Juvenile Justice Textbook Series

Supreme Court Decisions and Juvenile Justice

By
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Second Edition By
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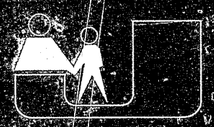

National Council of Juvenile and Family Court Judges

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PART I

Procedural Rights of Due Process

IN GENERAL

Kent v. U.S.

383 U.S. 541, 16 L.Ed. 2d 84, 86 S. Ct. 1045 (1966)

DECISION: District of Columbia Juvenile Court's order waiving its exclusive jurisdiction and authorizing minor to be criminally prosecuted in district court held to have been entered without compliance with required procedure.

SUMMARY: Juvenile interrogated by police — admitted burglary, robbery and rape. Juvenile court failed to grant or rule on juvenile's motions for (1) hearing (2) access to court's social records. (3) Court's order recited no reason for granting waiver and did not refer to juvenile's motions.

Juvenile indicted. In district court juvenile's motion to dismiss indictment because waiver was invalid was denied. Juvenile found guilty and sentenced 30 to 90 years in prison. Conviction affirmed by D.C. Court of Appeals. U.S. Supreme Court reversed and remanded to district court for a hearing *de novo* on issue of waiver.

Fortas, for five members, held order waiving juvenile court jurisdiction was invalid for failure:

1. to grant hearing requested by juvenile,
2. to give counsel for juvenile access to records,
3. to state reasons for its order waiving jurisdiction.

The Court refused to recharacterize the proceedings as "criminal" and automatically require the full compliment of criminal safeguards. Instead, the court indicated it would rely on a functional analysis — that would ignore tradition as such and focus on the consequences of the proceeding for the defendent, that is, the role that the safeguard plays in assuring that the outcome of the proceeding is proper, and the cost to society of providing the safeguard.

Fortas in *Kent* attacked the notion that procedural rights available in criminal cases should be denied merely on "the premise that the proceedings are 'civil' in nature and not criminal." Since the juvenile court system attempts to provide guidance and rehabilitation for the child rather than to fix criminal responsibility and impose punishment, state courts have often held that criminal safeguards need not be provided. But Fortas expressed serious doubts as to whether the consequences for a defendant in a juvenile proceeding differ significantly in practical effect from those faced by an adult in a criminal prosecution. Citing "evidence" that many juvenile courts "lack the personnel, facilities and techniques to perform adequately as representatives of the state in a *parens patriae* capacity" the Court indicated that practical shortcomings may be too great "to make tolerable the immunity of the process from the reach of constitutional guarantees applicable to adults."

Having raised these basic questions, the Court disposed of the case on a narrower ground, holding that a hearing and access by counsel to the juvenile's "social service" file must be provided before the juvenile court can waive its jurisdiction over a minor. On this more specific issue too, the Court placed primary reliance on substance; it stressed the consequences of a waiver of jurisdiction — "potentially as important to petitioner as the difference between five years' confinement and a death sentence" — and the practical value to the juvenile of having his attorney examine the pertinent records. Against this background, the Court construed the statute "in the context of constitutional principles" and concluded: "there is no place in our system of law for reaching a result of such tremendous consequences without ceremony — without hearing, without effective assistance of counsel, without a statement of reasons." Thus, the opinion leaves little doubt that denial of important procedural safeguards in state juvenile courts will be subject to serious attack on due process grounds.

Reports:

Availability of social reports to juvenile's counsel required by *Kent* not likely to be limited to waiver cases. Is this applicable to pre-sentence reports in criminal cases? Although the defendant has no constitutional right to view the pre-sentence report, *see, e.g., United States v. Dockery,* 447 F.2d 1178 (D.C. Cir. 1971); *Fernandez v. Meier,* 432 F.2d 426 (9th Cir. 1970), the trend is to provide the defendant with the report. *See Fed. R. Crim. Proc. 32 (c) (3); A.B.A. Sentencing Alternatives and Procedures,* Standard 4.4 (1968); authorities cited in *Dockery, supra* at 1186-1201 (Wright, dissenting).

Reasons for Decisions:

May be applicable to all juvenile decisions and even criminal courts if the *Kent* requirement of "reasons for decision" for "meaningful review" is read in the context of constitutional principles of due process.

"Short Cut" Avoiding *Kent* Transfer Hearing by Use of the Prosecutor's Discretion:

People (Illinois) v. Bombacino, 280 N.E.2d 697 (Ill.), *cert. denied,* 409 U.S. 912 (1972). Where statute did not give juvenile judge discretion to determine whether to retain jurisdiction of case involving crime committed by juvenile but granted state's attorney discretion to make such determination subject to objection by juvenile judge, in which event matter was referred to chief judge of circuit court, due process did not require juvenile judge to conduct hearing on state's attorney's petition to remove case from juvenile division.

U.S. ex rel. Bombacino v. Bensinger, 498 F.2d 875 (7th Cir.), *cert. denied,* 419 U.S. 1019 (1974). Subsequent proceedings in Federal Court upholds constitutionality of Illinois transfer statute giving the prosecutor the discretion to determine the forum (juvenile or criminal court) for trial of juvenile.

U.S. v. Bland, 472 F.2d 1329 (D.C. Cir.), *cert. denied,* 412 U.S. 909 (1972) The Legislature may, without violating due process, exclude from the jurisdiction of the juvenile (family) court one who, although otherwise a "juvenile" by reason of age, is charged by the prosecutor (in his discretion) with certain enumerated offenses resulting in prosecution as an adult in the criminal court. Due process does not require an adversary hearing before the prosecutor determines what charge is filed.

State v. Grayer, 215 N.W.2d 859 (Neb. 1974)

Vague Transfer Statutes:

People v. Fields, 199 N.W.2d 217 (Mich. 1972): Michigan transfer law held unconstitutional for lack of standards. The law provided that "In any case where a child over the age of 15 years is accused of . . . a felony, the judge . . . may, after investigation and examination, including notice to parents . . . and upon motion by the prosecuting attorney, waive jurisdiction; whereupon it shall be lawful to try such child in the court having general criminal jurisdiction. . . ."

In Re F.R.W., 212 N.W.2d 130 (Wis. 1973): Wisconsin transfer law held constitutional. The Wisconsin law provided that a child may be transferred to adult court if the juvenile court judge deems it contrary to the best interests of the child or of the public to hear the case and enters an order waiving his jurisdiction.

State v. Smagula, 377 A.2d 608 (N.H. 1977): New Hampshire transfer statute merely provided that for specified crimes, the juvenile may "be certified to the superior court." The New Hampshire Supreme Court construed the statute to incorporate the *Kent* standards and held that, so construed, the statute was not unconstitutionally vague.

Defective Transfer Hearing Before Juvenile Court:

Powell v. Hocker, 453 F.2d 652 (C.A. 9th, 1971): Right to counsel at transfer hearing, notice and reasons for transfer, not waived by guilty plea in criminal trial where juvenile was represented by counsel. Judgment and sentence in criminal court vacated.

Brown v. Cox, 481 F.2d 622 (C.A. 4th, 1973): Invalid transfer hearing and subsequent guilty verdict in criminal trial does not require a reconstructed *nunc pro tunc* hearing on transfer in all cases. Here the appellate court found "to a moral and legal certainty that no juvenile court, on the record in this case, would have denied transfer" and held that this was not a case requiring a *nunc pro tunc* waiver hearing. Conviction affirmed.

Sheppard v. Rhay
440 P.2d 422 (Wash. 1968)

Different result where juvenile misrepresented his age and was tried as an adult.

HELD: Juvenile, by repeated misrepresentation of his age, waived his right to be heard in Juvenile Court.

Gault
387 U.S. 1, 18 L.Ed.2d 527, 87 S.Ct. 1428 (1967)

Fifteen-year-old Gerald Gault taken into custody by sheriff of Gila County without notice to his parents; taken to detention; mother was orally advised that he was placed in detention for making an obscene telephone call and that a hearing would be held the following afternoon in juvenile court; a petition was filed on the date of the hearing, but was not served on or shown to the boy or his parents. The petition stated only that the boy was a delinquent minor and made no reference to the factual basis for the judicial action; the complainant was not present at the hearing and no one was sworn; the juvenile officer stated that the boy admitted making the lewd remarks after questioning out of the presence of the juvenile's parents without counsel and without being advised of his right to silence: neither boy nor his parents were advised of the boy's right to silence, or of the boy's right to be represented by counsel and of the right to appointed counsel if they could not afford a lawyer.

The juvenile court committed the boy as a juvenile delinquent to the Arizona State Industrial School for a period of his minority, unless sooner discharged by due process of law.

The boy's parents filed a petition for habeas corpus which was dismissed by the Maricopa County Superior Court and the Supreme Court of Arizona affirmed (99 Ariz. 181, 407 P.2d 760).

On appeal, the Supreme Court of the U.S. reversed. Fortas (for five members) held the boy was denied due process of law because juvenile delinquency proceedings which may lead to commitment in a state institution must measure up to the essentials of due process and fair treatment including:

(1) Written notice of the specific charge or factual allegations, given to the child and his parents or guardian sufficiently in advance of the hearing to permit preparation.

(2) Notification to the child and his parents of the child's right to be represented by counsel retained by them, or if they are unable to afford counsel, that counsel will be appointed to represent the child.

(3) Application of the constitutional privilege against self-incrimination; and,

(4) Absent a valid confession, a determination of delinquency and an order of commitment based only on sworn testimony subjected to the opportunity for cross-examination in accordance with constitutional requirements.

BLACK concurred because the procedure was invalid solely because it violated, in the four respects noted above, the fifth and sixth amendments made obligatory on the states by the Fourteenth Amendment, and not because it was "unfair."

WHITE concurred except he would not reach issues as to self-incrimination, confrontation and cross-examination.

HARLAN concurring in part and dissenting in part stated that juvenile court proceedings must have the essential elements of fundamental fairness — notice, counsel, and a record — but that imposition of requirements regarding self-incrimination, confrontation and cross-examination should be deferred.

STEWART dissented stating that while a state must accord every person due process of law, the constitutional restrictions applicable to adversary criminal trials should not be applied to juvenile proceedings.

(The maximum criminal penalty would have been two months.)

Each of the Court's holdings required a safeguard in juvenile proceedings which was formerly available only in criminal trials. But the cautious method of analysis adopted by the Court indicates that while divergence between criminal and juvenile procedures may be disfavored in the future, it remains possible.

The Court argued that its item-by-item approach to procedural standards for juvenile delinquency determinations both preserved flexibility for possible later differentiation between juvenile and criminal processes and displaced none of the advantages of the present juvenile system, for example, the "commendable segregation of processing and treatment facilities used for juveniles from those used by adults," and the attempt to avoid "criminal" nomenclature for juvenile offenders and to prevent public disclosure of juvenile court records.

The scope of the holding in *Gault* was limited by the Court's cautious approach. The opinion did not deal comprehensively with the adjudicative stage of the juvenile process. The Court explicitly declined to rule on the question of the right to appeal and to a transcript nor did the Court rule on the Sixth Amendment right to public trial.

Also, the Court refused to consider the implications of *Gault* for the pretrial phase of the juvenile process.

Gault placed emphasis on the character of the sanctions rather than on the state's motive for acting or on the labels it uses. Fortas derided the feeble enticement of the civil label-of-convenience, and Harlan said that "the protections necessary here cannot be determined by resort to any classification of juvenile proceedings either as criminal or as civil."

Paralleling the civil-criminal distinction is the division between proceedings which adjudicate past conduct and those which determine present and future condition. The first is factual and retrospective, involving no discretion or expertise. The second is prospective and involves a high degree of discretion or expertise. On its facts, *Gault* dealt with the former. The issue at trial was whether to determine Gerald a delinquent because of the alleged lewd telephone call. The trial resembled traditional inquiries into criminal guilt. But a delinquency proceeding need not always follow this format. The gravamen of the complaint may not be asserted past conduct but predicted future misconduct — as bad company or beyond parental control allegations.

Both conduct (past) and condition (present and future) depend on references to be drawn from past facts. Greater reliance on expertise is characteristic of condition determination and the adversary system is suitable here. Experts have been known to err, and it is in the nature of the adversary process that it is likely to discover or suggest error. Moreover, the danger of arbitrariness is far greater in a system in which the experts' judgment is conclusive rather than merely probative.

A number of constitutional issues in fact-finding hearings are left open:

1. Are juveniles entitled to all procedures and guarantees of adult criminal trials?
2. Do the rules of evidence apply to juvenile hearings?
3. Must the burden of proof be the same as in adult cases?
4. Must the juvenile judge state the grounds for his findings when he is trier of fact? At least one court has answered this question in the negative. *In re John H.*, 145 Cal. Reporter 357, 1978 (transcript provided basis for appellate review).
5. Do juveniles have a right to a jury trial?
6. Do juveniles have a right to public proceedings?
7. Do juveniles have a right to compulsory process in obtaining witnesses?
8. Are juveniles entitled to bail?
9. Does the *Miranda* doctrine apply to juvenile proceedings?
10. Are juveniles protected against unreasonable searches and seizures?
11. Are juvenile proceedings civil or criminal in nature, a combination of both, or neither civil nor criminal?
12. Are juveniles entitled to transcripts of the proceedings?
13. Are juveniles entitled to full appeal procedures?
14. Does the double jeopardy clause apply to juvenile proceedings?
15. Must the juvenile proceeding be commenced by a presentment or indictment of a grand jury?
16. Do juveniles have the right to a speedy trial?

The Court does not require juvenile courts to apply all the constitutional rights which a defendent might claim in a criminal case.

Harlan concurring in part and dissenting in part concludes that a right to adequate and timely notice, a right to counsel and to an adequate record should be required in juvenile court. They are fundamental and "should not cause any substantial modification in the character of juvenile court proceedings." But the privilege against self-incrimination, the right to confrontation, and cross-examination should not be implanted in children's courts "at least for the present." These protections "might radically alter the character of juvenile court proceedings." They belong to "an intensely adversary system of criminal justice."

