Juvenile Justice: The Adjudicatory Process

Judge Jerry L. Mershon
Juvenile Justice Textbook Series

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I. History and Background of 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 United States 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.


   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 which 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 of 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 at the present time 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 at the present time. 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 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:

   (a) The role and duty of the prosecuting attorney and the attorney representing the child.
   (b) The attorney should assume a strict advocate's role.
   (c) Sharing of juvenile court information among law enforcement agencies.
   (d) A view as to the correct role of the juvenile police officer.
   (e) A view as to the correct role of the juvenile probation officer.

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.

   (a) The role and duty of the prosecuting attorney and the attorney representing the juvenile, is 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 probation officer.

4. The records of the juvenile court and the philosophy concerning confidentiality of the same:

   (a) Generally, state statutes hold juvenile proceedings as confidential.
   (b) Juvenile expungement statutes.
   (c) Sharing of juvenile court records among law enforcement agencies.
   (d) The records of the juvenile court should be confidential.
   (e) Withholding names and why? Reference Articles:
      (4) Generally, statutes 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 purpose 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*, 506 N.E.2d 652 (III. 1973).

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 outline, I have referred to the National Advisory Commission on Criminal Justice Standards and Goals (NACCC) by citing various specific standards in the particular area covered.

Notwithstanding the above standards, there has been no project as immense and as comprehensive as the recently completed 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 has been a number of years in the making. In February 1979, the American Bar Association endorsed 17 volumes of the standards, and six of the volumes were withdrawn for revision or for future consideration. Endorsement of the 17 volumes came after rejection of motions to postpone consideration of all of the standards for another year. The said project lasted for approximately seven and one half years and cost about 2.5 million dollars to compile.

The volumes approved at the February, 1979, ABA meeting of the House of Delegates are as follows: Adjudications; Appeals and Collateral Views; Architecture; Corrections Administration; Counsel for Private Parties; Dispositional Procedures; Dispositions; Interim Status; Juvenile Records and Information Systems; Monitoring; Planning for Juvenile Justice; Police Handling of Juvenile Problems; Preliminary Proceedings; Prosecution; Rights of Minors; Transfer between Courts and Youth Service Agencies. The volumes approved at the February, 1980, ABA meeting of the House of Delegates are as follows: Standards on Schools and Education; Juvenile Probation Function; Court Organization and Administration and Juvenile Delinquency Sanctions.

The Child Abuse and Neglect volume withdrawn from consideration pending a redraft of parts Five and Eight and the Non-Criminal Misbehavior volume was "Deferred" in February, 1980, by a narrow vote thus these two standards remain in limbo at this time.

These 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 and profess that all parties were given equal representation and that the standards reflect a good mix of disciplines in their creation. I leave this controversy to your own evaluation and this writer will attempt to keep his personal ideas on this matter at least to a minimum in order 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 of these standards and be familiar with their provisions. I now include a brief summary of the standards in this outline:

**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 that would lead to the development of an accurate and comprehensive information base that would insure monitor's 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 through efforts to eliminate conditions that undermine 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 standard limits judicial discretion, requires "demon-
Standards Relating to Appeals and Collateral Review

Provides a comprehensive guide to juvenile appeals. Addresses such questions 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

Recommend merging juvenile matters and other family matters into a single family court in order to avoid judicial fragmentation. Provides opportunity to have the same judge handle legal rights of juveniles under correctional supervision.

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 calling for more flexibility in rehabilitational efforts.

Standards Relating to Transfer between Courts

Permits waiver only in carefully defined cases, after a full hearing in which the juvenile prosecutor clearly demonstrates that 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 means permitted by law.

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. 1654, 6 L.Ed.2d 1001 (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 of access to juvenile court records.

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

   Important to remember that 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. Bombaciino, 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 that the 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 principles relating to due process. The general conclusion is that:

   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 the 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 that 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 or 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 that 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.
2. Juvenile and parents entitled to sufficient notice in advance of hearing to permit preparation.
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., permitted preparation.

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 process 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 that these protections were applicable only where a juvenile would be "incarcerated". The decision left a gray area concerning other 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.
5. Capacity in insanity.
7. Appeal.

The Gault decision does have 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.
I.


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 constitutional safeguards. The due process rationale was used rather than equal protection.

In the case of Ivan V. 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 preponderance 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 (Otkl. 1978).

Facts:

Two juveniles, fifteen and sixteen 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 Burress case. 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 the 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 to 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".

8. Restriction on Miranda Warning Rule (As may be applicable in the juvenile court):

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.


Holding:

The constitutional right to counsel does not attach until judicial criminal proceedings are initiated. The exclusionary rule relating to lineups in out-of-court identification do 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.


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 record in the juvenile court. These facts brought the question squarely to the issue: which prevails?

Holding:

The accuracy and truthfulness of the juvenile's testimony was 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.

The statute was held unconstitutional. The age of majority must be the same for males and females. Generally, the due process clause of the Fifth Amendment and was unconstitutional.

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.

14. Concerning Parental Rights, Armstong v. Manzo, 80 U.S. 545, 85 S.Ct. 1187, 14 L.Ed.2d 551 (1972). The U.S. Supreme Court held that failure to give a divorced father notice of proceedings for adoption for his child was a violation of the due process clause. The decree was held invalid.

It is important to point out that 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 for the child 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 (Wis. 1973). Here, without notice to the biological father, the child was placed for adoption. The father's right of habeas corpus was denied in the Wisconsin Supreme Court on the ground that 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 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 that an 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 that an unwed father was entitled to a hearing on his fitness just as other parents were entitled to the same.

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Facts:

Ardell Williams had continuous custody of her illegitimate son for eleven years. She married Walcott who petitioned for adoption of the child. When advised of the petition, the natural father, Quillian, filed a petition for legislation and filed objections to the adoption. Georgia statutes required the consent for adoption of an illegitimate child from the mother only unless the father had legitimized the child. Consent from both parents was required if child was legitimate.
Quilloin claimed that under the statute, he was denied a "veto authority" on the adoption which both parents of a legitimate had under the statutory law. He further argued that his parental rights should be preserved 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 that 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 that 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 and never 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 that 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.


**Facts:**

Parties lived together out of wedlock for several years and had two children. The unwed father contributed to the children's support. The parents separated and the wife married her present husband. The unwed 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 that 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.

**Holdings:**

The Court ruled that 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 that the 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 the 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.


**Facts:**

The defendant parents, members of the Amish faith, refused to send their children, age fourteen and fifteen, 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 until the age of sixteen.

**Holdings:**

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 the 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 interests 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 that were prosecuted in this case and not the children, it was the parent's 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 their parents, but held that since the children of the Amish parents were not parties to the state prosecution for non-attendance at school, this principle was not applicable to the case under consideration.


