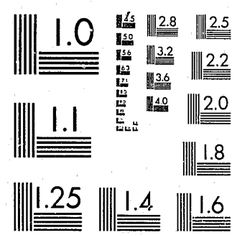

U.S. Department of Justice
Office of Juvenile Justice and Delinquency Prevention
National Institute for Juvenile Justice and Delinquency Prevention

Juvenile Justice Standards Symposium

conducted in Chicago Nov. 30-Dec. 2, 1978, by the
National District Attorneys Association
and its joint sponsors,
National Council of Juvenile and Family Court Judges
Judicial Administration Division of the American Bar Association
National Legal Aid and Defenders Association

May 1981

Juvenile Justice Standards

The Juvenile Justice Standards Symposium Project of the National District Attorneys Association was supported by Grant No. 78-JN-AX-0026 awarded by the National Institute for Juvenile Justice and Delinquency Prevention (NIJJDP), Office of Juvenile Justice and Delinquency Prevention, U.S. Department of Justice. Points of view or opinions expressed at the Symposium are those of the consultants and do not necessarily represent the official position of the U.S. Department of Justice. Neither do they necessarily represent the positions of the National District Attorneys Association, National Council of Juvenile and Family Court Judges, National Legal Aid and Defenders Association, or the Judicial Administration Division of the American Bar Association.

Abstracts of papers and summaries of discussions were prepared by Richard Van Duizend for the National Juvenile Justice Clearinghouse, a component of the National Criminal Justice Reference Service (NCJRS), which also prepared this microfilm edition of the Symposium proceedings. NCJRS is operated for NIJJDP, the National Institute of Justice, and other agencies of the U.S. Department of Justice by Aspen Systems Corporation, Rockville, Maryland, whose work on this publication was performed under contracts J-LEAA-023-77 and J-LEAA-017-80. Points of view or opinions do not necessarily represent the official position or policies of the U.S. Department of Justice.

ABOUT THE DESIGN OF THE MICROFICHE EDITION

The Final Report* of the National District Attorneys Association's Juvenile Justice Standards Symposium Project consisted of the Parts I and II which appear in this edition, a Part III which included author abstracts of the 16 position papers and summaries of the Symposium discussion which followed their presentation, plus Part IV, Conclusion. Sixteen appendixes, lettered A through P, contained the texts of the position papers. A transcript of the discussions was also prepared but was not a part of the Final Report.

The National Institute for Juvenile Justice and Delinquency Prevention discovered that references to the various sets of standards being discussed were not entirely consistent in their usage among the various consultants. Further, NIJJDP determined that abstracts from a single source, rather than those prepared in the various styles of the 16 consultants, might better give the flavor of the Symposium to users who had not attended it. Accordingly, NIJJDP's National Juvenile Justice Clearinghouse** secured the services of Richard Van Duizend, J.D., former Director of NIJJDP's Standards Program, to edit the papers for consistency of references only and also to write new abstracts and summaries.

In order to gather more closely together the material associated with each of the 16 Symposium topics, this present compilation takes the following sequence:

- Prefatory material
- Part I, Objective, from the Final Report
- Part II, Methodology, from the Final Report
- Part IV, Conclusion.
- For each of the 16 topic areas,
  --Mr. Van Duizend's abstract and summary of comments
  --Text of the position paper (as edited by Mr. Van Duizend for consistency of references only)
  --Transcript of discussion.

Some scholars or practitioners may be led to access these fiche through having seen the Final Report or some of the Symposium papers referenced in other publications. In order to facilitate locating passages thus referenced elsewhere, the pagination of the original has been maintained where legible. But in order to facilitate use of the Table of Contents and referencing from this present compilation, we have added in heavy numerals, at the bottom

**The Juvenile Justice Clearinghouse is a component of the National Criminal Justice Reference Service.

right of each frame (page), its page number within this compilation. Thus, you might find at the bottom of a frame such numbers as this:

B-7 65

This would mean that the page was at 7 in Appendix B to the Final Report and at 65 in this present compilation.

Some users may wish to obtain hard (paper) copy of parts of this compilation through photocopies made to order by the National Criminal Justice Reference Service. This service is provided at cost, but the cost runs fairly high--10 cents a page plus a $5 per order service charge at the inception of this service, a rate applicable for this compilation only. For information and to learn current rates, call (301) 251-5500 or write:

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TABLE OF CONTENTS

PREFACE

Child abuse and neglect as well as juvenile delinquency are serious problems confronting our society. It is well documented that these activities are often interrelated and can lead to even more serious breaches of societal rules. Juvenile laws must be molded to break the cycle of crime. This can be done through the modification of the juvenile justice system to provide swift and sure response to misbehavior in a way that makes offenders respect the system. Professionalizing the system through standardization can effectively achieve this goal. Toward that end this project was conceived and carried out. We hope it may prove useful to those presently contemplating codification or revision of juvenile statutes.

The National District Attorneys Association is pleased to present this compilation of the works of experts analyzing various proposed Juvenile Justice Standards. Presently, juvenile laws are as disparate as the myriad jurisdictions within the United States. Practices and procedures as well as rights afforded to juveniles differ among these jurisdictions. It is hoped that this work will lead to the improvement of areas of juvenile law that have been shown to be inadequate.

We express our sincere appreciation to the co-sponsoring organizations that made this project a success. Their participation provided views from many different perspectives and resulted in extremely high quality discussion. Additionally, we thank the Law Enforcement Assistance Administration, Office of Juvenile Justice and Delinquency Prevention, for funding this rewarding project which should provide impetus to juvenile justice reform.

Patrick F. Healy
Executive Director
National District Attorneys Association

FOREWORD

The development of standards for the administration of juvenile justice has had a long and productive history to date. The Office of Juvenile Justice and Delinquency Prevention (OJJDP) has provided substantial support to various national commissions and committees, including the IJA/ABA Juvenile Justice Standards Project, in their efforts to develop comprehensive standards to improve the fairness and effectiveness of the juvenile justice system. We are keenly interested in their successful implementation. The three sets of standards discussed at the Juvenile Justice Standards Symposium offered the groundwork for constructive change. Indeed, the purpose of the "standards movement" has been to stimulate change and to provide guidance in the resolution of critical issues now facing the juvenile justice system.

The IJA/ABA Standards have been in the forefront. However, the Task Force on Juvenile Justice and Delinquency Prevention and The National Advisory Committee Standards, which followed, have contributed to the movement. As this Symposium clearly demonstrated, although there is diversity among specific approaches taken by the various groups, more notable is their substantial agreement with the basic principles underlying the specific recommendations of the IJA/ABA Standards.

I am encouraged by the initiative taken by several states which have adopted changes--either through amendments to or major revisions of their juvenile codes--which reflect many of the basic principles common to all three sets of standards. Of particular note are the states of Washington, Maine, Wisconsin, West Virginia, Virginia, Utah, California, Florida, Pennsylvania and Georgia. Other states are actively considering legislative changes based on their own commissions' and committees' review and endorsement of the important concepts embodied in the Standards.

As an iterative process, the cycle of standards development, adoption, implementation, assessment and revision must proceed through their formative stages if we are to learn how best to improve our current system, sustain those improvements and continue this process. With the development phase nearly complete, leaving only the completion of the NAC Standards, it is critical that the nationwide adoption and implementation phases proceed without further delay in order to maintain the momentum exhibited by the states in improving their juvenile justice systems. Pursuant to OJJDP's legislative mandate to develop and encourage the implementation of national standards, we intend to begin our own process of endorsement of particular standards for implementation consistent with the Juvenile Justice and Delinquency Prevention Act of 1974, as amended. As this particular project recognizes, and experience dictates, the participation of professional organizations in this overall process has been and will continue to be essential to our success in carrying the process forward.

John M. Rector, Administrator
Office of Juvenile Justice and
Delinquency Prevention
January 1980

FINAL REPORT

JUVENILE JUSTICE STANDARDS SYMPOSIUM PROJECT

OF

THE NATIONAL DISTRICT ATTORNEYS ASSOCIATION

I

OBJECTIVE

The objective of the Juvenile Justice Standards Symposium Project has been to engage representatives from four national professional organizations in the identification, analysis and discussion of approximately sixteen critical issues addressed by the three sets of national standards dealing with reform of the juvenile justice system. The three sets of standards are those of the IJA/ABA Juvenile Justice Standards Project (hereinafter referred to as IJA/ABA Standards); The National Advisory Committee on Criminal Justice Standards and Goals Task Force on Juvenile Justice and Delinquency Prevention (hereinafter referred to as the Task Force Standards); and the National Advisory Committee for Juvenile Justice and Delinquency Prevention (hereinafter referred to as NAC Standards). The latter standards were promulgated to implement the Juvenile Justice and Delinquency Prevention Act of 1974 as administered by the Office of Juvenile Justice and Delinquency Prevention, National Institute for Juvenile Justice and Delinquency Prevention, United States Department of Justice. Although the Task Force had been established by the Law Enforcement Assistance Administration even before passage of the JJDP Act of 1974, the work of the Task Force continued with OJJDP funds, and OJJDP was one of the principal funding sources for the IJA/ABA Juvenile Justice Standards Project.

In pursuing its objective, the Juvenile Justice Standards Symposium Project commissioned four consultants from each of the following national organizations to prepare position papers on the 16 critical issues addressed by all three sets of standards. These organizations are: The National District Attorneys Association; The National Council of Juvenile and Family Court Judges; The Judicial Administration Division of the American Bar Association; and The National Legal Aid and Defender Association.

After the preparation of position papers on specific topics by the individual consultants, a three day symposium was held on November 30-December 2, 1978 for oral presentations by the consultants and discussion and rebuttals from other consultants. The involvement of these four national organizations in a structuted situation was intended to provide an articulate, reasoned analysis of the issues from different perspectives within the juvenile justice system by professionals familiar with current juvenile law practice and procedures. The symposium proceedings, including the position papers, responses, and the discussion at the symposium itself, are compiled herewith and published for nationwide dissemination by the United States Department of Justice, Law Enforcement Assistance Administration, Office of Juvenile Justice and Delinquency Prevention, National Institute for Juvenile Justice and Delinquency Prevention.

This Final Report has been prepared with the hope that it will be helpful to those professionals, and others, who are presently concerned with the various juvenile justice standards, particularly in their evaluation of the issues underlying these standards. By virtue of this Project an exhaustive consideration of all three sets of standards has now been accomplished by a national body of experts representing the major professional groups involved in juvenile justice, and it is hoped that their work will be helpful to those considering adoption and implementation of the various standards.

II

METHODOLOGY

The Juvenile Justice Standards Symposium Project had its genesis in late 1977. The Project was formulated as a vehicle that would be useful in evaluating the three existing sets of national standards in order to determine areas of critical interface, and to evaluate the recommendations of the standards. Of course, many of these recommendations portend sweeping changes in the juvenile justice system as we have known it.

It was felt that there was a need to clarify the basic principles underpinning all three projects and to clarify some of the confusion that existed because of duplication in some topic areas of the three sets of standards. This duplication and commonality was, to some extent, unavoidable. The IJA/ABA project commenced its work in 1971. The Task Force was formed in 1975, and the National Advisory Committee was appointed in March, 1975 with its first meeting in the summer of 1975.

Many of the reporters, drafting committee personnel, and consultants who worked on the IJA/ABA Standards, also contributed to the other two sets of standards. In fact, some of the IJA/ABA Standards were adopted by the other standard-setting groups without substantial changes. Some of the standards overlap and there are conflicts between several of the standards, although there is only one conflict between the basic principles of the IJA/ABA Standards and the basic principles of the other two standard projects, specifically, the recommendation of the IJA/ABA project that status offenses be removed from the jurisdiction of the juvenile court.

The Project commenced on July 1, 1978, and terminated on March 31, 1979.

Initial activity included the identification of coordinators from each of the sponsoring organizations. These coordinators are:

National District Attorneys Association 666 Lake Shore Drive, Suite 1432 Chicago, Illinois 60611	Anne Thompson, Prosecutor, Mercer County, New Jersey Chairperson of the National District Attorneys Association Juvenile Justice Standards Committee
American Bar Association Judicial Administration Division 1155 East 60th Street Chicago, Illinois 60637	Hon. Wilfred W. Nurenburger, Juvenile Court Judge, Lincoln, Nebraska Member, IJA/ABA Joint Commission on Juvenile Justice Standards
National Council of Juvenile And Family Court Judges P.O. Box 8978 (University of Nevada) Reno, Nevada 89507	Thomas Vereb, Associated Legal Officer, National Center for Juvenile Studies
National Legal Aid and Defender Association 2100 M Street, N.W. Washington, D.C. 20037	Michael J. Dale, Assistant Director, National Center for Youth Law

These coordinators solicited from their membership suggestions and recommendations for consultants and topics to be considered. The consultants, as noted, were to prepare a position paper and an oral presentation for the three-day Symposium. This Final Report from the Project includes the position paper of each consultant, the record of the discussion, comments, and rebuttals at the Symposium. The position papers are contained in an addendum.

The topics and consultants for this project are as follows:

NATIONAL DISTRICT ATTORNEYS ASSOCIATION

Topic	Consultant
Waiver of Jurisdiction	Helen E. Szabo Deputy Attorney General State of New Jersey
Interim Status Pertaining to Abuse And Neglect and Non-Criminal Misbehavior	Robert E. Rounds Assistant District Attorney San Diego County San Diego, California
Role of the Prosecuting Attorney	Elizabeth Bridges Assistant District Attorney Harris County Houston, Texas
Intake And Diversion	Kenneth M. Siegel Chief of Policy and Program Development, Genesee County Prosecutor's Office, Flint, Michigan

JUDICIAL ADMINISTRATION DIVISION OF THE AMERICAN BAR ASSOCIATION

Topic	Consultant
Adjudication, with focus upon Plea Negotiations	Charles Z. Smith Professor of Law University of Washington Seattle, Washington Member, IJA/ABA Joint Commission on Juvenile Justice Standards
Court Organization	Hon. Robert T. Cattle, Jr. Judge, County Division Seward, Nebraska Chairperson of the National Conference of Special Court Judges, Juvenile Justice Standards Committee
Right of Counsel in Delinquency Proceedings	Hon. William Fort Senior Judge, Oregon Court of Appeal; Member, IJA/ABA Joint Commission on Juvenile Justice Standards
Termination of Parental Rights	Hon. Orman W. Ketcham Senior Staff Attorney, National Center for State Courts Williamsburg, Virginia

NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES

Topic	Consultant
Proportionality And Determinate Sentencing	Hon. Lindsay G. Arthur Juvenile Court Judge, Minneapolis, Minnesota President Elect, National Council of Juvenile and Family Court Judges

Jurisdiction Over Abuse And Neglect	Hon. Eugene A. Moore Judge of Probate Pontiac, Michigan Vice-President, National Council of Juvenile and Family Court Judges
Records And Confidentiality	Hon. James J. Delaney Juvenile Court Judge Brighton, Colorado
Right to Jury Trial And Public Trial	Hon. Edward J. McLaughlin Administrative Judge Onondaga County Family Court Syracuse, New York

NATIONAL LEGAL AID AND DEFENDER ASSOCIATION

Topic	Consultant
Pre-Trial Detention in Delinquency Cases	Jane M. Sufian Staff Attorney The Legal Aid Society Juvenile Rights Division Brooklyn, New York
Rights of Minors in Non-Delinquent Settings	Gabe Kaimowitz Senior Attorney Michigan Legal Services Detroit, Michigan
Court Services--Whether Court Should Be Responsible for Probation and Detention	Brent D. Hege Staff Attorney Youth Law Center of Polk County, Inc. Des Moines, Iowa
Jurisdiction of Court Over Non-Criminal Misbehavior (Status Offenders)	Patricia Connell, Staff Attorney National Center for Youth Law St. Louis, Missouri

Considering the broad range of organizations, consultant viewpoints and topics considered by the Juvenile Justice Standards Symposium Project, it can now be said that all of the important issues that cut across the three sets of standards and, in particular, the issues addressed by the IJA/ABA Juvenile Justice Standards, have been addressed, debated, and sifted through by a national body of experts.

III

ABSTRACTS OF CONSULTANT PAPERS AND COMMENTS AND DISCUSSION AT THE JUVENILE JUSTICE STANDARDS SYMPOSIUM

(Here followed, in the original Final Report, the author abstracts and summaries which have been replaced in this compilation by Mr. Van Duizend's.)

SECTION IV OF FINAL REPORT: CONCLUSION

It was not the intention of this project, or its funding source (the United States Department of Justice, Office of Juvenile Justice and Delinquency Prevention, National Institute for Juvenile Justice and Delinquency Prevention) to reach specific conclusions or formulate specific recommendations with respect to any or all of the three sets of national standards dealt with by the Project. Rather, the purpose was simply to bring together consultants representing a ✓ broad spectrum of professional groups--judges, prosecutors, law professors and defense attorneys--to consider and discuss the treatment of the sixteen critical issues found in all three sets of standards and to measure the potential impact of the various standards upon the juvenile justice system, if implemented.

