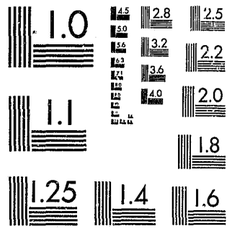

U.S. Department of Justice
Office of Juvenile Justice and Delinquency Prevention

Legislative Resource Manual for Implementation of the Juvenile Justice and Delinquency Prevention Act

L E G I S L A T I V E R E S O U R C E M A N U A L
FOR
IMPLEMENTATION OF THE JUVENILE JUSTICE
AND DELINQUENCY PREVENTION ACT

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I

INTRODUCTION

The purpose of this manual is to provide a discussion of the problem areas in the field of juvenile justice and to offer legislative proposals aimed at improving the quality of justice and related social services received by America's troubled youth. Ironically, many current juvenile justice problems such as the over-institutionalization of youth, mixing of juveniles with adult criminal offenders and the lack of community-based alternatives to jails or institutions are the same problems with which concerned citizens have attempted to cope for a period in excess of one hundred and fifty years. The history of the problems and the institutions which were created to address these problems is important for purposes of providing an insight to the scope of the problems and the defects of the past "answers" which in reality never resolved these long standing deficiencies and may, in fact, have exacerbated them.

The historical analysis necessarily begins with the treatment accorded children under the English/American common law. Children under seven years of age were conclusively presumed to be incapable of forming felonious intent and, therefore, could not be held criminally responsible for their acts. Children over age seven but under fourteen years of age were likewise presumed to be incapable of forming the requisite criminal intent neces-

sary for one to be held responsible for his or her acts, but the presumption was rebuttable. That is to say that if it appeared that the child knew the difference between right and wrong, the child lost the benefit of the presumption and could be convicted and suffer the adult penalty associated with the offense including death.[1] Thus, under the common law, no different treatment, in theory, was provided to children. The child was either exempt from the adult process or the child suffered the same punishment as adults. No attempt was made to provide different correctional treatment to children despite their differing needs. In practice, however, there are indications that juries accorded children leniency by refusing to convict them, thereby avoiding the infliction of harsh punishment, and that the King's pardoning power was used to ease the plight of convicted children.[2]

Poor children also suffered under the Anglo/American common law and early statutes. These children were made the objects of the practice of indenturing. Under this practice poor children were "sold" for the period of their minority to masters who were to train the children in a trade. The town from which the child came was thus relieved of the obligation of providing for such children; masters acquired cheap labor, and hopefully, the child would acquire the means to rise from poverty. A representative statute provided as follows:

> . . . Children under fourteen years of age, and above five, that live in idleness, and be taken begging, may be put to service by the governors of cities, towns, etc., to husbandry, or other crafts or labours . . .[3]

The practice of indenturing poor children carried over to the colonies. A Massachusetts statute vested local governments with the following power:

> . . . to present to the Quarter Court all idle and unprofitable persons, and all children who are not diligently employed by their parents, which Court shall have power to dispose of them for their own welfare and improvement of the common good . . .[4]

The indenture system seems to have been an invention to ease the burdens of local towns who would otherwise be called upon to support its poor, rather than a system aimed at aiding children. This system gradually was supplemented by the use of almshouses, workhouses or poorhouses as the means by which society dealt with its poor, adult or child. The poorhouses were criticized for mixing children with adult vagrants, criminals or simply poor adults. The criticism seems to have been that subjecting children to the adult poor tended to reinforce poor children's perceived habit of idleness and that subjecting them to contact with adult criminals in poorhouses would tend to corrupt the children.[5] Acceptance of the belief that poor dependent children should not be in poorhouses and of the premise that juvenile criminal offenders should be spared the harsh punishment inflicted on adults ultimately led to creation of that which has often been labeled the first major reform in juvenile justice - The New York House of Refuge.

Created in 1825, the New York House of Refuge was intended to remove salvageable juvenile offenders from adult prisons and

to provide food, shelter and an education to such children in an effort to head off the life of crime which reformers believed would otherwise befall such children. The "offenders" to be saved were vagrants (idle children with no visible means of livelihood who would be institutionalized in or a candidate for the poorhouses) or minor offenders.[6] The House did not attempt to deal with children considered to be hardened offenders for the same reason that reformers objected to mixing juveniles with adults, i.e., that the hardened offenders would taint those who were still salvageable. The focus of the House, then, was to prevent delinquency by the early intervention of the benevolent state. Serious offenders were left to fend for themselves in the adult system. If the early reformers were to be able to serve predelinquent children, some method of identifying and seizing such juveniles was necessary. The legislation which authorized the creation of the New York House of Refuge identified its prospective clients as vagrants or those convicted of criminal offenses.[7] As indicated, the House in practice cared for poor children who were seen as predelinquents or, at worst, minor offenders. Conditions of poverty and idleness were believed to be the nourishment of crime.[8] Given this belief, it is no small wonder that the early statutes focused on vagrant children (the poor) and identified these persons as the children in need of supervision and assistance from the state to prevent such children from becoming full fledged delinquents on their way to a life of crime.

The practice of summarily detaining or incarcerating children in the various Houses of Refuge was challenged in the case of Ex Parte Crouse, 4 Wharton 9 (Pa. 1838). Mary Ann Crouse was detained in the Philadelphia House of Refuge after her mother complained that the child was incorrigible. Pennsylvania law provided for the admission of children determined to be vagrants, criminal offenders or incorrigible to the extent the child was beyond parental control. Mary's father challenged the detainment on the ground that a trial by jury was necessary before a child could be committed or detained by the House. In response to the challenge, the Pennsylvania Supreme Court initially noted that the House was not a prison but a school intended to reform children: "by training its inmates to industry; by imbuing their minds with principles of morality and religion; by furnishing them with the means to earn a living; and, above all, by separating them from the corrupting influences of improper associates". . . . Id., at 11. The court concluded that when parents fail to properly instruct a child, the state must act to make such provisions for the child. No abridgement of personal rights was found and indeed the Court noted: "The infant has been snatched from a course which must have ended in confirmed depravity and, not only is the restraint lawful, but it would be an act of extreme cruelty to release her from it." Id., at 11, 12. The court in Crouse labelled the state's right to act as surrogate parents as the legitimate exercise of the state's

parens patriae power. While the decision clearly rested on the premise that incarceration at the House was not intended to punish, thereby rendering accepted due process safeguards inapplicable, the court failed to consider whether the treatment accorded to inmates was in fact of a punitive nature. The impact of the Crouse decision was clear. Children could be summarily deprived of liberty for such ill-defined conduct as being beyond the control of parents since the child was to be reformed, not punished. Whether the child was in fact suffering punitive treatment seemed irrelevant.

The second major event to be hailed as a great reform in the juvenile justice field was the creation of the Illinois juvenile court system in 1899. The legislation which created the court described the children who would be subject to the jurisdiction of the court as follows:

> §1. This act shall apply only to children under the age of 16 years not now or hereafter inmates of a State institution, or any training school for boys or industrial school for girls or some institution incorporated under the laws of this State, except as provided in section twelve (12) and eighteen (18). For the purposes of this Act the words dependent child and neglected child shall mean any child who for any reason is destitute or homeless or abandoned; or dependent upon the public for support; or has not proper parental care or guardianship; or who habitually begs or receives alms; or who is found living in any house of ill fame or with any vicious or disreputable person; or whose home, by reason of neglect, cruelty or depravity on the part of his parents, guardian or other person in whose care it may be, is an unfit place for such a child; and any child under the age of 8 years who is found peddling or selling any article or singing or playing any musical instrument upon the street or giving any public entertainment.

> The words delinquent child shall include any child under the age of 16 years who violates any law of this State or any City or Village ordinance.

Act of April 21, 1899, Illinois Laws §1, (1899).

We again see an attempt to assist children coupled with an effort to prevent future criminality by identifying children whose station in life appeared to make them appropriate candidates to pursue a life of crime. In discussing the purpose of the Illinois Act, a well respected commentator, Judge Julian Mack, wrote:

> And it is this thought - the thought that the child who has begun to go wrong, who is incorrigible, who has broken a law or an ordinance, is to be taken in hand by the state, not as an enemy but as a protector, as the ultimate guardian, because either the unwillingness or inability of the natural parents to guide it toward good citizenship has compelled the intervention of the public authorities; it is this principle, which to some extent theretofore applied in Australia and a few American states, was first fully and clearly declared, in the Act under which the Juvenile Court of Cook County, Illinois, was opened in Chicago, on July 1, 1899, the Hon. R.S. Tuthill presiding.

Mack, The Juvenile Court, 23 Har. L. Rev. 104 (1908).

Learned commentators such as Judge Mack realized that objections could be posed to the procedure which permitted a child to be deprived of liberty in a summary fashion without accepted due process standards.[9] Such objections were typically dismissed by legal commentators and by the courts with the assertion that the state, in exercising its power of parens patriae, had the right to bring children before the court and provide for the dispostion of such children without due process safeguards

since the state was acting to protect such minors.[10] Again the courts were preoccupied with the consideration of the state's purpose, not the actual treatment accorded its children. Judge Mack observed that indeed the state must carry out its obligation to provide care and treatment, not punishment:

> If a child must be taken away from its home, if for the natural parental care that the state is to be substituted, a real school, not a prison in disguise, must be provided. Whether the institutional life be only temporary until a foster home can be found, or for a longer period until the child can be restored to its own home or be given its complete freedom, the state must, both to avoid the constitutional objections suggested by the Turner case, and in fulfilment of its moral obligation to the child, furnish the proper care. This cannot be done in one great building, with a single dormitory for all of the two or three or four hundred or more children, in which there will be no possibility of classification along the lines of age or degrees of delinquency, in which there will be no individualized attention. . . . Locks and bars and other indicia of prisons must be avoided; human love, supplemented by human interest and vigilance, must replace them. In such schools there must be opportunity for agricultural and industrial training, so that when the boys and girls come out, they will be fitted to do a man's or woman's work in the world, and not be merely a helpless lot drifting aimlessly about. Id. at 114. (emphasis added).

The juvenile court system clearly envisioned a new and different treatment for troubled children. Adult punishments and the use of adult institutions for correction purposes were to be avoided. The state's power to interfere in the lives of parents and children for less than a criminal act (such as idleness or misfortune) was affirmed and now entrenched. Certainly, the reformers wanted to keep children who had not committed any

criminal offense away from the possible taint of adult offenders. Institutions were to be used only as a last resort since those concerned with juvenile justice realized that individual attention and treatment was all but impossible in a large institution. In addition, the reformers had seen the brutal results of institutionalizing children in poorhouses where children were not trained or instructed in anything but, rather, were simply warehoused.[11] In response to the inherent problems of institutionalization and the apparently poor results of this process, the drafters of the Illinois Act clearly emphasized that the care provided to a troubled child should closely resemble proper family life. The following provision serves to highlight the reformers' goal:

> This act shall be liberally construed to the end that its purpose may be carried out, to-wit: That the care, custody and discipline of a child shall approximate as nearly as may be that which should be given by its parents, and in all cases where it can properly be done, the child be placed in an improved family home and become a member of the family by legal adoption or otherwise.

Act of April 21, 1899, Illinois Laws §21 (1899).

In summary, the establishment of the various Houses of Refuge, beginning in New York in 1825, and the creation of the Illinois juvenile court were intended to provide different and better care to children by removing them from adult jails or other adult institutions. Both reform attempts sought to identify children thought to be predisposed to a life of crime and treat those children. The early detection system in both cases

relied on factors such as poverty, idleness and extremely minor deviant conduct as the indication of future criminality. Children were deprived of their liberty in a summary fashion without due process safeguards available to adults of that time period under the theory that such procedures were to aid and assist, not punish children. The Illinois Act resulted in part from a rejection of the notion that institutions could provide suitable training to predelinquent or delinquent children. Instead, an emphasis was placed on replicating proper family life as the method of rehabilitating children who the reformers believed would otherwise go or continue to go awry. It is interesting to note that the Illinois statute did not provide any funding to provide the alternate services which were apparently envisioned by the Act.

The Illinois model of a separate juvenile court system was quickly adopted by other states. Its promises were certainly alluring to those concerned with the needs of America's children. The system, in and of itself, has failed to produce its promised results. Concerned citizens must still advocate against the practice of incarcerating children with adults since the practice not only is alive and well but seems to be flourishing. The assumption that crime prone children could be identified for purposes of early pre-crime intervention and treatment has largely been rejected. The belief that poverty and crime were directly related has been rejected in favor of the recognition that the causes of delinquency are tied to societal failures and are much

more complicated than previously assumed and run much deeper than poverty or idleness. Thus, the ability of juvenile courts to claim a crime prevention component has been severely impaired, if not totally abrogated, by the reality that there is no reliable system of determining which child is headed for a life of crime. Nevertheless, juvenile courts continue to exercise jurisdiction over status offenders (generally defined as one who has committed an act which would not be criminal if committed by an adult, i.e., truancy, running away, beyond parental control). Many such children are committed to institutions for treatment, but rarely receive anything more than custodial care. Likewise, the use of institutions has not diminished in favor of local family life settings, but seems to have grown and prospered as one of few placement alternatives available to or used by juvenile court judges.

Today, as before, the poor results of the institutional model and its often brutal failings are readily recognized. After carefully studying the juvenile correctional system, Senator Birch Bayh, chairman of the Subcommittee to Investigate Juvenile Delinquency of the Committee on the Judiciary, made the following comments concerning the reality of life in juvenile institutions:

> There is dramatic need to take some decisive action in this area. From what I have learned thus far, in many instances, instead of rehabilitation young people are subjected to correctional neglect, mistreatment, and abuse.

About 50 percent of persons arrested for serious crimes are juveniles, as we tried to point out in the first set of hearings that we had.

Young people also show the highest recidivism rate of any age group. One study has shown that of those offenders under 20 released from institutions in 1963, 74 percent were rearrested by 1969. This is not surprising when we consider that less than 5 percent of the personnel in correctional institutions have the minimum qualifications required for rehabilitative treatment and the general philosophy is more often than not, one simply of incarceration, rather than rehabilitation.

Every major study and every investigation by this subcommittee has pointed up the utter inadequacy of correctional personnel training, qualifications, and standards.

By no means do I want to indict all the people in this field, since many are sincere and conscientious and are as horrified by the deficiencies in the facilities and programs to which juveniles are assigned as I am. However, we have found that incompetents, near illiterates, and even sadists have been placed in charge of handling young offenders on some occassions.

As we will learn in the course of these hearings, there have been gross miscarriages of justice under some juvenile procedures. Many young people are placed behind bars who are not delinquent or criminal.

Some are denied legal counsel and incarcerated without even a court appearance.

Many are beaten, brutalized, and exposed to vicious sexual attacks.

Punishment, isolation, neglect, and abuse seem to be the hallmarks of institutional life. This includes harassment, affront to human dignity, and the gross denial of human rights.

Almost as a rule, confinement institutions are closed systems inaccessible to public inspection, inaccessible even to judicial review.

The result is a strange society behind bars. Here, a hardening of human feelings and human emotion are characteristic features which affect both the inmates and the guards. The young inmates are often treated as if they were slaves, while the guards, too often, become unchallenged tyrants, who can send children to the "hole" on mere whim or fancied slight. The guard's word is law, not to be challenged or questioned.

The treatment and correction of offenders that should take place does not occur. At best, such programs are inadequate; at the worst, they are nonexis-

tent. . . .[12] (emphasis added)

Other commentators have noted the failings of the institutional model in juvenile corrections. Briefly, research indicates that large facilities require "regimentation and routinization" to allow the staff to maintain control while small group living reduces custody problems and allows staff to provide a more constructive atmosphere.[13] Confinement in large institutions results in an atmosphere of anonymity for each individual child and further results in feelings of powerlessness, meaninglessness, isolation and self-estrangement.[14] Institutionalization in larger facilities reinforces the child's image of rejection and thus compounds the problem of reintegrating that child into society.[15] Large facilities tend to develop their own programs rather than making use of community resources thereby thwarting the end goal of reintegrating the child into the community.[16]

In 1974, Congress reacted to the failings of the juvenile correctional system and offered its hope for improving the treatment accorded the children of America by passage of the Juvenile Justice and Delinquency Prevention Act of 1974 (hereinafter Act).[17] This legislation is predicated on the finding, inter alia, that "understaffed, overcrowded juvenile courts, probation services, and correctional facilities are not able to provide individualized justice or effective help" to troubled youth.[18] The Act expressly declared the policy of Congress:

> to provide the necessary resources, leadership, and coordination (1) to develop and implement effective methods of preventing and reducing juvenile delinquency; (2) to develop and conduct effective programs to prevent delinquency, to divert juveniles from the traditional juvenile justice system and to provide critically needed alternatives to institutionalization; (3) to improve the quality of juvenile justice in the United States; and (4) to increase the capacity of State and local governments and public and private agencies to conduct effective juvenile justice and delinquency prevention and rehabilitation programs and to provide research, evaluation, and training services in the field of juvenile delinquency prevention.

To accomplish this policy, Congress provided for federal assistance in the form of grants to state and local programs to assist such entities in planning and establishing more effective education, prevention, diversion, treatment and rehabilitative programs to prevent juvenile delinquency and improve the juvenile justice system.[19] To participate, each state must agree that seventy-five per centum (75%) of the funds made available by the federal government shall be used to: develop and maintain programs designed to prevent delinquency; divert juveniles from the juvenile justice system; provide community based alternatives to juvenile detention and correctional facilities; encourage a diversity of alternatives; and to adopt juvenile justice standards.[20] Further, participating states must agree that within three years after submission of the initial state plan, status offenders and non-offenders shall not be placed in juvenile detention or correctional facilities and that no children, be they delinquents, status offenders or non-offenders shall be detained or confined in any institution where they have regular contact with adult criminal offenders.[21]

The thrust of the Act is clear. Status offenders and non-offenders are to be deinstitutionalized and all children are to be free from the prospect of being incarcerated in adult facilities. Congress has clearly rejected the use of the institutional model and the cruelty associated with such institutions in favor of community-based alternatives. Clearly the congressional intent is to help children, not to simply inflict punishment in the name of rehabilitation as has been the case for so many years. The irony is inescapable. The noble goals are the same as those which prompted development of the Houses of Refuge and, ultimately, the juvenile court system. Your time and effort is necessary to insure that the goals are attained. The history of reformers attacking the problems of over-institutionalization, mixing children with adults in adult jails and the lack of community-based alternatives is one of failure. Much effort is required lest these same continuing problems beset yet another generation of our country's youth.

FOOTNOTES

1. Sir William Blackstone, Commentaries on the Laws of England, IV (London, 1975), 23.

2. Streib, The Informal Juvenile Justice System: A Need for Procedural Fairness and Reduced Discretion, 10 John Marshall Journal of Practice and Procedure 41 (1976).

3. 27 Henry VIII, 1535 - ch. 25, Great Britain, Statutes at Large, II, 229.

4. Massachusetts, 1646, Mass. Records, II, 180.

5. See: Rendleman, Parens Patriae: From Chancery to the Juvenile Court, 23 So. Car. L.R. 205 (1971).

6. Fox, Juvenile Justice Reform: An Historical Perspective, 22 Stan. L. Rev. 1187 (1970).

7. Act of March 29, 1824, Chapter 126, §4, N.Y. Laws 111 (1824).

8. Fox, supra, n. 6.

9. The Illinois act provided: "On return of the summons . . . the court shall proceed to hear and dispose of the case in a summary manner." Act of April 21, 1899 Illinois Laws §5 (1899).

10. See: Ex Parte Sharpe, 15 Idaho 120, 96 Pac. 563 (1908); Commonwealth v. Fisher, 213 Pa. 48 62 A.198 (1905).

11. For a complete discussion of institutional conditions prior to the Illinois Juvenile Court Act and of the desire to improve such conditions as a goal of the Act, see Fox, supra, n. 6, at 1222.

12. Hearings before the Subcommittee to Investigate Juvenile Delinquency of the Committee on the Judiciary, United States Senate, Ninety-Second Congress, First Session, Pursuant to S. Res. 32, Section 12, Investigation of Juvenile Delinquency in the United States, Juvenile Confinement Institutions and Correctional System, May 3, 1971, p. 2,3.

13. U.S. Dept. of Justice, Law Enforcement Assistance Administration, Planning and Designing for Juvenile Justice, 1972 National Assessment of Juvenile Corrections, Under Lock and Key, 1974.

14. Goffman, Erving, On the Characteristics of Total Institutes, 1961.

15. Sykes, Gresham, The Inmate Social System, 1960.

16. National Assessment of Juvenile Corrections, Under Lock and Key, 1974.

17. 42 U.S.C. 5601 et. seq.

18. 42 U.S.C. 5601(a)(2).

19. 42 U.S.C. 5631.

20. 42 U.S.C. 5633(a)(10).

21. 42 U.S.C. 5633(a)(12)(13).

II

EXISTING PRACTICES AND CORRECTIVE LEGISLATION

SCOPE OF JUVENILE COURT JURISDICTION

A. Introduction

The juvenile court system typically reaches children charged with conduct which would be criminal if committed by an adult (delinquents); children charged with misbehavior or conduct which if engaged in by an adult would not be criminal (status offenders); and children who come to the court's attention because of parental deficiencies or misconduct (dependent and neglected children). While changes in the state statutes creating jurisdiction over these children proliferate each legislative session, the enacted changes often fall short of "reform".

The meaning of "reform" in this context is not immediately apparent. Indeed, what is meant by juvenile court "jurisdiction" itself can be confusing. At the outset it is clear enough that jurisdiction encompasses the notion of a "valid" exercise of power over a class of "identified" children. Because jurisdiction over children is granted in order that they may be cared for and rehabilitated, the validity of an exercise of that jurisdiction is predicated upon the actual provision of care and treatment. See, A. Platt, The Child Savers: The Invention of Delinquency (1969). The jurisdiction of the court has therefore been

subject to attack whenever "the postulates of specialized treatment and resulting reclamation . . . have significantly failed of proof [either] in implementation [or] in consequences". President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Juvenile Delinquency and Youth Crime (1967) p.23; See In re Gault, 387 U.S. 1, 17-18 (1967); Kent v. United States, 383 U.S. 541, 556 (1966).

As a matter of definition and court decision, inappropriate court dispositions of children and dispositions not otherwise tailored to the individualized needs of each child do not amount to actual care and treatment. In addition, the courts have determined that the care and treatment that must be provided is care and treatment in the least restrictive setting (See Rights of Institutionalized Children chapter). Hence, actual treatment cannot be provided if the treatment alternatives made available to the court upon the exercise of a jurisdictional statute either bear no relation to the problem, status or condition of the class of persons identified by it or, given the nature of the problem, status or condition, the treatment alternatives are overly intrusive. A proper grant of jurisdiction over a class of children is one whereby the court is given the power to and must render the least restrictive treatment appropriate to the needs of the identified class.

Jurisdictional "reform", therefore, must mean a change that signals less restrictive and/or more appropriate treatment for a class of children. In the final analysis, if the needs of chil-

dren are not more sensitively addressed, changing the name of a jurisdictional category or moving a child from one category to another is not reform.

B. Trends - an Overview

Because the treatment guaranteed youth is treatment in the least restrictive setting, little justification exists for treating a truant, runaway, or other status offender as harshly as a criminal law violator. (See Dispositional Statutes chapter). In apparent recognition of this point of view, and the fact that stigma attaches to children labeled "delinquent", all but four jurisdictions have removed status offense behavior from the delinquency category.[1]

Further, in some jurisdictions adjudication and subsequent treatment as a status offender is authorized upon a finding that the child not only has committed a proscribed act, e.g., running away, but is also in need of court-administered care and rehabilitation.[2] These developments signal recognition of the fact that responsibility for status offense behavior often lies with the entire family unit and with the child's natural growth process. See J. Goldstein, A. Freud and A. Solnit, Beyond the Best Interests of the Child, (1973). Moreover, the legislatures of some jurisdictions have shifted some status offense activities into the dependency category and totally eliminated court jurisdiction over others, apparently in recognition of the fact that a status offense is seldom, if ever, solely the fault of the child and/or

that the juvenile court system is ill-suited to deal with this kind of problem.[3] See Bazelon, Beyond Control of the Juvenile Court, 121 Juv. Ct. Journal 42 (1970); Note, Ungovernability. The Unjustifiable Jurisdiction, 83 Yale L.J. 1383, 1387-88, at note 33, 1408 (1974); Beyond the Best Interest of the Child, supra at 8; O. Ketcham, Why Jurisdiction over Status Offenders Should be Eliminated from Juvenile Courts, 57 B.U. Law Rev. 645, 648-649 (1977).

Similarly, many state legislatures have determined that a criminal law violator should not be treated as or labelled as delinquent if the child is especially young,[4] if the offending conduct has been precipitated by the improper[5] or inadequate guidance[6] of his or her parents, or if the child is otherwise not in need of care and rehabilitation.[7]

In sum, to provide specialized treatment some legislatures are now seeking to place every activity or status, with which the court has some legitimate concern, in the jurisdictional category which triggers the least restrictive most appropriate treatment alternatives. In a significant and growing number of jurisdictions the least restrictive and most appropriate treatment of status offense conduct is thought to be treatment which presupposes a family unit in need of services provided in an in-home setting.

The realization of individualized treatment in the least restrictive environment depends not only on which activity or

status falls into each jurisdictional category, but also on how clearly a status or activity included within a category is identified. Typically couched in broad and vague terminology, status offender as well as neglect jurisdiction statutes have been extensively criticized for needlessly, arbitrarily, and discriminatorily subjecting children to court process. Comment, Parens Patriae and Statutory Vagueness in the Juvenile Court, 82 Yale L.J. 745 (1973); Comment, Juvenile Court Jurisdiction Over "Immoral" Youth in California, 24 Stan. L. Rev. 568, Note 32 at 577-79; Note, Statutory Vagueness in Juvenile Law and Mattiello v. Connecticut, 118 U. Pa. L. Rev. 143 (1969); Wald, State Intervention on Behalf of 'Neglected' Children: A Search for Realistic Standards, 27 Stan. L. Rev. 985, 987 (1975). Carefully and narrowly drawn statutes, in addition to excluding from court those who should be excluded, insure that children properly before the court and their parents or guardians will be put on notice of pending charges and possible adjudicatory outcomes. The "notice" afforded by many existing jurisdictional statutes is notice in name only. As one court finding a jurisdictional statute covering status offenders unconstitutionally vague aptly observed, "of what utility is notice of charges when the charge is merely that one is 'dissolute'? What use is counsel when it is impossible to know what type of evidence is relevant to rebuttal of the prosecution case?" Gonzalez v. Maillard, No. 50424 (N.D. Cal. filed Feb. 9, 1974) at 10-11, vacated and remanded 416 U.S. 918 (1974),

aff'd, No. 50424 (N.D. Cal. August 28, 1975). See also Roe v. Conn, 427 F. Supp. 769 (M.D. Ala. 1976).

The importance of good draftsmanship in jurisdictional statutes cannot be overstated. Proper notice in a case where a child may be even temporarily detained or otherwise removed from the custody of his or her parents protects not only the child's right to liberty but the fundamental right of parents to their child and child to parents. See, Stanley v. Illinois, 405 U.S. 645 (1972); Griswold v. Connecticut, 381 U.S. 479 (1965); May v. Anderson, 345 U.S. 528 (1953). A failure of clarity in dependency and neglect statutes is egregious because a neglect finding may ultimately lead to a permanent termination of that right.

While several states have effectively dealt with the vagueness problem as it relates to status offenders to the extent that they have eliminated status offender jurisdiction, the bulk of status offense and neglect jurisdiction statutes continue to reach the "incorrigible", the "ungovernable", those without "proper" parental care, and the like.

C. Delinquency Jurisdiction[8]

As conceived and implemented by its supporters, the juvenile justice system was to fulfill its goal of preventing future criminal conduct through the application of techniques and services designed to "reform and rehabilitate the youthful offender." See, e.g., State v. L.N., 263 A.2d 150 (N.J. App. 1970), aff'd per curiam, 270 A.2d 409 (N.J. 1970), cert. denied, 402

U.S. 1009 (1971). See generally, The President's Commission on Law Enforcement and the Aministration of Justice, Task Force Report: Juvenile Delinquency and Youth Crime 22 (1967). Broad jurisdictional statutes, then, were considered necessary in order to allow the court to "intervene in a wide range of situations and to bring many [juveniles] within its authority so that it [might] use the full range of diagnostic techniques available to decide who requires treatment." Note, The Status Offender and the Juvenile Court, 12 Willamette L.J. 557, 558 (1976). The legal construct of "delinquency", therefore, was defined as subsuming behaviors considered injurious to the community in general, such as property crimes and crimes against the person, as well as behaviors characterized as inimical to the juvenile's own welfare. Traditional statutes defining the parameters of the juvenile court's delinquency jurisdiction employed such terminology as: "habitually so deports himself as to endanger the morals or health of himself or others;"[9] "growing up in idleness or crime;"[10] "associates with vagrant, vicious or immoral persons;"[11] who engages "in indecent or immoral conduct;"[12] "living in circumstances of manifest danger of falling into habits of vice or immorality;"[13] "who by reason of being habitually wayward or habitually disobedient, becomes an incorrigible or uncontrollable child."[14] It is apparent, then, that the state, acting as parens patriae, had virtually unfettered discretion to intervene into the juvenile's life, See Note, The Parens Patriae Theory and

its Effect on the Constitutional Limits of Juvenile Court Powers, 27, U. Pitt. L. Rev. 894 (1966). Such pervasive jurisdiction was premised, in final analysis, upon the practical assumption that "[n]atural parents would be expected to be concerned with the whole gambit of undesirable behavior - from criminal activity to smoking cigarettes . . . . " F. Miller, et. al., The Juvenile Justice Process, at 58 (1976).

Recently, however, most states have acted to redefine the juvenile court's delinquency jurisdiction. The major trend in this movement has been the reformulation of delinquency jurisdiction to include only those behaviors or acts which if committed by an adult would be a violation of the criminal law (See Section B of this chapter). Those individuals who commit violations of the law applicable only to children are commonly classified as "children in need of supervision," "persons in need of supervision," or "unruly children." Two primary reasons exist for the development of such categories as "CHINS" and "PINS". Legislators, in recognition of recent evidence documenting the deleterious stimatizing consequences of labeling a juvenile as delinquent, have sought to limit application of the delinquent "label" to violations of the criminal law. Further, legislators have moved to prohibit the application of delinquency dispositional alternatives (secure confinement) to minors who have committed no criminal act.

In view of the admitted shortcomings of the juvenile justice system, in general, and recent evidence documenting the deleterious impact of labeling the juvenile as delinquent, in particular, the need for the reformulation and subsequent restriction of the juvenile court's delinquency jurisdiction is apparent. Although numerous exemplary proposals are available for reference in redrafting the court's delinquency jurisdiction for a particular state, one good example is found in Piersma, Ganousis & Kramer, The Juvenile Court: Current Problems, Legislative Proposals, and a Model Act, 20 St. L.U.L.J. 1 (1975) Section 1 (3). (See n. 17.)

The Pennsylvania code also provides that a child is not delinquent unless "the court has found [that he or she has] committed a delinquent act and is in need of treatment, supervision, or rehabilitation." 42 P.C.S.A. Ch. 63 §6302 (1979). The Pennsylvania Superior Court has held that the need for treatment, supervision or rehabilitation is a second and necessary element in a delinquency adjudication. In re Dreslinski, 386 A2d 81 (Pa. Super. 1978). Some states incorporate this requirement in the dispositional section of the juvenile code. In either case, dismissal of the petition is the remedy upon a negative finding of such need. Drafters should seriously consider inclusion of this requirement in juvenile code revisions since it goes to the heart of the necessity for juvenile court jurisdiction, the need for treatment and rehabilitation. (See also Section B of this chapter).

D. Status Offense Jurisdiction

As discussed, supra, many states have adopted a distinct jurisdictional category for status offenses. (See Appendix). Typically, the language of these statutes speaks of the "incorrigible child" or status offender as one:

> [w]ho refuses to obey the reasonable and proper orders or directions of his parent, guardian or custodian, and who is beyond the control of such person, or any child who is habitually truant from school, or who is a runaway from his home or parent, guardian or custodian or who habitually so deports himself as to injure or endanger the morals or health of himself or others. Ariz. Rev. Stat. Ann. §8-201(12) (West 1974).

Jurisdiction over behavior that is an offense only for persons who have not attained adult status pervades the American juvenile justice system and such jurisdiction is one of the most critical issues confronting the juvenile court today. An emerging legislative trend to eliminate or narrow the scope of status offense jurisdiction is underway. The following discussion sets forth the extent of juvenile court jurisdiction over status offenders, outlines the issues involved in the current status offendse controversy, presents the positions adopted by some major policy organizations and examines some recently enacted legislation and current legislative proposals.

The Extent of Juvenile Court Jurisdiction Over Status Offenders and the Current Status Offender Controversy

Although accurate data is difficult to retrieve, a 1974-75 study concluded that 35%-40% of the cases handled by juvenile courts in this country are status offenses. Sarri and Hasenfeld, eds., National Assessment of Juvenile Corrections, Brought to Justice? Juveniles, the Courts and the Law (Ann Arbor, Mich. 1976) p.67.

As indicated supra, moving children from one jurisdictional category to another has no meaning if more appropriate dispositional alternatives are not utilized or created to service these children. While many status offenders are jurisdictionally separated from delinquent children, they are regularly subjected to the same pre-adjudication detention and post-adjudication custody as alleged and adjudicated delinquent children. It has been estimated that 33-35 per cent of the committed youths in correctional facilities are status offenders. Sarri, "Status Offenders: Their Fate in the Juvenile Justice System" in National Council on Crime and Delinquency, Status Offenders and the Juvenile Justice System - An Anthology (1978) (hereinafter Anthology), pp. 61-77).[15] Some states authorize the jailing of status offender, both prior to adjudication and as a dispositional alternative. See Detention and Shelter Care, Children in Jails and Dispositional Statutes chapters. The enactment of the Juvenile Justice and Delinquency Prevention Act stands as the clearest indictment of our juvenile justice system's handling of status

offenders. (See Introduction chapter). It is within this framework that the status offense controversy has emerged.

Major Positions in the Status Offense Controversy

Social science literature is replete with studies and arguments on the status offense issue. Although difficult to categorize, three major positions can be identified: 1) juvenile court jurisdiction over status offenders should be retained; 2) juvenile court jurisdiction should be retained, but the focus of court intervention should be directed toward the family unit, rather than the child and/or juvenile court jurisdiction should be assumed only as a last resort and; 3) juvenile court jurisdiction over status offenses should be eliminated.

Retaining Juvenile Court Jurisdiction over Status Offenses

Several arguments are cited for the position that juvenile courts should retain jurisdiction over status offenders. All are premised on the rehabilitative nature of the juvenile justice process. Although it is conceded that status offense charges really reflect complex family and school problems, it is argued that compulsion is necessary to provide meaningful treatment to troubled children and families; that juvenile courts do divert every possible status offense case to appropriate community agencies, but that community services are scarce (and even if available, many troubled children will refuse to accept treatment voluntarily); and that status offenders, unless identified and

treated through the juvenile court, are likely to become juvenile delinquents. Arthur, Lindsay, G., "Status Offenders Need a Court of Last Resort" and Thomas, Charles W., "Are Status Offenders Really So Different?", in Anthology, pp. 19-32; 82-99; Arthur, Lindsay G., "Should Status Offenders Go to Court?", in Teitelbaum and Gough eds., Beyond Control - Status Offenders in Juvenile Court (1977), pp.235-247. Some authorities support retention of juvenile court jurisdiction but seek to change the focus of the court in such cases from the child to the family and/or to prohibit judicial intervention unless all community treatment alternatives have been exhausted. The report of the U.S. National Advisory Committee on Criminal Justice Standards and Goals, Task Force on Juvenile Justice and Delinquency Prevention is a good illustration of this approach. The Task Force recognized the potentially devastating effect on a child of a status offense label.[16] Further, the Task Force acknowledged that noncriminal misbehaviors require an exploration of family relationships and that all nonjudicial and voluntary resources should be exhausted prior to court intervention. The Task Force recommended, however, that certain specifically defined behaviors (habitual truancy, repeated disregard for or misuse of lawful parental authority, repeated runaways, repeated use of intoxicating beverages and delinquent acts committed by a juvenile younger than 10 years of age) be subject to "family" court jurisdiction and that this jurisdiction be designated Families with Service Needs.

The dispositional alternatives available to the court under this scheme would prohibit institutional confinement for any child under the court's Families with Service Needs jurisdiction. Juvenile Justice and Delinquency Prevention: Report of the Task Force on Juvenile Justice and Delinquency Prevention, Washington, D.C., U.S. Gov't Printing Off. (1977) pp.311-314, reprinted in Anthology, pp.51-54.

The Task Force's conclusions about the nature of status offenses and the need to deinstitutionalize status offenders is commendable. Some recent state legislation and current proposed legislation reflect these concerns. (See infra). Serious questions, however, are appropriately raised by proposals to alter, but maintain, juvenile court jurisdiction over status offenses. Even assuming court intervention only as a last resort, are there any services which the juvenile court can offer troubled families after community resources have been exhausted? Recognizing that a status offense label is often psychologically detrimental, is the label of Family in Need of Services (FINS) any less stigmatizing than that of Child in Need of Services (CHINS)? Such concerns form the foundation of a growing movement aimed at the elimination of juvenile court jurisdiction over status offenses.

Eliminating Juvenile Court Jurisdiction Over Status Offenses

Major policy organizations and many noted authorities in the area of juvenile justice advocate the removal of juvenile court jurisdiction over status offenses. The National Council on Crime

and Delinquency and the International Association of Chiefs of Police are among those adopting this position. See Board of Directors, NCCD, "Jurisdiction over Status Offenders Should Be Removed from Juvenile Court: A Policy Statement", Crime and Delinquency, 21(2): Apr. 1975, pp. 97-99, reprinted in Anthology, 3-5; Kobetz and Bosarge, Juvenile Justice Administration (1973), pp. 202-218. The Institute of Judicial Administration/American Bar Association Juvenile Justice Standards Project recommended the elimination of status offense jurisdiction with very limited exceptions to permit intervention in emergency situations and as a last resort in cases of serious and chronic truancy. See IJA-ABA Juvenile Justice Standards Project, Noncriminal Misbehavior, (Tentative Draft, 1976) (hereinafter Noncriminal Misbehavior); Synopsis: Standards Relating to Non-Criminal Misbehavior, 57 Boston U.L. Rev. 627-630 (1977), reprinted in Anthology, 15-18. The Model Juvenile Court Act of the National Juvenile Law Center also removes status offenses from court jurisdiction.[17] See generally, National Institute for Juvenile Justice and Delinquency Prevention, Office of Juvenile Justice and Delinquency Prevention, Jurisdiction - Status Offenses (1977).

The arguments for elimination of status offense jurisdiction are premised on legal and practical considerations. Statutes which confer status offense jurisdiction are often plagued with vagueness problems, (See Section A of this chapter). The indefiniteness of language such as "habitual", "beyond control", and "endanger the morals of himself or others" delegates to police

officers, social workers and the courts the decision as to whether particular conduct is prohibited. Generally, courts have been reluctant to declare such language void for vagueness. See National Juvenile Law Center, Law and Tactics in Juvenile Cases, (3rd Ed., 1977) pp. 24-28; Katz and Teitelbaum, "PINS Jurisdiction, the Vagueness Doctrine, and the Rule of the Law," in Teitelbaum and Gough, Eds., Beyond Control - Status Offenders in the Juvenile Court, (1977) pp.201-234. Equally important, status offense jurisdiction sanctions judicial intervention absent any criminal act. Such intervention is seen as totally unwarranted, both legally and practically. While the judicial system can decide whether or not a person has committed a given act, "it is incapable of managing, except in a very gross sense, so delicate a relationship as that between parent and child." See Noncriminal Misbehavior, supra p.11 and citations therein. In status offense cases, which are of "vastly greater duration, intimacy, complexity and emotional intensity than other cases in the justice system, the court is peculiarly ill-equipped to sit as a neutral arbiter." Note, Ungovernability: The Unjustifiable Jurisdiction, 83 Yale L. J. 1383, 1402, n.119 (1974). As a consequence, and "[a]lthough some juvenile court judges . . . question the wisdom of certain parents, the rule is 'the parents right or wrong,' and the child is treated as the one with the problem." O. Ketcham, Why Jurisdiction over Status Offenders Should be Eliminated from Juvenile Courts, 57 B.U.L.R. 645, 648-49 (1977).

Other persuasive arguments in support of this position include the following: court intervention is an unwise and uneconomic use of public funds; juvenile courts cannot identify pre-delinquent youth nor "save" anyone from embarking on a criminal career; court intervention exascerbates, rather than alleviates family disharmony; status offense statutes are invoked discriminately since girls are more frequently charged with status offenses than boys and suffer greater sanctions; status offense statutes allow the juvenile court to be a "dumping ground" for parents and school authorities; any scarcity of community services and/or school programs cannot be a rationalization for continued judicial intervention since the availability of the juvenile court inhibits the development of non-judicial services.

The fact that at least 30% of all juvenile court cases are status offenses is a clear indication that the cost of such jurisdiction is high in that it diverts the attentions of court personnel, judges and probation officers from those cases where intervention is warranted to those cases for which there is persuasive authority that coercive intervention is inappropriate and ineffective. The costs of institutionalizing status offenders must also be added to the costs of court processing. (See Dispositional Statutes chapter).

Several studies have demonstrated that the behavior encompassed by status offense statutes is not "protocriminal", i.e. no

evidence exists that status offenders are likely to escalate to criminal offenders. See Clarke, Stevens H., "Status Offenders Are Different: A Comparison of Offender Careers by Type of First Known Offense", Journal of Research in Crime and Delinquency, 12(1): 51-60 (Jan. 1975) reprinted in Anthology; Report of the California Interim Committee on Criminal Procedure, Juvenile Court Processes 7 (1971); See discussion and additional citations in Noncriminal Misbehavior, p.3. In fact, much of the conduct that gives rise to status offense charges represent a youthful push for independence which is both endemic and transitory. Noncriminal Misbehavior, p.3. Further, the goal of "saving" pre-delinquent juveniles from a downward spiral of criminal activity rests on the faulty assumptions that a court can "(1) understand accurately a youth's past behavior; (2) predict accurately how a youth will develop in the future without court intervention and (3) predict accurately that with court ordered "treatment" a youth's development will follow a different, more "desirable" path." Andrews and Cohn, "PINS Processing in New York: An Evaluation," in Beyond Control - Status Offenders in Juvenile Court, supra, at p.85.

Proponents of this position argue that, while status offense conduct is usually symptomatic of an unhealthy family dynamic, there is no concensus of opinion as to the constituent parts of a "healthy" family. Indeed, even the "healthy adult" has escaped definition. S. White, Federal Programs for Young Children:

Review and Recommendations (1973). It is now well-recognized, though, that "treatments" which focus on the child and not the family, further attenuate, rather than improve, family relationships. O. Ketchum, supra at 648-649 (1977). Even if the focus of status offense jurisdiction can be changed from the child to the family, it is doubtful that coercive court intervention at this level can have any significant effect on complex family interactions - an area ill-suited to legal analysis and coercive treatment. See Mahoney, "PINS and Parents", in Beyond Control - Status Offenders in the Juvenile Court, supra, at p.161-177.

In addition to the persuasive arguments which focus on the inability of juvenile courts to coercively treat status offenders, sexual discrimination in the application of status offense jurisdiction has been well-documented. A 1972-1973 study in the State of New York concluded that the majority of minor girls who appeared in court were charged with noncriminal misbehavior while only one-fifth of the boys referred to family court were charged with status offenses. Sussman, "Sex-Based Discrimination and PINS Jurisdiction," in Beyond Control - Status Offenders in Juvenile Court, supra, at p.179. It has been reported that in 1971, 75% of the girls in detention centers in this country were charged with noncriminal offenses as compared to 20%-30% of the boys detained. Chesney-Lind, "Judicial Paternalism and the

Female Status Offender", in Anthology, p.113. The New York study also concluded that girls adjudicated for noncriminal misconduct were disproportionately represented in state training schools and reformatories, Sussman, supra at 185. This phenomenon is largely attributable to the vague standards of conduct that characterize PINS statutes. "Their breadth (ungovernability, incorrigibility, beyond control) invites discretionary application and allows parents, police, and juvenile authorities, who ordinarily decide whether PINS proceedings should be initiated, to hold girls accountable for behavior-often sexual or in some way related to sex - that they would not consider serious if committed by boys." Sussman, supra, at 179.

A final argument set forth in support of eliminating status offense jurisdiction is that the development of nonjudicial services for troubled children and families is no rationalization for the retention of juvenile court jurisdiction. Indeed, passage of the Juvenile Justice and Delinquency Prevention Act which contains, as Title III, the Runaway Youth Act have prompted state and local governments, as well as private agencies, to initiate numerous alternative services including family-crisis intervention centers, runaway shelters and alternative educational programs.[18] It is persuasively argued that the growth of such programs will be hampered as long as juvenile courts encourage parents and schools to abdicate their functions and roles. Instead, removal of status offense jurisdiction will stimulate

the creation and extension of a wider range of voluntary services than is presently available. Noncriminal Misbehavior, p.15.

It cannot be denied that status offense jurisdiction as it now exists and is exercised in most states is in need of immediate reform. Restricting dispositional alternatives by prohibiting the secure confinement of status offenders will alleviate many of the defects of the present system. The ultimate issue, however, is whether any legal or moral justification exists for subjecting children to judicial intervention in the absense of any criminal conduct. The overwhelming weight of the evidence is that reforms which limit or redirect the focus of the present jurisdictional schemes will ultimately prove ineffective in curing the defects of the present system because the juvenile courts cannot now and will never be equipped to "correct" family conflicts or cure the ills of disabled educational systems.

Status Offense Jurisdiction - Legislative Trends

Colorado

In 1978, Colorado abolished its CINS category which encompassed habitual truants, runaways and beyond control children. In its place, the legislature enacted a "child needing oversight" category defined as follows:

> "any child whose behavior or condition is such as to endanger his own or others' welfare."

Colorado Revised Statutes, Title 19 §1-103 et. seq. (1978) (See

Appendix also for additional information regarding the Colorado statute and all statutes discussed infra.) The legislature moved runaway and beyond control behavior to the dependent or neglected classification. Habitual truancy is eliminated from any category. However, the retention of vague statutory language makes it difficult to distinguish conduct which renders a child beyond control (neglected or dependent) from conduct which endangers his/her own or others' welfare (child needing oversight) and to assess the signficance of the amendments.

Delaware

Prior to 1978, the Delaware code included all status offenses within the delinquency definition. In 1978, the legislature amended the code by eliminating status offense jurisdiction. Jurisdiction is currently limited to criminal law violators (delinquent category) and children not receiving proper physical, mental or emotional care and protection because of parental deficiencies or misconduct (neglect and dependent categories). The legislation also adds "truancy" to the definitions section. Thus, truancy can be one factor which triggers jurisdiction under the dependency or neglect categories. The disposition section of the code prohibits placement of a dependent or neglected child in the same facility for children charged with or found to be delinquent. Del. Code Ann. Title 10, §901 et. seq. (Supp. 1978).

Washington

The State of Washington revised its juvenile code in 1977 and again in 1979. See generally, Symposium: Juvenile Law, 14 Gonzaga L.R. No. 2 (1979). Juvenile court jurisdiction over status offenses has been eliminated. Judicial intervention is authorized only upon a "petition to approve an alternative residential placement". A parent, a child or the Department of Social and Health Services may initiate such a petition. The code sets forth an elaborate system of crisis intervention services and alternative living arrangement procedures to be pursued prior to judicial intervention. Upon the filing of a petition, the court may:

> approve an order stating that the child shall be placed in a residence other than the home of his or her parent if it is established by a preponderance of the evidence that a serious conflict exists between the parent and the child and that the conflict cannot be resolved by the delivery of services to the family during continued placement of the child in the parental home.

R.C.W. Chap. 155, Sec. 31(1) Wash. Legis. Serv. No. 1 (1979).

> The court shall dismiss the petition if it finds:
>
> (A) [that the petition is capricious] or
> (B) that the filing party did not first reasonably attempt to resolve the conflict outside the court.

R.C.W. Chap. 155, Sec. 31(5) supra. (Relevant sections of the Washington code are reproduced in the Appendix.)

Washington has also recently enacted a truancy statute premised on the belief that school attendance is the responsibility of parents and guardians. Under the Washington code, the school is responsible for informing the parents or guardians

of a child's truancy and the school must take all necessary steps to reduce the child's absence, including school programs adjustments and assistance to parents in securing supplementary services. Parents are subject to court imposed fines for failing to ensure that their children attend school. This legislation, then, gives a new direction to truancy jurisdiction by making parents, rather than truant children, subject to judicial sanctions.

R.C.W. Chap. 201, Wash. Legis. Serv. No., pp.1589-1591 (1979).[19] (Compare the Washington code and codes discussed, infra, with Michigan proposal, H.B. 4774 (July 5, 1979) which authorizes court intervention in status offense cases only after a number of clearly-defined extra-judicial interventions to resolve family and school problems have been exhausted. The relevant sections of H.B. 4774 are appended to this chapter).

Maine

In Maine, a juvenile runaway may be taken into interim care by a law enforcement officer. The officer must refer the juvenile to an intake worker who, in turn, must refer the juvenile to a shelter care facility licensed by the Department of Human Services. (Unfortunately, the Code permits placement in a secure facility or public section of a jail if no other appropriate placement is available.) Me. Rev. Stat. Ann. Tit. 15, §3501 (7)(b) (1979). If a juvenile refuses to return home and if no

living arrangement can be made which is agreeable to the juvenile and the parents or if a parent refuses to allow the juvenile to return home, a referral to the Department of Human Services is made. The Department determines whether a petition for protective custody (neglect) shall be filed. Additionally, if the minor is sixteen years of age or older and refuses to return home and the parents or guardian refuse to permit the juvenile to remain away from home, counsel will be appointed for the minor and he/she may file a petition for emancipation. Once a petition is properly filed, the court's power over the juvenile petitioner is limited. The court shall emancipate the petitioner "if it finds that the juvenile is sufficiently mature to assume responsibility for his own care and that it is in the juvenile's best interest for him to do so." Me. Rev. Stat. Ann. Tit. 15 §3506 (a) (1979). "If the court denies the petition, it may recommend that the Department of Human Services provide continued services and counseling to the family." §3506(3). See Me. Rev. Stat. Ann. Tit. 15 §3501 et. seq. (1979). (The relevant sections of the Maine code are appended to this chapter.)

Iowa

The Iowa legislature has adopted a Family in Need of Services (FINS) approach. Iowa Code Ann. Ch. 231 §232.1 et. seq. (effective July 1, 1979). Isolated incidents of status offense behavior are apprently not sufficient to trigger the jurisdiction

of the court. Instead, the triggering factor is "family breakdown," §232.2(17); §232.125(5); §232.127(5)(a). Any family member, including a child, may file a FINS petition. Further, a petitioner must allege that he/she has sought "services from public or private agencies to maintain and improve the familial relationship". §§232.125, 232.127(5)(b). Finally, before the court may adjudicate a family to be in need of assistance it must find that "[t]he court has at its disposal services [to maintain and improve the familial relationship] which can be made available to the family". §232.127(5)(c). Upon a FINS adjudication, the court may:

> (6) . . . . . order any or all of the parties to accept counseling and to comply with any other reasonable orders designed to maintain and improve the familial relationship. At the conclusion of any counseling ordered by the court, or at any other time deemed necessary, the parties shall be required to meet together and be apprised of the findings and recommendations of such counseling. Such an order shall remain in force for a period not to exceed one year unless the court otherwise specifies or sooner terminates the order.
>
> (7) The court may not order the child placed on probation, in a foster home or in a nonsecure facility unless the child requests and agrees to such supervision or placement. In no event shall the court order the child placed in the Iowa training school for boys or the Iowa training school for girls or other secure facility.
> §232.127(6)(7).

The Iowa Code does change the focus of traditional status offense jurisdiction from the child to the family. Closer scrutiny, however, reveals some shortcomings in this legislation. The term "family breakdown" is not defined. Absent any specific

criteria for determining the existence of a "family breakdown," it is possible that the court can become involved when there is a breakdown over conduct which is not, in itself, a serious problem.[20] The necessity of seeking family services prior to court intervention does not appear to be a sufficient check on this defect since the Iowa code neither requires genuine cooperation with the family agencies nor specifies under what circumstances a lack of cooperation may be inferred.[21] After a family has merely "sought" services, the court is probably in no better a position to assess the conflicting claims and perspectives of the family members than had the family gone directly to the court. Thus, parental access to the court under the FINS jurisdiction may be no more restrictive than it is under traditional status offense "incorrigible" and "ungovernable" jurisdiction.

The dispositonal alternatives available to the court upon a FINS adjudication do prohibit secure confinement of a child. However, the FINS section also provides that a child found to be in contempt of a court order may be "punished". "Punishment" includes the option of subjecting the child to every one of the dispositions available for a Children in Need of Supervision, including placement at an Iowa Training School. §§232.127(8); §232.100 et. seq. Thus, by defining contempt of court only in terms of the child's violation of a court order and by subjecting the child to secure confinement, the inconsistency in the Iowa

code is apparent. Presupposing a need for family treatment, jurisdiction is not authorized unless a "family breakdown" exists. Yet, when the breakdown manifests itself, it appears that the court is empowered to "treat" the child as though it is the child alone who has the problem.

Pennsylvania

Prior to 1977, the Pennsylvania Juvenile Code encompassed "delinquent" children and "deprived" children. "Habitual disobedience" was included within the delinquency category while habitual truancy was included in the deprived child classification. The dispositional alternatives available to the court upon an adjudication of delinquency due to habitual disobedience included placement in a secure institution for delinquent youth. In 1977 and 1978 the Pennsylvania legislature amended the code by removing "habitual disobedience" from the delinquency category. They also eliminated the "deprived child" classification and created a "dependent child" classification. Included within this classification is a child who:

> while subject to compulsory school attendance is habitually and without justification truant from school;
>
> - - - - -
>
> has committed a specific act or acts of habitual disobedience of the reasonable and lawful commands of his parent, guardian or other custodian and who is ungovernable and found to be in need of care, treatment and supervision; (emphasis added).

42 P.C.S.A. Ch. 63, §6302 (1979).

No child adjudicated dependent shall be "committed to or confined in an institution or other facility designed or operated for the benefit of delinquent children." 42 P.S.C.A. Ch. 63, §6351(b) (1979).

The recent amendments to the Pennsylvania Code have not removed the court's jurisdiction over status offenders, but all status offenses are now subsumed under the "dependent child" category. The significant change has been the removal of "habitually disobedient" children from the delinquency classification and, in turn, the elimination of confinement in institutions operated for delinquent children (which include secure facilities) as a dispositional alternative for these children. Dependent children may still be placed in non-secure institutional settings.

E. Non-offender Jurisdiction

> There is little question that many children in our society grow up in less than 'ideal' environments. . . . However, the fact that many children are denied 'an optimal' environment does not clearly lead to the conclusion that we should be expanding coercive state intervention on behalf of children. Determining the appropriate scope of coercive intervention entails evaluating the efficacy of such intervention and examining the costs and benefits of using court proceedings to try to protect children.

Institute of Judicial Administration/American Bar Association, Juvenile Justice Standards Project, Abuse and Neglect, 1-2 (Tentative Draft 1977) (hereinafter Abuse and Neglect).

Every state provides for the exercise of juvenile court jurisdiction over children who suffer from a lack of proper parental care. Critics of the current court system of intervention argue that there exists a preference toward removal of children from their homes rather than provision of protective services in the home, that children once placed out of the home face lengthy and multiple foster placements, and that children who cannot return home are not placed in more permanent settings. Restrictive intervention criteria are suggested as a solution. On the other hand, some argue that broad, vague laws are necessary to protect all children needing help. A compromise is called for which would balance both the needs of the children and limit the court's ability to order coercive intervention.

Individual statutes which govern the exercise of juvenile court jurisdiction may be phrased in terms of neglect, abuse, abandonment, dependency, or termination of parental rights, but most contain similar provisions vesting broad discretion in the court to find appropriate substitute care. Although considerable overlap may exist between individual statutes within a state code, and states vary considerably in their definitions of particular terms, some general observations will be attempted.