**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 that the Court did deny 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 that the Supreme Court has, at least for the present, left the decisions in regard to these statutes to the states and has chosen not to make any definitive rulings in this area.


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 an arrangement. It is this writer's opinion that the juvenile court judge should not have directive power over the prosecutorial staff and that the staff 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 that 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 judiciary branch of government rather than the executive, then there should be adequate safeguards to assure that they do have independence.


Facts:

Ohio statute empowered principals to suspend pupils for misconduct for up to ten days. Principal was required to notify student's parents within twenty-four 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 ten-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 that students facing suspension must, at the very minimum, be given appropriate notice and afforded some kind of informal hearing by the school authorities.


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 students clearly established constitutional rights, that his action could not be characterized as being done in good faith.

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


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 that 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.


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.
In this particular case, the Supreme Court held that the juvenile did waive 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.


(2) No objection was made to the presence of the press in the courtroom or to 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 pre-trial order as a prior restraint on the press violative of the First and Fourteenth Amendments.

Following a news story disclosing the name and picture of a juvenile that appeared at a detention hearing, the juvenile judge entered a pre-trial 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 pre-trial order as a prior restraint on the press violative of the First and Fourteenth Amendments.

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

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

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(2) Whether juvenile has waived his right to remain silent and have 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) 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 from which 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.


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 through the use of routine reporting techniques; monitoring of police radio band; and the questioning of 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 that 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.


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 that a judge will not be deprived of immunity because the action he took was error, was done maliciously, or was in excess of 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 that he should be able to act without fear of suit.


Facts:
An unmarried fifteen-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 unconstitutional. 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 or the minor the right to be informed of the minor's desire to have an abortion. 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 all 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 Crait 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. 238 (Fla. 1977).

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 the 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 that the statutory distinction between legitimate and illegitimate children was not unconstitutional and that a review of the factors used in deciding that 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.


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 standard, 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 parent's patria 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.

V. Jurisdiction
1. Generally, the states grant exclusive jurisdiction to juvenile courts concerning delinquency, misconduct, or neglect. Many statutes give general jurisdiction concerning criminal or civil cases to certain courts. 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).

Concurrent jurisdiction is somewhat confusing and the better rule would be to simply grant exclusive jurisdiction to juvenile court for offenders under a specified age. Subsequent to the Jackson case, under new constitutional and statutory changes, the Court watered down the original standard, narrowing concurrent jurisdiction to the juvenile courts and superior courts in matters of capital felonies. See J.W. 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 that 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, and welfare. Jurisdiction attaches to the children themselves resulting from the lack of proper care by their parents. In the case of a dependent and neglected or deprived child, the juvenile courts generally have jurisdiction to make the child a ward of the court without permanent parental severance, or the court may enter a finding of permanent parental severance after a finding of "Unfitness" of the parents or after finding the parents guilty of "Wilful Neglect" or "Abandonment".
Juvenile court jurisdiction generally gives the court power to order medical care for a child and otherwise direct the conduct of the parents and the child. 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 Sifterth, 127 N.E.2d 820 (N.Y. 1965). Other courts have been more liberal in their taking of jurisdiction and making orders for medical care such as plastic surgery notwithstanding objection of the parents as in the case of In re Sampson, 278 N.E.2d 918 (N.Y. 1972).

It will continue to be debated as to whether juvenile courts should exercise jurisdiction in a non-emergency medical situation.

6. U.S. District Court in Wisconsin, allows adult prosecution of those who commit criminal acts before reaching eighteen years but who are not formally charged until after reaching eighteen years of age. Bendler v. Percy, 481 F. Supp. 813 (Wis. 1979). Arizona Supreme Court has 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 has 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 has held that 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 that 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 that 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 that the legislative removal of the offense was a denial of due process. The Supreme Court ruled that 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 are 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., 394 So.2d 1017 (Fla. 1981).

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 or her 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 advocate and ombudsman.

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.


"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 unscrupulously 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 parent's 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 Cardozo (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 v. 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, parenthood 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 or her a chance to be a well-integrated adult.
   (c) When the State acts, rights to both parent and child are as follows:
      (i) Right to notice.
      (ii) Parents right to custody.
      (iii) Right to counsel.
      (iv) 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 in the parent, whose primary function and freedom includes preparation 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. 156, 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).

9. The right of a mother to terminate pregnancy was resolved in the landmark 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 who wished 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 to it that abortions are performed under circumstances that insure 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. In an interesting case, an action was brought in Massachusetts challenging a city hospital policy barring the use of facilities in connection with consensual sterilization. The Federal Court of Appeals held that the city hospital's prohibition of consensual sterilization, violated the equal protection clause. The Court noted that a fundamental interest was involved and no other surgical procedures were prohibited outright and other procedures of equal risk were allowed.

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 that the caseworkers felt that 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 or the child were present or represented.

The Court of Appeals held that foster parents having a close familial relationship during the first year 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. Drummmond 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 or not 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.

13. It is interesting to note 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. 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 parental relationships hereinafter discussed.

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

14. Rights of Parents and Children from Birth Through the Pre-school Years
(a) Generally speaking, parents have traditionally had the right to choose the medical care decisions, the custody, maintenance, discipline, support, religion, life style 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:
Parent and Child Rights as to Who May Commit to Institution

(a) Both the child and the parent are receiving more and more due process rights furthermore, there is no legal machinery presently designed for them to obtain judicial review of their hospitalization. Specifically, this class of patients includes the mentally retarded, juveniles and persons under a guardianship. Any person in any one of those classes may be admitted as a "voluntary" patient by his parent, guardian or person in loco parentis without the patient's actual consent, and fregu

(b) A Pennsylvania case, Bartley v. Krements, 402 F. Supp. 1039 (E.D. Pa. 1975), held that 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 herebefore referred to new case of Parham v. J.R., 442 U.S. 584, 99 S.Ct. 2493, 61 L.Ed.2d 101 (Ga. 1979).

Rights of Parents and Children in the Mandatory School Years

(a) Both the child and the parent are receiving more and 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. 122G(b).

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

Rights of Parents and Children 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 some degree of 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 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 questions.
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. California Supreme Court said that these 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."
(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 in plain view may be seized. See Cooper v. California, 386 U.S. 58, 87 S.Ct. 788, 17 L.Ed.2d 730 (1967).

4. School Search and Seizure Cases

(a) It has been held that school officials have 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. 775 (N.Y. 1968). School lockers may be searched and seized, State v. Stein, 456 P.2d 1 (Kan. 1969). It should be noted that these cases give power to school officials in relation to their disciplinary and regulatory needs. The majority rule is that these powers or regulations cannot be exercised for the benefit of outside law enforcement officials unless they have a warrant or have taken 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 721 (N.Y. 1971). A California court has established a test to guide school officials in searching student lockers, In re W., 105 Cal. Rptr. 775 (Cal. 1973).

