Juvenile Justice:

The Adjudicatory
and Dispositional Process

Judge Jerry L. Mershon

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Juvenile Justice Textbook

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DEDICATED TO MY WIFE
JACQUELINE

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I. HISTORY AND BACKGROUND OF THE JUVENILE COURT

1. Dual Standard in Early England
   (a) Juveniles had no property rights until they were twenty–one (21) years of age.
   (b) Juveniles were criminally responsible for their actions. Only children under seven (7) years of age (no *mens rea)* were exempt from criminal prosecution as adults. The situation generally reflected the common law concept of infancy.
   (c) Over three hundred (300) crimes in early England were punishable by death.
   (d) Historical Experience: Severe punishment for children not a significant deterrent.

2. There were a few early U.S. juvenile institutions such as the *New York House of Refuge* in 1824 and some parens patriae concepts were being discussed as early as 1839; however, generally, there was very little thought of a substantial legal distinction between juveniles and adults prior to 1899.

3. First Juvenile Code enacted in Cook County, Illinois, in 1899. A landmark change in the handling of juveniles in the United States.

   New Concept: Sociological foundations rather than pure *corpus juris* foundations.

   Social Theory: Sociological and psychological foundations.

   Legal Theory: (Parens Patriae power of the State)

   Parens patriae was vested in the King of England. In the United States, the state as sovereign developed the concept of guardianship over persons under disability that included minors.

4. Development of the Juvenile Court in the United States
   (a) Very little interest in the juvenile court in early development, including a paucity of juvenile case law and statutory enactments.
   (b) A general feeling of disinterest in juvenile law by the members of the bar and bench and a significant feeling that the juvenile court lacked importance as an institution in the jurisprudence of the nation.
   (c) Attorneys shunned juvenile courts and often the least–experienced prosecutor was assigned to the juvenile court. (This is unfortunately still true today to a certain extent, but this trend is slowly changing.)
   (d) Most law schools in the nation had no instruction in juvenile law and such was the case until fairly recently. Kansas University Law School began a course in juvenile law in 1956 and most other law schools have such courses now. By 1925, juvenile courts were established in most

states. Statutory enactments setting up the juvenile court system in the United States was influenced by early social work concepts and the new developing fields of psychology and psychiatry. Also, it was influenced by concepts of "administrative law with informal procedures" containing an overall direction toward the individual treatment concept.

Early development of juvenile law showed almost an incidental and summary examination of the complaint or the legal sufficiency of the same. This tended to foster commitments based on invalid legal grounds. This is unfortunate and this writer agrees with Professor Aidan R. Gough, University of Santa Clara Law School, when he observes that:

> "Due process is in many ways equal to good therapy. *Gault* and other cases have brought us back to the role of the court which is properly as a fact-finder prior to the dispositional process period."

II. PHILOSOPHY OF THE JUVENILE COURT

1. The fundamental position of most juvenile proceedings is that the state owes children a duty of protection and a chance at rehabilitation. The juvenile courts exist to help children in trouble with the law, rather than to simply punish them or to make them examples. Although the emphasis is on rehabilitation, this does not mean that punishment and deterrence has no place in the juvenile court system. Indeed, punishment does have some valid consideration in the juvenile court process.

2. The juvenile court construction and definition in most states: *Proceedings deemed not criminal.* This is reflected in general juvenile court nomenclature such as a child is not Arrested but is taken in *Protective Custody;* not put in Jail but placed in *Detention;* the act is not referred to as a Crime, but an *Offense;* the procedure is not referred to as a Trial, but a *Hearing;* a Sentence is not imposed but a *Disposition* takes place.

3. The fact that past juvenile procedures did not guarantee the right to remain silent, the right to counsel and other basic rights raised serious questions of constitutional law. The due process revolution and the mandates of the Supreme Court have corrected these deficiencies but have not totally destroyed the concept of the juvenile court.

   The June 1, 1987 *ABA Journal* at page 29, quotes a 1984 study conducted by The New York Bar Association finding: "Out of 199 courtroom observations of law guardians, forty-five percent of the attorneys observed gave 'seriously inadequate' or only 'marginally adequate' representation and forty-seven percent of the attorneys observed appeared to have done minimal or no preparation. Only one quarter of the law guardians viewed themselves as specialists in juvenile law, and more than half reported little interest in the substance of juvenile law."

(a) The role and duty of the prosecuting attorney and the attorney representing the juvenile, are a matter of controversy. Two differing major points of view emerge:
   (1) The attorney should assist the Court and take only positions in the best interest of the child.
   (2) The attorney should assume a strict advocate's role.

(b) A view as to the correct role of the juvenile police officer.

(c) A view as to the correct role of the juvenile probation officer.

4. Juvenile court philosophy of confidentiality and changing trends in the *medical model and just desserts* approach.

(a) Generally, state statutes hold juvenile proceedings as confidential.

(b) Juvenile expungement statutes.

(c) Sharing of juvenile court records among law enforcement agencies.

(d) Sock it to 'em and disclose the names syndrome.

(e) Withholding names and why? Reference Articles:
   (1) "Delinquency and the Panacea of Punishment," by Sydney Smith, Ph.D., *Federal Probation,* Sept. 1965.
   (2) "Identifying Delinquents in the Press," by Gilbert Geis, Ph.D., *Federal Probation,* Sept. 1965.
   (3) "Open Hearings in Juvenile Courts in Montana, Memorandums," by National Council on Crime and Delinquency, *Juvenile Court Judges Journal,* Spring 1965.

Generally, states forbid the use of juvenile court or arrest records on subsequent civil or criminal proceedings. Most statutes uphold this principle and the case law is generally supportive. See *Workman v. Cardwell,* 388 F. Supp. 893, Ohio (1972) where the Court held juvenile "convictions" inadmissible in any subsequent criminal prosecution or for the purposes of judging an individual's recidivist status. It has been held that juvenile arrest records can be used to impeach the credibility of a witness in a subsequent case. See *People v. Norwood,* 54 Ill. 2d 253 (1973).

It should be noted that a judge in a subsequent criminal case may properly have access to juvenile records in the presentence report and this report may be considered in sentencing. See *Thomas v. State,* 498 P.2d 1314, Nevada (1972).

Although I personally find the trend disconcerting, modern writers are suggesting that confidentiality in the juvenile system is not always salutary. An interesting article demonstrating this trend can be found in the November 1982 *Juvenile and Family Court Journal,* Vol. 32, No 4. The article is entitled "Why Confidentiality in Juvenile Justice?" by Eugene H. Czajkoski. Mr. Czajkoski notes that the dogma of confidentiality in juvenile justice has remained virtually unassailable, especially under the doctrine of rehabilitative treatment of juvenile offenders but he suggests some changes are on

the horizon. The author says that the heresy of lifting the confidentiality in juvenile justice proceedings is proposed on the basis of two major arguments:

(1) Confidentiality has not had the intended benign affect on the juvenile offender, and

(2) Confidentiality has disastrously undermined the control of serious crimes committed by young offenders.

This article asserts that the confidentiality or antistigma apparatus has dubious judicial development and it points out that the highly erratic nature of juvenile dispositions is compounded by the confidentiality factor and the vague doctrine of responding to the child's needs rather than to his deeds. It is suggested that "one is left to glumly speculate as to how youths' developing sense of responsibilities are enhanced by a justice system confused as to sanctions and accountability."

I have selected a few excerpts from the above-referred article to give you a flavor of the attack on the traditional position of juvenile courts upholding confidentiality. Indeed, in modern society when "just desserts" is becoming more and more of a factor in juvenile justice, we will probably see this trend developing more vigorously than in the past. It remains to be seen whether this trend will prevail or whether it is just one swing on the pendulum to rise to a crescendo only to then decline. The better view is probably that confidentiality should remain in the juvenile court but it should be handled wisely and judiciously. Some inroads in the interest of First Amendment rights and the public right to know are probably inevitable in the juvenile justice system.

In the late 1980s and early 1990s, a great deal of shifting has taken place from the concept of rehabilitation to retribution. This has been predominant in the adult criminal system and has filtered down to the juvenile system to such an extent that many juvenile codes are now bifurcated. The codes are often in two sections, one being the juvenile offender section and the other being the child in need of care or dependency and neglect section.

An interesting article entitled "The Return of Retribution," by J.S. Bainbridge, Jr., is in the May 1985 *American Bar Association Journal,* Volume 71 at page 61. Although this article has to do with the return of retribution in the adult court, some of the author's comments seem applicable to the juvenile trend. Mr. Bainbridge points out that at the turn of the century, those who wronged others often were regarded as sick individuals who deserved treatment, not punishment. Rehabilitation was a "humanitarian" goal. He further points out that a movement has begun to grow that challenges our skill at reforming criminals and rehabilitation is beginning to lose its luster. He suggests that the Supreme Court has shifted direction more toward retribution and that the retribution aspect of crime and juvenile delinquency is an essential ingredient in today's sentencing and adjudicatory delinquency findings. Mr. Bainbridge concludes his article with a predictive quotation:

> "As retribution regains its place in the American criminal justice system, its dimensions will become clearer. At some

> time in the future, should rehabilitative ideas be reborn with more legitimate expectations, retribution may once more be asked to make room. But it may never be asked -- so completely -- to give up its place again."

In light of the "Just Desserts" theme that seems predominant in the *IJA-ABA Juvenile Justice Standards,* it seems clear that Mr. Bainbridge's observations have some validity in the juvenile justice system as well as in the adult criminal justice system.

Professor Samuel M. Davis, in his 1986 revision to his book *Rights of Juveniles,* which is published by Clark Boardman Company, Ltd., New York, in Chapter 1.3, makes the following enlightening comments concerning the present philosophical trend of the juvenile court.

> "Some of the rethinking of the juvenile court concept has influenced and has been influenced by recent legislation eschewing the traditional rehabilitative philosophy in favor of a more punitive philosophy as the sustaining rationale of the juvenile court, largely in response to increasing concern about serious youth crime and the desire to hold children accountable for their actions. Legislatures have been influenced as well by recodification proposals to abandon the rehabilitative model in favor of a more punitive model. Such proposals are radical because they strike at the very foundation of the juvenile court as an institution -- the rehabilitative ideal -- and propose to replace it with concepts of accountability and proportionality, concepts traditionally associated with the penal process. Change of such dimensions does not come easily; yet, many indicators signal a new direction. If the juvenile court survives as an institution, change in the underlying philosophy of the court seems inevitable. Such change need not be unwelcome. Many of the shortcomings of the juvenile court are due to the fact that, typically of most reform efforts, too much was expected of it. With a substituted philosophy of punishment, expectations may be more modest and more realistic, and the juvenile court can still accomplish its central purpose, which is to control disruptive and threatening behavior."

Three good books discussing changing juvenile philosophy and emerging legal trends in the juvenile field are:

Children, Parents and the Courts, by Judge Millard L. Midonick, Surrogate Judge, New York County. Practicing Law Institute, New York City, Library of Congress, Catalog Card Number 70-181692.

Rights of Juveniles, by Professor Samuel M. Davis, Clark Boardman Company, Ltd. Publisher (1974). Library of Congress Catalog Card Number 74-84201.

Juvenile Law and Procedure, by Monrad G. Paulsen and Charles H. Whitebread, Juvenile Textbook Series (1974), National Council of Juvenile Court Judges, Box 8970, Reno, Nevada 89507.

5. State Cases on Juvenile Court Confidentiality

The Montana Supreme Court held that counsel for the mother in a neglect action may not disclose data from juvenile court files to outsiders having no valid interest in the matter. In this case, a California state senator was charged with a sex offense with two minor girls who contacted the lawyer who represented the girls' mother in a neglect action. The Montana lawyer examined the files of the court and sent some of the information to the California senator. The county attorney cited the lawyer for contempt and the court found him guilty. *Wise v. District Court,* 636 P.2d 865 (1981). The Supreme Court of Rhode Island held the media may publish a juvenile's name and attend juvenile proceedings if the trial court determines after hearing that the media learned the juvenile's identity from other than a judicial source. *Edward A. Sherman Pub. Co. v. Goldberg,* 443 A.2d 1252 (1982). The Supreme Court of Indiana held in determining whether to permit the media to cover a juvenile proceeding that the court must balance the impact on the juvenile with the public's right to know. *Taylor v. State,* 438 N.E.2d 275 (1982). The Supreme Court of Washington held that a newspaper investigation which will protect identities and is for a legitimate inquiry into court processes is entitled to access to juvenile court records. In that case, a feature writer for the *Seattle Times* was denied access to confidential juvenile files on the grounds newspaper articles are not "legitimate research" under the statute. The Court held that newspaper journalism may be legitimate research, and therefore allowed access to the records as long as identities were protected. *Seattle Times Co. v. Benton,* 661 P.2d 964 (1983).

In Maryland, an adult was convicted of murder. In the final argument the prosecutor characterized his one *witness* as having lived an exemplary life even though he knew he had a juvenile record. The defendant moved the judge to disclose the record to the jury which was declined. The Court held that juvenile records cannot be admitted to prove a witness had been delinquent. *Curry v. State,* 458 A.2d 474 (1983).

A Missouri statute forbids general public access to juvenile records. Prosecutor secured a fingerprint from a juvenile court file taken three years earlier, securing a murder conviction in adult court. The former juvenile adult defendant objected to the introduction of the fingerprint taken from juvenile records. The Appellate Court ruled the prints were admissible. The Court ruled the prosecutor can have access to juvenile records since the statute forbids general public access, not access by another government agency. *State v. Scott,* 651 S.W.2d 199 (Mo. App. 1983). A Louisiana Court ruled that where juvenile records are sought for impeaching a witness in an adult trial, the trial judge should view the juvenile records *in camera* and permit their use only if they are likely to change the verdict. *State v. Smith,* 437 So.2d 803 (La. 1983). A federal statute authorized a juvenile's conviction to be vacated. The Court held that the juvenile is entitled to have all references to his offense deleted from all government records. *United States v. Doe,* 579 F. Supp. 1351 (D.C. Ill. 1984).

The Florida Supreme Court holds that a statute can constitutionally close all adoption hearings. *In re Adoption of H.Y.T.,* 458 So.2d 1127 (Fla. 1984). In a Georgia case, the Court held the state may create a rule that delinquency, deprivation and unruliness hearings in juvenile court are presumed closed to the public and press. The Court went on to say however that this presumption cannot be conclusive and the public and/or the press must be given an opportunity to show that the state's or the juvenile's interest in a closed hearing is not "overriding" or "compelling." The Court therefore allows either a member of the public or the press the opportunity, upon proper motion, to present evidence and argument to show that the state's or juvenile's interest in a closed hearing is overridden by the public's interest in a public hearing. The Court's ruling on the question must be composed of findings in writing articulate enough for appellate review. *Florida Pub. Co. v. Morgan,* 322 S.E.2d 233 (Ga. 1984).

A North Carolina Court ruled that a witness in adult court may be impeached by using his juvenile record. *State v. Baker,* 320 S.E. 2d 670 (N.C. 1984). The Supreme Court of Nebraska held that records that might be needed in the future can be sealed but not expunged. *In Interest of P.L.F.,* 352 N.W.2d 183 (Neb. 1984). The U.S. First Circuit Court of Appeals has ruled that expungement requires that the record not be used in any way to the child's detriment; expungement does not require that records be physically destroyed. *United States v. Doe,* 732 F.2d 229 (1st Cir. 1984). The Georgia Court of Appeals has ruled that concerning confidentiality, in an adult court proceeding, a prior juvenile offense may be shown to demonstrate a pattern of conduct. *Houser v. State,* 326 S.E.2d 513 (1985). A Michigan Appeals Court has held that a previous juvenile record can be used to impeach where the interests of justice outweigh the need for confidentiality. *People v. Fort,* 361 N.W.2d 346 (1984). A Missouri Appellate Court has ruled that confidentiality is limited to the juvenile. The confidential rule is not a protection for others thus juvenile records can be used where the juvenile is not affected. *Smith v. Harold's Supermarket, Inc.,* 685 S.W.2d 589 (1984).

In Pennsylvania, the facts indicated there was no substantial evidence that the child was injured or the parents were involved and the Court held that the parents were entitled to have the abuse report expunged. *A.M. v. Com. Dept. of Pub. Welfare,* 540 A.2d 1 (Pa. Cmwlth. 1988). In an Alaska case, an adult was convicted of sexual abuse of a minor. At trial, social workers and others testified to statements of the children and others and there was no objection to this testimony. Defendant now contends that allowing this testimony violated the policy of confidentiality in children in need of attention proceedings under statutorily-mandated confidentiality. The Court held that there was no objection and testimony in question was relevant in determining whether the children's original charges of sexual abuse were accurate. Therefore the Court held that this confidentiality statute did not prevent allowance of evidence generated at a prior children in need of attention action in this sex abuse criminal trial. *Clifton v. State,* 758 P.2d 1279 (Alaska App. 1988). In Michigan, it has been held that a juvenile record cannot be considered in sentencing after the juvenile has been an adult for 10 years.

People v. Price, 431 N.W.2d 524 (Mich. App. 1988). In an Iowa divorce custody dispute, the Appellate Court held that the trial judge could require presentation to the Court of a child abuse report to be used in the divorce proceedings where child abuse was relevant in the issue before the Court as to who would have custody of the child. *Lozano v. State,* 434 N.W.2d 923 (Iowa App. 1988).

III. JUVENILE JUSTICE STANDARDS AND MODEL ACTS

Over the years there have been various model acts concerning juvenile law and various commissions who have prepared or formulated Standards for the Juvenile Court. The different groups are too many to mention however one of the more comprehensive and contemporary standards over the entire juvenile justice spectrum was compiled by the *National Advisory Commission on Criminal Justice Standards and Goals.* You will note in this text, I have referred to the *National Advisory Commission on Criminal Justice Standards and Goals* (NACCJ) by citing various specific standards in the particular area covered.

Notwithstanding the above standards, there has been no project as immense and comprehensive as the *ABA Institute of Judicial Administration, Juvenile Justice Standards Project.* These standards came after the ABA Standards on Criminal Law were compiled and so widely used and accepted. The ABA Standards Project consisted of various judges, professors, and people of unique expertise in the juvenile justice area, and were a number of years in the making. In February 1979, the American Bar Association endorsed 17 volumes of the standards and six volumes were withdrawn for revision or future consideration. Endorsement of the 17 volumes came after rejection of motions to postpone consideration of all the standards for another year. The project lasted approximately seven and one-half years and cost about $2.5 million to compile.

The volumes approved at the February 1979 ABA Meeting of the House of Delegates were: Adjudication; Appeals and Collateral Views; Architecture; Corrections Administration; Counsel for Private Parties; Disposition Procedures; Dispositions; Interim Status; Juvenile Records and Information Systems; Monitoring; Planning for Juvenile Justice; Police Handling of Juvenile Problems; Pretrial Court Proceedings; Prosecution; Rights of Minors; and Transfer Between Courts and Youth Service Agencies.

The volumes approved at the February 1980 ABA Meeting of the House of Delegates were: Standards on Schools and Education; Juvenile Probation Function; Court Organizations and Administration; and Juvenile Delinquency Sanctions.

The Child Abuse and Neglect volume was withdrawn from consideration pending a redraft of parts Five and Eight and the *Noncriminal Misbehavior* volume was "deferred" in February 1980, by a narrow vote. These two standards have not been approved by the ABA House of Delegates.

The standards contain some excellent recommendations for the improvement of juvenile justice. They have been met with continuing controversy and it has

been charged that the committee was in some instances academically overweighted; and the individuals and judges in the field who possess much knowledge and information in the way things are in the real world, sometimes found themselves in the minority and thus, their views were not fully reflected in the final product. The individuals involved in the formulation of the standards vehemently deny these allegations professing all parties were given equal representation, and the standards reflect a good mix of disciplines in their creation. I leave this controversy to your own evaluation and will attempt to keep my personal ideas on this matter at least to a minimum to promote a spirit of free discussion.

At any rate, the standards reflect an extraordinary effort and every person interested in juvenile justice should obtain copies and become familiar with their provisions. I now include a brief summary of the standards:

Standards Relating to Juvenile Records and Information

Provides for collection, retention and dissemination of records and information pertaining to juveniles; attempts to insure confidentiality and proper disposition of records.

Standards Relating to Youth Services Agencies

Suggests organizational structures and procedural safeguards for establishment of youth services and other agencies to coordinate existing community services.

Standards Relating to Monitoring

Lists standards leading to the development of an accurate and comprehensive information base insuring monitors access to this information.

Standards Relating to Police Handling of Juvenile Problems

Recommends that police policies emphasize officers' use of the least restrictive alternatives in handling juvenile problems, limiting arrest to more serious incidents. Proposes that police policy-making involve input from the public and other agencies.

Standards Relating to Planning for Juvenile Justice

Reviews planning as a process of innovation and reform. Deals with issues pertaining to organization and coordination of services and interrelationships among agencies.

Standards Relating to Abuse and Neglect

Presents principles and standards for the entire system of state intervention on behalf of neglected and abused children. Defines types of cases which justify intervention, establishes procedures to determine the child who is endangered.

Standards Relating to Schools and Education

Would provide juveniles with the right to an education and with an obligation to attend school. Removes truancy from court jurisdiction and calls for compulsory education through counseling and efforts to eliminate conditions undermining education.

Standards Relating to Dispositional -- Procedures Alternatives

Points out that dispositional proceedings should recognize the importance of the proceedings, to wit: possible loss of liberty. The standards limit judicial discretion, require "demonstration" of a need for deprivation of liberty and require written support for dispositional orders.

Standards Relating to Adjudication

Points out that a juvenile could suffer substantially through a delinquency finding and suggests *total* criminal procedural safeguards. Recommends the right to a public trial by jury and makes the proceeding more closely resemble criminal trials.

Standards Relating to Rights of Minors

Focuses on relationships between children, parents and third parties. Attention is given to legally imposed disabilities and legally enforceable obligations.

Standards Relating to Pre-Trial Court Proceedings

Adopts the procedural safeguard outlines set forth in U.S. Supreme Court decisions and unless the rehabilitative aims require otherwise, criminal procedural safeguards should apply.

Standards Relating to Interim Status

Sets standards that would curtail broad discretion to detain; narrows criteria for permissible detention and increases the accountability for decisions affecting pre-trial liberty.

Standards Relating to Juvenile Probation Function: Intake and Predispositional Investigative Services

Provides standards for intake, screening and predispositional investigations. Provisions in criteria for formal judicial proceedings, unconditional dismissal, consent decrees, etc.

Standards Relating to Noncriminal Behavior

Argues for prompt elimination of "status offense jurisdiction" and institution of a system of voluntary referral outside services.

Standards Relating to Architecture of Facilities

Recommends community-based residential facilities and emphasizes renovation of existing structures.

Standards Relating to Juvenile Delinquency and Sanctions

Recommends repeal of special juvenile offenses and decriminalization of certain "private offenses" commonly included in the state and criminal codes. Advocates tailoring general legal principles to fit conditions in situations of juveniles, and argues for special grounds of justification and excuse.

Standards Relating to Prosecution

Argues that the state's attorney should participate in every proceeding in every case of the juvenile court, and that he should vigorously represent the interest of the state while considering the needs of the juvenile.

Standards Relating to Appeals and Collateral Review

Provides a comprehensive guide to juvenile appeals. Addresses such ques-

tions as what orders should be reviewable, to whom the right of appeal should be extended, rights of parties, and the need for expeditious review.

Standards Relating to Court Organization and Administration

Recommends merging juvenile matters and other family matters into a single family court to avoid judicial fragmentation. Provides opportunity to have the same judge handle recurrent litigation within the family.

Standards Relating to Corrections Administration

Covers basic issues in organizational administration of juvenile corrections as well as the legal rights of juveniles under correctional supervision.

Standards Relating to Disposition

Provides adjudicated delinquents with fair and equitable treatment by reducing unregulated discretion, lessening use of institutions and calls for more flexibility in rehabilitation efforts.

Standards Relating to Transfer Between Courts

Permits waiver only in carefully defined areas, after a full hearing in which the juvenile prosecutor clearly demonstrates the youth is not an appropriate subject for the juvenile court.

Standards Relating to Counsel for Private Parties

Rejects the "guardianship" or *amicus curiae* role for counsel maintaining that counsel's function lies in seeking the "lawful" objective of the client through all reasonably available means permitted by law.

Federal Legislation

One piece of federal legislation is of particular interest. *The Adoption, Assistance and Child Welfare Act of 1980* (P.L. 96-272) has potentially great significance to juvenile and family courts both in terms of court workload and in judicial system funding. This federal act mandates major new responsibilities for juvenile courts with jurisdiction over child abuse and neglect and/or termination of parental rights cases. Public Law 96-272 requires states receiving federal funds under the Act assure every child in foster care receives periodic reviews of the child's progress and status in foster care at least every six months in a hearing by a court or a court-appointed or approved body. The Act further requires a permanent plan for that child within 18 months after the child is placed in foster care.

Most states have attempted to come into compliance with this provision to secure federal funds. It is important for all juvenile court judges to be aware of this Act and to make sure their state is in compliance. The law is consistent with the concept of review of children in placement to avoid foster care drift which is one of the continuing important missions of the National Council of Juvenile and Family Court Judges. This federal law imparts "permanency planning" requirements on a national basis which every juvenile judge should be thoroughly familiar with.

As of October 1, 1983, in order for any state to claim federal matching funds for a child placed in foster care by the court, a judge must make a determination whether the agency has made *reasonable efforts* to avoid out-of-home

placement of the child. See 41 U.S.C. Sections 672 (a)(15). It is very important therefore, to make a judicial determination of reasonable efforts when authorizing the placement of a child in foster care, not only to assure that federal funds are available for foster children, but, more importantly, because it is good sound judicial practice. The finding can be in the form of a court journal entry, written finding or transcript of an oral finding. Each judge must decide on a case-by-case basis whether there have been *reasonable efforts.* Depending on the facts of the case, *reasonable efforts* might involve the following:

1. Emergency day care.
2. Assistance in securing safe housing.
3. Parents' skills training.
4. Intensive home-based services or other types of assistance.

Judges should require the agency to provide written documentation of its efforts to avoid placement out of the home. The documentation should be provided well in advance of the hearing and made available to the guardian ad litem and parents' attorney to help the judge conduct a more thorough inquiry. Specific findings of fact related to reasonable efforts constitute good judicial practice and can provide a record which is helpful in later proceedings.

Juvenile Court Ethics

The subject of *ethics* has been a matter of continuing interest over the years, particularly concerning restrictions on juvenile judges who wish to actively participate in funding and legislative efforts on behalf of children. The difficult area of *ex parte* communications is also problematic. The National College of Juvenile and Family Law sponsored a Key Issues Curriculum Enhancement Project Faculty Consortium dealing with ethics in the juvenile court (1989-1990). This effort commenced under a grant award from the State Justice Institute.

This writer is privileged to be Chairman of this consortium which has prepared specific recommendations concerning the ethics of juvenile court judges. The American Bar Association is also in the process of evaluating, revising and updating the ABA Standards for Judicial Conduct. The final work product of the consortium will be published in the *Juvenile Court Journal.*

IV. UNITED STATES SUPREME COURT DECISIONS AND DEVELOPMENT OF JUVENILE LAW

1. Only since 1961 -- as set forth in the case of *Mapp v. Ohio,* 367 U.S. 643, 81 S.Ct. 1864, 6 L.Ed.2d 1081 (1961) -- has a portion of the criminal protections of the Constitution been made applicable to the states through the due process clause of the Fourteenth Amendment.
   (a) Unreasonable searches and seizures and exclusionary evidence rule applicable to the states. (Later cases expanded other constitutional due process protections.)
   (b) Protection to states similar to federal decisions in criminal matters.

2. First Significant Case -- Minimum Due Process -- Transfer and Waiver: *Kent v. United States,* 383 U.S. 541, 86 S.Ct. 1045, 16 L.Ed.2d 84 (1966). (Waiver hearings held required to comply with due process and fundamental fairness standards.)

Facts:

Juvenile admitted to burglary, robbery and rape. The juvenile court summarily waived jurisdiction under the District of Columbia statute and gave no reasons for the transfer. D.C. Court of Appeals affirmed and the U.S. Supreme Court reversed.

Holding:

(1) Case construed the District of Columbia statute in context of constitutional principles and due process.

(2) Court did not apply all constitutional safeguards. A "Functional Analysis" approach was used.

(3) Court held the order waiving juvenile court jurisdiction invalid and specifically held:

  (a) Juvenile had a right to due process hearing on the question of waiver.

  (b) Counsel for juvenile had the right to access juvenile court records.

  (c) Court was required to state specific reasons for waiving jurisdiction.

It is important to remember the particular "state statute" is controlling. Transfer statutes vary considerably from state to state. Illinois state statute gives absolute discretion to prosecutor on transfer. Judge has no discretion. *People v. Bombacino,* 280 N.E.2d 697 (Ill. 1962). U.S. Supreme Court *denied certiorari:* (41 L.W. 3207).

Concerning Constitutional Parameters of *Kent,* see: *Stokes v. Fair,* 581 F.2d 287 (1st Cir. 1978). Held that *Kent* was not totally constitutional in its dimensions. The Federal Court held:

> "We cannot say that *Kent* promulgates a standard test of absolute guarantees which must be provided before a juvenile can receive adult offender treatment."

Kent was decided within the District of Columbia Statute. (It should be noted Federal Law treats the question of when a person should be treated as adult or juvenile as one of prosecutorial discretion.) *U.S. v. Quinones,* 516 F.2d 1309 (1st Cir. 1975), and *Cox v. U.S.,* 473 F.2d 334 (4th Cir. 1973).

When a state entrusts this determination to the judiciary by statute, more formal mechanisms to insure fundamental fairness are called into play, and the statute must be interpreted in the context of constitutional principals relating to due process. The general conclusion is:

> "Safeguards which a juvenile must be afforded during a transfer to the adult court varies in terms of the particular statutory scheme which entitles him to juvenile status in the first place.

"It is important to point out that there are no substantive constitutional requirements as to the content of the statutory scheme a state may select. The Supreme Court has never attempted to prescribe criteria for the quantum of evidence that must support a decision of transferring a juvenile for trial to adult court."

3. Most Comprehensive Landmark Juvenile Court Decision to Date in the U.S. Supreme Court: *In the Matter of the Application of Gault,* 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527 (May 1967).

Facts:

Gerald Gault, 16 years of age, was taken into custody. No notice was given to parents. Juvenile was placed in detention after which mother was orally advised of the detention because of an obscene phone call. A petition was filed but was not served or shown to the juvenile or his parents. Petition stated the juvenile was an alleged delinquent with no reference to the factual basis of the action. The arresting officer was not present at the hearing; there was no sworn testimony; a juvenile officer stated the juvenile admitted making lewd remarks; the questioning was out of the presence of the parents; Gault was without counsel and was not advised of his right to remain silent; neither the juvenile nor his parents were advised of any constitutional rights. Juvenile was placed in the Industrial School and the matter was appealed. The Supreme Court of Arizona affirmed and the U.S. Supreme Court reversed.

Holding:

Court held the juvenile was denied due process of law. Juvenile proceedings must measure up to the essentials of due process and fair treatment. The court held specifically:

(1) Juvenile and parents entitled to written notice of the specific charge and allegations. Child and parents or guardian entitled to sufficient notice in advance of hearing to permit preparation.

(2) Juvenile and parents entitled to notification of child's right to be represented by counsel and that if unable to afford counsel, counsel will be appointed.

(3) The constitutional privilege against self-incrimination held applicable in juvenile proceedings.

(4) Absent valid confession, determination of delinquency and order of commitment must be based only on sworn testimony and cross-examination.

(5) Guidelines were set out for admission of confessions. Presence of parents and/or counsel, sophistication of child, etc.

Not all criminal constitutional safeguards were applied. A process of *selective incorporation* of constitutional guarantees on a case-to-case basis was set forth. The Court gave flexibility between juvenile and criminal

processes without totally destroying the salutary effects of the present juvenile philosophy and system. Procedures concerning proceedings such as intake, diversion and other information were not discussed. The Court indicated these protections were applicable *only* where a juvenile would be "incarcerated." The decision left a gray area concerning dispositional alternatives available other than commitment to an institution.

It is unlikely that due process will ever allow social agencies to have the final say concerning contested matters where juveniles will be committed to placements and/or institutions.

The following matters were not decided in *Gault:*

(1) Arrest rights;

(2) Post-Adjudication;

(3) Jury Trial;

(4) Jeopardy;

(5) Capacity in Insanity;

(6) Grand Jury; and

(7) Appeal.

The *Gault* decision has the impact of radically changing loose court practices concerning notice, rights to counsel, rights of child and family; and the decision curtails the power of the juvenile court to exercise *parens patriae* without due process of law. It should be noted that new statutory enactments in the majority of the states set forth with particularity the requirements of due process enunciated in the *Gault* decision.

4. Application of the Due Process Clause to Juvenile Proceedings: *In re Whittington,* 391 U.S. 341, 88 S.Ct. 1507, 20 L.Ed.2d 625 (1968).

Facts:

A 14-year-old juvenile was adjudged a delinquent in Ohio on the basis of the juvenile judge's finding that there was *probable cause* to believe he had committed a crime that would be a felony if committed by an adult (second degree murder). The juvenile appealed, contending the proceedings adjudicating him a delinquent violated his rights under the due process clause under the Fourteenth Amendment and that he had been determined to be a delinquent on the basis of an unconstitutionally low standard of proof. He also made other contentions that his constitutional rights were violated.

Holding:

The Supreme Court, in a *per curiam* opinion, vacated the state judgment and the case was remanded for consideration in light of *Gault.* This case was not decided on the merits. The Court's action simply reemphasized the position of *Gault* that certain due process constitutional guarantees are applicable to state juvenile courts.

5. Children and Pornography -- Held that the First Amendment May Forbid the Sale of Pornography to Children Which is permissible for Sale to Adults. *Ginsberg v. State of New York,* 390 U.S. 629, 88 S.Ct. 1274, 20 L.Ed.2d 195 (1968).

Facts:

Sam's Stationery and Luncheonette sold girlie-type magazines. The appellant was prosecuted under informations charging he sold a 16-year-old boy two girlie magazines on two different dates. The lower court held that both sales to the 16-year-old boy constituted a violation under the state statute. The trial court held that selling a minor any picture which depicts nudity and which taken as a whole is harmful to minors could be proscribed. The case reached the United States Supreme Court and was affirmed.

Holding:

The Court held that the well-being of children is within the state's constitutional power to regulate. The Court recognized the parents' claim to authority in their own household to direct the rearing of their children as basic in the structure of our society and the Court recognized parents' right to support laws restricting sexual materials to minors. While the supervision of children's reading may best be left to parents, the knowledge that parental control or guidance cannot always be provided justifies reasonable regulation of the sale of materials to minors. The Court cited with approval the case of *People v. Kahan,* 15 N.Y.2d 311 whereby Chief Judge Fuld stated it was altogether fitting and proper for a state to include in a statute designed to regulate the sale of pornography to children, special standards broader than those embodied in legislation aimed at controlling dissemination of such material to adults.

6. Court Declines to Rule on Burden of Proof and Prosecutorial Discretion: *DeBacker v. Brainard,* 396 U.S. 28, 90 S.Ct. 163, 24 L.Ed.2d 148 (1969).

Facts:

Seventeen-year-old juvenile was adjudicated delinquent on a forgery charge and sentenced to state training school. Habeas Corpus was filed alleging the standard of proof was *beyond a reasonable doubt* as opposed to *a preponderence of the evidence* and no jury trial was afforded. Nebraska Supreme Court affirmed the District Court.

Holding:

U.S. Supreme Court after accepting *certiorari, dismissed the appeal* and in a *per curiam* opinion, side-stepped the direct issue and stated the jury trial in this instance would not be available even if the juvenile was an adult and declined to decide the burden of proof question because appellant had not objected at the juvenile court hearing. The question of the prosecutorial discretion to choose from, either juvenile or criminal, wasn't decided because the issue was not raised in the juvenile court.

Therefore, the matter was not decided in the Supreme Court. As Professor Aidan R. Gough stated in a lecture at the National College of Juvenile and Family Law:

> "This seems to indicate the Supreme Court's position not to jump into each and every juvenile question and the Court's attitude that they will go to some length to have the states work a lot of these questions out at the state level."

The U.S. Supreme Court has gone on to decide some of these issues, but they have continued a position of very selectively applying constitutional standards to juvenile proceedings.

7. In the following year, Burden of Proof Issue Decided: *In the Matter of Samuel Winship,* 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970).

Facts:

Twelve-year-old juvenile adjudicated delinquent for stealing $112 from a woman's pocketbook and was placed in state training school. The applicable New York Statute provided that a determination of delinquency could be found on a *preponderance of the evidence.* The New York Court of Appeals upheld the conviction and the U.S. Supreme Court reversed.

Holding:

(1) Due process in criminal prosecutions requires *proof beyond a reasonable doubt.*

(2) The Fourteenth Amendment does not require all constitutional protections in juvenile court as afforded in a criminal trial, nevertheless essentials of due process are applicable.

(3) Juveniles, like adults, are constitutionally entitled to *proof beyond a reasonable doubt* during the adjudicatory stage when the *juvenile is charged with an act which would constitute a crime if committed by an adult.*

In applying the *beyond a reasonable doubt* standard to the "Adjudicatory Stage," this higher standard of proof would have no substantial impact on the beneficial aspects of the system in the "Dispositional Hearing." Also, this higher standard does not affect confidentiality, informality, flexibility or speed of the juvenile process. Again, the Supreme Court used a due process *balancing analysis* or *selective incorporation process* leaving flexibility in the juvenile system without applying all adult criminal constitutional safeguards. The due process rationale was used rather than equal protection. Equal protection could destroy all distinctions between juvenile and criminal proceedings.

In the case of *Ivan v. City of New York,* 407 U.S. 203, 92 S.Ct. 1951, 32 L.Ed.2d 659 (1972), a juvenile was adjudicated under the preponderance of the evidence standard. The U.S. Supreme Court accepted *certiorari* and held in a unanimous *per curiam* opinion, that the *Winship* rule should be given *complete retroactive effect* to all cases still in the appellate process.

Winship does not hold that it is impermissible to require that various affirmative defenses are to be proved by the defendant. *Patterson v. New York,* 432 U.S. 197, 97 S.Ct. 2319, 53 L.Ed.2d 281 (1977). The quantum of proof in a probation revocation hearing has been held to be a *prepon-*

derance of the evidence even when the violation is based on a law violative act. *In the Matter of T.L.W.,* 578 P.2d 360 (Okla. 1978).

8. Issue -- Right to Jury Trial: *McKeiver v. Pennsylvania,* 403 U.S. 528, 91 S.Ct. 1976, 29 L.Ed. 647 (1971).

Facts:

Two juveniles, 15 and 16 years of age, one charged with a felony act if an adult and the other charged with a misdemeanor act if an adult were denied jury trials in the Pennsylvania Juvenile Court. Also involved in this case was the *Burrus* matter where a group of children were charged in North Carolina with various acts and were denied a jury trial. The Supreme Court in the *McKeiver* opinion spoke to both cases. Both the North Carolina and Pennsylvania Supreme Courts held there was no constitutional right to jury trial in the juvenile court. U.S. Supreme Court affirmed.

Holding:

(1) Although the due process clause grants the right of jury trial to the states in criminal prosecutions, the court held this did not automatically require jury trial in state juvenile delinquency proceedings.

(2) The applicable due process standard was noted as "fundamental fairness."

(3) Notwithstanding the disappointments and failures of the juvenile court procedure, trial by jury in the juvenile court's adjudicative stage was held not a constitutional requirement. Again, the *balancing analysis* and *selective incorporation* of constitutional application were applied. The Court declined to require jury trials in juvenile cases which would remake the juvenile proceeding into a fully adversary process and put an effective end to the traditional juvenile court. The Supreme Court generally felt that full application and allowance of jury trials would be regressive of the principles enunciated in the development of the juvenile court in the United States.

9. Restriction on *Miranda* Warning Rule (As may be applicable in the juvenile court): *Harris v. New York,* 401 U.S. 222, 91 S.Ct. 643, 28 L.Ed.29 1 (1971):

Facts:

Defendant's confession was suppressed because he had not been advised of his *Miranda* rights. Statement otherwise met the test of voluntariness. The defendant took the stand at the trial and told his version of what occurred.

Holding:

That *his confession was properly useable for impeachment purposes to attack the credibility of the defendant's trial testimony,* notwithstanding the fact that it had been previously suppressed.

10. Exclusionary Rule and Lineups: *Kirby v. Illinois,* 406 U.S. 682, 92 S.Ct. 1877, 32 L.Ed.2d 411 (1972).

Holding:

The constitutional right to counsel does not attach *until judicial criminal proceedings are initiated.* The exclusionary rule relating to line-ups in out-of-court identification does not require the appointment of counsel until criminal proceedings are initiated.

Note:

Subsequent case law has not substantiated the fear that the *Kirby* case would point the way for most interrogations of juveniles before the filing of the formal petition in the juvenile court.

11. Confidentiality of Juvenile Proceedings and Right to Confrontation of Witnesses: *Davis v. Alaska,* 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974).

Facts:

The juvenile was a crucial prosecution witness against petitioner charged with a felony in adult court. Before the juvenile testified in the adult case against the petitioner, the prosecutor obtained a protective order to prevent any reference to the juvenile's record in the juvenile court. These facts brought the question squarely to the issue: which prevails? The right to confront a witness or the confidentiality of a juvenile's record.

Holding:

The accuracy and truthfulness of the juvenile's testimony were a key element in the state's case against petitioner and *the juvenile's right to confidentiality had to give way to the right of the petitioner to have full confrontation of witnesses against him.*

12. Age of Majority of Juveniles and Sexual Disparity: *Stanton v. Stanton,* 421 U.S. 7, 95 S.Ct. 1373, 43 L.Ed.2d 688 (1975).

Facts:

A Utah statute provided that males reach majority at an older age than females.

Holding:

The statute was held unconstitutional. The age of majority must be the same for males and females. The question of the age of majority was left to the states.

13. Double Jeopardy in Juvenile Court: *Breed v. Jones,* 421 U.S. 519, 95 S.Ct. 1779, 44 L.Ed.2d 346 (1975).

Facts:

A 17-year-old juvenile was adjudicated a delinquent and made a ward of the court. At a later hearing, the Court found him unamenable to treatment as a juvenile and he was transferred to the adult court where he was con-

victed of robbery and committed to an institution. The juvenile claimed double jeopardy.

Holding:

The double jeopardy clause of the United States Constitution does apply to juvenile proceedings.

The Court noted that "in terms of potential consequences" there is little to distinguish an adjudicatory hearing in juvenile court from a traditional criminal prosecution and the court further held that fundamental fairness required double jeopardy standards be applied to juvenile court. The double jeopardy clause was written in terms of "potential or risk of trial and conviction," *not punishment.* Here the juvenile was subjected to the burden of two trials for the same offense and was twice put to the task of marshalling his resources against those of the state and twice subjected to the heavy personal strain which such an experience presents.

Concerning succeeding trials on "different charges" -- when conviction for greater crime cannot be had without conviction for the lesser crime, the double jeopardy clause bars prosecution for the lesser crime after conviction for the greater. *Harris v. Oklahoma,* 433 U.S. 682, 97 S.Ct. 2912, 53 L.Ed.2d 1054 (1977), and *Brown v. Ohio,* 432 U.S. 161, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977).

Other cases following *Breed v. Jones* will be taken up in another section of the outline in a further discussion of double jeopardy.

14. Concerning Rights of Illegitimate Children: The United States Supreme Court has generally abrogated the common law doctrine that the illegitimate child is not an entity or a person; the Court holds that illegitimates are persons within the meaning of the Fourteenth Amendment.

See *Levy v. Louisiana,* 391 U.S. 68, 88 S.Ct. 1509, 20 L.Ed.2d 436 (1968), where a Louisiana statute was held invalid which barred an illegitimate child from recovering for the wrongful death of his mother. The Court held the statute denied equal protection of the law. Also see *Glone v. American Guaranty Liability Insurance Company,* 391 U.S. 73, 88 S.Ct. 1515, 20 L.Ed.2d 441 (1968), where a Louisiana statute providing that a mother could not recover benefits for the death of her illegitimate son was held to be unconstitutional. In *Labine v. Vincent,* 401 U.S. 532, 91 S.Ct. 1017, 29 L.Ed.2d 156 (1971), here again, a Louisiana law barring an illegitimate from sharing equally with legitimate children was held unconstitutional.

In *Gomez v. Perez,* 409 U.S. 535, 93 S.Ct. 872, 35 L.Ed.2d 56 (1973), a Texas statute required a natural father to support his illegitimate children. The state court held the natural father, under the statute, was not required to support his illegitimate children. The U.S. Supreme Court held under equal protection Texas could not discriminate against illegitimate children by denying them benefits generally accorded. In *Griffin v. Richardson,* 409 U.S. 1069, 93 S.Ct. 692, 34 L.Ed.2d 660 (1972), it was held that a denial of benefits payable to illegitimate children under the Social Security Act to favor stepchildren was a discrimination against illegitimate children and violated the due process clause of the Fifth Amendment and was unconstitutional.

15. Concerning Parental Rights: *Armstrong v. Manzo,* 80 U.S. 545, 85 S.Ct. 1187, 14 L.Ed.2d (1965). The U.S. Supreme Court held that failure to give a divorced father notice of proceedings for adoption of his child was a violation of the due process clause. The decree was held invalid.

