Juvenile Justice:

The Adjudicatory Process

Judge Jerry L. Mershon

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Juvenile Justice Textbook Series

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I. History and Background of Juvenile Court

1. Dual Standard in Early England
   (a) Juveniles had no property rights until they were twenty-one (21) years of age.
   (b) Juveniles were criminally responsible for their actions. Only children under seven (7) years of age (no mens rea) were exempt from criminal prosecution as adults. The situation generally reflected the common law concept of infancy.
   (c) Over three hundred (300) crimes in early England were punishable by death.
   (d) Historical Experience: Severe punishment for children not a significant deterrent.
2. There were a few early United States juvenile institutions such as the *New York House of Refuge* in 1824, and some *parens patriae* concepts were being discussed as early as 1839; however, generally, there was very little thought of a substantial legal distinction between juveniles and adults prior to 1899.
3. First Juvenile Code enacted in Cook County, Illinois, in 1899 — A landmark change in the handling of juveniles in the United States.

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

   Social Theory: Sociological and psychological foundations.

   Legal Theory: (Parens Patriae power of the State) Parens patriae was vested in the King of England. In the United States, the state as sovereign developed the concept of guardianship over persons under disability which included minors.
4. Development of the Juvenile Court in the United States
   (a) Very little interest in the juvenile court in early development, including a paucity of juvenile case law and statutory enactments.
   (b) A general feeling of disinterest of juvenile law by the members of the bar and bench and a significant feeling that the juvenile court lacked importance as an institution in the jurisprudence of the nation.
   (c) Attorneys shunned juvenile courts and often, the least-experienced prosecutor was assigned to the juvenile court. (This is unfortunately still true at the present time to a certain extent, but this trend is slowly changing.)
   (d) Most law schools in the nation had no instruction in juvenile law and such was the case until fairly recently. Kansas University Law School began a course in juvenile law in 1956 and most other law schools have such courses at the present time. By 1925, juvenile courts were established in most states. Statutory enactments setting up the juvenile court system in the United States was influenced by early social work concepts and the new developing fields of psychology and psychiatry. Also, it was influenced by concepts of administrative law with informal procedures containing an overall direction toward the individual treatment concept.

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

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

II. Philosophy of the Juvenile Court

1. The fundamental position of most juvenile proceedings is that the state owes children a duty of protection and a chance at rehabilitation. The juvenile courts exist to help children in trouble with the law, rather than to simply punish them or to make them examples. Although the emphasis is on rehabilitation, this does not mean that punishment and deterrence has no place in the juvenile court system. Indeed, punishment does have some valid consideration in the juvenile court process.
2. The Juvenile Court construction and definition in most states: *Proceedings deemed not criminal.* This is reflected in general juvenile court nomenclature such as a child is not Arrested but is taken in *Protective Custody*; not put in Jail but placed in *Detention*; the act is not referred to as a Crime, but an *Offense*; the procedure is not referred to as a Trial, but a *Hearing*; a Sentence is not imposed but a *Disposition* takes place.
3. The fact that past juvenile procedures did not guarantee the right to remain silent, the right to counsel and other basic rights raised serious questions of constitutional law. The due process revolution and the mandates of the Supreme Court have corrected these deficiencies but have not totally destroyed the concept of the juvenile court.
   (a) The role and duty of the prosecuting attorney and the attorney representing the juvenile, is a matter of controversy. Two differing major points of view emerge:
      (1) The attorney should assist the court and take only positions in the best interest of the child.
      (2) The attorney should assume a strict advocate's role.
   (b) A view as to the correct role of the juvenile police officer.
   (c) A view as to the correct role of the juvenile probation officer.
4. The records of the juvenile court and the philosophy concerning confidentiality of names:
   (a) Generally, state statutes hold juvenile proceedings as confidential.
   (b) Juvenile expungement statutes.
   (c) Sharing of juvenile court records among law enforcement agencies.
   (d) Sock it to 'em and disclose the names syndrome.
   (e) Withholding names and why? Reference Articles:
      (1) "Delinquency and the Panacea of Punishment," by Sydney Smith, Ph.D., *Federal Probation,* Sept. 1965.
      (2) "Identifying Delinquents in the Press," by Gilbert Geis, Ph.D., *Federal Probation,* Sept. 1965.
      (3) "Open Hearings in Juvenile Courts in Montana, Memorandums," by National Council on Crime and Delinquency, *Juvenile Court Judges Journal,* Spring 1965.
   (f) Generally, states forbid the use of juvenile court or arrest records on subsequent civil or criminal proceedings. Most statutes uphold this principle and the case law is generally supportive. See *Workman v. Cardwell,* 388 F. Supp. 893 (Ohio 1972) where the Court held juvenile "convictions" inadmissible in any subsequent criminal prosecution or for the purpose of judging an individual's recidivist status. It has been held that juvenile arrest records can be used to impeach the credibility of a witness in a subsequent case. See *People v. Norwood,* 296 N.E.2d 852 (Ill. 1973).

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

Three very good contemporary books in the juvenile field are:

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

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

Juvenile Law and Procedure, by Monrad G. Paulsen and Charles H. Whitebread, Juvenile Textbook Series, (1974), National Council of Juvenile Court Judges, Box 8000, Reno, Nevada 89507.

III. Juvenile Justice Standards and Model Acts

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

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

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

The volumes approved at the February, 1980, ABA meeting of the House of Delegates are as follows: Standards on Schools and Education; Juvenile Probation Function; Court Organization and Administration and Juvenile Delinquency Sanctions.

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

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

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

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

Standards Relating to Juvenile Records and Information

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

Standards Relating to Youth Services Agencies

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

Standards Relating to Monitoring

Lists standards that would lead to the development of an accurate and comprehensive information base that would insure monitor's access to this information.

Standards Relating to Police Handling of Juvenile Problems

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

Standards Relating to Planning for Juvenile Justice

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

Standards Relating to Abuse and Neglect

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

Standards Relating to Schools and Education

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

Standards Relating to Dispositional — Procedures Alternatives

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

Standards Relating to Adjudication

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

Standards Relating to Rights of Minors

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

Standards Relating to Pre-Trial Court Proceedings

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

Standards Relating to Interim Status

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

Standards Relating to Juvenile Probation Function: Intake and Pre-Dispositional Investigative Services

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

Standards Relating to Non-Criminal Behavior

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

Standards Relating to Architecture of Facilities

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

Standards Relating to Juvenile Delinquency and Sanctions

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

Standards Relating to Prosecution

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

Standards Relating to Appeals and Collateral Review

Provides a comprehensive guide to juvenile appeals. Addresses such questions as what orders should be reviewable, to whom the right of appeal should be extended, rights of parties, and the need for expeditious review.

Standards Relating to Court Organization and Administration

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

Standards Relating to Corrections Administration

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

Standards Relating to Disposition

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

Standards Relating to Transfer between Courts

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

Standards Relating to Counsel for Private Parties

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

IV. United States Supreme Court Decisions and Development of Juvenile Law

1. Only since 1961 — as set forth in the case of *Mapp v. Ohio,* 367 U.S. 643, 81 S.Ct. 1864, 6 L.Ed.2d 1081 (1961) — has a portion of the criminal protections of the Constitution been made applicable to the states through the due process clause of the Fourteenth Amendment.
   (a) Unreasonable searches and seizures and exclusionary evidence rule applicable to the states. (Later cases expanded other constitutional due process protections.)
   (b) Protection to states similar to federal decisions in criminal matters.
2. First Significant Case — Minimum Due Process — Transfer and Waiver: *Kent v. United States,* 383 U.S. 541, 86 S.Ct. 1045, 16 L.Ed.2d 84 (1966). (Waiver hearings held required to comply with due process and fundamental fairness standards.)

   Facts:

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

Holding:

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

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

(3) Court held the Order waiving juvenile court jurisdiction invalid and specifically held:
   (a) Juvenile had a right to due process hearing on the question of waiver.
   (b) Counsel for juvenile had the right of access to juvenile court records.
   (c) Court was required to state specific reasons for waiving jurisdiction.

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

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

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

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

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

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

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

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

   Facts:

   Gerald Gault, 16 years of age, was taken into custody. No notice was given to parents. Juvenile was placed in detention after which mother was orally advised of the detention because of an obscene phone call. A petition was filed but was not served or shown to the juvenile or his parents. Petition stated the juvenile was an alleged delinquent with no reference to the factual basis of the action. The arresting officer was not present at the hearing; there was no sworn testimony; a juvenile officer stated that the juvenile admitted making lewd remarks; the questioning was out of the presence of the parents; Gault was

without counsel and was not advised of his right to remain silent; neither the juvenile or parents were advised of any constitutional rights. Juvenile was placed in the Industrial School and the matter was appealed. The Supreme Court of Arizona affirmed and the U.S. Supreme Court reversed.

Holding:

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

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

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

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

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

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

Not all criminal constitutional safeguards were applied. A process of *selective incorporation* of constitutional guarantees on a case to case basis was set forth. The Court gave flexibility between juvenile and criminal process without totally destroying the salutary effects of the present juvenile philosophy and system. Procedures concerning proceedings such as intake, diversion and other information were not discussed. The Court indicated that these protections were applicable *only* where a juvenile would be "incarcerated". The decision left a gray area concerning other dispositional alternatives available other than commitment to an institution.

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

The following matters were not decided in *Gault*:

(1) Arrest rights.

(2) Post adjudication.

(3) Jury trial.

(4) Jeopardy.

(5) Capacity in insanity.

(6) Grand Jury.

(7) Appeal.

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

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

Facts:

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

Holding:

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

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

Facts:

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

Holding:

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

Therefore, the matter was not decided in the Supreme Court. As Professor Aidan R. Gough states in one of his lectures at the National College of Juvenile Justice:

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

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

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

Facts:

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

evidence. The New York Court of Appeals upheld the conviction and the U.S. Supreme Court reversed.

Holding:

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

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

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

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

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

Winship does not hold that it is impermissible to require that various affirmative defenses are to be proved by the defendant. *Patterson v. New York,* 432 U.S. 197, 97 S.Ct. 2319, 53 L.Ed.2d 281 (1977). The quantum of proof in a probation revocation hearing has been held to be a *preponderance of the evidence* even when the violation is based on a law violative act. *In the Matter of TLW,* 578 P.2d 360 (Okla. 1978).

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

Facts:

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

Holding:

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

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

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

8. Restriction on Miranda Warning Rule (As may be applicable in the juvenile court): *Harris v. New York,* 401 U.S. 222, 91 S.Ct. 643, 28 L.Ed.2d 1 (1971).

Facts:

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

Holding:

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

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

Holding:

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

Note:

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

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

Facts:

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

Holding:

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

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

Facts:

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

Holding:

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

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

Facts:

A seventeen year old juvenile was adjudicated a delinquent and made a ward of the court. At a later hearing, the Court found him unamenable to treatment as a juvenile and he was transferred to the adult court where he was convicted of robbery and committed to an institution. The juvenile claimed double jeopardy.

Holding:

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

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

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

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

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

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

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

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

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

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

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

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

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

Facts:

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

Quilloin claimed that under the statute, he was denied a "veto authority" on the adoption which both parents of a legitimate had under the statutory law. He further argued that his parental rights should be preserved absent a finding of "unfitness" instead of having the matter disposed of on the "best interest of the child" standard.

Holdings:

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

The Court reviewed the *Stanley* case where it had held that the State of Illinois could not take custody of children of an unwed father without a hearing and a finding of unfitness because the father's interest was "cognizable and substantial" while the state's interest in caring for the child was "Deminimus".

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

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

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

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

Facts:

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

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

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

Holding:

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

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

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

Facts:

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

Holding:

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

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

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

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

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

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

Facts:

In February, 1971, a three-judge district court panel declared the California status offense statute concerning "Beyond Control", unconstitutional. The statute contained provisions that the juvenile court had jurisdiction of children who lived an idle, dissolute

or immoral life. The panel held the statute unconstitutional for vagueness and uncertainty. The case was appealed to the U.S. Supreme Court who held the case for almost three years and denied certiorari in 1974. The Court cited a couple of cases referring to improvident use of an injunction but this really didn't answer the question.

Significance of Certiorari denial:

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

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

Facts:

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

Holding:

Certiorari was denied. Justice Douglas dissented.

This is a significant case because the juvenile courts are vulnerable to criticism for this kind of an arrangement. It is this writer's opinion that the juvenile court judge should not have directive power over the prosecutorial staff and that the staff should be independent concerning their decisions on what cases should be filed. This likewise applies to the probation staff. It seems to me that the better rule would be to make sure that both the prosecutorial staff and probation staff are free and independent from the dictates of the juvenile court judge. Their job should not depend upon the personal philosophy of the judge. If the probation staff is under the judiciary branch of government rather than the executive, then there should be adequate safeguards to assure that they do have independence.

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

Facts:

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

Holding:

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

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

Facts:

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

Holding:

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

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

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

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

Holding:

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

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

Facts:

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

Holding:

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

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

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

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

Facts:

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

Holding:

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

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

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

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

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

Facts:

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

Holding:

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

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

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

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

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

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

Facts:

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

Holding:

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

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

Facts:

An Indiana Circuit Judge approved a mother's petition to have her "somewhat retarded" minor daughter sterilized. The operation was performed, the daughter being told that she was to have her appendix removed. After the daughter later married and discovered that she had been sterilized, she brought suit against the state court judge and others in federal court seeking damages for, among other things, the alleged violation of the daughter's constitutional rights. The District Court dismissed the complaint and held the judge immune from suit but the Circuit Court of Appeals held the state court judge not immune from suit because he had not acted within his jurisdiction and failed to comply with due process. The Supreme Court reversed.

Holding:

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

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

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

Facts:

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

Holding:

In a six-three decision, the U.S. Supreme Court held that the state statute did not violate any guarantees of the Federal Constitution as applied to an unemancipated girl, living with and dependent upon her parents, since the statute gave neither parents or judges a veto over the minor's abortion decision. The Court held that the statute plainly served an important consideration of family integrity, the protection of adolescents, and that a significant state interest was present in the statute by providing parents an opportunity to supply essential medical and other information to the physician.

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

Facts:

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

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

Holding:

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

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

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

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

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

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

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

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

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

Facts:

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

Holding:

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

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

31. Standard of Proof at a Parental Rights Termination Proceeding: *John Santosky, II and Annie Santosky v. Bernhardt S. Kramer, Commissioner of Social Services, et al.,* ___ U.S. ___, 102 S.Ct. 1388, 71 L.Ed.2d 599 (N.Y. 1982).