The majority opinion does not speak directly to the preliminary proceedings, such as intake or informal police adjustments, or to the postadjudicated stages of disposition.

However, *Gault's* effect on police work with juveniles is likely to be considerable. In concluding that "the constitutional privilege against self-incrimination is applicable in the case of juveniles as it is with respect to adults" the Court has brought the *Miranda* doctrine to the police handling of children. This can do violence to informality between authority and youth. The recital of the *Miranda* warning is likely to suggest that the state is about to do battle with a child and he had better watch his step.

Gault's holding relating to counsel and the privilege does not apply to all fact-finding hearings that may result in an adjudication of delinquency. These issues in *Gault* were determined in the context of proceedings "which may result in commit-

ment to an *institution* in which the juvenile's freedom is curtailed"; or, in commitment to a *state* institution. Such a commitment, after delinquency adjudication, says Fortas, calls for the use of fundamentals of the adversary system.

Is *Gault* applicable when an order of commitment to an institution cannot result from the fact-finding hearing? Is mere adjudication of "delinquency" of sufficient gravity as to require the assistance of counsel? Is it of "critical importance"? *Cf. Kent:* indictment upset because hearing, which was refused, could not terminate in incarceration but it was of "critical importance" being a link in the chain of events that could end in imprisonment.

Also consider: if parents of a child can afford private counsel who has the right to appear at *all* hearings affecting the child, is it not a denial of equal protection to children of the poor not to supply them with counsel at all stages of the proceedings?

Note: Footnote at 387 U.S. at 31 N. 48 recognizes the "uniqueness" of the juvenile court's preadjudication and postadjudication processes, as follows: "Since this 'consent decree' procedure would involve neither adjudication of delinquency nor institutionalization, nothing we say in this opinion should be construed as expressing any views with respect to such procedure. The problems of preadjudication treatment of juveniles and of postadjudication disposition are unique to the juvenile process; hence, what we hold in this opinion with regard to the procedural requirements at the adjudicatory stage has no necessary applicability to other steps of the juvenile process."

DeBacker v. Brainard

396 U.S. 28, 24 L.Ed.2d 148, 90 S.Ct. 163 (1969)

Habeas corpus by minor who, after a hearing before juvenile court judge without a jury, was found delinquent and committed to training school because of an act which if committed by an adult, would have constituted forgery, was dismissed by a district court.

Nebraska statute required hearing of juvenile matters to be without a jury and based on preponderance of the evidence.

Nebraska Supreme Court divided on the question and accordingly affirmed lower court since Nebraska law required concurrence of five judges to hold legislative act unconstitutional and only four of the seven judges held the act unconstitutional on question of jury trial and preponderance of evidence in juvenile matters.

The U.S. Supreme Court dismissed the appeal in a *per curiam* opinion expressing the view of six judges:

1. *Duncan v. Louisiana* and *Bloom v. Illinois* requiring trial by jury in state courts was not applicable under *DeStefano v. Woods* which held *Duncan* and *Bloom* prospective in application only and not applicable to trials begun prior to May 20, 1968, and DeBacker's trial was before that date.
2. Issue of whether due process was violated by state statute requiring only preponderance of evidence standard for burden of proof in juvenile court proceedings would not be decided because appellant had not objected to such standard at the juvenile court hearing and had acknowledged at the Supreme Court argument that the reasonable doubt standard was satisfied.
3. The right of the prosecutor to choose the forum, either juvenile or criminal court, would not be decided because this issue was not raised in the juvenile court, and, although it was raised in habeas corpus petition, had not been passed on in the state court, and this issue standing alone could not be reviewed there being no indication that the issue drew into question the validity of any Nebraska statute.

In the Matter of Samuel Winship

397 U.S. 358, 25 L.Ed.2d 368, 90 S.Ct. 1068 (1970)

DECISION: New York statute authorizing determination of juvenile delinquency on preponderance of evidence, rather than on proof beyond a reasonable doubt, held violative of due process.

Twelve-year-old boy had stolen $112.00 from a woman's pocketbook, which, if done by an adult, would constitute the crime of larceny. Finding of delinquency and boy placed in training school, subject to confinement for possibly as long as six years. The hearing judge acknowledged that his finding of delinquency was based on a preponderance of the evidence and rejected the contention that due process required proof beyond a reasonable doubt.

U.S. Supreme Court (five members per BRENNAN, J.) held that:

1. Due process protected an accused in a criminal prosecution against conviction except upon proof beyond a reasonable doubt.
2. Although the Fourteenth Amendment did not require that a juvenile delinquency hearing conform with all the requirements of a criminal trial, nevertheless, the due process clause required application during the juvenile hearing of essentials of due process; and,
3. Thus juveniles, like adults, were constitutionally entitled to proof beyond a reasonable doubt during the adjudicatory stage when the juvenile was charged with an act which would constitute a crime if committed by an adult.

HARLAN, J., concurring: While there was no automatic congruence between procedural requirements imposed by due process in a criminal case and those imposed by due process in juvenile cases, the requirement of proof beyond a reasonable doubt for a determination of delinquency would not jeopardize the essential elements of the state's purpose in creating juvenile courts.

BURGER C.J., joined by STEWART, J., dissented, expressing the view that the original concept of the juvenile court system was to provide a benevolent and less formal means than criminal courts could provide for dealing with the special problems of youthful offenders, and that there was no constitutional requirement of due process sufficient to overcome the legislative judgment of the states in such area, the juvenile system requiring breathing room and flexibility in order to survive.

BLACK, J., dissented:

1. The Constitution does not expressly require proof of guilt beyond a reasonable doubt and,
2. Nothing in the due process clause invalidates a state's decision, through its duly constituted legislative branch, to apply a standard of proof different from the reasonable doubt standard.

"Proof Beyond A Reasonable Doubt"

The Supreme Court's requirement in *Winship* of the standard proof beyond a reasonable doubt is based upon the standard's critical role in assuring the fairness of criminal proceedings. The "reasonable doubt" formulation did not appear before the late eighteenth century and even then only in capital cases. But there has been a widespread belief that a trier of fact in a criminal case must be as fully convinced of his conclusion as possible short of an absolute unattainable certainty. While the Court had never before specifically held the standard to be constitutionally required, it was frequently assumed to be and has been adopted throughout the country.

The Court's requirement of proof beyond a reasonable doubt of all facts necessary to constitute the crime avoids any definition of the necessary "facts." *Winship's* eventual impact may turn on the extent to which the courts will insist that some specific fact, for example, sanity, is a necessary element of a crime and, therefore, will hold that the state cannot escape the reasonable doubt standard by calling the negative (insanity) an affirmative defense to be proven by the defendant.

The Court applied the reasonable doubt standard to the adjudicatory stage of juvenile proceedings. This higher standard of proof would have no impact on the allegedly beneficial aspects of the system such as the flexibility of the pre-judicial and post-adjudicative stages. Nor would this higher standard of proof affect the confidentiality, informality, flexibility, or speed of the juvenile process.

In *Winship* the Court could have drawn a bold line, finding that the consequences of a determination of juvenile delinquency were sufficiently punitive to warrant imposing all criminal safeguards at the adjudicatory hearing. But by using a due process balancing analysis, it limited the decision to the single issue of the standard of proof and left open the possibility that it might not apply other protections which would hamper the informality, flexibility, or speed of the fact-finding hearing—*e.g.*, trial by jury would impose an inappropriate rigidity and impersonality to the hearing.

The *Winship* as well as the *Gault* decisions use due process rather than equal protection analysis out of fear that the equal protection approach would obliterate all distinctions between juvenile and criminal proceedings.

In *Winship* and in *Gault* the Court carefully isolated the adjudicatory stage from both the pretrial and dispositional stages, refusing to comment on the application of the relevant criminal safeguards in those areas. Flexibility and experimentation in these areas, in contrast to the adjudicatory stage may make possible the disposition most beneficial for the youth, and, consequently, best fulfill the purposes of the juvenile court system.

Winship suggests that the standard of proof beyond a reasonable doubt may be extended beyond juvenile proceedings, as in so-called "civil" proceedings for alcoholism, sexual psychopaths, the mentally ill and narcotics addicts.

Ivan V. v. City of New York

407 U.S. 203, 32 L.Ed.2d 659, 92 S. Ct. 1951 (1972)

Winship rule requiring proof beyond a reasonable doubt to convict juvenile of act which would be a crime if committed by an adult, held completely retroactive.

Proof beyond a reasonable doubt is an essential element of due process and fair treatment that must be afforded at the adjudicatory stage when a juvenile is charged with an act that would constitute a crime if committed by an adult.

McKeiver v. Pennsylvania

In re Barbara Burrus, et al., Petitioners

403 U.S. 528, 29 L.Ed.2d 647, 91 S.Ct. 1976 (1971)

Jury trial in state delinquency proceedings held not required under due process clause of Fourteenth Amendment.

McKeiver involved separate proceedings against two boys, 15- and 16-years-old, in juvenile court of Philadelphia, Pa., charging acts of juvenile delinquency. Conduct by

the juvenile in one case which constituted felonies, and conduct amounting to misdemeanors in the second case. The trial judge in each case denied a request for jury trial, and adjudged the juvenile as delinquent on the respective charges, one of the juveniles being put on probation and the other being committed to an institution.

In *Burrus,* a group of children, ranging in ages from 11 to 15 years, were charged by juvenile petitions in the District Court, Hyde County, North Carolina, with various acts amounting to misdemeanors under state law, which acts arose out of a series of demonstrations protesting school assignments and a school consolidation plan. The trial judge excluded the general public over counsel's objection in all but two cases; denied a request for jury trial in each case; and, entered a custody commitment order in each case, declaring the juvenile a delinquent and placing each juvenile on probation after suspending the commitments.

The Supreme Court of North Carolina deleted that portion of each order relating to the commitment, but otherwise affirmed, holding that a juvenile was not constitutionally entitled to a jury in delinquency proceedings (169 S.E.2d 879).

In the Pennsylvania case, the Supreme Court of Pennsylvania affirmed the lower court, holding that there was no constitutional right to a jury trial in the juvenile court. (265 A.2d 350)

The U.S. Supreme Court affirmed in each case. A majority, although not agreeing upon an opinion, did agree that the due process clause of the Fourteenth Amendment did not assure the right to a jury trial in the adjudicative phase of a state juvenile court delinquency proceeding.

BLACKMUN, J., wrote the majority opinion joined by BURGER, C.J., STEWART, J., and WHITE, J., holding:

1. Although the due process clause of the Fourteenth Amendment imposed the Sixth Amendment right to jury trial upon the states in certain "criminal prosecutions," this did not automatically require jury trial in state juvenile delinquency proceedings — the claimed right to jury trial instead depended upon ascertaining the precise impact of the due process requirement on delinquency proceedings.
2. The applicable due process standard was fundamental fairness, and
3. Notwithstanding the disappointments and failures of the juvenile court procedure and its idealistic hopes relating to rehabilitation, nevertheless trial by jury in the juvenile court's adjudicative stage was not a constitutional requirement, particularly since requiring jury trial might remake the juvenile proceedings into a fully adversary process, with the attendent delay, formality, and clamor of such process, and would effectively end the juvenile system's idealistic prospect of an intimate, informal protective proceeding.

WHITE, J., concurred holding that due process did not require the states to afford jury trials in juvenile courts, although they were free to do so if they so chose.

BRENNAN, J., concurred in the Pennsylvania case and dissented in the North Carolina case holding that the due process clause did not require the states to provide jury trials on demand in juvenile delinquency proceedings so long as some other aspect of the process, such as availability of public trial, adequately protected the interest that the Sixth Amendment jury trial provision was intended to serve. Since public trial was available under Pennsylvania law, that judgment is affirmed.

But North Carolina either permitted or required exclusion of the general public from juvenile trials and the trial judge denied public hearing and there appeared to be no substitute for public or jury trial in protecting the juvenile against misuse of the judicial process, that case (North Carolina) should be reversed.

HARLAN, J., concurred on the ground that criminal jury trials were not constitutionally required of the states either as a matter of Sixth Amendment law or due process.

DOUGLAS, J., joined by BLACK and MARSHALL, JJ., dissented, expressing the view that, by reason of the Sixth and Fourteenth Amendments, a juvenile was entitled to a jury trial as a matter of right where the delinquency charge was an offense that, if the person were an adult, would be a crime triable by jury.

Congress repealed the right to a jury trial in the District of Columbia juvenile court hearings in order to alleviate the backlog which had developed after juries were permitted.

The *McKeiver* holding is narrow, dealing only with the jury trial right in juvenile proceedings. But the Court's decision is significant because it may indicate an increased willingness by the Court to employ the due process balancing test to deny application of other procedural safeguards to juvenile proceedings. Thus, the Court might also find constitutionally unnecessary the adoption of the pretrial criminal safeguards which are guaranteed in such decisions as *Miranda v. Arizona*. It could be argued that the *Miranda* requirement of opportunity to consult counsel in the preadjudicative proceedings would disrupt the process of rehabilitating youthful offenders even more than the jury trial right. The presence of a lawyer would, undoubtedly, destroy the atmosphere of informality and hamper confidential conversations among the juvenile, his parents, and enforcement officials. Without such conversations, it might be difficult for the authorities to close a case without a delinquency hearing, thereby destroying another aspect of the juvenile court system's flexibility.

Harris v. New York
401 U.S. 222, 28 L. Ed. 2d 1, 91 S. Ct. 643 (1971)

Consideration must be given to the restriction on the application of *Miranda* in *Harris v. New York,* 401 U.S. 222 (1971), in which the Court held:

> Statement by defendant to police following his arrest which was inadmissible in prosecution's case-in-chief under *Miranda* because defendant had not been advised of his right to counsel and to remain silent prior to making statement, but which otherwise satisfied legal standards of trustworthiness, held properly usable for impeachment purposes to attack credibility of defendant's trial testimony.