In the case of *Stanley v. Illinois,* 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972), the Illinois statute was held unconstitutional *which presumed* the unwed father of an illegitimate child was unfit to raise a child and could be deprived of custody without a hearing as to his fitness as a parent. The Court held an unwed father was entitled to a hearing on his fitness just as other parents.

It is important to point out the *Stanley* case did not require notice to the father of an illegitimate child in *every case.* It seemed to stand for the proposition that when the father of an illegitimate child had an *ongoing contact,* or *interest in the child, demonstrated by nurturing and caring or providing for the child,* that notice is required. Nevertheless, the better practice would be to obtain at least constructive service in every case whether involving a case of "State Interest" such as a "Juvenile Delinquency Hearing" or a "Private Adoption."

Also see *State ex rel. Lewis v. Lutheran Social Services,* 207 N.W.2d 826 (Wisc. 1973). Here, without notice to the biological father, the child was placed for adoption. The father's writ of habeas corpus was denied in the Wisconsin Supreme Court on the ground an unwed father had no parental rights under Wisconsin law. The U.S. Supreme Court vacated the judgment and remanded; see *Rothstein v. Lutheran Social Services,* 405 U.S. 1051, 92 S.Ct. 1488, 31 L.Ed.2d 786 (1972). On remand, the Wisconsin Supreme Court recognized the right to *notice* to unwed fathers before hearing to terminate parental rights.

In the area of parental rights, particularly concerning illegitimate children, *The Uniform Parentage Act,* National Conference of Commissioners on Uniform State Laws (1973) is quite comprehensive. The commissioners considered the U.S. Supreme Court cases on the subject at the time of the compilation of the Act and this Model Act is being studied by many state legislatures.

16. Georgia Adoption Statute Upheld (Court defines right of illegitimate father against state intervention): *Quilloin v. Walcott,* 434 U.S. 246, 98 S.Ct. 549, 54 L.Ed.2d 511 (1978).

Facts:

Ardell Williams had continuous custody of her illegitimate son for 11 years. She married Walcott who petitioned for adoption of the child. When advised of the petition, the natural father, Quilloin, filed a petition for legitimation and filed objections to the adoption. Georgia statutes required the consent for adoption of an illegitimate child from the mother *only* if the father had legitimized the child. Consent from both parents was required if the child was legitimate.

Quilloin claimed that under the statute he was denied a "veto authority" on the adoption which both parents of a legitimate child had under the statu-

tory law. He further argued his parental rights should be preserved absent a finding of "unfitness" instead of having the matter disposed of on the "best interest of the child" standard.

Holdings:

Quilloin did not challenge the sufficiency of the *notice* he received on the adoption hearing.

The Court reviewed the *Stanley* case where it had held the State of Illinois could not take custody of children of an unwed father without a hearing and a finding of unfitness because the father's interest was "cognizable and substantial" while the state's interest in caring for the child was *"deminimus."* The Court held the "countervailing interests in this case were more substantial" than in *Stanley.* This case was distinguished from the situation where a *state* might seek to break up a family without a showing of "unfitness." In the present case, the unwed father never had or sought actual custody of his child; hence, the proposed adoption would not place the child with a new set of parents. Rather, the result of the adoption in this case was to give full recognition to a family unit already in existence. The Court held the appellant's substantial rights were not violated by application of a "best interests of the child standard." As for the equal protection argument that an unmarried father should have the same veto power over an adoption as has a married father who is separated or divorced from the mother, the court stated that:

> "Appellant's interests are readily distinguishable from those of a divorced father and accordingly the state could permissively give unmarried fathers less veto authority than it provides to a married father."

The state was not foreclosed from recognizing the difference in the extent of commitment to a child's welfare between an *unmarried father* who never shouldered any significant responsibility for the child's rearing and that of a *divorced father* who at least bore responsibility for the child during the period of the marriage.

17. New York Statute Struck Down (which permitted an unwed mother, but not an unwed father, to prevent the adoption of their child by withholding consent for the adoption): *Caban v. Mohammed,* 441 U.S. 380, 99 S.Ct. 1769, 60 L.Ed.2d 297 (1979).

Facts:

Parties lived together out of wedlock for several years and had two children. The unmarried father contributed to the children's support. The parents separated and the wife married her present husband. The unmarried father maintained continuous contact and secured the custody of the children. The mother and the new husband petitioned for adoption and the natural father filed a cross-petition. The New York Statute allowed the unwed mother, but not the unwed father, to block the adoption by withholding consent. The statute was attacked as unconstitutional in violation of equal protection of the Fourteenth Amendment.

The appellant unwed father had notice and participated; thus *Stanley* was not in issue.

It should be noted here, the unwed father did maintain contact, he did help rear the children, he was interested and desired custody. In *Quilloin,* the father did not have the contact and did not exhibit the attendant responsibility concerning the children.

Holding:

The Court ruled the statute treats unmarried parents differently *according to their sex.* The sex-based distinction violates equal protection and the statute was held unconstitutional. The Court reasoned sex distinction alone bears no substantial relation to any state interest. (Note: In *Quilloin,* the Court did find a substantial state interest in the distinction between an unmarried father and a married or divorced father and the responsibility differences to the child between the two categories of fathers.)

In this case, although the sex distinction alone was ruled unconstitutional, the Court made it clear that states are not precluded from *withholding a veto power,* i.e., not requiring an unmarried father's consent for an adoption. The veto can be withheld from an unmarried father if the father has not participated in the rearing of the child.

18. Concerning the Rights of Parents and Children: *Wisconsin v. Yoder,* 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972).

Facts:

The defendant parents, members of the Amish faith, refused to send their children, ages 14 and 15, to public school after the children had completed the eighth grade. The parents were convicted under a Wisconsin statute for violating the state's Compulsory School Attendance Law requiring children to attend school under the age of 16.

Holding:

The U.S. Supreme Court agreed with the parents that their First Amendment Right to free exercise of religion had been violated. The Court held:

(1) That secondary schooling, by exposing Amish children to worldly influences, did interfere with the religious development of the child into the Amish way of life and requiring them to send the children to secondary education contravened their basic religious practice.

(2) That at most, two additional years of compulsory education would not impair the physical and mental health of the Amish child nor result in an inability to be self-supporting nor detract from the welfare of society. Under these circumstances the state's interest in its system of compulsory education was not so compelling that the established religious practices of the Amish had to give way.

(3) Since the parents were the ones who were prosecuted in this case and not the children, it was the parents' right of the exercise of religion and not the children's right, which had to determine Wisconsin's power to impose criminal penalties.

The Supreme Court talked about both parental rights and children's rights. The majority of the Court recognized the power of the state as *parens patriae* to provide a secondary education regardless of the wishes of the parents but held that since the children of the Amish parents were not parties to the state prosecution for nonattendance at school, this principle was not applicable to the case under consideration.

19. *Certiorari* Denied on California Status Offense Case: *Mailliard v. Gonzales,* 416 U.S. 918, 94 S.Ct. 1915, 40 L.Ed.2d 276 (1974).

Facts:

In February 1971, a three-judge district court panel declared the California status offense statute concerning "Beyond Control" unconstitutional. The statute contained provisions that the juvenile court had jurisdiction of children who lived an idle, dissolute or immoral life. The panel held the statute unconstitutional for vagueness and uncertainty. The case was appealed to the U.S. Supreme Court who held the case for almost three years and denied *certiorari* in 1974. The Court cited a couple of cases referring to improvident use of an injunction but this really didn't answer the question.

Significance of *Certiorari* denial:

> "It is significant to note the Court denied *certiorari* because this is an area that would cause tremendous shock waves in the juvenile justice system if the constitutionality of WAYWARD, PINS, CHINS, and other statutes were questioned. It appears the Supreme Court has, at least for the present, left the decisions regarding these statutes to the states and has chosen not to make any definitive rulings in this area."

20. *Certiorari* Denied on Case Attacking Juvenile Judge's Control Over Prosecutorial Function in the Juvenile Court: *Michaels v. Arizona,* 417 U.S. 939, 94 S.Ct. 3062, 41 L.Ed.2d 661 (1974).

Facts:

A juvenile was arrested on a series of robberies in Arizona. The case was heard by a juvenile judge who supervised and directed the juvenile court's prosecutorial and probation staff. The juvenile challenged the constitutionality of the statutes and rules giving the juvenile court this kind of power alleging that such procedures deprived the juvenile of a fair hearing.

Holding:

Certiorari was denied. Justice Douglas dissented.

This is a significant case because the juvenile courts are vulnerable to criticism for this kind of arrangement. It is this writer's opinion that the juvenile court judge should not have directive power over the prosecutorial staff and staffs should be independent concerning their decisions on what cases should be filed. This likewise applies to the probation staff. It seems to me that the better rule would be to make sure both the prosecutorial staff and probation

staff are free and independent from the dictates of the juvenile court judge. Their job should not depend upon the personal philosophy of the judge. If the probation staff is under the judicial branch of government rather than the executive, then there should be adequate safeguards to assure that they have independence.

21. School Suspension Case -- Right to Notice and Informal Hearing: *Goss v. Lopez,* 419 U.S. 565, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975).

Facts:

Ohio statute empowered principals to suspend pupils for misconduct for up to 10 days. Principal was required to notify student's parents within 24 hours and state reasons for action. Certain students brought a class action against Board of Education alleging they had been suspended without a hearing. The matter was appealed and U.S. Supreme Court granted *certiorari.*

Holding:

In a five-four decision, the Court held that the Ohio statute, insofar as it permitted the 10 day suspension without notice or hearing, either before or after the suspension, violated the due process clause and that the suspensions were invalid. The due process clause protects students against expulsion without a hearing. The Court held students facing *suspension* must, at the very minimum, be given appropriate notice and afforded some kind of informal hearing by the school authorities.

22. School Suspension Case -- "The Spiked Punch Bowl": *Wood v. Strickland,* 420 U.S. 308, 95 S.Ct. 992, 43 L.Ed.2d 214 (1975).

Facts:

Arkansas high school students were expelled from school for allegedly "spiking the punch bowl" and violating school regulations prohibiting the use of intoxicating beverages at school or school activities. The students instituted suit in the U.S. District Court against the School Board under a federal statute providing for civil action for violation of federal rights. The students claimed damages and prayed for injunctive and declaratory relief.

Holding:

The U.S. Supreme Court, in a five-four decision, held that the school board member is not immune for liability for damages if he knew or reasonably should have known that the action he took within the sphere of his official responsibility would violate the constitutional rights of the student affected or if the board member took action with malicious intention to cause the deprivation of constitutional rights or injury to the student.

The Court held that a compensatory award would be appropriate only if the school board members acted with such an impermissible motivation or with such disregard of the student's clearly established constitutional rights, that his action could not be characterized as being done in good faith.

The dissenting judge felt this was too harsh a standard for public school officials and didn't give them enough qualified immunity.

23. Corporeal Punishment in Schools: *Ingraham v. Wright,* 430 U.S. 651, 97 S.Ct. 1401, 51 L.Ed.2d 711 (1977).

Holding:

The Court, in another five-four decision, held that the infliction of disciplinary corporeal punishment on public school children does not violate the constitutional prohibition against cruel and unusual punishment or require prior notice and hearings. The Court reviewed the history of corporeal punishment of school children in this country and could discern no trend toward its total elimination and noted the common law principle that a teacher may impose reasonable but not excessive force to discipline a child has generally been controlling. Constitutional issues were considered against the background of historical and contemporary approval of reasonable corporeal punishment.

24. Fifth Amendment Waiver Questioning: *Fare v. Michael C.,* 442 U.S. 707, 99 S.Ct. 2560, 61 L.Ed.2d 197 (1979).

Facts:

A juvenile was taken to the police station for questioning where he was fully advised of his constitutional rights. The juvenile was asked if he wished to waive his rights to an attorney or if he wished to talk to the investigators. The juvenile responded with a request to see his probation officer. He was denied the opportunity and he gave information which incriminated him.

Holding:

(1) A juvenile's request to speak to his probation officer does not *per se* constitute an invocation of the Fifth Amendment of self-incrimination.

(2) Whether juvenile has waived his right to remain silent and has the assistance of counsel and whether his confession is admissible at trial, is to be resolved by examining the totality of the circumstances surrounding the interrogation.

(3) In this particular case, the Supreme Court held the juvenile waived his Fifth Amendment rights and consented to the interrogation and therefore the statements were admissible. But each case must rest on the totality of the circumstances test.

25. States May Not Require Parental Consent for All Abortions by Minors inasmuch as There is no Substantial State Interest in Preserving the Family that Overrides a Girl's Right to Decide the Issue of Abortion for Herself. *Planned Parenthood of Central Missouri v. Danforth,* 428 U.S. 52, 86 S.Ct. 2831, 49 L.Ed.2d 788 (1976).

Facts:

This case follows *Roe v. Wade,* 410 U.S. 113, 93 S.Ct. 605 (1973). Plaintiffs who were physicians performing abortions brought this action on their

own behalf and on behalf of other physicians performing or desiring to perform termination of pregnancies.

The Missouri statute provided that a written consent of one parent or person *in loco parentis* of the woman if the woman is unmarried and under 18 years of age was required prior to an abortion procedure, unless the abortion was certified by a licensed physician as necessary to preserve the life of the mother.

Holding:

The Supreme Court held that states may not impose a blanket provision such as in this statute, requiring the consent of a parent or person *in loco parentis* as a condition for abortion of an unmarried minor during the first 12 weeks of her pregnancy. The Court therefore held that the state does not have the constitutional authority to give a third party an absolute, and possibly arbitrary, veto over the decision of the physician and his patient to terminate the patient's pregnancy, regardless of the reason for withholding the consent. Any independent interest the parent may have in the termination of the minor daughter's pregnancy is no more weighty than the right to privacy of the competent minor mature enough to have become pregnant. However, the Court emphasized their holding did not suggest that every minor, regardless of age or maturity, may give effective consent for termination of pregnancy. The fault with the Missouri statute was it imposed a special consent provision, exercisable by a person other than the woman and her physician, as a prerequisite to a minor's termination of her pregnancy and does so without a sufficient justification for the restriction.

26. Procedures -- Parental Admission of Juvenile to Mental Health Care Institution: *Parham v. J.R.,* 61 L.Ed.2d 101 (1979).

Facts:

Georgia procedures allowed for admission of a child to a mental health care facility at the request of parents or state.. Petitioner alleged the Georgia statutory procedures violated due process.

Holding:

(1) When parents seek to have their child admitted to a mental health care facility, *due process does not require* that there be a formal or quasi-formal hearing prior to commitment but *due process does require* that some kind of inquiry be made by a neutral fact-finder to determine whether the state's statutory requirement for admission of a child has been satisfied. Such inquiry can be conducted by a staff physician as fact-finder so long as he is free to evaluate -- independently -- the child's condition. The review must be comprehensive as set forth in the opinion.

(2) Georgia statutory scheme did not violate due process since an admission team composed of a psychiatrist and one other health professional examined and interviewed the child and constituted a fact-finding body.

This is a significant and important case inasmuch as some lower federal courts went a great deal further in requiring a full due process hearing. *Bartley v. Kremens,* 402 F. Supp. 1039 (1975).

Important to Note: There must be an adequate impartial fact–finder involved, although it need not be a court hearing or quasi–court hearing.

27. Publishing of Juvenile Names: *Oklahoma Publishing Company v. District Court for Oklahoma County, Oklahoma,* 430 U.S. 308, 97 S.Ct. 1045, 51 L.Ed.2d 355 (1977).

Facts:

Following a news story disclosing the name and picture of a juvenile appearing at a detention hearing, the juvenile judge entered a pretrial order enjoining members of the news media from publishing, broadcasting or disseminating, in any manner, the name or picture of the juvenile in connection with pending proceedings. The newspaper publisher challenged the pretrial order as a prior restraint on the press violative of the First and Fourteenth Amendments.

Holding:

In a *per curiam* opinion, it was noted that petitioner did not challenge the constitutionality of the Oklahoma statute making juvenile proceedings confidential. The Court held:

(1) Members of the press were present at the detention hearing with full knowledge of the presiding judge, the prosecutor, and the defense counsel.

(2) No objection was made to the presence of the press in the courtroom or to photographing the minor as he left the hearing; and

(3) Identity of the minor had not been acquired unlawfully or without the state's implicit approval, but had been publicly revealed in connection with the prosecution of the crime.

If the judge had expressly ordered the detention hearing closed, the results would probably have been different. The "implicit or inferred" approval of the court and counsel for the press to be at the detention hearing where the picture and name of the juvenile was obtained, precluded the court from then ordering the media not to broadcast or disseminate the information and to do so was a prior restraint on the press in violation of the First and Fourteenth Amendments.

28. Publishing of Juvenile Names: *Smith v. Daily Mail Publishing Company,* 443 U.S. 97, 99 S.Ct. 2667, 61 L.Ed.2d 399 (1979).

Facts:

A West Virginia law made it a crime for newspapers to publish, without written approval of the court, information concerning the name of the youth charged as juvenile offender. Here the newspaper published articles identifying a juvenile who allegedly killed another youth. The newspaper learned the juvenile's identity using routine reporting techniques; monitoring police radio band; and questioning witnesses, the police, and an assistant prosecuting attorney at the scene of the crime. Petitioner alleges the statute violated the First Amendment (free speech) of the Constitution.

Holding:

The statutory imposition of criminal sanctions on the newspaper for the truthful publication of an alleged delinquent's name that was *lawfully obtained* did violate the First Amendment. Even assuming the statute served the state's interest of the highest order, it did not satisfy constitutional requirements in that it did not restrict the electronic media or any other form of publication, *except newspapers,* from publishing the names of youths charged in a juvenile proceeding. Rehnquist, in a concurring opinion, felt that a statute punishing publication of the identity of a juvenile offender *could indeed serve in the interest of a highest order so as to pass muster under the First Amendment. But that the ban would have to be generally applicable to all forms of mass communication, electronic and print alike.* This West Virginia statute was applicable to newspapers alone and therefore violated the Constitution.

29. Alabama Alimony Statutes Providing that Husbands, but not Wives, may be Required to Pay Alimony Upon Divorce is Held to be Unconstitutional. *Orr v. Orr,* 440 U.S. 268, 99 S.Ct. 1102 (1979).

Facts:

An Alabama final decree of divorce was entered granting a divorce which decree directed the appellant to pay the appellee monthly alimony. The appellee, wife, initiated a contempt proceeding for non-payment and arrearages in alimony payments and the appellant husband filed a motion in his defense requesting that Alabama's alimony statutes be declared unconstitutional because they place alimony obligation upon husbands but never upon wives. The matter reached the United States Supreme Court.

Holding:

The Alabama statute was held to be unconstitutional because in authorizing the imposition of alimony obligations on husbands, but not on wives, the statute provides that different treatment be accorded on the basis of sex and thus establishes a classification subject to scrutiny under the Equal Protection Clause of the United States Constitution. The Court stated that even if sex were a reliable proxy for need and even if the institution of marriage did discriminate against women, these factors still would not adequately justify this Alabama statutory scheme.

It is interesting that this was not a unanimous decision with the dissenters grounding their position on technical grounds suggesting that they should abstain from reaching this constitutional question at the present time.

30. Judicial Immunity: *Stump v. Sparkman,* 434 U.S. 535, 98 S.Ct. 855, 55 L.Ed.2d 331 (1978).

Facts:

An Indiana Circuit judge approved a mother's petition to have her "somewhat retarded" minor daughter sterilized. The operation was performed, the daughter being told that she was to have her appendix removed. After

the daughter later married and discovered that she had been sterilized, she brought suit against the state court judge and others in federal court seeking damages for, among other things, the alleged violation of the daughter's constitutional rights. The District Court dismissed the complaint and held the judge immune from suit but the Circuit Court of Appeals held the state court judge not immune from suit because he had not acted within his jurisdiction and failed to comply with due process. The Supreme Court reversed.

Holding:

The Court held a judge will not be deprived of immunity because the action he took was error, was done maliciously, or exceeded his authority; but rather he will be subject to liability *only when he has acted in the "Clear Absence of All Jurisdiction."* The Court held that the judge in this case had at least implied jurisdiction and there was not a clear absence of jurisdiction. The Court, under the Indiana statute, was granted broad general jurisdiction. Neither statute or case law had circumscribed or foreclosed consideration of the petition in question.

The Court noted that the factors determining whether an act by a judge is "Judicial" relate to the nature of the act itself and whether it is a function normally performed by a judge. The Court further held that disagreement with the action taken by a judge does not justify depriving him of his immunity. The fact that in this case, tragic consequences ensued, does not deprive the judge of his immunity. The Court indicated the fact that the issue before a judge is a controversial one is all the more reason he should be able to act without fear of suit.

31. Modern Trend to Put Limitations on Judicial Immunity.

In the case of *Butz v. Economou,* 438 U.S. 478, 98 S.Ct. 2894, 57 L.Ed.2d 895 (1978), the plaintiff filed against officials of the U.S. Department of Agriculture alleging constitutional deprivations had resulted from proceedings instituted to revoke the registration of the plaintiff's commodities future company. The District Court dismissed the action, holding that federal officials were absolutely immune for discretionary acts within the scope of their authority. The Court of Appeals reversed, holding officials were entitled only to a qualified immunity such as enjoyed by state officials. The United States Supreme Court vacated and remanded the Court of Appeals' decision, however it essentially agreed with the Court of Appeals' analogy to suits against state officials under Section 1983.

Holding:

Economou appears to be more an extension of judicial immunity than a threat to it, however *Economou* clearly institutes a new reasoning constituting a "functional analysis" of executive responsibilities for immunity purposes.

In an article by Jamie Aliperti and W. Lawrence Fitch in the *State Court Journal,* published by the National Center for State Courts, Summer 1982 Issue, Vol. 6, No. 3, at page 23, the authors state:

> "Judicial concern over recent developments in the immunity doctrine is well-founded. Although acts of strictly judicial nature currently remain absolutely immune, the *emergent* functional analysis strongly suggests that judges will be exposed to injunctive, attorney fee and, potentially, damages liability for enforcement and administrative wrongs. Moreover, the case of *The Court of Virginia v. Consumers Union of the United States,* 466 U.S. 719 (1980), expressly leaves open the question of whether injunctive relief may lie against strictly judicial acts. Beyond the danger of chilling independent legal judgment, injunctive relief for civil rights deprivations also may open the door to considerable attorney fee awards against judges under 42 U.S.C. Section 1988."

A copy of Volume 6, No. 3 of the *State Court Journal* may be secured by writing Publications Coordinator, State Court Journal, National Center for State Courts, 300 Newport Avenue, Williamsburg, Virginia 23185.

FURTHER LIMITATION ON JUDICIAL IMMUNITY. *Pulliam, Magistrate for the County of Culpeper, Virginia v. Richard R. Allen and Jesse W. Nicholson,* 466 U.S. 522, 104 S.Ct., 80 L.Ed.2d 565 (1984).

Facts:

After respondents were arrested for *nonjailable* misdemeanors, petitioner magistrate imposed bail and when respondents were unable to meet the bail, the petitioner committed them to jail. The respondents brought a federal action claiming that the magistrate's practice of imposing bail on persons arrested for nonjailable offenses under Virginia law and of incarcerating those persons if they could not make bail was unconstitutional. The District Court agreed, enjoined the practice and awarded the respondents costs and attorney fees under the *Civil Rights Attorney's Fees Awards Act of 1976.* The Court of Appeals affirmed the award of attorney's fees stating that judicial immunity does not extend to injunctive relief under the Act.

Holding:

The Court of Appeals was affirmed and the United States Supreme Court held that judicial immunity is not a bar to prospective injunctive relief against a judicial officer, such as petitioner who was acting in her judicial capacity. The Court held that there never has been a rule of absolute judicial immunity from prospective relief and there is no evidence that the absence of that immunity has a chilling effect on judicial independence. While there is a need for restraint by federal courts called upon to enjoin actions of state judicial officers, there is no support for a conclusion that Congress intended to limit the injunctive relief available in a way that would prevent federal injunctive relief against a state judge. The Court further said there is nothing to suggest that Congress intended to expand the common law doctrine of judicial immunity to insulate state judges completely from federal, collateral review.

The bottom line ruling of this case is that judicial immunity is no bar to the award of attorney fees under the Civil Rights Attorney's Fees Awards Act.

Congress made it clear in the Act that attorney's fees are available in any action to enforce the Act. This is true notwithstanding when damages would be barred or limited by immunity doctrines.

Powell, Burger, Rehnquist and O'Connor dissented in this 5–4 decision. The dissent recognized that the established principle of judicial immunity serves as a bulwark against threats to independent judicial decision–making. It was felt that this decision is contrary to that philosophy. The dissent commented that the holding of the majority subordinates realities to labels and that the rationale of the common law immunity cases refutes the distinction drawn by the majority decision.

Also see: *Forrester v. White,* 484 U.S. 219, 98 L.Ed.2d 555, 108 S.Ct. 538 which held:

> "State–court judge does not have absolute immunity from 42 USCS Section 1983 damages suit which alleges that judge demoted and discharged probation officer on account of her sex, in violation of Fourteenth Amendment."

For a very good discussion of this subject matter see Volume Five of the *Civil Rights Litigation and Attorney Fees Annual Handbook,* Chapter 11 at page 193. Clark Boardman Company, Ltd., New York, New York (1989).

TRENDS AND CONCERNS

Judges on all levels are becoming more concerned with gradual erosion of the doctrine of judicial immunity.

Some alternatives to this dilemma that have been suggested are as follows:

1. Seek legislative indemnification for acts of judges which are not malicious or fraudulent.
2. Secure insurance coverage which would be paid by the state.
3. It should be pointed out that whenever a profession secures liability coverage, there is a danger of unnecessary invitation to litigation, nevertheless, the cases leave few safe options for judges.

32. Constitutionality of Required Notice to Parents of Unemancipated Minor Desiring Abortion: *H.L. v. Scott M. Matheson,* 450 U.S. 398, 101 S.Ct. 1164, 67 L.Ed.2d 388 (1981).

Facts:

An unmarried 15–year–old girl living with her parents in Utah became pregnant. The physician refused to perform an abortion without first notifying the parents pursuant to a Utah statute. The minor wanted the abortion for her own reasons without notification to parents and the minor instituted an action to declare the Utah statute unconstitutional. The Utah Supreme Court held the statute constitutional. The U.S. Supreme Court accepted *certiorari* and affirmed.

Holding:

In a six–three decision, the U.S. Supreme Court held that the state statute

did not violate any guarantees of the Federal Constitution as applied to an unemancipated girl, living with and dependent upon her parents, since the statute gave neither parents nor judges a veto over the minor's abortion decision. The Court held that the statute plainly served an important consideration of family integrity, the protection of adolescents, and that a significant state interest was present in the statute by providing parents an opportunity to supply essential medical and other information to the physician.

33. Constitutional Requirements for the Appointment of Counsel for Indigent Parents in Parental Status Proceedings: *Lassiter v. Department of Social Services,* 452 U.S. 18, 101 S.Ct. 2153, 68 L.Ed.2d 640 (1981).

Facts:

A child was adjudicated a neglected child in North Carolina and placed in the custody of the Department of Social Services. One year later, the mother was convicted of second degree murder and the Department of Social Services sought permanent severance of the child. The mother was served with the petition and notice, but did not mention the hearing to her criminal attorney assisting her on the murder conviction. The mother was brought from prison to the termination hearing and the trial court held that she had ample opportunity to seek and obtain counsel prior to her hearing and her failure to do so was without cause. The mother did not aver indigency at the hearing and counsel was not appointed to represent her. The mother did participate in the hearing and did cross-examine witnesses at the hearing.

The court terminated the mother's parental rights to the child. The mother appealed arguing that she was in fact indigent and that the court erred in not appointing counsel, and her Fourteenth Amendment due process rights were violated. The Supreme Court of North Carolina affirmed the parental severance and the U.S. Supreme Court accepted *certiorari.*

Holding:

Notwithstanding the trend of state laws as well as federal and state court decisions requiring the appointment of counsel to represent indigent parents in termination proceedings, the U.S. Supreme Court, in a five-four decision, *held that the Constitution does not require the appointment of counsel for indigent parents in every parental status termination proceeding.*

The Court held that the decision where due process calls for the appointment of counsel is to be answered in the first instance by the trial court subject to appellate review. This narrow ruling then, in effect, leaves the appointment of counsel in termination proceedings to be determined by the state courts on a case-by-case basis.

The Court further held that the "fundamental fairness" requirement of the due process clause, concerning the right to appointed counsel, means that there is a presumption that an indigent litigant has a right to appointed counsel *only,* and when, if he loses, he may be deprived of his or her physical liberty.

The high court acknowledged that the parent's interest in the accuracy and justice of the decision to terminate parental status is an extremely important one, but then went into a complex balancing of interests, analysis between the parents and the state for trial courts to ponder in determining when due process will require the appointment of counsel and when it will not.

Although the Court upheld the permanent parental severance in this case where counsel was not appointed to represent the mother whose parental rights were terminated, the Supreme Court did state in the majority opinion that:

> "Wise public policy, however, may require that higher standards be adopted than those minimally tolerable under the Constitution. Informed opinion has clearly come to hold that an indigent parent is entitled to the assistance of appointed counsel not only in parental termination proceedings but in dependency and neglect proceedings as well."

The Supreme Court following the above quote, points out that the overwhelming case law in the states provided for the appointment of counsel in permanent severance cases and pointed out various standards, projects, and studies that supported this basic proposition.

As a matter of interest, and to list a few of the cases prior to the decision, the following courts have held that indigent parents are entitled to court-appointed counsel in child custody proceedings: *Cleaver v. Wilcox,* 499 F.2d 940 (Cal. 1974), and *Crist v. New Jersey Division of Youth and Family Services,* 343 A.2d 815 (N.Y. 1975). U.S. District Court of Florida held that parents in child dependency proceedings have a constitutional right to counsel immediately following service of the petition on the parent or seizure of the child, *Davis v. Page,* 442 F. Supp. 258 (Fla. 1977).

34. Constitutional Factors Applied to a Statute Barring Paternity Suit Within One Year After the Birth of a Child: *Mills v. Habluetzel,* 456 U.S. 91, 102 S.Ct. 1549, 71 L.Ed.2d 770 (Tex. 1982).

Facts:

The mother of a child born out of wedlock brought suit in the Texas state court to establish paternity. The father asserted a Texas statute whereby a paternity suit must be brought before the child is one year old or it is barred. The Texas Supreme Court denied review and the U.S. Supreme Court accepted *certiorari.*

Holding:

The U.S. Supreme Court reversed and remanded, holding that the Texas statute denied illegitimate children in Texas equal protection of law by not allowing illegitimate children a period for obtaining support sufficiently long in duration to present a reasonable opportunity for those with an interest in such children to assert claims on their behalf; noting further that the unrealistic short time limitation in this instance was not substantially related to the state's interest in avoiding the prosecution of stale or fraudulent claims.

The concurring justices indicated the statutory distinction between legitimate and illegitimate children was not unconstitutional and that a review of the factors used in deciding the one year statute of limitations could not withstand an equal protection challenge and they further indicated that longer periods of limitation for paternity suits also could be held unconstitutional, there being nothing special about the first year following birth.

35. Standard of Proof at a Parental Rights Termination Proceeding: *Santosky v. Kramer,* 455 U.S. 745, 102 S.Ct. 1388, 71 L.Ed.2d 599 (N.Y. 1982).

Facts:

In an action in the New York Family Court to terminate the rights of certain natural parents and their three children, the parents challenged the constitutionality of a provision of a New York statute under which the state may terminate the rights of parents and their natural child upon a finding that the child is permanently neglected when such a finding is supported by a "fair preponderance of the evidence." The Family Court, using the fair preponderance of the evidence standard, permanently terminated the parents' custody. The appellate division of New York called the preponderance of the evidence proper and constitutional and the New York Court of Appeals dismissed the parents' appeals. U.S. Supreme Court accepted *certiorari.*

Holding:

In another five–four decision, the Court held that the "fair preponderance of the evidence" standard prescribed by the state statute in this case violated the due process clause of the Fourteenth Amendment, which due process clause requires "proof by *clear and convincing evidence"* in such a proceeding.

The Court held that the balance of private interests affected weighs heavily against use of the "fair preponderance of the evidence" standard in parental rights termination proceedings, since the private interests affected is commanding and the threatened loss is permanent.

The Court held further that a standard of proof more strict than preponderance of the evidence is consistent with the two state interests at stake in parental rights termination proceedings -- a *parens patriae* interest in preserving and promoting the child's welfare and a fiscal and administrative interest in reducing the cost and burden of such proceedings. The Court stated that a "clear and convincing evidence" standard adequately conveys to the fact–finder the level of subjective certainty about his factual conclusions necessary to satisfy due process. Determinations of the precise burden equal to or greater than that standard is a matter of state law properly left to state legislatures and state courts.

36. Capital Punishment for a Juvenile Tried as an Adult for Murder was Held Unconstitutional -- the Court did not Consider the Social History of the Juvenile which Contained Possible Mitigating Factors. *Eddings v. Oklahoma,* 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982).

Facts:

The juvenile was convicted of first degree murder in killing an Oklahoma highway patrolman and sentenced to death. The juvenile was certified to stand trial as an adult inasmuch as he was found not amenable to rehabilitation within the juvenile court system. The juvenile pled *nolo contrendre* to the charge of murder which was accepted by the District Court. The juvenile was sentenced to death.

Holding:

The Oklahoma death penalty statute provided that the Court conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment. The statute stated that in sentencing proceedings, evidence may be presented as to any mitigating circumstances or as to any of the aggravating circumstances enumerated in the Act. The statute did not define what was meant by mitigating circumstances.

At the sentencing hearing, the juvenile presented substantial evidence by way of mitigation citing his troubled youth, emotional disturbance and an unhappy upbringing. The majority opinion pointed out that the juvenile was not a normal 16 year old; he had been deprived of the care, concern and paternal attention that children deserve and his mental and emotional development were several years below his chronological age. The Court held that these mitigating factors must be duly considered in sentencing. The Court stated that they were only concerned with the manner of the imposition of the ultimate penalty, the death sentence imposed for the crime of murder upon a youth with a disturbed child's immaturity. Judgment was *reversed* as to imposition of the death penalty and the case was remanded for further proceedings not inconsistent with the opinion.

37. Federal Habeas Corpus Applicability to Challenge State Court Parental Rights Termination: *Lehman v. Lycoming Cty. Children's Services,* 458 U.S. 502, 102 S.Ct. 3231, 73 L.Ed.2d 928 (1982).

Facts:

The natural mother of three sons placed them in the custody of a county agency who then placed the boys in foster homes. Upon petition of the agency, a state court terminated the mother's parental rights. The mother then sought a writ of habeas corpus under a federal statute which required federal courts to entertain such a writ in behalf of the person in custody pursuant to the judgment of the state court. The mother appeals from a dismissal of the petition for writ.

Holding:

The federal habeas corpus statute does not confer federal court jurisdiction to challenge the constitutionality of a state statute under which the state court has terminated parental rights.

The Court reasoned the petitioner's children were not "in custody" by the state, in the sense in which the term has been used in determining the availability of the writ of habeas corpus. The Court further noted that no unusual restraints were imposed on these children not imposed on other children.

The Court observed that the exceptional need for finality in child custody disputes argues strongly against the grant of a writ. The state's interest in finality is unusually strong in child custody disputes. It was stated that extended uncertainty over whether the child is to remain in his current home under the care of his parents or foster parents, is detrimental to the child's sound development and would be inevitable if federal courts had jurisdiction to *relitigate* state custody decisions.

38. No Absolute Rule of Exclusion of the Press and Public from Criminal Trials During the Testimony of Victims who are Children. *Globe Newspaper Co. v. Superior Court,* 457 U.S. 596, 102 S.Ct. 2613, 73 L.Ed.2d. 248 (1982).

The Court invalidated a Massachusetts statute which required exclusion of the press and public in criminal trials during the testimony of victims who are children. Although the Court acknowledged that children who are victims of sexual abuse may be traumatized if compelled to testify in front of the press and public, it concluded that an absolute rule of exclusion is inconsistent with open access to criminal proceedings. Therefore, the Court held that closure of the trial during the testimony of a minor victim should be determined on the merits of each individual case.

39. Biological Unwed Father who Fails to Develop a Relationship with the child and Fails to Utilize Statutory Putative Father Registry, not Entitled to Protection Under Due Process and Equal Protection Clauses. *Lehr v. Robertson,* 463 U.S. 248, 103 S.Ct. 2985, 77 L.Ed.2d 614 (1983).

Facts:

A child was born to parents out-of-wedlock. The father never supported the child or offered to marry the mother and did not enter his name in the New York "Putative Father Registry" which would have entitled him to "notice" of any adoption proceedings. The mother of the child maintained the custody and the father never supported the child.

The mother married and joined with her new husband in filing for an adoption when the child was two years old. After the adoption proceeding was commenced, the putative father filed a paternity action and sought a "stay" of the adoption, pending the paternity determination. At the time the request for stay was filed, the adoption order had already been granted. The putative father then moved to vacate the adoption order on the ground that it was obtained in violation of his rights under the due process and equal protection clauses of the Fourteenth Amendment.

Holding:

The appellant's rights under the due process and equal protection clauses were not violated.

The Court held where an unwed father demonstrates a full commitment to the responsibilities of parenthood by coming forward to participate in the rearing of the child, *Caban v. Mohammed,* 441 U.S. 380, his interest and personal contact with this child acquires substantial protection under the due process clauses. The mere existence of a biological link does not merit

equivalent protection. If the natural father fails to grasp the opportunity to develop a relationship with the child, the Constitution will not automatically compel a state to listen to his opinion of where the child's best interests lie.

The high court pointed out that New York had an appropriate statutory scheme to protect the appellant's inchoate interest in assuming a responsible role in the future of the child. Under the New York statutory scheme, the putative father had the right to receive notice and this right was completely within the father's control. All the father had to do was mail a postcard to the Putative Father Registry which would guarantee his right to receive notice of adoption proceedings. The father declined to do so and the high court held the Constitution does not require either the trial judge or a litigant give special notice to nonparties who are presumptively capable of asserting and protecting their own rights.

40. Tennessee Statute Barring Paternity Suits Brought on Behalf of Illegitimate Children More Than Two Years After Birth is Held to be Unconstitutional. *Pickett, et al. v. Brown, et al.,* 462 U.S. 1, 103 S.Ct. 2199, 76 L.Ed.2d 372 (1983).

Facts:

In a paternity and child support action commenced by the mother of an illegitimate child, the juvenile judge refused to grant the putative father's motion to dismiss because the action was barred by a state two year statute of limitations. The juvenile court held that this limitation period violated the equal protection clause of the Fourteenth Amendment because it imposed a restriction on the support rights of some illegitimate children that was not imposed on the identical rights of legitimate children. The Supreme Court of Tennessee reversed the juvenile court and upheld the constitutionality of the two year limitations.

The U.S. Supreme Court reversed, upholding the juvenile court, stating that the two year limitations period placed upon the institution of paternity actions by the Tennessee statute denied illegitimate children in Tennessee equal protection of law guaranteed by the Fourteenth Amendment of the United States Constitution since it did not provide them with an adequate opportunity to obtain support and that the short two year limitation period was not substantially related to the legitimate state interest in preventing the litigation of stale or fraudulent claims.

41. The Marriage of a Person to a Person of a Different Race Held Constitutionally not Sufficient to Justify Divesting a Mother of Child Custody. *Palmore v. Sidoti,* 466 U.S. 429, 104 S.Ct. 1879, 80 L.Ed.2d 421 (1984).

Facts:

A Caucasian couple was divorced in Florida and their three-year-old daughter was awarded to the mother. The father later sought modification of the custody award on the sole grounds that the child's mother married a Negro man. The Florida court awarded custody to the father holding that it could

be a damaging impact on the child if she remained in a racially mixed household. The Florida District Court of Appeals affirmed without opinion.

Holding:

On *certiorari,* the United States Supreme Court reversed holding that the effects of racial prejudice, however real, cannot justify a racial classification removing an infant child from the custody of the natural mother found to be an appropriate person to have such custody. It was held that while the Constitution cannot control such prejudices, neither can it tolerate them, and although private biases may be outside the reach of the law, the law cannot, directly or indirectly, give them affect.

42. New York "Preventive Detention" Statute for Juveniles Held Constitutional. *Schall, Commissioner of New York City Department of Juvenile Justice v. Martin,* 467 U.S. 253, 104 S.Ct. 2403, 81 L.Ed.2d 207 (1984).

Facts:

A section of the New York Family Court Act authorized pretrial detention of an accused juvenile delinquent based on a finding that there was:

> "A serious risk that the juvenile may, before the return date, commit an act which if committed by an adult would constitute a crime."

Juveniles who were detained under this statute brought a habeas corpus class action in the Federal District Court seeking a declaratory judgment that the statute violated, *inter alia,* the due process clause of the Fourteenth Amendment. The U.S. District Court struck down the statute as unconstitutional and the U.S. Circuit Court of Appeals affirmed stating that the statute was administered, "not for preventive purposes," but to impose punishment for unadjudicated criminal acts, and that therefore the statute was unconstitutional as to all juveniles.

Holding:

The United States Supreme Court held that the statute in question was not invalid under the due process clause of the Fourteenth Amendment. The Court held that preventive detention under the New York statute served the legitimate state objective, held in common with every state, of protecting both the juvenile and society from the hazards of pretrial crime. That objective, it was held, was compatible with the "fundamental fairness" demanded by the due process clause in juvenile proceedings, and the terms and conditions of confinement under the New York statute were compatible with that objective.

The Court felt that pretrial detention need not be considered punishment merely because a juvenile is subsequently discharged subject to conditions or put on probation. Further, when a case is terminated prior to fact-finding it does not follow that the decision to detain the juvenile amounts to a due process violation. The Court ruled that the procedural safeguards afforded by the New York Family Court Act to juveniles detained under the statute, prior to fact-finding, provided sufficient protection against erroneous and

unnecessary deprivations of liberty. The New York statute provided for notice, a hearing, and a statement of facts. Reasons were required to be given to the juvenile prior to any detention, and the act provided for a formal probable cause hearing to be held within a short time thereafter if the fact-finding hearing was not itself scheduled within three days.

The Court held that there was no merit to the argument that the risk of erroneous and unnecessary detention is too high despite these procedures because the standard for detention is fatally vague. It was pointed out that from a legal point of view there is nothing inherently unattainable about a prediction of future criminal conduct. The Court noted that such a prediction is an experienced one based on a host of variables that cannot be readily codified.

Finally, the Court stated that the post detention procedures -- habeas corpus review, appeals and motions for reconsideration, provided a sufficient mechanism for correcting on a case-by-case basis any erroneous detention.

This case was very controversial and Justice Marshall wrote a strong dissent, joined by Justice Brennan and Stevens.

43. Fourth Amendment Prohibition of Unreasonable Searches and Seizures Applies to Public School Officials, however, the Court Approves Less than Full Probable Cause Guidelines for Search. *New Jersey v. T.L.O.*, 469 U.S. 325, 105 S.Ct. 733, 83 L.Ed.2d 720 (1985).

Facts:

A New Jersey high school teacher discovered a 14-year-old freshman-respondent smoking cigarettes in the lavatory in violation of school rules. The respondent was taken to the assistant vice-principal's office where she denied smoking after which the vice-principal demanded to see her purse. Upon opening the purse, he found a pack of cigarettes and noticed a package of cigarette rolling papers, some marijuana and letters implicating her in marijuana dealing. The state brought delinquency charges against respondent in the juvenile court and the court denied the respondent's motion to suppress the evidence found in her purse and later adjudged the respondent delinquent. Upon appeal, the New Jersey Supreme Court reversed and ordered the suppression of the evidence found in the respondent's purse, holding the search was unreasonable. The United States Supreme Court granted *certiorari.*

Holding:

The United States Supreme Court reversed the New Jersey Supreme Court and held that under the facts in this case, the search was reasonable.

The Court held that the Fourth Amendment's prohibition on unreasonable searches and seizures applies to searches conducted by public school officials exempt from the amendment's dictates by virtue of the special nature of their authority over school children. The Court further held that in carrying out searches and other functions pursuant to disciplinary policies under state statutes, school officials act as representatives of the state and not merely as surrogates for the parents of students.

The Court recognized that school children have some legitimate expectations of privacy but made an effort to strike a balance between the school children's legitimate expectations of privacy and the school's need to maintain the proper learning environment. The school's legitimate need to maintain an environment in which learning can take place requires some easing of the restrictions to which searches by public authorities are ordinarily subject.

The Court held that school officials need not obtain a warrant before searching a student who is under their authority and school officials are not held subject to the requirement that searches are based on probable cause to believe that the subject of the search has violated or is violating the law. The Court then went on to set forth the test *stating that the legality of the search of a student should depend simply on the reasonableness of the search under all the circumstances.*

Under the new test, the Court held:

1. The initial search for cigarettes was reasonable.
2. The report to the assistant vice-principal that the child had been smoking warranted a reasonable suspicion that she had cigarettes in her purse and thus the search was justified despite the fact that the cigarettes, if found, would constitute "mere evidence" of a violation of the no smoking rule.
3. The discovery of the rolling papers then gave rise to a reasonable suspicion that respondent was carrying marijuana as well as cigarettes in her purse and this suspicion justified the further exploration that turned up the marijuana.