In the case of People v. Borders, 356 N.Y.S.2d 432 (N.Y. 1974), the court held that a school security officer was a government agent subject to the restrictions of the Fourth Amendment. Some courts have gone a bit further and have held that for all school searches, school teachers and officials are regarded as governmental agents, but are subject to a reasonable 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 both the person as well as school lockers, State v. More, 307 So.2d 317 (La. 1975). In the case of In re W., 105 Cal. Rptr. 775 (Cal. 1973), students told principal that there was marijuana in a particular locker. Principal searched the locker and found marijuana. Held: That the search here was reasonable and that the tests for the validity of a search by school officials involved following: 1) Is the search within the school's duties? 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 verify the 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 that opening lockers with a master key to confirm a report that it contained marijuana was reasonable. See In re W., 105 Cal. Rptr. 775 (Cal. 1973). It should be noted that concerning school locker cases, some of the federal courts have ruled that an expectation 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 the 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. McKennon, 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, 5) the probative value and reliability of information used as justification for the search. In another case, the principal was informed that 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 the 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 has held that a school principal does not have to give a Miranda warning if the child is 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 Gages, 720 P.2d 1076 ( Ore. 1980). The Illinois Appellate Court Fifth District has held that a school official who is 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).

5. Concerning Confessions:

(a) Voluntariness is still significant along with the Court made rules in Miranda and Gault. Following In re Gault most courts have concluded that Miranda requirements do apply to juvenile interrogations. Lopez v. United States, 399 P.2d 65 (Ariz. 1965), State v. Sidersson, 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 admissible because it was taken during a period of unlawful detention following an illegal arrest, In re Ramirez, 72 Cal. Rptr. 171 (Cal. 1968). A confession resulting from an unlawful 14-hour detention was held invalid even though questioning occurred in the presence of parents, State v. Strickland, 323 S.W.2d 912 (Tenn. 1957).

(b) The Supreme Court of Florida has held that 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... on if no parent or attorney was present. State in Interest of T. S. P., 607 P.2d 827 (Utah 1980). A Superior Court of Pennsylvania has 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.C.E., 605 S.W.2d 955 (Tex. 1980).

(c) 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 has held that a statement taken by the police from a juvenile is “inadmissible” unless a parent, lawyer, or other person in a guardian relationship was present. In re Carry, 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 has held that 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 has held that police acted properly by obtaining the consent of a 16-year-old sister of the juvenile, to enter and arrest, and the police left with the sister their address and phone number 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 does not require a Miranda warning because the questioning is not custodial in nature. Matter of Welfare of M. A., 310 N.W.2d 699 (Minn. 1981). In West Virginia, under that statute, fingerprints taken from a juvenile were not allowed to be used to identify the juvenile as an adult by comparison with fingerprints taken from a crime scene. State v. Van Isler, 283 S.E.2d 836 (W. Va. 1981).

(d) 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, 83 S.Ct. 1209, Ed.2d 525 (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

In the absence of counsel, a child’s confession is 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 absence of parent or counsel is involuntary. See 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 that the resulting statement was voluntarily given. See In re Williams, 217 S.E.2d 719 (S.C. 1975).

A Pennsylvania court held that a 15-year-old given Miranda warnings, who had prior experience with police, who didn’t ask to have a parent present, still had to be given the benefit of parental or interested adult guidance in order to validate the confession, Commonwealth v. McCutchen, 343 A.2d 669 (Pa. 1975). A Louisiana case held that a juvenile cannot waive Fifth Amendment right to counsel without first consulting with an interested and informed adult. To sustain waiver, state must prove the juvenile consulted a lawyer or other interested adult. It was further required that the adult be shown to, in fact, 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 are present. The court held that the law did not require in all cases that both parents be present. The court noted that the child’s IQ of 83 was not a per se indication that 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 parent’s 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 has 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).

6. 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 that a parent's refusal to hire an attorney cannot operate as a waiver of the child's right to counsel. J. v. Superior Court of Los Angeles County, 4 Cal.3d 836 (Cal. 1971).

Concering 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 as the alternative, the court may appoint an attorney for the child.

7. The present adult criminal law is that "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).


9. The adult guidelines for proper lineup technique is 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 lineup procedure. See, e.g., Jackson v. State, 608 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 that the constitutional safeguards only apply where a lineup 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 lineup and without counsel after the victim had been told by the police that they thought they had "the boys." The court held that the identification procedure was improper because, (1) no lineup was held, (2) it occurred in the absence of counsel, and (3) it was unduly suggestive. In re Stoutenberger, 344 A.2d 668 (Pa. 1975).

IX. Intake Procedures

1. Urban juvenile courts have a complex and organized process for determining which individuals will be charged and brought before the court. This screening function is performed usually by an intake staff consisting of a specialized staff functioning as a court attached agency.

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

3. The better view of intake procedure 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 that the court should not be an advocate in the matter and should not be involved in the intake procedure. It has been held that a juvenile has no right to counsel at the intake conference. In re S., 341 N.Y.S.2d 11 (N.Y. 1973). 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 Whitebread, intake (screening procedures) after arrest are 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.

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

5. The Court of Appeals of Washington has 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 (Wa. 1981).

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. Informal Probation: Another method of non-judicial 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.
5. **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 that the advice and conditions imposed will not extend beyond 90 days or a similar reasonable period of time.

6. **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 child. The court does not make a formal determination of jurisdictional fact or formal disposition. This is another method to ease the case load of the court. A consent decree should never result in the institutionalization of a child, in my judgment.

7. **The National Advisory Commission on Criminal Justice Intake Standard**: Recommends an intake unit to the family court. I would disagree with the Standard where they give temporary "detention" decision to the intake staff. This should only be done after the filing of a petition. The detention decision is a judicial function for the court to decide. Standard 14.2 of the NACJCJ.

XI. "Diversion" from the Juvenile Court

1. The Theory
   (a) Non criminal acts: e.g., truancy, waywardness, PINS, CHINS, etc.
   (b) Diversion is defined as: "The act of diverting or turning aside, as from a course. It is also defined as an attack or feint intended to draw the attention and force of the enemy from the principal point of operation."

Many modern social programmers and social advocates feel that there is no place for status offenders in the juvenile courts.

It is my observation that 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 that all efforts fail and the juvenile's conduct persists continuously to be detrimental to himself and society and when all reasonable diversionary efforts have been exhausted; then in that event, 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 follow:

> "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 efforts to divert innocent juveniles from the court to avoid labeling as delinquent is undeniably commendable.

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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 labeling them will be of substantial benefit. The slaughtering 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.