Thus , this Project has not produced specific recommendations for adoption, amendment or change in any of the standards, although individual consultants and their organizations they represent may wish to do so. This Final Report has combined the work product of the Project, consisting of the consultant papers, the proceedings of the Symposium, and formal comments and rebuttals of the consultants,

and made this work product available to all interested persons, agencies and organizations for their consideration and utilization in any manner that seems appropriate to them.

It should be realized that the Project has accomplished at least one goal that has been in the forefront in the discussion by others of the three sets of standards, and in particular, the IJA/ABA Juvenile Justice Standards. It has now brought together the widest range of national experts feasible to discuss and consider the relevant issues. In this sense the Project caps many months--and, indeed, many years--of discussion and debate on the various standards. If there is any consensus at all that can be gleaned from the proceedings of the Symposium itself, it is that the time has arrived for serious consideration of implementation of all three sets of standards, as may be most appropriate for the states and jurisdictions.

The proceedings of this project have also made clear that there are many fundamental points of agreement between the three sets of standards. These include endorsement of the concept of determinate sentencing, the need for limits to judicial discretion within the juvenile justice system, the need for accountability of juveniles for their actions in a manner different from the once prevailing philosophy, and the need for accountability by all decision-makers within the system. Whether the points of agreement outnumber the points of disagreement, quantitatively and qualitatively, is open to debate. For example, Barbara D. Flicker, writing in the Volume, Standards For Juvenile Justice: A Summary And Analysis, Institute of Judicial Administration/American Bar Association, Juvenile Justice Standards Project (1977) stated:

> Although many of the standards do coincide, the departures are significant. Delinquency prevention, except as an ultimate and greatly cherished consequence of providing voluntary services and of an effective juvenile justice system, is not one of the permissible criteria for decision making in the IJA/ABA standards because of the project's policy of rejecting the reliability of predictive behavior judgments. Other standards projects oppose the JJSP positions on proportionality in sanctions and removal of status offenses from the jurisdiction of the court; such projects generally place greater emphasis on rehabilitative and treatment goals from JJSP.

The point is, however, that although the three sets of standards contain differences in the resolution of the issues raised in the sixteen topic areas considered by the Project, the differences can, and undoubtedly will, be resolved by the individual states and jurisdictions through their legislative bodies and administrative decision-makers to meet their own particular needs. While specific approaches vary, the underlying principles are not greatly dissimilar. This is illustrated by a consideration of the ten underlying principles found in the IJA/ABA Juvenile Justice Standards (see Flicker, supra at p.22). All three sets of standards support the following principles inherent in the IJA/ABA Standards, with the exception of principle No. 4:

1. Proportionality in sanctions for juvenile offenders based on the seriousness of the offense committed, and not merely the court's view of the juvenile's needs, should replace vague and subjective criteria.

2. Sentences or dispositions should be determinate.

3. The least restrictive alternative should be the choice of decision makers for intervention in the lives of juveniles and their families.

4. Noncriminal misbehavior (status offenses, PINS) should be removed from juvenile court jurisdiction.

5. Visbility and accountability of decision making should replace closed proceedings and unrestrained official discretion.

6. There should be a right to counsel for all affected interests at all crucial stages of the proceeding.

7. Juveniles should have the right to decide on actions affecting their lives and freedom, unless they are found incapable of making reasoned decisions.

8. The role of parents in juvenile proceedings should be redefined with particular attention to possible conflicts between the interests of parent and child.

9. Limitations should be imposed on detention, treatment, or other intervention prior to adjudication and disposition.

10. Strict criteria should be established for waiver of juvenile court jurisdiction to regulate transfer of juveniles to adult criminal court.

With respect to principle No. 4, only the IJA/ABA Juvenile Justice Standards Project has called for the outright elimination for status offenses from the jurisdiction of the juvenile court.

NCJ 76913

A. JURISDICTION AND RELATED ISSUES

1. Court Organization -- The issue of specialized courts versus courts of general jurisdiction

Consultant
Hon. Robert J. Cattle, Jr.

ABSTRACT OF PAPER

In this paper, Judge Cattle questions not only the recommendations of the standards, but their basis and motives as well. He suggests that they are being used as a vehicle for inducing "massive changes in the social system," and that the standards suffer from lack of input by professionals actively engaged in the juvenile justice system. The discussion of the standards is set in the context of Judge Cattle's view equating:

> ...[T]he state with the family.... [T]he rules [should be set] at the same or a similar level to the one we use every day ... in bringing up our own children to adulthood.... The rules for juveniles must be designed to be the same format as the laws for adults and further designed not as parallel lines but as lines which will ultimately converge and coincide at the magic point we arbitrarily determine to be the gate to adulthood.

The recommendations of the three sets of standards regarding establishment of a family court as part of the highest court of general jurisdiction, the qualifications of the judges for that court, and their optimal term of service on the family court bench, are outlined and analyzed. Judge Cattle questions the wisdom of tampering with the "unseemly but functional" variety of juvenile court structures and jurisdictional boundaries that have developed in accordance with the differing political, financial, and philosophical factors and general court organization of each state. Questioned also is the need to assign all legal matters concerning families to a single court.

> Little thought seems to be given to the fact that this will fragmentize the older divisions of the law and create new problems of determining jurisdictional boundaries and to the analogous question of whether we consider it desirable to redivide the entire legal systems and re-orient the court jurisdictions on this concept. Should all questions affecting corporations, whether criminal or civil in nature, whether they involve franchises or contracts, etc., be solved in a separate corporation court?

He suggests that the list of qualifications set forth in the IJA/ABA standards is too lengthy and unrealistic, and conflicts with their recommendation that judges be assigned to the family court bench for only one year terms. In this regard he finds the recommendations and the tone of the Task Force and National Advisory Committee recommendations more acceptable.

Although Judge Cattle indicates that many of the changes advocated by the standards appear to be unnecessary, he urges the creation of an age of majority effective nationwide.

> It would be well ... if we bowed to the facts of life and established a practical age as a universal compromise throughout the social and legal structure with full realization that this would be only a necessary norm to enable society to function.

SUMMARY OF COMMENTS

Four themes marked the discussion. First, Judge Arthur, seconded many of the points made in the paper, particularly those favoring the current nonuniform pattern of juvenile court organization and jurisdiction, the provision by the courts of "unequal rights and extra protection" to children, the retention of the juvenile court's authority over both criminal and noncriminal misbehavior, and the dismissal of the recommended standards as products of academics in ivory towers.

Second, Judge Cattle was asked to clarify his views. Specifically, Mr. Dale inquired whether he felt that standards regarding judicial qualifications ought to be included in the proposed volumes. In response Judge Cattle indicated that long lists and rhetorical commentary were unnecessary, but that "all of us ought to have these qualifications." Then Judge Fort asked for his views on whether probation and detention services should be under the control of the juvenile court or an executive department. Judge Cattle replied that placing these functions in a "traditionally apathetic" executive department "is nothing short of destruction of the ... Juvenile Court."

Third, a number of speakers questioned Judge Cattle's defense of current juvenile court organization and practices. For example, Judge McLaughlin observed that there is significant public dissatisfaction with the juvenile court and that the courts were being asked after 85 years to rejustify their existence. Mr. Hege commented on the "absence of any evidence that the Juvenile Court has been able to socialize children" and on the need to look at the juvenile court as a court, not a social agency.

The fourth and final theme was a defense of the standards and the process for developing them. Professor Smith pointed out that the drafting committee for the IJA/ABA volume of standards on court organization included 9 judges, 2 former judges and only 2 law professors, and that the reporter for the volume was a former juvenile court judge. He noted that the IJA/ABA Joint Commission itself included several judges and that:

> The ultimate document as it is presented ... represents, in a large sense, a synthesis and perhaps to some extent a compromise of varying points of view.

Ms. Connell suggested that the standards, rather than seeking to destroy the juvenile court, are trying to provide a set of more realistic expectations to the court and the public by focusing resources on the more serious problems and seeking "to do a better job with those young people."

JUVENILE JUSTICE STANDARDS SYMPOSIUM

COURT ORGANIZATION

ISSUE OF SPECIALIZED COURTS v. COURTS OF GENERAL TRIAL JURISDICTION.

Robert T. Cattle Jr.

County Judge

County Courthouse
Seward, Nebraska

Consultant for

American Bar Association
Judicial Administration
Division

1. PREFACE

Alice folded her hands, and began:-

"You are old, Father, William," the young man said,
"And your hair has become very white;
And yet you incessantly stand on your head-
Do you think, at your age, it is right?"

"In my youth," Father William replied to his son,
"I feared it might injure the brain;
But, now that I'm perfectly sure I have none,
Why, I do it again and again."

****

"That is not said right," said the Caterpillar.

"Not quite right, I'm afraid," said Alice, timidly: "some of the words have got altered."

"It is wrong from beginning to end," said the Caterpillar decidedly, and there was silence for some minutes.

-Advice from a Caterpillar
Alice in Wonderland-
Lewis Carroll

As a preface to my presentation, I wish to commend the National District Attorneys Association for suggesting a symposium which would bring together diverse elements of the juvenile justice field to discuss the three leading standards proposals. And even though it will result in little more than another flurry of paper, it contains about the only germ of reason apparent in the whole affair. It is the sort of thing that should have been set up a year ago. Scheduled, as it is, so late in the game, it can have little or no effect on the proposed consideration by the American Bar Association of one particular set of standards in February. Since any set of standards adopted by ABA will automatically become the dominant one in its effect on legislation by the States, this comparison provides too little much too late. Since funding worthwhile projects is a slow and cumbersome process at best, this cannot be laid at their door. Nor can they be faulted for the rather "strange" delay in implementing the grant for this particular project which had resulted in so inhibiting the development and exposure of the theme that it ceases to be an effective element in ABA discussions and in its telescoping the working lead into so brief a period that it has practically precluded "non-professional" participation in its development. It is fortunate for judicial representation that the National Council of Juvenile and Family Court Judges had a bit of a head start on the judges from general or limited trial jurisdiction outside that organization.

I find it just a bit disturbing that such vast sums of money are made available from public coffers earmarked for the general improvement of juvenile justice, and that their disbursement is substantially effected and controlled by groups in the same government who have their own private brand of patent medicine to cure all the ills of man and beast and who use such funds to advocate and promote their medicine. I suggest that this thought be kept in mind as you study and compare the several proposed standards.

Through all of the proposals before us for study and comparison runs one dominant thread--the total reform of society. Juvenile law is used as the vehicle for massive changes in not merely our judicial system but our social system and the shape of government itself. The program is so substantial and all pervasive that it is difficult for the average mind to comprehend its ramifications. What seems to be a simple section devoted to judicial structure when viewed alone becomes a cog wheel in a machine devoted to much broader designs when viewed in conjunction with the rest of the proposals.

We are not in fact studying minor adjustments in a legal system and concerned only with improving juvenile justice delivery, but are confronted with a major restructuring of legal machinery to bolster and support a brave new world.

II. PROLOGUE -- HISTORICAL BACKGROUND

It is difficult nowadays to conceive that at least prior to the mid 1800's an imbecile and a child as well as a woman were largely considered as "incompetents" and outside the protection of the normal courts of law. They were "wards of the State" or chattels of the male "head of the family." In the long history of English legal development, it was only the Chancery or equity courts that were concerned with these rather attractive portions of the human race. Even then it was concern for property rights rather than human rights that interested the Chancery Court. The concerns were largely limited to the orderly passing of accumulated property, both real and personal, to succeeding generations. The premier rights of first-born sons, the secondary rights of later male offspring, and what to do with a childless man or a man who sired only females, were matters of grave concern because of the sacred precepts of property.

The mental or economic "incompetent," or "incompetent" by reason of age or sex, did occasionally touch the conscience of the trustees of public authority by reason of the Church's involvement in government and organized religion's inability to completely explain them away without grave doctrinal conflicts. So developed the theory of parens patriae making these neglected souls the peripheral responsibility of the King or State on grounds of Christian charity. The ladies, bless them, managed to hang on by their own "inherent powers" and did reasonably well for themselves until "modern thought" made them realize they should be doing even better. However, if you were a female child born in poverty, or lacking full mental capacity, you were better off leaving this world, and the sooner the better.

The improvement in communications and the spread of more broadly based education permitted the proponents of a more enlightened point of view to realize the luxury of a growing audience and thus were able to reach more and more elements of an expanding democratic consciousness and raise the concept of human

verities to challenge a reluctant Church and an indifferent State. With the increase in public awareness came the first small waves of "salvation" by private groups who concerned themselves with the saving of poor souls and helpless infants.

Early in the 19th century, urban development as a result of the Industrial Revolution confined large numbers of people in a close environment and the individual problems were pressed together and became too large to be ignored. With urbanization, poverty and a cash-oriented society came a diminished family cohesiveness and a community anonymity that bred increased crime and this in turn triggered public concern. The children of the urban poor were seen as exposed to sin and corruption. They were children "who are destitute of proper parental care, wandering about the streets, committing mischief, and growing up in mendicancy, ignorance, idleness and vice."[1] Besides they tended to disturb the sensibilities of the "good citizens" by their rude importunities and their tendency to pick pockets and steal the property of the more fortunate. This had to be taken care of said the City Fathers and State Legislators. And so it all began.

Throughout the subsequent growth of juvenile justice procedures and vehicles, their development has been hampered by the ambivalence of social attitudes. There has been a constant tug of war between the certain knowledge that children are not yet adults and have not matured to the point that they can reasonably be expected to adhere to an established moral code and bear the full consequences of their acts and the realization that juvenile behavior without restraint and training can result in the development of amoral attitudes which will result in serious damage to society as represented by the State.

The "experts" and "theorists" have vacillated from social rehabilitation and welfare of the child themes to social control and welfare of the State theories depending on their own personal background, orientation and need for establishing scholarly reputations.

I find the following language in Sarri and Hasenfeld's study fairly well covers the current situation in juvenile justice as I understand it, though I do not necessarily subscribe to other expressions and conclusions by the authors.

> The "in" concepts in social welfare and criminal justice programming are decriminalization, diversion, deinstitutionalization, and deterrence. At all levels of society there are increasing efforts to decriminalize a variety of behaviors including the use of drugs, sexual relationships between consenting persons, gambling, and status offenses of juveniles. In addition there are efforts to divert large numbers of persons from full criminal justice processing to voluntary community agencies. Deinstitutionalization has been linked to diversion policy but goes beyond it into the area of community-based placement of many categories of persons formerly placed in institutions.

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1. Chicago, Illinois, Ordinance, 1855, quoted in Fox, Juvenile Justice Reform: An Historical Perspective, 22 Stan. L. Rev. 1187, 1208 (1970).

> Deterrence is now also receiving renewed attention because research findings are consistently revealing that legal processing and sanctions do not have a deterrent effect on subsequent criminal behavior.[2]
>
> Past decisions resulted in an expansion of the juvenile justice system with the expectation threat of coercive control would induce greater law-abiding behavior in youth. The continued increase in juvenile crime suggests rather clearly that the desired results were not achieved.[3]
>
> Why do juvenile courts receive such a large proportion of "juvenile nuisances" for handling? The juvenile court's broad yet vague mandate over many juvenile problems enables it to become a "safety valve" for youth service agencies (excluding, of course, public correctional agencies) and parents. In particular, youth service agencies that want to protect their own domain, select the youth they wish to serve, reduce failures, and rid themselves of uncooperative youth find the juvenile court a convenient agent to handle their "unwanteds." Once these referrals are made to the court, youth service agencies and parents can wash their hands of responsibility to the youth.[4]

A major latent consequence of this role of the juvenile court is to reduce the pressure on youth service agencies, such as schools, child and family service agencies, employment services and mental health programs to respond more effectively to adolescence-related problems. Thus, for example, when children fail in school and officially defined as delinquent because of behavior frequently resultant from such failure (i.e., truancy, incorrigibility), the schools are relieved from having to deal with the very causes of failure.[5]

Much as I tend to agree with foregoing recitation of horrors and conflicts of "ivory tower opinions" inherent in the current juvenile justice picture, it is a little difficult for me to follow the rather twisted logic through which the authors, Yeheskel Hasenfeld and Rosemary Sarri, arrived at a conclusion which ascribes all the failures of society, duly catalogued, to the juvenile court and advocating, as a cure-all, a drastic reduction in juvenile court jurisdiction, transfer of all status offenses to the very child welfare or youth service agencies they have just castigated. Then they proceed to advise: "The critical role for the juvenile court is to ensure that these agencies provide the services needed by these youth...."[6] How? By taking away what little power the courts may now have to require it.

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2. R. Sarri and Y. Hasenfeld, Brought to Justice? Juveniles, The Courts, and the Law, 217 (1976).
3. Id., at 218.
4. Id., at 213.
5. Id., at 213.
6. Id., at 216.