Neglect

Neglect refers to a temporary lapse of care on the part of the parent, often involving some degree of willfulness. Statutes

may be quite detailed, specifying moral unfitness of a parent, failure to send the child to school, mental or physical incapacity of a parent, or may be couched entirely in broad phrases such as lack of proper parental care, control or guardianship. Although the various state statutes differ in terminology, the statutory criteria usually fall within four broad classifications:

> (1) abandoned; (2) without proper parental care because of the faults or habits of his parents; (3) without medical care or education as required by law due to parental neglect or refusal to provide such necessities; or (4) in an environment injurious to the well-being or morals of the child because of parental fault.

Even enactments which contain numerous specific grounds for neglect usually include one catchall phrase to cover other situations.

To guard against over-intervention by the courts and resulting harm to children, the requirements for neglect jurisdiction should be defined as specifically as possible. Statutes "should authorize intervention only where the child is suffering, or there is a substantial likelihood that the child will immediately suffer, serious harm, . . . and where the intervention . . . will do more good than harm." Abuse and Neglect, p. 40.

Vagueness Challenges

In neglect proceedings, parents face the possibility of loss of custody of their children. Although the necessity of protect-

ing a child from a dangerous home environment is recognized, parents also face severe consequences and are entitled to adequate notice of the specific circumstances that may lead to removal of their children and eventually a termination of parental rights. Moreover, a decision concerning loss of parental rights should not be left to the unfettered discretion of judges and other juvenile court officials. For these reasons, some neglect jurisdiction statutes may be susceptible to a void-for-vagueness constitutional challenge. Common to these statutes are phrases such as "proper parental care", "injurious to morals or well being," "a stable moral environment," which have no commonly accepted meaning. Such language fails to inform parents of conduct that must be avoided. In addition, these statutes fail to provide judges and juries with any definitive criteria against which to measure parental conduct. (See Section A of this chapter.)

Moreover, the vagueness of neglect statutes permits social workers and other administrative personnel to make highly subjective determinations concerning the applicability of neglect statutes to specific parent-child relationships. Since the courts usually rely heavily on agency recommendations, the latitude for discretionary application of neglect statutes creates an enormous potential for abuse at the agency level. Thus, the typical neglect statute injects into the governmental wheel "so much free play that in the practical course of its operation it

is likely to function erratically - responsive to whim or discrimination unrelated to any specific determination of need by the responsible policy making organs of society . . . ."Note, The Void-for-Vagueness Doctrine in the Supreme Court, 109 U. Pa. L. Rev. 67, 90 (1960).

It is the tendency of courts, faced with vagueness attacks on neglect statutes, to rely on the traditional notion that courts should be granted broad discretionary powers in determining the cricumstances constituting neglect. The basis for sustaining these statutes has been that the state's legitimate interest in protecting the child justifies the scope and ambiguity of the statute's language. This reasoning fails to recognize that, because of the strength of the parent-child bond, the state's concern for the child's welfare would be most effectively maintained by insuring the protection of the parent's rights through the use of statutes that delineate the scope of child neglect. Moreover, the contention that the state's interest in the child's welfare may justify weakened safeguards of the parent's constitutional rights is suspect when the state can protect parental rights by recasting statutes to cure vagueness defects. See infra.

In addition to citing the need for flexibility in neglect proceedings, courts have responded to vagueness attacks on neglect statutes by emphasizing that such statutes are civil in nature and thus do not require the specificity of statutes im-

posing penal sanctions. Although the void-for-vagueness doctrine has primarily been limited to criminal statutes, courts have recognized the doctrine's applicability to civil statutes.

First, in a neglect proceeding, the state asserts its weight, including its great resources, on behalf of the public against the parent. As such, the state's function in a neglect case more closely approaches the state's traditional role in criminal rather than civil proceedings. Second, neglect adjudications impose harsh consequences on both parent and child. A primary factor in determining if a statute is penal in nature is whether the statute works an affirmative disability or restraint on a parent and his/her child. The great weight of sociological and psychological evidence suggests that a child's removal from home can have seriously detrimental effects on both parent and child. Another factor considered in ascertaining the nature of a statute is whether the statute fulfills the traditional aims of punishment. The loss of custody of one's child is undeniably a form of punishment for parental failures or shortcomings.

A third consideration in demonstrating the futility of the civil-criminal distinction with regard to the application of vagueness standards is the fact that parental conduct for which a child may be declared neglected may, in many states, constitute grounds for criminal prosecution against the parent for contributing to the neglect of a child or for child abuse. In essence, parents in neglect cases are alleged to have engaged in conduct

that may constitute a crime. A factor of importance in classifying a statute as penal is whether the conduct to which the statute applies is already considered criminal. Although a parent cannot be fined or imprisoned in a neglect proceeding, the loss of child custody for conduct that could result in fine or imprisonment in a criminal prosecution should entitle the parent to the same constitutional safeguards required in prosecutions under criminal statutes.

Clearly, neglect statutes presently permit the juvenile court judges to interpret broad statutory wording to effect the dispositions they consider necessary in the cases before them. Thus, the dispositional phase of the proceeding should be separate and distinct from the finding of neglect and should be considered only after an adjudication of neglect has been made, recognizing that the judge's view of the most desirable disposition in a neglect proceeding will likely color the finding as to whether the child is neglected.

It should be evident from the typical neglect statutes that, although these statutes reflect the conviction that neglect involves parental fault, intent or willfulness is not a requisite element of child neglect. If the neglect is shown to have been willful, some states permit criminal prosecution of a parent under contributing to neglect statutes. See, e.g., People v. Phipps, 97 N.Y.S.2d 845, 849 (Dom. Rel. Ct. 1950). Moreover, when the element of willfulness is present, courts are more

likely to find a child neglected, thus allowing for removal of the child from the home.

It should be noted that if neglect or dependency statutes speak only of "parental" care, children may be adjudicated dependent or neglected, even though receiving excellent care from adults other than their parents. See, e.g., State ex rel. Jering v. Bird, 250 Iowa 730, 96 N.W.2d 100 (1959). This situation usually arises when a child is receiving adequate care and supervision in the physical custody of grandparents or other relatives. The child's caretakers seek to have the child declared neglected or dependent so that the court may award them legal custody. State neglect or dependency statutes which refer only to the child-parent relationship permit courts to decide that the welfare of the child justifies adjudicating him/her neglected or dependent and awarding custody to the caretakers. There is, however, persuasive authority to the contrary. In Orr v. State, 70 Ind. App. 242, 123 N.E. 470 (1919), the court held that neglect did not exist when the child's grandparents were providing care after the child had been abandoned by his parents. The decision in Orr is particularly important, since the neglect statute in that jurisdiction specifically defined a neglected child as one without proper parental care. See also In re Sneed, 230 Ore. 13, 368 P.2d 334 (1962), holding that a child could not be found dependent when his mother had legal custody and his grandmother's care was inadequate. Accord, In re Darst, 117 Ohio App. 374, 192 N.E.2d

287 (1963), holding that a state's interest in a child under the dependency statutes arises only when there is no one who is meeting the obligations of care, support, and custody owed by the parent.

Abuse

Most acts of child abuse would come within the standard neglect provisions, but many states have separate child abuse chapters. While these chapters primarily deal with reporting, they occasionally include procedures to be employed against the abusing party. These may result in civil or criminal penalties being levied against a guilty party depending on the specific provisions.

Abandonment

In addition to child abuse, abandonment and dependency are two additional categories of neglect which may be the subject of separate legislation. Abandonment is shown by parental absence, usually assumed to be willful and, where separated from neglect findings, it generally precedes a termination proceeding.

Neglect, dependency, and termination statutes almost universally include abandonment as a ground for an adjudication. Since most laws fail to define the term, it has been left to the courts to develop standards upon which decisions are based.

Although a finding of neglect ordinarily does not require intentional conduct by the parent, courts have usually characterized abandonment as including the element of willfulness. Many courts have adopted the definition of abandonment as "conduct on the part of a parent, which evinces a settled purpose to forego all parental duties and relinquish all parental claims to the child." Winans v. Luppie, 47 N.J. Eq. 302, 20 A. 969, 970 (1890); See Robinson v. Neubauer, 79 Ill. App. 2d 362, 223 N.E.2d 705 (1967); Baker v. Rose, 28 Ohio Misc. 200, 270 N.E.2d 678 (Juv. Div. C.P. 1970).

Since willfulness must be shown in order to establish abandonment, a separation of child and parent due to misfortune or misconduct alone will not suffice. Thus incarceration of a parent in and of itself will not constitute abandonment. Neglect based on abandonment is likewise not justified when a parent is in a mental hospital and unable to visit the child. Because abandonment suggests a parent's total rejection of the duties owed to a child, failure to support a child financially, in itself, should not necessitate a finding of abandonment. On the other hand, failure to assist a child financially when the parent is able to do so may be considered a major factor in a determining abandonment.

The major difficulty in abandonment cases is determining the point at which parental conduct amounts to relinquishment of all responsibilities to the child. A number of statutes have attempted ted to deal with this problem by setting time limits after which abandonment can be established. Under such statutes, abandonment

cannot be found unless the parent has foregone all contact with a child for the requisite time period. These statutes have their primary impact in termination of parental rights proceedings, see infra, since the court may find neglect based on such statutory provisions as "lacking proper parental care," thus obviating the problem of determining whether the parental neglect is so complete as to constitute abandonment. If no time limit for abandonment has been articulated in dependency or neglect statutes, the courts may seek to ascertain whether the parent has made sufficient attempts to preserve the parent-child relationship. The IJA/ABA Juvenile Justice Standards Project suggested the elimination of abandonment as a basis for jurisdiction. If a child is truly abandoned, "i.e., there is no adult caring for or willing to continue caring for the child", jurisdiction will be obtainable under some other criteria which requires a serious, immediate threat to the physical safety of the child. Abuse and Neglect, p. 49.

Dependency

Dependency, unlike neglect, denotes a failure to provide adequate care absent parental fault. See, e.g., Caruso v. Superior Court, 2 Ariz. App. 134, 406 P.2d 852 (1965). Those states retaining the separate statutory classification of "dependent child" typically employ such definitions as a child "without a parent or other legal custodian," "whose custodian is unable to provide him with adequate care," who is "dependent upon the

public for support," is "destitute," or is "homeless." Some states include within their dependency jurisdiction cases in which parents or other legal custodian cannot provide adequate care because of the special condition of the parent/custodian or child. The trend among the states, however, is to abolish dependency jurisdiction, a trend reflected by the major standard setting organizations: National Conference of Commissioners on Uniform State Laws, Uniform Juvenile Court Act (1968); National Council on Crime and Delinquency, Standard Juvenile Court Act (1959); W. Sheridan, Model Acts for Family Courts and State-Local Children's Programs (1975). See also American Justice Institute, National Task Force to Develop Standards and Goals for Juvenile Justice and Delinquency Prevention, 6 Abuse and Neglect pp. 5-7 (1976). The need for eliminating poverty as a ground for a dependency finding has been affirmed in numerous cases in which the courts have concluded that poverty is an insufficient basis for a dependency adjudication.

Despite the growing tendency to remove dependent children from the jurisdiction of the courts, a number of states have not yet taken the step. Two factors are important in the decision to maintain jurisdiction. Some states make no provision for voluntary placements of children with agencies. As a result, certain agencies will accept children only if a placement is ordered by the court, i.e. after a finding of dependency. Additionally, eligibility for federal matching funds for foster care may depend upon court ordered removal of a child from the home.

Termination of Parental Rights

The severing of all parental rights and interests in a child, past, present and future, is commonly known as termination of parental rights. While some state codes include separate chapters dealing with termination, most include it as a section or subsection of the neglect chapter. The grounds for termination may in large part duplicate the neglect provisions, but usually further require that the detrimental condition has continued for some period of time, or is incapable of resolution within the foreseeable future.

As with neglect provisions, termination statutes are written in broad language which allows judges considerable latitude in reaching a decision. These statutes typically include abandonment, parent's mental incapacity or deficiency, repeated or continuing neglect, parental unfitness, and failure to provide support when financially able to do so as grounds for termination.

Despite the drastic result of termination, the ability to completely sever parental rights is viewed as necessary under certain circumstances. Termination is required before a child can be adopted and is, therefore, necessary in order to provide for the permanent placement of a child.

Statutory Survey

A brief survey of a sample of jurisdictional statutes reveals that most of them suffer from the vagueness problems discussed supra.

Rhode Island §14-1-3, provides in part:

> H. The terms "dependent" and/or "neglected" when applied to a child shall mean and include any child - Who is homeless or destitute or abandoned or dependent upon the public for support, or who has not the parental care or guardianship or who habitually begs or receives alms, or whose home, by reason of neglect, cruelty, drunkenness or depravity on the part of the parent or parents having custody or control of such child is an unfit place for such child, or any child under eight (8) years of age found peddling in the streets . . .

R.I. Gen. Laws §14-1-3 (Comm. Supp. 1978). The provision is devoid of any requirement that there be an imminent serious harm to the health or welfare of the child and, instead, allows for expression of value judgments which may be culturally or economically based.

The Alabama Code, after listing several specific conditions which may lead to dependency jurisdiction, provides that a dependent child is one:

> "m. Who for any other cause is in need of care and protection of the state;"

This language places no limitation on the judges' exercise of discretion. Ala. Code §12-15-1(10)(M) (Comm. Supp. 1978).

The Idaho Child Protective Act confers jurisdiction as follows:

> 16-1603. Jurisdiction of the court. - Except as otherwise provided herein, the court shall have exclusive original jurisdiction in proceedings concerning any child living or found within the state;
> (a) who is neglected, abused or abandoned by his parents, guardian or other legal custodian, or who is homeless; or

(b) whose parent or other legal custodian fails to provide a stable home environment. In considering the child's home environment, the court shall determine if the parent or other legal custodian is unable to provide such environment by reason of immaturity or emotional, mental, or physical disability. [I.C., §16-1603, as added by 1976, ch. 204, §2, p.732.]

and, provides in part the following definitions:

16-1602. Definitions. - For purposes of this act:
(a) "Abused" means any case in which a child has been the victim of conduct resulting in skin bruising, bleeding, malnutrition, sexual molestation, burns, fracture of any bone, subdural hematoma, soft tissue swelling, failure to thrive or death, and such condition or death is not justifiably explained, or where the history given concerning such condition or death is at variance with the degree or type of such condition or death, or the circumstances indicate that such condition or death may not be the product of an accidental occurrence.
(b) "Abandoned" means the failure of the parent to maintain a normal parental relationship with his child, including but not limited to reasonable support or regular personal contact. Failure to maintain this relationship without just cause for a period of one (1) year shall constitute prima facie evidence of abandonment.

. . .

(n) "Neglected child" means a child:
(1) who is without proper parental care and control, or subsistence, education, medical or other care or control necessary for his well being because of the conduct or omission of his parents, guardian or other custodian or their neglect or refusal to provide them; provided, however, no child whose parent or guardian chooses for such child treatment by prayers through spiritual means alone in lieu of medical treatment, shall be deemed for that reason alone to be neglected or lack parental care necessary for his health and well being, but further provided this subsection shall not prevent the court from acting pursuant to section 16-1616, Idaho Code; or
(2) whose parents, guardian or other custodian are unable to discharge their responsibilities to and for the child because of incarceration, hospitalization, or other physical or mental incapacity; or

(3) who has been placed for care or adoption in violation of law.

Idaho Code §16-1602 to 16-1603 (Comm. Supp. 1979).

While this statute does incorporate more specificity, it retains such subjective terms as "a stable home environment." In addition, the definition of "abandoned" and "neglected child" contain no reference to a harm to the child.

Iowa and New York both provide fairly good examples of specific objective criteria for exercising dependency jurisdiction. Iowa Juvenile Code Section 232.2(5) defines a "child in need of assistance":

5. "Child in need of assistance" means an unmarried child:
a. Whose parent, guardian or other custodian has abandoned the child.
b. Whose parent, guardian or other custodian has physically abused or neglected the child, or is imminently likely to abuse or neglect the child.
c. Who has suffered or is imminently likely to suffer harmful effects as a result of:
(1) Conditions created by the child's parent, guardian, custodian; or
(2) the failure of the child's parent, guardian, or custodian to exercise a reasonable degree of care in supervising the child.
d. Who has been sexually abused by his or her parent, guardian, custodian or other member of the household in which the child resides.
e. Who is in need of medical treatment to cure, alleviate, or prevent serious physical injury or illness and whose parent, guardian or custodian is unwilling or unable to provide such treatment.
f. Who is in need of treatment to cure or alleviate serious mental illness or disorder, or emotional damage as evidenced by severe anxiety, depression, withdrawal or untoward aggressive behavior toward self or others and whose parent, guardian, or custodian is unwilling or unable to provide such treatment.
g. Whose parent, guardian, or custodian fails to exercise a minimal degree of care in supplying the

child with adequate food, clothing or shelter or refuses other means made available to provide such essentials.

h. Who has committed a delinquent act as a result of pressure, guidance, or approval from a parent, guardian, or custodian.

i. Who has been the subject of or a party to sexual activities for hire or who poses for live display or for photographic or other means of pictorial reproduction or display which is designed to appeal to the prurient interest and is patently offensive; and taken as a whole, lacks serious literary, scientific, political or artistic value.

j. Who is without a parent, guardian or other custodian.

k. Whose parent, guardian, or other custodian for good cause desires to be relieved of his or her care and custody.

l. Who for good cause desires to have his or her parents relieved of his or her care and custody.

Iowa Code Ann. §232.2(5) (West) (Comm. Supp. 1978-79).

New York Family Court Act:

§1012. Definitions

When used in this article and unless the specific context indicates otherwise:

(a) "Respondent" includes any parent or other person legally responsible for a child's care who is alleged to have abused or neglected such child;

(b) "Child" means any person or persons alleged to have been abused or neglected, whichever the case may be;

(c) "A case involving abuse" means any proceeding under this article in which there are allegations that one or more of the children of, or the legal responsibility of, the respondent are abused children;

(d) "Drug" means any substance defined as a controlled substance in section thirty-three hundred six of the public health law;

(e) "Abused child"means a child less than eighteen years of age whose parent or other person legally responsible for his care:

(i) inflicts or allows to be inflicted upon such child physical injury by other than accidental means which causes or creates a substantial risk of death, or serious or protracted disfigurement, or protracted impairment of physical or emotional health or protracted loss or impairment of the function of any bodily organ, or

(ii) creates or allows to be created a substantial risk of physical injury to such child by other than accidental means which would be likely to cause death or serious or protracted disfigurement, or protracted impairment of physical or emotional health or protracted loss or impairment of the function of any bodily organ, or

(iii) commits, or allows to be committed, a sex offense against such child, as defined in the penal law, provided, however, that the corroboration requirements contained therein shall not apply to proceedings under this article.

(f) "Neglected child"means a child less than eighteen years of age

(i) whose physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired as a result of the failure of his parent or other person legally responsible for his care to exercise a minimum degree of care

(A) in supplying the child with adequate food, clothing, shelter or education in accordance with the provisions of part one of article sixty-five of the education law, or medical, dental optometrical or surgical care, though financially able to do so or offered financial or other reasonable means to do so; or

(B) in providing the child with proper supervision or guardianship, by unreasonably inflicting or allowing to be inflicted harm, or a substantial risk thereof, including the infliction of excessive corporal punishment; or by using a drug or drugs; or by using alcoholic beverages to the extent that he loses self-control of his actions; or by any other acts of a similarly serious nature requiring the aid of the court; or

(ii) who has been abandoned, in accordance with the definition and other criteria set forth in subdivision five of section three hundred eighty-four-b of the social services law, by his parents or other person legally responsible for his care.

(g) "Person legally responsible" includes the child's custodian, guardian, any other person responsible for the child's care at the relevant time. Custodian may include any person continually or at regular intervals found in the same household as the child when the conduct of such person causes or contributes to the abuse or neglect of the child.

(h) "Impairment of emotional health" and "impairment of mental or emotional condition" includes a state of substantially diminished psychological or

intellectual functioning in relation to, but not limited to, such factors as failure to thrive, control of aggressive or self-destructive impulses, ability to think and reason, or acting out or misbehavior, including incorrigibility, ungovernability or habitual truancy; provided, however, that such impairment must be clearly attributable to the unwillingness or inability of the respondent to exercise a minimum degree of care toward the child.

(i) "Child protective agency" means any duly authorized society for the prevention of cruelty to children or the child protective service of the appropriate local department of social services or such other agencies with whom the local department has arranged for the provision of child protective services under the local plan for child protective services.

N.Y. Family Court Act §1012 (McKinney) (Comm. Pocket Part 1978-79).

The Model Juvenile Court Act, "Child in Need of Care" - provides as follows:

Section 1 (2) defines a "Child in Need of Care" as a child:

"(A) Whose parent or guardian inflicts, attempts to inflict, or allows to be inflicted as a result of inadequate supervision physical injury upon the child which seriously endangers the physical health of that child;

(B) Whose physical or mental condition is substantially impaired as a result of the refusal or neglect of his parent or guardian to supply the child with necessary food, clothing, shelter, medical care, or education, or as a result of the parent's or guardian's imposition of cruel punishment;

(C) Who is without necessary food, clothing, shelter, medical care, education, or supervision because of the disappearance or the prolonged absence of his parent or guardian."

Piersma, Ganousis and Kramer, The Juvenile Court: Current Problems, Legislative Proposals and a Model Act, 20 St. Louis U.L.J. 1, 88 (1975). (See n. 17).

FOOTNOTES

1. The following jurisdictions continue to include status offense behavior in the delinquency category: Connecticut, Connecticut General Statutes Annotated, Title 46, Ch. 815t, §46(b)-120 (1979) (See Subst. Senate Bill No. 1619 pending at the time of preparation of this text); Indiana, Burn's Indiana Statutes Annotated, Title 31, Article 6, §31-6-4-1(a)(2-5) (1978); Minnesota, Minnesota Statutes Annotated §260.015(5)(c) & (d) (1979); and West Virginia, West Virginia Code, Ch. 49 §49-1-1 (1979). See also Georgia, Code of Ga. Ann. Title 24A, 824A-401(e)(3) (1979) (patronizing bar and possessing alcoholic beverages included within delinquency category).

2. Alabama, Alabama Code Vol. II §12-15-1(4)(9) 1979; Georgia, §24A-401(g)(8); Arkansas, Arkansas Statutes Annotated Title 45, Ch. 4, §45-603(3)(c) (1979); Mississippi, S.B.2364 (Youth Court Act Uncodified at present time) (1979); New Hampshire, New Hampshire Revised Statutes Annotated, §169-D: 2(IV)(d) (1979); New Mexico, New Mexico Statutes Annotated, Ch. 13, Article 14, §13-14-28 (1979); New York, McKinney's Consolidated Laws of New York Annotated Book 29A Family Court Act §§731 & 732 (1978-79); North Dakota, Century Code North Dakota, Title 27 Ch. 27-20-02(4)(d) (1979); Tennessee, Tennessee Code Annotated, Title 37, Ch. 2, §37-202(5)(iv) (1978); and Virginia, Code of Virginia, Title 16.1, Ch. 11, §16.1-228(F)(4)(iii) (1979). For jurisdictions which permit the court to suspend adjudication proceedings if it is not clear whether a child is in need of care or rehabilitation, see, California, California Welfare and Institution Code §725(a) (1979); and Florida, Florida Statutes Annotated, Title V, Ch. 39, §39.409(2), (1979).

3. Colorado, Colorado Revised Statutes, Title 19, §19-1-103(20)(e) (1978); Delaware, Delaware Code Annotated, Title 10, §901(7) & (8) (1978); Pennsylvania, Pennsylvania Consolidated Statutes Annotated, Title 42, Ch. 63, §6302 (1979); Maine, Maine Revised Statutes Annotated, Title 15, Ch. 511, §§3501-3508 (1978); Washington, Revised Code of Washington Annotated, Title 13, §§14-34 (1979); Iowa, Iowa Code Annotated, Ch. 231, §§232.127(b) & (c) (1979).

4. Mississippi, Art. I, Section 3; Pennsylvania, §6302; Arizona, Arizona Revised Statutes Annotated, §8-201(10)(c) (1979); Wisconsin, West's Wisconsin Statutes Annotated, Title VII, Ch. 48, §§48.12, 48.13(12) (1979). See also Piersma, Ganousis and Kramer, The Juvenile Court: Current Problems, Legislative Proposals and a Model Act, 20 St. L.U.L.J. 1 (1975) ("Juvenile offender" means a child 10 years of age or older . . . . .) p.88.

5. Iowa, §232.2(5)(h); Alaska, §47.10.010(2)(C-E); and Georgia, §24A-401.

6. Minnesota, §260.015(10)(L); Georgia, §24A-401.

7. Alabama, 12-15-1(9); D.C., District of Columbia Code, Title 16, Ch. 23 §16-2301(8)(B) (1978); New Hampshire, §169-B:2(II); New Mexico, §13-14-28; New York, §§731 & 732; North Dakota, §27-20-02(3); Pennsylvania, §6302; Tennessee, §37-202(4).

8. Background material for this section was drawn from F. Miller, et. al., The Juvenile Justice Process (1976).

9. Iowa Code Ann. §232.2 (1969); Md. Code Ann. art. 26, §70-1 (Supp. 1971). Accord, Ariz. Rev. Stat. Ann. §8-201 (Supp. 1972); N.M. Stat. Ann. §13-8-26 (1968); S.C. Code Ann. §15-1103 (1962); W. Va. Code Ann. §49-1-4 (1966).

10. N.J. Rev. Stat. §2A:4-14 (Supp. 1972).

11. Pa. Stat. tit. 11, §243 (1965). Accord, Del. Code Ann. tit. 10, §901 (1953); S.C. Code Ann. §15-1103 (1962).

12. Ind. Stat. Ann. §9-3204 (Supp. 1972).

13. Me. Rev. Stat. Ann. tit. 15, §2552 (1965).

14. Miss. Code Ann. §7185-02 (Supp. 1972).

15. In some states, status offenses can be escalated into delinquent acts. For example, Ohio's juvenile code distinguishes "unruly" from "delinquent" children. Included, though, within the definition of "delinquent child" is any child "who violates any lawful order of the court made under this chapter." O.C.R. Ann., Title 21, Ch. 2151, §2151.02(B). Also, the statute prohibits placement of an "unruly" child in a state training school, except if, after disposition, the court finds that the child is not amenable to treatment under one of the authorized dispositions for "unruly" children. §2151.354. Thus, an adjudicated status offender who violates the terms of probation through continued non-delinquent misbehavior can be adjudicated delinquent and placed in a secure facility.

A current Ohio proposed code, S.B. 106 (113th General Assembly, 1979-1980), specifically excludes "violations of court orders made as dispositions of unruly children" from the delinquent child definition. Id. See 2151.24. This provision is a good example of concise legislative drafting to insure that the mandates of the Juvenile Justice and Delinquency Prevention Act which prohibit the secure confinement of status offenders will be accomplished.

16. "Put into a juvenile justice setting, the labeling theory works thus: The child commits a deviant act, whether it is an act which would be a crime if committed by an adult or simply one of the various "status offenses." If the deviant act goes officially unnoticed--the petty theft is not discovered, the unauthorized absence from school is not detected, etc.--the child comes to regard it as outside of his normal behavior pattern. He or she eventually grows out of his deviant behavior and becomes a law abiding member of society. If, on the other hand, the deviant act is discovered and does produce some official response, the labeling process begins. The child is brought into the juvenile justice system and receives his label--either delinquent or status offender. He or she comes to see the act, and as the labeling process proceeds, eventually himself or herself, as bad. This negative self-image is further reinforced by the rejections and other consequences produced by the stigma attached with the label until the particular youth becomes convinced he or she is not suited to associate with the "normal" members of society. He or she then begins to associate with others who carry the same stigma, closing more doors to acceptable behavior and facilitating the learning of new and different types of deviance. The child's alienation from the rest of the community is intensified by confusion over the court process and by feelings that he or she has been treated unfairly by adult society. This is especially true where a child has been treated like a delinquent, even though he or she has committed no crime." National Institute for Juvenile Justice, Office of Juvenile Justice and Delinquency Prevention. Jurisdiction -- Status Offenses (1977) p.7. See also Mahoney, "The Effects of Labeling on Youths in the Juvenile Justice System: A Review of the Evidence," 8 Law and Soc. Rev. 583 (1974).

17. National Juvenile Law Center Model Juvenile Court Act

Section 1. Definitions

(1) "Child" means a person under 18 years of age.
(2) "Child in Need of Care" means a child:
  (A) Whose parent or guardian inflicts, attempts to inflict, or allows to be inflicted as a result of inadequate supervision physical injury upon the child which seriously endangers the physical health of that child;
  (B) Whose physical or mental condition is substantially impaired as a result of the refusal or neglect of his parent or guardian to supply the child with necessary food, clothing, shelter, medical care, or education, or as a result of the parent's or guardian's imposition of cruel punishment;

(C) Who is without necessary food, clothing shelter, medical care, education, or supervision because of the disappearance or the prolonged absence of his parent or guardian.

(3) "Juvenile Offender" means a child 10 years of age or older who commits an act, which if committed by an adult, is designated a crime under state law or municipal ordinance, other than a violation of (traffic offenses).

Section 2. Jurisdiction

(1) The juvenile court has exclusive original jurisdiction in proceedings in which a child is alleged to be a youthful offender or a child in need of care.

(2) Jurisdiction of the juvenile court is terminated upon:

(A) An order of the court terminating jurisdiction.

(B) An order of the court under section 13 transferring jurisdiction to a criminal court.

(C) The expiration of the dispositional time limit prescribed in section 16.

The Model Act is set forth in Piersma, Ganousis and Kramer, The Juvenile Court: Current Problems, Legislative Proposals and a Model Act, 20 St. Louis U.L.J. 1 (1975).

18. See Office of Juvenile Justice and Delinquency Prevention, Alternative Education Options (Jan. 1979) and Community Alternatives (Feb. 1978); Hickey, Wm., "Programs for Juvenile Status Offenders," NCCD Criminal Justice Abstracts Vol. II, No. 2 pp.275-306 (1979),

The Youth Center of the National Council on Crime and Delinquency (NCCD) in Hackensack, N.J. maintains a data bank of information on over 500 community-based youth programs for both juvenile delinquents and status offenders. The system, Alternative Information and Referral Service (AIRS), has been developed primarily by mail survey. The National Youth Work Alliance (NYWA), 1346 Connecticut Ave., N.W., Wash., D.C. 20036, is also a good source for information regarding the types and ranges of community alternatives and guides for immplementing alternative programs.

19. See also Calif. Welfare and Institution Code §601.1; 601.2 (West Supp. 1979) (Habitual truants, prior to referral to juvenile court, shall be referred to school attendance review boards).

20. Compare the Iowa code with the Virginia "Child in Need of Services" statute which conditions adjudication on the seriousness of the problems. Code of Virginia, Title 16.1, Ch. 11 §16.1-228(F) (1979):

F. "Child in need of Services" means:

1. A child who while subject to compulsory school attendance is habitually and without justification absent from school; or

2. A child who is habitually disobedient of the reasonable and lawful commands of his or her parent, guardian, legal custodian or other person standing in loco parentis; or

3. A child who remains away from or habitually deserts or abandons his or her family; or

4. A child who commits an act, which is otherwise lawful, but is designated a crime only if committed by a child.

Provided, however, to find that a child falls within any of classes 1, 2 or 3 above (i) the conduct complained of must present a clear and substantial danger to the child's life or health or (ii) the child or his or her family must be in need of treatment, rehabilitation or services not presently being received and (iii) the intervention of the court must be essential to provide the treatment, rehabilitation or services needed by the child or his or her family. (emphasis added).

21. See Mich H.B. 4774, §116 appended to this chapter. See also Washington code in Appendix.

STATUS OFFENSE JURISDICTION
IN MAINE
Me. Rev. Stat. Ann. Tit. 15 §3501 et. seq. (1979)

§3501. Interim Care

1. Interim care. A juvenile may be taken into interim care by a law enforcement officer without order by the court when the officer has reasonable grounds to believe that:

A. The juvenile is abandoned, lost or seriously endangered in his surroundings and that immediate removal is necessary for his protection; or

B. The juvenile has left the care of his parents, guardian or legal custodian without the consent of such person.

2. Limit. Under no circumstances shall any juvenile taken into interim care be held involuntarily for more than 6 hours.

3. Interim care, police record. The taking of a juvenile into interim care pursuant to this section is not an arrest and shall not be designated in any police records as an arrest.

4. Notification of parents, guardian or custodian. When a juvenile is taken into interim care, the law enforcement officer or the intake worker shall, as soon as possible, notify the juvenile's parent, guardian, or legal custodian of the juvenile's whereabouts and of the name and telephone number of the intake worker who has been contacted. If a parent, guardian or legal custodian cannot be located, such notification shall be made to a person with whom the juvenile is residing.

5. Interim care, placement.

A. When a law enforcement officer takes a juvenile into interim care, the officer shall contact an intake worker who shall designate a place where the juvenile will be held.

B. The law enforcement officer shall take the juvenile to the intake worker or to the placement specified by the intake worker without unnecessary delay.

C. An intake worker shall refer juveniles taken into interim care only to a shelter care facility duly licensed by the Department of Human Services.

7. Interim care, restriction on placement and transportation

A. A child taken into interim care shall not be placed in a jail or other secure correctional facility intended or used to detain adults accused or convicted of crimes or juveniles accused or adjudicated of juvenile crimes.

B. Notwithstanding paragraph A, a juvenile taken into interim care may be held, if no other appropriate placement is available, in the public sections of a

jail or other secure correctional facility if there is an adequate staff to supervise the juvenile's activities at all times.

C. To the extent practicable, a juvenile taken into interim care shall not be placed or transported in any police or other vehicle which at the same time contains an adult under arrest.

8. Interim care, voluntary services. An intake worker shall offer, and encourage the juvenile and his family, guardian or legal custodian to voluntarily accept, social services.

9. Interim care, identification of juvenile. No fingerprints of a juvenile taken into interim care pursuant to this section may be obtained from the juvenile. Solely for the purpose of restoring a juvenile to his residence, the juvenile's name, address, photograph and other reasonably necessary information may be obtained and transmitted to any appropriate person or agency.

§3502. The Department of Mental Health and Corrections; 24-hour referral services

1. Emergency placement decisions. The Department of Mental Health and Corrections shall provide for a placement referral service, staffed by intake workers for 24 hours a day. This referral service shall make emergency placement decisions pursuant to the provisions of the Part for all juveniles referred to it by law enforcement officers.

2. Provision of shelter and detention placements.

A. Within the limits of available funding it shall be the responsibility of the department of Human Services to provide the foster home, group care home, and other shelter and non-secure detention placements necessary for the emergency placements described in subsection 1. Such emergency placements will be arranged by intake workers and Department of Human Services personnel according to procedures and standards jointly adopted by the Department of Mental Health and Corrections and the Department of Human Services, pursuant to Title 34, section 267.

B. Within the limits of available funding it shall be the responsibility of the Department of Mental Health and Corrections to ensure the provision described in subsection 1.

§3503. Juveniles, voluntary return home

If a juvenile who has been taken into interim care under the provisions of section 3501 and his parents, guardian or legal custodian agree to the juvenile's return home, the parents, guardian or legal custodian shall cause the juvenile to be trans-

ported home as soon as practicable. If the parents, guardian or legal custodian fail to arrange for the transportation of the juvenile, he shall be transported at the expense of the parents, guardian or legal custodian.

§3504. Runaway juveniles, shelter and family services needs assessment

If the juvenile refuses to return home and is under the age of 16 years, and if no other living arrangements agreeable to the juvenile and to the parent, guardian or custodian can be made, an intake worker shall offer the juvenile shelter in a licensed emergency shelter care facility, licensed group home or licensed foster home which is located as close as possible to the residence of the parent, guardian or custodian. The intake worker shall also refer the minor and his family to the Department of Human Services for a family services needs assessment.

Nothing in this section shall be interpreted as interfering with the right of a parent, guardian or legal custodian to exercise control over and take custody of his child.

§3505. Runaway juveniles, neglect petition

1. Filing of petition. Notwithstanding the provisions of section 3504, if the juvenile is 16 years of age or older, and the juvenile refuses to return home and the parents, guardian or custodian refuse to permit the juvenile to remain away from home, counsel shall be appointed for the juvenile and the juvenile may file with the District Court a petition for emancipation. The court shall schedule a hearing date and shall notify the parent, guardian or custodian of the date of the hearing, the legal consequences of an order of emancipation, and their rights to be represented by legal counsel and to present evidence at the hearing. The court shall grant an order of emancipation if it finds that the juvenile is sufficiently mature to assume responsibility for his own care and that it is in thejuvenile's best interests for him to do so.

2. Plan for care. Before the court grants a petition for emancipation it must review and approve the juvenile's plans for room, board, health care and education, vocational training or employment. The plan must identify the community resources and agencies necessary to assist in the juvenile's emancipated life and must demonstrate that these agencies have agreed to provide such support.

3. Denial of petition. If the court denies the petition, it may recommend that the Department of Human Services provide continued services and counseling to the family.

§3508. Responsibility of the Department of Human Services

1. General services responsibility. Within the limits of available funding, the Department of Human Services shall have responsibility for providing substitute care placements and offering necessary supportive and rehabilitative services to runaway juveniles and their families.

2. Protective services. All runaway cases referred to the Department of Human Services shall be reviewed by the department to determine whether a petition for protective custody, pursuant to Title 22, chapter 1055, should be filed.

M.S.R.A., Title 22, Chapter 1051

§3701. Definitions

As used in this part, unless the context or other definition otherwise indicates, the following words shall have the following meanings:

1. Child. "Child" or "minor" means any person who has not attained the age of 18 years.

2. Child at risk. "Child at risk" means a child who is or is alleged to be abused, neglected, abandoned, exploited, or a runaway from home. This definition shall not be construed to mean that the department has no responsibility to provide services to a child who is affected by other handicapping conditions or other adverse circumstances in combination with the conditions and circumstances included in the definition.

3. Family in crisis. "Family in crisis" means a family in which one or more members is a child at risk.

§3702. Goals, objectives, priorities and services

1. Goals. The department shall have the following goals when it provides services to children at risk, families in crisis and other categories of children and families who receive services under this part:

A. To prevent the development of circumstances which are detrimental to children;

B. To promote the kind of family life that encourages the wholesome development of children; and

C. To promote the welfare of children.

2. Objectives and priorities. In working toward the attainment of the goals in subsection 1, the department shall, where possible and where applicable, have the following objectives in the following order of priority:

A. To support and reinforce parental care;

B. To supplement parental care; and
C. To substitute, in whole or in part, for parental care.

3. Services. In working toward the attainment of the goals in subsection 1, the department shall also have the following objectives:

A. To strengthen the care and services it provides by cooperating and coordinating its own efforts with the efforts of other agencies which provide care and services to children at risk and families in crisis; and
B. To increase the efficiency and effectiveness of protective services, substitute shelter services and residential treatment services.

PART 4

SEC. 111. THIS PART SHALL APPLY ONLY TO FAMILY IN NEED OF SERVICES PROCEEDINGS.

SEC. 112. AS USED IN THIS PART:

(A) "FOSTER CARE" MEANS A FOSTER FAMILY HOME, A FOSTER FAMILY GROUP HOME, OR A CHILD CARING INSTITUTION AS DEFINED IN ACT NO. 116 OF THE PUBLIC ACTS OF 1973, AS AMENDED, BEING SECTIONS 722.111 TO 722.128 OF THE MICHIGAN COMPILED LAWS, AND LICENSED BY THE DEPARTMENT OF SOCIAL SERVICES. "FOSTER CARE" DOES NOT INCLUDE A PHYSICALLY RESTRICTIVE FACILITY.

(B) "FOSTER FAMILY HOME" AND "FOSTER FAMILY GROUP HOME" SHALL HAVE THE MEANINGS ASCRIBED TO THOSE TERMS IN SECTION 1 OF ACT NO. 116 OF THE PUBLIC ACTS OF 1973, AS AMENDED, BEING SECTION 722.111 OF THE MICHIGAN COMPILED LAWS.

SEC. 113. THE JUVENILE COURT HAS JURISDICTION OF THE FOLLOWING FAMILY IN NEED OF SERVICES PROCEEDINGS:

(A) PROCEEDINGS IN WHICH A MINOR LESS THAN 17 YEARS OF AGE IS ALLEGED TO HAVE DESERTED HIS OR HER HOME WITHOUT SUFFICIENT CAUSE.

(B) PROCEEDINGS IN WHICH A MINOR LESS THAN 16 YEARS OF AGE IS ALLEGED TO HAVE WILFULLY AND REPEATEDLY TRUANTED FROM SCHOOL.

(C) PROCEEDINGS IN WHICH THERE ALLEGEDLY IS A BREAKDOWN IN THE PARENT-CHILD RELATIONSHIP BASED ON THE PARENT'S OR PARENTS' REFUSAL TO PERMIT A MINOR LESS THAN 18 YEARS OF AGE TO LIVE WITH THE PARENT OR PARENTS OR BASED ON THE MINOR'S REFUSAL TO LIVE WITH HIS OR HER PARENT OR PARENTS.

SEC. 114. EXCEPT AS OTHERWISE PROVIDED IN SECTIONS 115 TO 123 OF THIS CHAPTER, THE RIGHTS AND PROCEDURES APPLICABLE TO A JUVENILE OFFENDER PROCEEDING UNDER PARTS 1 AND 3 OF THIS CHAPTER ARE APPLICABLE TO A PROCEEDING CONDUCTED UNDER THIS PART.

SEC. 115. (1) A COMPLAINT BASED ON SECTION 113(A) OF THIS CHAPTER MAY

BE FILED IN THE JUVENILE COURT BY THE MINOR, THE MINOR'S PARENT, GUARDIAN, OR CUSTODIAN, A LAW ENFORCEMENT OFFICIAL ACTING JOINTLY WITH A DEPARTMENT OF SOCIAL SERVICES OFFICIAL, OR A LAW ENFORCEMENT OFFICIAL ACTING WITH THE APPROVAL OF THE JUVENILE COURT.

(2) A COMPLAINT BASED ON SECTION 113(B) OF THIS CHAPTER MAY BE FILED IN THE JUVENILE COURT BY THE MINOR OR THE MINOR'S PARENT, GUARDIAN, OR CUSTODIAN. A COMPLAINT BASED ON SECTION 113(B) OF THIS CHAPTER MAY BE FILED BY AN OFFICIAL OF THE APPROPRIATE SCHOOL DISTRICT ONLY IF THE COMPLAINT IS ACCOMPANIED BY AN AFFIDAVIT IN WHICH THE SCHOOL OFFICIAL SWEARS TO BOTH OF THE FOLLOWING:

(A) THE SCHOOL OFFICIALS HAVE FOLLOWED THE PROCEDURES ESTABLISHED BY SECTIONS 1586 TO 1587 OF ACT NO. 451 OF THE PUBLIC ACTS OF 1976, BEING SECTIONS 380.1586 TO 380.1587 OF THE MICHIGAN COMPILED LAWS.

(B) THE PARENT, GUARDIAN, OR CUSTODIAN HAS ATTEMPTED COMPLIANCE WITH THE NOTICE GIVEN UNDER SECTION 1587 OF ACT NO. 451 OF THE PUBLIC ACTS OF 1976, BEING SECTION 380.1587 OF THE MICHIGAN COMPILED LAWS, OR IF NOT, THE SCHOOL OFFICIALS HAVE FILED A COMPLAINT UNDER SECTION 1588 OF ACT NO. 451 OF THE PUBLIC ACTS OF 1976, BEING SECTION 380.1588 OF THE MICHIGAN COMPILED LAWS.

(3) A COMPLAINT BASED ON SECTION 113(C) OF THIS CHAPTER MAY BE FILED IN THE JUVENILE COURT BY A PARENT, IF THAT PARENT REFUSES TO PERMIT THE MINOR TO LIVE WITH THE PARENT. A COMPLAINT BASED ON SECTION 113(C) OF THIS CHAPTER MAY BE FILED IN THE JUVENILE COURT BY A MINOR, IF THE MINOR REFUSES TO LIVE WITH HIS OR HER PARENT OR PARENTS. THE COMPLAINANT MAY WITHDRAW A COMPLAINT FILED UNDER THIS SUBSECTION AT ANY TIME.

SEC. 116. (1) THE JUVENILE COURT SHALL DISMISS A COMPLAINT FILED UNDER THIS PART UNLESS THE JUVENILE COURT FINDS CLEAR AND CONVINCING EVIDENCE

OF BOTH OF THE FOLLOWING:

(A) THE COMPLAINANT AND RESPONDENT HAVE EXHAUSTED OR REFUSED ALL APPROPRIATE AND AVAILABLE VOLUNTARY SERVICES. IN MAKING THIS FINDING, THE JUVENILE COURT SHALL CONSIDER A REPORT WHICH SHALL BE SUBMITTED BY THE DEPARTMENT OF SOCIAL SERVICES. IF THE DEPARTMENT INDICATES THERE ARE GROUNDS FOR FILING A COMPLAINT FOR A MINOR IN NEED OF CARE PROCEEDING UNDER PART 2 OF THIS CHAPTER, A COMPLAINT FILED UNDER THIS SUBDIVISION SHALL BE DISMISSED.

(B) COURT INTERVENTION IS NECESSARY TO SECURE SERVICES, WHICH ARE ACCESSIBLE TO THE JUVENILE COURT.

(2) EXCEPT AS PROVIDED IN SUBSECTION (3), THE JUVENILE COURT SHALL DISMISS A COMPLAINT BASED ON SECTION 113(A) OF THIS CHAPTER, UNLESS THE JUVENILE COURT IN ADDITION TO THE FINDINGS REQUIRED UNDER SUBSECTION (1), FINDS CLEAR AND CONVINCING EVIDENCE THAT THE FILING OF THE COMPLAINT WAS PRECEDED BY ALL OF THE FOLLOWING:

(A) THE MINOR AND FAMILY HAVE PARTICIPATED IN COUNSELING OR THE MINOR HAS REFUSED TO PARTICIPATE IN FAMILY COUNSELING.

(B) THE MINOR HAS BEEN PLACED IN THE HOME OF A RELATIVE, IF AVAILABLE, OR THE MINOR HAS REFUSED PLACEMENT IN THE HOME OF A RELATIVE.

(C) THE MINOR HAS SOUGHT ASSISTANCE AT A RUNAWAY OR SHELTER FACILITY OR THE MINOR HAS REFUSED ASSISTANCE FROM A RUNAWAY OR SHELTER FACILITY.

(D) THE MINOR HAS BEEN PLACED IN FOSTER CARE OR THE MINOR HAS REFUSED PLACEMENT IN FOSTER CARE.

(3) SUBSECTION (2) SHALL NOT APPLY TO A MINOR WHOSE RESIDENCE IS NOT IN THIS STATE.

(4) THE JUVENILE COURT SHALL DISMISS A COMPLAINT BASED ON SECTION 113(B) OF THIS CHAPTER, UNLESS THE JUVENILE COURT, IN ADDITION TO THE FINDINGS REQUIRED UNDER SUBSECTION (1), FINDS CLEAR AND CONVINCING EVIDENCE THAT THE

FILING OF THE COMPLAINT WAS PRECEDED BY ALL OF THE FOLLOWING:

(A) THE SCHOOL OFFICIALS AND A PARENT, GUARDIAN, OR CUSTODIAN HAVE HELD A MEETING ON THE MINOR'S TRUANCY OR THE PARENT, GUARDIAN, OR CUSTODIAN HAS REFUSED TO ATTEND A MEETING.

(B) THE SCHOOL OFFICIALS HAVE PROVIDED AN OPPORTUNITY FOR EDUCATIONAL COUNSELING TO THE MINOR TO DETERMINE WHETHER A CURRICULUM CHANGE WOULD RESOLVE THE MINOR'S TRUANCY. IF THE SCHOOL DISTRICT PROVIDES AN ALTERNATIVE EDUCATION PROGRAM, THE MINOR SHALL HAVE BEEN PROVIDED AN OPPORTUNITY TO ENROLL IN THE ALTERNATIVE EDUCATION PROGRAM.

(C) THE SCHOOL OFFICIALS HAVE CONDUCTED AN EVALUATION, WHICH MAY INCLUDE PSYCHOLOGICAL TESTING, OF THE MINOR TO DETERMINE WHETHER LEARNING PROBLEMS MAY BE A CAUSE OF THE TRUANCY, AND IF SO, STEPS HAVE BEEN TAKEN TO OVERCOME THE LEARNING PROBLEMS. IF THE MINOR HAS BEEN IDENTIFIED AS A HANDICAPPED PERSON ELIGIBLE FOR A SPECIAL EDUCATION PROGRAM UNDER ARTICLE 3 OF ACT NO. 451 OF THE PUBLIC ACTS OF 1976, AS AMENDED, BEING SECTIONS 380.1701 TO 380.1766 OF THE MICHIGAN COMPILED LAWS, THE MINOR SHALL HAVE BEEN ENROLLED IN THE APPROPRIATE SPECIAL EDUCATION PROGRAM.

(D) A SCHOOL COUNSELOR, LOCAL OR INTERMEDIATE SCHOOL DISTRICT SOCIAL WORKER, OR OTHER SCHOOL OFFICIAL HAS CONDUCTED AN INVESTIGATION TO DETERMINE WHETHER SOCIAL PROBLEMS MAY BE A CAUSE OF THE TRUANCY, AND IF SO, APPROPRIATE ACTION HAS BEEN TAKEN.

(E) THE SCHOOL OFFICIALS HAVE SOUGHT ASSISTANCE FROM APPROPRIATE AGENCIES AND RESOURCES AVAILABLE TO THE SCHOOL DISTRICT. THIS ASSISTANCE SHALL INCLUDE REFERRAL OF THE MATTER TO THE DEPARTMENT OF SOCIAL SERVICES FOR THE PURPOSE OF IDENTIFYING THOSE AGENCIES AND RESOURCES.

(5) A HEARING CONDUCTED UNDER THIS SECTION SHALL BE OPEN TO THE PUBLIC, UNLESS THE RESPONDENT OBJECTS.

SEC. 117. (1) A LAW ENFORCEMENT OFFICIAL WHO HAS REASONABLE GROUNDS TO BELIEVE THAT A MINOR LESS THAN 17 YEARS OF AGE HAS DESERTED HIS OR HER HOME WITHOUT SUFFICIENT CAUSE MAY TAKE THE MINOR INTO CUSTODY.

(2) A MINOR WHOSE RESIDENCE IS IN THIS STATE MAY BE TAKEN INTO CUSTODY UNDER SUBSECTION (1) ONLY FOR THE FOLLOWING PURPOSES:

(A) IF A COMPLAINT HAS NOT BEEN FILED UNDER SECTION 115(1) OF THIS CHAPTER, TO RETURN THE MINOR TO HIS OR HER HOME OR TO TAKE THE MINOR TO A RUNAWAY OR SHELTER CARE FACILITY LICENSED BY THE DEPARTMENT OF SOCIAL SERVICES.

(B) IF A COMPLAINT HAS BEEN FILED UNDER SECTION 115(1) OF THIS CHAPTER, TO TAKE THE MINOR TO THE JUVENILE COURT.

(3) A MINOR WHOSE RESIDENCE IS NOT IN THIS STATE MAY BE TAKEN INTO CUSTODY UNDER SUBSECTION (1) ONLY FOR THE PURPOSE OF TAKING THE MINOR TO THE JUVENILE COURT.

SEC. 118. IF A MINOR IS TAKEN TO THE JUVENILE COURT UNDER SECTION 117(2) (B) OR (3) OF THIS CHAPTER, THE JUVENILE COURT MAY:

(A) DISMISS THE COMPLAINT. THE JUVENILE COURT SHALL DISMISS A COMPLAINT FILED AGAINST A MINOR WHOSE RESIDENCE IS IN THIS STATE, IF THE REQUIREMENTS OF SECTION 116(2) OF THIS CHAPTER ARE NOT MET.

(B) RELEASE THE MINOR, PENDING A HEARING, IN THE CUSTODY OF A PARENT, GUARDIAN, CUSTODIAN, OR RELATIVE TO BE BROUGHT BEFORE THE COURT AT A DESIGNATED TIME.

(C) PLACE THE MINOR, PENDING A HEARING, IN A FOSTER FAMILY HOME, FOSTER FAMILY GROUP HOME, OR RUNAWAY OR SHELTER CARE FACILITY.

SEC. 119. (1) THE JUVENILE COURT MAY PLACE A MINOR WHO RUNS AWAY FROM A PLACEMENT MADE UNDER SECTION 118(C) OF THIS CHAPTER IN DETENTION FOR A REASONABLE TIME, NOT TO EXCEED 5 DAYS, EXCLUDING SUNDAYS AND HOLIDAYS.

SERVICE OF SUMMONS MADE AT LEAST 72 HOURS BEFORE THE DATE SET FOR HEARING IS SUFFICIENT FOR A PROCEEDING BASED ON THIS SUBSECTION.

(2) THE JUVENILE COURT SHALL NOT PLACE THE MINOR IN DETENTION, UNLESS THE COURT FINDS CLEAR AND CONVINCING EVIDENCE OF 1 OF THE FOLLOWING:

(A) THE MINOR PREVIOUSLY HAS RUN AWAY FROM A NONSECURE, COURT-ORDERED PLACEMENT MADE UNDER SECTION 118(C) OR 123(2) OF THIS CHAPTER. DETENTION SHALL NOT BE ORDERED UNDER THIS SUBDIVISION IF THE MINOR REMAINED IN THE NONSECURE, COURT-ORDERED PLACEMENT FOR MORE THAN 90 DAYS BEFORE RUNNING AWAY.

(B) THE MINOR PREVIOUSLY HAS FAILED TO APPEAR AT AN ADJUDICATORY HEARING.

(3) IF A MINOR IS DETAINED UNDER THIS SECTION, THE DETENTION SHALL NOT CONTINUE LONGER THAN 24 HOURS, EXCLUDING SUNDAYS AND HOLIDAYS, WITHOUT COMMENCEMENT OF A PRELIMINARY HEARING AS PROVIDED IN SECTION 30 OF THIS CHAPTER.

(4) A MINOR WHO IS PLACED IN DETENTION UNDER THIS SECTION SHALL BE KEPT SEPARATE FROM ALLEGED JUVENILE OFFENDERS.

(5) UPON A CERTIFICATION MADE BY THE GOVERNOR TO THE PRESIDENT OF THE SENATE AND THE SPEAKER OF THE HOUSE OF REPRESENTATIVES THAT IMPLEMENTATION OF THE DETENTION PROVISIONS OF THIS SECTION ARE IN CONFLICT WITH THE JUVENILE JUSTICE AND DELINQUENCY PREVENTION ACT OF 1974, PUBLIC LAW 93-415, 88 STAT. 1109, AND THAT AS A RESULT OF THE CONFLICT THIS STATE WILL BE INELIGIBLE TO RECEIVE FEDERAL FUNDS, THIS SECTION SHALL IMMEDIATELY EXPIRE.

SEC. 120. DURING THE TIME A MINOR SUBJECT TO SECTION 118 OR 119 OF THIS CHAPTER IS PLACED IN A FOSTER HOME, FOSTER FAMILY GROUP HOME, SHELTER CARE FACILITY, OR DETENTION, THE JUVENILE COURT SHALL PROCEED TO MAKE ARRANGEMENTS FOR THE RETURN OF THE MINOR TO HIS OR HER HOME. THE ARRANGEMENTS

MAY INCLUDE ACTIONS AUTHORIZED UNDER ARTICLE 4 OF SECTION 1 OF ACT NO. 203 OF THE PUBLIC ACTS OF 1958, AS AMENDED, BEING SECTION 3.701 OF THE MICHIGAN COMPILED LAWS.

SEC. 121. THE MINOR IN A PROCEEDING BASED ON SECTION 113(B) OF THIS CHAPTER SHALL NOT BE REMOVED FROM HIS OR HER HOME PENDING ADJUDICATION OR AWAITING PLACEMENT.

SEC. 122. (1) THE JUVENILE COURT MAY ENTER AN ORDER TO PLACE A MINOR IN A PROCEEDING BASED ON SECTION 113(C) OF THIS CHAPTER WITH A RELATIVE OR IN A FOSTER FAMILY HOME, FOSTER FAMILY GROUP HOME, OR SHELTER FACILITY, IF THE REQUIREMENTS OF SECTION 116(1) OF THIS CHAPTER ARE MET.

(2) THE MINOR IN A PROCEEDING BASED ON SECTION 113(C) OF THIS CHAPTER SHALL NOT BE HELD IN DETENTION.

SEC. 123. (1) THE JUVENILE COURT SHALL HOLD AN ADJUDICATORY HEARING AND DISPOSITIONAL HEARING AS PROVIDED IN PART 3 OF THIS CHAPTER.