Kirby v. Illinois
406 U.S. 682, 32 L.Ed.2d 411, 92 S. Ct. 1877 (1972)

In *Kirby v. Illinois* the U.S. Supreme Court narrowed the application of *U.S. v. Wade,* 388 U.S. 218, and *Gilbert v. California,* 388 U.S. 263, in criminal proceedings by ruling that the constitutional right to counsel did not attach until judicial criminal proceedings were initiated, and that the exclusionary rule relating to out-of-court identification in the absence of counsel did not apply to identification testimony based upon a police station showup which took place before the accused had been indicted or otherwise formally charged with any criminal offense. The *Kirby* case may point the way for most interrogations of juveniles before the filing of the formal petition in the juvenile court alleging acts of delinquency.

U.S. v. Dionisio
410 U.S. 1, 35 L.Ed.2d 67, 93 S.Ct. 764 (1973)

Compelling voice exemplar did not violate Fifth Amendment privilege against self-incrimination when used to measure the physical properties of the voice and did not violate the Fourth Amendment. Thus, a preliminary showing of reasonableness was not required.

U.S. v. Mara
410 U.S. 19, 35 L.Ed.2d 99, 93 S.Ct. 774 (1973)

U.S. v. Mara, 35 L.Ed.2d 99 (1973) dealing with handwriting exemplars follows *Dionisio supra.*

State v. Ostrowski
282 N.E.2d 359 (Ohio 1972)

Supreme Court of Ohio held that a handwriting exemplar by a fifteen-year-old boy given at his parents' home, but not in their presence, although shown to parents by police after it was obtained, when used solely for identification purposes, is a mere identifying physical characteristic and as such is outside the scope of the Fifth Amendment privilege against self-incrimination — even if the words written are identical to the words contained in a writing directly linked to the crime. The Court also held that *Miranda* warnings need not be given prior to obtaining the handwriting exemplar.

Breed v. Jones
421 U.S. 519, 44 L.Ed. 2d 346, 95 S.Ct. 1779 (1975)

Jeopardy attaches in juvenile court proceeding when the court, as trier of the facts, begins to hear evidence. Therefore, prosecution in court of general criminal jurisdiction, after an adjudicatory hearing and transfer from juvenile court, is barred by the Double Jeopardy Clause of the Fifth Amendment as applied to the States through the Fourteenth Amendment.

A petition filed in juvenile court alleged that Gary Jones, age 17, had committed acts which would constitute the crime of robbery if committed by an adult. After an adjudicatory hearing, the juvenile court found that the allegations in the petition were true and ordered that Jones be detained. A transfer hearing was held and, after finding Jones to be unfit for treatment as a juvenile, the court ordered that he be prosecuted as an adult.

In response to an information charging him with robbery, Jones pled that he had already been placed in jeopardy and convicted of the offense in juvenile court. The California state courts rejected his double jeopardy defense. He was convicted in criminal court on the robbery charge and was committed to the California Youth Authority.

The double jeopardy claim was again raised in a petition for a writ of habeas corpus filed in federal district court. The district court denied the writ but the Ninth Circuit Court of Appeals reversed. On appeal to the Supreme Court, the Ninth Circuit's judgment was affirmed.

BURGER, C.J., delivered the opinion of the Court (unanimous):

The Court's recent decisions have recognized that there is a gap between the originally benign conception of the juvenile court system and its realities. The response has been to apply the constitutional guarantees of criminal prosecutions to

juvenile proceedings. The Court expects that implementing fundamental fairness in the juvenile court system might prolong hearings and increase some of the burdens incident to a juvenile's defense. The Court is also aware that applying constitutional guarantees to the juvenile court system threatens the uniqueness of that system — a system which attempts to ameliorate the harshness of criminal justice when applied to youthful offenders. That the system has fallen short of the high expectations of its sponsors does not detract from the broad social benefits sought or from the benefits which can survive constitutional scrutiny.

The issue presented to the Court in this case is whether the defendant was "twice put in jeopardy" in the superior court proceeding because of the proceeding in juvenile court. Resolution of this issue is important to the administration of the juvenile court system.

"Jeopardy" denotes the risk associated with proceedings intended to result in criminal punishment. The purpose and potential consequences of such a proceeding imposes heavy psychological, physical, and financial burdens on the accused. The possible consequences of the adjudicatory proceeding — the inherent stigma of being found a delinquent and the deprivation of liberty — impose these same burdens on the juvenile. The double jeopardy prohibition requires that the accused be subject to these burdens only once for the "same offense". The Court concludes, therefore, that jeopardy attached when the juvenile court, as trier of the facts, began to hear evidence.

The State argues that this conclusion will "diminish the flexibility and informality of juvenile court proceedings without conferring any additional due process benefits upon juveniles charged with delinquent acts." It therefore asks the Court to fashion an exception to protect the "juvenile court's assumed ability to function in a unique manner."

Courts should be reluctant to impose on juvenile courts any requirements which would strain its resources and endanger its unique functions. If there is to be an exception to the double jeopardy prohibition, however, it must be justified by the interest of society in the juvenile court system, or of juveniles themselves, of sufficient substance to make tolerable the psychological, physical and financial burdens such an exception will place on juveniles. The Court concludes that the consequences of its decision on the juvenile court system are not so burdensome as to justify such an exception.

The Court's decision will require, in most cases, that the decision to transfer a juvenile to a court of general criminal jurisdiction be made before the adjudicatory hearing. The large number of jurisdictions which already require the transfer hearing to be conducted prior to the adjudicatory hearing suggests that this will not burden the juvenile court. Additionally, there is no reason to believe that compiling the information to make the transfer decision prior to the adjudicatory hearing, as opposed to after the hearing, will strain the juvenile court's resources. Finally, the likelihood that the

transfer decision can be made promptly in most cases reduces the resources which must be committed to the transfer hearing.

An added burden will be imposed on juvenile courts to the extent that evidence at the transfer and adjudicatory hearings is duplicative. However, this added burden is offset by two factors. First, when transfer is made, the adjudicatory hearing is eliminated; thus, there is no duplication of resources. Second, when transfer is rejected, the juvenile may be more willing to admit the offense, thus obviating the need for the adjudicatory hearing.

The nature of the evidence considered at the transfer hearing may require that, in some states, a different judge preside at the adjudicatory hearing if transfer is rejected. In those states which already have this requirement, it may be waived by the juvenile. There are strong reasons why the juvenile may waive this requirement, as indicated in the *amicus* brief of the National Council of Juvenile and Family Court Judges:

> A juvenile will ordinarily not want to dismiss a judge who has refused to transfer him to a criminal court. There is a risk of having another judge assigned to the case who is not as sympathetic. Moreover, in many cases, a rapport has been established between the judge and the juvenile, and the goal of rehabilitation is well on its way to being met.

Even where the requirement is not waived, it is difficult to see that it will substantially strain judicial resources.

Finally, the Court is persuaded that holding the transfer hearing prior to the adjudicatory hearing will aid the juvenile court system's objective. The possibility of transfer after an adjudicatory hearing places the juvenile in a dilemma. If he is cooperative in the adjudicatory hearing, he might prejudice his chances in adult court. If he is uncooperative, however, he runs the risk of an adverse adjudication and an unfavorable disposition. Thus, the risk of transfer after the adjudicatory hearing undermines the potential informality and cooperation of the juvenile system.

The Court noted in *Breed* that "nothing decided today forecloses States from requiring, as a prerequisite to the transfer of a juvenile, substantial evidence that he committed the offense charges, so long as the showing required is not made in an adjudicatory proceeding (citations omitted). The instant case is not one in which the judicial determination was simply a finding of, *e.g.*, probable cause. Rather, it was an adjudication that respondent had violated a criminal statute." 421 U.S. at 539 n.18.

Davis v. Alaska

415 U.S. 308, 39 L.Ed.2d 347, 94 S.Ct. 1105 (1974)

DECISION: A defendant's Sixth Amendment right of confrontation of witnesses is paramount to the state's interest in protecting the anonymity of juvenile offenders.

A jury found the defendant guilty of burglarizing a bar in Anchorage, Alaska. Richard Green, a minor, was a crucial prosecution witness at the defendant's trial. He testified that he spoke with the defendant and later saw the defendant with a crowbar in his hands near his home. The bar's safe was later found in the area where Green testified that he had seen the defendant. At the time of both the burglary and the defendant's trial, Richard Green was on probation by order of a juvenile court for burglarizing two cabins.

Defense counsel intended to use Green's probationary status to impeach his identification of the defendant by showing that he acted out of concern of possible jeopardy to his probation. The trial court, however granted the prosecutor's motion for a protective order preventing the defense counsel from making any reference to Green's juvenile record during cross-examination. The trial court based its action on an Alaska statute and a Rule of Children's Procedure which provided that "no adjudication, order or disposition of a juvenile case shall be admissible in a court not acting in the exercise of juvenile jurisdiction. . . ."

Defense counsel elicited from Green during cross-examination that it had crossed his mind that the police might think he was involved in the burglary. However, Green categorically denied that he had ever been questioned by law enforcement officers prior to the present incident.

The Alaska Supreme Court affirmed the defendant's conviction. The Court did not resolve the potential conflict between the defendant's right to meaningful confrontation of witnesses and the state's interest in protecting the anonymity of juvenile offenders by making the factual conclusion that defense counsel was able to adequately question Green concerning Green's possible bias or motive.

BURGER, C.J., delivered the opinion of the Court (six members):

A primary interest secured by the Confrontation Clause of the Sixth Amendment is the right of an accused to cross-examine the witnesses against him. Cross-examination tests the credibility of a witness and the truthfulness of his testimony. Traditionally, the witness can be discredited by introducing evidence of the witness' prior criminal convictions. Exposing the witness' motive in testifying is an important function of the right of cross-examination.

Defense counsel sought to show that possible bias and prejudice of Green caused him to make a faulty identification of the defendant. Green's status as a probationer could show that his identification of the defendant and his testimony were the result of either undue pressure from the police or his concern that he might be a suspect.

The cross-examination afforded the defendant was not adequate to develop the issue of Green's bias to the jury. Defense counsel was not able to make a record from which he could argue why Green was biased. To effectively cross-examine Green, counsel should have been permitted to expose to the jury the facts relating to the reliability of

the witness. The limited cross-examination that was permitted could have led the jury to believe that defense counsel was engaged in a speculative and baseless attack on the witness. Under the protection of the court's order, the witness was able to give a questionably truthful answer to defense counsel's inquiry whether he had ever been subject to questioning by law enforcement officers prior to the present incident.

The State argued that exposing a juvenile's record would impair the rehabilitative goals of the juvenile correctional procedures and might encourage the juvenile to commit further acts of delinquency, cause him to lose employment, or otherwise suffer unnecessarily. The defendant's right to probe possible bias in the testimony of a crucial identification witness, however, outweighs the state's policy of protecting juvenile offenders.

STEWART, J., concurring: The Constitution does not confer a right in every case to cross-examine a witness about his past delinquency adjudications or criminal convictions. Rather, the Court's holding is limited to the circumstances of the present case. (Discovery of juvenile records "to impeach the general credibility of a witness through cross-examination about his past delinquency adjudications or criminal convictions" is improper. *See Pickard v. State of Nevada,* 94 NV A.O. 194, 585 P.2d 1342 (1978).)

WHITE, J., and REHNQUIST, J., dissenting: No constitutional principle is at stake in the present case. The Court is second-guessing the state court's discretion to control the scope of cross-examination.

How broad is the Court's holding in *Davis*? The Court held that the right of confrontation is paramount to the state's policy of protecting the anonymity of juvenile offenders. Does this mean that past delinquency adjudications can be used in every case to impeach the credibility of a witness? The defendant in *Davis* was not relying on Green's prior delinquency adjudication; rather, he sought to show that Green's *probationary status* made him a biased or prejudiced witness. What if the possible bias or prejudice is highly speculative? The juvenile in *Davis* was on probation for burglary and was the only eye witness to connect the defendant with the burglary of the bar. What if (1) the witness' probationary term had terminated; (2) he was one of three eye witnesses; (3) the defendant was being tried for murder? Different facts might lead to different results, as Justice Stewart indicated in his concurring opinion.

One fact which particularly disturbed the Court in *Davis* was Green's assertion that he had not been questioned by law enforcement officers prior to the present incident. The Court characterized this as a "questionably truthful answer" asserted by Green under protection of the trial court's order. The Court has disfavored any rule that would allow a witness to perjure himself. In *Harris v. New York*, 401 U.S. 222 (1971), the Court stated that the privilege of a defendant to testify does not include a right to commit perjury. The state was allowed to use a statement obtained in violation of the *Miranda* decision to impeach the defendant's credibility. Was Green's "questionably truthful answer" the key factor which dictated the Court's decision in *Davis*?

Michaels v. Arizona
417 U.S. 939, 41 L.Ed.2d 661, 94 S.Ct. 3063 (1974)

Appeal from Arizona Supreme Court Dismissed for want of jurisdiction.

DOUGLAS, J., dissenting: The defendant was adjudged a delinquent in a juvenile court proceeding in which he was denied the right to a jury trial. *McKeiver v. Pennsylvania*, 403 U.S. 583 (1971) (dissenting opinion). Rather, he was tried before a juvenile judge. Juvenile judges appoint and supervise the prosecutorial staff; assign the officers to receive complaints; direct the dispositional investigations to be made; and generally control the prosecuting personnel through the power of appointment. Therefore, the juvenile was denied a right to be tried before an impartial judge. There is no justification for the discriminatory treatment afforded juveniles charged with criminal conduct.

The right of a juvenile to jury trial was disposed of in *McKeiver v. Pennsylvania*, as noted by Justice Douglas. This case raises a different problem, however: Does the traditional juvenile court structure, as described by Justice Douglas, result in a juvenile being tried before a judge so intimately connected with the system that he is not impartial and disinterested?