This society faces serious problems for its youth, including declining educational performance, increasing delinquency, family dissolution and inadequate parenting, increasing mental illness, high levels of substance abuse, and serious unemployment for at least one-third of young adults. These problems are further compounded by the fact that between now and the mid-1980's there will be a disproportionately large percentage of the population in the age group from 12 to 25. It is expected that the youth bulge in the age structure will begin to dissipate by 1990; therefore it is important that long-range policy decisions be made with this demographic pattern in mind. Otherwise, we may have to undo in the 1990's inappropriate social structures created in the 1970's.[7]

I can wholeheartedly agree with this entire assessment with the possible exception of the optimistic view of 1990. The solution--destroy or hog-tie the only social agency trying to do its job as best it can in an Alice-in-Wonderland atmosphere. It is this type of dichotomy that permeates most of the academic assessments of juvenile justice problems. The juvenile court is a dismal failure because all other agencies and society itself are failures. How do we cure the failures of society and all other agencies? Very simple. Destroy the obvious villain, the juvenile court. The public, which always prefers nice and neat rules for everyone except themselves, has therefore become totally confused. The practising bar has largely remained aloof from this time consuming and relatively unprofitable field of the law. The Courts themselves have overpersonalized the delivery of juvenile justice since they have until recently been outside the mainstream of legal thought and usually quite bewildered by their role as mediators between opposing social concepts, referees in educational, social welfare and family disputes, and lacking legal guidelines, structural ability and recognized public image. They have had to do the best they can in a world where they have become the scapegoat for all the social ills of an unrestrained and self-indulgent society where increased population, public mobility and urbanization have increased the friction points beyond a tolerable level.

III. SIGNIFICANCE -- NEED FOR ORGANIZATION

One of the early considerations when discussing justice should be the delivery format for the services contemplated. Historically it had been the last item on the experts' list of importance. As a result, we have developed over recent years an experimental hodge-podge of justice theories and thrown them broadcast at a fragmented court system that has been as diverse as fifty sovereign states could make it. When in even more recent times the legal pundits turned their combined talents to Court Organization, with a view to making the legal system more orderly and uniform throughout the United States and in order to hopefully make it a more efficient structure to deliver ultimate justice to the general public, they largely ignored the hybrid and somewhat alien growth which had haphazardly developed in a little-known or often ignored oxbow in the stream of court development--the Juvenile Court.

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7. Id., at 217.

Since juvenile jurisdiction has become so lately a part of legal and political thought, it would seem that with all the models available in criminal, civil and probate law there would have been no difficulty at all with organizing and establishing a juvenile court. But this would assume that we had some organization and standardization in those fields--and we had none. Even these ancient areas of the law were operating with overlapping jurisdictions springing from city, county, and state diversities arising out of political struggles between exponents of centralized and decentralized theories of government. In each of the fifty states the conflict took different forms arising out of differences in political history, population growth, economic bases, cultural background, etc. Juvenile courts were established at various times as "additional" courts or "special" courts or as additional or special appendages to the regularly-established courts whatever they happened to be. They therefore inherited all of the problems of the older courts plus the additional problems that arose out of different needs and uncertain concepts.

Separate juvenile courts generally developed in areas of greater population where the volume of cases made the need more apparent and more economically feasible. They were municipal, county wide or State courts depending on how they happened. In other areas, juvenile cases were handled on the criminal docket but with relaxed procedures, primarily in rural areas. In some they were offshoots of family law divisions.

Where juvenile court divisions grew out of family law they were a part of the court level that spawned them, normally the general jurisdiction courts. Elsewhere they were usually relegated to courts of limited jurisdiction because the general trial courts didn't want to be bothered.

An example of the thought process of the "thinkers" who are so articulate in the juvenile justice field, the topic of court organization and administration by whatever label they choose to put on it, seems to occupy their minds very little. In each of the three proposals we are considering the subject is considered largely as an afterthought. Yet it is just possible that the lack of an organized and standardized court delivery system and administrative methodology has tended to have as much of an effect on juvenile theory and philosophy as vice versa. Whether the chicken came before the egg or whether it was the other way around is not a part of my presentation.

Initially the functions of the juvenile court as seen by its protagonists affected the organization of that court. The over-paternalistic concept probably encouraged separate courts more than any other type, but as long as they were left alone they were happy. "The function of the proceedings was to diagnose the child's condition and to prescribe for his needs--not to judge his acts and decide his rights."[8] The three landmark cases in the Supreme

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8. U.S. Dept. of Justice, Law Enforcement Assistance Administration Prosecution in the Juvenile Courts: Guidelines for the Future, 5 (monograph 1973).

Court: Kent v. United States, 383,U.S. 541 (1966) In re Gault, 387 U.S. 1 (1967), and McKeiver v. Pennsylvania, 402 U.S. 528 (1971), changed all that. "The essential thrust of Gault was that greater procedural formality in juvenile courts was needed in order to safeguard the constitutional rights of juvenile litigants."[9] The McKeiver case, in refusing the right to a jury trial, said, in effect, thus far and no farther.

The Supreme Court seems therefore to say, and I think rightly, that children are immature adults and cannot reasonably be expected to adhere to the established moral and legal codes and cannot justly be required to bear full responsibility for their acts, yet their attitudes must be developed so that they are ready to assume full responsibility at a predetermined and established point in their lives. And further that without a graduated series of restraints and progressively greater requirements for accountability they may well become a danger to society. This is true "parens patriae" doctrine in its best sense. It equates the state with the family and sets the rules at the same or a similar level to the one we use every day or attempt to use in bringing up our own children to adulthood. The only real difference is that the family is an amorphous and highly individualized social structure while the state, dealing with all people, must of necessity maintain some rigidity of structural form and develop rules and regulations which can be applied across the board with as near a fair and equal impact as may be devised.

Just as in the family scene, children must be recognized as individuals and given full protection in all fundamental areas, but need not necessarily be accorded all the rights and constitutional protections provided for reasoning and experienced adults with concurrent requirements for full responsibility. Since they cannot be expected to pay the price, they should not be entitled to all the rights and privileges afforded adults, but they must be adequately prepared for this state of affairs.

The rules for juveniles must be designed to the same basic format as laws for adults and further designed not as parallel lines, but as lines which will ultimately converge and coincide at the magic point we arbitrarily determine to be the gate to adulthood. It would seem then that the forum for juvenile justice and the format of its delivery should be designed with the adult court and adult laws as a model so that the transition may take place naturally and there is no need to get excited at necessary variances so long as they are designed with the above purpose in mind.

In the IJA/ABA Standards[10] this recognition of a minor's passage through

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9. Id., at 6.

10. Institute of Judicial Administration/American Bar Association, Joint Commission (IJA/ABA), Standards Relating to Court Organization and Administration, (Tenative Draft 1977), (hereinafter IJA/ABA Court Organization).

youth to maturity and the coming of inevitable adulthood is acknowledged by granting him or her almost complete freedom to err in any way individual fancy takes them and virtually removes all protections generally accorded. All this is on the assumption that "all men are created equal" whether they be two years old or ninety and on the principle that the government should not meddle with the natural family. They accord the school a larger role in the child's development. They presume that the school will not act arbitrarily or exceed its authority and that the "natural family" still exists in its traditional form and with its traditional concerns. These are fairly broad assumptions as any judge who deals with children, their parents and their schools on a daily basis well knows.

This same philosophy removes all the protections provided for status offenders instead of improving their delivery and the exercise of judicial restraint. It removes from court jurisdiction conduct not cognizable by the adult court as a crime or one that is consensual in its nature. These are areas which might be properly taken care of within the "family" if their naive concepts of the modern family were sustainable.

> At the heart of the Standards, then, is the recognition that the child must have support in his gradual passage towards adulthood. They seek to accomplish this by granting the juvenile the full rights of an adult when his interests are jeopardized by state action, and by providing him with supportive structures when necessary. There is yet a third way in which the Standards encourage the development of the child. During the period of youth, children must be given "breathing space" to experiment with different life styles and modes of expression in the attempt to define their own identities.[11]

License to prey upon others and freedom to be preyed upon. A juvenile court in all too many cases is the only restraint on the license and the only protection with any authority that the child has. And to perform this function the Court must have control over areas which parental authority has abandoned.

This slender volume of the IJA/ABA Standards relating to Court Organization and Administration represents the Courts. It is on the back of this scrawny camel that they propose to carry all the wealth and dreams of fabled Samarkand. It is the vehicle that is supposed to carry the contents of the remaining twenty-two volumes. I think it is indicative of the importance the designers of the new world to come place on the courts of law. It is also prophetic of the role the courts are expected to play in the social reform and governmental reconstruction which the authors hopefully anticipate.

While the NAC and Task Force Standards do not go so far as the IJA/ABA Standards in encouraging the delivery of status offenders to the tender mercies of social welfare organizations without a thought of the protection rules of law provide, they do encourage and recommend a system that will allow the juvenile to be overpowered by concerns for the custodial rights of battling parents, and

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11. Kaufman, Protecting the Rights of Minors: On Juvenile Autonomy and the Limits of Law, 52 N.Y.U.L. Rev. 1015, 1029 (1978).

the drainage of needed resources to pursue and punish non-cooperative husbands and fathers. They would not dilute the delivery of desperatedly needed services by pitting the child against the executive department of corrections primarily concerned with adult criminal punishment and the building of institutions of control, and they do not advocate abandoning the child to a wasteland where he or she must stand alone against the temptations of an ever earlier stage of puberty or to make personal decisions on the risks of drug experimentation without guidance or restraint, but they would adopt a more relaxed position on court responsibility in these areas by placing the child in community welfare control retaining only some inchoate rights in terminal cases.

IV. COMPARATIVE ANALYSIS

All three of the standards under consideration have taken the position that juvenile matters should be considered only by courts at the highest level of general trial jurisdiction. This recommendation has been based on a feeling that these courts provided a higher quality of justice. They cite competitive judicial salaries, better judicial facilities, more prestige, ability of such a court to attract more competent jurists, more substantial credibility as courts of original jurisdiction and better appeal processing. The same general position is taken on whether the juvenile court should be a separate court or a division of the general trial court. All three have recommended that juvenile matters be considered by a division of the general trial court rather than by a separate juvenile court. The basis appears to be efficient and effective administration and consolidated resources. All three standards agree on a family court structure rather than the more limited concept of a court dealing only with juvenile delinquency, status offenses and dependency and neglect.

From what statistical information is presented in Volume III, of the Task Force's Comparative Analysis of Standards and State Practices,[12] it would appear that the positions taken by all three of the studied standards as to court organization for juvenile courts are not universally recognized by the fifty states of the Union.

On the proposition that juvenile matters should be handled at the highest general trial court level, only 25 states, including the District of Columbia, seem to concur. In the remaining 26 states there is a wide variety of opinion expressed. According to the above authority, in some 13 states the juvenile court is a part of the Inferior Court structure and in the remaining 13 there is a combination of formats. I note here that they have misconstrued the situation in my native state of Nebraska by placing our juvenile courts solely at the Inferior Court level. As a matter of fact it is a wild combination where the general trial court and the lower level County Court have concurrent jurisdiction in delinquency matters, the lower level County Court has original and

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12. National Task Force to Develop Standards and Goals on Juvenile Justice and Delinquency Prevention, Analyses of Standards and State Practices: Court Structure, Non Judicial Personnel, and Juvenile Records: A Comparative (hereinafter Comparative Analysis).

exclusive jurisdiction in all other areas and, in the three heavily urban jurisdictions, the Separate Juvenile Court has total jurisdiction at a co-equal level with the trial courts of general jurisdiction. Historically the general trial court rarely exercises its concurrent jurisdiction.

In order to further refine and support placement of normal juvenile justice matters in a court of general trial jurisdiction, all three of the studied standards adopt a position calling for the juvenile court operation as a part of a family court, but they differ in the precise method by which this is to be accomplished. Generally they seem to feel that all family related problems might best be handled in a single cohesive unit. This rationale contends that it would eliminate the specialized and compartmentalized court systems now existing, eliminate duplication of effort in working out the total family issues involved, and would consolidate resources. They advocate changing the focus from the juvenile to the family.

From the Comparative Analysis of Standards and State Practices referred to above,[13] we find an overwhelming political antagonism or indifference to this position. Only four state jurisdictions, including the District of Columbia presently have a totally integrated family court, one state incorporates all family related problems in a family court except divorce, and forty-six prescribe the handling of strictly traditional juvenile matters such as delinquency, non-criminal acts, and dependent/neglected children within the confines of a juvenile court.

As a part and parcel of the organization of courts dealing with juvenile or family matters, the qualification and assignment, to include tenure, of judges to perform this service must necessarily be considered.

The IJA/ABA Standards (2.1) opt for a family court judge with the basic qualifications of a trial court judge, such as a law degree and membership in the State Bar, and elaborate and detailed special qualifications.[14] The Task Force Standards (8.4) are roughly similar, but somewhat less detailed as to special qualifications.[15] The National Advisory Committee Standards (3.122) agree in general, but take no stand on special qualifications.[16]

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13. Id.
14. IJA/ABA, Court Organization, Supra note 10, at standard 2.1
15. National Advisory Committee on Criminal Justice Standards and Goals, Report of the Task Force on Juvenile Justice and Delinquency Prevention, standard 8.4 (1976), (hereinafter Task Force.

16. National Advisory Committee for Juvenile Justice and Delinquency Prevention Report of the Advisory Committee to the Administrator on Standards for the Administration of Juvenile Justice, Standards, 3.122 (1976) (hereinafter, NAC).

The several states generally agree that family and juvenile court judges must be an attorney. Forty states, including the District of Columbia, hold to this requirement. Five states call for them to be attorneys or persons with prior judicial experience. One requires that such judge must be knowledgeable about family and child problems, and five states have no qualifications at all.

In the related matter of assignment of judges and their tenure, there is some diversity in the approach. The IJA/ABA Standards (2.1) support assignment by chief trial judge on a modified rotation system, one year with no longer than two additional years on renewal of assignment.[17] The reasons advanced are "judge shopping," if the period is too brief or rotation too rapid. Long assignments raise their fears concerning stagnation and departmental isolation. They further advocate prescribed and regular intervals in rotation. They are more worried about "one-man empires" than any other consideration. The NAC Standards (3.122) suggest a minimum of two years and a maximum of four consecutive years.[18] They advocate a middle ground. The Task Force Standards (8.4) recommend permanent assignments and emphasize the specialized experience required by the duty and the length of time it takes to acquire it.[19] There appears to be little or no data on state practices.

V. PHILOSOPHICAL BASIS AND IMPLICATIONS

We are confronted at the outset with a variance of philosophical attitudes which complicates the formation of a uniform structural organization for a model juvenile court. Each body of thought compartmentalizes its position relative to the juvenile and virtually ignores the juvenile's orientation as a part of the entire structure of the law and society. Generally, little consideration is given to the fact that children have a way of "growing up" and becoming adults in a political sense with statutory boundary lines, whether the line of demarcation is 18, 19, or 21 years of age. In other words, and depending on the political framework in each state, at a legally established age each juvenile willy-nilly becomes an adult and subject to adult sanctions.

As an aside, it would seem to be obvious that the age of maturity in a political sense is an arbitrary one assigned to fix and stabilize economic and political frames of reference and only secondarily is concerned with an adaptation to a social framework. The purpose is to facilitate the mechanical operation of the State and the economic society. In order to establish it, the physical and mental age of maturity of the citizen had to be considered. Since the physical and mental maturity of a human being is a variable, it was necessary also to consider social maturity as well as the possibility of economic independence. All of these are variables depending on the individual and his physical, educational and economic growth and emotional maturity. The selected age in each political subdivision is arrived at by a consensus opinion and this is established at the whim of the general population at a given time.

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17. IJA/ABA, Court Organization, Supra note 10, at Standard 2.1
18. NAC Supra note 16, at Standard 3.122.
19. Task Force Supra note 15, at Standard 8.4.

Juvenile authorities attempt to base their theories on emotional maturity, but are forced to adapt this to the political age of maturity which can be a totally different age. It would be well, therefore, if we bowed to the facts of life and established a practical age as a universal compromise throughout the social and legal structure with full realization that this would be only a necessary norm to enable society to function. And since any such norm is arbitrary in any case, let there be a norm that is applied in all areas. It would be no more "wrong" than any other standard, and at least it would be workable.

Any system of law or caste which must differentiate in the treatment and status of those above and below the line must be aware that all of those below the line will automatically cross over sooner or later and design social activity and legal sanctions to function with that in mind. It would seem reasonable therefore that we worry less about form and more about substance and build on basics rather than seizing on the popular concept of the moment in determining the way to go. Each theory should be tested against those basics rather than the catch-words. The question is therefore how do we organize the juvenile court in any given political context to best deliver the universal elements of justice to a group who have not yet matured sufficiently in body, mind and spirit to be subject to adult rules of behavior, but most of whom will do so within a predictable span of time.