Justice Brennan with whom Justice Marshall joined, dissented on the grounds that the Court's decision sanctioned school officials to conduct full scale searches on a "reasonableness" standard whose only definite content is that it is *not* the same text as the "probable cause" standard found in the text of the Fourth Amendment. Justice Brennan felt that in adopting this unclear, unprecedented and unnecessary departure from generally applicable Fourth Amendment standards, the Court carved out a broad exception to standards that had been developed over years of considering Fourth Amendment problems. Justice Stevens likewise dissented with whom Marshall and Brennan joined. Stevens felt the Court unnecessarily and inappropriately reached out to decide a constitutional question here and expressed the fear that the concerns that motivated the Court's activism produced a holding that will permit school administrators to search students suspected of violating only the most trivial school regulations.

44. Federal Income Tax Refund for Excess Earned Income Credit Held Subject to Interception for Overdue Child Support Rights Assigned to State by Recipient of Welfare Benefits. *Sorenson v. Secretary of the Treasury of the United States,* 475 U.S. 851, 106 S.Ct. 1600, 89 L.Ed.2d 855 (1986).

Facts:

A husband fell behind on his child support payments to his ex-wife. His ex-wife applied for aid to families with dependent children welfare bene-

fits from the state. The husband filed with his current wife a joint federal income tax return, claiming a refund, due in part to an earned income credit. The Internal Revenue Service retained a portion of the anticipated refund under the Tax Interception Authority granted by law. After negotiations, the government still withheld half of the additional refund amount claimed. The husband's new wife filed a class action in the U.S. District Court seeking a declaration that the Internal Revenue Service could not withhold this tax and apply the same for overdue child support.

Holding:

The United States Supreme Court affirmed the U.S. District Court and the Ninth Circuit, expressing the view that since the Internal Revenue Code expressly defined excess earned income credits as "over payments," and distributed those excess credits to recipients through the federal income tax refund process, the credits were in fact payable "as" refunds and therefore *could be intercepted for overdue child support.*

The Supreme Court analyzed a number of federal statutes to arrive at their decision in this matter but the bottom line was, I believe, a reflection by the Court of the importance of paying child support. This reflects the trend of the nation at the present time.

45. Accused Sexual Abuse of Child Held to Have Right, Under Due Process Clause of Fourteenth Amendment, to Have Records of Child Protection Agency Turned Over to Trial Court for In-Chambers Review and Release of Material Information. *Pennsylvania v. Ritchie,* 480 U.S. 94, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987).

Facts:

Father charged with sexual offenses against minor daughter, subpoenaed child welfare agency's records in which he hoped to find medical report, names of witnesses and exculpatory evidence. Agency refused to comply with subpoena invoking state law on confidentiality of records. Trial court reviewed records and refused to order their disclosure. Supreme Court granted *certiorari* from state appellate court.

A majority of the Supreme Court agreed that the due process clause of the Fourteenth Amendment required some disclosure of the records but it would be sufficient for the trial court to review the records in chambers. Due process clause does not require the defense be granted full access to confidential material.

46. "Preponderance of Evidence" Concerning Paternity Held to Comply with Due Process Clause of Fourteenth Amendment: *Rivera v. Minnich,* 483 U.S. 574, 107 S.Ct. 3001, 97 L.Ed.2d 473 (1987).

Facts:

An unmarried woman filed a complaint for child support alleging the defendant was the father of her son. Prior to trial, the defendant requested the Court to rule that the Pennsylvania statute setting forth the burden of proof to prove paternity to be by a *preponderance of the evidence* was unconsti-

tutional. The defendant argued that paternity must be established by *clear and convincing evidence.* The defendant's motion was denied and the preponderance standard was applied and the defendant was found to be the father of the child. On appeal, the Pennsylvania Supreme Court held the statute constitutional and *certiorari* was granted to the United States Supreme Court.

Holding:

The Supreme Court held a determination of paternity by the *preponderance of the evidence standard,* complies with the due process clause of the Fourteenth Amendment. The Court noted that this standard is applied most frequently in litigation between private parties in every state and is the same standard that is applied in paternity litigation in the majority of American jurisdictions that regard such proceedings as civil in nature. The Court held that the clear and convincing test requirement in the *Santosky v. Kramer* case to terminate a parent–child relationship is not controlling in a proceeding to determine paternity. The Court pointed out the important differences between the ultimate results of a judgment and permanent parental severance and the finding of paternity and felt that there was an important distinction in the different proceedings.

47. Seventeen–Year–Old Sentenced to Death for Murder Held not Denied Sixth Amendment Right to Effective Assistance of Counsel by Conflict of Interest or Counselor's Failure to Investigate and Present Mitigating Evidence. *Burger v. Kemp,* 483 U.S. 776, 107 S.Ct. 3114, 97 L.Ed.2d 638 (1987).

Facts:

A 17–year–old robbed a cab driver at knife point with a confederate. The driver was locked in the trunk of his cab and the cab was driven into a pond where the driver drowned. The defendant was convicted of murder. After exhausting state collateral remedies, the defendant, with new counsel, appeals alleging that his original lawyer's performance was constitutionally deficient (1) because of a conflict of interest and (2) because counsel had failed to develop mitigating evidence for the sentencing hearing. The Supreme Court of Georgia affirmed the conviction and the U.S. Supreme Court grants *certiorari.*

Holding:

In a very narrow opinion based strictly on competence of counsel, conflict of interest and failure to develop mitigating evidence, the Court in a 5–4 decision ruled the accused had not shown such a conflict of interest on the part of his attorney violating the Sixth Amendment and the attorney's failure to investigate and present character evidence in the mitigation of the death penalty did not amount to constitutionally ineffective counsel, since it was based on reasonable professional judgment that raising the character issue would not help and might hurt the accused. The constitutionality of the death sentence for a 17–year–old *"per se"* was not taken up in this opinion.

48. First Amendment Rights of Students in the Public Schools Must be Applied in Light of the Special Characteristics of the School Environment. *Hazelwood School District v. Kuhlmeier,* 484 U.S. 260, 108 S.Ct. 562, 98 L.Ed.2d 592 (1988).

Facts:

High school student, staff members of the school newspaper filed suit against the school district and school officials alleging their First Amendment rights were violated by the deletion from a certain issue of the school paper of two pages including an article describing school students' experiences with pregnancy and another article on the impact of divorce on students at the school. The principal objected to the pregnancy story because the pregnant students might be identified from the text and he objected to the divorce article because the proofs named a student who complained of her father's conduct. Due to a short time frame wherein changes could not reasonably be made, the principal directed that the pages in which they appeared be withheld from publication.

The District Court held no First Amendment violation had occurred. The Court of Appeals reversed and the Supreme Court granted *certiorari.*

Holding:

The Supreme Court ruled First Amendment rights of students in public schools are not automatically coextensive with the rights of adults in other settings. Schools need not tolerate student speech inconsistent with its basic educational mission, even though the government could not censor similar speech outside the school. The school newspaper was deemed not to be a public forum open to the public and that school officials may impose reasonable restrictions on the speech of students, teachers, and other members of the school community. The Court concluded the principal's decision to delete these items was reasonable under the circumstances and there was no violation of the First Amendment to the U.S. Constitution.

It should be noted three of the justices dissented stating that in their view the principal violated the First Amendment's prohibition against censorship of student expression that neither disrupted class work nor invaded the rights of others. The dissent felt this opinion denuded high school students of First Amendment protections.

49. The Exclusion of a Defendant from a Hearing to Determine the Competency of Child Witnesses to Testify, did not Violate the Defendant's Rights Under the Confrontation Clause of the Sixth Amendment or the Due Process Clause of the Fourteenth Amendment. *Kentucky v. Stincer,* 482 U.S. 730, 107 S.Ct. 2658, 96 L.Ed.2d 631 (1987).

Facts:

After a jury was sworn but before presentation of evidence, the Court conducted an in-chambers hearing to determine if two young girls were competent to testify. (Over his objection, the defendant was excluded from this hearing, however, his attorney was allowed to be present.) The children were examined separately and the judge, prosecutor and defense counsel asked questions of each girl to determine if they were capable of remem-

bering basic facts and distinguishing between the truth and telling a lie.

Holding:

The Supreme Court stated the basic issue was to consider whether excluding the defendant from the competency hearing interferes with his opportunity for effective cross-examination. The high court felt no such interference occurred when the defendant was excluded from the competency hearing of the two young girls in this case. After the children were held competent to testify, they appeared and testified in open court and were subject to full and complete cross-examination by the defendant. During this open court cross-examination, the defendant was present and was available to assist counsel as necessary. The Court also pointed out the type of questions asked at the competency hearing were easy to repeat on cross-examination at trial which consisted basically of whether the child was capable of observing and recollecting facts, whether the child was capable of narrating those factors to a court or jury and whether the child has a moral sense of the obligation to tell the truth. The majority ruled that the defendant was unable to demonstrate that his presence at the competency hearing would have been useful in insuring a more reliable determination as to whether the witnesses were competent to testify.

50. State Court Set Aside a Contempt Sentence as Violative of Due Process Based on a Statutory Presumption. The Supreme Court Remanded to Determine Whether the Contempt was Civil or Criminal. *Hicks v. Feiock,* 485 U.S. 624, 108 S.Ct. 1423, 99 L.Ed.2d 721 (1988).

Facts:

A divorced father was ordered to make monthly child support payments in California and he only sporadically complied with the order omitting various monthly payments. He was served with an order to show cause why he should not be held in contempt. At the hearing, the Court found that under a *"California statute"* which provided that proof of existence of a valid child support order, knowledge of such order by the subject parent, and the parent's noncompliance, *constituted prima facie evidence of contempt.*

The father testified contending he was unable to pay the support for the months in question, however, the Court ruled that the father was in contempt. The father was sentenced and although the sentence was suspended, he appealed. The appellate state court nulled the contempt judgment holding that the state statute was unconstitutional under the due process clause of the federal Constitution's Fourteenth Amendment in that it imposed a *mandatory presumption* compelling a conclusion of guilt in a "quasi-criminal" contempt proceeding without independent proof of an alleged contemnor's ability to pay court-ordered support.

On *certiorari,* the U.S. Supreme Court vacated and remanded the decision holding that statutes requiring an alleged contemnor to carry the burden of persuasion on an element of the offense of contempt violates the due process clause *if applied in a criminal proceeding.* However, *if applied in a civil proceeding,* a presumptive statute requiring an alleged contemnor to carry the burden of persuasion is not unconstitutional.

51. Six-Year Statute of Limitation for Paternity Action Held to Violate Equal Protection Clause of Fourteenth Amendment: *Clark v. Jeter,* 486 U.S. 456, 108 S.Ct. 1910, 100 L.Ed.2d 465 (1988).

Facts:

Ten years after the birth of a daughter out-of-wedlock, the mother filed a support complaint on the daughter's behalf against the alleged father. Although the blood test showed a 99.3% probability that the respondent was in fact the father, the Pennsylvania Court entered judgment for the respondent on the basis of a Pennsylvania statute which sets forth a six year statute of limitations for paternity actions. The state Appellate Court affirmed and the United States Supreme Court granted *certiorari.*

Holding:

The U.S. Supreme Court expressed the unanimous view that the six year statute of limitations violated the equal protection clause of the U.S. Constitution because the six-year limitation period was not substantially related to Pennsylvania's interest in avoiding the litigation of stale or fraudulent claims. The Court noted that many states permit the issue of paternity to be litigated more than six years after the birth of an illegitimate child, that various state statutes oppose most other civil actions during the child's minority and the Court noted that the state of Pennsylvania has enacted a new 18-year statute of limitations for paternity and support actions bringing it into compliance with federal legislation.

52. Confrontation Clause Violated When Defendant and Juvenile Sexual Assault Victims Separated in Court by a Screen. *Coy v. Iowa,* 487 U.S. 1012, 108 S.Ct. 2798, 101 L.Ed.2d 857 (1988).

Facts:

Appellant was charged with sexually assaulting two 13-year-old girls. At the trial, *under a state statute,* the Court allowed the placing of a screen between the defendant and the complainant girls during their testimony which blocked the defendant from the sight of the girls but allowed him to see them dimly and to hear them. The defendant argued this procedure violated the confrontation clause of the Sixth Amendment. The Iowa Supreme Court affirmed the procedure. The U.S. Supreme Court granted *certiorari.*

Holding:

In a seven-to-one opinion, the Supreme Court held that the confrontation clause provides a criminal defendant the right to "confront" face-to-face the witnesses giving evidence against him at trial. That guarantee gives the general perception that confrontation is essential to fairness, and helps to ensure the integrity of the fact-finding process by making it more difficult for witnesses to lie.

The Court held in this case the defendant's right to face-to-face confrontation was violated since the screen in issue enabled the complaining witness to avoid viewing the defendant as they gave their testimony. The Court felt there was no merit to the state's assertion that the Iowa statute created a presumption of trauma to victims of sexual abuse outweighing the appellant's right to confrontation.

It is important to note that Justice O'Connor's concurring opinion pointed out that child abuse is a problem of disturbing proportions in today's society and it is a difficult problem to detect and prosecute, in large part because there are often no witnesses except the victim. The justice pointed out that a full half of the states have authorized the use of one or two-way closed-circuit television.

With closed-circuit television, the child's testimony is broadcast into the courtroom for viewing by the jury. Two-way systems permit the child-witness to see the courtroom and the defendant over a video monitor. It was noted it is not novel to recognize that a defendant's "right physically to face those who testify against him," is not absolute. The Court has often stated the clause "reflects a preference for face-to-face confrontation at trial" but has expressly recognized that this preference may be overcome in a particular case if close examination of "competing interests" so warrants. *Ohio v. Roberts,* 448 U.S. 56 (1980).

Therefore, the door was left open for a proper and careful use of closed-circuit television under the theory that it would be justified under a finding of necessity if supported by a compelling state interest of protecting child witnesses.

53. It is a Violation of the U.S. Constitutional Prohibition Against the Infliction of "Cruel and Unusual Punishment" for a 15-Year-Old Defendant to be Executed. *Thompson v. Oklahoma,* 487 U.S. 815, 108 S.Ct. 2687, 101 L.Ed.2d 702 (1988).

Facts:

The petitioner, when 15 years old, participated in a brutal murder. The juvenile was tried as an adult, convicted and sentenced to death. The Criminal Appeals Court of Oklahoma affirmed and the U.S. Supreme Court granted *certiorari.*

Holding:

The Supreme Court concluded that the "cruel and unusual punishment" prohibition of the Eighth Amendment, made applicable to the states by the Fourteenth Amendment, prohibits the execution of a person who is under 16 years of age at the time of his offense.

The Court was guided by the "evolving standards of decency marking the progress of a maturing society" and reviewed relevant legislative enactments in determining the reasons why a civilized society may accept or reject the death penalty for a person less than 16 years of age at the time of the crime. The Court pointed out most state statutes required that a person attain at least the age of 16 at the time of the capital offense before they might be executed which supports the conclusion it would offend civilized standards of decency to execute a person who is less than 16 years old at the time of his offense. The Court pointed out this conclusion is also consistent with views expressed by respected professional organizations, other nations sharing the Anglo-American heritage, and by leading members of the Western European community.

The dissent felt there is no rational basis for discerning that in a societal judgment no one so much as a day under 16 can ever be mature and morally responsible enough to deserve that penalty.

54. Social Welfare Agency Held to Have No Duty, Under Due Process Clause of Fourteenth Amendment, to Protect a Child Against Abuse by the Child's Father While the Child was in the Father's Custody Even Though They Allegedly Knew or Should Have Known a Risk of Violence to the Child Existed. *DeShaney v. Winnebago Social Services,* 489 U.S. 189, 109 S.Ct. 998, 103 L.Ed.2d 249 (1989).

Facts:

A 4-year-old boy in Wisconsin was severely beaten by his natural father resulting in brain damage so great he was expected to spend the rest of his life in an institution for the profoundly retarded. The boy and his mother brought suit under the Federal Code against the Wisconsin Department of Social Services and employees alleging the agency deprived the boy of his liberty without due process of law in violation of his rights under the due process clause of the Fourteenth Amendment by failing to intervene to protect him against the risk of violence of which they knew or should have known. The agency received reports the boy might be a victim of child abuse. About a year later the boy was hospitalized with multiple bruises and abrasions. The agency obtained an order from the Juvenile Court which placed the boy in temporary custody of the hospital but upon the recommendation of the child protection team, the case was dismissed and the child was returned to the custody of his father who promised to cooperate with the agency. Later, the boy was hospitalized twice for suspicious injuries and the agency took no action notwithstanding a social worker's continuing suspicions of child abuse.

Holding:

The Court held the agency had no duty under the due process clause to protect the boy against his father's violence and therefore the county's failure to provide such protection did not deprive the child of liberty in violation of the due process clause because the harm suffered by the child occurred not while he was in the state's custody, but while he was in the custody of the father and further that the state played no part in the creation of the dangers that the child faced, nor did the state do anything to render him any more vulnerable to such dangers.

Brennan and Marshall dissented expressing the view that the Agency had a constitutional duty to help the boy because state law gave the agency the authority to decide whether to disturb the family's living arrangements in cases of suspected child abuse. Justice Blackmun separately dissented, believing the facts of the case were not mere passivity but active state intervention in the life of the boy and such intervention triggered a fundamental duty to aid him once the state learned of the severe danger to which he was exposed.

55. Indian Children Born Outside the Tribal Reservation to Unmarried Mother Domiciled on the Reservation Held "Domiciled" on the Reservation Within the Meaning of the United States Code Provisions Giving Tribal Courts Exclusive Jurisdiction Over Adoptions. *Mississippi Choctaw v. Holyfield,* 490 U.S. 30, 109 S.Ct. 1597, 104 L.Ed.2d 29 (1989).

Facts:

Two children, the unmarried parents of whom were both enrolled members of an Indian tribe were residents and domiciliaries of the tribal reservation in Mississippi but the children were born in Harrison County, Mississippi, some 200 miles from the reservation. Both parents executed consent to adoption forms and a non-Indian couple successfully petitioned the Chancery Court of Mississippi for a decree of adoption. The tribe lodged a motion in Chancery Court to vacate the adoption on the ground the Court lacked jurisdiction over the adoption because of the Indian Child Welfare Act, which states tribal courts generally have exclusive jurisdiction as to child custody proceedings involving Indian children domiciled on the reservation. Because the children never physically resided or lived on the reservation, the Chancery Court overruled the motion and retained jurisdiction. The ruling was appealed to the United States Supreme Court.

Holding:

The United States Supreme Court held that Congress intended the meaning of "domicile" under the Indian Child Welfare Act to be a matter of uniform federal law and not a matter of individual state law. The Court ruled that under general common law principles, which indicate the domicile of illegitimate children follows that of their mother, these children were domiciled on the reservation within the meaning of the federal statute and the fact the children were voluntarily surrendered by their mother for adoption did not change this result. It was held the Chancery Court lacked jurisdiction over the adoptions and the decree had to be vacated with the Indian Tribal Court having final say concerning the adoption of the children.

56. Imposition of Capital Punishment on a Juvenile for a Crime Committed at 16 Years of Age, Does not Constitute Cruel and Unusual Punishment Under the Eighth Amendment of the Federal Constitution. *Stanford v. Kentucky* and *Wilkins v. Missouri,* 492 U.S. ___, 109 S.Ct. 2969, 106 L.Ed.2d 306 (1989). *Rehearing Denied:* 110 S.Ct. 23, 106 L.Ed.2d 635.

Facts:

Stanford was 17 years, 4 months old when he committed murder in Kentucky and Wilkins was 16 years, 6 months old when he committed murder in Missouri. Both juveniles were transferred for trial as adults under the Kentucky and Missouri statutes and both were convicted and sentenced to death. Both state courts affirmed the death sentence and both cases were appealed to the United States Supreme Court. The lower courts were affirmed.

Holding:

The Court stated that in determining whether a punishment violates evolving standards of decency, it looks not to its own subjective conceptions, but

rather to the conceptions of modern American society as reflected by objective evidence. The Court noted the primary most reliable evidence of national consensus failed to meet petitioners' heavy burden of proving a settled consensus against the execution of 16- and 17-year-old offenders. The Court further found no support for petitioner's argument that a demonstrable reluctance of juries to impose, and prosecutors to seek, capital sentences for 16 and 17 year olds establishes a societal consensus that such sentences are inappropriate. The Court ruled that public opinion polls, the views of interest groups, and the positions of professional associations are too uncertain a foundation to shape constitutional law.

Justice O'Connor concurred in the judgment of the majority, however, felt that the Supreme Court should conduct a proportionality analysis which was rejected by the majority.

Justices Brennan, Marshall, Blackmun and Stephens dissented, taking the view that to take the life of a person as punishment for a crime committed when below the age of 18 is cruel and unusual and hence prohibited by the Eighth Amendment.

It was felt the rejection of the death penalty for juveniles by a majority of the states, the rarity of the sentence for juveniles both as an absolute and a comparative matter, the decisions of respected organizations in relevant fields that this punishment is unacceptable, and its general rejection throughout the world provides a strong grounding for the view that it is not constitutionally tolerable that certain states persist in authorizing the execution of adolescent offenders. It was their view that the execution of juvenile offenders does not measurably contribute to the goal of deterrents and that the potential deterrent effect of juvenile executions on adolescent offenders is also insignificant. The dissent further stated there are strong indications that the execution of juvenile offenders violates contemporary standards of decency and that the death penalty is disproportionate when applied to such young offenders.

57. Mother, Custodian of Her Child Pursuant to Court Order Held Not Entitled, on Basis of the Fifth Amendment Privilege Against Self-Incrimination, to Resist Subsequent Court Order to Produce Child. *Baltimore Soc. Serv. v. Bouknight,* 493 U.S. ___, 110 S.Ct. 900, 109 L.Ed.2d 992 (1990).

Facts:

The child sustained numerous physical injuries and the mother had been observed shaking the child and dropping him into a crib while he was in a cast. Social Services obtained authorization to place the child in foster care. Upon petition by the Department, the Circuit Court entered an order of protective supervision granting the mother custody of the child but requiring her to accept parenting assistance, attend classes and refrain from all corporal punishment of the child. Upon being advised by the Department of the mother's failure to comply, the Court held a hearing which the mother did not attend and the mother was arrested and ordered to disclose the whereabouts of the child. After refusing to give whereabouts of the child, the mother was held in contempt and imprisoned until she could purge herself

by producing or revealing the location of the child. This action was appealed to the Court of Appeals of Maryland which ruled that the confinement for civil contempt violated the mother's privilege against compulsory self-incrimination. The State Department applied to Chief Justice Rehnquist for a temporary stay and a stay of the Court of Appeals decision was granted pending application for writ of *certiorari.*

The State Welfare Department filed a petition for *certiorari* and the writ was granted but limited to two issues.

Holding:

Assuming the testimonial assertions involved in production of child were sufficiently incriminating for purposes of the Fifth Amendment privilege against self-incrimination, the privilege does not protect the mother's resistance to the order to produce the child, because (1) once child adjudicated in need of assistance, his care and safety become the particular object of the state's regulatory interests, and by accepting care of the child subject to the conditions of the juvenile court's custodial order, the mother submitted to the state's regulatory interests; and (2) the order to produce the child was made for compelling reasons unrelated to criminal law enforcement and as part of a broadly applied regulatory regime not directed at a selective group inherently suspect of criminal activities.

58. In Divorce Case, "Presence" in State is Enough to Establish *In Personam* Jurisdiction; Due Process Does Not Require Defendant to Have "Minimum Contacts" With State. *Burnham v. Superior Court of California,* ___ U.S. ___, 110 S.Ct. 2105, 109 L.Ed.2d 631 (1990).

Facts:

Petitioner father, a New Jersey resident, was served divorce summons filed by his estranged wife while visiting in California. Petitioner denied the California court had *in personam* jurisdiction because he lacked minimum contacts with the state. The California court rejected his contentions and the U.S. Supreme Court accepted *certiorari.*

Holding:

Due process clause does not deny a state court's jurisdiction over a non-resident who was personally served while temporarily in that state. The court noted that near unanimous view of cases hold that service of process confers state court jurisdiction over a physically present non-resident. The court ruled that petitioner's contentions of a need for "minimum contacts" for jurisdiction, misreads the court's earlier decisions applying the standard.

59. States May Require a Minor to Notify Parent or Obtain Judicial By-Pass of Notification in Order to Have Abortion. *Ohio v. Akron Center for Reproductive Health,* USSCT No. 88-805, ___ U.S. ___, 110 S.Ct. 2972, 111 L.Ed.2d 405 (1990).

Facts:

Ohio statute made it a crime for performance of abortion on unmarried, un-

emancipated minor woman, unless physician provides timely notice to minor's parents or a juvenile court enters an order authorizing the minor to consent. Judicial by-pass procedures were specifically set out in the statute. Prior to the enactment date of the statute, a challenge to the statute's constitutionality was perfected and a Federal District Court issued an injunction preventing enforcement of the same. The U.S. Supreme Court accepted the case.

Holding:

The Supreme Court ruled the statute, on its face, does not impose an undue or unconstitutional burden on a minor seeking an abortion. This particular Ohio statute satisfies other case law guidelines that minors be allowed to show the maturity to make the abortion decision without regard to her parents' wishes. Also, the judicial by-pass provision satisfied the requirement that the minor be allowed to show, that even if she cannot make the decision by herself, the abortion would be in her best interests. Further, the requirement that the by-pass procedure ensure her anonymity was satisfied in the statute and finally, the statute's time limits on judicial action satisfied the requirement that a by-pass procedure be conducted with expedition. Justices Blackmun, Brennan and Marshall dissent stating that the Ohio statute created a tortuous maze and an unnecessary obstacle course.

60. Minnesota Minor Abortion Statute Which Requires That "Both" Parents be Notified Held Constitutional When Coupled With a Judicial By-Pass Provision. *Hodgson v. Minnesota,* USSCT No. 88-1125, ___ U.S. ___, 110 S.Ct. 2926, 111 L.Ed.2d 344 (1990).

Facts:

Minnesota statute provides no abortion shall be performed on a woman under 18 years of age until at least 48 hours after both of the parents have been notified. After appeals, U.S. Supreme Court granted *certiorari.*

Holding:

Held state has a strong and legitimate interest in the welfare of its young citizens whose immaturity, inexperience and lack of judgment, may impair their ability to wisely exercise their rights. Further, parents have an interest in controlling their children's education and upbringing and finally, the family has a privacy interest in its children's upbringing and education which is constitutionally protected against undue state interference. The state may enact laws designed to aid a parent who assumes "primary responsibility" for a minor's well-being in discharging that responsibility.

In a rather complicated opinion taking up separate parts of the statute, replete with dissenting and concurring opinions, the Court held:

> "The 48-hour notice as reasonable and constitutional; the requirement of notice to both parents as unconstitutional, however, it held the requirement was constitutional as it was coupled with a judicial by-pass provision."

Basically, the Court held the by-pass procedure saved the statute as a whole.

61. Alleged Child Abuse Victim Allowed to Testify by One-Way Closed-Circuit Television Does Not Violate the Confrontation Clause if the Court Finds That to Testify in Defendant's Presence Would Cause Child Substantial Psychological Trauma and Emotional Distress. *Maryland v. Craig,* USSCT No. 89-478, ___U.S.___, 110 S.Ct. 3157, 111 L.Ed.2d 666 (1990).

Facts:

The respondent was tried on charges of alleged sexual abuse of a child. The Maryland statute allowed statutory procedures to use one-way closed-circuit television for child's testimony if face-to-face in-court testimony would cause the child serious emotional distress such that the child could not reasonably communicate. Respondent objected that the procedure violated the confrontation clause of the Sixth Amendment. Lower court allowed the procedure, the defendant was convicted and appealed. The state reversed and the U.S. Supreme Court accepted *certiorari.*

Holding:

In a 5-4 decision, the Court held the confrontation clause does not guarantee criminal defendants an *absolute* right to face-to-face meeting with the witness at trial. The clause must be interpreted in a manner sensitive to its purpose and to the necessities of trial and the adversary process. Nonetheless, the clause may be satisfied, absent a face-to-face confrontation at trial only where denial of such confrontation is necessary to further an important public policy and only where the testimony's reliability is otherwise assured.

The Court held Maryland's interest in protecting a child witness from trauma in child abuse cases is sufficiently important to justify use of this special procedure. The requisite *necessity finding* must be case-specific. The trial court must hear evidence and determine whether the procedure's use is necessary to protect the particular child witness' welfare; find the child would be traumatized not by the courtroom generally, but by the defendant's presence; and find the emotional distress suffered by the child in the defendant's presence is more than *de minimis.*

Statutory procedure allowed children to testify under oath, be subject to full cross-examination and be observed by the judge, jury and defendant as they testified.

The dissenting justices felt the confrontation clause of the Sixth Amendment "requires confrontation" and they are not at liberty to ignore it.

62. Doctor's Hearsay Testimony About Incidents of Child Sexual Abuse, Held Barred by the Confrontation Clause of the Sixth Amendment. *Idaho v. Wright,* USSCT No. 89-260, ___ U.S. ___, 110 S.Ct. 3139, 111 L.Ed.2d 638 (1990).

Facts:

Respondent was charged with lewd conduct with her two minor daughters. Younger daughter, 2-1/2 years of age was held "not capable of communicating with the jury," and the trial court allowed hearsay statements that the child made to an experienced pediatrician concerning child abuse matters. The state court reversed, holding that the doctor's testimony under the residual

hearsay exception violated the confrontation clause. The Supreme Court accepted *certiorari.*

Holding:

The Supreme Court in a 5–4 opinion affirmed stating Idaho's residual hearsay exception was not a firmly rooted hearsay exception for constitutional purposes and further, that in this case, "particularized guarantees of trustworthiness were not shown."

The Court held that firmly rooted hearsay exceptions must be just that and must share the same tradition of reliability supporting admissibility of statements. To rule otherwise would require all codified hearsay exceptions would gain constitutional stature.

The high court stated that the state Supreme Court erred in placing dispositive weight on a lack of procedural safeguards at the interview but rather such trustworthiness guarantees must be shown from a totality of those circumstances surrounding the making of the statement and render the declarant particularly worthy of belief. Evidence of "particularized guarantees of trustworthiness" must be so trustworthy that adversarial testing would add little to its reliability.

In this case, the U.S. Supreme Court, looking at the totality of the circumstances, found no special reason for finding that incriminatory statements about the child's own abuse were particularly trustworthy. The lower court properly focused on the presumption of unreliability of out–of–court statements and the suggestive manner in which the doctor conducted the interview with the child.

The dissenting justices generally felt it was proper to consider corroborating evidence as a factor to determine whether in each case, there is or is not particularized guarantees of trustworthiness. The majority held that corroborating evidence may not be considered in whole or in part for this purpose.

AUTHOR'S NOTE: Under Copyright, 1989, the National Council of Juvenile and Family Court Judges published a comprehensive digest of cases of the United States Supreme Court relating to juvenile and family law. This digest includes not only juvenile and family law cases but also includes civil commitment. It is a comprehensive digest of these cases rather than a brief synopsis. Copies may be purchased from the National Council of Juvenile and Family Court Judges, P.O. Box 8970, Reno, Nevada 89507.

V. JURISDICTION

1. Generally, states grant exclusive jurisdiction to juvenile courts concerning delinquency, miscreancy, waywardness or ungovernability, children in need of supervision, and dependent and neglected children or children in need of care. Acts that would be crimes if the juveniles were adults still constitute one main area of juvenile jurisdiction. Early in the history of juvenile law, acts of waywardness or ungovernability, truancy or other such matters presently labelled status offenders, constituted another area of jurisdiction and a third area included dependency and neglect or children in need of

care. Contemporarily, in many juvenile codes, acts of waywardness, ungovernability, truancy and children out of control fall under the same umbrella as children in need of care which general statutes include dependency and neglect, child abuse and deprived children. Simply put, children in need of care codes now often include the traditional status offenses.

Jurisdiction of juvenile matters is set forth in each state's statutory law and jurisdictional provisions vary substantially from state to state. Most jurisdictional statutory schemes set up jurisdiction based on the age of the juvenile, either at the time of the commission of the offense or at the time of the filing of a petition or complaint and based upon the nature of the conduct of the juvenile. Most jurisdictions establish juvenile court jurisdiction as of the time the offense was committed. Some states have complicated statutes excluding certain offenses from the jurisdiction of the juvenile courts such as North Carolina, where the state's statutes, Section 7A-608 (1981), for example, *requires a waiver* when a child 14 years of age or older is alleged to have committed a capital offense. Colorado set up statutory procedures excluding certain offenses from the jurisdiction of the juvenile court and including others in a rather perplexing scheme. Other limitations on jurisdiction vary from state to state in regard to prosecutorial discretion, adult criminal court jurisdiction and juvenile court jurisdiction for discretionary transfer to or from juvenile court.

Most states have now separated noncriminal misbehavior or status offenders from the delinquency category. Other states have eliminated statutory definitions of status offenders such as: "in danger of leading an idle, dissolute or immoral life." Concerning status offenders, the modern trend is to shift the onus on the parents rather than the child when the child's conduct or misbehavior may be a result of inadequacies at home. Status offenders are often defined in the context of families or children in need of care or services. Some commentators still suggest status offenders be eliminated totally from the jurisdiction of the juvenile court.

2. Jurisdiction concerning juveniles varies from state to state, but under 18 years of age is the age in the majority of states for juvenile court jurisdiction. Some states vary on ages and some even have a different age for delinquency acts and for children who come under the cloak of children in need of care.

   The National Advisory Commission on Criminal Justice Standards, recommends all jurisdiction over juveniles of the sort presently vested in the juvenile court should be a division of the trial court of general jurisdiction and should have jurisdiction over all legal matters relating to family life. It is recommended that this jurisdiction should include dependency and neglect, support, adoption, divorce, and all factors involving the family. Standard 14.1 of the NACCJ.

3. Most statutes give general jurisdiction concerning adult criminal and civil cases to certain trial courts. Concerning juvenile jurisdiction, some courts have held that statutory grants of exclusive jurisdiction of children's cases to the juvenile court could be in violation of other jurisdictional grants. Other

states provide that the juvenile court and other courts have concurrent jurisdictions, particularly in criminal cases. See *Jackson v. Balkcom,* 80 S.E.2d 319 (Ga. 1954).

When statutes provide for concurrent jurisdiction, they are often confusing and the better rule is generally to grant exclusive jurisdiction to juvenile courts for offenders under a specified age and to set forth a provision for transfer to adult courts under certain circumstances. Subsequent to the above cited *Jackson* case, under new constitutional and statutory changes, the court watered down the original decision narrowing concurrent jurisdiction to the juvenile and superior courts in matters of capital felonies. See *J.W.A. v. State,* 212 S.E.2d 849 (Ga. 1975).

4. Generally, a single act, (constituting a crime if an adult) will establish juvenile court jurisdiction. *Doe v. People,* 398 P.2d 624 (Colo. 1965), and *In the Matter of Taylor,* 309 N.Y.S.2d 368 (N.Y. 1970). The general rule controls, notwithstanding a minority opinion that a violation of law if a single act constituting a minor misdemeanor would not constitute sufficient activity to give juvenile court jurisdiction. *Jones v. Commonwealth,* 38 S.E.2d 444 (Va. 1946). The rationale in not giving jurisdiction on single and minor offenses is the dispositional alternatives available could be quite disproportionate to the nature of the minor crime itself.

5. Most statutes grant juvenile courts jurisdiction over children whose parents abuse them physically or emotionally or fail to provide proper care, nurture, education, or welfare. Jurisdiction normally attaches to the children themselves resulting from the lack of proper care by the parents. In the case of a dependent, neglected or deprived child, or under contemporary statutes including children in need of care, juvenile courts generally have jurisdiction to make the child either a ward of the court without permanent severance or to place the child in the custody of social agencies until a further review hearing. The court may enter a finding of permanent parental severance after the general requirement of a finding of "unfitness" of the parents or after finding the parents guilty of "willful neglect," "abandonment," or other statutory grounds for permanent severance.

   Juvenile court jurisdiction generally gives the court power to order medical care for a child and otherwise direct the conduct of the parents and child. Contemporary statutes usually include contempt powers against parents for noncompliance with court orders concerning the children or the statutes will set forth specific statutory sanctions for noncompliance of parents to juvenile court orders. Generally, there must be a showing of a serious threat to health before the court will order medical care over the objection of the parent. *In re Sieferth,* 127 N.E.2d 820 (N.Y. 1965). Other courts have been more liberal in taking jurisdiction and making orders for medical care such as plastic surgery notwithstanding objection of the parents. See *In re Sampson,* 278 N.E.2d 918 (N.Y. 1972).

   Debate continues as to whether juvenile courts should exercise jurisdiction in non-emergency medical situations.

6. U.S. District Court in Wisconsin, allows adult prosecution of those committing criminal acts before reaching 18 years but not formally charged until after reaching 18 years of age. *Bendler v. Percy,* 481 F. Supp. 813 (Wisc. 1979). The Arizona Supreme Court held unconstitutional a statutory provision extending jurisdiction of the juvenile court over individuals beyond their eighteenth birthday. *Appeal in Maricopa County,* 604 P.2d 641 (Ariz. 1979). The Alaska Supreme Court held that a juvenile can consent to an additional year of juvenile court jurisdiction in order to avoid certification. *State v. F.L.A.,* 608 P.2d 12 (Alas. 1980). The Supreme Court of Minnesota held when a dependent child is placed with foster parents in another state, the foster parents have no standing to litigate custody, nor do the courts of the other state have jurisdiction to decide custody issues. *Matter of Welfare of Mullins,* 298 N.W.2d 56 (Minn. 1980).

   The Indiana Court of Appeals has held that when parties in a custody dispute reside in different states, the court cannot proceed with the custody dispute until it first determines it has subject matter jurisdiction and that it should exercise that jurisdiction. *Clark v. Clark,* 404 N.E.2d 23 (Ind. 1980).

   In Florida, a child contended he was given a right to treatment under existing law and that he would be deprived of this right to treatment if an offense (in this instance reckless driving) were removed from the juvenile court jurisdiction. It was argued the legislative removal of the offense was a denial of due process. The Supreme Court ruled the legislature has absolute discretion to determine jurisdiction of subject matter items under the juvenile court. Further, that neither substantial due process or equal protection is denied by the legislature's decision to include or exclude a particular traffic offense from the jurisdiction of the juvenile court. *State v. G.D.M.,* 398 So.2d 1017 (Fla. 1981).

   The juvenile court in Houston County, Alabama adjudicated a minor to be mentally ill and committed him to the custody of the Alabama Department of Mental Health. The state agency placed the child in an adolescent center for treatment in Barber County where he escaped and was involved in alleged delinquent activity. The Barber County Juvenile Court adjudicated the juvenile and modified the orders of the Houston County order without communication with them. The question arose as to which court had jurisdiction for orders in this matter. The Alabama Supreme Court ruled that the Houston County Juvenile Court retained jurisdiction of the juvenile and further that Barber County had concurrent jurisdiction because he was placed in a facility in that county. The Court pointed out when juvenile courts have concurrent jurisdiction, the general rule is the Court which assumed jurisdiction first has preference and should not be obstructed in the legitimate exercise of its powers by a court of coordinated jurisdiction. The Court further pointed out the need for a spirit of cooperation and juvenile courts should not compete with each other for jurisdiction. The determination of the juvenile's best interest is the polestar of proceedings in juvenile courts and the court of original jurisdiction should take precedence over the concurrent juvenile court. *Ex parte Dept. of Mental Health,* 511 So.2d 181 (Ala. 1987).

   In Florida, a juvenile petitioned the Appellate Court for a writ of habeas

corpus, arguing that his continued detention by juvenile authorities after the filing of an Information against him by the state attorney was unauthorized. The Appellate Court agreed and granted the writ. The Court ruled the filing of an Information removed the juvenile from the jurisdiction of the juvenile division of the Circuit Court, at least for purposes of pretrial detention, and the trial judge's attempt to continue his stay in the juvenile detention center for another week was improper. *C.S. v. Brown,* 553 So.2d 317 (Fla. App. 1989). In federal court, a charge in adult court against a juvenile for conspiracy commencing before he was 18 and continuing after said age, included the juvenile acts without the need to certify them. Therefore, it was handled as an adult matter without the need for certification. *U.S. v. Doerr,* 866 F.2d 944 (7th Cir. 1989).

VI. THE PHILOSOPHY OF PARENTAL RIGHTS VERSUS CHILDREN'S RIGHTS WITH SELECTED CASES

1. John Rawls: *Theory of Justice*

   Each individual is born with full rights.

   A minor's incapacity relates solely to the exercise of his rights and the inability to exercise these rights is the result of cognitive immaturity rather than specific age. During this phase, adults function on the minor's behalf as advocates and ombudsmen.

2. Traditional View (Hobbes, Locke, Mill):

   Minors are wholly subject to the authority of adults simply by virtue of age and rights do not accrue until majority.

3. Frankfurter, J. Concurring Opinion *May v. Anderson,* 345 U.S. 528, 73 S.Ct. 840, 97 L.Ed. 1221 (1953).

   > "Children have a very special place in life which the law should protect. Legal theories and their phrasing in other cases readily lead to fallacious reasoning if uncritically transferred to the area of determining a state's duty toward children."

4. The primacy of parental rights are coupled with parental duties to provide protection, food, shelter, clothing, medical care, education, love, and to be the child's advocate.

5. The state has a *parens patriae* responsibility to intervene when parents neglect their general responsibilities or are unable to fulfill their responsibilities because of:
   (a) Mental incapacity;
   (b) Physical incapacity;
   (c) Economic incapacity or where there are no parents;
   (d) Irresponsibility and so forth.

Justice Cardonzo (while Chief Judge of the New York Court of Appeals) described the basis of court intervention as follows:

> "As the responsibility to do what is best for the interest of the child, the judge is to put himself in the position of a wise, affectionate and careful parent and make provision for the child accordingly." *Finlay and Finlay,* 148 N.E. 624 (N.Y. 1925).

6. Concerning judicial rulings relating to the question of parental rights and children's rights, the courts usually must face a three-point decision, to-wit: concern for (1) the parent; (2) the child; and (3) the state.
   (a) Generally, *parents* have the right to be left alone without undue interference by the state.
   (b) The *child* generally has the right to receive the care and training that will give him a chance to be a well-integrated adult.
   (c) When the *state* acts, rights to both parent and child are as follows:
      (1) Right to notice;
      (2) Parents right to custody;
      (3) Right to counsel;
      (4) Right to hearing and cross-examine witnesses.

   Mr. Justice Rutledge wrote:

   > "It is a cardinal rule with us that the custody, care and nurture of the child *resides first with the parent,* whose primary function and freedom includes preparations for obligations the state can neither supply nor render . . . and it is recognition of this that these decisions have respected the private realm of family life which the state cannot enter." *Prince v. Massachusetts,* 321 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645 (1944).

7. Primary and Secondary Parents' and Children's Rights
   (a) ***Primary Rights*** consist of the direct decisional rights of the parent and child.
   (b) ***Secondary Rights*** include such things as schools, juvenile and family justice system and youth serving agencies both public and private. Looking at the broad spectrum of the rights of children and parents, the quest for justice is largely an effort to find a sensitive balance between child, parent and the secondary authorities.
   (c) It seems clear in this area as in many others for every "right," there is a correlative "duty."

8. Pre-Birth Rights of Parent and Child
   (a) The choice of conception rests on the parents. If one spouse refuses to allow the conception of a child, would the other spouse have grounds for divorce because of said refusal?

(b) The rights of prospective parents to avoid conception has been heard in the courts.

A Connecticut statute made the use of contraceptives a criminal offense and the directors of the Planned Parenthood League were convicted on a charge of having violated the statute by giving instruction and advice to married persons as to means of preventing conception. The U.S. Supreme Court in a five–four decision held:

(i) That the defendants had standing to attack the statute.

(ii) The statute was invalid as an *unconstitutional invasion of the right of privacy of married persons.* Three Justices concurred in the opinion of the Court elaborating the view that the Fourteenth Amendment concept of liberty protects those personal rights that are fundamental, and is not confined to the specific terms of the Bill of Rights. *Thus, married persons have the right to privacy concerning the contraceptive decision. Griswold v. State of Connecticut,* 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965).

(c) Concerning contraceptives for minors, it has been held a state statute requiring parental notification prior to minors obtaining contraceptives was unconstitutional. *Jane Does v. Utah Dept. of Health,* 776 F.2d 253, 10th Cir. Ct. (1985).

9. The right of a mother to terminate pregnancy was resolved in the landmark U.S. Supreme Court case of *Roe v. Wade,* 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973). This case involved an unmarried woman wishing to terminate her pregnancy by abortion who instituted an action in the U.S. District Court in Texas seeking a declaratory judgment that the Texas Abortion Statutes were unconstitutional. The Court held:

(a) That the pregnant unmarried woman had standing to sue.

(b) States have a legitimate interest in seeing that abortions are performed under circumstances insuring maximum safety for the patient.

(c) The right to privacy does encompass the woman's decision whether or not to terminate her pregnancy.

(d) A woman's right to terminate her pregnancy is not absolute and may to some extent be limited by the state's legitimate interest in safeguarding the woman's health.

(e) Prior to the end of the first trimester of pregnancy, the state may not interfere with or regulate an attending physician's decision, reached in consultation with the patient, that the patient's pregnancy should be terminated.

(f) From and after the end of the first trimester, the state may regulate the abortion procedure only to the extent that such regulation relates to the preservation of maternal health.

