A COMPARATIVE ANALYSIS OF STANDARDS AND STATE PRACTICES

PRE-ADJUDICATION AND ADJUDICATION PROCESSES

VOLUME VII OF IX

National Institute for Juvenile Justice and Delinquency Prevention

Office of Juvenile Justice and Delinquency Prevention

Law Enforcement Assistance Administration

U.S. Department of Justice

A COMPARATIVE ANALYSIS OF
STANDARDS AND STATE PRACTICES

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VOLUME VII OF IX

Working Papers of the National Task Force
to Develop Standards and Goals for Juvenile
Justice and Delinquency Prevention

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PREFACE TO WORKING PAPERS

Task Force Origin and Mission

The National Task Force to Develop Standards and Goals for Juvenile Justice and Delinquency Prevention was initiated as part of Phase II of the standards and goals effort undertaken by the Law Enforcement Assistance Administration (LEAA) of the U.S. Department of Justice.

The original portion of this effort (Phase I) led to the establishment of the National Advisory Commission on Criminal Justice Standards and Goals in October of 1971. To support the work of the National Advisory Commission, special purpose Task Forces were created, each concentrating on a separate area of concern in criminal justice. The efforts of the Task Forces resulted in the completion of five reports: Courts; Police; Corrections; Criminal Justice System; and Community Crime Prevention. In addition, the National Advisory Commission itself produced an overview volume entitled A National Strategy to Reduce Crime. Following the completion of these works in 1973, the National Advisory Commission was disbanded.

In the Spring of 1975, LEAA established five more Task Forces coordinated by a newly created National Advisory Committee to carry out the work of Phase II. The five Task Forces were Private Security; Organized Crime; Civil Disorders and Terrorism; Research and Development; and, of course, the Task Force to Develop Standards and Goals for Juvenile Justice and Delinquency Prevention.

From the beginning there was a recognition that the work of the Juvenile Justice and Delinquency Prevention Task Force was much broader than the other four groups. The charge of the Juvenile Justice Task Force was to supplement virtually all of the work of the Phase I National Advisory Commission with a "juvenile" version of the original adult-oriented standards and goals statements.

In all, the Task Force met ten times, for two or three days each time, in public meetings in various parts of the nation. At these meetings the Task Force was able to solidify its group philosophy, analyze the issues of importance in juvenile justice and delinquency prevention, direct the writing of standards and commentaries, review and modify draft material, and react to National Advisory Committee recommendations. The final results of the Task Force's efforts are set forth in the forthcoming volume on Juvenile Justice and Delinquency Prevention, soon to be published by LEAA.

Throughout its work process, the Task Force had the benefit of staff assistance. The American Justice Institute (AJI) of Sacramento, California, received a grant from LEAA to support the work of the Task Force.

Task Force Working Procedures and Use of Comparative Analyses

The time and resources provided to accomplish the challenging task of producing the standards volume did not allow the Task Force to conduct new research in juvenile justice and delinquency prevention. However, the Task Force did utilize a methodology which assured the incorporation of the best scholarship and state-of-the-art knowledge currently available.

This methodology involved identifying the major issues or questions which needed to be resolved before the Task Force could promulgate standards. Comparative Analyses were then constructed around each of these issues. Each Comparative Analysis begins with a comparison of the positions taken on the issue by other standard-setting organizations--previous Task Forces, Commissions, etc. The Comparative Analyses also consider the current practice of each state with regard to the issue in question.

These background materials were designed not only to make Task Force members aware of the various positions that had been taken with regard to a particular issue, but also to provide the Task Force with a complete analysis of the arguments for and against the full range of options presented.

Using the Comparative Analyses as a basis for its discussion and deliberation, the Task Force then directed the staff and consultants to prepare standards and commentaries in line with the positions which it took in each of these areas. This process proved to be very productive for the Task Force members. It allowed informed consideration of the pertinent issues prior to the adoption of any particular standard.

Compilation of Working Papers

Following completion of the Task Force's work, it was clear to members of the AJI staff and officials at LEAA that the Comparative Analyses prepared to assist the Task Force in its preparation of the standards volume could be useful to other groups. In particular, it was recognized that states and localities which plan to formulate standards or guidelines for juvenile justice and delinquency prevention will need to traverse much of the same territory and address many of these same questions. As a result, LEAA's National Institute for Juvenile Justice and Delinquency Prevention provided the AJI staff with a grant to compile the materials in their present form.

The Comparative Analyses have been organized in a series of nine volumes of Working Papers, each devoted to a particular aspect of juvenile justice and delinquency prevention. (A complete table of contents of each of the volumes is set forth in the appendix.) Some subjects have been analyzed in considerable detail; others, because of limited time or consultant resources, have been given abbreviated treatment. Thus, while it is recognized that these Working Papers do not present a comprehensive examination of all of the important issues in juvenile justice--or even of all of the issues considered by the Task Force--they do represent a useful survey of a wide range of subjects, with a wealth of data on many of the particulars. Using these materials as groundwork, other groups with interests in individual facets of the juvenile system may wish to expand the research as they see fit.

Although the Comparative Analyses should not be taken to represent the Task Force's views--they were prepared by project consultants or research staff and were not formally approved by the Task Force or reviewed by the National Advisory Committee--it was decided that it would be helpful to outline the position taken by the Task Force on each of the issues. Therefore, the AJI staff reviewed each of the Comparative Analyses and added a concluding section on "Task Force Standards and Rationale" which did not appear in the materials when they were considered by the Task Force.

A more thorough exposition of the Task Force's views can be found in the forthcoming volume on Juvenile Justice and Delinquency Prevention, which should, of course, be consulted by those considering these Working Papers.

The efforts of the many consultants and research assistants who prepared the drafts of these materials is gratefully acknowledged. Any errors or omissions are the responsibility of the American Justice Institute, which reviewed the materials and assembled them in their present form.

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FOREWORD

Over the past ten years, a number of national efforts have developed regarding juvenile justice and delinquency prevention standards and model legislation. After the enactment of the Juvenile Justice and Delinquency Prevention Act of 1974 (Pub. L. 93-415) and in conjunction with LEAA's Standards and Goals Program, many States started formulating their own standards or revising their juvenile codes.

The review of existing recommendations and practices is an important element of standards and legislative development. The National Institute for Juvenile Justice and Delinquency Prevention (NIJJDP) has supported the compilation of the comparative analyses prepared as working papers for the Task Force to Develop Standards and Goals for Juvenile Justice and Delinquency Prevention in order to facilitate this review. Over one hundred issues, questions, and theories pertaining to the organization, operation, and underlying assumptions of juvenile justice and delinquency prevention are covered in the analyses. These are divided into nine volumes: Preventing Delinquency; Police-Juvenile Operations; Court Structure; Judicial and Non-Judicial Personnel and Juvenile Records; Jurisdiction-Delinquency; Jurisdiction-Status Offenses; Abuse and Neglect; Pre-Adjudication and Adjudication Processes; Prosecution and Defense; and Juvenile Dispositions and Corrections.

The materials discussed in these reports reflect a variety of views on and approaches to major questions in the juvenile justice field. It should be clearly recognized in reviewing these volumes that the conclusions contained in the comparative analyses are those of the Task Force and/or its consultants and staff. The conclusions are not necessarily those of the Department of Justice, LEAA, or NIJJDP. Neither are the conclusions necessarily consistent with the recommendations of the Advisory Committee on Standrds that was established by the Act, although the Committee carefully considered the comparative analyses and endorsed many of the positions adopted by the Task Force.

Juvenile justice policies and practices have experienced significant changes since the creation of the first juvenile court in 1899. The perspective provided by these working papers can contribute significantly to current efforts to strengthen and improve juvenile justice throughout the United States.

James C. Howell
Director
National Institute for Juvenile Justice
and Delinquency Prevention
January, 1977

INTRODUCTION

Volume VII: Pre-adjudication and Adjudication Processes

The materials in this volume consider a wide range of issues relating to pre-adjudication and adjudication processes in the juvenile or family courts. The papers in Section A highlight a number of important procedural concerns form the time of pretrial detention through the adjudicatory hearing; those in Section B focus exclusively on special considerations regarding discovery in juvenile proceedings.

Section A contains thirteen Comparative Analyses. The first considers the general question of the need for juvenile court rules. The next two papers focus on the juvenile's initial appearance in court and the appropriate criteria for pretrial detention. The two Comparative Analyses which follow discuss whether the juvenile should have a right to a hearing to review his pretrial detention and, if so, within what time period. The materials then exercise the questions of what should be regarded as appropriate conditions of release and whether the juvenile should have the right to appeal an adverse decision at the detention hearing.

Next, the issues of waiver of counsel and the evidentiary status of a juvenile's custodial admissions are discussed. The ninth Comparative Analysis in this section analyzes the subject of probable cause hearings before trial in delinquency cases. The following paper addresses the difficult question of plea bargaining in juvenile proceedings. And the proper procedures for accepting admissions are considered next.

A rather lengthy Comparative Analysis dealing with rights before adjudication then examines a number of different procedural rights and the propriety of applying them in the juvenile context. The final Comparative Analysis in this section discusses whether the same rules of evidence employed in adult criminal proceedings should govern delinquency cases.

Section B considers fourteen separate issues related to discovery in juvenile proceedings. These range from very broad-scoped questions, such as whether specific rules or statutes on discovery in juvenile proceedings are necessary at all, to very narrow and specific topics, such as whether the names of experts and results of tests should be discoverable (see the table of contents for a complete listing of the issues discussed). In the standards volume the Task Force addressed discovery in a rather general way. It recommended that states formulate specific rules to govern this area, but it provided little in the way of detailed guidance. Hopefully, these

Comparative Analyses will help to elucidate some of the issues which should be addressed by the states and also provide some guidance on law to resolve these questions.

Two short memoranda are attached as an Appendix to the volume. These focus on questions related to the issuance of summons and issues bearing on speedy trial. While these are certainly not intended to serve as comprehensive treatments of these topics, they underscore at least some of the more important concerns in these areas.

Acknowledgements are gratefully made to: Professor Stanley Z. Fisher of the Boston University School of Law and Claudia Angelos of the Juvenile Court Advocacy Program, Dorchester, Massachusetts, who served as consultants on the materials in Section A; Michael Kelly and Fiona Powers, their research assistants, who assisted in preparing the drafts of the Comparative Analyses in Section A; Professor Michael Altman of the Arizona State University College of Law and Joseph Howard, his research assistant, who drafted the Comparative Analyses in Section B; and, the Honorable Ted Rubin, who authored the memoranda in the Appendix. All of these materials have, however, been revised by the American Justice Institute, which alone bears responsibility for any errors or omissions.

SECTION A

COURT RULES PRE-ADJUDICATION AND ADJUDICATION PROCESSES

1. Issue Title: Court Rules--Is there a need for juvenile court rules?

2. Description of the Issue:

Whether special rules governing juvenile court practice and procedure should be adopted and published.

3. Summary of Major Positions:

I. Standards promulgating groups on the need for rules: All of the groups surveyed recognized the need for rules governing juvenile court practice and procedure. HEW and NCCD require that rules be adopted, and the Uniform Juvenile Court Act permits rules to be adopted if the enacting jurisdiction wishes to supplement the Act's provisions. IJA/ABA recommends, in an introductory comment, that rules be adopted. Only NCCD has gone so far as to draft model rules, and these rules cannot be described as comprehensive.[1] None of the standards-promulgating groups has addressed the need to publish or widely disseminate adopted rules.

II. Summary of state practice: State practice on this issue varies widely. The majority of the fourteen juvenile court acts surveyed[2] are silent on the question of rules. Only a few of the states surveyed have adopted and published rules. Of the jurisdictions which have adopted and published rules, only a few have rules which contain sufficient detail.

4. Survey of Positions Recommended by Standard-Promulgating Groups:

IJA/ABA[3]	HEW (1974)	Uniform Juvenile Court Act (1968)	NCCD (1959)
Recommends detailed rules be adopted.	Requires that rules be adopted.	Permits rules to be adopted to supplement its provisions.	Requires that rules be adopted. Has provided model rules in Model Rules for Juvenile Courts (1969).

5. Survey of State Practices:

	Number of States	Name of States
Require rules to be adopted:	2	CA, CO
Permit rules to be adopted:	4	DC, NY, ND, OH
Silent on the question of rules:	6	ME, MI, MN, PA, TN, VA
Have adopted and published rules:	4	CO, DC, MN, OH
Use rules of civil procedure:	3	MO, NY, TX

6. Analysis of the Issue:

Detailed guidance from court rules is necessary if the bench and bar are to secure the "fundamental fairness" mandated by Gault.[4] Existing practices do not meet this need for comprehensive rules.

Even quite detailed juvenile court acts are not an adequate substitute for rules of procedure. For example, most of the juvenile court acts surveyed[5] do not address such issues as when a petition alleging delinquency may be amended,[6] what the standard of proof is in a transfer hearing,[7] and what method of computing time should be used for various procedures.[8] And myriad other questions normally addressed in civil and criminal court rules are left unanswered for juvenile court practice in most jurisdictions.

Resort to the rules of civil or criminal procedure does not suffice to fill the gaps in juvenile court acts. Juvenile court business differs in many important respects from ordinary civil and criminal business, and juvenile courts require rules tailored to their unique needs. States which use civil rules for juvenile court proceedings typically provide that such rules are to govern "to the extent that they are appropriate to the proceedings involved."[9] The appropriateness of particular civil rules must be decided on a case-by-case basis, creating confusion and uncertainty.[10]

Comprehensive rules drafted to fulfill the unique needs of the juvenile court process will promote efficiency, certainty and uniformity,[11] without the inflexibility characteristic of legislation. The lack of such rules or the failure to publish[12] them probably deters many members of the private bar from appearing in juvenile courts. The practical effect, then, of the failure to adopt and publish such rules is not only to diminish the effectiveness of legal counsel, but also to restrict its availability.

The adoption and publication of official forms supplementing juvenile court rules will also promote efficiency and make juvenile courts more accessible to attorneys. Such forms also serve to focus attention on the essential elements of particular procedural provisions.[13]

Finally, those jurisdictions which have already adopted and published juvenile court rules should review those rules to insure that they contain sufficient detail to serve their intended purposes.

7. Task Force Standards and Rationale:

The Task Force addressed the issue of family court rules in Standard 8.6.

> Comprehensive rules governing family court practice and procedure should be adopted and published to ensure regularity and promote efficiency in family court proceedings. The rules should provide in detail for pretrial discovery procedures appropriate for family court proceedings.

The Task Force felt that the development and publication of clearly defined rules would facilitate uniformity in the proceedings and eliminate the confusing and time-consuming delays which sometimes result from current efforts to make case-by-case determinations on the appropriateness of applying particular civil rules to individual cases.

The Task Force was particularly concerned about the prevalent confusion in pre-adjudicatory discovery procedures in juvenile cases. Therefore, it called for the issuance of detailed rules on this subject.

Footnotes:

[1]For example, the NCCD's Model Rules for Juvenile Courts does not specify the manner in which service of the petition and summons may be made, nor is there any provision for waiver of service of the summons or petition.

[2]For purposes of analysis of this issue, juvenile court acts and rules of the following jurisdictions were surveyed: California, Colorado, District of Columbia, Maine, Michigan, Minnesota, Missouri, New York, North Dakota, Ohio, Pennsylvania, Tennessee, Texas and Virginia.

[3]IJA/ABA, Standards on Pre-Trial Court Proceedings (publication forthcoming, 1976).

[4]Introduction, IJA/ABA, Standards for Pre-Trial Court Proceedings, (publication forthcoming, 1976).

[5]See note 2, supra, for a list of the jurisdictions surveyed.

[6]Of the fourteen jurisdictions surveyed on this question, nine omit provisions governing the times during which the petition may be amended. (Minnesota, Missouri, New York, North Dakota, Ohio, Pennsylvania, Tennessee, Texas, Virginia).

[7]Of the fourteen jurisdictions surveyed on this question, eleven do not provide the standard of proof to be used in a transfer hearing. (California, Colorado, Maine, Michigan, Minnesota, Missouri, New York, Ohio, Pennsylvania, Texas, Virginia).

[8]Of the fourteen jurisdictions surveyed on this question, thirteen do not provide a method of computing time. (California, Colorado, Maine, Michigan, Minnesota, Missouri, New York, North Dakota, Ohio, Pennsylvania, Tennessee, Texas, Virginia).

[9]New York Fam. Ct. Act Sec. 165. In Massachusetts, a similar flexible standard incorporating the criminal procedure rules is created, by court rule rather than by statute. See Rule 204 of the Special Rules of the District Courts of Massachusetts.

[10]See, for example, In re S., 70 Misc. 2d 320, 333 NYS 2d 466 (1972) where the prosecuting authority moved for consolidation of several petitions under both the civil and criminal rules causing the trial judge to issue an opinion on the appropriateness and applicability of the provisions of both sets of rules.

[11]Introduction to the Standards for Pre-trial Court Proceeding, supra note 4.

[12]"Publication" is used here to mean the reproduction and distribution of rules so that they are readily accessible to those who wish to consult them. The Boston Juvenile Court, for example, has promulgated rules which are not published. The Rules of the Juvenile Court for the State of Connecticut, are found in the June 25, 1968 edition of the Connecticut Law Journal rather than in the permanent volumes of the state's statutes where the rules of civil and criminal procedure are found. In neither case do the rules seem to be readily accessible.

[13]See, for example, the Official Forms of the Minnesota Juvenile Court Rules, consisting of 118 forms with accompanying instructions for their completion.

1. Issue Title: Initial Appearance--Should there be an initial appearance/arraignment (A) for delinquency defendants who are detained and (B) for delinquency defendants who are summoned/cited?

2. Description of the Issue:

The issue is whether a separate court appearance for arraignment should be required in delinquency cases for detained and nondetained defendants. In criminal cases, the arraignment serves six major purposes: to inform the defendant of the charges, to inform him of his rights, to appoint counsel if appropriate, to set bail for defendants in custody, to enter the defendant's plea, and to set the date for trial. The N.A.C. Courts volume (Standard 4.8) recommended the abolition of arraignments in criminal cases. Under the N.A.C. scheme, detained defendants must be brought to court within six hours of arrest; for nondetained defendants, all arraignment functions are performed without the need for a court hearing. Should that scheme be adopted, in whole or in part, for delinquency proceedings?

3. Summary of Major Positions:

Of six major standards-promulgating organizations,[1] three make no provision for a mandatory initial appearance before the court.[2] One, the N.A.C., calls for an initial appearance before a "judicial officer" within six hours for detained defendants, and calls for the abolition of arraignment for nondetained defendants.[3] Another seems to envision an initial appearance only after a petition has been filed, but does not state any time limit.[4] The sixth would require an initial appearance within five days of the petition being filed,[5] and sooner for detained juveniles.[6] In sum, only one out of six expressly provides for a separate arraignment appearance in delinquency proceedings; most of the others impliedly find no need for such a proceeding.

This attitude is consistent with the results of a survey of the law of thirteen jurisdictions.[7] Of these, only the District of Columbia requires an initial appearance.[8] Four of the twelve states surveyed give the defendant a right to bail, which may seem to imply an arraignment for juveniles in custody, but one of these four explicitly states that there shall be no formal arraignment or plea.[9]

4. Summary of Surveyed State Statutes:

Statutory Approach	Number of States	Names of States
I. Detained Juveniles		
A. Taken either before the court or before probation officer or intake officer without unnecessary delay. First hearing is detention hearing.	9	CA, MN, MS (in nonfelony cases), NY, ND, OH, PA, TN, TX
B. Bail available, probably taken before a judge or referee to have bond set within twenty-four hours.	3	CO, MS (in felony cases), MA
C. Bail available, but statute expressly does away with need for formal arraignment or plea.	1	ME
D. Initial appearance requirement, but will probably not apply if a detention or shelter care hearing is held prior to the time of initial appearance.	1	DC
	14*	
II. Nondetained Juveniles		
A. Arraignment not required by statute. First appearance is apparently for trial.	12	CA, CO, ME, MA, MN, MS, NY, ND, OH, PA, TN, TX
B. Initial appearance required within five days of filing of the petition.	1	DC
	13	

*Mississippi represented twice.

5. Summary of Positions Recommended by Standards Groups:

NAC (1973)	NCCD Standard Act (1959)	HEW Model Act (1974)	Recommended IJA/ABA (1975)	Uniform Juvenile Court Act (1968)
Detained: Recommends an initial appearance before a judicial officer within 6 hours of being taken into custody. Nondetained: Advocates elimination of arraignment as a formal procedure, so that nondetained defendants' first court appearance would be at trial. Usual functions of arraignment performed by summons and written notices. Stresses the saving in time for all involved.	Detained: Makes no recommendation that an initial appearance be mandatory: "If the child is not released as provided above, he shall be taken without unnecessary delay to the court or to the place of detention or shelter designated by the court." Nondetained: There seems to be no provision for a separate arraignment. "As soon as practicable after the filing of a petition, and prior to the start of a hearing, the court shall inform the parents, guardian, or custodian, and the child when it is appropriate to do so, that they have a right to be represented by counsel at every stage of the proceeding."	Detained: Makes no recommendation for an initial appearance. Recommends that a person who takes a child into custody but does not release him "bring the child to the Intake Office of probation services or deliver the child to a place of detention or shelter care." Nondetained: Summons is for trial. Usual arraignment functions performed by summons, and at start of trial.	Recommends an initial appearance for both detained and nondetained juveniles within five days of the filing of the petition. "A prompt arraignment ensures that counsel will be retained or appointed for unrepresented respondents soon enough after the alleged delinquent acts have occurred to be able to assist effectively in preparing the defense. In many cases, the youth's initial appearance will take place sooner than this section requires...But this section will ensure the timely entrance of counsel into the scene in residual cases."	Detained: Makes no recommendation for a mandatory initial appearance, but would have a person taking a child into custody "bring the child before the court or deliver him to a detention or shelter care facility designated by the court...." Nondetained: For respondents who are summoned, personal service must take place "at least 24 hours before the hearing." This apparently does not envision a separate arraignment.

Summary of Positions: I. Detained - Only two groups require an initial appearance for detained juveniles.

II. Nondetained - Only one group calls for an initial appearance for nondetained juveniles, in order to ensure the employment of counsel.

6. Analysqs of the Issue:

The arraignment issue requires separate analysis for detained and nondetained juvenile defendants.

A. Detained defendants. Under the N.A.C. criminal court standards, a defendant taken into custody and not released on citation must be produced in court within six hours for an "initial appearance." At that hearing, most of the traditional functions of arraignments are performed: The defendant is advised orally and in writing of the charges, and of his constitutional rights (including the right to bail and to the assistance of counsel if necessary, and either releases the defendant or sets the conditions for pretrial release. If the defendant is not released, he is removed from police custody and sent to jail facilities, unless, in extraordinary circumstances, the court remands him to police custody for limited custodial investigation.

In favor of applying the N.A.C. scheme to detained delinquents are the following considerations: (1) the youth would be promptly informed of his rights by an impartial, judicial officer, rather than by police or probation officers; (2) the youth might secure release within six hours, instead of having to wait the 24-96 hours within which detention hearings must typically be held; (3) the youth would receive early appointment of counsel.

On the other side, it might be argued: (1) juvenile court acts typically provide for prompt delivery of detained juveniles by the police either to the parents or to a probation-approved detention facility--safeguards not characteristic of criminal procedure; (2) juvenile court acts typically provide for prompt release from detention by probation or intake staff; (3) juvenile court acts typically provide for a prompt (24-96 hours) judicial hearing on the issue of detention.

The major question that arises in considering whether to adopt or adapt the N.A.C. scheme to juvenile delinquency proceedings is, what relationship would this "initial appearance" have to the full detention hearing typically required by juvenile court legislation? If it were to serve as the detention hearing, one may doubt whether the swift timing would permit the intervention of counsel and adequate preparation for the sort of hearing which should be available in juvenile cases--i.e., a hearing which explores the youth's background, family environment, the appropriateness and availability of shelter (vs. detention) facilities. If it were merely to precede the detention hearing, then one might question the need for two court appearances within the 24- or 48-hour period usually set for the detention hearing. A better solution might be to require the detention hearing within 24 or 48 hours, and do away with the "initial appearance."

A final question which arises--whether to permit "custodial remands for investigation"--is considered in a separate Comparative Analysis.

B. Nondetained defendants. The N.A.C. scheme for nondetained criminal defendants has much appeal for juvenile delinquency proceedings. For such defendants, particularly in urban courts, the arraignment is often a confusing and fruitless experience. Although the arraignment itself frequently takes less than five minutes, the defendant and his family may have to spend several hours waiting in court, missing school, work or other obligations. Defendants and parents who are anxious to "tell their story to the judge" are often frustrated and uncomprehending of their inability to do so at the arraignment, and may feel unfairly treated if the complainant need not appear, but they must. Like any court proceeding, the arraignment is also costly in terms of demands on the time of judges, court staff, police officers, and, if already retained, attorneys. If the procedure could be eliminated without sacrificing substantial goals, surely it would be desirable to eliminate it. The question is whether the functions of arraignment can be satisfactorily performed by other means.

Under the N.A.C. criminal courts scheme, nondetained defendants are informed of the charges, the trial date, and of their constitutional rights, in the summons or citation. The summons in delinquency cases, served upon both the defendant and his parents, could include the same information. The only major remaining function of the arraignment for nondetained defendants is the appointment of counsel. The N.A.C. criminal courts volume recommends an alternative way of doing this: the summons/citation contains a form for advising the court (within three days after service of the citation or summons) of the name of the defendant's counsel or of the desire to have the court appoint an attorney to defend him (Standard 4.2). If the court receives a request for appointed counsel--or if the form is not received within the time specified--the court appoints counsel. It is then counsel's duty to contact the client as soon as possible, and to verify the client's eligibility in the initial interview. (Standard 13.3).

The only remaining function of the arraignment not provided for by the above procedures are bail--not an issue for nondetained defendants--and taking of the plea. In practice, few binding "guilty" pleas are taken at arraignment--in many jurisdictions a plea of "not guilty" will automatically be entered, because there will not have been sufficient time for counseled deliberation to occur.

Against adoption of the N.A.C. criminal courts scheme, it might be argued that written notice of the charges and of constitutional rights is unsuitable for delinquency defendants because of their relative immaturity. Juvenile defendants should arguably have an opportunity for personal contact with the judge as soon as charges are made, so that the defendant's rights and liabilities can be

can be carefully explained. It might also be said that the N.A.C. scheme for appointment of counsel is not as reliable as in-person appointment at the arraignment. The latter system gives the court a prompt opportunity to ascertain the defendant's eligibility for appointed counsel, and ensures that counsel, if appointed, will promptly meet the defendant and his parents. Frequently, also, the arraignment provides defense counsel whether appointed or retained, with a valuable opportunity to conduct informal discovery of the government's case, by conversing with the police officer and/or complaining witnesses. That opportunity would be lost if the arraignment were eliminated.

7. Task Force Standards and Rationale:

The Task Force's position on the issue of the juvenile's initial appearance in court is set forth in Standard 12.4.

> Promptly after a delinquency petition is filed, the juvenile should be required to appear in court to be arraigned. Juveniles in custody should be arraigned at the start of the detention hearing. Juveniles who are not detained should be required to appear for arraignment within 72 hours of the time the summons or citation is served upon them. The juvenile's parent or guardian should also be required to attend the arraignment.
>
> At the arraignment the court should orally inform the juvenile of his legal rights, and of the allegations and possible consequences of the delinquency petition. The court should also appoint counsel if appropriate, and set the date for trial.

In considering this issue the Task Force felt that the time-savings advantage to the N.A.C. proposal warranted giving it careful thought, but the Task Force finally rejected that proposal, largely on the basis of the arguments outlined in the last paragraph of the preceding section of this comparative analysis.

The commentary to the Standard notes,

> Lacking any data on the effectiveness of written communications as a substitute for in-court, oral arraignment procedures, the Task Force recommends the latter. However, experimental programs to determine whether the separate arraignment appearance can be safely eliminated in delinquency proceedings should be undertaken.

Footnotes:

[1]The President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Juvenile Delinquency and Youth Crime, at 14 (1967) (Hereinafter Task Force Report.)

[2]Task Force Report; National Council on Crime and Delinquency, Standard Juvenile Court Act (1959) (Hereinafter Standard Act); Department of Health, Education, and Welfare, Model Acts for Family Courts and State-Local Children's Programs (1974) (Hereinafter Model Act); National Advisory Commission on Criminal Justice Standards and Goals, volumes on Courts, Corrections and Police (1973) (Hereinafter N.A.C.); Institute of Judicial Administration/American Bar Association Juvenile Justice Standards Project (1975) (Hereinafter IJA/ABA J.J.S.P.); and National Conference of Commissioners on Uniform State Laws Uniform Juvenile Court Act (1968).

[3]Standard Act, Model Act, Uniform Juvenile Court Act.

[4]N.A.C. volume on Courts, p. 77.

[5]Task Force Report, p. 5.