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 or not 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 the 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 shall 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 pre-trial detention of an accused juvenile without a showing of probable cause is unconstitutional. *Moss v. Weaver*, 333 F. Supp. 130 (Fla. 1974). The Fifth Circuit has ruled that pre-adjudicatory and post-adjudicatory detention of a juvenile without a probable cause hearing is an unconstitutional denial of due process. *Moss v. Weaver*, 525 F.2d 1258 (Fla. 1976). 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 420 (La. 1976).


   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 undesirable 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 clear and 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.

1. Some further information and cases in the area of detention and bail are as follows:
   (a) 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).
   (b) 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. Alldridge, 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 cause. 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).
   (c) 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.
   (d) Crowded dockets do not justify extension of preadjudication detention or custody orders beyond statutory limit. Dexter v. Rakestraw, 583 P.2d 504 (Okla. 1978).
   (e) The Superior Court of Appeals of New Jersey has held that the requirement for an adjudicatory hearing within thirty 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).
   (f) 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 690 (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).

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

4. 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.

XIII. Transfer to Adult Court, Certification, Waiver, Finding of Non-Amenability

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 Justice. Because the participants will receive this specific instruction, I have simply included a general introduction to the area in this outline.

1. Many states establish a procedure to transfer certain juvenile cases to the adult criminal court. Transferral represents a legislative declaration that juvenile court jurisdiction is inappropriate in certain situations. Transferral is based upon a variety of statutory grounds such as statements of the juvenile court waiving jurisdiction or the court finding that the juvenile is not amenable to treatment in available facilities under the Juvenile Code.
(a) As previously discussed, the Kent case established binding constitutional guidelines and authorities concerning the transfer procedure. Subsequent court decisions indicate that courts do not accord retroactive effect to Kent. Mordecai v. United States, 421 F.2d 1133 (D.C. 1970).

(1) The Kent case 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 F.2d 999 (Ore. 1948).

(2) The seriousness of the crime charged is, of itself, not sufficient for a valid waiver. States, 1974). Also, in Illinois, the state’s attorney has the power to decide whether youths 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. N.E.2d 859 (Ind. 1974). The Illinois Appellate Court has ruled that Illinois law 149 (Ill. 1975).

(b) An Ohio Court has held a valid transfer requires 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). Also, 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). Wisconsin Transfer Statute gives the juvenile judge discretion to determine whether to waive 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. W., 212 N.W.2d 130 (Wis. 1973).

The U.S. Court of Appeals has held that 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 (III. 1974). The Indiana Court of Appeals has ruled that hearsay evidence is admissible and the Fifth Amendment privilege against self-incrimination is not applicable in transfer hearings. Commonwealth v. Clement, 248 Pa. 304 (1920). The Illinois Appellate Court has ruled that the court in a juvenile 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 has held that hearsay is admissible at a certification hearing since it is not adjudicatory. Further, the court ruled that 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 has held that 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 (Wis. 1981). The Ninth Circuit Court of Appeals has held that a social investigation is not required by due process as a prerequisite to certification. People v. Kingsbury, 649 F.2d 740 (Guam 1981).

The Superior Court of Hawaii has held that the court in a certification proceeding, 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 has held that a juvenile may be committed for a psychiatric evaluation and he may be compelled to respond to the interrogatories, 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 has 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. In re Randolph T., 437 A.2d 230 (Md. 1981).
It should be noted that there is a split in authority on whether or not 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 has held that a transfer order from juvenile court to adult court is a final appealable order. In re Doe, 519 P.2d 133 (N.M. 1974).

XIV. Double Jeopardy

1. As previously considered, the Supreme Court has ruled that 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).


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 masters' determinations of nondelinquency made in the minors' favor.

Holding:
The lower appellate court held that the double jeopardy clause did bar the state from taking exceptions to a masters' proposed findings of nondelinquency. U.S. Supreme Court reversed saying that there was not a violation of double jeopardy in this instance because (1) the state did not require minor 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 embarrassment, expense and ordeal of trial. (4) the rule conferred the embarrassment, expense and ordeal of 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.


Facts:
In the course of a waiver proceeding, the judge signed an order which stated that the child was "adjudged to have committed a juvenile offense." 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.

Holding:
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 petition which was filed later.
JUDGE JERRY MERSHON

2. The question of how to handle an incapacitated juvenile is not totally clear from the
relevant cases. Generally, when an adult is found not guilty by reason of insanity, he is committed to a
civil hospital other than by formal court proceedings on the alleged delinquent act. In juvenile
cases, the paucity of cases available is probably because, as a practical matter, prosecutors and
civil procedure.

3. The adjudicatory hearing is a distinct hearing on the merits. The National Advisory
Committee on Juvenile Delinquency stated that children were entitled to a dismissal with prejudicewhen
a hearing is not begun within the time period. The courts have been relatively strict in enforcing such provisions.

4. The right not to be subjected to juvenile proceedings while incapacitated or incompetent.

5. Evidence of prior sustained delinquency petitions for the same conduct was 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 (1978). Proof "beyond a reasonable doubt" that a minor under fourteen years of age has the capacity
to commit a crime is not a constitutional prerequisite to an adjudication of delinquency 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 has held that a juvenile court may not proceed with a delinquency adjudication
when it determines that 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).

6. 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 F.C.M., 605 S.W.2d 643 (Tex. 1980).

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
in a delinquency proceeding to establish the minor's
dangerous to the community in out-of-state facilities if necessary.
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, a right to cross-examine witnesses, the maximum penalties involved upon accepting the plea, and other admonitions. Interest of Burk, 347 N.E.2d 23 (III. 1976).

Burden of Proof
(a) As previously considered, in the Matter of Winship, the Supreme Court held that 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, that due process requires proof beyond a reasonable doubt in governability and wayward trials. The court held that 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.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 has ruled that evidence required to terminate parental rights should be "clear and convincing." Hury v. Lente, 514 P.2d 1093 (N.M. 1973). The Oregon Court of Appeals has held that due process is satisfied by a preponderance of the evidence standard in a proceeding to terminate parental rights. State ex rel. Juv. Dep't. v. K. M.S., 532 P.2d 578 ( Ore. 1976). New York City Family Court's preponderance of evidence on abuse or neglect case. In the Matter of J.R., 386 N.Y.S.2d 774 (N.Y. 1976).

The Massachusetts Supreme Court has held that 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). See the Santosky case (supra p. 28) which sets standard of "clear and convincing."