10. Since *Roe v. Wade,* the controversy concerning abortion has continued in full force and a great deal of pressure has been mounted in an attempt to in–

fluence the Supreme Court to modify their landmark decision in this area.

As justices retire and new ones are appointed, the composition of the Court changes and although *Roe v. Wade* was not overruled, the case of *Webster v. Reproductive Serv.*, 492 U.S. ___, 106 L.Ed.2d 410, 109 S.Ct. 3040 (1989) held a Missouri statute regulating performance of abortions as *not* unconstitutional. In a highly divided court concerning the different sections of the decision interpreting the Missouri statute, the opinion has the effect of returning to the states much of the decision-making prerogative concerning state control over abortions. Some justices remarked that *Roe's* rigid trimester analysis has proved to be unsound in principle and unworkable in practice. The Court stated that in such circumstances, the court does not refrain from considering prior constitutional rulings, notwithstanding *stare decisis.*

Whether or not *Roe v. Wade* will later be overruled by the United States Supreme Court remains to be seen.

11. Rights of Foster Parents

(a) Timmy, the child of a white mother and black father, was placed in foster care with foster parents at the age of one month. After 15 months of caring for the child, the foster parents expressed a desire to adopt Timmy. They were then told the case-workers felt he should be adopted by a black family. The decision not to allow the foster parents to adopt Timmy was made at a staff meeting at which neither the foster parents nor the child was present or represented.

The Court of Appeals held that foster parents having a close familial relationship during the first years of a child's life, and the child himself, have a protectable interest under the Fourteenth Amendment which cannot be denied without due process of law. *Drummond v. Fulton County Department Family and Child Services,* 547 F.2d 835 (5th Cir. 1977).

12. Concerning an unmarried 16-year-old mother's right to decide whether she should have an abortion as opposed to the wishes of her parents, a three judge district court in Massachusetts held as follows:

(a) "Even if parents had rights of constitutional dimension vis-a-vis their child, that were separate from the child's, the individual rights of the minor outweigh the rights of the parents and the parental consent requirement was constitutionally invalid." *Baird v. Bellotti,* 393 F. Supp. 847 (Mass. 1975). Here, the infant mother could herself make the decision concerning an abortion without the permission of her parents.

(b) The author refers the reader to Chapter IV which summarizes the latest U.S. Supreme Court cases setting forth distinctions concerning notice to the parents of a minor mother prior to the abortion decision.

13. It is noteworthy some distinctions and decisions concerning illegitimate children and artificial insemination.

(a) Legitimate and Illegitimate Child Distinguished

The status distinction between a legitimate and illegitimate child still continues today although statutory and case law has softened or eliminated terms such as bastardy and illegitimacy. The distinction is rooted in western civilization's commitment to marriage and societal displeasure with the fruit of promiscuity. Modern legislation is moving rapidly toward a greater recognition of the rights of illegitimate children.

At common law, an illegitimate child was one begotten and born out of lawful wedlock. Such child was deemed, *"filius nullius,"* the son of nobody. The definition has been expanded to deal with different marital and paternal relationships hereinafter discussed.

The Uniform Parentage Act (proposed by the National Conference of Commissioners on Uniform State Laws, 1973), addresses itself to this problem.

(b) Modern scientific breakthroughs have caused perplexing legal problems in such matters as artificial insemination, in vitro fertilization and surrogate motherhood. Legal hypotheticals and problem scenarios in this fast changing area of the law are many.

14. Rights of Parents and Children from Birth Through the Pre-School Years

(a) Generally speaking, parents have traditionally had the right to direct the medical care decisions, the custody, maintenance, discipline, support, religion, lifestyle and other such matters during this period of time. If a conflict arises as to these rights between parent and child, if it is serious, the *parens patriae* theory of societal authority comes into play.

(b) *Rights of Minors to Medical Care.* Notwithstanding the common law right of parents to decide whether or not medical care is necessary and should be provided, the American courts in a long range of decisions, have consistently overruled objections to treatment when the life of the child is in danger.

(c) Thomas W. Frentz in *The Journal of Family Law,* Vol. 14, No. 4, noted: "An analysis of the case law dealing with non-emergency treatment reveals a pattern of discretionary decisions each weighing these certain factors:

(1) The probable effect of the child's social, physical and emotional well-being if treatment is allowed or denied.

(2) The seriousness of the condition, the medical risks involved and the probabilities of success as judged by competent medical opinion.

(3) The reasonableness of the parent's objections.

(4) The wishes and cooperation of the child."

15. Parent and Child Rights as to Who May Commit to Institution

(a) There is a group of patients who do not have full legal capacity and are classed as "voluntary" patients even though they have never consented to hospitalization. Furthermore, there is no legal machinery presently

designed for them to obtain judicial review their hospitalization. Specifically, this class of patients includes the mentally retarded, juveniles and persons under a guardianship. Any person in one of those classes historically could be admitted as a "voluntary" patient by his or her parent, guardian or person *in loco parentis* without the patient's actual consent, and frequently against their will.

(b) Pennsylvania case, *Bartley v. Kremens,* 402 F.Supp. 1039 (E.D. Pa. 1975), held the so-called voluntary commitment was a denial of due process and the applicable Pennsylvania statutes were unconstitutional. This case was concerned with a number of plaintiffs who were either juveniles committed by the parents, or retarded children, all in the hospital as "voluntary" patients, and was a determination of the rights of the "plaintiffs and others in their class," under the Pennsylvania statutes.

The *Bartley* case sets forth an elaborate process as a minimum due process standard including judicial hearings. The U.S. Supreme Court did not go that far in the heretofore referred to case of *Parham v. J.R.,* 442 U.S. 584, 99 S.Ct. 2493, 61 L.Ed.2d 101 (Ga. 1979).

16. Rights of Parents and Children in the Mandatory School Years

(a) Both the child and the parent are receiving ever-more due process rights concerning what happens to them in education. For example, parents have the benefit of the *Educational Rights and Privacy Act* whereby the parents have access to certain information in the child's file. See 20 U.S.C.A. Sec. 1232G(b).

The parent has the right to certain records. The child has a right to due process hearings prior to being suspended or expelled.

17. Rights of Parents and Child in Transition Years of Youth to Adulthood

(a) Questions could arise as to the right of the parents to ascertain where their child will reside, whether parents can maintain reasonable control and direction of the children during those years and so on. Statutes based on the *parens patriae* power of the state have generally held that the parents have the right to require the children to obey their reasonable and lawful commands up to the age of 18 but some children's rights groups are opposed to this concept.

(b) Some people concerned with the rights of parents and children feel that judicial intervention in these matters is not always helpful. Efforts are being made to prevent this court contact by means of diversion, non-labeling and prevention. Nevertheless, the private and social agency approach does not always allow the kind of due process and fair treatment that would be required in judicial handling of these kinds of issues.

For additional information concerning children's and parental rights, see the following articles:

"Puberty, Privacy and Protection: The Risks of Children's 'Rights,'" by Bruce C. Hasen, *American Bar Association Journal,* Volume 63, October, 1977.

Also see the following articles in the October 1977, *Trial Magazine:* "Parents' Rights," by Cynthia Naturale; "Parents' Rights, the Ingraham Decision Protecting the Rod," by Nancy K. Splain; "Parents' Rights, Adoption Without Consent," by Coeta Chambers; and "Parents' Rights, the Father's Revolution in Custody Cases," by Phillip F. Solomon.

The whole era of children's rights opposed to parental rights began in the nineteenth century when social reformers grew alarmed at children who were being increasingly exposed to poverty and devices of urban living. In Cook County in 1899, the first juvenile code fully embraced the state's *parens patriae* duties. The new juvenile justice system gave high priority to protection, rehabilitation and treatment. In 1967, in the *Gault* decision the Court rejected the unchecked powers of the juvenile court and set forth on a course of giving children certain constitutional rights. Since *Gault,* children's rights issues have advanced quickly and drastically.

Specific children's rights have been addressed by both federal and state legislatures and in the courts. Children along with women, minorities and other disadvantaged groups have benefitted from a national trend to secure their interest. Great strides have been made in the areas of legitimacy, child support, education for handicapped children, protection of children against sexual exploitation and missing children. Indeed, there is a greater awareness of children's rights today than there ever has been in the history of this nation.

A comprehensive publication in this area is "Legal Rights of Children," by Robert M. Horowitz and Howard A. Davidson, *Family Law Series,* Shepard's/McGraw-Hill, P.O. Box 1235, Colorado Springs, Colorado 80910 (1984).

VII. EDUCATION -- DUE PROCESS AND SEARCH CASES

Concerning Academic Dismissal: A medical student challenged his dismissal for academic deficiencies. The high court held that if a student was fully informed of a faculty decision, it was sufficient, and academic due process did not require a hearing before the school's decision-making body. *The Board of Curators of the University of Missouri v. Horowitz,* 435 U.S. 78, 98 S.Ct. 948, 55 L.Ed.2d 124 (1978). Generally, an expulsion because of academic deficiency is probably only reviewable if it can be shown the expulsion was arbitrary and capricious. The courts are not equipped to evaluate academic performance. A greater flexibility may be permissible in regulations governing high school students than college codes of conduct because of the different characteristics of educational institutions such as the differences in the range of activities subject to discipline and the age of students. A looser standard of constitutional review of high school regulations is appropriate because of the greater flexibility possessed by the state to regulate the conduct of children as opposed to adults. *Alex v. Allen,* 409 F. Supp. 379 (Pa. 1976).

In *Summons v. State,* 371 N.E.2d 1316 (Ind. 1978), a child in Indiana was declared a habitual truant. The child objected to attendance records being received because the person making the entries did not have personal knowledge of the absences represented by the record. The court held that attendance rec-

ords were properly introduced under the business records exception to the hearsay rule. The clerk is informed of the absence by the teachers whose duty it is to make such reports in the course of business and despite the hearsay, the facts warranted sufficient trustworthiness to allow the admissibility of the records.

In a suspension for violation of the school hair regulation code, the board adopted a regulation stating the school community did not approve of long, dirty hair. *Gere v. Stanley,* 453 F.2d 205 (Pa. 1971). In another case, hair length was held not protected by the First Amendment. No due process problem because schools are authorized to make reasonable rules. Privacy is not involved because hair is worn in the open and public. *Karr v. Schmidt,* 460 F.2d 609 (Texas 1972). Another case holds that a choice of hair length is a right and the only basis for regulation is safety and discipline. *Massie v. Henry,* 455 F.2d 799 (N.C. 1972).

Concerning Suspension for Pregnancy: A pregnant unmarried high school senior was entitled to a preliminary injunction requiring school officials to readmit her where there was neither a showing of danger to her physical or mental health nor a valid educational or other reason requiring her to receive educational treatment not equal to that given all others in her class. *Ordway v. Hargraves,* 323 F.Supp. 1155 (Mass. 1971).

Concerning Free Speech: It was held arm bands could not be banned because they symbolized equal symbolic speech. *Tinker v. DeMeines School District,* 556 P.2d 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731. It was held in a California case that school authorities may not exercise prior restraint concerning on or off campus newspapers nor may the sale of off campus newspapers be prohibited at high school. *Bright v. Los Angeles Unified School District,* 556 P.2d 1090 (Cal. 1976). In *Karp v. Becker,* 477 F.2d 171 (Cal. App. 1973), it was held: (1) that the First Amendment does not require officials to wait for actual disruption before taking action; (2) disruption or disorder potential need not be a certainty but only reasonably foreseeable; (3) since the public is strongly in favor of education, the degree of disturbance required for action by school officials is less than that required for general officials.

School officials may impose reasonable limits on the time, place and manner in which student publications may be distributed. *Riseman v. School Comm.,* 439 F.2d 148 (1st Cir. 1971). Materials containing dirty words, but not meeting the legal definition of obscenity, may not be banned by school officials for that reason. *Koppell v. Levine,* 347 F.Supp. 456 (1972).

Concerning Athletics: Prohibition of a married student from engaging in athletics is unconstitutional. *Indiana High School Athletic Association v. Raike,* 329 N.E.2d 66 (Ind. 1975). A Pennsylvania court held invalid a bylaw of an association prohibiting girls from competing against or practicing with boys in any athletic contest. *Commonwealth v. Pennsylvania Interscholastic Athletic Association,* 334 A.2d 839 (Pa. 1975).

The Illinois Appellate Court held that the maintenance of an all-girl's volleyball league by state organization and public school district did not violate the federal or state Constitutions; nor were the defendants required to provide separate teams for boys as a condition of continuing the all-girl league. *Petrie v. Illinois High School Association,* 394 N.E.2d 855 (Ill. 1979).

A United States District Court in Pennsylvania held that a state and school district's policy limiting the educational program to a period of 180 days deprived

severely handicapped children of the "appropriate education" mandated by federal law. *Armstrong v. Kline,* 476 F. Supp. 583 (Pa. 1979). The Oregon Court of Appeals held that handicapped children have a substantive right under state and federal law to a free and appropriate education, including placement in a private, residential facility if necessary and that school districts must bear the costs. *Mahoney v. Administrative School District #1,* 601 P.2d 826 (Ore. 1979). The Supreme Court of New Jersey held that a statute may constitutionally make custodial parents liable for damage caused to a public school by the malicious acts of their children. *Piscataway Tp. Bd. of Education v. Caffiero,* 431 A.2d 799 (N.J. 1981). The Court of Appeals of Louisiana held schools are responsible for torts of children committed on school grounds only if the school failed to exercise reasonable supervision. *Batiste v. Iberia Parish School Board,* 401 So.2d 1224 (La. 1981).

The Supreme Court of Virginia held that a statute is constitutional which requires that children withdrawn from public school who are taught at home must have teachers who meet state qualifications. After a hearing, the juvenile court ordered the parents to send their children to one of the designated types of schools or arrange for their instruction at home by an approved tutor or teacher which order was upheld on appeal. *Grigg v. Commonwealth,* 297 S.E.2d 799 (1982). Plaintiffs in Colorado installed in their store eight or nine video games which was close to a school. The city commission passed an ordinance forbidding children to play video games while school was in session and the plaintiffs attacked the ordinance as being unconstitutional. A U.S. District judge failed to see any fundamental rights violated by an ordinance which simply prohibits school children from playing coin-operated video games when school is in session. The District judge stated that statutes which restrict the activities of minors or require parental supervision for minors to engage in certain activities do not necessarily violate the minors' rights of association or impermissibly interfere with parents' rights to choose how to raise their children. *Shorez v. City of Dacano,* 574 F. Supp. 130 (U.S. District Court, Colorado, 1983).

Ohio has legislation authorizing the moderate use of corporeal punishment in public schools. After a child exhibited repeated behavioral problems and more moderate forms of discipline were unsuccessful, the teacher administered punishment of one swat with a wooden paddle to the buttock area over a distance of approximately 18 inches by snapping of the wrist rather than an arm swing motion. The teacher testified the method of punishment administered was determined after his consideration of the child's age, size, gender and other physical characteristics and the pattern of the child's behavior. The Court ruled the state did not prove beyond a reasonable doubt that the defendant did with indifference to the consequences, perversely disregard a known risk that would result in the strong possibility the child would suffer temporary serious disfigurement, acute pain or any degree of prolonged pain. It was held the teacher did not recklessly create a substantial risk of serious physical harm to the child. *State v. Albert,* 456 N.E.2d 594 (Ohio 1983).

A Connecticut Court held a Board of Education may not expel a student for nonresidency without affording a pre-expulsion hearing or notifying the student of the right to one. *Hall v. Olha,* 80-407 (1984). In Pennsylvania, it was

held that grade reduction was an impermissible sanction for an infraction not education related. *Katzman v. Cumberland Valley School District,* 479 A.2d 671 (1984). An Oklahoma Court ruled governmental immunity does not extend to school officials who physically punish the student in a willful or wanton manner. See *Holman v. Wheeler,* 677 P.2d 645 (1983). The Ninth Circuit Federal Court of Appeals has ruled that students are entitled to damages for an unconstitutional strip search by school officials. *Bilbey v. Brown,* 738 F.2d 1462 (1984). The Florida Court of Appeals held a school has authority to maintain peace on its grounds after school is out for the day. In this case, nonstudents went on a school campus and engaged in a fight with students waiting for the school bus to take them home. School was out and the question was whether or not the school had jurisdiction to maintain peace on its grounds after school hours. The Court held that part of the administrative duties of the school was to oversee the orderly safe transportation of students to and from school. *A.C. v. State,* 479 So.2d 297 (Fla. App. 1985).

School Search and Seizure Cases

It has been held that school officials have the authority to search a school locker or desk. *People v. Overton,* 229 N.E.2d 596 (N.Y. 1967), and *Moore v. Student Affairs Committee,* 284 F.Supp. 725 (Ala. 1968). School lockers may be searched and seized. *State v. Stein,* 456 P.2d 1 9Kan. 1969). It should be noted these cases give power to school officials in relation to their *disciplinary* and *regulatory* needs. The majority rule is these powers or regulations cannot be used for the benefit of outside law enforcement officials exercise unless they have a search warrant or take a juvenile into custody under circumstances permitting the search of his person or his surroundings. *Watkins v. Piazzolo,* 442 F.2d 284 (Ala. 1971). Also see *People v. Stewart,* 313 N.Y.S.2d 253 (N.Y. 1970). The search must be reasonable. *People v. Jackson,* 319 N.Y.S.2d 731 (N.Y. 1971).

In the case of *People v. Bowers,* 356 N.Y.S.2d 432 (N.Y. 1974), the court held a school security officer was a government agent subject to the restrictions of the Fourth Amendment. Some courts have gone a bit father and held that for *all* school searches, school teachers and officials are regarded as governmental agents, but are subject to a resonable suspicion test rather than the probable cause standard, based on the *In Loco Parentis* Doctrine. *Matter of Ronald B.,* 401 N.Y.S.2d 544 (App. Div. 1978). Most courts are a great deal more restrictive concerning the "person" and make a distinction as opposed to "school lockers." Some courts, however, have not made the distinction and hold the Fourth Amendment requirements for valid search applicable to the person as well as school lockers. *State v. Mora,* 307 So.2d 317 (La. 1975). In the case of *In re W.,* 105 Cal.Rptr. 775 (1973), students told principal there was marijuana in a particular locker. Principal searched the locker and found marijuana. *Held:* That the search was reasonable and the tests for the validity of a search by school officers involved the following: (1) Is the search within the school's duties? and (2) Is the search reasonable under the facts and circumstances of the case? This court held that preventing distribution of marijuana in the school is within the school official's duty to all students and it was reasonable for the principal to confirm a report which had been made to him. Another California case held that prevention of marijuana use is one of the duties of school personnel and opening lockers with a master key to confirm a report it contained marijuana

was reasonable. It should be noted that concerning school locker cases, some of the federal courts have ruled that an exception of privacy by defendant triggers a warrant requirement. Locked footlockers have been held not available in the absence of a search warrant because of the expectation of privacy. This particular theory may be overcome in juvenile matters concerning footlockers when the school's interest in the control and management of the school is deemed to be paramount.

In searching a student's *person,* most courts still view teachers and school officials as governmental agents subject to Fourth Amendment limitations; however, they have adopted a lesser standard than "probable cause" for measuring the legality of such searches, such as "reasonable suspicion." See *People v. Scott,* 315 N.E.2d 466 (N.Y. 1974). In *State v. McKennan,* 558 P.2d 781 (Wash. 1977), the court held: Search of a student's person is reasonable and does not violate Fourth Amendment rights if the school official has *reasonable grounds* to believe the search is necessary to maintain school discipline and order. Some guidelines to the validity of the search of a person by a school administrator would be: (1) the child's age, (2) history and school record, (3) prevalence and seriousness of problems in the school where search was directed, (4) exigency to make the search without delay, and (5) the probative value and reliability of information used as justification for the search. In another case, the principal was informed a student was selling marijuana. The student showed the principal a pouch containing a large sum of money but refused to reveal the contents of a bulging pocket. The court held that the authority of the principal to institute a search was not violated by the principal's request to a policeman for assistance. See *In re C.,* 102 Cal.Rptr. 682 (Cal. 1972).

The Oregon Court of Appeals held a school principal does not have to give a *Miranda* warning if the child is as free to leave as other students, or if the matter is still in the investigative stage and has not focused on the child. *Matter of Gage,* 624 P.2d 1076 (Ore. 1980). The Illinois Appellate Court Fifth District has held that a school official not acting on behalf of the police may search a child's clothing when there is reason to believe the child is carrying substances which might endanger the health and welfare of the students. *In Interest of J.A.,* 406 N.E.2d 958 (Ill. 1980).

In Florida, a teacher heard the statement that a student "has got something." The teacher took the child to the dean's office, looked in her purse and found some marijuana. The Court noted the reliability of the information used to justify the search in this matter could not be determined, that the identity of the participants in the overheard conversation was unknown and there was no evidence as to the existence or prevalence of a drug problem at the school. Therefore, the Court felt there was little or no probative value to a statement that a student "has got something" heard out of context and with no background information. The Court held the record insufficient to show school officials had a reasonable suspicion allowing them to search the appellant and the motion to suppress should have been granted. *A.B. v. State,* 440 So.2d 500 (Fla. App. 1983).

A federal court has held that the use of a dog brought into a school to canvass the entire school and sniff for drugs was an unconstitutional search. *Jones v. Latexo Independent School District,* 499 F. Supp. 223 (Tex. 1980). Subse-

quent cases seem to indicate if school officials have a reasonable belief that school lockers or other areas contain narcotics, they may subject this limited area to a drug sniffing canine and it would be constitutional. In Texas, a student was taken to the vice-principal's office for disciplinary inquiry where the student paced about the office, was belligerent, had red eyes and was erratic. The vice-principal told him if he did not empty his pockets, the police would be called to search him, at which time the juvenile complied and took a marijuana cigarette out of his pocket. The Texas Court, in upholding the search, found that under these facts, school authorities have the same authority as parents to make necessary searches to maintain discipline. *R.C.M. v. State,* 660 S.W.2d 552 (Tex. App. 1983).

In Colorado, school officials seized marijuana in the search of a juvenile's automobile. The trial court suppressed the evidence as violative of the standards of the Supreme Court case of *New Jersey v. T.L.O.,* (see Case No. 43, Chapter IV). A police officer was informed by a minor that other minors had stolen a quantity of marijuana, had dried, cured and packaged it, and had taken it to school that morning to sell to other students. The officer advised the assistant principal. Two suspected juveniles were removed from class and interrogated in separate rooms, were required to empty their pockets and submit to pat-down searches. Their lockers were also searched. These searches produced no evidence. Another minor had brought the suspect students to school by car. The school security officer and principal went to search the car at which time the student stated there was contraband in the car but it belonged to the other juveniles. Drug paraphernalia and marijuana were found. The Colorado Supreme Court, in reversing the trial court, ruled the principal and school security officer were not acting as agents of the police inasmuch as the police did not participate in the searches or enter into interrogations of the students. In quoting from *New Jersey v. T.L.O.,* the Court noted a student's expectation of privacy is balanced against the substantial interest of teachers and administrators in maintaining discipline in the classroom and on school grounds. They noted the school setting requires some easing of the restrictions to which searches by public authorities are ordinarily subject. Further, they stated that the warrant requirement is not suited for the school environment and is not applicable to searches of school children. The intrusiveness of this search was held justified because it was reasonably related in scope to the purpose of the initial intrusion and therefore this search conducted by school staff did not require a warrant or probable cause because there was reason to believe the safety of the student and the school was at risk. *People in Interest of P.E.A.,* 754 P.2d 382 (Colo. 1988).

VIII. JUVENILE INVESTIGATION -- ARREST, SEARCH, CONFESSION

1. Arrests

   (a) Since the *Gault* and *Miranda* cases, the present rule is that arrests of juveniles may be made under the same conditions as adults. Because juvenile proceedings are not regarded as criminal in nature, this causes some confusion on the part of officers taking a child into custody. The terms "taking into custody" as contrasted from "being arrested" are academic

terms only and the general rules of probable cause and other safeguards in making an arrest should apply to juveniles.

See *In re J.B., Jr.,* 328 A.2d 46 (N.J. 1974), where the court stated:

> "The criteria for the lawful arrest of a juvenile are those applicable to arrest for an adult offense, supplemented by criteria contained in rules of court pertaining to juvenile offenses."

The due process clause requires that, absent exigent circumstances, police must obtain a warrant before arresting a juvenile in his own home. *In re R.A.J.,* (D.C. 1978).

(b) *Concerning investigative stops or arrests* see *Fare v. Tony C.,* 582 P.2d 957 (Cal. 1978).

The police saw a minor and companion walking down a sidewalk during school hours. The officers made an investigative stop of the boys and some stolen property was seized from the minor. The California Supreme Court said the circumstances known to the police officers did not support reasonable suspicion that the minor and companion were involved in criminal activity. The investigative stop was therefore ruled to be unlawful and the stolen property was not admissible. The Court stated:

> "In order to justify an investigative stop or detention, the circumstances known or apparent to the officer must include specific articulable facts causing him to suspect that some activity relating to crime has taken place or is occurring or about to occur and the person he intends to stop or detain is involved in that activity. The officer must objectively entertain such a suspicion and must also have the basis for an objective reasonable basis for the arrest."

(c) In the area of ungovernability and waywardness, there is a lack of authority concerning valid arrests; however, the general case law in the field puts forth the rule that a police officer may hold a child in temporary involuntary custody until a parent can be notified or until further procedures can be reasonably instituted.

Arrest -- Case Survey

Police searched two vehicles in a parking lot with the consent of drivers where they found hashish. A juvenile was standing near one of the vehicles with several other persons and the entire group was placed in patrol cars, given Miranda warnings and driven to the police station. At the station the juvenile was questioned as to his identity and for information regarding the drugs. The juvenile did not acknowledge any connection with the drugs at which time he was not formally charged, fingerprinted or put in a cell. He was permitted to leave in the custody of his parents about an hour later. The issue brought before the Court was whether the juvenile was "under arrest" or "in custody" under the State Juvenile Code. State law provided that speedy trial considerations begin at the time the juvenile was taken into custody. In this case the juvenile later admitted involvement with the drugs and the issue was whether speedy trial time should start to run at the time of the

initial detention and whether or not this constituted an arrest. The Court held the detaining of this juvenile for questioning was not within the meaning of "taken into custody" and it was not an arrest. *State v. M.S.S.,* 436 So.2d 1067 (Fla. App. 1983).

In a Wisconsin case, the Court held that a child may be detained on a relatively minor offense, if grounds for detention exist, and the child is questioned as to a more serious offense. This did not entail an unlawful "arrest." *State v. Woods,* 345 N.W.2d 457 (Wisc. 1984). A Washington Appeals Court held where police officers illegally enter a home to arrest a boy for bike theft and are assaulted by the boy's father, they may legally arrest the father and then legally arrest the boy if he obstructs the arrest of the father and thus the arrested boy's subsequent admissions about the bike theft are not the product of an illegal arrest. See *State v. Holeman,* 679 P.2d 422 (Wash. App. 1974). An Illinois court held there are no requirements when a child has been arrested, that he be allowed to phone his parents. *People v. Stachelek,* 495 N.E.2d 984 (Ill. App. 1986). A Michigan statute requires police to take an arrested child directly to the juvenile authorities and therefore, the Court ruled that any statements made by the child during any deviation from the direct route are inadmissible. *People v. Jordan,* 386 N.W.2d 594 (Mich. App. 1986). In Illinois, a juvenile was convicted of very serious crimes and on appeal the argument was made that the trial court erred in denying the juvenile's motion to quash the arrest. Here, the juvenile went voluntarily to the police station where he stayed 27 hours, however, he was free to leave at any time. The Illinois Appellate Court ruled that in this instance, there was no arrest. The juvenile was not handcuffed, fingerprinted or charged while at the police station. The evidence indicated the juvenile was told he was free to leave and he voluntarily stayed overnight at the station in the interview room. A strong dissent was written in this case. *People v. Green,* 535 N.E.2d 413 (Ill. App. 1988). A Nebraska court ruled the statute requiring that parents be notified when their child is arrested is not jurisdictional but an additional safeguard of due process. *State v. Taylor,* 448 N.W.2d 920 (Neb. 1989).

2. Generally, Courts have applied Fourth Amendment *Search and Seizure* Limitations to Juvenile Proceedings. There are some problems encountered when investigating the juvenile offender, such as making sure the juvenile is living in the premises wherein the search warrant is issued and making sure that if the juvenile gives consent to the search, the consent is knowingly and voluntarily given with proper advice from counsel or parents.

When parents or adult relatives give consent to the search of a juvenile's room or quarters, most courts have held that the parental rights in the home are superior to any rights the minor child might have. *United States v. Stone,* 401 F.2d 32 (Ind. 1968), and *Maxwell v. Stephens,* 348 F.2d 325 (Ark. 1979). There is some authority to the contrary. See *People v. Flowers,* 179 N.W.2d 1235 (Mich. 1970). A father had a legal right to consent to the search of the minor son's toolbox despite the son's express lack of consent. The court held there is a strong public policy in protecting the interests of a parent in

the care, discipline and control of a minor child which overcomes the constitutional rights to privacy of the minor. *Scott v. Fare,* 142 Cal.Rptr. 61 (Cal. 1978). A recent Alaska case held that a warrantless search of a probationer is a violation of the Fourth Amendment unless there is a direct relationship between the search and the nature of the original crime for which the defendant was convicted. *Roman v. State,* 570 P.2d 1235 (Alas. 1977).

Inasmuch as the Fourth Amendment limitations have been applied to juvenile proceedings, the issues of consent and waiver are treated in the same manner as adult proceedings. *In re Ronny,* 242 N.Y.S.2d 844 9N.Y. 1963). Also see *In re Baker,* 248 N.E.2d 620 (Ohio 1969), and *State v. Lowry,* 230 A.2d 907 (N.J. 1967). The Exclusionary Rule is handled in juvenile proceedings by various state statutes and the applicable case law.

A New York Family Court has ruled that the search of a juvenile while in the noncriminal custody of police officers affiliated with the truancy squad is unlawful for the reason that police only had the power to return the child to the parents, but not to search the child. *In re Terence G.,* 474 N.Y.S.2d 940 (Fam. Ct. 1984). A juvenile consented to a search of her bag at the Denver airport. The Court held the minor was not in custody and absence of parent or guardian was only one factor to consider in the voluntariness determination. Consent for a search is to be determined under the same standards as an adult. *People in Interest of S.J.,* 778 P.2d 1348 (Colo. 1989). Older adult sister can properly consent to search of juvenile's room in absence of parent. *State v. Summers,* 52 Wash. App. 767 (1988).

3. Exceptions to the Requirements for a Search Warrant.

   (a) Consent: Consent must be voluntary -- under totality of circumstances.

   (b) Search incident to a lawful arrest may be made without a warrant. *Sibron v. New York,* 392 U.S. 40, 88 S.Ct. 1889, 20 L.Ed.2d (1968).

   (c) Probable cause to search plus exigent circumstances may justify a search without warrant. *Chambers v. Maroney,* 399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed.2d 419 (1970).

   (d) Hot pursuit. See *Warden v. Hayden,* 387 U.S. 294, 87 S.Ct. 1642, 18 L.Ed.2d 782 (1967).

   (e) Stop and frisk. *Terry v. Ohio,* 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

   (f) There appears to be developing a sixth exception that an automobile taken into police custody may be searched in good faith for noncriminal purposes such as to protect the public, the police or the owner's possessions; and that criminal evidence falling into plain view may be seized. See *Cooper v. California,* 386 U.S.58, 87 S.Ct. 788, 17 L.Ed.2d 730 (1967).

4. Confessions -- Case Law Survey

   Voluntariness is still significant along with the Court-made rules in *Miranda* and *Gault.* Following *In re Gault,* some courts concluded *Miranda* requirements do apply to juvenile interrogations. *Lopez v. United States,* 399

F.2d 65 (Ariz. 1968), *State v. Sinderson,* 455 S.W.2d 486 (Mo. 1970), *Commonwealth v. Darden,* 271 A.2d 257 (Pa. 1970), *Leech v. State,* 428 S.W.2d 817 (Tex. 1968), and *State v. Prather,* 463 P.2d 640 (Wash. 1970). Some courts have gone beyond the requirements of *Miranda. Miranda* safeguards were observed, but a juvenile's confession was held inadmissible because it was taken during a period of unlawful detention following an illegal arrest. *In re Rambeau,* 72 Cal.Rptr. 171 (Cal. 1968).

A totality of the circumstances test is generally held to determine the effectiveness of a minor's waiver. *Gallegos v. Colorado,* 370 U.S. 49, 183 S.Ct. 1209, 8 L.Ed.2d 325 (1962) Also see *West v. United States,* 399 F.2d 467 (Fla. 1968) and *Commonwealth v. Cain,* 279 N.E.2d 706 (Mass. 1972). A totality of the circumstances test encompasses some of the following circumstances:

(1) Length of questioning or detention;
(2) Access to parent or counsel;
(3) Age of juvenile;
(4) Place of interrogation or questioning;
(5) Number of interrogation sessions;
(6) Deception;
(7) Child's intelligence;
(8) Level of Schooling;
(9) Previous judicial or police contacts;
(10) Physical condition;
(11) Adherence by authorities to statutory or regulatory requirements;
(12) Time of day or night; and
(13) Spontaneity.

In the absence of counsel, a child's confession is held inadmissible unless the child and parent are advised of their rights, and the child is allowed to consult with the parents. *In re K.S.B.,* 500 S.W.2d 275 (Mo. 1973). A District of Columbia Court rejects the *"per se"* rule that any juvenile confession made in the asence of parent or counsel is involuntary. *In re J.F.T.,* 320 A.2d 322 (D.C. 1974). The Supreme Court of South Carolina holds that where interrogation of a 15-year-old child covered a period of 12 hours, the state had the burden to prove the resulting statement was voluntarily given. See *In re Williams,* 217 S.E.2d 719 (S.C. 1975). A confession resulting from an unlawful 14-hour detention was held invalid even though questioning occurred in the presence of parents. *State v. Strickland,* 532 S.W.2d 912 (Tenn. 1975). A Pennsylvania court held that a 15-year-old given *Miranda* warnings, who had prior experience with police, and didn't ask to have a parent present, still had to be given the benefit of parental or interested adult guidance to validate the confession. *Commonwealth v. McCutchen,* 343 A.2d 669 (Pa. 1975). A Louisiana case held a juvenile cannot waive the Fifth Amendment right to counsel without first consulting with an interested and informed adult. To sustain waiver, a state must prove the juvenile consulted a lawyer or other interested adult. It was further required that the

adult must be shown to be interested in the juvenile's welfare. *Louisiana v. Deno,* 359 So.2d 586 (La. 1978).

An Oklahoma juvenile claimed his confession was not admissible because both parents were not present. Mother and sister were present, and the father was ill. Oklahoma statute precludes admission unless child's parents, guardian, or attorney or legal custodian is present. The court held that the law did not require that both parents be present in all cases. The court noted that the child's IQ of 83 was not a *per se* indication he could not understand the waiver. *In the Matter of R.P.R.G.,* 584 P.2d 239 (Okla. 1978). A California Court of Appeals held that the request of a minor in custody to contact his parents constitutes an invocation of his privilege against self-incrimination and subsequent questioning in his parents' absence, even after restatement and purported waiver of his *Miranda* right, is a violation of the Fifth Amendment. *In re Roland K,* 147 Cal.Rptr. 96 (Cal. 1978). The U.S. Supreme Court has held that a juvenile's request to see his probation officer prior to custodial interrogation is not a per se invocation of his right to remain silent although it was a proper factor to be considered in the totality of the circumstances test for voluntariness of an alleged waiver. *Fare v. Michael C.,* 442 U.S. 707, 99 S.Ct. 2560, 61 L.Ed.2d 197 (1979). The California Supreme Court held that statements made by a juvenile to a probation officer during an intake interview cannot later be used against him at a delinquency adjudication hearing or criminal trial. *In re Wayne H.,* 156 Cal.Rptr. 344 (Cal. 1979).

The Supreme Court of Florida has held police may interrogate a child taken into custody before notifying a parent despite a statute requiring parental notification when a child is taken into custody. *Doerr v. State,* 383 So.2d 905 (Fla. 1980). The Supreme Court of Utah has held that a juvenile's confession is admissible if it was voluntarily made with a full understanding of his rights, even if no parent or attorney was present. *State in Interest of T.S.V.,* 607 P.2d 827 (Utah 1980). A Superior Court of Pennsylvania held that absent a showing that a juvenile had an opportunity to consult with an interested and informed parent or adult or counsel before he waived his *Miranda* rights, his waiver is ineffective. *Commonwealth v. James,* 416 A.2d 1090 (Pa. 1979). The Court of Appeals of the District of Columbia has held that when police have not begun to focus on a child they may hold him for several hours without releasing him to his family or delivering him to a court officer. *Jackson v. District of Columbia,* 412 A.2d 948 (D.C. 1980). In the Civil Appeals Court of Texas it has been held that a confession may be considered in a certification hearing without inquiry of whether it was given voluntarily and with knowledge of the rights and consequences. *Matter of S.E.C.,* 605 S.W.2d 955 (Tex. 1980).

The Court of Appeals of Washington has held that a juvenile does not necessarily waive his rights when parents are present at the time of an admission. The validity of a waiver of rights by a juvenile when with a parent will depend on the totality of circumstances. *In re Welfare of Deane,* 619 P.2d 1002 (Wash. 1980). The Superior Court of Pennsylvania held that a statement taken by the police from a juvenile is "inadmissible" unless a parent, lawyer, or other person in a guardianship relationship was present. *In re Curry,* 424 A.2d 1380 (Pa. 1981). In the aforementioned Pennsylvania case

the child was 15 years of age. Note that the Court of Appeals of Florida held a child with sufficient age, intelligence, education and experience may waive his *Miranda* rights without the presence of counsel, parents or other responsible adult person. *State v. F.E.J.,* 399 So.2d 47 (Fla. 1981). The Maryland Court of Special Appeals held that police acted properly by obtaining the consent of a 16-year-old sister of the juvenile, to enter and arrest, when the police their address and phone number left with the sister and a request that the mother contact them. *In re Anthony F.,* 431 A.2d 1361 (Md. 1981). The Supreme Court of Colorado has held that a *Miranda* warning does not have to include a statement that the juvenile defendant may terminate the questioning at any time. The voluntariness of a statement need only be proved by a fair preponderance of the evidence. *People in Interest of M.R.J.,* 633 P.2d 474 (Colo. 1981). A California court has held that a store detective is not required to give *Miranda* warnings for interrogation of a juvenile in a store's security office. *In re Deborah C.,* 635 P.2d 446 (Cal. 1981). The Florida Court of Appeals has held that a juvenile should have been given his *Miranda* warnings before requiring the juvenile to explain his presence in an alley at 2:45 a.m. The statement was suppressed. *B.R.S. v. State of Florida,* 404 So.2d 195 (Fla. 1981). The Minnesota Supreme Court has held that questioning during an investigatory stop of a juvenile generally did not require a *Miranda* warning because the questioning was not custodial in nature. *Matter of Welfare of M.A.,* 310 N.W.2d 699 (Minn. 1981).

In a civil Court of Appeals case in Texas, a juvenile was committed to a drug treatment program as a disposition for delinquency. While at the program, a staff member's car was stolen. Later, without being given a *Miranda* warning, the juvenile admitted to the administrative staff member that he had stolen her car. Her testimony convicted him of the offense and the juvenile appealed stating that he was entitled to a *Miranda* warning. The Court held that *Miranda* warnings are not required by administrative staff members of a drug therapy group to which the juvenile had been committed involuntarily. *In Interest of G.K.H.,* 623 S.W.2d 447 (1981). The Georgia Court of Appeals has held that an adult brother-in-law may stand in the stead of the parents for protecting a child's rights in a police investigation. *Spradley v. State,* 288 S.W.2d 133 (1982). In the Superior Court of Pennsylvania, it has been held that for a statement to be admissible, the juvenile must have had an opportunity to talk to an adult, which adult must be genuinely interested in the juvenile and the adult must be aware of the juvenile's constitutional rights. *Commonwealth v. Rochester,* 451 A.2d 690 (1982). In an Oregon case, the juvenile and father had a private conversation out of the officer's presence. The child confessed details of the burglary to the father. At the juvenile hearing, the child moved to suppress all admissions and confessions. The Court held that while the confession to the father was close in time and location to improper admissions to the police, those circumstances do not automatically require that the exclusionary rule be invoked. *The juvenile contends that the father was an agent of the police when he talked about the burglary.* The Court held that the confession given the boy's father was admissible inasmuch as the father was not acting as an agent of the police and was not under their control. *Matter of McCluskey,* 652 P.2d 812 (1982). In a Tennessee case, the Circuit Court of Appeals held that the presence of a

supportive adult is not necessary if parents are in another state and he refuses to call his custodians. The records showed that the defendant understood his *Miranda* rights, and he intelligently and knowingly waived them. *State v. Gordon,* 642 S.W.2d 742 (1982).

The Supreme Court of Massachusetts has held that for an intelligent waiver by a juvenile, the police must have an informed parent present in most cases. *Com. v. a Juvenile (No. 1),* 449 N.E.2d 654 (Mass. 1983). In an Illinois case, the juvenile never requested an interpreter and conversed entirely in English with the arresting officer. The youth officer and the state's attorney repeatedly stated the juvenile understood his *Miranda* warnings which were given to him. The suppression hearing was held and the juvenile presented testimony of a psychiatrist, two educators and a guidance counselor to support his position that he did not understand the *Miranda* warnings. The Appellate Court said the trial judge had the opportunity to observe the witnesses, their demeanor, candor and sincerity and is in the best position to decide whether a juvenile understood his rights in a given case. The juvenile court ruled there was sufficient evidence to find a valid and intelligent waiver of *Miranda* by the juvenile which finding was affirmed. *In Interest of J.S.,* 460 N.E.2d 412 (Ill. App. 1984). The Supreme Court of Maine has held that the police must advise a juvenile that he may terminate the interview at any time. *State v. Nicholas S.,* 444 A.2d 373 (1982). The Supreme Court of New Hampshire ruled that a juvenile's confession cannot be used in an adult criminal proceeding unless the *Miranda* warning included the possibility of certification to adult court. *State v. Benoit,* 490 A.2d 295 (N.H. 1985). In Alabama, a juvenile's voluntary confession was held admissible at a transfer hearing even though he was not informed of his right to communicate with his parent or guardian, but was given all other *Miranda* warnings. *Barber v. State,* 450 So.2d 470 (Ala. Crim. App. 1984).

In the United States District Court in New York, it has been held that where a magistrate is available, a 7 to 9 hour delay in taking an arrested juvenile before the magistrate is so unreasonable as to require suppression of any statements made by the juvenile during the day. *United States v. Nash,* 620 Fed. Supp. 1439 (D.C., N.Y. 1985). An Iowa court has held that when a child is taken into custody, the focus is sufficiently on him and that a *Miranda* warning becomes necessary. *State v. D.J.K.,* 397 N.W.2d 707 (Iowa 1986). A North Carolina Appellate Court has ruled that a mother cannot waive a 10 year old's *Miranda* rights. *In re Ewing,* 350 S.E.2d 887 (N.C. App. 1986). A Maryland case held that a gesture of the hand of the juvenile pointing to where stolen goods were hidden was inadmissible because not proceeded by a *Miranda* warning. *In re Owen F.,* 523 A.2d 627 (Md. App. 1987). An Illinois Court of Appeals has ruled that a boy interrogated for two hours in a closed and locked squad car was in custody sufficiently to require a *Miranda* warning even though he was told at the end of the interrogation that he was not under arrest. *In Interest of N.E.R.,* 512 N.E.2d 132 (Ill. App. 1987). In Michigan, where the police delayed taking a child to the juvenile court in order to take a statement from him, the Court ruled the statement must be suppressed. *People v. Williams,* 415 N.W.2d 301 (Mich. App. 1987).

Colorado requires warnings be given to *both* the child and a parent or custodian and the presence of the parent or custodian during any questioning

is required. The requirement of the presence of a parent is waived if an attorney is present to represent the child. See *Colo. Rev. Stat. Ann. Section 19-2-210(1)* (1988). In New Jersey, it has been held that for a child's statements to be admissible, the child's words must originate with the child. Yes or no answers to leading questions are inadmissible. *State v. J.S.,* 536 A.2d 769 (N.J. Supp. 1988). An Illinois case holds that when a parent appears at a police interrogation, they must be brought into the interrogation. *People v. Brown,* 538 N.E.2d 909 (Ill. App. 1989). In Alabama, a child asked a police questioner to see his father. It was held improper to persuade the child to wait until after he told the truth. *L.J.V. v. State,* 545 So.2d 240 (Ala. Cir. App. 1989). In a federal case, it has been held that a child must be given his *Miranda* rights whenever he reasonably considers himself to be restrained. *Quartararo v. Mantello,* 715 F.S. 449 (E.D., N.Y. 1989). Off-duty police officer, while working as a private security guard, does not have to give a *Miranda* warning when making a citizen's arrest on a shoplifter. *People in Interest of R.R.,* 447 N.W.2d 922 (S.D. 1989). Where child asserts right to counsel, police cannot circumvent the right by persuading mother to ask questions with police listening in. *In Interest of A.T.S.,* 451 N.W.2d 37 (Iowa App. 1989). A probation officer's interview with juvenile to determine possible placements, and juvenile makes incriminating statements, a *Miranda* warning is not required. Court held the interview was not an "interrogation." *State v. Karow,* (Wisc. App. 1990).