Facts:

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

Holding:

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

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

The Court held further that a standard of proof more strict than preponderance of the evidence is consistent with the two state interests at stake in parental rights termination proceedings — a parens patriae interest in preserving and promoting the child's welfare and a fiscal and administrative interest in reducing the cost and burden of such proceedings. The Court stated that a "clear and convincing evidence" standard adequately

conveys to the fact-finder the level of subjective certainty about his factual conclusions necessary to satisfy due process. Determinations of the precise burden equal to or greater than that standard is a matter of state law properly left to state legislatures and state courts.

V. Jurisdiction

1. Generally, the states grant exclusive jurisdiction to juvenile courts concerning delinquency, miscreancy, waywardness or ungovernability, persons in need of supervision, and dependent and neglected children. Acts that would be crimes if the juveniles were adults constitute one main area of juvenile jurisdiction; acts of waywardness or ungovernability and truancy constitute another area; and dependency and neglect or deprived children constitute the third area of juvenile court jurisdiction.
2. Jurisdiction concerning juveniles varies from state to state, but under eighteen years of age is the jurisdictional age in most states.
   (a) The National Advisory Commission on Criminal Justice Standard recommends that all jurisdiction over juveniles of the sort presently vested in the juvenile court should be a division of the trial court of general jurisdiction and should have jurisdiction over all legal matters related to family life. This jurisdiction should include dependency and neglect, support, adoption, divorce, and all factors involving the family. *Standard 14.1 of the NACCJ.*
3. Many statutes give general jurisdiction concerning criminal or civil cases to certain courts. Some courts have held that statutory grants of exclusive jurisdiction of children's cases to the juvenile court could be in violation of other jurisdictional grants. Other states provide that the juvenile court and other courts have concurrent jurisdictions, particularly in criminal cases. See *Jackson v. Balkcom,* 80 S.E.2d 319 (Ga. 1954).

   Concurrent jurisdiction is somewhat confusing and the better rule would be to simply grant exclusive jurisdiction to juvenile court for offenders under a specified age. Subsequent to the *Jackson* case, under new constitutional and statutory changes, the Court watered down the original decision narrowing concurrent jurisdiction to the juvenile courts and superior courts in matters of capital felonies. See *J. W.A. v. State,* 212 S.E.2d 849 (Ga. 1975).
4. Generally, a single act, (constituting a crime if an adult) will establish juvenile court jurisdiction. *Doe v. People,* 398 P.2d 624 (Colo. 1965) and *In the Matter of Taylor,* 309 N.Y.S. 2d 368 (N.Y. 1970). The general rule controls, notwithstanding a minority opinion that a violation of law if a single act constituting a minor misdemeanor would not constitute sufficient activity to give juvenile court jurisdiction. *Jones v. Commonwealth,* 38 S.E.2d 444 (Va. 1946). The rationale in not giving jurisdiction on single and minor offenses is that the dispositional alternatives available could be quite disproportionate to the nature of the minor crime itself.
5. Most statutes grant juvenile courts jurisdiction over children whose parents abuse them physically or emotionally or fail to provide proper care, nuture, education, and welfare. Jurisdiction attaches to the children themselves resulting from the lack of proper care by the parents. In the case of a dependent and neglected or deprived child, the juvenile courts generally have jurisdiction to make the child a ward of the court without permanent parental severance, or the court may enter a finding of permanent parental severance after a finding of "Unfitness" of the parents or after finding the parents guilty of "Willful Neglect" or "Abandonment".

Juvenile court jurisdiction generally gives the court power to order medical care for a child and otherwise direct the conduct of the parents and the child. Generally, there must be a showing of a serious threat to health before the court will order medical care over the objection of the parent. *In re Sieferth,* 127 N.E.2d 820 (N.Y. 1965). Other courts have been more liberal in their taking of jurisdiction and making orders for medical care such as plastic surgery notwithstanding objection of the parents as in the case of *In re Sampson,* 278 N.E.2d 918 (N.Y. 1972).

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

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

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

In Florida, a child contended that he was given a right to treatment under existing law and that he would be deprived of this right to treatment if an offense (in this instance reckless driving) were removed from the juvenile court jurisdiction. It was argued that the legislative removal of the offense was a denial of due process. The Supreme Court ruled that the legislature has absolute discretion to determine jurisdiction of subject matter items under the juvenile court. Further, that neither substantial due process or equal protection are denied by the legislature's decision to include or exclude a particular traffic offense from the jurisdiction of the juvenile court. *State v. G.D.M.,* 394 So.2d 1017 (Fla. 1981).

VI. The Philosophy of Parental Rights Versus Children's Rights with Selected Cases

1. John Rawls: *Theory of Justice*

   Each individual is born with full rights.

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

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

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

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

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

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

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

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

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

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

   Mr. Justice Rutledge wrote:

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

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

8. Pre-birth Rights of Parent and Child

   (a) The choice of conception rests on the parents. If one spouse refuses to allow the conception of a child, would the other spouse have grounds for divorce because of said refusal?

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

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

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

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

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

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

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

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

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

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

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

10. In an interesting case, an action was brought in Massachusetts challenging a city hospital policy barring the use of facilities in connection with consensual sterilization.

    The Federal Court of Appeals held that the city hospital's prohibition of consensual sterilization, violated the equal protection clause. The Court noted that a fundamental interest was involved and no other surgical procedures were prohibited outright and other procedures of equal risk were allowed.

11. Rights of Foster Parents

    (a) Timmy, the child of a white mother and black father, was placed in foster care with foster parents at the age of one month. After 15 months of caring for the child, the foster parents expressed a desire to adopt Timmy. They were then told that the caseworkers felt that he should be adopted by a black family. The decision not to allow the foster parents to adopt Timmy was made at a staff meeting at which neither the foster parents or the child were present or represented.

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

12. Concerning an unmarried 16 year old mother's right to decide whether or not she should have an abortion as opposed to the wishes of her parents, a three judge district court in Massachusetts held as follows:

    (a) "Even if parents had rights of constitutional dimension vis-a-vis their child, that were separate from the child's, the individual rights of the minor outweigh the rights of the parents and the parental consent requirement was constitutionally invalid." *Baird v. Bellotti,* 393 F. Supp. 847 (Mass. 1975).

    Here, the infant mother could herself make the decision concerning an abortion without the permission of her parents.

13. It is interesting to note some distinctions and decisions concerning illegitimate children and artificial insemination.

    (a) Legitimate and Illegitimate Child Distinguished

    The status distinction between a legitimate and illegitimate child still continues today.

    The distinction is rooted in western civilization's commitment to marriage and societal displeasure with the fruit of promiscuity. Modern legislation is moving rapidly toward a greater recognition of the rights of illegitimate children.

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

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

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

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

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

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

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

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

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

(iv) The wishes and cooperation of the child.

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

(a) There is a group of patients who do not have full legal capacity and are classed as "voluntary" patients even though they have never consented to hospitalization. Furthermore, there is no legal machinery presently designed for them to obtain judicial review of their hospitalization. Specifically, this class of patients includes the mentally retarded, juveniles and persons under a guardianship. Any person in any one of those classes may be admitted as a "voluntary" patient by his parent, guardian or person in loco parentis without the patient's actual consent, and frequc tly against his will.

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

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

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

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

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

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

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

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

For some excellent articles concerning children's and parental rights, see the following articles:

Puberty, Privacy, and Protection: The Risks of Children's "Rights," by Bruce C. Hasen, American Bar Association Journal, Volume 63, October, 1977. Also see the following articles in the October, 1977, *Trial* magazine: *Parents' Rights* by Cynthia Naturale; *Parents' Rights, the Ingraham Decision Protecting the Rod,* by Nancy K. Splain; *Parents' Rights, Adoption Without Consent,* by Coeta Chambers; *Parents' Rights, the Father's Revolution in Custody Cases,* by Phillip F. Solomon.

VII. Education — Due Process Cases

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

In *Summons v. State,* 371 N.E.2d 1316 (Ind. 1978), a child in Indiana was declared a habitual truant. The child objected to attendance records being received because the person making the entries did not have personal knowledge of the absences represented by the record. The court held that attendance records were properly introduced under the business records exception to the hearsay rule. The clerk is informed of the absence by the teachers whose duty it is to make such reports in the course of business and despite the hearsay, the facts warranted sufficient trustworthiness to allow the admissibility of the records.

In a suspension for violation of the school hair regulation code, the board adopted a regulation stating that the school community did not approve of long, dirty hair, *Gere v. Stanley,* 453 F.2d 205 (Pa. 1971). In another case, hair length was held not protected by the First Amendment. No due process problem because schools are authorized to make reasonable rules. Privacy is not involved because hair is worn in the open and publicly, *Karr v. Schmidt,* 460 F.2d 609 (Tex. 1972). Another case holds that a choice of hair length is a right and the only basis for regulation is safety and discipline, *Massie v. Henry,* 455 F.2d 779 (N.C. 1972).

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

Concerning Free Speech, it was held that armbands could not be banned because they symbolized equal symbolic speech, *Tinker v. DeMeines School District,* 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731. It was held in a California case that school authorities may not exercise prior restraint concerning on or off campus newspapers nor may the sale of off campus newspapers be prohibited at high school, *Bright v. Los Angeles Unified School*

District, 556 P.2d 1090 (Cal. 1976). In *Karp v. Becker,* 477 F.2d 171 (Cal. App. 1973), it was held: 1. that the First Amendment does not require officials to wait for actual disruption before taking action; 2. disruption or disorder potential need not be a certainty but only reasonably foreseeable; 3. since the public is strongly in favor of education, the degree of disturbance required for action by school officials is less than that required for general officials.

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

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

A United States District Court in Pennsylvania has held that a state and school district's policy limiting the educational program to a period of 180 days deprived severely handicapped children of the "appropriate education" mandated by federal law. *Armstrong v. Kline,* 476 F.Supp. 583 (Pa. 1979). The Oregon Court of Appeals has held that handicapped children have a substantive right under state and federal law to a free and appropriate education, including placement in a private, residential facility if necessary and that school districts must bear the costs. *Mahoney v. Administrative School District #1,* 601 P.2d 826 (Ore. 1979). The Supreme Court of New Jersey has held that a statute may constitutionally make custodial parents liable for damage caused to a public school by the malicious acts of their children. *Piscataway Tp. Bd. of Education v. Caffiero,* 431 A.2d 799 (N.J. 1981). The Court of Appeals of Louisiana has held that schools are responsible for torts of children committed on school grounds only if the school failed to exercise reasonable supervision. *Batiste v. Iberia Parish School Board,* 401 So.2d 1224 (La. 1981).

VIII. Juvenile Investigation — Arrest, Search, Confession

1. Arrests

   (a) Since the *Gault* case and *Miranda* case, the present general rule is that arrests of juveniles may be made under the same conditions as adults. Because juvenile proceedings are not regarded as criminal in nature, this causes some confusion on the part of officers in taking a child into custody. The terms "taking into custody" as contrasted from "being arrested" are academic terms only and the general rules of probable cause and other safeguards in making an arrest should apply to juveniles.

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

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

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

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

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

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

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

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

   When parents or adult relatives give consent to the search of a juvenile's room or quarters, most courts have held that the parental rights in the home are superior to any rights that the minor child might have. *United States v. Stone,* 401 F.2d 32 (Ind. 1968) and *Maxwell v. Stephens,* 348 F.2d 325 (Ark. 1979). There is some authority to the contrary. See *People v. Flowers,* 179 N.W.2d 1235 (Mich. 1970). A father had a legal right to consent to the search of the minor son's tool box despite the son's express lack of consent. The court held there is a strong public policy in protecting the interests of a parent in the care, discipline and control of a minor child which overcomes the constitutional rights to privacy of the minor; *Scott v. Fare,* 142 Cal. Rptr. 61 (Cal. 1978). A recent Alaska case held that a warrantless search of a probationer is a violation of the Fourth Amendment unless there is a direct relationship between the search and the nature of the original crime for which the defendant was convicted, *Roman v. State,* 570 P.2d 1235 (Alas. 1977).

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

3. Exceptions to the Requirement for a Search Warrant.

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

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

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

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

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

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

4. School Search and Seizure Cases

(a) It has been held that school officials have authority to search a school locker or desk, *People v. Overton,* 229 N.E.2d 596 (N.Y. 1967) and *Moore v. Student Affairs Committee,* 284 F. Supp. 725 (Ala. 1968). School lockers may be searchd and seized, *State v. Stein,* 456 P.2d 1 (Kan. 1969). It should be noted that these cases give power to school officials in relation to their *disciplinary* and *regulatory* needs. The majority rule is that these powers or regulations cannot be exercised for the benefit of outside law enforcement officials unless they have a search warrant or have taken a juvenile into custody under circumstances permitting the search of his person or his surroundings, *Watkins v. Piazzolo,* 442 F.2d 284 (Ala. 1971). Also see *People v. Stewart,* 313 N.Y.S.2d 253 (N.Y. 1970). The search must be reasonable, *People v. Jackson,* 319 N.Y.S.2d 731 (N.Y. 1971). A California court has established a test to guide school officials in searching student lockers, *In re W.,* 105 Cal. Rptr. 775 (Cal. 1973).

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

school's interest in the control and management of the school is deemed to be paramount.

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

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

5. Concerning Confessions:

(a) Voluntariness is still significant along with the Court made rules in *Miranda* and *Gault.* Following *In re Gault* most courts have concluded that *Miranda* requirements do apply to juvenile interrogations. *Lopez v. United States,* 399 F.2d 65 (Ariz. 1968), *State v. Sinderson,* 455 S.W.2d 486 (Mo. 1970), *Commonwealth v. Darden,* 271 A.2d 257 (Pa. 1970), *Leech v. State,* 428 S.W.2d 817 (Tex. 1968) and *State v. Prather,* 463 P.2d 640 (Wash. 1970). Some courts have gone beyond the requirements of *Miranda. Miranda* safeguards were observed, but a juvenile's confession was held inadmissible because it was taken during a period of unlawful detention following an illegal arrest, *In re Rambeau,* 72 Cal. Rptr. 171 (Cal. 1968). A confession resulting from an unlawful 14-hour detention was held invalid even though questioning occurred in the presence of parents, *State v. Strickland,* 532 S.W.2d 912 (Tenn. 1975).