(2) IF THE ALLEGATIONS OF THE PETITION ARE PROVED BEYOND A REASONABLE DOUBT, THE JUVENILE COURT SHALL ENTER AN ORDER OF DISPOSITION BASED UPON A REPORT DEVELOPED UNDER SECTION 90 OF THIS CHAPTER, EXCEPT THAT IF THE MINOR ELECTS TO DEVELOP A PLAN FOR HIS OR HER DISPOSITION, THE JUVENILE COURT SHALL CONSIDER THE MINOR'S PLAN. IF THE JUVENILE COURT REJECTS THE MINOR'S PLAN, REASONS FOR THE REJECTION SHALL BE GIVEN IN WRITING, AND THE ORDER OF DISPOSITION SHALL BE BASED UPON SECTION 92 OF THIS CHAPER, EXCEPT THAT:

(A) A MINOR SHALL NOT BE PLACED IN A SECURE INSTITUTION OPERATED BY THE DEPARTMENT OF SOCIAL SERVICES UNDER ACT NO. 150 OF THE PUBLIC ACTS OF 1974, BEING SECTIONS 803.301 TO 803.309 OF THE MICHIGAN COMPILED LAWS, OR ANY OTHER SECURE FACILITY.

(B) A MINOR SHALL NOT BE PLACED IN A FACILITY LICENSED BY THE DEPARTMENT

OF SOCIAL SERVICES TO HOUSE 13 OR MORE MINORS, A MAJORITY OF WHOM ARE JUVENILE OFFENDERS, UNLESS THE MINOR CONSENTS TO THE PLACEMENT.

(C) A MINOR IN A PROCEEDING BASED ON SECTION 113(B) OF THIS CHAPTER MAY BE PLACED IN FOSTER CARE OR WITH A RELATIVE WITH THE PARENT'S CONSENT, BUT SHALL NOT OTHERWISE BE REMOVED FROM THE MINOR'S HOME.

(3) THE JUVENILE COURT MAY ENTER AN ANCILLARY ORDER REQUIRING THE PARENT, GUARDIAN, OR CUSTODIAN IN A PROCEEDING CONDUCTED UNDER THIS PART TO DO THOSE THINGS NECESSARY TO ENABLE THE MINOR TO COMPLY WITH AN ORDER ENTERED UNDER THIS SECTION.

(4) THE JUVENILE COURT MAY ENTER AN ANCILLARY ORDER REQUIRING A PUBLIC INSTITUTION OR AGENCY TO MAKE ITS SERVICES AVAILABLE TO A FAMILY IN NEED OF SERVICES. THE JUVENILE COURT MAY ORDER THE PARENT, GUARDIAN, CUSTODIAN, OR ANY OTHER PERSON TO REFRAIN FROM CONTINUING CONDUCT WHICH, IN THE OPINION OF THE JUVENILE COURT, INTERFERES WITH, OR OTHERWISE OBSTRUCTS PLACEMENT OF THE MINOR PURSUANT TO AN ORDER ENTERED UNDER THIS SECTION.

Section 2. The following acts and parts of acts are repealed:

(a) Chapter XIIA of Act No. 288 of the Public Acts of 1939, as amended, being sections 712A.1 to 712A.28 of the Compiled Laws of 1970.

(b) Section 139 of Act No. 328 of the Public Acts of 1931, being section 750.139 of the Compiled Laws of 1970.

(c) Section 27 of chapter 4 of Act No. 175 of the Public Acts of 1927, as amended, being section 764.27 of the Compiled Laws of 1970.

Section 3. This amendatory act shall take effect January 1, 1983.

WAIVER OF JURISDICTION

A. Introduction

The juvenile court has evolved as a civil forum with indeterminate dispositions directed toward the treatment, rehabilitation and the best interests of the child. Punishment has not been among its objectives.[1] Instead, as described by Justice Fortas in Kent v. United States, 282 U.S. 541 (1966):

> The Juvenile Court is theoretically engaged in determining the needs of the child and of society rather than adjudicating criminal conduct. The objectives are to provide measures of guidance and rehabilitation for the child and protection for society, not to fix criminal responsibility, guilt and punishment. The State is parens patriae rather than prosecuting attorney and judge.
> Id. at 554.

Despite this rehabilitative philosophy which was and presumably still is the only justification for the existence of juvenile courts, nearly every state has created exceptions to it and provided for the prosecution of some juveniles as adults. Most commonly a function of a juvenile court judge, the procedure whereby a child winds up in the criminal court is variously referred to as transfer of jurisdiction, waiver of jurisdiction, certification as an adult or a determination of fitness.

Whatever the procedure's nomenclature, the power of the juvenile court to cause a child to be prosecuted as an adult is its most extreme sanction. Although a young person may conceivably benefit from the procedural safeguards available only in the

adult courts, the trade-off is considerable. A transferred juvenile faces the stigmatization of a public trial and a public record which may bar him from military service or public or private employment. He is also subjected to the possibility of long term incarceration, harsher conditions of confinement, the loss of his civil rights, exposure to adult felons and the loss of whatever individualized rehabilitation and treatment programs that may be available through the juvenile court.

In addition, young people who are confined in adult prisons will almost certainly be hardened by the experience; if they are not exploited due to their age and size they will likely become more aggressive simply out of a need for self-protection or survival. As Judge Bazelon has cogently observed:

> To brand a child a criminal for life is harsh enough retribution for almost any offense. But it becomes an all but inconceivable response when we realize that to brand him may in fact make him a criminal for life. The stigma of a criminal conviction may itself be a greater handicap in later life than an entire misspent youth. More important, casting a youthful offender to the wolves who prowl adult jails may well dash any hope that he will mature to be a civilized man. On the other hand, there is some hope that a youth can be recalled from the wrong road he has started down--whether by psychiatric help, a changed environment, proper schooling, or even just attention and understanding.[2]

Largely because of these extreme consequences, it has been argued by some commentators that juvenile courts should retain jurisdiction over all juveniles and that procedures permitting or mandating the transfer of some young people for adult prosecution should be abolished.[3] The crux of this argument is that "the

very existence of juvenile court is predicated upon recognition of the fact that a child is capable of rehabilitation no matter what he may have done and that he has a right to expect no less than that society, through the special establishment of the juvenile court, will seek to identify and treat the root causes of the trouble rather than seek retribution against him."[4]

Without faulting this underlying premise, other commentators caution that the transfer process is a necessary vent for public frustration and anger at highly visible and violent juvenile crime.[5] Abolishing the possibility of transfer under such circumstances could ultimately contribute to the undoing of the juvenile court system as the only alternative to adult prosecution. Denied the means to extract retribution for violent crime, political and community pressure to lower the maximum age of juvenile court jurisdiction or to otherwise exclude entire classes of juveniles from the jurisdiction of the juvenile court becomes almost irresistible. It has been postulated that a transfer mechanism is an essential safety valve "permitting the expiatory sacrifice of some youths to quiet political and community clamor and to preserve a more benign system for those who remain."[6]

For purposes of this chapter, however, it is unnecessary to attempt to resolve the question of whether transfer of jurisdiction has a legitimate place within the juvenile court framework. Instead, this chapter proceeds upon two basic premises. First,

it is accepted as given that a mechanism for transfer is a political reality in most states. If there is any change from the status quo, most states could be expected to move to facilitate transfer rather than abolish it. Secondly, it is accepted without discussion that given a choice between the rehabilitative philosophy of the juvenile court and the sanctions of the adult penal system, the juvenile court is preferred for those who can benefit from it. In other words, rehabilitation, where possible, is preferable to retribution.

At this juncture, then, the question becomes by what means can we insure that those juveniles who are subjected to transfer are screened for rehabilitative potential and that the adult courts are reserved as a last resort for those young people who will clearly derive no benefit from the juvenile system? How do we determine which youths will be abandoned to the adult court and which will be granted the protection, care, and solicitude of the juvenile court?

As a guide for legislative advocates facing these questions, this chapter examines the United States Supreme Court decision in Kent v. United States, supra. It also discusses various statutory schemes which circumvent the Kent decision by directly or indirectly placing the option for adult prosecution in the hands of prosecutors and it concludes that these statutes are inconsistent with both the due process requirements of Kent and the rehabilitative philosophy of the juvenile court. The transfer provisions

posed by the Juvenile Justice Standards Projects are also considered as a backdrop for legislative advocates to evaluate existing or proposed transfer mechanisms in their states.

B. The Impact of Kent v. United States

Kent v. United States, supra, was the first case arising out of the juvenile justice system to be reviewed by the United States Supreme Court and it was the point of debarkation for a procedural revolution in juvenile court decision-making. The central figure in the case was Morris A. Kent, Jr., a sixteen-year-old who was charged with housebreaking, robbery and rape while on probation under the jurisdiction of the District of Columbia Juvenile Court. Kent's attorney requested a transfer hearing and access to Kent's social service records maintained by the juvenile court. Although the District of Columbia's transfer statute required a "full investigation" by the court, the judge failed to rule on the request for a hearing and, without notice, transferred Morris Kent to the criminal jurisdiction of the district court. At trial he was found guilty of housebreaking and robbery and innocent of rape by reason of insanity and he was ordered to serve his sentence as a psychiatric patient at St. Elizabeth's Hospital in the District of Columbia.

In reviewing his appeal, the Supreme Court initially recognized that there is no constitutional requirement for a separate juvenile court system. But where such a system is authorized by statute, the Court held, a juvenile may not be excluded from its

benefits without ceremony. Specifically, the Court stated that there is no place in our system of law for reaching a result of such tremendous consequences without a hearing, without effective assistance of counsel who must be given access to the child's social records, and without a statement of the reasons for the decision.

The Kent decision initially evoked considerable discussion concerning its precedential value with commentators and courts alike taking the position that the due process safeguards announced in Kent applied only in the District of Columbia because they derived solely from an interpretation of the District of Columbia code. For the most part, the controversy was abated when the Court decided In Re Gault, 387 U.S. 1 (1967), the following term. The Gault opinion, which like Kent, was authored by Mr. Justice Fortas, held that although Kent relied upon the language of the District of Columbia code, the basic requirements of due process and fairness apply to all juvenile court transfer proceedings. A fair restatement of the effect of these decisions is that although a state is not required to create a juvenile court, once it does so the essentials of due process must be afforded those who fall within its jurisdiction.

A host of questions concerning the transfer procedure, however, remain unanswered. Because the Kent Court specifically declined to review the merits of the juvenile court's transfer decision, the case provides only limited guidance in establishing

criteria against which the appropriateness of transfer can be weighed. The interpretation and application of transfer criteria has been elusive as well.

As with most state statutes, the District of Columbia Code made transfer a function of amenability to treatment within the juvenile court framework. Eight factors were identified in the Code to guide District of Columbia Juvenile Court judges and to insure some uniformity in their transfer decisions. The criteria are:

1. the seriousness of the alleged offense;
2. whether the alleged offense was committed in an aggressive, violent, premeditated or willful manner;
3. whether the offense was against person or against property;
4. the merit of the complaint;
5. where the codefendants are adults, the desirability of trying the entire action at one trial;
6. the sophistication and maturity of the juvenile;
7. previous contacts with the juvenile court; and
8. the likelihood of reasonable rehabilitation of the juvenile.

The inclusion of these standards in the appendix to the Kent opinion reflects the apparent approval by the Supreme Court of their use in determining the propriety of juvenile court jurisdiction. Kent, supra at 556-67. A number of states have incorporated these criteria in their juvenile codes almost verbatim.

It should be noted, however, that only the last of these criteria avoids conflict with the non-punitive treatment ideal of the juvenile court philosophy. The other seven have been variously criticized for their failure to emphasize rehabilitation

instead of retribution, for being only indirectly relevant to the transfer decision and for providing only the illusion that explicit criteria for the transfer decision do exist.[7]

In reality, the transfer criteria are highly subjective and the decision to transfer is often the result of uneven judicial discretion. Various surveys have concluded that transfer may turn upon such factors as the contentiousness of the young person and the attitudes of the community toward the alleged offense. The decision may also be influenced by the crowded condition of available juvenile facilities, rather than an objective determination that the young person cannot benefit from them.[8]

As a practical matter, a juvenile is most likely to be transferred if he is nearing the maximum age of juvenile court jurisdiction, is accused of a relatively serious offense and has a prior record of arrests. Such factors are certainly relevant to the juvenile court's disposition, but may be overstated when considering transferring the juvenile to the adult court.

The older juvenile does not necessarily present a choice which requires that he be transferred to adult court or released outright after his eighteenth birthday. Juvenile court jurisdicition could, by statute, be extended beyond the eighteenth birthday in certain circumstances, as the Juvenile Justice Standards Project recommends. Additionally, if the youth is still in need of treatment when he passes the age of juvenile court jurisdiction, civil commitment may be appropriate; if he is no longer

in need of treatment, there is no reason for continued confinement.

The seriousness of the alleged offense is also a questionable criterion upon which to base transfer. There are indications that some serious offenders, and in particular juveniles who have committed a homicide, may in fact be more receptive to the treatment concepts of the juvenile court than others who are in the juvenile system as a result of lesser offenses.[9] At the least, a single serious offense should not disqualify one from rehabilitation. Perhaps juvenile court resources now being devoted to detention and supervision of status offenders could be better directed toward innovative treatment approaches for the serious offender within the juvenile court system.

C. Post-Kent Developments

In the thirteen years since Kent was decided, juvenile court transfer procedures in every state have been scrutinized for compliance with its due process requirements. During this period, a number of factors have also caused legislatures in some states to remove some or all of the transfer decisions from the juvenile court and instead to place the decision within the control of the prosecutor.[10]

One contributing factor has been a continuing public demand for retribution and protection in the wake of purported increases in juvenile crime. Another is the limitation of juvenile facilities in terms of physical capacity, personnel and the availabil-

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ity of the specialized, individually oriented treatment programs which are the hallmark of the juvenile court system. The fact that the recognition of procedural rights for juveniles has made the transfer process slower, more deliberate and less certain has also undoubtedly contributed. For some or all of these reasons, states have increasingly considered alternate, more streamlined methods to effect juvenile transfer.

An example is the District of Columbia Court Reform and Criminal Procedure Act of 1970.[11] There are indications that the provisions of the Act which triggered juvenile transfer were enacted in direct response to Kent,[12] and a number of states have been influenced by it. The act redefined the term "child" to exclude from the jurisdiction of the juvenile court persons who have reached age sixteen and who are charged with murder, forcible rape, first degree burglary, armed robbery or assault with intent to commit any of the offenses.

Although this procedure is sometimes referred to as the "legislative method" of transfer, this term is inexact because it is the prosecutor who has the ability to control the forum by deciding whether to charge the young person with one of the enumerated "adult" offenses.

At least one state has opted for a statute which permits the prosecutor even greater latitude. Nebraska, for example, allows the prosecutor to bring an action in either the adult court or the juvenile court in all felony cases and in misdemeanor cases

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if the young person is over sixteen.[13] Other states provide for concurrent jurisdiction for certain serious offenses.

While these statutory provisions may indeed streamline the transfer process, they are also fraught with the potential of arbitrariness. A prosecutor is traditionally more responsive to political pressure than a judge and is more likely to ignore the rehabilitative possibilities of the juvenile court while responding to society's demand for retribution. Furthermore, the prosecutor is an adversary who has been sworn to protect society's interests. It is unreasonable to expect him/her to dispassionately weigh the interests of the child and of the state simultaneously.

It has been argued that the choice of forum is of such consequence to the child that the Kent safeguards should apply whether the decision is the result of judicial or prosecutorial discretion. This argument, however, has generally been rejected by the courts which have considered it.

In United States v. Bland, 472 F.2d 1329 (D.C. Cir. 1972), the United States Court of Appeals for the District of Columbia Circuit viewed the decision to prosecute a young person as an adult as but one of a number of discretionary choices which have traditionally been reserved to the prosecutor. In this context it is indistinguishable from a decision to recommend probation, to plea-bargain, to reduce charges or to dismiss them altogether. The First,[14] Fourth,[15] Fifth[16] and Eighth[17] Circuits have each decided cases in which this reasoning has been adopted.

Until such time as the Supreme Court decides that the Kent due process protections apply to transfer proceedings regardless of who controls the decision, unreviewable prosecutorial discretion and its attendant arbitrariness will likely continue.

While it is recommended that such broad prosecutorial discretion be avoided altogether, where this is not possible specific guidelines should be developed against which the transfer decision can be made. Although it is not the only state to have done so, Nebraska has codified nine factors which must be considered by the prosecutor before choosing the forum.[18] The Nebraska standards and internal guidelines are recommended to those legislative advocates who have an opportunity to criticize their own state's discretionary practices or who see prosecutorial discretion statutes in their states as inevitable.

D. The Transfer Standards of the Institute of Judicial Administration/American Bar Association (Tentative Draft, 1977)

It is the position of this discussion that the only way that rights of juveniles can be consistently and adequately protected in transfer matters is to provide a hearing before a juvenile judge at which the state must prove by clear and convincing evidence that adult dispositions are more appropriate for the juvenile. The transfer standards produced by the Juvenile Justice Standards Project are an effective means to this end.

The IJA/ABA Transfer Standards (Tentative Draft, 1977) are divided into two parts. Part I recommends a jurisdictional framework which permits waiver of jurisdiction by a juvenile court judge only in certain circumstances. Part II establishes substantive and procedural restrictions on transfer which further limit the court's transfer authority.

Part I would provide for original and exclusive jurisdiction over all alleged criminal offenders who are fifteen-years-old or younger at the time of their alleged offense. The juvenile court would have original jurisdiction over those who are sixteen or seventeen years old at the time of their alleged offense, although under certain circumstances they could be subjected to adult criminal prosecution. Juvenile court jurisdiction would not extend beyond age eighteen except that those persons who are past that age but who are alleged to have committed a criminal offense before their eighteenth birthday would still be within the jurisdiction of the juvenile court.

Part I would also place a three year limit on the dispositional jurisdiction of the juvenile court. This limit would permit the juvenile court to retain jurisdiction of the older offender beyond his eighteenth birthday, if appropriate, thereby reducing the pressure to transfer him to adult court. At the same time the three year maximum would limit the indeterminate commitment of the younger juvenile.

A juvenile statute of limitations is also proposed. The statute of limitations for juveniles would correspond to that for adults except that it would be limited to a three year maximum

unless the offense carries no statute of limitations for adults. In such cases there would also be no time limitation on the prosecution of juveniles.

The initial section of Part II of the standards recommends a timetable for the procedures leading up to the transfer hearing. Section 2.2 then addresses the hearing itself. It provides that before the juvenile court can waive jurisdiction, the juvenile court judge must find (1) probable cause to believe that the juvenile has committed a Class I felony, defined as an act, which if committed by an adult, would be punishable by death or imprisonment for twenty years or longer and (2) that the juvenile is not a proper person to be handled by the juvenile court. This amenability determination must be by clear and convincing evidence and must include a finding (1) that the alleged offense is a serious one; (2) that the juvenile has a prior record of violent crime as demonstrated by prior adjudications of delinquency--not just contacts or arrests; (3) that each of the dispositional alternatives available to the juvenile court are likely to be ineffective and (4) that appropriate dispositions for the juvenile are available in the adult court.

The hearing itself is addressed in Section 2.3. It requires notice, multilinqual where appropriate, of the juvenile's right to counsel at the hearing; it provides that the juvenile should have access to an expert witness at state expense; and it insures access by the juvenile to any evidence available to the juvenile

court and permits the examination of any person who prepares reports which are presented at the hearing. Additionally, this section places the burden of proof for both probable cause and non-amenability on the prosecutor.

The final section of Part II concerns procedures for appealing the transfer decision. The recommended procedure is a review of the juvenile court judge's findings rather than an appeal de novo. When a juvenile appeals an adverse transfer decision, Section 2.4 would stay the criminal court's jurisdiction until the appellate court has reached its decision.[20]

E. Conclusion and Summary

There are a number of arguments commonly made in support of a judicial determination of transfer and against prosecutorial control over the decision either directly or indirectly through a "legislative transfer" scheme whereby the forum is controlled by the offense charged

First, the decision to deny juvenile court treatment is of critical importance to the juvenile, and due process and simple fairness demand that it be made only after a full hearing. Second, the automatic exclusion of some juveniles from juvenile court jurisdiction because of the offense with which they are charged is incompatible with the premise of the juvenile court system. Third, the prosecutor lacks the objectivity and the expertise to choose the forum with regard to the best interests of the child. Finally, due to the deference traditionally given

to prosecutorial discretion, decisions by prosecutors regarding the forum have been held to be unreviewable, thereby inviting abuse.

The burden is on the juvenile court, the community and state legislators to demand appropriate facilities to treat the serious juvenile offenders. If such programs are available, the pressure to transfer these young people to the adult prison system is considerably reduced. If we turn our backs on them, we may not only have moved them down a path from which they cannot be recalled, we have done injury to the very fabric of our society.

FOOTNOTES

1. A complete discussion of the history of juvenile court development may be found in Fox, Juvenile Justice Reform: An Historical Perspective, 22 STAN. L. REV. 1187 (1970).

2. Bazelon, Racism, Classism and the Juvenile Process, 53 J. AM. JUD. SOCIETY 373 (1970).

3. See, Edwards, The Case for Abolishing Fitness Hearings in Juvenile Court, 17 Santa Clara L. Rev. 596 (1977); Hogan, Waiver of Juvenile Jurisdiction and the Hardcore Youth, 51 N.D. L.R. 655 (1977).

4. Stamm, Transfer of Jurisdiction in Juvenile Court: An Analysis of the Proceeding, Its Roll in the Administration of Justice, and a Proposal for the Reform of Kentucky Law, 62 KY. L.J. 122, 145 (1973).

5. Stamm, supra, n. 4 at 147. 62 MINN. C.R. 515 (1978).

6. Minn. L.R. Id. at 519.

7. See generally, Stamm, supra, n. 4; Comment, Juvenile Court Waiver: The Questionable Validity of Existing Statutory Standards, 16 ST. LOUIS L.J. 604 (1972).

8. See Stamm, supra, n. 4 at pp. 150-157; Comment Waiver of Jurisdiction in Juvenile Courts, 30 OHIO ST. L.J. 132 (1969).

9. Vitiello, Constitutional Safeguards for Juvenile Transfer Procedure, 26 De Paul L. Rev. 23 (1976).

10. See chart appended to this chapter for a listing of states which permit the prosecutor to determine the forum for prosecution.

11. D.C. Code §16-2307 (1973).

12. The legislative history of the act reflects this intent:

> Because of the great increase in the number of serious felonies committed by juveniles and because of the substantial difficulties in transferring juvenile offenders charged with serious felonies to the jurisdiction of the adult court under present law provisions

are made in this subchapter for a better mechanism for separation of the violent youthful offender and recidivist from the rest of the juvenile community. H. Rep. 91-907, 91st Cong., 2d Sess. at 50 (1970)

13. NEB. REV. STAT. §43-202 (3)(b), 43-202.01 (1978).

14. United States v. Quinones, 516 F.2d 1309 (1st Cir. 1975).

15. Cox v. United States, 473 F.2d 334 (4th Cir. 1973).

16. Woodward v. Wainwright, 556 F.2d 781 (5th Cir. 1977).

17. Russell v. Parratt, 543 F.2d 1214 (8th Cir. 1976).

18. NEB. REV. STAT. §43-202.01 (1978). The Nebraska criteria are appended to this chapter.

19. Institute of Judicial Administration/American Bar Association Joint Commission on Juvenile Justice Standards, Transfer Between Courts (Tentative Draft, 1977). The text of the tentative draft is appended to this chapter.

20. For a comprehensive discription and analysis of the transfer proposal of the Juvenile Justice Standards Project see, Batey and Whitebread, Transfer Between Courts: Proposals of the Juvenile Justice Standards Project, 63 VA. L.R. 221 (1977). See also Appeal and Collateral Attack chapter for a discussion regarding the appealability of the transfer decision.

NEBRASKA TRANSFER CRITERIA
(NEBR. REV. STAT. §43-202.01 (1978))

(1) The type of treatment such minor would most likely be amenable to; (2) whether there is evidence that the alleged offense included violence or was committed in an aggressive and premeditated manner; (3) the motivation for the commission of the offense; (4) the age of the minor and the ages and circumstances of any others involved in the offense; (5) the previous history of the minor, including whether he had been convicted of any previous offenses or adjudicated in juvenile court and, if so, whether such offenses were crimes against the person or relating to property, and any other previous history of antisocial behavior, if any, including any patterns of physical violence; (6) the sophistication and maturity of the child as determined by consideration of his home, school activities, emotional attitude and desire to be treated as an adult, pattern of living, and whether he has had previous contact with law enforcement agencies and courts and the nature thereof; (7) whether there are facilities particularly available to the juvenile court for the treatment and rehabilitation of the minor; (8) whether the best interest of the minor and the security of the public may require that the minor continue in custody or under supervision for a period extending beyond his minority and, if so, the available alternatives best suited to this purpose; and (9) such other matters as he deems relevant to his decision.

IJA/ABA JUVENILE JUSTICE STANDARDS
PROJECT: TRANSFER BETWEEN COURTS
(Tentative Draft, 1977)

PART I: JURISDICTION

1.1 Age limits.

A. The juvenile court should have jurisdiction in any proceeding against any person whose alleged conduct would constitute an offense on which a juvenile court adjudication could be based if at the time the offense is alleged to have occurred such person was not more than seventeen years of age.

B. No criminal court should have jurisdiction in any proceeding against any person whose alleged conduct would constitute an offense on which a juvenile court adjudication could be based if at the time the offense is alleged to have occurred such person was not more than fifteen years of age.

C. No criminal court should have jurisdiction in any proceeding against any person whose alleged conduct would constitute an offense on which a juvenile court adjudication could be based if at the time the offense is alleged to have occurred such person was sixteen or seventeen years of age, unless the juvenile court has waived its jurisdiction over that person.

1.2 Other limits.

A. No juvenile court disposition, however modified, resulting from a single transaction or episode, should exceed thirty-six months.

B. The juvenile court should retain jurisdiction to administer or modify its disposition of any person. The juvenile court should not have jurisdiction to adjudicate subsequent conduct of any person subject to such continuing jurisdiction if at the time the subsequent criminal offense is alleged to have occurred such person was more than seventeen years of age.

1.3 Limitations period.

No juvenile court ajudication or waiver decision should be based on an offense alleged to have occurred more than three years prior to the filing of a petition alleging such offense, unless such offense would not be subject to a statute of limitations if committed by an adult. If the statute of limitations applicable to adult criminal proceedings for such offense is less than three years, such shorter period should apply to juvenile court criminal proceedings.

PART II: WAIVER

2.1 Time requirements.

A. Within two court days of the filing of any petition alleging conduct which constitutes a class one juvenile offense against a person who was sixteen or seventeen years of age when the alleged offense occurred, the clerk of the juvenile court should give the prosecuting attorney written notice of the possibility of waiver.

B. Within three court days of the filing of any petition alleging conduct which constitutes a class one juvenile offense against a person who was sixteen or seventeen years of age when the alleged offense occurred, the prosecuting attorney should give such person written notice, multilingual if appropriate, of the possibility of waiver.

C. Within seven court days of the filing of a petition alleging conduct which constitutes a class one juvenile offense against a person who was sixteen or seventeen years of age when the alleged offense occurred, the prosecuting attorney may request by written motion that the juvenile court waive its jurisdiction over the juvenile. The prosecuting attorney should deliver a signed, acknowledged copy of the waiver motion to the juvenile and counsel for the juvenile within twenty-four hours after the filing of such motion in the juvenile court.

D. The juvenile court should initiate a hearing on waiver within ten court days of the filing of the waiver motion or, if the juvenile seeks to suspend this requirement, within a reasonable time thereafter.

E. The juvenile court should issue a written decision setting forth its findings and the reasons therefor, including a statement of the evidence relied on in reaching the decision, within ten court days after conclusion of the waiver hearing.

F. No waiver notice should be given, no waiver motion should be accepted for filing, no waiver hearing should be initiated, and no waiver decision should be issued relating to any juvenile court petition after commencement of any any adjudicatory hearing relating to any transaction or episode alleged in that petition.

2.2 Necessary findings.

A. The juvenile court should waive its jurisdiction only upon finding:

1. that probable cause exists to believe that the juvenile has committed the class one juvenile offense alleged in the petition; and

2. that by clear and convincing evidence the juvenile is not a proper person to be handled by the juvenile court.

B. A finding of probable cause to believe that a juvenile has committed a class one juvenile offense should be based solely on evidence admissible in an adjudicatory hearing of the juvenile court.

C. A finding that a juvenile is not a proper person to be handled by the juvenile court must include determinations, by clear and convincing evidence of:

1. the seriousness of the alleged class one juvenile offense;

2. a prior record of adjudicated delinquency involving the infliction or threat of significant bodily injury;

3. the likely inefficacy of the dispositions available to the juvenile court as demonstrated by previous dispositions of the juvenile; and

4. the appropriateness of the services and dispositional alternatives available in the criminal justice system for dealing with the juvenile's problems and whether they are, in fact, available.

Expert opinion should be considered in assessing the likely efficacy of the dispositions available to the juvenile court. A finding that a juvenile is not a proper person to be handled by the juvenile court should be based solely on evidence admissible in a disposition hearing of the juvenile court.

D. A finding of probable cause to believe that a juvenile has committed a class one juvenile offense may be substituted for a probable cause determination relating to that offense (or a lesser included offense) required in any subsequent juvenile court proceeding. Such a finding should not be substituted for any finding of probable cause required in any subsequent criminal proceeding.

2.3 The hearing.

A. The juvenile should be represented by counsel at the waiver hearing. The clerk of the juvenile court should give written notice to the juvenile, multilingual if appropriate, of this requirement at least five court days before commencement of the waiver hearing.

B. The juvenile court should appoint counsel to represent any juvenile unable to afford representation by counsel at the waiver hearing. The clerk of the juvenile court should give written notice to the juvenile, multilingual if appropriate, of this right at least five court days before commencement of the waiver hearing.

C. The juvenile court should pay the reasonable fees and expenses of an expert witness for the juvenile if the juvenile desires, but is unable to afford, the services of such an expert witness at the waiver hearing.

D. The juvenile should have access to all evidence available to the juvenile court which could be used either to support or contest the waiver motion.

E. The prosecuting attorney should bear the burden of proving that probable cause exists to believe that the juvenile has committed a class one juvenile offense and that the juvenile is not a proper person to be handled by the juvenile court.

F. The juvenile may contest the waiver motion by challenging, or producing evidence tending to challenge, the evidence of the prosecuting attorney.

G. The juvenile may examine any person who prepared any report concerning the juvenile which is presented at the waiver hearing.

H. All evidence presented at the waiver hearing should be under oath and subject to cross-examination.

I. The juvenile may remain silent at the waiver hearing. No admission by the juvenile during the waiver hearing should be admissible to establish guilt or to impeach testimony in any subsequent criminal proceeding.

J. The juvenile may disqualify the presiding officer at the waiver hearing from presiding at any subsequent criminal

trial or juvenile court adjudicatory hearing relating to any transaction or episode alleged in the petition initiating juvenile court proceedings.

2.4 Appeal.

A. The juvenile or the prosecuting attorney may file an appeal of the waiver decision with the court authorized to hear appeals from final judgments of the juvenile court within seven court days of the decision of the juvenile court.

B. The appellate court should render its decision expeditiously, according to the findings of the juvenile court the same weight given the findings of the highest court of the general trial jurisdiction.

C. No criminal court should have jurisdiction in any proceeding relating to any transaction or episode alleged in the juvenile court petition as to which a waiver motion was made, against any person over whom the juvenile court has waived jurisdiction, until the time for filing an appeal from that determiantion has passed or, if such an appeal has been filed, until the final decision of the appellate court has been issued.

WAIVER OF TRANSFER TO CRIMINAL COURT

State	Any Provision for Waiver	At Discretion of: Ct.	Pros.	Child	Ages for which Waiver is allowed	Restricted to certain crimes
ALABAMA	§12-15-34	x	May Motion		14 or more	Already committed as delinquent or charged with felony.
ALASKA	47.10.060	x			Any	No
ARIZONA	Const. Art. 6 §15 Rules 12-14	x 436 P.2d 948		x	Above 14 272 P.97 (1928)	No
ARKANSAS	45-420	x			Any	Felonies and Misdemeanor
CALIFORNIA	606	x Upon motion by petitioner 707			16 or over 707	Violation of any criminal statute or ordinance-707
COLORADO	19-1-104(4) 19-3-108	x D.A. may refuse by not filing information within 5 days 19-3-108(4)(a)			14 and up 19-1-104(4)	Felony
CONNECTICUT	466-126 466-127	x			14 or over	Murder Felony, if previously adjudicated delinquent for commission of felony
DELAWARE	10-938	x			16 or over	Murder 1, Rape, Kidnapping, any Delinquent Act
DISTRICT OF COLUMBIA	16-2307	x (see exclusions)			15 or over (Felony) 16 or over (Already adjudicated delinquent) 18 or over (committed act before turned 18)	Felony or 2nd delinquency

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Updated Nov. 1979.

WAIVER OF TRANSFER TO CRIMINAL COURT

State	Any Provision for Waiver	At Discretion of: Ct.	Pros.	Child	Ages for which Waiver is allowed	Restricted to certain crimes
FLORIDA	39.09 39.09(2) Juvenile Rules 8.100, 8.110	x 39.09(a)		x Juvenile Rule 8.100(b)	14 or over 39.02(2)(a)	Any crime 39.09(2)(a)
GEORGIA	Yes 24A-2501	x			15 for lesser crimes 13 or 14 for capital offenses	Any crime
HAWAII	571-22	x			On or after 16th birthday	Felony
IDAHO	16-1806	x	Motion may be made by prosecutor, court or child		15 and up	Any crime
ILLINOIS	37-702-7(3) (38-1003-10-7) This section requires Dept. of Corrections to hold hearing to determine whether child committed to Juvenile Div. of Dept. of Corrections should be transferred to adult division upon reaching age of 17	x x	State's Attorney makes motion	x 37-702-7(5)	13 and up	Crimes

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WAIVER OF TRANSFER TO CRIMINAL COURT

State	Any Provision for Waiver	At Discretion of: Ct.	Pros.	Child	Ages for which Waiver is allowed	Restricted to certain crimes
INDIANA	31-5-7-14(a) (b)	x	On motion by prosecuting attorney		14 or older if "heinous offense" or part of repetitive pattern	Crime
IOWA	House File 248 §25(1979) §3(3) (1979)	x	x	x	After 14th birthday	Public offense
KANSAS	38-808	x	On motion by county or district attorney		16 or older	Crime
KENTUCKY	208.170	x			16 and up (any age for capital offense or class A felony)	Felony
LOUISIANA	Yes 13:1571.1	x	Motion may be made by prosecutor, court, or defendant		15 or older	Any crime if previously adjudicated delinquent for specfied offenses 13:1571.1A(5) No previous adjudication necessary if charged with armed robbery or offense punishable by life 13:1571.10
MAINE	3101(4)		x		Any	Any crimes 3101(2)(A); 3103(1)

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WAIVER OF TRANSFER TO CRIMINAL COURT

State	Any Provision for Waiver	At Discretion of: Ct.	Pros.	Child	Ages for which Waiver is allowed	Restricted to certain crimes
MARYLAND	3-817	x (on own motion or petition of state's attorney) Rules 913	x		15 (younger if crime punishable by death or life)	Delinquency
MASSACHUSETTS	Yes 119 61	x			14-17	Child previously adjudicated delinquent and present offense punishable by imprisonment; Offense involved infliction or threat of serious bodily harm
MICHIGAN	27.3178(598.4)	x	Upon motion of prosecuting attorney		15 or older	Felony
MINNESOTA	260.125	x	May move	May Move Rule 8-1	14 and over	Violation of state or local ordinance
MISSISSIPPI	43-21-31	x			13 or older	Felony
MISSOURI	211.071	x		May move Juv. Ct. Rule 118.01	14 or older	Felony; traffic offense; Child between 17-21 over whom jurisdiction has been retained; criminal homicide; arson; rape; aggravated assault; robbery; burglary; aggravated kidnapping; possession of explosives; sale of dangerous drugs for profit

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WAIVER OF TRANSFER TO CRIMINAL COURT

State	Any Provision for Waiver	At Discretion of: Ct.	Pros.	Child	Ages for which Waiver is allowed	Restricted to certain crimes
MONTANA	41-5-206	x	Upon motion of co. atty.		16 or older	Homicide; arson; aggravated assault; robbery; burglary; rape; aggravated kidnapping; possession of explosives; sale of drugs for profit.
NEBRASKA			x County atty. decides whether to file in juv. ct. or crim. ct. 43-202.01			
NEVADA	62.080	x			16 or older	Felony
NEW HAMPSHIRE	169-B-24	x	x	x if over 17 169-B-26	Any	Felony
NEW JERSEY	2A:4-48	x		x (Any offense if 14 or older	14 or older	Homicide; treason, violent crime, drugs (addict can't be waived.)
NEW MEXICO	13-14-27	x			16 or older	Felony
	13-14-27.1 (1975)	x			15 or older 16 or older	Murder Certain crimes transferable under 13-14-27.1; assault with intent to commit violent felony; kidnap; aggravated battery; dangerous use of explosives; rape; robbery; aggravated burglary; aggravated arson

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WAIVER OF TRANSFER TO CRIMINAL COURT

State	Any Provision for Waiver	At Discretion of: Ct.	Pros.	Child	Ages for which Waiver is allowed	Restricted to certain crimes
NEW YORK	NO	x			No restrictions	No restrictions
NORTH CAROLINA	7A-280	x			14 or over	Felony (waiver is mandatory for capital offenses).
NORTH DAKOTA	27-20-34	x		x (if over 17)	16 or more at time of alleged conduct	Crime or public offense
OHIO	2151.26	x			15 or older	Felony
OKLAHOMA	10 §1112	x			Any age	Felony
OREGON	419.533	x			16 and older	Crime, violation of ordinance
PENNSYLVANIA	42 §6355	x		May request	14 and older	Felony
RHODE ISLAND	14-1-7 14-1-9 (adult)	x			16 and older	Any crime mandatory if found delinquent for having committed two offenses after age 16. 14-1-7.1
SOUTH CAROLINA	14-21-510	x	(Person filing petition may request)		Any age	Murder and rape
SOUTH DAKOTA	26-8-22.7 26-11-4	x			Any age	Crimes
TENNESSEE	37-234 37-245 (Juv. traffic)	x			16 or older 15 or older	Crime or ordinance Murder, manslaughter Rape, robbery with deadly weapon, kidnapping

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WAIVER OF TRANSFER TO CRIMINAL COURT

State	Any Provision for Waiver	At Discretion of: Ct.	Pros.	Child	Ages for which Waiver is allowed	Restricted to certain crimes
TEXAS	54.02	x			15 or older	Felony
UTAH	78-3a-25	x			14 & older	Felony
VERMONT	No					
VIRGINIA	16.1-269	x	May make motion 16.1.269(A); may appeal if court decides to retain and crime is punishable by death or more than 20 years imprisonment. 16.1-269E	x May elect with consent of counsel 16.1-270	15 or older	Punishable by imprisonment
WASHINGTON	13.04.110	x	May make motion	May make motion	16 or 17 17	Class A Felony 2nd degree assault; 1st degree extortion; indecent liberties; 2nd degree kidnapping; 2nd degree rape; 2nd degree robbery
WEST VIRGINIA	49-5-10	x			16 or over any age	Felony Certain crimes, 49-5-10(d)

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WAIVER OF TRANSFER TO CRIMINAL COURT

State	Any Provision for Waiver	At Discretion of: Ct.	Pros.	Child	Ages for which Waiver is allowed	Restricted to certain crimes
WISCONSIN (New Code Effec. 11/18/78)	48.18	x	Child or D.A. may move; judge may move if he disqualifies himself from future proceedings.		16 or older	Violated State Criminal Law
WYOMING	Yes 14-6-237	x	x	County Attorney decides initially 14-6-211	Any age	Crimes

WAIVER OR TRANSFER TO CRIMINAL COURT

State	Criteria for Waiver				
	Criteria Outlined in Statute	Non-Amenability to Treatment	Need to Protect Society	Showing That Child did Commit Act	Must Court Give Reasons for Transfer
ALABAMA	Yes 12-15-34(d)	Yes-Prior history, demeanor, maturity	Nature of offense; interests of community		Yes 12-15-34(f) 5-219(f)
ALASKA	Yes 47.10.060(a), (d)	Yes-history of delinquency	Seriousness of offense	Probable cause	Yes Children's Rule 3 Alaska Rules of Court
ARIZONA	Yes Rule 14(b)	Yes Rule 14(b) (1)	Yes Rule 14(b) (3)	Probable cause Rule 14(a) unless waived	Yes Rule 14(c)
ARKANSAS	No				
CALIFORNIA	Yes 707	Yes 707(a)		Alleged	Yes 707(5)(A)
COLORADO	Yes 19-3-108	Yes 19-3-108(2) (b) vi	Yes 19-3-108(2) (b) I	Probable cause	Yes
CONNECTICUT	Yes 46b-126 (Murder) 46b-127 (Felony)	X X	x no	Reasonable cause Probable cause	N.P.
DELAWARE	Yes 10-938	X	x	Alleged	N.P.
DISTRICT OF COLUMBIA	Yes 16-2307(e)	X 16-2307(d)		Alleged	Yes 16-2307(d)

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State	Criteria for Waiver				
	Criteria Outlined in Statute	Non-Amenability to Treatment	Need to Protect Society	Showing That Child did Commit Act	Must Court Give Reasons for Transfer
*FLORIDA	Yes 39.09(2) (c)	X	X Rule 8.100 39.09(2) (c)	Alleged; consider also "prosecutive merit of the complaint"	Yes 39.09(e)
GEORGIA	Yes 24A-2501(3)	X AND	X	Reasonable grounds	Yes
HAWAII	Yes 571-22(a)	Yes	Yes	Alleged	N.P.
IDAHO	Yes 16-1806(8)	Yes	Yes	Alleged	Yes 16-1806(6)
ILLINOIS	Yes 37-702-7(3) (a)	Yes	Yes	Alleged	Unclear
INDIANA	Yes 31-5-7-14(a)	Yes	Yes	"P/C to believe that the case has specific prosecutive merit"	(Yes: 290 N.E. 2d 441 [1972]
IOWA	Yes-House file 248 Section 25(6)	Yes	Yes	Probable cause	Yes-House file 248 Section 25(8)
KANSAS	Yes 38-808	Yes	Yes	Alleged	Unclear 38-808(b)

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State	Criteria for Waiver				
	Criteria Outlined in Statute	Non-Amenability to Treatment	Need to Protect Society	Showing That Child did Commit Act	Must Court Give Reasons for Transfer
KENTUCKY	Yes 208.170(3)	Yes	Yes	Probable cause	Yes 208.170(4)
LOUISIANA	Yes 13.1571.1	Yes	N.P.	N.P.	Yes 1571.2(c)
MAINE	Yes 3101(D) & (E)	Yes	Yes	Probable cause	Yes 3101(F)
MARYLAND	Yes CJ3-817(d)	Yes CJ3-817(d)(3)	Yes CJ3-817(d)(5)	"Court assumes for purpose of waiver that child did commit."	Yes Rule 913(e)(c)(g)
MASSACHUSETTS	119§61	X	X	Probable cause	"Written finding based on clear and convincing evidence."
MICHIGAN	Yes 27.3178(598.4)(4)	X	X	Probable cause	Yes 273.3178(598.4)(7)
MINNESOTA	Yes 260.125(2) (d)	X OR	X	Alleged	Yes Rule 8-7(1) (b)
MISSISSIPPI	No			Charged	209.So.2d 841
MISSOURI	Yes Juv.Ct. Rule 118.04	X		Alleged	Yes Juv.Ct.Rule 118.04(d)

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State	Criteria for Waiver				
	Criteria Outlined in Statute	Non-Amenability to Treatment	Need to Protect Society	Showing That Child did Commit Act	Must Court Give Reasons for Transfer
MONTANA	Yes 41-5-206(2)	x AND Treatment needed beyond that available at juvenile facilities	Yes AND	Reasonable grounds (and offense committed in aggressive, violent or premeditated manner)	Yes 41-5-206(3)
NEBRASKA	County Atty. considers: 43-202.01	x	x	Violence and premeditation; motivation; age. Charged.	
NEVADA	No				
NEW HAMPSHIRE	Yes 169-B-24	x	x	Prosecutive merit of complaint	x 169-B-24(IV)
NEW JERSEY	2A:4-48(b)(c)	x	x	Probable cause	
NEW MEXICO	Yes 13-14-27(4) 13-14-27.1(4),(5)	x	Interests of community	Reasonable grounds	
NEW YORK	N/A				
NORTH CAROLINA	"Needs of Child" "Best Interests of State" 7A-280			Hearing to determine probable cause 7A-280	Yes 7A-280
NORTH DAKOTA	Yes 27-20-34	x	Interests of community required	Reasonable grounds	

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State	Criteria for Waiver				
	Criteria Outlined in Statute	Non-Amenability to Treatment	Need to Protect Society	Showing That Child did Commit Act	Must Court Give Reasons for Transfer
OHIO	Yes 2151.26(A)(3)	x	Safety of community	Probable cause	Yes 2151.26(E)
OKLAHOMA	Yes 10 §1112(b)	x	x	Whether there is prosecutory merit to complaint	Yes 10 §1112(b)
OREGON	419.533(1)(c)	x		Committed or is alleged to have committed	Yes 419.533(2)
PENNSYLVANIA	Yes 42 §6355	x	Interests of community required	Prima facie case	N.P.
RHODE ISLAND	No				Yes 231 A.2d 767
SOUTH CAROLINA	No				
*SOUTH DAKOTA	26-11-4	x	x	Prosecutive merit or complaint	Yes 26-11-4
TENNESSEE	Yes 37-234	x	x	Reasonable grounds	
TEXAS	Yes 54.02(f)	x	x	Evidence that grand jury would return indictment	Yes 54.02(h)
UTAH	Contrary to best interests of child or public			Alleged	

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State	Criteria for Waiver				
	Criteria Outlined in Statute	Non-Amenability to Treatment	Need to Protect Society	Showing That Child did Commit Act	Must Court Give Reasons for Transfer
VERMONT	N.P.				
VIRGINIA	Yes 16.1-269(a)(3)	x (not required if offense is armed robbery, rape or murder)	x interests of community required	Probable cause	
WASHINGTON	No	Best interest of juvenile or public	Best interest of juvenile or public		Yes R.C.W. 13.40.110(3)
WEST VIRGINIA	Yes 45-5-10(a)	x	x	Probable cause	Yes 45-5-10(e)
WISCONSIN	48.18(5)	x 48.18(5)(a)	x 48.18(5)(c)	Judge shall determine whether the matter has prosecutive merit	Yes 48.18(6)
WYOMING	Juvenile proceedings inappropriate under circumstances. 14-6-237(b) [County prosecutor may initiate in criminal court 14-6-211]			Reasonable grounds	No

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WAIVER OR TRANSFER TO CRIMINAL COURT

State	HEARING (On Transfer Issue)				
	May Mentally Ill or Retarded Child be Transferred	Required	With Notice	With Counsel	Transcript
ALABAMA	No 12-15-34(c)	12-15-34(b)		Yes 12-15-63(a) 5-124(a)	
ALASKA	N.P.	x 504 P.2d 837 (1972) 47.10.060(a) Childrens Rule 3, Alaska Rules of Court	x 47.10.070	x 47.10.050	
ARIZONA	No Rule 14(b)(2)	X Rule 13	X Rule 13 (5 days)	X Rule 13 8-225	
ARKANSAS	N.P.	N.P.			
CALIFORNIA	N.P.	Yes 707 (1978)	Yes 498 P.2d 1098		
COLORADO	No 19-3-107	X 19-1-104(4)	X 19-3-108(2)(a)	X 19-3-108(2)(b)	X 19-3-108(2)(a) 19-1-107(3)
CONNECTICUT	N.P.	X 46b-126 46b-127	X	X 46b-135 46b-136	
DELAWARE	N.P.	X Family	X Court	X Rules	X 170,230

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WAIVER OR TRANSFER TO CRIMINAL COURT

State	HEARING (On Transfer Issue)				
	May Mentally Ill or Retarded Child be Transferred	Required	With Notice	With Counsel	Transcript
DISTRICT OF COLUMBIA	No (But child must then be "committed" to a mental hospital) 16-2307	X 16-2307(d)	X 16-2304(a)	16-2304(a)	
FLORIDA		39.09(2)(c) Rule 8.110	X 39.09(2)(b)		N.P.
GEORGIA	No 24A-2501(3)(iii)	X 24A-2501(1)	X 24A-2501(2)	X 24A-2001	X 24A-1801
HAWAII	No 571-22(a)	Full Investigation and Hearing 571-22 See: 446 P.2d 564			
IDAHO	N.P.	X 16-1806(4)	X	X	X 16-1806(5)
ILLINOIS	N.P.	X 37-702-7(3)		X 37-702-7(3)(a)	
INDIANA	N.P.	X 31-5-7-14			
IOWA	N.P.	X House File 248 Sec. 25(2)	Sec. 25(3)	Sec. 6	Sec. 21
KANSAS	N.P.	X 38-808(b)	X 38-808(b)	X 38-808(b) 38-815(b)	Minutes 38-808(b)
KENTUCKY	No 208.150	208.170(1)		Yes 479 S.W.2d 592	

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State	HEARING (On Transfer Issue)				
	May Mentally Ill or Retarded Child be Transferred	Required	With Notice	With Counsel	Transcript
LOUISIANA	N.P.	Yes 13:1571.1(2)	Yes	Yes. 1571.3	If requested or ordered by court 1571.2(c)
MAINE	No 3318(1)(2)	Yes 3101(4)(A)	Yes 3101(4)(A)	Yes 3101(4)(A)	Yes 3101(4)(C)
MARYLAND	N.P.	Yes 3-817(b)	Yes	Yes Rule 913 3-821	N.P.
MASSACHUSETTS	N.P.	Yes 119 §61	X Rule 83	X Rule 85	Finding in writing Rule 85A
MICHIGAN	N.P.	Yes 27.3178(598.4) (2)	Yes (2)	Yes (5)	N.P.
MINNESOTA	N.P.	Yes 260.125	X 260.125	X Rule 8-3 Rule 5-1	X Rule 1-3
MISSISSIPPI	N.P.	Yes 43-21-31	X 209 So.2d 841	X 209 So.2d 841	
MISSOURI	N.P.	Yes 211.071	Yes Juv.Ct.Rule 118.02	Yes Juv.Ct.Rule 116.01	

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WAIVER OR TRANSFER TO CRIMINAL COURT

State	HEARING (On Transfer Issue)				
	May Mentally Ill or Retarded Child be Transferred	Required	With Notice	With Counsel	Transcript
MONTANA	N.P.	Yes 41-5-206(b)	Yes 41-5-206(c)	Yes 41-5-511	Yes 41-5-206(b) 41-5-521 (3)-Verbatim Recording
NEBRASKA	N.P.	N.P. (Within discretion of county attorney to bring in criminal court)			
NEVADA	N.P.	"Full Investigation" 62.080			
NEW HAMPSHIRE	N.P.	Yes 169-B-24	N.P.	Yes 169-B-24	N.P.
NEW JERSEY	N.P.	X 2A:4-48		X 2A:4-59	
NEW MEXICO	No 13-14-27(4)(c)	X 13-14-27 13-14-27.1	X 13-14-27(A)(5) 13-14-27.1	X 13-14-27 13-14-27.1 13-14-25(E)	X 13-14-27 13-14-27.1 13-14-28(A)
NEW YORK	N/A				
NO. CAROLINA	N.P.	X 7A-280	X 7A-280	X 7A-280	N.P.
NO. DAKOTA	No 27-20-34(1)(d)(3) requires finding that child is not committable to MH/MR Institution	X 27-20-34	X	X 27-20-34 27-20-26	X 27-20-34 27-20-24(3)

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WAIVER OR TRANSFER TO CRIMINAL COURT

State	HEARING (On Transfer Issue)				
	May Mentally Ill or Retarded Child be Transferred	Required	With Notice	With Counsel	Transcript
OHIO	N.P.	X	X	X 2151.352	Upon request 2151.35 2301.20
OKLAHOMA	Consideration given to juvenile's ability to distinguish right from wrong. 10 §1112(b)	X	X	X 10 §1109(a)	
OREGON	N.P.	N.P.			
PENNSYLVANIA	No 42 §6355(4)(iii)(B)	X 42 §6355	X 42 §6355	X 42 §6337	
RHODE ISLAND	N.P.	Yes 231 A.2d 767			
SO. CAROLINA	N.P.	N.P.			
SO. DAKOTA	N.P.	X 26-11-4		X 26-8-22.1	
TENNESSEE	No 37-234	X 37-234	X	X 37-226	Minutes 37-224
TEXAS	Should be hospitalized 55.02	X 54.02(c)	X 54.02(b)	X 51.10(a)(2)	X 54.09
UTAH	N.P.	X 55-10-86		X 78-3a-25 78-3a-35	X 78-3a-25 78-3a-35

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WAIVER OR TRANSFER TO CRIMINAL COURT

State	HEARING (On Transfer Issue)				
	May Mentally Ill or Retarded Child be Transferred	Required	With Notice	With Counsel	Transcript
VERMONT	N.P.				
VIRGINIA	No 16.1-296(3)(c)	X	X 16.1-269(2)	X 16.1-266B	
WASHINGTON	N.P.	X 13.40.110	13.40.140(7)	13.40.080(8) 13.40.140(2)	13.40.140(5)
WEST VIRGINIA		X 49-5-10(a)	X 49-5-10(a)	X 49-5-1(a)	X 49-5-1(d)
WISCONSIN	N.P.	48.18	48.18(3)(a)	48.18(3)(a)	48.18(7)
WYOMING	Reasonable grounds to believe child not subject to commitment to MH/MR institution 14-6-237(b)(iii)	X 14-6-237	X 14-6-237	X 14-6-237 14-6-222	X 14-6-237 14-6-224

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WAIVER OF TRANSFER TO CRIMINAL COURT

State	Transfer to Juvenile Court provided in Statute	If, at time of Act, Def. was under AGE____	May Def. Refuse Transfer?	May Criminal Court Choose to Retain Case?	Other Provisions
ALABAMA	12-15-33	18 (after 1/1/78)	N.P.	No	Court has discretion to transfer or retain traffic offenses
ALASKA	No				Child is exempt from criminal prosecution until Childrens Court waives. 504 P.2d 837 (1972)
ARIZONA	8-222	18	N.P.	No 8-222	No transfer after verdict or guilty plea 436 P.2d 948 (1968)
ARKANSAS	45-420				Any judge has discretion to transfer case to any court having jurisdiction
CALIFORNIA	604(a)	18	N.P.	No	
COLORADO	19-1-104(4)(c)	18		Yes....	If class 1 or repeat felony involved See 19-1-104(4)(b)
CONNECTICUT	46b-133	16 46b-120 46b-133	No	No	Criminal court may release child on bail or to parents or guardian 46b-133
DELAWARE	10-939	18 10-901	Court can transfer. Upon defendant's application. Atty. Gen. can transfer w/o Def.'s application	Yes 10-939	Superior Court may transfer any case of a child even if Family Court did not originally have jurisdiction. Atty. General also has authority to transfer a case.