[6]IJA/ABA Draft Standards on Pre-trial Court Proceedings, Standard 2.2 (1975).

[7]California, Colorado, District of Columbia, Maine, Massachusetts, Minnesota, Mississippi, New York, North Dakota, Ohio, Pennsylvania, Tennessee, Texas.

[8]D.C. Code Encycl. Ann. §16-2308.

[9]Colo. Rev. Stat. Ann. §19-2-103 (1973); Me. Rev. Stat. Ann. Title 15, §2608 (1964); Mass. Gen. Laws Ch. 119, §67 (1975) Miss. Code Ann. §§43-21-31 and 43-23-29 (Supp. 1972).

1. Issue Title: Pre-trial Detention--Should the functions of pre-trial detention in delinquency cases include "preventive detention," or should detention be used only if necessary to assure the juvenile's presence at future court proceedings? If "preventive detention" is appropriate at the pre-trial stages of delinquency proceedings, for which preventive purposes should it be allowed:

A. "Therapeutic Detention"

1. To protect the person of the juvenile,
2. to protect the property of the juvenile,
3. to protect the moral/education welfare of the juvenile,

B. "Public Protection"

4. to protect the persons of others,
5. to protect the property of others,
6. to protect the moral/educational welfare of others?

2. Description of the Issue

The issue is what criteria should govern detention before trial in delinquency proceedings in the light of the purposes of such detention. These purposes may or may not be the same as the purposes of pre-trial detention of criminal defendants.

3. Summary of Major Positions:

All of the six major standards-promulgating organizations surveyed favor allowing some kinds of preventive detention in delinquency proceedings. All would allow preventive detention to protect the youth's personal safety, but the IJA/ABA Juvenile Justice Standards Project would restrict this power to instances when the youth himself requests it. Only the National Advisory Commission and the Uniform Juvenile Court Act allow preventive detention to protect the youth's property. The H.E.W. Model Act, the National Advisory Commission, the Uniform Juvenile Court Act, and the N.C.C.D. Standard Act would all seem to permit it to protect the youth's moral/educational welfare. Although all the groups approve detention to protect the personal safety of others, the IJA/ABA restricts such detention to cases where "serious bodily harm" is anticipated, and both HEW and NCCD similarly qualify the standard. The President's Task Force, the National Advisory Commission, the H.E.W. Model Act, and the Uniform Juvenile Court Act allow preventive detention to protect property of others--the IJA/ABA clearly would not. It is not clear whether any of the groups would permit detention to protect the community from "moral injury."

Of the thirteen jurisdictions surveyed, eleven (California, Colorado, District of Columbia, Minnesota, Mississippi, North Dakota, New York, Ohio, Pennsylvania, Tennessee and Texas) permit preventive detention while Maine and Massachusetts do not define the reasons for pre-trial detention. Since the latter two jurisdictions do not limit the purpose of detention to insuring the youth's appearance before the court, they probably do permit preventive detention.

4. Summary of Surveyed State Statutes:

Statutory Approach	Number of States	Names of States
I. Allows preventive detention		
A. To protect the person of the juvenile;	10	CA, CO, DC, MN. MS, ND, OH, PA, TN, TX
B. to protect the property of the juvenile;	5	ND, OH, PA, TN, TX
C. to protect the moral/educational welfare of the juvenile;	8	CA, CO, DC, ND, OH, PA, TN, TX
D. to protect the persons of others;	11	CA, CO, DC, MN, MS, NY, ND, OH, PA, TN, TX
E. to protect the property of others;	10	CA, CO, DC, MN, NY, ND, OH, PA, TN, TX
F. to protect the moral/educational welfare of others.	Not clear, subject to varying interpretation.	
II. Does not specify reasons for pre-trial detention	2	ME, MA

5. Summary of Positions of Standards Groups:

NAC (1973)	NCCD Standard Act (1959)	HEW Model Act (1974)	Recommended IJA/ABA (1975)	Uniform Juvenile Court Act (1968)
The Courts volume declines to recommend detention criteria, but suggests in commentary: "Such detention is necessary to protect the person or property of others, or to protect the person or property of the child himself; to provide supervision and care for the child when there is no other feasible way of providing it...." The Corrections volume says detention should be considered a last resort, and used only where the juvenile has no parent or other person able to provide supervision and care for him and able to assure his presence at subsequent judicial hearings.	Permits preventive detention. "Children apprehended for delinquency should be detained for the juvenile court when after proper intake interviews, it appears that case work by a probation officer would not enable the parents to maintain custody and control, or would not enable the child to control his own behavior." Recommends detaining "children who are almost certain to commit an offense dangerous to themselves or to the community before court disposition...."	Recommends preventive detention when: "(1) The child has no parent, guardian, custodian, or other suitable person able and willing to provide supervision and care for such child; or (2) The release of the child would present a clear and substantial threat of a serious nature to the person or property of others ... or, (3) The release of such child would present a serious threat of substantial harm to such child."	Allows preventive detention for the purposes of "preventing the juvenile from inflicting serious bodily harm on others during the interim period and protecting the accused juvenile from imminent bodily harm upon his or her request...." (Standards on Interim Status, Draft 1974).	Recommends preventive detention "to protect the person or property of others or of the child.... or because he has no parent, guardian, or custodian, or other person able to provide supervision and care for him...."

Summary of Positions:
I. To protect the person of the juvenile - 5
II. To protect the property of the juvenile - 2
III. To protect the moral/educational welfare of the juvenile - 4
IV. To protect the persons of others - 5
V. To protect the property of others - 3
VI. To protect the moral/educational welfare of others - subject to interpretation.

6. Analysis of the Issue:

In debates on the criminal justice system, the issue of "preventive detention" has been most controversial. The Eighth Amendment, and similar provisions in every state constitution, have generally been regarded as restricting the legal use of pre-trial detention to the single purpose of ensuring the accused's presence at the trial; if (in noncapital cases) release on bail or other conditions will ensure the accused's presence, he may not be kept in detention. Although the law and practice of juvenile justice have long approved the "preventive detention" of youths, that issue has generated little controversy. As the above comparative analysis shows, legislatures and standard-setting groups have unanimously approved the practice of incarcerating youths charged with the commission of criminal delinquent acts, on the ground that detention is necessary to prevent the youth from committing other harmful acts. As discussed by Levin and Sarri (p. 25), detention is authorized not only to "prevent escape," but for "public protection" and "therapy." Under "therapy" should be included the prevention of harm to the juvenile's property and person, including his moral and psychological welfare.

Recently, several courts have had to judge the argument that to deny juveniles the right to release on bail constitutes a denial of Equal Protection under the Fifth and Fourteenth Amendments, because similarly situated criminal defendants are given the right to pre-trial release. Under pressure of such arguments, some courts have construed the detention criteria of their juvenile court legislation as substantially "equivalent" to criminal procedure laws which afford the right to release on bail. They have accordingly disapproved the use of preventive detention. /See Doe v. State, 487 P.2d 47 (Alas 1971)/.

The arguments in favor of pre-trial detention on grounds of public protection and protection of the youth are not identical. "Therapeutic detention" is grounded in the theory of parens patriae: the state has the power and responsibility to detain a youth whose predicted conduct or environment threatens his own physical, psychological and moral well-being. Preventive detention based on "protection of the public" is based primarily on the adversary notion that the state must be permitted to protect its citizens against the predicted conduct of the youth. But, it can be connected to the theory of parens patriae by the argument that it endangers the youth's own welfare to engage in anti-social conduct for which he may incur various kinds of liabilities.

The opposing arguments must also distinguish between preventive detention for purposes of public protection, and for purposes of "therapy." The arguments against incarcerating juveniles expected to commit future acts harmful to the public are essentially the

same as those articulated by opponents of preventive detention in the criminal process. (See, e.g., N.A.C. Corr. Std. 4.5, and Commentary at p. 125). These principally focus on our inability to make reliable predictions of future conduct, and the very high individual and social costs of preventive incarceration based on erroneous predictions. These difficulties apply to predictive decisions about juveniles as well as adults.

The arguments against preventive detention in order to protect the youth against himself or his environment are more complex. A major problem is that "therapeutic detention" may be used as a disguise for detention actually motivated by public protection. In order to discourage this abuse, it might be appropriate to prohibit "therapeutic detention" in delinquency proceedings, and to restrict the detention criteria in delinquency cases to those applicable in criminal cases--i.e., no detention unless necessary to ensure the youth's appearance for trial. (See, e.g., N.A.C. Corr. Std. 4.5, and Commentary at p. 125). If a youth's anticipated conduct upon release would endanger his physical, moral or psychological well-being, it might be sounder to proceed against him as a neglected child or one in need of supervision. A similar argument applies to therapeutic detention grounded not in the anticipated fear of the youth's own conduct, but out of apprehension for the dangers posed by the environment to which he would be released--e.g., if he were released to a parent who was threatening him. Such situations arguably justify only shelter care, not detention.

If therapeutic detention is approved in delinquency cases, consideration might be given to narrowing the scope to exclude detention solely to avoid endangering the youth's own property, as currently permitted in some jurisdictions.

7. Task Force Standards and Rationale:

The Task Force's conclusions as to the appropriate criteria for pre-adjudicatory detention of juveniles in delinquency cases are set forth in Standard 12.7.

> A juvenile should not be detained in any residential facility, whether secure or open, prior to a delinquency adjudication unless detention is necessary:
>
> 1. To insure the presence of the juvenile at subsequent court proceedings; or
>
> 2. To provide physical care for a juvenile who cannot return home because he has no parent or other suitable person able and willing to supervise and care for him adequately; or

3. To prevent the juvenile from harming or intimidating any witness, or otherwise threatening the orderly progress of the court proceedings; or

4. To prevent the juvenile from inflicting bodily harm on others; or

5. To protect the juvenile from bodily harm.

A detained juvenile should be placed in the least restrictive residential setting adequate to serve the purposes of his detention.

The Task Force clearly felt that the state's powers and responsibilities as parens patriae justified the use of such detention in juvenile cases. But it felt these powers could be (and have been) abused and should be subject to clearly defined controls. Therefore, it proposed the five detention criteria outlined above and, e.g., excluded the predicted commission of property offenses as a ground for detention. Moreover, the commentary to the Standard emphasizes that the requirement that detention be found "necessary" to achieve one of these five criteria

> implies consideration of alternative arrangments which might be devised to serve the same goals. For example, detention for the purpose of ensuring the youth's presence in court might be avoided if an arrangement for increased supervision by family or community resources could be substituted.

(See also Standard 22.4 which vests responsibility for the detention decision with intake personnel and Standards 12.8 through 12.10 relating to pre-adjudicatory custody in Families with Service Needs and Endangered Child cases.)

1. Issue Title: Detention Hearings--Should detained juveniles have the right to a judicial hearing to decide whether their detention should continue?

2. Description of the Issue:

The issue is whether a decision to continue a juvenile's detention should be made by judicial or administrative personnel, and, if judicial, whether it should be made by ex parte court order or after a judicial detention hearing. Finally, should detention hearings be mandatory or only at the defendant's election?

3. Summary of Major Positions:

Of the six major standards-recommending groups surveyed, four, the H.E.W. Model Act, the President's Task Force on Juvenile Delinquency and Youth Crime, the Uniform Juvenile Court Act, and the IJA/ABA Juvenile Justice Standards Project (Draft Standards on Interim status, 1974) would require a judicial hearing on whether or not to continue the detention of the juvenile. The National Advisory Commission, in its Courts volume, recommends giving the juvenile the "opportunity" for a "judicial determination of the propriety of the continued placement in the facility." The National Council on Crime and Delinquency Standard Act would require a court order and an opportunity for a hearing by a judge or a referee.

Of the thirteen jurisdictions surveyed, two states, Massachusetts and Mississippi, require neither a court order nor a judicial hearing. Minnesota requires a court order to continue detention more than twenty-four hours, permits a detention hearing within the first forty-eight hours upon the request of the juvenile's parents, and requires a detention hearing within ninety-six hours. The remaining ten jurisdictions (California, Colorado, District of Columbia, Maine, North Dakota, New York, Ohio Pennsylvania, Tennessee and Texas) provide the right to a detention hearing. The hearing is mandatory in California, the District of Columbia, Maine, New York, and Texas, although in New York it may be before a referee unless a judge is requested. The hearing is optional in Colorado, where it is waivable by the child's attorney, parent, or guardian, and in Tennessee. While a hearing is seemingly mandatory in North Dakota, Ohio and Pennsylvania, the parent, guardian, or custodian may waive the child's appearance.

4. Summary of Surveyed State Statutes:

Statutory Approach	Number of States	Names of States
I. Court Order Required	1	MN*
II. Judicial Hearing Available		
A. Mandatory	6	CA, DC, ME, MN,* NY,** TX
B. Mandatory with possible waiver of parent's appearance	3	ND, OH, PA
C. Optional	3	CO, NY,** TN
III. Neither court order nor judicial hearing required	2	MA, MS

*Minnesota has two forms of judicial review - see part 4.

**New York makes a hearing mandatory--whether before referee or judge is optional.

5. Summary of Positions Recommended by Standards Groups:

NAC (1973)	NCCD Standard Act (1959)	HEW Model Act (1974)	Recommended IJA/ABA (1975)	Uniform Juvenile Court Act (1968)
Recommends that "A juvenile placed in detention or shelter care should have the opportunity for a judicial determination of the propriety of continued placement in the facility...."	Recommends that "As soon as a child is detained, his parents shall be informed, by notice in writing on forms prescribed by the court, that they may have a prompt hearing regarding release or detention. The judge may hold the hearing or may authorize the referee to hold it." "... no child may be held longer than 24 hours after the filing of a petition unless an order for such continued detention has been signed by the judge or referee."	Recommends that "a detention or shelter care hearing shall be held within 24 hours, Saturdays, Sundays, and holidays included, from the time of filing the petition to determine whether continued detention or shelter care is required...."	Recommends that "an accused juvenile taken into custody shall, unless sooner released, be accorded a hearing in court within 24 hours of the service of an arrest warrant or the filing of a detention petition."	Recommends that "an informal detention hearing shall be held promptly and not later than 72 hours after he is placed in detention to determine whether his detention or shelter care is required...."

Summary of Positions: I. Recommends right to a detention hearing - 2

II. Recommends a mandatory detention hearing - 3

6. The Analysis of the Issue:

The requirement of a judicial hearing to review the propriety of continued pre-trial detention is justifiable on grounds of both constitutional law and public policy. Constitutionally, a judicial hearing provides the "due process" mandated by the Fourteenth Amendment in instances where a person's liberty is infringed. The Fourth Amendment, which prohibits the "seizure" of persons without "probable cause" is also enforceable at detention hearings if a jurisdiction chooses, as some have, to join review of detention and probable cause issues in one hearing. Sound policy also dictates the desirability of prompt judicial review in order to reduce the incidence and duration of unnecessary or inappropriate detentions. There is ample literature attesting to the harmful impact of such detention on the welfare of youths subjected to it.

While administrative rather than judicial review of detention has the relative advantage of speed and economy, it probably would not satisfy the needs discussed above. According to our traditions, decisions regarding the propriety of governmental deprivations of personal liberty should be made by judicial officers. And considerations of fairness and due process favor the right to an adversary hearing on these issues, rather than decision upon ex parte presentation of the facts to a judge.

Arguably, detention hearings should be optional on the part of the detained youth, rather than mandatory. An "optional" system could operate either by requiring an affirmative request for a hearing, or by requiring a hearing unless there was an express waiver. Either of these procedures would save scarce judicial and other resources. On the other hand, there is much to be said for mandatory hearings in all cases of continued detention. Such a requirement should ensure judicial attention to the urgent need to avoid unnecessary detention or detention in inappropriate placements. Knowledge of the pending judicial review should also encourage administrative officials to terminate such detention as promptly as possible. Finally a mandatory system is indicated by the fact that defense counsel's active involvement in the case is often delayed, and many attorneys who accept assignments to represent delinquency defendants are overworked or inadequately trained, and might fail to request a detention hearing not otherwise scheduled.

7. Task Force Standards and Rationale:

The Task Force's recommendations on detention hearings in delinquency cases are found in Standard 12.11.

Unless a juvenile who has been taken into custody has been released, a judicial hearing to review the necessity for his continued detention should be held within 48 hours from the time he was taken into custody.

The detention hearing should conform to due process requirements. The detention hearing should commence with a judicial determination of probable cause. If the prosecution establishes by competent evidence that there is probable cause to believe that the juvenile has committed the allegedly delinquent act, the court should review the necessity for continued detention. Unless the prosecution demonstrates by clear and convincing evidence that there is a need for continued detention according to the detention criteria, the court should release the juvenile upon conditions pending the next judicial proceeding. A court order continuing the juvenile's detention should be supported by written reasons and findings of fact.

If the juvenile's detention continues, a new detention hearing should be held promptly upon motion by the respondent asserting the existence of new or additional evidence. Absent such motions, the court should review the case of each juvenile held in secure detention no less frequently than every 10 court days.

Each jurisdiction should provide for an expedited appellate procedure to permit speedy review of allegedly wrongful detention orders.

The same judge who sits at a detention hearing should not sit at the adjudicatory hearing, without the respondent's consent.

The Task Force felt that mandatory judicial review of pre-adjudicatory detention decisions complied with the requirements of due process and was essential to prevent inappropriate or unnecessarily prolonged incarceration of allegedly delinquent youth. (See also the related Standard 22.4 in the Chapter on Detention and Shelter Care in Part V, Intake, Investigation and Corrections.)

1. Issue Title: Time of Hearing--Within what time period from placement in detention/shelter care must the detention hearing be held?

2. Description of the Issue:

The issue is what amount of time should be allotted for the completion of certain administrative tasks, including notice to parents and securing of counsel, while keeping at a minimum the restriction of the juvenile's freedom and any consequential harm.

3. Summary of Major Positions:

Of six major standards-promulgating organizations, four, the H.E.W. Model Family Court Act, the National Council on Crime and Delinquency Standard Juvenile Court Act, the National Advisory Commission on Criminal Justice Standards and Goals (Courts Volume), and the President's Commission on Law Enforcement and Administration of Justice Task Force Report: Juvenile Delinquency and Youth Crime, recommend that the detention or shelter care hearing be held within forty-eight hours of the child's being placed in custody. The Uniform Juvenile Court Act requires that the hearing be held within seventy-two hours of placement. The sixth, the Institute of Judicial Administration/American Bar Association Juvenile Justice Standards Project, recommends a detention hearing within twenty-four hours of the service of an arrest warrant or the filing of a detention petition. Standards on Interim Status (Draft, 1974).

Of the thirteen jurisdictions surveyed, two, Texas and the District of Columbia, call for a hearing within twenty-four hours; two, Colorado and New York, recommend forty-eight hours; four, California, Ohio, Tennessee and Pennsylvania, recommend seventy-two hours; two, Minnesota and North Dakota, require only ninety-six hours; and Mississippi and Massachusetts do not require a detention hearing. Maine has no specified time period during which the hearing must be held. While Minnesota has a ninety-six hour limit for a hearing, it also requires a court order within twenty-four hours.

4. Summary of Surveyed State Statutes:

Statutory Approach	Number of States	Names of States
I. Hearing required within a specified time period		
A. Twenty-four hours	2	DC, TX
B. Forty-eight hours	2	CO, NY
C. Seventy-two hours	4	CA, OH, PA, TN
D. Ninety-six hours	2	MN, ND
II. Hearing required within an unspecified time period	1	ME
III. Hearing not required	2	MA, MS

5. Summary of Positions Recommended by Standards Groups:

NAC (1973)	NCCD Standard Act (1959)	HEW Model Act (1974)	Recommended IJA/ABA (1975)	Uniform Juvenile Court Act (1968)
Recommends that the detention hearing be held within forty-eight hours of custody being initiated.	Recommends that a detention hearing be held within forty-eight hours of placement. Does not require a hearing.	Recommends that a detention hearing be held within forty-eight hours of the child being placed in custody.	Recommends that a detention hearing be accorded the accused juvenile within twenty-four hours of the service of an arrent warrant or the filing of a detention petition.	Recommends that the detention hearing be held within seventy-two hours of initial detention.

6. Analysis of the Issue:

All of the standards-setting groups and many state laws seem to accept the necessity of requiring a prompt judicial review of a youth's detention, but there is no uniformity in setting the precise time period defined by "promptness." The specified time periods generally range between twenty-four and seventy-two hours from the time of taking the youth into custody. The precise period adopted in any particular jurisdiction will reflect a compromise between two sets of conflicting demands. On the one hand, authorities need a certain period of time for the completion of administrative formalities connected with taking a youth into custody and deciding whether, and where, to place him pending the processing of his case: the youth must be "booked," his parents contacted, and their immediate situation assessed. If the police decide to place him in a detention or shelter care facility, there should be some brief time allowed for a prompt intermediate administrative review, usually conducted by probation or "intake" personnel, of that decision. If the responsible official decides to release the youth, there will be no need for a judicial detention hearing. If a judicial hearing is to be held, some time is needed to schedule it and give adequate notice to necessary participants such as the police, detention administrators, parents, and counsel.

Competing with the above demands for time to complete pre-hearing formalities are another set of demands for speedy judicial review of the detention decision. These include consideration of the physical and psychological harmfulness of unnecessary or inappropriate detention for minors, especially given their special sense of time (Goldstein, Freud, and Solnit, Beyond the Best Interests of the Child, (1973), p. 42), recognition that detention is often misused as punishment or imposed arbitrarily, and the concern for prompt vindication of fundamental rights to liberty and the presumption of innocence.

7. Task Force Standards and Rationale:

As noted in the preceding comparative analysis, the Task Force's Standard 12.11 calls for a judicial hearing to review the necessity of continued detention within 48 hours from the time the juvenile is taken into custody. The commentary notes that,

> Every effort should be made to hold the hearing on the day of the youth's admission to custody.

Recognizing that same-day hearings may, however, be unfeasible in some cases, the Task Force settled on the 48-hour time-frame. This was seen as a suitable accommodation of the competing interests outlined above.

1. Issue Title: Conditions of Release--Should juveniles who are detained pre-trial in delinquency proceedings have the right to release on money bail? On what conditions, other than the money bail, may pre-trial release properly be granted?

2. Description of the Issue:

Courts and law enforcement agencies normally permit juvenile delinquency defendants to remain at liberty in the period between the time of arrest or summons and the day of trial. But the defendant's liberty is generally subject to conditions, including but not limited to the defendant's promise to appear for trial. The issue is what release conditions are appropriate. A significant subissue is whether juveniles should enjoy the right to release on bail and, even if not, whether the authorities should be encouraged or permitted to condition the defendant's release on an agreement to forfeit money.

3. Summary of Major Positions:

All of the major standard-setting groups expressly or impliedly disapprove extending the right to bail to delinquency proceedings. Two, the NCCD and the Uniform Act, provide only that arresting officials may or should release the juvenile to his parents on their written promise to produce him in court at the required time. The N.A.C. Courts volume simply calls for the development of criteria and procedures for prehearing detention "to provide an adequate substitute for the right to bail. The HEW and IJA/ABA are more specific. The former would permit the court to condition pre-trial release on various conditions, including the agreement of his parents, guardian, custodian or a suitable third party individual or organization to supervise the defendant, restrictions on the defendant's travel, association, or residence during pre-trial release, or "any other condition deemed reasonably necessary and consistent with the criteria for detaining children." Conceivably, the last criterion could encompass release on bail bond on cash deposit. The latter group would permit the court to release the juvenile on "his or her own recognizance, on conditions, under supervision, ... or into a diversion program." The use of bail bonds "in any form," however, is expressly excluded.

The laws of the thirteen state jurisdictions surveyed are more varied than the standard-setting groups on the question of whether delinquency defendants enjoy the right to bail. Three states give juveniles the right to bail. One gives the bail right

only in felony cases, and three merely allow the court to set bail. Only one of the surveyed states expressly prohibits bail, but five omit to specify that mechanism among the conditions of pre-trial release. This has not always prohibited the use of bail, however, at least in the District of Columbia /see Trimble v. Stone, 187 F. Supp. 483 (D.D.C. 1960)/.

Regarding the non-financial conditions of release provided in the surveyed state legislation, the person taking a child into custody in ten of them may release him on the promise of his parent, guardian or custodian to bring the child before the court when requested. In one, New York, the probation officer or judge may condition the youth's release on the giving of a recognizance without security. Of the other jurisdictions which provide for judicial detention hearings, four mention no conditions. Three permit the judge to condition release on the parent's promise to produce the defendant for trial. One jurisdiction, the District of Columbia, adopts the detailed HEW conditions, and one, Texas, allows the court to impose any conditions necessary to insure the defendant's subsequent appearance.

4. Summary of State Statutes:*

a. Right to Bail

Statutory Approach	Number of States	Names of States
I. Allows bail as a matter of right		
a. in all cases	3	CO, ME, MA
b. in felony cases	1	MS
II. Allows bail in discretion of the court	3	MN, NY, TN
III. Prohibits bail	1	OH
IV. Does not mention bail	5	CA, DC, ND, PA, TX

Summary of Positions: I. In favor of bail - 7
II. Not in favor of bail - 6

*See also N.A.C. Corr., p. 259, note 53, summarizing the law of all the American jurisdictions regarding bail for juveniles; 9 expressly allow, 3 impliedly allow, 3 expressly deny, 8 impliedly deny, and the rest silent.

4. Summary of Surveyed State Statutes:

b. Non-Bail Conditions

Statutory Approach	Number of States	Names of States
I. Person taking juvenile into custody may require promise to bring the child before the court as a condition of release.	11	CA, CO, DC, MA, MN, MS, NY, ND, OH, TN, TX
II. No mention of condition of release by person taking juvenile into custody.	2	ME, PA
III. Probation officer/intake official may impose conditions on juvenile's release.	3	CA, NY, PA
IV. No mention of conditions of release by probation officer/intake official.	10	CO, DC, ME, MA, MN, MS, ND, OH, TN, TX
V. Judge may require promise of parent, guardian or custodian to bring the juvenile before the court as a condition of release.	3	CO, ME, MN
VI. Judge may impose other conditions of release.	4	DC, NY, PA, TX
VII. No mention of conditions of release by judge.	4	CA, ND, OH, TN
VIII. No detention hearing.	2	MA, MS

5. Summary of Positions of Standards Groups:

a. Right to Bail

NAC (1973)	NCCD Standard Act (1959)	HEW Model Act (1974)	Recommended IJA/ABA (1975)	Uniform Juvenile Court Act (1968)
Recommends the prohibition of bail. "One of the procedural differences between the juvenile and adult systems that the commission believes should be retained is the absence of a right to bail in the juvenile system."	"Provisions regarding bail shall not be applicable to children detained in accordance with the provisions of this Act except that bail may be allowed when a child who should not be detained lives outside the territorial jurisdiction of the court."	Does not mention bail when discussing conditions of release.	"The use of bail bonds in any form as an alternative interim status shall be prohibited."	Does not mention bail among conditions of release.

Summary of Positions: None favor money bail.

5. Summary of Positions Recommended by Standards Groups:

b. Nonbail Conditions

NAC (1973)	NCCD Standard Act (1959)	HEW Model Act (1974)	Recommended IJA/ABA (1975)	Uniform Juvenile Court Act (1968)
"The criteria and procedure for prehearing detention should be developed to provide an adequate substitute for the right to bail."	Recommends that the person taking the child into custody may request the parent, guardian or custodian to sign a written promise to being the child to the court at the time directed by the court. Specifies no conditions on pre-trial release by the judge.	Recommends that the judge, after a detention hearing, may condition a child's release on one or more of the following: 1. Place the child in the custody of a parent, guardian or custodian under their supervision or under the supervision of an individual or organization agreeing to supervise him; 2. Place restrictions on the child's travel, association or place of abode during the period of his release; 3. Impose any other condition deemed reasonably necessary and consistent with the criteria for detaining children.	"The court may release the juvenile on his or her own recognizance on conditions, under supervision, ... or into a diversion program."	(Similar to NCCD Standard Act.)

6. Analysis of the Issue:

In analyzing this issue, one should distinguish the "right to bail" from the system of professional bail bondsmen. Few would argue that the bail system as it has operated in our criminal justice system should be adopted or retained in the juvenile justice system. But a reformed bail system, purged of the professional bondsmen, might appropriately apply to delinquency defendants.

Whether delinquency defendants should enjoy a right to bail overlaps considerably with the question, addressed in a separate comparative analysis, whether they may be detained for reasons other than the need to ensure their subsequent appearance in court. Neither a youth nor a criminal defendant subjected to prevention detentive can enjoy the right to bail. But if the reason for detention is to ensure the youth's presence in court, should the court be forced, at least if the underlying offense is not a capital one, to set bail? There are four major arguments against extending the right to bail to juvenile delinquency defendants. First, juveniles, unlike adults, cannot sign a binding bail bond, and they rarely have independent financial resources. The parent, or some other interested adult, would therefore become the party responsible to pay in case of default, and this arguably removes the youth's incentive to honor his obligation to appear under the bond. Correspondingly, it permits the parents to decide by refusing to make bail, when able, to keep his child incarcerated. Secondly, critics argue that the bail system unfairly discriminates against the poor and that no youth's pre-trail status should depend on his family's financial resources. Third, it might be argued that recognizing the right to bail would lead judges routinely to set financial conditions for release, instead of favoring, in all but rare cases, release of the youth on his own recognizance or that of a responsible adult. Such a response would increase the use of pre-trial detention. The fourth argument, closely related to the third, is that the right to bail is unnecessary in juvenile cases, because the authorities will not detain youths for whom adequate supervision is otherwise available. The relative immobility of young as compared to adult defendants is one factor disposing the courts toward liberal release--most defaulting youths are easily found.