Burden of Proof — Probation Revocation Hearings
(a) The Court of Appeals of Georgia has held that revocation of a juvenile's probation requires proof beyond a reasonable doubt, or violation of conditions of probation. T.B.I. v. State of Georgia, 229 S.E.2d 553 (Ga. 1976). The Illinois Supreme Court has held that 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 Snead, 381 N.E.2d 272 (Ill. 1978). The Supreme Court of California has 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 that 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 that testimony at a probation revocation hearing that a juvenile was brought to intoxication and that he sniffed paint to become intoxicated wasn't sufficient to establish by a preponderance of the evidence the substance inhaled contained toxic vapors that created 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., 378 P.2d 360 (Okla. 1978). In a Louisiana case, a juvenile was adjudicated truant and placed on probation with conditions that he attend school with no unexcused absences. The juvenile violated the conditions and was committed. On appeal, the court reversed the commitment under a Louisiana statute that only children adjudicated delinquent may be committed. In the Interest of Bellanger, 357 So.2d 634 (La. 1978).

JUVENILE JUSTICE: THE ADJUDICATORY PROCESS
(a) The U.S. Supreme Court in McKeiver v. Pennsylvania, held that there is no constitutional right to a jury trial in juvenile proceedings. Although Gault holds that juvenile proceedings are governed by the Fourteenth Amendment requirement of due process, the McKeiver case holds by "selective incorporation," that the jury trial right is not applicable because "the juvenile court proceeding has not yet been held to be a criminal proceeding, 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), has held that there is no constitutional right to a jury trial under the Federal Juvenile Delinquency Act and that 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 that 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 that a jury trial is "not required," and others have interpreted these decisions to say 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 has, however, ruled that 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 that this practice should not be commonplace and that 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).

5. Jury Trial
(a) As previously considered, the U.S. Supreme Court in McKeiver v. Pennsylvania, held that there is no constitutional right to a jury trial in juvenile proceedings. Although Gault holds that juvenile proceedings are governed by the Fourteenth Amendment requirement of due process, the McKeiver case holds by "selective incorporation," that the jury trial right is not applicable because "the juvenile court proceeding has not yet been held to be a criminal proceeding, 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."

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Corroboration
(b) As previously considered, the U.S. Supreme Court decided in Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974) that the anonymity of juvenile offenders does not take precedence over the right of confrontation in a hearing. If a state statute requires corroboration under the criminal code, the requirement of corroboration would undoubtedly be necessary in the proceeding to show the evidence was constitutionally acquired. Alderman v. United States, 394 U.S. 165, 89 S.Ct. 961, 22 L.Ed.2d 176 (1969). A Missouri court has held that a child should not bear the burden of proving incriminating statements were made involuntarily. In re Interest of M.C., 504 S.W.2d 641 (Mo. 1974).

Privilege against self-incrimination and plea of guilty or stipulation concerning the facts in open court.
(a) The Gault case held that 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 confession may be admitted. A juvenile may admit to a charge in juvenile court if the appropriate safeguards are provided. Matter of Daniel Richard D., 261 N.E.2d 627 (N.Y. 1978). The juvenile should be represented by counsel in open court and he should concur with his counsel's plea on his behalf. It is helpful to have a ratification of the plea or stipulation by the juvenile's parents in open court to show that said stipulation or plea was given knowingly and intelligently. The ramifications of a plea should be made quite 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 (1975).

A New York Family Court has held that 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 Supreme Court of New Hampshire has held that statutory time limits for holding an adjudication hearing are a substantive right with which the state must comply. In re Richard K., 34 A.2d 934 (N.H. 1980). The Supreme Court of Ohio has held that a juvenile desiring to appeal has no right to demand a narrative summary of the proceedings from the judge unless he shows that no verbatim transcript is available. State ex rel. Corona v. Harris, 406 N.E.2d 1120 (Ohio 1980). The Supreme Court of Minnesota has held that a child has the right to a plee bargain, 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 has 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 has held that plea bargaining is necessary to prevent the 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 re Interest of Jones, 407 N.E.2d 691 (III. 1980). The Court of Appeals of the District of Columbia has held that a child has a right to have counsel in open court and to testify if he 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 has held that 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 that...
The Supreme Court of Nevada has held that the confession of a juvenile accomplice must be corroborated by a person who was not an accomplice. A minor v. Juvenile Dept. 4th Jud. Dist., 608 P.2d 509 (Nev. 1980). The Court of Appeals Fourth District Florida has held that voluntary intoxication is a defense to acts of delinquency requiring intent. In the Interest of J. D., 382 So.2d 1331 (Fla. 1980). The Court of Appeals of Florida has held that, where a juvenile is present as a passenger in a stolen automobile, such presence is not a basis for finding him in an act of delinquency. See State v. Doe, 419 N.Y.S.2d 936 (N.Y. 1979). The California Court of Appeals has held that the mere presence of a juvenile as a passenger in a stolen automobile is not of itself sufficient to prove that the juvenile participated in stealing the automobile. B.L.W. v. State, 393 So.2d 59 (Fla. 1981). The Supreme Court of Louisiana has held that the mere presence of a juvenile as a passenger in a stolen automobile is not a basis for finding him in an act of delinquency. State in Interest of Giangrasso, 395 So.2d 709 (La. 1981). The Supreme Court of South Carolina has ruled that a juvenile court may limit the length of final argument but the final argument of a minor v. Juvenile Dept. 4th Jud. Dist., 608 P.2d 509 (Nev. 1980).

The courts have held that indigent parents are entitled to court appointed counsel in child dependency proceedings. Cleaver v. Wilcox, 499 F.2d 940 (Cal. 1974). Also see Crist v. State, 393 So.2d 59 (Fla. 1981). The Court of Appeals Florida has held that if tapes of an electronically reported hearing are lost, and available transcript will not support a finding of delinquency, a new trial is required. J.E. v. State, 404 So.2d 845 (Fla. 1981). The Supreme Court of New Mexico has ruled that a child of eight is capable of willful and malicious conduct. Ortega v. Monroy, 637 P.2d 841 (N.M. 1981).

 XVIII. Proceedings — “Dependent and Neglected” or “Deprived” Children

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 one who is without a parent or other person responsible for his care and a “neglected child” may be one who lacks proper parental care and supervision, or who has been abandoned.

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

3. Unique problems in the investigation and trial of battered and dependent and neglected children.

(a) Hearings involving permanent parental severance.

(b) Hearings involving non-permanent parental severance with children made wards of the court.

(c) Mandatory child abuse legislation in most states.

(d) The necessity for drawing the dependency and neglect or deprived complaint in specific terms rather than general statutory terms.