Each of the three standards under consideration has assumed from the beginning that the juvenile court must necessarily function within a single-tier trial court. It is true that the American Bar Association has decreed a single-court concept in its standard on Court Organization.[20] "The Court of original proceedings should be organized as a single court."[21] In the commentary a number of reasons are cited such as administrative efficiency, elimination of unjust and embarrassing discrepancies in the disposition of cases, elimination of an alleged exclusion of inferior courts from participation in the concerns of the judiciary as a whole and consequent insulation from the influence and direction of the courts of general trial and appellate jurisdiction. The standard maintains that such a structure makes possible a more efficient use of judicial manpower and they emphasize that "it can reduce or eliminate the tradition of second class justice that is associated with courts of inferior jurisdiction."[22]

The Commentary for section 1.12a goes on to say, however, that this inclusive original proceeding does not embrace all adjudicative proceedings such as those conducted before administrative boards and agencies, so it does

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20. American Bar Association, Standards of Judicial Administration: Court Organization, Standard 1.12 (Approved Draft 1974), (hereinafter ABA, Judicial Administration).
21. Id.
22. Id.

make exceptions and is not totally monolithic.[23] Most important it also says:

> Yet these steps can be taken, and many of the advantages of a unified trial court realized, without complete merger having been accomplished. Thus, it is possible in a two-level court system to formulate integrated court rules and administrative policies, to establish a single administrative office to serve all trial court levels, to select a single presiding judge having general supervisory responsibility for all trial court levels, and to integrate financial administration through a single budget, disbursement, and accounting process. Adoption of such measures could at the same time improve the efficiency of a two-level system and facilitate eventual merger of all trial courts into a single system.[24]

It is apparent therefore that the ABA standard has set up an "ideal" in the black letter material but has based it on the reasons given in the commentary. It also admits that most of the needs cited can be taken care of in another type of system. It would seem to follow also that the "tradition of second class justice" can be wiped out in the same manner and perhaps it can finally be realized that the phrase "inferior jurisdiction" should be read as originally intended with the Latin meaning, not the one we peasants have given it. There is no reason to believe that the other weaknesses of "local courts of limited jurisdiction" cannot be given the cure outside the single-tier system.

In other words, let us concentrate on the improvements that need to be made to upgrade the delivery of justice at all levels rather than concentrate on the single catch phrase, single-tier trial court. And we can then think about juvenile courts within a context that concentrates on improving the delivery of basic juvenile justice without limiting ourselves to a straight-jacket even though such a jacket may prove to be most attractive and suitable in some if not all situations.

The IJA/ABA Standards suggest in their commentary that:

> ...family court division judges should have demonstrated special interest in the social and legal problems of children, youth and families; should possess special sensitivity toward minority groups who may come before the court; and should have an appreciation of divergent life styles. Judges with rigid moral standards, who are prone to excessive moralizing, should not be assigned to the division. A basic knowledge of sociology, psychology, psychiatry, children and their wide ranges of behavior, and the "community" are further desirable qualifications, along with the capability of evaluating the testimony of

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23. Id.
24. Id.

> children and of expert witnesses concerning children. The ability to listen to and communicate with children and families is critical.
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> The judge should have not only an interest in the work of the division, but also experience gained in the other divisions--civil, criminal and probate.[25]

Except for some gratuitous language such as "Judges with rigid moral standards, who are prone to excessive moralizing..."[26] the above requirements for a juvenile judge are almost identical with the requirements for every judge with the caveat that I can think of no "judges" in recorded history who ever met this standard or closely approached it. The experience requirements seem to imply that a juvenile judge of necessity must be a "grey beard" with long service in the Court system. Indeed, such varied experience is helpful, but as a requirement it would bar the service of many able jurists. Such experience can, however, be gained by practical work in the practice of law, and it is a valuable asset to any juvenile judge.

In fact the above statement points out most forcibly that juvenile justice is only a part of the entire framework of the law and must be developed and dispensed with that overriding thought in mind.

But, if we are to take the IJA/ABA Standards at their word on qualifications, how can we square this with their paranoia as to abbreviated terms of assignment to prevent a situation which may breed "empire building"? If the area of juvenile law is as complex and sensitive as they indicate and if the field requires the god-like attributes they set out in section 2.1, how do they propose to satisfy all this within the limitations of one-year assignments renewed no more than twice? They fall into the same trap as the ABA Standards of Judicial Administration, Trial Courts.[27] In order to destroy the bogeyman, we will conveniently forget our solemn pronouncements on the joys of "stability and efficiency through specialization" and the other qualifications which cannot possibly be acquired during arbitrary short-term assignments. Remember the words of a popular song which states you can't have one without the other.

The twin problems of qualifications and tenure can and will be solved in time within the framework of the total legal system by compromise or by ignoring the whole thing. They will not distort the natural evolution of legal concepts.

The "family court" proposal, like the "single-tier court," is one which can distort orderly development. In the hands of zealous advocates who are prone to forget all else but their pet project, the idea ignores the fact that we are all of one house. It tends to focus on the destruction of basic sub-

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25. IJA/ABA Court Organization, Supra note 10, at Standard 2.1.
26. Id.
27. ABA, Judicial Administration, Supra note 20.

divisions of law without considering the further implications. It encourages indulgence in the thrills of building a brave new world in the midst of the old one without considering the effect on the older established community and the inevitable and cumulative deterioration of the community which must result.

The "family court" doctrine which is espoused by all three of the standards being discussed is largely predicated on a philosophy whose focal point is the family rather than the individual child. It is based on the belief that all legal actions concerning children are normally interrelated with family situations and that all family-type actions directly affect the child. They propose to consolidate jurisdiction over matters such as divorce, child custody, paternity, inter-family assaults, guardianships, mental illness, offenses against children and civil commitments of family members in one neat bundle with traditional juvenile matters. They suggest that this will cure current problems of lack of communication between courts of varied jurisdiction, avoid needlessly upsetting and confusing the lives of families by requiring them to appear in separate courts and increase the court's influence over the total family environment.

Little thought seems to be given to the fact that this will fragmentize the older divisions of the law and create new problems of determining jurisdictional boundaries and to the analagous question of whether we consider it desirable to redivide the entire legal system and re-orient the court jurisdictions on this new concept. Should all questions affecting corporations, whether criminal or civil in nature, whether they involve franchises or contracts, etc., be solved in a separate corporation court? Should all questions involving governmental subdivisions be lumped in a separate forum? Should we further split the traditional functions of a probate court by distinguishing guardianships of minors from other guardianships? What about trusts for minors? Shall we fragmentize civil jurisdiction by segregating therefrom civil actions involving minors and the financial responsibility of parents for the torts of their children? There are a great many similar questions that arise and are not considered. Juvenile jurisdiction can be supported for a variety of reasons, but can further artificial compartmental divisions be equally well supported and where does the process end?

With the above questions regarding the sanctity of the dominant themes of single-tier and family courts being raised but not settled, I think we are still some distance from a workable juvenile standards solution if we insist on devising them to fit those broad assumptions. In the area of court organization relating to juveniles, and adopting for the moment the two "immutable" concepts, the sounder positions would appear to be contained in the NAC Standards and NAC Task Force Standards.

Given the inviolability of the primary assumptions, inclusion of the juvenile court in the trial court as a separate division offers more pluses than a separate juvenile court. Such organizational treatment would permit rotation of judicial personnel in the degree determined optimal; best permit the acquiring and utilization of those judicial qualities deemed necessary for a complete juvenile judge; consolidate personnel and resources; and provide a means to end the isolation inherent in a separate juvenile court and permit a natural interchange of common legal ideas and concepts.

There is yet a third "immutable principle" which does not appear in the sections on Court Organization, but which substantially affects it. The new doctrine of determinate sentencing, designed to cure all the evils of disparate sentences, is apparently to be applied in all its artificial rigidity to the juvenile structure. Under the basic assumptions that all crimes of petit larceny, or those bearing any other label, are alike, and that all persons who commit such a petit larceny, or any other identified offense, are as similar as two peas in a pod, each category having the same motivations and whose punishment will have identical effects on the offender and on society, a mathematically precise series of formulae have been designed for punishments which will replace most judicial discretion and remove a large part of the necessity for judges.

Since a major portion of the science or art of judging, whatever your personal preferences in terminology may be, is traditionally concerned with the problem of punishment, there will no longer need to be much attention given to this area and all the worry over the type of person who is to be chosen for a judge, his temperament and experience, and concerns about his tenure in office are so much dry wind sweeping monotonously across an empty prairie. Since the crime of petit larceny now has its own neat little box, there will be no further need for high-priced judges with interminable qualifications to make determinations. We can easily employ two equally high-priced technicians skilled in computer analysis to replace each judge who can scientifically select the appropriate factors disclosed by the adjudication and the other limited factors permitted to be considered such as prior record, etc., and apply the infallible magic formula to them, insert them in the pre-programmed computer and Voila! out will come justice in a tidy package with no loose ends to unravel.

There is therefore really no necessity for the scholarly dissertations on qualification and tenure and all three standards may be reduced accordingly. Even the concerns about "family courts" and the "status" of the juvenile court and the structural problems of a division of the general trial court as opposed to a separate juvenile court lose much of their significance. As long as we can design an endless series of conveyor belts efficiently connecting automatic processing stations monitored by machine clinicians which light up appropriately when a child displays the proper characteristics for that station, all the problems can be solved clinically and scientifically by non-court agencies. We can forget all the variable human factors inherent in courts and judges making them prone to err and hire a body of skilled technicians in white laboratory jackets, provide them with an automatic supply of pre-fabricated foster homes, half-way houses, limited term detention centers to be provided by social agencies, which have been unable to supply them for the courts, and turn them loose to punch the buttons from nine to five with compensatory time for overtime.

VI. CONCLUSION

The question that keeps bothering me is whether any volume on Organization in Juvenile Justice Standards is required at all. Perhaps a cautionary section

or two in the ABA Standards Relating to Court Organization would take care of it or, in the alternative, it could be included as a part of a companion volume in the juvenile series. All of the proposed standards could be drastically reduced in size and number by ruthless surgery on the commentaries which, in the case of the IJA/ABA Standards in particular, are long, scholarly, but impassioned dissertations whose primary purpose is to advance a cause rather than provide a concise summary of the reasons on which a paragraph in the standards is based. Every speaker should have his or her day in the preliminary stages when position papers are constructed to support various theoretical approaches to the problems involved, but the final work product does not need the overbalance of rhetoric that sustains the authors in their creative moments.

The Juvenile Justice Task Force and National Advisory Committee generally stuck to their last and produced workman-like drafts. Some further work needs to be done in determining whether or not the juvenile justice series presents such a completely independent area that it needs individual treatment throughout. Any consensus draft should be carefully considered in conjunction with the rest of the ABA Standards to determine whether or not all of the proposals are original or mere duplications.

Finally, it would seem beyond any shadow of a doubt that the scholars, pundits, professional theorists, and full-time agency personnel representing High Academia and a fatherly Government have done a thorough and noteworthy job in gathering together all of the possible materials and building blocks from which a selection can be made to build the envisioned edifice. It would seem that now is the appropriate time for the dreamers and designers and the architects to depart the scene and let the builders and artisans who work with the bricks and mortar select the appropriate blocks of Parian marble and fit them finally in their places and let the people into the building to use it.

Since we very apparently have no Berninis or Frank Lloyd Wrights who possess the architectonic skills to arrange and systematize the pure knowledge provided by these three standards proposals, but many aspiring candidates, it is time to call in the stone masons and bricklayers. The marble blocks must be finally selected, shaved and burred, and trimmed to fit without strain or forcing. Expansion points must be devised on the site to relieve the stress and the harsh rigidity implicit in the black letter standards. The exterior frame must be purified and simplified to remove Victorian gingerbread and rococo flights of fancy, however delightful to the eye and ego. Elasticity of design must be introduced into the grand plan to permit alternatives for on-site adjustments and movable interior walls that may be adjusted to changing case flows and new behavior patterns without major reconstruction.

This type of highly-skilled labor, having the collective wisdom to do what needs to be done yet leave undone those things which perhaps need not be done, is available. The House of Delegates of the American Bar Association, who must grant endorsement and approval to give any proposal a life and impact of its own, should as owner or the agent of the owners, if you will, select a committee of perhaps a dozen persons to perform the skilled labor duties required to actually build the final structure from the materials contained in these proposals. They should be selected from judges with original jurisdiction in and daily responsibility for juvenile justice and attorneys with

substantial juvenile practice before the courts. They should come from all types of courts having juvenile jurisdiction and be persons not burdened with any overweening pride of authorship, but who will pursue their work driven by a very certain understanding of the need, and they should be given adequate support personnel as they shall deem necessary who shall provide technical assistance only to the committee not dictate its conclusions.

VII. EPILOGUE

As I read the voluminous literature advocating this or that position and study the three Standards under discussion, I have the uneasy feeling that I am an innocent traveler in ancient Attica who has run afoul of an entire tribal group bearing the name of Procrustes, each division of which is attempting to fit me neatly to their own particular iron bedstead. And the bed frames themselves often seem constructed in such a manner that the headboard appears to deny the existence of the footboard. Each bed when re-engineered may well provide me with a suitable physique whether I deem it becoming or not. But I cannot possibly be stretched on several beds at the same time to anyone's advantage.

I suggest that the ironmongers be called in from the crucibles where the metal is heated, refined and shaped and that the parts be disengaged, modified slightly, if necessary, and fitted together again to form one sturdy bedstead that can sleep us all with reasonable confort even though you may desire a soft mattress and I a firm one.

It is now time for the judges having original jurisdiction in these areas, and attorneys who practice in this field on a day-to-day basis, to take the several presently-existing proposals which represent the best and most scholarly theoretical opinions, and meticulously compare them section by section, one against the other, in the light of their practical experience in the field, and hammer out a workable consensus to fill the void that now exists.

(WHEREUPON, Judge Robert Cattle's presentation was given and the following is the discussion that ensued.)

MR. MANAK: Mr. Siegel?

MR. SIEGEL: Okay.

I will hold off on questions until I hear some of the others.

MR. MANAK: Yes, please do not feel compelled, obviously, to comment.

Okay, Mr. Rounds?

MR. ROUNDS: I have no comments.

MR. MANAK: All right, Mrs. Bridges?

MS. BRIDGES: Nothing.

MR. MANAK: And Mrs. Szabo?

MS. SZABO: No questions.

MR. MANAK: All right, Judge Delaney?

JUDGE DELANEY: I feel no compulsion to respond.

MR. MANAK: All right, Judge Arthur?

JUDGE ARTHUR: I just -- I don't know if it's permissible to agree with him or do you just want me to disagree or ask questions?

MR. MANAK: It's entirely up to you. You can ask a question, you can comment.

JUDGE ARTHUR: I would just like to stress some of the points that he has made and do it as briefly as I can; that is, I like the point, and I don't think you mentioned it orally about the diversity of the courts, how America has grown all over the three thousand something counties of the United States. Each developed different ideas, different challenges, and different approaches and I resist these standards coming in and saying this is the way that all courts in the United States are to be run from here on it; and I would support that, and I would hope that he would expand that particular part of his paper.

I also strongly agree with him in his idea that we need to get some of the people who have been out in the field to do some of the work, and a lot of those people aren't here either -- the police and the teachers and some of the probation officers -- these people that are actually out there in the nitty gritty with these people. I think Bob mentioned this briefly, but I think I'd like it to go further and say let's get this out of academia and out of the ivory towers.

In the standards group that I was on, I remember two of the people that were doing the most

were saying to us, of course, I have never been in a Juvenile Court, so I am not prepped by knowledge; and I think maybe we need some of that prepping brought back in the whole system.

I agree with him again in his concept of --

JUDGE CATTLE: I want to assure Judge Arthur that in the last four or five pages of this that I didn't get to because of the stringency of the time requirement covers some of those items.

JUDGE ARTHUR: I would agree with your views on the equality of children. I don't think children are equal to adults. I think that by the very definition one has achieved an authority to know how to make decisions and what the consequences are, that they should be given not equal rights but unequal rights and extra protection; and I think the standards which go into this as Judge Cattle mentions somewhat, the standards that opt for the equality of children have the basic results of destroying the family, taking the last few props out from under it.

And lastly, I certainly agree with his concepts of petition of judges. The standards seem to think, as he said, well they are paranoid. The

group I was in again, had five of these standard writers, they are all professors of law at various schools, they all say, "Judges should have no discretion, judges are inadequate, judges should not have any power at all."

Well, the judges have power now, and they never say where that power is planning to go if you take it away from the judge. It's going to go into the staff, it's going to go into the field workers, into the clerical people, into the lawyers. The power isn't going to cease to exist. It's going to be exercised somewhere, and I think it should be exercised by the judges; and I think the only way to do that is to have a long enough period where you can acquire a few of these qualifications that they mention and you can keep control of the operation, including the ancillary services.