(b) The Supreme Court of Florida has held that police may interrogate a child taken into custody before notifying a parent despite a statute requiring parental notification when a child is taken into custody. *Doerr v. State,* 383 So.2d 905 (Fla. 1980). The Supreme Court of Utah has held that a juvenile's confession is admissible if it was voluntarily made with a full understanding of his rights, even if no parent or attorney was present. *State in Interest of T.S.V.,* 607 P.2d 827 (Utah 1980). A Superior Court of Pennsylvania has held that absent a showing that a juvenile had an opportunity to consult with an interested and informed parent or adult or counsel before he waived

his *Miranda* rights, his waiver is ineffective. *Commonwealth v. James,* 416 A.2d 1090 (Pa. 1979). The Court of Appeals of the District of Columbia has held that when police have not begun to focus on a child they may hold him for several hours without releasing him to his family or delivering him to a court officer. *Jackson v. District of Columbia,* 412 A.2d 948 (D.C. 1980). In the Civil Appeals Court of Texas it has been held that a confession may be considered in a certification hearing without inquiry of whether it was given voluntarily and with knowledge of the rights and consequences. *Matter of S.E.C.,* 605 S.W.2d 955 (Tex. 1980).

(c) The Court of Appeals of Washington has held that a juvenile does not necessarily waive his rights when parents are present at the time of an admission. The validity of a waiver of rights by a juvenile when with a parent will depend on the totality of circumstances. *In re Welfare of Deane,* 619 P.2d 1002 (Wash. 1980). The Superior Court of Pennsylvania has held that a statement taken by the police from a juvenile is "inadmissible" unless a parent, lawyer, or other person in a guardianship relationship was present. *In re Curry,* 424 A.2d 1380 (Pa. 1981). In the aforementioned Pennsylvania case the child was 15 years of age. Note that the Court of Appeals of Florida has held that a child with sufficient age, intelligence, education and experience may waive his *Miranda* rights without the presence of counsel, parents or other responsible adult person. *State v. F.E.J.,* 399 So.2d 47 (Fla. 1981). The Maryland Court of Special Appeals has held that police acted properly by obtaining the consent of a 16-year-old sister of the juvenile, to enter and arrest, and the police left with the sister their address and phone number and a request that the mother contact them. *In re Anthony F.,* 431 A.2d 1361 (Md. 1981). The Supreme Court of Colorado has held that a *Miranda* warning does not have to include a statement that the juvenile defendant may terminate the questioning at any time. The voluntariness of a statement need only be proved by a fair preponderance of the evidence. *People in Interest of M.R.J.,* 633 P.2d 474 (Colo. 1981). A California court has held that a store detective is not required to give *Miranda* warnings for interrogation of a juvenile in a store's security office. *In re Deborah C.,* 635 P.2d 446 (Cal. 1981). The Florida Court of Appeals has held that a juvenile should have been given his *Miranda* warnings before requiring the juvenile to explain his presence in an alley at 2:45 a.m. The statement was suppressed. *B.R.S. v. State of Florida,* 404 So.2d 195 (Fla. 1981). The Minnesota Supreme Court has held that questioning during an investigatory stop of a juvenile generally does not require a *Miranda* warning because the questioning is not custodial in nature. *Matter of Welfare of M.A.,* 310 N.W.2d 699 (Minn. 1981). In West Virgina, under that statute, fingerprints taken from a juvenile were not allowed to be used to identify the juvenile as an adult by comparison with fingerprints taken from a crime scene. *State v. Van Isler,* 283 S.E.2d 836 (W.Va. 1981).

(d) A totality of the circumstances test is generally held to determine the effectiveness of a minor's waiver, *Gallegos v. Colorado,* 370 U.S. 49, 82 S.Ct. 1209, 8 L.Ed.2d 325 (1962). Also see *West v. United States,* 399 F.2d 467 (Fla. 1968) and *Commonwealth v. Cain,* 279 N.E.2d 706 (Mass. 1972). A totality of the circumstances test encompasses some of the following circumstances:

(1) Length of questioning or detention

(2) Access to parent or counsel

(3) Age of juvenile

(4) Place of interrogation or questioning

(5) Number of interrogation sessions

(6) Deception

(7) Child's intelligence

(8) Level of Schooling

(9) Previous judicial or police contacts

(10) Physical condition

(11) Adherence by authorities to statutory or regulatory requirements

(12) Time of day or night

(13) Spontaneity

In the absence of counsel, a child's confession is inadmissible unless the child and parent are advised of their rights, and the child is allowed to consult with the parents, *In re K.S.B.,* 500 S.W.2d 275 (Mo. 1973). A District of Columbia Court rejects the "per se" rule that any juvenile confession made in the absence of parent or counsel is involuntary. See *In re J.F.T.,* 320 A.2d 322 (D.C. 1974). The Supreme Court of South Carolina holds that where interrogation of a 15-year-old child covered a period of 12 hours, the State had the burden to prove that the resulting statement was voluntarily given. See *In re Williams,* 217 S.E.2d 719 (S.C. 1975).

A Pennsylvania court held that a 15-year-old given *Miranda* warnings, who had prior experience with police, who didn't ask to have a parent present, still had to be given the benefit of parental or interested adult guidance in order to validate the confession, *Commonwealth v. McCutchen,* 343 A.2d 669 (Pa. 1975). A Louisiana case held that a juvenile cannot waive Fifth Amendment right to counsel without first consulting with an interested and informed adult. To sustain waiver, state must prove the juvenile consulted a lawyer or other interested adult. It was further required that the adult must be shown to, in fact, be interested in the juvenile's welfare, *Louisiana v. Deno,* 359 So.2d 586 (La. 1978).

An Oklahoma juvenile claimed his confession was not admissible because both parents were not present. Mother and sister were present, and the father was ill. Oklahoma statute precludes admission unless child's parents, guardian, or attorney or legal custodian are present. The court held that the law did not require in all cases that both parents be present. The court noted that the child's IQ of 83 was not a per se indication that he could not understand the waiver, *In the Matter of RPRG,* 584 P.2d 239 (Okla. 1978). A California Court of Appeals held that the request of a minor in custody to contact his parents constitutes an invocation of his privilege against self-incrimination and subsequent questioning in his parents' absence, even after restatement and purported waiver of his *Miranda* right, is a violation of the Fifth Amendment, *In re Roland K.,* 147 Cal. Rptr. 96 (Cal. 1978).

The U.S. Supreme Court has held that a juvenile's request to see his probation officer prior to custodial interrogation is not a per se invocation of his right to remain silent although it was a proper factor to be considered in the totality of the circumstances test for voluntariness of an alleged waiver. *Fare v. Michael C.,* 442 U.S. 707, 99 S.Ct. 2560, 61 L.Ed.2d 197 (1979).

The California Supreme Court has held that statements made by a juvenile to a probation officer during an intake interview cannot later be used against him at a delinquency adjudication hearing or criminal trial. *In re Wayne H.*, 156 Cal. Rptr. 344 (Cal. 1979).

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

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

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

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

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

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

IX. Intake Procedures

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

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

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

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

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

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

X. Different Intake Alternatives

1. *No Action Taken:* File kept for future reference.
2. *Communication in Writing:* From the prosecuting attorney's office or probation staff concerning the alleged infraction and admonition of the parents to correct the situation.
3. *Informal Proceedings:* Require parents to come in for a conference and discussion with the probation staff, officers, prosecuting attorney and/or the court. An informal conference sheet should be kept on file for future reference in the event of further difficulty with the juvenile.
4. *Informal Probation:* Another method of non-judicial handling of juvenile cases permits informal supervision of the juvenile by probation officers who wish to reserve judgment regarding the necessity for filing a petition until after the juvenile has had the opportunity for some informal treatment.

5. *Informal Adjustment:* Before a petition is filed an intake officer may give counsel and advice to the parties and impose conditions for the conduct and control of the child which constitutes an informal adjustment. Generally, the juvenile must admit what occurred and that the facts would bring the case within the juvenile court jurisdiction. The child and parents agree to and consent to the informal adjustment with the knowledge that the procedure is not mandatory and that the advice and conditions imposed will not extend beyond 90 days or a similar reasonable period of time.
6. *Consent Decree:* A consent decree is a more formal order for case work supervision or treatment to be provided either by the court staff or another agency. It is approved by the judge with the consent of the parents and child. The court does not make a formal determination of jurisdictional fact or formal disposition. This is another method to ease the case load of the court. A consent decree should never result in the institutionalization of a child, in my judgment.
7. *The National Advisory Commission on Criminal Justice Intake Standard:* Recommends an intake unit to the family court. I would disagree with the Standard where they give temporary "detention" decision to the intake staff. This should only be done after the filing of a petition. The detention decision is a judicial function for the court to decide. *Standard 14.2 of the NACCJ.*

XI. "Diversion" from the Juvenile Court

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

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

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

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

> "We are concerned that several references to the so-called status offender in the introduction to the juvenile justice volumes emphasizes that these juveniles are essentially normal young people whose misbehavior is simply a manifestation of their high spirits and understandable drive for independence. Most status offenders never come to the attention of the police or the court. However, those who do, definitely are likely to be the most difficult and severe problems. The effort to divert innocent juveniles from the court to avoid labeling as delinquent is undeniably commendable.

> But juveniles who are, in fact, behaving in seriously offensive, threatening or self-endangering ways should not be ignored in the naive belief that not labeling them will be of substantial benefit. The sloughing of these young people from a formal juvenile court to a community agency may stimulate some prepared communities to develop services, but it may also overwhelm many others which are less prepared and, meanwhile, cause undue tragedy."

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

3. An excellent article in this area has been written by Judge Lindsay G. Arthur. See "Status Offenders Need Help Too," *Juvenile Justice,* February 1975, Volume 26, No. 1. Also see "Elimination of Status Offenses: The Myth Fallacies and More Juvenile Crime," by Robert L. Drake, *Juvenile and Family Court Journal,* May 1978, Volume 29, No. 2.

XII. Detention, Bail, and Shelter Care Procedures

1. Whenever possible, a verified juvenile petition should be on file and an expeditious judicial hearing should ascertain whether or not the juvenile should be placed in detention or shelter care pending further hearing on the merits.
   (a) Intake staff should not have the power to make the decision for placement in detention and/or shelter care. This is a judicial function.
   (b) The detention hearing should be set up with procedural safeguards at the earliest possible moment after the juvenile is taken into custody. Both parents and counsel should be present for said hearing.

   All detention hearings should require sufficient evidence to substantiate a finding of "probable cause" that the allegations in the complaint were committed by the juvenile. A United States District Court in Florida has held that pre-trial detention of an accused juvenile without a showing of probable cause is unconstitutional. *Moss v. Weaver,* 383 F. Supp. 130 (Fla. 1974). The Fifth Circuit has ruled that pre-adjudicatory detention of a juvenile without a probable cause hearing is an unconstitutional denial of due process. *Moss v. Weaver,* 525 F.2d 1258 (Fla. 1976). The Louisiana Court of Appeals has held that juveniles are entitled to a probable cause hearing in any situation in which an adult would be entitled to one. *State ex rel. Joshua,* 327 So.2d 429 (La. 1976).

   Holding an accused juvenile in detention simply because he has no parents to care for him is a denial of equal protection. *In re C.,* 345 N.Y.2d 38 (N.Y. 1973). Jeopardy does not attach to a juvenile detention hearing that does not reach the merits of the case. *Locke v. Commonwealth,* 503 S.W.2d 729 (Ky. 1973). Uncorroborated hearsay evidence at a detention hearing is insufficient for finding probable cause to hold a juvenile. *People ex rel. Guggenheim v. Mucci,* 360 N.Y.S.2d 71 (N.Y. 1974).

   The Colorado Supreme Court has held that prompt juvenile detention hearings apply to neglect and dependency cases as well as delinquency situations. *P.F.M. v. District Court in and for County of Adams,* 520 P.2d 742 (Colo. 1974).
   (c) A Constitutional Right to Bail for Juveniles has not Generally Emerged. An Alaska case held that the right to bail was "unworkable and undesirable from the child's viewpoint." *Doe v. State,* 487 P.2d 47 (Alas. 1971). The courts have generally resolved the issue by finding that an adequate substitute by means of procedural due process and fundamental fairness in the holding of juveniles is sufficient in lieu of

bail. Implicit in the adequate substitute theory as formulated by the courts is the proposition that every effort must first be made to place the child in a situation where his freedom will not be curtailed and that his freeodm can only be curtailed if there is clearly no alternative available other than detention. Detention criteria have to do with "The probability that the child will appear," "The safety of the child," and other such criteria. Further, implicit in the adequate substitute for bail concept is the proposition that the juvenile be afforded a full hearing before the court, with the assistance of counsel, usually within 48 hours of the apprehension of the juvenile. Juveniles who are detained should be held in separate quarters from adults.

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

2. Some further information and cases in the area of detention and bail are as follows:

(a) Bond may be made available to juveniles by state statute. *Interest of Hobson,* 336 So.2d 736 (Miss. 1976). Also see *R. v. Whitmer,* 515 P.2d 617 (Utah 1973); and *In re Appeal for Montgomery County,* 351 A.2d 164 (Md. 1976).

(b) In Virginia, state law requires a preliminary hearing within seven days or the juvenile is to be released on his own recognizance. *State ex rel. E.D.V. Aldedge,* 245 S.E.2d 849 (W. Va. 1978). In an Arizona case, the court stated that the record, whether in the form of an affidavit or a description of the circumstances of the offense in the juvenile petition, may suffice to convince a detached judicial officer concerning the existence of probable cause. However, the mere filing of a petition alleging an act that would constitute a crime if committed by an adult was held to be an insufficient showing of probable cause to issue an arrest warrant or to support an independent judicial determination. *Bell v. Superior Court,* 574 P.2d 39 (Ariz. 1977).

In the case of *Moss v. Weaver,* 525 F.2d 1258 (Fla. 1976), it was held that for pretrial detention, there must be a judicial determination of probable cause. This need not be adversarial and it is not required that witnesses be sworn and subject to cross-examination. In Florida, hearsay is admissible and may be relied upon in a detention hearing based on a statute which allows consideration of "all relevant and material evidence even though not admissible at the adjudicatory hearing." *State v. I.B.,* 366 So.2d 186 (Fla. 1979). In the case of *In re Robin,* 579 P.2d 1 (Cal. 1978), the general proposition was upheld that detention should be the exception and not the rule. The purpose of a detention hearing is to ascertain the need for custody.