The Court has recognized that due process guarantees adults a right to a trial before a disinterested and impartial judicial officer. *Ward v. Village of Monroeville, Ohio*, 93 S.Ct. 80 (1972). Should (or *must*) the same right be afforded juveniles? What effect would such a decision have on the juvenile court system? *Breed v. Jones* may shed some light on this issue. There, in reviewing the impact of its decision on the juvenile court system, the Court noted that different judges may have to preside at transfer and adjudicatory hearings. The Court concluded that this would not substantially strain judicial resources.

Many family court judges hear cases involving the same family (or the children) in juvenile court. May a family recuse or disqualify a judge who has previously heard matters effecting the child or the family? Is the concept of the "impartial trier of fact" violated? If the concept is violated, is it systemic or should disqualification be done on a case-by-case basis?

Oklahoma Pub. Co. v. District Court
430 U.S. 308, 51 L.Ed.2d 355, 97 S.Ct. 1045 (1977)

DECISION: Information acquired lawfully at a juvenile proceeding which is in fact open to the public may not be suppressed by the court.

An eleven-year-old boy appeared at a detention hearing on charges which alleged delinquency by second degree murder. Members of the press were present at the

hearing with the full knowledge of the District Court, prosecutor and defense counsel. No objection was made to their presence or to the child being photographed. The press learned the boy's name, photographed him, and subsequently disseminated this information through the news media. At the boy's arraignment, the Oklahoma District Court issued a pre-trial order which enjoined publication of the boy's name and photograph. Oklahoma statutes provide that juvenile proceedings are to be held in private "unless specifically ordered by the judge to be conducted in public," and that juvenile records are open to public inspection "only by order of the court." The Oklahome Supreme Court relied on these statutes and reasoned that in the absence of a specific order opening the proceeding to the public, the District Court's pre-trial order was proper.

The Court has refrained from intimating any view on the constitutionality of state policies denying the public or the press access to records of juvenile proceedings. *Cox Broadcasting Corp v. Cohn*, 420 U.S. 469 (1975). Similarly, the constitutionality of these policies is not now before the Court. The constitutionality of the Oklahoma statutes, relied on by the state Supreme Court, is not challenged. The sole issue is whether a state court can prohibit publication of widely disseminated information obtained at court proceedings which were in fact open to the public.

The Court has previously stated that the press cannot be prevented from truthfully publishing information released to the public in court records. *Cox, supra*. Once a public hearing is held, the information obtained there is not subject to prior restraint. *Nebraska Press Assn. v. Stuart*, 427 U.S. 539 (1976).

The Oklahoma Supreme Court reasoned that because the District Court did not distinctly and expressly order the hearing to be public, the statutory requirement that the proceedings be closed to the public applied. The absence of an express order opening the proceeding to the public, however, is immaterial. No objection was made to the presence of the press who were at the hearing with the full knowledge of the presiding judge, prosecutor and defense counsel. Thus, the information was obtained lawfully and with the state's implicit approval. The name and picture of the juvenile, having been publicly revealed in connection with the prosecution of the crime, could not be suppressed by the District Court's order.

As the Court's opinion in *Oklahoma Publishing* makes clear, the question of whether the public or press can be constitutionally excluded from juvenile proceedings remains to be decided. Would resolution of this issue be different if (1) a juvenile asserted the right to a public trial or (2) the press asserted a right to attend the juvenile proceeding? What interest does the right to a public trial protect? What interest is protected by the freedom of the press? Can these interests be balanced against competing state interests or are they absolute?

Government of the Virgin Islands v. Brodhurst, 285 F.Supp. 831 (D.C.V.I. 1968) involved the conviction of newspaper personnel for publishing, without the court's approval, the names of children who were under the jurisdiction of the court. The relevant statute provided that "the name or picture of any child under jurisdiction of the court shall not be made public by any newspaper . . . except as authorized by order of the court." The defendants contended that the statute abridged the freedom of the press. The district court rejected the defendant's view that the freedom of the press could only be restrained where there was a clear and present danger to the government. Rather, the district court felt that the interests of society, juveniles and the press should be balanced against each other and adopted the conclusion of the lower court that the interest of rehabilitating juveniles by shielding them from publicity justified the limitation on the press.

Stump v. Sparkman

435 U.S. 349, 55 L.Ed.2d 331, 98 S.Ct. 1099 (1978)

DECISION: Judge who grants sterilization petition is only liable in subsequent damage suit by sterilized person if he acted in clear absence of all jurisdiction.

Linda Sparkman's mother, Ora McFarlin, petitioned the Circuit Court of DeKalb County, Indiana, to have Linda sterilized. The affidavit in support of the petition stated that Linda was "somewhat retarded," attended public schools and had begun dating older youths and men. McFarlin further stated in the affidavit that she was not able to continually observe Linda to prevent "unfortunate circumstances." Judge Stump signed the ex parte order. No guardian was appointed to represent Linda, no notice of the petition was given to her and no hearing was held. When the sterilization was performed Linda was told she was having her appendix removed. Two years later, when Linda and her husband discovered that she had been sterilized, they brought suit under 42 U.S.C. §§1983 and 1985 (3) against Ora McFarlin, her attorney, Judge Stump and the physicians who performed the surgery. The district court held that Judge Stump was clothed with absolute judicial immunity, and, in the absence of the necessary state action, dismissed the suit. On appeal, the Seventh Circuit reversed.

The Supreme Court reversed the decision of the Seventh Circuit.

WHITE, J., delivered the opinion of the Court (five members):

To insure the proper administration of justice, a judicial officer should be free to act without fear of the personal consequences of his decision. If the action he took was in error or done maliciously or in excess of his authority, he will be protected by judicial immunity unless he acted in the clear absence of all jurisdiction.

Judge Stump functioned under a broad jurisdictional grant. As an Indiana circuit court judge, he had jurisdiction in all cases at law and in equity and in all cases where

jurisdiction was not conferred in some other tribunal. At the time that Judge Stump acted in this case, there was no statutory or case law which prevented him from considering a sterilization petition. Because of this broad, unlimited grant of jurisdiction, neither the procedural errors which may have been committed nor the absence of a specific statute authorizing his approval of sterilization petitions deprived him of judicial immunity.

Respondents argue that even if Judge Stump had jurisdiction to consider the sterilization petition, he is nevertheless liable for his actions because he did not perform a "judicial act." The lack of formality in the sterilization proceeding — the absence of a docket number, the fact that the petition was approved in an ex parte proceeding without a hearing, and the fact that the petition was not filed in the clerk's office — does not determine whether Judge Stump performed a "judicial act." Rather, an act is a "judicial" one if it is normally performed by a judge and the parties dealt with the judge in his judicial capacity. State judges frequently consider petitions concerning the affairs of minors. Here, it can be inferred from the record that the parties dealt with Judge Stump precisely because he was an Indiana circuit court judge. It follows, therefore, that the approval of the sterilization petition was a "judicial act." Because Judge Stump had jurisdiction to perform this act, he is clothed with judicial immunity and cannot be sued for damages by the sterilized minor.

STEWART, J., joined by MARSHALL, J., and POWELL, J., dissenting: Judges are immune from monetary liability only when they perform judicial acts. Indiana provided administrative proceedings for the sterilization of institutionalized persons. Only after a sterilization order was entered in those proceedings could a circuit court review the sterilization decision. Thus, approval of the sterilization petition by Judge Stump was not a "judicial act" normally performed by a judge. Further, the Court should not rely on Judge Stump's statement that he was acting in his judicial capacity or the petitioner's perception of the role that Judge Stump was performing when he approved the sterilization petition. Rather, the Court should consider the factors which support judicial immunity from liability to determine whether a judge performed a "judicial act." "Judicial acts" are normally performed during a judicial proceeding in which "litigants" present a "case" to the judge. Normally, an appeal can be taken to correct any error committed by the court. In the present case, none of these factors were present. The absence of any of these attributes of a judicial proceeding leads to the conclusion that Judge Stump did not perform a "judicial act" when he approved the sterilization petition.

POWELL, J., dissenting: The doctrine of absolute judicial immunity was developed because the judicial system provided other means for protecting aggrieved individuals. When a judicial officer acts in a manner that precludes the aggrieved individual from vindicating his rights in alternative forums, as Judge Stump did in the present case, judicial immunity should not be available to shield the judge from liability.

Morales v. Turman

430 U.S. 322, 97 S.Ct. 1189, 51 L.Ed.2d 386 (1977)

Petitioners challenged alleged unconstitutional and punitive conditions in Texas institutions housing juvenile delinquents. A single district judge adjudicated the merits of this claim. The Court of Appeals held that a three judge court should have been convened. The Supreme Court reversed the Court of Appeals and remanded for further proceedings.

The District Court decision is reported at 383 F.Supp. 53 (E.D. Tex. 1974). The court held that institutionalized juvenile delinquents were entitled to treatment based on the federal constitution and Texas statutes. The court also found that certain practices in Texas Youth Authority institutions constituted cruel and unusual punishment.

Swisher v. Brady

438 U.S. ___, 57 L.Ed.2d 705, 98 S.Ct. 2699 (1978)

DECISION: Maryland Rule of Procedure 911 which allows the state to file exceptions to a juvenile court master's proposed finding of nondelinquency does not violate double jeopardy clause.

The Maryland Court of Appeals promulgated Rule 911 to govern the use of masters in juvenile proceedings. The master is authorized to make *proposed* findings, conclusions, recommendations or orders. The State may file exceptions with the juvenile judge. The juvenile judge can act on the exceptions on the basis of the record made before the master and additional evidence to which the parties do not object. The judge retains the power to accept, reject or modify the master's proposals, or to remand the matter for further proceedings.

The three-judge district court held that a juvenile is placed in jeopardy when he is subjected to the hearing before a master. It also held that the juvenile court judge's review of the record constituted a "second proceeding" in violation of the Double Jeopardy Clause.

On appeal, the United States Supreme Court reversed.

BURGER, C.J., delivered the opinion of the Court (six members):

The Double Jeopardy Clause prevents the prosecution from presenting evidence at a second proceeding which it failed to present in the first proceeding. Additionally, the Clause precludes the prosecution from taking the issue of guilt to a series of persons empowered to make a binding determination. Finally, the Clause protects the defendant from the embarrassment, expense and ordeal of a second trial.

Rule 911 authorizes the use of masters to meet the heavy burden of juvenile court caseloads without violating the Double Jeopardy Clause. After the State presents its

evidence to the master the record is closed. Additional evidence can only be received by the juvenile court judge if the minor consents. Maryland has conferred the power of fact-finder and adjudicator solely on the juvenile court judge, who may accept, modify or reject the *proposals* of the master. Therefore, the State is precluded from presenting additional evidence to multiple fact-finders. Finally, the Rule 911 procedure does not subject the juvenile to the embarrassment, expense and ordeal of a second trial.

In *Breed v. Jones*, this Court held that a defendant was twice put in jeopardy when he was subjected to a trial in an adult criminal court after a full adjudicatory hearing was held in juvenile court. In *Breed*, the Court found that the two proceedings were separate and distinct and that the juvenile court had the power to deprive the juvenile of this liberty. Unlike *Breed*, the Maryland scheme subjects the juvenile to only one proceeding.

MARSHALL, J., joined by BRENNAN, J., and POWELL, J., dissenting: It is conceded that under the Maryland scheme, jeopardy attaches when the juvenile court master begins to hear evidence. The master acts as a fact-finder. The master transmits his proposed findings of fact, conclusions of law and disposition recommendations to the juvenile court judge. The judge is expressly authorized to enter his order solely on the master's findings. Once the master hears evidence and announces his proposed findings, the juvenile may justifiably expect the decision to be final. The Maryland scheme gives the State a second opportunity to persuade a decision maker of the juvenile's guilt after an adverse ruling by the master. For these reasons, Rule 911 violates the Double Jeopardy Clause.

Additionally, the adjudicatory scheme implemented by Rule 911 raises serious due process issues. In *In re Winship*, this Court held that a juvenile may only be convicted upon proof beyond a reasonable doubt. *Winship* suggests that only the most reliable procedures may be utilized in making this determination. Under the Maryland scheme, final fact findings are made by the juvenile court judge. These factual findings are made by the judge without hearing live testimony and independently assessing the witnesses' credibility. It appears, therefore, that the Maryland system which bifurcates the evidentiary and adjudicatory proceedings violates the Due Process Clause.

IN THE SCHOOLS

Goss v. Lopez

419 U.S. 565, 42 L.Ed.2d 725, 95 S.Ct. 729 (1975)

DECISION: Due process requires that a student who is to be suspended from public school for 10 days or less must be given notice of the charges against him, and explanation of the evidence, and an opportunity to present his version of the facts.

Ohio law authorized public school principals to suspend or expel a pupil from school for up to 10 days for misconduct. The student's parents had to be notified of the reasons for the suspension or expulsion within 24 hours. An expelled student or his parents could appeal the decision to the Board of Education. Suspended students were not entitled to a hearing.

The named plaintiffs in this class action suit were suspended from school for up to 10 days. The complaint alleged that the Ohio statute was unconstitutional because students could be deprived of their right to an education in violation of procedural due process. The three judge district court held that the plaintiffs, who were suspended without a hearing prior to or within a reasonable time after the suspension, were denied due process of law. The Supreme Court affirmed.

WHITE, J., delivered the opinion of the Court (five members):

There is no constitutional right to an education. Ohio, however, provides a free education to all residents between ages five and twenty-one. Therefore, plaintiffs were entitled to a public education based on state law.

The Fourteenth Amendment prohibits the State from depriving any person of life, liberty or property without due process of law. A student's entitlement to a public education, created by state law, is a property interest protected by the due process clause. Moreover, suspension from school could damage the student's reputation and interfere with later opportunities for higher education and employment. Thus, suspension from school interferes with the student's liberty interest which is also protected by the due process clause. Neither the temporary denial of the student's property interest nor the interference with his liberty interest are so insubstantial that the State can ignore the minimum procedural requirements of the due process clause.