So I strongly agree with Judge Cattle's approach on practically the whole paper, and thanks for the chance.

MR. MANAK: Thank you.

All right, Judge Moore?

JUDGE MOORE: I have a comment and a question, I guess.

The comment is, again, on the presentation. I found this to be a most difficult problem that I see with that particular problem of the IJA/ABA Standards, to a lesser degree, the other Standards. I think, once again, an example of the fact that through all these standards would be IJA/ABA Standards is a fundamental distress for a legal process and the top legal process has to be the courts; and I think that the way that you carry out the goal of having the least amount of state involvement at all in people's lives is by taking the top of that pinnacle within the judicial process, i.e., being the court, and require the retention which will again eliminate as a claim stagnation the department of isolation. But, in essence, what you are doing is taking the first step towards elimination of any particular court concerned only for the needs of the children.

My question is, if you are going to send us, when we get back home, our paper to be rewritten or possibly rewritten and the comments that are made here, are we supposed to, in our rewriting, put down these comments also? Are we supposed to reinforce our papers and tell why we don't agree with the comments? What is the objective when we get this material back?

MR. MANAK: Okay.

You are going to be getting any formal rebuttal papers. You will also be getting an edited version of the reporter's transcript; that is, that portion that you are concerned with, that portion which addresses your paper or any area of rebuttal interest that you have indicated. Then you have the opportunity to revise your paper to supply an addendum but that is entirely up to you. There is no compulsion to make the changes. That is up to each individual consultant.

JUDGE MOORE: What is going to be published, the papers?

MR. MANAK: What will be published, as we have indicated will be the papers, will be the rebuttals, will be the transcript of the procedures.

JUDGE MOORE: Oh, the transcript itself will be published, too?

MR. MANAK: Well, actually I am not sure whether we will publish the transcript or not, probably because of size, space, limitations, we won't be able to do that. We may publish selected portions, edited portions of the transcript; but as far as any revision to your paper is concerned, that's entirely up to you.

JUDGE MOORE: The only reason I ask is that we haven't gotten into a controversial area, but I think we are going to get into some areas, I am sure, that are more controversial than this, and we may spend a great deal of time when we have a lot of people to rebut orally here today what he or she has written; and I am wondering if there is some way that that rebuttal, which isn't in the form of a formal paper will be published and communicated, otherwise we just have the one author's opinion and there is no descent which is -- goes along with the finished document.

MR. MANAK: If a consultant feels strongly that his or her oral rebuttal should be published, you can indicate that to the project and we will consider that. We would prefer that -- if you feel strongly on a rebuttal point, we would prefer that you supply a written rebuttal, take the opportunity after the symposium to do that.

JUDGE MOORE: Okay.

MR. MANAK: And I think that you would prefer to do that, and again, be fairly brief,to supply a written rebuttal to a point if you feel strongly.

JUDGE MOORE: Okay, thank you.

MR. MANAK: Judge McLaughlin?

JUDGE MC LAUGHLIN: I only have a few comments to make. I think they should be made now since Judge Cattle had the burden of going first.

I don't know who picked Chicago, I think it was a very significant site, however, being the location of the first Juvenile Court, I guess, in the United States. So I think at least we are in historical harmony.

But I think we have to, coming from a state like New York, I am not now just going to speak for New York, I get the feeling it's not unique, I get the feeling it's throughout the United States, that the fact of the matter is that the public is dissatisfied with delivery of justice in the Juvenile Court system -- that I think is given. They are dissatisfied with it on two points.

Historically, the Juvenile Court was essentially society's response to the parent who is not socializing their child within the family unit. Now, socialization standards within family units tend to be established; in other words, what is good socialization, you know. What result we want from the child tends to be established -- those standards

tend to be established by the people in the middle-class -- you know, the "backbone of society." They establish the standard. So, when you deviate from that standard, you are essentially deviating from a very arbitrary kind of thing that, well everybody does this. This is meant -- Juvenile Courts right from the beginning, since they -- no court has had very much power over rich people, the Juvenile Court essentially has been used as society's device to make the poor meet the middle-class standards.

Now, so the poor, I suppose, were dissatisfied with the court right from the beginning, but I think now with changing times, the poor are beginning to have a voice, to be heard. So they are dissatisfied with the court. They ask a good question, why should our children have to abide by your standards, why not my standards or someone else's, so they are dissatisfied.

So, on the the other hand, since the court is -- as Judge Cattle pointed out so eloquently, the court is not achieving the socialization goals that society imposed upon it. We are not socializing in the family court. The Juvenile Court has never socialized before poor children or

the children of the poor. So the great middle-class are dissatisfied. Now, therefore, if the courts won't respond to the criticism, then someone else is going to do it. Now, we can bemoan the fact that it's ivory towers professors, but the fact is that if the professors won't do it, then society will get somebody else to do it; but somebody's going to do it. We just will not, at this point in our development, we will not sit there and let this Juvenile Court continue the way it has been going. In fact, the Juvenile Courts have been, you know, what -- eighty years, eighty-five years old, is really being asked now to rejustify it's existence; and if we don't, we are going to go through the same arguments that were put forth when the court was first proposed here in Chicago by people like Florence Kelly, Thurston. They are going to have to rejustify it's existence; and if we fail to do that, the Juvenile Court is simply going to be abolished -- if not in name, certainly in form.

And I think, finally, when I think we are commenting here, one of our problems, not just to this group, but to all groups who get involved in this thing is the problem of definitions. Now, what

do we mean by a word like "family"? If you talk to judges from the far west, for example, the Indians were involved with Indian tribes. Their definition of a family is entirely different from the definition of the New England family that Norman Rockwell painted, and this -- so when we make a statement, you know, the family is disintegrating, I don't know what we mean by that because I don't know what the speaker means by the word "family".

In fact, I think may be the Indian families, for example, are getting stronger. What is disintegrating, and I think as we address each other, we should, where possible, give some sort of a working definition of what we mean by those words.

Thank you.

MR. MANAK: Thank you.

Mrs. Thompson?

MS. THOMPSON: No, I have nothing at this time.

MR. MANAK: Okay, Mr. Hutzler?

MR. HUTZLER: No, thank you.

MR. MANAK: Okay, Mr. Dale?

MR. DALE: Yes, I have a question.

Judge Cattle, you mentioned that you thought that judges couldn't meet the standards

set out in -- qualification standards set out in volumes. Despite the fact that they may or may not be able to meet the standards, should those standards be contained in the volumes?

JUDGE CATTLE: I think they are -- that the commentaries in the IJA Standards are rather long and infashioned presentations of a cause rather than reasons on which the black-letter stuff is predicated. I am not sure that we need to make a long list like this. I think any judge will agree that all of us ought to have these qualifications. It would be nice to think that we even have a few of them, and I love this language about judges with rigid moral standards who are prone to excessive moralizing. I think that's a very fine point, but I don't think that -- I think that the commentary, not only in this volume but in all of them, are the type of thing that we put together when we are presenting a paper. They are not the basic reasons on which the standards are set. I have some more material in here in which the N.A.C. and the task force are a little better at that. In other words, they have pretty well trimmed the rhetoric down, giving basic reasons.

Now, I think that you could cut that

long list of judicial requirements down to some -- a two or three line description of heaven, but -- and I don't believe all this is necessary, frankly.

MR. MANAK: Mr. Sandel?

MR. SANDEL: Two brief comments.

The A.B.A. sometimes has a reputation of being a single-minded, monolith that imposes it's corporate deficiencies on all two hundred and forty thousand members. I think Judge Cattle's forth-right discussion of an A.B.A. corporate set of standards should lay that myth to rest, at least in this group.

And secondly, if anyone has any ques-tions of technical -- well, not technical questions, but how these proceed through the A.B.A, when they become the A.B.A. policy which are involved that's happening, please get in touch with me, any time that I am here and I will be happy to discuss exactly how they are going to be given.

MR. MANAK: I think Dave Gilman will probably touch on that also.

MR. SANDEL: He said he hadn't planned to, I checked with him.

MR. MANAK: Okay.

Okay, Dean Smith?

DEAN SMITH: Well, I want to commend Judge Cattle for his very fine critique, but I want parenthetically to be somewhat defensive because I appear here under the label of a law professor. I am one of the vice-chairpersons of the Juvenile Justice Standards Commission, along with Judge Fort, and my greater contribution to the Juvenile Justice Standards Commission arises out of my experience as a judge -- a great deal of that experience being as a Juvenile Court judge.

I would point out that the standards are not the Holy Writ, they do not purport to say this is the only way. They merely purport to express the consensus of a group of persons, very few of whom were law professors, the very large percentage of whom were judges. I have just checked the drafting committee responsible for court organization and administration, the document recently under dis-cussion for which I served as chairperson; and on that drafting committee were nine judges, two former judges, two law professors, and the document itself was reported by a former Juvenile Court judge from Colorado. The Juvenile Justice Standards Commission itself, which consists of about thirty-two persons,

nine judges, one law professor, and with my title as a law professor now, I would say two law professors. I point this out merely to indicate that this is not an ivory tower exercise by law professors. The Juvenile Justice Standards Commission consisted of behavioral scientists, it consisted largely of judges, it consisted of a wide-range of thought. There was not always total agreement in the commission itself, not total agreement in the drafting committees themselves.

The ultimate document as it is presented as the tentative draft of standards represents, in a large sense, a synthesis and perhaps to some extent a compromise of varying points of view. We have decided that after five or six years of laboring at the conference table, that it was time to reach some conclusion in the form of a document, and the documents we have published in their tentative form, the twenty-four volumes represent that work product. No document, as we all know, is ever perfect, and this process of critical evaluation from knowledgeable persons such as those who are participating in this activity will be very meaningful.

As has already been pointed out, it

is perhaps a bit late to make changes before our presentation to the American Bar in February based upon what occurs here; but many of the persons who are here have already made their critiques to the Juvenile Justice Standards Commission, and I am sure David Gilman will make reference to this in his presentation. The Executive Committee of the Juvenile Justice Commission has taken into consideration the varying points of view, and in some instances, have modified the language of documents which have been published in their tentative form in the twenty-four volumes.

I apologize for taking this time to say this, but I think the time to say it is at the beginning of this session so that we will not labor under any misapprehensions as to what Juvenile Standard documents really are.

JUDGE CATTLE: Can I respond briefly to that?

MR. MANAK: Okay.

JUDGE CATTLE: I wanted to say just a few words. Out of all the judges that are on this committee, I would like to ask Judge Smith how recently have they been conflicted with the juvenile problems and how many of them probably never saw a

juvenile problem?

DEAN SMITH: All right.

If I may identify by name rate, there are one, two, three judges on the Commission who are presently sitting as Juvenile Court judges, -- four, and out of the others, the others were in general jurisdiction judges who had been Juvenile Court judges. The --

JUDGE CATTLE: Some time ago?

DEAN SMITH: Right, and I cannot say what year.

The reporter for the document, of course, is a "former" Juvenile Court judge who we all know, Ted Rubin.

On the drafting committee, the judges who served -- who, at the time of the participation were serving as active Juvenile Court judges were one, two, three, four, five out of the nine.

MR. MANAK: Okay.

We are running very, very close on the time. Perhaps we should continue down the line. If we have some time, we can come back.

JUDGE CATTLE: Okay.

MR. MANAK: Judge Fort?

JUDGE FORT: I would like to ask Judge Cattle

whether he wants to make any comments on one point two of the standards of the ABA. I did not -- in this paper, perhaps overlooked it, Judge, and the opinion I think of many of the members of the Commission who promulgated these standards, this is an extremely important provision.

JUDGE CATTLE: I didn't touch this, because I think there is a topic on this separate, except that personally, I don't see how on earth you can operate a juvenile probation or detention service under the executive branch of the government. I think this is the strong right arm of any Juvenile Court, it's their only means of exercising their control over the juvenile and their attempts to do something for him; and to stick it over an executive department, which is traditionally apathetic, shall we say, to the judicial branch, I think is nothing short of destruction of the -- not just the Juvenile Court. This would be true of the general trial jurisdiction, too.

MR. MANAK: This issue is going to be dealt with by our very next paper, as a matter of fact. So we will have discussion on it.

Judge Ketcham?

JUDGE KETCHAM: I would like to briefly associate myself with what Judge McLaughlin said and I think the community is deeply concerned in looking for solutions. I read Judge Cattle's paper before I came here and heard him present it, and I understand vividly the numerous reasons why he objects to the several standards on court organization, but I have some concern about his proposed solution.

As I understand, he suggests a solution on page twenty-four and again restating it on page twenty-six of his paper which is, i.e., to turn all of the recommendations, standards, and proposals, what he calls his bricks and mortar, over to the builders and artisans, whom he defines as the Juvenile Court judges with experience and the attorneys who practice regularly in the Juvenile Court. But on page five of the paper, Judge Cattle describes these very Juvenile Courts as, and I quote, "outside the mainstream of legal thought" --

JUDGE CATTLE: They have been.

JUDGE KETCHAM: "Usually quite bewildered," "lacking in legal guidelines, structural stability, and recognized public image."

So apologies to our sponsors and

to Barbara Allen-Hagen who represents L.E.A.A. here by way of an analogy. L.E.A.A. has been under substantial criticism by the public, the White House, the Attorney General, and many in the executive branch of the government. Congress has conducted numerous oversight hearings and critical scrutiny of L.E.A.A. Senator Kennedy's office and staff have developed several versions of a reorganization bill. Many interested groups and organizations have spent long hours suggesting various solutions.

As I understand Judge Cattle's proposal, if it were to be allowed to L.E.A.A., he would now suggest that all of these proposals for reorganization be turned over to L.E.A.A. officials to work out their own problems. Is that the solution, sir?

JUDGE CATTLE: No.

In the first place, on page five, it says the courts have, until recently, been outside the mainstream of legal thought, and I think something that has been neglected largely in this whole thing is that, while the judges have been traditionally reluctant to clean their own linen, they are finally getting to it; and in the last five or ten years,

much of the statistics and much which are suspected, incidentally, I know they are collected at the grass roots, don't indicate that there has been any progress made by the courts themselves, and I can assure you in every court across the land, as you will find out when you start making this study you are doing, they have made tremendous drives, and the only problem is that we have got such a long way to go; and in this situation, we are in so different shape than the courts of general jurisdiction who are in just as bad shape as we are and have made no greater contributions to the control of adult crime than we have to juvenile crime.

MR. MANAK: Okay, Mrs. Sufian?

MS. SUFIAN: No comments.

MR. MANAK: Okay, Miss Connell?

MS. CONNELL: I just would like to have one very brief comment, and that's that to some -- in some ways, I object to the characterization of many of these standards as a real attempt to throw out the Juvenile Court system. I think Judge Cattle is very right in the sense that Juvenile Courts have historically been made the scapegoats in many societies. I think that what the standards attempted

to do is restrict the scope of what is expected of Juvenile Courts to realistically cause it to focus on those most serious views and to do a better job with those young people. To stop calling upon it as the end-all of service protection and therefore, although certainly it does cause a restriction in the scope of jurisdiction, I think it causes a more realistic focus in a Juvenile Court upon those -- that Juvenile Court's suggestion and symptoms are historically better able to reach.

MR. MANAK: Mr. Hege?

MR. HEGE: I will just go on to maybe amplify on what Pat had said a little and on what Judge McLaughlin has in terms of association.

I don't think the Juvenile Court -- there is any evidence that the Juvenile Court has been able to socialize children and that there is never going to be a replacement for the natural family, no matter how bad the natural family might be, and that there is the scope of their services which ought to be limited to those cases where children are committing acts against society or in which they need a protection from their own home, and I don't think the court should be looked at as a

social agency. It is a court, it should operate as a court.

MR. MANAK: And Mr. Hege will enlarge on that in his topic, Scope of Court Services.

Mr. Kaimowitz?

MR. KAIMOWITZ: It is aware that I never publicly agree with a Juvenile judge, so I will say that I agree entirely at the outset of Judge McLaughlin's remarks, and would hope that they are subsequently embraced by other speakers.

I would make one brief comment to what Judge Cattle last alighted to in terms of the tremendous progress that has been made by the Juvenile judges, themselves, and to jurisdictions that I am familiar in New York and Michigan, it has been clear in my mind that Juvenile judges have made every attempt not to allow the appeals process to scrutinize Juvenile Court procedures that I have encountered at least on three occasions on appeals, Juvenile Judge's briefs in opposition to scrutiny by higher courts of procedures that had taken place below and arguing basically to leave the entire matter to the bricklayers and the people supplying the mortar. So I would urge and suggest that part of any considera-

tion of court organizations consider scrutiny of the Juvenile judges through its term -- whether or not the job that Judge Cattle claims they are now in scope doing is in effect being done.