(c) Crowded dockets do not justify extension of preadjudication detention or custody orders beyond statutory limit. *Dexter v. Rakestraw,* 583 P.2d 504 (Okla. 1978).

(d) The Superior Court of Appeals of New Jersey has held that the requirement for an adjudicatory hearing within thirty days of detention is simply a reminder to trial judges to move detention cases expeditiously. Whether a trial is held speedily is determined by the length of delay, reason for the delay, prejudice to the juvenile and assertion of the rights. *State in the Interest of C.B.,* 414 A.2d 572 (N.J. 1980).

(e) The California Appellate Court has held that it is improper to have an automatic detention for a probation violation. The court held that a disposition for theft may require school attendance, but it cannot provide for detention without a hearing for nonattendance. *Matter of Gerald Allen B.,* 164 Cal. Rptr. 193 (Cal. 1980). The Supreme Court of Oregon has held that a child cannot be held in detention unless the court finds probable cause to believe that the child committed the offense alleged in the petition. *Application of Roberts,* 622 P.2d 1094 (Ore. 1981). The Colorado

Supreme Court has held that a juvenile may be held without bail to prevent harm to himself or others, or may be released on bail if it will guarantee his return for hearing. *L.O.W. v. District Court,* 623 P.2d 1253 (Colo. 1981). A federal court has held that a statutory scheme which empowers the state to have juveniles incarcerated for as long as five days without the state having established a justification for their being held constitutes a punitive measure offensive to due process. *U.S. ex rel. Martin v. Strasburg,* 513 F.Supp. 691 (N.Y. 1981). The Court of Appeals of Florida has held that a child who is truant in violation of the condition to an order which found the child dependent may be detained in secure custody *for the delinquency charge of contempt. D.H. v. Polen,* 396 So.2d 1189 (1981). The Supreme Court of Louisiana has held that juveniles in that state are entitled to bail pending adjudication when they are presumed innocent but not entitled to bail pending appeal when they have been found guilty. *State in Interest of Banks,* 402 So.2d 690 (La. 1981). The New Hampshire Supreme Court has held that a finding of probable cause is not statutorily required for detention before arraignment, but failure to find probable cause after arraignment will result in suppression of any statements made while detained. *In re Vernon E.,* 435 A.2d 833 (N.H. 1981).

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

4. Points to consider regarding detention facilities:

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

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

(c) Detention facility administration.

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

(2) Staff problems — rotation.

(3) Recreation, tutoring and treatment modalities.

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

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

The area of transfer, waiver and non-amenability is a complex area of the juvenile law and merits an entirely separate program of instruction in the National College of Juvenile Justice. Because the participants will receive this specific instruction, I have simply included a general introduction to the area in this outline.

1. Many states establish a procedure to transfer certain juvenile cases to the adult criminal court. Transferral represents a legislative declaration that juvenile court jurisdiction is inappropriate in certain situations. Transferral is based upon a variety of statutory grounds such as statements of the juvenile court waiving jurisdiction or the court finding that the juvenile is not amenable to treatment in available facilities under the Juvenile Code.

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

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

(2) The seriousness of the crime charged is, of itself, not sufficient for a valid waiver.

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

(4) Some jurisdictions, by statute, confer upon the criminal court or the prosecutor, authority to decide in which court, juvenile or criminal, the case should be commenced.

(b) An Ohio Court has held a valid transfer requires showing of reasonable grounds to believe the minor cannot be rehabilitated in juvenile facilities. *State v. Carmichael,* 298 N.E.2d 586 (Ohio 1973). In Colorado, the District Attorney has the right to prosecute certain designated juveniles as adults under the statute, without a transfer hearing. *Myers v. District Court for Fourth Judicial District,* 518 P.2d 836 (Colo. 1974). Also, in Illinois, the state's attorney has the power to decide whether youths should be prosecuted as juveniles or adults. *People v. Sprinkel,* 307 N.E.2d 161 (Ill. 1974). Wisconsin Transfer Statute gives the juvenile judge discretion to determine whether to waive juvenile court jurisdiction on the basis of whether it is in the best interest of the child or the public, has been held constitutional. *In re F.R.W.,* 212 N.W.2d 130 (Wis. 1973).

The U.S. Court of Appeals has held that the prosecutor need not show probable cause when a juvenile is transferred to a criminal court. *United States ex rel. Bombacino v. Bensinger,* 498 F.2d 875 (Ill. 1974). The Indiana Court of Appeals has ruled that hearsay evidence is admissible and the Fifth Amendment privilege against self-incrimination is not applicable in transfer hearings. *Clemons v. State,* 317 N.E.2d 859 (Ind. 1974). The Illinois Appellate Court has ruled that Illinois law making it unnecessary to hold a transfer hearing for a juvenile who has been moved to adult court by the state's attorney is constitutional. *People v. Lane,* 330 N.E.2d 149 (Ill. 1975).

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

The Superior Court of Hawaii has held that an order certifying a juvenile to the adult criminal system can only be made after there has been a full investigation, a hearing with counsel for the child and findings by the judge stating the relevant facts and his reasons for granting the order. *In Interest of Doe,* 606 P.2d 1326 (Haw. 1980). A Superior Court of Minnesota has held that a juvenile court may not grant certification and then stay its execution on condition of participation in a juvenile program. *In re Welfare of K.P.H.,* 289 N.W.2d 722 (Minn. 1980). The Superior Court of Pennsylvania has held that a juvenile certified to the adult court may plead guilty in adult court even though mother was not present. *Commonwealth v. Bane,* 414 A.2d 1056 (Pa. 1980). The Court of Appeals of Hawaii has held that at a certification hearing the charge may be presumed to be true without any showing of probable cause that the offense was committed and that the juvenile participated in the commission. The finding was that there was no constitutional right to a probable cause showing. *In Interest of Doe,* 617 P.2d 830 (Haw. 1980). The Supreme Court of Minnesota has held that when a seventeen year old charged in juvenile court eludes reasonable attempts to find and prosecute him until he is twenty-one years old, he becomes an adult for prosecution in the adult court without the need for certification. *Matter of Welfare of S.V.,* 296 N.W.2d 404 (Minn. 1980).

The Texas Civil Appeals Court has ruled that a confession may be considered in a certification hearing without inquiry of whether it was given voluntarily. *Matter of S.E.C.,* 650 S.W.2d 955 (Tex. 1980). The Supreme Court of North Dakota has ruled that at a certification hearing, hearsay is admissible about whether the juvenile is amenable to treatment, but not about whether there is probable cause to believe the juvenile was involved in the offense charged. *In Interest of P.W.N.,* 301 N.W.2d 636 (N.D. 1981). The Supreme Court of Virginia has ruled that hearsay is admissible at a certification hearing since it is not adjudicatory. Further, the court ruled that the juvenile is not entitled to a jury trial to decide if he should be certified to adult court. *In re E.H.,* 276 S.E.2d 557 (Va. 1981). The Court of Appeals of Wisconsin has held that for the purposes of determining if there is "prosecutive merit", the court in a certification hearing, may consider evidence which was illegally obtained if it is reliable. *In Interest of D.E.D.,* 304 N.W.2d 133 (Wis. 1981). The Ninth Circuit Court of Appeals has held that a social investigation is not required by due process as a prerequisite to certification. *People of Guam v. Kingsbury,* 649 F.2d 740 (Guam 1981). The Superior Court of Pennsylvania has held that prior to hearing a motion for certification, a court may require a child to cooperate in a psychiatric evaluation to determine whether the child is mentally ill. *Commonwealth v. Datsun,* 429 A.2d 682 (Pa. 1981). A United States District Court has held that a juvenile may be committed for a psychiatric evaluation and he may be compelled to respond to the interviewers, but *his responses may not be used to support certification. U.S. v. J.D.R.S.,* 517 F. Supp. 69 (N.Y. 1981). A civil appeals court of Texas has held that in a certification proceeding, the child is not entitled to a hearing as to whether he was mentally competent to be responsible for the offense. *T.P.S. v. State,* 620 S.W.2d 728 (Tex. 1981). The Kansas Court of Appeals has held that the court's inability to control the release date from the state training school may not be considered in determining whether the child is amenable to juvenile programs. *In Interest of Hobson,* 636 P.2d 198 (Kan. 1981). The Maryland Supreme Court has held that the "preponderance of evidence" standard is constitutional for certification, even though "reasonable doubt" is required for adjudiation. *In re Randolph T.,* 437 A.2d 230 (Md. 1981).

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

XIV. Double Jeopardy

1. As previously considered, the Supreme Court has ruled that the *Fifth Amendment protection against double jeopardy applies to juvenile delinquency proceedings.* With jeopardy attaching when the juvenile court begins to hear evidence, the juvenile cannot be tried again for the same offense in an adult court. *Breed v. Jones,* 421 U.S. 519, 95 S.Ct. 1779, 44 L.Ed.2d 346 (1975).
2. *Swisher v. Brady,* 438 U.S. 204, 98 S.Ct. 2699, 57 L.Ed.2d 705 (1978).

Facts:

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

Holding:

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

3. When a conviction for a greater crime cannot be had without conviction for a lesser crime, the double jeopardy clause bars prosecution for the lesser crime after conviction of the greater. *Harris v. Oklahoma,* 433 U.S. 682, 97 S.Ct. 2912, 53 L.Ed.2d 1054 (1977). The concurring opinion set forth a philosophy of one prosecutorial proceeding of all charges which grow out of a single criminal act, occurrence, episode or transaction.
4. *State v. Corlas,* 379 A.2d 998 (Me. 1977).

Facts:

In the course of a waiver proceeding, the judge signed an order which stated that the child was "adjudged to have committed a juvenile offense" and the court committed him to a juvenile institution for six months. The order was dated June 1, 1976. On August 10, 1976, the judge rescinded that order and in a separate order, waived the child for trial as an adult.

Holding:

At the moment of signing the original commitment order, the judge's jurisdiction ceased and any action thereafter was a nullity since the Department of Human Resources had obtained a guardianship of the child under the statute. The first order signed by the judge, by implication, was a denial of the waiver petition which was filed later.

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

   In *District of Columbia v. I.P.,* 335 A.2d 225 (D.C. 1975), it was held that where a family court judge sua sponte declared a mistrial after it began to hear evidence and the mistrial was not dictated by "manifest necessity" (physically impossible to continue, gross misconduct, death or illness of judge, juror or witness, etc.), then double jeopardy precludes a second trial. The Supreme Court of California has held that a referee's dismissal of a wardship petition, based on a lack of proof beyond a reasonable doubt of a juvenile's guilt, precluded (on double jeopardy grounds) a rehearing de novo before a judge. *Jesse W. v. Super. Ct.,* 145 Cal. Rptr. 1 (Cal. 1978). The Court of Criminal Appeals of Oklahoma has held that jeopardy does not attach at a parole revocation proceeding so as to bar a subsequent delinquency adjudication based on conduct considered at the revocation proceedings. *In re J.E.S.,* 585 P.2d 382 (Okla. 1978). The California Court of Appeals has held that if a referee, after hearing the petition to adjudge the juvenile a ward of the court, dismisses the petition sua sponte without legal necessity, a rehearing de novo by a juvenile court judge placed the minor twice in jeopardy. *In re Raymond T.,* 150 Cal. ptr. 537 (Cal. 1978). An Illinois Appellate Court has held that where charges were dismissed in a minor in need of supervision proceeding, retrial on the same and associated charges was barred by double jeopardy. In *Interest of R.L.K.,* 384 N.E.2d 531 (Ill. 1978).
6. The Civil Court of Appeals of Texas has held that a parole revocation hearing does not determine whether an offense has been committed and does not expose to stigma or loss of liberty and does not place the child in jeopardy. *In re D.B.,* 594 S.W.2d 207 (Tex. 1980).
7. The Supreme Judicial Court of Massachusetts has held that a trial de novo does not constitute double jeopardy. The trial to a judge without rules of evidence, cross-examination or record does not bar a trial de novo to a jury in a court of record. *Juvenile v. Commonwealth,* 409 N.E.2d 755 (Mass. 1980). In Texas, a child failed to assert that he was a juvenile until he had been convicted of murder in the adult court. The Civil Court of Appeals in Texas found that since the adult court lacked jurisdiction, the conviction was a nullity and did not constitute jeopardy; nor were subsequent juvenile proceedings of denial of speedy trial since the delay was attributable to the juvenile, not the state. *Matter of D.N.,* 611 S.W.2d 880 (Tex. 1980).

XV. Pre-Trial Discovery and Pre-Trial Conference

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

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

XVI. Juvenile Capacity

1. Most courts hold that a juvenile has the right to plead not guilty by reason of insanity and the right not to be subjected to juvenile proceedings while incapacitated or incompetent. *In re Causey,* 363 So.2d 472 (La. 1978). Insanity defense is available in the California Juvenile Court. *In re M.G.S.,* 267 Cal. App. 2d 329 (Cal. 1968), and also see *In re Michael E.,* 14 Cal.3d 892 (Cal. 1975).
2. Generally, when an adult is found not guilty by reason of insanity, he is committed to a hospital or ordered to be privately supervised pending further order of the court. In many instances, in the juvenile court, the only alternative to an incapacitated juvenile is to decline jurisdiction. Certainly a statute could provide that a juvenile be committed to a specialized mental institution under a commitment order pending recovery and further court review and order.
3. A juvenile charged with armed robbery, requested a psychiatric panel to determine if he was legally sane at the time of the commission of the offense, and whether competent to stand trial. The Louisiana court held that while there is no statutory authority authorizing a plea of insanity in a juvenile case since it is civil in nature; nevertheless, due process guarantees granting the juvenile the right to such an examination. *In the Interest of Causey,* 603 So.2d 472 (La. 1978). A difficulty is the issue of how a mentally ill juvenile should be handled when the child can be clearly shown to be "mentally ill" as opposed to the "legal insanity" test, the McNaughton Rule or right from wrong test. In one case, where the problem was not legal insanity but mental illness, the court was held to have discretionary power to initiate proceedings for civil commitment. *State v. Doe,* 576 P.2d 1137 (New Mexico, 1978). Another problem is whether or not a child can be certified as an adult when found to be "mentally ill" but not "legally insane." In a California case, a fourteen year old juvenile with a mental age of five or six was charged. Testimony indicated the juvenile had a very low IQ, couldn't read or tell time, was incapable of abstract thought, had a speech impediment and had little awareness of the proceedings. Nevertheless, the psychiatrist admitted that the defendant did know right from wrong. Under a California idiocy defense statute, it was held that the McNaughton right and wrong test was inappropriate. The court held that the defendant could be excused by reason of a mental defect if he lacked substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law. *People v. Drew,* 583 P.2d 1318 (Cal. 1978). Another California case held that the presumption of incapacity of a criminal act of children under fourteen years of age refers to chronological age and not to mental age. *In re Ramon M.,* 584 P.2d 524 (Cal. 1978).
4. The question of how to handle an incapacitated juvenile is not totally clear from the cases. The paucity of cases available is probably because, as a practical matter, prosecutors and juvenile probation officers make private arrangements for care and treatment of these instances of mental illness or incapacity with the approval and cooperation of the court other than by formal court proceedings on the alleged delinquent act. In a juvenile transfer case, the Kansas Supreme Court held that mental illness is but one of the factors to be considered in a waiver hearing and that the court is not required to retain juvenile jurisdiction because of the alleged mental illness. *In the Interest of Ferris,* 563 P.2d 1046 (Kan. 1977). In a transfer case, it can be argued that a juvenile can be transferred to the adult court even though the juvenile was found to be mentally ill because his rights would not be waived because he could raise the insanity defense in the adult criminal proceeding.