5. Parents Generally May Not Waive a Juvenile's Constitutional Rights. Because of the conflict of interest between the child and parents, only the child should be able to waive his constitutional rights. *In re Collins,* 20 Ohio App.2d 319 (1969). Generally, courts have held a parent's refusal to hire an attorney cannot operate as a waiver of the child's right to counsel. *J.V. v. Superior Court of Los Angeles County,* 4 Cal.3d 836 (Cal. 1971).

   Concerning right to counsel: Right to counsel belongs to the child and the parents may not select the attorney where their interests are hostile. *Wagstaff v. Superior Court,* 535 P.2d 1220 (Alas. 1975). Conflicts of interest may arise where one lawyer represents joint defendants. It has been held that there is a conclusive prejudice whenever a trial court sanctions joint representation by joint defendants by one lawyer without apprising the defendants of the risks involved or without obtaining a knowing waiver of rights to separate counsel by the defendants. See *Holloway v. Arkansas,* 434 U.S. 475, 98 S.Ct. 1173, 55 L.Ed.2d (1978).

   Wagstaff seemed to hold that where express interests of the child and the parents are hostile, the choice of an attorney for the child by the parents might create an irreconcilable conflict. Therefore, the child's choice of counsel in a case must be respected whenever possible. The child may retain an attorney of choice or in the alternative, the court may appoint an attorney for the child.

6. The present adult criminal law is "spontaneous declarations" of the suspect are admissible. The same appears to be true in juvenile proceedings. See *People v. Rodney,* 233 N.E.2d 255 (N.Y. 1967), and *In re Orr,* 231 N.E.2d 424 (Ill. 1967).

7. Constitutional limitations do not apply to juveniles concerning confessions to private and non-law enforcement officials. See *State v. Largo,* 473 P.2d 895 (Utah 1970).

8. The adult guidelines for proper line-up technique are guided by *United States v. Wade,* 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967) and *Gilbert v. California,* 388 U.S. 263, 87 S.Ct. 1951, 18 L.Ed. 1178 (1967). Subsequent to *Gault,* the right to counsel protects juveniles in delinquency proceedings and that right supports the protections in the line-up procedure. See *Jackson v. State,* 460 S.W.2d 319 (Ark. 1970), *Carter v. Carol,* 81 Cal.Rptr. 655 (Cal. 1969), and *In re Holley,* 268 A.2d 723 (R.I. 1970). It should be pointed out, however, that the U.S. Supreme Court's decision in *Kirby v. Illinois,* 406 U.S. 682, 92 S.Ct. 1877, 32 L.Ed.2d 411 (1972), generally indicated constitutional safeguards only apply where a line-up is held "following indictment or other formal charge," i.e., applicable to post-indictment identification procedures. In a recent Pennsylvania case, two juveniles were taken to a police station and were shown to the victim without a line-up and without counsel after the victim had been told by the police they thought they had "the boys." The Court held that the identification procedure was improper because, (1) no line-up was held, (2) it occurred in the absence of counsel, and (3) it was unduly suggestive. *In re Stoutzenberger,* 344 A.2d 668 (Pa. 1975).

IX. INTAKE PROCEDURES

1. Urban juvenile courts often have a complex and organized process for determining which juveniles will be charged and brought before the court. This screening function is usually performed by an intake staff consisting of a specialized staff functioning as a court attached agency or by a separate county or district attorney's office. The local prosecutor traditionally handles intake responsibility in rural juvenile courts.

2. Process of Intake Procedures
   (a) Reports by Citizens
   (b) Law Enforcement Reports
   (c) Probation Staff or Social Agency Review
   (d) Review and Decision by Prosecuting Attorney

3. The better view of intake procedures is that the process includes the police juvenile officer, the probation or juvenile court investigating staff, as well as the staff of the prosecuting attorney for the final decision on appropriate action to be taken. It is my view the court should not be an advocate in the matter and should not be involved in the intake procedure. It was held a juvenile has no right to counsel at the intake conference. *In re S.,* 341 N.Y.S.2d 11 (N.Y. 1973).

4. It should be noted that less than half of all cases of juvenile delinquency referred to juvenile courts are formally adjudicated. Many other instances of delinquency are never referred to court at all. As set forth in the juvenile justice textbook series, *Juvenile Law and Procedure,* by Paulsen and Whitebreak, intake (screening procedures) after arrest is designed:
   (a) To eliminate matters over which the court has no jurisdiction;
   (b) To eliminate cases in respect to which the petition would be insufficiently supported by evidence;
   (c) To eliminate from the process cases not serious enough to require juvenile court adjudication; and
   (d) More controversially, to arrange an "informal adjustment" which may involve a degree of supervision and treatment without the stigma of court adjudication.

5. Concerning *Miranda* rights at intake, see *Massey v. State,* 371 N.E. 703 (Ind. 1978). This case implies *Miranda* warnings must be given by probation officers if a statement is to be subsequently used in criminal court.

6. Case Law Survey

   The Court of Appeals of Washington held that a first offender not charged with a felony has a statutory right to be referred to a diversionary unit, though that unit is not obliged to divert him. *State v. Chatham,* 624 P.2d 1180 (Wash. 1981).

   The juvenile court was found to be the proper authority to screen juveniles for further court action in Oklahoma in the intake process. The Appellate Court held that the legislative delegation of this function to the judicial branch, rather than the executive, was not an unconstitutional usurpation of the executive branch's power. Here it was held that the juvenile court could control intake without a constitutional separation of powers conflict. *State v. Juvenile Division, Tulsa County District Court,* 560 P.2d 974 (Okla. Cr. App. 1977).

   A Maryland statute authorized intake to *divert* a child at intake, unless the victim, the officer or the petitioner expresses disagreement. *In re Kemmo N.,* 540 A.2d 1202 (Md. App. 1988).

X. DIFFERENT INTAKE ALTERNATIVES

1. *No Action Taken:* File kept for future reference.

2. *Communication in Writing:* From the prosecuting attorney's office or probation staff concerning the alleged infraction and admonition of the parents to correct the situation.

3. *Informal Proceedings:* Require parents to come in for a conference and discussion with the probation staff, officers, prosecuting attorney and/or the court. An informal conference sheet should be kept on file for future reference in the event of further difficulty with the juvenile.

4. *Diversion:* A procedure to hold the formal petition in "abeyance" or to "stay" an action taken on the petition. In lieu of action on the petition, the court sets out specific requirements for the juvenile to comply with which often resemble conditions of probation. The requirements are set up for a period of time, typically for one year. If the juvenile successfully complies with the requirements and conditions, the formal petition will be dismissed. If the juvenile fails to comply with the requirements, the formal juvenile petition is reinstated and action will be taken on the same as if no diversion had been offered.

5. *Informal Probation:* Another method of nonjudicial handling of juvenile cases permits informal supervision of the juvenile by probation officers who wish to reserve judgment regarding the necessity for filing a petition until after the juvenile has had the opportunity for some informal treatment.

6. *Informal Adjustment:* Before a petition is filed, an intake officer may give counsel and advice to the parties and impose conditions for the conduct and control of the child which constitutes an informal adjustment. Generally, the juvenile must admit what occurred and that the facts would bring the case within the juvenile court jurisdiction. The child and parents agree to and consent to the informal adjustment with the knowledge that the procedure is not mandatory and the advice and conditions imposed will not extend beyond 90 days or a similar reasonable period of time.

7. *Consent Decree:* A consent decree is a more formal order for case work supervision or treatment to be provided either by the court staff or another agency. It is approved by the judge with the consent of the parents and the child. The court does not make a formal determination of jurisdictional fact or formal disposition. This is another method to ease the caseload of the court. A consent decree should never result in the institutionalization of a child, in my judgment.

8. *The National Advisory Commission on Criminal Justice Intake Standard:* Recommends an intake unit to the family court. The Standard gives the temporary "detention" decision to the intake staff. *Standard 14.2 of the NACCJ.* This is controversial and the better rule is not to take up a temporary "detention" decision until the petition is filed. Further, other than in an emergency situation at night or over the weekend, the judge, rather than staff, should make the temporary detention decision. Most states have strict statutory procedures in this area to insure due process and adequate procedures for adequate substitution for bail.

XI. STATUS OFFENDERS

1. The Theory
   (a) Acts unique to minors and juveniles
   (b) Generally, status offenses refer to noncriminal acts for adults but illegal for children such as truancy, runaways from home, incorrigible, ungovernable, wayward or youths associating with criminals or with notorious and immoral persons.
   (c) Statutory provisions which cover status offenses typically refer to children or persons in need of *supervision* or *care:* MINS, CHINS, PINS, etc.
   (d) Most states provide due process protection to status offenses although the U.S. Supreme Court has not set forth definitive standards in this area. Counsel is generally provided by statute.

2. The trend in the last decade is to *divert* status offenders from the juvenile justice system with some recommendations to completely *divest* the juvenile courts of status offense jurisdiction.

3. Commentary on Status Offender Developments

   It is my observation diversion is already an inherent part of the juvenile intake screening process whereby juveniles may be referred to appropriate agencies and handled without formal court intervention. Whenever possible, status offenders should indeed be diverted from the juvenile court and all other courses of action sought. However, in the event all efforts fail and the juvenile's conduct persistently continues to be detrimental to themselves and society and when all reasonable diversionary efforts have been exhausted, then the juvenile court is still the only reasonable viable alternative for the handling and appropriate placement of status offenders. If status offenders must be placed, they should be placed in special residential treatment areas where they would not be mixed with other offenders. In my view, total diversion is unrealistic and unjustified.

   The American Psychiatric Association responded to the *Juvenile Justice Standards Project* concerning status offenders in their April 1978, report as follows:

> "We are concerned that several references to the so-called status offender in the introduction to the juvenile justice volumes emphasizes that these juveniles are essentially normal young people whose misbehavior is simply a manifestation of their high spirits and understandable drive for independence. Most status offenders never come to the attention of the police or the court. However, those who do, definitely are likely to be the most difficult and severe problems. The effort to divert innocent juveniles from the court to avoid labelling as delinquent is undeniably commendable. But juveniles who are, in fact, behaving in seriously offensive, threatening or self-endangering ways should not be ignored

> in the naive belief that not labelling them will be of substantial benefit. The sloughing of these young people from a formal juvenile court to a community agency may stimulate some prepared communities to develop services, but it may also overwhelm many others which are less prepared and, meanwhile, cause undue tragedy."

The American Psychiatric Association response went on to recommend the establishment of an official, separate and distinct jurisdiction of the juvenile court for status offenders.

Many modern sociologists remain concerned status offenders have the potential for being placed in secure residential treatment or custody often mixed with other types of offenders. In the early development of the juvenile court, the philosophy was to have individualized treatment and to rehabilitate wayward children or status offenders whose parents were unable or unwilling to properly control and direct them. With the limited dispositional alternatives available, status offenders still come into the juvenile court for curfew violation, waywardness and immoral activity. Indeed, even the detractors of the juvenile court having jurisdiction over status offenders, support the idea juvenile courts should assist parental authority and help parents control their adolescent children. Many complaints have always been instituted by parents who have children out of control. Whether the parents are at fault or the child is disobedient and is at fault is largely immaterial in regard to courts attempting to assist status offenders. A further contemporary trend is that children brought to court as status offenders, should be handled as abused, neglected or children in need of care rather than as wayward, miscreant or delinquent. The movement urging decriminalization of status offenders has resulted in the creation of a separate offense jurisdiction in many states. The majority of states now have separated or bifurcated juvenile codes relating to noncriminal misbehavior. Efforts have been made to consider the family as a unit concerning status offenders rather than looking at the child alone or looking at the parents alone.

In the book *Legal Rights of Children,* by Robert M. Horowitz and Howard A. Davidson, (Shepard's/McGraw-Hill Book Company, P.O. Box 1235, Colorado Springs, Colorado), the authors suggest the following alternatives to status offense adjudication:

1. Diversion from the status offense system in favor of referral to appropriate community service agencies.
2. Filing of an abuse, neglect or dependency petition.
3. Guardianship or third party custody arrangements.
4. Voluntary placement in foster care.
5. Custody change in ongoing domestic relations change.
6. Emancipation of the older teenager.
7. Informal adjustment, consent decree or other method of informal probation prior to a court finding.

A 1985 Office of Juvenile Justice and Delinquency Prevention publication entitled *Juvenile Justice Bulletin,* which was not numbered or dated, con-

tains an introduction concerning runaway status offender children by Alfred S. Regnery, the Administrator of the OJJDP. Mr. Regnery made the following striking observations: 'The current attitude of the juvenile justice system towards runaways can be described as one of apathy -- more specifically, apathy by statute. The fault lies behind the well-intentioned passage of the Juvenile Justice and Delinquency Protection Act of 1974. In an effort to correct the ills of a juvenile justice system which incarcerated youth convicted of minor offenses, Congress effectively tied the hands of juvenile authorities, leaving runaways, quite literally, out in the cold. The Act calls for the deinstitutionalization of status offenders, juveniles who commit acts which would not be considered criminal if committed by adults. Truancy and incorrigibility and alcohol consumption are status offenders, as is running away from home. While the motive behind deinstitutionalization was indeed noble, the blanket application of this 'either/or' statute has not been without its darker consequences. Compliance means that the decriminalization of status offenders has been given the indiscriminate force of law. In other words, running away is legal. The question which needs to be asked is whether or not it is in the best interest of children to afford them such a right."

Mr. Regnery pointed out that many runaways find themselves involved in prostitution, crime and are often victimized by adults. I share Mr. Regnery's view that total diversion of status offenders from the juvenile justice system was a mistake and both the federal and state legislative bodies should reevaluate current legislation in this area.

Some excellent articles in this area have been written. See "Status Offenders Need Help Too," *Juvenile Justice,* 1975, Volume 26, No. 1. Also see "Elimination of Status Offenses: The Myth Fallacies and More Juvenile Crime," by Robert L. Drake, *Juvenile and Family Court Journal,* 1978, Volume 29, No. 2; and "A New Approach to Runaway, Truant, Substance Abusing and Beyond Control Children," *Juvenile and Family Court Journal,* 1990, Vol. 41, No. 3B.

4. Status Offenders -- Case Law Survey

The Supreme Court of South Carolina has ruled that a youthful "status offender" who violates a court order can, under "egregious circumstances," be placed in a secure facility. In dealing with juveniles, the Court held that family judges may rely not only on the Juvenile Code but also on their inherent powers which include the power to punish contempt. The Court stated that we acknowledge the legislature's concern with the effects of commingling disobedient children with juveniles who have allegedly committed more serious crimes. However, the legislature has not dealt adequately with the problem of chronic runaways. The Court held that they believe that if family courts were to retain jurisdiction of runaways, they must have the authority to handle them. However, the Court modified this by saying that only under the most egregious circumstances should family courts exercise their contempt power in such a manner that a status offender will be incarcerated in a secure facility. Additionally, the Court indicated the following elements should exist for holding a status offender in contempt:

1. The existence of a valid order directing the juvenile to do or refrain from doing something;
2. The juvenile's notice of the order with sufficient time to comply with it;
3. The juvenile's ability to comply with the order; and
4. The juvenile's willful failure to comply with the order.

In Interest of Darlene C., 301 S.E.2d 136 (S.C. 1983).

An Eighth Circuit U.S. Court of Appeals case held juveniles who are detained on suspicion of committing a status offense are like juveniles accused of committing criminal acts, and are entitled to a prompt probable cause hearing. The Court approved an injunction forbidding juvenile officers in a Missouri Judicial Circuit from denying status offenders such hearings. The Court held:

> "We hold that juveniles who are detained for committing 'status offenses,' as that term is used by the parties in this case, are entitled to probable cause hearings to the same extent as juveniles who are accused of committing criminal acts. It would be anomalous to afford less protection to children who are accused of acts, such as running away, truancy, and the like, which do not present an immediate threat to society, than to children who are accused of such criminal acts as murder, robbery, and rape." *R.W.T. v. Dalton,* U.S. Court of Appeals, Eighth Judicial Circuit, 712 F.2d 1225, *cert. denied* by U.S. Supreme Court, 104 S.Ct. 527.

In North Carolina, an Appellate Court held that noncriminal activities in violation of a valid disposition order of a status offender cannot convert the status offense into a delinquency. *Matter of Jones,* 297 S.E.2d 168 (N.C. App. 1982). A Wisconsin Appellate Court has held that a status offender may be held in contempt and incarcerated if (1) she is given sufficient notice and time to comply with the Order, (2) the violation is egregious, (3) less restrictive alternatives would not be effective and (4) the confinement meets juvenile requirements. *In the Interest of V.G.,* 331 N.W.2d 632 (Wisc. App. 1983). The Florida Court of Appeals has held that even though a status offense is a dependency and not a delinquency, a violation of an order based on the dependency is contempt and the violation is itself a delinquency. *In re A.O.,* 433 So.2d 22 (Fla. App. 1983).

A Mississippi case has held that when there are serious problems of incorrigibility, children may be placed in a residential treatment center, even though they are status offenders. *In Interest of M.R.L.,* 488 So.2d 788 (Miss. 1986). Concerning the status offense of truancy, a Minnesota court has held that school records are admissible in truancy cases without violating the confrontation clause, however, there must be proof not only of absence, but of unexcused absence. Absence is presumed unexcused unless proven excused. *Matter of Welfare of L.Z.,* 396 N.W.2d 214 (Minn. 1986).

In Alabama, an abused child ran away from home to a friend's house and refused to return. The Court held that he was a dependent child *and* a child in need of supervision. *Anonymous v. Anonymous,* 504 So.2d 289 (Ala. App. 1987). The Tennessee Department of Corrections, Division of Youth

Services commingled juvenile "status offenders" with "delinquent offenders" in certain secure correctional facilities. This practice of commingling these different classes of violators was challenged on constitutional grounds. The Appellate Court held that the detention of status offenders in secure facilities operated for delinquents impinges upon the fundamental right of personal freedom. It was noted that the state has a compelling reason to protect status offenders from harm. The practice of commingling status offenders and delinquents was not "precisely tailored" to serve a compelling interest of society and the Court therefore concluded that this practice violated the guarantees of equal protection under both the Tennessee and the United States Constitution. *Doe v. Norris,* 751 S.W.2d 834 (Tenn. 1988).

In South Carolina, the Court held that a status offender could not be held in detention unless first found in contempt. *Matter of Johnny J.,* 387 So.2d 251 (S.C. 1989).

XII. DETENTION, BAIL, AND SHELTER CARE PROCEDURES

1. Whenever possible, a verified juvenile petition should be on file and an expeditious judicial hearing should ascertain whether the juvenile should be placed in detention or shelter care pending further hearing on the merits.

   (a) Intake staff should not have the power to make more than an overnight decision for placement in detention and/or shelter care. This is a judicial function.

   (b) The detention hearing should be set up with procedural safeguards at the earliest possible moment after the juvenile is taken into custody. Both parents and counsel should be present for said hearing.

   All detention hearings should require sufficient evidence to substantiate a finding of "probable cause" that the allegations in the complaint were committed by the juvenile. A United States District Court in Florida has held that pretrial detention of an accused juvenile without a showing of probable cause is unconstitutional. *Moss v. Weaver,* 383 F. Supp. 130 (Fla. 1974). The Louisiana Court of Appeals has held that juveniles are entitled to a probable cause hearing in any situation in which an adult would be entitled to one. *State ex rel. Joshua,* 327 So.2d 429 (La. 1976).

   Holding an accused juvenile in detention simply because he has no parents to care for him is a denial of equal protection. *In re C.,* 345 N.Y.2d 38 (N.Y. 1973). Jeopardy does not attach to a juvenile detention hearing that does not reach the merits of the case. *Locke v. Commonwealth,* 503 S.W.2d 729 (Ky. 1973). Uncorroborated hearsay evidence at a detention hearing is insufficient for finding probable cause to hold a juvenile. *People ex rel. Guggenheim v. Mucci,* 360 N.Y.S.2d 71 (N.Y. 1974). The Colorado Supreme Court has held that prompt juvenile detention hearings apply to neglect and dependency cases as well as delinquency situations. *P.F.M. v. District Court in and for County of Adams,* 520 P.2d 742 (Colo. 1974).

   (c) A Constitutional Right to Bail for Juveniles has not Generally Emerged. An Alaska case held that the right to bail was "unworkable and unde-

sirable from the child's viewpoint." *Doe v. State,* 487 P.2d 47 (Alas. 1971). The courts have generally resolved the issue by finding that an adequate substitute by means of procedural due process and fundamental fairness in the holding of juveniles is sufficient in lieu of bail. Implicit in the adequate substitute theory as formulated by the courts is the proposition that every effort must first be made to place the child in a situation where his freedom will not be curtailed and that his freedom can only be curtailed if there is clearly no alternative available other than detention. Detention criteria have to do with "the probability that the child will appear," "the safety of the child," and other such criteria. Further, implicit in the adequate substitute for bail concept is the proposition that the juvenile be afforded a full hearing before the court, with the assistance of counsel, usually within 48 hours of the apprehension of the juvenile. Juveniles who are detained should be held in separate quarters from adults.

(d) The child should always be placed back in the home whenever possible and detention used only when necessary, compelling and persuasive.

2. Dependent and neglected children should always be placed in foster homes or shelter care. They should not be placed in a juvenile detention facility.

3. Points to consider regarding detention facilities:

(a) Think twice before you build too large a detention facility.

(b) Availability of a detention facility can create a summary and convenient holding of juveniles when other disposition would be to the better interest of the child.

(c) Detention facility administration.

(1) Detention agreements for proper physical care of the facility. This necessitates probation staff screening.

(2) Staff problems -- rotation.

(3) Recreation, tutoring and treatment modalities.

(4) Don't confuse "short-term detention" with "treatment." The shorter the period of detention, the better. Detention is normally more custodial than treatment oriented.

4. Case Survey -- Detention Issues

Bond may be made available to juveniles by state statute, *Interest of Hobson,* 336 So.2d 736 (Miss. 1976). Also see *R. v. Whitmer,* 515 P.2d 617 (Utah 1973), and *In re Appeal for Montgomery County,* 351 A.2d 164 (Md. 1976). In Virginia, state law requires a preliminary hearing within seven days or the juvenile is to be released on his own recognizance. *State ex rel. E.D. v. Aldedge,* 245 S.E.2d 849 (W. Va. 1978). In an Arizona case, the court stated that the record, whether in the form of an affidavit or a description of the circumstances of the offense in the juvenile petition, may suffice to convince a detached judicial officer concerning the existence of probable

However, the mere filing of a petition alleging an act that would constitute a crime if committed by an adult was held to be an insufficient showing of probable cause to issue an arrest warrant or to support an independent judicial determination. *Bell v. Superior Court,* 574 P.2d 39 (Ariz. 1977). In the case of *Moss v. Weaver,* 525 F.2d 1258 (Fla. 1976), it was held that for pretrial detention, there must be a judicial determination of probable cause. This need not be adversarial and it is not required that witnesses be sworn and subject to cross-examination. In Florida, hearsay is admissible and may be relied upon in a detention hearing based on a statute which allows consideration of "all relevant and material evidence even though not admissible at the adjudicatory hearing." *State v. I.B.,* 366 So.2d 186 (Fla. 1979). In the case of *In re Robin,* 579 P.2d 1 (Cal. 1978), the general proposition was upheld that detention should be the exception and not the rule. The purpose of a detention hearing is to ascertain the need for custody.

Crowded dockets do not justify extension of pre-adjudication detention or custody orders beyond statutory limit. *Dexter v. Rakestraw,* 583 P.2d 504 (Okla. 1978). The Superior Court of Appeals of New Jersey has held that the requirement for an adjudicatory hearing within 30 days of detention is simply a reminder to trial judges to move detention cases expeditiously. Whether a trial is held speedily is determined by the length of delay, reason for the delay, prejudice to the juvenile and assertion of the rights. *State in the Interest of C.B.,* 414 A.2d 572 (N.J. 1980). The California Appellate Court has held that it is improper to have an automatic detention for a probation violation. The court held that a disposition for theft may require school attendance, but it cannot provide for detention without a hearing for nonattendance. *Matter of Gerald Allen B.,* 164 Cal. Rptr. 193 (Cal. 1980). The Supreme Court of Oregon has held that a child cannot be held in detention unless the court finds probable cause to believe that the child committed the offense alleged in the petition. *Application of Roberts,* 622 P.2d 1094 (Ore. 1981). The Colorado Supreme Court has held that a juvenile may be held without bail to prevent harm to himself or others, or may be released on bail if it will guarantee his return for hearing. *L.O.W. v. District Court,* 623 P.2d 1253 (Colo. 1981).

A Federal court has held that a statutory scheme which empowers the state to have juveniles incarcerated for as long as five days without the state having established a justification for their being held constitutes a punitive measure offensive to due process. *U.S. ex rel. Martin v. Strasburg,* 513 F. Supp. 691 (N.Y. 1981). The Court of Appeals of Florida has held that a child who is truant in violation of the condition to an order which found the child dependent may be detained in secure custody *for the delinquency charge of contempt. D.H. v. Polen,* 396 So.2d 1189 (1981). The Supreme Court of Louisiana has held that juveniles in that state are entitled to bail pending adjudication when they are presumed innocent but not entitled to bail pending appeal when they have been found guilty. *State in Interest of Banks,* 402 So.2d 590 (La. 1981). The New Hampshire Supreme Court has held that a finding of probable cause is not statutorily required for detention before arraignment, but failure to find probable cause after arraignment will result in suppression of any statements made while detained. *In re Vernon E.,* 435 A.2d 833 (N.H. 1981).

The North Dakota Supreme Court has held that a statute cannot constitutionally allow a juvenile supervisor to order a child removed from his home for 30 days notwithstanding the fact that the child was alleged to be "deprived" and notwithstanding the fact that a deprived child must be removed from the home environment to protect the child's health and safety. The Court held that due process requires, at the very minimum, an informal detention hearing on the temporary custody order. The Court pointed out that under the statute, the juvenile supervisor would be able to act in exigent circumstances when a child had to be quickly removed from a home. However, once a child has been removed, due process further requires that some procedural safeguards be used to test the necessity of the removal, to inform the parents of the reasons why the child was removed, and to permit the parents to respond. *Anderson v. H.M.,* 317 N.W.2d 394 (1982). The Oregon Court of Appeals has held that for purposes of holding a child in detention pending adjudication, a child is entitled to a probable cause hearing, but failure to provide said hearing does not require a reversal of conviction. Therefore, the Court held that independent of whether the child's pre-adjudication detention was unlawful, he is not entitled to reversal of the juvenile court's ultimate determination. *Matter of Wick,* 644 P.2d 630 (1982).

In Arizona, seven juveniles surrendered themselves pursuant to an agreement between their attorney and the police and a detention hearing was commenced just a few hours later where a different attorney was appointed over the protest of the juveniles and the appointed attorney. The Court proceeded forthwith with a detention hearing of all seven juveniles together, though they were charged with different offenses, and over the objection of the appointed attorney that she had not had time to prepare for the hearing. During the hearing, the juveniles' own attorney appeared but was not allowed to represent them because it would delay the hearing. The Appellate Court held that the Court erred and that it should have allowed the attorneys adequate time to prepare. The Court concluded that the petitioners were denied a fundamental right when the hearing proceeded with the court-appointed attorney who had no opportunity to interview her clients or otherwise prepare for the hearing. *Perkins v. Helm,* 644 P.2d 1323 (Ariz. 1982). In West Virginia, a juvenile had formal proceedings started against him and a warrant was issued at the time of the detention hearing. The juvenile contended that he had an absolute right to have counsel appointed for him at that detention hearing. The Supreme Court noted that the West Virginia statute gave juveniles the right to counsel at the preliminary hearing but gave no such guarantee at a detention hearing unless a preliminary hearing was held in conjunction with the detention hearing. The Court noted that formal proceedings had not been instituted and that the juvenile petition was filed after the detention hearing and counsel was properly appointed at that time. *Arbogast v. R.B.C.,* 301 S.E.2d 827 (1983). In Indiana, it has been held that failure to hold a detention hearing within the required time is not jurisdictional. *Gerrick v. State,* 451 N.E.2d 327 (Ind. 1982).

The Supreme Court of West Virginia has held that at a detention hearing, a child has (1) a right to counsel, (2) a presumption of release, (3) the application of known standards in determining whether he will be held, (4) the right to bail and (5) written findings explaining restrictive orders. This, of

course, was based upon state statute whereby the juvenile had a right to bail pursuant to state law. *State ex rel. M.C.H. v. Kinder,* 317 S.E.2d 151 (W. Va. 1984). A Superior Court of Pennsylvania has held that the failure to hold a timely detention hearing allows release from detention but does not require dismissal of the petition. *In re Kerr,* 481 A.2d 1225 (Pa. Super. 1984). In Maine, it was held that a judge can be suspended for holding a juvenile in detention for six weeks without a hearing. *Matter of Benoit,* 487 A.2d 1158 (1985). The Illinois Court of Appeals has ruled that failure to provide counsel at a detention hearing is not reversible error if the child was so obviously detainable that counsel could not have changed the result. *In Interest of M.L.K.,* 483 N.E.2d 662 (Ill. App. 1985). The Arizona Supreme Court has ruled that when a statute requires a detention hearing within 24 hours, the time starts running when the intake officer determines that detention is necessary, unless he has taken an unreasonable time to decide. *State v. Newman,* 716 P.2d 419 (Ariz. App. 1986). By statute in Pennsylvania, a detention center is not liable for the acts of violence of a boy who escaped even though the center knew he was of a violent nature. *Mascaro v. Youth Study Center,* 523 A.2d 1118 (Pa. 1987).

A unique question was raised in Rhode Island where the Family Court Justice ordered the detention of a 13-year-old in the Training School for Girls while awaiting a hearing on an alleged petition by the Department of Children and Families alleging the juvenile had been disobedient. The Rhode Island statute provided that no juvenile could be held at a training school unless facing a felony or misdemeanor if committed by an adult. A disobedient act was not considered delinquent conduct. This juvenile had a history of being a habitual runaway exhibiting continual suicidal tendencies. The Appellate Court reasoned, at common law, suicide was a serious felony and recognized there should be some facility to hold a child temporarily and protect the child when they threaten suicide. On an emergency basis, it was held the Court had the power to detain the child in such a training facility notwithstanding the statutory restraints. The Court found no error in the temporary detention of this 13-year-old child under these circumstances. *In re Marlene R.,* 540 A.2d 1028 (R.I. 1988). In Alaska, the statute requires first-hand testimony to justify detention. At a hearing, hearsay testimony from an abuse victim to a police officer was taken to justify the detention and validity of the detention came to issue. The Appellate Court stated there were insufficient circumstances to justify a violation of the statute. The Court noted the state didn't claim exigent circumstances or ask the Court to make special findings. The detention was held improper. *D.G. v. State,* 754 P.2d 1128 (Alaska App. 1988). In Arizona, a statute requires sworn evidence to support a court order for detention. At a pretrial detention hearing, the Court reviewed a sworn statement by a prosecutor based on an unsworn statement by the arresting police officer. The Appellate Court ruled this did not constitute sworn evidence but was based upon hearsay. The detention was improper. *J.V.-114246 v. Superior Court,* 767 P.2d 705 (Ariz. App. 1988).

In New Jersey it has been held the state may not hold juveniles committed to the training school in county detention facilities because the training school is full. *County of Monmouth v. Dept. of Corr.,* 566 A.2d 543 (N.J. 1989).

In Illinois, a court ruled that failure to provide a speedy detention hearing does not require release or dismissal. *People v. Holcomb,* 348 N.E.2d 613 (Ill. 1989). It was held in Ohio if children are voluntarily placed with an agency, there is no requirement for an early detention hearing. *In re Pachin,* 522 N.E.2d 655 (Ohio 1990).

XIII. TRANSFER TO ADULT COURT, CERTIFICATION, WAIVER, FINDING OF NON-AMENABILITY

1. The area of transfer, waiver and non-amenability is a complex area of the juvenile law and merits an entirely separate program of instruction in the National College of Juvenile and Family Law. I have included a general introduction and a case survey in this outline.

The decision to waive jurisdiction and certify a juvenile as an adult is a profoundly important one. Statutory waiver provisions vary widely from state to state but most states only allow waiver over a certain age. Some states provide either prosecutorial discretion or automatic waiver for juveniles over a certain age or if previously convicted of serious offenses or if the juvenile is charged with particularly serious crimes. Likewise, state laws vary greatly concerning due process provisions in transfer or waiver proceedings. Some transfer statutes set forth a laundry list of factors to consider before making the waiver decision and others are more vague allowing transfer if the juvenile is not amenable to the juvenile court and its existing facilities for treatment. Some statutory schemes require the application of rigid rules of evidence at the transfer hearing but many relax the rules and allow hearsay if it is deemed reliable.

(a) As previously discussed, *Kent* established constitutional guidelines and authorities concerning the transfer procedure under the Washington, D.C. statute applicable in that case. Subsequent court decisions indicate courts do not accord retroactive effect to *Kent. Mordecai v. United States,* 421 F.2d 1133 (D.C. 1970).

(1) *Kent* held that transfer proceedings are a critically important proceeding. To make a valid transfer order, the juvenile court must perform a "full investigation." A waiver hearing is required and the court must make findings and conclusions. Generally, it is not necessary to determine if the juvenile actually committed the crime. *State v. Bauer,* 193 P.2d 999 (Ore. 1948).

(2) The National Advisory Commission on Criminal Justice Standard recommends the family court has the authority to transfer certain juvenile offenders for adult trial. The Standard generally follows the guidelines of *Kent. Standard 14.3 of the NACCJ.*

2. TRANSFER CASE SURVEY

An Ohio Court held a valid transfer requires a showing of reasonable grounds to believe the minor cannot be rehabilitated in juvenile facilities. *State v. Carmichael,* 298 N.E.2d 586 (Ohio 1973). In Colorado, the District Attorney has the right to prosecute certain designated juveniles as adults under

the statute, without a transfer hearing. *Myers v. District Court for Fourth Judicial District,* 518 P.2d 836 (Colo. 1974). In Illinois, the state's attorney has the power to decide whether youths should be prosecuted as juveniles or adults. *People v. Sprinkel,* 307 N.E.2d 161 (Ill. 1974). The Wisconsin Transfer Statute, giving the juvenile judge discretion to determine waiving juvenile court jurisdiction on the basis of whether it is in the best interest of the child or the public, has been held constitutional. *In re F.R.W.,* 212 N.W.2d 130 (Wisc. 1973). The U.S. Court of Appeals held the prosecutor need not show probable cause when a juvenile is transferred to a criminal court. *United States ex rel. Bombacino v. Bensinger,* 498 F.2d 875 (Ill. 1974). The Indiana Court of Appeals ruled that hearsay evidence is admissible and the Fifth Amendment privilege against self-incrimination is not applicable in transfer hearings. *Clemons v. State,* 317 N.E.2d 859 (Ind. 1974). The Illinois Appellate Court ruled that Illinois law making it unnecessary to hold a transfer hearing for a juvenile who has been moved to adult court by the state's attorney is constitutional. *People v. Lane,* 330 N.E.2d 149 (Ill. 1975).

U.S. Eighth Circuit Court of Appeals found no denial of due process in the reviewable discretion by the county attorney in proceeding against a juvenile as an adult without an evidentiary hearing. *Russell v. Parratt,* 534 F.2d 1214 (1976). Although state statutes change, here are some examples of statutes that have allowed prosecutorial discretion in the transfer decision: Nebraska authorizes the prosecutor to make the transfer decision. Neb. Rev. Stat. 43-202.02 (1976). The U.S. Attorney in the District of Columbia has this discretion, D.C. Code Ann. 16-2301(3)(A)(1973). Maryland grants the criminal court discretion for transfer, Md. Ann. Code Art. 27, 594A (1975). Arkansas allows discretion by both the prosecutor and the appropriate court to decide whether a case is to be handled as a juvenile or a criminal matter. Ark. Stat. Ann. 45-418 (1975).

The Superior Court of Hawaii held an order certifying a juvenile to the adult criminal system can only be made after there has been a full investigation, a hearing with counsel for the child and findings by the judge stating the relevant facts and his reasons for granting the order. *In Interest of Doe,* 606 P.2d 1326 (Haw. 1980). A Superior Court of Minnesota held a juvenile court may not grant certification and then stay its execution on condition of participation in a juvenile program. *In re Welfare of K.P.H.,* 289 N.W.2d 722 (Minn. 1980). The Court of Appeals of Hawaii held that at a certification hearing, the charge may be presumed true without any showing of probable cause that the offense was committed and that the juvenile participated in the commission. The finding was there was no constitutional right to a probable cause showing. *In Interest of Doe,* 617 P.2d 830 (Haw. 1980). The Supreme Court of Minnesota held when a 17-year-old charged in a juvenile court eludes reasonable attempts to find and prosecute him until he is 21 years old, he becomes an adult for prosecution in the adult court without the need for certification. *Matter of Welfare of S.V.,* 296 N.W.2d 404 (Minn. 1980).

The Supreme Court of North Dakota ruled that at a certification hearing, hearsay is admissible about whether the juvenile is amenable to treatment, but not about whether there is probable cause to believe the juvenile was

involved in the offense charged. *In Interest of P.W.N.,* 301 N.W.2d 636 (N.D. 1981). The Supreme Court of Virginia ruled hearsay is admissible at a certification hearing since it is not adjudicatory. Further, the court ruled the juvenile is not entitled to a jury trial to decide if he should be certified to adult court. *In re E.H.,* 276 S.E.2d 557 (Va. 1981). The Court of Appeals of Wisconsin held for the purposes of determining if there is "prosecutive merit," the court in a certification hearing, may consider evidence which was illegally obtained if it is reliable. *In Interest of D.E.D.,* 304 N.W.2d 133 (Wisc. 1981). The Ninth Circuit Court of Appeals held that a social investigation is not required by due process as a prerequisite to certification. *People of Guam v. Kinsbury,* 649 F.2d 740 (Guam 1981). The Superior Court of Pennsylvania held that prior to hearing a motion for certification, a court may require a child to cooperate in a psychiatric evaluation to determine whether the child is mentally ill. *Commonwealth v. Datsun,* 429 A.2d 682 (Pa. 1981). A United States District Court held that a juvenile may be committed for a psychiatric evaluation and compelled to respond to the interviewers, but *his responses may not be used to support certification. U.S. v. J.D.R.S.,* 517 F. Supp. 69 (N.Y. 1981). A civil appeals court of Texas held that in a certification proceeding, the child is not entitled to a hearing as to whether he was mentally competent to be responsible for the offense. *T.P.S. v. State,* 620 S.W.2d 728 (Tex. 1981). The Kansas Court of Appeals has held the court's inability to control the release date from the state training school may not be considered in determining whether the child is amenable to juvenile programs. *In Interest of Hobson,* 636 P.2d 198 (Kan. 1981). The Maryland Supreme Court held the "preponderance of evidence" standard is constitutional for certification, even though "reasonable doubt" is required for adjudication. *In re Randolph T.,* 437 A.2d 230 (Md. 1981).

It should be noted there is a split in authority on whether a juvenile transfer order is a final appealable order. For example, the Minnesota Supreme Court has ruled that a transfer order is *not* a final appealable order. *Welfare of A.L.J. v. State,* 220 N.W.2d 303 (Minn. 1974). The New Mexico Court of Appeals held a transfer order from juvenile court to adult court *is* a final appealable order. *In re Doe,* 519 P.2d 133 (N.M. 1974).

In an Arizona case, the Supreme Court held that the failure of the police to warn a child of possible certification did not prevent certification of the child as an adult if the child was able to understand his rights and intelligently waived them. The Court rejected the juvenile's claim that the transfer was constitutionally infirm because he was not specifically advised of the possibility of criminal prosecution as an adult. The Arizona Court cited other appellate courts that have held similarly as follows: *People v. Prude,* 363 N.E.2d 371 (1977), *State v. Luoma,* 558 P.2d 756 (1977), *State v. Loyd,* 212 N.W.2d 671 (1973), *Edwards v. State,* 608 P.2d 1006 (1980). The Supreme Court of Indiana held the state is not required to prove probable cause beyond a reasonable doubt in a certification hearing inasmuch as that would amount to a trial on the merits. The Court further held that the burden is on the juvenile to show there are adequate dispositional alternatives in the juvenile justice system to avoid certification. *Trotter v. State,* 429 N.E.2d 637 (1981). The Supreme Court of Wisconsin held that the petition alone is sufficient to show probable cause, but the state must present evidence to

justify the certification itself. *In Interest of T.R.B.,* 313 N.W.2d 850 (1981). The Court of Appeals of New Mexico ruled that a juvenile court may require a child to submit to psychiatric testing to determine competence prior to a certification order. *State v. Doe,* 639 P.2d 72 (1982).

The Supreme Court of Colorado held a statute may constitutionally empower the prosecutor to decide whether a child will be prosecuted in the juvenile or adult court. *People v. Thorpe,* 641 P.2d 935 (1982). The Maryland Supreme Court held that statutory presumption of guilt in a certification proceeding is constitutional since the issue of guilt will be fairly tried at a later hearing and there is no constitutional right to juvenile treatment. *In re Samuel M.,* 442 A.2d 1072 (1982). The Illinois Court of Appeals held a child should not be certified if he needs long-term psychiatric help that he can get as a juvenile but not as an adult. *In Interest of R.L.L.,* 435 N.2d 904 (1982). In Alaska, a minor was found in possession of a small quantity of marijuana in school. The penalty for adults was a fine. The juvenile moved for certification without showing cause. The motion was denied and the juvenile court, as a disposition after the juvenile adjudicatory hearing, placed him on probation with five days in the youth center as a condition of probation. The Supreme Court of Alaska held that (1) a juvenile cannot waive jurisdiction *ex parte* but may move for certification if he can show probable cause for granting it; (2) A juvenile disposition may be more severe than an adult sentence for a similar offense without denial of equal protection; and (3) Incarceration, even in a juvenile facility *cannot be made a condition of probation. M.O.W. v. State,* 645 P.2d 1229 (1982). In a South Dakota case, a juvenile was *not* warned at the police interrogation that he might be tried as an adult and any statements could be used against him in the adult court. The Court held that before a juvenile, who will be tried as an adult, waives his constitutional right to counsel and against incrimination, the juvenile must be given notice that he may be tried as an adult. *State v. Lohnes,* 423 N.W.2d 409 (1982).

The Indiana Court of Appeals held that hearsay is admissible at a certification hearing. *Jonaitis v. State,* 437 N.W.2d 140 (1982). The Illinois Court of Appeals held a juvenile cannot be certified to adult court unless it is shown the juvenile court does not have facilities which can benefit the juvenile. *In Interest of M.D.,* 441 N.E.2d 122 (1982). The Wisconsin Supreme Court held that before the juvenile can be allowed to consent to certification, the judge should question him personally as to whether he understands his right to contest the proceedings and the consequences of being certified to the adult court. The presence of counsel at said consent alone is insufficient. *In Interest of T.R.B.,* 325 N.W.2d 329 (1982). The Arizona Court of Appeals held the burden of proof for a juvenile certification hearing is a "fair preponderance of the evidence." *Matter of Appeal in Maricopa County,* 654 P.2d 39 (1982). The Alabama Court of Appeals ruled a court can find a juvenile unamenable to treatment in juvenile facilities even though it is the first offense and when no juvenile facility has ever been tried. The probation report offered the opinion that in order to protect the community and attempt to get the juvenile to change his behavior, the only alternative was to place him in the adult system where the penalties are stronger. The Supreme Court held that in light of this probation officer's report and the Court's finding

that the appellant is now 18 years of age and was within three months of his eighteenth birthday when the alleged offense occurred, the judge's determination that the appellant would not benefit by the juvenile court treatment was valid. *Sanborn v. State,* 421 So.2d 1373 (1982).

The Wisconsin Court of Appeals held a juvenile does have some limited discovery rights before a certification hearing is held. The Court held that a juvenile does not have the same full discovery rights prior to the prosecutive merit portion of a waiver hearing afforded to a criminal defendant prior to trial. However, all materials relating to the juvenile's personality and past history are discoverable inasmuch as the court must consider these factors in deciding whether to order waiver, assuming prosecutive merit has been found. *In Interest of T.M.J.,* 327 N.W.29 198 (1982). The Washington Supreme Court held that a checklist finding concerning certification may be used only if these findings are supported by adequate detail particularizing the case. The Court looked at the entire record including the court's oral opinion, to determine the sufficiency of the court's reasoning to decline jurisdiction and waive the child to adult court. The Court stated that while the lack of written findings were not fatal in the case, the Court did not approve of this omission. *State v. Holland,* 656 P.2d 1056 (1983). In a United States District Court case in Wyoming, the Court held that if the record indicates a juvenile can be rehabilitated by juvenile facilities, he should not be certified as an adult even for the crime of murder. This was a case where federal jurisdiction came into play concerning a native American Indian. Notwithstanding the serious crime of murder, the Court held the juvenile's potential for rehabilitation was excellent, there was slight risks for further bloodshed, that his prospects for the future were good if placed in facilities in the juvenile court and a transfer of the juvenile to adult court would not be in the interest of justice. *United States v. B.N.S.,* 557 F. Supp. 351 (1983).