The question remains as to what process is due. The student's interest is to avoid unfair or mistaken exclusion from the educational process. On the other hand, school officials must be able to maintain order for the educational function to be performed. Suspension not only maintains order but is itself an educational device. The interest of the student and of the school officials must be accommodated.

Due process does not require that the student be afforded counsel, the right to confront and cross-examine witnesses or to call his own witnesses. Such procedures would unduly burden administrative facilities and divert educational resources. Further, too much formality and adversity would be too costly and would destroy the suspension process as an educational tool.

Due process does require that the student be given oral or written notice of the charges against him, an explanation of the evidence and an opportunity to present his version of the facts. In the majority of cases, notice may be given at the time of the hearing — usually immediately following the alleged misconduct. As a general rule, the notice and hearing should precede the student's suspension. However, where the

student's presence endangers persons or property, or threatens the academic process, the student may be immediately suspended so long as notice and a hearing follow as soon as practicable thereafter.

POWELL, J., joined by BURGER, C.J., BLACKMUN, J., and REHNQUIST, J., dissenting:

The property interest which due process protects is created and defined by state law. The Ohio statute did not create an unqualified right to free public education, but authorized principals to suspend a student for as much as 10 days. Thus, the student's entitlement to education is subject to the principal's power of suspension. Therefore, no property interest in an education free from suspension exists to which the due process clause attaches.

Even if a property interest in education does exist, due process only comes into play when the State's action results in a severe detriment or grievious loss. The maximum suspension authorized is for no more than 5% of the school year. Absences of such a short period cannot be said to result in a serious or significant infringement of education.

The Court has previously recognized that school authorities must have broad discretionary authority in the daily operation of public schools. The State has an interest in administering the public school system for the benefit of all the students and the general public. Maintaining order in the classrooms is a major educational problem. If hearings are required for a substantial number of short-term suspensions, school authorities will have little time to do anything else.

The normal teacher-pupil relationship is one in which the teacher assumes the roles of educator, advisor, friend and parent. The due process procedures mandated by the Court inject an element of adversity into the relationship. The informal method of resolving differences was more compatible with the interest of the student and teacher than the procedures adopted by the Court.

School authorities make many decisions in the educational process which effect students. They decide what courses are required, whether a student passes a particular course and whether he will be promoted to the next grade. These decisions may impair one's educational entitlement to a greater extent than a short-term suspension from school. Unless there is a sound distinction between these types of discretionary decisions and the decision to suspend a student, it seems apparent that due process procedures will have a serious impact upon public education.

Wood v. Strickland

420 U.S. 308, 43 L.Ed.2d 214, 95 S.Ct. 992 (1975)

DECISION: School board member is not immune from liability under §1983 if he knew or reasonably should have known that his official action violated the constitu-

tional rights of the aggrieved student or if the action was taken with the malicious intention to injure the student or deprive him of his constitutional rights.

Plaintiffs "spiked" a school punch with alcoholic beverages. The use or possession of alcoholic beverages at school or school sponsored activities was a ground for suspension from school. After the plaintiffs talked with the school's principal, they were suspended from school for two weeks subject to the decision by the school board. Neither the plaintiffs nor their parents attended the school board meeting. During the meeting a teacher reported that he had heard that one of the plaintiffs was involved in a fight at a basketball game that evening. The board voted to expel plaintiffs from school for the remainder of the semester, approximately three months.

Plaintiffs brought this action under 42 U.S.C. §1983, claiming that their constitutional rights to due process had been violated. They prayed for compensatory and punitive damages and injunctive relief. The district court ruled that there was no evidence that the defendants acted maliciously and directed a verdict in their favor. The court of appeals held that the proper test was whether, in light of all the circumstances, the defendants acted in good faith. The Supreme Court modified the court of appeal's decision and affirmed.

WHITE, J., delivered the opinion of the Court (five members):

School board members function as legislators and adjudicators. When confronted with student misconduct, they must take prompt action based on information supplied by others. If denied any measure of immunity, they would be actuated by intimidation rather than fearless and principled decision making. Absolute immunity, however, would not sufficiently contribute to principled decisions so as to justify denying students a remedy for intentional or inexcusable deprivations. The issue, therefore, is how the appropriate standard of immunity should be formulated.

The appropriate standard contains elements of both an objective and subjective test of good faith. The official must act with a belief that he is doing right. However, a school board member must also know the basic, unquestioned constitutional rights of his students. Therefore, a school board member is not immune from liability for damages if he knew or should have known that his actions would deprive the student of his clearly established constitutional rights.

POWELL, J., joined by BURGER, C.J., BLACKMUN, J., and REHNQUIST, J., dissenting: Today's decision significantly enhances the possibility of personal liability of school board members for their official actions. The Court's standard of immunity requires school board members to know the "settled, indisputable law" and "unquestioned constitutional rights" of students. This standard is more stringent than what has previously been applied to governors and policemen. The proper standard for qualified immunity should be whether, in light of the surrounding circumstances and the discretion and responsibility of his office, the official acted reasonably and in good faith.

Baker v. Owen

395 F.Supp. 294 (D.N.C.), *Aff'd,* 423 U.S. 907 (1975)

DECISION: North Carolina statute which authorizes school officials to use reasonable force to maintain order in schools does not infringe on parental right to discipline children. However, corporal punishment must be administered in accordance with due process of law.

Mrs. Baker requested that school officials not corporally punish her son, Russell, a sixth grader. Russell was paddled for violating a rule announced by his teacher. The North Carolina statute authorized the use of reasonable force to discipline students and to maintain order. Mrs. Baker alleged that the statute violates her parental right to determine disciplinary methods for her child. Russell claimed that the manner in which he was punished violated his right to procedural due process and was cruel and unusual.

Parents have a constitutional interest in the care, custody and nurture of their children. This interest includes the right to determine disciplinary methods for the child. However, the parent's interest in disciplining the child is not fundamental. Corporal punishment of school children has historically been accepted in our society.

The use of corporal punishment in schools can be justified if it is rationally related to a legitimate state purpose. The North Carolina statute authorized the use of reasonable punishment "to restrain or correct pupils and maintain order." The state has assumed the duty of providing an education to its young people. It is essential that order and discipline be maintained to fulfill this duty.

Corporal punishment is an effective disciplinary tool because of the speed with which it is administered. The child, however, has a legitimate interest in avoiding unnecessary or arbitrary punishment. To protect the child's interest, corporal punishment may not be used unless the child is first warned that his behavior subjects him to its use. Except in cases of gross misconduct, less drastic methods of discipline, *e.g.,* extra work, should initially be used in order to provide the child with notice that his behavior will subject him to punishment. Further, corporal punishment should only be administered when a second school official is present. The second official should be advised of the reason for the punishment in the child's presence. Finally, a written explanation of the reasons for the punishment and the name of the second official who witnesses the punishment should be given to the child's parents upon request.

Plaintiffs did not contend that corporal punishment was cruel and unusual per se. Rather, the claim was made that the particular punishment Russell received was cruel and unusual. Factually, the court found that the punishment administered was not cruel and unusual.

Ingraham v. Wright
430 U.S. 651, 51 L.Ed.2d 711, 97 S.Ct. 1401 (1977)

DECISION: Prohibition against cruel and unusual punishment does not prevent infliction of corporal punishment in public schools. Due process is satisfied by availability of common law remedy if punishment exceeds scope of common law privilege.

Florida statute and school board policy authorized use of corporal punishment in public schools, which was viewed as a less drastic disciplinary measure than suspension or expulsion. After plaintiffs were paddled by school authorities, they brought suit for damages and injunctive relief in district court. At the conclusion of the plaintiff's evidence, the district court dismissed the complaint and the Fifth Circuit, sitting en banc, affirmed. The Supreme Court affirmed on appeal.

POWELL, J., delivered the opinion of the Court (five members):

Corporal punishment has been a traditional means of disciplining school children since the colonial period. The common law recognized a privilege to inflict reasonable, but not excessive corporal punishment on students. If the force is excessive or unreasonable, the teacher may incur civil or criminal liability.

The Eighth Amendment prohibition against cruel or unusual punishment was designed to protect those convicted of crimes. This is confirmed by the early English history and the history of the amendment in the United States. School children have little need for the protections of the amendment. Students, unlike prisoners, are not physically restrained from returning to the community. Supervision by the community affords protection from the abuses in school which the Eighth Amendment offers prisoners. Therefore, the Eighth Amendment is inapplicable to the use of corporal punishment in schools.

The Fourteenth Amendment prevents the deprivation of life, liberty or property without due process of law. Our liberty protected by the due process clause is the right to be free from unjustified intrusions on personal security. The state cannot physically punish an individual unless it is done by due process of law.

The common law — which recognized the privilege of corporal punishment in school — also provided remedies for its abuse. There is no deprivation of substantive rights so long as the punishment is within the limits of the common law privilege. Moreover, the availability of civil and criminal sanctions for abuse of the privilege, together with the openness of the school environment, provide protection against unjustified punishment. The purpose of the due process clause — to prevent arbitrary or unjustified state action — is satisfied by the common law remedies. Even if pre-punishment procedures were preferable, to require hearings before any punishment would burden the use of corporal punishment as a disciplinary device. Additionally, such a requirement would divert educational resources from the educational process. The incremental benefit which advance hearings would provide to students would not justify the added societal costs.

WHITE, J., joined by BRANNAN, J., MARSHALL, J., and STEVENS, J., dissenting:

If some forms of punishment are so barbaric that they cannot be imposed on criminals, similar punishments cannot be imposed for breaches of school discipline. By its words the Eighth Amendment is not limited to cruel and unusual punishment *of criminals*, but it prohibits cruel and unusual ***punishment***. Spanking in public schools — designed to rehabilitate or deter — is punishment within the meaning of the Eighth Amendment. The fact that school officials are subject to public scrutiny or that state remedies are available to the student does not alter this conclusion.

Due process is designed to protect the individual from erroneous or mistaken punishment. The availability of a private tort action protect the individual from excessive punishment. It does not protect him from erroneous punishment if the official was acting in good faith. More importantly, the remedy provided by the court — a tort suit for damages — occurs after the punishment has been inflicted. Physical pain cannot be alleviated by damages.

PART II

Rights of Illegitimate Children

Levy v. Louisiana
391 U.S. 68, 20 L.Ed.2d 436, 88 S.Ct. 1509 (1968)

Glona v. American Guarantee & Liability Ins. Co.
391 U.S. 73, 20 L.Ed.2d 441, 88 S.Ct. 1515 (1968)

Labine v. Vincent
401 U.S. 532, 28 L.Ed.2d 288, 91 S.Ct. 1017 (1971)

Weber v. Aetna C & S Co.
406 U.S. 164, 31 L.Ed.2d 768, 92 S.Ct. 1400 (1972)

Levy v. Louisiana held invalid, as denying equal protection of the law, a Louisiana statute which barred an illegitimate child from recovering for the wrongful death of its mother when such recoveries by legitimate children were authorized.

Glona v. American G & L Ins. Co.: A Louisiana law that provided that a mother could not recover benefits for the death of her illegitimate son is unconstitutional.

Labine v. Vincent upheld, against constitutional objections, Louisiana intestacy laws which barred an acknowledged illegitimate from sharing equally with legitimate children in her father's estate. BRENNAN, J., with DOUGLAS, WHITE, and MARSHALL, JJ., dissented, expressing the view that the state's intestate succession laws, insofar as they treated illegitimate children whose fathers had publicly acknowledged them differently from legitimate children, violated the equal protection clause of the Fourteenth Amendment, there being no rational basis for the distinction made by the state.

Weber: State's (Louisiana) Workmen's Compensation law, denying equal recovery rights to dependent unacknowledged illegitimate children, held unconstitutional.

U.S. Supreme Court held that *Levy v. Louisiana* rather than *Labine* controlled the facts of the instant case. The state's denial of equal Workmen's Compensation recovery rights to dependent unacknowledged illegitimate children violated the equal protection clause of the Fourteenth Amendment because the statutory classification bore no rational relationship to any legitimate state interest, compelling or otherwise.

Richardson v. Davis
342 F.Supp. 588 (D. Conn.), *cert. denied*, 409 U.S. 1069,
34 L.Ed.2d 659, 93 S.Ct. 678 (1972)

Four Supreme Court decisions seriously undermine the common law doctrine that an illegitimate child is "nullius filius" and hold that he or she is a person within the meaning of the Fourteenth Amendment.

Levy v. Louisiana, 391 U.S. 68 (1968): A Louisiana law which did not allow illegitimate children, dependent on their mother for support, to recover for her wrongful death held unconstitutional.

Glona v. American Guarantee and Liability Insurance Company, 391 U.S. 73 (1968). Louisiana law that a mother could not recover benefits for the death of her illegitimate son held unconstitutional.

Labine v. Vincent, 401 U.S. 532 (1971) upheld Louisiana law which permitted illegitimate children to inherit *only* to the *exclusion* of the state.

Weber v. Aetna, 406 U.S. 164 (1972) struck down a discrimination against illegitimate dependent children in Workmen's Compensation law.

The Social Security Act provision discriminating against illegitimate children in payment of benefits on death of wage earning parent causing them to lose benefits if family award is not sufficient to meet maximum payments to wife and legitimate children of the father, even though illegitimate child has been either acknowledged or supported regularly by the parent, constituted as an invidious discrimination unrelated to the purposes of the law or to any legitimate legislative consideration governing the Social Security Act, and enforcement of the provision would be enjoined.

Gomez v. Perez
409 U.S. 535, 35 L.Ed.2d 56, 93 S.Ct. 872 (1973)

Texas statute requires natural father to support his legitimate children. State court held father under this statute is not required to support his illegitimate children.

U.S. Supreme Court held: Under the equal protection clause of the Fourteenth Amendment a state may not discriminate against illegitimate children by denying them substantial benefits accorded children generally.