I think one of the problems that I do have, not only with this option, but with the standards as such, is that some of the missing links that exist are crucial as far as I am concerned and what I have just eluded to is the entire question of the appeals structure being related to the Juvenile Court system. What we have in this area compared to almost any other area except perhaps mental health is no higher court scrutiny, and subsequently, on a -- what I would regard as still a very scattered basis where fundamental questions are still being addressed on appeal levels and I am sorry that there is no commentary on some kind of appeal language, especially within the court organization structure.

JUDGE CATTLE: I can give two lines as far as I don't know about New York and Michigan. I know some of the judges, and this doesn't somehow seem to jive with what I know, but that maybe true. All I know, is the reason the Appellate procedures were not

followed is not because of the Juvenile judges, it's because the lack of interest in the general bar and proceeding, and in Nebraska, they -- in fact, I have two reviews over me, if anybody wishes to exercise them, and so far nobody has chosen to exercise them over my decisions in six years; and I don't think that's my fault because I have got a pretty thick head and I'd be happy if they'd review me.

MR. MANAK: Okay.

2. Scope of Court Services -- Whether the court should be responsible for probation and detention

Consultant
Brent D. Hege

ABSTRACT OF PAPER

Mr. Hege places the issue of the scope of court services in the context of the controversy between advocates of the parens patriae and due process approaches to the administration of a system of justice for juveniles. He divides this issue into four questions and compares the positions adopted by the three sets of standards on each. The first question is whether intake, predisposition investigation, and probation services should be administered by the juvenile court or an executive agency. The arguments against judicial administration of these services are summarized as follows:

> Many have decried that the present system denies the child the right to a fair and impartial judge ... because the judge's employee does the intake and investigation, and this information is informally communicated freely between judges and probation officers. Another constitutional attack is on the grounds of separation of powers. This argument is that the judge's employee should not be responsible for execution of the court's order ... as the execution of laws is generally attributed to the executive branch of government.... Other objections center on a theory of conflict of interest when the judge is responsible for administering services and subsequently acts as a decisionmaker on his or her administrative decisions [and on the fact that many] judges have neither the time nor the skills to administer [treatment] programs....

The counterarguments are not presented. Mr. Hege finds both the IJA/ABA and Task Force standards clearly favor executive administration of these functions while the NAC standards are somewhat more equivocal, particularly with regard to intake and predispositional investigation.

The second question is whether intake, predispositional investigation and probation services should be administered as part of a statewide system or locally. The discussion of the IJA/ABA standards on this point indicates that while a statewide system assures greater

uniformity of policies and more efficient use of resources, local administration avoids "bureaucratic breakdown" and may increase community support. Mr. Hege concludes that all three sets of standards favor statewide highly decentralized systems.

The third question is whether all three of the functions should be performed by the same individual or agency.

> ...[T]he lack of specialization within court services, notably probation, results in significant role confusion. Here the probation officer is forced to wear the "hats' of parental confessor, investigator, prosecutor and, lastly, sympathetic treatment counselor.

Mr. Hege finds that both the IJA/ABA and NAC standards favor specialization of all three functions, while the Task Force standards recommend that intake and predisposition investigation can be performed by the same individuals since similar skills are required.

The fourth question concerns where responsibility for the administration of detention programs should be placed. As with the initial question, and for much the same reason, all the standards appear to favor executive branch control at the same level.

The final question is the locus of control of post-trial detention. In keeping with the prevailing practice, all three standards favor centralized state control of juvenile correctional facilities.

Mr. Hege concludes with an exploration of some of the philosophical implications and implementation issues presented by the standards.

SUMMARY OF CONTENTS

There was general agreement among the discussion panelists that the organization and administration of intake, predisposition investigation and probation services was a highly significant issue, that probation should be administratively distinct from the other services, and that while constitutional issues may be involved, the question of executive or judicial control was a policy matter centering on which branch could best marshall the necessary resources. On other points there was a sharp disagreement.

For example, with regard to judicial vs. executive control of probation services, a number of the panelists, including Judge Ketcham, Judge McLaughlin, Judge Arthur, Judge Delaney, Ms. Bridges and Mr.

Dale addressed themselves to the question of the juvenile court's ability to obtain necessary services for juveniles and assure the quality of those services if they were placed in an executive agency. Judge Arthur suggested that responsiveness and control would be lost by transferring intake, predisposition investigation and probation services from an elected judge to an unelected bureaucrat, and that courts could provide more prompt and thorough review of complaints regarding inadequate or unprovided services. Judge Delaney, on the other hand, commented that:

> As long as we [judges] can say to the probation officer, this is your function[;] [i]f we can bring that case back for periodic review ... and make both the subject of the report and the people who are providing services give an account of their stewardship[;] if they all understand that they are going to come back and say this is what I did or ... didn't get; [and] we ... [are] in a position to say ... look you haven't done your job, I'm going to insist that you do; ... that's the kind of authority we need.

Mr. Bridges and Mr. Dale both pointed out examples of courts able to maintain power over services administered by executive agencies and Judge McLaughlin suggested that neither system, in and of itself, seemed to work better than the other.

Some speakers, for example Judge Delaney, suggested that some of the commentaries, particularly in the IJA/ABA standards, have mischaracterized current juvenile court practices. Mr. Seigel, however, commented that the application of due process procedures was still a problem in some juvenile courts and Judge Ketcham concluded that there were significant differences between those in urban and rural areas.

There was little explicit discussion of the state vs. local issue, although in addition to Judge Arthur's comments cited earlier, Judge Fort noted the impact which the increasing levels of state financing would have over local control.

With regard to specialization of function, a number of panelists distinguished probation from both corrections and intake predisposition investigation arguing that court controlled probation appeared to be functioning well and was less subject to the conflicts noted in other areas.

What Kind of Animal is Juvenile Court: Should the Juvenile Court be Responsible for Probation, Detention and Post-Trial Detention Services?

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I. DESCRIPTION OF THE TOPIC

"The time and money we spend on juveniles now is wasted to a great degree--Juvenile Courts get them (juveniles) when they've already accumulated years of deprivation due to the neglect and abuse of their parents...it's difficult to reverse.

Hopefully we will someday start with them at birth so they're not subject to that deprivation."

"Parks believes government should begin supervision of children at birth--every child's birth should be reported to a state office and a file opened on the child.

For most children the consequences would be routine--a yearly visit with persons trained to detect abuse or deprivation.

If necessary, officials also would interview the child's doctor, teachers and neighbors to identify signs of abuse and mistreatment."[1]

The author of this view is a lawyer. He has not practiced law, but has devoted the greatest part of his life to another passion: children. He is considered to be a juvenile justice professional. His selfless work with juveniles cannot be denied. But the views and ideas which he espouses have come under increasing scrutiny in the last decade. Where once he would have been a lone voice crying in the wilderness, he now is advocating an extreme position on a continuum of controversy. The controversy surrounds the question of 'what kind of animal is juvenile court.' Is it a social agency with legal powers and authority or is it a court of law which admittedly needs special knowledge, training, and philosophy to decide cases coming before it?

The topic of this paper is the broad policy question of whether juvenile court should directly control and operate the probation, detention and post-trial detention services within the juvenile justice system. The object is to make a comparison and analysis of three sets of standards[2] promulgated by three groups who have intensely studied the juvenile justice system in the United States.

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1. Garms, "His plan: Start at birth to stop juvenile crime", Des Moines Tribune, November 30, 1977, at 1, col. 2. (Article on Carl B. Parks, retired Director of Juvenile Court Services, Polk County, Iowa.
2. Institute of Judicial Administration/American Bar Association, Juvenile Justice Standards, Report of the Advisory Committee to the Administrator on Standards for the Administration of Juvenile Justice; National Advisory Committee on Criminal Justice Standards and Goals, Report of the Task Force on Juvenile Justice and Delinquency Prevention.

The controversy and criticism surrounding the juvenile justice system today has arisen because of the perceived dichotomy between the original goals of juvenile court and the realities of its present day practice and effect.[3] These criticisms have been validated by the United States Supreme Court, which has found significant failures in achieving the original benevolent purposes of juvenile court.[4] As result, juveniles must now be afforded many of the same procedural protections granted adults in the punitive adult criminal justice and corrections system.[5]

In spite of these court decisions mandating new protections for children within the juvenile justice system, the controversy of how far to go in reforming the juvenile court continues.

On the one hand, parens patriae[6] advocates argue that the original purposes of juvenile court, benevolence and rehabilitative, non-punitive treatment of delinquents, incorrigibles and wayward youth, are still valid and should be expanded. Generally, the parens patriae model has been characterized as follows:

> Procedural formalities were deemphasized, a new vocabulary was created, social sciences were used more frequently in diagnosis and treatment, physical surrounding of hearing rooms were altered, and the child's background was investigated more thoroughly in order to decide on the proper disposition. The traditional punitive system was replaced by a clinical approach to delinquent behavior. (citations omitted) [7]

It is the position of the parens patriae advocates that the informality and lack of legal "technicalities" are necessary to correct a child's unacceptable behavior, both criminal and non-criminal.

At the other end of the continuum, have arisen the critics of the present system, the child and due process advocates. They decry the treatment that children receive from the system.[8] They object that children many times receive harsher punishment than their adult counterparts; that the proffered "treatment" never materializes; that the benevolent purposes espoused are

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3. Kent v. U.S., 383 U.S. 541, 86 S.Ct. 1045, 16 L.Ed 2d 84 (1966).
4. In re Gault, 387 U.S.1, 87 S.Ct. 1428, 18 L.Ed 2d 527 (1967); In re Winship 397 U.S.358, 90 S. Ct. 1068, 25 L. Ed 2d 368 (1970); Kent v. U.S., 383 U.S. 541,86 S.Ct.1045, 16 L.Ed 2d 84 (1966); Breed v. Jones, 421 U.S. 519 (1975).
5. Id.
6. Contemporary Studies Project, Funding The Juvenile Justice System in Iowa, 60 Ia. L.Rev.1149, at 1166, N. 101(1975). [hereinafter cited as Contemporary Studies Project].
7. Id. at 1166, 1167 n.n.103-108 (1975).
8. Woodin, Weeping in the Playtime of Others, (1976)

never internalized by the adult individuals who control kids' lives in juvenile court. Problems are perceived with the fragmented organization of the system[9] and the lack of any comprehensive planning and programming of a fiscal nature which results in a lack of meaningful services.[10]

The child advocate sees the imposition of due process models and procedures as necessary to protect children from the system.[11] Other improvements would include alternative methods of financing probation services,[12] closing of certain juvenile institutions,[13] elimination of status offenders,[14] alternative use of funds,[15] and diversion from the juvenile justice system.[16]

So there, in brief, is the controversy. This article will discuss a small, but philosophically important, portion of the larger controversy. Specifically, whether juvenile court should be responsible for probation (intake, predisposition investigation and community supervision), detention and post-trial detention. Also addressed will be the related questions: If the juvenile court is not to be responsible for these functions, what entity should; what administrative structure should be implemented; and are these functions significantly similar to justify combining them or should they be specialized and separate.

While a superficial analysis of the policy question of court-administered services may indicate that this topic is of little significance, in fact, both quantitatively, in the numbers of juveniles potentially impacted by the system, and qualitatively, in the appearance of fairness to juveniles, the question is of looming importance.

It has been estimated that 90 per cent of all juveniles commit an act for which they could be adjudicated delinquent by juvenile court.[17] Nine out of ten young people potentially could have contact with a juvenile court before they reach adulthood. This is not to imply they are formally adjudicated by a court. In fact, statistics indicate that from 50[18] to 82[19] percent of juveniles

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9. Contemporary Studies Project, at 1215 nn 567 - 569, 1216 n. 570 (1975).
10. Id. at Appendix A
11. Id. at 1264 - 67.
12. Id. at 1267 - 73.
13. Id. at 1273 - 87.
14. Id. at 1287 - 90.
15. Id. at 1290 - 97.
16. Id. at 1297 - 1300.
17. Address by Milton Rector, New York State Council of Voluntary Child Care Agencies, May 9, 1975.
18. Gittler, Proposed Standards Relating to the Juvenile Probation Function, at 2.(IJA/ABA,Draft,January, 1976). (hereinafter cited as Gittler).
19. Contemporary Studies Project, supra n 6, at 1242.

are not formally adjudicated. However, this doesn't militate against the significance of court-administered services for even these less intrusive contacts with the court can significantly impact on a youth's normal lifestyle. Police arrest and interrogation, intake officer conferences and investigations and probation officer community supervision bring young people into contact with the courts.

Similarly, statistics show the significance of court-administered detention services. It is estimated that as many as one million juveniles annually are detained in both secure and non-secure facilities.[20] Again, juvenile courts choosing to administer detention services impact significantly on a large number of youth. The high costs of detention,[21] the harshness of conditions of confinement[22] and deleterious after-effects of detention[23] also impact on court-administered services.

Not only the large numbers of youth impacted, but the impression or appearance juveniles are left with after contact with the courts, have raised many concerns regarding court-administered probation, detention and post-trial detention services.

Generally, objections to the present parens patriae model of juvenile court have focused on the constitutionality or propriety of the system organization. Many have decried that the present system denies the child the right to a fair and impartial judge. This is because the judge's employee does the intake and any investigation, and this information is informally communicated freely between judges and probation officers. Another constitutional attack is on the grounds of separation of powers. This argument is that the judge's employee should not be responsible for execution of the court's orders and dispositions, as the execution of laws is generally attributed to the executive branch of government by constitution.

Other objections center on a theory of a conflict of interest when the judge is responsible for administering services and subsequently acts as a decisionmaker regarding his or her administrative decisions. Also, the trend toward unionization of court personnel could lead a judge into conflict with his or her employees at the collective bargaining table, which might require a judicial determination focusing on that same process.

Another concern regarding court-administered services is that judges have neither the time nor skills to administer programs which are within a treatment, rather than legal, setting.

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20. Freed, Terrell & Schultz, Proposed Standards Relating to Interim Status: The Release, Control and Detention of Accused Juvenile Offenders Between Arrest and Disposition, at 1 n.1 (IJA/ABA,Draft,May 1975). (hereinafter cited as Freed, Terrell and Schultz).
21. Id. at 1 n.2.
22. Id. at 1 n.3.
23. Id. at 1 n.4.

Finally, the lack of specialization within court services, notably probation, results in significant role confusion. Here the probation officer is forced to wear the "hats" of parental confessor, investigator, prosecutor and, lastly, sympathetic treatment counselor. This blurring of roles can appear to the child as an unfair and negative experience. It is doubtful that any treatment or rehabilitation will have any lasting positive effect when the child views the whole process as "stacked against" him or her.

It is within the foregoing context that the standards under analysis were proposed to improve the juvenile justice system.

II COMPARATIVE ANALYSIS OF THE IBA/ABA, TASK FORCE AND NAC STANDARDS RELATING TO PROBATION, DETENTION, AND POST-TRIAL DETENTION ISSUES

A. Basis on Which Standard Derived

1. Probation Function

The IJA/ABA standard addressing the issue of probation function clearly states a preference for executive vis-a-vis judicial branch administration.[24]

> 4.2 Executive agency administration vs. judicial administration. Intake and predisposition investigative services should be administered by an executive agency rather than by the judiciary.

The IJA/ABA Standards mandate statewide organization and administration of the functions of intake and predisposition investigative services.[25]

> 4.3 State vs. local organization and administration. Intake and predisposition investigative services should be organized and administered either at the state level on a statewide basis or partly at the state level and partly at the local level.

Finally, the IJA/ABA Standards call for specialization of the three functions normally associated with probation.[26]

> 4.1 Specialization of the intake, investigative, and probation supervision functions.
> a. Whenever possible, intake screening, predisposition investigations, and supervision of juveniles should be treated as specialized functions.

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24. Gittler, supra, note 18, at 126.
25. Gittler, supra, note 18, at 131.
26. Gittler, supra, note 18, at 123.

b. Juvenile probation agencies or other agencies responsible for performing these three functions should not ordinarily simultaneously assign probation supervision duties as well as intake screening and predisposition investigative duties to the same individual. Such agencies should either establish separate units for each of these three functions or establish one unit with the responsibility for intake screening and predisposition investigation and another unit with the responsibility for supervision of juvenile probationers.

As noted in the above, the IJA/ABA standards subdivide the major question into the issues of executive vs. judicial administration, the organization at state vs. local level and the specialization of the three functions with probation services.

Judicial vs. Executive Administration

Presently, the bulk of juvenile probation services are judicially administered.[27] Nevertheless, the standard sets out several concerns, both in law and philosophy, that militate against judicially-controlled probation services.

A major concern is whether the common scheme of the juvenile court judge acting as the employer and supervisor of probation and intake officer is constitutional. The intake stage has been labelled as "most critical" by one court,[28] because of the accusatory nature of the process. In practice, an intake or probation officer, who is an employee of the judge, conducts an investigation of the alleged behavior. This could include conferences with the victim(s), the police and the alleged delinquent. Incriminating evidence may be given to the judge's employee. The issue then becomes can a judge impartially and in an unbiased fashion make a determination of the guilt or innocence of the alleged delinquent as is required by the Due Process Clause of the Fourteenth Amendment.[29]

While the issue has yet to be resolved because of contradictory decisions specifically addressing the issue, other authority persuasively argues that the scheme is unconstitutional.