5. Evidence of prior sustained delinquency petitions for the same conduct was properly admitted in a delinquency proceeding to establish the minor's *capacity* or (knowledge of the wrongfulness of his conduct.) *In re Harold M.,* 144 Cal. Rptr. 744 (Cal. 1978). Proof "beyond a reasonable doubt" that a minor under fourteen years of age has the capacity to commit a crime is not a constitutional prerequisite to an adjudication of wardship in juvenile court, i.e., the juvenile's capacity to commit a crime need not be proved beyond a reasonable doubt. *In re Clyde H.,* 154 Cal. Rptr. 727 (Cal. 1979). The Supreme Court of Nevada has held that a juvenile court may not proceed with a delinquency adjudication when it determines that the juvenile is not competent to assist counsel in his defense and that the court has inherent power to order commitment of juvenile incompetents deemed dangerous to the community in out-of-state facilities if necessary. *In re Two Minor Children,* 482 P.2d 793 (Nev. 1978).
6. The Civil Court of Appeals of Texas has ruled that in a hearing to determine whether a child is mentally fit, as an adjunct to a certification hearing, the child has a statutory right to a jury. *Matter of V.C.H.,* 605 S.W.2d 643 (Tex. 1980).

XVII. Trial or Adjudicatory Hearing

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

   Some guidelines for the time frame to bring a juvenile to hearing are as follows: (1) length of delay, (2) reason for delay, (3) the defendant's assertion of rights, (4) prejudice to the defendant, (5) did the State discharge its constitutional duty to make a diligent, good faith effort to bring the defendant to trial. *Moore v. Arizona,* 414 U.S. 25, 94 S.Ct. 188, 38 L.Ed.2d 183 (1973).

   Generally, when a juvenile is arrested, he is "accused" and speedy trial time commences at the time of the arrest. *Dillingham v. U.S.,* 423 U.S. 64, 96 S.Ct. 303, 46 L.Ed.2d 205 (1975). Concerning the right to quick disposition, in the case of *State ex rel. Juvenile Department v. W.,* 578 P.2d 824 (Ore. 1978), a juvenile who was charged with two distinct offenses was entitled to disposition of every allegation. The court's reservation for six months of one of the allegations was improper. In New Mexico, a case was set for trial after the date when time had passed under the statute. The juvenile did not object and the State argued a waiver of the provision. It was held that the statute affirmatively stated that children were entitled to a dismissal with prejudice if a hearing is not begun within the time period. The court decided the case not on the principle of prejudice to the child but upon the concept of prompt adjudication. The petition was dismissed. *State v. Doe,* 545 P.2d 1022 (N.M. 1976).
2. The adjudicatory hearing is a distinct hearing on the merits. The National Advisory Commission on Criminal Justice Standard recommends an adjudicatory hearing as a distinct and separate hearing from the dispositional hearing. At the adjudicatory hear-

ing, the juvenile should be afforded all of the rights given a defendant in an adult criminal prosecution except jury trial. *Standard 14.4 of the NACCJ.*

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

3. Burden of Proof

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

The burden of proof in child protection and dependency and neglect cases has been generally held to a lesser standard. A case in the District of Columbia held that a *preponderance of the evidence* is constitutionally permissible as a standard of proof in paternity cases, because loss of liberty is not a consequence of the finding. *Johnson v. District of Columbia,* 137 A.2d 567 (D.C. 1958). There is a persuasive argument that the need to protect helpless children from neglectful or abusive parents requires and justifies a lower degree of persuasion.

The New Mexico Supreme Court has ruled that evidence required to terminate parental rights should be "clear and convincing." *Huey v. Lente,* 514 P.2d 1093 (N.M. 1973). The Oregon Court of Appeals has held that due process is satisfied by a *preponderance of the evidence* standard in a proceeding to terminate parental rights. *State ex rel. Juv. Depart. v. K.M.S.,* 552 P.2d 578 (Ore. 1976). New York City Family Court ok's *preponderance of evidence* on abuse or neglect case. *In the Matter of J.R.,* 386 N.Y.S.2d 774 (N.Y. 1976).

The Massachusetts Supreme Court has held that a court may properly find a parent currently unfit to care for a newborn child *based on ongoing and unabated history of past neglect of other children* and that determination of unfitness must be supported by detailed and specific findings of fact, *but not by "clear and convincing" proof. Custody of a minor,* 389 N.E.2d 68 (Mass. 1979). See the *Santosky* case (*supra* p. 28) which sets standard of "clear and convincing."

4. Burden of Proof — *Probation Revocation Hearings*

(a) The Court of Appeals of Georgia has held that revocation of a juvenile's probation requires proof *beyond a reasonable doubt,* or violation of conditions of probation. *T.S.I. v. State of Georgia,* 229 S.E.2d 553 (Ga. 1976).

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

(b) An Oklahoma case held that testimony at a probation revocation hearing that a juvenile was intoxicated and that he sniffed paint to become intoxicated wasn't sufficient to establish by a *preponderance of the evidence* the substance inhaled contained toxic vapors that created a state of intoxication. The court held that the juvenile court had previously adjudicated the juvenile and therefore had jurisdiction to consider the motion to revoke probation, although the behavior for probation revocation had taken place in another county. *Matter of T.L.W.,* 578 P.2d 360 (Okla. 1978). In a Louisiana case, a juvenile was adjudicated truant and placed on probation with conditions that he attend school with no unexcused absences. The juvenile violated the conditions and was committed. On appeal, the court reversed the commitment under a Louisiana statute that only children *adjudicated delinquent* may be committed. *In the Interest of Bellanger,* 357 So.2d 634 (La. 1978).

5. Jury Trial

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

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

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

6. Confrontation and Cross-Examination

(a) The U.S. Supreme Court in *Gault,* implies the right of confrontation and cross-examination to juvenile proceedings. The Court held that a determination of delin-

quency and an order of commitment to a state institution cannot be sustained in the absence of sworn testimony and cross-examination.

(b) As previously considered, the U.S. Supreme Court decided in *Davis v. Alaska,* 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974) that the anonymity of juvenile offenders does not take precedence over the right of confrontation in a hearing. Although the juvenile judge has discretion to control the extent of cross-examination, this power does not include total prohibition of cross-examination. *People ex rel. Lauring v. Mucci,* 355 N.Y.S.2d 786 (N.Y. 1974).

7. Corroboration

(a) State laws vary concerning the necessity of corroboration of testimony in order to sustain a conviction. If a state statute requires corroboration under the adult criminal code, the requirement of corroboration would undoubtedly be necessary in the juvenile proceeding. Following the *Winship* decision, the better rule is probably that corroboration is required for an adjudicatory finding. For one court's reasoning, see *In re Arthur M.,* 310 N.Y.S.2d 399 (N.Y. 1970).

Even if the corroborating evidence does not identify the juvenile with the commission of the offense, it at least should establish the corpus delecti, which consists of proof of the actual injury or loss caused by criminal agency. *D.C.A. v. State,* 217 S.E.2d 470 (Ga. 1975). The Louisiana Court of Appeals held in a juvenile case that accomplice testimony, even though uncorroborated, is competent evidence, but that it is "subject to suspicion and should be received and acted upon with extreme or at least grave caution." *State ex rel. Williams,* 325 So.2d 854 (La. 1976).

(b) It was held proper corroboration of accomplice testimony in a burglary case when the court found that the juvenile at the time of arrest was in possession of recently stolen goods. *J.M.E. v. State,* 243 S.E.2d 730 (Ga. 1978). Some cases have held that the accomplice testimony rule is not constitutionally based and a state statute can provide for a lesser burden than this general rule. It has been held that differences in criminal and juvenile evidentiary procedures may be constitutionally permissible. *In re Mitchell P.,* 587 P.2d 1144 (Cal. 1978).

8. Social Reports as Evidence

(a) Generally social reports are not proper evidence in the adjudicatory hearing unless stipulated to by the parties. *State of Utah v. Lance,* 464 P.2d 395 (Utah 1970). It is elementary that social reports must be made available to the respondent and/or his counsel if they are used in the adjudicatory or dispositional hearing.

9. Hearsay and Other Rules of Evidence

(a) In light of recent Supreme Court cases, the rules of evidence are generally held to be applicable in an adjudicatory hearing in juvenile cases. Although there are some cases to the contrary, most courts have determined that the rules of evidence are applicable in juvenile proceedings. The New York Supreme Court has ruled that uncorroborated hearsay evidence at a detention hearing is not sufficient for a finding of probable cause to hold a juvenile. *People ex rel. Guggenheim v. Mucci,* 360 N.Y.2d 71 (N.Y. 1974). The Kansas Supreme Court has ruled that hearsay evidence is not admissible in the adjudicatory phase of the proceeding to terminate parental rights. *In re Johnson,* 522 P.2d 330 (Kan. 1974). Also see *In re Kevin G.,* 363 N.Y.S.2d 999 (N.Y. 1975).

10. Motions

(a) Motions in the juvenile court should be handled generally as in adult criminal matters. The better procedure is to hear a suppression motion before the trial begins.

11. Burden of Proof in Suppression Hearing

(a) Although some courts rely on the rule that the party submitting the motion has the burden of proof, the more recent decisions recognize that the burden of proof rests on the prosecution to show the evidence was constitutionally acquired. *Alderman v. United States,* 394 U.S. 165, 89 S.Ct. 961, 22 L.Ed.2d 176 (1969). A Missouri court has held that a child should not bear the burden of proving incriminating statements were made involuntarily. *In the Interest of M.C.,* 504 S.W.2d 641 (Mo. 1974).

12. Privilege against self-incrimination and plea of guilty or stipulation concerning the facts in open court.

(a) The *Gault* case held that the privilege against self-incrimination pertains to juvenile court proceeding. Depending upon the age of the child, the presence of parents and/or counsel, a juvenile confession may be admitted. A juvenile may admit to a charge in juvenile court if the appropriate safeguards are provided. *Matter of Daniel Richard D.,* 261 N.E.2d 627 (N.Y. 1978). The juvenile should be represented by counsel in open court and he should concur with his counsel's plea on his behalf. It is helpful to have a ratification of the plea or stipulation by the juvenile's parents in open court to show that said stipulation or plea was given knowingly and intelligently. The ramifications of a plea should be made quite clear to the juvenile and should be spread on the record. *Parker v. North Carolina,* 397 U.S. 790, 90 S.Ct. 1458, 25 L.Ed.2d 785 (1970).

13. A New York Family Court has held that the statute empowering a court to confer immunity in a criminal proceeding authorizes the family court to grant immunity to a witness in a delinquency adjudication hearing. *In re Barry,* 403 N.Y.S.2d 979 (N.Y. 1978).

14. The Supreme Court of New Hampshire has held that statutory time limits for holding an adjudication hearing are a substantive right with which the state must comply. *In re Russell C.,* 414 A.2d 934 (N.H. 1980). The Supreme Court of Ohio has held that a juvenile desiring to appeal has no right to demand a narrative summary of the proceedings from the judge unless he shows that no verbatim transcript is available. *State ex rel. Corona v. Harris,* 406 N.E.2d 1120 (Ohio 1980). The Supreme Court of Minnesota has held that to expedite litigation, a court should take judicial notice of the files of any of its divisions. *Matter of Welfare of Clausen,* 289 N.W.2d 153 (Minn. 1980). A Superior Court of Pennsylvania has held that interviews with children in chambers, even if both counsel are present, should be reported. *Lewis v. Lewis,* 414 A.2d 375 (Pa. 1979). The Court of Appeals of Illinois has held that plea bargaining is necessary to prevent the courts from becoming overloaded and is encouraged if conducted in open court and no statements are used against the respondent if he rejects the bargain. *In Interest of Jones,* 407 N.E.2d 691 (Ill. 1980). The Court of Appeals of the District of Columbia has held that a child age three at the time of the crime, could testify. The court held a child is competent to testify if she knows the difference between truth and falsity, appreciates her duty to tell the truth, and is able to remember the events. *Smith v. U.S.,* 414 A.2d 1189 (D.C. 1980). The Supreme Court of Arizona has held that a juvenile has a constitutional right to be able to understand the charges and assist in his own defense, and adult procedures should be used to determine this if the juvenile procedures do not exist. *State ex rel. Dandoy v. Superior Court,* 619 P.2d 12 (Ariz. 1980). The Court of Appeals of Georgia has held that

if termination and neglect are more civil than criminal in nature; discovery procedures are not barred. *Re v. Development of Human Resources,* 270 S.E.2d 303 (Ga. 1980). A Court of Appeals of New Mexico has held that a court cannot order a commitment to a boy's school on stipulated facts without hearing supportive evidence. *State v. Doe,* 619 P.2d 194 (N.M. 1980).

