right to counsel. There, the juvenile must have counsel present to provide assistance before she can waive her right and proceed through the program. Minn. R. Juv. P. 3.04, subdiv. 1 (1995).
[203] Faretta v. California, 422 U.S. 806, 835 (1975) (defendant has absolute right to waive counsel and to represent herself).
[204] Commonwealth v. Nicoll, 452 Mass. 816, 820 (Mass. 2008); see also Commonwealth v. Martin, 425 Mass. 718, 720-721 (Mass. 1997) (defendant may waive right to assistance of counsel).
[205] In re Gault, supra note 27 at 41; see also Marsden v. Commonwealth, 352 Mass. 564, 568 (Mass. 1967).
[206] Mass. Gen .Laws Ann. ch. 119, § 55A (2008) (A minor cannot waive right to a jury trial unless they are represented by counsel, ***or*** have, with parental/guardian consent, waived their right to counsel) (emphasis added).

The reasoning behind the requirement that the participants waive their right to counsel is based on the belief that allowing lawyers into the program would ultimately destroy its restorative justice purpose. Allowing the parties to bring lawyers into the youth tribunal immediately makes the atmosphere, and the process, more adversarial. Each lawyer would be there to represent her client, and a lawyer's mindset is to "win." It is likely, that she will not have knowledge of restorative justice, and therefore, would only focus on what is "best" for her client, in a very narrow sense of the word. This program is not intended to be a "zero-sum" game; the youth tribunal should lead to an outcome that is best for each party.

Furthermore, it is the parties that speak at the youth tribunal, not their lawyers. In doing so, they create a positive dialogue so that the youth judges can facilitate a decision regarding the appropriate restorative justice method to be applied.[207] Including lawyers will invariably lead to the parties being coached on what to say, and how to say it. This destroys the notion of open, "positive dialogue" which is essential to our program's success.

Also, an adult presence in a youth tribunal setting creates an imbalance of power. The youth judges may be improperly influenced by the words of a lawyer, rather than the words of the parties. Sharon S. Brehm of the University of Kansas performed a study in the late 1970's that clearly indicated that adult influence strongly affects the decision-making process of youths.[208] Allowing a strong adult presence in our program would destroy the goal to make it youth-based. The parties' peers would not be able to make independent decisions, but rather they would be affected by adult counsel.

It is important to note that the parties will not be alone in our program. Once they enter

[207] See infra Section 2, Part I(D).
[208] Sharon S. Brehm, The Effect of Adult Influence on Children's Preferences, 5 J. Abnormal Child Psychol. 1 (1977) (When indicated which preference to choose by an adult, a class of 5th grade boys and girls unanimously chose the particular preference indicated by the adult).

the program, they will be assigned a youth representative who will be with them throughout the entire process. They will be with them at the youth tribunal to provide guidance, as well as being available during the Circle, VOM, or FGC to answer questions, etc.[209] Using a youth representative system, instead of adult counsel, promotes the core ideas of our program: that it be run by youth and that it is a restorative justice process.

iv. Right Against Self-Incrimination

In In Re Gault, the Supreme Court extended to youths the right against self-incrimination, guaranteed by the Fifth Amendment.[210] The diversionary program will protect this right in the following ways: first, the program respects the right of the responsible party to refrain from disclosing any information that she does not want to share.[211] Furthermore, although the responsible party is required to take responsibility for the harm, the program provides that this admission will not be used against the youth in future proceedings. Therefore, if the responsible party leaves the program and must return to formal delinquency proceedings, she retains the right to plead "not delinquent." This right will be protected by the inadmissibility of any records from the youth tribunal.

Provisions already exist in Massachusetts General Laws, which provide for the protection of records from juvenile proceedings.[212] We recommend inserting language into this statute, protecting all records from the proposed youth tribunal. More specifically, we recommend provisions in line with those of Washington, which limits the information that the juvenile court may receive from its diversionary program.[213] The only information admissible into

[209] See infra Section 2, Part I(D).
[210] In re Gault, supra note 27 at 55 ("We conclude that the constitutional privilege against self-incrimination is applicable in the case of juveniles as it is with respect to adults.")
[211] See supra, Section 1, Part V(A)(i).
[212] Mass. Gen. Laws Ann. ch. 119, § 60(a) (2008).
[213] Wash. Rev. Code Ann. § 13.40.080 (2004).

Washington's juvenile court is an explanation of the charge, the facts of the offense, the fact that a diversion agreement was entered into, the youth's obligations under the agreement and whether the agreement was completed successfully.[214] We recommend even more explicit provisions than Washington's statute, regarding the information that must be inadmissible in further proceedings.

New South Wales, Australia has a diversionary program that is similar to the one we are recommending. Their statutory language includes an "information preclusion" provision.[215] The statue explicitly states that any statement, confession, admission made or information given by the participant is precluded from being submitted as evidence in subsequent proceedings.[216] Using the Washington and New South Wales's statutory language as guidance, we recommend inserting language into Massachusetts General Laws that makes clear the information that will be admissible in subsequent proceedings, in order to protect the right to not self-incriminate.

v. Right to a Hearing

The Sixth Amendment of the U.S. Constitution states, "The accused shall enjoy the right to a speedy and public trial."[217] This right is one that has been upheld in criminal trials and delinquency hearings on the basis of the Fifth and Fourteenth amendments, which guarantee the right to not be deprived of "life, liberty, or property without, due process of law."[218] In Massachusetts, the right to trial by jury is guaranteed in CHINS,[219] delinquency and youthful offender proceedings.[220]

---

[214] Wash. Rev. Code Ann. § 13.40.080 (2004).
[215] N. S. W. Young Offenders Act 1997 no 54 § 67 (Austl.).
[216] N. S. W. Young Offenders Act 1997 no 54 § 67 (Austl.).
[217] U.S. Const. amend. VI.
[218] U.S. Const. amend. V ("Nor shall any person…be deprived of life, liberty, or property, without due process of law."); U.S. Const. amend. XIV, § 1 ("Nor shall any State deprive any person of life, liberty, or property, without due process of law.")
[219] Mass. Gen. Laws Ann. ch. 119, §§ 39E, 39I (2008).
[220] Mass. Gen. Laws Ann. ch. 119, § 56 (2008).

As a hearing is a fundamental aspect of the American justice system, it is no surprise that other states' diversionary programs have guaranteed the right to a hearing. The Colorado Teen Court statute ensures the right to a trial by a jury of peers.[221] Washington State gives the diverted party the right, once engaged in the diversionary program, to leave or remain in that program. Before she can be removed from the diversion program, there must be a hearing with a number of stipulations.[222]

In the model we are recommending, the youth tribunal serves as an initial hearing before the youth enters the remainder of the program. We do not provide for a hearing upon exiting the program. Should the restorative process break down, due to the responsible party's lack of participation, or unwillingness to cooperate, she will be referred back to the court from which she was diverted. In other words, if the responsible party was diverted from the CHINS system, she will be required to go back to the CHINS system. If she was diverted from the juvenile justice system, she will go back to the juvenile justice system. We do not believe any additional hearing is necessary, because, upon re-entry into the system from which the responsible party was diverted, all constitutional rights that are guaranteed within that system are reinstated. Thereby, making it impossible for the responsible party to be deprived of her liberty without a hearing.

---

[221] Colo. Rev. Stat. Ann. § 19-2-1104(2)(a) (West 1999) ("The teen court judge shall select a teen jury").

[222] Wash. Rev. Code. § 13.40.080(7)(c) (2004).

> Those stipulations include, "[w]ritten notice of alleged violations of the conditions of the diversion program… [d]isclosure of all evidence to be offered against the divertee… [o]pportunity to be heard in person and to present evidence… right to confront and cross-examine all adverse witnesses… written statement by the court as to the evidence relied on and the reasons for termination, should that be the decision; and…[d]emonstration by evidence that the divertee has substantially violated the terms of his or her diversion agreement.

vi. Double Jeopardy

The Supreme Court has held that youths are entitled to the same constitutional protections as adults in criminal proceedings,[223] including the Fifth Amendment's protection against being tried twice for the same crime.[224] Because the youth tribunal is not a trial, where guilt is determined, and all records are protected,[225] there is no danger of a youth being tried twice as a result of her participation in the diversionary program.

vii. Presumption of Innocence;[226] Right to Confront Witnesses;[227] Right to a Unanimous Jury Verdict;[228] Right to be Present;[229] Right of Appeal[230]

Some of the rights afforded youths in delinquency and CHINS proceedings are only relevant to adjudication. Because there is no trial at which guilt is determined in the diversionary program, these rights will not be violated. Furthermore, if a youth is referred back to CHINS or delinquency proceedings, all records of the youth tribunal are sealed, and the rights are restored.[231]

Because the methods to be applied in our model do not focus on innocence or guilt, but rather on the harm caused, the right to presumption of innocence cannot be violated. To participate, the responsibility party must voluntarily accept responsibility for the harm caused. If she cannot do so, she must remain in the traditional system. Similarly, the rights to confront witnesses and to a unanimous jury verdict are irrelevant, because these elements are only present in the context of a trial. The right to be present cannot be overlooked in the proposed model,

---

[223] Breed v. Jones, 421 U.S. 519, 528 (1975); see Commonwealth v. Juvenile (No. 2), 6 Mass. App. Ct. 194, 197 (Mass. App. 1978).
[224] U.S. Const. amend V; U.S. Const. amend. XIV.
[225] See supra, Section 1, Part V(A)(iv).
[226] Coffin v. U.S., 156 U.S. 432, 453 (1895).
[227] U.S. Const. amend VI; U.S. Const. amend V; U.S. Const. amend. XIV.
[228] Mass. Gen. Laws Ann. ch. 119 § 39I (2008).
[229] U.S. Const. amend V; U.S. Const. amend VI; U.S. Const. amend. XIV.
[230] Mass. Gen. Laws Ann. ch. 119 § 39I (2008).
[231] See supra, Section 1, Part V(A)(iv).

because neither the youth tribunal, nor the restorative processes can function without the responsible party's participation.[232] Lastly, the right of appeal does not apply to the diversionary program because all parties must agree to the resolution. If the parties cannot form an agreement, the youth retains the option of returning to CHINS or delinquency proceedings.[233]

viii. Immunity from Liability

In establishing youth courts, other states have made the effort to statutorily shield all participants from any liabilities that may arise from the operation of said youth courts. Alaska created legislative immunity from civil actions for those who administer, operate and participate in their youth courts.[234] Vermont also provides immunity for participants in their youth court from claims that arise from the youth court.[235] In other words, none of the participants in the diversionary program can be subject to litigation that may arise from their actions during the program, or from anything that is discussed in the program. For example, if it comes up in a circle that the responsible party has suffered from abuse, this knowledge cannot be used to start legal action against the person who has abused her. The reason for this protection is that fear of legal actions and harsh repercussions resulting from actions in good faith could discourage support of and involvement in the diversion program. We recommend that similar immunity

---

[232] See infra Section 2, Part I(D).

[233] See infra Section 2, Part I(F).

[234] Alaska Stat. § 47.12.400(g) (2000)

> An individual who is a member or an agent of the board of directors of a nonprofit corporation that has obtained recognition from the commissioner to serve as a youth court under this section is immune from suit in a civil action based upon the exercise or performance of or the failure to exercise or perform a discretionary function or a discretionary duty as a member of the board of directors or that has been properly delegated by the board of directors. An individual who tries, represents, or adjudicates a minor in a youth court is immune from suit in a civil action based upon the exercise or performance of or the failure to exercise or perform a discretionary function or a discretionary duty within the individual's quasi-judicial capacity with the youth court. A nonprofit corporation that has obtained recognition from the commissioner to serve as a youth court is immune from suit in a civil action based upon an act or failure to act for which an individual is granted immunity under this subsection.