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WAIVER OF TRANSFER TO CRIMINAL COURT

State	Transfer to Juvenile Court provided in Statute	If, at time of Act, Def. was under AGE____	May Def. Refuse Transfer?	May Criminal Court Choose to Retain Case?	Other Provisions
DISTRICT OF COLUMBIA	16-2302	18	No	No	No transfer after jeopardy attaches. After verdict, can transfer for disposition. No transfer if defendant is over 21
FLORIDA	39.02(2)	18		No	Adult court may retain if there has already been a verdict. Rule 18
GEORGIA	24A-901 (1973)	17	No	No	Mandatory transfer if defendant is under 21 unless adult court has concurrent jurisdiction
HAWAII	571-12	18	N.P.	No	Mandatory transfer during the pendency of criminal charge
IDAHO	16-1804	18		No	Mandatory during pendency
ILLINOIS	N.P.				
INDIANA	31-5-7-13	18	N.P.	No	Except: 1st degree murder & traffic offenses of child 16 or older
IOWA	House File 248 §3(2)	18	N.P.	No	
KANSAS	38-815(c)	18		No	
KENTUCKY	No				Juvenile Court has exclusive jurisdiction over child under 18, 208.020

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WAIVER OF TRANSFER TO CRIMINAL COURT

State	Transfer to Juvenile Court provided in Statute	If, at time of Act, Def. was under AGE____	May Def. Refuse Transfer?	May Criminal Court Choose to Retain Case?	Other Provisions
LOUISIANA	13:1571	17	N.P.	No	Mandatory transfer if defendant is still under 21.
MAINE	Yes 3101(2)(D)	18	No	No	
MARYLAND	N.P.			N.P.	
MASSACHUSETTS	Yes	17 119 §72	No	No	
MICHIGAN	27.3178(598.3)	17	No	No	
MINNESOTA	260.115	18	No	No	
MISSISSIPPI	N.P.				If child convicted of misdemeanor by justice of peace or municipal court, juvenile court may stay the order.
MISSOURI	211.061	17		No	Mandatory transfer, no matter when true age is discovered.
MONTANA	No				
NEBRASKA	Yes 43-202.02	18	Def. may move for transfer	Yes	
NEVADA	62.050	18		No	62.060 - If child of 18-21 charged with non-capital felony or misdemeanor, criminal court judge may choose to treat defendant as a juvenile

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WAIVER OF TRANSFER TO CRIMINAL COURT

State	Transfer to Juvenile Court provided in Statute	If, at time of Act, Def. was under AGE_____	May Def. Refuse Transfer?	May Criminal Court Choose to Retain Case?	Other Provisions
NEW HAMPSHIRE					
NEW JERSEY	2A:4-47	18		No	
NEW MEXICO	13-14-11	18		No	
NEW YORK	180.75, 190.71, 220.10, 310.85 and 330.25 of CPL			See statutes noted	
NORTH CAROLINA	No				
NORTH DAKOTA	27-20-09	18	N.P.	No	
OHIO	2151.25	18	N.P.	No	
OKLAHOMA	10 §1112(a)	18	N.P.	No	
OREGON	419.478	18	N.P.	No	
PENNSYLVANIA	42 §6322	18		No	
RHODE ISLAND	14-1-28 8-10-4 (Adults)	18		No	Once juvenile is tranferred juvenile court has no jurisdiction over any future offense.
SOUTH CAROLINA	14-21-530	17	No	No	
SOUTH DAKOTA	26-11-2	18	N.P.	N.P.	
TENNESSEE	37-209	18		No	
TEXAS	51.08	17		No	

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WAIVER OF TRANSFER TO CRIMINAL COURT

State	Transfer to Juvenile Court provided in Statute	If, at time of Act, Def. was under AGE____	May Def. Refuse Transfer?	May Criminal Court Choose to Retain Case?	Other Provisions
UTAH	78-3a-18	18		No	
VERMONT	33 §635	18		Yes, if defendant was over 16; otherwise, no	
VIRGINIA	16.1-245	18		No	
WASHINGTON	N.P.				
WEST VIRGINIA	49-5-1(a)	18		No	
WISCONSIN	N.P.				
WYOMING	14-6-237(f)	19		Yes	

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STATUTORY EXCLUSION OF CRIMES FROM JUVENILE COURT JURISDICTION

State	Statute	Crimes Excluded
COLORADO	19-1-103 19-1-104(A)	Class 1 felonies if child is over 14. Class 2 felonies if child is over 16 and has been adjudicated delinquent within past two years for commission of a felony. Any felony if child is over 14 and was previously waived to criminal court for allegedly committing a felony.
DELAWARE	10 §921	First degree murder; rape; kidnapping
DISTRICT OF COLUMBIA	16-2301(3)	Murder; rape; burglarly in the first degree; robbery while armed; or assault with intent to commit such an offense; traffic offense (16 or over)
FLORIDA	39.02(c)	Offense punishable by death or life if the grand jury returns an indictment
GEORGIA	24A-301(b)	Crime punishable by death or life
INDIANA	House File 248 §3(1)	If child is 15 and charged with a capital crime or attempted aggravated rape.
LOUISIANA	13 §1570	Crime punishable by death or life if child is over 14. Robbery with a deadly weapon if child is over 16. Certain traffic and boating offenses if child is over 16.
MARYLAND	3-804 Courts and Proceedings	Murder; attempted murder.
NEVADA	62.040(c)(1)	Felony if child is over 15.
NEW MEXICO	13-14-3N(5), 13-14-9	Mandatory transfer for capital offenses after a finding of probable cause.
NORTH CAROLINA	7A-280	

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STATUTORY EXCLUSION OF CRIMES FROM JUVENILE COURT JURISDICTION

State	Statute	Crimes Excluded
PENNSYLVANIA	42 Pa.C.S.A. 6302	Murder
	STATUTORY EXCLUSION OF CRIMES FROM ORIGINAL JURISDICTION OF FAMILY COURT	
NEW YORK	30.00 CPL to be read in conjunction with §712 of the Family Court Act	Murder - 2nd degree (ages 13, 14, 15) The statutory definition of murder in the 1st degree requires the actor to be 18 years of age or older Kidnapping - 1st degree (ages 14 and 15) Arson - 1st degree " Assault - 1st degree " Manslaughter - 1st degree " Rape - 1st degree " Sodomy - 1st degree " Burglarly - 1st degree and 2nd degree " Attempted murder - 2nd degree " Attempted kidnapping - 1st degree " See §180.75 CPL which provides for the transfer of jurisdiction to the Family Court for offenders charged with the above acts on certain conditions.
	STATES WHICH PROVIDE CONCURRENT JURISDICTION IN THE CRIMINAL AND JUVENILE COURTS	
IOWA	232.62	
NEBRASKA	43-202.01	
WYOMING	14-6-203(c)	

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PRE-TRIAL PRACTICES

A. Overview of Intake Procedures

The pretrial investigation and screening of cases by juvenile court personnel is generally referred to as intake. Some of the primary purposes of juvenile court intake are to screen out cases that are not within the court's jurisdiction, cases that present problems of proof, and matters that are not sufficiently serious to warrant official court intervention. Another equally important purpose of intake is to refer cases to community agencies in situations in which the exercise of court authority is not necessary in order to provide the assistance needed by the child and his/her family. Given these functions, reform in statutory provisions governing intake holds great promise for major impact in the treatment of status offenders, non-offenders and non-dangerous delinquents in furtherance of compliance with the deinstitutionalization and community based treatment goals of the JJDP Act.

The importance of careful screening is highlighted by the pressing need in most courts to reduce to manageable levels the high demands on limited court resources. The intake stage provides an efficient and inexpensive mechanism for handling the alleged offender. It also represents, however, an opportunity for coercion of a child into an informal probation program without any determination that the child has committed a delinquent

act. Although it has not been the subject of extensive litigation or legislative attention in the past, the intake process is critically important because approximately half of the referrals to juvenile courts never proceed beyond that stage. Juvenile Court Statistics, National Institute for Juvenile Justice and Delinquency Prevention, (1974).

The United States Supreme Court has not decided a case concerning juvenile court intake. In McKeiver v. Pennsylvania, 403 U.S. 528 (1971), however, which concerned a juvenile's right to a jury trial, Justice White in his concurring opinion noted that the distinctive intake procedures in juvenile courts obviate the need for a jury to serve as a buffer to the overzealous prosecutor, an important function of the jury in criminal cases.

The range of available adjustments at the intake stage is limited only by the availability of resources in the community and the imagination of the intake staff. If a child has been referred to the court on a minor charge and the intake worker determines that court intervention is not necessary, but that the child needs to be impressed with the seriousness of his/her actions, the worker will deliver a lecture to the child. To make the warning more impressive, the child may be taken before a judge for a stern reprimand.

A common practice is to delay the intake decision with the understanding that no petition will be filed if the child makes restitution, apologizes to the complainant, completes a work

detail at the police station, obtains employment, attends school regularly for a certain number of days, or takes some other action. If the child or his/her parents are viewed as needing professional assistance, to avoid a court appearance, they may be required to participate in a series of counseling sessions.

If the intake worker is treatment oriented and views himself/herself as an effective agent for change, the worker may personally engage the child or the parents in counseling sessions. In explaining why this counseling function is taken in-house rather than referred to a community agency, a frequent reason given is that the most effective time for intervention is the time of family crisis. The worry is that valuable treatment time will be lost by a referral.

A common practice in juvenile courts has been the use of informal probation in cases in which the child and family are willing to cooperate with probation personnel. Problems with informal probation have arisen, since supervision of the child by probation personnel is conducted in much the same way that adjudicated children are supervised. Unfamiliar with juvenile court procedures, children and their parents sometimes agree to informal probation, not realizing that they have the right to their day in court before the probation staff has authority over them.

The use of informal probation, even with proper safeguards, is open to serious legal challenge. If no coercion of the child or family is necessary to obtain agreement to the course of treatment, there appears to be no reason for juvenile court

involvement. Alternatively, if the treatment plan has been reached through coerion, effected without the procedural safeguards afforded in a formal juvenile court hearing, the terms of the agreement may well be unenforceable.

A developing trend, arising at least in part from the recognized need to impose sound controls on the intake process, is a move toward consent decree procedures for informal probation that clarify the process, impose judicial supervision, and contain time limits. See Piersma, Ganousis & Kramer, The Juvenile Court: Current Problems, Legislative Proposals, and a Model Act, 20 ST. LOUIS U.L.J. 1, 23 (1975).

An alternative to informal probation is the possibility of a short term attempt at mediation, particularly when the child is in conflict with his parents or school personnel. Counseling the child alone is not likely to improve the child's ability to function within the family or school setting. Instead, the intake worker acts as mediator, listens to all sides in the dispute, assists in pointing out the areas of difficulty, and recommends solutions that involve all parties to the conflict.

In some localities, youth service bureaus and other diversion programs provide an alternative to juvenile court. Services offered include counseling, drug treatment, job assistance, recreational programs, and educational assistance.

Youth service bureaus and other diversion programs were conceived, in part, to replace the screening and referral function of juvenile court. In some communities, the police and

schools make referrals directly to these new diversion agencies, bypassing juvenile court intake altogether. It should be noted here that when a young person eligible for diversion is offered the opportunity to participate in the program, project personnel should carefully explain the nature of activities planned and, more importantly, the requirements that must be met for successful completion of the program. Project personnel should take all necessary steps to ensure that young people and their parents understand their right to refuse to participate.

For a complete listing of intake sections and general comments see Intake Table I, infra. In addition see Intake Table 6, infra, for Institute of Judicial Administration and American Bar Association, Standards Relating to The Juvenile Probation Function, Intake and Predisposition Investigation Services (Tentative Draft 1977), Standards 1.1-2.16. (hereinafter referred to as ABA Standards - Probation) for complete overview.

B. Responsibility for the Intake Decision

Probation personnel typically perform the function of screening cases in juvenile court. In many courts, they also have the responsibility for gathering evidence and presenting testimony at the adjudicatory hearing. An obvious role conflict arises when the probation officer assigned to the child at disposition has previously filed the charging petition and has participated in presenting the case against the juvenile. Another problem arises

in the probation officer's review of the sufficiency of the evidence. Probation personnel who screen complaints are primarily concerned with the determination of whether the child and his/her family need assistance, not the assessment of the strength of the available evidence.

Juvenile court intake personnel generally examine the following factors during the intake process: The seriousness of the alleged offense; the sufficiency of evidence; the need for family assistance; and the need for juvenile court involvement. Since In re Gault, 387 U.S. 1, 41, 55 (1967), implicitly requires an adversary proceeding to determine juvenile delinquency, prosecutors or juvenile court attorneys playing the same role are becoming increasingly involved in the intake process.

Recently, the expanding role of the prosecutor has been acknowledged by giving the prosecutor duties at the intake stage. Generally, the prosecutor is given the responsibility to assess the legal sufficiency of the evidence. This allocation of responsibility to the prosecutor is desirable because in some cases the insufficiency of evidence to prove an offense may prompt the dropping or lessening of charges. On the other hand, court social workers should not be excluded from the screening process. The prosecutor's inquiry, as a practical matter, would usually be confined to the issues of the seriousness of the alleged offense and the strength of the available evidence. Referral to outside agencies and informal adjustment, which are important alterna-

tives to official court action, would in many cases be neglected if court social workers were given no initial role in the intake process.

In order to make effective referrals, the court personnel with the responsibility to refer should be familiar with a broad range of community agencies providing services to children and families. At present, the court workers who typically do intake and make referrals to outside agencies are probation personnel.

Under many current statutes, the judge is to aid in this process. The judge may "authorize filing of a petition," or "make a preliminary inquiry". Involvement of the judge in the accusatory process engenders bias and prejudice in the judge for at least three reasons. First, it increases the potential for prejudicial comment or disclosure outside the record. Secondly, it fosters undue confidence in the prosecution's rendering of evidence. The juvenile judge's position as director and supervisor of the court's investigative staff and the judge's close continuous relationship with the staff, on whom the judge must constantly rely, must certainly influence the judge in weighing the evidence that they have developed, and cannot fail to foster the judge's confidence in their judgment regarding its reliability and seriousness. Thirdly, the judge's involvement in the accusatory process places the judge in a position of partisan allegiance and psychological identification with the prosecution against the juvenile charged.

If the case later comes to trial before a judge who has been involved in the intake decision to prosecute the juvenile, serious questions of basic fairness are raised. Two state courts have held that a judge's review of social investigation reports or records prior to or during an adjudicatory hearing is a basis for reversal. See In Re Alexander, 16 Md. App. 416, 297 A.2d 301 (Md. App. 1972); In Re Gladys R., 1 Cal. 2d 855, 484 P.2d 127, 83 Cal. Rptr. 671 (1970). See also INTAKE, prepared for the Office of Juvenile Justice and Delinquency Prevention by Arthur D. Little, Inc., Washington, D.C., March, 1979, at p.14, for the issues in the executive-versus-judicial administration of intake debate. Also, compare ABA Standards - Probation, infra, Standards 1.1, 2.1 which place probation services in charge of intake and place it in a state department.

Recent legislative proposals reflect a trend away from the involvement of the judge at the preadjudicatory stage, giving the prosecutor a new responsibility for assessing the legal sufficiency of the available evidence in juvenile court complaints. See The Juvenile Court: Current Problems, Legislative Proposals, and a Model Act, supra.

Present statutory approaches still rely primarily on the court or probation offices or intake departments within the court to handle intake decisions, although some states have shifted this function to offices outside the court's jurisdiction including the district or county attorney. See INTAKE TABLES 1 and 2 for review of the present statutory situation.

C. Intake Criteria

Although almost all state juvenile court statutes provide for preliminary screening, they are typically silent on the procedures to be followed and the criteria to be applied. At best, the statutes usually authorize intake decision makers to decline filing a petition on the basis of "interests of the public or minor" or "best interests of the child or public" or "legally sufficient" (as to jurisdiction and/or probable cause finding), or "suitable cases". The failure of the state to provide for and the failure of the juvenile court to implement adequate criteria was deemed to state a federal civil rights claim by a federal appeals court in Conover v. Montemurro, 477 F.2d 1073 (3d Cir. 1973). This lawsuit claimed that juveniles were denied due process under the federal constitution because of the overbroad discretion allowed to the intake worker and the vagueness of the standards for the intake decision. Briefly stated, the arguments supporting this claim were: (1) The lack of standards denies a juvenile the opportunity to make an intelligent, informed response in his/her attempt to secure a discharge at the intake interview; and (2) the intake policy of automatically filing petitions against juveniles who deny violations of the law with which they are charged is not rationally related to the juvenile court's purpose of according individualized attention to juveniles. While the courts have not resolved this issue, such litigation does indicate that regardless of the allocation of personnel responsibility in the intake determina-

tion, the criteria applied and the procedures must be carefully defined.

The lack of written guidelines for the intake decision in most juvenile courts was criticized as early as 1967, by the PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: JUVENILE DELINQUENCY AND YOUTH CRIME 21 (1967):

> Written guides and standards should be formulated and imparted in the course of in service training. Reliance on word of mouth creates the risk of misunderstanding and conveys the impression that pre-judicial dispositions are neither desirable nor common. Explicit written criteria would also facilitate achieving greater consistency in decision making.

See also J. OLSON & G. SHEPARD, INTAKE SCREENING GUIDES: IMPROVING JUSTICE FOR JUVENILES 26 (1975); INTAKE, supra, at p.4.

Some intake departments have formulated written guidelines. Those used by the Maryland Department of Juvenile Services are fairly typical:

(1) Seriousness of the offense.

a. Intent

b. Severity of personal injury

c. Extent of property damage

d. Value of property taken - whether or not recovered

e. Whether the offense is repetitive or isolated

(2) Impact of the offense on any individual or the community.

(3) Previous number and nature of Department of Juvenile Services, police and juvenile court contacts.

(4) Age and maturity of child. (Was the violation committed because of an immature impulse or was it premeditated? What is the child's degree of awareness regarding the severity of the violation?)

(5) Attitude of child. (Does the child admit his involvement in the violation?)

(6) Attitude of parents toward child's responsibility regarding the offense and toward discipline of the child. (A possible lack of parental control or concern may be reflected by the time of day the offense occurred, and so forth.)

(7) Degree of incorrigibility under parent's supervision. (Does the child normally obey reasonable guidelines set by parents?)

(8) School attendance and behavior pattern.

(9) Available social factors.

(10) Resources and ability of family and community to provide appropriate care, treatment, and rehabilitation as opposed to the Department of Juvenile Services or the Court doing so.

The seriousness of the offense is perhaps the most important element considered. A number of courts, as a matter of policy, may specify that certain offenses may not be adjusted, or more generally, that no felony offense may be adjusted.

Whatever the test, the automatic filing of a petition conflicts with the concept of individualized justice, a hallmark of the juvenile court process. Cases holding automatic detention policies inappropriate support this position by analogy. See Commonwealth ex rel. Sprowal v. Hendricks, 438 Pa. 435, 265 A.2d 348 (1970); In re M., 3 Cal. 3d 16, 473 P.2d 737, 89 Cal. Rptr. 33 (1970); In re Macidon, 240 Cal. App. 2d 600, 49 Cal. Rptr. 861 (1966).

The attitude of the alleged offender and his family is accorded great weight when the intake decision is made. If the child appears unconcerned or defiant, and if the parents have taken no disciplinary action, an adjustment is not likely. This great emphasis on attitude, however, has a discriminatory effect on the poor, who act out their resentment and frustration. On the other hand, a middle class family, more aware of the situation, is more likely to exhibit a charade of concern and cooperation. For a study of the variables that influence intake decisionmaking, see Thomas & Sieverdes, Juvenile Court Intake: An Analysis of Discretionary Decision-Making, 12 CRIMINOLOGY 413 (1975). For an excellent and complete set of criteria for intake decisions, see A.B.A. Standards - Probation, infra Standards 2.6, 2.7 and 2.8.

D. Diversion Programs

Diversion is the referral of a child, who would otherwise be in danger of being adjudicated a delinquent, to services designed

to prevent further acts of delinquency and future contact with the official juvenile justice system. There are essentially two kinds of diversion: true diversion, involving referral of a child to services not connected with the juvenile justice system; and minimization of penetration, involving referral of a child to services within the juvenile justice system. See D. Cressey & R. McDermott, Diversion from the Juvenile Justice System, (1974). In either case, for a referral to be diversionary, it must occur prior to adjudication. Moreover, since diversion implies a positive act of referral, the mere act of not filing a petittion for court action is not diversion. Finally, diversion is usually supposed to be voluntary, but the implicit threat of official court action as the alternative to accepting the referral tends to render it involuntary in many cases.

In addition to questions concerning the involuntary character of new alternative programs, serious questions of program design are raised. One concerns the relationship of the alternative program with the schools. As with traditional juvenile court programs, diversionary programs may continue to serve as a very convenient dumping ground for schools that are unwilling to cope with troublesome students. By accepting troublesome young people on referral from the schools, the program may lend significant support to exclusionary school policies.

Another serious drawback is the unavoidably close relationship with the juvenile court. Most juvenile codes currently

direct law enforcement officials to take apprehended juveniles to the court or to a detention facility designated by the court, if not released to their parents. Thus, in most states the diversionary program must, as a practical matter, achieve designation by the juvenile court as an official referral program.

The Juvenile Justice and Delinquency Prevention Act of 1974 recognizes the failures of the juvenile court system and calls for experimentation and research in developing diversionary programs. The Act requires the coordination of all federal diversion programs, 42 U.S.C. §5614; and the development of information and training concerning the most effective new alternative programs, 42 U.S.C. §5654. At least 75% of the funding allocated directly to the states must be used for advanced techniques in delinquency prevention, diversion programs, and community-based alternatives to detention and correctional facilities, 42 U.S.C. §5633.

The police and court personnel have probably always engaged in a considerable amount of diversion by referring youth to existing community agencies (true diversion) and by placing children on informal probation (minimization of penetration). It was not until 1967, however, when the President's Commission on Law Enforcement and Administration of Justice recommended diversion, that most states decided to encourage the establishment of programs to which children might be diverted. Now, the A.B.A. Standards - Probation, infra, have developed model guidelines for

diversion which would implement the Commission's call as well aid many legislatures and juvenile justice advocates seeking to pass diversion laws. Standard 2.4, nonjudicial disposition of a complaint. These standards prohibit some traditional intake practices because of abuses in their application. The Standards, for example, prohibit: (1) non-judicial probation (supervision by probation personnel for a period of time during which the juvenile may be required to comply with certain restrictive conditions with respect to his/her conduct and activities); (2) "provision of intake services" (services provided by probation personnel on continuing basis). Community agency referrals are the favored intake practice, subject to strict criteria set out in standard 2.4E: (1) there must be an agreement of a contractual nature not to file in exchange for certain commitments by the juvenile and the parents regarding future conduct and activities; (2) the juvenile and parents must voluntarily and intelligently enter the agreement; (3) the juvenile and parent have the right to refuse to enter into the agreement and may request a trial, (4) the agreement must be limited in duration; (5) the juvenile and parent must be able to terminate the agreement at any time and get a trial; (6) the agreement should be clearly stated in writing and signed by all parties; (7) filing of a petition is permitted only within 3 months of the agreement - juvenile's compliance with proper and reasonable terms of agreement is an affirmative defense to such petition. The following subsections will discuss some present diversionary approaches.

1. Informal Adjustment

It is now quite common to have juvenile code provisions which call for a halting or suspending of the formal juvenile court process prior to filing a petition or adjudication to allow a juvenile to be handled informally by community agencies. Presently the majority of states have statutory provisions which allow diversion through informal adjustment. See INTAKE TABLE 3, infra. A typical and good example is the Iowa provision which requires an admission by the child to a delinquent act; the right to refuse informal adjustment; voluntary, intelligent consent by the child with advice of his or her attorney; terms clearly stated and signed to by parties; a six-month limit; and the right to terminate. Petitions can be filed only within the six-month period and are dismissed if the child has complied with the terms of agreement. Some of the informal adjustment provisions are in reality more formal than informal. They may, in fact, be more in the nature of a consent agreement. See e.g. the Mississippi Youth Court Act, §44.

2. Screening and Referral by Community Agencies.

An increasing number of states have adopted provisions which allow for the intake screening and/or referral by community agencies. See Intake Table 4.

A model for this type of referral is found in the Pennsylvania Juvenile Act §6323. Under its terms, if the probation officer deems it in the best interest of the child and public,

the officer refers the child and his/her parent to any willing public or private agency who reports back in three months. The agency and the probation officer give counsel and advice. The child and parent voluntarily consent. The admitted facts must bring the case within the jurisdiction of the court. Any incriminating statement can not be used against the child over objection. A six-month limit is put on the process. The agency can refer back for further informal adjustment at any time, but no petition can be filed.

3. Youth Service Bureaus

One of the more specific diversion recommendations of the President's Commission was the establishment of youth service bureaus as community diversion agencies. These bureaus typically refer children to existing agencies, and themselves provide individual counseling, family and group counseling, drug treatment, help with jobs, education, recreation, medical services, and legal services. Unfortunately, almost any type of youth-serving program can call itself a youth service bureau. In fact, many programs adopting that name are clearly mere extensions of the juvenile court evidencing many similarities, including service patterns, relationships to other official agencies, and most importantly, coercive and stigmatizing practices.

Another serious problem concerns the coordination of community services to young people. In recent years, policymakers have recognized the vast number of organizations that already

exist have a significant untapped service capacity. They could be much more effective if organized properly and coordinated. The youth service bureau is touted as fulfilling this need for coordination.

In reality, little visible coordination has been accomplished by youth service bureaus. Youth service bureaus have had to spend much of their energy and resources in attempting to establish their legitimacy and effectiveness. Even though their announced service goals may be in accord with other community agencies, they are often cast in a competitive position. For this reason, few youth service bureaus have even attempted to work with other organizations in setting overall policy, assigning priorities, and in adopting uniform procedures for the referral of young people. For a comprehensive review of the activities of youth service bureaus, see A. SCHUCHTER & K. POLK, SUMMARY REPORT: PHASE I ASSESSMENT OF YOUTH SERVICE BUREAUS (1975).

An outstanding model Youth Service Bureau is La Playa, Ponce, Puerto Rico, which has been operating for many years under LEAA and OJJDP support. With the complete cooperation of the local juvenile court, most juvenile cases are diverted at intake to La Playa for intensive one to one counseling, assistance and advocacy. In addition, La Playa receives many referrals from community agencies. In such cases, the juvenile voluntarily agrees to utilize the services and programs of La Playa. The

program has five sub-centers, located in the various barrios, with community offices for its advocates. The program emphasis is two-fold: prevention of institutionalization and programming to prevent the juvenile from committing the same acts that have threatened him/her with institutionalization.

To achieve these objectives, La Playa relies on its advocate program. The concept behind the advocacy program is that it is more beneficial to the child if an agency intervenes in the judicial process as early as possible.

Implementation of the advocacy program is fairly simple. As soon as the police arrest or pick up a juvenile for questioning who is from a barrio served by La Playa, a call is made to La Playa which, in turn, calls the advocate in charge of the specific barrio. Advocates are required to represent the barrio they have grown up in--so the advocate often knows the juvenile or his family, thereby facilitating communications. As soon as the advocate is informed, he/she goes to wherever the juvenile is being detained. As soon as the phone call was placed, all police action has been at a standstill until the advocate arrives.

Upon arriving at the station, the advocate immediately interviews the police and then the juvenile, away from the police, to determine why the juvenile is being detained. At this point, the advocate is often able to obtain the juvenile's release by showing that there is no valid reason for detention.

If the juvenile is kept for further questioning, the advocate then explains to the juvenile his/her rights, informing him/her of the advantages of keeping silent and having an attorney. If the juvenile is questioned, the advocate remains, advising the juvenile on any possible repercussion if the juvenile is held for court action. The advocate then intercedes with the court intake department to seek diversion of the juvenile to the La Playa program. In most cases, the advocate is successful in this effort. If the case proceeds beyond intake, the advocate helps investigate and prepare the case.

At trial, the advocate is a witness for the juvenile. If the juvenile is found guilty and it is a first offense, the court places the juvenile on probation in the advocate's custody. If it is a second offense, the court often will still place the juvenile on probation and in the custody of the advocate. The second situation, however, seldom occurs, since La Playa has the lowest recidivism rate in Puerto Rico.

Once the juvenile is diverted or placed in the custody of the Center's advocate, the second stage of La Playa's program begins. Immediately, an individual program is designed for the juvenile which is carried out entirely within the community. The juvenile attends school in the community and attends vocational programs, some of which are operated by La Playa, with other persons who are not juvenile offenders. La Playa supplements all of this by providing an individual tutor to help the juvenile in

school. The advocate makes regular appointments with the youth and tries to interest him/her in the various La Playa programs. These programs are geared to give the juvenile a sense of belonging and accomplishment. Regular group activities such as baseball, a club house, trips, etc., are provided. Vocational courses include carpentry, welding, auto mechanics, sculpturing, gardening and cosmetics. Special activities such as art, guitar, weaving and photography are offered.

Throughout all of this, although instructors are available, the juveniles learn by themselves. The La Playa programs seem to be working extremely well. An excellent example is the photography class where the juvenile is taught everything from chosing the right camera, to taking the picture, to developing the film to finally deciding what size the picture should be. The photography course has worked so well that the youth had a showing at the New York Metropolitan Museum of Art.

For a statutory scheme providing a youth service bureau network see California Welfare and Institutions Code, §1900 et. seq.

4. Community Youth Boards

An involuntary system of diversion from the traditional juvenile court process makes use of community youth boards. The agencies act as informal hearing boards to determine what, if any, services should be provided to children referred by schools, the police, the juvenile court, parents, or the children themselves. Their ideals are the same as those of the first juvenile

courts - to help children in trouble to become useful and healthy citizens, not to determine fault. While some boards only accept status offender referrals, others allow referral of all juvenile offenders. Children must obey the board's orders for receiving services unless they choose to ask for a juvenile court review, in which case the court has the power to vacate the boards' orders. This approach has been embodied in some proposals, but has not yet been put into practice.

E. Informal Probation and Consent Decrees

A developing trend, arising at least in part from the recognized need to impose sound controls on the court intake process, is a move toward consent decree procedures for informal probation. See INTAKE TABLE 5 for listing of states with such provisions. Under such proposals and code provisions the child and his/her parents might, for example, agree to attend counseling sessions with a court worker, make restitution, obtain employment, or attend school for an established period of time without an adjudication of delinquency. Most recent bills and codes require an agreement by both the child and his/her parents. Some require the child's admission to the alleged offense, and most contain time limit in the duration of informal probation.

The provisions of these bills and codes typically allow for reinstatement of the petition if the child fails to comply with the agreement. Some require that the court find noncompliance

with the agreement by a preponderance of evidence before a petition can be reinstated. Several make statements made by a child during the consent probation inadmissable in later hearings. Others bar the judge who approved the consent decree from presiding at later adjudicatory hearings.

The use of informal probation, even with a review mechanism, is open to some serious questions. The Washington code illustrates the difficulties. It authorizes a "diversion agreement" between an accused and the court's "diversion unit". After the prosecutor has made a "probable cause" finding, court staff may negotiate an agreement with the youngster. Under this provision, the staff is required to advise young people of their right to counsel and that the agreement "constitutes a part of the youth's criminal history." (Emphasis added)

An elaborate process is required when a petition is reinstated for noncompliance. The law requires a hearing preceded by written notice providing an opportunity to present evidence, and to confront and cross-examine adverse witnesses. The court must find clear and convincing evidence of noncompliance.

Under this law the only means of achieving "diversion" is through an agreement process outlined in the code. Initially, the juvenile qualifies if the case is a misdemeanor or summary offense and, including the new charge, is not greater than the child's third offense (no felonies permitted). For offenses falling between these and certain felonies, diversion is possible

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depending on the length, seriousness and recency of the juvenile's "criminal history". Persons working in the diversionary unit may then simply decline to reach an agreement. Although a finding of "probable cause" is required, no finding of guilt or admission of guilt is required as a prerequisite to entering into the agreement. Under this provision a child may be required to perform an act of community service, or to make restitution to the victim. "Community service" is defined as "compulsory service, without compensation, performed for the benefit of the community by the offender as punishment for committing an offense". Sec. 54 (2).

This law, seemingly designed to divert young people from juvenile court and to protect them in the process, in actual effect entails a serious deprivation of rights. The child is forced to "pay" for the crime without a finding of guilt or an admission of guilt. This law essentially codifies out-dated juvenile court practices which had typically moved to disposition without a finding of guilt and without an adversarial hearing. Caution must be employed in the area of legislation to guarantee that juveniles are not forced into this contradictory position.

The reinstatement of petitions after the entry of a consent decree presents a number of problems. Commendably, some of the proposals and codes attempt to protect children in this situation from possible detriment due to the initial choice of the consent decree alternative. Several bills and codes, for example, make

inadmissible in later hearings statements made by a child during the decreed probation. In addition, other proposals and codes bar the judge who approved the consent decree from presiding at later adjudicatory hearings. If consent decrees are to be used in juvenile courts, procedural safeguards similar to these should be implemented. See A.B.A. Standards - Probation, infra, Standard 2.5.

INTAKE TABLE 1

Juvenile Court Intake Process	State - Juvenile Code
Intake officer receives complaints and procedures per court rules	Alab. 12-15-50
Probation officer or other officer of court may informally adjust pursuant to court rules of procedure	Alab. 12-15-51
Court appoints a competent person or agency to preliminary inquiry and court may informally adjust	Alask. 47.10.020
Juvenile court officer shall have duty to investigate delinquency and incorrigible complaints	Ariz. 8-205
Child Protective Services shall be responsible for investigation of alleged dependency and disposition unless court intervention is required	Ariz. 8-224B
Intake officer shall receive and investigate all complaints, may make referrals to other public/private agencies	Ark. 45-411
Petitions charging juveniles as habitually disobedient or truant (§601) are filed by the probation officer. Those charging delinquency (§602) are filed by the prosecutor.	Cal. 650
A program of supervision; after investigation and before a petition is filed is possible.	Cal. 654
Police may release minor after taking into custody	Cal. 626
District Attorney reviews and does intake. District Attorney may refer to probation officer, District Social Services, etc. to investigate and informally adjust or recommend filing	Colo. 19-3-101
After complaint filed, juvenile court makes preliminary investigation. Nonjudicial disposition permitted	Conn. 46b-128

Juvenile Court Intake Process	State - Juvenile Code
No mention of any inquiry or informal proceeding. But may "defer" proceeding	Del. 10 932-33 Del. 936
Complaints shall be directed to Director of Social Services to make preliminary inquiry - but no comment as to informal adjustment	D.C. 16-2305
Intake department operated by State Department of Health and Rehabilitative Services initially screens all complaints. State attorney may be consulted for sufficiency of evidence determination and can cause filing if intake decides against and victim requests filing. Diversion by intake worker permissible	Fla. 39.04
A probation officer may informally adjust	Ga. 24A-1001
Court by orders or rules may provide regulations for filing investigation	Haw. §571-21
The court shall make a preliminary inquiry - may use services of probation officer - then may informally adjust	Idaho 16-1807
Court may authorize probation officer to confer in a preliminary conference with any person seeking to file a petition with a view towards adjusting without filing	Ill. 37 §703-8
Prosecutor decides to file in criminal delinquency. May use informal adjustment	Ind. 31-6-4-7
In CHINS cases, intake officer makes preliminary inquiry and may recommend informal adjustment, but "person representing interests of the state" decides to file.	31-6-4-8 (CHINS)
Complaint referred to intake officer to conduct a preliminary inquiry - may make informal adjustment	Iowa Sec. 13
Shall be the duty of the juvenile probation officer make a preliminary inquiry. Probation officer may then recommend filing of a petition to County Attorney or D.A. No mention of authority to informally adjust, etc.	Kan. 38-816

INTAKE TABLE 1 (Continued)

Juvenile Court Intake Process	State - Juvenile Code
Court shall make a preliminary inquiry and may informally adjust	Ky. 208.070
The court or district attorney may authorize informal adjustment,	La. Art. 42
D.A. or any court authorized person may file	La. Art. 45
Intake worker conducts preliminary investigation and may informally adjust may refer for services	Maine 15 §3301
Intake officer conducts preliminary inquiry. State's attorney can overrule denial. Specific provision for informal adjustment by the intake officer	Md. 3-810
For CHINS - Probation officer shall conduct a preliminary inquiry, report to the court at the hearing and court may direct informal assistance, declining to issue the petition or order filing. - As to delinquents no provision made for any preliminary inquiry - no mention of diversion	Mass. 39E
Provides that a preliminary inquiry shall be made - but doesn't specify by whom	Mich. 712A.11
Upon request the court - the County Welfare Board or probation officer may investigate family background - only after petition filed	Minn. 260.151
Specific provision setting up intake unit - Intake procedure Sect. 43 - allows informal adjustment	Miss. (New) Youth Court Act §9 Miss. (New) Youth Court Act §44
Juvenile court shall make preliminary inquiry of all complaints, and may informally adjust	Mo. 211.081
All complaints go to probation officer for preliminary inquiry and may informally adjust	Mont. 41-5-301

INTAKE TABLE 1 (Continued)

Juvenile Court Intake Process	State - Juvenile Code
The only provision for investigation of complaint is if child is taken into custody - then probation officer shall investigate and either detain or release	Neb. 43-205.03
Complaint referred to County Probation Officer who investigates. District Attorney has final decision.	Nev. 62.128
Any officer authorized by 169-B:9 (police or probation) to take a minor into custody may dispose of case without court referral or refer to diversion program	N.H. 169-B:10
Complaints charging delinquency may be filed by any person. Complaints charging JINS may be filed by agencies, schools, police, parent, correction or probation officer.	N.J. 2A:4-53
After adjudication, may "adjourn" disposition up to 12 months for "adjustment" by juvenile.	N.J. 2A:4-61
Probation services shall conduct preliminary inquiry (best interests of child & public requisites for petition). Children's Court Attorney signs petition.	N.M. 13-14A-20
Rules of court authorize and determine circumstances when probation service may attempt to adjust a case before a petition is filed, subject to judge approval in designated felony cases and corporation counsel or county attorney approval if prior adjustment	N.Y. §734
- County Attorney or corporation counsel must then approve the petition. Can petition for insufficiency of evidence or petition.	N.Y. §734-a
The establishment of intake services is optional, but if established then certain procedures laid out. Designated personnel will conduct a preliminary inquiry - time limit - may informally adjust	N.C. 7A-289.7
- Otherwise straight petition to court route	N.C. 7A-281

Juvenile Court Intake Process	State - Juvenile Code
Juvenile supervisors are to receive complaints and charges - and investigate - power to informally adjust	N.D. 27-20-05.1. to 27-20-06.
The only provision for intake refers to the detention decision - not whether a petition should be filed	Ohio 2151.314
The court may provide by rule who shall make a preliminary inquiry as to wheter further court action is required. Authorized to make informal adjustment	Okla. 1103
Personnel at the juvenile court make the preliminary inquiry as to whether or not the petition should be filed. Minimal criteria	Ore. 419.482
Probation officer has the duty to receive and examine complaints and charges - some limitations	Pa. 6304 & 6323
Judge authorizes probation officers and social workers to make investigation. Judge may discharge or refer to appropriate agency which shall place child under supervision in child's own home or foster home or institution or refer to another community agency for social services	P.R. Rule 4, Rules of Court P.R. Rule 5.1, Rules of Court
Duty of court to make preliminary investigation to determine whether petition should be filed - factors which should be investigated include: preliminary investigation of home and environmental situation, his previous history and circumstances which were the subject of the information. May use reports of public or licensed private agencies as sufficient evidence for filing of petition.	R.I. 14-1-10
The court shall make preliminary inquiry to determine whether petition or informal adjustment. Investigation to include child's age, habits and history, parentage home conditions; may order physical, psychological or psychiatric examination, school report	S.C. 14-21-560

Juvenile Court Intake Process	State - Juvenile Code
State's attorney makes preliminary investigation to determine whether petition should be filed or may refer to court service worker for informal adjustment or take no further action.	S.D. 26-8-1.1
Probation officer has duty to receive and investigate all complaints - may make referral to other social agency and may detain - may informally adjust	Tenn. 37-206 Tenn. 37-210
Law enforcement officer may dispose of case by warning notice or otherwise without referral to juvenile court - if guidelines established - If referred to the court - intake, or probation or other authorized person shall investigate - Criteria for informal adjustment	Tex. 52-03 Tex. 52-01 Tex. 53.01 Tex. 53.03
Probation officer shall investigate all complaints - may make informal adjustment - with some limitations. Court or at request of court, county attorney may file petition	Utah 78-3a-22
Commissioner of Corrections (delinquents) or Commissioner of Social & Rehabilitative Services (CHINS) has duty to receive and review complaints and allegations - not specific authority to informally adjust. May make appropriate referrals to private/public agencies where assistance needed or desirable	Vt. T.33 §638
Probation officer receives complaints, court thereafter may proceed informally without a petition or may file - also see - sets out procedure in detail	Va. §16.1-164 Va. §16.1-260
Probation counselors shall receive and examine referrals to juvenile court - may arrange and supervise diversion agreements	Wash. 13.04.040 (new amend. '79)

INTAKE TABLE 1 (Continued)

Juvenile Court Intake Process	State - Juvenile Code
A complaint may be referred to probation officer for preliminary inquiry - there are specific provisions allowing for informal adjustment	W. Va. 49-5-7 W. Va. 49-5-3a
All referrals to intake worker - who shall conduct an intake inquiry - May make informal disposition - Duties of intake worker clearly specified	Wisc. 48.24 Wisc. 48.245 Wisc. 48.243
Complaints alleging child is delinquent, in need of supervision or neglected referred to County Attorney who makes intake decision. County Department of Health and Social Services, County Sheriff and County/State Probation Department assist County Attorney in investigation	Wyo. 14-6-211
Attorney General, after investigation and finds that state juvenile court does not have jurisdiction or refuses jurisdiction or does not have programs and services adequate for needs of juvenile, certifies to district court. Court may suspend adjudication of delinquency; impose conditions as it deems proper, put on probation	U.S. 5032 U.S. 5037

INTAKE TABLE 2

Summary: Responsibility for the intake decision

PROBATION OFFICER	INTAKE OFFICER	COURT	OTHER
Arizona[1]	Alabama	Connecticut	Alaska[18]
California[2]	Arkansas	Hawaii	Colorado[19]
Georgia	Florida[10]	Idaho[14]	Delaware
Illinois[3]	Iowa	Kentucky	District of Columbia[20]
Montana[4]	Maine[11]	Massachusetts[15]	Indiana
Nebraska[5]	Maryland[12]	Missouri	Kansas[21]
Nevada	Mississippi	Oklahoma[16]	Louisiana[22]
New Hampshire[6]	North Carolina[13]	Puerto Rico	Michigan[23]
New Mexico	Wisconsin	Rhode Island	Minnesota[24]
New York[7]		South Carolina	New Jersey[25]
North Dakota[8]		Utah[17]	Ohio[26]
Oregon			South Dakota[27]
Pennsylvania			United States[28]
Tennessee			Vermont[29]
Virginia			Wyoming[30]
Texas[9]			
Washington			
West Virginia			

Footnotes to "Table 2 Responsibility for the Intake Decision"

1. Protective services specialist of State Department of Economic Security has responsibility for deprived children complaints - responsible for disposition of child unless court intervention required.

2. Only petitions charging habitually disobedient or truant. Prosecutor files delinquency petitions.

3. Court may authorize probation officer to confer in preliminary conference with person seeking to file. Any person can file petition - probation officer cannot prevent this.

4. Youth in need of care are handled by Department of Social and Rehabilitative services. County attorney can file if probation officer refuses petition.

5. Only if child in custody, then investigate and either detain or release. Court also can do this.

6. Probation officer or police officer can approve filing.

7. Probation services reviews; county or corporation counsel has final approval of petitions.

8. "Juvenile Supervisors" whose powers are designated under 27-20-06.

9. Police can divert pursuant to 52.01 and 52.03 with court approved guidelines.

10. State Department of Health and Rehabilitative Services; consultation with state attorney for sufficiency of evidence if necessary.

11. If intake worker decides not to file, complaint may be submitted to prosecuting attorney who after consultation with intake worker makes final decision.

12. If the complaint alleges a delinquent act, the complainant may appeal denial of filing by intake officer to State's attorney who after review may file the petition. If the complaint does not allege a delinquent, the complainant may appeal denial of filing by the intake officer to the regional intake officer. Motor vehicle violations are filed directly with the state's attorney who makes petition decisions.

13. Intake services are optional, but if provided, must conduct preliminary inquiry and other intake procedures.

14. Court initially handles, but may use services of probation officer.

15. For CHINS, probation officer conducts preliminary inquiry and reports to court at hearing. Court decides on filing.

16. Court provides by court rule who makes preliminary inquiry.

17. May also request county attorney to file petition.

18. Court appoints "a competent person or agency" to make preliminary inquiry.

19. District Attorney initially handles, but may refer to probation office department of social services, etc., for investigation and other intake procedures.

20. Director of Social Services conducts preliminary inquiry and decides per court intake rules.

21. At request of judge, probation officer does preliminary inquiry and refers to county attorney or district attorney for filing decision. Judge can also request these attorneys to file without preliminary inquiry.

22. The District Attorney may file a petition without leave of court. Any person authorized by the court may file a petition.

23. Provides for preliminary inquiry by unspecified person.

24. Upon request of the court, the county welfare board or probation officer may investigate family background. But only after filing of petition. Any person may file.

25. Any person may file delinquency petition. JINS Petitions filed by agencies, schools, police, parent, correction or probation officer.

26. No intake provision.

27. State's attorney makes preliminary investigation and may refer to court service worker for informal adjustment.

28. Attorney General certifies cases to federal district court.

29. Commissioner of Corrections or Commissioner of Social and Rehabilitative Services reviews complaints.

30. County Attorney files all petitions.

INTAKE TABLE 3

Diversion	State - Code Section
Specific provision for informal adjustment	Alab. 12-15-51
Court may informally adjust	Alask. 47.10.020
Instead of §601 petition or request by prosecuting attorney under §602 or after dismissal of petition, may informally adjust and enter juvenile in program of supervision.	Cal. 654
Child who habitually refuses to obey orders of school authorities or who is an habitual truant, referred to a school attendance review board before referral to juvenile court	Cal. 601.1
Specifically allows for infomral adjustment with some limitations.	Colo. 19-3-101
Court can make any nonjudicial disposition it deems practical	Conn. 46b-128
May defer proceedings pending further investigation on where the interests of child will thereby be served	Del. 936
Specific provision allowing intake officer to refer to diversionary or other voluntary program	Fla. 39.04
Specific provision for informal adjustment	Ga. 24A-1001
Court may informally adjust	Idaho 16-1807
Probation officer may informally adjust	Ill. 37 §703-8
Specific provision allowing intake officer to informally adjust	Ind. 31-6-4-12
Specific provision providing for informal adjustment good limitations	Iowa 232.29
Court may make informal adjustment	Ky. 208.070
Informal adjustment allowed	La. Art. 42

INTAKE TABLE 3 (Continued)

Diversion	State - Code Section
Intake worker may informally adjust - specific - limitations on authority to adjust	Maine 15 §3301
Intake officer may informally adjust - specific criteria & limitations	Md. 3-810
Probation officer may informally adjust	Mass. §39E
Specific provision for informal adjustment	Miss. Youth Court Act §44
Juvenile court may informally adjust	Mo. 211-081
Probation officer may informally adjust	Mont. 41-5-301
- Specific limits put on disposition permitted	Mont. 41-5-403
Police or probation officer may refer to court approved diversion program	N.H. 169-B:10
Court may order (with consent) diversion, after arraignment and prior to adjustment	N.H. 169-B:13(I)
Intake services may informally adjust	N.C. 7A-289.7
Juvenile supervisor may informally adjust - specific provision	N.D. 27-20-10
Informal adjustment is authorized	Okla. 1103
Court personnel may make informal recommendations to a child and parent or custodian	Ore. 419.482
Probation shall refer dependent child and refer delinquent child before filing petition. Specific provision for informal adjustment	Pa. 6323
Court may make informal adjustment without a petition	S.C. 14-21-560
Court service worker may make informal adjustment	S.D. 26-8-1.1

INTAKE TABLE 3 (Continued)

Diversion	State - Code Section
Probation officer or other designated officer may informally adjust	Tenn. 37-210
Law enforcement officer may dispose of case without referral to court - Informal adjustment by probation officer	Tex. 52.01(c) Tex. 52.03 Tex. 53.03
Probation officer may informally adjust	Utah 78-3a-22
Court may informally adjust without a petition - intake officer also may informally adjust	Va. §16.1-164 Va. §16.1-260
Probation counselors may arrange and supervise diversion agreements. May contract with private agencies for provision of services in diversion agreements.	Wash. 13.04.040 ('79 amend.)
Specific provision allowing for noncustodial counseling which can be ordered without formal proceedings under certain conditions	W. Va. 49-5-3
Intake worker may make informal disposition - specific provision - criteria 48.245	Wisc. 48.24

INTAKE TABLE 4

Screening & Referral by Community Agencies	State - Code Section
May refer juvenile to private or public shelter care with counseling, which parents may have to pay partially or fully. Refer to crisis intervention home. Refer to counseling and educational center for vocational training and shelter Youth Service Bureau system set up for referrals. 1900 et. seq.	Cal. 654(a) Cal. 654(b) Cal. 654(c)
Law enforcement officer may take child to court approved center offering voluntary services	Ky. 208.110
Intake worker may refer for care and treatment	Ma. 33015.A
Probation officer may refer to other agencies for treatment	Mass. §39E
Intake unit may refer to other agency for investigation	Miss. New Youth Court Act §43
Probation officer may refer to other community agency	Mont. 41-5-301
Matter may be referred to other agencies to work out adjustments to avoid filing a petition	N.M. 13-14A-20
Intake officer may refer to appropriate public or private agency with notice to complainant after which file is closed	N.C. 7A-281
Juvenile Supervisor, subject to court's direction, may make appropriate referrals	N.D. 27-20-06
Probation officer may refer to social, community agencies, public or private	Pa. 6323
Child may be referred to an "appropriate agency for placement or referral to another agency for services	P.R. Rule 5
Probation officer may refer to social, community agencies	Tenn. 37-206
May make referral to public or private agencies of the community where their assistance appears to be needed or desirable	Vt. 638(4)

INTAKE TABLE 5

Informal Probation and Consent Decrees	State - Code Section
After the close of evidence and before judgment is entered, court may continue for 12 months	Ind. 31-6-4-14
Specific provision for consent adjustment before filing of a petition	Mont. 41-5-401
Upon filing a petition judge may place under supervision and consent decree without formal adjudication	Nev. 62.128(5)
General informal probation	N.Y. §734
Specific provision for consent decree - after petition filed and before adjudicatory order	Pa. 6340
Probation counselor may decide against referral to juvenile court and instead arrange and supervise diversion agreement	Wash. 1304.040 (New Amend. 1979)
Specific provision for informal adjustment by probation officer	W. Va. 49-5-3a
- Specific provision for an "improvement period" before final adjudication - period of 1 year	W. Va. 49-5-9
Specific provision for consent decree	Wisc. 48.32
At any time before adjudication consent decree permitted	Wyo. 14-6-228

Standards

PART ONE: DEFINITIONS

1.1 Definitions as used herein:

A. "Juvenile probation" is an organizational entity that furnishes intake, investigative, and probation supervision services to juvenile courts.

B. "Juvenile probation services" consist of intake, investigative, and probation supervision services.

C. A "juvenile probation officer" is an individual who provides intake, investigative, or probation supervision services.

D. A "complaint" is a report made to a juvenile court that alleges that a juvenile is delinquent and that initiates the intake process.

E. A "petition" is a formal legal pleading that initiates formal judicial proceedings against a juvenile who is the subject of a complaint to determine whether the court has and should exercise jurisdiction over the juvenile.

F. "Intake services" consist of the intake screening and disposition of complaints.

G. "Intake" is a preliminary screening process initiated by the receipt of a complaint, the purpose of which is to determine what action, if any, should be taken upon the complaint.

H. An "intake officer" is an individual who screens complaints and makes intake dispositional decisions with respect to complaints.

I. "Investigative services" consist of the conducting of predisposition investigations and the preparation of predisposition reports.

J. A "predisposition investigation" is the collection of information relevant and necessary to the court's fashioning of an appropriate dispositional order after a juvenile has been adjudicated delinquent.

K. A "predisposition report" is a report based upon a predisposition investigation furnished to the court prior to the court's issuance of a dispositional order.

L. An "investigation officer" is an individual who conducts predisposition investigations and prepares predisposition reports.

M. "Probation supervision services" consist of the supervision of juveniles who have been placed on judicial probation.

N. "Judicial probation" refers to the supervision of a juvenile who has been adjudicated delinquent and who remains in his or her own home, by a designated individual or agency for a designated period of time during which he or she may be required to comply with certain restrictive conditions with respect to his or her conduct and activities pursuant to a dispositional order of the court.

O. "Parent" means the juvenile's natural parent, guardian, or custodian.

PART II: JUVENILE COURT INTAKE

Section I: General Standards

2.1 Availability and utilization of intake services.

Intake services should be available to and utilized by all juvenile courts.

Section II: Dispositional Alternatives at Intake

2.2 Judicial disposition of a complaint.

"Judicial disposition of a complaint" is the initiation of formal judicial proceedings against the juvenile who is the subject of a complaint through the filing of a petition. After intake screening, judicial disposition of a complaint may be made.

2.3 Unconditional dismissal of a complaint.

The "unconditional dismissal of a complaint" is the termination of all proceedings against a juvenile. Unconditional dismissal of a complaint is a permissible intake dispositional alternative.

2.4 Nonjudicial disposition of a complaint.

A. "Nonjudicial disposition of a complaint" is the taking of some action on a complaint without the initiation of formal judicial proceedings through the filing of a petition or the issuance of a court order.

B. The existing types of nonjudicial dispositions are as follows:

1. "Nonjudicial probation" is a nonjudicial disposition involving the supervision by juvenile intake or probation personnel of a juvenile who is the subject of a complaint, for a period of time during which the juvenile may be required to comply with certain restrictive conditions with respect to his or her conduct and activities.

2. The "provision of intake services" is the direct provision of services by juvenile intake and probation personnel on a continuing basis to a juvenile who is the subject of a complaint.

3. A "conditional dismissal of a complaint" is the termination of all proceedings against a juvenile subject to certain conditions not involving the acceptance of nonjudicial supervision or intake services. It includes a "community agency referral," which is the referral of a juvenile who is the subject of a complaint to a community agency or agencies for services.

C. A "community agency referral" is the only permissible nonjudicial disposition, subject to the conditions set forth in Standard 2.4 E. Intake personnel should refer juveniles in need of services whenever possible to youth service bureaus and other public and private community agencies. Juvenile probation agencies and other agencies responsible for the administration and provision of intake services and intake personnel should actively promote and encourage the establishment and the development of a wide range of community-based services and programs for delinquent and nondelinquent juveniles.

D. Nonjudicial probation, provision of intake services, and conditional dismissal other than community agency referral are not permissible intake dispositions.

E. A nonjudicial disposition should be utilized only under the following conditions:

1. A nonjudicial disposition should take the form of an agreement of a contractual nature under which the intake officer promises not to file a petition in exchange for certain commitments by the juvenile and his or her parents or legal guardian or both with respect to their future conduct and activities.

2. The juvenile and his or her parents or legal guardian should voluntarily and intelligently enter into the agreement.

3. The intake officer should advise the juvenile and his or her parents or legal guardian that they have the right to refuse to enter into an agreement for a nonjudicial disposition and to request a formal adjudication.

4. A nonjudicial disposition agreement should be limited in duration.

5. The juvenile and his or her parents or legal guardian should be able to terminate the agreement at any time and to request formal adjudication.

6. The terms of the nonjudicial agreement should be clearly stated in writing. This written agreement should contain a statement of the requirements set forth in subsections 2.-5. It should be signed by all the parties to the agreement and a copy should be given to the juvenile and his or her parents or legal guardian.

7. Once a nonjudicial disposition of a complaint has been made, the subsequent filing of a petition based upon the events out of which the original complaint arose should be permitted for a period of three (3) months from the date the nonjudicial disposition agreement was entered into. If no petition is filed within that period its subsequent filing should be prohibited. The juvenile's compliance with all proper and reasonable terms of the agreement should be an affirmative defense to a petition filed within the three-month period.

2.5 Consent decree.

A. A consent decree is a court order authorizing supervision of a juvenile for a specified period of time during which the juvenile may be required to fulfill certain conditions or some other disposition of the complaint without the filing of a petition and a formal adjudicatory proceeding.

A consent decree should be permissible under the following conditions:

1. The juvenile and his or her parents or legal guardian should voluntarily and intelligently consent to the decree.

2. The intake officer and the judge should advise the juvenile and his or her parents or legal guardian that they have the right to refuse to consent to the decree and to request a formal adjudication.

3. The juvenile should have an unwaivable right to the assistance of counsel in connection with an application for a consent decree. The intake officer should advise the juvenile of this right.

4. The terms of the decree should be clearly stated in the decree and a copy should be given to all the parties to the decree.

5. The decree should not remain in force for a period in excess of six (6) months. Upon application of any of the parties to the decree, made before expiration of the decree, the decree, after notice and hearing, may be extended for not more than an additional three (3) months by the court.

6. The juvenile and his or her parents or legal guardian should be able to terminate the agreement at any time and to request the filing of a petition and formal adjudication..

7. Once a consent decree has been entered, the subsequent filing of a petition based upon the events out of which the original complaint arose should be permitted for a period of three (3) months from the date the decree was entered. If no petition is filed within that period its subsequent filing should be prohibited. The juvenile's compliance with all proper and reasonable terms of the decree should be an affirmative defense to a petition filed within the three-month period.