The major argument in favor of extending the bail right to delinquency defendants is that of equal protection. Often in criminal cases third parties--families, friends, supporters--rather than the defendant assume the financial risk of the defendant's default. One may think it fundamentally unfair to permit criminal defendants to secure their appearance by such a cash deposit or promise to pay, and to deny the same opportunity to juveniles and their families.

A middle position might be to permit, but not require, the court to set financial conditions in appropriate cases. This

might be done, e.g., if a defendant's detention were based on a fear of his nonappearance, and the court found that the risk of financial loss would induce the parent or other adult responsible for producing the youth to take his responsibilities more seriously than he otherwise would.

The NAC Corrections standards for pre-trial release conditions in criminal cases might be a suitable model for adaptation to the juvenile delinquency context. Although the NAC would eliminate the use of professional bail bondsmen, and prefer the defendant's release on his own recognizance, it would permit release on the basis of the accused's unsecured appearance bond, or of a financial security to be provided by the accused himself. One might modify these conditions for the delinquency context to permit the parent or other adult responsible for ensuring the youth's court appearance to sign the bond or provide the financial security. The other NAC criminal release conditions also relevant for juvenile cases include: release into the care of a qualified person or organization, release to the supervision of a probation officer or other public official, and release with restrictions on the defendant's activities, associations, movements and residence. The NAC would also permit the court to impose on a criminal defendant any other restrictions reasonably related to securing his appearance, and would allow detention with release during certain hours for specified purposes.

7. Task Force Standards and Rationale:

The Task Force spoke to the issue of conditions of release in Standard 12.12.

> The release of a juvenile from detention should be conditioned upon his own promise to appear for subsequent court proceedings. If a juvenile cannot appropriately be released on this basis, he should be released on the least onerous other condition(s) necessary to assure his appearance. These may include:
>
> 1. Release on the written promise of his parent or guardian to produce him in court for subsequent proceedings;
>
> 2. Release into the care of a responsible person or organization;
>
> 3. Release conditioned on restrictions on activities, associations, residence or travel if reasonably related to securing the juvenile's presence in court;

4. Any other conditions reasonably related to securing the juvenile's presence in court.

The use of bail bonds in any form or any other financial conditions should be prohibited.

The commentary notes that the Standard rejects the use of bail both on the basis of the "demonstrated inadequacies" of the adult system and the "potential hazards of using financial conditions for juveniles," e.g., decreased incentive to appear where bail is posted by parents. (See also Standard 12.3 on Court Proceedings Before Adjudication in Delinquency Cases which likewise prohibit the use of bail.)

As to the permitted conditions of release, the commentary emphasizes the requirement of using the "least onerous conditions necessary to assure /the juvenile's/ appearance" and states that,

> Any measure which is imposed should be directly related to insuring his presence at subsequent proceedings and should not be applied arbitrarily to punish the youth or deprive him of his liberty.

1. Issue Title: Appeal of Detention Decision--Should the juvenile have a right to appeal from an adverse decision at the detention hearing?

2. Description of the Issue:

This issue encompasses not only the right to appeal judicial decisions not to release a juvenile before trial, but also decisions to release the youth on restrictive conditions.

3. Summary of Major Positions:

Of the thirteen jurisdictions surveyed, only three (District of Columbia, Maine and Ohio) specifically provide for an appeal from an adverse decision at the detention hearing. Five others (California, Colorado, Minnesota, North Dakota, and Tennessee) provide in general terms for rights of appeal, usually limited to appeals from "final orders"; such provisions probably do not apply to orders regarding pre-trial detention. Five jurisdictions (California, District of Columbia, North Dakota, Pennsylvania and Tennessee) provide for a rehearing on detention if the juvenile's parent, custodian or guardian was not notified of the detention hearing and did not appear or waive appearance.

Only one (the joint IJA/ABA Juvenile Justice Standards Project, Standard 7.13 on Interim Status) of six major standards-promulgating organizations specifically advocates a right of appeal at any time from an adverse decision at the detention hearing. The N.C.C.D. Standard Act (1959) could also be interpreted as favoring this right, in that Sec. 28 permits appellate review of questions of fact and law when the decree or order affects the custody of a child. The issue is not mentioned in either the Courts or Corrections volume of the National Advisory Commission nor in the 1967 President's Task Force Report. Both the H.E.W. Model Act and the Uniform Juvenile Court Act (1968) recommend the right to appeal from a final order and the right to a rehearing if the parent, custodian, or guardian was not notified of the detention hearing and did not appear or waive appearance.

4. Summary of Surveyed State Statutes:

Statutory Approach	Number of States	Names of States
I. Appeal		
A. Specifically provides for appeal of adverse decision at detention hearing.	3	DC, ME, OH
B. Lists decisions which may be appealed and omits detention decision.	2	NY, TX
C. Provides for appeal generally, usually limited to "final orders."	5	CA, CO, MN, ND, TN
D. Does not mention any appeal.	1	PA
E. Does not provide for detention hearing; therefore nothing to appeal from.	2	MA, MS
II. Rehearing--provides for rehearing if parent, custodian or guardian was not notified of detention hearing and did not appear or waive appearance.	5	CA, DC, ND, PA, TN

5. Summary of Positions of Standards Groups:

Task Force (1967)	NAC (1973)	NCCD Standard Act (1959)	HEW Model Act (1974)	Recommended IJA/ABA (1975)	Uniform Juvenile Court Act (1968)
Not mentioned.	Not mentioned.	Provides for an appeal from a final adverse disposition. Provides for an appeal of questions of fact and law where the decree or order affects the custody of a child.	Provides for a rehearing if the parent, guardian or custodian was not notified of the original hearing and did not appear or waive appearance. Provides for appeal from a final order, judgment, or decree.	Recommends a right to appeal an adverse decision at a detention hearing at any time.	Provides for a rehearing if the parent, guardian, or custodian was not notified of the original detention hearing and did not appear or waive appearance. Provides for appeal from a final order, judgment or decree of the juvenile court. If it grants or withholds custody of the child, the appeal shall be heard at the earliest time.

6. Analysis of the Issue:

Like any interlocutory appeal right, the right to appeal an adverse judicial decision on pre-trial detention imposes costs of manpower and other scarce resources in the judicial system. And the temporary nature of pre-trial custody militates against providing a regular right of appeal from such decisions. Arguably, assuming reasonable competence and integrity on the part of family court judges, and the right to petition the family court for rehearings on detention in case of new or additional evidence bearing on the issue, no appeal right should be necessary. In case of gross abuse, habeas corpus remedies will generally be available to the juvenile.

On the other side, it may be argued that pre-trial detention orders, though temporary in nature, can be extraordinarily harmful to youths. Because the family court in many jurisdictions is close to the community and therefore susceptible to pressure from victim and law enforcement sources, juveniles are often detained for punitive or other impermissible reasons. The right to a prompt appeal to a higher court, further removed from community pressure, may serve to discourage as well as correct abuses of the discretion to detain.

If an appellate remedy is provided, it must be decided whether it should be a de novo consideration of the detention issue, including the opportunity to present evidence, or whether review should be limited to allegations that the lower court's decision constitutes an abuse of discretion, as demonstrated on the record below. Although the latter alternative seems more efficient, it cannot be implemented unless family court detention hearings are recorded in some manner.

7. Task Force Standards and Rationale:

The Task Force's Standard 12.11 on Detention Hearings provides, in pertinent part,

> If the juvenile's detention continues, a new detention hearing should be held promptly upon motion by the respondent asserting the existence of new or additional evidence. Absent such motions, the court should review the case of each juvenile held in secure detention no less frequently than every 10 court days.
>
> Each jurisdiction should provide for an expedited appellate procedure to permit speedy review of alleged wrongful detention orders.

The commentary to the Standard notes,

> The requirement in this standard of a detention hearing within 48 hours is designed to give the youth prompt access to the courts for initial review of his incarceration. However, the very promptness of that hearing may also limit the ability of the youth and his counsel to prepare arguments adequately and to gather evidence in support of the youth's release. Consequently, this standard establishes a right to appeal any adverse detention decision, including decisions to release the youth on intrusive conditions. This appeal should be for alleged abuse of discretion appearing on the record, rather than for a new evidentiary hearing, and should not be available to challenge the lower court's decision on probable cause.
>
> In urban court systems, detention appeals should be heard within 24 hours of the time an appeal is claimed. In rural areas, every effort should be made to treat such proceedings with urgency.

1. Issue Title: Waiver of Counsel; Custodial Admissions--
   A. Should the right to counsel be waivable in juvenile delinquency preceedings?
   B. What is the evidentiary status of the juvenile's custodial admission made in the absence of counsel or parent?

2. Description of the Issue :

A. Although the Supreme Court's decision in the Gault case guaranteed juvenile delinquency respondents the right to be represented by an attorney, in many jurisdictions a youth may waive the right, and proceed without legal advice or representation. Should representation by counsel be waivable?

B. Although the Gault case appears to have established the juvenile's right to counsel during custodial police interrogation, in all jurisdictions, the juvenile may waive the right, and make incriminating statements without the advice of counsel and, perhaps, without the advice of a parent or guardian. The issue is whether statements made under such circumstances can be used in evidence at the trial of the delinquency allegations.

3. Summary of Major Positions:

A. Only Mississippi, of the thirteen jurisdictions surveyed, does not give juveniles a statutory right to counsel. Of the remaining twelve, three (California, Colorado and Maine) make the right to counsel waivable, and one (Texas) makes representation by counsel mandatory. Ohio and the District of Columbia permit waiver of the right to counsel at the discretion of the court. However, Ohio limits this to cases where the charge is not a felony, and when there is no possibility of commitment or placement of the child. Massachusetts, Minnesota, and New York concur with Ohio in one or both restrictions. Tennessee, Pennsylvania, and North Dakota make waiver possible only if the parent, guardian, or custodian is available to represent the child.

Of the six major standards-promulgating organizations surveyed, three (The President's Task Force, HEW's Model Act, and the IJA/ABA) advocate nonwaivability of counsel. The Uniform Juvenile Court Act makes counsel mandatory if the child is not represented by his parent, guardian, or custodian. The National Advisory Commission's Courts volume states a preference for both sides to be represented by counsel but does not take a stand on waiver. The Standard Act, implies that counsel is waivable by addressing situations where the child is not represented by counsel.

B. Only four of the thirteen jurisdictions surveyed take positions on this issue. California and the District of Columbia would make the custodial admissions made in the absence of counsel or a parent admissible at the adjudicatory hearing if they are corroborated by other evidence. Colorado and Minnesota rule them inadmissible. Of the remaining nine jurisdictions, the statutes of Maine, Massachusetts, New York, and Ohio do not deal with the issue of custodial admissions. Mississippi, North Dakota, Pennsylvania, Tennessee, and Texas consider the custodial admissions admissible only if they meet the constitutional standards of a criminal proceeding.

Half of the standards-promulgating groups--the H.E.W. Model Act, the IJA/ABA, and the Uniform Juvenile Court Act--advocate that uncounseled custodial admissions be excluded from evidence, at least over objection. The President's Task Force recommends that admissions to intake officers be inadmissible but does not take a stand on responses to police questioning. The National Advisory Commission and the Standard Act do not discuss their evidentiary status, although the Standard Act says that parents should be present at custodial interviews.

4. Summary of Surveyed State Statutes: A. Waiver of Counsel

Statutory Approach	Number of States	Names of States
I. Right to counsel is waivable in juvenile delinquency proceedings.	3	CA, CO, ME
II. Representation by counsel is mandatory in juvenile court proceedings.	1	TX
III. Waiver of counsel is only permitted at the discretion of the court.	2	NC, OH*
IV. Counsel may be waived except where the charge would be a felony and/or when commitment or placement of the child is a possibility.	4	MA, MN, NY, OH*
V. Counsel may be waived only if the parent, guardian, or custodian is available to represent the child.	3	ND, PA, TN
VI. No statutory right to counsel.	1	MS

14* *Ohio represented twice.

4. Summary of Surveyed State Statutes: B. Custodial Admission

Statutory Approach	Number of States	Names of States
I. Custodial admissions made in the absence of counsel or parent, are admissible at the adjudicatory hearing if corroborated.	2	CA, DC.
II. Custodial admissions made in the absence of counsel or parent are inadmissible.	2	CO, MN
III. Custodial admissions made in absence of counselor or parent are only admissible if they meet the constitutional standards of a criminal proceeding.	5	MS, ND, PA, TN, TX
IV. Custodial admissions not specifically regulated.	4	ME, MS, NY, OH

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5. Summary of Positions of Standards Groups:

President's Task Force (1967)	NAC (1973)	NCCD Standard Act (1959)	HEW Model Act (1974)	Recommended IJA/ABA(1975)	Uniform Juvenile Court Act (1968)
A. Waiver of Counsel					
Recommends that right to counsel be non-waivable.	Does not say whether the right to counsel should be waivable, but states a preference that both the state and the juvenile be represented by counsel.	Implies that counsel right is waivable.	Provides for mandatory representation by counsel.	Provides for mandatory representation by counsel.	Provides that counsel must appear for a child not represented by his parent, guardian, or custodian.
B. Custodial Admissions					
Recommends exclusion of admissions to intake officers, but makes no comment on police questioning "in view of the uncertainty in which the whole range of issues has been left by recent decisions of the court."	Does not discuss the evidentiary status of custodial admissions.	States that parents should be present at custodial interview, but does not say that their absence makes the admission inadmissible.	Custodial admissions not admissible if obtained without attorney's advice.	Custodial admissions not admissible if obtained without attorney present.	Statements made by the child after being taken into custody and before the service of notice of the time, place, and purpose of a transfer hearing are not admissible against him over objection in the criminal proceedings following the transfer. This subsection and the commissioner's note appurtenant to it would seem to imply that a custodial admission is admissible at a juvenile court proceeding.

6. Analysis of the Issue:

Proponents of the view that the juvenile's right to counsel should be waivable are supported by constitutional law traditions, which hold that virtually all procedural rights may be surrendered by their beneficiary. Not only might it seem unfair to force a solvent but unwilling parent to pay for a lawyer whose services neither he nor his child wants, but arguably, a child has the constitutional right to represent himself in court. See Farett v. California, -- U.S. --, 43 L.W. 5004 (1975). Also, many juvenile delinquency cases are sufficiently simple and straightforward that legal representation is unnecessary. In many instances, introducing a lawyer's services requires delaying the proceedings for a time; always, it makes the proceedings more costly to the family and/or the state. And, of course, the appearance of lawyers usually makes the proceeding more formal and, perhaps, more adversary.

The major argument favoring mandatory representation of delinquency respondents by legal counsel is that a juvenile is not capable of making an intelligent decision to waive the right, and that in fact, waiver decisions are the product of express or implied coercion by parents, police or court officials. Parents may be motivated to urge waiver because they believe that waiver shows the correct "cooperative" attitude necessary to receive lenient treatment from the court, or because they do not wish to pay for counsel's services. And, youth may perceive signals from police, probation officers, or judges that exercising the right to counsel will provoke hostile official reactions. Finally, opponents of allowing waiver point out that the presence of counsel for the respondent actually facilitates the efficient flow of litigation in the family court, and removes from judges the burden to assume the various functions of the defense counsel's role.

The arguments opposed to admitting into evidence at trial statements made by a juvenile while in custody, and without the advice of parents or counsel, are closely related to the arguments just discussed in favor of mandatory counsel. If the juvenile's rights under Miranda v. Arizona, 384 U.S. 436 (1966)--impliedly ruled applicable to delinquency proceedings by the Supreme Court's decision in the Gault case--are to be protected, he should have the advice of a parent or lawyer before deciding whether to waive his constitutional right to keep silent. Waivers of the privilege against self-incrimination made by a juvenile unaided by some such friendly adult, are inherently suspect. A rule forbidding the use of confessions or admissions which are the products of uncounseled custodial interrogations is one way to safeguard the juvenile's right against self-incrimination, without foreclosing the police from conducting prompt questioning when needed. Such a per se rule also would avoid courtroom battles over whether the youth's waiver was made "voluntarily and intelligently."

According to the opposing view, juveniles should be treated no differently than adults under the Miranda ruling: if the juvenile "intelligently and voluntarily" waives his constitutional rights to silence and to legal counsel while in custody, resulting statements should be admissible in evidence to prove the delinquency allegations. Otherwise, it can be argued, evidence of the youth's delinquent conduct might be suppressed, and the youth escape a justified assertion of the court's jurisdiction over him. The detrimental consequences of such an occurrence to both the youth and the community are obvious. Since many juveniles are sufficiently sophisticated and experienced to waive their rights knowingly, a rule excluding confessions simply because no lawyer or parent was present would be inappropriate.

7. Task Force Standards and Rationale:

A. Waiver of Counsel

The Task Force's Standard 12.3 on Court Proceedings Before Adjudication in Delinquency Cases indicates, among other things, that,

> No Constitutional right of a juvenile may be waived without prior consultation with an attorney.

Standard 16.1 addresses this issue as it related to the juvenile's right to counsel.

> At every stage of delinquency proceedings the juvenile should be represented by a lawyer. If a juvenile who has not consulted a lawyer indicates his intention to waive the assistance of counsel, a lawyer should be provided to consult with the juvenile and his parents. The court should not accept a waiver of counsel unless it determines after thorough inquiry that the juvenile has conferred at least once with a lawyer, and is waiving the right competently, voluntarily and with a full understanding of the consequences.

Thus, while the Task Force did not opt to make legal representation mandatory, it placed two restrictions on waiver of counsel. First, it required the juvenile to confer at least once with a lawyer. As the commentary points out,

> The purpose of providing a lawyer to confer with a juvenile and his parents about the wisdom of waiver is to discuss with them the advantages and disadvantages of legal representation in the case.

Second, the Task Force required the court to inquire searchingly into the juvenile's competence, his understanding of the consequences of dispersing with counsel, and the voluntariness of his waiver decision.

B. Custodial Admissions

The commentary to Standard 12.3 indicates that,

> It is the Task Force's belief that individuals below a certain age--juveniles--lack the maturity of judgment to make such momentous decisions /i.e., waiving Constitutional rights/ on their own behalf without consultation with a lawyer.

As to custodial admissions, the commentary continues,

> The Task Force recommends excluding such statements as direct evidence if objected to at any judicial proceeding prior to entry of an adjudication of delinquency or, in a criminal proceeding, prior to conviction. The standard does not forbid questioning in such circumstances, but does require the police to choose between questioning the youth immediately without being able to use the resulting statements (or other evidence derived from such statements) to prove the government's case in court, and postponing questioning until the youth's attorney appears. Statements could, in any event, be used to impeach the juvenile's credibility if his trial testimony were inconsistent with the statements.

1. Issue Title: Probable Cause Hearing--Should detained juveniles have the right to a probable cause hearing before trial in delinquency cases?

2. Description of the Issue:

The issue is whether a juvenile detained prior to trial in delinquency proceedings should have the right to a judicial determination whether there is probable cause to believe he has committed the alleged delinquent act. In other words, can the state keep the juvenile in custody until trial without satisfying the court that there exists a sufficient basis for the allegations of the petition?

3. Summary of Major Positions:

Of the thirteen jurisdictions surveyed, only the District of Columbia and New York require a probable cause hearing for detained juveniles, but California allows the hearing if the juvenile so requests. Six of the states (Minnesota, Mississippi, Ohio, Pennsylvania, Tennessee and Texas) make no mention of probable cause in their statutes, and four (Colorado, Maine, Massachusetts and North Dakota) require a finding of probable cause only if there is a transfer hearing.

Therg is no provision for a finding of probable cause, even at a transfer hearing, in the H.E.W. Model Act, the N.C.C.D. Standard Act, the Task Force Report or the N.A.C.'s volumes on Courts and Corrections. The Uniform Juvenile Court Act imposes a "reasonable grounds" requirement at the transfer hearing, but does not otherwise require the court to screen the allegations before trial. The IJA/ABA Juvenile Justice Standards Project, (Draft) Standards on Interim Status, state that "At the time of the initial detention hearing, the State must demonstrate that there is probable cause to believe that the juvenile committed the offense charged." The Project's draft volume on Pre-Trial Court Proceedings contains a similar requirement, and also provides for probable cause hearings for non-detained juveniles who are not tried within a specified time period after filing of the petition.

Probable Cause

4. Summary of Surveyed State Statutes:

Statutory Approach	Number of States	Names of States
I. Does for a hearing to determ probable cause before trial d detained juven	13	
A. On request of child	1	CA
B. Mandatory	2	DC, NY
II. Does not mention a hearing to determine probable cause before trial.	6	MN, MS, OH, PA, TN, TX
III. Requires a finding of probable cause only if there is a transfer hearing.	4	CO, ME, MS, ND

5. Summary of Positions of Standards Groups: Probable Cause Hearing

Task Force (1967)	NAC (1973)	NCCD Standard Act (1959)	HEW Model Act (1974)	Recommended IJA/ABA (1975)	Uniform Juvenile Court Act (1968)
Not mentioned.	Not mentioned.	Not mentioned.	Not mentioned.	"At the time of the initial detention hearing, the State must demonstrate that there is probable cause to believe that the juvenile committed the offense charged."	No provision for a separate probable cause hearing--Imposes a "reasonable grounds" requirement at a transfer hearing.

6. Analysis of the Issue:

The principal argument in favor of a probable cause hearing for detained juveniles is that it is required by the Fourth Amendment's prohibition of "unreasonable search and seizures." Giordenello v. U.S., 357 U.S. 480 (1958) established that the Fourth Amendment applies to arbitrary arrests and detention as well as unreasonable searches. In Gerstein v. Pugh, 41 L.Ed.2d 210, 417 U.S.___ (1975) the Supreme Court interpreted the Fourth Amendment to require a prompt judicial determination of probable cause whenever a criminal defendant is subjected to any extended restraint on liberty. Although the Supreme Court has not addressed the issue whether the Fourth Amendment's protections apply in delinquency cases, most state courts have assumed that they do apply. In criminal and delinquency proceedings the policies underlying the hearing requirement are arguably identical: to prevent deprivations of personal liberty by administrative authorities without an opportunity for prompt court review of the legal basis for the deprivation.

The principal argument opposing application of the probable cause hearing requirement to delinquency proceedings is that it would further formalize family court proceedings, which are already more closely modeled upon criminal proceedings than is desirable. Because the evidentiary standard required to establish "probable cause" is quite low, and because the juvenile detention process generally provides for screening and diversion of unfounded charges by probation and other personnel, a probable cause requirement is arguably unnecessary to comply with the standard announced by the Supreme Court in In Re Gault and succeeding cases--"fundamental fairness" to the juvenile.

If it is decided to extend to delinquency respondents the right to a probable cause hearing, it would be necessary to decide whether the government's ex parte showing of probable cause would suffice, or whether the juvenile should be entitled to a bilateral, adversary hearing. The latter procedure would permit the juvenile to confront and rebut evidence offered by the state; it would also serve the incidental function of providing pretrial discovery to the respondent.

7. Task Force Standards and Rationale:

The following excerpt from the Task Force's Standard 12.11 outlines the Task Force's position on probable cause hearings:

> Unless a juvenile who has been taken into custody has been released, a judicial hearing to review the necessity for his continued detention should be held within 24 hours from the time he was taken into custody.

> The detention hearing should conform to due process requirements. The detention hearing should commence with a judicial determination of probable cause. If the prosecution establishes by competent evidence that there is probable cause to believe that the juvenile has committed the allegedly delinquent act, the court should review the necessity for continued detention. Unless the prosecution demonstrates by clear and convincing evidence that there is a need for continued detention according to the detention criteria, the court should release the juvenile upon conditions pending the next judicial proceeding. A court order continuing the juvenile's detention should be supported by written reasons and findings of fact.

The commentary to the Standard indicates that the policy considerations identifying Gerstein apply to delinquency cases, even if there is no constitutional protested right to a probable cause hearing. Moreover, the commentary notes,

> /T/he Task Force believes that the continued detention of a youth should not be ordered without some initial screening of the sufficiency of the charges by a judge. Such screening not only protects the juvenile against continued detention on baseless or unsupported changes, but also conserves judicial resources by avoiding fruitless prosecutions and trials.

1. Issue Title: Plea Bargaining--Should plea bargaining practices either be prohibited or regulated?

2. Description of the Issue:

Th- question is whether a delinquency respondent and the prosecutor should be allowed to negotiate regarding an agreement to admit to the allegations of the petition in exchange for a less restrictive disposition, reduced charges, dismissal or substitution of other petitions, or other benefits. If these negotiations are not prohibited, should they be regulated by law?

3. Summary of Major Positions:

Of the thirteen jurisdictions surveyed none explicitly recognizes plea bargaining. Statutes in Colorado and Maine specifically provide that the juvenile need not plead to the petition. Of the remaining ten jurisdictions (California, District of Columbia, Massachusetts, Minnesota, Mississippi, New York, North Dakota, Ohio, Pennsylvania, Tennessee and Texas), only Ohio's laws deal with pleas (but not plea bargaining) in their laws. Nine jurisdictions, however, specifically provide for informal adjustment and/or consent decrees (California, District of Columbia, Minnesota, New York, Ohio, Pennsylvania, Tennessee and Texas) whereby the respondent agrees to counseling and other conditions and thus avoids having the petition filed or an adjudication reached.

Five of the six major standards-promulgating organizations surveyed (National Advisory Commission, H.E.W. Model Act, N.C.C.D. Standard Act, Uniform Juvenile Court Act, and the President's Task Force Report) do not discuss plea bargaining; they do, however, permit informal adjustment or consent decrees provided they are entirely voluntary and of limited duration. As the comment to §10 of the Uniform Juvenile Court Act notes, "unless informal conferences are controlled, fear of court proceedings may make participation involuntary and their agreeing to prescribed terms a product of compulsion." The sixth organization, the IJA/ABA Juvenile Justice Standards Project, advocates regulation of plea bargaining. The introduction to Part III on uncontested adjudication proceedings summarizes the JJSP approach:

> "Most commentators would probably agree that plea bargaining when it exists in the juvenile justice system, represents the 'worst of both worlds' since it is invisible and unregulated. Most would also agree that plea bargaining in juvenile cases must move in either one of two directions: either plea bargaining should be recognized and regulated or it should be eliminated.... These standards take the 'recognize and regulate' approach."

4. Summary of Surveyed State Statutes:

Statutory Approach	Number of States	Names of States
I. Does not provide for plea bargaining		
A. Does not mention plea bargaining	11	CA, DC, MA, MN, MS, NY, ND, OH, PA, TN, TX
B. States that no plea is required	2	CO, ME
	13	
II. Provides for informal adjustment and/or consent decrees.	9	CA, DC, MN, NY, ND, OH, PA, TN, TX

5. Summary of Positions of Standards Groups:

Task Force (1967)	NAC (1973)	NCCD Standard Act (1959)	HEW Model Act (1974)	Recommended IJA/ABA (1975)	Uniform Juvenile Court Act (1968)
Does not discuss plea bargaining.	Does not discuss plea bargaining.	Does not discuss plea bargaining.	Does not discuss plea bargaining.	Advocates regu-regulation of plea bargaining, not abolition.	Does not discuss plea bargaining.

6. Analysis of the Issue:

> "The reality of plea bargaining is apparent to anyone who participates in the juvenile process.... Even in those juvenile courts where plea bargaining has been absent up to now, the trend of greater reliance on the bargained for admission is as unmistakable as it is unpreventable."
> Besharov, Juvenile Justice Advocacy (1974).

Recognizing that plea bargaining exists in various forms in the juvenile court, the choices presented to policy makers are three: to ignore, to regulate, or to prohibit the practice. Although official nonrecognition of the existence of plea bargaining has been the traditional approach in both the criminal and juvenile justice systems, the recent trend in criminal procedure has been otherwise. It is now generally accepted that unregulated plea bargaining is subject to serious abuses. Either it should be recognized and regulated by law, or completely prohibited. The choice for enlightened juvenile justice lawmakers seems to be the same.