[235] Vt. Stat. Ann. tit. 12, § 7107 (1995) ("Court diversion, its board, and staff, the youth court or any of its officers, the youth court advisory board members and participants in youth court activities shall as individuals and as standing bodies be immune from any claims that may arise as a result of activities related to the Windsor county youth court.")

from civil liability be extended, either statutorily and/or by waiver, to participants so as to not deter participation.[236]

B. The Rights of Parents

At the outset of our project, Senator Spilka conveyed to us her concern regarding the rights of parents, and protecting parent-child relationships.[237] Her role as Chair of the Joint Committee on Children and Families, and her consistent efforts to reform CHINS reflect this general concern, and highlight the problems that CHINS proceedings create for family relationships.[238] In treating juvenile status and minor offenses, CHINS adjudication processes and dispositions raise complex issues regarding home and family life. These issues, more often than not, fall outside the scope of what courts can address through traditional justice processes.[239]

The difficulty that arises in CHINS proceedings is that the ultimate sentence or result of the process is often detached from the remedy sought at the outset.[240] Because CHINS intake often originates with parent petitions, the relief sought is sometimes as simple as aid or assistance with their troubled child.[241] However, CHINS proceedings can result in measures as drastic as terminating parental rights. Mia Alvarado, chief of staff at the Department of Social Services ("DSS"), was quoted as saying that parents often tell her "they had no idea when they

---

[236] Youth Resources of Southwestern Indiana, Teen Court Liability Waiver, available at http://www.youth-resources.org/apps/YouthVolLiabilityforms.pdf (last visited March 19, 2009) (an example of such a waiver, whereby parent/guardian and youth consent to absolve participants of any and all claims that may arise from participation in the youth court).

[237] Interview by Law Office 12 with Mary Anne Padien, General Counsel, Office of Senator Spilka, in Boston, Mass. (Nov. 14, 2008).

[238] http://www.karenspilka.com/bio.htm.

[239] In other states such as Illinois, similar statutes for juvenile status offenses have, comparably to CHINS, resulted in termination of parental custody rights, splitting up families, and raising concerns among community members, lawyers, judges and legislators. See e.g. Maria Kantzavelos, Once Undesireable, Juvenile Court Attracts Judges, Chicago Lawyer, Volume 29, Number 4, April 2006.

[240] See Julie Jette, Parents Search for Help Often Lose Kids, The Patriot Ledger, Oct. 6, 2007, available at 2007 WLNR 20374218 (discussing the divisive family impact that CHINS petitioning processes can have, in particular when parents petition as a request for help, rather than a request for their child to be taken from their custody).

[241] Julie Jette, Parents Search for Help Often Lose Kids, The Patriot Ledger, Oct. 6, 2007, available at 2007 WLNR 20374218.

filed a CHINS that [it] could equate to loss of custody."[242] In her words, all they wanted was for their family "to get help dealing with the problem they were facing."[243]

The phenomenon of parental custody termination has not gone without resistance or checks in support of parental rights. In In the Matter of Angela an appeal of a CHINS parent custody termination led the Supreme Judicial Court of Massachusetts to recognize "CHINS proceedings as intrusions on a child's fundamental liberty interest in the parent-child relationship."[244] Expounding upon this precedent, in 2008 the Mass. S.J.C held that parents, too, possess a "fundamental liberty interest" in the "care [and] custody" of their children.[245] In its aftermath, the precedent of Hilary, has effectively guaranteed parental rights to counsel in any and all CHINS proceedings involving terms of custody.[246] While this demonstrates a positive step in recognizing the need to protect parental custody rights, and keep families together, its effect has been the creation of a hyper-adversarial process between parents and their children.[247] The result is that now both the youth and the parents have attorneys and are pitted against each other in a court-like setting. Also, just because parents are guaranteed the right to counsel, it does not mean their custody rights will ultimately remain intact. Furthermore, the underlying problems leading to those petitions also remain. Child advocates urging CHINS reform have pointed to the almost complete lack of available social services or early intervention processes for children and families as the principal cause of such high numbers in parent CHINS

---

[242] Julie Jette, supra note 240.
[243] According to a 2000 report from Citizens for Juvenile Justice, a Boston advocacy group, 54 percent of children involved in a CHINS proceeding wind up being arraigned in juvenile or adult court within three years of their first CHINS-related court appearance. Julie Jette, supra note 240.
[244] In Re Angela, 445 Mass. 55, 61 (Mass. 2005).
[245] In Re Hilary, 450 Mass. 491, 496 (Mass. 2008) citing to In Re Angela, 445 Mass. 55, 62 (Mass. 2005) (holding inter alia that the purpose and intent of §29 of Mass. Gen. Laws ch. 119, infers the "explicit right to court appointed counsel" for "parents facing termination of their [custody] rights").
[246] David E. Frank, Mass. Supreme Judicial Court gives parents right to counsel in CHINS cases, Massachusetts Lawyers Weekly, Feb. 11, 2008, available at 2008 WLNR 2735355.
[247] Interview by Law Office 12 with Mary Anne Padien, General Counsel, Office of Senator Spilka, in Boston, Mass. (Nov. 14, 2008).

petitions.[248] Because CHINS is often the only option for families to receive assistance with problems they are facing, parents will continue to file petitions for their children as long as there is not other alternative.[249]

Our model legislation, and the processes incorporated therein, provides a more efficient alternative to the current adversarial CHINS process. By providing Family Group Counseling Sessions, as well as Healing Circles, our model can supplement the existing CHINS process with tools it is currently lacking. Rather then taking parents and families by surprise by transferring youths into the custody of DSS or DYS, our model's aim is to assess the nature of the problem and the reason behind the parent's decision to petition at all.[250] In doing so, our model provides the opportunity to address the true problem, as opposed to simply separating the parties involved, or isolating the CHINS youth.

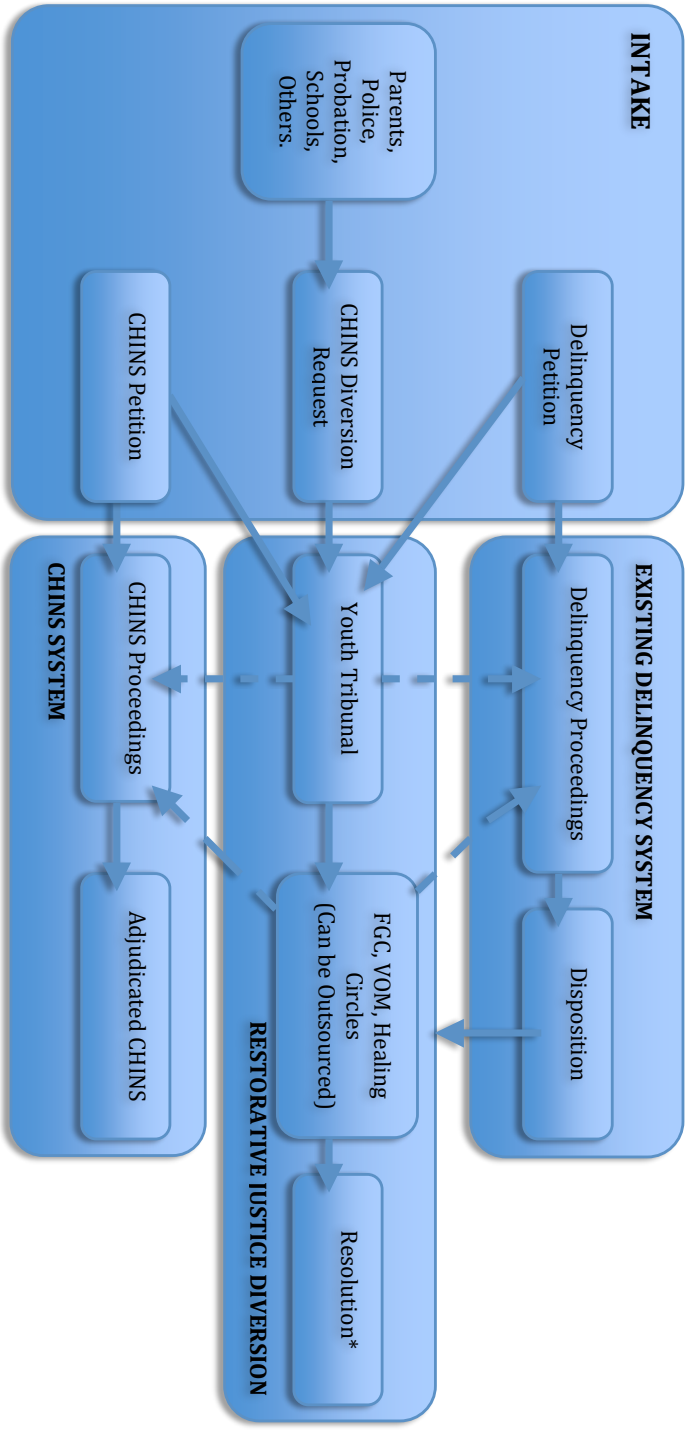
Furthermore, our model would save the Commonwealth a substantial amount of funding.[251] Because it bypasses the adversarial process of CHINS, it eliminates costs associated with the increasing number of CHINS youth who remain in the justice system, and the increased need for court appointed counsel.

---

[248] Julie Jette, supra note 240.
[249] In the context of such high rates of arraignments post-CHINS proceedings, see note 7 supra, this raises the principle criticism of CHINS legislation, which is inextricably linked with parental custody rights and family relationships: while it was established to keep children *out* of the juvenile justice system, CHINS has, in effect become a "gateway" into DSS custody, and incarceration.
[250] See supra Section 1, Part II.
[251] See supra/infra Section 1, Part IV(D); see also Staff of Massachusetts Lawyers Weekly, CPCS: Mass. Supreme Judicial Court decision shows need for boost in fee, Feb. 18, 2008, available at 2008 WLNR 3274498.

Section 2: Law Office 12's Recommendations

Diagram For Potential Restorative Justice Diversionary Program



- * When a resolution has been agreed upon, a record needs to be kept that sets out specifics of the agreement including follow up requirements and expectations. The case will be referred to a Juvenile court judge tor approval and dismissal of the petition.
- Dotted lines represent possible points of egress should the restorative process cease to be effective.

I. THE PROPOSED MODEL: RESTORATIVE JUSTICE DIVERSIONARY PROGRAM

The following section is a description of the model and the rationale behind our recommendations.

A. INFORMING RESPONSIBLE PARTIES AND PARENTS OF THE DIVERSION PROGRAM

Before a responsible party is diverted, it is important that the youth knows what the diversion process entails so that her consent can be fully informed. Consent is a critical element in any restorative justice process.[252] Therefore, we recommend that a letter be sent to the responsible party detailing the diversion process. The letter will be sent as soon as a youth tribunal hearing is scheduled, and will inform the responsible party of her obligations if she chooses to enter the diversion program. A better understanding of the diversionary program will ensure that the responsible party is engaging in the program of her own volition. Such letters are used in Clark County, Washington's juvenile diversion program. The letters used in the Clark County program have influenced our recommendation to include letters in our program, and have served as a guide in our decisions about what to include, and how to word the letters.

There are several points that need to be addressed in the letter sent to a responsible party. First, the letter must let the responsible party know that her actions allegedly caused harm, either to the community, or a specific impacted party. Framing the responsible party's actions as causing harm, rather then as a violating the law, sets the stage for a restorative justice process. The letter should also let the youth know that she must attend a hearing, indicating the date and time, as well as the specific incident that will be discussed at the hearing. Confusion about what incident the youth is being referred for would hinder the process.

[252] See supra Section 1, Part II.