Section III: Criteria for Intake Dispositional Decisions

2.6 Necessity for and desirability of written guidelines and rules.

A. Juvenile probation agencies and other agencies responsible for intake services should issue written guidelines and rules with respect to criteria for intake dispositional decisions. The objective of such administrative guidelines and rules is to confine and control the exercise of discretion by intake officers in the making of intake dispositional decisions so as to promote fairness, consistency, and effective dispositional decisions.

B. These guidelines and rules should be reviewed and evaluated by interested juvenile justice system officials and community-based delinquency control and prevention agencies.

C. Legislatures and courts should encourage or require rulemaking by these agencies with respect to criteria for intake dispositional decisions.

2.7 Legal sufficiency of complaint.

A. Upon receipt of a complaint, the intake officer should make an initial determination of whether the complaint is legally sufficient for the filing of a petition on the basis of the contents of the complaint and an intake investigation. In this regard the officer should determine:

1. whether the facts as alleged are sufficient to establish the court's jurisdiction over the juvenile; and

2. whether the competent and credible evidence available is sufficient to support the charges against the juvenile.

B. If the officer determines that the facts as alleged are not sufficient to establish the court's jurisdiction, the officer should dismiss the complaint. If the officer finds that the court has jurisdiction but determines that the competent and credible evidence available is not sufficient to support the charges against the juvenile, the officer should dismiss the complaint.

C. If the legal sufficiency of the complaint is unclear, the officer

should ask the appropriate prosecuting official for a determination of its legal sufficiency.

2.8 Disposition in best interests of juvenile and community.

A. If the intake officer determines that the complaint is legally sufficient, the officer should determine what disposition of the complaint is most appropriate and desirable from the standpoint of the best interests of the juvenile and the community. This involves a determination as to whether a judicial disposition of the complaint would cause undue harm to the juvenile or exacerbate the problems that led to his or her delinquent acts, whether the juvenile presents a substantial danger to others, and whether the referral of the juvenile to the court has already served as a desired deterrent.

B. The officer should determine what disposition is in the best interests of the juvenile and the community in light of the following:

1. The seriousness of the offense that the alleged delinquent conduct constitutes should be considered in making an intake dispositional decision. A petition should ordinarily be filed against a juvenile who has allegedly engaged in delinquent conduct constituting a serious offense, which should be determined on the basis of the nature and extent of harm to others produced by the conduct.

2. The nature and number of the juvenile's prior contacts with the juvenile court should be considered in making an intake dispositional decision.

3. The circumstances surrounding the alleged delinquent conduct, including whether the juvenile was alone or in the company of other juveniles who also participated in the alleged delinquent conduct, should be considered in making an intake dispositional decision. If a petition is filed against one of the juveniles, a petition should ordinarily be filed against the other juveniles for substantially similar conduct.

4. The age and maturity of the juvenile may be relevant to an intake dispositional decision.

5. The juvenile's school attendance and behavior, the juvenile's family situation and relationships, and the juvenile's home environment may be relevant to an intake dispositional decision.

6. The attitude of the juvenile to the alleged delinquent conduct and to law enforcement and juvenile court authorities may be relevant to an intake dispositional decision, but a nonjudicial disposition of the complaint or the unconditional dismissal of the

complaint should not be precluded for the sole reason that the juvenile denies the allegations of the complaint.

7. A nonjudicial disposition of the complaint or the unconditional dismissal of the complaint should not be precluded for the sole reason that the complainant opposes dismissal.

8. The availability of services to meet the juvenile's needs both within and outside the juvenile justice system should be considered in making an intake dispositional decision.

9. The factors that are not relevant to an intake dispositional decision include but are not necessarily limited to the juvenile's race, ethnic background, religion, sex, and economic status.

Section IV: Intake Procedures

2.9 Necessity for and desirability of written guidelines and rules.

Juvenile probation agencies and other agencies responsible for intake services should develop and publish written guidelines and rules with respect to intake procedures.

2.10 Initiation of intake proceedings and receipt of complaint by intake officer.

A. An intake officer should initiate proceedings upon receipt of a complaint.

B. Any complaint that serves as the basis for the filing of a petition should be sworn to and signed by a person who has personal knowledge of the facts or is informed of them and believes that they are true.

2.11 Intake investigation.

A. Prior to making a dispositional decision, the intake officer should be authorized to conduct a preliminary investigation in order to obtain information essential to the making of the decision.

B. In the course of the investigation the intake officer may:

1. interview or otherwise seek information from the complainant, a victim of, witness to, or co-participant in the delinquent conduct allegedly engaged in by the juvenile;

2. check existing court records, the records of law enforcement agencies, and other public records of a nonprivate nature;

3. conduct interviews with the juvenile and his or her parents or legal guardian in accordance with the requirements set forth in Standard 2.14.

C. If the officer wishes to make any additional inquiries, he or

she should do so only with the consent of the juvenile and his or her parents or legal guardian.

D. It is the responsibility of the complainant to furnish the intake officer with information sufficient to establish the jurisdiction of the court over the juvenile and to support the charges against the juvenile. If the officer believes the information to be deficient in this respect, he or she may notify the complainant of the need for additional information.

2.12 Juvenile's privilege against self-incrimination at intake.

A. A juvenile should have a privilege against self-incrimination in connection with questioning by intake personnel during the intake process.

B. Any statement made by a juvenile to an intake officer or other information derived directly or indirectly from such a statement is inadmissible in evidence in any judicial proceeding prior to a formal finding of delinquency unless the statement was made after consultation with and in the presence of counsel.

2.13 Juvenile's right to assistance of counsel at intake.

A juvenile should have an unwaivable right to the assistance of counsel at intake:

A. in connection with any questioning by intake personnel at an intake interview involving questioning in accordance with Standard 2.14 or other questioning by intake personnel; and

B. in connection with any discussions or negotiations regarding a nonjudicial disposition, including discussions and negotiations in the course of a dispositional conference in accordance with Standard 2.14.

2.14 Intake interviews and dispositional conferences.

A. If the intake officer deems it advisable, the officer may request and arrange an interview with the juvenile and his or her parents or legal guardian.

B. Participation in an intake interview by the juvenile and his or her parents or legal guardian should be voluntary. They should have the right to refuse to participate in an interview, and the officer should have no authority to compel their attendance.

C. At the time the request to attend the interview is made, the intake officer should inform the juvenile and his or her parents or legal guardian either in writing or orally that attendance is voluntary and that the juvenile has the right to be represented by counsel.

D. At the commencement of the interview, the intake officer should:

1. explain to the juvenile and his or her parents or legal guardian that a complaint has been made and explain the allegations of the complaint;

2. explain the function of the intake process, the dispositional powers of the intake officer, and intake procedures;

3. explain that participation in the intake interview is voluntary and that they may refuse to participate; and

4. notify them of the right of the juvenile to remain silent and the right to counsel as heretofore defined in Standard 2.13.

E. Subsequent to the intake interview, the intake officer may schedule one or more dispositional conferences with the juvenile and his or her parents or legal guardian in order to effect a nonjudicial disposition.

F. Participation in a dispositional conference by a juvenile and his or her parents or legal guardian should be voluntary. They should have the right to refuse to participate, and the intake officer should have no authority to compel their attendance.

G. The intake officer may conduct dispositional conferences in accordance with the procedures for intake interviews set forth in subsections D. and E.

2.15 Length of intake process.

A decision at the intake level as to the disposition of a complaint should be made as expeditiously as possible. The period within which the decision is made should not exceed thirty (30) days from the date the complaint is filed in cases in which the juvenile who is the subject of a complaint has not been placed in detention or shelter care facilities.

Section V: Scope of Intake Officer's Dispositional Powers

2.16 Role of intake officer and prosecutor in filing of petition: right of complainant to file a petition.

A. If the intake officer determines that a petition should be filed, the officer should submit a written report to the appropriate prosecuting official requesting that a petition should be filed. The officer should also submit a written statement of his or her decision and of the reasons for the decision to the juvenile and his or her parents or legal guardian. All petitions should be countersigned and filed by the appropriate prosecuting official. The prosecutor may refuse the

request of the intake officer to file a petition. Any determination by the prosecutor that a petition should not be filed should be final.

B. If the intake officer determines that a petition should not be filed, the officer should notify the complainant of his or her decision and of the reasons for the decision and should advise the complainant that he or she may submit the complaint to the appropriate prosecuting official for review. Upon receiving a request for review, the prosecutor should consider the facts presented by the complainant, consult with the intake officer who made the initial decision, and then make the final determination as to whether a petition should be filed.

C. In the absence of a complainant's request for a review of the intake officer's determination that a petition should not be filed, the intake officer should notify the appropriate prosecuting official of the officer's decision not to request the filing of a petition in those cases in which the conduct charged would constitute a crime if committed by an adult. The prosecutor should have the right in all such cases, after consultation with the intake officer, to file a petition.

DETENTION AND SHELTER CARE

> The detention of juveniles prior to adjudication or dispostion of their cases represents one of the most serious problems in the administration of juvenile justice. The problem is characterized by the very large number of juveniles incarcerated during this stage annually, the harsh conditions under which they are held, the high costs of such detention, and the harmful after-effects detention produces.

Institute of Judicial Administration/American Bar Association, Juvenile Justice Standards Project, Standards Relating to Interim Status, 1 (Tentative Draft 1977). (Approved 1979) (hereinafter Interim Status).

The detention of juvenile suspects has been overused and misused for a variety of reasons. Such detention has often been overused because juvenile courts have not had the resources to develop alternative means of insuring childrens' attendance at their hearings. Misuse has often occurred due to the improper screening of suspects by court personnel.

Even in the most humane environments, detention is a traumatic experience.

> Detention is a waiting period. During the entire course of his confinement a child is troubled by his immediate placement and he wonders what's going to happen to him. The time lapse between admission, a quickly scheduled court hearing, and immediate disposition we may consider as short-term, but to a detained adolescent this period can seem an eternity. He has not volunteered to be in his circumstances and being in unnatural surroundings he can be expected to be on edge. Resistance must be anticipated and considered to be perfectly normal.

R. Perkins, "Your Detention Program - Is It Focused on the Needs of the Children Detained?" 19 Juvenile Court Judges Journal pp. 55, 56 (1968).

Detention is also a serious deprivation of parents' rights to custody of their offspring. For these reasons, hearings on the propriety of the detention should be held as soon as possible in all cases. At such a hearing it should be determined whether the removal of a child from his family is necessary, and if so, alternatives to conventional incarceration should be explored.

The term detention as used here and in juvenile court statutes means the temporary care of children in physically restricting facilities pending adjudication, pending dispostion or awaiting implementation of the court's disposition. Shelter care, on the other hand, refers to the temporary care of children in physically unrestricting facilities, such as foster homes and group boarding homes, pending return to their homes or placement for long term care.

The critical factors in the detention process are the screening procedures; the criteria for detention; the time limits on the period between initial intake and the detention hearing, as well as the total length of confinement; and the designated place of confinement. Most state statutes grant law enforcement and court personnel broad discretion as to each of these factors. This discretion results in the misuse and overuse of detention. The IJA/ABA Juvenile Justice Standards Project suggests that urgent reform is necessary. Detention criteria must be more

specific; must restrict the class of juveniles who may be appropriately detained; must reduce the delay between intake and the detention hearing and; must mandate increased visibility of and accountability for detention decisions. See Interim Status, 1-4. The Project Standards are based on the principle that restraints on the freedom of accused juveniles pending trial are contrary to public policy. Detention should be authorized only in clearly defined, limited circumstances and the least restrictive alternative doctrine should always govern the detention decision.

A. Screening Procedures

The initial decision to take a child into custody is usually made by a police officer. It is important, therefore, for police procedures to be clearly defined. The Interim Status Standards set forth specific guidelines for police officers to follow regarding the initial detention decision and also prohibit the detention of any juvenile in a police detention facility prior to release or transportation to a juvenile facility. Interim Status, Standards 5.1-5.6 and Commentaries. If the police do not return a juvenile to his/her home, a second decision concerning detention is usually made by a probation, intake or other court official designated to screen detention admissions. Some states, however, allow the police officer making the arrest to directly place the child in detention. The need for guidelines here is also critical. The Standards set forth the following requirement:

> 5.5 Interim status decision not made by police.
> The observations and recommendations of the police concerning the appropriate interim status for the arrested juvenile should be solicited by the intake official, but should not be determinative of the juvenile's interim status.
> Interim Status, supra.

Although the arresting officer's observations may be highly relevant to the making of an informed decision, he/she should not have the authority to impose detention. See Interim Status, Standard 5.5 Commentary.

The Interim Status Standards also contain the following procedural requirements to be observed by intake personnel:

> 6.5 Procedural requirements.
> A. Provide information. The intake official should:
>
> 1. inform the accused juvenile of his or her rights, [as in Standard 5.3 A.] (constitutional warnings re: right to silence, the making of statements, and the right to the presence of an attorney).
>
> 2. inform the accused juvenile that his or her parent will be contacted immediately to aid in effecting release; and
>
> 3. explain the basis for detention, the interim status alternatives that are available, and the right to a prompt release hearing.
>
> B. Notify parent. If the arresting officer has been unable to contact a parent, the intake official should make every effort to effect such contact. If the official decides that the juvenile should be released, he or she may request a parent to come to the facility and accept release.
>
> C. Notify attorney. Unless the accused juvenile already has a public or private attorney, the intake official should promptly call a public defender to represent the juvenile.

B. Detention Criteria

One of the effects of Kent v. United States, 383 U.S. 541 (1966), on the juvenile courts has been to make court personnel aware of the enormous discretion exercised by the courts at "critically important" stages in juvenile proceedings. "When proceedings may result in incarceration in an institution of confinement . . .", In re Gault, 387 U.S. 1, 1-2 (1967), such a stage has clearly been reached. The decision to detain a juvenile therefore, must be based on clear statutory standards. Detention criteria should contain specific language which sets out concrete and readily identifiable facts about the juvenile. Criteria based on "likelihood of flight" should be based on a recent record of willful failure to appear at juvenile court proceedings. If detention is required for a minor's own protection, the criteria should emphasize immediacy and the physical safety of the child. Likewise, if detention is required for the protection of others, legislative criteria should prohibit mandatory detention except when a juvenile is charged with a crime of violence and he/she poses a substantial threat of harm to others.

Typically, state codes use general and imprecise phrases to grant broad discretion to detain. Thirty-one states allow detention to insure presence at a subsequent hearing, and only eight of these have any additional requirements, e.g., that the child have been taken into custody for a serious offense or that

there must be a history of failure to appear. Twenty states allow a child to be placed in detention solely because there is no parent available to provide care and/or supervision. Mississippi adds the requirement that there be no reasonable alternative to custody, and Florida limits the place of detention to crisis homes only. Thirty-eight states provide that a child may only be detained if detention is necessary to protect the personal safety or property of others. Only eight of those states additionally require that the probability of the harm to others be serious, or the offense be of a serious nature. Just three states call for a probable cause determination to justify detention on this basis. Thirty-seven states also allow detention to protect the health and safety of the juvenile. Only Alabama requires that the threat of harm be substantial, while five states require that the threat to the child's welfare be immediate.

While most state statutes contain at least broad guidelines concerning the decision to detain, some provisions altogether fail to guide the decision-maker. Several states allow detention if release is "impracticable or inadvisable". See for example section 62.170 of the Nevada Juvenile Court Act:

> 62.170 Taking custody of child; release to parent or other person; detention of children; citation in lieu of arrest for traffic violation.
> 1. Except as provided in subsection 6, any peace officer, or probation officer may take into custody any child who is found violating any law or ordinance or whose surroundings are such as to endanger his welfare. When a child is taken into custody, the officer shall

immediately notify the parent, guardian or custodian of the child, if known, and the probation officer. Unless it is impracticable or inadvisable or has been otherwise ordered by the court, or is otherwise provided in this section, the child shall be released to the custody of his parent or other responsible adult who has signed a written agreement to bring the child to the court at a stated time or at such time as the court may direct. The written agreement shall be submitted to the court as soon as possible. If such person fails to produce the child as agreed or upon notice from the court, a writ may be issued for the attachment of the person or of the child requiring that the person or child, or both of them, be brought into the court at a time stated in the writ.

. . .

Nev. Rev. Stat. §§62.170 (1977).

For example of good criteria statutes see the recently enacted Iowa Code provision for placement in shelter care, and the Wisconsin provision for holding a child in a secure detention facility.

Sec. 11. NEW SECTION. PLACEMENT IN SHELTER CARE.
1. No child shall be placed in shelter care unless one of the following circumstances applies:
a. The child has no parent, guardian, custodian, responsible adult relative or other adult approved by the court who will provide proper shelter, care and supervision.
b. The child desires to be placed in shelter care.
c. It is necessary to hold the child until his or her parent, guardian, or custodian has been contacted and has taken custody of the child.
d. It is necessary to hold the child for transfer to another jurisdiction.
e. The child is being placed pursuant to an order of the court.
2. A child may be placed in shelter care as provided in this section only in one of the following facilities:
a. A juvenile shelter care home.
b. A licensed foster home.
c. An institution or other facility operated by the department of social services, or one which is

licensed or otherwise authorized by law to receive and provide care for the child.
d. Any other suitable place designated by the court provided that no place used for the detention of a child may be so designated.
3. When there is reason to believe that a child placed in shelter care pursuant to section nine (9), subsection one (1), paragraph c of this Act would not voluntarily remain in the shelter care facility, the shelter care facility shall impose reasonable restrictions necessary to insure the child's continued custody.
4. A child placed in a shelter care facility under this section shall not be held for a period in excess of forty-eight hours without a court order authorizing such shelter care. A child placed in shelter care pursuant to section nine (9), subsection one (1), paragraph c of this Act shall not be held in excess of seventy-two hours in any event.
5. If no satisfactory provision is made for uniting a child placed in shelter care pursuant to section nine (9), subsection one (1), paragraph c of this Act with his or her family, a child in need of assistance complaint may be filed pursuant to section forty-two (42) of this Act. Nothing in this subsection shall limit the right of a child to file a family in need of assistance petition under section seventy-one (71) of this Act.

Iowa Code Ann. §232.1 et seq. (1979).

Wisconsin Children's Code:

48.208 Criteria for holding a child in a secure detention facility

A child may be held in a secure detention facility if the intake worker personally interviews the child and one of the following conditions applies:
(1) Probable cause exists to believe that the child has committed a delinquent act and either presents a substantial risk of physical harm to another person or substantial risk of running away as evidenced by previous acts or attempts so as to be unavailable for a court hearing.
(2) Probable cause exists to believe that the child is a fugitive from another state and there has been no reasonable opportunity to return the child.

(3) The child consents in writing to being held in order to protect him or her from an imminent physical threat from another and such secure custody is ordered by the judge in a protective order.

(4) Probable cause exists to believe that the child, having been placed in nonsecure custody by an intake worker under s.48.207 or by the judge or juvenile court commissioner under s.48.21(4), has run away or committed a delinquent act and no other suitable alternative exists.

(5) Probable cause exists to believe that the child has been adjudged or alleged to be delinquent and has run away from another county and would run away from nonsecure custody pending his or her return. A child may be held in secure custody under this subsection for no more than 24 hours unless an extension of 24 hours is ordered by the judge for good cause shown. Only one extension may be ordered by the judge.

Wisc. Stat. Ann. §48.208 (West) (Comm. Phamphlet 1979).

The Interim Status Standards, supra, require that intake officials take all necessary steps to effectuate the juvenile's release from a secure facility or, in the alternative, placement in a non-secure setting. If a juvenile is detained, the intake official must document the reasons why a less restrictive alternative has not been utilized.

6.5 D. Reach status decision.

1. The intake official should determine whether the accused juvenile is to be released with or without conditions, or be held in detention.

2. If the juvenile is not released, the intake official should prepare a petition for a release hearing before a judge or referee, which should be filed with the court no later than the next court session, or within twenty-four hours after the juvenile's arrival at the intake facility, whichever is sooner. The petition should specify the charges on which the accused juvenile is to be prosecuted, the reasons why the accused was placed in detention, the reasons why release

has not been accomplished, the alternatives to detention that have been explored, and the recommendations of the intake official concerning interim status. (emphasis added.)

3. If the court is not in session within the twenty-four-hour period, the intake official should contact the judge, by telephone or otherwise, and give notice of the contents of the petition.

E. Continue release investigation. If an accused juvenile remains in detention after the initial court hearing, the intake official should review in detail the circumstances of the arrest and the alternatives to continued detention. A report on these investigations, including any information that the juvenile's attorney may wish to have added, should be presented to the court at the status review hearing within seven days after the initial hearing.

F. Maintain records. A written record should be kept of the incidence, duration, and reasons for interim detention of juveniles. Such records should be retained by the intake official and staff, and should be available for inspection by the police, the prosecutor, the court, and defense counsel. The official should continuously monitor these records to ascertain the emergence of patterns that may reflect misuse of release standards and guidelines, the inadequacy of release alternatives, or the need to revise standards. Interim Status, supra.

C. Time Limitations and the Detention Hearing

"Delay in the processing, adjudication, and disposition of criminal and juvenile cases compounds the disadvantages of detention, increases the risks of nonappearance and antisocial conduct if the juvenile is released, and is harmful to the interests both of the accused and the community." Interim Status, p. 11. A number of states have recognized and addressed this problem.

Twenty-eight states allow detention for only a limited time unless a petition is filed. The limits range from 24 hours to 10 days with the majority of states imposing a 24-48 hour limita-

tion. Almost all of the time limits exclude Saturdays, Sundays and court holidays. Other states require a detention hearing within a certain time of the initial placement in detention, de-emphasizing the role of the petition as a focal point. Thirty-one states specifically limit the duration of detention before a detention hearing. Nineteen of those states set the limit at 48 or 72 hours.

Fifteen states limit the time between initial detention and the adjudicatory hearing. The limit ranges from 5 days to 30 days, with the most common limit being 30 days. Most states allow some extension for good cause shown. Illinois limits the time between the detention hearing and the adjudicatory hearing to 10 judicial days for delinquents and status-offender and 30 days for non-offenders. Eight states place some type of limit on the duration of post-adjudicatory -- pre-dispositional detention, with a minimum of 15 days to a maximum of 45 days.

The IJA/ABA Juvenile Justice Standards Project compiled time limits believed necessary to reduce the delay, yet still limit the risks of inappropriate release. Each of the limits includes weekends and holidays.

1. arrest - release within two hours, or transportation to a juvenile facility;
2. intake - release or petition for detention to be filed within twenty-four hours;
3. hearing - if custody continues, hearing to be held within twenty-four hours of filing of petition;
4. review - detention decision to be reviewed by the court every seven days;
5. adjudication and disposition - cases dismissed with prejudice if:

a. adjudication is not completed within thirty days of arrest if the juvenile is in a release status, and within fifteen days of arrest if the juvenile remains in detention for more than twenty-four hours following a court order of detention; or

b. final disposition is not determined and carried out within thirty days of adjudication if the juvenile is released, and within fifteen days of adjudication if the juvenile remains in court ordered detention following adjudication. These latter time constraints may be extended or waived only in limited and specified circumstances;

6. appeal - decision within ninety days when juvenile held in detention.

Interim Status, 13.

Most states afford a detained juvenile the right to a detention hearing. A hearing is constitutionally required to justify continued detention. Pretrial detention without a hearing violates the fundamental fairness guaranteed by the due process clause of the Fourteenth Amendment. The "fundamental requisite of due process of law is the opportunity to be heard," Grannis v. Ordean, 234 U.S. 385, 394 (1914), "at a meaningful time and in a meaningful manner". Armstrong v. Manzo, 380 U.S. 545, 552 (1965). Since the majority of states do not accord the juvenile the right to bail, a detention hearing is crucial to avoid arbitrary confinement. If there is neither a hearing nor an opportunity for release on bail, the detention of the juvenile is essentially punitive custody prior to any adjudication of guilt. Without a judicial determination of the need for detention or a means of release, the juvenile is subjected to punitive confinement, a situation that was rejected by the court In re Colar, 9 Cal. App. 3d 613, 88 Cal. Rptr. 651 (1970).

Most states do not require a bi-furcated detention hearing, where both probable cause to believe the juvenile committed the offense charged, and a finding as to the necessity of detention is made. In recent years, though, both federal and state courts have held that as a matter of federal constitutional law, a juvenile may not be detained pending trial on charges of delinquency without a prompt determination of probable cause. Although the United States Supreme Court has not ruled directly on the issue of whether a probable cause determination should be required in juvenile detention hearings, the decisions cited, supra, support the view that constitutional safeguards are necessary to protect the juvenile from arbitrary detention. There can be no justificiation for denying juveniles the right afforded adults to challenge the legal sufficiency of the case against them. Pretrial custody for adults and juveniles has the identical consequence for the person incarcerated - the loss of liberty.

The IJA/ABA Juvenile Justice Standards provide the following guidelines for the release (detention) hearing which protect the juvenile's due process rights and require release from custody if the state fails to establish probable cause to believe that the juvenile committed the offense charged.

> 7.6 Release hearing.
>
> A. Timing. An accused juvenile taken into custody should, unless sooner released, be accorded a hearing in court within twenty-four hours of the filing of the petition for a release hearing [required by Standard 6.5 D. 2.].

> B. Notice. Actual notice of the detention review hearing should be given to the accused juvenile, the parents, and their attorneys, immediately upon an intake official's decision that the juvenile will not be released prior to the hearing.
>
> C. Rights. An attorney for the accused juvenile should be present at the hearing in addition to the juvenile's parents, if they attend. There should be a strong presumption against the validity of a waiver of any constitutional or statutory right of the juvenile, and no waiver should be valid unless made in writing by the juvenile and his or her counsel.
>
> D. Information. At the review hearing, information relevant to the interim status of an accused juvenile, other than information bearing on the nature and circumstances of the offense charged and the weight of the evidence against the accused juvenile, need not conform to the rules pertaining to the admissibility of evidence in a court of law.
>
> E. Disclosure. The juvenile and the attorney should have full access to all information and records upon which a judge relies in refusing to release the juvenile from detention, or in imposing conditions of supervision.
>
> F. Probable cause. At the time of the initial detention hearing, the burden should be on the state to demonstrate that there is probable cause to believe that the juvenile committed the offense charged. (emphasis added).
>
> G. Notice of right to appeal. Whenever a court orders detention, or denies release upon review of an order of detention, it should simultaneously inform the juvenile, orally and in writing, of his or her rights to an automatic seven-day review under Standard 7.9 and to immediate appellate review under Standard 7.12.

> 7.7 Guidelines for status decisions.
>
> A. Release alternatives. The court may release the juvenile on his or her own recognizance, on conditions, under supervision, including release on a temporary, non-overnight basis to the attorney if so requested for the purpose of preparing the case, or into a diversion program.
>
> B. Mandatory release. Release by the court should be mandatory in any situation in which the arresting officer or intake official was required to release the juvenile, but failed to do so, or when the state fails to establish probable cause to believe that the juvenile committed the offense charged. (emphasis added).

C. Discretionary situations. In all other cases, the court should review all factors that officials earlier in the process were required by these standards to have considered. The court should review with particularity the adequacy of the reasons for detention recorded by the police and the intake official.

D. Written reasons. A written statement of the findings of facts and reasons why no measure short of detention would suffice should be made part of the order and filed immediately after the hearing by any judge who declines to release an accused juvenile from detention. (emphasis added). An order continuing the juvenile in detention should be construed as authorizing nonsecure detention only, unless it contains an express direction to the contrary, supported by reasons. If the court orders release under a form of control to which the juvenile objects, the court should upon request by the attorney for the juvenile, record the facts and reasons why unconditional release was denied.
Interim Status, supra.

See also Illinois Code §703-b(1) relating to detention hearings:

If the court finds that there is not probable cause to believe that the minor is a person [described in Section 2-1] it shall release the minor and dismiss the charge.

In addition to a prompt initial detention hearing, the appropriateness of continued confinement should be regularly reviewed.

7.9 Continuing detention review.
A. The court should hold a detention review hearing at or before the end of each seven-day period in which a juvenile remains in interim detention.
Intrim Status, supra.

In summary, the decision to place a juvenile in pre-trial detention is a serious deprivation of liberty which can be the direct cause of irreparable psychological injury. At all stages of the detention process, specific guidelines must be legislatively articulated to insure that only those juveniles who pose a serious threat to themselves or others are detained.

D. Place of Detention - Impact of Federal Legislation

The Juvenile Justice and Delinquency Prevention Act of 1974 (JJDPA) places special emphasis on improvements in the pretrial handling of juveniles. The JJDPA requires that the states end the practice of detaining juvenile status offenders in detention facilities with law-violating delinquents. 42 U.S.C. §5633(12). The Act also requires that the states discontinue the confinement of juveniles with incarcerated adults. 42 U.S.C. §5633(13) (See Children in Jails chapter). A major section of the JJDPA, 41 U.S.C. §5701, often referred to as the Runaway Youth Act, provides for the funding of runaway houses designed to provide temporary shelter and counseling as an alternative to detention in secure custody.

Requirements for the development of community-based alternatives to incarceration are, of course, central to the Act. Under the compliance requirements of §§223(a)(12) and (13), states receiving federal funds under the Act must insure that status offenders (defined as juveniles who have committed non-criminal acts such as truancy, running away, or who are ungovernable) and non-offenders who are defined as juveniles subject to juvenile court jurisdiction, usually under abuse, dependency and neglect statutes, shall not be detained or placed in juvenile detention or correctional facilities. For purposes of the Act, a juvenile detention or correctional facility is defined as:

(a) Any secure public or private facility used for the lawful custody of accused or adjudicated juvenile offenders or non offenders; or

(b) Any public or private facility, secure or non-secure, which is also used for the lawful custody of accused or convicted adult criminal offenders. Federal Register, Vol. 44, No. 189, Thursday, Sept. 27, 1979, p.55748.

The following is a summary of the present state statutory compliance or non-compliance with the key mandates of the JJDP Act regarding the detention of status-offenders and non-offenders. (This summary was prepared in September, 1979). For quick reference, see the chart appended to this text at the end of this chapter. (See Appendix also).

1. Juvenile Facilities - Secure

(a) Pre-Adjudication Status Offenders

In twenty-seven (27) states, the District of Columbia and the Commonwealth of Puerto Rico, status offenders can be held pre-trial in juvenile detention or juvenile correctional facilities under express statutory authority. Of the remaining twenty-three (23) states such detention is expressly prohibited for status offenders in nine (9) states. Six of those states passed laws prohibiting such detention after enactment of the JJDPA. It may be used in certain circumstances in eleven (11) other states. In the remaining three (3) states the practice is uncertain.

(b) Pre-adjudication - Non-offenders

In six (6) states and the Commonwealth of Puerto Rico, non-offenders face pre-trial detention in juvenile detention or

juvenile correctional facilities under express statutory authority. In fifteen (15) states and the District of Columbia such detention of non-offenders is expressly prohibited. Over half of those states enacted the prohibition since 1977. Under certain circumstances, it may be used in twenty-three (23) other states. In the remaining six (6) states, the practice is uncertain.

2. Pre-Adjudication - Adult Facilities

Fourteen (14) states and the District of Columbia expressly prohibit jailing of status offenders. Fourteen (14) states and the District of Columbia expressly prohibit jailing of non-offenders. Four (4) states expressly provide for jailing of status offenders. In twenty-three (23) states and Puerto Rico, status offenders may be jailed under certain circumstances. In seventeen (17) states and Puerto Rico, non-offenders may be jailed under certain circumstances. In the remaining states, jailing of status offenders or non-offenders is neither expressly prohibited nor expressly authorized. In two (2) states, however, the practice of jailing status offenders and non-offenders is prohibited by inference. (See also Children in Jails chapter).

Ten (10) of the states passed amendments prohibiting detention of non-offenders with adults after the 1977 amendments to the JJDPA applying its provisions to non-offenders. Two (2) other states had done likewise between 1974 and 1977.

Eleven (11) states have passed amendments or new codes since the passage of the JJDP Act in 1974 which prohibit detention of

status offenders with adults. Apparently four (4) states already had such provisions in their codes before 1974.

The Maryland Code is a good example of a statutory enactment in accord with the mandate of the JJDPA in that it prohibits the pre-trial confinement of status offenders and non-offenders in detention facilities, as well as the confinement of any juvenile in an adult facility.

§3-815. Detention and shelter care prior to hearing.

> (d) After January 1, 1978, a child alleged to be delinquent may not be detained in a jail or other facility for the detention of adults, or in a facility in which children who have been adjudicated delinquent or detained.
>
> (e) A child alleged to be in need of supervision or in need of assistance may not be placed in detention. If the child is alleged to be in need of assistance by reason of a mental handicap, he may be placed in shelter care facilities maintained or licensed by the Department of Health and Mental Hygiene or if these facilities are not available, then in a private home or facility approved by the court. If the child is alleged to be in need of assistance for any other reason, or in need of supervision, he may be placed in shelter care facilities maintained or approved by the Social Services Administration, or the Juvenile Services Administration, or in a private home or shelter care facility approved by the court.

Md. Code Ann. §3-815 (Comm. Supp. 1978). See also the Pennsylvania code, 42 Pa. S.C.A. §327(a) reproduced in Children in Jails chapter.

PRE-ADJUDICATION DETENTION IN A JUVENILE DETENTION OR CORRECTIONAL FACILITY

	Ala.		Alaska		Ariz.		Ark.		Cal.		Colo.		Conn.		Del.		D.C.		Fla.		Ga.	
	S	N	S	N	S	N	S	N	S	N	S	N	S	N	S	N	S	N	S	N	S	N
(a) Any secure public or private facility used for the lawful custody of accused or adjudicated juvenile offenders or non-offenders; or	P	O	X	O	X	X	XC	O	XC	O	X	X	X	O	O	O	X	O	XC	O	X	P
(b) Any public or private facility, secure or non-secure, which is also used for the lawful custody of accused or convicted adult criminal offenders; or	I	I	X	O	I	I	P	O	P	O	O	O	P	P	O	O	P	P	XC	XC	P	P

POST-DISPOSITIONAL COMMITMENT TO A JUVENILE DETENTION OR CORRECTIONAL FACILITY

	S	N	S	N	S	N	S	N	S	N	S	N	S	N	S	N	S	N	S	N	S	N
(a) Any secure public or private facility used for the lawful custody of accused or adjudicated juvenile offenders or non-offenders; or	O	P	O	O	O	O	P	O	X	O	X	O	O	O	O	P	X	P	O	O	O	P
(b) Any public or private facility, secure or non-secure, which is also used for the lawful custody of accused or convicted adult criminal offenders; or	P	O	O	O	O	O	P	O	X	O	O	O	O	O	O	O	P	P	O	O	O	O

S = Status Offender
N = Non-Offender
X = Expressly authorized
XC = Authorized in certain circumstances
P = Expressly prohibited
O = Not expressly prohibited or not expressly authorized
I = Prohibited by Inference

September, 1979

PRE-ADJUDICATION DETENTION IN A JUVENILE DETENTION OR CORRECTIONAL FACILITY

	Haw.		Ida.		Ill.		Ind.		Iowa		Kan.		KY.		La.		Maine		Md.		Mass.	
	S	N	S	N	S	N	S	N	S	N	S	N	S	N	S	N	S	N	S	N	S	N
(a) Any secure public or private facility used for the lawful custody of accused or adjudicated juvenile offenders or non-offenders; or	X	X	X	O	X	X	XC	XC	P	P	X	XC	X	X	O	O	XC	P	P	P	X	O
(b) Any public or private facility, secure or non-secure, which is also used for the lawful custody of accused or convicted adult criminal offenders; or	XC	XC	X	O	XC	XC	O	O	O	O	X	XC	XC	XC	O	O	XC	P	P	P	O	O

POST-DISPOSITIONAL COMMITMENT TO A JUVENILE DETENTION OR CORRECTIONAL FACILITY

	S	N	S	N	S	N	S	N	S	N	S	N	S	N	S	N	S	N	S	N	S	N
(a) Any secure public or private facility used for the lawful custody of accused or adjudicated juvenile offenders or non-offenders; or	P	P	O	O	O	P	O	O	O	O	O	O	O	O	O	O	O	O	O	O	P	O
(b) Any public or private facility, secure or non-secure, which is also used for the lawful custody of accused or convicted adult criminal offenders; or	O	O	X	O	O	O	O	O	O	P	X	O	O	O	O	O	O	O	O	O	O	O

S = Status Offender
N = Non-Offender
X = Expressly authorized
P = Expressly prohibited
XC = Authorized in certain circumstances
O = Not expressly prohibited or not expressly authorized

September, 1979

PRE-ADJUDICATION DETENTION IN A JUVENILE DETENTION OR CORRECTIONAL FACILITY

	Mich.		Minn.		Miss.		Mo.		Mont.		Neb.		Nev.		N.H.		N.J.		N.M.		N.Y.	
	S	N	S	N	S	N	S	N	S	N	S	N	S	N	S	N	S	N	S	N	S	N
(a) Any secure public or private facility used for the lawful custody of accused or adjudicated juvenile offenders or non-offenders; or	X	X	P	P	X	X	X	X	X	P	X	X	X	X	XC	O	P	O	P	P	XC	O
(b) Any public or private facility, secure or non-secure, which is also used for the lawful custody of accused or convicted adult criminal offenders; or	XC	XC	P	P	P	P	XC	XC	XC	P	O	O	XC	XC	P	P	P	O	P	P	XC	O

POST-DISPOSITIONAL COMMITMENT TO A JUVENILE DETENTION OR CORRECTIONAL FACILITY

	S	N	S	N	S	N	S	N	S	N	S	N	S	N	S	N	S	N	S	N	S	N
(a) Any secure public or private facility used for the lawful custody of accused or adjudicated juvenile offenders or non-offenders; or	O	O	O	O	P	P	X	X	P	O	O	O	O	O	X	P	P	O	P	P	O	O
(b) Any public or private facility, secure or non-secure, which is also used for the lawful custody of accused or convicted adult criminal offenders; or	O	O	O	O	O	O	P	P	P	O	O	O	O	O	O	P	O	O	P	O	O	O

S = Status Offender
N = Non-Offender
X = Expressly authorized
P = Expressly prohibited
XC = Authorized in certain circumstances
O = Not expressly prohibited or not expressly authorized

September, 1979

PRE-ADJUDICATION DETENTION IN A JUVENILE DETENTION OR CORRECTIONAL FACILITY

	N.C.		N.D.		Ohio		Okla.		Ore.		Penn.		R.I.		S.C.		S.D.		Tenn.		Tex.	
	S	N	S	N	S	N	S	N	S	N	S	N	S	N	S	N	S	N	S	N	S	N
(a) Any secure public or private facility used for the lawful custody of accused or adjudicated juvenile offenders or non-offenders; or	X	O	X	P	X	X	XC	X	X	P	P	P	X	X	X	X	X	X	X	P	X	O
(b) Any public or private facility, secure or non-secure, which is also used for the lawful custody of accused or convicted adult criminal offenders; or	XC	O	XC	P	XC	XC	XC	O	XC	XC	P	P	P	O	XC	XC	XC	XC	XC	P	XC	O

POST-DISPOSITIONAL COMMITMENT TO A JUVENILE DETENTION OR CORRECTIONAL FACILITY

	S	N	S	N	S	N	S	N	S	N	S	N	S	N	S	N	S	N	S	N	S	N
(a) Any secure public or private facility used for the lawful custody of accused or adjudicated juvenile offenders or non-offenders; or	O	O	O	P	X	O	O	O	P	P	O	O	O	O	O	O	P	O	X	P	O	O
(b) Any public or private facility, secure or non-secure, which is also used for the lawful custody of accused or convicted adult criminal offenders; or	X	O	O	O	O	O	X	X	P	P	O	O	O	O	O	O	O	O	O	O	P	P

S = Status Offender
N = Non-Offender
X = Expressly authorized
P = Expressly prohibited
XC = Authorized in certain circumstances
O = Not expressly prohibited or not expressly authorized

September, 1979

PRE-ADJUDICATION DETENTION IN A JUVENILE DETENTION OR CORRECTIONAL FACILITY

	Utah		Ver.		Va.		Wash.		W.Va.		Wisc.		Wyo.		P.R.							
	S	N	S	N	S	N	S	N	S	N	S	N	S	N	S	N	S	N	S	N	S	N
(a) Any secure public or private facility used for the lawful custody of accused or adjudicated juvenile offenders or non-offenders; or	X	X	X	X	XC	P	P	P	P	P	XC	XC	X	O	X	X						
(b) Any public or private facility, secure or non-secure, which is also used for the lawful custody of accused or convicted adult criminal offenders; or	XC	XC	P	P	XC	XC	XC	XC	P	P	XC	XC	X	XC	XC	XC						

POST-DISPOSITIONAL COMMITMENT TO A JUVENILE DETENTION OR CORRECTIONAL FACILITY

	S	N	S	N	S	N	S	N	S	N	S	N	S	N	S	N	S	N	S	N	S	N
(a) Any secure public or private facility used for the lawful custody of accused or adjudicated juvenile offenders or non-offenders; or	O	P	X	P	O	O	O	O	O	O	P	P	O	P	O	O						
(b) Any public or private facility, secure or non-secure, which is also used for the lawful custody of accused or convicted adult criminal offenders; or	P	P	P	P	O	O	P	P	O	O	O	O	X	O	O	O						

X = Expressly authorized
P = Expressly prohibited
S = Status Offender
N = Non-Offender

XC = Authorized in certain circumstances
O = Not expressly prohibited or not expressly authorized

September, 1979

CHILDREN IN JAILS

A. Introduction

It is extremely difficult to determine the actual number of children incarcerated in adult jails throughout America. On any given day there will be children in jail in the vast majority of states. Some authorities place the number as high as 500,000 children per year.[1] The 1970 National Jail Census reported that on March 15, 1970 some 7800 juveniles were incarcerated in adult jails.[2] This survey was limited to locally administered jails which have authority to hold adults for 48 hours or more. The following facilities were excluded: Federal and State prisons or other correctional institutions; the jails of Connecticut, Delaware and Rhode Island (states in which all jails are administered by state not local authorities); and drunk tanks and lockups which retain persons for less than 48 hours. The preliminary report of a 1978 census indicated that 1611 children were incarcerated in adult jails on a given day in February 1978.[3] The 1978 census excluded the jails in five states which have integrated jails systems - Connecticut, Delaware, Hawaii, Rhode Island and Vermont. In addition, only six of Alaska's jails were surveyed since only six of those jails are locally operated in an otherwise integrated system. Further, temporary holding facilities or lockups were excluded from the survey. The 1978 survey was thus even narrower than the 1970 jail census. At first

glance, the great disparity between the results of the 1970 survey and 1978 census would lead one to conclude that substantial progress has been made in removing children from adult jails. Whether or not this is true is questionable. First, in terms of ascertaining a nationwide trend, consider that of the 7,800 juveniles identified in the 1970 census, 4,990 were incarcerated in adult facilities in New York State. The 1978 survey identified only 84 children in adult jails in New York. If New York were removed from each survey, the results of the 1970 survey would total 3,250 youths in adult jails; the 1978 preliminary report would reflect 1,527 children in jails. The ratio of reduction changes from approximately 5 to 1 to 2 to 1 after removing New York State from consideration. Further, use of daily figures must be highly suspect for purposes of determining any trend in that juveniles are usually detained in adult jails for relatively short periods of time.[4] A high degree of fluctuation in the number of juveniles detained over a short period of time is more likely the rule rather than the exception. These factors, as well as the narrower scope of the 1978 survey, may explain what otherwise appears to be significant reduction in the number of children in jail. Hopefully such a trend is occurring or will occur.

As indicated, some authorities place the total number of children jailed in all adult facilities in any one year period in the vicinity of 500,000.[5] It is clear that the number of chil-

dren placed in adult jails per year is shockingly high. For example, monitoring reports filed by the Kentucky Department of Justice with the Office of Juvenile Justice and Delinquency Prevention, (OJJDP) Washington D.C., indicate that in the first six months of 1978, 5,504 children were held in adult jails in Kentucky, up from 3,739 children so confined in the first six months of 1977. Of these 5,504 children, 1,331 were status offenders or non-offenders.[6] Similarly, Tennessee reported to OJJDP that in excess of 4,700 children were held in the local jails of Tennessee during the first six months of 1978. Iowa reported that 8,109 children were jailed in county and municipal adult facilities from the period July 1, 1977 to June 30, 1978; of these youths, 2,007 were nondelinquents.[7] The 1978 jail survey found children in the jails of all states surveyed except Massachusetts, New Jersey, Maryland and the District of Columbia. These numbers certainly indicate that whatever the trend, a significant number of children are still jailed in adult facilities throughout the United States.

B. Statutory Law Analysis

The states have adopted diverse statutory approaches in dealing with the practice of jailing juveniles. It is extremely difficult to categorize such statutes for purposes of discussion or to discern a common approach. State statutes often address the issue of pre-trial detention in adult facilities, but are silent as to whether jailing is a permissible or prohibited

dispositional alternative. In addition to the pre-trial and post-adjudication differentiation, a few states permit or prohibit jailing on the basis of a child's classification as a delinquent, status offender or non-offender. Other states prohibit or permit the practice on the basis of age. In addition, states may impose various additional restrictions or conditions on jailing. Typical restrictions, employed alone or in combination, often permit jailing only; if no other detention facilities are available, if adequate supervision of the juvenile is provided by the jail, by court order, if the child would be a menace to other juveniles in detention, or if the particular adult facility has been approved for use. Further, separation from adults is usually mandated but the degree of separation required may differ from state to state. Lastly, some state codes are internally inconsistent with regard to when jailing is permitted or prohibited. All of these factors mitigate against categorization on anything but a general level.

Very few states prohibit all jailing. Only the statutes of Pennsylvania (effective December 31, 1979) and Maryland clearly prohibit pre-trial and post-adjudication jailing of any child except juveniles certified to adult court.[8] The new Mississippi Youth Court Act explicitly prohibits pretrial jailing but neither explicitly prohibits nor permits jailing as a dispositional alternative.[9] Likewise, Arizona and Rhode Island prohibit all pre-trial jailing but do not specifically prohibit post-adjudi-

cation placement in an adult facility.[10] Other states prohibit jailing on the basis of age. The states of Colorado (age 14), Illinois (age 16), Michigan (age 15), New York (age 10), Oklahoma (age 12), Oregon (age 14), South Dakota (age 15) and Utah (age 16) make all children, be they delinquent, a status offender or non-offender, subject to jailing solely on the basis of age.[11] Puerto Rico (age 16) also provides for a flat age prohibition under which children may not be jailed.[12] Most of these states do require that the juvenile be lodged in separate quarters within the adult jail. Some states do not provide a flat age prohibition but specify an age applicable to one or more "categories" of juveniles but not all juveniles. These states include Iowa (delinquents under 14), Louisiana (delinquents under 15), Minnesota (delinquents under 14), Ohio (delinquents and status offenders under age 15); Virginia (delinquents under age 15), Washington (delinquents under 16 and some runaways and status offenders) and West Virginia (delinquents under 14).[13] The District of Columbia permits the jailing of delinquents over 16 years of age.[14] States which permit the jailing of children on the basis of age may require the existence of other conditions such as: adequate supervision of the youth, by court order only, if no juvenile facility is available, if the adult facility is an approved facility, or, in the case of New York, approval of the state division for youth. States which provide a limited age prohibition, usually applicable only to delinquents, often fail

to provide any type of explicit prohibition on the jailing of other children.

The balance of the states permit jailing without age exceptions of all or some children involved in the state juvenile justice system. Only sixteen (16) states and the District of Columbia specifically prohibit the pre-trial jailing of status offenders, non-offenders or both.[15] The balance of the states permit such jailing, some with, but most without, age restrictions. The statutes of the majority of states fail to address the issue of whether children may be placed in adult facilities post-adjudication.

In summary, the vast majority of states allow for the jailing of all or some classes of juveniles. States permitting this practice usually require that juveniles be detained in quarters separate from adults. Only two states, Maryland and Pennsylvania clearly prohibit both pretrial and post-adjudication jailing in adult facilities. Only sixteen (16) states and the District of Columbia prohibit the pre-trial and post-adjudication jailing of status offenders and/or non-offenders. The balance, thirty-four (34) states and Puerto Rico, do not prohibit the incarceration of non-offenders and status offenders in adult facilities. Some states have adopted the approach of prohibiting jailing on the basis of the child's age. While the ages range as low as 10 in New York, fourteen, fifteen or sixteen years of age appear to be the more common cut off age range. Only eight (8) states and

Puerto Rico provide an absolute cut off age applicable to all children. The possibility that some delinquents may be jailed without violating state statutory law, either pre-trial or post-trial, exist in all states except Pennsylvania and Maryland.[16]

Nature of Jails and Their Effect on Youth

Richard W. Velde, then associate administrator of the Law Enforcement Assistance Administration of the U.S. Department of Justice, has stated:

> Jails are festering sores in the criminal justice system. There are no model jails anywhere; we know, we tried to find them. Almost nowhere are there rehabilitative programs operated in conjunction with jails. Its harsh to say, but the truth is that jail personnel are the most uneducated, untrained and poorly paid of all personnel in the criminal justice system -and furthermore, there aren't enough of them.
>
> The result is what you would expect, only worse. Jails are, without question, brutal, filthy, cesspools of crime - institutions which serve to brutalize and embitter men to prevent them from returning to a useful role in society. Cited in R. Goldfarb, Jails: The Ultimate Ghetto of the Criminal Justice System, p.23 (1975).

Few people would dispute that most jails are extremely old and generally deteriorated. The typical jail physical plant can be described as inadequate to meet the needs of adult prisoners, if not unsafe for habitation.[17]

Specific characteristics of the nation's jails were identified during a 1972 survey of jails.[18] Fewer than five (5) percent of small jails (jails with fewer than 21 inmates) and roughly thirty (30) percent of medium sized jails (21 to 249 inmates) provided in-house medical services.[19] Juveniles are usually detained in small or medium sized jails. Large jails are usually located near or in metropolitan areas; metropolitan areas usually

provide separate detention facilities for juveniles. While the use of jails to incarcerate juveniles is not limited to rural areas, the practice is most prevalent in rural areas where the jail size is usually small or, less often, a medium sized facility. All of this means that the jails most likely to detain children probably will not provide in-house medical facilities since only five(5) percent of small jails do so. Thus, provision of medical services to juveniles will usually require transporting the child to such services. The additional steps necessary to secure medical attention mitigate against the likelihood that a juvenile will receive such services as needed. This is important since at least one source has indicated that of 31,323 youth remanded to detention facilities in New York City over a five year period, approximately fifty (50) percent required medical care.[20]

The 1972 survey also found that only ten (10) percent of small jails had an exercise yard.[21] It is therefore unlikely that a juvenile incarcerated in jail will be provided with any opportunity for recreation or exercise. Psychiatrists serve as staff members in approximately three (3) percent of all jails; psychologists were employed in less than three (3) percent of all jails.[22] Less than five (5)percent of all jails employed social workers.[23] Three (3) percent of all jails employed academic teachers; less than two (2) percent of all jails employed vocational teachers.[24] Twenty-two (22) states reported no vocational

teachers; twenty-one (21) states reported no academic teachers.[25] From these figures, one can reasonably conclude that a juvenile incarcerated in an adult jail will receive no counseling services and will not be provided with any type of educational or vocational program. Only six (6) percent of small jails offered any type of social or rehabilitative program.[26] Juveniles therefore are not likely to have the benefit of any social or rehabilitative programs during their incarceration in an adult jail.

What then is the effect of jailing an accused or adjudicated non-offender, status offender or delinquent in these brutal, filthy cesspools of crime where no counseling, academic, vocational or other rehabilitative services are provided and no recreation or exercise facilities are available? Not only are such youth not receiving the states' promised rehabilitation, they are being harmed by such incarceration. Many of these children have committed no crime. The deprivation of liberty for status offenders and non-offenders is justified solely on the ground that the state, acting under the doctrine of parens patriae, need care for the child to provide assistance and rehabilitative treatment if necessary. The underpinnings of the juvenile justice system mandate rehabilitative efforts for all children. Incarceration in an adult facility clearly does not provide such rehabilitation or assistance.

The effect of jailing has been the object of study by many different organizations. The findings indicate that juveniles

are not only subject to physical and sexual abuse by adult prisoners, including trustees who may have access to juveniles in "separate" quarters within the jail, but also suffer additional harm not directly related to contact with adults. After careful study, the Office of Juvenile Justice and Delinquency Prevention (OJJDP) concluded that the problems of jailing youth in adult facilities:

> include the stigma produced by the negative perception of an adult jail or lockup regardless of designated areas for juveniles, the negative self-image adopted by or reinforced within the juvenile placed in a jail, the often over-zealous attitudes of staff in an adult facility, the high security orientation of operational procedures, the harshness of the architecture and hardware traditionally directed towards the most serious adult offenders, and the potential for emotional and physical abuse by staff and trustees alike. . . . [a]ny acceptable level of separation within adult jails would not only be a costly architectural venture if adequate living conditions were to be provided, but would be virtually impossible in the majority of the existing adult facilities.[27]

Other significant findings include those of the President's Commission on Law Enforcement and Administration of Justice (hereinafter President's Commission). They concluded that:

> Jail detention is characterized by enforced idleness, no supervision, and rejection. It is a demoralizing experience for a youngster at a time when his belief in himself is shattered or distorted. Repeated jailing of youth has no salutory effect on the more sophisticated youngster; on the contrary, it reinforces his delinquency status with his peers and his self-identification as a criminal. Enforced idleness in a jail gives the sophisticated juvenile ample time and reason for striking back at society.[28]

The recommendation of the President's Commission was that no child should be admitted to a jail or jail-like place of detention.[29] The National Advisory Commission has also declared that jails should not be used for the detention of juveniles.[30] Similar conclusions were reached by a National Assessment of Juvenile Corrections study which found, inter alia, that jails generally lack basic necessities for physical and mental health. This finding and others, including lack of appropriate supervision and the likelihood of abuse by adults, led this group to conclude that jailing should be prohibited in all instances.[31] The Juvenile Justice Standards Project of the Institute of Judicial Administration and the American Bar Association recommended that the use of adult jails should be flatly prohibited.[32] This position was taken with the recognition that many juveniles are held in quarters separated from adults. Separation was simply deemed insufficient to cure the ills of the practice of jailing children in adult jails. There seems to be a clear recognition that contact with alleged or convicted criminal offenders is only a narrow aspect of the problems and harm which incarcerated children suffer. Much of the harm is psychological in nature and flows from the simple act of being placed in an adult penal facility. The high security orientation of the facility, the harshness of the conditions and the inability of staff members, who lack training in dealing with children, to cope with youth problems all combine to create an atmosphere in which the child must identify himself or herself as a societal outcast. Physical separation is not the answer and wholly fails to address the

major harms inherent in the jailing of a child. The only remedy to this injustice is the outright prohibition on the jailing of youth.

C. Remedial Legislation

The language of the recent Pennsylvania statutes which prohibit the jailing of any child provides a good model for discussion. The language of this legislation is clear and specific. The statute deals explicitly with detention placements by providing as follows:

> §6327. Place of detention
>
> (a) General rule. - A child alleged to be delinquent may be detained only in:
> (1) A licensed foster home or a home approved by the court.
> (2) A facility operated by a licensed child welfare agency or one approved by the court.
> (3) A detention home, camp, center or other facility for delinquent children which is under the direction or supervision of the court or other public authority or private agency, and is approved by the Department of Public Welfare.
> (4) Any other suitable place or facility, designated or operated by the court and approved by the Department of Public Welfare.
>
> Under no circumstances shall a child be detained in any facility with adults, or where the child is apt to be abused by other children.
>
> . . .
>
> (e) Detention of dependent child. - A child alleged to be dependent may be detained or placed only in a Department of Public Welfare approved shelter care facility as stated in subsection (a)(1), (2) and (4), and shall not be detained in a jail or other facility intended or used for the detention of adults charged with criminal offenses, ... 42 Pa. C.S.A. §327(a), (e).

Note that Pennsylvania has no "status offender" category. Such children fall within the definition of dependent children under Pennsylvania law.[33] With regard to dispositional placements, the Pennsylvania statute provides:

> (b) Limitation on place of commitment. - A child shall not be committed or transferred to a penal institution or other facility used primarily for the execution of sentences of adults convicted of a crime. 42 Pa. C.S.A. 6352(b).

The language of the statute is very precise in prohibiting the practice of jailing children both pre-trial and post-adjudication. The statute does not stop at simply prohibiting jailing but, rather, declares the practice illegal:

> (c) Detention in jail is prohibited. It is unlawful for any person in charge of or employed by a jail knowingly to receive for detention or to detain in jail any person whom he has or should have reason to believe is a child. 42 Pa. C.S.A. 6327(c).