In an interesting case in New Mexico, the Court of Appeals ruled that a child is not put in jeopardy at a transfer hearing; therefore a trial court, based upon substantial competent evidence, may certify a juvenile as an adult even after having previously denied a motion to certify. *State v. Doe,* 659 P.2d 912 (1983). The Texas Court of Appeals held that since a certification hearing is not an adjudication of guilt or innocence, Fifth Amendment rights are not applicable and therefore a psychological report can be considered even though no *Miranda* warning was given before the testing. *A.D.P. v. State,* 646 S.W.2d 568 (1983). The Texas Court of Appeals ruled a police officer with academic training in psychology and sociology may give his opinion as to whether a child should stand trial in adult or juvenile court. *Kirkwood v. State,* 647 S.W.2d 49 (1983). The Massachusetts Supreme Court held the test for admission of evidence at a certification hearing is "fundamental fairness" and not the strict rules of hearsay. *Commonwealth v. Watson,* 447 N.E.2d 1182 (1983).

Justice Charles Springer of the Nevada Supreme Court wrote a decision setting forth unique rules for deciding when to transfer juveniles to the adult system. The thrust of this opinion plows new ground taking the position that society's interest, not the child's, is paramount in the transfer. The Court stated that juvenile courts owe their chief allegiance to the public good and

not to the "best interests of the child." The Court indicated public interest and safety require some juveniles be tried as adults, regardless of the impact on the child and the opinion went on to say that once transfer is justified on the basis of public interest and safety, there is no need to consider the "best interests of the child" or the use of amenability to treatment in the juvenile court system except insofar as such considerations bear on the public interest. With community protection as a guiding principle to be considered in transfer proceedings, subjective evaluations and prognostications as to whether a given youth is or is not likely to respond favorably to juvenile court treatment will no longer be the Court's primary focus in transfer proceedings; rather, the dispositive question to be addressed by the Court is whether the public interest requires the youth be placed within the jurisdiction of the adult criminal courts. The Court indicated the nature and seriousness of the crime upon which the transfer proceeding is based may be such that transfer could be based on this factor alone. This was qualified however, by saying only the most heinous and egregious offenses would fall into this category. The Court summarized by enumerating indicated procedures in transfer matters. *Matter of Seven Minors,* 664 P.2d 947 (Nev. 1983).

A Texas Court held a certification hearing may be delayed beyond the statutory limit if the delay is needed to obtain the necessary diagnostic study. *In the Matter of D.L.H.,* 649 S.W.2d 826 (Tex. App. 1983). In a certification hearing in another Texas case, a statute providing for the right of privacy as to psychiatric evaluations must yield to a statute authorizing the Court to order and consider psychiatric evaluation in the transfer decision. *Proctor v. State,* 650 S.W.2d 465 (Tex. App. 1983). A Massachusetts Appellate Court held that in a certification hearing, findings which fail to discuss family, school, social history or previous treatment efforts are insufficient under the statute. *Commonwealth v. A Juvenile,* 450 N.E.2d 1089 (Mass. App. 1983). In an Iowa case, the Court ruled the state was required to prove a violent child was not amenable to juvenile treatment facilities prior to certification. *In Interest of T.D.,* 335 N.W.2d 638 (Iowa App. 1983). The Texas Court of Appeals ruled that an alleged denial of due process at the certification hearing cannot be raised for the first time at an appeal from the conviction in adult court. *McBride v. State,* 655 S.W.2d 280 (Tex. App. 1983). A Nebraska case held certification is determined by balancing public protection against the needs of the juvenile and the practicality of rehabilitation. *State v. Alexander,* 339 N.W.2d 297 (Neb. 1983).

The Arizona Court of Appeals has ruled that a certification as unamenable to juvenile treatment cannot be based on the juvenile's refusal to cooperate in a psychological evaluation when no protection was given as to the use of his answers in an adult trial. *Matter of Appeal in Pima County Juv. Action,* 679 P.2d (Ariz. App. 1984). The Texas Court of Appeals ruled a child is not entitled to counsel at public expense to appeal a certification order if his social security income and his stepfather's earnings are sufficient to pay counsel fees. *Mitchell v. Baum,* 668 S.W.2d 757 (Tex. App. 1984). The Supreme Court of Nevada ruled a juvenile is entitled to an informal hearing to present his response to allegations of prosecutive merit. The Court stated prosecutive merit exists if there is evidence upon which a grand jury would

be expected to return an indictment, that is, when probable cause exists to believe the subject juvenile committed the charged felony. *Matter of Three Minors,* 684 P.2d 1121 (Nev. 1984). The Supreme Court of Wisconsin held the state has the burden of proof but may submit its case on the file including a confession. If the child's evidence challenges the confession, the state must prove its validity in a certification hearing. The certification hearing in Wisconsin must be based upon appropriate prosecutive merit. *In Interest of J.G.,* 350 N.W.2d 668 (Wisc. 1984). Concerning the question of certification, the Washington Court of Appeals held it is not discriminatory to treat a girl the same as a boy even though the girl is pregnant. *State v. Toomey,* 690 P.2d 1175 (Wash. App. 1984).

In Arizona, a juvenile signed himself into a mental hospital the night before his certification hearing. The question was raised on appeal as to whether the Court erred in certifying the juvenile as an adult when the juvenile was not present. The appellate court indicated the juvenile court was in a difficult bind and held that although the Court may proceed in the absence of the juvenile at a certification hearing, the Court has every right to issue a bench warrant for the arrest of the juvenile, if it considers the juvenile's absence improper. In this instance, the juvenile was not arrested and effectively blocked the validity of the certification order. *Appeal of Maricopa County Juvenile,* 709 P.2d 1375 (Ariz. App. 1985). In Pennsylvania it was held that a court to whom a child is certified as an adult cannot "decertify" the child back to the juvenile court. The Appellate Court held the issue of the appellant's nonamenability to treatment within the juvenile court system had been determined at the certification hearing and that determination was final and could not be relitigated in another co-equal court. *Com. v. Madden,* 492 A.2d 420 (Pa. App. 1985). In Pennsylvania, a juvenile cannot be held non-amenable to juvenile treatment if his rehabilitation would require more time than is available to the juvenile court. *Com. v. Zoller,* 498 A.2d 436 (Pa. App. 1985). The Wisconsin Court of Appeals ruled during a certification proceeding, the court may require a child to submit to a mental status examination and is not required to suspend proceedings on determination of a mental commitment petition. *In Interest of G.B.K.,* 376 N.W.2d 385 (Wisc. App. 1985). In Minnesota, the petition and police report are sufficient to make the state's *prima facie* case of probable cause that the child committed the offense in a certification hearing. *Matter of Welfare of T.S.E.,* 379 N.W.2d 99 (Minn. App. 1985).

The Arizona Supreme Court ruled a juvenile cannot be certified to the adult court because he is unable to pay the restitution prior to becoming an adult and out of juvenile court jurisdiction. *Matter of Pima County Juvenile Action,* 716 P.2d 404 (Ariz. 1986). Concerning burden of proof in a certification hearing, a New Jersey Appellate Court ruled the state must prove probable cause for a certification hearing, but after the probable cause burden is met by the state, the juvenile has the burden to prove he can be rehabilitated in juvenile court. *State in Interest of S.M.,* 12 A.2d 570 (N.J. App. 1986). The Alaska Supreme Court ruled that in determining certification, the results and efficacy of adult facilities are irrelevant. *State v. J.D.S.,* 723 P.2d 1278 (Alas. 1986). In another Alaska decision, it was held the burden of proof for certification is by a fair preponderance of the evidence. *W.M.F. v. State,*

723 P.2d 1298 (Alas. App. 1986). In Minnesota it was held where the offense charged includes acts before the minimum age as well as acts after the minimum age, only the acts after the minimum age may be certified. *State v. Anderson,* 394 N.W.2d 813 (Minn. App. 1986). Alabama held a mentally retarded child who has "streetwise intelligence" can be certified for adult trial. *Williams v. State,* 494 So.2d 887 (Ala. App. 1986). A Minnesota Appellate Court has ruled since treatment as a juvenile is a child's right, it can be waived by a child who desires a jury trial as an adult. *Matter of Welfare of K.A.A.,* 397 N.W.2d 4 (Minn. App. 1986). In another Minnesota case it was held that at a certification hearing the "charge" is assumed to be true thus establishing a *prima facie* proof of dangerousness. *Matter of Welfare of S.R.L.,* 400 N.W.2d 382 (Minn. App. 1987).

In Oklahoma, the Circuit Court held that where the petition is brought in adult court and the juvenile desires to be certified to the juvenile court, the juvenile has the burden of proving he can be rehabilitated by the juvenile system in the time left to it. *State v. Woodward,* 737 P.2d 569 (Okla. Cir. 1987). Minnesota has ruled unamenability of the juvenile to be treated under the juvenile code cannot be based solely on the opinion of the probation officer but must be supported by psychological data, history of misconduct or dangerousness of the offense. *Matter of Welfare of R.D.W.,* 407 N.W.2d 113 (Minn. App. 1987). In a New Jersey certification hearing, by both inherent powers of the court and by local rule, the juvenile court, in its discretion, has the power to appoint an expert whenever it concludes a disposition of an issue will be assisted by expert opinion. In making the decision, the Court must balance competing interests, the expense the public would bear compared to the value of the testimony of the witness. Here, it held the juvenile had no constitutional right to a psychiatric expert at a certification proceeding. *State v. R.G.D.,* 527 A.2d 834 (N.J. 1987). An Oklahoma case held that a plea of guilty in adult court does not waive a jurisdictional deficiency in a certification proceeding. *M.L.R. v. State,* 740 P.2d 1201 (Okla. Cir. 1987). In Minnesota, if a juvenile requires security and no secure placement is available, the child must be certified for unamenability to juvenile treatment. *In the Matter of the Welfare of D.R.D.,* 415 N.W.2d 419 (Minn. App. 1987). In Wisconsin, the Court of Appeals ruled that in determining whether to certify, the juvenile court cannot speculate on what the adult sentence might be. *In Interest of C.W.,* 419 N.W.2d 327 (Wisc. App. 1987).

In Illinois, a juvenile court ruled the juvenile should stand trial as an adult on attempted murder of his mother. At the certification hearing, the judge did not have the benefit of a social history investigation, a psychiatric evaluation of the child, or hear testimony as to the existence of treatment or rehabilitative facilities available to the juvenile court. The Appellate Court ruled the record did not establish the child's social adjustment, school adjustment or mental and physical health. Therefore, the court held the evidence as to the defendant's history was inadequate to support a transfer or certification determination. *People v. Langston,* 522 N.E.2d 304 (Ill. App. 1988). In a federal case, it was ruled that notwithstanding the seriousness of the offense, a juvenile cannot be certified unless there is proof that no adequate programs exist in the juvenile system. *U.S. v. A.J.M.,* 685

F. Supp. 1192 (N.M. 1988). A Minnesota Court ruled a child may be certified as an adult for the sole reason that the public safety is not served by retaining him in juvenile court. The dissent felt the majority's conclusion was wrong because they relied emphatically and singularly on the circumstances of the offense and the age of the offender alone. *Matter of Welfare of J.L.B.*, 435 N.W.2d 595 (Minn. App. 1989). In West Virginia, the juvenile court certified the juvenile even though experts testified juvenile programs could rehabilitate the child and that adult incarceration would be far more helpful. The Appellate Court affirmed the certification. *In Interest of H.J.D.*, 375 S.E.2d 576 (W.Va. 1988).

In Vermont, it was held the adult court cannot require the child to admit the charge as a condition of remanding the case to the juvenile court. *State v. Smail,* 560 A.2d 955 (Vt. 1989). In an Ohio certification hearing, the court held the juvenile could not reject the court's psychiatrist and require the court to appoint a different one. *State ex rel. A Juvenile v. Hoose,* 539 N.E.2d 704 (Ohio App. 1989). In Georgia, an appellate court ruled a juvenile can be certified as an adult for public safety even though he is amenable to treatment in juvenile facilities. *In Interest of R.J.,* 382 S.E.2d 671 (Ga. 1989). In Alaska, it has been held that it is an unconstitutional violation of self-incrimination to require a juvenile to submit to a psychiatric examination to be used to determine whether he should be certified as an adult. *R.H. v. State,* 777 P.2d 204 (Alas. App. 1989).

It has been ruled in Wisconsin that when an offense is certified, it carries with it all other offenses within the same event. *State v. Karow,* 453 N.W.2d 181 (Wisc. App. 1990). In Oklahoma, the state has the burden of proving the child is not amenable to juvenile treatment. *W.C.P. v. State,* 791 P.2d 97 (Okla. Cir. 1990). In Massachusetts, the court held it was proper for the judge to consider a lack of remorse on the part of the juvenile in the certification decisions. *Ward v. Com.,* 554 N.E.2d 25 (Mass. 1990). In Nebraska, the court held certification requires a balance between the public's right to protection and the chances of rehabilitating the juvenile. *State v. Nevels,* 453 N.W.2d 579 (Neb. 1990).

IV. DOUBLE JEOPARDY

1. The law of double jeopardy is well-established in adult criminal law under the Fifth Amendment that no person shall be subject to the same offense to twice be put in jeopardy. The U.S. Supreme Court held the Constitutional prohibition against double jeopardy was applicable to the states in *Benton v. Maryland,* 395 U.S. 784 (1969).

   As previously considered, the Supreme Court ruled the *Fifth Amendment protection against double jeopardy applies to juvenile delinquency proceedings.* With jeopardy attaching when the juvenile court begins to hear evidence, the juvenile cannot be tried again for the same offense in an adult court. *Breed v. Jones,* 421 U.S. 519, 95 S.Ct. 1779, 44 L.Ed.2d 346 (1975).

2. *Swisher v. Brady,* 438 U.S. 204, 98 S.Ct. 2699, 57 L.Ed.2d 705 (1978).

Facts:

Maryland officials filed exceptions with the juvenile court to proposed findings of nondelinquency made by masters of the court pursuant to a state rule of procedure. Several minors sought a declaratory judgment to prevent state officials from filing exceptions to a master's determinations of nondelinquency made in the minors' favor.

Holding:

The lower appellate court held the double jeopardy clause did bar the state from taking exceptions to a master's proposed findings of nondelinquency. The U.S. Supreme Court reversed saying there was not a violation of double jeopardy in this instance because (1) the state did not require minors to stand trial a second time, (2) the proceeding did not provide the prosecution a second crack at the accused, (3) the rule conferred the role of fact finding and adjudicator only to the judge and not the master, and (4) there was nothing to indicate the procedures unfairly subjected the defendant to the proscribed embarrassment, expense and ordeal of a second trial.

3. When a conviction for a greater crime cannot be had without conviction for a lesser crime, the double jeopardy clause bars prosecution for the lesser crime after conviction of the greater. *Harris v. Oklahoma,* 433 U.S. 682, 97 S.Ct. 2912, 53 L.Ed.2d 1054 (1977). The concurring opinion set forth a philosophy of one prosecutorial proceeding of all charges which grow out of a single criminal act, occurrence, episode or transaction.

4. Double Jeopardy Case Survey

In Maine, during a waiver proceeding, the judge signed an Order stating the child was "adjudged to have committed a juvenile offense" and the Court committed him to a juvenile institution for six months. The Order was dated June 1, 1976. On August 10, 1976, the judge rescinded that Order and in a separate Order, waived the child for trial as an adult. On appeal, this second Order was deemed double jeopardy. The Court held at the moment of signing the original commitment Order, the judge's jurisdiction ceased and any action thereafter was a nullity since the Department of Human Resources had obtained a guardianship of the child under the statute. The first Order signed by the judge, by implication, was a denial of the waiver and petition which was filed later. *State v. Corlas,* 379 A.2d 998 (Me. 1977).

In *State v. Knowles,* 371 A.2d 624 (Me. 1977), the Court noted that under *Breed v. Jones,* to avoid violation of the federal protection against double jeopardy in the prosecution of a juvenile as an alleged criminal, the initial juvenile proceeding from which emerges the order to hold the juvenile for action by the criminal court must be plainly identified in advance as being limited strictly to the consideration of whether the juvenile is to stand trial as an adult. If there is any consideration of adjudication of the juvenile as a delinquent, the double jeopardy clause would be applicable concerning subsequent prosecution as an adult. In *District of Columbia v. I.P.,* 335

A.2d 225 (D.C. 1975), it was held that where a family court judge *sua sponte* declared a mistrial after it began to hear evidence and the mistrial was not dictated by "manifest necessity" (physically impossible to continue, gross misconduct, death or illness of judge, juror or witness, etc.), then double jeopardy precludes a second trial. The Supreme Court of California held a referee's dismissal of a wardship petition, based on a lack of proof beyond a reasonable doubt of a juvenile's guilt, precluded (on double jeopardy grounds) a rehearing *de novo* before a judge. *Jesse W. v. Super. Ct.,* 145 Cal.Rptr. 1 (Cal. 1978). The Court of Criminal Appeals of Oklahoma held jeopardy does not attach at a parole revocation proceeding so as to bar a subsequent delinquency adjudication based on conduct considered at the revocation proceedings. *In re J.E.S.,* 585 P.2d 382 (Okla. 1978). The California Court of Appeals held if a referee, after hearing the petition to adjudge the juvenile a ward of the court, dismisses the petition *sua sponte* without legal necessity, a rehearing *de novo* by a juvenile court judge placed the minor twice in jeopardy. *In re Raymond T.,* 150 Cal.Rptr. 537 (Cal. 1978). An Illinois Appellate Court held where charges were dismissed in a minor in need of supervision proceeding, retrial on the same and associated charges were barred by double jeopardy. *In Interest of R.L.K.,* 384 N.E.2d 531 (Ill. 1978).

The Civil Court of Appeals of Texas held that a parole revocation hearing does not determine whether an offense has been committed and does not expose to stigma or loss of liberty and does not place the child in jeopardy. *In re D.B.,* 594 S.W.2d 207 (Tex. 1980). The Supreme Judicial Court of Massachusetts held that a trial *de novo* does not constitute double jeopardy. The trial to a judge without rules of evidence, cross-examination or record does not bar a trial *de novo* to a jury in a court of record. *Juvenile v. Commonwealth,* 409 N.E.2d 755 (Mass. 1980). In Texas, a child failed to assert he was a juvenile until he had been convicted of murder in the adult court. The Civil Court of Appeals in Texas found that since the adult court lacked jurisdiction, the conviction was a nullity and did not constitute jeopardy; nor were there subsequent juvenile proceedings of denial of speedy trial since the delay was attributable to the juvenile, not the state. *Matter of D.N.,* 611 S.W.2d 880 (Tex. 1980).

It is clear that double jeopardy principles are applicable concerning convictions of previous criminal juvenile offenders. The Appellate Court of Illinois has gone further and held the double jeopardy prohibition applies to a previously adjudicated status offender (a minor in need of supervision). The aggrieved conduct in the criminal action was the same conduct as alleged in the previous status offender adjudication. Therefore, the case was dismissed on the basis of double jeopardy. *In re R.L.K,* 384 N.E.2d 531 (1978). In California, a referee dismissed a petition for insufficiency of evidence and the juvenile court judge ordered a rehearing. The juvenile raised the defense of double jeopardy as a defense. The California Supreme Court, although acknowledging that findings of referees are advisory only and not binding on the juvenile court, nevertheless held that if the juvenile court acts not simply to review the advisory findings of the referee but rather to conduct a *de novo* hearing, this constitutes a separate hearing and a second exposure to jeopardy. *Jesse W. v. Superior Court of San Mateo County,* 576 P.2d 963 (1978).

In *Burks v. United States,* 437 U.S. 1 (1978), the court established the key test that jeopardy attaches if the evidence at the first trial was insufficient to prove guilt, but does not attach if the first court merely made trial errors such as incorrect rulings on evidence. In North Carolina, a juvenile was charged with obstructing justice. At trial, the school principal testified only that he had seen the boy running from the building. The trial court, on its own motion, continued the case for nine days to give the state a chance to bring in additional witnesses who could testify to the allegations of the petition. When the trial resumed, the juvenile moved to dismiss for double jeopardy. The motion was denied and upon appeal, the Court held a trial may be recessed without the resumed hearing being barred by double jeopardy. *Matter of Hunt,* 266 S.E.2d 385 (Ct. App., N.C. 1980). In Pennsylvania, a master entered a finding which the juvenile court did not accept and ordered a rehearing. The Pennsylvania Supreme Court held that because the master's findings were advisory only, jeopardy did not attach at the hearing before the master. *In re Stephens,* 461 A.2d 1223 (1983).

XV. PRETRIAL DISCOVERY AND PRETRIAL CONFERENCE

1. Pretrial discovery in civil and criminal proceedings is generally governed by specific statutory provisions. The trend in American Jurisprudence is for greater use of pretrial discovery as long as it is consistent with the protection of persons. Juveniles should be afforded pretrial discovery and a pretrial conference as appropriate from case to case, when the dictates of justice so indicate. There is no reason the same pretrial discovery and pretrial conference procedures should not be applicable in dependency and neglect matters, as well as in appropriate delinquency cases similar to adult omnibus hearings.

2. Pretrial and Discovery Case Survey

   It has been held that a juvenile court has authority to dismiss a case for failure to obey a discovery order and this authority exists in juvenile cases as well as in other proceedings. *State v. Doe,* 588 P.2d 555 (New Mexico 1978). The Court of Appeals of Louisiana held discovery procedures in juvenile delinquency cases are governed by the code of civil procedure. *State in Interest of Giangrosso,* 361 So.2d 259 (La. 1978). Privacy protects an unwed mother from excessive discovery in a paternity proceeding. *Foltz v. Superior Court,* 152 Cal.Rptr. 210 (Cal. 1979).

   A New York Family Court held that juveniles charged with delinquency are entitled to a pretrial hearing on a Motion to Suppress Evidence and the same judge may hear both the suppression motion and the trial. *In re James A.,* 424 N.Y.S.2d 334 (1980).

XVI. JUVENILE CAPACITY AND COMPETENCY

1. Most courts hold juveniles have the right to plead not guilty by reason of insanity and the right not to be subjected to juvenile proceedings while incapacitated or incompetent. *In re Causey,* 363 So.2d 472 (La. 1978). Insanity

defense is available the California Juvenile Court. *In re M.G.S.,* 267 Cal.App.2d 329 (Cal. 1968), and *In re Michael E.,* 14 Cal.3d 892 (Cal. 1975).

2. Generally, when an adult is found not guilty by reason of insanity, he is committed to a hospital or ordered to be privately supervised pending further order of the Court. In many instances in the juvenile court, the only alternative to an incapacitated juvenile is to decline jurisdiction. Certainly a statute could provide that a juvenile be committed to a specialized mental institution under a commitment order pending recovery and further court review and order.

3. Concerning competency of a child witness to testify, the law presumes competency in most instances, however, some statutes set forth a chronological age where competency is not presumed. The juvenile court judge should always ascertain the competency of a child witness or a child victim witness when appropriate. It is important to remember the competency of the witness cannot be ascertained a few days or weeks prior to trial. The competency of a witness should be ascertained on the day of trial by taking expert testimony and reviewing any evaluations prior to trial. Further, the judge should examine the witness to determine competency to testify. The Court should ascertain that the child is aware of time, place, right and wrong, remembrance of the events in question and other such matters in determining competency. It is a good practice to have a checklist to ask questions concerning competency. American Jurisprudence Proof of Facts has a good checklist of questions to ask a child to help the Court determine competency.

4. Juvenile Capacity and Competency -- Case Survey

A juvenile charged with armed robbery, requested a psychiatric panel to determine if he was legally sane at the time of the commission of the offense, and whether he was competent to stand trial. The Louisiana court held that while there is no statutory authority authorizing a plea of insanity in a juvenile case since it is civil in nature, nevertheless, due process guarantees granting the juvenile the right to such an examination. *In the Interest of Causey,* 603 So.2d 472 (La. 1978). A difficulty is the issue of how a mentally ill juvenile should be handled when the child is shown to be "mentally ill" as opposed to the "legal insanity" test, i.e., the McNaughton Rule – Right from Wrong Test. In one case, where the problem was not legal insanity but mental illness, the Court was held to have discretionary power to initiate proceedings for civil commitment. *State v. Doe,* 576 P.2d 1137 (New Mexico 1978). Another problem is whether a child can be certified as an adult when found to be "mentally ill" but not "legally insane." In California, a 14-year-old juvenile with a mental age of five or six was charged. Testimony indicated the juvenile had a very low IQ, couldn't read or tell time, was incapable of abstract thought, had a speech impediment and had little awareness of the proceedings. Nevertheless, the psychiatrist admitted the defendant did know right from wrong. Under a California idiocy defense

statute, it was held the McNaughton right and wrong test was inappropriate. The Court held the defendant could be excused by reason of a mental defect if he lacked substantial capacity either to appreciate the criminality of his conduct or to conform to the requirements of law. *People v. Drew,* 583 P.2d 1318 (Cal. 1978). Another California case held the presumption of incapacity of a criminal act of children under 14 years of age refers to chronological age, not to mental age. *In re Ramon M.,* 584 P.2d 524 (Cal. 1978).

The question of how to handle an incapacitated juvenile is not totally clear from the cases. The paucity of cases available is probably because, as a practical matter, prosecutors and juvenile probation officers make private arrangements for care and treatment of these instances of mental illness or incapacity with the approval and cooperation of the court other than by formal court proceedings on the alleged delinquent act. In a juvenile transfer case, the Kansas Supreme Court held that mental illness is but one factor to be considered in a waiver hearing and that the court is not required to retain juvenile jurisdiction because of the alleged mental illness. *In the Interest of Ferris,* 563 P.2d 1046 (Kan. 1977). In a transfer case, it can be argued a juvenile can be transferred to the adult court even though found to be mentally ill since his rights would not be waived because he could raise the insanity defense in the adult criminal proceeding. Evidence of prior sustained delinquency petitions for the same conduct were properly admitted in a delinquency proceeding to establish the minor's *capacity* (or knowledge of the wrongfulness of his conduct). *In re Harold M.,* 144 Cal.Rptr. 744 (Cal. 1978). Proof beyond a reasonable doubt that a minor under 14 years of age has the capacity to commit a crime is not a constitutional prerequisite to an adjudication of wardship in juvenile court, i.e., the juvenile's capacity to commit a crime need not be proved beyond a reasonable doubt. *In re Clyde H.,* 154 Cal.Rptr. 727 (Cal. 1979). The Supreme Court of Nevada held that a juvenile court may not proceed with a delinquency adjudication when it determines the juvenile is not competent to assist counsel in his defense and that the court has inherent power to order commitment of juvenile incompetents deemed dangerous to the community in out-of-state facilities if necessary. *In re Two Minor Children,* 482 P.2d 793 (Nev. 1978).

The Civil Court of Appeals of Texas has ruled that in a hearing to determine whether a child is mentally fit, as an adjunct to a certification hearing, the child has a statutory right to a jury. *Matter of V.C.H.,* 605 S.W.2d 643 (Tex. 1980).

The Illinois Court of Appeals held once a court orders a hearing to determine if a juvenile is competent to stand trial, the court must rule on the question of competency before proceeding further. *In Interest of T.D.W.,* 441 N.E.2d 155 (1982). The Georgia Court of Appeals ruled a 15-year-old boy with an IQ of 44 and the mental age of 8 with schizophrenia in remission by reason of medication, may be certified as an adult. *In Interest of L.L.,* 299 S.E.2d 53 (1983). The U.S. Third Circuit Court of Appeals held parents have a right to a hearing before the change of placement is decided for their mentally ill child. *Halderman by Halderman v. Pennhurst St. Sch. and Hosp.,* 707 F.2d 702 (3d Cir. 1983). A Pennsylvania Court held a juvenile delinquent is not *per se* mentally ill. The presence of mental illness cannot

be inferred solely from the fact the person acted in a manner displaying delinquency. *In re McMullins,* 462 A.2d 718 (Pa. Super. 1983).

In Georgia, a juvenile was found guilty of murder and other crimes. The juvenile appealed insisting the trial court erred in excluding evidence regarding the circumstances of his childhood, his emotional maturity and mental capacity, maintaining it would have shown he had the mental age of a 10 year old. The evidence was proffered for the sole purpose of showing the juvenile was incapable of forming the requisite intent under the statute which provides a person shall not be considered or found guilty of a crime unless he has attained the age of 13 years at the time of the act. The Court held the age referred to in the code is biological age and noted nothing evidences a legislative intent to refer to mental age -- if, indeed, such a thing could be determined. Because the juvenile did not contend he was not guilty by reason of insanity or guilty but mentally ill, the evidence was properly excluded as irrelevant. *Couch v. State,* 325 S.E.2d 366 (Ga. 1985).

In a Washington case the Court held concerning a child victim that competency to testify is not a prerequisite to the admission of statements by that witness under the child hearsay rule. Thus a child victim's statements may be admissible even though the child may be incompetent to testify. *State v. Przybylski,* 739 P.2d 1203 (1987). Another Washington case held that a child may be competent at the time of making a statement but incompetent at the time of trial because of inability to remember at time of trial. *State v. Hunt,* 741 P.2d 566 (1987). In Montana, a 15-year-old mentally ill boy was charged with shooting and killing a fellow student at school. The juvenile court found the youth seriously mentally ill, a danger to himself or others, and in need of intensive psychiatric care. The juvenile was 15 and the court would lose jurisdiction at 21. The court held that six years was not a sufficient time for the Court's jurisdiction and thus certified the juvenile as an adult knowing he would be placed in prison for a long term. The Appellate Court affirmed this mentally ill juvenile to be certified for homicide because there wasn't enough time left in the juvenile treatment program. The dissent pointed out the consequences were terrible for this 15-year-old boy being in prison noting that treatment for his mental condition would be facially ordered but very little mental treatment would be received. In the adult court if the inmate was mentally ill, he would not be required to stay in the adult prison but would be committed to the custody of the Superintendent of the Montana State Hospital for custody, care and treatment. The well-reasoned dissent felt the juvenile received the worst of both worlds. *Matter of K.M.H.,* 752 P.2d 168 (Mont. 1988).

XVII. TRIAL OR ADJUDICATORY HEARING

1. Once a petition is filed, statutes typically provide that a hearing must be held within a stated period of time. The courts have been relatively strict in enforcing such provisions. *In re F.E.B.,* 346 A.2d 191 (Vt. 1975).

Some guidelines for the time frame to bring a juvenile to hearing are as follows: (1) length of delay, (2) reason for delay, (3) the defendant's assertion

of rights, (4) prejudice to the defendant, (5) did the state discharge its constitutional duty to make a diligent good faith effort to bring the defendant to trial. *Moore v. Arizona,* 414 U.S. 25, 94 S.Ct. 188, 38 L.Ed.2d 183 (1973).

Generally, when a juvenile is arrested, he is "accused" and speedy trial time commences at the time of the arrest. *Dillingham v. U.S.,* 423 U.S. 64, 96 S.Ct. 303, 46 L.Ed.2d 205 (1975). Concerning the right to quick disposition, in the case of *State ex rel. Juvenile Department v. W.,* 578 P.2d 824 (Ore. 1978), a juvenile charged with two distinct offenses was entitled to disposition of every allegation. The court's reservation for six months of one of the allegations was improper. In New Mexico, a case was set for trial after the date when time had passed under the statute. The juvenile did not object and the state argued a waiver of the provision. It was held the statute affirmatively stated children were entitled to a dismissal with prejudice if a hearing is not begun within the time period. The court decided the case not on the principle of prejudice to the child but upon the concept of prompt adjudication. The petition was dismissed. *State v. Doe,* 545 P.2d 1022 (N.M. 1976). The Iowa Supreme Court ruled a juvenile has a constitutional right to a speedy trial, the speediness to be determined by adult criminal procedure tests. *In Interest of C.T.F.,* 316 N.W.2d 865 (1982). The Washington Court of Appeals ruled a backlog of work is not a reasonable ground for delaying a juvenile court trial. *State v. McAllaster,* 644 P.2d 677 (1982). In Illinois, a Court held a juvenile can only request dismissal for lack of prosecution if the delay has prejudiced the juvenile. *In Interest of C.T.,* 456 N.E.2d 1089 (Ill. App. 1983). In Indiana, it was held failure to hold a hearing within the statutory time requires release from detention but not a dismissal of the case. *Spikes v. State,* 460 N.E.2d 954 (Ind. 1984).

A Federal Court held the determinate jurisdictional date is the date when proceedings are started, not the offense date or the arrest date. *In re Martin,* 788 F.2d 696 (11th Cir. 1986). The Vermont Supreme Court held that the statutory time for hearing cannot be extended by granting a continuance. *In re L.S.,* 509 A.2d 1017 (Vt. 1986). A New York court held in a delinquency hearing, the juvenile court can proceed to trial immediately after a brief pretrial hearing without delaying for a transcript of the pretrial hearing. *Matter of Eric W.,* 496 N.E.2d 219 (N.Y. 1986).

In a District of Columbia case, it was held the government can delay filing a petition for up to five days if it can show good cause in a juvenile matter. *Matter of T.G.T.,* 515 A.2d 1086 (D.C. App. 1986). The Kansas Court of Appeals has held a statutory 30-day time period for hearing a juvenile matter was directory rather than mandatory in nature. *In Interest of T.K.,* 731 P.2d 887 (Kan. App. 1987).

A Colorado Court of Appeals ruled where it is required that the trial be held within ninety (90) days, the Court can extend the time if, in the best interests of the child or if the Court needs more time to consider legal issues, is appropriate. *People in Interest of S.B.,* 742 P.2d 935 (Colo. App. 1987). In Georgia, it was held when a speedy trial is to be had within 60 days, this only requires the trial be set within 60 days. The actual trial can be past the 60 days if the Court's calendar requires. *In re J.B.,* 358 S.E.2d 620 (Ga. App. 1986). In Minnesota, when a speedy trial is required within 60 days,

the high court ruled that the case must be dismissed if the trial is not held within 60 days, unless waived. That court held that a crowded calendar was no excuse. *In the Matter of the Welfare of J.D.P.,* 410 N.W.2d 1 (Minn. 1987). Likewise, New York held that by statute, a trial can only be delayed for good cause which does not include scheduling problems of the Court or counsel. *In the Matter of Frank C.,* 516 N.E.2d 1203 (N.Y. 1987).

In an Illinois case, there was a substantial delay between the filing of the delinquency petition and the final adjudicatory hearing and the issue arose if this excessive delay required dismissal of the petition. The petition was filed in June 1985 charging the juvenile with sexual assault offenses. There followed a series of continuances. The adjudicatory hearing did not commence until more than nine months after the juvenile was ready for trial and approximately one year after the petition was filed. The Appellate Court held this was a case where substantial prejudice can be presumed, shifting the burden to the state to show the delay was reasonable. The Court ruled the continuance in this case had the effect of being punitive and was, therefore, a denial of speedy trial requiring dismissal of the petition. *In Interest of F.H.,* 546 N.E.2d 637 (Ill. App. 1989).

It was held in Wisconsin that when the state fails to file the petition within the statutory time because of misunderstanding the statute, the case must be dismissed. *In Interest of C.A.K.,* 453 N.W.2d 897 (Wisc. 1990).

2. The adjudicatory hearing is a distinct hearing on the merits. The National Advisory Commission on Criminal Justice Standards recommends an adjudicatory hearing as a distinct and separate hearing from the dispositional hearing. At the adjudicatory hearing, the juvenile should be afforded all rights given a defendant at an adult criminal prosecution except jury trial. *Standard 14.4 of the NACCJ.* In most instances, particularly in serious matters, the court should order a predispositional report immediately following the adjudicatory hearing and the dispositional hearing should be set in the future allowing the Court Services Officers or probation officers to prepare the appropriate report.

   (a) *Voluntary Pleas:* It is important for the court to advise a juvenile and parents concerning his rights prior to accepting a plea. The court must admonish the child concerning such things as his right to a hearing, the range of dispositional alternatives or penalties involved upon accepting the plea, and other admonitions. See *Interest of Burk,* 347 N.E.2d 23 (Ill. 1976).

Various contemporary statutory schemes provide for juveniles to appear at hearings styled pretrial conference or preliminary proceedings, at which time the court is required to go over the nature of the charges, and explain all dispositional alternatives. In most cases, counsel has already been appointed and the court may ask the juvenile to "admit" or "deny" the allegations in the petition. If the child admits the allegations, further inquiry is appropriate including procedures for receiving facts to support the admission. If the child denies the allegations, the matter can be set for adjudicatory hearing.

The Colorado Court of Appeals ruled a juvenile may waive counsel at an arraignment hearing if he has the maturity and intelligence to understand what he is doing, even if his mother does not. *People in Interest of J.F.C.,* 660 P.2d 7 (1983). The Ohio Court of Appeals ruled there is no provision in their juvenile code for a "no contest" plea. The petition must be proven if not admitted. *In re Green,* 447 N.E.2d 129 (1983). It should be noted various statutory schemes provide a specific procedure allowing a juvenile to plead no contest in a juvenile hearing.

In an interesting California case, it was held the parties have a right to have the disposition made by the same judge who accepted the plea bargain. If the judicial officer was a referee, the parties may stipulate that he is a temporary judge so his disposition is not reviewable by the permanent judge. *In re Mark L.,* 666 P.2d 22 (Cal. 1983). It has been held a juvenile's waiver of the right to counsel can only be made if the court carefully explains the meaning of the right. *J.G.S. v. State,* 435 So.2d 942 (Fla. App. 1983). In California, the court held juveniles are not "defendants" and do not "plead guilty" and thus are not within the intent of a statute prohibiting adult criminal appeals after a plea of guilty or *nolo contendere.* Therefore, notwithstanding the fact "the juvenile admitted to the act," this did not preclude him from taking an appeal. *In re Joseph B.,* 671 P.2d 852 (Cal. 1983).

The Rhode Island Supreme Court ruled that a delinquency finding will be set aside where the trial judge warned the juvenile of many of his rights but did not include the maximum penalty nor of the right not to testify. *In re John D.,* 479 A.2d 1173 (R.I. 1984). A Texas court ruled the judge must advise the juvenile of each right, the meaning of the charge, and the possible disposition; merely asking if he understands is insufficient. *J.D.P. v. State,* 691 S.W.2d 106 (Tex. App. 1985).

Case law is expanding requiring the judge to advise the juvenile of all consequences including all possible categories of disposition prior to accepting a plea. *In Interest of S.K.,* 485 N.E.2d 578 (Ill. App. 1985). In Georgia, the court ruled if a juvenile is considering waiving counsel, the court must make her aware of possible dispositions which could be imposed. *In re B.M.H.,* 339 S.E.2d 757 (Ga. App. 1986). Oregon held that a child's admission of the charge in court is invalid if the court did not warn him of the maximum penalty. *State ex rel. Juv. Dept. v. Clements,* 770 P.2d 937 (Ore. App. 1989).

3. As previously considered in the *Matter of Winship,* the Supreme Court held proof *beyond a reasonable doubt* is the standard in serious delinquency cases. The New York Court of Appeals subsequently decided on the basis of *Winship,* due process requires proof *beyond a reasonable doubt* in governability and wayward trials. The Court held the *beyond a reasonable doubt* standard is applicable in a proceeding to determine whether a child is a person in need of supervision. *Richard S. v. City of New York,* 27 N.Y.S.2d 802 (N.Y. 1970).

The burden of proof in child protection and dependency and neglect cases has been generally held to a lesser standard. A case in the District of Columbia held that a *preponderance of the evidence* is constitutionally permissible as

a standard of proof in paternity cases, because loss of liberty is not a consequence of the finding. *Johnson v. District of Columbia,* 137 A.2d 567 (D.C. 1958). There is a persuasive argument that the need to protect helpless children from neglectful or abusive parents requires and justifies a lower degree of persuasion.

The New Mexico Supreme Court ruled evidence required to *terminate parental rights* should be "clear and convincing." *Huey v. Lente,* 514 P.2d 1093 (N.M. 1973). The "clear and convincing" burden of proof has been sustained in the case of *Santosky v. Kramer,* 455 U.S. 745 (1982), as heretofore set forth in the U.S. Supreme Court decision section.

New York City Family Court ok's *preponderance of evidence* on abuse or neglect cases. *In the Matter of J.R.,* 386 N.Y.S.2d 774 (N.Y. 1976). The Massachusetts Supreme Court has held a court may properly find a parent *currently* unfit to care for a newborn child *based on ongoing and unabated history of past neglect of other children* and that determination of unfitness must be supported by detailed and specific findings of fact, *but not by "clear and convincing" proof. Custody of a Minor,* 389 N.E.2d 68 (Mass. 1979).

Concerning delinquency, the Washington Court of Appeals has ruled a juvenile has the burden of proving his age and that he comes under the juvenile code. *State v. Sandomingo,* 695 P.2d 592 (1985). A North Carolina Court of Appeals held it is reversible error for the court not to state the charges were proven beyond a reasonable doubt. *Matter of Walker,* 348 S.E.2d 823 (N.C. App. 1986).

4. Burden of Proof – Probation Revocation Hearings

The Illinois Supreme Court held a juvenile's probation may not be extended or revoked without notice and a hearing and finding that the juvenile has violated a condition of probation. *In re Sneed,* 381 N.E.2d 272 (Ill. 1978). The Supreme Court of California held that a juvenile court does not have jurisdiction to review a denial of probation by the California Youth Authority absent a showing of clear abuse of discretion by the agency. *In re Owen E.,* 154 Cal.Rptr. 204 (Cal. 1979). The Colorado Court of Appeals has held *proof beyond a reasonable doubt* is the proper standard in a juvenile probation revocation proceeding where the alleged violation is an act which would be a crime if committed by an adult. *C.B. v. M.B.,* 572 P.2d 843 (Colo. 1977).

An Oklahoma case held testimony at a probation revocation hearing that a juvenile was intoxicated and he sniffed paint to become intoxicated wasn't sufficient to establish by a *preponderance of the evidence* the substance inhaled contained toxic vapors creating a state of intoxication. The court held that the juvenile court had previously adjudicated the juvenile and therefore had jurisdiction to consider the motion to revoke probation, although the behavior for probation revocation had taken place in another county. *Matter of T.L.W.,* 578 P.2d 360 (Okla. 1978).

A Michigan Court of Appeals ruled the burden of proof for revocation is *fair preponderance.* They noted this is true in most states by statute. *Matter of Belcher,* 371 N.W.2d 474 (Mich. App. 1985). Violating probation rules

are not an act which can be petitioned as delinquency. *A.L.C. v. State,* 563 So.2d 59 (Ala. Cir. App. 1990).

5. Jury Trial

As previously considered, the U.S. Supreme Court in *McKeiver v. Pennsylvania,* held there is no constitutional right to a jury trial in juvenile proceedings. Although *Gault* holds juvenile proceedings are governed by the Fourteenth Amendment requirement of due process, the *McKeiver* case holds by "selective incorporation," the jury trial right is not applicable because "the juvenile court proceeding has not yet been held to be a criminal prosecution, within the meaning and reach of the Sixth Amendment." So far, the Supreme Court has refrained from imposing all adult criminal safeguards to the juvenile court and has instead sought a "judicial balance."

The Second Circuit in the case of *U.S. v. Torres,* 500 F.2d 944 (N.Y. 1974), held there is no constitutional right to a jury trial under the Federal Juvenile Delinquency Act and the provision requiring the juvenile's consent to be proceeded against as a juvenile, plus his waiver of a jury trial, is not unconstitutional.

The Texas Court of Appeals in *In re V.R.S.,* 512 S.W.2d (Tex. 1974), held that since juvenile proceedings are civil in nature, they are subject to the rule of procedure permitting less than unanimous verdicts. (Texas provides by statute for juvenile hearings to juries.) The *McKeiver* case, and subsequent state decisions, have held no right to a jury trial exists in juvenile proceedings either under the federal or state Constitutions. Some courts have interpreted these decisions to hold a jury trial is "not required," and others have interpreted these decisions that jury trials in juvenile proceedings are "not permitted." A New York holding that jury trials are not permitted is *In re George S.,* 355 N.Y.S. 143 N.Y. App. Div. 1974. California, however, ruled juvenile court judges may appoint advisory panels to assist in the fact-finding process. *People v. Superior Court of Santa Clara County,* 15 Cal.3d 271 (Cal. 1975). The court made it clear this practice should not be commonplace and the jury should be advisory only, assisting the judge who would be free to follow or reject the panel's advice. Denial of right to jury trial in Washington's new Juvenile Act was held constitutional. *State v. Lawley,* 591 P.2d 772 (Wash. 1979).

6. Confrontation and Cross-Examination

The U.S. Supreme Court in *Gault,* implied the right to confrontation and cross-examination to juvenile proceedings. The Court held that a determination of delinquency and an order of commitment to a state institution cannot be sustained in the absence of sworn testimony and cross-examination.

In Alaska, prior to the scheduled regular adjudicatory hearing, a hearing was scheduled for the sole purpose of preserving the testimony of an expert witness. The juvenile was not present and counsel did not waive the juvenile's statutory right to be present. The court nevertheless proceeded to hear the expert testimony in the absence of the juvenile. On appeal, the

Alaska Supreme Court reversed the adjudicatory finding of the court on the basis the juvenile's absence was not harmless and the expert testimony given in his absence was offered to prove an essential element of the state's case. *R.L.R. v. State,* 487 P.2d 27 (Alas. 1971). A juvenile was placed alone in a room outside the courtroom while the victim testified. The juvenile was provided with a closed-circuit television to watch and listen to the testimony as well as an audio device through which he could speak to his attorney. Following the victim's testimony, the juvenile was brought back into the courtroom and the remainder of the proceedings took place in his presence. The juvenile was removed from the courtroom without any misconduct on his part. On appeal, the court held the juvenile had been denied his right to due process, cross-examination and confrontation. The opinion pointed out that if the juvenile was disruptive, the court would have the power to arrange this videotape situation without violating the juvenile's right, but only in that event. *In Interest of Borden,* 546 A.2d 123 (Pa. Super. 1988).