The case specifically finding a statutory juvenile court organizational scheme unconstitutional is In re Reis, 7 Crim. L. Rptr. 2151(R.I. Fam. Ct. April 14, 1970). Under Rhode Island law, probation officers charged with investigative and screening responsibilities were employed by a branch of the family court. By law, the court was mandated to receive delinquency complaints and petitions and to conduct a thorough investigation which was used by the same court to determine jurisdiction and to hold adversary proceedings for delinquency dispositions. In finding the scheme unconstitutional, the court stated, at 2152:

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27. Kobetz and Bosarge, Juvenile Justice Administration, at 327-28 (1973); Gittler, supra, note 12, at 127.
28. In re Reis, 7 Crim.L.Reptr. 2151 (R.I.Fam Ct. April 14, 1970). (Hereinafter cited as Reis).
29. In re Gault, 387 U.S. 1 (1967).

There has been a disposition of treating the pre-judicial phases with great flexibility, when, in fact, it is the most critical stage. The proceedings for one who commits a crime is arrest, detention and interrogation. These proceedings certainly should not be carried out by a court or any one branch of the court or any branch associated with the court...

It is therefore, this court's opinion that the trier of facts should not be acquainted with any of the facts of the case or have any knowledge of the circumstances, either through officials in his department or records in his possession. His duty is to adjudicate on the evidence introduced at the hearing.

The Arizona Supreme Court reached a contrary result in In Re Appeal in Pima County Anonymous Juvenile Action No. J-24818-2, 110 Ariz. 98, 515 P.2d 600, cert. den., app. dism., 417 U.S. 939 (1974). The Arizona Statutory scheme was attacked because of the involvement of juvenile court in the accusatory process and it was alleged that this involvement violated the Equal Protection and Due Process clauses of the United States Constitution. The Court's decision appeared to be based on the statutory language which gave the juvenile judge only supervisory, not personal, involvement in the accusatory process. It is not evident from the opinion whether any evidence of actual practice was admitted. The Court addressed each of the four categories of schemes that have been found to violate due process. The Court held that Arizona's statutory scheme prevented abuses due to the judge becoming so personally involved as to be unfit,[30] a merger of the prosecutorial and judicial functions,[31] the judge having participated in a preliminary fact finding, [32] and situations where the judge had an interest in finding against the accused.[33]

Other schemes of judicial or quasi-judicial organization, outside of juvenile court, have been found to be violative of due process. In In re Murchison, 349 U.S. 133, 75 S.Ct. 623, 99 L. Ed 942 (1955), the United States Supreme Court found Michigan's "one-man grand jury" scheme violative of due process, because of the judge's participation in preliminary fact-finding. Within the context of administrative law, the rationale of a judicial or quasi-judicial officer participating in preliminary fact-finding was used to invalid, on due process grounds, a Federal Trade Commission proceeding in American Cyanamid v. F.T.C., 363 F.2d 757 (6th Cir.1966).

Other violations of the concept of a fair and impartial tribunal by a fair and impartial judge have been found when the roles of judge and prosecutor have become intertwined.[34] In Figueroa Ruiz v. Delgado, the Court

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30. In re Appeal in Pima County Anonymous Juvenile Action No. J-24818-2, 110 Ariz.98, 515 P.2d 600 at 603,cert.den.,app.dism., 417 U.S. 939 (1974). [hereinafter cited as Pima].
31. Id. at 603.
32. Id. at 603-604.
33. Id. at 604.
34. Figueroa Ruiz v. Delgado, 359 F. 2d 718 (1st Cir. 1966); Wong Yang Sung v. McGrath, 339 U.S. 33 (1950).

of Appeals for the First Circuit found that Puerto Rico's scheme of judge-prosecutor violated due process. The scheme provided no prosecutorial services by the government in District Court, and the judge was called on to introduce the government's evidence, and perform cross examination on the government's behalf. The Court in holding the procedure a denial to a fair and impartial trial, found that not even the appearance of justice was served.

Other schemes that have been found violative of due process include those where the judge becomes so personally involved as to be unfit to render an impartial decision[35] and those where the judge has an interest in finding against the accused.[36]

Another concern regarding the present model of juvenile courts is presented by the doctrine of separation of powers.

> It has been said that the object of the Federal Constitution was to establish three great departments of government: the legislative, the executive, and the judicial departments. The first was to pass the laws, the second, to approve and execute them, and the third, to expound and enforce them. (citations omitted)[37]

It can be argued that the three functions of probation, detention and post-trial detention are functions properly done by the executive branch, indeed, in the adult correctional system, the analogous functions to probation, detention and post-trial detention are usually performed by an agency other than the court.

Notwithstanding the ambiguity of the constitutionality of judicial administration of services, the propriety or wisdom of doing so has been seriously questioned.[38] Many concerns revolve around the ability of a judge to remain as an impartial trier of fact when he or she may have the administrative responsibility for the services ordered by the court. This concern becomes significant when viewed in light of the recent 'right to treatment'[39] and 'conditions of confinement'[40] litigation. A judge is surely placed in a conflict of interest when he or she administers probation, detention or post-trial detention and then is called upon to decide the validity or legality of his or her own administrative decisions.

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35. Mayberry v. Pennsylvania, 400 U.S. 455, 91 S.Ct. 499, 27 L.Ed 2d 532 (1971); Pickering v. Board of Education, 391 U.S. 563, 88 S.Ct.1731: 20 L.Ed. 2d 811 (1968).
36. Tumey v. Ohio, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927).
37. 16 Am. Jr. 2d, Constitutional Law, S 210 (1964)
38. Gittler, supra, note 18, at 129; National Advisory Committee on Criminal Justice Standards and Goals, Report of the Task Force on Juvenile Justice and Delinquency Prevention., (Dec.1976).
39. Morales v. Turman, 364 F.Supp. 166 (E.D. Tex 1973)
40. Marturella v. Kelley, 349 F. Supp. 575 (S.D.N.Y.1972)

A similar concern is raised regarding employer-employee relations when the judge is the employer of personnel responsible for probation, detention and post-trial detention. In a recent federal court decision,[41] a state juvenile court judge was found personally liable for damages stemming from the illegal discharge of a probation officer, whom the judge controlled by virtue of statute. In the §1983 civil rights claim suit, the court held that judicial immunity was not a defense because the action was ministerial as opposed to judicial and the judge failed to show his action was in good faith which could have entitled him to defense of qualified judicial immunity.

A related concern is the position of a judge as employer with the increase in labor union organizing of state, county and local government workers. Again, the judge may be placed in an untenable position by being a party to collective bargaining agreements and subsequently having to make judicial determinations concerning those agreements.

Another concern relates to the ability of both the probation officer and judge to be objective when they are in an employer-employee relationship. When a close working relationship develops and, especially when the judge does not handle juvenile law cases full time,[42] the judge may abrogate his authority and become a "rubber-stamp" for the probation officer. Similarly, a probation officer may be less inclined to advocate a certain position if he or she knows a judge holds a different view of how to handle the problem.

A final argument against the judicial administration of intake predisposition investigation and community supervision, is that judges lack the time and, in cases, the skills to administer these services. First, as the argument goes, a judge should spend his or her time carrying out the mandated decision-making responsibilities. If the juvenile court continues to move toward the due process model embodied in Gault and its progeny, less and less time will be available for judges to deal with non-judicial functions. Secondly, there is nothing inherent in a legal education to qualify one as an administrator or manager. Those professions require special skills and only recently has the legal profession recognized this by the increased use of court administrators and law office managers with degrees in management and administration.

For the above reasons, the IJA/ABA Standards call for executive branch administration of the probation function and related intake, predisposition investigative and community supervision services.

Statewide vs. Local Administration

As pointed out earlier, Standard 4.3[43] recommends that the administration of intake and predisposition investigative services should be at the state level on a statewide basis or partly at the state level and partly at the local

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41. Atcherson v. Siebenmann, Civil No. 76-33-D (S.D.1A., Sept. 7,1978), Appeal filed (8th Cir.Oct.7, 1978).
42. Contemporary Studies Project, supra, note 18, at 1265.
43. Gittler, supra, note 18, at 131.

level. The Standard reflects the fact that no rigid model can be applied to all jurisdictions with favorable results. Instead, the Standard identifies the advantages of each alternative and calls upon the states to develop a specific plan taking into account their own circumstances.

The commentary to Standard 4.3 includes several advantages of local administration. First, and probably most important, is that local employees tend to have better ties with the community than would state employees.[44] Further, because local agencies are generally smaller, local administration generally suffers less from 'bureaucratic breakdown' than would a huge statewide administration.[45] Finally, community support is usually increased when the probation officers and other personnel live in the community and this would alleviate the feeling of outsiders dictating what is best for the community.[46]

The Standards make clear, however, the performance of some tasks at the state level has many advantages. Chief among those is the need for uniformity in service provision.[47] Furthermore, state involvement can result in planning and coordination of service provision,[48] which have been found lacking presently.[49] Finally, a state agency would be better able to draw on state treasuries and more equitably determine appropriate fiscal allocations which localities are hard-pressed to do.[50]

While Standard 4.3 definitely prefers some state involvement in the provision of probation services, also clearly addressed is the problem that large, overcentralized systems can impede effective delivery of services.[51]

Specialization of Probation Functions

IJA/ABA Standard 4.1[52] recommends that intake, predisposition investigation and community supervision should be separate and distinct from one another and that one individual should not be assigned all three tasks. If the population and geography prohibits effective separation of all three functions, the Standard calls for two units; one for community supervision and another handling intake and predisposition investigation.

The principal evil of the present scheme, which largely combines these functions, is role confusion. That is, the probation officer is required to wear several "hats" which can interfere with the performance of one or several of the functions. First, the officer is a confessor, parental-figure at intake. Then, he or she changes hats to that of an investigator attempting to prove commission of the alleged delinquency. A third "hat" in the sequence is that

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44. Id. at 132
45. Id.
46. Id.
47. Id. at 133
48. Id.
49. Contemporary Studies Project, supra, note 6, at 1304.
50. Gittler, supra, note 18, at 133.
51. Id. at 134.
52. Id.

of testifying against the child and maybe even presenting the state's evidence whereby the probation officer becomes a prosecutor of sorts. Finally, if the child is adjudicated and placed on probation, the officer again changes "hats" to become a sympathetic treatment figure. This confusion has effects both for the officer and the child. The officer, many times overworked, cannot give adequate time to all functions and frequently the community supervision function suffers because of it.[53] The child, on the other hand, doesn't know what role the officer will take next; whether it will be a helping role or that of accuser. As a result, it will be extremely difficult for the child to develop any trust in the relationship. Without trust, it's hard to imagine any real treatment effect by community supervision. In reality, most kids view the probation officer, not as he or she is conceived by the juvenile justice system, but as "another" cop ready to "get" them.[54]

In summary, the IJA/ABA Standards recommend executive administration on a statewide or partly state and partly local basis with specialization of the three tasks of intake, predisposition investigation and community supervision within the probation function.

The Task Force on Juvenile Justice and Delinquency Prevention Standards also address the issue of court administered probation services.

Task Force Standard 19.2[55] sets out the basic organizational structure of the probation function.

> 19.2 Creation of a state agency for Juvenile Intake and Corrections. There should be a strong preference for a single statewide agency with responsibility for the administration of all juvenile intake and corrections. This state agency should be located within the executive branch of government, and its chief administrator should report directly to the governor or a cabinet-level official. The state agency should be a separate administrative entity but may be under an umbrella organization in which a number of people-serving agencies are brought together for coordination purposes.

Task Force Standard 21.1[56] deals specifically with the intake function.

> 21.1 State Agency Responsibility for Intake Services. Intake services should be the responsibility of the State agency. These services should be designed to serve three functions:

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53. Id. at 125.
54. Johnson, The Role of Counsel in the Juvenile Court, (1974), (published under LEAA Grant No. 73-MI-07-004)
55. National Advisory Committee on Criminal Justice Standards and Goals, Report of the Task Force on Juvenile Justice and Delinquency Prevention, Standard 19.2, at 613 (Dec.1976). (hereinafter cited as Task Force.)
56. Task Force, supra, note 55, Standard 21.1, at 653.

1. To act for the family court in screening applications for petitions;

2. To act for family court in developing the necessary information to make a dispositional order; and,

3. To act as the intake apparatus for the State agency in the cases of children or families for which the State agency has responsibilities for carrying out dispositional orders.

Task Force Standard 21.3[57] recommends that the task of predisposition investigation and dispositional report should be placed in a state agency responsible for intake services.

21.3 Dispositional Report
The dispositional report should be prepared by the State agency's intake personnel. This report should comply with the guidelines set forth for such reports in Standard 14.5. The recommendations contained in the report should be consistent with the criteria and limitations on dispositional decisions described in the standards in Chapter 14.

Task Force Standards 23.1[58] and 23.2[59] indicate the organization for the community supervision function.

23.1 Organization
The State agency should have responsibility for developing a statewide network of community supervision that will provide implementation of the family court's dispositional order, supervision, counseling, and other services for juvenile delinquents. These services should be made available on a decentralized basis by workers located as close to the community and the family court as feasible.

23.2 Nature of Services
The primary responsibility of the community supervision division of the State agency should be the implementation of the conditional dispositions of the family court. Such dispositions should not interfere with the juvenile's schooling, regular employment, or other activities necessary for normal growth and development.

Finally, Task Force Standard 18.2[60] addressed the issue of the court's relationship with probation services and the need for input into the executive branch standard setting in the areas of intake, predisposition investigations and community supervision.

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57. Task Force, supra, note 55, Standard 21.3, at 658
58. Task Force, supra, note 55, Standard 23.1, at 675.
59. Task Force, supra, note 55, Standard 23.2, at 677.
60. Task Force, supra, note 55, Standard 18.2, at 595.

Generally, the Task Force Standards set out above, are similar to the IJA/ABA Standards relating to the probation function, although an extended commentary or rationale is usually absent.

Judicial vs. Executive Administration

Task Force Standard 19.2 clearly indicates that the probation functions of intake, predisposition investigation and community supervision should be the responsibility of the executive branch. The commentary indicates that one of the rationales for placement in an executive agency is to remove the objections relating to unconstitutionality and the biased decision-maker discussed in the IJA/ABA commentary.[61] The commentary also expresses the view that removal of intake from court administration will allow the court to concentrate on fact finding and making dispositions.[62]

Statewide vs. Local Administration

Task Force Standard 19.2 states a preference for administration of the probation function in a single statewide agency. Standard 19.3 indicates that direct services should be decentralized to the smallest geographic entities consistent with cost and community-based corrections. On this issue, the Task Force Standards mirror those of the IJA/ABA.

Again, the rationale for the standard is uniformity in standard-setting and operation.[63] Additional benefits include avoidance of duplication, equitable distribution of resources and fiscal accountability.[64]

Specialization of Probation Function

Task Force Standards 21.2 and 21.3 clearly indicate a position of combining the functions of intake and predisposition investigation, noting that they require similar skills and can avoid a duplication of effort. This is in contrast to the IJA/ABA Standard[65] calling for separation of all three functions within probation services, and a combination of intake and investigative services as a less acceptable alternative.

While the IJA/ABA Standard recommends, at a minimum, that community supervision be assigned to different individuals than intake and investigative services, Task Force Standard 23.2 would seem to allow and anticipate the three functions coalescing in one individual. The commentary to Standard 23.2[66] states:

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61. Task Force, supra, note 55, Standard 21.1, at 653
62. Id.
63. Task Force, supra, note 55, Standard 19.2, at 614.
64. Task Force, supra, note 55, Standard 19.3, at 616.
65. Gittler, supra, note 18, Standard 4.1, at 123.
66. Task Force, supra, note 55, at 677.

> The community supervision division of the agency should have responsibility for providing intake services, preparing diagnostic and predispositional reports, and implementing the family court's dispositional orders.

In summary, the Task Force Standards agree with the IJA/ABA Standards with regard to executive and state level administration of probation services. However, the Task Force Standards do not appear to go as far as the IJA/ABA Standards relating to specialization of intake, predisposition investigation and community supervision.

The National Advisory Committee on Juvenile Justice and Delinquency Prevention is the third group which has promulgated standards being compared in this endeavor. The NAC Standards are generally less comprehensive than either the IJA/ABA or Task Force Standards.

In the area of probation function there are four standards which apply:

NAC Standard 3.141[67] provides in pertinent part:

> 3.141 Organization of Intake Units
> An intake unit should be established as a separate department or agency to review complaints submitted pursuant to the jurisdiction of the family court over delinquency, non-criminal misbehavior, and neglect and abuse and to make the initial determination regarding the release or retention in custody of juveniles who are named in such complaints...