The Pennsylvania legislation also recognizes the tremendous difficulty of monitoring what actually occurs at jail intake. Jails are, by necessity, closed institutions. Any statute drafted to correct or eliminate the injustice of jailing children must contain monitoring or reporting provisions which will effectively prevent the jailing of children. The Pennsylvania statute requires the following:

> (b) Report by correctional officer of receipt of child: - The official in charge of a jail or other facility for the detention of adult offenders or persons charged with crime shall inform the court immediately if a person who is or appears to be under the age of 18 years is received at the facility and shall bring him before the court upon request or deliver him to a detention or shelter care facility designated by the court. 41 Pa. C.S.A. 6327(b).

Reporting must be required. However, since jailing is primarily a local phenomenon, it may be wise to require reporting to both local and state officials. It would be reasonable to statutorily require reporting to a state official in the executive branch of government and to charge that individual with the statutory responsibility to insure that an alternative placement is utilized and that the jailing does not occur.

Other issues must be dealt with when an entity or individual seeks reform of local jailing practices. Community based alternatives to jails and the lack thereof will head the list of issues. The Pennsylvania legislation begins to address this problem by the use of several approaches. First, the statute requires development of such alternatives by use of the following language:

> (f) Development of approved shelter care programs. - The Department of Public Welfare shall develop or assist in the development in each county of this Commonwealth approved programs for the provision of shelter care for children referred to or under the jurisdiction of the court. 42 Pa. C.S.A. 6327(f).

Second, the legislature of Pennsylvania provided ample lead time between passage of the jail prohibition statute and its effective date to allow for the development of alternative programs.[34] Additional lead time was secured by passage of other legislation which permitted the jailing of delinquents if the detention was necessary for the safety of the public and if the jail had been approved for detention of children by the Pennsylvania Department of Public Welfare.[35] Lastly, in separate legislation Pennsylvania

encouraged the development of alternative facilities such as foster care, group homes, shelter care, community residential care, etc., by providing that the State would raise the reimbursement to the local government from 60% to the range of 75% to 90% of the cost of such care.[36] The rate of reimbursements for institutional placements was reduced from 100% to 50% by the same legislation. While this related development was intended to impact on the use of institutions, the alternatives which developed or will develop may also serve as alternatives to jail detention.

Advocates of statutory prohibitions on jailing should discourage the use of large regional detention centers. Typically, advocates will discover that the majority of child detainees of jails do not need to be detained in any facility. A study conducted by the Children's Defense Fund surveyed 449 jails and found that under 12 percent of the children detained in jails were alleged to have committed a dangerous act.[37] The balance of the child detainees, 88 percent, were alleged to have committed minor offenses, property offenses or no offenses (18 percent were not alleged to have committed any criminal offense). Other available information supports the premise that present jail detention practices tend to grossly "overdetain" juveniles. A study of juvenile detention and alternatives in Scott County, Iowa, indicates that 1,243 youth were arrested in Scott County in 1977.[38] Only 36 of these juveniles were arrested for offenses

which would normally be considered serious offenses against persons. An additional 30 youths were arrested for carrying a concealed weapon. Only these 66 youths could be considered threats to the safety of the community. Yet some 436 juveniles or 42 percent of those arrested in 1977 were detained in the Scott County jail. The study notes that the John Howard Association Standard provides that only 5 percent of arrested juveniles normally need be detained if adequate services are available. In Scott County, 84.5 percent of all male juvenile detainees and 98 percent of female juvenile detainees were released within 3 days or less. Such a short term of detention leads one to question exactly what was gained by detaining these children in jail. Based on all this information, the study concludes that the vast majority of juvenile detainees did not need to be detained in the first place. Such findings indicate that the alternatives to jails which must be developed do not need to provide anywhere near the bed space size that jail detention rates would indicate. Further, the actual cost of detention should decline if only those juveniles who actually need detention are detained in alternatives to jails. For rural areas, the development of very small facilities, 3-5 beds, would not only accommodate the county of the facility's location but would also accommodate those few juveniles from neighboring counties who need to be detained.

In summary, large detention facilities should be avoided since the history of such facilities indicates that control can only be maintained by regimentation. Small facilities offer the only setting in which rehabilitation, as opposed to security, can be the primary orientation. The advocate should urge development of small local facilities as the alternative to jailing. While several contiguous counties may join to create a small facility which would serve such counties, the size should be limited to 5 or 6 beds. Development of large regional detention centers would be self-defeating to the goal of providing facilities which can provide individualized help to troubled children.

Impact of Federal Legislation

The Juvenile Justice and Delinqency Prevention Act of 1974, hereinafter Act, 42 U.S.C. 5601 et seq., requires participating states to:

> (12)(A) provide within three years after submission of the initial plan that juveniles who are charged with or who have committed offenses that would not be criminal if committed by an adult, or such nonoffenders as dependent or neglected children, shall not be placed in juvenile detention or correctional facilities; and
>
> (B) provide that the State shall submit annual reports to the Associate Administrator containing a review of the progress made by the State to achieve the deinstitutionalization of juveniles described in subparagraph (A) and a review of the progress made by the State to provide that such juveniles, if placed in facilities, are placed in facilities which (i) are the least restrictive alternatives appropriate to the needs of the child and the community; (ii) are in reasonable proximity to the family and the home communities of such juveniles; and (iii) provide the services described in section 103(1);

> (13) provide that juveniles alleged to be or found to be delinquent and youths within the purview of paragraph (12) shall not be detained or confined in any institution in which they have regular contact with adult persons incarcerated because they have been convicted of a crime or are awaiting trial on criminal charges; 42 U.S.C. 5633(a)(12), (13).

The Office of Juvenile Justice and Delinquency Prevention (OJJDP) has defined a juvenile detention or correctional facility as:

> (a) Any secure public or private facility used for the lawful custody of accused or adjudicated juvenile offenders or non-offenders; or
> (b) Any public or private facility, secure or non-secure, which is also used for the lawful custody of accused or convicted adult criminal offenders. Federal Register, Vol. 44, No. 189, Thursday, Sept. 27, 1979, p.55784.

Clearly, jails fall within the definition of juvenile detention and correctional facilities. States which are participating in the Act must remove status offenders and non-offenders from adult jails. Further, the provisions of subsection(a)(13) of 42 U.S.C. 5633 which prohibit the detention of or confinement of children in facilities in which they have regular contact with adults have been the subject of study and comment by OJJDP. The findings indicate that the optimum level of separation is complete environmental separation (use of different facilities).[39] OJJDP discourages the placement of any youth in facilities which can be used for adult detention or confinement, but permits the practice if total sight and sound separation is provided.[40] Nevertheless, the infirmities of this practice are readily recognized. States should plan now to correct these deficiencies and meet present humanitarian standards which dictate complete separation. OJJDP

has readily recognized that the harm which befalls juveniles incarcerated in adult jails does not arise solely from contact with adults but rather arises from placement in such facilities.[41] States should not expend money to provide architectural changes within existing jails to meet the sight and sound separation requirement when such funds could be used to provide separate facilities.

Funding to develop community alternatives to jails and institutions is available under the Act. 42 U.S.C. 5633(a)(10) provides that 75% of the funds available to the states be used for:

> . . . advanced techniques in developing, maintaining, and expanding programs and services designed to prevent juvenile delinquency, to divert juveniles from the juvenile justice system, to provide community based alternatives to juvenile detention and correctional facilities, to encourage a diversity of alternatives within the juvenile justice system, and to establish and adopt juvenile justice standards. . . . (emphasis added)

Information regarding the types of community alternatives which have developed as alternatives to incarceration is available from the Office of Juvenile Justice and Delinquency Prevention, Law Enforcement Assistance Administration, U.S. Department of Justice, Washington, D.C.

The Juvenile Justice and Delinquency Prevention Act of 1974 is a call to action for those interested in improving the juvenile justice system. The incarceration of children in adult jails offends all standards of decency and is repugnant to the

underlying rehabilitative philosophy of the juvenile justice system. Certainly, this abuse should be high on any list of practices for legislative reform in the juvenile justice area. The Act provides the impetus and funding possibilities to correct the injustice which occurs each and every time a child is subjected to physical and psychological harm by the act of being placed in an adult penal facility. The jailing practice must be specifically prohibited. Legislative reform of the various state laws which permit this practice to continue, by commission or ommission, is absolutely necessary to protect the children of America.

FOOTNOTES

1. R. Sarri, Under Lock and Key, Juveniles in Jails and Detention 5 (1974).

2. National Criminal Justice Information and Statistics Service, Law Enforcement Assistance Administration; U.S. Department of Justice, 1970 National Jail Census, A Report on the Nation's Local Jails and Type of Inmates, p.1, (1971).

3. National Criminal Justice Information and Statistics Service, Law Enforcment Assistance Administration; U.S. Department of Justice, Census of Jails and Survey of Jail Inmates 1978, Preliminary Report, (1979).

4. Children's Defense Fund, Children in Adult Jails, Table 2 page 9 (1976).

5. Supra, note 1.

6. Kentucky jails are reported as having held only 60 children on the given day of February 1978 on which the 1978 jail survey was conducted.

7. Of these 2,007 nondelinquents, only 194 were held more than 24 hours. This enormous discrepancy highlights the defects of both the national jail surveys which only count children held over 24 hours.

8. 42 Pa. C.S.A. §§6327(c), 6351, 6352(b); Annotated Code of Maryland, §§3-815(d)(e), 3-816, 3-823. The Pennsylvania jailing prohibition is not effective until December 31, 1979. See 1978 Pa. Laws, Act 1978, April 28, P.L. 202 No. 53, Section 25, which provides that until December 31, 1979, jails may be used to hold children only if approved by the Pennsylvania Department of Public Welfare.

9. Mississippi S.B. No. 2364, Youth Court Act, Article 5, Sections 39, 66, 67 (effective date July 1, 1979) (1979)

10. Arizona Revised Statutes Annotated Title 8, §8-226 (1979); Rhode Island §14-1-26 (1979).

11. Colorado Revised Statutes Title 19, 19-2-103(6) (1978); Illinois Annotated Statutes, Chapter 37, §702-8 (1978); Michigan Compiled Laws Annotated, §712A.16 (1979); McKinney's Consolidated Laws of New York Annotated Book 29A, Family Court Act §720 (1978-9),

see also, McKinney's Consolidated Laws of New York Annotated Book 11A, Criminal Procedure Law §510.15 (1978-79), as amended by 1979 N.Y. Laws, Ch. 411, (effective 8/4/79) (McKinney's Session Law News of N.Y., 1979 No. 6, August, 1979); Oklahoma Statutes Annotated Title 10, Ch. 51, 1107(c)(d), 1116(e) (1978-9); Oregon Revised Statutes Ch. 419, 419.575 (1979); South Dakota, Title 26, Ch. 26-8, 26-8-29 (1978); Utah Code Annotated Title 78, Ch. 39 §78-3a-30(3) (1979).

12. Title 34, Ch. 147, §2007 (1971).

13. Iowa Code Annotated Ch. 231, §232.22 (effective July 1, 1979) (1979); Louisiana, Code of Juvenile Procedure (LSA-CJP) Article 41(A)(1979); Minnesota Statutes Annotated, §260.173 (1979); Ohio Revised Code Annotated Title 21, Ch. 2151, §2151.312 (1979), c.f. §2151.34 (1979); Code of Virginia Title 16.2, Ch. 11, §16.1-249(B), 16.1-249(E) (1979); Revised code of Washington Annotated, Title 13, Ch. 13.04 §13.04.115, Section 80 of Substitute Senate Bill 2768, Ch. 155, Laws of 1979 (46th Legislative Session); West Virginia Code Ch. 49, §49-5-16(a) (1979);

14. District of Columbia Code Title 16, Ch. 23, §16-2313(d)(e) (1978).

15. Prohibition on the jailing of all status offenders: Arkansas -Arkansas Statutes Annotated Title 45, Ch. 4, 45-606 (1979); Connecticut - Connecticut General Statutes Annotated Title 46, Ch. 815t, §46-131 (1979); Rhode Island - Rhode Island, §14-1-26 (1979);

Prohibition of jailing of non-offenders: Montana - Montana Code Annotated Title 41, Ch. 3, §41-5-306(4) (1978); North Dakota - Century Code North Dakota Title 27, §27-20-16(4) (1979); Tennessee - Tennessee Code Annotated, Title 37, §37-216(d) (1978);

Prohibition on jailing of all status offenders and non-offenders: California - California Welfare and Institution Code §207 (1979); District of Columbia - District of Columbia Code Title 16, Ch. 23, 16-2313(a), (d), (e) (1978); Georgia - Code of Georgia Annotated Title 24A, §24A-1403(e), (f) (1979); Maryland - Annotated Code of Maryland, §3-815(d), (e) (1979); Minnesota - Minnesota Statutes Annotated, §260.173 (1979); Mississippi - Mississippi S.B. No. 2364, Youth Court Act, Article 5, Section 39 (effective date July 1, 1979) (1979); New Hampshire - New Hampshire Revised Statutes Annotated, §169.8, 169.14 (1979); New Mexico - New Mexico Statutes Annotated Ch. 13, Article 14, §13-24-23 (1979); Pennsylvania -Pennsylvania Consolidated Statutes Annotated, Title 42, Ch. 63, §6327 (1979); Vermont - Vermont Statutes Annotated Title 33, §642(c) (1979); West Virginia - West Virginia Code, Ch. 49 §49-5-16(a) (1979).

16. Supra, note 8. Connecticut and Mississippi prohibit the pretrial jailing of delinquents but do not prohibit such placement post adjudication. Connecticut General Statutes Annotated Title 46, Ch. 815 t, 46b-131 (1979); Mississippi S.B. No. 2364, Youth Court Act, Article 5, Section 39, 66, 67 (effective date July 1, 1979) (1979).

17. See generally Children's Defense Fund, Children in Adult Jails (1976); R. Goldfarb, Jails: The Ultimate Ghetto of the Criminal Justice System (1975).

18. National Criminal Justice Information and Statistics Service, Law Enforcement Assistance Administration, U.S. Department of Justice, The Nation's Jails: A Report on the Census of Jails from the 1972 Survey of Inmates of Local Jails (1975).

19. Id., at 7.

20. Children's Defense Fund, Children in Adult Jails, 35 (1976), citing Dr. Inis F. Litt, Medical Director, Juvenile Center Service, Division of Adolescent Medicine, Montefiore Hospital and Medical Center, Statement before the U.S. Senate Committee on the Judiciary, Subcommittee to Investigate Juvenile Delinquency, 17 September 1973.

21. Supra, note 18, at 7.

22. Supra, note 18, at 11.

23. Supra, note 18 at 11.

24. Supra, note 18 at 12.

25. Supra, note 18 at 12.

26. Supra, note 18 at 12, 13.

27. OJJDP, Monitoring Policy and Practices Manual, Statement of "Rationale Utilized in Determining the Level of Separation for Compliance with Section 223(a)(13) of the JJDP Act", undated, (available from the Office of Juvenile Justice and Delinquency Prevention, Washington, D.C.).

28. The President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Corrections, 1967, p.122.

29. Id.

30. NAC Task Force Report on Juvenile Justice and Delinquency Prevention, Standard 122.3, 1976, p.667.

31. R. Sarri, Under Lock and Key, Juveniles in Jail and Detention 64-74 (1974).

32. IJA-ABA Juvenile Justice Standards, Tentative Draft, 1977 (Approved 1979), Interim Status, Standard 10.2, 1976, p.97.

33. 42 Pa. C.S.A. 6302.

34. The statute prohibiting jailing was passed on July 9, 1976. The effective date of his legislation was June 27, 1978.

35. Act 1978, April 28, P.L. 202, No. 53, §25.

36. 62 Purdon's Stat. Ann. 704.1 (1979).

37. Children's Defense Fund, Children in Adult Jails, 20 (1976).

38. Ira M. Schwartz, Consultant, National Juvenile Law Center, Technical Assistance Report, Juvenile Detention and Alternatives, Scott County, Iowa, (1979) (available from the National Juvenile Law Center Library).

39. Supra, note 27.

40. Supra, note 27.

41. Supra, note 27.

DISPOSITIONAL STATUTES

A. Introduction

The separate juvenile court system emerged from a pervasive belief that the goal of rehabilitation could be served best by permitting juvenile courts to maximize flexibility, informality and discretion, especially at the dispositional or sentencing stage.[1] Thus, the juvenile court is vested with broad dispositional power. Under the parens patriae concept, it is left to the discretion of the court as to what disposition will best serve the interests and welfare of the child. Broad dispositional power is both justified and necessitated in a system whose prime interest is the welfare of the minor.[2] Time and again the statement is made that the dispositional decision is likely to be the most important aspect of a juvenile court case.

In keeping with the juvenile court system's philosophy of treatment and rehabilitation, most juvenile codes address the need for treatment of the individual brought before the court in their purpose clauses.[3] Typical of these clauses is the following provision found in the Standard Juvenile Court Act:[4]

> Each child coming within the jurisdiction of the court shall receive, preferably in his own home, the care, guidance and control that will conduce to his welfare and the best interests of the state, and . . . when he is removed from control of his parents the court shall secure for him care as nearly possible equivalent to that which they would have given him.

It is the dispositional phase of the juvenile court proceeding, then, where the juvenile court's philosophy of treatment and

rehabilitation is put to the test. At this stage, the court is required to order a plan of treatment that meets the individual needs of the child.

Although the disposition is the heart of the juvenile process, it has received scant attention in appellate court decisions. The Supreme Court's decision in In re Gault, 387 U.S. 1 (1967), was limited to the adjudicatory stage of delinquency cases; the due process protections made applicable to the determination of delinquency by that case have not been extended by the U.S. Supreme Court to the dispositional process. Consequently, this area of law is currently the subject of extensive litigation and legislative revision.

B. Criteria and Standards

Presently, juvenile court statutes permit the court to make any one of numerous dispositions ranging from no services to commitment in an adult correctional facility. Typically, however, these statutes provide the court with little guidance as to which disposition would be appropriate for a particular youth. This absence of guidelines is of major concern today when it is still possible in many states to place runaways or truants in secure institutions and jails, sanctions which are totally out of proportion to the acts committed. (See infra). The IJA/ABA Juvenile Justice Standards Project has recognized the importance of establishing guidelines and limiting judicial discretion at the dispositional stage. Applying a concept of proportionality,

the Standards recommend that the category and duration of a disposition be determined with reference to the seriousness of the juvenile's offense, modified by the youth's degree of culpability as indicated by the circumstances of the case as well as the age and prior record of the youth. Additionally, the standards would require the least restrictive alternative consistent with these considerations to be selected.

> In choosing among statutorily permissible dispositions, the court should employ the least restrictive category and duration of disposition that is appropriate to the seriousness of the offense, as modified by the degree of culpability indicated by the circumstances of the particular case, and by the age and prior record of the juvenile. The imposition of a particular disposition should be accompanied by a statement of the facts relied on in support of the disposition and the reasons for selecting the disposition and rejecting less restrictive alternatives.[5]

The Iowa legislature has adopted a similar standard in the dispositional section of its juvenile code:

> 1. Pursuant to a hearing provided in section 232.50, the court shall enter the least restrictive dispositional order appropriate in view of the seriousness of the delinquent act, the child's culpability as indicated by the circumstances of the particular case, the age of the child and the child's prior record. The order shall specify the duration and the nature of the disposition, including the type of residence or confinement ordered and the individual, agency, department or facility in whom custody is vested. Iowa Code Ann. §232.52 (Supp. 1979).

For other state codes which mandate the least restrictive dispositional approach see: West Virginia, W. Va. Code §49-5-13(b) (Supp. 1979); Pennsylvania, 42 P.S.C.A. §6342; Mississippi, Mississippi Youth Court Act, §§65-68 (1979). Thus, while most

state codes are devoid of guidelines to be applied during the dispositional phase of the juvenile court proceeding, some legislatures have recognized the need to assure the provision of rehabilitative treatment in the least restrictive, appropriate environments. (For a discussion of the constitutional basis for the least restrictive alternative approach to treatment, see Rights of Institutionalized Juveniles chapter).

Further, to insure that the least restrictive, most appropriate alternative is selected, courts should be required to examine fully each alternative and, after selecting one, explain why each less restrictive alternative has been rejected. The National Juvenile Law Center Model Code provides:

> Section 15. Dispositional Hearing
>
> (1) Prior to the dispositional hearing the juvenile court worker shall prepare a written report describing all reasonably appropriate alternative dispositions. The report shall contain a specific plan for the care of and assistance to the child calculated to resolve the problems presented in the petition. The report shall contain a detailed explanation showing the necessity for the proposed plan of disposition and the benefits to the child under the proposed plan. If placement of the child away from home is recommended, the juvenile court worker shall give precedence to placements in the manner provided in section 17 of this chapter. The report shall contain specific reasons for not recommending placement of the child with the child's parent or guardian.
>
> (2) At the dispositional hearing, the court shall consider the predisposition report and all relevant and material evidence presented. Upon motion of the child or the child's parent or guardian, the court shall require the person as a witness and be subject to examination.
>
> (3) After consideration of all evidence offered bearing on disposition, the court may:
>
> (A) Order a disposition pursuant to section 16 of this chapter if the child is adjudicated a juvenile offender;
>
> (B) . . .

> (4) The dispositional order of the court shall set forth the findings of fact upon which the order is based together with clear and concise reasons for the order.[6] See IJA/ABA Standard, supra. See also Mississippi Youth Court Act §65(6) (1979).

C. Institutionalization and Jailing

The need for clearly defined dispositional criteria is best illustrated by an overview of current jailing and institutionalization practices. It is estimated that as many as 500,000 youths spend one or more days each year in adult jails or lockups. While state statutes often address the issue of pre-trial detention in adult facilities, they are often silent as to whether jailing is a permissible or prohibited dispositional alternative. (See Children in Jails chapter). The deplorable conditions in jails have been well documented. Yet, only Pennsylvania and Maryland clearly prohibit the post-adjudication jailing of juveniles. (See Children in Jails chapter). In fact, six states expressly authorize the post-adjudication placement of status offenders in adult facilities. Only one (1) state expressly authorizes the post-adjudication jailing of non-offenders. Ten (10) states and the District of Columbia expressly prohibit post-adjudication jailing of status offenders. Eight (8) states and the District of Columbia expressly prohibit post-dispositional jailing of non-offenders. The remaining states neither expressly prohibit nor expressly authorize post-dispositional commitment to an adult facility. (See charts appended to Shelter Care and Detention chapter).

The placement of juveniles in institutions is another dispositional alternative gravely in need of legislative attention. Examination of juvenile justice institutions has revealed an almost universal absence of treatment-oriented programs. The President's Commission on Law Enforcement and the Administration of Justice succinctly described the plight of many juveniles institutionalized for the ostensible purpose of treatment under the state's parens patriae authority:

> Institutionalization too often means storage - isolation from the outside world - in an overcrowded, understaffed, high-security institution with little education, little vocational training, little counseling or job placement or other guidance upon release. Programs are subordinated to everyday control and maintenance.[7]

Lack of dispositional guidelines is an especially serious concern in light of a growing body of literature which indicates that institutionalization per se is harmful. Research findings of the Office of Juvenile Justice and Delinquency Prevention (OJJDP) indicate the following:

> Large facilities require regimentations and routinization for staff to maintain control and restrict individual handling. Smaller groups reduce custody problems and allow staff to offer a more constructive and controlled environment.[8]
>
> Large facilities convey an atmosphere of anonymity to the individual resident, and tend to engulf a child in feelings of powerlessness, meaninglessness, isolation and self-estrangement.[9]
>
> Larger facilities reinforce the image of rejection of the individual by society, compounding the problems of reintegration into society.[10]
>
> Statistics show that juvenile residential facilities have a tendency to fill to capacity. Larger facilities increase the measure of detention through inappropriate placements.[11]

Of equally grave concern is the fact that institutionalization cannot be justified on the basis of good results. Generally, studies reveal that institutionalization is no more effective in reducing recidivism than alternatives that do not involve incarceration. Some studies indicate that institutionalization actually may increase recidivism.[12] Further, studies reveal that many incarcerated youth, particularly status offenders, do not require secure confinement. See Children in Jails chapter.

Not only is institutionalization harmful, it is also expensive:

> Analysis of the comparative costs of institutionalization versus nonincarcerative dispositions also provide cogent reasons for preferring the latter...a comparison of institutional costs and the costs of nonincarcerative dispositions revealed that "the overall daily cost for a juvenile in an institution is ten times more than the cost of juvenile probation or after care."[13]

These findings all lead to the conclusion that, at best, large institutions offer mere custodial care. Further, increased deviance is promoted by institutionalization. Troubled children, especially status offenders, are entitled to the individualized care and treatment which can only be provided at the local level in small, community settings.

> Somehow, it appears to us that if the state's purpose is to develop a society characterized by peace and love, that our institutions for children should reflect those qualities and not their opposite.[14]

Presently, seven (7) states and the District of Columbia expressly authorize the post-dispositional commitment of status

offenders to secure facilities. Only one (1) state expressly authorizes such commitment for a non-offender.

Post-dispositional commitment to a secure facility is expressly prohibited for status offenders in ten (10) states. Fifteen (15) states and the District of Columbia expressly prohibit secure commitment of non-offenders. The remaining states neither expressly prohibit or expressly authorize the practice. (See charts appended to Detention and Shelter Care chapter). Further, in four (4) states, status offenders are jurisdictionally classified as delinquents. (See Scope of Juvenile Court Jurisdiction chapter, Section B). Therefore, they are automatically subject to the same dispositional alternatives (including secure confinement) as those children who have committed criminal acts.

The preceding discussion clearly illustrates that the broad dispositional power of juvenile courts must be legislatively addressed through the establishment of clearly defined guidelines directed at eliminating the practices of unwarranted institutionalization and jailing of juveniles.

D. Probation

Probation may be defined as the conditional freedom granted by a judicial officer to an alleged offender, or adjudicated . . . Juvenile . . . as long as the person meets certain conditions of behavior.[15] According to one authority, on September 1, 1976, there were 328,854 juveniles under probation

supervision in the United States.[16] Probation is usually an available disposition for every juvenile, regardless of the nature of the offense,[17] and its theoretical rationale lies in the concept that the correction of deviant behavior may be better accomplished by assisting the rehabilitation of the juvenile in the community than by isolating him/her in an institution. The central emphasis of probation is rehabilitation and reintegration, and the principal figure in accomplishing these goals is the juvenile court probation officer.[18] A number of juvenile courts have no probation services at all; in those that do, caseloads typically are so high that counselling and supervision take the form of occasional phone calls and perfunctory visits instead of the careful, individualized service that was intended.[19] Furthermore, it has been well documented that juvenile probation workers are frequently lacking in professional training.[20] As a result, probation often becomes more a process of verifying behavior than of correcting it.[21]

Although there may be some common restriction imposed in any given juvenile court probation order,[22] the typical statutory authority given to the judge to shape conditions of probation is phrased in the broadest of terms.[23] In only a few states are the permissible terms of juvenile probation specified by statute or court rule.[24] Consequently, the juvenile court judge is all too often free to use his/her own imagination. The result of this latitude in imposing conditions may be the negation of any beneficial effects of probation.[25]

Since probation has historically been viewed as an "act of grace" to one convicted of a crime,[26] until fairly recently, probation conditions were rarely subject to judicial review.[27] The consensus now, however, is that probationary conditions are subject to certain limitations, some of them being constitutional and others relating to the nature of the offense and the rehabilitation of the offender.[28]

> Since the purpose of probation is educational and reconstructive rather than primarily punitive or oppressive, the program of probation should envisage only such terms and conditions as are clearly spelled out in the statutes . . . and such other conditions as fit the probationer by education and rehabilitation to take his place in society.[29]

In the juvenile court, where rehabilitation is the purported goal of the entire process, such an argument has even greater cogency.[30] Theoretically, the goal of probation is to accomplish the rehabilitation of the child by treatment and guidance while the child remains an active and useful member of the community. If probation conditions do not promote this end, they should not be employed or permitted.[31]

In short, statutes that grant juvenile courts broad discretionary powers in the imposition of conditions of probation should be repealed or amended. Legislatures should, instead, set out for the courts the goals they should seek, the methods they should use, and the conditions that may be imposed.[32]

E. Fines and Restitution

A large number of juvenile codes permit the use of restitution as a dispositional alternative for juveniles.[33] A somewhat smaller number permit the use of fines.[34] Either may be imposed as a condition of probation and both are commonly imposed, at least as far as adult probationers are concerned. Some problems, however, are encountered in the use of these measures.

Fines often bear little relationship to rehabilitation of the offender, being clearly punitive in character. To that extent, they are inconsistent with the goals of the juvenile justice system and undesirable as dispositions for the juvenile court.[35]

Whether restitution is rehabilitative is another question. It has been utilized so often that the courts fail to articulate any real concern about whether its use serves to reform or rehabilitate the offender.[36]

Occasionally, the juvenile court may attempt to impose responsibility for payment upon the child's parents. It is questionable that a court which has adjudicated the child delinquent would have jurisdiction to compel payment by the parent. Moreover, it is doubtful that payment by the parent can have any rehabilitative effect upon the child.[37] The function of the juvenile court, in brief, must be to provide for the care and guidance of the child, not to satisfy civil damage claims.[38]

F. Duration of Dispositional Orders

A large number of states permit the juvenile or family court to exercise jurisdiction over a juvenile found delinquent until he/she reaches twenty-one, regardless of the offense.[39] Some allow the same jurisdiction over status offenders and non-offenders. Since youth adjudged delinquent are thought to be in need of "treatment", many think that it is in the youth's best interest for treatment to continue as long as it is necessary to achieve desired results.

Other state statutes provide that the court may commit a juvenile for an indeterminate period up to a statutory maximum, which is the same for most offenses.[40] Many of these provisions also provide for extensions of the dispositional period.[41] Still other statutes provide that the court may commit a juvenile for a specified period of time, usually reserving the right to extend the duration of the order of commitment.[42] A few states provide that a juvenile may be committed until such time as the objectives of the dispositional decree have been met.[43] One state provides that an adjudicated delinquent may not be committed for a period exceeding the maximum term of imprisonment for the offense forming the basis of the adjudication.[44]

Statutes that limit the duration of disposition orders represent the best approach. Disposition orders of indeterminate duration may result in situations where the child remains institutionalized or on probation for a time greatly disproportionate

to the seriousness of his/her conduct or his/her need for treatment or greater than the maximum period of confinement statutorily authorized for an adult convicted of the same offense. Statutory limitations on the duration of dispositions can avoid this abuse.

G. Revocation of Probation and Changes in Dispositional Orders

The Supreme Court has held that a previously sentenced adult probationer is entitled to a hearing when his probation is revoked.[45] An adult probationer, however, does not have an absolute right to counsel at revocation proceedings.[46] The right to counsel depends upon the particular circumstances of the case. The Court has noted that if the probationer asserts that he/she has not committed the violation or if he/she admits the violation but alleges mitigating circumstances that make revocation inappropriate, counsel should usually be appointed.[47] The ultimate decision should be based on a determination of whether or not the probationer appears capable of effectively representing him/herself.[48] Based upon this test, the juvenile probationers should almost always be entitled to the right to counsel since they will generallly lack the maturity and intelligence to present their arguments effectively without the assistance of counsel.[49]

Most of the juvenile codes examined recognize the right to a hearing on the revocation of probation[50] and some even guarantee the right to counsel.[51] Most of the statutes also require ade-

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quate notice of the hearing and notice of the factual basis for the alleged violation of probation.[52] These latter provisions guarantee that juveniles will be given notice of the charges against them in order to prepare a defense.

> Justice requires that a person on probation should not be compelled to live in dread of being recommitted on the whim or caprice of a probation officer, or even of a court. Ordinary principles of fair play demand that he should be advised of the ground upon which revocation of probation is sought, and to have a hearing on whether his probation should be revoked.[53]

As for the standard of proof applicable to proceedings to revoke probation, some statutes adopt clear and convincing evidence as the applicable standard,[54] while others adopt the preponderance of the evidence standard.[55] and still others require proof beyond a reasonable doubt.[56] Several codes adopt no specific standard of proof at all. Proof beyond a reasonable doubt should be required whenever the alleged violation amounts to a criminal act.

Generally, the statutes surveyed recognize the juvenile's right to a hearing before probation is revoked and indicate a trend toward recognition of the right to counsel. Because of the serious consequences facing a juvenile in revocation proceedings, these rights deserve further recognition and protection. Even if a violation is admitted by the probationer, an attorney can more effectively present evidence of mitigating circumstances, should there be any. These circumstances may be of such a nature as to dissuade the judge from revoking probation on the theory that the

juvenile is not a danger to society and can be better rehabilitated outside of an institution.

The system of revocation is easily criticized, and justly so, because improvement of the system would not be difficult. Every revocation proceeding should comport with constitutional due process safeguards. Even if the violations are admitted, the second question, that of proper disposition, requires a hearing. A violation of probation conditions does not, in itself, mean that the juvenile is a risk to society. It will be for the states individually to protect their probationers' rights in the revocation process by appointment of counsel and more strict adherence to formal constitutional and adversary requirements.

H. Aftercare

Aftercare, or parole, is the release of an individual from an institution prior to the time when the period of the original commitment would end. Juvenile parole has its origins in the early House of Refuge practice of indenturing child inmates to work for several years in private homes after their term of incarceration. It was the responsibility of the receiving family to feed and clothe the indentured youngster and also to decide when he had earned complete freedom.[57] Today, the decision to parole and the determination of conditions of parole are generally made by the institution in which the juvenile is confined.

Aftercare is generally beyond the scope of the juvenile court process and juvenile codes generally do not deal with it.

However, entrusting the important decision of whether to grant parole to the absolute discretion of an agency raises some serious concerns. When coupled with the traditional provision for indeterminate sentencing, such discretion allows agency officials to exercise great power over a juvenile's life for a long period of time. Some provisions require judicial review of any modification of disposition. These provisions seem better designed to protect juveniles' rights because the review affords juveniles the opportunity to be heard in matters of vital concern to them.

FOOTNOTES

1. Thomas, C.W., Fitch, W.A., An Inquiry Into the Association Between Respondents' Personal Characteristics and Juvenile Court Dispositions, 17 Wm. & Mary Law Review 61, 64.

2. Case, Warren J., The Penal Incarceration of the Incorrigible Juvenile, 49 Notre Dame Lawyer 857, 860 (1974).

3. Comment, An Important Step Towards Recognition of the Constitutional Right to Treatment, 16 St. Louis Univ. Law Journal 340, 343 (1971).

4. National Council on Crime and Delinquency, Standard Juvenile Court Act §1, cited in Comment, Id., at 343.

5. Institute of Judicial Administration/American Bar Association, Juvenile Justice Standards Project. Standards Relating to Dispositions, (Tentative Draft 1977).

6. Piersma, Ganousis, Kramer, The Juvenile Court: Current Problems, Legislative Proposals and a Model Act. Reprinted from St. Louis U.L.J. Vol. 20 No. 1 (1975).

7. See also In Re Gault, 387 U.S. 1 (1967).

8. 43 Fed. Reg. 36410 (1978) citing Planning and Designing for Juvenile Justice, LEAA, and Under Lock and Key (NAJC, 1974).

9. 43 Fed. Reg. 36410 (1978) citing Goffman, Ewing, "On the Characteristics of Total Institutions", (1961).

10. 43 Fed. Reg. 36410 (1978), citing Sykes, Gersham, "The Inmate Social System", (1960).

11. 43 Fed. Reg. 36410 (1978), citing Under Lock and Key (NAJC, 1974).

12. Institute of Judicial Administration, American Bar Association, Juvenile Justice Standards Project, Standards Relating to Dispositions, Tent. Dr. p.71, (1977), citing Sykes, "The Pains of Imprisonment" in The Criminal in Confinement, 131 (Radzinowica and Wolfgang, eds. 1971).

13. National Council on Crime and Delinquency (NCCD) Survey, "Juvenile Institutions", 13 Crime and Delinquency 73, 235 (1967).

14. State ex rel Harris v. Calendine, 233 S.E.2d 318, 329 (W. Va. 1977).

15. Sourcebook of Criminal Justice Statistics - 1978 United States Department of Justice, Law Enforcment Assistance Administration, National Criminal Justice Information and Statistics Service (U.S. Government Printing Office, Wash., D.C.) p.730.

16. Id. Table 6.20, p.617.

17. The following statutes include probation as a dispositional alternative for delinquents, status offenders and non-offenders:

Ariz. Rev. Stat. §8-241(A)(1)(h), (2)(b), 3(b) (1979).
Ind. Code Ann. §31-6-4-16(e)(1) and (g)(1) (Burns, 1978)
Ky. Rev. Stat. §208.200(1)(a) (1978)
HB2315 §7 Mich. Comp. Laws Ann. §712A.18(b) (1979)
Mo. Ann. Stat. §211.181(6)
Md. Courts and Judicial Proceedings Code Ann. §3-820(b)(1) (1978); HB379 (1979) §3-820(c)(1)
Okla. Stat. Ann. Tit. 10, §1116(a)(1) (1978-79)
Ore. Rev. Stat. §419.507(1) (1979)
R.I. Gen. Laws §14-1-32 (1979)
S.C. Code §14-21-620(a) (1978) NB2787 (1979)

The following statutes include probation as a dispositional alternative for delinquents and status offenders:

Ala. Code §12-15-71(c)(2) (1979)
Calif. Welfare and Institution Code §725(a) (1979)
Colo. Rev. Stat. §§17-3-112(1)(a); 19-3-113(a) (1978)
Conn. Gen. Stat. Ann. §46b-140(a) (1979)
D.C. Code §16-2320(c)(3) (1978)
Ga. Code Ann. §§24A-2302(b); 24A-2303 (1979)
Idaho Code §16-1814(1) (1978)
Kan. Stat. §38-826(1) (1979)
La. Code of Juvenile Procedure, Art. 83 (A)(2), Art. 84(A)(2) (1979)
Minn. Stat. Ann. §260.185(1)(b) (1979)
Mont. Code Ann. §41-5-523(1)(a) (1978)
Neb. Rev. Stat. §43-210(1)(a) (1978)
N.J. Stat. Ann. §§2A:4-61(c), 2A:4-62(a)
N.M. Stat. Ann. §13-14-31(B)(3), (C)(3) (1979)
N.Y. Family Court Act §§754(d), 753 (1)(c) (McKinney, 1978-9)
N.C. Gen. Stat. §7A-286(4)(b) (1978)
N.D. Cent. Code §§27-20-31(2), 27-20-32 (1979)
Ohio Rev. Code Ann. §§2151.354(B), 2151,355(A)(2) (1979)

S.D. Codified Laws Ann. §26-8-40.2 (1978)
Tex. Fam. Code Ann. Tit. 3, §54.04(d)(1) (1978-79)
Utah Code Ann. §78-3a-39(1) (1979)
Va. Code §16.2-279(C)(3), (E)(4) (1979)
Wyo. Stat. §14-6-229(C)(i) (1979)

The following statutes include probation as a dispositional alternative for delinquents only but other states also include status offenders in the definition of delinquency:

Alaska Stat. §47.10.080(b)(2) (1979)
Del. Code Ann. Tit. 10, §937(b)(10) (1978)
Fla. Stat. Ann. §39.11(1)(a) (1979)
Haw. Rev. Stat. §571-48(1)(a) (1978)
Ill. Ann. Stat. Ch. 37, §705-2(1)(a)(1) (1978), 705-3
Iowa Code Ann. §232.34(2) (1979)
Me. Rev. Stat. Ann., Tit. 15, §3314(B) (1979)
Mass. Gen. Laws Ann., Ch. 119, §58, (1979)
Miss. SB2304 (approved) Art. 11, §66(1)(C) (1979)
N.H. H.B. 831 Ch. 169-B:19(I)(d)
Pa. Stat. Ann., Tit. 42, §6352(2) (Purdon, 1979)
Tenn. Code Ann. §37-231(2) (1978)
Vt. Stat. Ann. Tit. 33, §657(a)(2) (1979)

Wisconsin, West Virginia, Washington and Nevada do not provide for probation as a dispositional alternative in their respective juvenile codes.

(See also Appendix)

18. Schwarzenberger, Juvenile Probation: Restrictions, Rights, and Rehabilitation, 16 St. Louis U. L. J. 276 (1971).

19. President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Juvenile Delinquency and Youth Crime, 8 (1967).

20. President's Commission on Law Enforcment and Administration of Justice, Task Force Report: Corrections, 136-40 (1967).

21. Schwarzenberger, Juvenile Probation: Restrictions, Rights, and Rehabilitation, 16 St. Louis U. L. J. 276 (1971).

22. e.g. obedience to all laws, regular attendance at school, periodic reporting to the probation officer, remaining within the jurisdiction, and being home at night by a set hour.

23. For example:

Ala. Code §12-15-71(c)(2) (1979) provides that:

(c) If a child is found to be delinquent or in need of supervision, the court may make any of the following orders or dispositions for his supervision, care and rehabilitation:

(2) place the child on probation under such conditions and limitations as the court may prescribe. (emphasis added).

and D.C. Code §16-2320(c)(3) states that:

(c) If a child is found to be delinquent or in need of supervision, the Division may order any of the following dispositions for his supervision, care, and rehabilitation:

(3) probation under such conditions and limitations as the Division may prescribe. (emphasis added).

24. New York is a good example: N.Y. Fam. Ct. Rule §2507.10 (1978)

§2507.10. Permissible terms and conditions of an order entered in accordance with sections 755 and 757 of the Family Court Act

(a) A suspended judgment entered in accordance with section 755 of the Family Court Act shall contain at least one of the following terms and conditions directing the respondent to:

(1) attend school regularly;
(2) obey all rules and regulations of the school attended by the respondent;
(3) obey all reasonable commands of the parent or other person legally responsible for the respondent's care;
(4) observe a specified curfew;
(5) abstain from associating with named individuals;
(6) abstain from visiting designated places;
(7) abstain from driving a motor vehicle without a license;
(8) abstain from glue sniffing; (9) abstain from the use of alcoholic beverages, hallucinogenic drugs, habit forming drugs not lawfully prescribed for the respondent's use, or any other harmful or dangerous substance;
(10) abstain from any act which if done by an adult would be an offense;
(11) cooperate with a mental health or other appropriate community facility to which the respondent is referred;

(12) make restitution or require services for public good;
(13) restore or replace property taken from the petitioner or complaining witness;
(14) repair any damage to or defacement of the property of the petitioner or complaining witness;
(15) comply with such other reasonable terms and conditions as the court shall determine to be necessary or appropriate to ameliorate the conduct which gave rise to the filing of the petition;
(16) abstain from disruptive behavior in the home and in the community;
(17) stay away from the person, the place of employment, and the residence of the petitioner or the complaining witness, and any member of that person's family;
(18) abstain from communicating, directly or through an intermediary with the petitioner or the complaining witness, or any member of the person's family;
(19) cooperate in accepting medical or psychiatric diagnosis and treatment, alcoholism or drug abuse treatment or family counseling services; and permit an agency delivering that service to furnish the court with information concerning the diagnosis, treatment or counseling.

(b) An order placing the respondent on probation in accordance with section 757 of the Family Court Act shall contain at least one of the following terms and conditions, including subdivision (c) of that section and including any of the terms and conditions set forth in subdivision (a) of this section, directing the respondent to:

(1) meet with the assigned probation officer when directed to do so by that officer;
(2) permit the assigned probation officer to visit the respondent at home or at school;
(3) permit the assigned probation officer to obtain information from any person or agency from whom the respondent is receiving or was directed to receive diagnosis, treatment or counseling;
(4) permit the assigned probation officer to obtain information from the respondent's school;
(5) cooperate with the assigned probation officer in seeking to obtain and in accepting employment and employment counseling services
(6) submit records and reports of earnings to the assigned probation officer when requested to do so by that officer;
(7) obtain permission from the assigned probation officer for any absence from the county or residence in excess of two weeks;

(8) with the consent of the Divison for Youth, spend a specified portion of the probation period, not exceeding one year, in a facility provided by the Divison for Youth pursuant to subdivision 2 of section 502 of the Executive Law;
(9) do or refrain from doing any other specified act of omission or commission that, in the opinion of the court is necessary and appropriate to implement or facilitate the order placing the respondent on probation;
(10) make restitution or require services for public good.
(c) The court may set a time or times at which the probation service shall report to the court, orally or in writing, concerning whether the terms and conditions of a judgement entered in accordance with sections 755 or 757 of the Family Court Act are being complied with.
(d) A copy of the order setting forth its duration and the terms and conditions imposed shall be furnished to the respondent and to the parent or other person legally responsible for the respondent.

25. Best and Birzon, Conditions of Probation: An Analysis, 51 Geo. L. J. 809, 811 (1963).

26. See Escoe v. Zerbst, 295 U.S. 490, 492 (1935).

27. Having been granted this privilege in lieu of incarceration, the probationer was viewed as having no right to challenge its terms; if he found them unacceptable he might always opt for imprisonment. People v. Blankenship, 16 Cal. App.2d 606, 608, 61 p.2d. 352, 353-54 (1936).

28. (a) Whatever its substantive content, a condition lacking the specificity to give notice of the standard of conduct required should be deemed void for vagueness. See Lathrop v. Lathrop, 50 N.J. Super, 525, 535, 142 A.2d 920, 925 (1958).

(b) It has been held that the 6th amendment's guarantee of counsel forbids the imposition of a conditon that the probationer reimburse the county for court-appointed counsel. In re Allen, 71 Cal. 2d 388, 78 Cal. Rptr. 207, 455 p.2d 143 (1969). This line of reasoning suggests that there may be a basis for contesting any conditon whose fulfillment depends largely on factors that prove to be outside the volitional control of the probationer. See Schwarzenberger, Juvenile Probation: Restrictions, Rights and Rehabilitation, 16 St. Louis U.L.J. 276, 289, 290 (1971).

(c) The purpose of probation is rehabilitation and . . . conditions must be reasonably related to the nature of the offense and the rehabilitation of the offender. Logan v. People 138 Colo. 304, 322 p.2d 897 (1958); In re Weiner, 176 Pa. Super. 255, 106 A.2d 915 (1954).

(d) Requiring the probationer to leave the jurisdiction has been held invalid as a condition of probation on the grounds of public policy. As one court has rather dramatically put it, permitting one state to "dump its probationers into another:

. . . would entitle the state believing itself injured thereby to exercise its police and military power in the interest of its own peace, safety, and welfare, to repel such an invasion. It would tend to invite dissension, provoke retaliation, disturb that fundamental equality of political rights among the several states which is the basis of the Union itself. People v. Baum, 251 Mich. 187, 189, 231 N.W. 95, 96 (1930); accord. State v. Doughtie, 237 N.C. 368, 371, 74 S.E.2d 922, 924 (1953).

(e) Restricting a probationer from an area associated with his lawbreaking behavior may be challenged if it is unnecessarily broad. See People v. James R.O., CCH Pov. L. Rep. §13.374 (N.Y. Sup. Ct. App. Div. April 8, 1971) In re Mannino, 14 Cal. App. 3d 953, 92 Cal. Rptr. 880 (1971).

(f) The probationer may . . . challenge a condition which unduly restricts constitutional rights in a manner not reasonably related to the purposes of probation. See In re Allen, 71 Cal. 2d 388, 389, 78 Cal. Rptr. 207, 208, 455 P.2d 143, 144 (1969).

(g) Church attendance: subject to challenge as violative of the establishment clause as well as of the free exercise clause. See Jones v. Commonwealth, 185 Va. 335, 38 S.E.2d 444 (1946).

29. Logan v. People, 138 Colo. 304, 307, 332 p.2d 897, 899 (1958).

30. Schwarzenberger, Juvenile Probation: Restrictions, Rights and Rehabilitation, 16 St. Louis U.L.J. 276, 278 (1971).

31. Piersma, Ganousis, Kramer, The Juvenile Court: Current Problems, Legislative Proposals and A Model Act, Reprinted from St. Louis U.L.J., Vol. 20, No. 1 (1975) p.53.

32. Piersma, Ganousis, Kramer, n. 31, supra.

33. Those codes which list restitution as a dispositional alternative are:

Ala. Code §12-15-71(c)(5) (1979)
Alaska Stat. §47.10.080(b)(4) (1979)
Ark. Stat. Ann. §45-436(1) (1979) see also S.B.522 §10 (enacted((1979)
Cal. Welfare and Institution Code §731 (1979)
Colo. Rev. Stat. §19-13-112(1)(f) §19-13-113(1)(f) (1978)
Conn. Gen. Stat. Ann. §46b-140(a) (1979)
Del. Code Ann. §937(b)(12) (1978)
Fla. Stat. Ann. §39.11(1)(a) (1979)
Idaho Code §16-814(7) (1978)
Ind. Code Ann. §31-6-4-16(g)(4) (1978)
Kan. Stat. §38-826(6) (1979)
Ky. Rev. Stat. §208.240 (1978)
La. Code of Juvenile Procedure Art. 83 (A)(8) (1978)
Me. Rev. Stat. Ann., Tit. 15, §3314(B) & (E) (1979)
Md. Courts and Judicial Proceedings Code Ann. §3-829(e) (1979)
Mass. Gen. Laws Ann., Ch. 119, §62 (1978-79)
Minn. Stat. Ann. §260.185(1)(e) (1979)
Miss. SB2304 (approved) §66(1)(b)(c)(e)
Neb. Rev. Stat. §43-210(1) (1978)
N.H. H.B.831, Ch. 169-B:19(I)(b) (1979)
N.Y. Family Court Act §758(a) (1978-79)
N.C. Gen. Stat., Art. 2, §110-22(5) (1978)
Ohio Rev. Code Ann. §2151.355(7) (1979)
Ore. Rev. Stat. §419.507(1) (1979)
Pa. Stat. Ann., Tit. 42, §6352(5)(6) (1979)
R.I. Gen. Laws §14-1-32 (1979)
S.D. Codified Laws Ann. §26-8-39.2, §26-8-40.1(5) (1978)
Utah Code Ann. §78-3a-39(7) (1979)
Va. Code §16.1-279(E)(7) (1979)
Wash. Rev. Code Ann. §13.40.190(1) (1979)
Wisc. Stat. Ann. §48.34(8) (1979)
Wyo. Stat. §14-6-229(d)(i)(ii) (1979)

(See also Appendix)

34. Those codes which list fines as a dispositional alternative are:

Ala. Code §12-15-71(C)(5) (1979)
Del. Code Ann., Tit. 10, §937(b)(11) (1978)
Ky. Rev. Stat. §208.200(4)(b)(c) (1978)

Me. Rev. Stat. Ann., Tit. 15, §3314(G) (1979)
Miss. SB2304 (approved) Art. 11, §66(1)(e) (1979)
N.H. H.B.831, Ch. 169-B:19(I)(b) (1979)
N.M. Stat. Ann. §13-14-44.1(B) (1979)
N.C. Gen. Stat. Art. 2, §110.22(5) (1978)
Ohio Rev. Code Ann. §2151.355(b) (1979)
Pa. Stat. Ann., Tit. 42, §6352(5)(6) (1979)
S.D. Codified Laws Ann. §26-8-39(2) (1978)
Tenn. Code Ann. §37.231(5) (1978)
Utah Code Ann. §78-3a-39(7) (1979)
Va. Code §16.1-279(E)(5) (1979)
Wash. Rev. Code Ann. §13.40.190(1) (1979)
Wisc. Stat. Ann. §48.34(8) (1979)
Wyo. Stat. §14-6-229(d)(i)(ii) (1979)

(See also Appendix)

35. Piersma, Ganousis, Kramer, n. 31, supra.

36. Schwarzenberger, Juvenile Probation: Restrictions, Rights and Rehabilitation, 16 St. Louis U.L.J. 276, 280 (1971).

37. Id. at 281; see also In re Weiner, 176 Pa. Super 255. 100 A.2d 915 (1954).

38. Id. at 281.

39. Report of the Advisory Committee to the Administrator on Standards for the Administration of Juvenile Justice, U.S. Dept. of Justice, LEAA, NIJJDP, Sept. 30, 1976, p.146; see also the following:

Ala. Code §12-15-31(a) (1979)
Ariz. Rev. Stat. z8-246(A)(B) (1979)
Calif. Welfare and Institution Code §607 (1979)
Colo. Rev. Stat. §19-3-118 (1978)
D.C. Code §16-2303 (1978)
Ga. Code Ann. §24A-2701(c); HB802, §24A-2701(f)
Idaho Code §16-1805 (1978)
Ill. Ann. Stat., Ch. 37, §705-11(1) (1978)
Kan. Stat. §38-806(c) (1979)
La. Code of Juvenile Procedure, Art. 89(c)
Minn. Stat. Ann. §260.181(4)
Mo. Ann. Stat. §211.041 (1979)
Mont. Code Ann. §41-5-205(3)
Nev. Rev. Stat. §62.070 (1977)
R.I. Gen. Laws §14-1-6 (1979)
P.R. §2003 (1971)
S.D. Codified Laws Ann. §26-8-49.1 (1978)
Tenn. Code Ann. §37-203(c) (1978)
Utah Code Ann. §78-3a-40 (1979)

40. Id. p.146; also see the following:

Ark. Stat. Ann. §45-508 (1979)
Conn. Gen. Stat. Ann. §46b-141(a) (1979)
Me. Rev. Stat. Ann. Tit. 15, §3316(2)(A)(B) (1979)
Md. Courts and Judicial Proceedings Code Ann. §3-825(a) (1978)
N.M. Stat. Ann. §13-14-35(A) (1979)
N.C. Gen. Stat. §78-286(5) (1978)
Vt. Stat. Ann. §658 (1979)
Va. Code §16.1-285 (1979)
Wyo. Stat. §14-6-231(a)(b)(c) (1979)

41. Conn. Gen. Stat. Ann. §46B-141(a)
Me. Rev. Stat. Ann. Tit. 15, §3316(2)(A)(B) (1979)
N.M. Stat. Ann. §13-14-35(A) & (H) (1979)
Vt. Stat. Ann. §568 (1979)

42. Ga. Code Ann. §24A-2701(b) (1979) (2 yrs.)
Md. Courts and Judicial Proceedings Code Ann. §3-825(b) (1978) (3 yrs.)
Mass. Gen. Laws Ann., Ch. 119, §39G(c) (1979) (6 mos.)
N.Y. Family Court Act §756(b) (1978-9) (18 mos.)
N.D. Cent. Code §27.20-36(2) (1979) (2 yrs.)
Wisc. Stat. Ann. §48.355(4) (1979) (1 yr.)

43. Ind. Code Ann. §31-6-4-19(a) (Burns, 1978)
Neb. Rev. Stat. §43-240 (1978)
Okla. Stat. Ann. Tit. 10, 51139(a) (1978-79)
Wyo. Stat. §14-6-231(b) (1979)

44. La. Code of Juvenile Procedure, Art. 89 (B)

45. Gagnon v. Sarpelli, 411 U.S. 779 (1973); Morrissey v. Brewer, 408 U.S. 471 (1972).

46. Gagnon v. Scarpelli, 411 U.S. 779, 779-91 (1973).

47. Id.

48. Id. at 791.

49. Piersma, Ganousis, Kramer, n. 31, supra.

50. Ala. Code §12-15-75 (1979)
Colo. Rev. Stat. §19-3-117(3) (1978)
D.C. Code §2326 (1978)
Fla. Stat. Ann. §39.11 (1979)
Ga. Code Ann. §24A-280(b) (1979)
Haw. Rev. Stat. §571.50 (1978)
Ill. Ann. Stat. Ch. 37, §705-3 (1978)

Kan. Stat. 538-829b (1979)
Ky. Rev. Stat. §205.510 (1978)
La. Code of Juvenile Procedure, Art. 93, (1979)
Miss. SB2304 (approved) Art. 11, §69 (1979)
Mont. Code Ann. §41-5-533 (1978)
Neb. Rev. Stat. §43-210(4) (1978)
N.M. Stat. Ann. §13-14-40 (1979)
N.Y. Family Court Act §779 (McKinney 1978-79)
N.D. Cent. Code §27-20-37 (1979)
Or. Rev. Stat. §419.529 (1979)
S.C. Code §14-21-90 (1978)
P.R. §2013 (1971)
S.D. Codified Laws Ann. §26-8-60 (1978)
Tenn. Code Ann. §37-238 (1978)
Tex. Fam. Code Ann., Tit. 3, §5405 (1978-79)
Utah Code Ann. §78-3a-45 (1979)
Va. Code §16.1-291 (1979)
Wisc. Stat. Ann. §48.363 (1979)
Wyo. Stat. §14-6-232 (1979)

51. Colo. 519-3-117 (1978)
Fla. Stat. Ann. §39.11 (1979)
Ill. Ann. Stat. Ch. 37, §705-3 (1978)
La. Code of Juvenile Procedure, Art. 95 (1979)
Neb. Rev. Stat. §43-210(4) (1978)
Tex. Fam. Code Ann., Tit. 3, §54.05 (1978-79)
Wisc. Stat. Ann. §48.363 (1979)

52. A good example is the Colorado statute which provides:

19-3-117. Probation - terms - release - revocation. (1) The terms and conditions of probation shall be specified by rules or orders of the court. Each child placed on probation shall be given a written statement of the terms and conditions of his probation and shall have such terms and conditions fully explained to him.