The principal argument in favor of prohibiting plea bargaining is that the practice is inherently coercive and irrational. Especially in the juvenile justice system, coercion should be avoided--whether it takes the form of pressuring a youth to give up his procedural rights in return for a "good deal," or pressuring the state to dismiss justified charges or agree to an unwarranted disposition in return for the respondent's "cooperation" in avoiding trial. Presumably, juveniles should be encouraged to plead truthfully, to exercise their procedural rights, and to expect justice; family court judges should try all those cases which are in fact contested by both sides. Plea bargaining, it is generally acknowledged, generates cynicism among all the parties. And, if the abusive character of the practice is acknowledged, prohibition should not be as difficult as commentators fear would be true in the context of criminal courts. In juvenile courts the plea bargaining process is not so ingrained or indispensable to the efficient flow of cases as it is in the criminal system.

The argument in favor of regulating, rather than prohibiting, plea bargaining in juvenile courts is essentially the same as that made by proponents of regulation in the criminal courts: prohibition is impossible to enforce; therefore, a policy of prohibition will simply result in the status quo, and the evils of plea bargaining will continue without benefit of needed regulation. The anti-prohibition view relies also on the argument that plea bargaining, if properly regulated to guard against abuse, is indeed an appropriate mechanism for the fair and speedy disposition of matters before the juvenile courts. The process of administratively "settling" juvenile cases avoids clogging the courts with cases not needing trial, permits juveniles to avoid the trauma of court contests, and reduces the time, lengthy in some jurisdictions, between commission of the acts giving rise to court jurisdictions,

and conclusion of the case. The goal of prompt handling is particularly important in juvenile cases.

7. Task Force Standards and Rationale:

> The Task Force's Standard 13.1 specifies that,
>
> Plea bargaining in all forms should be eliminated from the delinquency process. Under no circumstances should the parties engage in discussions for the purpose of agreeing to exchange concessions by the prosecutor for the juvenile's admission to the petition.

The commentary to this Standard sets forth a very lengthy and quite detailed defense of the Task Force's position on this issue. Among other things, it emphasizes the inherently coercive nature of such practices and the fact that they result in decisions not rationally related to the merits and circumstances of the individual case. After noting that both the public and the juveniles suffer from such practices and observing that "plea bargaining has not yet become as firmly entrenched in the delinquency process as it is in the criminal process," the commentary considers and rejects the suggestions for regulation rather than prohibition.

The final portion of the commentary does, however, recognize that despite the Task Force's strong recommendation to the contrary some jurisdictions will retain such practices. Therefore, the commentary sets forth a series of regulations designed to reduce the abuses of plea bargaining where it continues to occur.

1. Issue Title: Admissions--Should Boykin-type procedures apply when a juvenile admits to a delinquency petition?

2. Description of the Issue:

The question is whether a judge, before accepting the juvenile respondent's admission to the petition, should determine by personally communicating with the respondent that the admission was voluntarily and knowingly offered with a full understanding of what the admission connotes and of its consequences. Similar procedures are constitutionally required in criminal cases. Boykin v. Alabama, 395 U.S. 238 (1969).

3. Summary of Major Positions :

Of the thirteen jurisdictions surveyed, only Ohio provides for a Boykin-type procedure when a juvenile's plea is taken. The District of Columbia uses a Boykin-type procedure when a consent decree is entered into. The D.C. statute is silent on the issue when a juvenile enters a formal plea. The remaining eleven jurisdictions (California, Colorado, Maine, Massachusetts, Minnesota, Mississippi, New York, North Dakota, Pennsylvania, Tennessee and Texas) do not require a Boykin-type procedure at any phase of delinquency proceedings.

Of the six major standards-promulgating organizations, only the IJA/ABA recommends a detailed inquiry to determine whether the defendant's plea is truly voluntary and based on an understanding of the nature and consequences of the allegations and of his rights. The Uniform Juvenile Court Act conditions informal adjustment at intake on the facts being admitted, the adjustment being in the best interest of the child, and with the consent of all, with the knowledge that consent is not obligatory. It does not discuss how the court is to ascertain that the conditions have been met. The President's Task Force, the Standard Act, and the H.E.W. Model Act all prescribe some sort of general review of informal adjustments and consent decrees. The National Advisory Commission believes that "almost all of the procedural protections used in the trial of an adult criminal case to minimize the likelihood of an unjustified conviction should be applied in a juvenile case...." These would presumably include a Boykin-type procedure, but that is not mentioned specifically.

4. Summary of Surveyed State Statutes:

Statutory Approach	Number of States	Names of States
I. Does not mention any requirement of a Boykin-like procedure.	11	CA, CO, ME, MA, MN, MS, NY, ND, PA, TN, TX
II. Does provide for a Boykin-type procedure when a juvenile's plea is taken.	1	OH
III. Provides for a Boykin-type procedure when a consent decree is entered into.	1	NC

5. Summary of Positions of Standards Groups:

Task Force (1967)	NAC (1973)	HEW Model Act 1974)	Recommended IJA/ABA (1975)	NCCD Standard Act (1959)	Uniform Juvenile Court Act (1968)
Does not discuss pleas.	A Boykin-type procedure is not specifically mentioned, but the comment to Standard 14.4 of the Courts volume says "Almost all of the procedural protections used in the trial of an adult criminal case to minimize the likelihood of an unjustified conviction should be applied in a juvenile case...."	Does not provide for a Boykin-type procedure.	Recommends detailed procedure by which the judge determines if the defendant's plea is truly voluntary and based on an understanding of the nature of the allegations. The judge should personally address the defendant and inform him of his rights and the consequences of his plea.	Not mentioned. There is no formal plea.	Pleas not mentioned.

6. Analysis of the Issue:

Although uncontested delinquency proceedings are common, the law governing juvenile court proceedings has not traditionally regulated the taking of pleas, to "admissions," in any detail. Since the Supreme Court's decision in Boykin v. Alabama, 395 U.S. 238 (1969), criminal plea procedures have had to comply with its requirements for a formal judicial inquiry into the defendant's motivations and awareness with regard to the plea. The Boykin decision is based on the need for ceremony when a defendant waives the important constitutional rights of jury trial, confrontation of witnesses, and self-incrimination. The issue presented here is whether such formal procedures should be made a part of juvenile delinquency hearings.

In Re Gault, 387 U.S. 1 (1967) established that delinquency respondents enjoy the rights to confrontation and self-incrimination: These Fifth and Sixth Amendment rights are waived by the juvenile who admits to the petition instead of requiring the state to provide the allegations of delinquency. In light of the Boykin case, it is difficult to contend that the court's obligation to ensure that waiver of these rights by the juvenile is voluntary and intelligent requires any less procedural caution than in the case of an adult. On the other hand, the Supreme Court has not held that Boykin-type procedures are required to meet the Due Process standard of "fundamental fairness" in delinquency proceedings. If less formal and time consuming means could be devised to ensure fairness in the pleading process, strict compliance with Boykin would probably not be required.

7. Task Force Standards and Rationale:

The Task Force addressed this issue in Standard 13.2, which provides, in pertinent part, that,

> Prior to accepting an admission to a delinquency petition, the family court judge should inquire thoroughly into the circumstances of that admission.
>
> The judge should, in the first instance, determine that the juvenile has the capacity to understand the nature and consequences of the proceeding. If a guardian ad litem has been appointed for the juvenile, no admission should be accepted without independent proof of the acts alleged.
>
> The family court judge should also determine whether the admission is knowingly and voluntarily offered. In making such an inquiry, the court

> should address the youth personally, in simple language, and determine that he understands the nature of the allegations in the petition. The court should then satisfy itself that the juvenile understands the nature of those rights which are waived by an entry of an admission and the consequences of waiving them. It should also inform the juvenile of the most restrictive disposition which could be imposed in the case. By inquiring of the juvenile, the court should then determine that the allegations in the petition are true.

The commentary cites In re M., 96 Col. Rptr. 8 P 7 (Col. App. 1970), suggesting that Boykin-type procedures may be constitutionally required in delinquency cases. In any event, the Task Force felt that the policy considerations underlying Boykin were applicable in the juvenile context and should lead to adoption of the same procedures for delinquent youths.

1. Issue Title: Rights Before Adjudication--What rights should the defendant enjoy at judicial hearings prior to an adjudication of delinquency: (a) public trial, (b) jury trial, (c) confrontation and cross-examination of witnesses, (d) subpoena witnesses, (e) counsel, (f) self-incrimination, (g) impartial fact finder, (h) verbatim record of proceedings, (i) presence of parent?

2. Description of the Issue:

(a) The issue is whether juvenile proceedings should be open to public scrutiny to guard against possible abuses or the child should be afforded a right of privacy, sparing him the emotional trauma from publicity which might hinder the rehabilitative process.

(b) Disagreement over whether a juvenile should have a right to a jury trial (he does not have a constitutional right to one) focuses on the advantages of the jury trial as an appeal to the community conscience /see McKeiver v. Pennsylvania, 403 U.S. 528 (1971) Brennan, J., concurring/ and the advantage of the juvenile court judge as a fact finder who has had more training and experience with "problem children."

(c) The question of whether a juvenile defendant has the right to confrontation and cross-examination of witnesses was answered affirmatively by In re Gault, 387 U.S. 1 (1967). The alternative to having witnesses against the defendant present in the courtroom is to allow depositions or ex parte affidavits used against him with no opportunity for personal examination and cross-examination.

(d) The Sixth Amendment right to compulsory process in criminal trials has recently been described as "the right to present a defense, the right to present the defendant's version of the facts." /see Washington v. Texas, 388 U.S. 19 (1967)/. However, the issue is really for our purposes the narrower one of whether the court will give the defendant the same assistance it gives the prosecution in compelling the appearance of witnesses or the defendant must build his case around witnesses who will testify voluntarily.

(e) The defendant's right to counsel is probably his most important since it is a means of protecting his other rights. It was decided in In re Gault , 387 U.S. 1 (1967) that juvenile defendants do have a right to counsel. The controversy often arises over when this right attaches.

(f) The issue of whether or not a juvenile defendant should enjoy the privilege against self-incrimination is another battle in the war between the doctrine of parens patriae and due process, whether the child should by incriminating himself take the first humble step toward rehabilitation under the aegis of his guardian,

the state or whether he should be spared the affront to his dignity of a compelled admission against interest. (Under parens patriae it is in his best interest.)

(g) The question of whether a juvenile defendant is entitled to an impartial fact finder is really two questions, whether he is entitled to an impartial jury if he has a right to a jury trial, and whether he is entitled to an impartial judge if there is no jury trial. Impartiality may mean no bias, no previous opportunity to have formed an opinion on the matter, no exposure to prejudicial information, and no conflict of interest or role.

(h) The issue here is whether a verbatim transcript of the proceedings obtained by an electronic, stenographic, or other mechanical device is required or if minutes taken by the court are sufficient to protect the defendant's rights.

(i) The juvenile defendant's desired right to the presence of his parent or guardian may be compared to that of his right to counsel. The main issue is when it should attach. It could be interpreted to mean the right to timely notice of the proceedings being given the parent who will then be entitled to attend the hearings or to mean that the defendant cannot be questioned in the absence of his parent or lawyer.

4. Summary of Major Positions:

(a) Of the 13 jurisdictions surveyed, only California gives the defendant a right to a public trial if requested, while seven statutes (those of District of Columbia, Maine, Massachusetts, Minnesota, Mississippi, North Dakota and Pennsylvania) provide that the defendant has no right to a public trial. Colorado and Texas allow the court to exclude the general public as it deems proper for the best interests of the child. The New York, Ohio and Tennessee statutes say that the general public may be excluded, but they do not specify at whose request or discretion.

Of the standards-promulgating organizations surveyed, the President's Task Force, the Standard Act, the H.E.W. Model Act, and the Uniform Act take a position against public trials for juveniles, although the President's Task Force favors admitting the press. The National Advisory Commission does not specifically mention this issue, but it does say that all the rights of an adult defendant, except a jury trial, should be extended to juveniles. The IJA/ABA took the position that a public trial should be weighed against the victim's interest in privacy, but exclusion of the public is within the judge's discretion.

(b) Of the 13 jurisdictions surveyed, seven (District of Columbia, Massachusetts, Minnesota, North Dakota, Ohio, Pennsylvania and Tennessee) deny a juvenile defendant the right to a jury trial. The statutes of California, Maine and New York do not mention this right. Only Colorado grants the juvenile defendant at a judicial hearing the right to a jury trial if demanded. The Mississippi statute is divided; the Family Court Act gives the right to a jury trial if requested, while the Youth Court Act denies it. Texas gives the defendant a right to a jury trial at the adjudicatory stage, but not at the detention or transfer hearing.

Only the IJA/ABA of the standards-promulgating groups surveyed recommends that a juvenile defendant have a right to a jury trial. The other five (President's Task Force, N.A.C., Standard Act, H.E.W. Model Act and the Uniform Act) are opposed to jury trials for juveniles.

(c) Of the nine jurisdictions out of 13 surveyed that mention the right of confrontation and cross-examination, five (California, Massachusetts, Minnesota, Pennsylvania and Tennessee) confer that right on juvenile defendants. The Ohio and Texas statutes only refer to the right as attaching at the adjudicatory hearing. Colorado's only mentions it with regard to the dispositional hearing. North Dakota does not make it clear whether or not the right applies to all judicial hearings.

The President's Task Force, the National Advisory Commission and the IJA/ABA recommend that the right to confront and cross-examine witnesses be accorded juvenile defendants. The Standard Act appears to recommend a limited right, giving the judge greater control over cross-examination. The H.E.W. Model Act does not specifically mention this right but does provide that all information about the defendant submitted to the court shall be available to the parties, presumably to controvert or cross-examine. The Uniform Juvenile Court Act provides a right to cross-examine adverse witnesses but makes the source of confidential information safe from disclosure.

(d) Four (Massachusetts, Mississippi, New York and Texas) of the 13 surveyed jurisdictions do not mention the right to subpoena witnesses. Seven (California, Colorado, District of Columbia, Minnesota, North Dakota, Pennsylvania and Tennessee) say that a juvenile defendant at a judicial hearing enjoys the unqualified right to subpoena witnesses. Maine and Ohio, however, limit this right to witnesses whose presence is considered necessary and proper to the court.

Only the H.E.W. Model Act and the Uniform Juvenile Court Act mention the word subpoena when they grant their right to juvenile defendants. The National Advisory Commission advocates the right

by reference, bestowing on a juvenile all the rights of a criminal defendant except a jury trial. The Standard Act, the President's Task Force, and the IJA/ABA all recommend that a juvenile have the right to call his own witnesses.

(e) All of the surveyed jurisdictions provide a statutory right to counsel except Mississippi. The right is also recommended by all the standards-promulgating organizations surveyed.

(f) Of the jurisdictions surveyed, ten (California, Colorado, District of Columbia, Massachusetts, Minnesota, New York, North Dakota, Pennsylvania, Tennessee and Texas) extend the privilege against self-incrimination to juvenile defendants. Ohio's statute says the defendant has the right to remain silent with respect to any allegation. Maine and Mississippi do not specifically mention this right.

(g) The jurisdictions surveyed provide a variety of partially effective methods of insuring an impartial fact-finder. Eight statutes (those of California, Colorado, District of Columbia, Minnesota, Mississippi, New York, Pennsylvania and Texas) say that the judge is not to see the defendant's social report until after an admission or adjudication of delinquency, while Ohio and Tennessee permit the judge to see the report before the adjudicatory hearing. Four jurisdictions (District of Columbia, Massachusetts, North Dakota and Tennessee) prohibit the judge who sat at the transfer hearing from presiding over subsequent hearings. The District of Columbia applies the previous rule to the detention hearing judge as well. Minnesota's statute provides that neither the court nor any member of the court staff may participate in presentation of evidence in support of the petition. In Ohio, a referee who has contemporaneous responsibility for working with children subject to a dispositional order of any juvenile court shall not preside at a juvenile hearing. By providing for a jury trial, Colorado and Texas (and apparently Mississippi) impliedly give a right to an impartial fact finder.

The six standards-promulgating organizations all provide some means to help insure a partial fact finder. For details please see the chart in Part 5, infra.

(h) Six of the jurisdictions surveyed (District of Columbia, Minnesota, North Dakota, Ohio, Pennsylvania and Texas) confer on the juvenile defendant the right to have a verbatim record made of the proceedings. California and Colorado leave it to the discretion of the judge, while Maine and Tennessee provide for a less complete record. Massachusetts, Mississippi and New York do not mention recording of proceedings.

The H.E.W. Model Act and the Uniform Act both provide for a right to verbatim recordings of the proceedings, but then go on to say that if this is not done, full minutes are to be kept by the court. The National Advisory Commission does not specifically mention this right, but it is probably included in the adult defendant's rights which the National Advisory Commission would accord juvenile defendants. The President's Task Force definitely recommends the recording of court hearings on a routine basis without court orders. The Standard Act favors this right but says the court may order that the hearing not be recorded if the parties waive their right to such record. The IJA/ABA recommends that a verbatim record be made of all adjudication proceedings, whether or not the allegations in the petition are contended. It does not discuss recording the other hearings although the requirement of a right to appeal from a detention decision would indicate a need for recording the detention hearing.

(i) In eight of the 13 jurisdictions surveyed (California, Colorado, Maine, Massachusetts, North Dakota, Ohio, Pennsylvania and Tennessee), the juvenile defendant's right to the presence of his parents is applicable to all the hearings. In Texas and the District of Columbia this right does not apply to the detention hearing. The Mississippi and New York statutes provide that a hearing may proceed in the absence of a parent if sufficient notice has been given or the parents do not appear within ten days. In any proceeding, a Minnesota court may temporarily exclude the parents if this is in the best interests of the child. An attorney for the child or guardian ad litem is allowed to remain in the courtroom.

Three of the standards-promulgating groups surveyed (President's Task Force, the Standard Act and the H.E.W. Model Act) provide for a summons to the parents but do not say whether the parents may be excluded from any hearing. The Uniform Juvenile Court Act provides that "parties," which includes parents, have a proper interest and may be admitted to the court. Parents are entitled to receive notice of the transfer hearing and, if they can be found, of the detention hearing. The IJA/ABA recommends that parents be entitled to be present throughout the proceedings unless this violates a rule on witnesses or impairs the defendant's ability to defend his case fully. The National Advisory Commission is silent on the right of a juvenile defendant to the presence of his parents at the proceedings.

4. Summary of Surveyed State Statutes:

A. Public Trial

Statutory Approach	Number of States	Names of States
I. The defendant at judicial hearings enjoys a right to a public trial if requested.	1	CA
II. The court may exclude the general public as it deems proper for the best interests of the child.	2	CO, TX
III. The general public may be excluded, but statute does not specify at whose request or discretion.	3	NY, OH, TN
IV. The defendant at judicial hearings has no right to a public trial (except in hearings to declare a person in contempt or in traffic violations).	7	DC, ME, MA, MN, MS, ND, PA

B. Jury Trial

I. The defendant at a judicial hearing enjoys the right to a jury trial if demanded.	1	CO
II. The defendant at a judicial hearing is denied the right to a jury trial.	7	DC, MA, MN, ND, OH, PA, TN
III. The statute does not mention the right to a jury trial.	3	CA, ME, NY
IV. One chapter of the statute gives a right to a jury trial; another denies it.	1	MS
V. The defendant has a right to a jury trial at the adjudicatory hearing but not at the detention or transfer hearing.	1	TX

4. Summary of Surveyed State Statutes:

C. Confrontation & Cross-Examination

Statutory Approach	Number of States	Names of States
I. The defendant has a right to confront and cross-examine witnesses at all judicial hearings.	5	CA, MA, MN, PA, TN
II. The statute only mentions the defendant having the right at adjudicatory hearings.	2	OH, TX
III. The statute only mentions the defendant having the right at the dispositional hearing.	1	CO
IV. The statute is not clear whether or not the right applies to all judicial hearings.	1	ND
V. The statute does not mention the right to confront and cross-examine witnesses.	4	DC, ME, MS, NY

D. Subpoena

I. The defendant at a judicial hearing enjoys the unqualified right to subpoena witnesses.	7	CA, CO, DC, MN, ND, PA, TN
II. The defendant at a judicial hearing has the right to subpoena witnesses whose presence is considered necessary and proper to the court.	2	ME, OH
III. The statute does not mention the right to subpoena witnesses.	4	MA, MS, NY, TX

4. Summary of Surveyed State Statutes:

D. Right to Counsel

Statutory Approach	Number of States	Names of States
I. The defendant at a judicial hearing enjoys the right to counsel.	12	CA, CO, DC, ME, MS, MN, NY, ND, OH, PA, TN, TX
II. The statute does not mention the right to counsel.	1	MS

E. Self-Incrimination

Statutory Approach	Number of States	Names of States
I. The defendant at a judicial hearing enjoys the privilege against compelled self-incrimination.	10	CA, CO, DC, MA, MN, NY, ND, PA, TN, TX
II. The defendant at a judicial hearing enjoys the right to remain silent with respect to any allegation.	1	OH
III. The statute does not specifically mention the privilege against self-incrimination.	2	ME, MS

4. Summary of Surveyed State Statutes:

G. Impartial Fact Finder

Statutory Approach	Number of States	Names of States
I. The judge is not to see defendant's social report until after an admission of adjudication of delinquency.	8	CA, CO*, NC*, MN*, MS, NY, PA, TX
II. The judge may see the defendant's social report before the adjudicatory hearing (not impartial).	2	OH*, TN*
III. The defendant who sat at the transfer hearing may not preside over subsequent hearings.	4	NC*, MA, ND, TN*
IV. The judge who sat the the detention hearing may not preside over subsequent hearings.	1	DC*
V. Neither the court nor any member of the court staff may participate in presentation of evidence in support of the petition.	1	MN*
VI. Referee who has contemporaneous responsibility for working with children subject to a dispositional order of any juvenile court shall not preside at a juvenile hearing.	1	OH*
VII. Right to jury implies impartial fact finder.	2	CO*, TX*

*Represented more than once.

4. Summary of Surveyed State Statutes:

H. Verbatim Record

Statutory Approach	Number of States	Names of States
I. The defendant at a judicial hearing has right to have a verbatim record made of the proceedings.	6	DC, MN, ND, OH, PA, TX
II. The defendant at a judicial hearing is not given the right to a verbatim record of the proceedings.	2	ME, TN
III. No mention is made in the statute of a right to a verbatim record of the proceeding.	3	MA, MS, NY
IV. It is within the judge's discretion to order the reporter to make a verbatim record of the proceedings.	2	CA, CO
		I. Presence of Parents
I. Defendant's right to the presence of his parents is applicable to all judicial hearings.	8	CA, CO, ME, MA, NH, OH, PA, TN
II. The statute provides that the hearing may proceed in the absence of a parent if sufficient notice has been given or parents do not appear within ten days.	2	MS, NY
III. The defendant has a right to the presence of his parents at all but the detention hearing.	2	DC, TX
IV. In any proceeding, the court may temporarily exclude the parents in the best interests of the child.	1	MN

5. Summary of Positions of Standards Groups:

A. Public Trial

President's Task Force (1967)	NAC (1973)	NCCD Standard Act (1959)	HEW Model Act (1974)	Recommended IJA/ABA (1975)	Uniform Juvenile Court Act (1968)
Does not recommend public trials for juveniles but seems to favor opening the trial to the press so long as the names of the defendants are not disclosed.	Does not mention specifically, but does say all the rights of an adult except a jury trial should be extended to trials of juveniles.	Provides that the general public shall be excluded.	Provides that except in hearings to declare a person in contempt of court the general public shall be excluded from delinquency and neglect hearings.	Took the position that a juvenile has a right to a public trial but that a public trial should be weighed against the victim's interest in privacy, but exclusion of the public is within the judge's discretion.	Provides that except in hearings to declare a person in contempt of court or in traffic offenses the general public shall be excluded from hearings under this act.
				B. Jury Trial	
Opposed to jury trials for juveniles.	Recommends that juveniles not have a right to trial by jury.	Provides that cases of children shall be dealt with without a jury.	Provides that hearings shall be conducted by the court without a jury.	Recommends that the defendant in a juvenile proceeding have a right to a trial by jury.	Provides that hearings under this act shall be conducted by the court without a jury.

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5. Summary of Positions of Standards Groups:

C. Confrontation & Cross-Examination

President's Task Force (1967)	NAC (1973)	NCCD Standard Act (1959)	HEW Model Act (1974)	Recommended IJA/ABA (1975)	Uniform Juvenile Court Act (1968)
Recommends that juveniles have the right to confront and cross-examine witnesses which it sees as an "essential attribute of a judicial trial."	Recommends that juveniles be extended the right to confront and cross-examine witnesses against them.	Appears to recommend a limited right. Recommends "much more information, with a greater flexibility governing the admission of evidence and a far greater control by the judge over cross-examination and the order of presentation of evidence."	Does not mention this specifically but does say that all information, including oral and written reports submitted shall be available to the parties and their counsel. Presumably this is to enable challenge (cross-examination) to the evidence.	Recommends that a defendant in a juvenile delinquency proceeding be given the right to confront and to cross-examine witnesses.	Provides a right to cross-examine witnesses. However, at dispositional hearings, while the parties or their counsel shall be afforded an opportunity to examine and controvert written reports and to cross-examine individuals making the report, sources of confidential information need not be disclosed.
				D. Subpoena Witnesses	
Recommends the right of defendant's counsel to present his own witnesses. Does not discuss the use of subpoenas.	Does not specifically mention this issue but says that juvenile defendants should be afforded all the rights of a defendant in an adult criminal prosecution except trial by jury.	Provides that "a summons may be issued requiring the appearance of any other person whose presence in the opinion of the judge is necessary."	Provides that upon application of a party, the clerk of the court shall issue subpoenas.	Recommends that a juvenile defendant's attorney be permitted to call witnesses on the juvenile's behalf. Does not use the word "subpoena."	Provides a right to subpoena witnesses upon application of a party or on the court's own motion.

5. Summary of Positions of Standards Groups:

E. Right to Counsel

President's Task Force (1967)	NAC (1973)	NCCD Standard Act (1959)	HEW Model Act (1974)	Recommended IJA/ABA (1975)	Uniform Juvenile Court Act (1968)
Recommends that the juvenile have the right to counsel, not only at the adjudicatory stages of the proceeding, but also at intake and at disposition wherever coercive action is possible.	Recommends that juvenile defendants have the right to counsel. Prefers that both the state and the juvenile be represented by counsel.	Provides that there is "a right to be represented by counsel at every stage of the proceeding."	Provides for a "non-waiverable" right to counsel in delinquency cases--at all stages of the proceeding.	Recommends that legal representation should be provided the child in all proceedings arising from or related to a delinquency or in need of supervision proceeding.	Recommends that counsel be provided for a child not represented by his parent, guardian, or custodian. Specifically applies this right to the detention hearing as well as the adjudicatory hearing.
				F. Self-Incrimination	
Conditions the privilege against compelled self-incrimination on the absence of counsel. "But if counsel is present, allowing a reasonable inference from the exercise of the right to silence might constitute a proper balance between the demands of justice and those of welfare."	Recommends that juvenile defendants have the privilege against compelled self-incrimination.	Provides that "a child will not be required to be a witness against himself."	Provides that a child charged with a delinquent act shall be accorded the privilege against self-incrimination.	Recommends that a juvenile defendant have the right to remain silent with respect to the allegations on the petition.	Provides that a child charged with a delinquent act need not be a witness against or otherwise incriminate himself.

5. Summary of Positions of Standards Groups: G. Impartial Fact-Finder

President's Task Force (1967)	NAC (1973)	NCCD Standard Act (1959)	HEW Model Act (1974)	Recommended IJA/ABA (1975)	Uniform Juvenile Court Act (1968)
Recommends that the judge not have to shift roles from prosecution to defense counsel to judge. Recommends bifurcated hearings and the exclusion of impressionistic social investigation reports from the court in advance of adjudication.	Recommends that the judge be impartial in that he not be asked to solicit testimony tending to establish delinquency. Does not discuss whether a judge who has been exposed to possibly prejudicial information about the defendant from a prior hearing or from social reports or from personal knowledge should be disqualified from hearing the case.	Provides that there shall be no social investigation until after the allegations have been established at the hearing. Does not mention any conflict of roles for the judge or his exposure to prejudicial information at a prior hearing.	Prohibits judge who participates in consent decree or a transfer hearing of this case from participating over objection in any subsequent proceedings. It does not mention a judge who has participated in a detention hearing. Prohibits use of the predisposition study report prior to a finding on the allegations. Does not discuss conflict of judge as prosecutor.	Provides for a jury trial on request but alternatively by an impartial judge. Recommends that a judge who previously presided at detention, waiver, adjudication or disposition hearing concerning the defendant be disqualified if objected to. The judge or jury shall not receive social information prior to or during the adjudication hearing. Excludes possibility of conflict of judge's roles by requiring counsel for both sides.	Provides that the social study and report are not to be made until after the allegations are admitted or the court has found after a hearing that the child committed a delinquent act. Provides that a judge who has presided at a transfer hearing shall not over objection preside at the hearing on the petition. Does not discuss whether the judge from the detention hearing may also be disqualified.