The letter should also inform the responsible party that the diversion program will provide her with an opportunity to take responsibility for the harm she has caused without going through the formal system. It is imperative that the responsible party understands that she is taking responsibility for her actions before she agrees to enter the diversion program. This understanding is important because restorative justice focuses on working with impacted and responsible parties in order to repair harms.[253] To repair the harm a youth must acknowledge the negative impact of her actions and then take steps to restore all impacted parties.[254] In order to ensure that the responsible party understands this concept, the letter should encourage the responsible party to think about what ways she could be held accountable for her actions. It should give examples of possible remedies, such as: community service, restitution, apology letters, or attending educational classes. Encouraging a responsible party to think about how to remedy her actions before a hearing will help her to reflect. Later in the process, the responsible party will be expected to suggest ways that she can remedy the harm caused, which will show facilitators she has been thinking about the harm she has caused and those who were affected by it.

Finally, the letter should explain the general steps of the process, and what the end result will be. It is important that the responsible party understand that the process will likely involve a meeting with the impacted parties, and that the end goal of the process is agreeing on the best way for her to repair the harm she has caused. In addition to the letter we also recommend that the diversion process be explained to responsible parties verbally before they consent to diversion, so that any questions the responsible party may have can be addressed. The person that explains the diversionary process will vary depending from where the case is diverted.

---

[253] Bilchik, supra note 75.
[254] Id.

B. CHINS DIVERSIONARY INTAKE

i. Petition Stage

Presently, grievances can only be addressed in the Massachusetts juvenile court by: (1) law enforcement and probation officers in delinquency matters by way of warrants and through powers of arrest;[255] and, (2) parent, schools, or law enforcement entities under CHINS.[256] In Massachusetts in 2008, a total of 31,492 delinquency complaints were filed, and 8,814 CHINS applications were filed, resulting in 5,447 CHINS petitions being issued.[257] This implies that 3,367 CHINS applications, a notable number, do not reach adjudication and are "resolved" informally. The gatekeepers for prosecuting delinquency petitions are government prosecutors,[258] while the power to prosecute CHINS petitions lies with law enforcement entities, including truancy officers, the probation department, and also with school officials.[259] There is presently a scattering of informal procedures established to address the underlying causes of the offenses for which juveniles come under the jurisdiction of either delinquency or CHINS courts. However, these current informal options are neither utilized in a transparent manner with marked delineation of success, nor do they identify low-level offenses committed by potentially high-risk youth when appropriate for alternative programs – e.g., restorative justice youth diversionary program.

The scarcity of information regarding the utilization of informal options currently afforded to decision makers in CHINS cases is illuminated by Citizens for Juvenile Justice, a juvenile justice advocacy agency in Boston, Massachusetts. Their highly critical analysis of the

[255] Mass. Gen. Laws Ann. ch. 119, § 56 (2008).
[256] Mass. Gen. Laws Ann. ch. 119, § 39E (2008).
[257] Juvenile Court Department, Fiscal Year 2008 Statistics 1 (2008) available at http://www.mass.gov/courts/courtsandjudges/courts/juvenilecourt/2008stats.
[258] Mass. Gen. Laws Ann. ch. 119, § 56 (2008).
[259] Mass. Gen. Laws Ann. ch. 119, § 39E (2008).

current juvenile justice system sets forth several concerns. First, Citizens for Juvenile Justice advocates for transparency in Massachusetts juvenile justice data collection, and note that youth of "different race[s], ethnicities and gender" are not tracked within the Massachusetts juvenile justice system, and no report is made at key decision points.[260] Reporting at key decision points is essential to gaining insight into whether or not disparities exist in the types of cases brought within the CHINS jurisdiction. A second concern set forth by Citizens for Juvenile Justice is that a uniform, diversionary program is needed once again, as was previously permitted under Massachusetts law.[261] According to Citizens for Juvenile Justice, probation departments in Fall River, New Bedford and Worcester have created mechanisms to divert youth, however, they vary and there is no "comprehensive plan of community-based services for CHINS youth and families."[262]

ii. CHINS Diversionary Petition

Therefore, the creation of a new "CHINS Diversionary Petition" is the most feasible and effective way of identifying matters that are ideal for resolution via a restorative justice diversionary program.[263] Complainants would be able to file an application for the issuance of a CHINS Diversionary Petition. Additionally, under the appropriate circumstances[264] court officials may recommend that submitted CHINS applications[265] should be considered for

[260] Citizens for Juvenile Justice, "Just Facts" Fact Sheet (May 2008), http://cfjj.org/Pdf/CfJJ Just Facts Fact Sheet May 2008.pdf.
[261] Mass. Gen. Laws Ann. ch. 28A, § 6A (repealed in 1996); Citizens for Juvenile Justice, CHINS Report Card: The Unfinished Agenda 8 (2000), http://www.cfjj.org/Pdf/105-CHINS.pdf.
[262] Citizens for Juvenile Justice, CHINS Report Card: The Unfinished Agenda 8 (2000), http://www.cfjj.org/Pdf/105-CHINS.pdf.
[263] The importance of addressing underlying issues that surround harms committed is one of the core principals of restorative justice. See Zehr, supra note 6 at 11.
[264] Determination of appropriate circumstances requires an evaluation of the offenses or problems alleged by the complaining party. Many jurisdictions exclude violent crimes and sex offenses from the jurisdiction of their diversionary programs. See e.g., Fla. Stat. Ann. § 985.155(3)(b) (2007) ("[B]oard has jurisdiction to hear all matters involving first-time, *nonviolent* juvenile offenders who are alleged to have committed a delinquent act within the geographical area covered by the board") (emphasis added).
[265] These refer to traditional CHINS Applications, which are presently designated as "runaway", "stubborn child",

conversion to a CHINS Diversionary Applications. Again, the purpose of this specially identified procedure is to clearly designate the harm, which has been identified by an impacted party or other involved stakeholder, as one that would benefit from informal, restorative justice resolution.[266] The matter would proceed by utilizing the existing Massachusetts CHINS framework, which already involves participation by probation, the Clerk of Courts, the youth and her parent or guardian/legal custodian, but would open the resolution up to other stakeholders not usually involved in existing, traditional adjudication.

In the CHINS Reform Analysis deliverable of 2007 for Senator Spilka, Law Office 3 points out that the juvenile court favors the involvement of non-parental adults because it provides a neutral perspective about the child, and it shows that other parties are interested in taking on a larger community ownership role in the child's life.[267] Moreover, restorative justice principles themselves promote the involvement of non-parents, who may play a substantial part in children's lives.[268] These principles demand that interested and affected parties partake in restoring the child's place within the community. It is therefore important that diversionary programs, and organizations with a shared investment in the community and its youth, are provided the option to file a CHINS Diversionary Petition.

School administrators, teachers and superintendents will also be provided with the ability to file an application for the issuance of a CHINS Diversionary Petition. The majority of

---

"truancy", and "school offender". Law Office 3, Massachusetts CHINS Statute Reform 16 (2006) (unpublished orientation manual on file with the Northeastern University School of Law); see Mass. Gen. Laws Ann. ch. 119, § 39E.

[266] It is essential to note, that in all cases, the responsible party will have to consent to participation in the youth tribunal to preserve volition. See supra Section 1, Part V(A)(i).

[267] Law Office 3, CHINS Procedural Reform Analysis, 62 (May 2007) (Unpublished manuscript on file with Northeastern University School of Law LSSC Program).

[268] "Zehr's third pillar [of restorative justice] emphasizes engagement and participation in resolving harm. The guide specifies that the offender, the victim and the community need to be involved in the process. Community support for both victim and offender is emphasized as a critical necessity." See Zehr, supra note 6 at 11; see also supra Section 1, Part II.

Massachusetts's schools, with the exception of the Hyde Park Educational Complex, Social Justice Academy, do not have internal formalized school wide diversionary programs to augment education depriving conventional school disciplinary codes to handle school harms, or other harms committed in the community. Allowing schools to petition for a youth's involvement in the youth tribunal will enable underlying issues to be addressed at earlier stages of misbehavior before it progresses to more deviant behavior.[269] In addition, by petitioning the youth tribunal directly, school officials will be encouraged to be involved in the restorative process.

An administrative issue that arises by creating new avenues for non-traditional sources to file petitions or applications to a state-connected diversionary program is that someone must be responsible for screening these cases and sending them to the youth tribunal.[270] As mentioned above, these intake options will need a general administrator or clerk who oversees all cases and screens any abuses of the system or diversionary programs. This is the primary reason why utilizing the existing CHINS framework and procedures is, at this point, the most feasible method of effecting the application for CHINS Diversionary Petition.

iii. Processing the CHINS Diversionary Petition

After a traditional application for CHINS Petition is received and screened by the Clerk of Court, he sets a date for preliminary hearing, and notifies the child of the date of the hearing.[271] At this early stage the clerk also requests that the Chief Probation Officer, or his or her designee, begin a preliminary inquiry into the case and make a recommendation "as to whether in his or her opinion the child's best interests require that a Petition be granted."[272] This

[269] See supra Section 1, Part II.
[270] Previously in Massachusetts, there existed an agency created by statute that was granted the authority to oversee such diversion, however, this legislation was repealed. Mass. Gen. Laws Ann. ch. 28A, § 6A (repealed in 1996); Citizens for Juvenile Justice, supra note 262 at 8.
[271] Mass. Gen. Laws Ann. ch. 119, §39E (2008).
[272] Id.

is the first real piece that goes into determining whether the child will be adjudicated CHINS, or whether the child may be diverted back to the juvenile delinquency justice system. It is also the first point from which youth may be diverted, subject to consent by all parties involved,[273] to the youth tribunal.

This procedure mirrors Missouri's Supreme Court Rules; however, the Missouri rules specifically create a section for what they call "Informal Case Processing."[274] In this section there are specific, outlined procedures that court officers must follow, including review of the legal sufficiency of the referral, provision of notice to the parties, oversight of informal case processing, and oversight of formal case processing.[275] These statutory provisions set forth clear standards, so that due process, notice and other important issues are considered. If the legal sufficiency of the allegations contained in the referral is unclear, a provision directs the officer to consult with legal counsel.[276]

Under the proposed restorative justice youth diversionary program, the Massachusetts Commissioner of Probation's participation is essential. The Massachusetts Probation Service mission statement states that Probation is "at the center in the delivery of justice."[277] Massachusetts legislation dictates that, "each case of a delinquent child shall be investigated by a probation officer, who is to make a report regarding the child's character, school record, home surroundings and any previous complaints against him."[278] This is indicative of a significant amount of discretion granted to the Department of Probation, as well as power to access information, granted by existing statutes.

---

[273] See supra Section 2, Part I(A).
[274] Mo. Sup. Ct. Rule 111.03, App. B (VI)(A) et seq (2004).
[275] Id.
[276] Id.
[277] Admin. Office of the Trial Court, Massachusetts Probation Services Fact Sheet, available at http://www.mass.gov/courts/probation/whatisprobation.html (last visited Mar. 18, 2009).
[278] Mass. Gen. Laws Ann. ch. 119, § 57 (2008).

In Massachusetts, probation officers are automatically assigned to juveniles against whom an application has been filed (if sufficiency is found by the clerk)[279] or when a CHINS petition or delinquency complaint is issued subsequent to arrest.[280] The duty of that officer is to begin investigation.[281] Probation officers will likely present the results of the investigation to a judge and may recommend an appropriate course for the child.[282] However, there is currently no option for diversion to a restorative justice youth tribunal. With this previously existing legislative grant of discretionary power, probation officers, in consultation with the subject youth and any relevant stakeholders, should be permitted discretion to suggest diversion to a youth tribunal.