(2) (a) The court shall review the terms and conditions of probation and the progress of each child placed on probation at least once every six months.

(b) The court may release a child from probation or modify the terms and conditions of his probation at any time, but any child who has complied statisfactorily with the terms and conditions of his probation for a period of two years shall be released from probation, and the jurisdiction of the court shall be terminated.

(3) (a) When it is alleged that a child has violated the terms and conditions of his probation, the court shall set a hearing on the alleged violation and shall give notice to the child and his parents, guard-

ian or other legal custodian, and any other parties to the proceeding as provided in section 19-3-103.

(b) The child, his parents, guardian, or other legal custodian shall be given a written statement concerning the alleged violation and shall have the right to be represented by counsel at the hearing, and shall be entitled to the issuance of compulsory process for the attendance of witnesses, as provided in section 19-3-103(4).

(c) When the child has been taken into custody because of the alleged violation, the provisions of sections 19-2-102 and 19-2-103 shall apply.

(d) (I) The hearing on the alleged violation shall be conducted as provided in section 19-1-107.

(II) If the court finds that the child violated the terms and conditions of probation, it may modify the terms and conditions of probation, revoke probation, or take such other action permitted by this article which is in the best interest of the child and the public.

(III) If the court finds that the child did not violate the terms and conditions of his probation as alleged, it shall dismiss the proceedings and continue the child on probation under the terms and conditions previously prescribed.

(e) If the court revokes the probation of a person over eighteen years of age, in addition to other action permitted by this article, the court may sentence him to the county jail for a period not to exceed three months during which he may be released during the day for school attendance, job training, or employment, as ordered by the court.

53. Velasquez v. Pratt, 21 Utah 2d 229, 231, 443 p.2d 1020, 1021 (1968) (ct. held that juvenile probationer had a right to notice and hearing). See also Keller v. State ex rel. Epperson, 265 So.2d 497 (Fla. 1972); Adams v. Rose, 551 P.2d 948 (Alaska, 1976); Naves v. State, 91 Nev. 106, 531 P.2d 1360 (1975).

54. Clear and Convincing:

Ala. Code §12-15-75 (1979); see also N.Y. Family Court Act §779 (requires competent proof) (1978-9).

55. Preponderance of the Evidence:

D.C. Code §16-2326
Ill. Ann. Stat. Ch. 37, §705-3 (1978)
S.D. Codified Laws Ann. §26-8-60 (1978)

56. Beyond a Reasonable Doubt:

N.M. Stat. Ann. §13-14-40 (1979)

See also Mont. Code Ann. §41-5-533(3) (1978) which provides that the "standard of proof is the same standard used in probation revocation of an adult".

57. Hussey, "Perspectives on Parole Decision-Making with Juveniles", Criminology, Vol. 13, No. 4, Feb. 1976, p.450.

APPEAL AND COLLATERAL ATTACK

A. Right of Appeal

Unlike the constitutional guarantees in the Bill of Rights and in many state constitutions, such as the right to counsel and the privilege against self-incrimination, the right of appeal is not a "right" at all in the constitutional sense. Courts have never found that a constitutionally mandated right of appeal exists, even in adult criminal cases. (See Generally Law & Tactics in Juvenile Cases, 3rd Ed. Ch. 14, Appeals & Collateral Attack, p.393, National Juvenile Law Center (1977)). The fact, though, that the overwhelming majority of jurisdictions do provide for appellate review of juvenile court dispositions attests to its desirability. In re Gault,[1] suggests the difficulties that can arise if the juvenile has no right to appeal:

> As the present case illustrates, the consequences of failure to provide an appeal, to record proceedings, or to make findings or state the grounds for the juvenile court's conclusion may be to throw a burden upon the machinery for habeas corpus, to saddle the reviewing process with the burden of attempting to reconstruct a record, and to impose upon the Juvenile Judge the unseemly duty of testifying under cross-examination as to the events that transpired in the hearings before him.[2]

In general, appellate review is advantageous for at least two reasons: (1) it obviously corrects errors committed by trial courts, and (2) it contributes to uniformity of decision throughout a jurisdiction. Ambiguity and incompleteness of many juvenile court statutes make considerations of uniformity most important in this setting.[3] Appeals to higher tribunals are of great importance in establishing fundamental legal principles in the operation of the juvenile courts, and in establishing some limits on the exercise of the court's broad discretion.[4]

Although the right to appeal in juvenile cases is not guaranteed by the due process clause, when that right exists within a state, it is a denial of equal protection if it does not extend to juveniles.[5] Most juvenile codes, however, guarantee the right of appeal in juvenile cases. Generally, the statutes surveyed contain broad language describing who has the right to appeal.[6] The unique nature of juvenile courts, with their professed desire to effect beneficient individual treatment of juveniles, should not extend to the point of denying any party materially affected by an order of such a court the right to appellate review.[7] In delinquency cases, the juvenile is the real party in interest and should have the right to appeal. Courts have generally agreed with this proposition,[8] although some have required that the appeal be filed through a guardian.[9] Parents may appeal a decision that affects their custodial rights whether they were a party to the original proceeding[10] or not.[11] Statutes which specifically provide for a parent's right to appeal whenever his/her rights may be adversely affected insure adequate protection.[12]

Some statutes provide specifically that the state has a right to appeal;[13] others employ language that does not specifically identify the state as a party having a right of appeal, but which is broad enough to include the state. One statute, however, provides that any party other than the state may appeal.[15] Providing the state with a right of appeal may create serious double jeopardy problems. Recent decisions indicate that if the state is allowed to appeal adverse findings in a delinquency adjudication, the juvenile is denied his/her right not to be subjected twice to jeopardy for the same offense.[16] To be consistent with these decisions, future proposals should specifically deny the state the right of appeal, perhaps with limited exceptions.[17]

B. Appealable Orders

Language in state statutes commonly provides a right of appeal from all final orders or judgments of the juvenile court.[18] The stated reason for this limitation is to prevent undue delay in juvenile proceedings. The argument is made that if appeal from interlocutory orders is permitted, the resulting delay prevents the early consideration and resolution of primary issues.[19] Those orders of the court that are considered final have never been succinctly defined. A final order might appropriately be defined as an order ending the litigation between two parties by a determination of all rights of the parties and a disposition of all issues. The lack of a statutory definition

specifically defining what constitutes a "final order" will enable courts to inconsistently entertain or deny appeals of identical orders. In the interest of uniformity, statutes should incorporate more specific descriptions of precisely what constitutes final, appealable orders.

In the main, courts interpret the statutory limitation of finality to mean the entry of an order of disposition.[20] Most courts hold probationary dispositions to be final appealable orders despite their non-custodial nature.[21] Orders transferring jurisdiction to a criminal court are also considered in a majority of jurisdictions to be final.[22] The transfer order clearly represents a final determination by the juvenile court on the juvenile's amenability to treatment by the court. Accordingly, it should be readily appealable, and future proposals to this effect should be encouraged.

Orders which should be considered final are those which so alter the direction of the proceedings that an immediate appeal should be available in order to best promote the goals and values of the juvenile system as a whole.[23]

C. Habeas Corpus and Other Extraordinary Writs

The use of extraordinary writs as vehicles for appellate review of juvenile court decisions is largely of historical importance. Before the decision in In re Gault,[24] a number of states did not provide for appeals from juvenile court proceedings. At that time, therefore, the use of extraordinary writs

was the only method of attaining meaningful review in such jurisdictions. By far, the most commonly used method of collateral attack is that of habeas corpus which was, at an early date, accepted as an appropriate method of reviewing custody determinations of juvenile courts. Other methods of review of juvenile court proceedings by means of collateral attack may include such extraordinary writs as the writ of prohibition and the writ of certiorari.

Since all states now provide for appellate review in some manner, collateral attack has diminished in importance and the role of the extraordinary writ has changed. The writ of habeas corpus retains a continuing vitality as a means of challenging unlawful restraint, particularly in cases of preadjudication detention or if the statutory period for appeal of an order of disposition has expired and attempts to modify it have not been successful.[25] The writ of prohibition, used to prevent an inferior court from proceeding when it either has no jurisdiction or is exceeding the jurisdiction it does have, also remains useful in some limited situations.[26] The writ of certiorari, however, which has traditionally been limited to the correction of errors of law and fact, has generally been replaced by statutory provisions providing for appeal.

The use of an extraordinary writ had two major advantages over ordinary appellate processes: it was generally speedier than tedious appellate procedures and it tended to eliminate the

need for a transcript. However, writs are now unavailable in most instances, especially when an adequate remedy at law exists either by means of appeal or by a motion to modify the order. If provisions for expedited handling of appeals, especially from orders of detention, were incorporated into juvenile codes, this would further serve the goals of insuring that no child would be made to suffer the harms of institutionalization when it has not been proven necessary.

FOOTNOTES

1. In re Gault, 387 U.S. 1 (1967).

2. Id. at 58.

3. Bowman, Appeals from Juvenile Courts, 11 Crime & Delinquency 63, 64 (1965).

4. Law of Juvenile Delinquency, 36 (1959).

5. See Griffin v. Illinois, 351 U.S. 12 (1956); In re Brown, 439 F.2d 47, 53-54 (3rd Cir. 1971).

6. E.g. ALA. CODE §12-15-120(a) (1979) (an aggrieved party . . . may appeal); ARIZ. REV. STAT. §8-236(A) (1979) (any aggrieved party may appeal . . .); FLA. STAT. ANN. §39.14(1) (1979) (any child, and any parent or legal custodian of any child, affected by an order of the court may appeal . . .); HAW.REV. STAT. §571-54 (1978) (an interested party aggrieved by any order or decree of the court may appeal . . .); KAN. STAT. §38-829a (b) (1979) (any appeal from any final order . . . shall be allowed by the secretary of social and rehabilitation services, the guardian ad litem for the child, the child's parent, guardian or other legal custodian or any party to the original proceeding); KY. REV. STAT. §208.380(4) (1978) (any party aggrieved . . . may appeal from the juvenile court . . .); LA. CODE OF JUV. PROC. art. 98 (1979) (any person directly affected or the district attorney may appeal from a judgment of disposition); ME. REV. STAT. ANN. tit. 15, §2661(2) (1979) (any juvenile adjudged by the juvenile court to have committed a juvenile offense may, by his parent or parents, his next friend, guardian or attorney, appeal from such judgment or any orders based thereon); MASS. GEN. LAWS ANN., ch. 119, §26 (1979) (the child, parent, guardian or person appearing in behalf of such child, or the department, may appeal . . .); MINN. STAT. ANN. §260.29 (subdivision 1) (1979) (an appeal may be taken by the aggrieved person from a final order affecting a substantial right of the aggrieved person); MONT. CODE ANN. §41-5-532(1) (1978) (any party other than the state may appeal).

7. Institute of Judicial Administration, American Bar Association, Juvenile Justice Standards Project, Standards Relating to Appeals and Collateral Review, p.11 (Tent. Draft, 1977).

8. See, e.g., Dana J. v. Superior Court, 484 p.2d 595, (Cal. Super. 1971); In re Sippy, 97 A.2d 455 (D.C. Mun. Ct. App. 1953).

9. See, e.g., In re Cager, 248 A.2d 384 (Md. App. 1968); Brennan v. Civil Court, 444 S.W.2d 290 (Tex. 1968); Hernandez v. Hardy, 426 S.W.2d 258 (Tex. Civ. App. 1968).

10. See, e.g., In re Pankey, 38 Cal. App. 3d 919, 113 Cal. Rptr. 858 (Cal. App. 1974).

11. See, e.g., In re Hartman, 210 p.2d 53 (Cal. App. 1949); In re Dargo, 183 P.2d 282 (Cal. App. 1947); In re Santillanes, 138 P.2d 503 (N.M. 1943); In re Aronson, 58 N.W.2d 553 (Wis. 1953).

12. See, e.g., FLA. STAT. ANN. §39.14(1) (1979); KAN. STAT. §38-829a (b) (1979); MASS. GEN. LAWS ANN., ch. 119, §26 (1979).

13. See, e.g., ALA. CODE §12-15-120(a) (1979); LA. CODE JUV. PROC. art. 98 (1979); MASS. GEN. LAWS ANN. ch. 119, §26 (1979).

14. See, e.g., ARIZ. REV. STAT. §8-236(A) (1979); HAW. REV. STAT §571-54 (1978); KY. REV. STAT. §208.380(4) (1978); N.M. STAT. ANN. §13-14-36 (1979); WIS. STAT. ANN. §48.47 (1979);

15. See MONT. CODE ANN. §41-5-532(1) (1978).

16. See, e.g., In re P.L.V., 490 P.2d 685 (Colo. 1971); People v. D.K., 491 P.2d 81 (Colo. App. 1971); In re Waterman, 512 P.2d 466 (Kan. 1973); State v. Jackson, 503 S.W.2d 185 (Tenn. 1973); State v. Marshall, 503 S.W.2d 875 (Tex. Civ. App. 1973);

17. Institute of Judicial Administration, American Bar Association, Juvenile Justice Standards Project, Standards Relating to Appeals and Collateral Review, Standard 2.2., p.22-29 (Tent. Draft, 1977).

18. See, e.g., ALA. CODE §12-15-20 (1979); ARIZ. REV. STAT. §8-236(A) (1979); IDAHO CODE §16-1819 (1978); MINN. STAT. ANN. §260.29 (subdivision 1) (1979).

19. People v. Jiles, 251 N.E.2d 529, 531 (1969).

20. See, e.g., In re E.D.M., 490 P.2d 658 (Alaska 1971); In re Maricopa County, Juvenile Action No. J-74197, 514 P.2d 738 (Ariz. App. 1973); People v. D., 23 Cal. App. 3d 592, 100 Cal. Rptr. 351 (Cal. App. 1972).

21. See, e.g., In re J., 26 Cal. App. 3d 528, 103 Cal. Rptr. 21 (Cal. App. 1972); Clampffer v. Moore, 296 A.2d 44 (Pa. Super. 1972).

22. See, e.g., In re P.H., 504 P.2d 837 (Alaska 1972); Graham v. Ridge, 489 P.2d 24 (Ariz. 1971); Agnew v. Superior Court, 257 P.2d 661 (Cal. App. 1953); In re Doe (I), 444 P.2d 459 (Haw. 1968); Aye v. State, 299 A.2d 513 (Md. App. 1973); In re Waters, 281 A.2d 560 (Md. App. 1971); State v. Loray, 215 A.2d 539 (N.J. 1965); In re Doe (II), 519 P.2d 133 (N.M. Appl 1974); State v. Ross, 262 N.E.2d 427 (Ohio App. 1970); State v. Yoss, 225 N.E.2d 275 (Ohio App. 1967); State v. Little, 407 P.2d 627 (Ore. 1965), cert. denied, 395 U.S. 902 (1966); State ex rel. Juvenile Dept. v. Johnson, 501 P.2d 1011 (Ore. App. 1972); In re Houston, 428 S.W.2d 303 (Tenn. 1968). The National Juvenile Law Center has available, upon request, materials outlining the appealability of the transfer decision in all states.

23. Institute of Judicial Administration, American Bar Association, Juvenile Justice Standards Project, Standards Relating to Appeals and Collateral Review, Standard 2.1, p.18 (Tent. Draft 1977).

24. 387 U.S. 1 (1967).

25. Fritts v. Frugh, 92 N.W.2d 604 (Mich. 1958).

26. State ex rel. T.J.H. v. Bills, 504 S.W.2d 76 (Mo. 1974); State ex rel. Catholic Charities v. Hoester, 494 S.W.2d 70 (Mo. 1973); State ex rel. R.L.W. v. Billings, 451 S.W.2d 125 (Mo. 1970); State ex rel. D.A.S. v. Adams, 485 S.W.2d 442 (Mo. App. 1972).

THE RIGHTS OF INSTITUTIONALIZED JUVENILES

A. Introduction

In keeping with the juvenile court system's philosophy of treatment and rehabilitation, most juvenile codes address the need for treatment of the individual brought before the court. Comment, An Important Step Towards Recognition of the Constitutional Right to Treatment, 16 St. Louis U.L.J. 340, 343 (1971). Typical of juvenile court laws is the following provision found in the STANDARD JUVENILE COURT ACT:

> Each child coming within the jurisdiction of the court shall receive, preferably in his own home, the care, guidance and control that will conduce to his welfare and the best interests of the state, and . . . when he is removed from control of his parents the court shall secure for him care as nearly possible equivalent to that which they would have given him.

National Council on Crime and Delinquency, STANDARD JUVENILE COURT ACT §1 (1959), cited in Comment, An Important Step Towards Recognition of the Constitutional Right to Treatment, supra. (See also Dispositional Statutes chapter).

Examination of juvenile institutions, however, has revealed an almost universal absence of treatment - oriented programs. (See Introduction and Dispositional Statutes chapters). The Supreme Court, in response to the situation existant in many juvenile institutions has stated: "There is evidence, in fact, that there may be grounds for concern that the child receives the worst of both worlds: That he gets neither the protections accorded to adults nor the solicitous care and regenerative

treatment postulated for children". Kent v. United States, 383 U.S. 541, 556 (1966).

The right to treatment for detained and institutionalized juveniles has been judicially affirmed on a statutory basis since the purpose clauses of most state codes resemble that of the Standard Juvenile Court Act, supra, see Creek v. Stone, 379 F.2d 106 (D.C. Cir. 1967), and on constitutional grounds. The affirmation of a constitutionally-protected right to treatment has closely paralleled judicial recognition of a right to treatment for institutionalized mentally ill and mentally retarded persons. See, Birnbaum, The Right to Treatment, 46 A.B.A. §499 (1960); Note, Civil Commitment of the Mentally Ill, 87 Harv. L. Rev. 1190 (1974); Comment, Wyatt v. Strickney and the Right of Civilly Committed Mental Patients to Adequate Treatment, 86 Harv. L. Rev. 1282 (1973); Kittrie, Can the Right to Treatment Remedy the Ills of the Juvenile Process?, 57 Geo. L. J. 848 (1969); Reaves, The Juvenile's Right to Receive Treatment, 7 Cum.-Sam. L. Rev. 13.17 (1976); Pyfer, The Juvenile's Right to Receive Treatment, 6 Family L.Q. 279 (1972); Note, Judicial Recognition and Implementation of a Right to Treatment for Institutionalized Juveniles, 49 Notre Dame Law. 1051 (1974).

The constitutional basis for the juvenile's right to receive rehabilitative treatment is grounded in the due process clause of the fourteenth amendment. See, e.g., Inmates of Boys' Training School v. Affleck, 346 F.Supp. 1354 (D.R.I. 1972). The state, as

parens patriae, is permitted to confine juveniles for varying lengths of time without providing the full panoply of procedural safeguards guaranteed adult criminal defendants. See In re Gault, 387 U.S. 1, 17 (1967). As the quid pro quo for depriving the child of procedural protections, the state must provide rehabilitative treatment.[1] The logic of this analysis is inescapable when one considers that the denial of full due process rights is accomplished under the theory that according a child full due process would disrupt the rehabilitative atmosphere upon which juvenile court systems are predicated. See In re Gault, 387 U.S. 1, 14-16 (1967).

In contrast to the quid pro quo analysis employed under procedural due process, substantive due process analysis addresses directly the State's asserted benevolent purposes for exercise of its parens patriae authority. Substantive due process, as a principle, recognizes that the fourteenth amendment provides not only procedural guarantees against the deprivation of liberty but also protects the substantive aspects of liberty against unreasonable restrictions or interventions by the State. Kelley v. Johnson, 425 U.S. 238 (1976). See Stanley v. Illinois, 405 U.S. 645 (1972); Meyer v. Nebraska, 252 U.S. 390 (1923). In order to satisfy the requisites of substantive due process, then, "[t]he nature and duration of [confinement] [must] bear some reasonable relationship to the purpose for which the individual is committed." Jackson v. Indiana, 406 U.S. 715, 738 (1972) (emphasis added).

When a juvenile is deprived of his/her liberty through the juvenile court process, subsequent retention of jurisdiction over the juvenile is clearly intended to further the State's objective of rehabilitation. If, then, after depriving the juvenile of his/her liberty, the state fails to provide treatment, the nature of the juvenile's confinement bears no reasonable relation to the purpose for intervention, i.e., rehabilitation, and must be deemed a violation of substantive due process. See Jackson v. Indiana, supra. Courts, therefore, in order to avoid the constitutional infirmity inherent in confinement absent treatment, have concluded that juveniles, as individuals confined pursuant to the state's parens patriae authority for purposes of rehabilitation, have a judicially cognizable right to receive rehabilitative treatment.[2] Implicit in the juvenile's right to receive treatment is the right to receive that treatment in the least restrictive environment. See Halderman v. Pennhurst State School and Hospital, 446 F. Supp. 1295 (E.D. Pa. 1977); Gary W. v. Louisiana, 437 F. Supp. 1209 (E.D. La. 1976). In as much as juvenile court jurisdiction infringes on the juvenile's fundamental right to liberty, implementation of that jurisdiction must be pursued in a manner calculated to avoid an unnecessary deprivation of liberty. See Shelton v. Tucker, 364 U.S. 479 (1960). Several state legislatures have mandated the selection of dispositional alternatives on a "least restrictive alternative" basis. (See Dispositional Statutes chapter).

B. Protecting the Rights of Institutionalized Juveniles - the Need for Legislative Advocacy

Mountain View's history, well known to the inmates of both Mountain View and Gatesville, has been one of brutality and repression. New boys placed at Mountain View are called "fresh fish", and are "tested" by various forms of physical abuse, applied by staff or other boys with the encouragement of staff. For example, one entering boy, identified as C.W., was initially beaten by the other boys in his cottage with the tacit approval of Correctional Officer Flores. Later that day, the boys who administered the beating were in turn "racked" by Flores - that is, forced to line up against the wall with their hands in their pockets while the correctional officer punched each one in the stomach. On the following day, while Correctional Officer Stovall watched, C.W. was hit and kicked by seven or eight boys in the corner of the cottage day room for more than an hour. After C.W. had been knocked unconscious, Stovall stopped further abuse, announcing that he did not want any "dead fish" on his hands. Morales v. Turman, 383 F.Supp. 53 (E.D. Tex. 1974).

As indicated by the preceeding introductory comments, the judicial system has been the primary arena in which the right to rehabilitative treatment for institutonalized juveniles has been advocated. In fact, the federal courts have been the primary protectors of all constitutional rights for such children. General institutionalized conditions and practices including the indiscriminate use of solitary confinement, physical brutality, inadequate medical care, lack of educational programming, unwarranted restrictions on correspondence, telephone and visitation privileges and indiscriminate administration of drugs have all come under judicial scrutiny. Courts have found deplorable conditions and practices in juvenile institutions unconstitutional on numerous constitutional grounds. Many of these condi-

tions and practices also have been declared violations of the eighth amendment proscription against cruel and unusual punishment. Additionally, courts have fashioned broad-based relief to remedy existing abuses. For example, in Morales v. Turman, supra, the court ventured beyond recognition of the institutionalized juvenile's right to receive individualized rehabilitative treatment to formulate minimally acceptable standards for medical, educational and vocational services, psychiatric and psychological counseling, staff and personnel qualifications, recreation activities, general correspondence privileges, dietary services and physical plant facilities. Cf. Nelson v. Heyne, 492 F.2d 352 (7th Cir. 1974) (standards for rehabilitative treatment, administration of drugs and corporal punishment); Martarella v. Kelley, 359 F.Supp. 478 (S.D.N.Y. 1973) (standards for rehabilitative treatment, recreation, psychiatric services and personnel qualifications); Inmates of Boy's Training School v. Affleck, 346 F.Supp. 1354 (D.R.I. 1972) (standards for medical and psychiatric services, recreation, general correspondence rights, personal hygiene, access to reading materials, use of solitary confinement and physical plant facilities). In Santiago v. City of Philadelphia, No. 74-2589 (E.D. Pa. Dec. 22, 1978) (stipulation in partial settlement), an extensive argument set forth standards for a juvenile detention facility encompassing:

i) intake;
ii) alternative detention placements;

iii) corporal punishment and isolation, including disciplinary procedures for fights and sexual incidents;
iv) grievance procedures;
v) general institutional conditions;
vi) visitation, privacy and freedom of movement, including access to recreational activities;
vii) medical, social, dietary and custodial services;
viii) general correspondence, including mail and telephone privileges;
ix) personnel qualifications; and
x) monitoring.

Notwithstanding the apparent gains occasioned from litigation, oppressive conditions and abusive practices are prevalent in juvenile detention facilities and institutions. (See Introduction chapter). See Sarri and Hasenfeld, Eds., Brought to Justice? Juveniles, the Courts and the Law, Assessment of Juvenile Corrections, U. of Michigan (1976); Courtless, Ferster & Snethen, Juvenile Detention: Protection, Prevention or Punishment?, 38 Fordham L. Rev. 161 (1969). See generally LaPook & Nejelski, Monitoring the Juvenile Justice System: How Can You Tell Where You're Going, If You Don't Know Where You Are?, 12 Am. Crim. L. Rev. 9 (1974).

Litigation has resulted in improved conditions. Judicial victories, however, result from long and costly adversarial proceedings. Litigation is undertaken on a case-by-case basis and judicial orders of broad-based relief must be enforced, often by threat of subsequent judicial sanctions. Further, judicially outlined standards for the care and treatment of institutionalized children represent only the minimally acceptable constitu-

tional standards. While the history of litigation in this area underscores the prevalence of institutional abuses, the establishment of humane conditions and appropriate care and treatment for this nation's institutionalized children cannot be fully realized without affirmative legislative action, which, at the very least, must incorporate the mandates of recent court decisions into state statutes.

C. Legislative Trends

The state of West Virginia, in recognition of this exigency, has adopted legislation articulating the rights of detained and institutionalized juveniles. W. VA. CODE ch. 49, §49-5-16a (Supp. 1979). (The West Virginia code is set forth infra, in its entirety). Although the Code is not a comprehensive statement of the rights of institutionalized juveniles, it does establish some important protections. (Citations to additional model standards and proposed standards are inserted). The West Virginia statute provides that each "child in custody or detention shall have, at a minimum, the following rights":

> (1) A child shall not be punished by physical force, deprivation of nutritious meals, deprivation of family visits or solitary confinement,
> [See, Standards Relating to Corrections Administration, IJA/ABA Juvenile Justice Standards Project, Tentative Draft, 1976 (Approved 1979); Child Welfare League, Standards for Services of Child Welfare Institutions 45 (1977); New Jersey Department of Corrections, Manual of Standards for Juvenile Detention Facilities 21 (1978).];

> (2) A child shall have the opportunity to participate in physical exercise each day,
> [See, IJA/ABA, Standards Relating to Corrections Administration, supra, Standard 7.6 and Commentary; Child Welfare League, Standards for Services of Child Welfare Institutions, supra, at 55.];
>
> (3) Except for sleeping hours a child in a state facility shall not be locked alone in a room unless such child is out of control,
> [See, Standards Relating to Corrections Administration, supra, at 165; Child Welfare League, Standards for Services of Child Welfare Institutions, supra, at 45.];
>
> (4) A child shall be provided his own clothing or individualized clothing which is clean, supplied by the facility and daily access to showers,
> [See Child Welfare League, Standards for Services of Child Welfare Institutions, supra, at 41.; IJA/ABA, Standards Relating to Corrections Administration, supra, Standard 7.6 and Commentary];
>
> (5) A child shall have constant access to writing materials and may send mail without limitation, censorship or prior reading, and may receive mail without prior reading, except that mail may be opened in the child's presence, without being read to inspect for contraband,
> [See New Jersey Department of Corrections, Manual of Standards for Juvenile Detention Facilities, supra, at 30.; IJA/ABA, Standards Relating to Corrections Administration, supra, Standard 7.6 and Commentary];
>
> (6) A child may make and receive regular local phone calls without charge and long distance calls to his family without charge at least once a week, and receive visitors daily on a regular basis,
> [See Corrections Administration, supra];
>
> (7) A child shall have immediate access to medical care as needed,
> [See American Medical Association, Standards for Medical and Health Services for Juveniles in Correctional Facilities (Proposed Standards 1978)]; American Academy of Pediatrics, "Health Standards for Juvenile Court Residential Facilities," Pediatrics, Vol. 52 No. 3 (Sept., 1973).

(8) A child in a juvenile detention facility or state institution shall be provided access to education including teaching, educational materials and books, [See, IJA/ABA Juvenile Justice Standards Project, Corrections Administration Standards Relating to Schools and Education (Tentative Draft, 1977), supra; Child Welfare League, Standards for Services of Child Welfare Institutions, supra, at 46; American Correctional Association, Library Standards for Juvenile Correctional Institutions, (1975).];

(9) A child shall have reasonable access to an attorney upon request.
[See Corrections Administration, supra, Standard 7.6 and Commentary]; and

(10) A child shall be afforded a grievance procedure, including an appeal mechanism.
[See Corrections Administration, supra, Standard 9.2 and Commentary]. [See infra.

"Upon admission to a jail, detention facility or institution, a child shall be furnished with a copy of the rights provided him by virtue of this section . . . ." W. VA. CODE ch. 49, §49-5-16a (Supp. 1979).

The Rhode Island legislature has also adopted a Children's Bill of Rights for all children placed or treated under the supervision of the Department of Children and their Families (newly established). See Senate Bill 79-5355A, January Session 1979, enacted into law 1979, amending Title 42 of the General Laws of Rhode Island. The Bill of Rights guarantees the following:

"42-72-15. Children's bill of rights. -
A. No child placed or treated under the supervision of the department in any public or private facility shall be deprived of any personal property or civil rights, except in accordance with due process.
B. Each child placed or treated under the supervision of the department in any public or private

facility shall receive humane and dignified treatment at all times, with full respect for his personal dignity and right to privacy, consistent with his treatment plan.
C. Each child placed in a secure facility under the supervision of the department shall be permitted to communicate with any individual, group or agency, consistent with his treatment objectives; shall be provided writing materials and postage; and shall be permitted to make or receive telephone calls to or from his attorneys, guardians ad litem, special advocates, or child advocate at any reasonable time.
D. The department shall adopt rules and regulations pursuant to the Administrative Procedures Act regarding children placed in secure facilities to specify the following:
(1) When a child may be placed in restraint or seclusion or when force may be used upon a child;
(2) When the head of a facility may limit the use or receipt of mail by any such child and a procedure for return of unopened mail; and
(3) When the head of a facility may restrict the use of a telephone by any child.
E. A copy of any order placing a child at a secure facility under the supervision of the department in restraint or seclusion shall be made a part of the child's permanent clinical record. In addition, any special restriction on the use or receipt of mail or telephone calls shall be noted in writing, signed by the head of the facility or his designee, and made a part of the child's permanent clinical record.
F. Each child placed or treated in a secure facility under the supervision of the department shall be permitted to receive visitors subject to reasonable restriction consistent with the child's treatment plan. The head of each facility shall establish visiting hours and inform all children and their families and other visitors of these hours. Any special restrictions shall be noted in writing, signed by the head of the facility or his designee, and made a part of the child's permanent clinical record.
G. Each child may receive his clergyman, attorney, guardian ad litem, special advocate, or child advocate at any reasonable time.
H. No person shall be denied employment, housing civil service rank, any license or permit, including a professional license, or any other civil or legal right, solely because of a present or past placement with the department except as otherwise provided by statute.

I. Each child under the supervision of the department shall have the right to counsel, and the right to receive visits from physicians and mental health professionals.

J. Each child shall have a right to a hearing pursuant to rules and regulations promulgated by the department if he is involuntarily transferred by the department to any facility outside the state of Rhode Island in accordance with the procedure set forth in section 42-72-14 of this chapter.

K. The children's bill of rights shall be posted in a conspicuous place within any secure facility for the residential housing of children.

L. Every deliverer of services with whom the department enters into a purchased services agreement shall agree in writing to observe and post in a conspicuous place, the aforementioned Children's Bill of Rights.

M. Any child aggrieved by a violation of the Children's Bill of Rights may petition the Family Court for appropriate equitable relief. The Family Court shall have exclusive original jurisdiction notwithstanding any remedy contained in Title 42-35 of the general laws.[3]

The Rhode Island and West Virginia statutes are certainly rogressive legislation. Neither, however, sets forth specific tandards for the use of solitary confinement, details when force ay be used upon a child or the components of adequate treatment, ducational, or medical care programs. While legislation cannot ncompass the detailed daily procedures to be followed by institutional staff, it can set forth the parameters within which ules and regulations must be promulgated. It is, therefore, mperative that legislatures address the all-too-common institutional abuses such as corporal punishment, solitary confinement, lack of rehabilitative treatment, lack of educational programming and inadequate medical treatment with sufficiently detailed standards so as to guarantee that the goals of humane

and dignified treatment will be realized. It is also important that such legislation encompass all service sub-contractors to the "department" as well as all non-secure facilities for the care of children. See Rhode Island Bill of Rights, Section L, supra.

The State of California's codified grievance procedures for juveniles committed to the California Youth Authority is a good example of legislative specificity. Compare the following provisions with the West Virginia Code, supra, which mandates only that "a child shall be afforded a grievance procedure, including an appeal mechanism". The California mandates, in part, a system which shall:

(a) Provide for the participation of employees of the department and of persons committed to the Youth Authority on as equal a basis and at the most decentralized level reasonably possible and feasible in the design, implementation and operation of the system;

(b) Provide, to the extent reasonably possible, for the selection by their peers of persons committed to the Youth Authority as participants in the design, implementation and operation of the system;

(c) Provide, within specific time limits, for written responses with written reasons in support thereof, to all grievances at all decision levels within the system;

(d) Provide for priority processing of grievances which are of an emergency nature, including, but not limited to, matters which would, by passage of time required for normal processing, be made moot and matters in which delay would subject the grievant to substantial risk of personal injury or other damage;

(e) Provide for the right of grievants to be represented by another person committed to the Youth Authority, by an employee, or by any other person, including a volunteer who is a regular participant in departmental operations;

(f) Provide for safeguards against reprisals against any grievant or participant in the resolution of a grievance;

(g) Provide, at one or more decision levels of the process, for a full hearing of the grievance at which all parties to the controversy and their representatives shall have the opportunity to be present and to present evidence and contentions regarding the grievance;

(h) Provide a method of appeal of grievance decisions available to all parties to the grievance, including, but not limited to, final right of appeal to advisory arbitration of the grievance by a neutral person not employed by the department, the decision of such arbitrator to be adopted by the department unless such decision is in violation of law, would result in physical danger to any persons, would require expenditure of funds not reasonably available for such purpose to the department, or, in the personal judgment of the director, would be detrimental to the public or to the proper and effective accomplishment of the duties of the department;

California Welfare and Institutions Code §1766.5 (West, 1979 Supp.). See also California Youth Authority, Right to be Heard: Evaluation of the Ward Grievance Procedure in the California Youth Authority (1978). Care must be taken in legislative drafting, however, not to substitute grievance procedures for the right to litigate such issues in court. This could be accomplished by a simple statement to this effect in the grievance procedure section of the code or regulations.

C. Conclusion

The Juvenile Justice and Delinquency Prevention Act stands as a clear indictment of our juvenile justice system, particularly the unwarranted confinement of children. Legislative action to deinstitutionalize children and provide care in the least restrictive, appropriate environments is urgent. The number of children who remain institutionalized must be dras-

tically reduced, but legislators must also assure that these children receive the care and treatment in accordance with the highest standards and the establishment of such standards must be translated into departmental rules and regulations.

> The courts, as we have seen, are attempting to fulfill their obligation to assure that institutionalized juveniles receive adequate treatment. Unfortunately, the limits of judicial power are apparent. Legislatures can define procedures and remedies far more precisely than can the courts. If a legislature were so inclined, it could provide the sort of policy-making and enforcement apparatus characteristic of administrative agencies in order to further and protect the right to treatment.

National Institute for Juvenile Justice and Delinquency Prevention, Office of Juvenile Justice and Delinquency Prevention, Juvenile Dispositions and Corrections (1977).

FOOTNOTES

1. See, e.g., Nelson v. Heyne, 355 F.Supp. 451, 459 (N.D. Ind. 1972), aff'd, 491 F.2d 352, 359 (7th Cir. 1974), cert. denied, 417 U.S. 976 (1974); Collins v. Bensinger, 347 F.Supp. 273 (N.D. Ill. 1974), cert. denied, 422 U.S. 1058 (1975); Inmates of Boys' Training School v. Affleck, 347 F.Supp. 1354, 1364 (D.R.I. 1972). Other cases recognizing the right to treatment are the following: McRedmond v. Wilson, 533 F.2d 757 (2d Cir. 1976); Vann v. Scott, 467 F.2d 1235 (7th Cir. 1972); Morgan v. Sproat, 432 F.Supp. 1130, 1136 (S.D. Miss. 1977); Gary W. v. Louisiana, 437 F.Supp. 53, 124 (E.D. La. 1976) (juvenile delinquents, mentally retarded and mentally ill children); Pena v. New York State Division for Youth, 419 F.Supp. 203, 207 (S.D.N.Y. 1976); Roe v. Pennsylvania, C.A. No. 74-519 (slip opinion dated June 7, 1976, W.D. Pa.); Morales v. Turman, 383 F.Supp. 53, 124 (E.D. Tex. 1974), rev'd on other grounds, 535 F.2d 864 (5th Cir. 1976), rev'd per curiam and remanded for ruling on merits, 430 U.S. 322 (1977), remanded for further hearing, 562 F.2d 993 (5th Cir. 1977), reh. denied, 565 F.2d 1215 (5th Cir. 1977); Baker v. Hamilton, 345 F.Supp. 345 (W.D. Ky. 1972). Children in need of supervision ("CHINS") have also been held to have a constitutional right to treatment. Martarella v. Kelley, 349 F.Supp. 575, 585, 598-600 (S.D.N.Y. 1972), enforced, 359 F.Supp. 478 (S.D.N.Y. 1973).

2. See Morgan v. Sproat, 432 F.Supp. 1130 (S.D. Miss. 1977); Nelson v. Heyne, 355 F.Supp. 451 (N.D. Ind. 1972), aff'd, 492 F.2d 352 (7th Cir. 1974), cert. denied, 417 U.S. 976 (1974); Martarella v. Kelley, 349 F.Supp. 575 (S.D.N.Y. 1972); Inmates of Boys' Training School v. Affleck, 346 F.Supp. 1354 (D.R.I. 1972). See also Gary W. v. Louisiana, 437 F.Supp. 1209 (E.D. La. 1976).

3. The Congress of the United States has codified general protections for all juveniles subject to federal jurisdiction. Juveniles detained prior to disposition and committed to the custody of the Attorney General shall be provided with:

> adequate food, heat, light, sanitary facilities, bedding, clothing, recreation, counseling, education, training, and medical care including necessary psychiatric, psychological, or other care and treatment.
> 18 U.S.C.A. §5035; §5039 (Supp. 1979).

CONFIDENTIALITY OF PROCEEDINGS AND RECORDS

A. Introduction

In the past, nearly every state provided for a limitation on access by the public to both juvenile court proceedings and juvenile court records. Because of the rehabilitative goals of the juvenile court system, these provisions have traditionally been thought to best advance the goals of the system. Leading experts have long recognized that although a youth's association with the juvenile court will eventually terminate, the effect of the association often lingers on, and may harm the individual for many years. Juvenile court associations are most often found to adversely effect persons seeking employment in either the public or the private sector. In addition, a juvenile court record may adversely limit opportunities for higher education and may seriously impede the ability of a person to obtain insurance.

In an effort to alleviate these serious problems, legislatures have traditionally enacted statutes that limit access to juvenile court proceedings, limit access to juvenile court and arrest records, and allow for the eventual expungement or destruction of those records. While it has long been recognized that these provisions have been ineffective in providing the protections that legislators expected, the controversy over how to handle the problem of juvenile court records has taken a new tack in recent years. A growing number of persons involved in

the juvenile justice field are beginning to articulate support for public trials and, in many instances, public records. While a public trial is not necessarily synonymous with a public record, it is likely to mean greater public exposure of the names and addresses of children accused of juvenile delinquency. The arguments for and against public trials and public records will be set out briefly below.

B. The Right to a Public Trial

Over 80% of the states currently limit access to juvenile trials to persons with a specified interest in the proceeding. This is usually interpreted to mean members of the youth's family, or other persons the youth is interested in having attend, as well as persons who may have a general or specific interest in juvenile justice. In the remaining handful of states, statutes provide that the general public is not excluded except in those instances where the court finds that exclusion would be in the best interest of the child. These provisions very closely approximate those suggested by proponents of public trials.

In the debate that has grown between the two groups, proponents of public trials argue that the secrecy that surrounds juvenile court proceedings has failed to provide protection for children as it was intended to do. Instead of serving to keep a youth's name from the public, private trials serve only to establish a star chamber atmosphere in which the juvenile court judge rules supreme. Persons are excluded from hearings, not out of

concern for the youth, but out of a desire to protect the court and its processees from the intense scrutiny that would bring its faults and weaknesses to the public eye. In essence, proponents of public trials argue that existing provisions serve only to perpetuate archaic procedures, and routine deprivations of rights. Further, a public trial would satisfy the community's curiosity with respect to the disposition of juvenile criminals.

While the opponents of public trials do not argue with any but the last of these reasons, their approach would attempt to place other safeguards on the process. Among these safeguards might be (1) allowing a youth a public trial upon request; (2) establishing a citizens' monitoring committee that would routinely view court hearings; (3) rotating judges every year in order to avoid the abuse of power that almost inevitably occurs when any one person holds that position for a long period of time. They also suggest that public trials and the attendant publicity will interfere with the rehabilitation process. See Howard, Grisso, Neems, "Publicity and Juvenile Court Proceedings," 11 CLEARINGHOUSE REV. 203 (1977) which documents the deleterious effects of publicity on an eleven-year-old child charged with murder. Furthermore, there is genuine concern that the juvenile court will order dispositions because of public pressure rather than because of the needs of the child. Although most proponents of public trials would not disagree with these positions, they would simply suggest that the safeguards would be ineffectual in solving the problems that exist.

C. Confidentiality of Juvenile Court Records

As stated previously, almost 80% of all states provide for private trials; and, the vast majority of these states also provide that court records as well as records of arrest are to be maintained separate from the records of adults and are not to be opened to the general public. For the most part, those who advocate for the maintenance of these kinds of provisions base their arguments on the theory that the juvenile system is designed to habilitate youth, and that habilitation is fostered by protecting children from the disabilities that normally adhere to a criminal prosecution. Practically, the only way that these disabilities can be prevented is to assure that the information regarding a youth's association with the juvenile court will be kept confidential. On the other hand, those persons who advocate that juvenile records should be public base their arguments on, (1) the fact that these provisions are typically used to thwart the rights of the child, rather than to promote them; (2) the public's need to know and; (3) the increase in serious youth crime.

Unfortunately, provisions in state laws preventing access to these records have been singularly ineffective. Generally, members of the military, prospective employers, and representatives of educational institutions have had little difficulty in obtaining information about a youth's past record. Even when statutes make the revelation of such information a misdemeanor,

the information finds its way into the hands of members of the public. Furthermore, it appears that those with the greatest need for access to juvenile court records are frequently given the hardest times in attempting to gain access. Lawyers who defend children typically complain that provisions limiting access to juvenile court records by the general public are most often used as tools to prevent discovery and to thwart defense efforts to adequately prepare for court hearings. It is not unusual for a child's lawyer to have to obtain a court order to view his/her client's records. When counsel is able to get access to these files, he or she may not be allowed to photocopy them, but may be required to hand copy necessary information. Many opponents of public records would, therefore, require that juvenile files be made available to the youth and his/her attorney in every instance without court order.

Another area that merits some discussion is that of social files. Even if trials are public, many people believe that social files should always be maintained in confidence because of the nature of the materials they contain. Unlike the court file which may contain only the petition and other reflection of the court process, the social file is likely to hold personal observations and evaluations that are highly subjective. The stigma arising from erroneous or hasty characterization in those files may be disastrous. See Volenik, "Juvenile Court and Arrest Records," 9 CLEARINGHOUSE REV. 169 (1975).

D. Media Involvement

A serious issue that is inexorably intertwined with the issues of public trials and public records is media involvement in the juvenile court proceeding. A number of states attempt to prohibit the publication by any of the mass media of the names or other identifying information of juveniles accused of committing crimes. These provisions do not always contain bars to the presence of the mass media at hearings. Instead, they are typically written in terms of a prohibition on the publication of the names, rather than upon presence. In fact, certain statutes would allow the media to attend hearings and to publish information about the hearings and about the disposition of the juvenile involved, but would prohibit the actual use of specific identifying information. These kinds of provisions are particularly popular with the group of individuals who would contend that private trials provide no check for abuses of authority by the juenile court judge. They often suggest that allowing the media to monitor hearings would serve as an adequate restraint on abuse of power.

While this position has obvious merit, it fails to take into consideration recent Supreme Court decisions that have largely eroded the state's power to limit publication of information lawfully obtained. In Davis v. Alaska, 415 U.S. 308 (1974), the Supreme Court rejected the state's argument that a juvenile should not be cross-examined with regard to his juvenile record

for impeachment purposes because of the state's interest in protecting the anonymity of the juvenile offender. The court concluded that the defendant's sixth amendment right of confrontation must prevail over the state's interest in protecting juveniles from adverse publicity.

Two years later, in Oklahoma Publishing Co. v. District Court, 430 U.S. 308 (1976), the Court struck down a state court injunction prohibiting the news media from publishing the name or photograph of an eleven year old boy who was being tried before a juvenile court. Despite a state statute closing juvenile trials to the public, the juvenile judge had permitted reporters and other members of the public to attend an initial hearing. Subsequent to that hearing, the juvenile court attempted to halt publication of information obtained at the hearing. The Supreme Court, however, held that once information was "publicly revealed" or "in the public domain," the dissemination of that information could not be restrained.

Another case, recently decided by the Supreme Court, further erodes the efficacy of using the media as monitors who would refrain from mentioning the identity of a juvenile. On June 26, 1979, the Supreme Court decided Smith v. Daily Mail Publishing Co., etc., et al., 47 L.W. 4824. In West Virginia, a statute existed prohibiting newspapers from publishing the name of any child in connection with a juvenile court proceeding without a written court order. Three radio stations and two newspapers

carried identifying information about a fourteen-year-old who shot and killed a classmate at school. The State of West Virginia sought to justify its statute on the grounds that it would protect the anonymity of the juvenile offender. The confidentiality assured by the statute would further the child's rehabilitation and protect him from future employment or other disabilities that might occur because of the offense.

Just as the Court in Davis, supra, found the defendant's sixth amendement right to confrontation more important, the Court in Smith, supra, concluded that where information is lawfully obtained, as it was in the West Virginia case, the state may not prohibit its publication except when necessary to further an interest more substantial than the one advocated by the state.

E. Expungement of Records

Well over half the states currently have provisions that allow for sealing or destroying juvenile court records. It must be recognized that sealing provisions do not mandate the total destruction of all records. Typically, they allow for the sealing or destruction of only social files or arrest records; the docket sheets or official court files will be maintained although they may be sealed or placed in a separate area open to no one.

Many persons argue for the total destruction of all records theorizing that unless the records are totally destroyed, certain information will inevitably become available and, ultimately, harm the youth. Other persons, recognizing the volatility of

this position, argue that total destruction of records may place a youth in a more vulnerable position than if his/her entire record was left intact. The theory behind this argument is that, in many instances, the conduct that brought a juvenile to the attention of the court may be far less serious than the label that is attached may imply. For example, a youth may be charged with and found delinquent for assault for what may be no more than a school boy brawl. Absent detailed information, a youth may be unable to prove that his criminal action was of a minimal nature at best.

F. Conclusion

It is important in preparing legislation to ascertain with some certainty, the goals of that legislation. If protection of youth is the primary goal, then legislation must protect not only against public exposure, but also against an over-zealous prosecutor and an over-zealous judge. If protection of the public is the primary goal, then the protections offered youth may be modified. It is important to thoroughly discuss goals and avenues prior to the offering of legislation. Failure to do so will result in the drafting and possible passage of legislation which will accomplish neither goal.

ALI/ABA JUVENILE JUSTICE STANDARDS
PROJECT
STANDARDS RELATING TO ADJUDICATION
(Tent. Draft. 1977)

RIGHT TO A PUBLIC TRIAL

PART VI: PUBLIC ACCESS TO ADJUDICATION PROCEEDINGS

6.1 Right to a public trial.

Each jurisdiction should provide by law that a respondent in a juvenile court adjudication proceeding has a right to a public trial.

6.2 Implementing the right to a public trial.

A. Each jurisdiction should provide by law that the respondent, after consulting with counsel, may waive the right to a public trial.

B. Each jurisdiction should provide by law that the judge of the juvenile court has discretion to permit members of the public who have a legitimate interest in the proceedings or in the work of the court, including representatives of the news media, to view adjudication proceedings when the respondent has waived the right to a public trial.

C. The judge of the juvenile court should honor any request by the respondent, respondent's attorney, or family that specified members of the public be permitted to observe the respondent's adjudication proceeding when the respondent has waived the right to a public trial.

D. The judge of the juvenile court should use judicial power to prevent distractions from and disruptions of adjudication proceedings and should use that power to order removed from the courtroom any member of the public causing a distraction or disruption.

6.3 Prohibiting disclosure of respondent's identity.

A. Each jurisdiction should provide by law that members of the public permitted by the judge of the juvenile court to observe adjudication proceedings may not disclose to others the identity of the respondent when the respondent has waived the right to a public trial.

B. Each jurisdiction should provide by law that the judge of the juvenile court should announce to members of the public present to view an adjudication proceeding when the respondent has waived the right to a public trial that they may not disclose to others the identity of the respondent.

WISCONSIN
1979 ASSEMBLY BILL 609

SECTION 1. 48.31 of the statutes is amended to read:

48.31 (5) The general public shall be excluded from hearings under this chapter unless a public fact-finding hearing is demanded by a child through his or her counsel. The court shall refuse the public hearing if the victim of an alleged sexual assault objects or in the case of a nondelinquency proceeding if a parent or guardian objects. If such a demand is not made, only the parties, their counsel, witnesses and other persons requested by a party and approved by the court may be present. Any other person the court finds to have a proper interest in the case or in the work of the court, including a member of the bar, may be admitted by the court. The court may admit news media reporters for the purpose of obtaining information to report news without revealing the identity of the child involved. Any person who divulges any information which would identify the child or the family involved in any proceeding under this chapter shall be subject to ch. 295.

ALI/ABA JUVENILE JUSTICE STANDARDS PROJECT
STANDARDS RELATING TO
JUVENILE RECORDS AND INFORMATION SYSTEMS
(Tent. Draft 1977)

ACCESS TO RECORDS

PART XV: ACCESS TO JUVENILE RECORDS

15.1 General policy on access.

A. Juvenile records should not be public records.

B. Access to and the use of juvenile records should be strictly controlled to limit the risk that disclosure will result in the misuse or misinterpretation of information, the unnecessary denial of opportunities and benefits to juveniles, or an interference with the purposes of official intervention.

15.2 Access to case files.

A. Each juvenile court should provide access to a "case file" to the following persons:

1. the juvenile who is the subject of the file, his or her parents, and his or her attorney;

2. the prosecutor who has entered his or her appearance in the case;

3. a party, and if he or she has an attorney who has entered an appearance on his or her behalf, the attorney;

4. a judge, probation officer, or other professional person to whom the case has been assigned or before whom a proceeding with respect to the juvenile is pending or scheduled; and

5. A person who is granted access for research purposes in accordance with Standard 5.6.

B. A person who is a member of the clerical or administrative staff of a juvenile court, who has been previously designated in writing by the court, may be given direct access to a "case file" if such access is needed for authorized internal administrative purposes.

C. A juvenile court should not provide access to nor permit the disclosure of information from a "case file" except in accordance with this standard.

ALI/ABA JUVENILE JUSTICE STANDARDS PROJECT
STANDARDS RELATING TO
JUVENILE RECORDS AND INFORMATION SYSTEMS
(Tent. Draft 1977)

18.1 Use of juvenile records by third persons.

Public and private employers, licensing authorities, credit companies, insurance companies, banks, and educational institutions should be prohibited from inquiring, directly or indirectly, and from seeking any information relating to whether a person has been arrested as a juvenile, charged with committing a delinquent act, adjudicated delinquent, or sentenced to a juvenile institution.

18.2 Application forms.

All application for licenses, employment, credit, insurance, or schooling, used by a licensing authority, employer, credit company, insurance company, bank, or education institution, which seek information concerning the arrests or convictions or criminal history of the applicant should include the following statement: It is unlawful for a licensing authority, employer, credit company, insurance company, bank, or educational institution to ask you, directly or indirectly, whether you have been arrested as a juvenile, charged with committing a delinquent act, adjudicated a delinquent, or sentenced to a juvenile institution. If you have been asked to disclose such information, you should report that fact to the state attorney general. If you have a juvenile record, you may answer that you have never been arrested, charged, or adjudicated delinquent for committing a delinquent act or sentenced to a juvenile institution."

ALI/ABA JUVENILE JUSTICE STANDARDS PROJECT
STANDARDS RELATING TO
JUVENILE RECORDS AND INFORMATION SYSTEMS
(Tent. Draft 1977)

DESTRUCTION OF RECORDS

17.1 General policy.

It should be the policy of juvenile courts to destroy all unnecessary information contained in records that identify the juvenile who is the subject of a juvenile record so that a juvenile is protected from the possible adverse consequences that may result from disclosure of his or her record to third persons.

17.2 Cases terminating prior to adjudication of delinquency.

In cases involving a delinquency complaint, all identifying records pertaining to the matter should be destroyed when:

A. the application for the complaint is denied;
B. the complaint or petition is dismissed; or
C. the juvenile is adjudicated not delinquent.

17.3 Cases involving an adjudication of delinquency.

In cases in which a juvenile is adjudicated delinquent, all identifying records pertaining to the matter should be destroyed when:

A. no subsequent proceeding is pending as a result of the filing of a delinquency or criminal complaint against the juvenile;
B. the juvenile has been discharged from the supervision of the court or the state juvenile correctional agency;
C. two years have elapsed from the date of such discharge; and
D. the juvenile has not been adjudicated delinquent as a result of a charge that would constitute a felony for an adult.

17.6 Providing notice of destruction to the juvenile.

A. Before destroying a juvenile's record, the juvenile court should offer to provide a copy of that record to the juvenile if he or she can be located.
B. Upon destroying a juvenile's record, the juvenile court should send a written notice to the juvenile at his or her last known address informing him or her that the juvenile court record has been destroyed and that the juvenile may inform any person

that, with respect to the matter involved, he or she has no record and, if the matter involved is a delinquency complaint, the juvenile may inform any person that he or she was not arrested or adjudicated delinquent except that, if he or she is not the defendant and is called as a witness in a criminal or delinquency case, the juvenile may be required by a judge to disclose that he or she was adjudicated delinquent.

17.7 Effect of destruction of a juvenile record.

A. Whenever a juvenile's record is destroyed by a juvenile court, the proceeding should be deemed to have never occurred and the juvenile who is the subject of the record and his or her parents may inform any person or organization, including employers, banks, credit companies, insurance companies, and schools that, with respect to the matter in which the record was destroyed, he or she was not arrested, he or she did not appear before a juvenile court, and he or she was not adjudicated delinquent or neglected.

B. Notwithstanding subsection A., in any criminal or delinquency case, if the juvenile is not the defendant and is called as a witness, the juvenile may be ordered to testify with respect to whether he or she was adjudicated delinquent and matters relating thereto.

NEW MEXICO S.B. 231 (1979)
(defeated in house)

"32A-2-9. [NEW MATERIAL] CONFIDENTIALITY--RECORDS.--

A. All hearings conducted pursuant to Sections 32A-2-1 through 32A-2-9 NMSA 1978 shall be open to the general public except in proceedings involving delinquent acts under Sections 30-9-1 through 30-9-16 and 30-10-1 through 30-10-3 NMSA 1978 in which the victim is a child.