5. Summary of Positions of Standards Groups: H. Verbatim Record

President's Task Force (1967)	NAC (1973)	NCCD Standard Act (1959)	HEW Model Act (1974)	Recommended IJA/ABA (1975)	Uniform Juvenile Court Act (1968)
Recommends the recording of court hearings by court stenographers on a routine basis without court order.	Not specifically mentioned but probably included in the adult criminal defendant's rights which should be accorded juvenile defendants.	Provides that "stenographic notes or mechanical recordings shall be required as in other civil cases--unless the court otherwise orders and the parties waive the right to such record" (emphasis added).	Provides that the proceedings shall be recorded by stenographic notes or by electronic, mechanical or other appropriate means. However, it then goes on to say that if not so recorded, full minutes shall be kept by the court.	Recommends that a verbatim record be made of all adjudication proceedings, whether or not the allegations in the petition are contested. Doesn't discuss recording the other hearings, although the requirement of a right to appeal a detention decision would indicate a need for a record of the detention hearing.	Provides that if requested by a party or ordered by the court the proceedings shall be recorded by stenographic notes or by electronic, mechanical or other appropriate means. If not so recorded, full minutes are to be kept by the court.
				I. Presence of Parents	
Provides that parent and child should be notified, but does not discuss whether parents may be excluded from some of the hearings.	Not mentioned.	Provides for summons to the parents even if they do not have custody of the juvenile. Does not say whether they may be excluded from any hearing.	Provides for summons to parents even if they don't have custody of the juvenile. Does not say whether or not they may be excluded from any hearing.	Recommends that parents be entitled to be present throughout the proceedings unless this violate a rule on witnesses or impairs the juvenile's ability to defend the case fully. The court should make every reasonable effort to secure the presence of both parents.	Provides that the parties (including parents) have a proper interest and may be admitted by the court. Provides that the parents also receive notice of the transfer hearing &, if they can be be found, of the detention hearing.

6. Analysis of the Issue:

(a) The guarantee in the Sixth Amendment that the accused's trial be conducted in public has always been regarded as a safeguard against any attempt to employ our courts as instruments of persecution. "The purpose of the requirement of a public trial was to guarantee that the accused would be fairly dealt with and not unjustly condemned." /See Estes v. Texas, 381 U.S. 532 at 538 (1965)/. Whether juvenile defendants should also enjoy this protection from possible government abuse may depend on a weighing of alternative safeguards available and the special effect publicity may have on a juvenile.

Justice Brennan's opinion in McKeiver v. Pennsylvania, 402 U.S. 528 (1971) noted that trial by jury and a trial open to the public perform similar functions. They are both appeals to the community conscience so that any improper judicial behavior will not go unnoticed and unredressed. If a jury, a miscrocosm of the community, is available, perhaps a public trial is not necessary.

The main arguments for private juvenile proceedings involve the detrimental effect of publicity on thx juvenile defendant. He may be psychologically traumatized, or he may revel in the spotlight. Either way, the rehabilitative process is hindered. In addition, some argue that privacy may be necessary for the protection of the victim. But it should be noted that similarly situated victims preyed upon by adult criminals are often present at criminal trials.

(b) Many of the traditional arguments against a jury trial for juvenile delinquents revolve around the ideal of informality. Critics claim that a jury trial would be too expensive and too lengthy. Moreover, while the juvenile courts were set up to serve the best interests of the child, it is argued that members of a lay jury are unlikely to have sufficient knowledge of a juvenile's developmental needs to come to the most appropriate result. A hearing by a judge trained and experienced in the problems of young people is viewed as more likely to reach a just result.

The Supreme Court has argued with the critics, and fearing a jury trial could entail delay, formality, and the clamor of the adversary system as well as possible publicity, held that denial of a jury trial does not violate the fundamental fairness standard applicable to juvenile proceedings because a jury is not a necessary component of accurate fact-finding. On the other hand, those who favor extending the right to a jury trial to delinquency proceedings argue that juvenile defendants are usually tried for violating the same laws as criminal defendants and, like adults, face possible imprisonment in a state institution. When a person is seized by the state and may be deprived of his liberty, it is contended that he is entitled to the protections of the Bill of Rights, whether he be an adult or a juvenile.

(c) The confrontation clause was included in the Sixth Amendment in order "to prevent depositions on ex parte affidavits . . . being used against the prisoner in lieu of personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief." (See Mattox v. United States, 156 U.S. 237 at 242 (1895)/. The Supreme Court in In re Gault, 387 U.S. 1 (1967) held that juvenile defendants are also entitled to confront and cross-examine witnesses in the absence of a valid confession.

However, the court has since advocated an attenuated confrontation right. In Dutton v. Evans, 400 U.S. 74 (1970) the court upheld the use as substantive evidence of a statement by a witness who was available but not produced by the state. Four justices concluded that presentation of the statement under oath, before a jury, and subject to cross-examination by the defendant is not the only way of complying with the confrontation clause. The court said it may be satisfied if the trier of fact has a satisfactory basis for evaluating the truth of the hearsay statement, one such basis being an inquiry into the likelihood that cross-examination of the declarant could successfully challenge the statement's meaning or the declarant's sincerity, perception, or memory.

In light of this recent development, the Task Force may wish to address the appropriate scope of the right to confrontation in juvenile proceedings.

(d) The right to subpoena witnesses may, in reality, be the right to present witnesses, to present any case at all. Often, a defendant's only witnesses may be unwilling to testify. Compulsory process enables the defendant to present a defense--his version of the story. It can certainly be argued that limiting the right to subpoena witnesses is a violation of the Sixth Amendment's compulsory process provision.

Compulsory process might be opposed because of the expense of serving the subpoena and the inconvenience to, and infringement on, the valuable time of witnesses who might be frivolously called. It is unlikely, however, that the juvenile defendant will choose this occasion to play the mischievous prankster. In any case, it will be his attorney who selects the witnesses to call. Leaving a defendant without the opportunity to call witnesses may force him to take the stand unless he can argue that the state has simply failed to prove its case beyond a reasonable doubt. This limiting the right to call witnesses might result in a coerced waiver of the juvenile's right to remain silent.

(e) The Task Force Report: Juvenile Delinquency and Youth Crime (at p. 31) describes the right to counsel as consisting of three principal aspects: to be represented by counsel at various stages of the proceeding; to have counsel appointed by the court; and to be meaningfully advised of those rights. The right to assistance of counsel was originally thought to include only the first aspect, but Powell v. Alabama, 287 U.S. 45 (1932) began the expansion of the concept by imposing on courts an affirmative duty to appoint counsel when the defendant is unable to make his own defense or to employ counsel. Subsequent cases have made it clear that the defendant must be informed of his right to counsel to make the right meaningful. The Supreme Court ruled in In re Gault, 387 U.S. 1 (1967) that juvenile defendants also have the right to counsel. Only if a defendant is provided with competent counsel can he effectively exercise his other rights and participate meaningfully in the proceedings.

According to the Task Force Report,

> "the case against counsel in juvenile proceedings rests in part on the fear that lawyers will inject into juvenile court proceedings the worse features of criminal trials: emphasis on technical and legalistic points without regard to the larger interests at stake; use of dilatory devices such as needless requests for adjournments; preoccupation with 'getting the client off' rather than concern for furthering the interests of child and state."

There was also fear that the requirement of counsel would impose too great a financial burden on the public. Perhaps some of the fears have been realized, but assistance of counsel has also enabled the judicial process to flow more easily. Attorneys can more optly evaluate a client's case and decide which points to raise before the court, thus preventing time-consuming irrelevant defenses. They can also object to irrelevant or incompetent evidence introduced by the other side, thus saving more time.

(f) The privilege against compelled self-incrimination was held applicable to juveniles in In re Gault, supra. In its opinion the court referred to Dean Wigmore's statement (3 Wigmore, Evidence §822, 3 ed. 1940) that under certain stresses a person, especially one of defective mentality or peculiar temperament, may falsely acknowledge guilt. The Gault court also cited Haley v. Ohio, 332 U.S. 596 (1948), where in reversing the murder conviction of a 15-year-old boy the court said,"He cannot be judged by the more exacting standards of maturity." Moreover, the Gault opinion noted the difficulty in obtaining a valid waiver by a juvenile.

The main argument presented against the privilege was that a juvenile

> "should not be advised of his right to remain silent because confession is good for the child as the commencement of the assumed therapy of the juvenile court process, and he should be encouraged to assume an attitude of trust and confidence toward the officials of the juvenile process." Gault, supra.

The court pointed out how this is unrealistic in that a paternally urged confession followed by discipline is likely to produce a hostile and adverse reaction. The court also dismissed the argument that the privilege did not apply because juvenile proceedings are civil and not criminal, saying that the availability of the privilege turns upon the nature of the statement and the exposure to deprivation of liberty that it invites.

(g) Many commentators argue that several safeguards are necessary to insure a truly impartial fact-finder. For example, if a jury is the finder of fact, a voir dire should be employed. If the judge is to have that role, it is argued that he should not have to prosecute the case for the state or be in a position where he feels compelled to protect the interests of either side by opening a certain line of questioning or by any other assistance. In addition, it is often contended that an impartial fact-finder should not have been exposed to any prejudicial information (favorable or unfavorable to the defendant) in the form of, e.g., social or probation reports, prior arrect reports, etc., or bias-forming personal experience with the juvenile either socially or in a professional context--such as having presided at a previous delinquency proceeding where the juvenile was a defendant or at an earlier stage of the present proceeding.

The right to an impartial jury is granted to adult criminal defendants by the Sixth Amendment. The right to an impartial fact-finder may also be found in the due process clause of the Fourteenth Amendment and in the confrontation clause of the Sixth Amendment since the fact finder must reach his decision from evidence presented at the trial, not from information or impressions received from outside sources.

Juveniles have, of course, been accorded the rights of confrontation and cross-examination by the decision in In re Gault. However, while the applicable standard for juvenile proceedings is "fundamental fairness," due process for juveniles may not always be the same as due process for adult criminal defendants.

For example, some commentators believe that judges in juvenile proceedings can safely be exposed to information which would likely be regarded as prejudicial in an adult criminal proceeding. This is so, it is argued, because of the judge's need to know all the facts in order to decide upon the best possible treatment for the juvenile. It is also contended that prior contact with the defendant is not necessarily prejudicial. Some argue that a juvenile will receive more personalized treatment from a judge who is already familiar with the case or the defendant.

(h) Arguments against the right to a verbatim record of the proceedings would of course include economy. The recording and the transcription of the record can be very expensive. It might also be argued that the juvenile would then make frequent demands to hear the recording or see the transcript and seize upon insignificant errors.

On the other hand, many argue that a verbatim record is necessary if the defendant is to have a meaningful right of appeal. Without a verbatim transcript to examine for errors, it is contended that the appellate court cannot determine if the defendant's rights were violated. Having every word recorded also gives both parties an opportunity to have a certain part of the testimony read back if there is a question about what was said. It is also claimed that a record is essential when a defendant pleads guilty because there must be a showing that the judge made a personal determination that the plea was intelligently and voluntarily entered.

(i) It might be argued that requiring the presence of parents would entail so much delay in certain cases that the juvenile would be forced to remain in detention for an unfair amount of time. The presence of the parents might prompt certain other youngsters to lie since the thing they fear the most is disappointing their parents. At the other extreme are youngsters so full of hate they will do anything to hurt and embarrass their parents.

On the other hand, most children probably could benefit from the moral support of their parents' presence. Many juveniles are easily intimidated. Even though represented by counsel, the juvenile defendant may feel all alone as all the weight of the law is pitted against him. The presence of his parents may serve to allay these fears.

At the other end of the spectrum are the hardened types of juveniles who may look upon the proceeding as a big joke. In these cases a requirement that parents be issued a summons to attend the hearings can help to emphasize the gravity of the situation and adjust the child's perspectives.

7. Task Force Standards and Rationale

The Task Force addressed many of the issues raised by this Comparative Analysis in Standard 12.3 on Court Proceedings Before Adjudication in Delinquency Cases,

> Court procedures in delinquency cases prior to adjudication should conform to due process requirements. Except for the right to bail, grand jury indictment, and trial by jury, the juvenile should have all the procedural rights given a criminal defendant.
>
> The juvenile should have the following rights in addition to the right to counsel:
>
> 1. An impartial judge;
>
> 2. Upon request by the juvenile, a proceeding open to the public or, with the court's permission, to specified members of the public;
>
> 3. Timely written notice of the proceeding, and of his legal rights;
>
> 4. The presence of his parent or guardian;
>
> 5. The assistance of an interpreter when necessary;
>
> 6. The privilege against self-incrimination.
>
> No constitutional right of a juvenile may be waived without prior consultation with an attorney.
>
> A verbatim record of the proceedings should be kept.

Standard 13.4 on Contested Adjudications is also relevant.

> Adjudications of delinquency petitions should conform to due process requirements. The hearing to determine whether the juvenile is delinquent should be distinct and separate from the proceedings at which--assuming an adjudication of delinquency--a decision is made as to what disposition should be made concerning the juvenile. At the adjudicatory hearing, the juvenile alleged to be

delinquent should have all the rights given a criminal defendant except for the right to trial by jury. In addition to the rights specified in Standards 16.1 (Juvenile's Right to Counsel) and 12.3 (Court Proceedings Before Adjudication in Delinquency Cases), the juvenile should have the following rights:

1. To confront and cross-examine witnesses for the state;

2. To compel the attendance of witnesses in his favor;

3. To require the state to prove the allegations of delinquency beyond a reasonable doubt;

4. To have applied the rules of evidence which apply in criminal cases;

5. Protection against double jeopardy.

And Standard 16.1 on Juvenile's Right to Counsel provides that,

> At every stage of delinquency proceedings the juvenile should be represented by a lawyer. If a juvenile who has not consulted a lawyer indicates his intention to waive the assistance of counsel, a lawyer should be provided to consult with the juvenile and his parents. The court should not accept a waiver of counsel unless it determines after thorough inquiry that the juvenile has conferred at least once with a lawyer, and is waiving the right competently, voluntarily and with a full understanding of the consequences.

The Task Force viewed these procedures as consistent with the requirement of "fundamental fairness" mandated by the Due Process Clause and as representing social policy judgments on the proper scope of procedural safeguards in delinquency proceedings.

Three issues are perhaps deserving of special comment. First, as to the issue of public trial, the Commentary to Standard 12.3 indicates,

> Although the standard contemplates that the judge will normally grant a juvenile's request to open the proceeding to nonparticipants, the Task Force does not intend to foreclose the exercise of sound discretion in special circumstances to keep the proceeding partially or completely closed.

As examples of such "special circumstances" the Commentary refers to cases involving young victims of sexual abuse or cases where exclusions may be necessary to prevent disruptions.

Second, the Task Force did not opt for a right to trial by jury. The Task Force saw this as a close issue, but ultimately concluded that,

> the jury's disadvantages, which include increased formality, expense and delay, outweigh its admitted usefulness in a small proportion of cases.

Third, while affirming the right of confrontation outlined in Gault, the Task Force did not speak specifically to the issue raised by Dutton as to the scope of this right. This was viewed as a question which could more appropriately be resolved by judicial decisions on a case-by-case basis.

1. Issue Title: Rules of Evidence--Should the rules of evidence applied in delinquency proceedings be the same as those applied in criminal proceedings?

2. Description of the Issue:

This issue entails such considerations as the applicable standard of proof, burden of proof, corroboration rules, competency requirements, and exclusionary rules. Basically, it is asking what means are available to reach what ends. If the purpose of the juvenile system is not the same as that of the criminal system, must the same rules be used?

3. Summary of Major Positions:

Of the 13 jurisdictions surveyed ten (California, Colorado, District of Columbia, Massachusetts, Minnesota, North Dakota, Ohio, Pennsylvania, Tennessee and Texas) place the burden of proof on the prosecution. The statutes of Maine, Mississippi and New York do not mention the burden of proof. Maine and Mississippi also fail to mention the standard of proof in juvenile proceedings, while New York's statute says that the standard is a preponderance of the evidence. The other ten states listed above impose a standard of "beyond a reasonable doubt." None of the state statutes surveyed mentioned accomplice testimony but seven (District of Columbia, Minnesota, New York, North Dakota, Pennsylvania, Tennessee and Texas) require that a juvenile defendant's confession be corroborated. California, Colorado, Maine, Massachusetts, Mississippi and Ohio have no such requirement in their statutes. Seven statutes (California, District of Columbia, Minnesota, New York, North Dakota, Pennsylvania and Texas) require that evidence at an adjudicatory hearing be competent, relevant, and material; however, Minnesota and Texas qualify this with "in accordance with the requirements of civil cases." (emphasis added). The remaining jurisdictions surveyed (Colorado, Maine, Massachusetts, Mississippi, Ohio, and Tennessee) do not specifically address this question. None allow incompetent evidence to be admitted at the adjudicatory hearing although it may often be used at detention and dispositional hearings. With regard to the exclusionary rules, all but five states (Maine, Massachusetts, Mississippi, New York and Ohio) take some sort of position. Minnesota and Texas allow the admission of evidence admissible in a civil proceeding, while California, the District of Columbia, North Dakota, Pennsylvania, and Tennessee adhere to the standard of admissibility in a criminal proceeding. Colorado, the thirteenth jurisdiction, excludes any evidence obtained in violation of the "Miranda rule," as do Texas, Tennessee, Pennsylvania, North Dakota, Minnesota, and the District of Columbia. A final statutory approach, to exclude any illegally seized evidence, is adopted by Texas, Tennessee, Pennsylvania, North Dakota, and the District of Columbia.

The Standard Act does not mention the standard of proof to be applied in juvenile proceedings or on whom the burden of proof should be imposed. Four (the National Advisory Commission Courts volume, the H.E.W. Model Act, the Uniform Act, and the IJA/ABA) of the five standards-promulgating organizations that did discuss the issue agree that the prosecution must establish the allegations beyond a reasonable doubt. The President's Task Force, the first of the five to take a position, advocated a requirement of clear and convincing proof but did not mention on whom the burden of proof should lie. While the President's Task Force, the NAC and the Standard Act do not mention any corroboration requirements, the H.E.W. Model Act, the Uniform Act, and the IJA/ABA recommend that an uncorroborated confession be insufficient to support an adjudication of delinquency. They do not discuss corroboration of accomplice testimony. All of the surveyed organizations except the Standard Act favor the admission of only competent evidence at the adjudicatory hearing. But the IJA/ABA does not address this issue specifically as it recommends that the rules of evidence be the same as in the trial of criminal cases. These organizations either explicitly or implicitly allow the use of other than competent evidence at non-adjudicatory hearings. While the Standard Act does not mention this specific issue it does say in the comment to Section 19 that ". . . the hearing in juvenile court is much more informal, with a greater flexibility governing the admission of evidence . . . ."

The President's Task Force conditions application of the exclusionary rules and other canons of criminal proof on the possible result of the proceeding being commitment to an institution similar to an adult correctional institution. The Standard Act appears to be opposed to applying the exclusionary rules in juvenile proceedings, stressing the informality and flexibility of the juvenile court. The NAC Courts volume and the IJA/ABA seem to favor a blanket grant of the rights of a criminal defendant at least at the adjudicatory hearing. The IJA/ABA does specifically exclude information obtained from the juvenile in the absence of his attorney but does not specifically mention the admissibility of illegally seized evidence. The H.E.W. Model Act and the Uniform Act specify that both these classes of evidence are inadmissible "to establish the allegations." Presumably such evidence could be used at the dispositional stage.

4. Summary of Surveyed State Statutes:

I. Burden of Proof

II. Standard of Proof

Statutory Approach	Number of States	Names of States
I. Burden of Proof		
A. In a delinquency proceeding the burden of proof is on the prosecution.	10	CA, CO, DC, MA, MN, ND, OH, PA, TN, TX
B. The statute does not mention the burden of proof.	3	MA, MS, NY
II. Standard of Proof		
A. In a delinquency proceeding the standard of proof is proof beyond a reasonable doubt.	10	CA, CO, DC, MA, MN, ND, OH, PA, TN, TX
B. The standard of proof is a preponderance of the evidence.	1	NY
C. The statute does not specifically mention the standard of proof.	2	ME, MS

4. Summary of Surveyed State Statutes:

I. Corroboration Requirement

II. Admissibility

Statutory Approach	Number of States	Names of States
I. Corroboration		
A. In a delinquency proceeding the defendant's confession must be corroborated.	7	DC, MN, NY, ND, PA, TN, TX
B. The statute does not mention a corroboration requirement either for a confession by the juvenile defendant or for accompliance testimony.	6	CA, CO, ME, MA, MS, OH
II. Admissibility		
A. Evidence at an adjudication proceeding must be competent, relevant, and material.	5	CA, DC, NY, ND, PA
B. The statute specifies that the evidence be competent, relevant and material in accordance with the requirements of civil cases.	2	MN, TX
C. The statute does not specifically address this question.	6	CO, ME, MA, MS, OH, TN

4. Summary of Surveyed State Statutes: Exclusionary Rules

Statutory Approach	Number of States	Names of States
I. The statute excludes any evidence obtained in violation of the "Miranda rule."	7	CO, DC, MN, ND, PA, TN, TX
II. The statute excludes any illegally seized evidence.	5	DC, ND, PA, TN, TX
III. The statute provides for the admission into evidence of any evidence admissible in a criminal proceeding.	5	CA, DC, ND, PA, TN
IV. The statute provides for the admission of evidence admissible in a civil proceeding.	2	MN, TX
V. The statute does not discuss the question clearly.	5	ME, MA, MS, NY, OH

5. Summary of Positions of Standards Groups:

A. Standard of Proof

B. Burden of Proof

President's Task Force (1967)	NAC (1973)	NCCD Standard Act (1959)	HEW Model Act (1974)	Recommended IJA/ABA (1975)	Uniform Juvenile Court Act (1968)
A. "An attractive solution to evidentiary problems of the juvenile court in the majority of its cases may be to require clear and convincing proof, which the lawbooks denote as more than a preponderance of the evidence but less than proof beyond a reasonable doubt...for the most grievous of juvenile law violations...the canons of criminal proof should prevail." B. Not mentioned.	A. "The juvenile should be entitled... to have the state convince the family court judge beyond a reasonable doubt that the criminal act was committed by the juvenile." B. "A determination of delinquency should require a finding that the state has proven that the juvenile has committed an act that, if committed by an adult, would constitute a criminal offense."	A. Not mentioned. B. Not mentioned.	A. "If the court finds on the basis of a valid admission or a finding on proof beyond a reasonable doubt...it may...proceed to disposition." B. "If the court finds that the allegations in the petition have not been established, it shall dismiss the petition and order the child discharged from any detention or temporary care theretofore ordered in the proceeding."	A. "He has the burden of proving the allegations of the petition beyond a reasonable doubt if the child is subject to a disposition involving loss of freedom, and by a preponderance of the evidence in other cases." B. The Juvenile Prosecutor "has the burden of proving the allegations..."	A. "If the court finds beyond a reasonable doubt that the child committed the acts by reason of which is alleged to be delinquent, it shall proceed...." B. "If the court finds the allegations of delinquency have not been established, it shall dismiss the petition."

5. Summary of Positions of Standards Groups:

A. Corroboration Requirement

B. Admissibility

President's Task Force (1967)	NAC (1973)	NCCD Standard Act (1959)	HEW Model Act (1974)	Recommended IJA/ABA (1975)	Uniform Juvenile Court Act (1968)
A. Not mentioned. B. Admitting everything into evidence on the theory that the judge can cull out that which is not competent overlooks the point that in juvenile court much of the evidence is in the form of reports which are often little more than compilations of professional hearsay. Whether the ordinary run of judges and referees are qualified to sift this kind of evidence is questionable.	A. Not mentioned. B. "The juvenile should be entitled ... to have only competent and relevant evidence admitted."	A. Not mentioned. B. Not mentioned. "...the hearing in juvenile court is much more informal, with a greater flexibility governing the admission of evidence and a far greater control by the judge over cross-examination and the order of presentation of evidence."	A. Does not specifically mention accomplice testimony. Does say "An extrajudicial admission or confession made by the child out of court is insufficient to support a finding that the child committed the acts alleged in the petition unless it is corroborated by other evidence." B. "... finding on proof beyond a reasonable doubt, based upon competent, material, and relevant evidence ...."	A. "Thus no child should be found delinquent or in need of supervision based solely on his own confession; there must be other, independent evidence to establish probable cause ...." B. The rules of evidence should be the same as in the trial of criminal cases.	A. "A confession validly made by a child out of court is insufficient to support an adjudication of delinquency unless it is corroborated in whole or in part by other evidence." B. The social study and report are to be used only at the dispositional hearing. Their use during the hearing on the petition would violate the hearsay rule and the Due Process Clause. In dispositional hearings, all evidence helpful in determining the questions presented may be received ... even though not otherwise competent in the hearing on the petition."

5. Summary of Positions of Standards Groups: Exclusionary Rules

President's Task Force (1967)	NAC (1973)	NCCD Standard Act (1959)	HEW Model Act (1974)	Recommended IJA/ABA (1975)	Uniform Juvenile Court Act (1968)
"... For the most grievous of juvenile law violations, in which protection of the public interests becomes a dominant value, the canons of criminal proof should prevail. However, their seriousness can be defined more meaningfully in operational terms by making them contingent upon legally possible dispositions rather than on formal allegations that the offense is analogous to a felony."	Does not specifically mention the exclusionary rules. Does say that "at the adjudicatory hearing, the juvenile alleged to be delinquent should be afforded all the rights given a defendant in an adult criminal prosecution, except that trial by jury should not be available ...."	Seems to be opposed to use of the exclusionary rules in juvenile proceedings. "Whereas criminal court procedure is governed strictly by rules of evidence--particularly exclusionary rules ... the hearing in the juvenile court is much more informal, with a greater flexibility governing the admission of evidence ...."	"A child charged with a delinquent act shall be accorded the privilege against self-incrimination. An extrajudicial statement which would be constitutionally inadmissible in a criminal proceeding shall not be received in evidence over objection. Evidence illegally seized or obtained shall not be received in evidence over objection to establish the allegations against him."	Recommends that the rules of evidence be the same as in the trial of criminal cases. Says that "if the police question any arrested juvenile concerning an alleged offense in the absence of an attorney for the juvenile, no information obtained thereby or as a result of the questioning shall be admissible in any proceeding."	"... An extrajudicial statement, if obtained in violation of this Act or which would be constitutionally inadmissible in a criminal proceeding shall not be used against him. Evidence illegally seized or obtained shall not be received over objection to establish the allegations made against him."

6. Analysis of the Issue:

Whatever the merits of traditional arguments that the rehabilitative orientation of delinquency proceedings means that these proceedings need not comply with the full panoply of procedural safeguards employed in adult criminal courts, In re Winship effectively ended the discussion on this subject in regard to the burden and standard of proof. In Winship the Supreme Court held as the law of the land that when a juvenile is charged with an act which would constitute a crime if committed by an adult the state must prove the allegations by proof beyond a reasonable doubt.

As to the other evidentiary procedures discussed in this comparative analysis, however, the Supreme Court has provided no definitive guidance and opinion is divided.

For example, persons in favor of corroboration requirements for the admission of a juvenile's confession into evidence would point to Wigmore's comments on the unreliability of confessions (3 Wigmore, Evidence §822, 3d ed. 1940) which are alluded to in In re Gault, supra, at p. 44 and to the great instability produced by the crisis of adolescence /see Haley v. Ohio, 332 U.S. 596, at 599 (1948)./ Those opposed to a corroboration requirement for juveniles would argue that it places an unfair burden on the prosecution especially when there were no witnesses and the defendant was very careful not to leave other evidence of his involvement in the delinquent act. They might also argue that his confession is a cry for help, that he should not be denied treatment merely because he was too clever to leave other clues.

The issue of whatever evidence in juvenile proceedings should be required to be competent, material, and relevant and to adhere to all the rules on hearsay evidence also is the subject of debate. Those who argue for relaxed evidentiary rules in delinquency proceedings emphasize that the aspirational ideal of the juvenile court is an informality which de-emphasizes adversariness. Another reason not to have these restrictive rules of evidence, they cited, is that these rules are not necessary in juvenile proceedings heard without a jury. The reasons for the restrictions on the type of evidence which is admissible originated with the desire to protect against a jury's susceptibility to prejudice and irrelevancies and its limited ability to decide which evidence had more probity. Therefore, it is argued that proceedings heard by a judge, who is trained to give evidence its proper weight and disregard it to the extent it is prejudicial, irrelevant, or incompetent, need not be subject to the same restrictions. On the other hand, those in favor of applying these rules frequently also advocate jury trials for juveniles and all the other trappings for a criminal procedure.

In addition, they sometimes argue that the hearsay rules are constitutionally mandated by the confrontation clause of the Sixth Amendment. While In re Gault, supra, did extend the right of confrontation to juveniles, the court has said, however, that while the two "are generally designed to protect similar values, it is quite a different thing to suggest that the overlap is complete ... merely because evidence is admitted in violation of a long-established hearsay rule does not lead to the automatic conclusion that confrontation rights have been denied." /See California v. Green, 399 U.S. 149 at 155 (1970)./ Whether the trial is by judge or by jury, the court has said that the confrontation clause is satisfied if the circumstances of out-of-court statements are such that "the trier of fact has a satisfactory basis for evaluating the truth of the statement." /See Dutton v. Evans, 400 U.S. 74, at 86 (1970)./ The proponents of the rules will then have to resort to the argument that since the rules are applied in criminal proceedings they are also applicable in juvenile proceedings which are deemed criminal because the defendant risks loss of his liberty for a substantial period of time.