4. The courts have held that indigent parents are entitled to court appointed counsel in child dependency proceedings. Cleaver v. Wilcox, 499 F.2d 940 (Cal. 1974). Also see Crist v. State, 393 So.2d 59 (Fla. 1981). The Supreme Court of Texas has held that where the child is neglected, the parents have the burden of proving that the child should be restored to them but welfare has the burden of proving that their residual, noncustodial rights should be restored. Weaver v. Rounake Department of Human Resources, 265 S.E.2d 692 (Va. 1980). The Supreme Court of South Dakota has 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). In a New York case, the court held that the death of a child from malnutrition and dehydration may be a basis for finding his sister also in danger from the same causative factors. Matter of Maureen G., 426 N.Y.S.2d 384 (N.Y. 1980). The Supreme Court of Minnesota has held that in deciding whether to terminate parental rights, “the text is whether the (parent) is presently able and willing to assume his responsibilities and not whether 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 Third District has stated that passively failing to protect constitutes neglect. The court held that 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).
Court of Appeals Fifth District has held that 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 have not made great efforts to provide adequate care for their children. In Interest of Devine, 401 N.E.2d 616 (Ill. 1980). A Supreme Court of Ohio has held that parental rights cannot be terminated for failure to correct conditions unless the court has advised the parents of the conditions which must be corrected. Master of T.M.H., 613 P.2d 468 (Okla. 1980).

For a helpful 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 Court Judges, P.O. Box 8000, Reno, Nevada 89507.

8. A superior court in New Jersey has ruled that 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 so as 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). A superior court of Connecticut has held that 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 has held that mental retardation of the parents is insufficient grounds for terminating their parental rights. Master of Gross, 425 N.Y.S.2d 220 (N.Y. 1980). The Supreme Court of Oregon has held that 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 be heard was not 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. Master of P.F.K., 609 P.2d 774 (Or. 1980). An Illinois appellate court reversed a finding of neglect where 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 Loira, 401 N.E.2d 971 (Ill. 1980). The Ohio Supreme Court has held that independent panels on appeal from determination of parental rights are entitled to appointed counsel and free transcripts under the due process and equal protection guarantees of the state and federal constitution. Heller v. Miller, 399 N.E.2d 66 (Ohio 1980). The Kansas Supreme Court has held that 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. Numm v. Morrison, 608 P.2d 1309 (Kan. 1980).

9. The District Court of Appeals of Florida has held that in dependency proceedings, the state must be represented by counsel and the mother has full due process rights to counsel, sworn testimony and confrontation. A.Z. v. State, 383 So.2d 934 (Fla. 1980). The Supreme Court of Washington has held that 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 Aschner's Welfare, 611 P.2d 1245 (Wash. 1980). The Court of Appeals of Oregon has held that a child placing agency is liable in tort, not contract, for failure to find and supervise an adequate placement, but public agencies are immune from negligence concerning discretionary functions. Bradford v. Davis, 611 P.2d 326 ( Ore. 1980). A court of appeals of Illinois has held that 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 Dickson, 401 N.E.2d 591 (Ill. 1980).

10. A Court of Appeals in Indiana has 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). The Circuit Court of Appeals of Missouri has held that even though the mother's neglect consisted of obscene conduct with a daughter, it was improper for the court to allow the 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). In the Court of Appeals of New Jersey, a father who was charged with child abuse was held not entitled to review the welfare investigation reports for purposes of bringing a civil lawsuit. Razzerrman v. Menshel, 422 A.2d 449 (N.J. 1980). The Supreme Court of Nebraska has held that 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 750 (Neb. 1980). The Court of Appeals of Missouri has 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). The Court of Appeals of Georgia has held that a mother's parental rights cannot be terminated simply because she is 16 years old, unemployed and with no prospects for employment. Chancy v. Department of Human Resources, 274 S.W.2d 728 (Ga. 1980).

11. The Supreme Court of Oregon has held that 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. Master of Swartz Phae, 629 P.2d 882 ( Ore. 1980). A Court of Appeals of Colorado has held that 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). A Court of Appeals of Michigan has held that limitation is justified when the mother failed to comply with the most important of fourteen 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 that a petitionor must prove a parent is unfit. The mere fact that a mother is in prison at the time of birth is insufficient of itself. Department of Public Welfare, et al., 421 N.E.2d 28 (Mass. 1981). The Supreme Court of Montana has held that regardless of actual proof that a parent intentionally inflicted injuries upon the child, the occurrence of serious and frequent and yet unexplained, physical injuries to the child is sufficient to properly bring the child within the statutory definition of neglect. In the Master of A.J.S., 630 P.2d 217 (Mont. 1981). The Supreme Court of Oregon has 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. Master of McDermid, 630 P.2d 913 (1981). The Supreme Court of Nebraska has held that 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).

XIX. Dispositional Proceedings and Hearings in Juvenile Cases

4. As stated in

X. Disposition of Juvenile Cases

Therefore my outline is brief and is intended as a general introduction to the subject.

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. Under the model rules for juvenile courts and dispositional hearings, it is stated that the court may admit into evidence any testimony or exhibits that are 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 that the child has a right to a dispositional hearing. In re J.L., 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 that 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 (Ala. 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.

6. The case evaluation by the staff for consideration by the court for disposition may include a personality evaluation and social history. The personality evaluation generally consists of standardized tests verified by extensive use and the social history covers the panorama and history of the juvenile. The staff evaluation is an extremely important tool for the court's use in making an appropriate disposition.

7. There has been historic controversy over whether the contents of social reports should be revealed to the juvenile, his parents or his lawyer. The prevailing rule is that at least the substance of these reports should be revealed to the child's attorney and his parents. State v. Lance, 464 P.2d 395 (Utah 1970). Also see Sorrelles v. Steele, 506 P.2d 942 (Okla. 1973). This 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. There are some cases to the contrary, but the above reflect the majority view.

8. A Family Court of New York City has held that 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 has held that 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 has held that when a father agrees with a proposed disposition but the child disagrees, the child is entitled to a guardian ad litem. In re J.R., 36 N.Y.2d 870 (Vt. 1980). The Appellate Division Court of West Virginia has stated that the dispositional 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 determine whether the child is competent because of his own free will or for environmental reasons. 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 has held that where a juvenile court has considerable discretion in the disposition it imposes, it must select the least restrictive under the circumstances of the case. In Interest of Weston, 388 So.2d 73 (La. 1980). The Supreme Court of Wisconsin has 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 (Wis. 1981). The Court of Appeals of North Carolina has held that a juvenile may not be committed to the state training school unless there is no other suitable placement which he will accept. Matter of Hughes, 273 S.E.2d 324 (N.C. 1981). The Supreme Court of Iowa has held that a child has the burden of proving he is entitled to have the adjudicatory proceedings suspended and a “consent decree” entered for probation. In Interest of Matzen, 305 N.W.2d 479 (Iowa 1981). The Court of Appeals of the District of Columbia has held that 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.W., 432 A.2d 692 (D.C. 1981). The Court of Special Appeals of Maryland has ruled that 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 has ruled that a child cannot be placed in a training school where 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 has held that at a disposition hearing, the juvenile’s counsel is entitled to copies of reports seen by the judge. Further, it is ruled that the adjudicatory proceedings suspended and a “consent decree” entered for probation of the child in suit was wrongful. Matter of Lail, 284 S.W.2d 731 (N.C. 1956).