B. All legal, law enforcement or other records concerning a child except social records, diagnostic evaluations, psychiatric and psychological reports which are in the possession of the court or probation services as the result of a delinquency or child in need of supervision proceeding, or which were produced or obtained in anticipation of or incident to such proceeding, are public records; provided, however, that such social records, diagnostic evaluations, psychiatric and psychological reports shall be public records if they are admitted into evidence during the course of the proceeding."

MENTAL HEALTH TREATMENT FOR MINORS

A. Introduction

The legal processes by which children are committed to mental institutions and mental retardation facilities is an area of law which is in need of immediate legislative reform. The urgency of the need is underscored by the United States Supreme Court decision rendered on June 20, 1979, in Parham v. J.L., 443 U.S. ____, 99 S. Ct. 2493 (1979). In that case, the Court ruled that states may authorize parents to commit children to mental institutions without the protection of formal adversary hearings. The Court further held that a state, acting on its own initiative, may hospitalize children who are state wards without judicial or administrative hearings. The Court's 6-3 decision reversed the unanimous decision of a three-judge district court striking Georgia's juvenile commitment statutes as unconstitutional in that such laws authorize juvenile commitment solely upon parental request and medical fact-finding review. In a companion case, Secretary of Public Welfare of Pennsylvania v. Institutionalized Juveniles, 443 U.S. _____, 99 S. Ct. 2523 (1979) (formerly Bartley v. Kremens), the Supreme Court reversed a federal district court holding that Pennsylvania's statutory provisions for the commitment of alleged mentally ill and mentally retarded children fail to satisfy the due process requirements of the fourteenth amendment. In Parham, the Supreme Court

examined a single commitment procedure. In Secretary of Public Welfare, the Court examined several Pennsylvania statutes which set forth various admissions procedures based on age classifications and on whether admission is sought for treatment of mental illness or mental retardation. The Court first delivered a lengthy opinion in Parham and, in accordance with that holding, found the Pennsylvania procedures to be constitutional.

The following discussion will summarize the Parham opinion and address the Parham and Secretary of Public Welfare decisions in light of emerging legislative models for the reform of state juvenile commitment statutes.

In the Parham opinion, the Court initially recognized that children do have a substantial liberty interest, protected by the due process guarantees of the fourteenth amendment, in not being confined unnecessarily in mental institutions. The Court proceeded to determine what procedures are required to protect that interest by balancing three factors:

1. the private interest affected by official action;
2. the risk of erroneous deprivation of liberty through present procedures and the probable value, if any, of substituted or additional safeguards;
3. the state's interest, [Mathews v. Eldridge, 424 U.S. 319, 335 (1976).]

The Court defined the privacy interest as one of familial privacy and found that the child's interest in not being confined unnecessarily is subordinate to the historical concept of the

family as a unit "with broad parental authority over minor children," including a "high duty" to recognize symptoms of illness and to seek and follow medical advice. The Court did recognize that the risk of error inherent in the parental decision to have a child institutionalized for mental health care is great, but concluded that an inquiry made by a "mental factfinder" to determine whether the statutory requirements for admission are satisfied is a sufficient check on such error. The Court found that due process is "not violated by the use of informal traditional medical investigative techniques," even when state personnel, not guided by natural parental affection, seek admission of juvenile state wards to mental health facilities. In the last prong of its analysis, the Court found that the state has a significant interest in limiting the use of its mental health facilities to cases of genuine need, but that the present Georgia procedure accomplishes this purpose through the initial review of parental admission requests by state personnel. The Court did mandate periodic review of a child's continuing need for confinement, although the same deficiencies of the persons and standards which appear in the admissions process will necessarily be present in such a review.

The Parham and Secretary of Public Welfare decisions are disturbing inasmuch as they neither comport with legal precedent or recent state legislative reforms. While a detailed analysis of the decisions is beyond the scope of this article, some of the

major factors which the Court failed to address are outlined below. See generally, Legal Challenges to the Voluntary Admission of Children to Mental Institutions, Vols. I and II, a publication of the National Juvenile Law Center and the Mental Patient Civil Liberties Project (Clearinghouse #15,989); Ellis, Volunteering Children: Parental Commitment of Minors to Mental Institutions, 62 Cal. L. Rev. 840 (1974); Teitelbaum and Ellis, The Liberty Interest of Children: Due Process Rights and Their Application, Vol. XII Family Law Quarterly 153 (Fall, 1978).

Among the primary shortcomings of the decisions is the Court's apparent failure to address an overwhelming body of evidence which documents the fact that parental commitment of children to mental hospitals often results from parental inability to understand or accept a child's lifestyle, or punitive feelings, or by a lack of knowledge about less restrictive, alternative forms of mental health care. See Ellis, Volunteering Children, 62 Cal. L. Rev. supra, at 851. The Court also accorded considerable deference to medical diagnosis as a check on parental authority. In doing so, the Court, again, seemed to ignore a substantial body of evidence documenting reasons why physicians can fail to effectively screen requests for commitment of children: the unreliability and ambiguity of psychiatric diagnosis; a tendency to overdiagnosis; and a susceptibility to overidentification with the wishes of parents. Finally, the Court failed to adequately address the negative effects of institutionaliza-

tion and the inevitable stigmatization which former mental patients confront. Such effects are exacerbated when the patient is a child in his/her formative years. Misdiagnosis and unnecessary hospitalization can, and often do, lead to permanent adjustment problems.

The Parham and Secretary of Public Welfare decisions are a setback to litigators who seek to extend procedural and substantive protection to children facing commitment to mental hospitals and mental retardation facilities. Although several litigation avenues remain open (State court suits, lawsuits which rely on enforcement of existing statutes, particularly P.L. 94-142, and single issue or discrete class actions) future litigation in this area could yield retrenchments, not gains. In light of Parham and Secretary of Public Welfare, much work in this area must be accomplished by state legislatures. The Court's rulings pose no bar to the enactment of legislation to insure that children receive the due process guarantees which the Supreme Court has failed to recognize.

B. Legislative Advocacy

Most state statutes presently allow parents to place children in mental hospitals and mental retardation facilities without any form of judicial proceeding; such decisions being subject only to the review of the admitting physician. The children committed pursuant to these statutes are considered "voluntary" patients.

Recently, however, some state statutes have been amended to provide that once a child reaches a certain age, his/her own consent (sometimes in conjunction with parental consent) is required for admission.[1] Several model codes have emerged which can serve as guides for advocacy in the legislative arena directed at revising juvenile commitment laws. Mental Health Treatment for Minors, a model statute prepared by the Mental Health Law Project, appearing at 2 Mental Disability Law Reporter, 474-481 (Jan. - Feb. 1978), is an excellent model. Several of its provisions are worthy of note:

1. The Model Code makes no distinction between "voluntary" and "involuntary" commitment procedures.

2. No hospitalization is authorized prior to a commitment hearing, except in cases of emergency.

3. The minor is afforded full due process rights at the commitment hearing.

4. A commitment order must be based on clear and convincing evidence (a) that the minor needs and will substantially benefit from treatment, and (b) that no other setting which involves less restriction of the minor's liberty is feasible for purposes of treatment or for the protection of the minor or others from a likelihood of serious harm.

5. The Model Code defines "MINOR" as any person under the age of eighteen years. No distinctions are made on the basis of age. Teenagers, as well as pre-schoolers, have the same procedural protections.

The State of New Mexico's statutory provisions for the hospitalization of children are also an excellent model for other states. N.M. Stat. Ann. 43-1-16, 43-1-16.1 (1979).

The following is a summary of the major provisions of the Model Code and the New Mexico statute. Some of the provisions are paraphrased.

Mental Health Treatment for Minors - Model Code

I. Petition for Commitment

Any person having custody of a minor must file a petition for the commitment of the minor which must:

(A) allege that the minor is suffering from a mental disorder;

(B) allege that there is a substantial probability that treatment will significantly improve the minor's mental condition;

(C) allege that the minor's proposed hospitalization is necessary for treatment to protect the minor or others from a likelihood of serious harm;

(D) allege that a hospital certified by the Department of Mental Health to provide mental health treatment appropriate to the minor's condition has agreed to accept the minor; and

(E) if hospitalization is alleged to be necessary to protect the minor or others from a likelihood of serious harm, specify the behaviors which substantiate such allegation and the evidence which will be submitted as proof thereof.

II. Pre-hearing Procedure - Counsel, Waiver of Hearing, Mental Examinations - The court shall, upon receipt of the petition, appoint counsel for the minor. Counsel shall interview the minor within two days after appointment. If counsel for the minor determines that it is the intent of the minor to waive the right to contest the commitment, counsel shall submit a written, verified statement, to the court. If commitment to a particular institution is sought, the minor shall be examined, prior to the commitment hearing by a qualified mental health professional at that institution. The minor also has the right to examination by any mental health professional of his/her choice prior to the hearing.

III. Hearing Scheduling - Unless a valid waiver is obtained, a commitment hearing shall be held within ten days after the appointment of counsel.

Minor's Rights - At the commitment hearing, the minor shall at all times be represented by counsel; shall have the right to present witnesses in opposition to commitment, including mental health professionals; shall have the right to confront and corss-examine witnesses who testify in favor of commitment; shall have a right to a written transcript of the proceedings and the right to an expedited appeal of an adverse ruling. The minor shall have the right to testify or to remain silent, and cannot be forced to answer any question. The rules of evidence shall apply.

IV. Findings and Order - The court shall make an order committing or recommitting the minor to a mental hospital only if it is shown by clear and convincing evidence (a) that the minor needs and will substantially benefit from treatment, and (b) that no other setting which involves less restriction of the minor's liberty is feasible for purposes of treatment or for the protection of the minor or others from a likelihood of serious harm. The court shall consider all possible treatment alternatives within the hospital as well as other treatment alternatives.

V. Emergency Commitment - Emergency commitment is permissible upon reasonable belief that a minor presents a likelihood of serious harm to him/herself or others as a result of a mental disorder. Such a belief must be premised on factual information. A mental health officer must conduct a screening investigation to verify the information. A commitment hearing must be held within 5 days of an emergency commitment. 2MDLR 474-476 (Jan.-Feb., 1978).

The New Mexico legislation encompasses the commitment of children alleged to be suffering from "mental disorders" and those alleged to be "developmentally disabled". Additionally, the Code distinguishes "voluntary" and "involuntary" commitment.

New Mexico Code
Voluntary Commitment

The voluntary commitment procedure is restricted to minors twelve years of age or older who seek treatment in a residential facility for a mental disorder. The minor and his guardian or parent must knowingly and voluntarily execute, prior to admission, the minor's voluntary consent to admission document. This document must include a clear statement of the minor's right to voluntarily consent or refuse to consent to his admission and his right to request an immediate discharge. Each statement must be clearly explained and each statement must be initialed by the minor and his parent or guardian. On the next business day following the minor's admission, the director of the treatment facility

must notify the court. Within seven days of admission, an attorney must meet with the minor and explain the right to counsel, procedures for terminating voluntary commitment and options of the physician and other interested parties to petition for involuntary commitment. If the attorney determines that the minor voluntarily and knowingly desires to remain in the hospital, the attorney must certify this to the court. A voluntarily admitted minor has the right to an immediate discharge from a facility upon request except where the director of the facility determines that the minor requires continued treatment. In that event, a petition for involuntary commitment must be filed within one day of the minor's request for discharge and a hearing for involuntary commitment must be held within seven days of the minor's request for release. N.M. Stat. Ann. §43-1-16 (1979).

New Mexico Code
Involuntary Commitment

I. Petition for Commitment

Any person may file a petition for hospitalization of a child believed to be suffering from a mental disorder or developmental disability. The petition must include a detailed description of the symptoms or behaviors of the minor which support the allegations in the petition; a list of prospective witnesses for commitment; and a summary of matters to which they will testify. The petition should also contain a discussion of the alternatives to residential care which have been considered and the reasons for rejecting the alternatives.

II. Pre-hearing Procedure - Counsel, Waiver of Hearing

Upon receipt of the petition, the court must appoint counsel for the minor. A minor may waive his/her right to a hearing on the issue of commitment, but the court must determine that waiver has been made knowingly and voluntarily.

III. Hearing

Scheduling - Unless a valid waiver is obtained, a commitment hearing must be held within ten days of the appointment of counsel.

Minor's Rights - At the commitment hearing, the minor must be represented by counsel, and has the right to present evidence, including testimony of a mental health or developmental disabilities professional of his own choosing, the right to cross-examine witnesses, the right to a complete record of the proceedings and the right to an expeditious appeal of an adverse ruling.

IV. Findings and Order - The court shall make an order committing the minor to residential care only if it is shown by clear and convincing evidence:

(1) that as a result of a mental disorder or developmental disability the minor needs and is likely to benefit from the treatment or habilitation services proposed; and

(2) that the proposed commitment is consistent with the treatment needs of the minor and with the least drastic means principle.

V. Emergency Commitment

If the person seeking the commitment of a minor to residential treatment or habilitation believes that the minor is likely to cause serious bodily harm to himself or to others during the period which would be required to hold a commitment hearing as provided in this section, the minor may be admitted to residential care on an emergency basis. A commitment hearing must be held within seven days of emergency commitment. N.M. Stat. Ann. §43-1-16.1.[2]

Both the Model Code and the New Mexico Code mandate a least restrictive approach to treatment. This is an important factor in reducing inappropriate hospitalization. Advocates must be aware though, that actual implementation of such an approach is, to a large extent, dependent on the availability of alternatives such as group homes, foster homes and out-patient treatment facilities. If such alternatives do not exist, legislative advocacy directed at the provision of due process guarantees to protect children should be co-ordinated with efforts to develop community alternatives to mental health/mental retardation institutions.[3]

Advocates must also be aware that "voluntary" commitment is, in most states, only one of several ways in which the hospitalization of children is accomplished. Children can be involuntarily committed through the juvenile courts or can be administratively transferred from a state facility for the treatment of delinquent children to a mental hospital. In Missouri, for example, if a child subject to the jurisdiction of the juvenile court "is found by the court to be mentally disordered (without specification as to how such a finding shall be made), the juven-

ile court may commit the child to the Department of Mental Health for care and treatment in a state school and hospital or in a state mental hospital and the order of commitment is binding on the Department." (If the Department determines, after observation and diagnosis that the placement is inappropriate, an order for relief of custody is authorized). Mo. R.S. §211.201.1 (Supp. 1979). The same section of the code also provides that when a child is committed to the Division of Youth Services and is subsequently found to be mentally disordered, the Division "may order the transfer of the child to the Department of Mental Health for care and treatment in an institution or hospital within the department subject to the jurisdiction of the division." Mo. R.S. §211.201.2 (Supp. 1979). Other sections of the Missouri code authorize juvenile court judges to commit children within their jurisdiction to mental institutions for examination prior to adjudication and post-adjudication but prior to disposition. Mo. R.S. 211.131.3; 211.161.1; 211.161.2.

Any legislative strategy designed to establish procedural protections in the commitment process must, therefore, address all the legislatively authorized methods by which children can be placed in mental hospitals and mental retardation facilities. The Juvenile Justice and Delinquency Prevention Act, hereinafter Act, prohibits participating states from placing juvenile status offenders and non-offenders in secure facilities. Section 223(a)(12)(A) of the Act, 42 U.S.C. 5633(a)(12). The Office of

Juvenile Justice and Delinquency Prevention has provided a policy statement regarding the application of this prohibition to juveniles committed to state institutions for the treatment of a mental disorder. This statement does emphasize that, for monitoring purposes, the Act "would not permit placement of status offenders or non-offenders in a secure mental health facility following an adjudication for a status offense or a finding that the juvenile is a non-offender". Id. at 18. The prohibition would extend to commitment for diagnostic purposes. This policy statement attempts to insure that the intent of the Act cannot be circumvented by juvenile court placement of status offenders and non-offenders in mental health facilities instead of community based alternatives. Office of Juvenile Justice and Delinquency Prevention, Monitoring Policy and Practices Manual (Policy chapter, p.18). However, for the purposes of monitoring compliance with the Act, "a juvenile committed to a mental health facility under state law governing commitment of all individuals for mental health treatment would be considered as outside the class of juvenile non-offenders defined by Section 223(a)(12)(A) of the Act." Monitoring Policy and Practices Manual, supra, at 18.

As states move toward compliance with the Act's mandates, parents seeking secure confinement for children who are not delinquent, and state agencies seeking secure confinement for their wards who are not delinquent will no longer be able to turn to the juvenile courts. It is very probable, then, that "volun-

tary" commitments of juveniles to mental hospitals will increase in those states where laws governing the commitment of minors authorize admission solely upon parental request and medical fact-finding review. Thus, mental health and retardation facilities could be turned to as alternatives to correctional institutions. Legislative action to establish due process protections for all juveniles in the commitment process can eliminate this alternative.

A possibility of federal statutory reform also exists. It is possible, for example, that federal funding of mental health services could be conditioned on state compliance with minimum standards of treatment and due process. The proposed Mental Health Systems Act, now under review by committees in both chambers of Congress, could incorporate provisions requiring procedural safeguards for any person before he/she is civilly committed to an institution. The Act could also authorize a private cause of action for patients, provide for access to patient advocates and require post-commitment review of the continuing need for confinement.

In conclusion, the decisions of the Supreme Court in Parham and Secretary of Public Welfare are a setback for those who advocate in the judicial arena on behalf of children subject to the commitment process. Legislative advocacy, though, is a viable and promising strategy for reducing inappropriate commitments and securing appropriate treatment for children in the least restrictive environments.

FOOTNOTES

1. See Okla. Stat. Ann. Tit. 43A, §53; S.C. Code §44-17-310 (Supp. 1978); Utah Code Ann. §64-7-29; Wash. Rev. Code Ann. §72.23.070;
See also Wisc. Stat. Ann. §51.13 (West Supp. 1979-80) under Wisconsin law, parents or guardians may apply for voluntary admission of a minor under 14 years of age. Application for a minor 14 or older must be executed by the minor and the parent. The code provides for juvenile court review, without a hearing, within 3 days of admission or application for all minors. A juvenile's access to the court, though, is limited. Evidence of a minor's unwillingness to be hospitalized must be noted on admissions applications and petitions to the juvenile court. If a notation of the minor's unwillingness appears on the petition or if the minor requests, a hearing shall be held within 14 days of admission. Voluntary admission will then be permitted only upon a judicial finding of a clear and convincing evidence that the minor is in need of services, that the inpatient facility offers appropriate services, that the facility is the least restrictive alternative, and, in the case of minors 14 years of age and older, that the admission is voluntary. The Wisconsin Code also authorizes a short-term admissions procedure whereby a minor may be admitted to an inpatient treatment facility, without review of the application, for diagnosis and evaluation for a 12-day period. Wisc. Stat. Ann. §51.13(h)(6). (West Supp. 1979-80).

Statutory schemes which mandate commitment hearings for adolescents and teen-agers, but not for younger children (as well as schemes which mandate admission hearings for the alleged mentally ill but not for the alleged mentally retarded) have been criticized for the following reasons: Capacity to participate, cannot be defined by age, particularly in the case of mentally retarded minors; "exploration of the facts which allegedly indicate the need for placement and consideration of the possible alternatives do not require the active participation of the child; there may be reason to believe that a hearing is even more important to the future of a younger child than to an older one since the harmful impact of institutionalization may fall even more heavily upon very young children; it also appears that the likelihood of erroneous diagnosis is greater in the very early years or months of the child's life - - -." Teitlebaum and Ellis, supra, at 186 (citations omitted). See also Institutionalized Juveniles v. Secretary of Public Welfare, C.A. No. 72-2272, (E.D. Pa. May 25, 1978) an opinion ultimately reversed by the Surpeme Court, see supra, in which the court held that Pennsylvania

statutory provisions which set forth differing admissions procedures on the basis of age and reason for admission (retardation or mental illness) were unconstitutional.

2. Statutory provisions for periodic review and discharge are beyond the scope of this chapter. See Model Code and statutes cited, infra, for these provisions.

3. See General Laws of Rhode Island §40.1-1 - 10.1 et seq. (Supp. 1978) Parent Deinstitutionalization Program. This legislation established a program of financial subsidies to natural parents and foster parents for the in-home care and training of previously institutionalized juveniles and adults. See also Gordon, James S., "Group Homes: an Alternative to Institutions," Vol. 23 Social Work, pp. 300-304 (July, 1978) (Group home care for adolescents who had been recommended for hospitalization).

TOWARD A CHILDREN'S BILL OF RIGHTS

> The child's subjugated status [is] rooted in the same benevolent depotism that kings, husbands and slave masters claimed as their moral right. According to Blackstone, the architect of English law, parents had a legal duty to provide maintenance, protection and education for their children in return for obedience. The social philosophers of the 19th century - Hobbes, Locke, Mills - never considered children parties to the social contract; they owed absolute obedience to their sovereign parents whose duty was to educate them to the degree of competence necessary to participate as adults in the social contract or the utilitarian society. For the child, said Hobbes, '[l]ike the imbecile, the crazed and the beasts . . . there is no law'. Even the ultimate libertarian, John Mills, complacently announced that '[t]he existing generation is master of . . . [the] entire circumstances of the generation to come.' To economic determinists, on the other hand, the inferior status of children was an essential counterpoint to parental control if parents were to support and protect children - as society wished them to do - and to the value of the child's labor as a contribution to the family's economic survival.[1]

The search for legally enforceable rights and obligations proceeds against a legal background which includes the notion, expressed by a variety of courts in a variety of contexts, of "family privacy" or "family autonomy". American Bar Association/ Institute of Judicial Administration, Juvenile Justice Standards Project, Standards Relating to the Rights of Minors, Tentative Draft p.2 (1977), (Approved 1979). See, e.g., Kilgrow v. Kilgrow, 268 Ala. 475, 107 So.2d 885 (1959); People ex rel. Sisson v. Sisson, 271 N.Y. 285, 2 N.E.2d 660 (1963). As articulated by courts, the principle of "family autonomy" assumes that judges have no more expertise in making intrafamilial judgments than parents. See

Kilgrow v. Kilgrow, supra, at 475. See generally Project, Standards Relating to the Rights of Minors, supra, at 3. Courts, therefore, are to refrain, to the maximum extent feasible from interfering with family decisionmaking unless the parents' behavior falls below the legislatively mandated minimum standard of parental care as established in the juvenile court's neglect jurisdiction. See Kilgrow v. Kilgrow, supra, at 475; Roe v. Roe, 29 N.Y.2d 188, 272 N.E.2d 567 (1971). The principle of "family autonomy" further "implies that when the family is an ongoing unit parents are able to impose their decisions on their children; children do not have a legal forum in which to assert directly rights they have against their parents, so long as the minimum standard of parental care is maintained". Project, Standards Relating to the Rights of Minors, supra, at 2. Given then, the historical background of the rights of children, see Wald, Making Sense Out of the Rights of Youth, 4 Human Rights L. Rev. 13 (1974), and the judicial reluctance to intervene into the decisionmaking process of the ongoing family, there is a "paucity of legal authority for the general proposition that children . . . are persons under the law". Foster & Freed, A Bill of Rights for Children, 6 Fam. L. Q. 343 (1972). The Joint Commission on Juvenile Justice Standards, therefore, has suggested that any "rights independent of their parents' wishes children should be accorded must . . . be established by specific legislative value judgments". Project, Standards Relating to the Rights of Minors, supra, at 2.

In recognition of the necessity for legislative advocacy in the field of juvenile rights, several commentators have proposed legislative adoption of a comprehensive "Bill of Rights" for juveniles.[2] E.g., Foster & Freed, A Bill of Rights for Children, supra, at 343. See generally Katz, Schroeder, Sidman, Emancipating Our Children - Coming of Legal Age in America, 7 Fam. L. Q. 211 (1973); Worsfold, A Philosophical Justification of Children's Rights, 44 Harv. Ed. Rev. 142 (1974). An example of a "Children's Bill of Rights" for use in drafting proposed legislation is found in Foster & Freed, A Bill of Rights for Children, 6 Fam. L. Q. 343 (1972). In their article, Foster and Freed propose that:

> A child has a moral right and should have a legal right:
>
> 1. To receive parental love and affection, discipline and guidance, and to grow to maturity in a home environment which enables him to develop into a mature and responsible adult;
> 2. To be supported, maintained, and educated to the best of parental ability, in return for which he has the moral duty to honor his father and mother;
> 3. To be regarded as a person, within the family, at school, and before the law;
> 4. To receive fair treatment from all in authority;
> 5. To be heard and listened to;
> 6. To earn and keep his own earnings;
> 7. To seek and obtain medical care and treatment and counseling;
> 8. To emancipation from the parent-child relationship when that relationship has broken down and the child has left home due to abuse, neglect, serious family conflict, or other sufficient cause, and his best interests would be served by the termination of parental authority;
> 9. To be free of legal disabilities for incapacities save where such are convincingly shown to be necessary and protective of the actual best interests of the child; and

10. To receive special care, consideration, and protection in the administration of law or justice so that his best interests always are a paramount factor.[3]

Support for a legislative affirmation of the basic rights of juveniles through adoption of a comprehensive "Bill of Rights" has been premised upon a variety of philosophical, see Foster & Freed, A Bill of Rights for Children, supra, at 343; Worsfold, A Philosophical Justification of Children's Rights, supra, at 142 (1974), as well as sociological justifications. See Wald, Making Sense Out of the Rights of Youth, supra, at 23. At least one commentator has further suggested that:

> [the] fundamental reason why children's rights has emerged as a serious topic at all is the erosion in confidence in the family reliability to meet all the needs of the child. Our technological society has isolated the nuclear family and subordinated its welfare to the demands of great economic entities for mobile labor; others point to the escalation of child abuse and to the incidence of mental illness, alcoholism, and suicide among both parents and children. Intact families whose members love and respect each other would not be likely to disintegrate if there were to be a different allocation of rights and privileges within the family. I would wager that most strong family units already allow their children the freedom we are talking about. It is the borderline, shaky or unstable family structures that might split open when the lines of authority become more blurred. These are also the high risk families in which abuse and exploitation of children are most likely to occur, and where children most need an affirmation of their basic rights.

Wald, Making Sense Out of the Rights of Youth, supra, at 23. See generally McGrath, Early Sorrow: Some Children of Our Time, 8 Fam. L. Q. 91 (1974) (700 American children killed, 10,000 battered annually by parents); Escalana, Intervention Programs for Children at Psychiatric Risk, in 3 The Child in his Family: Children at Psychiatric Risk 33, 35-43 (E. Anthony & C. Koupernik eds. 1974); J. Holt, Escape from Childhood, 45-43 (1974) ("there is much evidence that the modern nuclear family is . . . the source of many people's most severe problems"), cited in Wald, Making Sense Out of the Rights of Youth, supra, at 23 n.36.

Beyond philosophical justification and sociological necessity, advocates of juvenile rights argue that contemporary "concepts of fairness strongly support adoption of a general presumption that children should be allowed the same rights and freedoms as adults . . . ." Wald, Making Sense Out of the Rights of Youth, supra, at 25. This presumption, as articulated by supporters, could be rebutted only by either a clear showing of irreversible damage - physical, psychological or emotional - from the exercise of such rights or by valid empirical data indicating the inability of a particular age group to exercise those rights. Wald, Making Sense Out of the Rights of Youth, supra at 25.

FOOTNOTES

1. Wald, Making Sense Out of the Rights of Youth, 4 Human Rights L. Rev. 13 (1974), citing 1 W. Blackstone, Commentaries on the Laws of England, 446-455 (T. Cooley ed. 1899); T. Hobbes, Leviathan 257 (Malesworth ed. Vol. 3, 1839-45); J.S. Mill, On Liberty, 48 (Peoples ed. 1903); Childhood and Capitalism in America, Address by Kenneth Keniston, Instituto Mexicano Norte Americano de Relaciones Culturales, Mexico City, March 15, 1974. ("the position, the definition, and the value of children in America has largely been defined by their expected role in the productive system"). For an extensive discussion of the past and present legal status of children see J. Goldstein, A. Freud & A. Solnit, Beyond the Best Interests of the Child (1973); Greenstein, Children and Politics (1965); Berger, The Child, The Law and The State, in Children's Rights, ch. 5 (P. Adams et. al., eds. 1971); Cogan, Juvenile Law: Before and After the Entrance of "Parens Patriae", 22 So. Car. L. Rev. 147 (1970); Kleinfeld, Balance of Power Among Infants, Their Parents and the State (I, II, III), 4 & 5 Fam. L. Q. (1970-1971); Rodham, Children Under the Law, 43 Harv. Ed. Rev. 487 (1973); Note, State Intrusion into Family Affairs: Justifications and Limitations, 26 Stan. L. Rev. 1383 (1974); Note, The Parens Patriae Theory and Its Effects on the Constitutional Limits of Juvenile Court Powers, 27 U. Pit. L. Rev. 894 (1966).

2. It should be noted that the United Nations General Assembly has advocated, for some twenty (20) years, that every child should be guaranteed the right:

> To affection, love and understanding;
> To adequate nutrition and medical care;
> To free education;
> To full opportunity for play and recreation;
> To a name and nationality;
> To special care, if handicapped;
> To be among the first to receive relief in times of disaster;
> To learn to be a useful member of society and to develop individual abilities;
> To be brought up in a spirit of peace and universal brotherhood;
> To enjoy these rights, regardless of race, color, sex, religion, national or social origin.

U.S. Senate Committee on the Judiciary, Constitutional Rights of Children, app. 1 at 23 (1978) [hereinafter cited as Committee].

Additionally, as the year 1979 marks the 20th anniversary of the United Nations Declaration of the Rights of the Child, "a landmark international commitment to the protection and improvement of the rights of all children", the designation of 1979 as the International Year of the Child is a reaffirmation of the intent of that Declaration. Committee, supra, at 131.

3. Additional suggestions for standards in the areas of age of majority, emancipation, support, medical care, contracts, employment and first amendment freedoms can be drawn from Project, Standards Relating to the Rights of Minors, supra, at 1 et. seq.

> These standards focus on relationships between the child and the parents and between the child and third parties, against a background of the interests of the family. Our concern is with legally enforceable rights and obligations; the question we ask in each context is whether and to what extent a minor should be treated as an adult. Thus, situations in which the state seeks to interfere in an authoritarian fashion with both parents and child (e.g., the issue of compulsory medical care against the family's wishes) are not addressed here but in the Abuse and Neglect volume. Moreover, this focus is not intended to explicate a "Bill of Rights for Children", 6 Fam. L. Q. 343 (1972). Whatever the utility of articulating a host of unenforced and unenforceable hopes for minor citizens, we believe it is more useful to focus narrowly on legally imposed disabilities and legally enforceable obligations. The "right to life", the "right to a balanced diet", the "right to loving custodians", and other imponderables we leave to philosophers.
> Id. at 2.

III

LEGISLATIVE ADVOCACY
A PRIMER FOR JUVENILE JUSTICE ADVOCATES

INTRODUCTION

Children represent our poorest, least organized and most vulnerable group of citizens. As such, they have traditionally comprised a powerless and unrepresented class within the legislative process. Social policy pertaining to children has largely been left to such special interest groups as juvenile court judges and administrators, police and state welfare agencies, lawyers, and social workers. State welfare and juvenile justice systems, while based on the rhetoric of "helping" children, often result in the subjection of children to the arbitrary and excessive authority of parents, custodians and the state. As a result of the glaring absence of effective child advocacy in state legislatures, many children--whether labeled as abused, neglected, incorrigible, predelinquent, or violent delinquent--are denied their basic human rights through unnecessary detention and incarceration. This chapter is written with the intent of aiding those who wish to undertake the vital and important role of representing the interests of children in the legislative process.

The passage of the Juvenile Justice and Delinquency Prevention Act of 1974, along with current attempts to implement that law, have encouraged a growing involvement among citizen activists and youth workers in juvenile justice reform. This chapter attempts to synthesize an approach to the accomplishment of juvenile justice reform through systematic intervention in the legislative process. It is drawn from the experiences of lobbyists, legislators, legislative staff and others who have actively and effectively changed youth policy through legislative advocacy at the state level. Its purpose is toillustrate a strategy by which advocacy groups and individual advocates may develop their own legislative advocacy agenda.

ORGANIZING A LEGISLATIVE AGENDA

Forming a Network of Advocacy Groups

Before effective and sustained advocacy can take place, advocates must first be involved in the creation of a network of individuals and organizations which can develop a full panoply of legislative, administrative and judicial strategies for implementing juvenile justice reform within the state. Such a network should provide both the political power necessary to directly influence the legislative process, and the organization and resources necessary to properly monitor the implementation of youth policy throughout the state.

In every state there are numerous interest groups concerned with issues involving the welfare of children. Members of such

groups as child serving professionals, civil liberties organizations, churches, organized labor, as well as individual jurists and legislators may be brought together on common issues of concern. Organizations such as the League of Women Voters and Junior League can be encouraged to become involved in issues involving the welfare of children. One of the most difficult and ultimately most important tasks of a legislative advocacy network is the creation of a coalition of support among representatives of these diverse community groups. It is an ongoing task.

Defining Legislative Goals

The first task of a child advocacy network is to define its legislative goals. An advocacy agenda can be formulated only after an identification of the significant juvenile issues within the state. The Juvenile Justice and Delinquency Prevention Act may serve as a useful organizational tool for the establishment of legislative priorities. The JJDPA represents a strong Congressional statement in favor of alternatives to the traditional institutionalization of juveniles, and explicitly requires (1) that status offenders and non-offenders be removed from secure facilities, and (2) that children not be detained or confined in institutions where they would have contact with incarcerated adults. State statutes and administrative policies should be examined in order to ensure that status offenders are removed from secure facilities, and that juvenile offenders spend a decreased amount of time in secure detention.

Issues involving difficult policy questions, such as the problem of the violent juvenile offender, the habitual runaway, and the role of punishment in the juvenile justice system, constantly arise in the legislative process. The advocate cannot avoid them. While there are no easy answers or solutions to these issues, a legislative agenda should generally address these common issues of public concern. National juvenile law and advocacy centers can be particularly helpful in formulating intelligent responses to such difficult issues.

The Legislative Process

After the creation of a viable network of child advocacy groups throughout the state, and the development of an issues agenda, legislative advocacy must then focus on organized lobbying efforts in the legislature. The effectiveness of any legislative advocacy strategy depends, to a great extent, on how well an advocacy network can organize support for key issues at the grass roots level, develop and maintain direct communication with legislators, and provide expertise to legislative staff in the drafting and criticism of bills. However, in order to be an effective legislative advocate one must first begin with a knowledge of how the legislature operates.

It is important for the advocate to become familiar with the internal operation of the state legislature. Every state has standard reference materials available free of charge which describe general legislative procedures, along with the name,

districts, party affiliation, and committee assignments of each legislator. In addition, information such as the names of legislative leadership, and the schedule of committee hearings can be obtained through any legislator. It is relatively easy to request committee staff to place one's name and address on a mailing list which will provide up-to-date information on committee hearings and work sessions.

Existing organizations which are already involved in the legislative process should be contacted. Organizations such as Common Cause, the American Civil Liberties Union, the League of Women Voters and state-wide Legal Services Programs generally have offices in the State Capitol. Many of these organizations publish booklets about the state legislature, and provie an excellent source of background information as to voting records, and political nuances of legislators.

Probably the most important source of information on the legislative process comes from other advocates and lobbyists. Lobbyists tend to be a congenial group of people, and are often happy to assist those who are new to the process. In addition to public interest lobbyists, professional lobbyists for such entities as the utility commission, local municipalities and insurance companines can provide extremely helpful advice on the peculiarities of the local legislative scene. The legislative cafeteria, as well as the local bar adjoining the Capitol, often serves as the strategy center for lobbyists. It is often useful

to spend time in such places in order to make important contact with other lobbyists, legislators and legislative staff.

After gathering as much information as possible on the legislative power structure, special attention should be paid to the organization of legislative committees. The referral of bills to committees is one of the most important steps in the legislative process, as the selection of which committee a bill is referred to can often determine the outcome of the proposed legislation. Every member of the legislature is assigned to one or more committees, with the majority party in each selecting the committee chairperson and a majority of the membership. In some states, bills cannot get out of committee without committee approval. In addition, some states allow bills to be amended only in committee, rather than on the floor. Sponsors of bills work hard to see that their bills are assigned to the most receptive committees, and advocates must pay careful attention to the committees to which their bills are assigned.

In order to understand the workings of the committee system, the lobbyist should determine which legislative power determines committee assignments, along with assignments of bills to committees. The advocate should understand the role of the committee chairperson, and ascertain which committee would respond most favorably to the advocates' goals. Such information is vital when drafting legislation, as often the packaging of bills as well as bill titles can influence committee assignments.

The formulation of a strategy for dealing with the politics of various legislative committees is extremely complicated and difficult. An advocate must listen to the advice of experienced legislators, staff and lobbyists in order to determine the most advantageous strategy for any particular issue. In order to understand the power structure, an advocate must also analyze the campaign contribution lists of key leigslators, if such information is available. Such a list will provide clues as to names of potential supporters for legislation, as well as give an idea of the strength of the opposition.

An example of the need for careful planning and strategy can be seen in legislation authorizing state contracts with private non-profit youth service providers. Such legislation often results in opposition from state employees' unions. Because legislative committees vary in their sensitivity to union issues, a successful advocate will have researched the political ramifications of a particular issue, and will have been able to use such information to influence committee assignments.

Formulation of Legislative Strategy

After careful analysis of the legislative power structure, an advocacy network must formulate a well thought-out legislative strategy. Advocates should carefully ponder whether their own scarce resources should be spent trying to draft new legislation, or trying to defeat harmful bills. The advocacy agenda should also be examined in order to determine whether key juvenile issues could best be addressed by statute, executive regulation,

or through the encouragement of community-based projects or service delivery programs. For example, issues involving a determinate sentencing policy for youthful offenders would most likely be dealt with through executive regulation, while dispositional alternatives and re-entry services may best be facilitated at the community level.

Once a determination has been made to enter the legislative arena, much consideration should be given to budgetary items. It may be possible to achieve greater results by concentrating efforts on the passage of a single appropriation, as opposed to drafting and lobbying a complex bill. Also, legislation harmful to juveniles may be killed or redirected by reduced appropriations or budget control language. When engaging in an analysis of proper strategy, the advocate should research those bills which have been previously defeated, as well as those which have been close to passage. One should continuously consult with sympathetic legislators and staff members in this process.

Legislative strategies vary widely depending on the political realities existing in the legislature. One strategy may consist of trying to create widespread public support for, or opposition to, a bill. On the other hand, it may be appropriate to minimize public awareness about a controversial bill. Other strategies include emphasizing the cost effectiveness or unconstitutionality of various bills. The choice of strategy will be the end product of consultation with other lobbyists, legislators and staff.

The Child Advocate as Lobbyist

Once a network has been established, and a legislative agenda has been prepared, a child advocacy network must next learn effective lobbying techniques. A child advocate must, of necessity, be willing to spend substantial amounts of time at the state capitol. Effective lobbying consists of working closely with key legislative staff members, legislators, and the governor's office, in order to achieve the passage or defeat of legislation. Lobbyists will draft desired legislation, provide research and background information, and work closely with relevant committees.

The following discussion highlights some of the major issues and techniques of which the child advocate should be aware before becoming a lobbyist in the legislative arena.

Working with Legislative Staff

In almost every state, legislatures hire professional staff to provide research and general assistance on key issues which are of interest to individual legislators. Staff are generally composed of a mix of legal and non-legal personnel. It is important to realize that certain staff members may provide a lobbyist with an invaluable source of information on the inner workings of the legislative decision-making process. Staff members are the first to become aware of important legislative information, such as when committee hearings will be held, who will testify at the hearing and what legislators will attend. In addition, staff members are likely to have access to behind-the-scenes information on whether certain bills are likely to be delayed or killed in committee. Such information can be crucial in aiding lobbyists in the formulation of strategy.

Staff members are paid to become knowledgeable on the issues and to communicate that knowledge to the legislators. They collect information, write memoranda on various issues involved in a subject area, recommend specific courses of action, research past legislative history, and draft proposed legislation. For example, a legislator may inform a staff member that s/he has received numerous complaints from constituents that the police will pick up and detain children who are reported runaways. Typically a staff member would investigate the complaints, analyze existing legislation, and draft a memorandum outlining possible solutions to the problem. This analysis may include a history of prior bills introduced in the subject area, and the inclusion of a draft of a bill which would address the stated need of the legislator.

Once a bill has been drafted, the staff member commonly aids the legislator in obtaining additional signatures on the bill, and may arrange for press conferences along with distributing news releases announcing the sponsorship of the bill. Occasionally the staff member attends community meetings in the legislator's district in an attempt to gain support for the legislation.

As staff members are required to become knowledgeable on a wide variety of issues ranging from liquor licensing to

capital punishment, they often lack expertise in the specific issue areas for which they are responsible. In addition, staff members may simply lack the time to engage in the detailed research necessary to analyze policy considerations involved in complex social issues.

Both lobbyists and legislative staff often aid each other in the performance of their professional duties. The staff member often serves as an important source of information to the lobbyist; the lobbyist, on the other hand, provides the staff member with research material, drafts of bills, and data necessary to successfully complete the staff members' responsibilities. Ideally, a lobbyist should attempt to establish a relationship of trust with key staff members. Such a relationship should be based on the staff member's knowledge that an individual lobbyist will provide pertinent and accurate information in a useful format. In addition, the staff member should be able to rely on the lobbyist as a person who can produce data quickly in times of legislative emergencies.

A close professional relationship with a staff member has important potential for influencing legislative policy. Such a relationship must be based on trust and professional respect. It is inappropriate to "lobby" a staff member by asking them to help pass or defeat proposed legislation. A staff member is hired to become a "neutral" researcher for the legislature, and cannot be viewed as an advocate. It is important for the lobbyist to com-

municate to the staff member that s/he knows and respects the staff member's role as an employee of the legislature. Once a staff member is able to trust that the lobbyist will not compromise this role, s/he will be more likely to share information which is not accessible to the public.

A lobbyist is often able to influence the outcome of legislation simply by providing key information to the staff of the legislature. As an expert, a lobbyist can influence a staff member who has neither the time nor the expertise to seek out, or even recognize important issues involving juveniles. Staff members, like legislators, are generally inundated with pressures from parents, juvenile court judges, government bureaucrats and the press, emphasizing the need to increase juvenile court control over juveniles. Through frequent contact with staff members, such influence can be balanced by lobbyists who are armed with information which is presented in a way that can be useful to the staff member. For example, a legislator may ask a staff member to draft legislation providing for the secure confinement of runaways. Often this type of request is based on irate complaints by constituents who seek state involvement in the control of their children. The legislator may lack familiarity with the existing state juvenile court legislation. A lobbyist may aid the staff member in dealing with the individual constituents' complaints. Investigation may disclose that the police have authority under state law to retain temporary custody of run-

aways, but refuse to exercise this authority. A lobbyist may provide a useful function for the staff member by writing a brief fact sheet outlining the problem, existing statutory authority which authorizes the desired result, along with a brief summary of the policy reasons for limiting court jurisdiction over status offenders. This fact sheet will enable the legislator to effectively answer the constituents' complaints, will focus the debate on implementation of existing legislation, and will prevent the passage of legislation expanding juvenile court jurisdiction over status offenders. Without this investigation and resulting fact sheet, such data might never come to the attention of the legislator or staff.

In drafting a response to the concerns of a legislator or staff person, it is often helpful to avoid, whenever possible, policy debates. For example, legislators and staff members who are not likely to agree that status offenders should not be incarcerated, may respond quite favorably to arguments which stress that it is cost effective to deinstitutionalize or which emphasize that the Juvenile Justice and Delinquency Prevention Act authorizes federal funds only to those states committed to deinstitutionalization. Many legislators' votes depend upon budgetary concerns, and a lobbyist may surprisingly gain the support of legislators whose political and philosophical beliefs would indicate that they would not be supportive of children's rights issues.

Lobbying Legislators

Direct personal contact with legislators should ideally begin before the commencement of the legislative session. An assessment should be made of the legislators who will most likely be sympathetic to juvenile issues. It is generally a mistake to stereotype legislators on the basis of political affiliation. Conservative legislators may find themselves in the forefront of issues involving children.

As with legislative staff, the goal of personal contact with legislators is to establish a trust relationship, whereby a legislator will be willing to look to a lobbyist as a central source of information on a particular issue.

Initial contact with legislators may be simply introductory in nature, whereby the legislator is made aware of the lobbyist's interest in a general subject area. Subsequent visits should generally be short, and informative. It is a good practice, whenever possible, to bring a typed fact sheet, listing the title of the bill, along with a brief outline of the issue, and recommended position for which one is lobbying. Because legislators are inundated with information on hundreds of bills, they may or may not recall the title of the bill, or the complexity of issues involved in pending legislation. The fact sheet will serve to quickly orient the legislator to the purpose of the lobbyist's visit, and will reduce the time spent explaining background information prior to a full discussion of the pertinent issues.

It is vitally important to keep in constant touch with the key legislators who are supportive of one's position, and with the relevant committee chairpersons, regardless of their political stance. While communication with such legislators begins in the formal context of the legislator's office, subsequent contacts may take place informally anywhere within the legislature. When unable to get a formal appointment with a legislator, successful lobbyists will buttonhole legislators in such varied places as elevators, outside committee hearing rooms and parking lots. Legislators expect to be lobbied in informal settings, and generally do not resent intrusion into their activities outside the office. It is important for the lobbyist to be highly visible in the setting of the cafeteria or tavern. When a lobbyist is visible, it reminds the legislator of the issues associated with the lobbyist and indicates that the lobbyist is readily available as a source of information.

Lobbying Through Technical Assistance

Before a bill is introduced onto the floor of the house or senate, it generally will go through numerous drafts. In any lobbying campaign, it is important to have at least one person in charge of reviewing the technical details in each of these drafts. As code revisors and legislative staff are potentially responsible for hundreds of bills, they are generally unable to take the time to review bills for stylistic inconsistencies or minor technical errors. Staff members generally welcome help in the proof-reading

process, and can be receptive to suggestions which improve the language of the bill.

In reviewing initial drafts of bills, a lobbyist may influence significant changes in the substantive content of legislation. Careful technical analysis protects against inaccuracies, vagueness and inconsistencies. Given the vast number of bills introduced during a legislative session, errors in drafting are commonplace. The lobbyist may gain substantial credibility by bringing such errors to the attention of the legislative staff. An excellent example of technical assistance occurred during a recent legislative session, when a staff member responded to a legislative request for legislation calling for 72 hour secure detention of runaway youth. Upon initial review of the bill, a lobbyist found that the bill authorized periods of secure confinement in excess of 72 hours, as the 72 hour commitment period excluded weekends and holidays. The lobbyist found that the phrase, "exclusive of weekend and holidays" had been included in the draft simply because it had been automatically included in all other bills dealing with confinement of citizens, and was considered to be a stock phrase. The lobbyist was successful in arguing that the original wording might result in the incarceration of runaways for up to 144 hours, contrary to the legislative request for a bill calling for only 72 hour secure confinement. This major policy change was obtained without political debate, and was the result of simple checking on the part of the lobbyist.

Lobbying at Public Hearings

The most visible mode of lobbying a committee consists of the presentation of testimony at public hearings. Testimony should be concise, and should not duplicate previous testimony. A presentation should be accompanied by written testimony which is distributed to each member of the committee in advance.

There is much debate over the usefulness of public testimony. Perhaps the most important function of legislative hearings is that it provides an opportunity for legislators to ask questions of those in attendance. Also, the presence of various advocates may impress upon the committee the importance of particular legislation. Attendance at hearings, however, cannot substitute for continuous personal contact with legislators and staff.

Lobbying the Executive Branch

Lobbying must be carried out in both the legislative and executive realms. The executive branch's greatest power lies in the governor's ability to submit a budget to the legislature. The governor and executive agencies will also often propose legislation and submit bills for legislative consideration. A lobbyist should be aware of the legislative priorities of the governor, and should develop a working relationship with the governor's staff long before the commencement of the legislative session.

The executive branch can play a significant role in advancing the rights of juveniles. The executive branch retains a type of power which does not exist in the legislature: access to and control of information, the resources of state agencies, and the ability to mobilize interest groups. If necessary, the executive branch can mobilize public opinion through access to the media, thereby bypassing the heads of the legislature. Most importantly, the governor retains authority to submit the initial budget. Once adopted, it is difficult to significantly shift the premises or details of the budget. All executive agencies under the governor's control are committed to defending the budget, thus bringing to bear all the institutional advantages of the executive branch in lobbying the legislature. Lobbyists must be continually involved in the budgetary process when sponsoring bills which concern a state agency's program or finances, in order to influence the premises and dollar priorities that are built into the governor's budget.

Like the legislature, the governor's office is comprised of many layers of support staff whose function is to aid the governor in the formulation of public policy. The governor's staff works with the legislature, various interest groups, the governor's political party, and other lobbyists. A lobbyist should communicate with the staff member in charge of children's issues at each stage of the legislative process. At a minimum, the lobbyist should provide a fact sheet on every bill with which the lobbyist

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is concerned, setting forth the purpose of the bill along with recommended gubernatorial action. Such information will hopefully be used by the staff in preparation of their formal analysis of pending legislation which is submitted to the governor during each legislative session.

While the governor's office is certainly the most important segment of the executive branch, there are other officers along with numerous boards and commissions which possess varying degrees of autonomy from the governor. In addition, most government agencies will have staff assigned to the lobbying process. The agency director, along with the assistant attorney general or in-house counsel assigned to the agency, will generally be actively involved in the budget-making and legislative process. It is helpful to meet with the agency personnel before the session in order to determine the agency's priorities and areas of concern. Such information is vital in formulating legislative strategy.

State social service, criminal justice, and mental health agencies will generally be involved in legislation affecting children. A lobbyist should understand fully each agency's stand on legislative issues. In addition, many legislators have specific views on the quality of agency performance. When necessary, such views can be used to the lobbyist's benefit. For example, legislators who are critical of a state social service agency's track record may support legislation calling for mandatory contracting of various youth services to private non-profit agencies.

USEFUL ADVOCACY TECHNIQUES

Legislative Notebook

After basic legislative strategy has been determined, a lobbyist must work to inform and gather community support for a decided course of action. Often advocates spend considerable amounts of time speaking at various groups, disseminating information and eliciting support for the issues. It is important to remember that people are generally intimidated by the legislative process, and volunteer services only when given concrete tasks to perform. When addressing organizations on the relevant legislative issues, or when organizing citizens interested in lobbying, it is extremely useful to prepare an individual legislative notebook for each participant. Such a notebook puts all vital information before the potential lobbyist, and helps digest complex legislative issues in an easy, readable manner.

Every volunteer should be given a legislative notebook, which may simply consist of a manila file. The file should contain a list of key senators and representatives organized by committee. For example, proposed legislation dealing with the secure confinement of truants may originate in the Institutions Committee of the House of Representatives, and then pass to the Ways and Means Committee and finally into the Rules or Judiciary Committee before traveling to the Senate. An effective lobbyist must know the names of key legislators within each of these committees, as well as the names of leadership in each party. A

list providing the information, along with each legislators' address, telephone, occupation and political district, will enable the lobbyist to quickly and efficiently locate the important players in the legislature.

For easy reference, the lobbying packet should also contain a map of the political districts in the state, along with a complete list of all senators and representatives, with addresses and phone numbers, present at the legislative session. The packet should include a summary of all proposed bills relevant to the subject area, along with a brief analysis of the legislation coupled with a plan of action. Such information is crucial, as it can become extremely difficult to organize the larger number of bills which may be introduced in a single subject area. The information will aid the lobbyist in remembering the number of the bill, the name of the sponsor, along with providing a concise and reasoned critique of the issues raised in the proposed legislation. This information may then provide the basis for individual contact with legislators, telephone calls or letters.

Finally, the notebook should contain all vital legislative information, such as the legislator's office address, the number of any toll-free legislative hotlines, and the name and number of a contact person who will be available to provide information throughout the legislative session.

Simple Techniques: Letters and Phone Trees

A lobbying campaign often utilizes the simple and time worn but proven techniques of encouraging letter writing campaigns, and phone trees. Such techniques are used to bring issues continually before the local representatives and to emphasize the extent of community interest in the issues before the legislature. At least at the state level, legislators do pay attention to constituent letters and phone calls. Legislators are generally aware of those with vested financial interest in children, such as group home operators, agency and training school personnel. Letters and phone calls balance out and sensitize the legislator to opposing citizen views of issues involving children.

USING NATIONAL JUVENILE ADVOCACY ORGANIZATIONS AS A LEGISLATIVE RESOURCE

A brief list of national juvenile advocacy organizations can be found in the manual's chapter on "Researching Juvenile Justice Issues". Such organizations can be extremely helpful in developing a legislative agenda prior to the commencement of the session, as well as during the session in times of legislative crisis.

Prior to the session, national legal organizations may aid in the collection and drafting of proposed legislation. National youth work organizations may provide needed input on the technical details involved in the delivery of youth services: Such organizations are aware of national trends, and can provide an advocacy network with an overview as to the tactics that have been successful in other legislative arenas.

National organizations can often provide responses to the difficult issues involved in the juvenile justice system. For example, many legislators argue that runaway girls should be incarcerated in juvenile detention facilities in order to protect them from involvement with prostitutes. National organizations can aid in the formulation of a comprehensive response to such a stance, by citing examples of alternatives to incarceration, providing statistics on runaway girls, and also providing model policy arguments in support of deinstitutionalization. Such information may be critical to the advocate when unexpected issues appear during the legislative session, and the advocate does not have the time or experience to develop an adequate position on the issue.

ADVOCACY AND TAX EXEMPT ORGANIZATIONS

Before engaging in legislative activity, a non-profit organization should be aware of the various restrictions under which tax exempt organizations must operate. Tax exempt organizations which engage in lobbying are allowed to exercise one of two options under the tax code for determination of their tax liability. A tax exempt organization can choose to abide by the pre-Tax Reform Act of 1976 standard which provides that no tax exempt organization may devote "a substantial part of the activity [to] . . . carrying on propaganda or otherwise attempting to influence legislation" 26 U.S.C. 501(c)(3). The "substantial part" standard has never been adequately defined, and has often inhibited vigorous lobbying activities.

Instead, an organization may choose to file under the Tax Reform Act of 1976, U.S.C. 4911 (hereinafter the "Act"). The Act establishes specific monetary guidelines which determine the maximum figure a tax exempt organization may spend for political lobbying and grass roots organizing. Expenditures for lobbying which exceed the limit are taxed at 25 percent of the excess. Repeated violations which result in the organization exceeding its limits by 150 percent over a four year period result in the organization losing its tax exempt status.

The monetary amount which a tax exempt organization may spend for lobbying without incurring a penalty is pegged to the organization's "exempt purpose expenditures," i.e. the money the corporation spends to accomplish its organizational purpose. See chart below. No organization, regardless of how much money it expends for exempt purposes, may spend more than $1 million for lobbying. Funds available for grass roots organizing are limited to 25 percent of the lobbying non-taxable amount.

Organization Exempt Purpose Expenditures	Lobbying Non-Taxable Amount
Less than $500,000	20% of exempt purpose expenditures
$500,000 - $1 million	$100,000 plus 15% of exempt purpose expenditures over $500,000
$1 - $1.5 million	$175,000 plus 10% of excess exempt purpose expenditures over $1 million
Over $1.5 million	$225,000 plus 5% of excess exempt purpose expenditures over $1.5 million

Maximum for any organization: $1 million
Grass roots funds: 25% of lobby amount.

A tax exempt organization must specifically elect to be covered by the Act. IRS Form 5768 must be filed in order to qualify. It is important to note that the IRS has also codified its definitions of "lobbying" and "grass roots organizing." "Lobbying" is defined as any attempt to influence legislation through meetings with people who would formulate legislation. "Grass roots organizing" is defined as any attempt to influence legislation by affecting the opinions of the general public. The new Act also attempts to define activities which amount to "influencing" legislation. The Act specifies that certain activities are not attempts to influence legislation: making available the results of nonpartisan analysis; providing technical assistance to a legislative committee upon request; legislative appearances on matters affecting the powers, duties, tax exempt status or deduction of contributions to the organization; communications with "bona fide members" (as defined in the legislation) with respect to legislation of "direct interest" to the organization and its members as long as such communication does not directly encourage members either to communicate with legislators or to urge others to comminicate with legislators; and communications with government officials or employees outside the legislative branch, unless the "principle purpose" of the communication is to influence legislation.

The decision whether to elect participation under the new Act or to stay within the old regulations should be made after careful consideration in consultation with experienced tax counsel.

SUMMARY

Effective advocacy on behalf of children is desperately needed in legislatures. A small network of child advocates, armed with information on the legislative process and power structure, can have a significant impact on the formulation of youth policy. An effective coalition of local, state and national child advocacy groups will hopefully succeed in reducing the number of children housed in jails and prisons.

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