Whether or not the exclusionary rules must be applied to juveniles depends on one's understanding of the bases of the rules. If they are seen to be grounded in the Fourth and Fifth Amendments, which apply to all people, there is a stronger argument for applying them than if they are grounded in the Sixth Amendment, which applies to criminal proceedings. The exclusionary rules are actually just tools to enforce the defendant's rights against compelled self-incrimination and against unreasonable search and seizure.

Those opposed to the exclusionary rules will argue that there are alternative means of enforcement available. Criminal prosecution and internal departmental discipline are available sanctions for overzealous law enforcement officers. There is usually also a tort action available for the victims of this police illegality. Opponents of the rules argue that these sanctions are preferable to letting a guilty person go free because evidence necessary to convict was suppressed by the court.

Proponents of the rules on the other hand will point out that the above sanctions are rarely exercised. In court actions, the police usually can use such common law defenses as good faith to relieve themselves of accountability. Also, the police victims are usually unable to afford a suit or, if they get to court, are not looked upon favorably by juries.

7. Task Force Standards and Rationale:

The Task Force addressed the issues raised in this comparative analysis in a number of different standards. Standard 13.4 explicitly affirms that the state has the burden of proving the allegations of delinquency beyond a reasonable doubt. This position not only represents social policy, but is, of course, mandated by In re Winship (see also Standard 13.5).

Standard 13.2 stipulates that following a juvenile's admission to a delinquency petition,

> By inquiry of the juvenile, the court should then determine that the allegations in the petition are true.

Thus, the Task Force did not require independent evidence to corroborate the confession. But it should be noted that the Task Force's judgment on this issue was based on the assumption that plea negotiations would be prohibited as it recommended in Standard 13.1. Where plea bargaining continues notwithstanding the Task Force's recommendation, the Commentary to that standard indicates,

> A plea agreement should not be entered into by the prosecutor without the presentation on the record of independent evidence that the juvenile has committed the acts alleged.

Where bargaining is admitted, the Task Force felt this approach was necessary to ensure the reliability of admissions.

As to the applicable rules of evidence, Standard 13.4 indicates that the juvenile should have the right "to have applied /at the adjudication/ the rules of evidence which apply in criminal cases." The Task Force felt this approach was consistent with the emerging case law and was necessary to ensure "fundamental fairness" in the proceedings.

Finally, as to the exclusionary rule, the Commentaries to Standards 12.3 on Court Proceedings Before Adjudication in Delinquency Cases and Standard 12.6 on Search and Seizure both support the application of the rule to delinquency cases. The Task Force viewed the application of the rules as an enforcement mechanism which was essential to achieving the objectives of the right against self-incrimination.

SECTION B

SPECIAL CONSIDERATIONS RE DISCOVERY

1. Issue Title: Discovery Procedures--Are specific, integrated juvenile court rules or statutes on discovery necessary?

2. Description of the Issue:

Presently, statutes pertaining to children and juvenile courts can be found in the Children's Code, the chapter on Courts, the Family Law section, or the Social or Health and Welfare section of a state's laws, depending on the state. In addition, there are often court rules which may appear as a subdivision of the rules of the superior, family, probate or supreme court. The various items and lists that may be discovered may be in the subsection dealing with the petition, notice, hearing, mental examination, investigations, reports, inspection of records or disposition, etc. The overlapping and non-integration of laws makes it difficult to determine what procedures apply to a particular issue.

3. Summary of State Practices:

Four states have provisions that deal specifically with discovery and that collect most, but not all, of the discovery rules. The remainder of the states have no such provisions.

Discovery Provision	
Most of discovery procedures:	AZ, CO, KY, OH

4. Summary of Recommendation by Standard Groups:

The ABA standards which have been published contain a section on discovery. The other groups' standard acts do not collect discovery into one provision.

Standards Groups	Policy Recommendation
NCCD Standard Act (1959)	No specific provision
Uniform Juvenile Court Act (1968)	No specific provision
HEW Model Act (1974)	No specific provision
Recommended IJA/ABA (1975)	Discovery provision
ABA Adult Standards (1974)	Discovery provision

5. Analysis of the Issue:

The scattered placement of the various provisions for discovery in the state statutes and rules made the research for this study very difficult. The study was of course being conducted by a person who was an "outsider" to all but one of the states. It is safe to

assume, however, that, while those who practice in a jurisdiction's juvenile courts will acquire a thorough knowledge of the juvenile code and rules, those who are "foreign" to the system will have problems similar to those encountered by the researcher for this study. Those who would be "foreign" to the system would include, in most cases, the child and his parents, a lawyer who did not practice in juvenile court often, legislators, and other researchers. Having a specific, integrated, discovery provision would allow the uninitiated to grasp the rights granted by the system much more easily.

An additional advantage of collecting all of the discovery rules in one area would be that the whole discovery section could be evaluated better in terms of its goals, whether they be to make discovery a two-way street, or to equalize the advantage of the state, or to provide full access by each side to all the relevant information, or whatever.

The only disadvantage would be for those states who will not be totally revising their laws in the near future. It would put them to some expense to do an interim juggling of the scattered provisions. Nevertheless, the value of an integrated, complete provision outweighs this one negative consideration.

6. Task Force Standards and Rationale:

The Task Force addressed this issue in Standard 8.6 on Family Court Rules.

> Comprehensive rules governing juvenile court practice and procedure should be adopted and published to ensure regularity and promote efficiency in family court proceedings. The rules should provide in detail for pretrial discovery procedures appropriate for family court proceedings.

The commentary to this standard indicates:

> The standard's call for detailed rules on the subject of preadjudicatory discovery procedures reflects the Task Force's concern over the confusion which seems to exist in many jurisdictions regarding the proper approach to this important issue....
>
> Although some relief is achieved by rules which simply designate either civil or criminal discovery rules as applicable to each type of family court proceeding, the Task Force believes that the unique character of family court proceedings requires a more discriminating approach. Discovery rules should address the specific problems which arise in family court proceedings.

1. Issue Title: Participation of the judge in discovery--To what extent should the discovery process in juvenile cases be self-executing?

2. Description of the Issue:

Civil discovery under the Federal Rules is designed to proceed largely without the judge. The Federal Rules of Criminal Procedure are also designed for little participation by the judge. A self-executing process keeps implementation of discovery from being burdensome on the court system, helps isolate the judge from any prejudicial influences which might surface in the proceedings and helps keep the cost of discovery low. On the other hand, a self-executing system gives the court much less control over the process.

A sub-issue is whether a party should have to request information, which in some cases would presuppose some knowledge that this information exists, or if disclosure of some items should be automatic.

3. Summary of State Practice:

This issue is not well adapted to the usual comparison of state practices because most states have no specific discovery provisions. Therefore, no pattern has developed within the states on participation of the judge. The following are the states which do have specific discovery provisions:

Arizona. State automatically discloses witnesses, statements of the juvenile, names of experts, documents and tangible objects and mitigating information. Upon motion of juvenile and a showing of substantial need, the court can order any additional disclosure. The juvenile must automatically disclose defenses, witnesses, experts and documents and tangible objects. Upon written request, the juvenile must stand for a line-up, be fingerprinted, etc. Upon motion of the county attorney, and a showing of substantial need, the juvenile must disclose any other information which will not violate his constitutional rights. Upon motion of any party and for good cause, the court can excise or issue a protective order for any name or information.

Colorado. Upon motion of respondent, the court can order production by the people of designated items and statements. The court has the power to issue a protective order.

Kentucky. Child must move to have Rules of Criminal Procedure apply. Depositions may be taken by court order. Upon motion of defendant, court can order state to permit inspection of statements and results of physical, mental, and scientific tests, and any books tangible objects, etc. Court may condition its order on the

defendant allowing the state inspection of any of the above intended to be introduced at trial. Court can deny or restrict discovery as is appropriate.

Ohio. Court may grant taking of deposition upon good cause. Upon written request each party shall produce witnesses, statements of parties or witnesses, reports to be introduced, photographs and physical evidence to be introduced. If discovery is refused, court can order it and make its order reciprocal to all parties. If order refused, grant continuance, exclude evidence, or any other order. Court can limit discovery.

4. Summary of Recommendation by Standards Groups:

The NCCD, HEW and Uniform Juvenile Court Acts handle discovery in much the same way as the majority of the states--without a specific provision. The IJA/ABA standards follow:

> Section 3.2 states that counsel for respondent and petitioner should take the initiative and conduct discovery willingly. Also, the trial court should encourage discovery and supervise to the extent necessary. Section 3.3 says that petitioner should disclose witnesses, statements, all reports, tangible items, etc. Petitioner should inform respondent of any relevant recorded grand jury testimony not transcribed and any electronic surveillance, and mitigating information. Respondent can take depositions. Upon request petitioner should disclose information on searches and seizures, acquisition of statements from respondent and relationship of specific persons to petitioner.
>
> Court can order additional disclosures upon a showing of materiality and deny or limit discovery, upon request. The intake unit must, upon request of counsel, give counsel access to all reports and documents within its control.
>
> Subject to Constitutional limitations, the trial court may order the child to disclose experts and results of all tests, and the nature of all defenses.

The ABA Adult Standards are similar to the IJA/ABA standards and will not be set forth here.

5. Analysis of the Issue:

This issue resolves itself to a trade-off between more control and less expense. In view of the usually small resources of the youth, it should be an overall goal to keep discovery as inexpensive as possible. In view of the inability of the youth to help in his

defense and the lack of sophistication of most youth, another overall goal has to be to control discovery to reproduce a fair result. Thus, we have the conflict.

The ABA adult standards, Discovery, had the following comments to give on the role of counsel and judge:

> The obligation of the court stated first emphasizes that the court's initiative is needed in providing guidelines and perhaps also a climate, whereby discovery will be conducted automatically, i.e., without its continuing initiative or supervision, and without filings and formalities.... However, it is also important for the long-range efficiency and effectiveness of the system that judges not permit themselves to get involved in the ordinary, regular exchange of information between counsel. To the extent a judge becomes active in doing what counsel can and should do for themselves, he is permitting his time, energies and talents to be wasted....
>
> Along with his responsibilities for discovery, there is the related problem area in which the trial court's initiative is essential--the exposure and determination prior to trial of latent procedural and constitutional issues....
>
> ...
>
> Whereas the court's initiative with respect to discovery is in making provision for the voluntary and informal contacts between counsel, it is up to counsel to exercise initiative in getting the job done in a way that is consistent with the letter and the spirit of these standards--'willingly and expeditiously, with a minimum of imposition on the time and energies' of all concerned. ABA standards, Discovery, pp. 49-51.

What the ABA has said in regard to adult trials is equally applicable to juvenile cases, since the considerations are basically the same in both cases.

One way to analyze the problem is to reduce the participation of the judge to the minimal level necessary for efficient functioning of the system. This can be done by allowing the portions of discovery which are expected to function well to be carried on between the parties. If one side or the other is expected to want to impede or abuse a particular device, it may be necessary to have the judge supervise what transpires.

The following are the types of disclosures which should take place freely under any recommended standards: Documents and

tangible objects, reports used at a waiver hearing, social reports and reports used at the dispositional stage, police records, the statements of the juvenile, the names of experts, and notices of defenses. The provisions for these could call for automatic disclosure by the party in possession or for disclosure on request of the party seeking the information. The only difference between these two types of provisions is upon whom the burden of asking or showing the information should fall. Other items--mental examinations, physical evidence from the youth, and sanctions--are of such a nature that resistence is more likely to develop. In the case of the physical evidence from the child, there is some possibility of abuse, i.e., neglecting the safeguards. The discovery of these may be better done with the participation of the judge to avoid difficulties. The provision for these should be prefaced by "Upon motion of the _____" or a similar phrase in order to allow the judge to supervise the administration of the discovery.

There are two things which should be able to proceed without the judge but which may run into considerable opposition for a while. They are exchange of witness lists and depositions. It may be more efficient to simply involve the judge from the beginning and eliminate having to go to court later for an order compelling discovery or protecting certain witnesses. Until there is some experience with these devices in juvenile courts, it may be wiser to class them with the previous group to insure cooperation.

6. Task Force Standards and Rationale:

The Task Force's Standard 12.2 on Motion Practice provides, in pertinent part:

> The rules governing motions should provide for extra-judicial conferences between the parties before motions are argued whenever discovery motions are filed and in other appropriate circumstances.

The commentary discusses this portion of the standard as follows:

> In both criminal and civil litigation, informal conferences between the parties have proved valuable in resolving pretrial issues without the need for a hearing before the judge. The standard recommends the holding of such conferences to facilitate the resolution of motion requests in appropriate circumstances. Circumstances in which a conference prior to hearing might produce agreement and thereby save court time are, for example, motions for discovery, lineups, polygraphs and fingerprinting. In many such instances, the agreement of the parties will obviate the need for a hearing on the motion.

1. Issue Title: Reports submitted at a waiver hearing--Should a juvenile and his counsel be allowed to examine reports submitted to the court at a waiver hearing?

2. Description of the Issue:

In Kent v. United States 383 U.S. 541 (1966), the United States Supreme Court held that waiver of juvenile court jurisdiction over a child could be ordered only after a hearing and that at such a hearing a juvenile is entitled to access to all reports submitted to the court by the state. The Court's opinion was not clear regarding whether the right of access to reports was based on the Constitution of the United States or on a District of Columbia statute. This issue encompasses a sub-issue concerning to whom discovery should be granted.

3. Summary of State Practices:

Counsel is allowed to review the reports used or filed in a waiver hearing by six state statutes or rules. In two states, provisions allow the attorney or the parties to examine the reports. In two other states, rules allow the parties or counsel to inspect the reports filed in a waiver hearing and to cross-examine its writer. Finally, three states have broad discovery provisions which would allow the discovery of these reports by counsel or parties. The majority of states have no provisions for discovery in waiver hearings.

Reports in Waiver Hearings Discoverable:

Counsel can review	AK, DC, MD, MI, TX, NC
Parties and attorneys	PR, WA
Examine the report and cross-examine its writer	MN, CO
Liberal Discovery	AZ, OH, KY

4. Summary of Recommendation by Standards Groups:

None of the standards groups have dealt specifically with reports used or filed with the court in a waiver hearing. However, two groups have suggested inspection provisions which would cover the reports if applied to waiver hearings and a third has broad discovery provisions which would allow the juvenile and his counsel to examine the reports.

Standards Groups	Policy Recommendation
NCCD Standard Act (1959)	No position taken.
Uniform Juvenile Court Act (1968)	General provision for inspection of reports used.
HEW Model Act (1974)	General provision for inspection of all files.
Recommended IJA/ABA (1975)	Broad discovery provisions.
ABA Adult Standards	Not applicable.

5. Analysis of the Issue:

The purpose of the waiver hearing is to determine whether or not the child will be sent to the courts of general criminal jurisdiction and be handled as an adult with all the concommitant sentence possibilities, public exposure and social stigma. The question is not "Did the child do it?" but "Would he benefit from the juvenile process?" Despite the obvious importance of this step in the process to the child, very few states have any provisions which specifically allow the child the right of discovery of the reports submitted to the court. Thus, the only real difference of opinion found during the research on this subject was whether or not counsel and/or the parties should be allowed to see the reports submitted at a waiver hearing.

The United States Supreme Court, in Kent v. United States, 383 U.S. 541 (1966), held that disclosure of the reports submitted to the court at a waiver hearing was necessary, but whether that holding was based on a Constitutional provision or on a District of Columbia statute is unclear. The Court said:

> We believe that this result is required by the (transfer) statute read in the context of constitutional principles relating to due process and the assistance of counsel.

The argument that access to the reports is constitutionally compelled is this: Transfer proceedings are a critical stage in the process; juveniles have a constitutional right to counsel at every critical stage, In re Gault; access to the reports is required for effective assistance of counsel; therefore, access by counsel to reports submitted to the court in a waiver hearing is constitutionally compelled. The statement that access is required for effective assistance of counsel can be based on the fact that access is the only way counsel can be given a chance to confront, challenge and rebut the reports by gathering information before the hearing which contradicts or impeaches the report. The Court in Kent relied more on a statute which allowed interested persons access to the reports and the fact

that counsel clearly was an interested person. It may be unimportant for the purposes of this study whether the Court based its decision on the Constitution or on a statute. The opinion is a considered analysis of the problems of discovery in a waiver hearing and the benefits which could come to the juvenile from such discovery. The Court decided that discovery of this type would be a good thing.

Under the IJA/ABA standards /Standard 3.3(a)iii/ the prosecution must disclose

> any reports or statements of experts, made in connection with the particular case, including scientific tests, experiments, or comparisons, and results of physical or mental examinations, behavioral observations, and investigations of the respondent's school, social or family background.

The problems of delay, increased formalization of the juvenile process and expense are minor compared with the possible harm which misinformation at the waiver hearing could do to the child. The problem of information harmful to the child reaching him could be handled in a number of ways. One way would be to allow discovery to the counsel only, possibly with a court order prohibiting counsel from revealing certain items to the child. Another method which could be used in some situations would be excision or protective orders which would allow almost all of the information to be used in representing the child, but protect him from the information psychologically harmful to him. This latter method would necessitate more involvement of the judge in issuing orders in the pre-hearing process.

Considering the authority lent to discovery of reports submitted to the court at a waiver hearing by the Supreme Court in Kent and by the position of the IJA/ABA standards and after evaluating the various problems presented by this type of discovery, the standard for this issue should allow discovery of the reports by counsel and if the child is not represented by counsel, by the child.

6. Task Force Standards and Rationale:

The Task Force's Standard 9.5 on Waiver and Transfer specifies inter alia:

> The family court should have the authority to waive jurisdiction and transfer a juvenile for trial in adult criminal court when:
>
> ...
> 6. The juvenile has been given a waiver and transfer hearing which comports with due process including, but not limited to, the right to counsel and a decision rendered in accord with specific criteria promulgated

> by either the court or the legislature with the criteria of Kent v. United States, 383 U.S. 541 (1966) as a minimum.

The Task Force found the arguments outlined above which favor requiring disclosure of reports submitted at waiver hearings persuasive. Therefore, the commentary indicates:

> The hearing may be informal and need not conform to all the requirements of a criminal trial. It must, however, measure up to the essentials of due process and fair treatment. Thus, the juvenile is entitled to counsel and the juvenile and his counsel are entitled to see the records the court will rely upon in making its decision.

1. Issue Title: Statements of the juvenile and of co-defendants--Should the statements be discoverable by the parties and counsel?

2. Description of the Issue:

In both neglect and delinquency cases, the statements of the juvenile could well be pivotal in the final outcome, whether these statements were made to law enforcement officials or probation officers or any one else. The juvenile is less likely than an adult to know the significance of what he or she said and also less likely to recall the exact words he or she used.

3. Summary of State Practices:

Four states make provision for discovery of the statements of juveniles. Two other states, by court decision, leave disclosure of statements of juveniles to the discretion of the judge.

Statements are discoverable

Discoverable	AZ, CO, OH, KY
In judge's discretion by court decision	CA, IL

4. Summary of Recommendation by Standards Groups:

Three of the groups took no position on discovery of statements. The ABA groups feel that such statements could be discoverable.

Standards Groups	Policy Recommendation
NCCD Standard Act (1959)	No position taken.
Uniform Juvenile Court Act (1968)	No position taken.
HEW Model Act (1974)	No position taken.
Recommended IJA/ABA (1975)	Discoverable.
ABA Adult Standards (1974)	Discoverable.

5. Analysis of the Issue:

In Cicenia v. LaGay 357 U.S. 504 (1958), the Supreme Court of the United States said that pretrial disclosure of the statements of the defendant in a criminal case may be the better practice. Thus,

there is no constitutional mandate that the statements be disclosed. The Supreme Court did show further support for the practice of pretrial disclosure by making it mandatory upon request of the defendant in the proposed Federal Rules of Criminal Procedure. This provision was in the version approved by Congress. 89 Stat. 374. The Advisory Committee noted:

> This is done in the view that broad discovery contributes to the fair and efficient administration of criminal justice by providing the defendant with enough information to make an informed decision as to plea; by minimizing the undesireable effect of surprise at the trial, and by otherwise contributing to an accurate determination of the issue of guilt or innocence.
> Amendments to the Federal Rules of Criminal Procedure with Advisory Committee Notes, Supreme Court of the United States., p. 39.

A new dimension was added to this issue when the Miranda decision was handed down. Now it is important for the defendant's counsel to have access to the statements before trial so that he can investigate the circumstances under which the statement was made to find out if the Constitutional safeguards were observed. Often the statement itself will reveal whether or not it was made when the defendant was in custody and if the warnings were given. Furthermore, a review of the defendant's statement may be important to allow counsel to assess the precise words for impact on the jury, relevance, and admissibility. It can also help to legitimately refresh the defendants memory. If counsel does not see the statement ahead of time, postponements and continuances will be required to allow counsel time to investigate.

The only objections raised to revealing the statements before trial seem to be that this will enable the defendant to tailor his testimony to fit the previous statement or that he will be able to fabricate explanations for inconsistencies.

In the juvenile area, the purposes of disclosure and the objections to it remain the same as in adult proceedings. The traditional informality of juvenile proceedings and their purpose--i.e., to help the child--do not seem to weigh heavily on either side of the issue. The IJA/ABA has followed the adult standards lead and suggested that these statements be automatically disclosed by the state. Standard 3.3(a)ii.

A partial answer to the objection that fabrication will result from pretrial disclosure is that counsel would not allow or assist in such fabrication. Whether or not that explanation is accepted, the better practice still would seem to be automatic disclosure of the statements.

The disclosure of statements of co-defendants in adult proceedings may be compulsory in joint trials under Bruton v. United States 391 U.S. 123 (1968). In that case, the Court held it unconstitutional to admit the statement of a co-defendant which implicated the defendant even under strict jury instructions that it was only to be considered against the co-defendant. Pretrial discovery of these statements allows motions for separate trials at appropriate times. The ABA Standards, Discovery, 2.1, and the IJA/ABA Standard 3.3(a)ii call for disclosure of statements of co-defendants and co-respondents. The Federal Rules of Criminal Procedure do not mention these statements. Since they will aid in pretrial motion practice, it seems wise to allow them to be discovered. The objection that disclosure would encourage fabrication is not as potent here because these statements should not be admitted in any way against the respondent and therefore there should be no need to fabricate in connection with them. If the co-respondent becomes a witness against the respondent, then disclosure of his statements falls into another issue--statements of government witnesses. The statements of co-respondents should be revealed before trial.

6. Task Force Standards and Rationale:

Since the Task Force did not elaborate on the subject of discovery at great length, it did not address this issue specifically. However, a number of the Task Force's standards do bear on the issue. Standard 8.6 calls upon each state to formulate detailed discovery procedures. Moreover Standards 4.5, 5.6 and 5.8 call for the application of Miranda rules to delinquency cases. And, Standard 12.3 specifies that no constitutional right of a juvenile may be waived without prior consultation with an attorney. The commentary to that standard, therefore, specifies that statements violative of Miranda guidelines should be excluded from direct evidence prior to adjudication. In addition, Standard 15.17 requires the Family Court Prosecutor to disclose evidence favorable to the juvenile.

1. Issue Title: Physical characteristics--Should juveniles be required to submit to being fingerprinted and photographed, to stand for line-ups, speak for voice identification, try on clothing, etc.?

2. Description of the Issue:

Although this issue is often not treated as discovery by state statutes, it allows the state to find out more information about the juvenile to implicate or clear him of charges and therefore must be considered in this section. The provisions in this area are generally directed more toward the protection of the juvenile from public scrutiny of his record than toward any consideration of discovery. Also the fact that this type of discovery may not be made available to the juvenile highlights the subissue of whether or not the results of these devices should be discoverable by the juvenile.

3. Summary of State Practices:

Provisions were found in two states which limited the fingerprinting to juveniles suspected of felonies or of certain serious crimes. Statutes make consent of the court necessary for fingerprinting of juveniles in thirteen states. One state's statute allows fingerprinting in either of the above situations. In two states, fingerprinting is allowed only if latent fingerprints were found at the scene of the crime and are suspected to be the juvenile's, and either latent fingerprints or suspicion of a felony is necessary according to another state's statute. In yet another state, if a law enforcement officer has reasonable cause to believe that the juvenile committed a crime or if the court consents, a juvenile may be fingerprinted. The provision of one state says that fingerprinting of juveniles is not affected by the juvenile code and, in one final state, the juvenile must submit to fingerprinting on request of the state.

The statutes and rules of fifteen states require consent of the court before a juvenile can be photographed. One state statute allows a juvenile suspected of a felony to be photographed. The rules of another state require the juvenile to be photographed on request of the state, and a final state's statute says that the photographing of juveniles is not affected by the juvenile court act.

Line-ups, voice identification, trying on clothing, taking samples of hair, blood, saliva, urine, samples of handwriting, and physical inspection of his body are specifically allowed to

the state by rules of one state. The juvenile is entitled to the presence of counsel.

One state clearly makes the fingerprints and photographs of juveniles discoverable. Thirteen states have provisions for inspection of law enforcement records. The majority of states have no provision for any of the above.

Fingerprinting	States
Felonies or serious crimes	FL, GA
Consent of the Court	HA, ID, IN, KS, MN, MT, MO, NM, OR, TN, TX, WA, UT
Felony or consent	OH
Latent fingerprints	WY, NJ
Felony or latent	NV
Resonable cause or consent of the Court	OK
Not affected by juvenile code	LA
On request of state	AZ
Photographing	
Consent of the Court	KS, ID, HA, GA, MN, MO, MT, NM, NJ, NV, OR, TN, TX, WA, WY
Felony	FL
On request of the state	AZ
Not affected by juvenile code	LA
Line-ups, voice, etc.	AZ
Discovery	
Discoverable to juvenile	FL
Inspection of law enforcement records	DC, GA, HI, KY, MN, MO, MN, NM, NY, PA, TN, TX, VA, CA

4. Summary of Recommendation by Standards Groups:

The standards groups' suggestions each vary slightly on when fingerprinting and photographing should be allowed, much as the states themselves do. None address line-ups, etc.

Standards Groups	Policy Recommendation
NCCD Standard Act (1959)	By consent of court.
Uniform Juvenile Court Act (1968)	If latent fingerprints or for specific serious crimes.
HEW Model Act (1974)	If latent fingerprints or for a felony.
Recommended IJA/ABA (1975)	No position taken.
ABA Adult Standards (1974)	No position taken.
Discovery	
NCCD Standard Act (1959)	No position taken.
Uniform Juvenile Court Act (1968)	Inspection of law enforcement records by counsel.
HEW Model Act (1974)	Inspection of law enforcement records by counsel or parents.
Recommended IJA/ABA (1975)	Discovery of law enforcement records.
ABA Adult Standards (1974)	Discovery of law enforcement records.

5. Analysis of the Issue:

The Supreme Court in Schmerber v. California, 384 U.S. 757 (1966) decided that the Fifth Amendment protected only communications or testimony and that compulsion which makes the suspect allow fingerprinting, blood and urine samples, etc., is not unconstitutional for adults. This leaves the issue free of Constitutional strains and the question is whether or not it is good in juvenile cases to have the youth be photographed and fingerprinted, stand for line-ups, try on clothing, speak for voice identification, give blood and urine samples.

The IJA/ABA did not include this issue in their standards on discovery because they had contemplated them being in a volume on

police. But this is direct discovery by the government and should be included in one section with the rest of discovery so that an integrated provision is attained.

The need of the government for fingerprinting, etc., is the same in juvenile cases as in cases involving adults. They need to use the available techniques to determine who committed a particular offense. Usually there is no way to tell if the prints or clothes or blood is that of an adult or of a juvenile until comparisons are made. Thus, police have a legitimate desire to utilize these methods in doing their job.

However, problems arise in cases involving youth which do not arise in cases of adults. The two prime concerns seem to be that these tests will further traumatize the child and that the existence of the records of these tests represent a further threat of public exposure to the child. Except perhaps for urine samples, these techniques would not seem to be the true source of trauma for a juvenile. It is the arrest and detention in facilities which are for all practical purposes jails, and the prospect of trial and then further detention which gives rise to the major trauma. Therefore, in view of the need of law enforcement officers to take these tests, the psychological effect on the youth would not seem strong enough to prevent them.

There is the further problem, to which most of the state statutes seem primarily directed, that retention or public exposure of the records of these tests will lead to a stigma for the youth, which most juvenile systems are designed to prevent. But it would seem that the interests of the police and of the child can both be protected by drawing statutes, as has been done in the past with fingerprinting statutes, which would prevent retention and public exposure of these records. Thus, allowing the law enforcement personnel to conduct these tests would seem to fit well with the informal juvenile proceedings and with a two-way street theory of juvenile discovery.