The next step occurs at the CHINS preliminary hearing. While this hearing may have been bypassed due to previous diversion by either a court clerk or probation officer, there must remain an available option to divert at this point. At the preliminary hearing, a juvenile court judge addresses the information alleged in the application along with the recommendation. The judge uses this information to determine if a petition should be granted.[283] Based on the language of the statue, it appears that the only standard the judge is to apply is that a petition should be granted if he or she finds probable cause to conclude that the child is in need or services.[284] The determination can take one of three forms:

> [The judge may] either (i) decline to issue the Petition [finding] there is no probable cause to believe that the child is in need of services; (ii) decline to issue the Petition because it finds that the interests of the child would best be served by informal assistance without a trial on the merits, in which case the court shall, with the consent of the child and his parents or guardian, refer the child to a

[279] Mass. Gen. Laws Ann. ch. 119, § 39E (2008).
[280] Mass. Gen. Laws Ann. ch. 119, § 57 (2008).
[281] Mass. Gen. Laws Ann. ch. 119, § 39E (2008).
[282] Id.
[283] Mass. Gen. Laws Ann. ch. 119, § 39G (2008).
[284] Mass. Gen. Laws Ann. ch. 119, § 39E (2008).

> probation officer for assistance; or (iii) issue the Petition and schedule a trial on the merits.[285]

The option to divert to the youth tribunal would add a fourth (iv) option, "subject to the consent of all parties, and subject to the reports and information received by the probation officer, the court will refer the child to the youth tribunal."

If the court determines that the best interests of the child are best served by a referral to a probation officer, the child will be referred to a public or private organization, or to an individual for assistance. A referral may also be directed to a person or program qualified to provide assistance regarding "psychiatric, psychological, educational, occupational, medical, dental or social services."[286] The intention of referral is to resolve the circumstances that resulted in the filing of a Petition and to avoid a CHINS trial on the merits. During this informal assistance, neutral third-party adults are encouraged to attend, and may lend any aid they can provide. However, it is understood that counsel should not be involved in this process.[287] The option to divert to the Youth Tribunal should be an option at this stage as well. In the instance that further information has been received regarding the harm and the involved parties, which the parties agree would be best handled utilizing restorative justice practices, the youth tribunal would be an ideal forum for such resolution.

For the youth tribunal, it is important to maintain the principles of restorative justice. In order to do so, the responsible and impacted parties should have a role in this procedure. Because it is necessary to obtain the consent of the responsible party to participate in the diversionary program, it will be necessary to discuss the possibility of diversion with the responsible party and the impacted party prior to deciding whether to refer a case to the youth

---

[285] Id.
[286] Mass. Gen. Laws Ann. ch. 119, §§ 39E, 39G (2008).
[287] Law Office 3, supra note 267 at 64.

tribunal.[288]

iv. Other Relevant Considerations

To address the possibility of diversion at this early stage of petitioning, a discussion of restorative justice disposition methods is necessary. Because restorative justice focuses on strengthening the relationship between the responsible party and the community, a traditional, adversarial approach may potentially increase the social distance between the responsible party and the community.[289] Thus, it is important take a restorative justice approach as early as possible to avoid this result.

Furthermore, it is important to note that Youthful Offender Indictments[290] and Care and Protection Petitions[291] are not applicable to our youth tribunal because they address violent or sex offenses that are subject to possible transfer into adult court[292] and matters that potentially involve the removal of the juvenile from their living situation,[293] respectively. We believe the best approach is to target the low-level, high-risk population because they have not yet committed a serious harm. While they may be in jeopardy of doing so, there is a greater possibility of repairing harm between a responsible party, the impacted party and the community before a serious harm has been committed. All parties may be more receptive to a diversionary program at this point. Subsequently, it is our hope that the diversionary program will prevent responsible parties from committing further and possibly more serious harms.

For further guidance, and an example of a legislated working model, we may look to the current practice of North Carolina's juvenile justice system. When a complaint is

[288] See Section 2, Part I(A).
[289] Godwin, supra note 69 at 1.
[290] Mass. Gen. Laws Ann. ch. 119, § 52 (2008) (provides the definition for "youthful offender" and the types of offenses which may bring the juvenile within that category).
[291] Mass. Gen. Laws Ann. ch. 119, § 24 (2008) (authority granting power to file a petition for court determination that a child is in need of care and protection).
[292] Mass. Gen. Laws Ann. ch. 119, § 58 (2008).
[293] Mass. Gen. Laws Ann. ch. 119, § 24 (2008).

initially filed, a clerk, general administrator or "Court Counselor" has discretionary power to determine whether or not the matter should go directly to a youth court for informal processing.[294] Diversionary options include, among others, diversion to an appropriate public or private resource, victim offender mediation, and participation in teen court programming.[295]

Under the North Carolina system, if a diversion plan needs more structure, the Court Counselor, juvenile and the juvenile's parent or legal guardian/custodian may enter in to a diversion contract.[296] The contract must:

> a) State conditions by which the juvenile agrees to abide and any actions the juvenile agrees to take;
>
> (b) State conditions by which the parent/legal guardian/custodian agrees to abide and any actions they agree to take;
>
> (c) Describe the role of the clerk in relation to the juvenile and the juvenile's parent/legal guardian/custodian; and
>
> (d) Indicate that all parties understand and agree that the juvenile's violation of the contract may result in the filing of the complaint as a petition and the juvenile's successful completion of the contract shall preclude the filing of a petition.[297]

We recommend that this format be modified for the purposes of our model. Some of the formalized, binding procedures of the contract contradict the restorative justice approach. While it is important for the juvenile and her parent or guardian to consent to the process and understand both the role of the court clerk and the consequences of not successfully completing the diversionary program, we do not think that the juvenile and parent/legal guardian/custodian should be forced to agree to a set of actions. Restorative justice requires a cooperative process,

---

[294] N.C. Gen. Stat. Ann. § 7B-1706(a) (2001).
[295] N.C. Gen. Stat. Ann. § 7B-1706 (a)(1), et seq. (section titled "Diversion plans and referral") (2001)
[296] N. C. Dep't of Juvenile Justice and Delinquency Prevention, Program Service Division Policies, C.S. 1: Intake, 7 (2006) available at http://www.ncdjjdp.org/resources/policy_manual/program_service_division_policies/PSDP-0002.pdf.
[297] Id.

and participants must be open to express their feelings and viewpoints so that a negotiable, reparable process can take place.

As a final note, while the Commonwealth cannot force a juvenile to engage in a diversionary program such as this youth tribunal, if the juvenile does not successfully complete the youth tribunal, the clerk should be authorized to file the complaint as an official petition and submit it for further action within the juvenile delinquency court.

C. Delinquency Diversionary Intake

The proposed model illustrates numerous ways that youth can enter the diversionary program; one of those is from delinquency complaints. One of our client's goals is to prevent youth from being formally adjudicated in the traditional juvenile justice system. Keeping this goal in mind, we recommend creating points of diversion to the youth tribunal at the pre and post adjudication stages.

i. Pre-Adjudication

The pre-adjudication stage is the ideal place for diversion in delinquency proceedings, because it would allow youths to avoid the traditional adversarial system. However, the overarching issue that we run into with placing our program at this stage is the concern that due process rights are at risk of being jeopardized because of the unique approach of restorative justice.[298]

Frederick White, Jr., the Director of Community Operations from the Massachusetts DYS, noted in a field interview that because of due process concerns, legality plays a major role

[298] See supra Section 1, Part V(A).

in attempting to divert youths prior to adjudication.[299] Mr. White, Jr. is familiar with restorative justice, and reiterated the importance of the responsible party's acceptance of responsibility for the harm she has caused, prior to going through a restorative process.[300] This approach directly contrasts with the traditional justice system, which guarantees the presumption of innocence in juvenile matters.[301] Mr. White, Jr. suggests that it seems highly unlikely that youth would admit responsibility prior to being adjudicated delinquent.[302] To illustrate his point, he informed us that DYS has care of youth at two different stages: (1) bail, and (2) after being committed to DYS.[303] At the bail stage, the youth has not been adjudicated yet, and very few services can be offered because the youth has not accepted responsibility and the details of the case cannot be discussed.[304] At the second stage, however, the youth has already been found delinquent, and DYS can step in and offer counseling services, etc.[305] He used this dichotomy to explain why post-adjudication is the only feasible place for the diversionary program.

Judge Blitzman, of the Middlesex Juvenile Court, offered a different opinion on our proposed model. Although he indicated that diversion could not happen anywhere in the middle of the adjudication process,[306] he mentioned that it could occur pre or post adjudication.[307] Judge

---

[299] Interview by Marissa Sherman and Chris Logue with Marie-Elena Edwards and Frederick White Jr., Director of Victim Services and Director of Community Relations at DYS in Boston, MA (Feb. 12, 2009).
[300] Id.
[301] The Supreme Court describes the presumption of innocence as "that bedrock 'axiomatic and elementary' principle whose 'enforcement lies at the foundation of the administration of our criminal law.'" In re Winship 397 U.S. 358, 363 (1970), citing Coffin v. United States, 156 U.S. 432, 453 (1895). The Court referenced the New York Court of Appeals' dissent in the matter of a juvenile, Samuel W., noting "we agree, 'a person accused of a crime would be at a severe disadvantage, a disadvantage amounting to a lack of fundamental fairness, if she could be adjudged guilty and imprisoned for years on the strength of the same evidence as would suffice in a civil case.' In re Winship 397 U.S. at 363, citing W. v. Family Court, 24 N.Y.2d 196, 205 (N.Y. 1969).
[302] Interview by Marissa Sherman and Chris Logue with Marie-Elena Edwards and Frederick White Jr., Director of Victim Services and Director of Community Relations at DYS in Boston, MA (Feb. 12, 2009).
[303] Id.; "Detained Youth means a child between seven and 17 years of age held by the court for further examination, trial or continuance, or for indictment and trial... if unable to furnish bail, shall be committed by the court to the care of the Department." 109 Mass. Code Regs. 11.03 (1993).
[304] Id.; see also 2 Department of Youth Services - Continuum of Care Policy No. 02.01.01(c) (1999).
[305] For a broader list of services offered to juveniles committed to the Department of Youth Services, see 2 Department of Youth Services - Continuum of Care Policy No. 02.02 et seq.
[306] See supra, Section 1, Part V(A)(vi).

Blitzman's observation indicates that it is possible to place diversion mechanisms prior to adjudication, but we will need to be careful to protect a youth's right to plead "not-delinquent", and yet still require that she accept responsibility for the harm.[308]

Some states, such as Washington, divert youth prior to adjudication.[309] Washington's Clark County Juvenile Court provides a great example of a restorative-based diversionary program that we have used in developing the youth tribunal. The mission of Clark County Juvenile Court is to consider the well being of the community by focusing on harms, rather than crimes.[310] The court calls this a "balanced and restorative approach."[311] The court provides diversionary options as alternatives to prosecution, primarily for misdemeanors and first-time offenders.[312] First-time offenders who commit misdemeanors must be diverted by law.[313] Second-time offenders can also be diverted as per the recommendations of the prosecutor.[314] Diversion options include, but are not limited to, restorative community service, counseling, restitution, letters of responsibility, educational programs[315], mediation, victim-offender reconciliation,[316] etc. Because this is a restorative based program, the Clark County Juvenile Court requires youth to admit responsibility in order to participate in its diversion program.[317]

---

[307] Interview by James Hodge and Sowande Brown-Lawson with Honorable Jay D. Blitzman, MA Juvenile Court Judge, Boston MA (Feb. 2, 2009).
[308] See supra, Section 1, Part V(A)(iv).
[309] Wash. Rev. Code Ann. § 13.40.070 (1977); see also W. Va. Code § 49-5-13d; Minn. Stat. Ann. § 299A.296 (2008) (permits the administration of a grant program which is designed to fund community-based programs designed to support community sense of "personal security" and to "assist in crime control and prevention effort" with priority given to programs addressing "pre-arrest or pretrial diversion, including through mediation.")
[310] Diversion – Juvenile Court – Clark County Washington, available at http://www.clark.wa.gov/juvenile/programs/diversion.html.
[311] Id.
[312] Wash. Rev. Code Ann. § 13.40.070(6) (1977) ("Where a case is legally sufficient the prosecutor shall divert the case if the alleged offense is a misdemeanor or gross misdemeanor or violation and the alleged offense is the offender's first offense or violation. If the alleged offender is charged with a related offense that must or may be filed under subsections (5) and (7) of this section, a case under this subsection may also be filed.")
[313] Wash. Rev. Code Ann. § 13.40.070(6) (1977).
[314] http://www.clark.wa.gov/juvenile/programs/diversion.html.
[315] Id.
[316] Wash. Rev. Code Ann. § 13.40.070.(10) (1977).
[317] http://www.clark.wa.gov/juvenile/programs/diversion.html.