15. The Supreme Court of Nevada has held that the confession of a juvenile accomplice must be corroborated by a person who was not an accomplice. *A minor v. Juv. Dept. 4th Jud. Dist.,* 608 P.2d 509 (Nev. 1980). The Court of Appeals Fourth District Florida has held that voluntary intoxication is a defense to acts of delinquency requiring intent. *In the Interest of J.D.Z.,* 382 So.2d 1351 (Fla. 1980). The Court of Appeals of Florida has held that the mere presence of a juvenile as a passenger in a stolen automobile is not of itself sufficient to prove that the juvenile participated in stealing the automobile. *B.L.W. v. State,* 393 So.2d 59 (Fla. 1981). The Supreme Court of Louisiana has held that either party has statutory right to have witnesses sequestered in a juvenile adjudicatory hearing, even without showing that he would be prejudiced by their presence. *State in Interest of Giangrosso,* 395 So.2d 709 (La. 1981). The Supreme Court of South Carolina has ruled that a juvenile court may limit the length of final argument but the final argument of a juvenile may not be denied all together. *In the Matter of Bazzle,* 279 S.E.2d 370 (S.C. 1981). The Court of Appeals of Florida has held that if tapes of an electronically reported hearing are lost, and available transcript will not support a finding of delinquency, a new trial is required. *J.E. v. State,* 404 So.2d 845 (Fla. 1981). The Supreme Court of New Mexico has ruled that a child of eight is capable of willful and malicious conduct. *Ortega v. Montoya,* 637 P.2d 841 (N.M. 1981).

XVIII. Proceedings — "Dependent and Neglected" or "Deprived" Children

1. The term "neglected" usually implies some element of parental fault, whereas the term "dependent" generally refers to a condition not resulting from parental fault, i.e., a "dependent child" may be one who is without a parent or other person responsible for his care and a "neglected child" may be one who lacks proper parental care and supervision, or who has been abandoned.
2. A "deprived child" is defined as a child under eighteen years of age who is without proper parental care or control, subsistence, education as required by law or other care or control necessary for such child's physical, emotional or mental health; and the deprivation is not due solely to the lack of financial means of such child's parents, guardian or other custodian.
3. Unique problems in the investigation and trial of battered and dependent and neglected children.
   (a) Hearings involving permanent parental severance.
   (b) Hearings involving non-permanent parental severance with children made wards of the court.
   (c) Mandatory child abuse legislation in most states.
   (d) The necessity for drawing the dependency and neglect or deprived complaint in specific terms rather than general statutory terms.
4. The courts have held that indigent parents are entitled to court appointed counsel in child dependency proceedings. *Cleaver v. Wilcox,* 499 F.2d 940 (Cal. 1974). Also see *Crist v. New Jersey Division of Youth and Family Services,* 343 A.2d 815 (N.Y. 1975). The U.S. District Court in Florida has held that parents in child dependency proceedings have a constitutional right to counsel immediately following service of the petition on the parent or seizure of the child. *Davis v. Page,* 442 F. Supp. 258 (Fla. 1977). But see, *Lassiter* does not require counsel in all such cases, (*supra,* p. 26).

5. The Appellate Court of Illinois has held that once the period to appeal from an order terminating parental rights has expired, a parent may not seek to restore those rights by means of a petition to modify the order. *In Interest of Workman,* 373 N.E.2d 39 (Ill. 1978). The California Court of Appeals has held that an order declaring minor children free from the custody and control of the parent neither relieves the parent of his duty to support the children nor precludes awarding him visitation rights. *In re Marriage of O'Connell,* 146 Cal. Rptr. 26 (Cal. 1978). The Oregon Supreme Court has held that there is no cause of action stated by plaintiff children suing their mothers for neglect of parental duties, nor would the Court recognize a new tort of parental desertion. *Burnette v. Wahl,* 588 P.2d 1105 (Ore. 1978). The Supreme Court of Utah has held that, where the juvenile court has terminated parental rights and ordered a child placed for adoption, it lacks jurisdiction to grant the child the right to visit her natural parents. *State in Interest of R.J.,* 589 P.2d 244 (Utah 1978).
6. The Arkansas Supreme Court has struck down as unconstitutionally vague the state's termination of parental rights statute which recognizes parental failure to maintain "a proper home" as grounds for termination. *Davis v. Smith,* 583 S.W.2d 37 (Ark. 1979). In a New York case, parent's election of unconventional laetrile treatment for cancer over radiation or chemotherapy was held not to amount to neglect of the child's medical needs. *In re Hofbauer,* 419 N.Y.S.2d 936 (N.Y. 1979). In a matter where permanent parental severance was not requested, a California case holds that evidence illegally obtained by law enforcement officers will not be excluded in a child dependency proceeding to declare the child a ward of the court. *In the Matter of Robert P.,* 132 Cal. Rptr. 5 (Cal. 1979). In a Georgia case, the juvenile court did not hear a neglect hearing within the ten days required by statute. The appellate court held that the court therefore lacked jurisdiction and the motion to dismiss should have been granted. *Cruz v. County,* 246 S.E.2d 426 (Ga. 1979).
7. The Supreme Court of Virginia has held that under Virginia law, when custody of a child has been removed from the parents because of neglect, the parents have the burden of proving that the child should be restored to them but welfare has the burden of proving that their residual, noncustodial rights should be restored. *Weaver v. Roanoke Department of Human Resources,* 265 S.E.2d 692 (Va. 1980). The Supreme Court of South Dakota has held that at the trial of a dependency and neglect action, the court may consider events which occurred *after the petition was filed. Matter of A.M.,* 292 N.W.2d 103 (S.D. 1980). In a New York case, the court held that the death of a child from malnutrition and dehydration may be a basis for finding his sister also in danger from the same causative factors. *Matter of Maureen G.,* 426 N.Y.S.2d 384 (N.Y. 1980). The Supreme Court of Minnesota has held that in deciding whether to terminate parental rights, "the test is whether the (parent) is presently able and willing to assume his responsibilities and not whether he has from time to time in the past been derelict in his duties." *Matter of Welfare of Solomon,* 291 N.W.2d 364 (Minn. 1980). The Illinois Court of Appeals Third District has stated that passively failing to protect constitutes neglect. The court held that it is neglect for a noncustodial parent not to take an active role in correcting a home environment which he knows is causing physical and psychological trauma for the children. *In Interest of Dixon,* 401 N.E.2d 591 (Ill. 1980). The Illinois

Court of Appeals Fifth District has held that parents may be found unfit and their rights terminated solely on the basis that they are mentally retarded, even though this is not their fault and have not made great efforts to provide adequate care for their children. *In Interest of Devine,* 401 N.E.2d 616 (Ill. 1980). A Supreme Court of Oklahoma has held that parental rights cannot be terminated for failure to correct conditions unless the court has advised the parents of the conditions which must be corrected. *Matter of T.M.H.,* 613 P.2d 468 (Okla. 1980).

For a helpful summary of case law in this area, see *Child Neglect and Dependency: A Digest of Case Law,* by Elizabeth W. Brown, Juvenile Justice Textbook Series, National Council of Juvenile Court Judges, P.O. Box 8000, Reno, Nevada 89507.

8. A superior court in New Jersey has ruled that the father of an illegitimate child may be served by publication in a determination of parental rights proceedings *where the mother refuses to reveal his identity so as to permit more effective service. Lutheran Social Services v. Doe,* 411 A.2d 1183 (N.J. 1979). The Supreme Court of New Hampshire has ruled that a mother may be compelled to submit to a psychiatric examination to determine whether she is fit to take care of her children. *In re Fay G.,* 412 A.2d 1012 (N.H. 1980). A superior court of Connecticut has held that a mother may surrender her parental rights if she is adequately counseled as to her rights and the consequences of waiving them, and is given adequate time for consideration. *Doe v. Catholic Family Services, Inc.,* 412 A.2d 714 (Conn. 1980). A family court in New York has held that mental retardation of the parents is insufficient grounds for terminating their parental rights. *Matter of Gross,* 425 N.Y.S.2d 220 (N.Y. 1980). The Supreme Court of Oklahoma has held that inadequate housekeeping is not a basis for termination of parental rights, but lack of responsibility is. It further held that though a mother is entitled to be advised of her right to counsel, failure to do so is not fatal where her right to counsel was mentioned in the summons, where the children had counsel at the hearing, and where the mother did not raise the issue until four years after the termination of the decree was issued. *Matter of F.K.C.,* 609 P.2d 774 (Okla. 1980). An Illinois appellate court reversed a finding of neglect because a finding of abuse was speculative and a finding of no reasonable effort to correct previous neglect was inappropriate because the mother did not have custody. *In Interest of Loitra,* 401 N.E.2d 971 (Ill. 1980). The Ohio Supreme Court has held that indigent parents on appeal from determination of parental rights are entitled to appointed counsel and free transcripts under the due process and equal protection guarantees of the state and federal constitution. *Heller v. Miller,* 399 N.E.2d 66 (Ohio 1980). The Kansas Supreme Court has held that a parent as defined under Kansas statutes is a party to the proceedings and is therefore entitled to review the records, reports and evaluations received or considered by the court. *Nunn v. Morrison,* 608 P.2d 1359 (Kan. 1980).

9. The District Court of Appeals of Florida has held that in dependency proceedings, the state must be represented by counsel and the mother has full due process rights to counsel, sworn testimony and confrontation. *A.Z. v. State,* 383 So.2d 934 (Fla. 1980). The Supreme Court of Washington has held that the statutory phrases, "proper parental control" and "proper maintenance and control", are not so vague as to be a denial of due process of law. *In re Aschauer's Welfare,* 611 P.2d 1245 (Wash. 1980). The Court of Appeals of Oregon has held that a child placing agency is liable in tort, not contract, for failure to find and supervise an adequate placement, but public agencies are immune from negligence concerning discretionary functions. *Bradford v. Davis,* 611 P.2d 326 (Ore. 1980). A court of appeals of Illinois has held that it is neglect for a noncustodial

parent not to take an active role in correcting a home environment which he knows is causing physical and psychological trauma for the children. *In Interest of Dickson,* 401 N.E.2d 591 (Ill. 1980).

10. A Court of Appeals in Indiana has held that a parent who observes the other parent treating the child in a dangerous manner is criminally liable for not intervening to protect the child. *Worthington v. State,* 409 N.E.2d 1261 (Ind. 1980). The Circuit Court of Appeals of Missouri has held that even though the mother's neglect consisted of obscene conduct with a daughter, it was proper for the court to also remove a son from her custody, even though the evidence of improper conduct related solely to the daughter. *In Interest of A.K.S.,* 602 S.W.2d 848 (Mo. 1980). In the Court of Appeals of New Jersey, a father who was charged with child abuse was held not entitled to review the welfare investigation reports for purposes of bringing a civil lawsuit. *Kaszerman v. Manshel,* 422 A.2d 449 (N.J. 1980). The Supreme Court of Nebraska has held that it is not necessary to try to implement a rehabilitation plan before seeking termination of parental rights. *In re Interest of Carlson,* 299 N.W.2d 760 (Neb. 1980). The Court of Appeals of Missouri has held that documents from the files of the Division of Family Services may be admitted in evidence as business records if they meet all the requirements for business records. *In Interest of A.R.S.,* 609 S.W.2d 490 (Mo. 1980). The Court of Appeals of Georgia has held that a mother's parental rights cannot be terminated simply because she is 16 years old, unemployed and with no prospects for employment. *Chancey v. Department of Human Resources,* 274 S.W.2d 728 (Ga. 1980). The Supreme Court of Georgia has held that a court cannot compare the relative merits of the parents with some other home and terminate if the other home provides better financial, educational or even moral advantages. *Carvalho v. Lewis,* 274 S.W.2d 471 (Ga. 1980).

11. The Supreme Court of Oregon has held that a mother who functioned normally and cared for her child well, cannot be terminated because she had intermittent bouts of disease which caused mental aberations. *Matter of Swartz Fhaer,* 629 P.2d 882 (Ore. 1980). A Court of Appeals of Colorado has held that if a treatment plan is developed as part of a disposition in a neglect case, it must specify the criteria which will be used to determine whether custody will be returned to the mother. *People v. C.A.K.,* 628 P.136 (Colo. 1981). A Court of Appeals of Michigan has held that termination is justified when the mother failed to comply with the most important of fourteen conditions incorporated by the court in its order continuing a termination hearing for an experimental ninety days. *Matter of Adrianson,* 306 N.W.2d 487 (Mich. 1981). The Supreme Judicial Court of Massachusetts has held that a petitioner must prove a parent is unfit. The mere fact that a mother is in prison at the time of birth is insufficient of itself. *Department of Public Welfare, etc.,* 421 N.E.2d 28 (Mass. 1981). The Supreme Court of Montana has held that regardless of actual proof that a parent intentionally inflicted injuries upon the child, the occurrence of serious and frequent and yet unexplained, physical injuries to the child is sufficient to properly bring the child within the statutory definition of neglect. *In the Matter of A.J.S.,* 630 P.2d 217 (Mont. 1981). The Supreme Court of Oregon has held that testimony by a social worker of children's descriptions of sexual contacts with a third party, of which their parents were aware, is not competent evidence in a proceeding to remove the children from the parents' custody. *Matter of McDermid,* 630 P.2d 913 (1981). The Supreme Court of Nebraska has held that termination is too important to be decided by informal procedures; thus, reliance upon letters from social workers to the court without cross-examination of the writers is discouraged. *In Interest of D.,* 308 N.W.2d 729 (Neb. 1981).

For Model Acts concerning termination of parental rights, see: "Freeing Children for Permanent Placement Through a Model Act," by Sanford N. Katz, *Family Law Quarterly,* Volume 12, No. 3, Fall, 1978, Family Law Section of the American Bar Association. "Model Statute for Termination of Parental Rights," by James H. Lincoln, *Juvenile Justice,* Volume 27, No. 4, November, 1976, National Council of Juvenile and Family Court Judges, Box 8000, University of Nevada, Reno, Nevada 89507, and the *Standards Relating to Abuse and Neglect,* American Bar Association Institute of Judicial Administration, Juvenile Justice Standards Project.

XIX. Dispositional Proceedings and Hearings in Juvenile Cases

1. The participants will have a full block presentation on dispositions at the college. Therefore my outline is brief and is intended as a general introduction to the subject.
2. The National Advisory Commission on Criminal Justice Standard recommends that the dispositional hearing should be separate from the adjudicatory hearing and the procedures of disposition should be identical to those followed in sentencing procedure for adult offenders. *Reference: Standard 14.5 of the NACCJ.*
3. The dispositional hearing is where the decision is made concerning the life and placement of the juvenile. The dispositional hearing should weigh and balance both the best interest of society as well as the best interest of the child with the overriding philosophy of rehabilitation, care, treatment and behavior modification of the juvenile. If the probation staff has not gathered the appropriate dispositional investigational materials, then the dispositional hearing should be continued and not heard on the same day as the adjudicatory hearing.