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

1. 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
(b) Attitude of the judge

XX. Dispositional Alternatives

This writer plans to spend very little time going over dispositional alternatives because that will be covered later in the college. However, I have included an abbreviated outline as a general introduction.

Concerning fines and restitution as a dispositional alternative, the U.S. Supreme Court in Durst v. United States, 434 U.S. 542, 98 S.Ct. 849, 55 L.Ed.2d 14 (1978) notes that the federal statute neither grants nor withholds authority to order youthful offenders to make restitution or to allow a fine as a condition of probation. The Court cited the statute and states that it is "implied and is implicit that both fines and restitution comport with the rehabilitative goals of the Federal Youthful Offender Act. The Court said: "We are not persuaded that fines should necessarily be regarded as other than rehabilitative in nature when imposed as a condition of probation." Various statutes specifically allow restitution as a condition of probation. In a Georgia case, the court held that the requirement that juveniles 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 the process requires a judge to consider (1) the amount of damage, (2) effort to determine value, (3) pro-rata share where there are multiple offenders, (4) a reasonable method of repayment which realistically assesses ability to pay. The court held that the judge must make these decisions as a due process requirement. They cannot be delegated to the probation department.

I was a faculty member of A Comprehensive Plan for the Prevention and Control of Juvenile Delinquency in Kansas, wherein a study of juvenile delinquency in the state was undertaken in 1971 and 1972. Some of the dispositional alternatives gleaned from said studies are as follows:

1. 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
2. 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 out-patient treatment from a mental health center or equivalent private institution or practitioner.
(2) 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.

3. Residential Treatment

(a) Residential treatment is a costly method of treatment for 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, if properly staffed and programmed, can be a valuable tool in the treatment of juvenile offenders.

A new trend of case law is 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 procedure, a child cannot be committed to a juvenile institution solely on the basis that there are no suitable alternatives; rather, it must appear that the child will benefit from the commitment. Concerning the dispositions for “status offenders,” the courts are becoming more and more restrictive. The New York Court of Appeals held that children in need of supervision might 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 and appropriate referral for those returning to the community following a period of residential treatment.

XXI. Post Adjudication and Disposition —

The Concept of the Constitutional Right to Treatment

1. Some case law recognizes a constitutional basis for the right to treatment under the parens patriae power of the state. It can be argued that in the absence of adequate treatment, juvenile court jurisdiction and procedures are constitutionally defective. Creek v. Stone, 379 F.2d 106, the Matter of Jeanette P., 310 N.Y.S.2d 125 (N.Y. 1970).

The U.S. District Court in Texas has ruled that involuntarily confined juveniles have a right to treatment. See Morales v. Thurman, 364 F. Supp. 166 (Tex. 1973).

The United States Court of Appeals for the Fifth Circuit remanded the above-cited case of Morales v. Thurman for further evidentiary hearing in light of substantial changes in the practices of the Texas Youth Council and said Court seriously questioned the principle of the right to treatment for juvenile offenders. The Court states in the opinion that the right to treatment argument is “even less strong” as applied to juvenile offenders. The Court concluded that the Donaldson case (cited hereafter) left open whether those juveniles who “clearly pose a danger to society” can be detained without treatment. While a right to treatment is “doubtful” the Court determined that any constitutional abuses in the institutions can 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).

Another U.S. Court of Appeals has ruled that incarcerated juveniles have a constitutional right to individualized rehabilitative treatment. Nelson v. Heyne, 491 F.2d 352 (Ind. 1974). Supplemental Opinion, 491 F.2d 352 (1973). Also see Inmates v. Affleck, 346 F. Supp. 1354 (R.I. 1972). The Inmates case stated that in the absence of a minimally acceptable program of treatment, the children in said institution are entitled to be released. In 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), the Court raised the issue of the constitutional right to treatment although it wasn’t fully answered. The Fifth Circuit upheld damages to the plaintiff involuntarily committed to a mental institution finding that treatment had not been given, and gave broad approval to the existence of the constitutional right to treatment. The Supreme Court affirmed; however, the Court decided the case on a very narrow ground that a state may not confine against his will, an individual who is neither dangerous to himself or others, involving the constitutional right to “freedom” not “treatment.” United States District Court in New York has recognized the due process right to rehabilitative treatment for incarcerated juveniles. Pina v. New York State Division for Youth, 419 F. Supp. 203 (N.Y. 1976).

See the Right to Treatment Under Civil Commitment, by Elizabeth W. Browne, Juvenile Justice Textbook Series, National Council of Juvenile Court Judges. Also see article “Do Juvenile Courts Have a Duty to Supervise Child Care Agencies and Detention Facilities,” 11 Howard Law Journal 443 (1972); and the article “Right to Treatment,” 57 Georgia Law Review 673 (1967).
2. In the case of State ex rel. K. W. v. Wernin, 242 S.E. 2d 907 (W. Va. 1978), the court held that juveniles are constitutionally entitled to the least restrictive alternative treatment that is consistent with the purpose of their custody. The court held in that case that there was insufficient evidence to show a lack of rehabilitation programs. In New York, a judge committed a juvenile to the New York State Division of Youth notwithstanding some evidence at the hearing that the child had brain damage. The Appellate Court held that it was error not to have required a neurological examination to determine if there was brain damage prior to the order of restrictive placement. In the Matter of Jose Luis Q., 408 N.Y.S.2d 510 (N.Y. 1978). Another New York case found that a state agency could not find suitable placement for a child with behavioral problems. The court reserved the right to order the state agency to create a treatment alternative. This is a precarious course to take on the part of the courts.

3. In Cruz v. Collazo, 450 F. Supp. 235 (P.R. 1978), a U.S. District Court held that 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 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.

4. 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 Family Services or other state agencies. Generally, the court contends that 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 generally contend that the juvenile court has no further authority after placement with the agency and because they have budgetary considerations and fiscal limitations, they must be the ones to determine where the child will be ultimately placed.

The District Court of Appeals of Florida has held that the juvenile court does retain such authority to regulate the placement of the children. Division of Family Services v. State, 319 So.2d 72 (Fla. 1975). The Superior Court of New Jersey has held that the juvenile court does not have authority to commit a juvenile to the Division of Youth and has held that the juvenile court does not have authority to make specific placements and impose the costs of placement on the agency. State v. D.C.F., 377 A.2d 1198 (N.J. 1977). This is an important area that concerns many juvenile court judges. Other cases where this question has been decided are as follows: Vern v. Siehmann, 266 N.W.2d 11 (Iowa 1977); 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. Dec, 566 P.2d 121 (N.M. 1977); In Interest of C.G.A., 263 S.E.2d 171 (Ga. 1977); Eldridge v. Kamp-Kuchas Youth Services Inc., 583 P.2d 626 (Wash. 1978).