Clark County's implementation of Washington law guides our legislative recommendations for delinquency proceedings. We recommend inserting similar language into M.G.L.A. 119 § 54 to provide the option of diversion into the youth tribunal prior to adjudication. M.G.L.A. 119 § 54 sets forth provisions directing the court with regard to the complaint and examination of the complaint.[318] Language should be added to this statute to allow the court to divert the case before pretrial motions and any delinquency proceedings.

In recommending diversion prior to adjudication we will need to address due process considerations, however, Washington's model shows this is not an insurmountable obstacle. Diversion away from adversarial delinquency proceedings is squarely in line with principles of restorative justice and our client's goals.

ii. Post-Adjudication

In addition to recommending diversion pre-adjudication, it should also be available post-adjudication as a disposition option. Marie-Elena Edwards, Director of Victim Services at DYS and a supporter of restorative justice, suggested not limiting the points of diversion into our youth tribunal, because the more restorative justice is brought up and discussed, the more awareness can be raised with the goal of alleviating some of the skepticism surrounding it.[319]

There may also be political reasons for diverting youth after they have been adjudicated delinquent. It is important to keep in mind that once our recommendations are turned into legislation they will require the approval of the citizens of Massachusetts to be put into effect. Certain youth should still be subject to traditional delinquency proceedings, and must be adjudicated delinquent before they are diverted into the youth tribunal. This is particularly true for more serious offenses where the public may not feel justice has been served unless the

[318] Mass. Gen. Laws Ann. ch. 119, § 54.
[319] Interview by Marissa Sherman and Chris Logue with Marie-Elena Edwards and Frederick White Jr., Director of Victim Services and Director of Community Relations at DYS in Boston, MA (Feb. 12, 2009).

responsible party has taken the traditional route through the delinquency system. In some sense, this may alleviate concerns that the youth tribunal is simply a way for youth to "get off easy."

There are two main areas within the post-adjudication stage where we would recommend inserting our program: continuance without a finding, or after the youth is adjudicated delinquent.

iii. Continuance Without a Finding

After a youth has been through the adjudication process there is a dispositional option called "continuance without a finding" ("CWOF").[320] If there are enough facts for a youth to be adjudicated delinquent, rather than formally deeming her "delinquent," the court may, with the youth and the parent's consent, issue a CWOF and place the youth under the supervision of the Probation department.[321] This is an appropriate option when a youth has admitted to sufficient facts pre-trial or after it has been found beyond a reasonable doubt that she has committed the harm.[322] Although the youth would be under the supervision of the Probation department, she would not be under formal probation because there has been no legal conviction of delinquency.[323]

Part of a CWOF's requirements can be that the youth "do work or participate in activities of a type and for a period of time deemed appropriate by the court."[324] We recommend this as another option for diversion to the youth tribunal. If the youth and parent consent, this diversion can be one of the "activities" that the court deems appropriate. Although Mr. White Jr. told us, that judges issue very few CWOF's and the ones that are issued tend to be for petty

[320] Mass. Gen. Laws Ann. ch. 119, §§ 55B, 58 (2008).
[321] Id.
[322] Id.
[323] Mass. Gen. Laws Ann. ch. 119, § 58 (2008).
[324] Id.

misdemeanors,[325] there are a number of benefits to be gained from establishing a point of diversion in CWOF. If the youth successfully completes the requirement of her CWOF, she does not receive a record and the case gets dismissed.[326] [327]

iv. Adjudicated Delinquent

M.G.L.A. 119 § 58 states: "if a child is adjudicated a delinquent child on a complaint, the court may place the case on file or may place the youth in the care of a probation officer…or may commit him to the custody of the Department of Youth Services."[328] Language could be inserted in this section, allowing for a third option of diverting the youth. This could be in addition to, or instead of, placing the youth in the custody of Probation or DYS. This last option is less attractive, as the youth will have gone through delinquency proceedings, and as Mr. White, Jr. indicated it may be perceived as stepping on the toes of probation officers and DYS administrators.[329]

Although the youth would still have a record as a consequence of being adjudicated delinquent, there is no reason to limit the points of placement for our program. Allowing diversion in the dispositional stage will increase a youth's chances of being able to participate in a restorative justice process.

D. RESTORATIVE JUSTICE YOUTH TRIBUNAL

Once it has been decided that the responsible party should be diverted from the traditional Juvenile Justice system, and the responsible party has consented and admitted guilt, the first step

[325] Interview by Marissa Sherman and Chris Logue with Marie-Elena Edwards and Frederick White Jr., Director of Victim Services and Director of Community Relations at DYS in Boston, MA (Feb. 12, 2009).
[326] Mass. Gen. Laws Ann. ch. 119, § 58 (2008).
[327] Commonwealth v. Valiton, 432 Mass. 647, 651 (2000) (Furthermore, the Massachusetts Supreme Judicial Court has held that a disposition that requires assignment to a drug or alcohol rehabilitation program that results in a CWOF is not considered a conviction and is not viewed as criminal).
[328] Mass. Gen. Laws Ann. ch. 119, § 58 (2008).
[329] Interview by Marissa Sherman and Chris Logue with Marie-Elena Edwards and Frederick White Jr., Director of Victim Services and Director of Community Relations at DYS in Boston, MA (Feb. 12, 2009).

of the process is to participate in a Restorative Justice Youth Tribunal.[330] The purpose of the Restorative Justice Youth Tribunal is to determine which one of three restorative justice systems – Victim-Offender Mediation, Family-Group Counseling, and Healing Circles – is most appropriate for the responsible party.

i. Procedure and Structure

Procedurally the youth tribunal is relatively simple. After a youth has chosen to be diverted into our program, a date for the tribunal hearing will be set, and the youth will be informed of when and where he is to appear. The impacted party will also be informed of the hearing, and will be given three options. She should inform the tribunal if she wishes, (a) to participate at this stage, (b) provide an impact statement[331] or (c) to have an impacted party representative represent her at the tribunal. A youth representative (a youth volunteer) will be given the responsible party's case. They will contact and meet with the responsible party prior to the beginning of the process. The youth representative will be present at the pre-tribunal conference, during which the process is explained to the responsible party, and continuing through the tribunal to the restorative justice program the impacted party participates in. Another representative will work in the same type of capacity with the impacted party to decide the best way to represent her interests to the youth tribunal.[332] It must be emphasized that these youth representatives serve only to help the responsible party and the impacted party to present what they have to say to the youth tribunal, and in no way are to create an adversarial atmosphere.

---

[330] This is only one of the ways for the responsible party to enter the Restorative Justice diversion program; referrals from parents, schools, etc. are also possible routes.

[331] Interview by Matthew Schulz and Yana Garcia with Stacy Rubin, Volunteer, Social Justice Academy, in Boston, Mass. (Jan. 21, 2009) (An impact statement is a document written by the impacted party in which they describe what happened to them, how they perceived the harm that occurred, how that harm has affected them, and what they hope to get out of participating in our diversionary program).

[332] The youth representatives serve as advisors and guides to the impacted and responsible parties. They are there to support the parties through this process and to help them in any way they can to make it a more positive experience through giving advice, answering questions, letting the parties know what to expect, etc.

Prior to the tribunal convening, the youth judge panel will receive a brief on the case from wherever the youth was diverted (e.g. CHINS, the Juvenile Justice system, their school, etc). This brief will contain all relevant facts collected at this time; e.g. Probation officer reports, police reports, witness statements.

The youth tribunal resembles youth court models. It consists of a panel of youth judges and the parties, with their youth representatives.[333] This model will have no jury; instead, the impacted party and responsible party present their stories, with their youth representatives, to the youth judge panel, and the panel decides which restorative justice method will best serve all parties involved. In order for this model to work within our restorative justice framework, we will have to make some changes. We want to eliminate as many of the "adversarial" aspects as possible. The panel of youth judges can ask questions of the impacted and responsible parties and their youth representatives. If the responsible party has been diverted through a Preliminary Hearing (e.g. CHINS, Juvenile Justice), the panel can utilize any and all relevant findings from that hearing (such as, a report by a probation officer, information about the offense, a school incident report, etc.). Impacted parties are not required to participate in this youth tribunal, but they can if they so desire. If they choose not to participate they can have their representative present their side and/or read their impact statement to the tribunal. Both parties are able to make recommendations regarding which method they feel will best address the harm caused and their needs, but the youth panel is not obligated to follow them. We want to stress that the purpose of this youth tribunal is not to be inquisitorial, but rather to create a positive dialogue between the parties and the youth tribunal.

When the youth tribunal convenes it should not be set up like a traditional courtroom, but

[333] National Association of Youth Courts, Youth Court Function Model (2009), available at http://www.youthcourt.net/content/view/49/.(MJS).

instead, the parties will be seated across the table from each other to facilitate discussion. In addition to the youth volunteers and participants there will always be an adult to supervise the proceedings of the tribunal. The adult's main purpose is to provide guidance if the youth judges request it, but she may intervene if the tribunal begins to stray away from its objective, or if the conversation becomes adversarial. The youth and the impacted party will each explain what happened, each side respecting the other's time to talk. After the youth and the impacted party have spoken their piece the youth panel of judges may ask questions of either side. These questions should be directed to coming to a better understand of what happened, determining what the youth understands about what they did, and the scope of any other stakeholders who may be involved. Once the youth judges feel they have sufficient information to make a decision, they will recess the tribunal and deliberate the appropriate decision in private. When they have made a decision they will reconvene the tribunal and disclose their decision to the youth and the impacted party. The youth judges should do their best to explain their logic in making the specific recommendation so that all parties understand and no one feels like they have been ignored. After the decision has been rendered, a date will be set for the chosen method of restorative justice to take place. All relevant parties will be informed of when and where this will occur, as well as be given a brief explanation of the restorative justice method and what their roles will be.

We think that the youth tribunal model is the best method for the youth court because it is most distant from the traditional adversarial process. We believe that the responsible party will react better to a decision-making panel of youth judges, rather than a single youth, or adult judge. In many instances, these responsible parties are distrustful of the local adult authority figures (police, juvenile justice system, DYS, etc.). "There is ample evidence to suggest that many

youths in juvenile court do not perceive their lawyers as their rights' champions."[334] They may be more receptive to a restorative justice program run by a panel of their peers. We do not want them to feel angry about the results of the restorative justice proceedings. Allowing the responsible parties to enter a restorative justice program feeling like they have been given a fair chance will help ensure their successful completion of the program.

In using a system similar to a youth court, we hope to procure some of the same positive results models in other states have achieved. In most cases, the use of youth courts has dramatically affected recidivism rates for the better. For example, the Anchorage Youth Court boasted a recidivism rate of 6% in 2002, versus a rate of 23% for the traditional system.[335] Missouri's Independence Youth Court reports a recidivism rate of 9%, while the traditional system has a rate of 28%.[336] In using a youth court-like model for our restorative justice hearing, we are trying to combine the best of two worlds. We hope to achieve the recidivism rates of other states' traditional youth courts, while at the same time utilizing the principles of restorative justice in that process.

ii. Determining Factors behind the Method Choice

The three available options will be Victim-Offender Mediation,[337] Family-Group Counseling, and Healing Circles. These three types of programs are the main approaches used in restorative justice, and they cover a wide range of possible harms.