   See *Disposition Hearings: The Heartbeat of the Juvenile Court,* by Lindsay G. Arthur and William A. Gauger, Juvenile Justice Textbook Series, National Council of Juvenile Court Judges. Also see *Dispositional Alternatives in Juvenile Justice: A Goal Oriented Approach,* by Richard B. Traitel, Ph.D., Juvenile Justice Textbook Series, National Council of Juvenile Court Judges, P.O. Box 8978, Reno, Nevada 89507.
4. As stated in *Guides for Juvenile Court Judges,* by the National Council on Crime and Delinquency, Library of Congress Catalog Card No. 57-12880, "The judge's basic problem in dispositional hearings is how to insure that said disposition is realistically related to the causes of the youngster's behavior as well as to the specific offense to which he is appearing in court."

   There are five mandates basic to the disposition of juvenile cases:

   (a) Individualize the child.

   (b) Have an awareness of how the child views himself.

   (c) Weigh the past in terms of the future.

   (d) Do not hold to cliches like "probation is for the first time offenders only" and "three strikes and he's out."

   (e) Determine the type and quality of treatment services available and select what is needed.
5. Under the model rules for juvenile courts and dispositional hearings, it is stated that the court may admit into evidence any testimony or exhibits that are material and relevant to arriving at an appropriate disposition. In arriving at this decision, the court shall consider only the testimony or exhibits offered as evidence in court or contained in the social study report. The courts generally hold that the child has a *right* to a dispositional hearing. *In re J.L.P.,* 100 Cal. Rptr. 601 (Cal. 1972). It has been found to be error to enter dispositional orders without conducting a dispositional hearing, as well as the adjudicatory hearing.

   Counsel for the parties should be permitted to cross-examine the person who prepared the social study report and the parties are entitled to compulsory process for the appearance of any person, including character witnesses to testify at the dispositional hearing.

   An Alaska court has held that it is error to proceed with the dispositional hearing in the absence of the child's attorney. *A.A. v. State,* 538 P.2d 1004 (Ala. 1975). The dispositional hearing should not proceed in the absence of the juvenile. *In re Cecilia R.,* 36 N.Y.2d 317 (N.Y. 1975). The *Cecilia* decision extended the right of a juvenile to be present during a hearing concerning status offenders or persons in need of supervision, as well as proceedings alleging commission of an act that would be a crime if committed by an adult.
6. The case evaluation by the staff for consideration by the court for disposition may include a personality evaluation and social history. The personality evaluation generally consists of standardized tests verified by extensive use and the social history covers the panorama and history of the juvenile. The staff evaluation is an extremely important tool for the court's use in making an appropriate disposition.
7. There has been historic controversy over whether the contents of social reports should be revealed to the juvenile, his parents or his lawyer. The prevailing rule is that at least the substance of these reports should be revealed to the child's attorney and his parents. *State v. Lance,* 464 P.2d 395 (Utah 1970). Also see *Sorrels v. Steele,* 506 P.2d 942 (Okla. 1973). This Oklahoma case held that in the absence of a showing of cause, the parents of a child should have been advised of the contents of a social summary for use in the dispositional portion of a delinquency hearing. There are some cases to the contrary, but the above reflects the majority view.
8. A Family Court of New York City has held that when a child is in foster care, the court may develop plans for its care and may monitor implementation of its orders including the religious training being given the child. *Matter of Roxanne F.,* 428 N.Y.S.2d 853 (N.Y. 1980). The Court of Appeals of Maryland has held that a child has a right, of which he must be advised, to speak to the court about the disposition to be ordered even though his lawyer may also address the court. *In re Virgil M.,* 421 A.2d 105 (Md. 1980). The Supreme Court of Vermont has held that when a father agrees with a proposed disposition but the child disagrees, the child is entitled to a guardian ad litem. *In re J.S.,* 420 A.2d 870 (Vt. 1980). The Appellate Division Court of West Virginia has stated that the disposition hearing is the most important part of the juvenile process. The court must have a complete social history which discusses all options. It must hear all witnesses who may help advise the most appropriate disposition. Counsel for the child should seek and press for the least restrictive viable alternative. The court must determine whether the child is delinquent because of his own free will or for environmental reasons. The court must consider the public safety, deterrence of the child; and should seek to develop the child's responsibility for his actions. It must determine the least restrictive alternative which will accomplish the requisite rehabilitation, using punishment where necessary, but using incarceration only when other methods would clearly fail. *State ex rel. D.D.H. v. Dostert,* 269 S.E.2d 401 (W.Va. 1980).

9. The Court of Appeals of Louisiana has held that where a juvenile court has considerable discretion in the disposition it imposes, it must select the least restrictive under the circumstances of the case. *State in Interest of Weston,* 388 So.2d 73 (La. 1980). The Supreme Court of Wisconsin has held that a child who presents a threat to the property of others may be deemed to be a "danger to the public" for purposes of a statute which limits the use of restrictive custodial treatment for such children. *In Interest of B.M.,* 303 N.W.2d 601 (Wis. 1981). The Court of Appeals of North Carolina has held that a juvenile may not be committed to the state training school unless there is no other suitable placement which he will accept. *Matter of Hughes,* 273 S.E.2d 324 (N.C. 1981). The Supreme Court of Iowa has held that a child has the burden of proving he is entitled to have the adjudicatory proceedings suspended and a "consent decree" entered for probation. *In Interest of Matzen,* 305 N.W.2d 479 (Iowa 1981). The Court of Appeals of the District of Columbia has held that a child may be given a disposition which amounts to a greater deprivation of liberty than an adult could receive for the same offense. *Matter of L.N.,* 432 A.2d 692 (D.C. 1981). The Court of Special Appeals of Maryland has ruled that a restitution order entered two months after the child was placed on probation was invalid. *In re Yolande L.,* 431 A.2d 743 (Md. 1981). The Supreme Court of North Carolina has ruled that a child cannot be placed in a training school where it was not recommended by anyone at the disposition hearing. *Egan v. M.S.,* 310 N.W.2d 719 (N.C. 1981). The Court of Appeals of Maryland has held that at a disposition hearing, the juvenile's counsel is entitled to copies of reports seen by the judge. Further, it is ruled that the juvenile is entitled to allocution. *In re Jeffrey L.,* 437 A.2d 255 (Md. 1981). The Court of Appeals of North Carolina has ruled that a disposition cannot be made without a hearing at which the juvenile has an opportunity to be heard and present evidence. *Matter of Lail,* 284 S.W.2d 731 (N.C. 1981).

10. At the dispositional hearing, the court should carefully review the evaluation materials and recommendations should be solicited from:
    (a) The prosecutor
    (b) Parents
    (c) Guardian ad Litem
    (d) Evaluation element
    (e) Interested persons
    (f) The juvenile
    (g) Other appropriate parties
11. *Judge's Objectivity:* Things that could affect the judge in the dispositional hearing. The Judge must maintain courage, bearing in mind the best interest of the child.
    (a) Politics
    (b) Attitude of the press
    (c) Police-Court relations
    (d) How the judge views his image in the community
    (e) How long to the next election
    (f) Nature of the offense
    (g) Protection of the public
    (h) Attitude of the judge

    (i) Social upbringing of the judge, the judge's background, behavioral scientific training and so forth.

XX. Dispositional Alternatives

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

Concerning fines and restitution as a dispositional alternative, the U.S. Supreme Court in *Durst v. United States,* 434 U.S. 542, 98 S.Ct. 849, 55 L.Ed.2d 14 (1978) notes that the federal statute neither grants nor withholds authority to order youthful offenders to make restitution or to allow a fine as a condition of probation. The Court cites the statute and states that it is *imputed* and is *implicit* that both fines and restitution comport with the rehabilitative goals of the Federal Youthful Offender Act. The Court said: "We are not persuaded that fines should necessarily be regarded as other than rehabilitative in nature when imposed as a condition of probation."

Various statutes specifically allow restitution as a condition of probation. In a Georgia case, the court held that the requirement that juveniles perform services with the Department of Parks does not amount to involuntary servitude. *M.J.W. v. State,* 210 S.E.2d 842 (Ga. 1975). In a New Jersey case, *State v. D.G.W.,* 361 A.2d 513 (N.J. 1976), the court held that due process requires a judge to consider (1) the amount of damage, (2) effort to determining value, (3) pro-rata share where there are multiple offenders, (4) a reasonable method of repayment which realistically assesses ability to pay. The court held that the judge must make these decisions as a due process requirement. They cannot be delegated to the probation department.

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

1. General community rehabilitation programs
    (a) *Probation and parole.*
    (b) *General probation*
        (1) Probation counseling
        (2) Volunteer utilization
    (c) Social Services
        (1) Personal Counseling
        (2) Big Brothers — Big Sisters
        (3) Minority Group Counselors
        (4) Pre-Vocational Preparations
        (5) Skill Training
        (6) Licensing
        (7) Job Placement
        (8) Supportive Employment Counseling
        (9) General Recreation

(10) Junior Achievement

(d) Family Counseling

(1) Work with Families

(2) Work with Siblings

(3) Parent Group Meetings

(e) Education Programs

(1) Individual Attention

(2) Tutoring

(3) Vocational Technical Schools

(4) Distributive Education (combination of half day school and half day paid employment)

2. Intensive Community Rehabilitative Programs including intensive probation

(a) Supportive Services

(1) Intensive Counseling

(2) Employment

(3) Social Services

(4) Skilled Training, etc.

(b) Living Arrangements

(1) Home Improvement

(2) Day Care

(3) Foster Homes

(4) Group Homes

(5) Independent Living Arrangements (older juvenile)

(3) Therapy

(1) These are juveniles who are in need of out-patient treatment from a mental health center or equivalent private institution or practitioner.

(d) Family Counseling

(1) Juveniles in need of family counseling who face massive problems caused by disintegrating family structures. Others present their families with new problems with which they are not prepared or equipped to deal.

3. Residential Treatment

(a) Residential treatment is a costly method of treatment for juveniles and should be utilized only when other efforts fail and the juvenile is not amenable to community dispositional alternatives. Nevertheless, the residential treatment facility, if properly staffed and programmed, can be a valuable tool in the treatment of juvenile offenders.

A new trend of case law is that commitment of a juvenile to an institution can be done only as a last resort. The California Supreme Court in *In re Aline D.*, 14 Cal.3d 557 (Cal. 1975), held that under California procedure, a child cannot be committed to a juvenile institution solely on the basis that there are no suitable alternatives; rather, it must appear that the child will benefit from the commitment. Concerning

the dispositions for "status offenders," the courts are becoming more and more restrictive. The New York Court of Appeals held that children in need of supervision might be confined to training schools, but must not be confined with delinquent children. *In re Lavette M.*, 35 N.Y.2d 136 (N.Y. 1974).

(b) After Care

(1) A dependable provision of support counseling and appropriate referral for those returning to the community following a period of residential treatment.

XXI. Post Adjudication and Disposition — The Concept of the Constitutional Right to Treatment

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

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

The United States Court of Appeals for the Fifth Circuit remanded the above-cited case of *Morales v. Thurman* for further evidentiary hearing in light of substantial changes in the practices of the Texas Youth Council and said Court seriously questioned the principle of the right to treatment for juvenile offenders. The Court states in the opinion that the right to treatment argument is "even less strong" as applied to juvenile offenders. The Court concluded that the *Donaldson* case (cited hereafter) *left open* whether those juveniles who "clearly pose a danger to society" can be detained without treatment. While a right to treatment is "doubtful" the Court determined that any constitutional abuses in the institutions can be corrected by applying the constitutional standard of the cruel and unusual punishment prohibition of the Eighth Amendment. *Morales v. Thurman*, 562 F.2d 993 (Tex. 1977).

Another U.S. Court of Appeals has ruled that incarcerated juveniles have a constitutional right to individualized rehabilitative treatment. *Nelson v. Heyne*, 491 F.2d 352 (Ind. 1974). Supplemental Opinion, 491 F.2d 352 (1973). Also see *Inmates v. Affleck*, 346 F. Supp. 1354 (R.I. 1972). The *Inmates* case stated that in the absence of a minimally acceptable program of treatment, the children in said institution are entitled to be released. In the United States Supreme Court case of *O'Connor v. Donaldson*, 422 U.S. 563, 95 S.Ct. 2486, 45 L.Ed.2d 396 (1975), the Court raised the issue of the constitutional right to treatment although it wasn't fully answered. The Fifth Circuit upheld damages to the plaintiff involuntarily committed to a mental institution finding that treatment had not been given, and gave broad approval to the existence of the constitutional right to treatment. The Supreme Court affirmed; however, the Court decided the case on the very narrow ground that a state may not confine against his will, an individual who is neither dangerous to himself or others, involving the constitutional right to "freedom" not "treatment." United States District Court in New York has recognized the due process right to rehabilitative treatment for incarcerated juveniles. *Pina v. New York State Division for Youth*, 419 F. Supp. 203 (N.Y. 1976).

See the *Right to Treatment Under Civil Commitment*, by Elizabeth W. Browne, Juvenile Justice Textbook Series, National Council of Juvenile Court Judges. Also see article "Do Juvenile Courts Have a Duty to Supervise Child Care Agencies and Detention Facilities," 17 *Howard Law Journal* 443 (1972); and the article "Right to Treatment," 57 *Georgia Law Review* 673 (1967).

2. In the case of *State ex rel. K.W. v. Werner,* 242 S.E..2d 907 (W.Va. 1978), the court held that juveniles are constitutionally entitled to the least restrictive alternative treatment that is consistent with the purpose of their custody. The court held in that case that there was not sufficient evidence to show a lack of rehabilitation programs. In New York, a judge committed a juvenile to the New York State Division of Youth notwithstanding some evidence at the hearing that the child had brain damage. The Appellate Court held that it was error not to have required a neurological examination to determine if there was brain damage prior to the order of restrictive placement. *In the Matter of Jose Luis Q.,* 408 N.Y.S.2d 510 (N.Y. 1978). Another New York case found that a state agency could not find suitable placement for a child with behavioral problems. The court reserved the right to order the state agency to create a treatment alternative. This is a precarious course to take on the part of the courts and it should be pointed out in the above-cited case of *O'Connor v. Donaldson,* Chief Douglas Berger, quoting from Justice Harlan's concurring opinion in the *Gault* case, stated:

   > Courts may not substitute for the judgments of legislators their own understanding of the public welfare, but must instead concern themselves with the validity of the methods which the legislature has selected.