R.S. Linda v. D. Richard and Texas et al.
410 U.S. 614, 35 L.Ed.2d 536, 93 S.Ct. 1146 (1973)

Mother of illegitimate child brought class action in U.S. District Court of Texas for injunction against discriminatory application of Texas criminal statute making parents wilful refusal to support child under 18 a misdemeanor. The statute makes no distinction between legitimate and illegitimate children but Texas courts construe it to apply only to legitimate children. Three judge district court dismissed for want of standing.

U.S. Supreme Court affirmed: MARSHALL, J. (for five members) held mother failed to show that enforcement of the statute would result in support of her child rather than in the mere jailing of the child's father. Thus the "direct" relationship between the alleged injury and the claim sought to be adjudicated, a prerequisite of standing to bring an action, is absent in this case. The Court noted (f.n. 6): "Since we dispose of this case on the basis of lack of standing, we intimate no view as to the merits of petitioners' claim. But *cf. Gomez v. Perez.*"

Lorenzo Willis, etc. v. Prudential Ins. Co. of America
405 U.S. 318, 31 L.Ed.2d 273, 92 S.Ct. 1257 (1972)

Per Curiam: The Judgment is affirmed by an equally divided Court. (POWELL, J., not participating). Question presented was whether illegitimate children qualified as beneficiaries under the Serviceman's Insurance Act.

Case below — 227 Ga. 619, 182 S.E.2d 420: (1971) Ga. Sup. Ct. considered whether or not the meaning of the term "child or children" in the beneficiary clause of the Serviceman's Group Life Insurance Act, 79 Stat. 883 (1965), 38 USCA #770, must be determined by state or federal law. Majority opinion held state law controls. Georgia law agrees with *Labine v. Vincent,* 401 U.S. 532, 28 L.Ed.2d 288 (1971) which held Louisiana statute denying the right of an illegitimate child to inherit from his intestate father, did not violate the equal protection and due process clauses of the U.S. Constitution.

Dissent in Georgia Supreme Court argued that federal law should control in interpretation of Federal Serviceman's Life Insurance so as to produce uniformity throughout U.S. and *Levy* should control.

Note: Kurland suggests the *Willis* decision delays the "overruling or isolation as sui generis" of the *Labine* case.

Griffin v. Richardson
346 F.Supp. 1226 (D.Md.), *Aff'd*, 409 U.S. 1069,
34 L.Ed.2d 660, 93 S.Ct. 689 (1972)

Class action by illegitimate child challenging constitutionality of Social Security Act section on ground it discriminates against certain illegitimate children. Three judge district court held that it is a violation of due process to discriminate arbitrarily among members of a group established by an Act of Congress (#203(a) of the Social Security Act); that a denial of benefits payable to certain illegitimate children so as to favor stepchildren was discrimination against illegitimate children and violative of due process clause of the Fifth Amendment.

New Jersey Welfare Rights v. Cahill
411 U.S. 619, 36 L.Ed.2d 543, 93 S.Ct. 1700 (1973)

New Jersey family assistance program limits benefits to only those families which consist of a household composed of two adults of the opposite sex ceremonially married to each other who have at least one minor child of both, the natural child of one and adopted by the other, or a child adopted by both, discriminates against illegitimate children, so as to violate the equal protection clause of the Fourteenth Amendment.

The U.S. Supreme Court relied on *Weber, Levy,* and *Gomez v. Perez* in its conclusion that the claim of denial of equal protection must be sustained — "there can be no doubt that the benefits extended under the challenged program are as indispensable to the health and well-being of illegitimate children as to those who are legitimate."

Trimble v. Gordon
430 U.S. 762, 52 L.Ed.2d 31, 97 S.Ct. 1459 (1977)

DECISION: Illinois Probate Act, which allows legitimate children to inherit by intestate succession from both parents, but which allows illegitimate children to inherit only from their mother, denies illegitimate children the equal protection of the law and is unconstitutional.

Deta Mona Trimble is the illegitimate daughter of Jessie Trimble and Sherman Gordon. In a paternity suit, Gordon was found to be Deta's father and was orderd to pay child support. Gordon subsequently died intestate.

Deta Mona Trimble was not allowed to inherit Gordon's estate. Illinois law provides that illegitimate children can only inherit from both parents.

The Illinois Supreme Court noted that the statute was intended to modify the common law rule which prevented an illegitimate child from inheriting from anyone. The court found that preventing an illegitimate from inheriting from its father encouraged family relationships and provided an orderly method to distribute property at death. Additionally, the court noted that the harshness of the statute, as it affected illegitimates, could be avoided by the decedent leaving a will providing for the child. The court therefore upheld the constitutionality of the statute.

POWELL, J., delivered the opinion of the Court (five members): The statutory classification which provides that illegitimate children are to be treated different than legitimate children for purposes of intestate succession cannot be sustained unless the classification bears a rational relationship to a legitimate state purpose. The state cannot promote legitimate family relationships by visiting the consequences of an illegitimate parent's conduct nor alter their own status. Lines of heirship based on paternity may be drawn by the state to facilitate the disposition of property. Difficulties of proving paternity, however, do not justify the total disinheritance of illegitimate children whose fathers die intestate, as the present statute does. A different case would be presented if the statute merely eliminated imprecise and burdensome methods of proof. Here, paternity was established in a state court prior to the decedent's death. The State's interest in the orderly distribution of property would not be jeopardized by allowing Deta to inherit in these circumstances. Finally, the ability of the decedent to circumvent the statutory inheritance provisions by providing for the illegitimate child in a will is not responsive to the constitutional inquiry of whether the statute itself denies illegitimates the equal protection of the law.

Chief Justice BURGER, STEWART, J., BLACKMUN, J., and REHNQUIST, J., dissent: The present case is indistinguishable from *Labine v. Vincent*, 401 U.S. 532 (1971). The decision of the Illinois Supreme Court should be affirmed.

REHNQUIST, J., dissenting: The distinction between legitimates and illegitimates for purposes of intestate succession is neither mindless nor patently irrational. Therefore, illegitimate children are not denied equal protection of the law and the judgment below should be affirmed.

Mathews v. Lucas

427 U.S. 495, 49 L.Ed.2d 651, 96 S.Ct. 2755 (1976)

DECISION: Social Security Act classifications are reasonably related to the likelihood of a child's dependency on a deceased wage earner at the time of his death. The Act does not impermissibly discriminate against illegitimate children as compared to legitimate children.

The Social Security Act provides that dependent children of insured wage earners are entitled to surviving child's benefits upon the death of the parent. A child is

considered dependent if the parent contributed to his support or was living with him at the time death. Children who are legitimate or who are heirs of the decedent are considered dependent, and are not required to furnish proof of dependency. Additionally, a child is presumed dependent if the decedent, prior to his death, had been adjudged the child's father, or had been ordered to support the child, or had acknowledged his paternity in writing, or had gone through a purported, but legally deficient, marriage ceremony.

Ruby and Darin Lucas, the illegitimate children of Robert Cuffee, applied for surviving children's benefits after Robert Cuffee died. The children had lived with the decedent until two years before his death. The benefits were denied because the children, unaided by the statutory presumptions of dependency, failed to prove that their father lived with them or contributed to their support at the time of his death.

The children filed suit in district court alleging that they were denied equal protection of the law because other children, including all legitimate children, were entitled to survivor's benefits regardless of actual dependency. The district court found that the statutory provisions regarding presumptive dependency impermissibly discriminated against illegitimate children. On appeal, the Supreme Court reversed.

BLACKMUN, J., delivered the opinion of the Court (six members):

Legislation which treats legitimate and illegitimate children differently is not constitutionally suspect and therefore need not withstand strict judicial scrutiny. Rather, such classifications are permissible if they are rationally related to a legitimate governmental interest.

The purpose of the present statute is to provide survivor's benefits to children who were dependent on an insured wage earner at the time of his death. The presumptions of dependency are based on readily documented facts. They avoid the burden and expense of specific case by case determinations where dependency is objectively probable. Thus, the presumptions facilitate the administration of survivor's benefits. The classifications are reasonable and are consistent with the intent of Congress to provide benefits to children who were dependent on the wage earning parent at his death.

Finally, unlike classification schemes in prior cases, illegitimate children are not conclusively denied survivor's benefits under the Act. Illegitimate children are denied benefits only where the facts which raise the six statutory presumptions of dependency are absent and the child is unable to prove that the decedent lived with him or contributed to his support at the time of his death. Thus, the statute is carefully tuned to considerations other than the legitimacy of the child.

STEVENS, J., joined by BRENNAN, J., and MARSHALL, J. dissenting:

Illegitimates are a traditionally disfavored class. The Court should examine with vigilance any classification which involves illegitimacy.

The purpose of the statute is to provide survivor's benefits to children who were dependent on the deceased wage earner. The classifications conclusively presume that all legitimate children and some illegitimate children were dependent on the wage earner when in fact many were not. Thus, the classifications are overinclusive. Similarly, the classifications are underinclusive because, as demonstrated by the plaintiffs, children who were actually dependent on the wage earner prior to his death were conclusively prevented from receiving benefits. Moreover, the classifications themselves do not bear any substantial relationship to the fact of dependency.

Norton v. Mathews

427 U.S. 524, 49 L.Ed.2d 672, 96 S.Ct. 2771 (1976)

The decision of the district court that the distinction between legitimate and illegitimate children for purposes of survivor's benefits under the Social Security Act did not deny illegitimates the equal protection of the law is affirmed in light of *Mathews v. Lucas*, 427 U.S. 495 (1976).

Fiallo v. Bell

430 U.S. 787, 52 L.Ed.2d 50, 97 S.Ct. 1473 (1977)

DECISION: Immigration and Nationality Act of 1952, which grants women and their illegitimate children a preferred immigration status but which withholds the preferred status from men and their illegitimate children, is not unconstitutional.

The Immigration and Nationality Act of 1952 grants a preferred immigration status to aliens who are either the parents or children of United States citizens and permanent residents. "Parent" and "child" are defined so that both a natural mother and her illegitimate child are granted preferred immigration status. However, a natural father and his illegitimate child are both denied the preferred status.

Three sets of natural fathers and their illegitimate offspring challenged the constitutionality of the sections of the Act which excluded them from the preferred immigration status. A three judge district court noted that the power of Congress to regulate the admission of aliens was exceptionally broad and held that the provisions were rationally related to a legitimate governmental purpose. The complaint was therefore dismissed. On appeal, the United States Supreme Court affirmed.

POWELL, J., delivered the opinion of the Court (six members): The power to expel or exclude aliens is a sovereign attribute exercised by the political departments of government. Because the power over aliens is of a political character, it is subject to narrow judicial review. Congress may make rules governing immigration and naturalization which would be unacceptable if applied to citizens. The history of the

Immigration and Nationality Act shows that Congress intentionally chose not to provide an illegitimate child and his natural father preferred immigration status. This is a policy question entrusted exclusively to the political branches of government and there is no judicial authority to substitute the Court's judgment for that of Congress.

MARHALL, J., and BRENNAN, J. (with whom WHITE, J., concurs), dissenting:

All American citizens are entitled to bring their alien children into the United States under the preferred immigration provisions of the Act. Fathers, however, are denied this privilege for their illegitimate children. Similarly, citizens, except for illegitimate children, are allowed to bring their fathers into the United States under the preferred immigration provisions of the Act. Therefore, this case involves the rights of citizens, not aliens. Congress chose to allow American citizens to reunite with their families, but denied this privilege to natural fathers and their illegitimate children. Thus, the Act discriminates against American citizens on the basis of gender and legitimacy. Additionally, the statute interferes with the freedom of personal choice regarding marriage and family life which is protected by the Constitution.

The government suggests two justifications for this discrimination. First, that the mother and child relationship is more likely that the father and child relationship to be close and personal. However, some mother-child relationships are not close and personal while some father-child relationships are close and personal. Thus, the classification based on this assumption is both overinclusive and underinclusive. Second, the government contends that the inaccurate classification scheme is justified because of the administrative costs of case by case assessments of closeness and paternity. Administrative convenience is closely scrutinized when invidious classifications infringe fundamental rights. The Immigration and Naturalization Service has established elaborate administrative procedures to assess the existence of the parent-child relationship. Thus, administrative convenience does not justify the discrimination in this case.

PART III

Parental Rights

Armstrong v. Manzo

380 U.S. 545, 14 L.Ed.2d 62, 85 S.Ct. 1187 (1965)

Failure to give divorced father notice of pending proceeding for adoption of his child held violated due process.

Adoption proceeding by divorced mother and her new husband to adopt her child by a prior marriage; no notice of the proceedings was given to the divorced father of the child although the petitioners knew his whereabouts. After the adoption decree was entered, the father was notified of the adoption and promptly filed a motion to set aside the decree and grant a new trial. The court, which heard the adoption proceeding, granted a hearing on the motion without setting aside the adoption decree and denied the motion.

U.S. Supreme Court (STEWART, J.) reversed:

(1) Failure to notify the divorced father of the pendency of the adoption proceeding deprived him of due process of law and rendered the decree constitutionally invalid; and,

(2) The subsequent hearing did not cure its constitutional invalidity.

Stanley v. Illinois

405 U.S. 645, 31 L.Ed.2d 551, 92 S.Ct. 1208 (1972)

Illinois statutory procedure whereby unwed father of illegitimate child is presumed unfit to raise child on mother's death, and may be deprived of custody without a hearing as to his fitness as a parent, held violative of due process and equal protection.

Circuit Court in dependency proceedings instituted by the state upon the death of the mother of illegitimate children, declared that the children, who with their mother

had lived with and been supported by their unwed father, were wards of the state, and placed them with court-appointed guardians. Under the Illinois statute an unwed father is not considered a parent and is subject to being deprived of the custody of his illegitimate children by dependency proceedings in which he is not entitled to a hearing as to his fitness as a parent but is presumed to be unfit, whereas married or divorced parents or unwed mothers raising their children can be deprived of custody only through neglect proceedings in which the parent is entitled to a hearing on fitness.