The youth tribunal must consider several factors when deciding to which type of restorative justice program they will divert the responsible party. They will first examine if the offense is a "large impact" or "small impact" offense. A large impact offense would involve the

[334] Emily Buss, The Missed Opportunity in Gault, 70 U. Chi. L. Rev. 39, 45 (Winter 2003).
[335] Butts, supra note 62 at 28.
[336] Id.
[337] Although we use the terms "impacted party" and "responsible party" throughout, when talking about Victim-Offender Mediation we will continue to refer to it by this title, which is the common usage.

community of the responsible party (e.g. school, neighborhood), but not necessarily a directly impacted party (e.g. an individual schoolmate). A small impact offense would involve a directly impacted party (e.g. bullying).[338] Next, a youth judge panel will want to identify those people directly affected by the offense. Has the responsible party directly harmed an impacted party, or has he harmed the whole community (e.g. fighting versus vandalism)? The youth panel must discover who brought the responsible party into the process to help identify stakeholders, such as parents or school officials. These considerations can all be guiding factors in determining which program to use.

For VOM, the youth judge panel will want to handle "small impact" offenses where the effect of the offense is limited to the impacted party and the responsible party. VOM creates an environment that allows for the type of intimacy needed when addressing offenses between two people.[339] "Although many other types of mediation are largely 'settlement-driven,' victim-offender mediation is primarily 'dialogue-driven,' with emphasis upon victim empowerment, offender accountability, and restoration of losses."[340] The dialogue that occurs between the participants in VOM helps to address, the "emotional and informational needs of victims that are central to both the empowerment of the victims and the development of victim empathy in the offenders, which can help to prevent criminal behavior in the future."[341] VOM reflects the personal nature of a direct impacted party offense (i.e. fighting, bullying) by involving the impacted party, the responsible party, and a trained facilitator.[342]

---

[338] Interview by Matthew Schulz and Yana Garcia with Stacy Rubin, Volunteer, Social Justice Academy, in Boston, Mass. (Jan. 21, 2009).
[339] Telephone interview by Austin Dana and Suhee Kim with Jean Greenwood, Training Associate, Center for Restorative Justice and Peacemaking of Univ. of Minn. (Feb. 6, 2009).
[340] Mark Umbreit et al., Guidelines for Victim-Sensitive Victim-Offender Mediation: Restorative Justice Through Dialogue 11 (2000) available at www.ojp.usdoj.gov/ovc/publications/infores/restorative_justice/restorative_justice_ascii_pdf/ncj176346.pdf.
[341] Id. at 12.
[342] See supra Section 1, Part III(A).

Healing circles will handle "large impact" offenses in which the youth has harmed a community. Healing circles allow for multiple members of the community to be involved in the process. The youth judge panel can even use healing circles for direct impacted party offenses, if the harm caused has impacted the greater community such that their involvement is necessary (i.e. gossip in school, vandalism). Healing circles allow for the community to express its views and concerns in ways that can positively contribute to furthering the responsible party's understanding of the negative impact her actions can have.[343]

The youth tribunal should strongly consider Family Group Counseling when the youth's offense has had a strong and direct impact on her family. If it has, then family-group counseling is an appropriate program. FGC brings together the responsible party and her family, similar to the way in which healing circles bring together the community. This will allow the responsible party to hear the effect her actions are having on her family. This program focuses more on offenses that occur within the family unit, and is not the best approach for offenses in which there is a large outside group of stakeholders. It also may be pertinent to consider if the parents or family brought the responsible party into the diversionary process in the first place. If they did, FGC is the best method for these offenses because they can voice their opinions and address their concerns.[344]

iii. Example Scenarios

1. Victim-Offender Mediation

Billy is a 6th grader at the local public school. Johnny, a 7th grader, has repeatedly bullied him at school. Billy hasn't reported bullying to the school administration. One day Johnny begins to bully Billy, and in response Billy pushes Johnny in an attempt to get away.

[343] See supra Section 1, Part III(C).
[344] See supra Section 1, Part III(B).

Johnny responds by starting to fight Billy. He punches Billy several times, but a teacher breaks up the fight before it escalates. The school petitions for Johnny to enter the CHINS program, and his case is accepted. He is offered, and accepts to enter the diversion program. Upon review by the youth tribunal, the case is referred to VOM. The harm was between two individuals, and did not really affect the immediate community. To properly heal the harm, Billy and Johnny need to sit together, with the help of a facilitator, and discuss what occurred. A positive dialogue is needed so that Billy can tell Johnny how his bullying is affecting him, and to show Johnny the harm his actions are causing.

2. Healing Circle

Sally is an 8th grader at the local private school. To rebel from her rigid social upbringing she goes out at night and tags her local town's buildings with graffiti. She covers several local shops and stores with graffiti. During one of these tagging sessions, the police catch her. The police refer her case to the juvenile justice system, but at her initial conference she is offered and accepts to enter the diversion program. During the tribunal, it comes out that Sally's tagging affected many in the community. Several shops had to have their buildings repainted, and their windows replaced at a personal cost to them. The youth panel determines that it is important for all these community members to be able to address their feelings and concerns to the responsible party, so they place her in the healing circle method. Using the circle method will allow the many members of the community to be involved and to feel like something is being done. It will also allow Sally to see the negative impact her actions have had on the community where she lives.

3. Family Group Counseling

Lee is a local 15 year old who lives at home with his mother and father. His parents are

having a difficult time in their marriage and often fight. As a result Lee has repeatedly run away from home. He stays away for several days at a time. Sometimes his parents find him and bring him home, and other times he returns on his own. But as his parents' bickering increases, so have the length of his absences. As a result of one such run away incident, his parents petition Lee into CHINS. He is accepted, but at the initial hearing he is given the option of entering the diversion program and he accepts. At his tribunal the youth judges learn of the trouble within his home and offer FGC. At family-group counseling Lee will sit down with his parents, and with the help of a counselor, explain why he is running away. It will allow him to address his feelings about his parent's fighting, but also allow them to express how concerned they become when he runs away. Lee and his parents can both get their points of view heard, and in doing so hopefully can come to a solution that repairs the harm that has occurred to their family.

E. PREPARATION FOR RESTORATIVE JUSTICE PROGRAM

Once the appropriate type of restorative justice approach has been chosen, the next step in our model is to prepare both the impacted and responsible parties for the process. Preparation can help avoid the many hazards that can arise in attempting to implement any restorative justice process. When attempting to integrate restorative justice principles within a formal system, there is an inherent danger of losing touch with those same restorative justice principles. Thus, the program may possibly assume a punitive rather than restorative approach.[345]

Economic, bureaucratic or political reasons can all lead to this more punitive approach. Despite the specific cause, the punitive result is usually a "fast food" version of restorative justice, which use restorative justice vocabulary but aims to provide a quick fix rather than seriously attempting to heal harms.[346] In this "fast food" version of restorative justice, impacted

[345] Bilchik, supra note 75 at 53.
[346] Id.

parties are used more as props then actual contributors, and cases are quickly passed through a cookie cutter version of restorative justice.[347] In proper restorative justice practice each party is recognized as being a unique individual with an idiosyncratic story that is to be appreciated for the process to function as designed. Not only does this "fast food" system fail to achieve the goals and adhere to the principles of restorative justice, it also runs the risk of re-victimizing[348] impacted parties by forcing them to relive their experiences without feeling like anything was achieved in the meeting with the responsible party.[349] Preparation in our system will insure that this "cookie cutter" version of restorative justice is not carried out.

i. Facilitators Interviews

Proper preparation prior to any type of mediation helps prevent a restorative justice system from deviating from its inherent principles.[350] At the heart of the preparation process is a face-to-face meeting between a representative of the restorative justice system and the impacted party, as well a separate meeting between the representative and the responsible party.[351] It is recommended that the representative of the juvenile justice system in our model be a well trained youth volunteer who will both conduct the interviews as well as be present at the restorative justice meeting (the meeting in our model is either family group counseling, a circle, or victim offender mediation). Having the same volunteer that conducted the interview be present at the restorative justice meeting will build comfort for both parties by ensuring that there are familiar faces at the restorative justice meeting.[352]

ii. Interview Goals

---

[347] Id.
[348] See supra Section 1, Part IV(C)(iii).
[349] Telephone interview by Austin Dana and Suhee Kim with Jean Greenwood, Training Associate, Center for Restorative Justice and Peacemaking of Univ. of Minn. (Feb. 6, 2009).
[350] Id.
[351] Id.
[352] S. Gordon Bazemore & Mara Schiff, Juvenile Justice Reform and Restorative Justice: Building theory and policy from practice 159 (Willian Publishing 2005).

The three procedural goals for each of the interviews include hearing the story from each party's point of view, informing the parties about the program and what they should expect, and finally, establishing safeguards for the meeting between the relevant parties.[353] These three procedural goals are common for victim offender mediation, circles, and family group counseling, as is the process used to achieve them. Apart from the procedural goals, the underlying purpose of the interviews is to build trust and comfort in order to allow the parties to feel safe during the restorative justice process.[354]

The first procedural goal of the interview process is to hear each party's version of the story.[355] During this time, the interviewer should encourage the use of 'I' statements by asking how the individual felt, and what his experience was like.[356] Throughout the interview, the interviewer should do his best to display empathy in order to build trust and comfort both between the interviewer and each party as well as between the parties and the system.[357] On top of building trust, allowing the parties to verbalize their version of the story encourages them to think about the underlying effects of the incident, resulting in a more productive restorative justice meeting.[358]

The second procedural goal of the interview process is to explain the program to each party, including what they can expect.[359][360] It is important that each party understands how the restorative justice method will be structured in order to avoid surprise and allow the parties to

---

[353] Telephone interview by Austin Dana and Suhee Kim with Jean Greenwood, Training Associate, Center for Restorative Justice and Peacemaking of Univ. of Minn. (Feb. 6, 2009).
[354] Id.
[355] Id.
[356] Id.
[357] Id.
[358] Id.
[359] Id.
[360] See supra Section 2, Part I(A).

mentally prepare for the restorative justice meeting.[361] It is also important that each party understands that the purpose of the meeting is not to establish guilt or seek retribution, but rather, to repair the harm which has been caused.[362] An understanding of the goals and the restorative justice method being used by each party will help create a more productive and meaningful meeting between the parties.[363] By explaining to each party what he can expect out of the process, the interviewer also has the opportunity to reinforce restorative justice principles into the system by ensuring that each party is voluntarily participating, and making certain the responsible party is willing to accept responsibility for his act.[364]

While it is true that the responsible party would not be at this stage of our model unless he had already acknowledged responsibility, it is possible that the level of culpability can be clarified during the interview stage.[365] For example, in cases which involve multiple responsible parties, doubt may exist as to how much responsibility each responsible party is assuming; if this is an issue, the mediation process will be at best awkward and at worst a re-victimization.[366]

An example of this type of situation occurred in a circle mediation in Colorado when the responsible party was willing to admit that he had negligently fired a gun, but was unwilling to admit that it was indeed his shot that had hit the impacted party (there were four other individuals shooting guns at the same time).[367] This confusion put the responsible party on the defensive and left the impacted party confused and frustrated about the lack of accountability.[368]

Interviews prior to the meeting may have been able to clarify the confusion before it

---

[361] Telephone interview by Austin Dana and Suhee Kim with Jean Greenwood, Training Associate, Center for Restorative Justice and Peacemaking of Univ. of Minn. (Feb. 6, 2009).
[362] Id.
[363] Id.
[364] Bazemore supra note 352 at 156.
[365] Id.
[366] Id. at 159.
[367] Id. at 157.
[368] Id.

reached the point of re-victimization. Had there been an interview with the responsible and impacted parties before the restorative justice process exactly what each party expected would have been clear. If the interview had shown that the responsible party was not willing to accept responsibility for the harm the process would not have gone forward and there may not have been a re-victimization. [369]

The third procedural goal of the interview process is to establish safeguards for the meeting.[370] These safeguards once again protect against re-victimization and also ensure that the meeting runs smoothly.[371] Examples of safeguards were discussed earlier in the paper and include the use of a talking piece to prevent the parties from interrupting each other, making certain that the parties employ the appropriate language, and preventing the use of insulting remarks.[372] While safeguards should be addressed once again during the actual meeting, going over them with both parties prior to the meeting helps guarantee that they feel safe and comfortable at the start of the process.[373]

As we have stressed, preparation is vital for a successful restorative justice session.[374] Face to face interviews are particularly worthwhile because they help build trust and a feeling of comfort for each party prior to the mediation stage.[375] As stated above, during face-to-face interviews, the interviewer should explain the system, listen to each party's version of the event, and establish safeguards for the mediation.