A sub-issue of this topic is what kind of discovery should be allowed to the juvenile and his counsel of the result of these tests. In United States v. Wade 388 U.S. 218 (1967) and Gilbert v. California 388 U.S. 283 (1967), the Supreme Court found that it was error of constitutional proportion to allow in-court identifications into evidence without showing that the identification was not tainted by an improper post-indictment line-up. To allow this in would be to deny the defendant effective assistance of counsel and the right to a meaningful confrontation of opposing witnesses. Id. These cases were not mandates that counsel be present at pretrial line-ups but that was pointed out as a way of insuring the propriety of the pre-trial procedures.

For our purposes, presence of counsel or parent is one way of giving the respondent discovery of the results of the line-up of trying on clothes, and of voice identification testing. It is also a method of minimizing the trauma, if any, resulting from the tests. These reasons would seem to make presence of counsel a desirable segment of the standard. It would occasion some delays in order to arrange schedules for counsel to be there and added cost to the state, particularly if it is paying for the respondent's lawyer. But these drawbacks are outweighed by the benefit to the youth. The purpose of the tests should be to be sure that the child committed the delinquent act. Nothing could be more inimical to the goals of the juvenile court than to send an innocent child to an institution for rehabilitation. The presence of counsel may help to prevent that.

The presence of counsel or parent should be allowed at the taking of the other tests, even though the results are not immediately known, in order to act as support for any child who is disturbed by these tests.

The results of any tests at which the attendance of counsel was waived or at which the attendance of counsel does not provide discovery of the results should be required to be disclosed regardless of outcome and regardless of whether or not the prosecutor intends to introduce them at trial. The negative outcome of many of these tests, while it may not be exculpating in terms of Brady v. Maryland, 373 U.S. 83 (1963) and therefore not be otherwise required to be shown, may give counsel for the youth clues to weaknesses in the state's case and may provide impeachment information at trial. One final factor calling for discovery of the results is that under the two-way street approach it would be unfair to allow the state to use a discovery tool but to deny the child, who cannot use the tool itself, access to the results.

6. Task Force Standards and Rationale:

The Task Force specified in Standard 5.12 that the juvenile should be afforded the right to counsel at lineups. In Standard 5.13 the Task Force limited fingerprinting and photographing to situations where it is employed for investigatory purposes only. It further indicated the prints and photographs should be maintained solely on a local basis unless the juvenile requests transmission of the information for the purpose of obtaining a national security clearance. As to physical specimens, the commentary to this standard states that, "In most cases the police should obtain a search warrant to draw or take physical specimens." The commentary to Standard 5.15 indicates that the court should allow appropriate parties to the proceedings to inspect basic police records. This would probably allow the juvenile's counsel to obtain the results of any test. However, the Task Force did not specifically address the issue of discovery in this area.

1. Issue Title: Mental Examination--Should a mental examination of a child be allowed and should the results be immediately available to the parties or to counsel?

2. Description of the Issue:

In some states a judge may order a mental examination for any juvenile. If the mental examination results in a finding of mental disturbance, the juvenile may be placed in an institution. Thus, the end consequence can be separation from his home, just as if he were adjudged delinquent or neglected. Yet, no real safeguards surround the judge's discretion, except that the report must say that the juvenile is disturbed. A second situation in which a mental examination and discovery of the results thereof is important is that in which there has been a plea of insanity and the state seeks to controvert it. A provision for discovery might provide some sort of safeguard in the first situation and would be a simple discovery device in the second. One problem with allowing discovery of the results of the mental examination is that it could contain material which could by psychologically damaging to the child were he to see it.

3. Summary of State Practices:

Twenty-two states were found to have provisions in their codes for the court to order a mental examination, no distinction being made in most of them between the two types of situations in which the mental examination is employed. At least nine other states allow a mental examination to be ordered after the adjudication stage. Only one state makes the report expressly available to counsel or the parties. Nine states have inspection provisions which would include inspection of psychological studies. The remainder of the states have no provision for discovery of the results of the mental examination.

Mental Examination	
At any time	AL, CT, DC, FL, GA, HI, IN, ME, MA, MI, MS, NV, OH, PA, RI, SD, TX, UT, VA, WI, WY
After adjudication	AK, AZ, CA, CO, MN, MO, NC, NM, TN
Discovery of Results	
Inspection	CA, CO, MN, MO, NJ, NM, PA, WY
Expressly available	OH

4. Summary of Recommendation by Standards Groups:

Three of the groups treated the mental examination in the same manner as most of the states and allow the examination at some point without provision for discovery by the child. The ABA groups each treat the issue in a different manner.

Standards Groups	Policy Recommendation
NCCD Standard Act (1959)	Exam after petition.
Uniform Juvenile Court Act (1968)	Exam at dispositional stage.
HEW Model Act (1974)	Exam at dispositional stage.
Recommended IJA/ABA (1975)	Child must disclose results of defense-initiated exam, within constitutional limits.
ABA Adult Standards (1974)	Exam if insanity defense and defense gets report.

5. Analysis of the Issue:

Despite the widespread use of the mental examination provision in the state statutes, little has been written on the pros and cons of such statutes. There are four situations in which the mental examination could be used. One is after the adjudicatory stage to help determine the proper disposition of the child. A second is in a case in which the child is offering a defense of insanity and the state seeks to controvert it. The third is for a child whom the court thinks they may have mental problems, before the adjudicatory stage. Th· 'ast would be in a neglect case where the psychological health of the child was in issue.

In the first situation, after the adjudicatory stage, the mental examination is really being used as a part of the social report. The only distinction between the examination and the other parts of the report is that in most of the other investigation the child himself does not have to participate. The right against self-incrimination has not yet been extended to the dispositional stage and, in view of the traditional informality and goal of the juvenile court to help the child, requiring participation in a mental examination is probably not unconstitutional.

The propriety of having a criminal defendant who is pleading insanity undergo an examination by the experts of the state has been upheld in many cases. ABA standards, Discovery, p. 95, and cases cited. The Federal Rules of Criminal Procedure allow the court to order a psychiatric examination in such cases. Rule 12.2(c). The reasoning behind enabling the state to use this examination is that there is no other way to controvert effectively a plea of insanity. Since the validity statutes requiring notice of the defenses of alibi and insanity has been upheld, Williams and Wardius, supra, this seems like a logical offshoot of receiving notice since it allows the state to prepare its rebutting testimony before the trial to avoid continuances. The reports are then made available upon request of the defendant to the defendant for his pretrial inspection. This also seems like a logical extension of the pretrial notice statute and the purpose of discovery which is to aid in evaluating the case, prevent surprise, etc.

In juvenile cases, the considerations seem much the same as in the adult area. There is no objection on the grounds that the youth will be traumatized because he will almost certainly have been examined by defense psychiatrists to prove the defense. One more examination should not cause any problems. There is no added public exposure or stigma either since the doctors can be enjoined from disclosing the subject of these tests to anyone. The youth and his counsel should get to view the findings of the psychiatrist for the same reasons which adults have. This does present the possibility of material which the youth is not emotionally prepared to take getting to him. This once again brings into play the excision or protective orders and the order to counsel that he may use but not disclose to the child some of the information in the report. This should provide for the fullest possible exchange of information.

It is the third situation which is the most disturbing. It is allowed by the provisions of about 40 percent of the states. The statutes read that the court may order a mental examination of any child within their jurisdiction or any child against whom a petition has been filed. These usually mean the same thing. The mental examination seems to be set up for use as an alternative to the usual juvenile process. It allows the child to be removed from society without being declared delinquent or neglected. The goal is the quick and easy disposition of children who need help which cannot be afforded them through the ordinary procedures. This avoids protracted trials and dispositions.

An alternative to this would be to appoint a lawyer for children who did not have one after a petition had been filed and allow the lawyer to choose whether or not to use an insanity or lack of mental competence approach. This may prolong the time in which the child is waiting for needed help, but it removes the spectre of children being taken out of the safeguarded process and put in institutions. If the plea was made, we would of course have the second situation again.

If the alternative method is not employed, it is vital that the parent or attorney for the child be entitled to review and challenge the finding of the mental examination if we are to preserve the open flow in information in the juvenile process. This report should be discoverable to the extent that other reports used in the adjudication are.

The last situation raises questions of whether there is such a thing as psychological neglect, which is beyond the purview of this topic. Since the object of the neglect hearing is not to punish or rehabilitate the child, the requirement of a mental examination does not make the child incriminate himself. It should be to the benefit of the child to be taken from an unfit home. It is therefore not wise to prevent judges from doing this, if there is such a thing as psychological neglect. The best accommodation here again is to say, if the examination is allowed, the results should be discoverable to the counsel or parent with the protection of excision or protective orders.

6. Task Force Standards and Rationale:

On the issue of diagnostic commitments to obtain dispositional information following adjudication, Standard 14.5 specifies:

> If diagnostic-type information is sought then any form of confinement or institutionalization should be used only as a last resort. A hearing should be held where it is shown only such confinement or institutionalization is necessary; and what non-confining alternatives were explored and with what result.
>
> An order for confinement and examination should be of limited duration with a maximum of 30 days allowed. The orders should specify the nature and objectives of the proposed examination as well as the place where such examination is to be conducted.

As to storing and disclosure of dispositional information, Standard 14.6 indicates:

> No dispositional decision should be made on the basis of a fact or opinion that previously disclosed to the lawyer for the juvenile and any lawyer representing the state. In unusual circumstances, the judge may elect to caution the attorney not to disclose information to the juvenile if it appears that such information may prove harmful to the juvenile.

Thus, the ask Force felt that detailed, formalized guidelines were necessary to provide guidance to both the court and the parties and their counsel in this area.

he Task Force did not address the issue of mental examinations in delinquency cases where an insanity defense is invoked. On the subject of mental examinations before adjudication, Standard 14.18 authorizes such examinations, stipulating that they should be on an outpatient basis if at all feasible. The standard also indicates that a juvenile cannot be committed to an institution--other than for diagnostic study for not longer than 30 days--except pursuant to the laws relating to commitment of mentally ill or mentally retarded juveniles. The Task Force specified in Standard 8.2 that civil commitments should be heard by the family court. Detailed laws and procedural guidelines should of course be formulated to cover such cases.

The Task Force addressed the issue of emotional neglect in Standard 11.12 (see Volume VI of these Working Papers).

1. Issue Title: Depositions--Should the state and/or the child be allowed to take and use depositions in juvenile cases?

2. Description of the Issue:

Depositions are available as discovery devices in civil litigation. Under the Federal Rules of Criminal Procedure depositions can be taken in criminal cases only when exceptional circumstances make it in the interest of justice to preserve a witness's testimony for use at trial. Arguably, lawyers for children may need to take depositions more than lawyers for adults because children may be less able to communicate effectively with their lawyers and to participate in the investigation of relevant facts.

3. Summary of State Practices:

One state's rule allows a deposition to be taken by either side for good cause shown, while a second state's follows more closely the federal lead and requires that the deposition be necessary for the preservation of the testimony for trial. A third state's statute gives the judge of the juvenile court the power to order a deposition, but there was no provision found implementing that power.

Depositions

For good cause shown	OH
Preservation of testimony	KY
Juvenile Court has power	KS

4. Summary of Recommendation by Standards Groups:

Three of the groups did not deal with the issue of whether or not depositions should be allowed. One group allows both sides to use depositions as discovery devices. The final group recommended that they not be allowed.

Standards Groups	Policy Recommendation
NCCD Standard Act (1959)	No position taken.
Uniform Juvenile Court Act (1968)	No position taken.
HEW Model Act (1974)	No position taken.
Recommended IJA/ABA (1975)	Both sides can use depositions for discovery.
ABA Adult Standard (1974)	Depositions not allowed.

5. Analysis of the Issue:

The role of depositions in criminal proceedings is still much in debate. The Federal Rules of Criminal Procedure allow taking a deposition by either side to preserve testimony (89 Stat. 374). The ABA Adult Standards intended that depositions be covered in their section on Discretionary Disclosures, 2.5(a), which reads in pertinent part:

> Upon a showing of materiality to the preparation of the defense, and if the request is reasonable, the court in its discretion may require disclosure to defense counsel of relevant material and information not covered by sections 2.1, 2.3 and 2.4. (ABA Standards, p. 84)

The IJA/ABA Standards take specific exception with the ABA Standards and allow both sides to discover by means of deposition subject to protection of work product and informants (S. 3.8) and protective orders (3.17). The IJA/ABA group recapped each objection the ABA Standards had raised to depositions and countered them in the juvenile procedure. A synopsis follows: (1) There is no limitation of cost of unnecessary depositions, most of which will be born by the state. Counter: The interests of the parties and justice outweigh this abuse, which can be curbed by protective orders. Also, shorter trials will offset some of the expense. (2) Taking depositions may become incorporated in the standard for effective counsel. Counter: Appeal for inadequacy of counsel is usually unsuccessful. The question of adequacy should arise no more under this standard than one which allows depositions as discretionary disclosures. (3) The imposition will discourage witnesses from coming forward. Counter: Protective orders will be available to stop harassment. (4) Depositions really will not add much to discovery already granted by the standards. Counter: If a witness whom the respondent wants to call has not made a statement or the subject is not covered by his statement, a deposition is needed.

The IJA/ABA is the more convincing. Allowing the respondent to depose will help to make up for the deficiencies in the defense caused by the immaturity and lack of understanding of the child. The granting of the right to depose to the government is attributable to the two-way street theory of the IJA/ABA. One must wonder if the government with all of its investigatory power is in need of this additional discovery device. One justification may be that used to discourage witness tampering since the names and addresses of witnesses will be revealed. But this is to use it as a device for preserving testimony, not as a discovery device. The better course would be to grant the deposition to the defendant as a right and allow the government to rely on its own devices.

A middle-road approach could be implemented by allowing interrogatories to be used by both sides all of the time, subject to protective orders, or to be used in cases where depositions must be curtailed to preserve the identity of informants or to prevent abuse.

6. Task Force Standards and Rationale:

The Task Force's Standard 8.9 indicates that each statute should formulate detailed rules on discovery. The Task Force did not, however, address the specific issue of depositions.

1. Issue Title: Lists and Statements of Witnesses--Should the lists and statements of witnesses be discoverable by either side in a juvenile case?

2. Description of the Issue:

This has been a controversial issue in adult as well as juvenile proceedings. The chief concerns voiced in adult cases center around the disclosure of the names of witnesses: the possibility of tampering with witnesses or physical harm to them, with the resultant reluctance of other witnesses to come forward in the future; and the untimely exposure of informants. In juvenile cases, there is the added concern, especially if statements are disclosed, that some of the information used comes from persons close to the child and that finding out what these people said may be very damaging to him. Provisions for the exclusion of the child from the courtroom during some portion of the trial which the judge feels may be damaging to the child are almost universal. The United States Supreme Court had a provision for discovery of witnesses in its proposed Rules of Criminal Procedure, but Congress deleted this provision before passing the Rules.

3. Summary of State Practices:

In three states there are statutes or rules which require the state to divulge the names of the witnesses which it intends to call in support of the petition. In another state, both sides have to reveal the names, addresses, and statements of the witnesses who will be called at the adjudication. In one final state, the rules require that both sides divulge the names, addresses and statements of the witnesses to the occurrence. A closely related provision was found in a different state which followed a Jencks-type approach and required the disclosure of the statements of witnesses of the state after they had testified.

Discovery of Witnesses	Names of States
State to divulge names	CO, MD, MT
Both sides to reveal names and statements of witnesses to be called	AZ
Witnesses to the occurrence	OH
Jencks-type rule	KY

4. Summary of Recommendation by Standards Groups:

The ABA groups are once again the only two to take a position and those groups require the state to disclose the names, addresses, statements, and records of witnesses to be called.

Standards Groups	Policy Recommendation
NCCD Standard Act (1959)	No position taken.
Uniform Juvenile Court Act (1968)	No position taken.
HEW Model Act (1974)	No position taken.
Recommended IJA/ABA (1975)	The state to divulge names, addresses, statements, and records of witnesses to be called.
ABA Adult Standards (1974)	Same as IJA/ABA

5. Analysis of the Issue:

The issue of disclosure of the names of witnesses has been hotly contested in the adult criminal area. The United States Supreme Court put provisions for disclosure of the names and addresses of witnesses by both sides upon request of the opponent into its proposed Federal Rules of Criminal Procedure, coupled with the right to depose the witnesses discovered by the opponent. Amendments to the Federal Rules of Criminal Procedure With Advisory Committee Notes, Supreme Court of the United States, Rule 16(a)(1)(E) and Rule 16(b)(1)(C), p. 35-36. Congress deleted both provisions (89 Stat. 374-75). The ABA Adult Standards call for the disclosure of the names of witnesses intended to be called and their statements. ABA Standards, Discovery, p. 52-53. Rebuttal witnesses are not included. The justifications given for disclosure are: (1) The names and addresses of the witnesses will in all fairness be disclosed at trial in any event; (2) pretrial disclosure will avoid delays, the attendent inconveniences, and surprise; (3) disclosure will aid in proper pretrial preparation by counsel for cross-examination and impeachment. ABA Standards, Discovery, 57-58. The protection of informants not to be called at trial under Section 2.6 and the protective orders of Section 4.4 are cited as nullifying the objections to disclosure of the names and addresses of witnesses, Id., which are usually the possibility of witness tampering and disclosure of informants.

This issue has a constitutional aspect. If the defendant is compelled to give in advance of trial the names of witnesses, either by mandatory or reciprocal discovery, a good prosecutor could use this information to inculpate the accused. Thus, the defendant's Fifth Amendment right to be free from being a witness against himself would seem to be violated. Justices Black and Douglas have

voiced this view. The list of witnesses could also be looked at as communicating to the prosecutor the defense's train of thought and therefore be labeled "communicative." Forcing the defendant to communicate is violative of the Fifth Amendment. This is presumably answered by citing Williams v. Florida, 399 U.S. 78 (1970), in which it was held that a notice of alibi and list of witnesses statute was constitutional because it merely accelerated the time at which the disclosure was made, and did not compel the disclosure of anything which would not be introduced at trial anyway. Thus the provisions for discovery by the government of lists of witnesses intended to be introduced at trial is probably constitutional. The defendant could of course ask that the witness and any evidence gathered because of the pretrial revelation of his name be suppressed should the defendant decide not to call him in the trial. The proposed Federal Rules of Criminal Procedure contained the provision for discovery of defense witnesses and justified it merely by saying that state cases have found that it does not violate the Fifth and that the defendant has the same options as the government for a protective order or to take the witnesses' depositions. Amendments, p. 46.

In Vermont, open file practices followed the enactment of a 1961 statute allowing the defendant to depose state witnesses before trial. In Langrock, "Vermont's Experiment in Criminal Discovery," 53 ABAJ 732 (1967) the following results were noted: (1) Not a single judge, prosecutor, or defense counsel has called for a return to the prior restrictive law; (2) there was a significant decrease in the likelihood of trial; (3) after reviewing the arguments against discovery including "probable intimidation of witnesses, better opportunity to prepare perjured testimony, harassment of prosecutors and police officers, extra burden on prosecutors, increased costs" the author concludes that they were imaginary. (See also, "ABA Minimum Standards for Criminal Justice - A Student Symposium," La. L. Rev., 33-541, 596 et. seq, 1973.)

It seems that a provision for discovery of the names and addresses of witnesses to be called at trial by both sides is constitutional and desirable, at least in the adult criminal area.

The disclosure of the statements of the witnesses would greatly increase counsels' ability to plea bargain, prepare for cross-examination, gather impeaching information, and judge admissibility, and help to eliminate surprise at trial. If the pretrial disclosure of the names merely accelerates the time when disclosure is made, the disclosure of the statements of defense witnesses is probably constitutional also. The objections to pretrial discovery is directed mainly at the discovery of the names, so it seems proper that in order to facilitate full and open pretrial discovery, the statements should also be disclosed.

In juvenile proceedings, the considerations seem much the same as in the criminal area. The child should be protected against self-incrimination. Pretrial disclosure will eliminate delays and surprise and help counsel prepare for trial. The names will also usually be disclosed at trial. However, in children's cases, the difference in investigative powers between the child and respondent are even more pronounced than in criminal cases. The child also is less able to help with his own defense because of poorer understanding and recollection, and in many cases less resources than adults. These reasons all call for the state to disclose its witnesses, but not for the child to disclose his. This would help to balance the differences of the power between opponents.

Against the aforementioned factors, one must weigh the traditional informality and the avowed goal of juvenile proceedings--to help the child. It would be more in keeping with these functions to have the child also disclose his witnesses and their statements so that the proceedings can move smoothly toward its search for the truth. Only after arriving at the truth can a proper disposition be made to help the child. If one accepts this, then one must call for mutual mandatory discovery of witnesses and their statements in the juvenile proceeding.

Those who think that the proceeding must be made more formal and adversary in nature in order to preserve the juvenile's rights may call for the state alone to disclose its witnesses before trial.

Finally, the definition of "statement" deserves at least passing note. The ABA Standards give the following expansive definition as opposed to the Jencks definition of "a substantially verbatim statement:

> The Advisory Committee intends that the term be given a broad meaning so as to include generally any utterances of a statement-giver which are recorded by any means in whole or in part, and regardless of to whom they were made whether a prosecuting attorney, an investigator, a grand jury /see subsection (a)(iii)/ or anyone else. ABA Standards, Discovery, pp. 61-62.

Included in this definition are surreptitious recordings, interview notes, jottings, and secondary transcripts. ABA Standards, Discovery, pp. 62-63. The primary problem caused by the more expansive definition is how the statements could be used at trial--i.e., if the witness could be impeached and harassed by words which are not his--and not whether there is any problem with discovery of these by

defense counsel. The countervailing advantage is that this would discourage the practice of destroying the original transcript and keeping secondary notes and would also enlarge the number of times when the counsel would get an idea of what a witness can testify to, subject to the work-product protections. The proposed Federal Rules of Criminal Procedure left the definition up to a case-by-case development, but this would be unacceptable in a standard seeking to be adopted across the nation. The broad definition should be accepted.

6. Task Force Standards and Rationale:

The Task Force did not address the issues raised in this Comparative Analysis.

1. Issue Title: Designated Tangible Objects and Documents--Should documents and tangible objects, intended to be introduced at trial, be disclosed (by the state, the juvenile or both) prior to trial?

2. Description of the Issue:

This issue is primarily toward a delinquency hearing at which subject objects as bullets, knives, articles of clothing, perhaps pictures of the occurrence are intended to be introduced as evidence. Since juveniles might not understand the significance of these objects or perhaps not understand the investigative power of the state, and therefore deliberately or negligently not reveal the possible existence of these objects to counsel, in many cases, the discovery of such items, and the method of discovery can be very important to counsel. The state may need discovery to determine the authenticity of tangible objects and documents.

3. Summary of State Practices:

Three states have provisions for discovery by both sides of tangible objects, photographs, and documents. One of these provisions requires a court order and provides only for conditional discovery by the state. A fourth state has a rule requiring the state to allow inspection of these items on court order.

Discovery of Tangible Objects	Names of States
Both sides disclose	AZ, KY, OH
Conditional discovery for state	KY
State can be required to disclose by court order	CO

4. Summary of Recommendation by Standards Groups:

Three of the groups took no position. The ABA groups require the state to disclose the designated objects and documents automatically and do not require the defendant or juvenile to disclose them at all.

Standards Groups	Policy Recommendation
NCCD Standard Act (1959)	No position taken.
Uniform Juvenile Court Act (1968)	No position taken.
HEW Model Act (1974)	No position taken.
Recommended IJA/ABA (1975)	Respondent is given documents and tangible items automatically, but does not have to disclose the same.
ABA Adult Standards (1974)	The same as the IJA/ABA.

5. Analysis of the Issue:

The constitutionality of a defendant having to give up for inspection certain tangible objects and documents which are intended to be introduced at trial seems to hinge on the same arguments as the constitutionality of giving up lists of witnesses by the defense. In Boyd v. United States, the court held that books and papers were not protected by the Fifth Amendment because they were not testimonial in nature. If the defense intends to introduce them at trial, their disclosure is not being compelled (Williams v. Florida). Thus, the issue is free of constitutional dimensions and the question is, "What is good?", not "What is allowable?"

In the adult area, the proposed Federal Rules of Criminal Procedure called for independent discovery by the government upon its request of documents and tangible items intended to be introduced as evidence in the case in chief of the defendant. Amendments to the Federal Rules of Criminal Procedure with Advisory Committee Notes, Supreme Court of the United States, Rule 16(b)(1)(A). Congress amended them to read that, if the defendant discovered tangible documents and items, then the government could discover the same class of items from the defendant, if the defendant intended to introduce them as evidence in chief at the trial. 89 Stat. 375.

In the juvenile area, this issue points out another time when the government has a decided edge over the child in terms of investigative power. This determines who is most likely to have any items or documents which the other side will not know about. The juvenile is also less likely to recall and understand these items and documents and will need more help in finding them.

The IJA/ABA has called for the government to disclose these items and any others which the government obtained from the child. Standard 3.3(a)(v). The ABA Discovery Commentary states:

> "It seems quite clear that permitting defense counsel to inspect them before trial will be the only way to satisfy many of the objectives to be achieved in the pretrial period, such as facilitating pleas, insuring adequacy of preparation, including examination by experts, and saving considerable time at any trial that follows."
> ABA Standards, Discovery, p. 68.

Also, since the character of these objects is usually immutable, the arguments that discovery will enhance perjury and tampering do not generally apply. It will clearly aid the juvenile process to allow the juvenile to discover these items before trial.

The last consideration is whether or not the government should be able to discover the tangible items and documents which the defendant intends to introduce at trial. Much as in the discussion of lists of witnesses, the critical difference here is how one views the juvenile process. If it is a procedure to help the child which carries on informally, then the "two-way street" approach to discovery is more appealing. This would allow the government independent or at least conditional discovery (as in the Federal Rules). If one views the goal of pretrial discovery as equalizing the power of the two opponents so that a true and fair adversary contest can take place, only the government should be required to disclose its documents and tangible items.

6. Task Force Standards and Rationale:

The Task Force did not specifically address the issue of discovery of tangible objects and documents.

1. Issue Title: Notice of Defense--Should the juvenile have to give notice to the state of defenses intended to be used at trial?

2. Description of the Issue:

This issue pertains primarily in delinquency hearings, and would only rarely be involved in a neglect action. The Federal Rules of Criminal Procedure now call for disclosure of the defenses of insanity and alibi before trial. There is concern, however, that disclosure of defenses may lead to the defendant becoming a witness against himself, particularly when the witnesses to be used to establish these defenses must be disclosed also. One justification for compelled pretrial disclosure of defenses is that the defendant will reveal his defenses eventually at trial and earlier disclosure just avoids the delays which would result if the state had to ask for a continuance to investigate the defense. See, Williams v. Florida 399 U.S. 78 (1970). A second problem that arises here is the issue of what sanction can and should be imposed for non-compliance with the rule. The Supreme Court in Williams specifically reserved judgment on that issue. The issues raised by the notice of defense question are similar for adults and children. The only difference between adults and children on this issue is that children may be less able to advise their attorneys effectively and therefore notice requirement rules should be applied less rigorously for children.

3. Summary of State Practices:

One states requires disclosure of all defenses including, but not limited to, self-defense, alibi, insanity, entrapment, impotency, marriage, mistaken identity, and good character. It also requires disclosure of the witnesses who will be called in support of these defenses.

Notice of Defenses	Name of State
Pretrial notice of all defenses	AZ

4. Summary of Recommendation by Standards Groups:

The ABA groups are the only two to take a position on this issue and both groups' positions are identical: The court may require that the state be informed of any defense respondent or defendant intends to use.

Standards Groups	Policy Recommendation
NCCD Standard Act (1959)	No position taken.
Uniform Juvenile Court Act (1968)	No position taken.
HEW Model Act (1974)	No position taken.
Recommended IJA/ABA (1975)	Court may require that the state be informed of any defense respondent intends to use and of names and addresses of witnesses to be used to establish the defense.
ABA Adult Standards (1974)	Same as the IJA/ABA.

5. Analysis of the Issue:

The constitutional aspects of this issue are discussed and decided in two Supreme Court cases: Williams v. Florida, supra and Wardius v. Oregon, 412 U.S. 470 (1973). In Williams, the court held that a statute requiring notice of alibi defenses and a list of witnesses intended to be used at trial to substantiate the defense was not unconstitutional because there was no compulsion involved. It merely accelerated the timing of the disclosure. In Wardius, the court declared that a notice of alibi statute was invalid for failure to give reciprocal discovery against the state's case. Seeking to satisfy these two cases, the Federal Rules of Criminal Procedure require the defendant, after demand by the government, to disclose his intention to offer an alibi defense and the place at which he claims to have been and the names and addresses of witnesses upon whom he intends to rely to establish the defense. Federal Rules of Criminal Procedure, 89 Stat. 372. The government is then required to serve upon the defendant a written notice stating the names and addresses of the witnesses upon whom the government intends to rely to establish the defendant's presence at the scene, and any other witnesses to be relied on to rebut the testimony of any of the defendant's alibi witnesses. 89 Stat. 373. The sanction for failure to comply with the rule is exclusion of the testimony of any undisclosed witness, except for the defendant himself who cannot be excluded. The court has the power to grant exceptions for good cause. Id. The rules contain similar provisions for defenses based on mental incompetence, but there is no provision for discovery of witnesses. The defendant must disclose his intended defense and the government can move for a mental examination. Amendments to the Federal Rules or Criminal Procedure with Advisory Committee Notes, Supreme Court of the United States, Rule 12.2, p. 25. The sanction is exclusion of expert witnesses offered by the defendant on insanity. Id. The validity of both of these sanctions is specifically left uncertain by the Advisory Committee's Notes. Amendments, p. 24.