U.S. Supreme Court (five members) reversed and remanded holding:

> The statutory scheme violated the due process clause of the Fourteenth Amendment since an unwed father, like other parents, was entitled to a hearing on his fitness before his children were taken from him. Four members held that the equal protection clause of the Fourteenth Amendment was also violated since all parents were constitutionally entitled to a due process hearing on fitness before their children were removed from their custody and the state's denial of such a hearing to an unwed father, while granting it to other parents, was inescapably contrary to the equal protection clause.

BURGER, C.J., with BLACKMUN, J., dissented, holding that the only issue was the matter of equal protection and this constitutional provision was not violated by the states giving full recognition only to those father-child relationships that arose in the context of family units bound together by legal obligations arising either from marriage or adoption.

Quilloin v. Walcott

434 U.S. 246, 54 L.Ed.2d 511, 98 S.Ct. 549 (1978)

DECISION: Natural father of illegitimate child was not deprived of due process of law when Georgia trial court found that it was in the best interest of the child to deny the father's legitimation petition and approved the child's adoption. It was not necessary to show that the natural father was an "unfit" parent before authorizing the child's adoption.

Under Georgia law, the consent of both parents is necessary for a child born in wedlock to be adopted, unless that parent was found to be unfit or had voluntarily surrendered his rights in the child. If the child was born out of wedlock, only the consent of the mother is required for adoption. The natural father's consent of adoption is only required if he had legitimated the child.

Randall Walcott filed a petition to adopt the eleven-year-old illegitimate child of Leon Quilloin. The child had lived with his mother and Randall Walcott since the age

of five. During this time, the natural father had provided for the child's support on an irregular basis and had visited with the child on many occasions. However, he did not attempt to legitimate the child until after Randall Walcott filed a petition to adopt the child. Although Leon Quilloin was not found to be an unfit parent, the trial court determined that it was in the best interest of the child to allow the adoption and therefore denied Leon Quilloin's petition to legitimate the child.

The natural father argued that under *Stanley v. Illinois, supra,* adoption of his child should not have been allowed in the absence of a finding that he had abandoned the child or was an unfit parent. He urged that he should have been treated the same as a married or divorced parent or the unwed mother of the child. The Georgia Supreme Court rejected his contentions and upheld the action of the trial court. On appeal, the Supreme Court affirmed.

MARSHALL, J., delivered the opinion of the Court (unanimous):

The parent-child relationship is a constitutionally protected interest. However, in this case, the unwed father sought neither the actual nor legal custody of his child. Moreover, the adoption in this case did not place the child with a new set of parents with whom the child had never lived. Here, the adoption gave full recognition to a family unit already in existence. The natural father did not petition to legitimate the child during the eleven years prior to the filing of the adoption petition. Additionally, he was provided with a hearing on his legitimation petition prior to the adoption. Under these circumstances, the State was not required to do more than determine that it was in the child's best interest to authorize the adoption and deny the natural father's petition to legitimate the child.

Equal protection of the law is not violated by treating married and unmarried parents differently for purposes of consenting to adoption of the parent's child. In this case, the unwed father never exercised actual or legal custody of the child and never bore the daily responsibilities of providing for the child's care, supervision, education or protection. The married parent, in contrast, had legal custody of the child and had full responsibility for rearing the child during the marriage. These distinctions, in the circumstances of this case, justified treating the unwed father differently than married fathers. Finding that the unwed father was neither denied due process nor equal protection of the law, the decision of the Georgia Supreme Court is affirmed.

Smith v. Organization of Foster Families for Equality and Reform
431 U.S. 816, 53 L.Ed.2d 14, 97 S.Ct. 2094 (1977)

DECISION: Assuming that foster parents had a protected liberty interest in the existence of the foster family, New York procedural requirements for removal of foster child from foster home satisfied due process requirements.

New York law provided that when agency determined to remove child from foster family, the family must be notified 10 days before removal. If the parents object, they may request a conference at which they are advised of the reasons for the removal and may submit reasons why the child should not be removed. If the child is removed, the parents may appeal for a full administrative hearing and thereafter, obtain judicial review. The district court found that these procedures were inadequate. The Supreme Court reversed.

BRENNAN, J., delivered the opinion of the Court (six members): Plaintiffs contend that psychological ties are created between the child and the foster parents so that the foster family has a liberty interest in its survival. The usual "family" in which the Court has previously found a liberty interest has consisted of a biological relationship. The importance of the family relationship stems from the emotional attachments derived from daily contacts. The foster family shares the same role in the emotional life of the child as a natural family. There are, however, significant differences. The foster family is a creature of state law while the biological family is a creature of nature. Whatever emotional ties developed have their origins in state law, not nature. The expectations and entitlements of the parties are derived from state law. New York extends a limited recognition to foster families. Thus, the "liberty" interest in foster families is not as strong as it is in natural families. Additionally, the liberty interest of the foster family is asserted, not against arbitrary action of the state, but against the liberty interest of the natural family — an interest recognized by the foster family from its creation. Thus, the foster family's threshold claim to an interest protected by the due process clause raises novel and complex issues. Assuming, however, that liberty interest exists, the pre-removal procedures provided by New York satisfy due process requirements.

STEWART, J., joined by BURGER, C.J., and REHNQUIST, J., concur in the judgment: The foster family unit is created by state law. New York confers no right on foster families to remain intact. Rather, it is clear from the outset that the foster family is intended as a temporary arrangement until the child can be returned to its natural parents or placed for adoption. The discretionary authority vested in agency officials negates any "entitlement" to an indefinite family relationship. Thus, the plaintiffs have no interest to which the due process clause attaches.

PART IV

Rights of AFDC Recipients

Goldberg v. Kelly
397 U.S. 254, 25 L.Ed.2d 287, 90 S.Ct. 1011 (1970)

Wheeler v. Montgomery
397 U.S. 280, 25 L.Ed.2d 307, 90 S.Ct. 1027 (1970)

New York procedure terminating public assistance payments without affording prior evidentiary hearing to recipient held violative of procedural due process.

Welfare benefits are a matter of statutory entitlement for persons qualified to receive them and their termination involves state action that adjudicates important rights, and procedural due process is applicable to termination of welfare benefits.

Some governmental benefits may be administratively terminated without affording the recipient a pretermination evidentiary hearing. But we agree with the district court that when welfare is discontinued, only a pretermination evidentiary hearing provides the recipient with procedural due process. *Cf. Sniadach v. Family Finance Co.*, 397 U.S. 337, 23 L.Ed.2d 349, 89 S.Ct. 1820 (1969).

Note: Wheeler v. Montgomery: California procedure terminating welfare payments without affording prior evidentiary hearing to recipient held violative of procedural due process. *Goldberg v. Kelly* controlled.

In *Goldberg v. Kelly* and *Wheeler v. Montgomery* the Court held that due process requires the states to grant a welfare recipient an evidentiary hearing before terminating or suspending his welfare payments. New York did provide that a recipient could make a written request for review of the decision by an official superior to the case supervisor who had originally approved the termination. The welfare recipient argued that the procedure violated the Fourteenth Amendment due process clause because it failed to provide an oral hearing before termination of benefits. The central issue in the case was not whether a hearing must be granted, but when the hearing must be held and what procedural safeguards must be provided. New York regulations already provided that

after termination, or even after denial of aid upon application, an individual could obtain, upon request, a so-called "fair hearing." If he were successful, funds wrongfully withheld would be paid retroactively.

The Supreme Court refused to rely on the "right-privilege" distinction but looked at the particular benefit at stake, the nature of the government function, the extent of the possible injury and available alternatives before determining the applicability of the due process clause.

While the Court held that the state must afford a hearing before it can reverse its decision to pay welfare benefits, it indicated that the hearing need not provide all the attributes of a judicial trial. The welfare recipient must be given an opportunity to be heard orally and to confront and cross-examine witnesses, adequate notice of his right to a hearing must be given and the hearing must be held before an impartial decision maker. The decision maker must base his conclusions solely on the law and the evidence adduced at the hearing, and must state the reasons for his determination, indicating the evidence he relied on.

Kelly left open the question whether counsel must be provided at state expense. The Court did decide that the recipient must be allowed to retain counsel.

Sniadach v. Family Finance Corp.
395 U.S. 337, 23 L.Ed.2d 349, 89 S.Ct. 1820 (1969)

Wisconsin prejudgment garnishment procedure in which summons is issued at request of creditor's lawyer which sets in motion machinery whereby wages are frozen in interim before trial of main suit without any opportunity on part of wage earner to be heard violates fundamental principles of due process (Fourteenth Amendment).

Such summary procedure may well meet the requirements of due process in extraordinary situations. But in the present case no situation requiring special protection to a state or creditor interest is presented by the facts; nor is the Wisconsin statute narrowly drawn to meet any such unusual condition. (Defendant was a resident of the community and in personam jurisdiction was readily obtainable.)

Townsend v. Swank
404 U.S. 282, 30 L.Ed.2d 448, 92 S.Ct. 502 (1971)

Carter v. Stanton
405 U.S. 669, 31 L.Ed.2d 569, 92 S.Ct. 1232 (1972)

Carleson v. Remillard
406 U.S. 598, 32 L.Ed.2d 352, 92 S.Ct. 1932 (1972)

Townsend v. Swank: Illinois statute and regulation excluding 18- through 20-year-old college students from AFDC benefits held invalid on ground of inconsistency with Social Security Act.

Carter v. Stanton: Summary judgment held improperly entered against women in suit challenging validity of Indiana regulation denying AFDC for six months following separation or desertion of spouse.

Carleson v. Remillard: Social Security Act held violated by California regulation denying eligibility for AFDC benefits where parent is absent from home because of military service.

Wyman v. James
400 U.S. 309, 27 L.Ed.2d 408, 91 S.Ct. 381 (1971)

ISSUE: May a beneficiary of AFDC program refuse a home visit by a caseworker without risking the termination of benefits.

BLACKMUN, J.: Even if the caseworker's home visit possesses some of the characteristics of a search in the traditional sense, it does not fall within the Fourth Amendment's proscription because it does not descend to the level of unreasonableness. The Fourth Amendment's standard is unreasonableness. *Terry v. Ohio,* 392 U.S. 1, 9 (1968).

The home visit is not unreasonable because the public's interest is protection and aid for the child. The dependent child's needs are paramount and the mother's claim under the Fourth Amendment is secondary.

DOUGLAS, J., dissents: Douglas, J., would place the same restrictions on "inspectors" entering the homes of welfare beneficiaries as are on inspectors entering the homes of those on the payroll of the government, or those who contract with the government, or those who work for those having government contracts.

MARSHALL, J. (with BRENNAN, J.) dissents: Would the majority sanction, without probable cause, compulsory visits to all American homes for the purpose of discovering child abuse? Or does the majority hold that a mother, because she is poor, is substantially more likely to injure or exploit her child?

The majority seems to accept the position that since the state's interest is paternalistic, it justifies the search. Thus, a citizen's constitutional rights can be violated so long as the state is helping him. This idea is alien to our nation's philosophy.

"Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficient." (BRANDEIS, J., in *Olmstead v. U.S.*, 277 U.S. 438, 479, 1928, dissent).

PART V

Rights of Children vis-à-vis Rights of Parents

Meyer v. Nebraska
262 U.S. 390, 67 L.Ed. 1042, 43 S.Ct. 625 (1923)

Defendant convicted of violating a statute forbidding the teaching in school of any other than the English language until child passed the eighth grade. Defendant was an instructor in Zion Parochial School where he taught German.

HELD: Statute violates the guaranty of liberty in the Fourteenth Amendment. The teacher has a right to teach and parents have a right to hire him to instruct their children and both rights are protected by the Constitution.

Pierce v. Society of the Sisters
268 U.S. 510, 69 L.Ed. 688, 45 S.Ct. 571 (1925)

The Oregon Compulsary Education Act requiring all children between the ages of eight and 16 years to attend the public schools of the state would have worked an unconstitutional interference with the liberty of parents to direct the upbringing and education of their children since the legislation has no reasonable relation to some purpose within the competency of the state. The fundamental theory of liberty excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only.

The child is not the mere creature of the state: those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.

Prince v. Massachusetts
321 U.S. 158, 88 L.Ed. 654, 64 S.Ct. 438 (1944)

Aunt and custodian of nine-year-old girl was convicted under state labor law which prohibited boy under 12 and girl under 18 from selling newspapers or magazines in any street or public place and makes it unlawful for adult to furnish such material with knowledge of its intended use.

U.S. Supreme Court upheld conviction:

> "But the family itself is not beyond regulation in the public interest, as against a claim of religious liberty. And neither rights of religion nor rights of parenthood are beyond limitation. Acting to guard the general interest in youth's well-being, the state as *parens patriae* may restrict the parent's control by requiring school attendance (*Meyer v. Nebraska,* 262 U.S. 390, 67 L.Ed. 1042, 29 A.L.R. 1146; *Pierce v. Society of Sisters,* 268 U.S. 510, 69 L.Ed. 1070, 39 A.L.R. 468) regulating or prohibiting the child's labor, and in many other ways. . . . It is sufficient to show . . . that the state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare: and that this includes, to some extent, matters of conscience and religious conviction. . . ."

The state's authority over children's activities is broader than like actions of adults.

Haley v. Ohio
332 U.S. 596, 92 L.Ed. 244, 68 S.Ct. 302 (1948)

Murder confession by a 15-year-old Negro boy after five hours of interrogation by police officers working in relays, without warning him regarding his rights, and without his having had benefit of the advice of friends, family or counsel, should have been excluded because involuntary and extracted by methods violative of due process requirements of Fourteenth Amendment.