F. POINTS OF EGRESS FROM THE DIVERSIONARY PROGRAM

A critical issue in the implementation of the Restorative Justice Youth Tribunal is the

[369] Id.
[370] Telephone interview by Austin Dana and Suhee Kim with Jean Greenwood, Training Associate, Center for Restorative Justice and Peacemaking of Univ. of Minn. (Feb. 6, 2009).
[371] Id.
[372] Id.
[373] Id.
[374] Id.
[375] Id.

volition of all parties involved. In order for the principles of restorative justice to work properly, the responsible and impacted parties must voluntarily choose to participate in the diversion process.[376]

Volition is important and necessary not just in the decision to participate but also throughout the entire process.[377] This raises the issue of points of egress. What if the responsible party, in the middle of the diversionary program, decides to not complete the program? What if the responsible party fails to show a desire to participate in the way restorative justice needs to be successful? Establishing how these situations will be dealt with is important to the overall success and acceptance of the youth tribunal.

To answer the first question; volition must remain in existence throughout the entire process for the responsible party to continue. If at any point the responsible party changes her mind, does not feel comfortable, etc. she may choose to leave the program and return to the original source of her diversion; whether that is CHINS, delinquency proceedings, etc. This is a right that is present in other diversion programs. For example, in Washington, the state statute dealing with youth diversion states, "the juvenile shall retain the right to be referred to the court at any time…"[378] In order to stay true to the principles of restorative justice, the responsible party must have the right to leave the program at any time, and exercises that right by informing the youth tribunal.[379]

A more complicated situation arises if during the diversionary program the youth tribunal panel, adult supervisor, or facilitator of the restorative justice method believes that the responsible party is not genuinely participating in the process. Without meaningful participation

[376] See supra Section 1, Part II.
[377] Id.
[378] Wash. Rev. Codes Ann. § 13.40.080 (2004).
[379] See supra Section 1, Part II.

the impacted party may feel re-victimized.[380] Restorative practices depend on the creation of meaningful, positive dialogue from which healing of the harm can occur.[381] This idea of "healing dialogue," "suggests that open, relatively unrestricted dialogue leads to better intermediate and long-term results regarding the well-being and behavior of offenders and victims."[382] If a responsible party is unwilling to participate in that kind of discourse the process will not be effective, and the harm will not be repaired.

If the facilitator feels that the impacted party is not engaged and is not participating the facilitator should speak with her, reiterate the reasons she is there and the goals of the process. The facilitator should be looking for things such as the responsible party acknowledging responsibility for the harm, and portraying a sense of accountability for it.[383] The facilitator also wants to ensure that the responsible party is expressing an understanding of the harm and its impact on those involved.[384] Furthermore all the involved parties need to work together in trying to find a way to ensure the success of the process. If after this discourse the facilitator still feels that the impacted party is not participating in a positive manner she can recommend the responsible party's participation in our program be terminated and she be sent back to the source of diversion. This is a situation that plays heavily into the facilitator's discretion,[385] which is why it is essential we have well-trained and experienced volunteers participating in this program.

---

[380] See supra Section 1, Part IV(C)(iii).

[381] "The purpose of victim-offender mediation and dialogue is to provide a restorative conflict resolution process that actively involves victims and offenders in repairing (to the degree possible) the emotional and material harm caused by the crime; an opportunity for both victims and offenders to discuss offenses and express their feelings and for victims to get answers to their questions; and an opportunity for victims and offenders to develop mutually acceptable restitution plans that address the harm caused by the crime." Mark S. Umbreit, Guidelines for Victim-Sensitive Victim Offender Mediation: Restorative Justice Through Dialogue 7 (April 2000).

[382] Bazemore supra note 352 at 59.

[383] Id. at 166.

[384] Id.

[385] To have a rigid list of considerations a facilitator must look for to determine if an impacted party is properly engaging in the restorative justice process is too inflexible. Each circle, VOM, or FGC will be unique with unique individuals participating and to have a strict "check-list" like structure will prevent the natural flow of dialogue because the facilitator will always be pressing the responsible party to address those specific items. Leaving it to the well-trained facilitator's discretion allows for the facts and circumstances of that specific meeting to be considered.

We hope that those who enter our diversion program will be sincerely attempting to address and heal those relationships they have damaged, but it would be naïve to think that our program is not above abuse. In those hopefully rare instances where a facilitator strongly feels that the impacted party is simply not participating in a positive manner, or in a way not conducive to successful restorative justice, it must be within their discretion, after good faith attempts to correct the situation, to end the proceedings.

G. COMPLIANCE

Recommending a process that ensures that a responsible party has complied with the terms of a resolution is critical. This process can serve to assuage any fears that diversion is a "free pass" for responsible parties. When deciding whether to divert to our program state players[386] will want assurance that the terms of the resolutions will be completed.

A compliance process that holds responsible parties accountable for completing the terms of their resolution will be necessary before a responsible party can be diverted from CHINS or delinquency proceedings. In CHINS preliminary hearings the judge has the ability to choose from several paths each with procedures in place that verify compliance with dispositions.[387] A compliance process will also be necessary if our program is going to be considered a viable option for diversion delinquency proceedings.[388] A process that provides for proof, that a responsible party has completed the terms of a resolution will satisfy legal requirements and add credibility to our program in the eyes of those who will be considering diverting a case.

We recommend a compliance process similar to that of the Clark County Washington Juvenile Court. Clark County's diversion staff has established a process of continuous oversight

[386] State players include: DYS, Probation, District Attorneys and the judiciary.
[387] Mass. Gen. Laws Ann. ch. 119, § 39E (2008).
[388] Mass. Gen. Laws Ann. ch. 119, §§ 55B, 58 (2008).

in which a staff member is assigned to monitor the diverted youth.[389] The staff member periodically checks in with the youth or the youth's parents via telephone calls during the course of the diversion program.[390] If during the course of a check-in there is an indication that a responsible party is having difficulty fulfilling her contract, higher officials are notified and action is taken to work with responsible party in completing the terms of the contract.[391] We recommend that the youth representative who has acted as a guide to the responsible party throughout the process serve the role of monitoring the resolution. The youth representative will be responsible for checking in with the responsible party once every two weeks to ensure that she is working towards fulfilling the resolution.

Once the resolution has been completed we recommend that the responsible party report back to the diversionary system for a final meeting with a youth representative. During this meeting the responsible party will be expected to bring with her evidence that she has completed everything that the resolution required. The date of this final meeting and what evidence will be required should be decided before the responsible party begins to fulfill her obligations under the resolution, so she can be clear as to what is required of her. [392]

III. ADDITIONAL CONSIDERATIONS FOR IMPLEMENTATION

A. TRAINING

In conducting our field research for this project, almost every person we have spoken with emphasized the importance of properly training the parties involved.[393] If the facilitators

[389] Clark County Juvenile Court Diversion Manual 19 (2008).
[390] Id.
[391] Id.
[392] Telephone interview by Austin Dana and Suhee Kim with Jean Greenwood, Training Associate, Center for Restorative Justice and Peacemaking of Univ. of Minn. (Feb. 6, 2009).
[393] Telephone interview by Sarah Volante and Liz Nettleton with Eric Gilman, Community Programs Supervisor, Clark County Juvenile Court of WA (Feb. 5 2009); see also Telephone interview by Sarah Volante and Liz Nettleton with Ann Warner Roberts, Senior Fellow at Center for Restorative Justice and Peacemaking of Univ. of Minn. (Feb. 9, 2009).

are not adequately prepared, they may be incapable of appreciating the personal complexities of the participants, or the factors leading to the offense.[394] Common traits needed in restorative justice settings include: strong listening skills, a supportive and reflective nature, patience, humility, openness, flexibility and honesty, to name a few.

These skills are difficult to sharpen, and require adaptability when approaching each harm and set of impacted parties. Therapist Richard Powell, who has led VOM in Minnesota, related a story in which the parties were unable to reach a resolution due to their conflicting perspectives.[395] The offender was a man of Cambodian heritage and had murdered the family member of an African-American woman. The offender was incarcerated for his crime and the impacted party decided she wanted to meet with him. The process was discontinued for 2 different reasons. First, the offender was not familiar with restorative justice methods, and didn't value the intent and purpose behind it. Furthermore, English was not his first language, which made communication difficult. The second problem was that the impacted party was not approaching the process to heal her pain surrounding the loss of her family member, but rather with an agenda to "heal" the offender. Such an outcome was not within her control. The intent behind restorative justice is not for one party to "heal" the other. Rather, the process is meant to foster communication and consensus to heal harms between parties. The offender resisted the process and the mediation broke down.[396]

This example illustrates the importance of understanding the intentions and goals of the parties, as well as accommodating any language differences and cultural perspectives. Implementing restorative justice methods in a multi-cultural context demands additional

[394] Umbreit, supra note 140 at 298.
[395] Telephone interview by Sarah Volante and Liz Nettleton with Richard Powell MS, Mediation Trainer, Center for Restorative Justice and Peacemaking, Univ. of Minn. (Jan. 27, 2009).
[396] Id.

considerations. The facilitator must be conscious of the unique cultures of the participants, and how it shapes their identities. At the same time, it is important to see the participants as individuals, who are not necessarily defined by their distinct cultures.[397] A facilitator should try to understand the home environment of the participant, and "what they are about," both within that context and outside of it.[398] Practitioners must recognize the needs of the individuals and adapt to the unique challenges involved, even if it means letting the conversation dissolve. This heightened perception with respect to the parties' unique cultures, and the ability to understand each participant does not come naturally. Hours of training are necessary to ensure that a facilitator is able to properly run a restorative justice dialogue.

In addition to ensuring that facilitators are properly trained, the participants must be adequately prepared for the process, as well. An example that illustrates the problems that arise when parties are ill prepared is a drunk-driving case, in which the wife of the victim was invited to take part in determining a settlement.[399] To do so, she had to meet with the drunk driver. However, no one discussed with her the mental and emotional strain that can come with the process. In consequence, the meeting renewed painful memories and led to her feeling re-victimized.[400] Restorative justice methods can bring up intense emotions. Facilitators must be trained to create a safe space and help participants share their perspectives in a manner that is constructive and healing.[401]

As the skill set required in mediation is complex, training is essential. When interviewed, Doug Reynolds, a local attorney with over eight years of experience in dispute resolution,

---

[397] Id.
[398] Id.
[399] Umbreit, supra note 140 at 298.
[400] Id.
[401] Roca, Inc., supra note 95.

recommends multi-day trainings.[402] He believes such a program is beneficial because it allows participating youth volunteers to withdraw from other things in their life, and immerse themselves in the method. ROCA, a local organization that incorporates healing circles in their dispute resolutions, gives three and a half day trainings.[403] Mr. Reynolds also mentioned that there is a 30-hour mediation training that takes place over five days, and has statutory approval in Massachusetts. The most important aspects of cultural sensitivity training are that it is led by a person who is highly experienced in the field of mediation, and that ample time is given for participants to understand and experience the process.