In "Amendments to the Federal Rules of Criminal Procedure - Expansion of Discovery," 66 J. Crim. Law and Crimin. 23 (1975), a critical look was taken at the rules and the following observations were made: (1) Either mandatory or conditional discovery is "reciprocal" in terms of Wardius. (2) The government did not have to give the names of witnesses to be used in direct rebuttal to a defense witness who said he was at the scene and the defendant was not. (This was changed in the Congress by adding "and any other witnesses to be relied on to rebut testimony of any of the defendant's alibi witnesses." 89 Stat. 373.) (3) The sanction of Rule 12.1 may violate the Sixth Amendment right to compulsory process. (4) The Fifth Amendment may be violated if the defendant decides not to use the alibi and has disclosed something self-incriminating. (5) Rule 12.2 may violate Wardius because the defendant gets nothing in return. (6) The exclusion of expert witnesses lacks any rational connection to the untrustworthiness of the witness and therefore the exclusion of the expert violates the Sixth Amendment. In response to these points, the discovery permitted by these proposed standards is more than sufficient to be termed reciprocal, as a whole, under Wardius. The phrase added by Congress can be added in a proposed standard. The notice of alibi, witnesses, and any "fruit of the notice" can be excluded by court order to prevent violating the Fifth Amendment. Point #5 was answered above when it was noted that under the proposed standards the respondent will get reciprocal discovery, which will include the government's witnesses on mental competence. This leaves only one true problem--i.e., whether the sanctions violate the Sixth Amendment. The clearly constitutional sanction of a continuance is available regardless of discovery. The contempt sanction seems particularly inappropriate in a situation where the counsel is concerned about violation of the Fifth Amendment and the attorney-client privilege. This leaves only the exclusion of relevant, admissible testimony as a sanction, which is also undesirable. The only light shed on the dilemma by any groups is the shear weight lent to the constitutionality of the sanctions by reason of their having been in the proposed Amendments and passed only by Congress.

In juvenile cases, the more sensitive nature of the immature child adds impetus to the desire to have a traumatic experience like trial in a juvenile court be as streamlined as possible. This would speak for prior disclosure. But that same factor, the immaturity of children, makes it much more difficult for an attorney to decide ahead of time what defenses to use. The child will be less able to assist his counsel. Another drawback mentioned by the ABA Standards is that since the defendant himself may not be required to speak, the defendant who has counsel who feels himself bound to follow the rules may be disadvantaged.

The IJA/ABA Standards call for disclosure by the respondent subject to constitutional limitations of any defense he intends to use at trial and the names of the witnesses intended to be called in support thereof. Standard 3.11. As the comment thereto suggests, this provision fits in well with a two-way street theory of discovery designed to achieve full and free access to information by both sides before trial. A similar provision should be implemented here with discretion resting in the trial judge to impose sanctions in case of abuse of the rules.

6. Task Force Standards and Rationale:

The Task Force did not formulate a standard on this issue.

1. Issue Title: Names of Experts and Results of Tests--Should both sides reveal the names and reports of experts?

2. Description of the Issue:

In neglect and dependency matters, the physical and mental experts can be very important. In delinquency matters, the usual scientific experts--ballistics, fingerprint, time and motion, accountants--become more prominent although in insanity or impossibility cases the medical and psychological experts are still crucial. The utilization of experts is an area where the state has vastly greater resources than the individual, particularly the typical juvenile. The juvenile may also have use for the reports of experts whom the state has decided not to call at trial, since their testimony may be exculpatory or lead to exculpatory evidence in the hands of defense counsel.

3. Summary of State Practices:

One state's rules require that both sides reveal any experts and their reports which are intended to be used at trial or concern any evidence which will be introduced. Another state's rules require the state to disclose all the experts who have conducted tests concerning the trial and their reports, but require the juvenile to disclose only those experts whom he intends to introduce at trial and their reports. Three other states have provisions requiring the state to disclose its witnesses, which would include its experts.

Disclosure of Experts and Reports	Names of States
Both sides reveal experts to be used at trial	OH
State reveals all experts; juvenile reveals trial experts	AZ
Lists of witnesses	CO, MD, MT

4. Summary of Recommendation by Standards Groups:

The ABA groups are the only ones to take a position on this issue. Their position is that the juvenile should automatically receive the reports of the state's experts made in connection with the particular case, and that, subject to constitutional limitations, the court can order that the juvenile give to the state a copy of his experts' statements.

Standards Groups	Policy Recommendation
NCCD Standard Act (1959)	No position taken.
Uniform Juvenile Court Act (1968)	No position taken.
HEW Model Act (1974)	No position taken.
Recommended IJA/ABA (1975)	Juvenile receives reports of experts of state. Subject to constitutional limitation court can order juvenile to disclose reports of experts.
ABA Adult Standards (1974)	Same as IJA/ABA.

5. Analysis of the Issue:

The constitutional problems of having the defense disclose any thing prior to trial rise to the surface again in this issue. The author of "Amendments to the Federal Rules of Criminal Procedure - Expansion of Discovery," 66 J. Crim. Law and Crimin. 23 (1975) felt that scientific reports are usually nontestimonial and therefore not covered by the Fifth Amendment. The ABA standards and the IJA/ABA standards put in the phrase, "Subject to constitutional limitations," saying that this may be used to cover the limitation that only those experts who will be used at trial are subject to discovery. ABA Standards, Discovery, Supp. pp. 2-3. This is a subsection of the issue on lists of witnesses and the discussion there is applicable here also.

The use of experts is the area most subject to pretrial preparation. In trials which are going to be turned into battles of the experts, it will take weeks of preparation of testimony. This would necessitate huge delays if continuances had to be granted for one side or the other to get its own experts and rebuttal testimony. Disclosure by both sides of the names and statements of experts is a must for full and free exchange in preparation for trial. Discovery from the defendant may however have to be limited in order to preserve its constitutionality. The ABA and IJA/ABA standards both say that the trial court may order the discovery from the accused if it desires.

6. Task Force Standards and Rationale:

The Task Force did not formulate a standard on this issue.

1. Issue Title: Social Reports--Should the reports received and used by a court at the dispositional stage be subject to discovery?

2. Description of the Issue:

These reports are analogous to the pre-sentence report in criminal proceedings, which are disclosed to the defendant or counsel, subject to protection of harmful or confidential material, under the Federal Rules of Criminal Procedure. Since the juvenile court judge has wide discretion in most states as to the proper disposition of a juvenile adjudged delinquent, incorrect data in these reports can be very damaging to the juvenile. On the other hand, a juvenile may not be able to cope with certain confidential material in these reports which is either gathered from or is about people who are closely related to the juvenile.

3. Summary of State Practices:

Thirteen states have statutes or rules which allow counsel or parties and counsel to examine the social report. Four states have provisions requiring the writer to appear for cross-examination. Provisions in six states allow the parties or counsel to see the report and to cross-examine the writer. In two states, a court order is required to see the report by statute. One other state's provision mandates the judge to give the parties the facts from the reports and in one final state a provision was found which gave the judge discretion to give or withhold the report in whole or in part.

Social Reports	Names of States
Examine the report	AZ, DC, MD, MA, MN, NH, NM, OH, NC, PR, WA, TX, VT
Cross-examine the writer	CO, HI, IO, UT
Examine the report and cross-examine the writer	KY, GA, MT, PA, TN, WY
Court order required	ID, SD
Facts from judge	IL
Judge can give or withhold in whole or part	NY

4. Summary of Recommendation by Standards Groups:

All but one of the groups advocated the disclosure of the report in some way to the respondent.

Standards Groups	Policy Recommendation
NCCD Standard Act (1959)	No position taken.
Uniform Juvenile Court Act (1968)	Examine the report and cross-examine the writer.
HEW Model Act (1974)	Examine the report and cross-examine the writer.
Recommended IJA/ABA (1975)	Examine the report.
ABA Adult Standard (1974)	Examine the report.

5. Analysis of the Issue:

In adult cases the pre-sentence report is an often superficial document which can contain irrelevant and hearsay information from official sources, the defendant, his family employer or closely related people. Additionally, ex parte communications, e.g., from the probation officer, are commonly received by the judge after a determination of guilt. Moore's Supplement, Rules of Criminal Procedure, Rule 32(3). The chief fear produced by suggestions that the report be revealed is that sources will dry up. The ABA Standards, Sentencing, 4.4, disputed this fear saying that the experience of committee members who have lived under a system in which disclosure is routine shows that there is little factual basis for the fear. The quality of the pre-sentence report depends on the quality of the probation officer. Another factor mentioned by the ABA was that one of the basic values of the guilt phase is that the defendant knows the details of the charge and can respond to them. This would be subverted if the defendant is denied the right to know and respond to the pre-sentence report, which can determine how long he will be incarcerated or what other penalties will be imposed. The court should at least tell the defendant the important details of the report so that they can be disputed. Baker v. United States 388 F.2d at 933-34. Id.

In response to the argument that disclosure of the pre-sentence report will drag out the sentencing hearing, the ABA committee said that a phase as important as sentencing should become a little more protracted. As a footnote to this all, it was noted that the Supreme Court has never said that disclosure is not required. Id. Due Process is violated if the pre-sentence information is in error, Townsend v. Burke, 334 U.S. 736 (1948), so there may be a constitutional compulsion to reveal the report so that counsel can assure the defendant of Due Process.

The IJA/ABA subsection, 3.3(a)(iv), "was deliberately drafted broadly to maximize counsel's access to information which might be of some use to him in representing the youth, particularly at hearings on transfer, detention and disposition." IJA/ABA p. 17. It covers reports of the youth's involvement with public agencies. Subsection 3.3(a)(iii) allows a specific access to investigations of school and social background. The judges in children's courts have wide discretion in dispositional alternatives after the youth has been found delinquent. Thus, the correctness of the information in the report is especially important to the youth. One author has analogized the role of counsel in a dispositional hearing to that of counsel in a waiver hearing and drawn the conclusion that United States v. Kent, supra, points to the conclusion that counsel should have access to the social report constitutionally guaranteed. McGuire, "Discovery Rights in Juvenile Proceedings," U.S.F. L. Rev. 333-47 (1973).

The issue in juvenile proceedings is slightly different from that in criminal cases. The child should still be afforded fundamental fairness, which would call for disclosure. Since the juvenile courts are set up to help and rehabilitate the child, they should be even more wary of false information at the dispositional stage and more inclined to show the child the report to be sure it is correct. But just as the factors calling for disclosure are greater, so are the needs for secrecy. The likelihood of some sort of reprisal upon the source of harmful information is still there in juvenile cases, although it may often take a slightly different form than in criminal cases. Then, an additional fear is added that psychologically damaging material, often from sources close to the child, will be contained in the social report and seriously impair his chances for rehabilitation.

These considerations can all be accommodated by calling for mandatory disclosure of the social report to counsel, or to the child if he is not represented by counsel, and by giving the judge the power to excise any portions of the report which could be detrimental to the child and to protect the names of any of the sources who would suffer some sort of reprisal from the child.

6. Task Force Standards and Rationale:

The Task Force's Standard 14.5 provides, in pertinent part:

> Copies of the predispositional report should be supplied to the attorney for the juvenile and the family court prosecutor in sufficient time prior to the dispositional hearing to permit careful review and verification if necessary.

Also relevant to this Comparative Analysis is Standard 14.6, which indicates that:

> No dispositional decision should be made on the basis of a fact or opinion not previously disclosed to the lawyer for the juvenile and any lawyer representing the state. In unusual circumstances, the judge may elect to caution the attorney not to disclose information to the juvenile if it appears that such information may prove harmful to the juvenile.

The Task Force felt that this approach would fully protect the juvenile's interests in knowing the contents of the reports, while shielding the juvenile client himself from the potentially harmful effects of sensitive information.

1. Issue Title: Police Records of Prior Arrests and Convictions--Should police records by available to counsel and parties?

2. Description of the Issue:

Police records concerning the child will be used largely at the dispositional stage of juvenile proceedings. Disclosure may also be important for reasons not connected directly with the juvenile process, such as future employment.

3. Summary of State Practices:

There is provision for discovery of law enforcement records by some method in 13 states. No provision was found in the remainder of the states.

Police Records Discoverable	Names of States
Not open to inspection except with the consent of the judge.	GA, HI, MN, MO, NY, VA
Open to inspection by counsel or parties.	CA, DC, KY, MT, PA, TN, TX

4. Summary of Recommendation by Standards Groups:

No position was taken by two of the groups. The other three suggested that police records should be open to discovery in some way.

Standards Groups	Policy Recommendation
NCCD Standard Act (1959)	No position taken.
Uniform Juvenile Court Act (1968)	Counsel can inspect.
HEW Model Act (1974)	Counsel and parents can inspect.
Recommended IJA/ABA (1975)	State must disclose.
ABA Adult Standard (1974)	No position taken.

5. Analysis of the Issue:

This is not a hotly debated issue. The usual objections of witness tampering and harassment do not apply here since the information disclosed is not subject to easy change and the police are traditionally difficult to intimidate. There is relatively little chance for information psychologically damaging to the child getting to him, except for the fact that, if he is told too often that he is a criminal, he will behave accordingly and in conformity with others' expectations.

At the dispositional stage it may be beneficial for the counsel to see the data upon which the section of the social report covering police records is based. It may also be helpful for counsel to know about the child's past record before the adjudication stage in order to evaluate his case and the trustworthiness of his client's story. Finally, the child should have the right to challege any misinformation in his record so that it is correct for the future.

Only a few of the states have enacted provisions for the youth to discover law enforcement records, and many of those who do have provisions have ambiguous inspection provisions. This is the reason that a standard calling for the automatic disclosure of the child's law enforcement records is needed.

6. Task Force Standards and Rationale:

The Task Force Standard 5.15 specifies that basic police records should not be open for inspection nor should their contents be disclosed except by court order. The commentator to the standard, however, makes an exception as to parties to the proceedings.

> This standard specifies that police-juvenile records system should be designed to assure confidentiality. A court before which a juvenile appears in a proceeding should of course have access to these records. And this court should also require that appropriate parties to the proceeding be able to inspect these records with these obvious exceptions, however, access to police-juvenile records should be strictly limited.

This exception is provided to facilitate adequate preparation for the proceedings. (On the issue of confidentiality of juvenile records generally, see Chapter 28: Security, Privacy and Confidentiality of Information About Juveniles.)

1. Issue Title: Additional Disclosures--Should the judge in juvenile court have the discretion to order additional disclosures which are relevant and material to the case before him?

2. Description of the Issue:

It would be very difficult to provide for every possible form of discovery of every possible type of information in these standards. A standard which would allow the judge to order additional discovery would make it possible for counsel to use its imagination with regard to discovery and yet shield the opposite side from overly burdensome and unjustified practices. The objection to this type of provision is that it increases the participation of the judge in the pretrial process and increases the expenses to both sides.

3. Summary of State Practices:

Discovery provisions which allow the judge the discretion to order additional disclosures were found in only two states.

Comparison of States	Names of States
Discretion in judge	AS, AZ

4. Recommendation of Standards Groups:

The IJA/ABA and the ABA Adult Standards are the only two which specifically give the discretion to the judge to order additional discovery.

Standards Groups	Policy Recommendation
NCCD Standard Act (1959)	No position taken.
Uniform Juvenile Court Act (1968)	No position taken.
HEW Model Act (1974)	No position taken.
IJA/ABA Standards	Upon a showing of materiality court can require petitioner to disclose additional information not covered by the specific discovery provisions of the standards.
ABA Adult Standards (1970)	Upon a showing of materiality court can require prosecution to disclose additional information not covered by the specific discovery provisions.

5. Analysis of the Issue:

The ABA committee intended three types of information to be included under their standard for discretionary disclosure: depositions, information possessed by third parties, and residual matter, e.g. which of several theories the prosecution intends to advance on how the defendant committed the offense. ABA Standards, Discovery, pp. 84-87. The IJA/ABA committee simply stated that this standard should cover discovery not handled in the other sections and that the court has broad discretion to deny the request. It then said that it would cover residual matters and items in the possession of private parties. IJA Standards, pp. 23-24.

The advantages of having such a provision is that defense counsel is not limited in inventive discovery by the shackles of the standards. One cannot imagine all of the cases in which the rules will have to apply and therefore the rules cannot be assumed to cover every possibility. The disadvantages of such a provision are that it increases the participation of the judge and the expense of the pretrial process. It might also be noted that it gives the court wide discretion to grant as well as deny the request and therefore to some extent reduces the effectiveness of the standards as guides to what is permissible discovery.

Some of the topics which could be included in such a provision are, in addition to those mentioned by the previous groups: Grand Jury minutes, information regarding searches and seizures, if there has been any electronic surveillance, the relationship of specific persons to the accused, standard procedures in regard to specific types of cases, the location of specific persons or objects and documents, interrogatories. Some of these items were included in separate standards by the ABA standards, but are so seldom relevant to juvenile cases that it was felt they could be handled by discretionary disclosures.

The absence in the standards groups of a provision which would allow similar discovery to the prosecution may be due to the fear of constitutional restrictions. However, the judge in any particular case could deny the disclosure if he felt that it would violate the youth's constitutional rights. Such a provision would allow the standards to adjust to any new decisions which might be handed down in the juvenile area. On the whole a provision allowing both sides to ask for discretionary disclosures is advised.

6. Task Force Standards and Rationale:

The Task Force did not formulate a standard on this issue.

APPENDIX A

SUMMONS

SPEEDY TRIAL

Summons

ISSUE 1: SHOULD THERE BE A REQUIREMENT THAT THE SUMMONS (TO WHICH THE PETITION IS ATTACHED) BE SERVED ON THE CHILD, AS WELL AS THE PARENT OR GUARDIAN?

While statute or rule has tended to require service of summons and petition on a parent or guardian, a new trend is developing to also require service on the child if he or she is 14 years or older. For example, Georgia, Pennsylvania, and the HEW Model Act (1975) direct that service be made on the child if 14 years or older. Such a provision appears consistent with the concepts of a juvenile's responsibility for his actions, and with his participation in the judicial process. Reducing the age minimum to 12 or 13 years for mandatory service would not seem necessary.

ISSUE 2: TO WHAT EXTENT SHOULD THE SUMMONS PROVIDE NOTICE OF THE RIGHTS OF CHILD AND PARENTS, AND OF THE POSSIBLE CONSEQUENCES OF THE JUDICIAL PROCESS?

Utah Rule 17 requires that the summons include a notice of a right to counsel and free counsel, and the right to remain silent during preliminary investigation and at trial. Colorado (19-3-103) provides the summons shall set forth the constitutional and legal rights of the child, his parents or guardian, or any other respondent, including the right to have an attorney present at the hearing on the petition. The Colorado summons form, however, sets forth what might be the most all-inclusive enunciation of rights: that the allegations must be proven beyond a reasonable doubt; right to counsel and free counsel; trial by jury; the right to silence at a hearing, and a provision that if a statement or testimony is given, it may be used against him; any witnesses may be questioned at the hearing, the child or parent may bring witnesses to the hearing, and upon request, the court may order persons to attend the hearing as witnesses; the right to request a rehearing or new trial, if in writing, and filed within 10 days of a hearing unless the court grants additional time; the right to appeal to an appellate court; if a child is 14 years or older, and is alleged to have committed a felony, the court may conduct a transfer hearing to determine whether to retain juvenile jurisdiction or transfer to criminal court for trial as an adult; if the petition is sustained, the court may make orders including institutionalization.

The Tulsa, Oklahoma, juvenile court summons provides notice of the right to counsel and to free counsel if indigent, while the Oklahoma City, Oklahoma juvenile court advises only: "You are hereby advised of your rights to be represented by counsel of your choice at the above hearing."

ISSUE 3: SHOULD STATUTE OR RULE OF JUVENILE PROCEDURE PROVIDE FOR A PROMULGATION OF RIGHTS IN THE SUMMONS?

Probably, this should be done to facilitate uniform practice throughout a state and a greater awareness of rights on the part of the child and parents.

Task Force Standards and Rationale

Issues relevant to the summons are addressed in Standard 12.5,

> A delinquency petition should set forth in plain and concise language and with reasonable particularity the time, place, and manner of the acts alleged, and should cite the federal or state statute or local ordinance which is alleged to have been violated.
>
> A summons should be issued which provides notice to the juvenile and his or her parents of their required appearance in court on a designated date, their right to representation by counsel and the available procedures for obtaining counsel.
>
> The summons and petition should be served on a juvenile and his or her parents.
>
> The form and contents of the petition and summons should be determined by the supreme court, the judicial counsel or other rule-making body and should be uniform throughout a state.

Standard 15.15 outlines in considerable detail the appropriate form and content of the petition. The Commentary outlines the rationale for the other components of Standard 12.5 as follows:

Consistent with the right to know, juveniles should receive their own copy of the petition and summons, and the summons should elaborate the rights of the juvenile and his family to counsel. The summons should also specify that the juvenile and his family are entitled to appointed counsel if they are indigent and should describe the available procedures for obtaining legal representation. It should, for example, list the address and phone number of the local legal aid society or the appointing authority of the court.

To insure that the petitions and summons meet these requirements, a state's rule-making body should promulgate uniform forms and content directives for statewide utilization.

Speedy Trial

ISSUE 1: WHO SHOULD PROMULGATE SPEEDY TRIAL PROVISIONS?

An increasing number of juvenile codes include one or more time-frame standards; state rules of juvenile procedure, usually promulgated by supreme courts, may include certain time-frame standards. ABA Standards, Trial Courts, 2.51 Commentary suggests establishment of normal time intervals for disposition of each type and each stage of case. Promulgation should be by a unified court system, or in decentralized systems, by each geographical unit of the trial court subject to central guidelines. IJA/ABA Juvenile Justice Standards recommend, in the absence of statute or supreme court/rule, promulgation by the general trial court on the recommendation of family court division judges.

There is question whether time standards are procedural matters which are the province of court rule, or substantive matters which are the province of legislative determination. The authority to promulgate may be influenced by a given state's judicial article provisions.

ISSUE 2: FOR WHAT STAGES SHOULD TIME-FRAME STANDARDS BE PROMULGATED?

These may include:

a. The time a police incident report should be handed to detention authorities for a child brought to detention by a police officer

b. The time within which a police supplemental report should be filed with the intake authority for (1) a detained child, (2) a non-detained child

c. Intake decision-making (depends upon Task Force determination of the prosecutor role). This may include a time-frame for an intake officer, a time-frame for complainant's appeal to a prosecutor or judge, and a time-frame for prosecutor decision

d. The first appearance hearing

e. The detention/shelter/probable cause hearing

f. Motion-filings and hearings

g. Adjudicatory hearing/transfer (waiver) hearing

h. Disposition hearing

i. Motion for a new trial--filing and hearing

Examples of some of the above include:

a. The general practice of police officials is to hand an incident report to a detention home official at the time a child is brought to detention.

b. Florida legislation, 1975, requires a supplemental police report to be filed with the intake officer within three days of the time the child is taken into custody.

c. Florida allows 15 days for intake officer decision-making from the time the child is delivered to or reported to the intake office.

   The District of Columbia requires the petition be filed within 7 days of the receipt of the complaint by the Director of Social Services.

d. The District of Columbia requires that the court hold an initial arraignment hearing within 5 days after the filing of a petition. This may be extended, at the time of the detention hearing, for an additional 5 days.

e. NAC, Courts, Standard 4.1 would require that all motions in adult misdemeanor cases be filed within 7 days after appointment of counsel. They shall be heard immediately preceding trial.

f. California requires an adjudicatory hearing for a detained child within 15 judicial days from the date of the detention hearing order. For non-detained children, such hearings shall be held within 30 days. A 1975 Florida amendment provides "No child shall be held in detention or shelter care under a special order for more than 14 days unless an order of adjudication for the case has been entered by the court." Further, IJA/ABA Standards provide for a detained child not later than 15 days following admission to detention, and for a non-detained child, not more than 30 days following the filing of a petition.

g. Disposition hearings shall be held in California, for (1) a detained child, not later than 10 judicial days following adjudication, and (2) for a non-detained child, not later than 30 days from the date of the filing of the petition, and this may be extended by the court for 15 additional days. (California requires a written social report for a disposition hearing.)

h. The clock on filing a motion for new trial is generally governed by those rules which a state holds applicable to juvenile proceedings.

ISSUE 3: SHOULD A STATUTE EXPRESSLY PROVIDE THOSE CIRCUMSTANCE WHICH SHALL BE EXCLUDED FROM COMPUTING TIME-FRAME LIMITS?

The District of Columbia Act (Section 16-2329) provides six bases for exclusions from time computations, e.g., a continuance granted on "unusual circumstances" at the request or with the consent of the child or his counsel; and the unavailability of evidence material to the case where Corporations Counsel has exercised due diligence and there are reasonable grounds to believe this evidence will be available at a later date. HEW's Model Act (1975) provides seven circumstances which shall be excluded in computing the time for a hearing on the petition's allegations.

ISSUE 4: WHAT SHOULD BE THE EFFECT OF A FAILURE TO ACHIEVE TIME-FRAME REQUIREMENTS?

A provision such as Utah's is rather common: the failure to provide a detention or shelter hearing within the required time shall result in a release of the child.

Florida Rule 8.020(b)(5) provides that on motion by or on behalf of the child, a petition for a juvenile delinquency or in need of supervision may be dismissed with prejudice if not filed within 30 days from the date the complaint was received by the intake officer. HEW's Model Act (1975) provides a petition shall be dismissed with prejudice if not heard within 10 judicial days of filing (as to a detained child) and 15 judicial days of filing (as to a non-detained child).

At least one appellate court has held that time-frame guidelines are directory, but nonadherence need not require dismissal with prejudice.

Probably, statutory authorization for informal adjustments or a consent decree should provide for a waiver of speedy trial rule or an express exclusion from statutory time computation.

Task Force Standards and Rationale

The Task Force addressed the issue of time-frames for case processing in Standard 12.1.

Each state juvenile code should set forth the time-frame standards for juvenile case processing. Those should include:

1. For juveniles in detention or shelter care:

   a. From admission to detention or shelter care to filing of petition, arraignment, detention or shelter care hearing and probable cause hearing if continued detention has been ordered: 48 hours.

   b. From arraignment hearing to adjudicatory hearing: 20 calendar days.

2. For juveniles not in detention or shelter care:

   a. From referral to filing of petition: 30 calendar days.

   b. From referral to filing of petition where the juvenile has been referred by the intake department to a service program: 90 calendar days.

   c. From filing of petition to arraignment hearing: 5 calendar days.

   d. From arraignment hearing to adjudicatory hearing: 60 calendar days.

3. For all juveniles:

   a. From adjudicatory hearing to dispositional hearing: 15 calendar days.

   b. From submission of any issue taken under advisement to trial court decision: 30 calendar days.

   c. From trial court decision to appellate decision when interlocutory appeal is taken: 30 calendar days.

d. From trial court decision to appellate decision on appeal of the adjudicatory finding: 90 calendar days.

4. For detained juveniles:

a. A review detention hearing each 10 judicial days.

Failure to comply with these time-frames should result in appropriate sanctions upon the individual(s) within the juvenile justice system responsible for the delay. The court should be able to grant reasonable continuances for demonstrably justifiable reasons. Case dismissal should occur only where failure to comply with statutory time-frames results in prejudice to the particular juvenile.

The Commentary specifies that where these time-frames cannot be inserted in the juvenile code, they should be implemented by court rule. In addition, the Commentary indicates that

> priority should favor the juvenile in detention or shelter care, due to the particular impact and possible trauma which involuntary deprivation of freedom has on youth.

Therefore, it is recommended that there be mandatory release of juveniles from pre-adjudicatory detention or shelter care if the time frame for a detention hearing is not met. But the Task Force felt that, in general, delays should not result in dismissal of the case. Thus, the Commentary outlines plausible alternative sanctions unless prejudice could be demonstrated.

While emphasizing that,

> It is important that courts establish the practice of requiring fundamental adherence to these standards,

the Commentary notes that certainly exceptions should be specified, e.g., for cases where a waiver hearing is held, or complex and extensive evaluation of the juvenile is necessary.

APPENDIX B

COMPLETE LISTING OF COMPARATIVE ANALYSES

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