XXII. Family Law — Trends and Cases

1. The modern trend in "Divorce" or "Dissolution" legislation is more and more in the direction of the No-Fault Concept. The states vary substantially on Divorce Codes but efforts toward uniformity are increasing. The Uniform Child Custody Jurisdiction Act has been enacted in some form in over twenty states which attempts to curb "Child Snatching" and correct other jurisdiction inequities. The Uniform Marriage and Divorce Act, finally compiled in 1971, is just now coming into its own and is beginning to exert influence on State Divorce Codes.

2. Generally the "tender years doctrine or presumption" has been abrogated by case law and statutory enactment. The Superior Court of Pennsylvania has held that the "tender years" doctrine does not require that custody be awarded to the mother, where both parents are determined to be fit. Commonwealth v. E. P., 369 A.2d 821 (Pa. 1977). The Supreme Court of Alaska has held that the doctrine of "tender years" is an impermissible criterion for determination of the best interests of a child in a custody dispute. Johnson v. Johnson, 564 P.2d 71 (Alas. 1977). However, the Supreme Court of Virginia has held that if everything were equal, that the presumption would be controlling; however, if other things are not equal then the father could obtain custody.

3. The Supreme Court of Pennsylvania has held that where their testimony is made a part of the record, children may be interviewed by the trial judge in a custody dispute outside the presence of counsel for the parents. Chepp v. Chepp, 369 A.2d 554 (Pa. 1977). The Supreme Court of Georgia has held that the right of a child fourteen years or older to choose the parent with whom he wishes to live is controlling—abstain a showing of present unfitness. Harbin v. Harbin, 230 S.E.2d 859 (Ga. 1976). This is an important case. The Supreme Court of Wisconsin has held that a temporary award of custody to one parent does not place a burden on the other parent to show changed circumstances in order to gain final custody in a divorce proceeding. Kuesel v. Kuesel, 247 N.W.2d 72 (Wis. 1976).

4. The California Supreme Court has held that where the state participates in the prosecution of a paternity suit against an indigent defendant, such defendant is constitutionally entitled to court-appointed counsel. Sela v. Cortez, 154 Cal. Rptr. 592 (Cal. 1979). In New Jersey, a known donor of semen for artificial insemination of an unmarried woman was granted visitation rights to child. C.M. v. C.C., 377 A.2d 821 (N.J. 1977). The Supreme Court of Montana has held that if a change of child custody, the uniform marriage and divorce act requires more than merely a finding that the interest of the children will be "best served" by the change. In re Custody of Dillingham, 568 P.2d 169 (Mont. 1977). The Superior Court of Pennsylvania has held that in a custody dispute between the natural parent and a third party, the parent has a "prima facie right to custody" which may not be forfeited unless "convincing reasons appear that the best interests of the child will be served" by awarding custody to the third person. In re Custody of Hernandez, 376 A.2d 648 (Pa. 1977).

5. The U.S. Supreme Court has held violative of equal protection a Wisconsin statute requiring a parent under a court support order to obtain permission of the court to remarry. Zablocki v. Reddell, 3 F.L.R. 2027 (Wis. 1978). The Supreme Court of Nebraska has held that a court in a divorce action has jurisdiction to determine whether the husband is the natural father of his wife's child born before their marriage. Farmer v. Farmer, 263 N.W.2d 664 ( Neb. 1978). The Supreme Court of Missouri has held that a state statute allowing the opening of adoption records only upon court order does not
court must find that (1) the child recognizes both parents as sources of security and love and wishes to continue the relationship; (2) both parents must be physically and psychologically capable of parenting; (3) each parent must desire custody, though they may oppose joint custody; (4) the parents must be capable of enough cooperation to facilitate arrangements and reduce the emotional stress on the child; (5) effective methods of enforcement must be available; (6) joint custody must be practical geographically and financially, school arrangements must be workable, contacts with friends and relatives must be maintained; and (7) the child's preferences must be given due weight. 

The Supreme Court of Kansas has held that a parent's right to custody is a constitutional right of which the parent cannot be deprived without a finding of unfitness after due process procedures. *Shepherd v. Shepherd*, 630 P.2d 1121 (Kan. 1981). The Supreme Court of New Hampshire has ruled that an illegitimate father who has acknowledged paternity has equal rights with the mother to custody of the child. *Bravo v. Shaw*, 432 A.2d 1 (N.H. 1981). The Court of Appeals of Florida has ruled that natural parents are presumed to be preferred. *In re Custody of Townsend*, 427 N.E.2d 1231 (III. 1981). The Court of Appeals of Tennessee has ruled that an agreement of parties to reduce support is not binding on the court. *Rasnic v. Webb*, 625 S.W.2d 278 (Tenn. 1981).

In an interesting case in Louisiana, the Court of Appeals has ruled that a court can set support according to what a parent is able to earn, even though the parent takes a job for a lesser amount. *Guin v. Guin*, 405 So.2d 620 (La. 1981). The Court of Appeals of North Carolina has likewise ruled that if a parent is earning less than he is able because of a disregard for parental obligation, the court may base its support order on earning capacity and is not limited to actual earnings. *Stanley v. Stanley*, 273 S.E.2d (N.C. 1981).

Again, the Court of Appeals of Michigan has likewise held that a parent's unexercised ability to earn may be considered in determining support unless there is good reason for earning below ability. *Dunn v. Dunn*, 307 N.W.2d 424 (Mich. 1981). The Illinois Court of Appeals has ruled that the custodial parent has the burden of proving that visits by the noncustodial parent would endanger the children. *In re Marriage of Neighbors*, 428 N.E.2d 1093 (III. 1981).

**XXIII. Prevention**

1. Prevention of juvenile delinquency is one of the most important concerns of both prosecutors and judges. A knowledge of the general and programmatic elements of "prevention" programs are helpful so that they may be recognized and recommendations made for 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
   (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 technical training, finishing high school, higher education.
(b) 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) Moral Guidance
5. Programs for Groups
(a) Family Groups
(b) Neighborhood Peers, etc.

XXIV. 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 of this nation have not been given the funding or the "tools" to accomplish the task of rehabilitation that they have been assigned.
2. It is clear that the juvenile courts are "important" and have a great deal to do with the system of justice in the nation. There is a great need for education in this area. Juveniles are more pliable and have the opportunity for change and rehabilitation. The chance of success with juveniles is extremely greater than with adults.
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