7. Corroboration

State laws vary concerning the necessity of corroboration of testimony in order to sustain a conviction. If a state statute requires corroboration under the adult criminal code, the requirement of corroboration would undoubtedly be necessary in the juvenile proceeding. Following the *Winship* decision, the better rule is probably that corroboration is required for an adjudicatory finding. For one court's reasoning, see *In re Arthur M.,* 310 N.Y.S.2d 399 (N.Y. 1970). Even if the corroborating evidence does not identify the juvenile with the commission of the offense, it at least should establish the *corpus delicti,* which consists of proof of the actual injury or loss caused by the criminal agency. *D.C.A. v. State,* 217 S.E.2d 470 (Ga. 1975). The Louisiana Court of Appeals held in a juvenile case accomplice testimony, even though uncorroborated, is competent evidence, but "subject to suspicion and should be received and acted upon with extreme or at least grave caution." *State ex rel. Williams,* 325 So.2d 854 (La. 1976).

It was held proper corroboration of accomplice testimony in a burglary case when the court found the juvenile, at the time of arrest, was in possession of recently stolen goods. *J.M.E. v. State,* 243 S.E.2d 730 (Ga. 1978). Some cases have held that the accomplice testimony rule is not constitutionally based and a state statute can provide for a lesser burden than the general rule requiring corroboration. It has been held that differences in criminal and juvenile evidentiary procedures may be constitutionally permissible. *In re Mitchell P.,* 587 P.2d 1144 (Cal. 1978). The Supreme Court of Nevada held the confession of a juvenile accomplice must be corroborated by a person who was not an accomplice. *A Minor v. Juv. Dept., 4th Jud. Dist.,* 608 P.2d 509 (Nev. 1980). In Iowa, it was held an adjudication of delinquency cannot be based on uncorroborated testimony of an accomplice. *In re Dugan,* 344 N.W.2d 300 (Iowa 1983).

8. Social Reports as Evidence

Generally, social reports are not proper evidence in the adjudicatory hearing unless stipulated to by the parties. *State of Utah v. Lance,* 464 P.2d 395 (Utah 1970). Social reports should not be made available to the court until the dispositional hearing and it is elementary that the social reports must be made available to the respondent and/or his counsel if they are to be used. Further, the better rule provides social reports may not be considered or admitted into evidence unless stipulated to or unless the scrivener of the report is present and subject to cross-examination. At any rate, the report should not be considered unless the parties have the *opportunity* to call and cross-examine the scrivener. Some statutes allow the report to be admitted if the parties have the opportunity to examine the scrivener of the report but fail to do so.

9. Rules of Evidence

In light of recent Supreme Court cases, the rules of evidence are generally held as applicable in juvenile court adjudicatory hearings. The better rule is that the rules of evidence should likewise be applicable in the dispositional hearing. Some state statutes and cases allow some relaxation of rules of evidence in the dispositional hearing. States often provide that rules of evidence in civil cases apply to status offenses such as neglect, dependency, children in need of care, etc. The New York Supreme Court ruled uncorroborated hearsay evidence at a detention hearing is not sufficient for a finding of probable cause to hold a juvenile. *People ex rel. Guggenheim v. Mucci,* 360 N.Y.2d 71 (N.Y. 1974). The Kansas Supreme Court ruled hearsay evidence is not admissible in the adjudicatory phase of the proceeding to terminate parental rights. *In re Johnson,* 522 P.2d 330 (Kan. 1974). Also see *In re Kevin G.,* 363 N.Y.S.2d 999 (N.Y. 1975).

10. Motions

Motions in the juvenile court should be handled generally as in adult criminal matters. The better procedure is to hear suppression motions before the trial begins and if possible, all motions should be filed and disposed of before the adjudicatory hearing. Depending on the nature and complexity of the juvenile court hearing, it is often advisable to set up a pretrial hearing setting forth parameters of reasonable discovery and what issues will be tried.

11. Burden of Proof in Suppression Hearing

There are few courts relying on the rule the party submitting the motion has the burden of proof. The majority of decisions recognize the burden of proof rests on the prosecution to show the evidence at issue was, in fact, constitutionally acquired. See *Alderman v. United States,* 394 U.S. 165, 89 S.Ct. 961, 22 L.Ed.2d 176 (1969).

A Missouri court held a child should not bear the burden of proving incriminating statements were made involuntarily. *In the Interest of M.C.,* 504 S.W.2d 641 (Mo. 1974).

12. Privilege against self-incrimination and plea of guilty or admitting the charges by stipulation in open court.

Well-settled under *Gault* is the privilege against self-incrimination pertains to juvenile court proceedings. Depending upon the age of the child, the presence of parents and/or counsel, a juvenile may admit to a charge in open court, if the appropriate safeguards are provided. See *Matter of Daniel Richard D.,* 261 N.E.2d 627 (N.Y. 1978). The juvenile should be represented by counsel in open court. It is helpful to have a ratification of the plea or stipulation by the juvenile's parents in open court to further reflect said stipulation or plea was given knowingly and intelligently. Ramifications of a plea should be made clear to the juvenile and should be spread on the record. *Parker v. North Carolina,* 397 U.S. 790, 90 S.Ct. 1458, 25 L.Ed.2d 785 (1970). Under modern procedures, it is imperative that the juvenile court judge prepare a comprehensive checklist in accepting a plea or stipulation from a juvenile even though he has either hired or appointed counsel. The checklist should include such things as making sure the juvenile and his attorney have gone over the juvenile petition or complaint and know exactly what the charge is. Further, the court should go over all appropriate dispositional alternatives available to the court in the event the court accepts the juvenile's plea or admission concerning the allegations in the petition. The court should advise the juvenile he has a right to trial to the court or to a jury as the case may be, that he need not take the stand at trial under the Fifth Amendment to the United States Constitution, that he would have the opportunity to subpoena witnesses on his own behalf and would have the right to confront his accusers in open court. Further, the court might inquire to make sure the juvenile is satisfied with his lawyer and that the lawyer has answered all questions. The court should require any plea agreements be submitted either in writing or set forth any oral plea agreement on the record and make sure the juvenile understands and ratifies the same as the complete plea agreement. Finally, it is important that the court secure and obtain a sufficient factual basis on the record to support accepting the admission or plea to the allegations in the petition.

13. Adjudicatory Hearing -- Case Law Survey

A New York Family Court held the statute empowering a court to confer immunity in a criminal proceeding authorizes the family court to grant immunity to a witness in a delinquency adjudication hearing. *In re Barry,* 403 N.Y.S.2d 979 (N.Y. 1978). The New Hampshire Supreme Court held statutory time limits for holding an adjudication hearing are a substantive right with which the state must comply. *In re Russell C.,* 414 A.2d 934 (N.H. 1980).

The Supreme Court of Minnesota has held that to expedite litigation, a court should take judicial notice of the files of any of its divisions. *Matter of Welfare of Clausen,* 289 N.W.2d 153 (Minn. 1980). A Superior Court of Pennsylvania held that interviews with children in chambers, even if both counsel are present, should be reported. *Lewis v. Lewis,* 414 A.2d 375 (Pa. 1979). The Court of Appeals of Illinois held plea bargaining is necessary to prevent courts from becoming overloaded and is encouraged if conducted

in open court and no statements are used against the respondent if he rejects the bargain. *In Interest of Jones,* 407 N.E.2d 691 (Ill. 1980). The Court of Appeals of the District of Columbia held that a child age three at the time of the crime, could testify. The court held a child is competent to testify if she knows the difference between truth and falsity, appreciates her duty to tell the truth, and is able to remember the events. *Smith v. U.S.,* 414 A.2d 1189 (D.C. 1980). The Supreme Court of Arizona held a juvenile has a constitutional right to be able to understand the charges and assist in his own defense, and adult procedures should be used to determine this if the juvenile procedures do not exist. *State ex rel. Dandoy v. Superior Court,* 619 P.2d 12 (Ariz. 1980). The Court of Appeals of Georgia has held if termination and neglect are more civil than criminal in nature, discovery procedures are not barred. *R. v. Development of Human Resources,* 270 S.E.2d 303 (Ga. 1980). The Court of Appeals of New Mexico held a court cannot order commitment to a boy's school on stipulated facts without hearing supportive evidence. *State v. Doe,* 619 P.2d 194 (N.M. 1980).

The Court of Appeals Fourth District Florida held that voluntary intoxication is a defense to acts of delinquency requiring intent. *In the Interest of J.D.Z.,* 382 So.2d 1351 (Fla. 1980). The Court of Appeals of Florida held the mere presence of a juvenile as a passenger in a stolen automobile is not of itself sufficient to prove the juvenile participated in stealing the automobile. *B.L.W. v. State,* 393 So.2d 59 (Fla. 1981). The Supreme Court of Louisiana held either party has a statutory right to have witnesses sequestered in a juvenile adjudicatory hearing, even without showing he would be prejudiced by their presence. *State in Interest of Giangrosso,* 395 So.2d 709 (La. 1981). The Supreme Court of South Carolina ruled a juvenile court may limit the length of final argument but the final argument of a juvenile may not be denied all together. *In the Matter of Bazzle,* 279 S.E.2d 370 (S.C. 1981). The Court of Appeals of Florida held that if tapes of an electronically reported hearing are lost, and an available transcript will not support a finding of delinquency, a new trial is required. *J.E. v. State,* 404 So.2d 845 (Fla. 1981).

New Mexico's Supreme Court ruled a child eight years of age is capable of willful and malicious conduct. *Ortega v. Montoya,* 637 P.2d 841 (1981). The Supreme Court of Connecticut ruled due process is satisfied by a full hearing before a referee. *Kroop v. Kroop,* 440 A.2d 293 (1982). The Maryland Court of Appeals ruled a juvenile judge cannot consider a child's prior probation contacts at an adjudicatory hearing. *In re Ernest J.,* 447 A.2d 97 (1982). The Illinois Court of Appeals ruled that one attorney cannot represent two juveniles if both juveniles are claiming alibi. *In Interest of V.W.,* 445 N.E.2d 445 (1983). The Wisconsin Supreme Court ruled the court may deny the parties final argument in a suppression hearing if the record is simple or obvious enough that argument is not necessary for the court to analyze the evidence. *Matter of E.B.,* 330 N.W.2d 584 (1983).

In a Florida case, it was held if counsel does not present a defense, unless for a specifically beneficial purpose, he must make a record that the child understands and waives his right to trial. *A.E.K. v. State,* 432 So.2d 720 (Fla. App. 1983). A Maryland Court held that dismissal is not the remedy for delay in determining restitution since the adverse impact of dismissal

would fall mainly on the victim. *In re Travor A.,* 462 A.2d 1245 (Md. App. 1983). In Indiana, a child misrepresented his age as 20 when he was in fact a juvenile. The court held he thus waived his right to demand juvenile procedures after conviction in an adult court. *Twyman v. State,* 452 N.E.2d 434 (Ind. App. 1983). The Illinois Supreme Court held that in a delinquency adjudication, failure to serve a noncustodial parent was not jurisdictional. In this case, the minor, the mother and the stepfather all were sufficiently informed of the charges to enable the minor to prepare an adequate defense affording due process of law. *People v. Taylor,* 462 N.E.2d 478 (Ill. 1984). The Illinois Court of Appeals ruled where a judge on his own motion heard jointly seven cases where the juveniles were offering to admit and stipulate to charges pending against them, that such was an abuse of judicial discretion. The court cautioned that in hearings, particularly in juvenile cases, conducted in the presence of others jointly, that minors may be distracted from the gravity of admonitions from the bench and may be inhibitive in asking questions material to their cause. The court held it is better practice not to have more than one case in the courtroom at a time. *In Interest of R.L.G.,* 465 N.E.2d 1025 (Ill. App. 1984).

A Michigan court ruled that alleged errors at the adjudication hearing cannot be raised at the appeal of a revocation of probation. *Matter of Madison,* 369 N.W.2d 474 (Mich. App. 1985). The Kansas Court of Appeals held that venue for the adjudicatory phase is preferable in the county of occurrence where the facts are best known and venue for the disposition is preferable in the county of residence where the child is best known. *In Interest of A.T.K, Jr.,* 717 P.2d 528 (Kan. App. 1986). The Appellate Court in Louisiana held a juvenile can withdraw his plea only if he shows fraud, mistake, lack of jurisdiction or new evidence. *State in Interest of Kemp,* 486 So.2d 909 (La. App. 1986). In Virginia, it was held a child charged with homicide is entitled to a psychiatric evaluation but cannot have a second evaluation because he doesn't like the first. Further, it was held that the juvenile does not have a constitutional right to choose a psychiatrist of his own personal liking or to receive funds to hire his own. *Pruitt v. Com.,* 351 S.E.2d 1 (Va. 1986).

A Connecticut Court ruled a delinquency petition may be amended during the trial to add new charges if they are within the same event that occurred, if the child was aware of the possible charges and was given time for any new preparation that may be required. *In re Stephen G.,* 540 A.2d 107 (Conn. App. 1988). Concerning a law forbidding convicted persons from possessing a firearm, a delinquency adjudication was deemed a conviction. *In re Bernard H.,* 557 A.2d 864 (R.I. 1989). In Oregon, it was held error to permit an amendment to conform to the evidence by changing a charge of compelling sex to engaging in sex, since the defense would be different for the amended charge. *State ex rel. Juv. Dept. v. Henson,* 775 P.2d 325 (Ore. App. 1989). Florida ruled that a juvenile represented by a certified legal intern did not have adequate counsel even though the intern became a lawyer during the proceedings. *In Interest of L.S.,* 560 So.2d 425 (Fla. App. 1990).

XVIII. PROCEEDINGS – "DEPENDENT AND NEGLECTED" – "DEPRIVED" – "CHILD IN NEED OF CARE"

1. The term "neglected" usually implies some element of parental fault, whereas the term "dependent" generally refers to a condition not resulting from parental fault, i.e., a "dependent child" may be without a parent or other person responsible for his care and a "neglected child" may lack proper parental care and supervision, or has been abandoned.

2. A "deprived child" is typically defined as a child under 18 years of age who is without proper parental care or control, subsistence, education as required by law or other care or control necessary for his physical, emotional or mental health; and the deprivation is not due solely to the lack of financial means of the parents, guardian or other custodian.

3. The definition of "child in need of care" is similar to a "deprived child" but is broadened and inclusive of other areas. Typically, a "child in need of care" is a person less than 18 years of age who is without adequate parental control or subsistence and the condition is not due solely to the lack of financial means of the child's parents or other custodian; is without the care or control necessary for the child's physical, mental or emotional health; has been physically, mentally or emotionally abused or neglected or sexually abused; has been placed for care or adoption in violation of law or has been abandoned or does not have a known living parent. Some definitions include truancy, curfew violations, etc.

4. Unique problems in the investigation and trial of dependent or neglected children and children in need of care.
   (a) Hearings involving permanent parental severance.
   (b) Hearings involving nonpermanent parental severance with children made wards of the court, placement with social agency or other suitable person.
   (c) Mandatory child abuse legislation in most states. The list includes doctors, nurses, social workers and is growing. Civil immunity granted for non-fraudulent reporting.
   (d) Legal requirement for drawing the dependent and neglected, deprived or child in need of care complaint in specific terms rather than general statutory terms.

5. For Model Acts concerning termination of parental rights, see: "Freeing Children for Permanent Placement Through a Model Act," by Sanford N. Katz, *Family Law Quarterly,* Volume 12, No. 3, Fall, 1978, Family Law Section of the American Bar Association; "Model Statute for Termination of Parental Rights," by James H. Lincoln, *Juvenile Justice,* Volume 27, No 4, November 1976, National Council of Juvenile and Family Court Judges, Box 8970, Reno, Nevada 89507; and the *Standards Relating to Abuse and Neglect,* American Bar Association Institute of Judicial Administration, Juvenile Justice Standards Project.

6. Indigent Parents -- Right to Counsel

Although the United States Supreme Court in *Lassiter v. Department of Social Services,* 452 U.S. 18 (1981), as heretofore cited in the Supreme Court section, held the Constitution does not require the appointment of counsel for indigent parents in every parental termination proceeding, an overwhelming number of states provide for counsel in these proceedings. Prior to and subsequent to *Lassiter,* most courts held that indigent parents are entitled to court-appointed counsel in child dependency, neglect and child in need of care proceedings. See *Cleaver v. Wilcox,* 499 F.2d 940 (Cal. 1974). Also see *Crist v. New Jersey Division of Youth and Family Services,* 343 A.2d 815 (N.Y. 1975). Also, the U.S. District Court in Florida has held parents in child dependency proceedings have a constitutional right to counsel immediately following service of the petition on the parent or seizure of the child. *Davis v. Page,* 442 F. Supp. 258 (Fla. 1977). Most statutes provide for the appointment of counsel for indigent parents involved in dependent and neglected, deprived or child in need of care proceedings.

The District Court of Appeals of Florida has held that in dependency proceedings, the state must be represented by counsel and the mother has due process rights to counsel, sworn testimony and confrontation. *A.Z. v. State,* 383 So.2d 934 (Fla. 1980). The Ohio Supreme Court has held that indigent parents on appeal from termination of parental rights are entitled to appointed counsel and free transcripts under the due process and equal protection guarantees of the state and federal Constitutions. *Heller v. Miller,* 399 N.E.2d 66 (Ohio 1980).

7. Reasonable Efforts Requirement -- Children Removed from Home

All juvenile and family court judges should be familiar with federal legislation setting forth certain criteria for state courts to follow in dependency and neglect, abuse and child in need of care cases as a condition precedent to the receipt of federal funds by state social service agencies. Public Law 96-272, *The Adoption and Assistance and Child Welfare Act* provides for financial incentives to prevent breakup of families and provide permanency for children. Most states have adopted implementing legislation to be in compliance with the Act. The statutes generally require a time schedule for review of all cases where children are placed outside their home and further mandate that a written reintegration plan be prepared and provided to the court.

Most state statutes now provide that children can only be removed from their home if the court finds:

1. Continuation in the home would be contrary to the welfare of the child; and
2. In each case, REASONABLE EFFORTS have been made:
   a. To prevent or eliminate the need for removal of the child from the home; and
   b. To make it possible for the child to return home.

IT IS IMPORTANT THAT JUDGES MAKE THESE *REASONABLE EFFORTS FINDINGS* IN EACH CASE WHERE A CHILD IS REMOVED FROM THE HOME AND TO MAKE SURE THE FINDING IS SPECIFICALLY REFLECTED IN THE COURT'S ORDER ON THE RECORD AND IN THE JOURNAL ENTRY.

THE FOLLOWING SURVEY OF CASES HAVE BEEN CAREFULLY SELECTED TO REFLECT A REPRESENTATIVE NATIONAL SAMPLING OF INFORMATIVE RULINGS IN THIS AREA:

8. Dependency and Neglect -- Case Survey

The Oregon Supreme Court has held that there is no cause of action stated by plaintiff children suing their mothers for neglect of parental duties, nor would the Court recognize a new tort of parental desertion. *Burnette v. Wahl,* 588 P.2d 1105 (Ore. 1978). In a New York case, parent's election of unconventional laetrile treatment for cancer over radiation or chemotherapy was held not to amount to neglect of the child's medical needs. *In re Hofbauer,* 419 N.Y.S.2d 936 (N.Y. 1979). In a matter where permanent parental severance was not requested, a California case holds that evidence illegally obtained by law enforcement officers will not be excluded in a child dependency proceeding to declare the child a ward of the court. *In the Matter of Robert P.,* 132 Cal. Rptr. 5 (Cal. 1979). In a Georgia case, the juvenile court did not hear a neglect hearing within the 10 days required by statute. The appellate court held the court therefore lacked jurisdiction and the motion to dismiss should have been granted. *Cruz v. County,* 246 S.E.2d 426 (Ga. 1979).

The Court of Appeals of Missouri held that documents from the files of the Division of Family Services may be admitted in evidence as business records if they meet all the requirements for business records. *In Interest of A.R.S.,* 609 S.W.2d 490 (Mo. 1980). A Court of Appeals of Colorado ruled if a treatment plan is developed as part of a disposition in a neglect case, it must specify the criteria which will be used to determine whether custody will be returned to the mother. *People v. C.A.K.,* 628 P. 136 (Colo. 1981). The Supreme Court of Oregon held that testimony by a social worker of children's descriptions of sexual contacts with a third party, of which their parents were aware, is not competent evidence in a proceeding to remove the children from the parents' custody. *Matter of McDermid,* 630 P.2d 913 (1981). The Pennsylvania Superior Court ruled a professional evaluation of a mother's parenting ability should be given *great weight* in deciding whether a child is dependent. *In Interest of H.B.,* 427 A.2d 1229 (1981). The North Dakota Supreme Court held where both parents are able and willing to provide custody, and homosexuality is contrary to the mores of the community, children will not be placed with the homosexual parent. *Jacobson v. Jacobson,* 314 N.W.2d 78 (1981).

A United States District Court in Kentucky ruled a welfare agency may not remove a child from placement unless it has established guidelines, has furnished the placement parents with a copy, has notified them of the reasons for proposed removal with an opportunity to correct them, and held a hearing before an impartial tribunal with right of confrontation. *Siereveld v. Com-*

monwealth, 587 F. Supp. 1178 (1983). The Louisiana Court of Appeals ruled if a parent withdraws her consent for voluntary placement, the child must be returned forthwith and unconditionally though the agency may later petition for custody as a dependent and neglected child. *State in Interest of Boutte v. Rogers,* 426 So.2d 1284 (1983). In West Virginia it was held that there must be facts showing neglect, and that a mere stipulation of neglect is insufficient. *State v. T.C.,* 303 S.E.2d 685 (W.Va. 1983).

The Supreme Court of Virginia held that under Virginia law, when custody of a child has been removed from the parents because of neglect, the parents have the burden of proving the child should be restored to them but welfare has the burden of proving their residual, noncustodial rights should be restored. *Weaver v. Roanoke Department of Human Resources,* 265 S.E.2d 692 (Va. 1980). The Supreme Court of South Dakota held that at the trial of a dependency and neglect action, the court may consider events which occurred *after the petition was filed. Matter of A.M.,* 292 N.W.2d 103 (S.D. 1980). The Illinois Court of Appeals Third District stated that passively failing to protect constitutes neglect. The Court held it is neglect for a noncustodial parent not to take an active role in correcting a home environment which he knows is causing physical and psychological trauma for the children. *In Interest of Dixon,* 401 N.E.2d 591 (Ill. 1980). An Illinois Appellate Court reversed a finding of neglect because a finding of abuse was speculative and a finding of no reasonable effort to correct previous neglect was inappropriate because the mother did not have custody. *In Interest of Loitra,* 401 N.E.2d 971 (Ill. 1980).

The Kansas Supreme Court held a parent, as defined under Kansas statutes, is a party to the proceedings and is therefore entitled to review the records, reports and evaluations received or considered by the court. *Nunn v. Morrison,* 608 P.2d 1359 (Kan. 1980). The Supreme Court of Washington held the statutory phrases, "proper parental control" and "proper maintenance and control," are not so vague as to be a denial of due process of law. *In re Aschauer's Welfare,* 611 P.2d 1245 (Wash. 1980). The Circuit Court of Appeals of Missouri held that even though the mother's neglect consisted of obscene conduct with a daughter, it was proper for the court to also remove a son from her custody even though the evidence of improper conduct related solely to the daughter. *In Interest of A.K.S.,* 602 S.W.2d 848 (Mo. 1980).

It has been held a presumption that leaving a child in the care of others for more than one year is unconstitutional abandonment. *Petition of Dept. of Soc. Serv. to Adoption,* 452 N.E.2d 497 (Mass. 1983). In neglect proceedings, it has been held that a child cannot be removed from his parents' custody before trial unless there is a showing of "immediate and urgent necessity." *In re Polovchak,* 454 N.E.2d 258 (Ill. 1983). It has been held that a parent is required to protect a child from harm by others and, if unable personally to provide the protection, to call for help. *State v. Williams,* 670 P.2d 122 (N.M. App. 1983). Children must be removed from parents who will cause them psychological damage, no matter how much the parents may love the children. *In re R.D.J.,* 340 N.W.2d 415 (Neb. 1983).

It has been held that a child may testify *in camera* if the parents' attorney is present. *Cruz v. Com. Dept. of Pub. Welf.,* 472 A.2d 725 (Pa. Cmwlth.

1984). In Louisiana a social history cannot be used against the parents in a neglect case unless it has been made available to the parents. *Morales v. Morales,* 446 So.2d 459 (La. App. 1984). In a South Dakota case, a child had been in foster care continuously for 14 months prior to a hearing. The mother was wanted on criminal charges, departed from the jurisdiction and failed to maintain contact with relatives. The Court held she had voluntarily broken off contact with all who knew her and therefore held the matter should go to hearing on neglect so the child would not be held in limbo because of the mother voluntarily absenting herself and hiding. *People in Interest of B.A.R.,* 344 N.W.2d 90 (S.D. 1984).

A New York Court has held where a case was continued without trial to observe compliance with a plan for rehabilitation with the understanding that if the mother does not comply, the child will be removed; the mother's failure to comply cannot be the basis for removing the child without a hearing. *Matter of Marie B.,* 465 N.E.2d 807 (N.Y. 1984). A North Dakota Appellate Court ruled that the time allowed parents to rehabilitate themselves cannot be formulated, it depends on the facts of each case. *In Interest of J.K.S.,* 356 N.W.2d 88 (D.C. 1984).

The Appellate Court of New York held the plan for rehabilitating the family must offer solutions for the family's particular problems, not merely boilerplate generalized plans. *Matter of Jamie M.,* 472 N.E.2d 311 (N.Y. 1984). The North Carolina Court of Appeals ruled that for the purpose of showing rehabilitative efforts, the court may admit multi-disciplinary team reports even though they are based on inadmissible hearsay. *Matter of Byrd,* 324 S.E.2d 273 (N.C. App. 1985). A North Carolina Court of Appeals ruled that an expert can testify as to the ability of the parents to provide adequate care for the child. *Matter of McDonald,* 423 S.E.2d 847 (N.C. App. 1984). In an interesting Minnesota case, it was ruled that a videotape deposition of a psychologist who discussed a teams' evaluation of reports prepared by others was admissible as a business record without calling any of the persons having input. *Matter of Welfare of J.K.,* 374 N.W.2d 463 (Minn. App. 1985). In Colorado, it was held a social worker's opinion as to the credibility of a child witness is inadmissible. It held this testimony clearly invaded the providence of the court or jury. *People v. Kuhn,* 713 P.2d 410 (Colo. App. 1985).

In Maine, a Court held a mother is entitled to her own psychologist to examine her son if the state or social agency is relying on its psychologist. *In re Michael V.,* 513 A.2d 287 (Me. 1986). In Maine, parents refused to speak and cooperate with the agency concerning allegations of neglect concerning the child. The parents claimed this should not be considered by the trier of fact because of their privilege not to self-incriminate themselves. The Court held since the Fifth Amendment does not prevent an adverse inference against a party exercising his privilege against self-incrimination in a civil action, the evidence of the refusal to speak and cooperate did not violate their constitutional privilege against self-incrimination. *In re Ryan M.,* 513 A.2d 837 (Me. 1986).

The Arizona Court of Appeals ruled that a motion for judgment on the pleadings is not proper in a dependency case. The Court held that in order to sus-

tain judgment in an adjudicatory hearing on a dependency case, there must be evidence in the record to prove the petition. *Matter of Appeal in Pima County,* 727 P.2d 1070 (Ariz. App. 1986). In a Florida case, the Court granted the motion of an agency to compel the mother to submit to a mental examination. The Court reversed stating that an evaluation should not be ordered until the party moving for a mental examination of a person seeking custody of a dependent child, must be able to articulate a reason or reasons that the examination is necessary. *S.N. v. Dept. of Health and Rehab. Serv.,* 529 So.2d 1156 (Fla. App. 1988). A question often discussed by judges was answered in an Alabama case. The trial court had been involved in the case for several years and many hearings and trials had been held concerning the children. The Appellate Court held the judge could take judicial knowledge of the previous proceedings and could consider the prior matters and was not required to ignore or attempt to forget the past. Citing *Witcher v. Motley,* 417 So.2d 208 (Ala. App. 1982). The Court reasoned the reports the judge considered in previous hearings were proper to consider for the reason that the mother had previously had her opportunity to examine the reports and cross-examine and she had either previously exercised those rights or waived them.

In an interesting Minnesota case, it was held the Court can consider evidence presented in a neglect proceeding in another state. *Matter of Welfare of D.M.D.,* 438 N.W.2d 713 (Minn. App. 1989). In a Kentucky case which departs from contrary findings in other jurisdictions, it was held when one child has been shown to be neglected, this does not justify a finding that siblings are neglected without proof as to each sibling. *J.H. v. Cabinet for Human Resources,* 767 S.W.2d 330 (Ky. App. 1989). In an interesting Iowa case, it has been held a child is a "child in need of assistance if he is taught at home without the special classes and socializing attributes of a school." *In Interest of B.B.,* 440 N.W.2d 594 (Iowa 1989). Illinois held that frequent beatings of the mother by the father amount to neglect though the child was never touched. *In Interest of A.D.R.,* 542 N.E.2d 487 (Ill. App. 1989). In a neglect case in Pennsylvania, it was held foster parents who have a strong bond with the child are entitled to be treated like parties in a proceeding to determine custody of the child. *In re Manual,* 566 A.2d 626 (Pa. Super. 1989). Indiana held that a parent who injects drugs in the presence of a child contributes to the child's neglect. *White v. State,* 547 N.E.2d 831 (Ind. 1989). In Pennsylvania it was held that *dependency* cannot be based on an isolated incident but must consider other past and potential future care. *In re Swope,* 571 A.2d 470 (Pa. Super. 1990). Virginia held that since custody following a dependency finding is only temporary, the burden of proof is only a fair preponderance. *Wright v. Department of Social Services,* 388 S.E.2d 477 (Va. App. 1990). In Florida the welfare department cannot require the court to dismiss a dependency petition filed by the grandparents. *In Interest of J.M.,* 560 So.2d 343 (Fla. App. 1990).

For a further summary of case law in this area, see "Child Neglect and Dependency: A Digest of Case Law," by Elizabeth W. Brown, *Juvenile Justice Textbook Series,* National Council of Juvenile and Family Court Judges, P.O. Box 8970, Reno, Nevada 89507.

For aditional review of dependency and neglect issues, see the article by Robert W. ten Bensel, Lindsay G. Arthur, Larry Brown and Jules Riley entitled "Child Abuse and Neglect," in the *Juvenile and Family Court Journal,* Winter 1984–1985/Vol. 35, No. 4.

9. Abuse -- Case Survey

At the turn of this century, one of the hottest and most significant items in the development of juvenile law and the rights of children was the subject of child abuse and more particularly, child sexual abuse. One thing is quite apparent -- the reporting and prosecution of child sexual abuse is either at epidemic new proportions or the willingness of victims to come forward and society's attitude to encourage reporting and prosecution of child sexual abuse is much greater. Child sexual abuse occurred in this country in past years without reporting for fear of embarrassment and the general stigma of society. The increase in child sexual abuse is probably due to a combination of both the lack of reporting in past years and some increase in incidents.

Along with this difficult problem of child sexual abuse comes the evidentiary questions of confrontation of child witnesses and the capacity of child witnesses to testify if unavailable or incompetent. Previous statements may be admitted into evidence under certain exceptions to hearsay if there was a reasonable *indicia* of reliability and other factors present. There is a virtual explosion of case law on children as witnesses. See the U.S. Supreme Court section for the latest pronouncements of the court in this area.

In a New York case, the court held the death of a child from malnutrition and dehydration may be a basis for also finding his sister in danger from the same causative factors. *Matter of Maureen G.,* 426 N.Y.S.2d 384 (N.Y. 1980). A Court of Appeals in Indiana held that a parent who observes the other parent treating the child in a dangerous manner is criminally liable for not intervening to protect the child. *Worthington v. State,* 409 N.E.2d 1261 (Ind. 1980). In the Court of Appeals of New Jersey, a father charged with child abuse was held not entitled to review the welfare investigation reports for purposes of bringing a civil lawsuit. *Kaszerman v. Manshel,* 422 A.2d 449 (N.J. 1980).

In an interesting case in Alaska, a mother was an observer of numerous sexual activities of the father with a daughter when the daughter was eight years old. The trial court, on a plea bargain, imposed a suspended sentence because the mother was a passive participant and in an effort to preserve the home for the children though they had been removed to foster homes. The Alaska Court of Appeals remanded the case back to the trial court for a more severe sentence. The Appellate Court pointed out it was particularly aggravated because of the great number of episodes of sexual abuse over a long period of time and therefore found it was necessary for the Court to impose a term of imprisonment in order to express community condemnation of those who sexually abuse children. *State v. Doe,* 647 P.2d 1107 (1982). A child may be removed from her mother's home if the presence of the mother's boyfriend reasonably causes the child emotional instability

because of the boyfriend having previously hit the child. *In re Juvenile Appeal,* 466 A.2d 798 (Conn. Super. 1983).

If scientific accuracy and predictive values are demonstrated, some courts have allowed admissibility of the "Battering Parent Syndrome." *State v. Zoebach,* 310 N.W.2d 58 (1981), *Sanders v. State,* 251 Ga. 70 (1983). Also see: *The Battering Syndrome: In Expert Testimony as Evidence,* 17 U. Mich. JL Ref. 653 (1984). A New York Family Court held abuse of one child does not mandate a *per se* finding of neglect of other siblings. *In re Cindy D.,* 471 N.Y.S.2d 193 (1983). In an abuse case, a Kentucky Court of Appeals ruled an indigent parent residing in another state must be supplied with transportation to the hearing and may appeal in *forma pauperis. G.G.L. v. Cabinet for Human Resources,* 686 S.W.2d 826 (Ky. App. 1985). An Indiana Court of Appeals case ruled that uncorroborated testimony of a nine-year-old victim is sufficient for a conviction of sexual abuse. *Knisley v. State,* 474 N.E.2d 513 (Ind. App. 1985).

Georgia has ruled a child victim found on *voir dire* to be competent to testify must still be given an oath. *Belcher v. State,* 326 S.E.2d 857 (1985). Connecticut held an expert can give an opinion as to whether there was a "battered child syndrome," but the expert cannot be judgmental or identify any particular person as the cause. *State v. Dumlao,* 491 A.2d 404 (Conn. App. 1985).

A federal case held that statements to a caseworker by a person charged with child abuse are not privileged nor is presence of counsel required. *United States ex rel. Bradley v. Hartigan,* 612 F.S. 795 (D.C. Ill. 1985). A New Jersey Court ruled concerning *res gestae* statements, *res gestae* is determined more by whether the child is under the "stress of nervous excitement" than by how much time had elapsed. A court may make allowances for a child's youth and naivety in extending the time during which the nervous excitement continues to enhance the reliability of the statement. The child's youth and naivety, however, are not substitutes for the stress of a nervous excitement, which is the basis for the hearsay exception. *State in Interest of C.A.,* 492 A.2d 683 (N.J. App. 1985). In the case of a sexually abused child, Oklahoma statutes permitted statements of children which would otherwise be hearsay. The Court on appeal held these statements are not a denial of equal protection nor of confrontation. See *Matter of W.D.,* 709 P.2d 1037 (Okla. 1985).

The Supreme Court of Wisconsin held that a woman who knew her husband was abusing their young children but did nothing to stop him is herself guilty of child abuse. The husband repeatedly committed unconscionable acts on his young son and daughter and the children reported this abuse to their mother who did nothing. The state charged both parents with child abuse but the trial court dismissed the action against the mother on the ground the statute applied only to people who directly abuse children. On appeal, the Supreme Court held the mother could be charged under the statute as one who "subjects" children to abuse. The Court construed the "subjects" clause broadly to include a parent whose knowing failure to act leaves the child open to abuse by another. Although the common law excuses a failure to help someone in distress, parents owe their children a greater duty to help. *State v. Williquette,* 385 N.W.2d 145 (Supreme Court of Wisconsin

1986). An Appellate Court in Louisiana held a child victim must be available and able to testify if the videotape was made without the defendant and his lawyer present. *State v. R.C.,* 494 So.2d 1350 (La. App. 1986).

A Pennsylvania court ruled that while a child's words to a case worker are hearsay, a child's actions in maneuvering dolls are verbal acts and not hearsay. *Lehigh County Office of Children v. Commonwealth,* 516 A.2d 1305 (Pa. Com. Ct. 1986). Also, a South Dakota court held that describing a child's use of anatomical dolls, omitting the words, is an observation of fact, and not hearsay. *Matter of C.L.,* 397 N.W.2d 71 (S.D. 1986). An Illinois Appellate Court ruled it is admissible to show violent acts toward the mother occurring shortly after the alleged violent acts toward the child. *People v. Sykes,* 504 N.E.2d 1363 (Ill. App. 1987). South Carolina's Appellate Court went through various factors to consider when a child witness can be deemed competent to testify. They ruled great caution should be used in finding a child's statements reliable if they are offered as a hearsay exception. *S.C. Dept. of Soc. Services v. Doe,* 355 S.E.2d 543 (S.C. App. 1987). North Dakota's rules of evidence provide that everyone is competent as a witness unless it can be shown to the contrary. In this case, the Court ruled corroboration was not necessary for a seven-year-old witness, and the testimony sustained a conviction for child abuse. Nevertheless, the Court pointed out the preferred practice is to support the testimony with as much other corroborating evidence as possible. *State v. Schill,* 406 N.W.2d 660 (N.D. 1987). In a child sexual abuse case in Massachusetts, the Court held that if a defendant can show a good faith basis, he should be allowed a *voir dire* examination of the victim and the victim's mother to determine if the victim's knowledge of sexual matters may have come from a previous experience and, if so, to advise the jury. *Com. v. Ruffen,* 507 N.E.2d 684 (Mass. 1987).

In Florida, the Court held a father's previous sexual abuse of half-sisters is admissible to show lack of inadvertence and opportunity in the case at bar. *In Interest of C.G.,* 506 So.2d 1131 (Fla. App. 1987). In Illinois, the Appellate Court ruled a victim's previous sex abuse experiences cannot be raised unless they are shown by *voir dire* to show interest, bias, or motive to falsify. *Peoples v. Campos,* 507 N.E.2d 1342 (Ill. App. 1987). In Nebraska, the Appellate Court ruled a child's statements are admissible as *res gestae* regardless of the time lag or evidence of excitement if in fact they were made spontaneously without the capacity for conscious fabrication. *In re Interest of R.A.,* 403 N.W.2d 357 (Neb. 1987).

In Georgia, the Court ruled statements of a child sexual abuse victim while talking in his sleep are admissible if otherwise reliable. *Godfrey v. State,* 358 S.E.2d 264 (Ga. App. 1987). In a federal case, the Court ruled that where the defense attempted to cross-examine the child victim to show the story was a fabrication devised by the mother and grandmother, a videotape of the child's statement was allowed to be used in rebuttal. *Sullivan v. State of Minnesota,* 818 F.2d 664 (8th Cir. 1987). A Nebraska Court ruled the juvenile judge may forbid visitation by the abuser with the victim until the abuser presents proof of rehabilitation. The juvenile court was held not to abuse its discretion. *In re Interest of K.L.C.,* 416 N.W.2d 18 (Neb. 1987).

In Washington, it was held a child's responses to leading questions by her mother were admissible, if reliable. The Court discussed the constitutional requirement that there be adequate indicia of reliability surrounding a child's hearsay statements and allowed the testimony. *State v. McKinney,* 747 P.2d 1113 (Wash. App. 1987).

Illinois held that neglect and abuse may be found for injurious environment when a child is bruised from unknown causes while in the mother's care though there is no showing she caused the bruises. *In Interest of Weber,* 537 N.E.2d 428 (Ill. App. 1989). In Rhode Island, it was held that a neglect action being civil, a child's testimony may be taken in chambers with only the judge and reporter present. *In re Michael C.,* 557 A.2d 1219 (R.I. 1989). Oklahoma held in an abuse case, it is error, but not so fundamental as to require automatic reversal, not to hold a hearing *in camera* to test a child's reliability as a witness. *J.J.J. v. State,* 782 P.2d 944 (Okla. Cir. 1989). In Arizona, it has been held that where parents have abused older siblings, a newborn can be found neglected and removed without waiting for it to be injured. *Matter of Juvenile Dep. Action,* 785 P.2d 121 (Ariz. App. 1990). In Washington, it was held that clergy can constitutionally be required to report incidents of child abuse which they learn from the confessional. *State v. Motherwell,* 788 P.2d 1066 (Wash. 1990). In an interesting Iowa case, it was held as part of their treatment, the Court can require parents to admit they have abused their children even though they denied it at trial. *In Interest of K.M.R.,* 455 N.W.2d 690 (Iowa App. 1990). Vermont held that the court in an abuse hearing can admit evidence of abuse of other children, unless it is unreasonably prejudicial. *In re S.G.,* 571 A.2d 677 (Vt. 1990).

10. Termination of Parental Rights -- Case Survey

The Appellate Court of Illinois has held that once the period to appeal from an order terminating parental rights has expired, a parent may not seek to restore those rights by means of a petition to modify the order. *In Interest of Workman,* 373 N.E.2d 39 (Ill. 1978). The Supreme Court of Utah held that, where the juvenile court has terminated parental rights and ordered a child placed for adoption, it lacks jurisdiction to grant the child the right to visit her natural parents. *State in Interest of R.J.,* 589 P.2d 244 (Utah 1978). The Arkansas Supreme Court struck down as unconstitutionally vague the state's termination of parental rights statute which recognizes parental failure to maintain "a proper home" as grounds for termination. *Davis v. Smith,* 583 S.W.2d 37 (Ark. 1979). The Supreme Court of Minnesota has held that in deciding whether to terminate parental rights, "the test is whether the (parent) is presently able and willing to assume his responsibilities and whether or not he has from time-to-time in the past been derelict in his duties." *Matter of Welfare of Solomon,* 291 N.W.2d 364 (Minn. 1980).

The Illinois Court of Appeals Fifth District has held parents may be found unfit and their rights terminated solely on the basis that they are mentally retarded, even though this is not their fault and they have not made great efforts to provide adequate care for their children. *In Interest of Devine,* 401 N.E.2d 616 (Ill. 1980). The Supreme Court of Oklahoma held parental rights cannot be terminated for failure to correct conditions unless the court

has advised the parents of the conditions which must be corrected. *Matter of T.M.H.,* 613 P.2d 468 (Okla. 1980).

A Superior Court in New Jersey ruled the father of an illegitimate child may be served by publication in a determination of parental rights proceedings *where the mother refuses to reveal his identity to permit more effective service. Lutheran Social Services v. Doe,* 411 A.2d 1183 (N.J. 1979). The Supreme Court of New Hampshire has ruled that a mother may be compelled to submit to a psychiatric examination to determine whether she is fit to take care of her children. *In re Fay G.,* 412 A.2d 1012 (N.H. 1980). The Superior Court of Connecticut ruled a mother may surrender her parental rights if she is adequately counseled as to her rights and the consequences of waiving them, and is given adequate time for consideration. *Doe v. Catholic Family Services, Inc.,* 412 A.2d 714 (Conn. 1980). A Family Court in New York held that mental retardation of the parents is insufficient grounds for terminating their parental rights. *Matter of Gross,* 425 N.Y.S.2d 220 (N.Y. 1980). The Supreme Court of Oklahoma ruled inadequate housekeeping is not a basis for termination of parental rights, but lack of responsibility is. It further held that though a mother is entitled to be advised of her right to counsel, failure to do so is not fatal where her right to counsel was mentioned in the summons, where the children had counsel at the hearing, and where the mother did not raise the issue until four years after the termination of the decree was issued. *Matter of F.K.C.,* 609 P.2d 774 (Okla. 1980).

The Supreme Court of Nebraska has held it is not necessary to try to implement a rehabilitation plan before seeking termination of parental rights. *In re Interest of Carlson,* 299 N.W.2d 760 (Neb. 1980). The Court of Appeals of Georgia held a mother's parental rights cannot be terminated simply because she is 16 years old, unemployed and has no prospects for employment. *Chancey v. Department of Human Resources,* 274 S.W.2d 728 (Ga. 1980). The Supreme Court of Georgia ruled that a court cannot compare the relative merits of the parents with some other home and terminate if the other home provides better financial, educational or even moral advantages. *Carvalho v. Lewis,* 274 S.W.2d 471 (Ga. 1980). The Supreme Court of Oregon has held a mother who functioned normally and cared for her child well, cannot be terminated because she had intermittent bouts of disease which caused mental aberrations. *Matter of Swartz Fhaer,* 629 P.2d 882 (Ore. 1980). A Court of Appeals of Michigan held that termination is justified when the mother failed to comply with the most important of 14 conditions incorporated by the court in its order continuing a termination hearing for an experimental ninety days. *Matter of Adrianson,* 306 N.W.2d 487 (Mich. 1981). The Supreme Judicial Court of Massachusetts has held a petitioner must prove a parent is unfit. The mere fact a mother is in prison at the time of birth is insufficient of itself. *Department of Public Welfare, etc.,* 421 N.E.2d 28 (Mass. 1981).