Training sessions may include a variety of activities designed to teach facilitators about the parties' experiences before coming to a restorative process, how to conduct the process and how to form a resolution. A sample training agenda includes exercises, designed to explain the impacted party's experience dealing with the harm: "phases of victimization," "dealing with powerlessness and vulnerability," and "from victim to survivor: a strength's perspective."[404] Similarly, the program includes exercises designed to explain the responsible party's experience with the justice system. It also includes lectures to help volunteers see beyond the offense the responsible party committed, for example, "separating criminal behavior from the person," and "focusing on strengths."[405] The agenda also provides for role-plays that simulate calling the parties to invite them to the process, as well as lectures on communication, mediation skills and creating a safe space.[406] At the end of the program, the trainees must have learned how to facilitate a productive dialogue and craft a resolution with the parties.

---

[402] Telephone Interview by Marissa Sherman and Chris Logue with Doug Reynolds, The New Law Center (Feb. 12, 2009)
[403] Id.
[404] Mark Umbreit, Restorative Dialogue: A Multi-Method Approach Through Mediation, Conferencing, and Circles, U. Minn. Center for Restorative Justice, http://cehd.umn.edu/ssw/rjp/Training/default.asp
[405] Id.
[406] Id.

Because the parties create a resolution for themselves, sources about restorative processes do not detail the elements of a resolution. However, the goal of any restorative justice dialogue is a resolution which repairs harms and leaves both parties feeling whole. It is important that restorative justice facilitators understand when a resolution will be successful at repairing harm, and are able to identify proposed resolutions that are not in line with the principles of restorative justice. For this reason, training is critically important.

B. OUTSOURCING

Our model provides several options for further processing after the youth tribunal stage. A youth's case can go to a freestanding system that will implement a variety of restorative justice methods. Alternatively, the case can be outsourced to local organizations.[407]

In beginning any new program, a significant amount of time, money and other resources are spent to set it up: training needs to take place; facilities acquired; partnerships formed with local communities; and standards and procedures need to be created, implemented and evaluated. In our research for this project, we have had the opportunity to speak with, and visit a number of different community groups who have been implementing restorative justice methods in dispute resolution for many years. We have been struck by the comprehensive nature of the programs. These community groups are well established, and by tapping into these cooperating agencies, the Commonwealth of Massachusetts can capitalize on existing resources, such as experienced professionals and pre-existing relationships.

The facilitators we have interviewed emphasize the importance of community in restorative processes, specifically "community" in a geographic sense. Many of the restorative

[407] A disclaimer about terminology: While the term "outsourcing" can be a particularly loaded phrase, especially when addressing government functions, we use the idea to mean partnering with local non-profits across the state to provide restorative justice services to local communities. We do not mean it as the replacement of employees with private (non-government) enterprises.

justice facilitators are from the neighborhoods where they work, live there, and have established long-running relationships with local school personnel, law enforcement officers and other community members. These relationships are essential when bringing community members together to address the alleged wrong that an individual has done and how it has impacted the community.

A number of other states have legislation that creates connections between juvenile diversionary programs and local non-profits. Alaska Statute § 47.12.400 states that a nonprofit may serve as a youth court with the commissioner's permission.[408] Furthermore, § 47.12.450 says that a court may require a minor to use the services of a community dispute resolution center that has been recognized by the commissioner.[409] Therefore, the legislation allows for a decentralized system where juvenile cases are processed by volunteer organizations that implement youth court models.[410] The work of the volunteer organizations is in turn supervised by United Youth Courts of Alaska.[411] This process of diversion and removed supervision by a third party is highly praised and widely supported by local communities.[412] Similarly, a Minnesota public safety statute includes as part of the commissioner's role, the provision of grant money to fund community based efforts that increase security.[413]

Priority for such funding is given to programs whose work includes pre-trial diversion, probation innovation, teen courts, intervention programs, working with youth in gangs, and reducing truancy. Minnesota has embraced restorative justice principles on a statewide level. It is part of the curriculum of the School of Social Work of the University of Minnesota, and we have

[408] Alaska Stat. § 47.12.400 (2008).
[409] Alaska Stat. §47.12.450 (2008).
[410] Michelle E.Heward, The Organization and Operation of Teen Courts in the Untied States: A Comparative Analysis of Legislation, Juv. and Fam. Ct. J. 19, 25 (2002).
[411] Alaska Stat. § 47.12.400 (2008).
[412] Telephone interview by Sarah Volante and Liz Nettleton with Sharon Leon, Executive Director Anchorage Youth Court of Anchorage (Feb. 4, 2009).
[413] Minn. Stat. Ann. §299A.296 (2000).

interviewed local practitioners whose life's work focuses around VOM and restorative justice.[414]

Several others states allow for juvenile offenses and offenders to be diverted from the courts and governmental entities. In North Carolina, juvenile offenses can be adjudicated at several levels; the first level is community disposition, and the state is in the process of replacing state run Youth Development Centers with small, community-connected facilities.[415] Idaho also provides community incentives to support community-based options.[416] Other states, such has Massachusetts, have organizations that use mediation or restorative justice methods in legal disputes, but have not yet passed legislation to create formal relationships between the juvenile justice system and these local groups.

Some of these states, such as Alaska and Minnesota, are well known for their successful alternative programs and have developed commendable reputations for restoring communities and reducing recidivism.[417] In other states, these methods are relatively new and have yet to provide statistics as to their success rates. The growing amount of legislation in support of diversionary programs, and which provides for its implementation by community organizations, shows there is increased support for such work in numerous parts of the country.

Still, despite the many benefits of a decentralized process, there are some drawbacks. A decentralized process can result in inconsistent approaches and sentencing. Each organization will already have a model they feel comfortable with, as well as certain offenses they may or may not address. Just as with any other statewide program, standards will need to be created and

---

[414] Telephone interview by Sarah Volante and Liz Nettleton with Richard Powell MS, Mediation Trainer, Center for Restorative Justice and Peacemaking of Univ. of Minn. (Jan. 27, 2009); see also Telephone interview by Sarah Volante and Liz Nettleton with Anne Warner Roberts, Senior Fellow, Center for Restorative Justice and Peacemaking of Univ. of Minn. (Feb. 9, 2009).

[415] National Center for Juvenile Justice, North Carolina State Juvenile Justice Profiles available at http://www.ncjj.org/stateprofiles.

[416] Id.

[417] Telephone interview by Sarah Volante and Liz Nettleton with Sharon Leon, Executive Director Anchorage Youth Court of Anchorage (Feb. 4, 2009).

adhered to. Furthermore, mechanisms should be designed for effective supervision. The Commonwealth may want to create criteria for choosing local organizations and include such language in its legislation. Important considerations include: the number of years the program has been operating, their achievements and local recidivism rates, as well as the qualifications of its practitioners.

C. NEXT STEPS

One of the elements that the Law Office did not address was how the diversionary program would fit into the Massachusetts juvenile justice system from an administrative standpoint. We envision that the diversionary program will be housed within a state agency. We recommend that several considerations be kept in mind during the preparation and implementation of the program.

We recommend a high-level of localized control. A crucial component of an effective restorative justice program is a strong foundation in the community. Having facilitators and volunteers from the community, who work with responsible parties, impacted parties and other stakeholders, makes for a more informed and productive process. For these reasons, we strongly urge that the diversionary program be implemented by discrete modules across the state with a great range of flexibility rather than administered solely and uniformly from Boston.

We further recommend that the role of the centralized authority concentrate on providing support for the individual programs. While it is crucial that the individual programs be local and tied to the community, we think a strong central back-end process would be an asset for effective delivery of services. The key to the functioning of every process is knowledge of how that process operates. Restorative justice is no different in that regard. A central entity stands in a good position to ensure a certain quantum of training of a definite sort. This training can

guarantee that specific standards are upheld to ensure fairness and consistency. Examples of these standards could include sentencing/restitution guidelines, appropriate timelines and notification requirements. Also a central entity is inherently suited to foster the sharing of information as a hub of gathering and distribution data, communication and knowledge. In addition, such a locus could provide other centralized support services.

We additionally recommend that the central agency, in the preliminary stages at least, assist with the staffing needs of this program. It is undeniable that youth are the backbone of this diversionary program yet they will need assistance and guidance. Having a stable number of facilitators, who are well trained and comfortable with the responsibilities of facilitating these programs, is important. They will also be responsible to outreach, network and partner with local schools, non-profits and other community groups. The aid of a pool of staff will give the diversionary program the ability to operate independently of volunteer participation rates.

Along a similar line we recommend that the chief office implement a program of statistic gathering. An important part of this initial, and continued, implementation will be gathering data about the effectiveness of the program. We suggest that this can be accomplished by surveying stakeholders who have partaken in the process, documenting rates of recidivism, gathering information about who volunteers for the diversionary program and at what stage, etc. Not only will this information be important in articulating the effectiveness of restorative justice to Massachusetts citizens – many of whom may be unfamiliar with these principles – but also it will provide a fact base upon which to make managerial decisions.

D. PILOTING

The intention of our recommended legislation is to create a statewide program that is flexible enough to address the local needs of youth, but also standardized enough to comport

with state legislation. For example, addressing the needs of youth in Suffolk County, where 25% of families are "foreign born," will be substantially different from addressing the needs of youth in Plymouth County, where the foreign born population is only 6.3%.[418] Therefore, it is important that the program is able to consider the cultural needs of a variety of communities and that the program has the means to reach out to and involve community resources to meet that need. But amenability to statewide regulation necessitates standardization of procedures to protect the rights of participants.[419] This standardization also provides a means for the state to gather data to measure the efficacy of the diversionary program at both the state and local levels.[420]

The Honorable Jay D. Blitzman, First Justice of the Middlesex County Division of the Juvenile Court Department, expressed interest in discussing the piloting of the diversionary program.[421] Judge Blitzman suggests that the most important aspect of developing any diversionary program is participation by as many stakeholders as possible, including schools, probation officers, prosecuting and defense attorneys, and community-based organizations.[422] Judge Blitzman also noted that there have been ongoing discussions in Lowell, MA, between the Superintendent of Police, the local Superintendent of Schools, and the United Teen Equality Center.[423] Although piloting in Lowell would be ideal, since "the big dogs" are already at the table, this will require discussion with the new presiding Chief Justice of the Essex County Juvenile Court, Honorable Michael F. Edgerton.[424]

---

[418] U.S. Census Bureau, State and Metropolitan Area Data Book: 2006, 190 (2006).
[419] See supra Section 1, Part V.
[420] See supra Section 2, Part I(B).
[421] Interview by James Hodge and Sowande Brown-Lawson with Honorable Jay D. Blitzman, MA Juvenile Court Judge, in Boston, Mass. (Feb. 2, 2009).
[422] Id.
[423] Id.
[424] Id.

CONCLUSION

The Law Office is confident that its legislative recommendations will effect real change in the Juvenile Justice System of the Commonwealth of Massachusetts. The Restorative Justice Diversionary Program we have proposed provides a unique restorative justice based alternative to both, delinquency proceedings, and CHINS that will improve many of the current problems in the system. We have shown that simply labeling a youth delinquent or a child in need of services does nothing to address the underlying cause of her behavior. This diversionary not only addresses the underlying harm, but also to heals the relationships between the responsible party, the impacted party, and their communities, including their families.

We hope that our arguments convince the people of the Commonwealth that change is needed. As one author put it, "restorative programs can always benefit from stronger legislation, more funding, and an increase in well-trained mediators and volunteers, but the most essential element for the success of restorative justice is a change in the way our society views punishment."[425] We wish Senator Spilka the very best in moving forward with these recommendations, and look forward to seeing the positive results.

[425] Lucy Clark Sanders, Restorative Justice: The Attempt to Rehabilitate Criminal Offenders and Victims, 2 Charleston L. Rev. 923, 938 (2008).