3. In *Cruz v. Collazo,* 450 F. Supp. 235 (P.R. 1978), a U.S. District Court held that a juvenile was not deprived of due process and equal protection when he was transferred *without a judicial hearing* from a nonsecure juvenile facility, to which he had been committed, to a maximum security institution for hardened juvenile delinquents pursuant to an administrative determination made by the Secretary of the Department of Social Services of the Commonwealth of Puerto Rico. The court held that the U.S. Supreme Court's holding that juvenile adjudicative proceedings must be conducted in compliance with due process standards is *inapplicable* to *post-adjudicative stages in juvenile proceedings.*

4. Appeliate decisions have split just about down the middle on questions of whether or not the juvenile court retains authority to regulate the placement of children after commitment of the child to Family Services or other state agency. Generally, the court contends that it has statutory and inherent powers to place conditions on orders and place children in the best facility available to meet their needs. Social service agencies generally contend that the juvenile court has no further authority after placement with the agency and because they have budgetary considerations and fiscal limitations, they must be the one to determine where the child will be ultimately placed.

   The District Court of Appeals of Florida has held that the juvenile court does retain such authority to regulate the placement of the children. *Division of Family Services v. State,* 319 So.2d 72 (Fla. 1975). The Superior Court of New Jersey has held that the juvenile court does not have authority to commit a juvenile to the Division of Youth and at the same time order that agency to make specific placements and impose the costs of placement on the agency. *State in re D.F.,* 367 A.2d 1198 (N.J. 1976). This is an important area that concerns many juvenile court judges. Other cases where this question has been decided are as follows: *Vern v. Siebenmann,* 266 N.W.2d 11 (Iowa 1978); *Health and Social Services Department v. Doe,* 579 P.2d 801 (N.M. 1978); *Department of Mental Health v. County of Madison,* 375 N.E.2d 862 (Ill. 1978); *In re Welfare of Iowa,* 576 P.2d 65 (Wash. 1978); *State v. Dee,* 566 P.2d 121 (N.M. 1977); *In Interest of C.A.G.,* 263 S.E.2d 171 (Ga. 1977); *Eldredge v. KampKachess Youth Services Inc.,* 583 P.2d 626 (Wash. 1978).

XXII. Family Law — Trends and Cases

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

2. Generally the "tender years doctrine or presumption" has been abrogated by case law and statutory enactment. The Superior Court of Pennsylvania has held that the "tender years" doctrine does not require that custody be awarded to the mother, where both parents are determined to be fit. *Commonwealth ex rel. Cutler v. Cutler,* 369 A.2d 821 (Pa. 1977). The Supreme Court of Alaska has held that the doctrine of "tender years" is an impermissible criterion for determination of the best interests of a child in a custody dispute. *Johnson v. Johnson,* 564 P.2d 71 (Alas. 1977). However, the Supreme Court of Virginia has held that if everything were equal, that the presumption would be controlling; however, if other things were not equal then the father could obtain custody. *McCreery v. McCreery,* 237 S.E.2d 167 (Va. 1977).

3. The Superior Court of Pennsylvania has held that where their testimony is made a part of the record, children may be interviewed by the trial judge in a custody dispute outside the presence of counsel for the parents. *Cheppa v. Cheppa,* 369 A.2d 854 (Pa. 1977). The Supreme Court of Georgia has held that the right of a child fourteen years or older to choose the parent with whom he wishes to live is controlling -- absent a showing of present unfitness. *Harbin v. Harbin,* 230 S.E.2d 889 (Ga. 1976). The Supreme Court of Wisconsin has held that a temporary award of custody to one parent does not place a burden on the other parent to show changed circumstances in order to gain final custody in a divorce proceeding. *Kuesel v. Kuesel,* 247 N.W.2d 72 (Wis. 1976).

4. The California Supreme Court has held that where the state participates in the prosecution of a paternity suit against an indigent defendant, such defendant is constitutionally entitled to court-appointed counsel. *Salas v. Cortez,* 154 Cal. Rptr. 529 (Cal. 1979). In New Jersey, a known donor of semen for artificial insemination of an unmarried woman was granted visitation rights to child. *C.M. v. C.C.,* 377 A.2d. 821 (N.J. 1977). The Supreme Court of Montana has held that for a change of child custody, the uniform marriage and divorce act requires more than merely a finding that the interest of the children will be "best served" by the change. *In re Custody of Dallenger,* 568 P.2d 169 (Mont. 1977). The Superior Court of Pennsylvania has held that in a custody dispute between the natural parent and a third party, the parent has a "prima facie right to custody" which may not be forfeited unless "convincing reasons appear that the best interests of the child will be served" by awarding custody to the third person. *In re Custody of Hernandez,* 376 A.2d 648 (Pa. 1977).

5. The U.S. Supreme Court has held violative of equal protection a Wisconsin statute requiring a parent under a court support order to obtain permission of the court to remarry. *Zablocki v. Redhail,* 3 F.L.R. 3027 (Wis. 1978). The Supreme Court of Nebraska has held that a court in a divorce action has jurisdiction to determine whether the husband is the natural father of his wife's child born before their marriage. *Farmer v. Farmer,* 263 N.W.2d 664 (Neb. 1978). The Supreme Court of Missouri has held that a state statute allowing the opening of adoption records only upon court order does not

abridge an adult adoptive's First Amendment right to receive information or her Fourteenth Amendment rights to liberty, privacy and equal protection. *Application of Maples,* 563 S.W.2d 760 (Mo. 1978). The Supreme Court of Arkansas has held that a change in the name of a minor child without notice to the noncustodial parent, denies that parent due process. *Carroll v. Johnson,* 565 S.W.2d 10 (Ark. 1978). The Supreme Court of Illinois held that state statutes imposing a greater support obligation on divorced parents than upon parents not divorced, do not violate equal protection. *Kujawinski v. Kujawinski,* 376 N.E.2d 1382 (Ill. 1978). The Supreme Court of Missouri has held that no judicial officer may determine child custody based on the court's approval, disapproval or interpretation of the beliefs, doctrines or tenets of a parent's religion. *Waites v. Waites,* 567 S.W.2d 326 (Miss. 1978).

6. The Court of Appeals of Michigan has held that it is desirable for the trial court to consider the report of a "friend-of-the-court" but it may not be considered if either party objects. The court further held that the trial court should consider which parent can best provide for the material needs of the child but must treat this as only one factor. *Dempsey v. Dempsey,* 292 N.W.2d 549 (Mich. 1980). The Court of Appeals Second Circuit of Louisiana has held that a natural parent prevails over the psychological parent and the quality of the home is not to be compared. The court stated that when a parent's home and a grandparent's home are both acceptable, the parent's home will be designated without any comparison as to which may be in the best interests of the child. *LaCroix v. Cook,* 383 So.2d 59 (La. 1980). The Supreme Court of Pennsylvania has held that brothers and sisters, even half brothers and sisters, should be raised together unless there are compelling reasons for separating them. *Albright v. Commonwealth ex rel. Fetters,* 421 A.2d 157 (Pa. 1980). The Superior Court of Pennsylvania has held that a person may be found in contempt and imprisoned for failing to disclose the whereabouts of the children whom she has helped a parent secrete, but only after a proper hearing. *Cahalin v. Goodman,* 421 A.2d 696 (Pa. 1980). The Court of Appeals of Illinois has held that grandparents are preferred if they are the psychological parents. The court held that grandparents who have provided the child and her mother a home for most of the girl's eight years are entitled to custody in preference to the father who has remarried with a nice home and a good job. *In re Piccirilli,* 410 N.E.2d 1086 (Ill. 1980).

7. The Superior Court of Pennsylvania has held that the fact that a mother and the children are living with another man is not sufficient grounds for transferring custody to the father unless the relationship has an adverse affect on the children. The court in effect said that adultery is not a basis to deny custody unless harmful to the children. *G.D.F. v. K.B.F.,* 425 A.2d 459 (Pa. 1981). The Superior Court of Pennsylvania has ruled that in deciding custody between parents, the court must examine both home environments, the quality of day care while each is at work and ability of each to provide care and supervise the child. *Parks v. Parks,* 426 A.2d 108 (Pa. 1981). The Supreme Court of Arkansas has held that grandparents who have established a parental relationship with children do not have the right to refuse consent to an adoption, but they have the right to present evidence relevant to whether the adoption is in the child's best interests. *Quarrels v. French,* 611 S.W.2d 757 (Ark. 1981).

The Civil Court of Appeals of Texas has ruled that fees allowed for attorneys as guardians ad litem are considered as costs chargeable to the party or parties whose conduct made the appointment of the attorney or guardian necessary. *Minns v. Minns,* 615 S.W.2d 893 (Tex. 1981). The New Jersey Supreme Court has set forth specific conditions necessary for joint custody. The court held that to award joint custody, the

court must find that (1) the child recognizes both parents as sources of security and love and wishes to continue the relationship; (2) both parents must be physically and psychologically capable of parenting; (3) each parent must desire custody, though they may oppose joint custody; (4) the parents must be capable of enough cooperation to facilitate arrangements and reduce the emotional stress on the child; (5) effective methods of enforcement must be available; (6) joint custody must be practical geographically and financially, school arrangements must be workable, contacts with friends and relatives must be maintained; and (7) the child's preferences must be given due weight. *Beck v. Beck,* 432 A.2d 63 (N.J. 1981). The Court of Appeals of Oklahoma has ruled that children have a right to parental support and nurture which cannot be taken from them by parental agreement or contract except in accordance with the provisions of the surrender statute. *Bingham v. Bingham,* 629 P.2d 1297 (Okla. 1981).

The Supreme Court of Kansas has held that a parent's right to custody is a constitutional right of which the parent cannot be deprived without a finding of unfitness after due process procedures. *Shepherd v. Shepherd,* 630 P.2d 1121 (Kan. 1981). The Supreme Court of New Hampshire has ruled that an illegitimate father who has acknowledged paternity has equal rights with the mother to custody of the child. *Brauch v. Shaw,* 432 A.2d 1 (N.H. 1981). The Court of Appeals of Florida has ruled that the nonparent or psychological parent may be granted visitation over the parent's objection if it can be shown to be in the child's best interests. *Wills v. Wills,* 399 So.2d 1130 (Fla. 1981). The Illinois Supreme Court has ruled that psychological parents should be considered in determining custody, but natural parents are presumed to be preferred. *In re Custody of Townsend,* 427 N.E.2d 1231 (Ill. 1981). The Court of Appeals of Tennessee has ruled that an agreement of parties to reduce support is not binding on the court. *Rasnic v. Webb,* 625 S.W.2d 278 (Tenn. 1981).

In an interesting case in Louisiana, the Court of Appeals has ruled that a court can set support according to what a parent *is able to earn,* even though the parent takes a job for a lesser amount. *Guinn v. Guinn,* 405 So.2d 620 (La. 1981). The Court of Appeals of North Carolina has likewise ruled that if a parent is earning less than he is able because of a disregard for parental obligation, the court may base its support order on earning capacity and is not limited to actual earnings. *Stanley v. Stanley,* 273 S.E.2d (N.C. 1981). Again, the Court of Appeals of Michigan has likewise held that a parent's unexercised ability to earn may be considered in determining support unless there is good reason for earning below ability. *Dunn v. Dunn,* 307 N.W.2d 424 (Mich. 1981). The Illinois Court of Appeals has ruled that the custodial parent has the burden of proving that visits by the noncustodial parent would endanger the children. *In re Marriage of Neat,* 428 N.E.2d 1093 (Ill. 1981).

XXIII. Prevention

1. Prevention of juvenile delinquency is one of the most important concerns of both prosecutors and judges. A knowledge of the general and programmatic elements of "prevention" programs are helpful so that they may be recognized and recommendations made to the community for the improvement of existing programs and the beginning of new programs.
2. Socially Responsible Community Life
   (a) Family Life Education Programs
      (1) Marriage Counseling

(2) Child Rearing, etc.

(b) Employment

(c) Income Supplementation

(1) Job Creating Programs

(d) Housing Programs

(e) Moral Guidance

(1) Family and Religious Groups

(f) Day Care Programs

(g) Education Programs

(1) Early ascertainment of difficulties in school, such as learning disabilities (LD's).

(2) Appropriate goals, special education, vocational technical training, finishing high school, higher education.

(h) Leisure Time Activities

(i) Character Building Programs

(1) Boy Scouts, Girl Scouts, 4-H, etc.

(j) Drug Education Programs

3. Community Structures

(a) Children and Youth Services

(b) Community Planning

(1) Clergymen Aid Juvenile Courts

(2) Block Mothers

(3) Police Neighborhood Councils, Police Youth Councils, etc.

4. Programs for Individuals

(a) Mental Skills

(b) Physical Skills

(c) Moral Guidance

5. Programs for Groups

(a) Family Groups

(b) Neighborhood Peers, etc.

XXIV. Successes and Failures of the Juvenile Court

1. The lofty goals of the founding advocates of the juvenile court have not been fully met; however, most of the juvenile courts of this nation have not been given the funding or the "tools" to accomplish the task of rehabilitation that they have been assigned.

2. It is clear that the juvenile courts are "important" and have a great deal to do with the system of justice in the nation. There is a great need for education in this area. Juveniles are more pliable and have the opportunity for change and rehabilitation. The chance of success with juveniles is extremely greater than with adults.

3. The need for due process of law as well as maintaining a philosophy of reclamation and rehabilitation.

(a) "For many years, the juvenile courts imagined themselves immune from invasion. However, the Supreme Court of the United States in the *Gault* decision has decided differently and the mandate has been issued to the juvenile court system to attend to its housekeeping. The adjudicatory hearing needs to be cleaned up and due process of law observed in all instances. Some feel that the Supreme Court has more or less put the juvenile court system on probation. The Court has given warning that the juvenile court system should strive to provide the results which were envisioned at the time of its creation, otherwise, the High Court might find it necessary to impose greater limits on the juvenile court system which could lead to its abolition as it is known today. Nevertheless, the juvenile court has practiced rehabilitation concepts that the adult courts are just now coming to consider as important." Excerpt from: "In Defense of the Juvenile Courts,' ' an address by George Edwards, Judge, U.S. Court of Appeals, Sixth Circuit, at the National Convention of Juvenile Court Judges in Milwaukee, Wisconsin (1972).

Table of Cases

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