The Supreme Court of Nebraska ruled termination is too important to be decided by informal procedures; thus, reliance upon letters from social workers to the court without cross-examination of the writers is discouraged. *In Interest of D.,* 308 N.W.2d 729 (Neb. 1981). The Texas Court of Appeals held that an incarcerated father has no constitutional right to appear personally at a trial of petition to determine his parental rights. *Major v. Oman,*

624 S.W.2d 835 (1981). The Supreme Court of Virginia ruled that a lesbian relationship is insufficient to terminate a mother's parental rights or permit an adoption over her objection. The Court "declined to hold that every lesbian mother or homosexual father is *per se* an unfit parent." The Court pointed out the decision was not to be construed as approving, condoning or sanctioning such unorthodox conduct, even in the slightest degree. The Court further stated the mother's unnatural lifestyle was a proper factor to consider in determining her fitness as a mother in what was in the best interest of the child. *Doe v. Doe,* 284 S.E.2d 799 (1981). The Georgia Court of Appeals ruled a retarded mother can be terminated when the children are retarded with her but alert in foster care, even though she loves her children and is showing some improvement. *In Interest of T.R.G.,* 290 S.E.2d 523 (1982).

The Kansas Supreme Court has ruled termination of parental rights is of such gravity that service by publication is only permissible if there is a showing of diligent efforts to make personal service. *In Interest of Woodward,* 646 P.2d 1105 (1982). The Supreme Court of Colorado ruled that due process of law is accorded to the parties to a termination of parental rights proceeding under Colorado law when the grounds for termination are established by clear and convincing evidence and the underlying dependency or neglect determination was however established by a *preponderance of the evidence. People in Interest of A.M.D.,* 648 P.2d 625 (1982).

The Nebraska Supreme Court held a mother's parental rights can be terminated for not protecting her daughter from the father's sexual abuse and further that the statute of limitations for criminal incest does not apply to termination of parental rights procedures. *In re Interest of Hollenbeck,* 322 N.W.2d 635 (1982). The Utah Supreme Court held that a statute is unconstitutional which allows termination of parental rights solely in the child's best interest without reference to the parents' fitness. *In re J.P.,* 648 P.2d 1364 (1982). The New York Supreme Court ruled where termination of parental rights was granted before the case of *Santosky v. Kramer,* 102 S.Ct. 1388, on a "fair preponderance of the evidence," the order may stand if an appellate court finds "clear and convincing evidence" from the record. *Matter of Michael B.,* 445 N.E.2d 637 (1983).

The North Carolina Court of Appeals ruled a mother may be excluded from permanent parental termination proceedings during the questioning of her son if her presence would unduly restrain the boy and if her attorney remains with an opportunity to cross-examine the boy. *Matter of Barkley,* 300 S.E.2d 713 (1983). A parent's privilege as to the privacy of her psychiatric records must yield to the needs of the child in termination case. *Betty J.B. v. Division of Social Services,* 460 A.2d 528 (Del. 1983). If the rights of one parent are terminated, it was held in South Dakota that the rights of the other parent must also be terminated if they are living together. *Matter of J.W.W.,* 334 N.W.2d 513 (S.D. 1983). In Vermont, hearsay statements in a social report are not admissible. The Court held these hearsay statements could not be used as a factual basis for determining parental unfitness. *In re Y.B.,* 466 A.2d 1167 (Vt. 1983). A case of interest in New York held that a parent who is required to submit to a psychiatric examination in a termination proceeding is entitled to have her lawyer with her unless the Court is persuaded that the lawyer's presence would impair the examination. *Guardi-*

anship and Custody of Alexander L., 457 N.E.2d 731 (N.Y. 1983). It has been held a mother cannot be denied her child because it has psychologically bonded to a foster parent during long delays caused by the courts. *In re Donna W.,* 472 A.2d 635 (Pa. Sup. 1984).

A petition in a termination proceeding must specifically warn the parent she is allegedly unfit, giving specific grounds. *In Interest of B.K.,* 460 N.E.2d 43 (Ill. App. 1984). The Texas Court of Appeals held the court may terminate parental rights to one child because of their abuse of another child. *Stewart v. Tarrant Co. Child Welfare Unit,* 677 S.W.2d 273 (Tex. App. 1984). The Minnesota Court of Appeals ruled parental rights cannot be terminated unless the parents were provided with a case plan and there was proof of the failure to conform to an essential part of the plan. *Matter of Welfare of Copus,* 356 N.W.2d 363 (Minn. App. 1984). The Ohio Court of Appeals ruled termination of parental rights cannot be ordered unless the petition warned the parents that this was being sought. *In re Snider,* 471 N.E.2d 516 (Ohio App. 1984). The Supreme Court of Nevada ruled in termination proceedings the court must consider parental conduct, capacity and suitability. *Champagne v. Welf. Div. of Nev. State Dept.,* 691 P.2d 849 (Nev. 1984).

The Illinois Court of Appeals ruled that a parent's unfitness toward one child may be the basis for termination of parental rights to all the children. *In Interest of J.R.,* 473 N.E.2d 1009 (Ill. App. 1985). A North Carolina Court of Appeals ruled the failure of the welfare agency to make the statutory requests for periodic judicial reviews are not sufficient to defeat a petition for termination. *In re Swisher,* 328 S.E.2d 33 (N.C. App. 1985). A Louisiana Court of Appeals ruled termination of parental rights due to the parents' alcoholism is not cruel and unusual punishment. *State in Interest of C.P.,* 463 So.2d 899 (1985). In New York, termination of a natural father's rights was precluded where the child care agency failed to plead and prove by clear and convincing evidence that it had fulfilled its statutory duty to exercise diligence in attempting to reunite the family. *In re Sheila G.,* 61 N.Y.2d 368 (Ct. App. 1984).

A Louisiana Court ruled that a state agency that brought "unsuccessful" pleadings to terminate parental rights, may be ordered to pay the indigent parents' attorney's fees. See *State in Interest of Johnson,* 475 So.2d 340 (La. 1985). In Iowa, a Court has held that a woman who persistently selected violent men and allowed them to sexually abuse the children is sufficient grounds for terminating parental rights. *In Interest of M.H.,* 367 N.W.2d 275 (Iowa App. 1985). In a termination case in Pennsylvania, the Court held the issue should be whether a mother can and will learn to take care of her disabled child in the future, not whether she has done so in the past. *Matter of Adoption of Ellingsen,* 501 A.2d 1123 (Pa. App. 1985).

In Minnesota, an Appellate Court held that it is not a denial of a parent's constitutional right against self-incrimination to require him to either acknowledge the causes of his child's injuries or risk termination of his parental rights. *Matter of Welfare of S.A.V.,* 392 N.W.2d 260 (Minn. App. 1986). In Florida, the Supreme Court has ruled as unconstitutional, a statute authorizing termination of parental rights solely because of violation of

a court ordered rehabilitation plan. *In Interest of R.W.,* 495 So.2d 133 (Fla. 1986). In West Virginia, it was held that unless there are compelling circumstances to the contrary, a mother is entitled to an improvement period before parental rights can be terminated. *State ex rel. W. Va. Dept. of H.S. v. Cheryl M.,* 356 S.E.2d 181 (W. Va. 1987). In Montana, the Court ruled parents may be allowed to visit after a termination of parental rights in exceptional circumstances, where it is beneficial to the child. The Court further ruled that visitation can never be authorized after the child has been adopted. *Matter of V.B.,* 744 P.2d 1248 (Mont. 1987). In an unusual Georgia case, it was ruled a mother's rights cannot be terminated merely because she has no contact with the children and is unable to have their custody if in fact they are being adequately cared for by someone else so that there would be no benefit to the children from the termination. *In Interest of C.T.,* 365 S.E.2d 117 (Ga. App. 1988).

Arizona held that alcoholism or mental illness are not grounds for termination of parental rights unless it can be demonstratively shown these illnesses are detrimental to the child. The Court pointed out the record must show a benefit to the children of the severance of parental rights and conversely, the record should reflect any detriment to the children if the severance was denied. *Appeal of Maricopa County Juvenile Action,* 756 P.2d 335 (Ariz. App. 1988). In Missouri, the Court ruled that although the abuse of one child substantially exceeded the abuse of his sister, the abuse of one child may justify the termination of parental rights not only with respect to the victim but also with respect to the sibling. The Court cited the cases of *In re Interest of A.L.B.,* 743 S.W.2d 875 (Mo. App. 1987) and *In Interest of A.M.K.,* 723 S.W.2d 50 (Mo. App. 1986). This case was cited as *In Interest of R.A.M.,* 755 S.W.2d 431 (Mo. App. 1988).

In a Nebraska termination case, it was held that (a) a home study report is inadmissible unless the maker is available for cross-examination, (b) a therapist report is inadmissible unless there is evidence of reliability and (c) noncompliance with the rehabilitation plan is immaterial if the plan was not Court ordered. *In Interest of P.D.,* 437 N.W.2d 156 (Neb. 1988). In Michigan, it has been held that a judge who heard evidence in a previous neglect proceeding does not disqualify him from hearing the termination proceeding. *Matter of Schmeltzer,* 438 N.W.2d 866 (Mich. App. 1989). Once again in a Georgia case, the court held that in a termination case, the petition must allege facts demonstrating the neglect, a recitation of statutory language is insufficient. *In Interest of D.R.C.,* 381 S.E.2d 426 (Ga. App. 1989). In New Jersey, it has been held that the court can examine a child without the father or his lawyer being present. *Div. of Youth and Fam. Serv. v. V.K.,* 565 A.2d 706 (N.J. Super. 1989).

In Vermont it has been held that an order terminating parental rights which allows the parties to reopen it from time-to-time is not a final order and is invalid because the child is left in limbo. *In re R.B.,* 566 A.2d 1310 (Vt. 1989). However, in an Iowa case, it was held that the mother of a child who was not readily adoptable, should be allowed to reopen to show she has a new husband and has mended her ways. *In Interest of T.W.W.,* 449 N.W.2d 103 (Iowa App. 1989). In Louisiana, a mother's nomadic life which al-

lowed the child to bond with the foster mother was grounds for termination. *State in Interest of Sampson,* 558 So.2d 314 (La. App. 1990). Missouri held that persistent alcoholism is a ground for termination. *In Interest of J.M.,* 789 S.W.2d 818 (Mo. App. 1990).

> "If we don't find a way to prevent the painful abandonment, abuse and exploitation of children, we will spend the rest of our lives building mental hospitals and prisons."
>
> *Karl Menninger, M.D.*

XIX. DISPOSITIONAL PROCEEDINGS AND HEARINGS IN JUVENILE CASES

1. The participants generally have a full block presentation on *dispositions* at the college. This outline is a general introduction to the subject, along with a case survey in the area.

2. The National Advisory Commission on Criminal Justice Standards recommends that the dispositional hearing should be separate from the adjudicatory hearing and the procedures of disposition should be identical to those followed in sentencing procedure for adult offenders. Reference: *Standard 14.5 of the NACCJ.*

3. The dispositional hearing is where the decision is made concerning the life and placement of the juvenile. The dispositional hearing should weigh and balance both the best interests of society as well as the best interest of the child with the overriding philosophy of rehabilitation, care, treatment and behavior modification of the juvenile. If the probation staff has not gathered the appropriate dispositional investigational materials, then the dispositional hearing should be continued and not heard on the same day as the adjudicatory hearing.

   Concerning dispositions, see the following materials: "Dispositions, the Heartbeat of the Juvenile Court," by Lindsay G. Arthur and William A. Gauger, *Juvenile Justice Textbook Series,* National Council of Juvenile Court Judges. Also see "Dispositional Alternatives in Juvenile Justice: A Goal Oriented Approach," by Richard B. Traitel, Ph.D., *Juvenile Justice Textbook Series,* National Council of Juvenile Court Judges, P.O. Box 8970, Reno, Nevada 89507. Also, see the May 1983 Volume No. 2 of the *Juvenile and Family Court Journal.* This *Journal* contains a great deal of important information concerning concepts on dispositions: "Disposition Concepts," by Judge Romae T. Powell; "The Authority of the Court," by Judge George O. Peterson; "The Social History," by Michael S. Katz; "Procedures in Due Process," by Judge Forest E. Eastman; "Particularized Dispositions," by Dr. Jack P. Haynes and Judge Eugene Arthur Moore; "Revocation," by Judge Daniel G. Heely; and "Accountability of the Juvenile Court," by Judge Carl E. Guernsey.

4. As stated in *Guides for Juvenile Court Judges,* by the National Council on Crime and Delinquency, Library of Congress Catalog Card No. 57–12880, "The judge's basic problem in dispositional hearings is how to insure that said disposition is realistically related to the causes of the youngster's behavior as well as to the specific offense to which he is appearing in court."

   There are five mandates basic to the disposition of juvenile cases:

   (a) Individualize the child.

   (b) Have an awareness of how the child views himself.

   (c) Weigh the past in terms of the future.

   (d) Do not hold to cliches like "probation is for the first time offenders only" and "three strikes and he's out."

   (e) Determine the type and quality of treatment services available and select what is needed.

5. The case evaluation by the staff and adjunct professionals, for consideration by the court for disposition, may include a personality evaluation and social history. The predispositional evaluation may consist of psychological testing and interviews by the professionals with the juvenile. The probation staff or court services officers traditionally put together a comprehensive panorama of the history of the juvenile for the court's consideration. The predispositional report is an extremely important tool for the court's use in making an appropriate disposition.

6. There has been historic controversy over whether the contents of social reports should be revealed to the juvenile, or his parents. Attorneys generally have access to the full social and dispositional report and are the ones who must make the value judgment as to sharing that information with their juvenile client and parents. Predispositional reports often contain sensitive materials which if shown to the juvenile might be detrimental to his psychological welfare. Therefore, a great deal of discretion and judgment should be utilized. I think the report should be revealed to the attorney, and at least the substance should be revealed to the juvenile and parents. See *State v. Lance,* 464 P.2d 395 (Utah 1970) and *Sorrels v. Steels,* 506 P.2d 942 (Okla. 1973). The Oklahoma case held that in the absence of a showing of cause, the parents of a child should have been advised of the contents of a social summary for use in the dispositional portion of a delinquency hearing. This seems to reflect the majority rule.

7. Under the model rules for juvenile courts and dispositional hearings, it is stated the court may admit into evidence any testimony or exhibits material and relevant to arriving at an appropriate disposition. In arriving at this decision, the court shall consider only the testimony or exhibits offered as evidence in court or contained in the social study report. The courts generally hold the child has a *right* to a dispositional hearing. *In re J.L.P.,* 100 Cal. Rptr. 601 (Cal. 1972). It has been found to be error to enter dispositional orders without conducting a dispositional hearing, as well as the

adjudicatory hearing. Counsel for the parties should be permitted to cross-examine the person who prepared the social study report and the parties are entitled to compulsory process for the appearance of any person, including character witnesses to testify at the dispositional hearing. An Alaska court has held it is error to proceed with the dispositional hearing in the absence of the child's attorney. *A.A. v. State,* 538 P.2d 1004 (Alas. 1975). The dispositional hearing should not proceed in the absence of the juvenile. *In re Cecilia R.,* 36 N.Y.2d 317 (N.Y. 1975). The *Cecilia* decision extended the right of a juvenile to be present during a hearing concerning status offenders or persons in need of supervision, as well as proceedings alleging commission of an act that would be a crime if committed by an adult.

8. Recommendations at Dispositional Hearing

At the dispositional hearing, the court should carefully review the evaluation materials and recommendations should be solicited from:

(a) The prosecutor
(b) Parents
(c) Guardian ad Litem
(d) Evaluation element
(e) Interested persons
(f) The juvenile
(g) Other appropriate parties

9. Judge's Objectivity

Judge's Objectivity: Things that could affect the judge in the dispositional hearing. The judge must maintain courage, bearing in mind the best interest of the child.

(a) Politics
(b) Attitude of the press
(c) Police-Court relations
(d) How the judge views his image in the community
(e) How long to the next election
(f) Nature of the offense
(g) Protection of the public
(h) Attitude of the judge
(i) Social upbringing of the judge, the judge's background, behavioral scientific training and so forth.

10. Dispositional Proceedings -- Case Survey

A Family Court of New York City has held when a child is in foster care, the court may develop plans for its care and may monitor implementation of its orders including the religious training being given the child. *Matter*

of Roxanne F., 428 N.Y.S.2d 853 (N.Y. 1980). The Court of Appeals of Maryland held a child has a right, of which he must be advised, to speak to the court about the disposition to be ordered even though his lawyer may also address the court. *In re Virgil M.,* 421 A.2d 105 (Md. 1980). The Supreme Court of Vermont held when a father agrees with a proposed disposition but the child disagrees, the child is entitled to a guardian ad litem. *In re J.S.,* 420 A.2d 870 (Vt. 1980). An Appellate Court of West Virginia stated the disposition hearing is the most important part of the juvenile process. The court must have a complete social history which discusses all options. It must hear all witnesses who may help advise the most appropriate disposition. Counsel for the child should seek and press for the least restrictive viable alternative. The court must consider the public safety, deterrence of the child, and should seek to develop the child's responsibility for his actions. It must determine the least restrictive alternative which will accomplish the requisite rehabilitation, using punishment where necessary, but using incarceration only when other methods would clearly fail. *State ex rel. D.D.H. v. Dostert,* 269 S.E.2d 401 (W.Va. 1980).

The Court of Appeals of Louisiana held where a juvenile court has considerable discretion in the disposition it imposes, it must select the least restrictive disposition under the circumstances of the case. *State in Interest of Weston,* 388 So.2d 73 (La. 1980). The Supreme Court of Wisconsin held that a child who presents a threat to the property of others may be deemed to be a "danger to the public" for purposes of a statute which limits the use of restrictive custodial treatment for such children. *In Interest of B.M.,* 303 N.W.2d 601 (Wisc. 1981). The Court of Appeals of North Carolina has held a juvenile may not be committed to the state training school unless there is no other suitable placement which will accept him. *Matter of Hughes,* 273 S.E.2d 324 (N.C. 1981). The Court of Appeals of the District of Columbia held a child may be given a disposition which amounts to a greater deprivation of liberty than an adult could receive for the same offense. *Matter of L.N.,* 432 A.2d 692 (D.C. 1981). The Court of Special Appeals of Maryland ruled a restitution order entered two months after the child was placed on probation was invalid. *In re Yolande L.,* 431 A.2d 743 (Md. 1981). The Supreme Court of North Carolina ruled a child cannot be placed in a training school when it was not recommended by anyone at the disposition hearing. *Egan v. M.S.,* 310 N.W.2d 719 (N.C. 1981). The Court of Appeals of Maryland held that at a disposition hearing, the juvenile's counsel is entitled to copies of reports seen by the judge. *In re Jeffrey L.,* 437 A.2d 255 (Md. 1981). The Court of Appeals of North Carolina ruled a disposition cannot be made without a hearing where the juvenile has an opportunity to be heard and present evidence. *Matter of Lail,* 284 S.W.2d 731 (N.C. 1981).

A 16-year-old boy who admitted fornication with a 15-year-old girl, was placed in the county jail for seven days for shock probation. The Court ruled that "shock probation" by placing the juvenile in jail for whatever time or reason is illegal under the rules and statutes and is not to again be undertaken except where specifically permitted by rule or law. *In re L.L.W.,* 626 S.W.2d 261 (1981). The West Virginia Supreme Court ruled that a child has a constitutional right to the least restrictive individualized treatment and to such changes of the disposition order as may from time-to-

time be indicated. *State ex rel. R.S. v. Trent,* 289 S.E.2d 166 (1982). The West Virginia Supreme Court also ruled a court cannot order restitution in amounts which the child cannot pay. *State v. M.D.J.,* 289 S.E.2d 191 (1982). The Supreme Court of Nebraska held a child should not be kept in foster care indefinitely waiting for his parents' rehabilitation. *In Interest of Hastings,* 318 N.W.2d 80 (1982). The District of Columbia Court of Appeals ruled a court is not required to obtain a social investigation if sufficient data is available to enable it to determine an appropriate disposition. *Green v. United States,* 446 A.2d 402 (1982). The Supreme Court of Maryland held that before authorizing sterilization of an incompetent minor, the court must ascertain that the minor will not soon become competent, that a guardian acquainted with the minor consents, that contraceptive measures would be ineffective and that the procedure is medically necessary to preserve the life or physical or mental health of the minor. *Wenzel v. Montgomery General Hospital, Inc.,* 447 A.2d 1244 (1982).

The Supreme Court of California held that restitution is proper and an often desirable method of disposition. It may be based on the ability of both the child and the parents to pay. It may be imposed by a probation officer at intake as a condition of informal probation if the child and parents consent and there is a right of court review. Neither informal nor formal probation can be denied a child because he and his parents are unable to pay the appropriate amount. *Charles S. v. Superior Court of Los Angeles,* 653 P.2d 648 (1982). The Georgia Court of Appeals ruled a juvenile court cannot order restitution as a condition of probation unless it makes a judicial determination of the amount of loss. *In Interest of J.C.,* 296 S.E.2d 117 (1982). The Supreme Court of Montana held that the court must prepare findings adequate to show the reasons for its dispositional orders. *Matter of V.R.B.,* 653 P.2d 133 (1982). The Wisconsin Court of Appeals ruled restitution may include unrecovered stolen property. *In Interest of I.V.,* 326 N.W.2d 127 (1982). In a dispositional hearing, the Washington Court of Appeals ruled the burden of proof for restitution is the same as any tort; a fair preponderance of the evidence, since restitution does not involve sentence enhancement. *State v. Smith,* 658 P.2d 1250 (1983). In the continuing saga of who has jurisdiction for placement, the Oregon Court of Appeals ruled the juvenile court can vacate a commitment of custody to the welfare agency or it can order the agency to remove the child from a bad placement, but it cannot specify the place where the child is to be placed. *State ex rel. Juv. Dept. v. A.,* 660 P.2d 707 (1983). The United States Court of Nevada ruled a juvenile can be committed to a rehabilitative program for longer than an adult could be committed to a penal program for the same offense. *United States v. Lowery,* 559 F. Supp. 688 (1983).

The Illinois Court of Appeals ruled an attorney at a disposition hearing must not only protect the child's right but must propose a disposition which is in the child's best interest even if the child disagrees. *In Interest of K.M.B.,* 462 N.E.2d 1271 (Ill. App. 1984). The Michigan Court of Appeals ruled evidence supporting the disposition must be on the record. In this case the juvenile plead guilty to breaking and entering an occupied dwelling and the Court retired to chambers to speak with the juvenile court case worker, the prosecutor, the juvenile's counsel, the parents and a representative from the

welfare department. After the recess, court was reconvened and the juvenile was summarily made a temporary ward of the Court and turned over to the Department of Social Services. The Court held the proper course in the dispositional phase would have been to swear the parties, receive evidence on the record and then receive argument. Finally, the Court should articulate on the record the specific reasons for disposition of the case. *Matter of Chapel,* 350 N.W.2d 871 (Mich. App. 1984). The United States Ninth Circuit Court of Appeals ruled that the recommendations as to sentencing options in the social history need not be shown to the child. *U.S. v. Doe,* 734 F.2d 406 (9th Cir. 1984). The Alaska Court of Appeals ruled the Court decides whether a child is to be placed, the welfare department determines where the placement is to be, however, the Court can review the placement to determine if it is in the child's best interest. *State Dept. of Health v. A.C.,* 682 P.2d 1131 (Alas. App. 1984). The Oregon Court of Appeals ruled that the juvenile court cannot enforce a restitution order after the child becomes older than the juvenile court jurisdictional age. *In the Matter of MacKillop,* 683 P.2d 146 (Ore. App. 1984). The Florida Court of Appeals ruled that a child charged only with theft can be required to pay restitution for vandalism of the place from which the property was taken. *J.S.H. v. State,* 455 So.2d 1143 (Fla. App. 1984). The West Virginia Supreme Court has ruled that a statute which allows greater dispositional flexibility for boys than for girls is unconstitutional. *Flack v. Sizer,* 322 S.E.2d 850 (W.Va. 1984). The Indiana Court of Appeals ruled a hearing for revocation of probation requires notice and no detention without the usual grounds for such. Hearsay, however, is admissible and there is no privilege as to communications with the probation officer. *Matter of L.J.M.,* 471 N.E.2d 637 (Ind. App. 1985).

Pennsylvania had held that a juvenile may be incarcerated for nonpayment of restitution if it is established he was able to pay it and did not do so. *In Interest of Steven J.,* 491 A.2d 125 (Pa. App. 1985). It has been held that when a child is appropriately warned in advance, probation can be revoked with commitment to the state for missing a probation appointment. *In Interest of B.R.J.,* 478 N.E.2d 1206 (Ill. App. 1985). The Sixth U.S. Court of Appeals has ruled that a juvenile may be incarcerated for a longer period than an adult convicted of the same offense. *U.S. v. McDonald,* 775 P.2d 724 (Sixth Cir. 1985). In Minnesota, the Court held findings must show the disposition is necessary, appropriate, and the least restrictive. *Matter of Welfare of L.K.W.,* 372 N.W.2d 392 (Minn. App. 1985). A South Carolina Appellate Court ruled restitution can only be ordered as part of probation; it cannot be used in conjunction with commitment to the state. *In the Interest of Joseph Eugene M.,* 338 S.E.2d 328 (S.C. 1985). A Vermont court stated that the issue at the adjudicatory hearing is the truth of the petition and the issue of the disposition hearing is the placement of the child. The case pointed out the necessity of a bifurcated hearing. *In re L.S.,* 509 A.2d 1017 (Vt. 1986). The Kentucky Appeals Court has ruled a parent cannot be ordered to pay restitution nor can her agreement to pay it in order to keep her son out of the training school be enforced. *Wilson v. West,* 709 S.W.2d 468 (Ky. App. 1986). More recent cases seem to stand for the proposition that the court cannot control the place of treatment. See *In re Morris,* 491 So.2d 244 (Ala.

App. 1986). However, the better rule is that the court can require the agency to file progress reports. See *Matter of L.K.C.,* 721 P.2d 1316 (Okla. 1986). A Georgia Court of Appeals ruled waiver of counsel at a dispositional hearing is invalid if the possible dispositions and their consequences were not explained to the child or the parent by the court. *In Interest of W.M.F.,* 349 S.E.2d 265 (Ga. App. 1986).

An interesting Oregon case holds that the statute requiring parents to pay for the cost of a training school commitment of a delinquent child is unconstitutional because it is unfair in not also requiring parents to pay for the cost of a training school commitment of a child certified to adult court and placed by it in a training school. *Van Daam v. Hegstrom,* 744 P.2d 269 (Ore. App. 1987). An Illinois Appellate Court ruled that disposition hearings of more than one juvenile at a time are acceptable if the judge clearly distinguishes between the cases. *In re J.C.,* 516 N.E.2d 1326 (Ill. App. 1987). In another Minnesota case, it was held that where a statute authorizes the county to seek reimbursement for treatment costs from the parents, the parents can refuse to pay only to the extent they are unable to pay. *Matter of Welfare of M.J.M.,* 416 N.W.2d 142 (Minn. App. 1987). In Illinois, it was held a Court can commit a child to the training school even though the state and all social workers prefer a less restrictive disposition if there is a reasonable basis for the Court's determination. *In the Interest of A.J.D.,* 515 N.E.2d 1277 (Ill. App. 1987). A North Carolina case held a juvenile is entitled to a transcript of the trial, that the Court must make a full inquiry into the needs of the child and the community before determining the least restrictive alternative and the Court may not order creation of a new foster home. *Matter of Bullabough,* 365 S.E.2d 642 (N.C. App. 1988). In a Nevada case, the Supreme Court ruled that punishment and incarceration as a deterrent is proper. Here, a high school student was heavily involved in the sale of marijuana to his fellow students and the judge gave his reasons for ordering a punitive disposition, namely, incarceration in a youth camp. The Supreme Court stated that using punishment as a means for changing youthful behavior is not a new phenomenon and punishment must be recognized as a valid and useful rehabilitative tool. The Court pointed out that punishment in many cases has a rehabilitative effect and can serve the child's best interests. *Scott v. State,* 760 P.2d 134 (Nev. 1988).

Fines are uncommon in juvenile court, however, a Delaware court ruled that in a proper case, the Court may assess a substantial fine. A delinquent found guilty of delivering cocaine to a juvenile was fined $9,000 plus an assessment to the victim's compensation fund with payments over a period of time. The Court found the fine was not so excessive as to be shocking to the public conscience or that the judge could not reasonably have reached the conclusion he did. *Walker v. State,* 548 A.2d 492 (Del. Super. 1988). In a North Carolina case, it was held that when a child laughed during the disposition hearing, it did not necessarily show a lack of remorse requiring an aggravation of the disposition. The Appellate Court pointed out many possibilities exist where the child might have laughed out of mere nervousness or because of immature adolescence in the toils of the law for the first time and it was pointed out as a universal truth defendants and other witnesses often laugh or smile at being contradicted. The case was remanded

for resentencing. *State v. Parker,* 373 S.E.2d 558 (N.C. App. 1988). In a New Jersey case, it was held mandatory statutory fines and costs can be required of juvenile drug dealers. *State in Interest of L.M.,* 550 A.2d 1252 (N.J. Super. 1988).

A Washington Appellate Court ruled that a probation officer is not bound by a plea bargain and is free to recommend a disposition outside the terms of the bargain. *State v. Merz,* 771 P.2d 1178 (Wash. App. 1989). Illinois has held the court may commit a child to a training school even though there are less restrictive alternatives, if the child's previous dispositional history indicates the training school is appropriate. *In Interest of T.L.B.,* 539 N.E.2d 1340 (Ill. App. 1989). In Louisiana, an Appellate Court ruled commitment of a juvenile to the state until he is 21 for sex offenses is not so grossly disproportionate as to shock the conscience. *State v. Burt,* 546 So.2d 931 (La. App. 1989). In Illinois, it was ruled notice to the mother by telephone call on the morning of the dispositional hearing was inadequate requiring demand for a new hearing. *In Interest of D.L.W.,* 543 N.E.2d 542 (Ill. App. 1989). Florida has held the state cannot leave a child in local detention simply because all the state's resources for placement are full. *D.A.T. v. Coler,* 552 So.2d 319 (Fla. App. 1989). Alaska held the state training school may be the least restrictive placement for a child who has a history of running away from placements. *P.R.J. v. State,* 787 P.2d 123 (Alas. App. 1990). Also, Alaska has held the juvenile court may overrule the welfare agency's limitation of parental visits with children in foster homes if such limitation does not meet the best interests of the child. *Matter of A.B.,* 791 P.2d 615 (Alas. 1990).

XX. DISPOSITIONAL ALTERNATIVES

1. Historically, following the first juvenile code in 1899 in this country, the concept was primarily toward rehabilitation and treatment with emphasis toward the imposition of the least intrusive disposition concerning the juvenile. As stated earlier in Chapter II, a contemporary trend reflects a shift from the medical model to more "retribution and just desserts." This has been brought about in part by a serious increase in violent crime by juveniles, particularly in conjunction with drug traffic and its attendant violence. Although most juvenile court judges are still given wide latitude in the majority of states whose statutory laws contain a range of dispositional alternatives, a few states, following a trend in the adult criminal law, have enacted laws which set up more determinate sentencing guidelines for juveniles. Some have even mandated a dispositional *grid.* Such grids typically give very limited discretion to the judge and mandate certain specified dispositions for specified crimes committed. Only the future will tell us how far the pendulum will swing. Let us hope a moderate position will prevail with the best interest and rehabilitation of the child as the goal, but at the same time, provide sanctions for protecting the public from violence and crime perpetrated by juveniles.

   It is rather elementary that fines and restitution constitute an important part of dispositional alternatives. The U.S. Supreme Court in *Durst v. United*

States, 434 U.S. 542, 98 S.Ct. 849, 55 L.Ed.2d 14 (1978) noted the federal statute neither granted nor withheld authority to order youthful offenders to make restitution or allow a fine as a condition of probation. The Court cites the statute and states it is *imputed* and *implicit* that both fines and restitution comport with the rehabilitative goals of the Federal Youthful Offender Act. The court stated:

> "We are not persuaded that fines should necessarily be regarded as other than rehabilitative in nature when imposed as a condition of probation."

Various state statutes specifically allow restitution as a condition of probation. In a Georgia case, the court held that requiring juveniles to perform services with the Department of Parks does not amount to involuntary servitude. *M.J.W. v. State,* 210 S.E.2d 842 (Ga. 1975). In a New Jersey case, *State v. D.G.W.,* 361 A.2d 513 (N.J. 1976), the Court held that due process requires a judge to consider (1) the amount of damage, (2) effort to determine the value, (3) pro rata share where there are multiple offenders, and (4) a reasonable method of repayment which realistically assesses ability to pay. The court held the judge must make these determinations as a due process requirement. These decisions, it was held, cannot be delegated to the probation department.

2. As a faculty member of *A Comprehensive Plan for the Prevention and Control of Juvenile Delinquency in Kansas* where we studied juvenile delinquency in the state, dispositional alternatives were gleaned as follows:

General community rehabilitation programs

(a) *Probation and parole*

(b) *General probation*
  (1) Probation counseling
  (2) Volunteer utilization

(c) *Social Services*
  (1) Personal Counseling
  (2) Big Brothers–Big Sisters
  (3) Minority Group Counselors
  (4) Pre–Vocational Preparations
  (5) Skill Training
  (6) Licensing
  (7) Job Placement
  (8) Supportive Employment Counseling
  (9) General Recreation
  (10) Junior Achievement

(d) *Family Counseling*
  (1) Work with Families

(2) Work with Siblings
(3) Parent Group Meetings

(e) *Education Programs*
(1) Individual Attention
(2) Tutoring
(3) Vocational Technical Schools
(4) Distributive Education (combination of half day school and half day paid employment)

3. Intensive Community Rehabilitative Programs including Intensive Probation

(a) *Supportive Services*
(1) Intensive Counseling
(2) Employment
(3) Social Services
(4) Skilled Training, etc.

(b) *Living Arrangements*
(1) Home Improvement
(2) Day Care
(3) Foster Homes
(4) Group Homes
(5) Independent Living Arrangements (older juvenile)

(c) *Therapy*
(1) These are juveniles who are in need of outpatient treatment from a mental health center or equivalent private institution or practitioner.

(d) *Family Counseling*
(1) Juveniles in need of family counseling who face massive problems caused by disintegrating family structures. Others present their families with new problems with which they are not prepared or equipped to deal.

4. Residential Treatment and Commitment

(a) Residential treatment and commitment are costly methods of treating juveniles and should be utilized only when other efforts fail and the juvenile is not amenable to community dispositional alternatives. Nevertheless, the residential treatment facility and commitment, if necessary, if properly staffed and programmed, can be a valuable tool in the treatment and rehabilitation of juvenile offenders. Some cases reflect that commitment of a juvenile to an institution can be done only as a last resort. The California Supreme Court in *In re Aline D.,* 14 Cal.3d 557 (Cal. 1975) held that under California law, a child cannot be committed to a juvenile institution solely on the basis that there are no suitable

alternatives; rather, it must appear the child will benefit from the commitment. Concerning the dispositions for "status offenders," state laws and the courts are becoming more and more restrictive. The New York Court of Appeals held that children in need of supervision may be confined to training schools, but must not be confined with delinquent children. *In re Lavette M.,* 35 N.Y.2d 136 (N.Y. 1974).

(b) After Care

(1) A dependable provision of support, counseling, appropriate referral and supervision for those returning to the community following a period of residential treatment of commitment.

XXI. POST-ADJUDICATION AND DISPOSITION -- THE CONCEPT OF THE CONSTITUTIONAL RIGHT TO TREATMENT

1. Post-Adjudication and Disposition Issues

In *Cruz v. Collazo,* 450 F. Supp. 235 (P.R. 1978), a U.S. District Court held a juvenile was not deprived of due process and equal protection when he was transferred *without a judicial hearing* from a nonsecure juvenile facility, to which he had been committed, to a maximum security institution for hardened juvenile delinquents pursuant to an administrative determination made by the Secretary of the Department of Social Services of the Commonwealth of Puerto Rico. The Court held that the U.S. Supreme Court's holding that juvenile adjudicative proceedings must be conducted in compliance with due process standards *is inapplicable to post-adjudicative stages in juvenile proceedings.* Appellate decisions have split just about down the middle on questions of whether or not the juvenile court retains authority to regulate the placement of children after commitment of the child to a state agency. Typically, the Court contends it has statutory and inherent powers to place conditions on orders and place children in the best facility available to meet their needs; social service agencies contend the juvenile court has no further authority after placement with the agency and because the agency has budgetary responsibility and fiscal limitations, the agency must be the one to determine where the child will be ultimately placed. Presently, the majority of state statutes give the ultimate post-adjudicative placement decision to the social agencies, however, there are exceptions and some statutes allow the court to review the action of the agency.

For the reader's information, I have listed some cases taking this issue up: The District Court of Appeals of Florida has held the juvenile court does retain such authority to regulate the placement of children. *Division of Family Services v. State,* 319 So.2d 72 (Fla. 1975). The Superior Court of New Jersey held that the juvenile court does not have authority to commit a juvenile to the Division of Youth and at the same time order that agency to make specific placements and impose the costs of placement on the agency. *State in re D.F.,* 367 A.2d 1198 (N.J. 1976). This is an important area concerning many juvenile court judges.

Other cases where this question has been decided are: *Vern v. Siebenmann,* 266 N.W.2d 11 (Iowa 1978), *Health and Social Services Department v. Doe,* 579 P.2d 801 (N.M. 1978), *Department of Mental Health v. County of Madison,* 375 N.E.2d 862 (Ill. 1978), *In re Welfare of Iowa,* 576 P.2d 65 (Wash. 1978), *State v. Dee,* 566 P.2d 121 (N.M. 1977), *In Interest of C.A.G.,* 263 S.E.2d 171 (Ga. 1977), *Eldredge v. KampKachess Youth Services, Inc.,* 583 P.2d 626 (Wash. 1978).

2. The Concept of the Constitutional Right to Treatment

In the early 70s, various disciplines began to theorize that children were entitled to a constitutional right to treatment and it followed that the issue was tested in various cases throughout the country. The fire and enthusiasm of this early thrust toward the concept of the constitutional right to treatment has been substantially diminished by the development of the case law in the area. The concept is nevertheless one of substantial interest to judges and professionals who deal in the juvenile and family law field.

The early theory of the constitutional right to treatment was founded upon the argument that under the *parens patriae* power of the state, in the absence of adequate treatment, juvenile court jurisdiction and procedures would be constitutionally defective. Some cases seem to adopt this theory. See *Creek v. Stone,* 379 F.2d 106, and the *Matter of Jeannette P.,* 310 N.Y.S.2d 125 (N.Y. 1970). Also the case of *Morales v. Thurman,* 354 F. Supp. 166 (Tex. 1973), generally held that involuntarily confined juveniles had a right to treatment. However, the United States Court of Appeals for the Fifth Circuit remanded the *Morales* case for further evidentiary hearing in light of substantial changes in the practices of the Texas Youth Council and the Court seriously questioned the principle of the right to treatment for juvenile offenders. The court stated the right to treatment argument was "even less strong" as applied to juvenile offenders than adult offenders. The court inferred those juveniles who "clearly pose a danger to society" may be detained without treatment. While the right to treatment was deemed to be "doubtful," the court nevertheless determined any constitutional abuses in the institutions could be corrected by applying the constitutional standard of the cruel and unusual punishment prohibition of the Eighth Amendment. *Morales v. Thurman,* 562 F.2d 993 (Tex. 1977). Other earlier cases ruled that incarcerated juveniles had a constitutional right to individualized rehabilitative treatment. See *Nelson v. Heyne,* 491 F.2d 352 (Ind. 1974). Also see *Inmates v. Affleck,* 346 F. Supp. 1354 (R.I. 1972). The *Inmates* case held that in the absence of a minimally acceptable program of treatment, the children in that institution were entitled to be released.

Probably the most important case to date concerning the constitutional right to treatment was the United States Supreme Court case of *O'Connor v. Donaldson,* 422 U.S. 563, 95 S.Ct. 2486 45 L.Ed.2d 396 (1975). In *O'Connor,* the court referred to the issue of constitutional right to treatment but did not fully develop or answer the matter. The lower circuit court upheld damages to the plaintiff who was involuntarily committed to a mental institution after finding treatment had not been given. The Circuit Court seemed to give broad approval to the existence of the constitutional right to treatment. The

Supreme Court affirmed the decision, however, the high court decided the case on the very narrow ground that a state may not confine against his will, an individual who is neither dangerous to himself nor others, involving the constitutional right to "freedom" not "treatment."

The United States Court of Appeals for the First Circuit held that a state does not have a constitutional duty to provide rehabilitative treatment to juveniles within its custody simply because its professed purpose in taking custody of them is to help them. The court held that while such treatment is desirable, the theoretical basis for the alleged duty of treatment, i.e., the state's *parens patriae* interest in the juvenile's welfare, and the failure to extend some due process safeguards to the juvenile, is questionable. Concerning the *parens patriae* argument, the Court noted a state may confine a juvenile for reasons other than the child's benefit and the U.S. Supreme Court decisions validating the denial of certain due process rights are based on an analysis of the interests involved, not a *quid pro quo* theory. The matter was remanded for a determination of whether the confinement would be related to legitimate governmental goals notwithstanding rehabilitative treatment. *Santana v. Collazo,* 466 U.S. 974 (1984), 793 F.2d 41 (1st Cir. 1986).

Although the constitutional right to treatment is an interesting theoretical attempt to secure treatment for committed juveniles, the movement has lost substantial steam at the present time in light of these federal cases which have not embraced the concept.

XXII. PREVENTION

1. Preventing juvenile delinquency is one of the most important concerns to prosecutors and judges. A knowledge of the general and programmatic elements of "prevention" programs are helpful so they may be recognized and recommendations made to the community for the improvement of existing programs and the beginning of new programs.

2. Socially Responsible Community Life
   - (a) Family Life Education Programs
     - (1) Marriage Counseling
     - (2) Child Rearing, etc.
   - (b) Employment
   - (c) Income Supplementation
     - (1) Job Creating Programs
   - (d) Housing Programs
   - (e) Moral Guidance and Religious Training
     - (1) Family and Religious Groups
   - (f) Day Care Programs

(g) Education Programs
  (1) Early ascertainment of difficulties in school, such as learning disabilities (LD's).
  (2) Appropriate goals, special education, vocational training, finishing high school, higher education.
(h) Leisure Time Activities
(i) Character Building Programs
  (1) Boy Scouts, Girl Scouts, 4-H, etc.
(j) Drug Education Programs

3. Community Structures
(a) Children and Youth Services
(b) Community Planning
  (1) Clergymen Aid Juvenile Courts
  (2) Block Mothers
  (3) Police Neighborhood Councils, Police Youth Councils, etc.

4. Programs for Individuals
(a) Mental Skills
(b) Physical Skills
(c) Guidance

5. Programs for Groups
(a) Family Groups
(b) Neighborhood Peers, etc.

In discussing *Prevention and Cure,* Joseph Malines wrote:

"'Twas a dangerous cliff, as they freely confessed
  Though to walk near its crest was so pleasant
But over its terrible edge there had slipped
  A Duke and many a peasant;
So the people said something would have to be done,
  But their projects did not at all tally.
Some said: 'Put a fence round the edge of the cliff.'
  Some: 'An ambulance down in the valley.'"

XXIII. SUCCESSES AND FAILURES OF THE JUVENILE COURT

1. The lofty goals of the founding advocates of the juvenile court have not been fully met; however, most of the juvenile courts in the nation have *striven* mightily and they have done so without the funding and tools to accomplish the difficult task assigned to them. As Thomas Bailey Aldrich observed: "They fail, and they alone, who have not striven."

2. It is clear the juvenile courts in this country have an important mission in the overall criminal justice system and it would be a tragedy indeed to abolish the noble rehabilitative goals envisioned for youthful offenders in favor of treating all juveniles as adults.

   I include an excerpt from "In Defense of the Juvenile Courts," an address by George Edwards, Judge, U.S. Court of Appeals, Sixth Circuit, at the National Convention of Juvenile Court Judges in Milwaukee, Wisconsin (1972):

   > "For many years, the juvenile courts imagined themselves immune from invasion. However, the Supreme Court of the United States in the *Gault* decision has decided differently and the mandate has been issued to the juvenile court system to attend to its housekeeping. The adjudicatory hearing needs to be cleaned up and due process of law observed in all instances. Some feel that the Supreme Court has more or less put the juvenile court system on probation. The Court has given warning that the juvenile court system should strive to provide the results which were envisioned at the time of its creation, otherwise, the High Court might find it necessary to impose greater limits on the juvenile court system which could lead to its abolition as it is known today."

3. Future goals of the juvenile court should recognize contemporary concepts that dictate the need to put juveniles on notice that within due process of law, "Just Desserts" are a real part of the system, that the public must and will be protected. Nevertheless, I do not join those who wish to abandon the long-established *pole star* philosophy of the juvenile court to provide *individualized treatment* and *rehabilitation.* These concepts are likewise contemporary, viable and important to successfully meet the challenges of the future.

   My good friend and colleague Judge Lindsay Arthur reported that a number of years ago at a meeting of juvenile judges and juvenile probation officers in the State of New York, the Chief Judge gave an inspiring address and closed with an observation that is still true today:

"NEVER FORGET, YOU ARE THE KEEPERS OF A DREAM"

TABLE OF CASES

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