Ginsberg v. N.Y.
390 U.S. 629, 20 L.Ed.2d 195, 88 S.Ct. 1274 (1968)

Tinker v. Des Moines School District
393 U.S. 503, 21 L.Ed.2d 731, 89 S.Ct. 733 (1969)

Wisconsin v. Yoder
406 U.S. 205, 32 L.Ed.2d 15, 92 S.Ct. 1526 (1972)

The rights of children is not a concept without some legal foundation. The U.S. Supreme Court in May 1972 in *Wisconsin v. Yoder,* 406 U.S. 505, 32 L.Ed.2d 15, acknowledged its existence. The majority opinion recognized the substantive right of the Amish child to a secondary education and the power of the state as *parens patriae* to extend the benefit of secondary education to children regardless of the wishes of their parents but held that since the children of the Amish parents were not parties to the state prosecution for non-attendance at school this principle was not applicable to the case under consideration. The majority opinion carefully noted that its decision *"in no degree depends on the assertion of the religious interest of the child as contrasted with that of the parents."*

This last reference in the majority opinion in *Yoder* was prompted by the vigorous dissent of Douglas. Douglas felt that since two of the children of the defendants had not expressed their views on attending high school, no decision could be made affecting them. In his dissent he held:

> ". . . Our opinions are full of talk about the power of the parents over the child's education. *(Pierce v. Society of Sisters,* 268 U.S. 510, 39 A.L.R. 468; *Meyer v. Nebraska,* 262 U.S. 390). And we have in the past analyzed similar conflicts between parent and state with little regard for the views of the child. *(Prince v. Massachusetts,* 321 U.S. 158). Recent cases, however, have clearly held that the children themselves have constitutionally protectible interests.
>
> "These children are 'persons' within the meaning of the Bill of Rights. We have so held over and over again. In *Haley v. Ohio,* 332 U.S. 596 . . . we extended the protection of the Fourteenth Amendment in a state trial of a 15-year-old boy.
>
> "In *In re Gault,* 387 U.S. 1, we held that 'neither the Fourteenth Amendment nor the Bill of Rights is for adults alone.'
>
> "In *In re Winship,* 397 U.S. 358, we held that a 12-year-old boy, when charged with an act which would be a crime if committed by an adult, was entitled to procedural safeguards contained in the Sixth Amendment.
>
> "In *Tinker v. Des Moines School District,* 393 U.S. 503, we dealt with 13-year-old, 15-year-old, and 16-year-old students who wore armbands to public schools and were disciplined for doing so. We gave them relief, saying that their First Amendment rights had been abridged. 'Students in school as well as out of school are "persons" under our Constitution. They are possessed of fundamental rights which the state must respect, just as they themselves must respect the obligations to the state.'. . ."
>
> "On this important and vital matter of education, I think the children should be entitled to be heard. . . . It is the student's judgment, not his

parent's, that is essential if we are to give full meaning to what we have said about the Bill of Rights and of the right of students to be masters of their own destiny. . . ."

Despite Douglas' strong assertion of the constitutional rights of children as distinct from those of their parents, and the careful notation in the majority opinion that it did not intend to disregard such rights our highest court has wavered in its delineation of this area of law that it is safe to assert that only sometimes children are "persons" within the meaning of the Constitution — and sometimes they are not.

Consider the 1968 opinions of the U.S. Supreme Court in *Ginsberg v. N.Y.*, 390 U.S. 629. This case involved the sale of "obscene" literature to a minor in violation of a state law. Here is what four members of the court said:

> BRENNAN, J., Even where there is an invasion of protected freedoms, the power of the state to control the conduct of children reaches beyond the scope of its authority over adults — citing *Prince v. Massachusetts*, 321 U.S. 158, 170. But, said Brennan, we have no occasion in this case to consider the impact of the guarantees of freedom of expression upon the totality of the relationship of the minor and the state — citing *In re Gault*, 387 U.S. 1.
>
> STEWART, J., although concurring, seemed somewhat cautious: I think the state may permissibly determine that at least in some precisely delineated areas, a child — like someone in a captive audience — is not possessed of that full capacity for individual choice which is the presupposition of the First Amendment guarantees. It is only upon such a premise, I should suppose, that a state may deprive children of other rights — the right to marry, for example, or the right to vote — deprivations that would be constitutionally intolerable for adults.
>
> FORTAS, J., in dissent: I agree that the state in the exercise of its police power — even in the First Amendment domain — may make proper and careful differentiation between adults and children.

Thus, Fortas did not disagree with the majority use of variable obscenity standards, but disagreed with the failure of the Court to define the meaning of a different standard for youth and adult. This justice wrote the opinion of the majority in *Gault* during the prior term of that court.

> DOUGLAS, J., in dissent: If the problem of state and federal regulations of "obscenity" . . . is in the field of substantive due process, I see no reason to limit the legislature to protecting children alone. The "juvenile delinquents" I have known are mostly over 50 years of age.

He enunciated the view that obscenity depends not upon age but upon neurotic responses of the censor.

Implementing the concept that children are people with rights faces the dilemma that our social structure is based on the family, and the courts, and the community as well, are at the very least reluctant to take any action which they erroneously believe will undermine the family unit. It is this mistaken apprehension which causes the courts to disregard children's rights and to seek out a security blanket of vague parental fitness to avoid equal consideration of the protection of children.

Parham v. J.L.

412 F.Supp. 112 (M.D. Ga. 1976) on appeal,
Supreme Court Docket #75-1690

Georgia statute authorized children under 18 to be committed to mental health institution on application of the parents or guardians. The admittee could be detained for treatment if he showed evidence of mental illness. Withdrawal from the institution could be conditioned on the consent of the minor's parent or guardian. The three judge district court found that in concept and in practice, the statute gives parents and guardians an unbridled discretion to admit and detain children in mental hospitals until their 18th birthday. The district court held that the lack of adequate hearings both at the initial intake and to determine appropriate treatment remedies or discharge violated due process of law.

Kremens v. Bartley

431 U.S. 119, 52 L.Ed.2d 184, 97 S.Ct. 1709 (1977)

Pennsylvania statute authorized persons 18 years of age or younger to be committed to mental health facility upon application of parent or a person standing in loco parentis. The admitted person is free to withdraw from the institution only with the consent of the parent or guardian who admitted him. A three judge district court struck down the statutes as violating due process. The Supreme Court held that changes in the Pennsylvania law made after the district court decision rendered the claims of the named plaintiffs moot and remanded the case to the district court for substitution of class representatives with "live" claims.

In Re Roger S.

569 P.2d 1286 (Cal. 1977)

DECISION: Minors of 14 years or more are entitled to procedural due process in determining whether he is mentally ill or disordered and, if he is not dangerous, whether admission to mental institution is likely to benefit him.

Pursuant to California law, 14-year-old was admitted to state mental hospital on application of his mother. He alleged that his admission violated due process of law and the equal protection of the law.

The California Supreme Court recognized that minors possess a personal liberty interest, including freedom from bodily restraint, but stated that it was not coextensive with that of an adult.

The child's liberty interest is subject to the control of his parents. The parents' power to curtail the child's constitutional rights is greater than the power of the state because part of the parents' constitutionally protected liberty includes the right to bring up children. However, the state has the power to control the parents if parental decisions would jeopardize the health or safety of the child or would impose significant social burdens. Society has an interest in the future development of the child. The consequences of involuntary commitment of a minor to a mental institution are so great that if a minor is mature enough to intelligently participate in the commitment decision, due process requires that he be allowed to do so.

Due process requires that the minor be afforded a hearing before a neutral fact-finder before he is committed. This can be satisfied by an administrative hearing. Counsel should be provided for the minor. He should be given an opportunity to present evidence on his behalf and to confront and cross-examine adverse witnesses. The minor may be committed based on a preponderance of the evidence, and a record should be kept to permit meaningful appellate review.

In *O'Connor v. Donaldson*, 422 U.S. 563 (1975), the Supreme Court held that a nondangerous individual who is capable of surviving safely in freedom cannot be involuntarily confined in a state mental hospital. In his concurring opinion, BURGER, C.J., discussed the theory supporting a constitutional right to treatment for individuals committed to mental health institutions. The theory is that because the due process safeguards of the criminal process are not present in civil commitment cases, there must be a *quid pro quo* extended by the state to justify the commitment. This *quid pro quo* is the right to treatment. Chief Justice Burger stated:

> "A . . . troublesome feature of the *quid pro quo* theory is that it would elevate a concern for essentially procedural safeguards into a new substantive right. Rather than inquiring whether strict standards of proof or periodic redetermination of a patient's condition are required in civil confinement, the theory accepts the absence of such safeguards but insists that the State provide benefits which, in view of a court, are adequate 'compensation' for confinement." 422 U.S. at 587-88.

Carey v. Population Services International
431 U.S. 678, 52 L.Ed.2d 675, 97 S.Ct. 2010 (1977)

DECISION: State may not place total ban on distribution of non-medical contraceptives to minors under 16.

New York law prohibited the distribution of contraceptives to persons under 16 except by a licensed physician. Plaintiff challenged the constitutionality of this provision. The district court held the restriction unconstitutional and the Supreme Court affirmed.

BRENNAN, J., delivered the opinion of the Court (four members):

The Court first held that placing restrictions on the sale of contraceptives to adults placed a burden on the fundamental right to decide whether or not to beget children and was therefore unconstitutional.

The power of the state to control the conduct of children is broader that its power over adults. However, restrictions inhibiting the privacy rights of minors can be sustained only if they serve a significant state interest. Since the state may not impose a blanket prohibition on the right of a minor to procure an abortion (*Planned Parenthood, infra*), it follows that it cannot impose a blanket prohibition on the distribution of contraceptives to minors. There is no showing that limiting the minor's access to contraceptives discourages sexual activity among the young. Moreover, it is unreasonable to assume that the state has prescribed pregnancy as a punishment for fornication.

WHITE, J., concurring in the result: The state has not demonstrated that limiting the access of the young to contraceptives will deter promiscuity.

POWELL, J., concurring in the judgment:

Prohibiting the distribution of contraceptives to minors prevents parents from providing contraceptives for their children. Thus, the statute interferes with the exercise of parental responsibility.

The state has an interest in protecting the welfare of children. Sexual activity at an early age may have physical and psychological effects on the child. There is more room for state regulation in this area than the Court's opinion allows. For example, requiring prior parental counseling before deciding whether to engage in sexual intercourse would be constitutionally permissible.

STEVENS, J., concurring in the judgment: The state's justification for prohibiting the distribution of contraceptives to minors is to inhibit their sexual activity. The sanction — pregnancy or exposure to venereal disease — is irrational and perverse.

REHNQUIST, J., and BURGER, C.J., dissented.

Planned Parenthood of Missouri v. Danforth
428 U.S. 52, 49 L.Ed.2d 788, 96 S.Ct. 2831 (1976)

DECISION: State may not impose a blanket parental consent provision as an absolute condition for an unmarried minor to obtain an abortion during the first 12 weeks of her pregnancy.

Missouri statute required, inter alia, that unmarried minors obtain their parents' consent to obtain an abortion. The three judge district court, over one dissent, found a compelling state interest in safeguarding the authority of the family relationship and sustained the provision. The Supreme Court reversed.

BLACKMUN, J., delivered the opinion of the Court (three members): The state cannot regulate or proscribe abortions during the first trimester of pregnancy. Therefore, the state does not have the constitutional authority to give a third person an absolute and possibly arbitrary veto over the physician and his minor patient's decision to have an abortion. The state attempts to justify the parental consent requirement as safeguarding the family unit and parental authority. However, it is difficult to conclude that giving parents an absolute veto over the decision of a competent minor and her physician would strengthen the family unit or enhance parental authority. Therefore, there is an insufficient justification for the special consent requirement.

STEWART, J., joined by **POWELL**, J., concurring: The fault with the parental consent provision is that it imposes an absolute parental veto on the minor's right to obtain an abortion.

WHITE, J., joined by **BURGER**, C.J., and **REHNQUIST**, J. dissenting: The purpose of the provision is to require parental consultation and consent so that the minor child will not make a decision that is not in her own best interest. Providing for parental consent is the traditional way in which children are protected from making immature and improvident decisions. There is no reason advanced by the majority why this method may not be utilized here.

STEVENS, J., dissenting: The state's interest in protecting young people from harm justifies imposing restraints on their freedom. A state may conclude that imposing a parental consent requirement is an appropriate method of fostering the welfare of the child.

Bellotti v. Baird
428 U.S. 132, 49 L.Ed.2d 844, 96 S.Ct. 2857 (1976)

DECISION: Federal district court should have abstained from interpreting parental consent statute where statute was susceptible of interpretation which would avoid or minimize federal constitutional challenges.

Massachusetts statute required an unmarried pregnant minor to obtain her parents' consent to an abortion. If the parents refused, consent could be obtained by a court order for good cause. An abortion counseling service, a medical doctor and unmarried minor women desiring an abortion challenged the constitutionality of the statute. They alleged that the statute violated due process and equal protection. The three judge district court, over one dissent, found that the statute applied to minors who were capable of giving informed consent. The district court also found that the statute, rather than merely providing for parental counseling, recognized independent rights of the parents in the abortion decision of the minor child and gave the parents the power to veto the minor's decision. The dissent stated that the statute was designed to provide for parental and judicial counseling. If the parents refused to consent to the abortion, a state court could make the final determination. On appeal, the Supreme Court vacated the district court decision and remanded the case for certification to the state court.

BLACKMUN, J., delivered the opinion of the Court (unanimous): In *Planned Parenthood v. Danforth* the Court struck down a statute which created a parental veto. Construction of the parental consent statute by the state judiciary might avoid or modify the alleged constitutional infirmities in the statute. In this case, the statute is susceptible of interpretation that while preferring parental consent it is not required under some conditions which might avoid constitutional challenge. Accordingly, the federal court should have certified to the state court appropriate questions concerning the meaning of the statute. In an absence of an authoritative construction of the statute by the state court, the constitutional questions raised by this statute are not clearly defined. Thus, the district court should have abstained from interpreting the statute until the state court had done so.

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