NAC Standard 3.186 addresses the issue of predisposition investigations.

> 3.186 Predisposition Investigations
> Predisposition investigative services should be available to and utilized by family courts. Predisposition investigations should be conducted by the agency responsible for the provision of supervisory services to juveniles and should be governed by written guidelines and rules issued by that agency. Whenever possible, separate units should be established to conduct such investigations.

Although the Standard doesn't specifically say so, the commentary[68] to NAC Standard 4.11 indicates that community supervision should be the responsibility of a single state agency.

> 4.11 Role of the State
> The State should be responsible for providing directly or subsidizing the provision of residential programs for juveniles subject to the jurisdiction of the family court over delinquency,

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67. National Advisory Committee for Juvenile Justice and Delinquency Prevention Report of the Advisory Committee to the Administrator on Standards for the Administration of Juvenile Justice, (Sept.,1976,Mar.1977). (hereinafter cited as NAC).
68. NAC, supra, note 67, at 106.

> non-criminal misbehavior, and neglect and abuse, and non-residential programs for juveniles and/or families subject to that jurisdiction.

Finally, NAC Standard 4.32 clearly prefers the community supervision function[69] should be placed in the state agency set out in Standard 4.11.

> 4.32 Community Supervision
> A system of community supervision services should be provided by the state agency described in Standard 4.11, to supervise persons adjudicated pursuant to jurisdiction of the family court over delinquency, non-criminal misbehavior and neglect and abuse. Community supervision personnel should be state employees. The services should be decentralized with sufficient personnel assigned to each family court to assure that the number of active cases for which each community supervision officer is responsible averages no more than 25. However, there should be sufficient flexibility in case assignments to permit caseloads as low as 12 when the cases require intensive supervision, and as high as 40, when only minimal supervision is required.
>
> In sparsely populated areas, regional community services offices should be established to serve several family courts.

The NAC Standards generally are less detailed and comprehensive than those of the IJA/ABA or the Task Force and differ from both of the latter in some respects.

Judicial v. Executive Administration

The NAC Standards specifically do not address the issue of judicial vs. executive administration of the probation function.[70] Apparently, the standard drafters felt the question of judicial vs. executive administration of probation services is best left to the determination of each of the several states based on the political, geographic and economic climate in each. The basis policy question of the court administering services is crucial to the juvenile justice reform effort. By failing to address the issue the NAC group may have undermined the whole philosophy and protections incorporated in the other NAC standards.

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69. It is interesting to note from the Commentary to NAC Standard 3.141, that the community supervision definition excludes pre-adjudication, i.e., informal or non-judicial, probation. If such services are necessary, the child is referred to the appropriate agency and the complaint is to be dismissed. Informal probation is disallowed because of its constraints on liberty without due process safeguards. This is similar to the IJA/ABA position, Gittler, supra, note 18, Standard 2.4D, at 52; Task Force, supra, note 50, Standard 21.2, at 656.
70. NAC, supra, note 67, Standard 3.186, at 161.

Statewide vs. Local Administration

The NAC Standards recommend a single state agency for administration of probation services.[71] Further, the Standards[72] emphasize the need for decentralization to local areas for direct service provision, at least for community supervision. In this respect, the NAC Standards agree with those of the IJA/ABA and Task Force.

Specialization of Probation Function

The NAC Standard recommends the establishment of separate units for intake,[73] predisposition investigation[74] and community supervision,[75] whenever possible. Again, the Standard appears to assume a more flexible position than the IJA/ABA Standard on a local autonomy rationale.

With regard to the issue of probation function the NAC Standards do not assume a position of either judicial or executive administration, in contrast to both the IJA/ABA and Task Force Standards. All standards agree on administration at the state level. Finally, the NAC Standards call for specialization of the functions of intake, predisposition investigation, and community supervision and are similar to IJA/ABA Standards in this respect. However, the NAC Standards do not answer the question of which services, intake, predisposition investigation or community supervision, should be combined if that is necessary.

II. DETENTION

In the juvenile justice system there exists a severe problem in the tremendous over-use of detention at the pretrial stage. One study found that in 1965, of a total 409,218 juveniles detained prior to trial, only 242,275 were detained or placed on probation as a disposition.[76] This anomalous situation has been analyzed:

> In contrast to the pretrial stage, much greater care and sensitivity is usually devoted to the postadjudicative disposition, its facilities, and its alternatives to incarceration. The result, paradoxically, is considerably less detention under better conditions once the juvenile justice system ceased to presume that the juvenile is innocent. (Citation omitted)[77]

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71. NAC, supra, note 67, Standard 4.11.
72. Id., Standard 4.31.
73. Id., Standard 3.141
74. Id., Standard 3.186.
75. Id., Standard 4.31.
76. National Council on Crime and Delinquency, Juvenile Detention in Corrections in the United States, 13 Crime & Delinquency 1, 11, 15, 36 (1967); see also Ferster, Snethen, and Courtless, Juvenile Detention; Protection, Prevention, or Punishment? 38 Fordham L.Rev. 161 (1969).
77. Freed, Terrell & Schultz, supra, note 20, at 2.

This situation has resulted, at least in part, because of the widespread local administration[78] of the detention process. Although exact statistics of the number of judicially administered detention facilities is unknown, it is not unheard of for a juvenile court to control detention.[79] The Standards under analysis seek to correct this tragedy by state agency administration and strong standard setting on criteria for detention.

The IJA/ABA Standard relating to the administration of the detention function is found in the Interim Status[80] volume.

> 11.1 Centralized interim status administration in a statewide agency.
>
> A. To facilitate the creation of an adequate interim decision making process, with the resources necessary to implement it and an information system to monitor it, the responsibility for all aspects of nonjudicial interim status decision involving accused juvenile offenders should be centralized in a single statewide agency. This centralization should include both personnel and facility administration. The agency should be part of the executive branch of the state government, though contracting with private non-profit organizations should be permitted initially. All detention facility personnel, and all public employees involved in release, control and supervision programs for accused juveniles could be employed by or otherwise responsible for the coordination and review of all release and control of, and detention programs for, accused juveniles.
>
> B. Each juvenile court and local police department should have available to it representatives of the agency and facilities developed by the agency.
>
> C. The juvenile facility intake officials described in Part VI of these standards should be the local representatives of the statewide agency. They should be empowered to make or recommend the pretrial release, control, and detention decisions authorized by these standards, and to relax the restrictions imposed on a juvenile in accordance with Standard 7.11.

This standard clearly prefers that the detention function be administered by the executive branch vis-a-vis judicial control. It does so while admitting that no empirical studies have been completed which address the efficacy of executive vs. judicial responsibility.[81] The rationale appears to be the inappropriateness of judicial control and the attendant conflict of a judge being called upon to review his or her own administrative decisions.

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78. Freed, Terrell & Schultz, supra, note 20, at 102.
79. Note, Administration of Pre-Trial Release and Detention; A Proposal for Unification, 83 Yale L.J. 157, 177-180 (1973). (hereinafter cited as Unification).
80. Freed, Terrell & Schultz, supra, note 20, at 2.
81. Id.

The foregoing Standard also recommends that the responsibility for detention services be placed at the state level. This is geared toward uniform standard setting, greater accountability and greater financial resources.

The Task Force Standard[82] relating to the detention function takes a position similar to that of the IJA/ABA.

> 22.1 Development of a Statewide System of Detention and Shelter Care.
> The State juvenile intake and corrections agency should be responsible for the development of a statewide system of detention care facilities and approved shelter care facilities for juveniles referred to or under the jurisdiction of the family court of who are in the legal custody of the State agency or under community supervision.
>
> The State agency should be authorized to purchase detention and shelter care services from other public agencies or from private organizations, provided that the agency's standards are met in the provision of such services.
>
> Where it determines that adequate shelter care cannot be provided, the State agency should construct shelter care facilities and operate these facilities in accordance with its promulgated standards.

The Standard clearly contemplates executive administration of detention and shelter care services. The rationale for this position is not indicated, but presumably follows the logic that a judge-administered system involves an inherent conflict of interest.

Further, the Standard recommends a statewide system administered by a state juvenile agency. The advantages of placement in a single state agency includes economies of scales, uniform standards resulting in more uniform application, greater potential for program specialization and a greater likelihood of adequate training, personnel and salaries.

In sum, the Task Force Standards track with those of the IJA/ABA in calling for executive branch administration and centralization to a state agency, eschewing the present local control.

The NAC Standards relating to detention are somewhat ambiguous as to their thrust and direction.

> 4.11 Roles of the State
> The State should be responsible for providing directly or subsidizing the provisions of residential programs for juveniles subject to the jurisdiction of the family court over delinquency, non-criminal misbehavior, and neglect and abuse, and non-residential programs for juveniles and/or their families subject to that jurisdiction.

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82. Task Force, supra, note 55, Standard 22.1, at 663.

> Ordinarily, such programs should be administered by a single state agency....

NAC Standard 3.151 specifically addresses the issue of detention and release.

> 3.151 Purpose and Criteria for Detention and Conditioned Release-Delinquency.
> Written rules and guidelines should be developed by the agency responsible for intake services to govern detention decisions in matters subject to the jurisdiction of the family court over delinquency....

While the former Standard appears to place the operational management in a single, state agency, the latter appears to allow the agency only a standard setting function and not operational responsibility for detention services. However, Standard 3.141 does allow direct detention services by the state intake unit.

The NAC Standards do not address the issue of judicial vs. executive administration. The commentary does recognize that significant detention problems exist by virtue of local control,[83] and seek to correct these difficulties with standard setting and centralized state administration.

To recapitulate, both the IJA/ABA and Task Force Standards call for removal of the detention function from the judiciary and placement within a centralized state agency to implement a statewide system of detention services. The NAC Standards, on the other hand, don't address the judicial vs. executive administration, but agree that detention should be administered at the state as opposed to the local level.

III. POST-TRIAL DETENTION

The post-trial detention within the juvenile justice system is closely analogous to the adult corrections system. In practice the courts have not generally administered these residential programs and the trend has been for more centralized state control.[84] Statistics vary, but show that in 30[85] to 50[86] states, the state has responsibility for post trial detention. For that reason, these Standards will probably have a less significant impact, because to a large extent they have already been implemented.

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83. NAC, supra, note 67, at 80.
84. Cohen and Rutherford, Standards Relating to Corrections Administration, Standard 2.1, at 50 (IJA/ABA, Draft, May, 1976).
85. R. Sarri, R. Venter, and R. Kish, Juvenile Injustice: Failure of a Nation 31 (1974)
86. National Advisory Commission on Criminal Justice Standards and Goals, Corrections, at 610-14. (U.S. Government Printing Office, Washington, D.C., 1973). (hereinafter cited as Corrections).

The IJA/ABA Standard relating to court-administred post-trial detention is clear.[87]

"2.1 Statewide Department.
a. Single statewide department. There should be a preference for a single statewide department with responsiblility for the administration of juvenile corrections rather than a proliferation of agencies at both the state and local level. The statewide department may be termed "the Department of Youth Services." In these standards it is referred to as "the department."

b. Location in executive branch of government. The department should be located with the executive branch of the state government.

c. Exceptions to statewide jurisdiction. When for political or geographic considerations, some programs are within the jurisdiction of local government and it is determined that they should remain subject to local control, the statewide department should be responsible for the setting and enforcement of standards and the provision of technical assistance, training, and fiscal subsidies."

Another Standard[88] clarifies that the administration of the system may include direct services or purchase-of-service.

"2.5 The department and the private sector.
a. Alternative means of program provision. The department may provide directly or may purchase from the private sector programs required to carry out the court's dispositions. There should be a purchase of programs and services from the private sector when purchase avoids duplication and provides a wider range and greater flexibility and more adequately meets the needs of the individual juvenile than can be attained through direct provision by the department.

b. Quality control for public and private programs. Standards developed by the department for programs it administers should apply to programs purchased from the private sector. The department's monitoring activities should apply to both public and private programs."

These Standards call for executive branch administration of a single statewide agency to be responsible for all juvenile corrections programs. Although statewide administration is preferred, exceptions are allowed for jurisdictions where such an organization is not politically or geographically possible. The Standards also indicate that administration includes direct provision of post-trial detention by the agency. It is argued that the centralization would result in improved standard setting, greater accountability and managerial controls, increased diversification and specialization, better financial support and a more equitable distribution of resources.[89]

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87. Cohen and Rutherford, supra, note 84, at 49.
88. Id., at 58.
89. Id., at 49.

Task Force Standards[90] are similar to those of IJA/ABA.

"14.9 Provision of Dispositional Services
In both conditional and custodial dispositions, the administration of correctional programs and assignment and reassignment of juveniles to activities, programs, and services within the category and duration ordered by the court should be the responsibility of the State's correctional agency."...

Task Force Standard 24.1[91] specifically deals with residential facilities.

"24.1 Development of a Statewide System
The State agency should establish a statewide network of co-educational residential facilities for the care and training of adjudicated delinquents committed to its custody. These facilities should be of a wide variety ranging from secure facilities to camps, ranches, and residential schools. They may be operated by the State agency under a division of residential services or by local public or private organizations."

Task Force Standard 19.2[92] calls for a statewide agency within the executive branch to administer all juvenile corrections programs. These Standards assume that organization. Again, the rationale is administrative claiming that this organization will result in a more equitable distribution of correctional resources, more uniform application statewide, greater diversification and program experimentation and greater accountability.[93]

The Task Force Standards track very closely to those of the IJA/ABA with the added requirement that the residential facilities be coeducational to provide a normalized environment for kids who must be removed from their home.

The NAC Standard only generally indicated the administrative structure for post-trial detention.

"4.11 Role of the State
The State should be responsible for providing directly or subsidizing the provision of residential programs for juveniles subject to the jurisdiction of the family court over delinquency, non-criminal misbehavior, and neglect and abuse, and non-residential programs for juveniles and/or their families subject to that jurisdiction. Ordinarily, such programs should be administered by a single state agency."...

While the Standard fails to address the judicial vs. executive administration issue, it does recommend a single state agency be responsible for juvenile corrections. No reasons for this structure appear in the Standard, but presumably they are similar to the administrative rationales put forth by both the IJA/ABA and Task Force Standards.

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90. Task Force, supra, note 55, Standard 14.9, at 451.
91. Task Force, supra, note 55, Standard 24.1, at 699.
92. Task Force, supra, note 55, Standard 19.2, at 613.
93. Task Force, supra, note 55, Standard 24.1, at 699.

In conclusion, the foregoing standards address the issue of post-trial detention by the juvenile court. Two of the Standards groups, IJA/ABA and the Task Force, mandate that post-trial detention should be administered by the executive branch and not by the court. All three groups find a need for statewide administration in a single state agency.

B. Present Statutes

1) State

a) Probation Function

Traditional to the juvenile justice system has been the provision of probation services (intake, predisposition investigation and report, community supervision) at the local level with judicial administration.[94]

In twenty-nine jurisdictions, probation services are judicially administered,[95] presumably with a direct employer-employee relationship between the judge and probation personnel. In four more jurisdictions, the court may appoint its own probation officers or obtain probation services from the executive-administered agency.[97] In four other jurisdictions, the executive agency supplies the probation officers who perform their responsibilities under court supervision and control.[98] Finally, in five jurisdictions, there is a mix of judicially administered services to some courts and executive administered services to others.[99]

Specifically in regard to predisposition reports, the majority of states do not even mandate that they be done.. Thirty states provide that the reports are discretionary.[100] Only eighteen states require a predisposition report in each and every case.[101] Finally, two jurisdictions provide both mandatory reports in certain cases and discretionary reports in others.[102]

Finally, community supervision is largely a local level phenomenon. Twenty-four states provide that this supervisory function is adminstered at the local level.[103] Twenty states mix the administration at both the state and local level.[104] Only eight states provide for exclusive state level administration of community supervision.[105]

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94. Gittler, supra, note 18 Standard 4.2, at 127; Working Papers of the National Task Force to Develop Standards and Goals for Juvenile Justice, a Comparative Analysis of Standards and State Practices, Juvenile Dispositions and Corrections, App. A. at 82 (Task Force, Draft, January, 1977); NAC, supra, note 57. Standard 3.141, at 60.
95. Gittler, supra, note 18, Standard 4.2, at 127, n. 96.
96. Id. at 127, n. 97.
97. Id., at 127, n. 98.
98. Id., at 127, n. 99.
99. Id., at 128, n. 100.
100. Gittler, supra, note 18, Standard 3.1, at III, n. 81.
101. Id., at III, n. 80.
102. Id., at III. n. 82.
103. Corrections, supra, note 91.
104. Id.
105. Id.

b) Detention

Detention service administration follows a pattern similar to probation services in that they are administered predominantly at the local level.[106] Forty states administer detention at the local level.[107] State level administration is used as the organizational approach in eight jurisdictions.[108] Two states provide for administration at a mixture of state and local levels.[109]

Generally, there is a lack of information regarding whether the detention function is judicially or executively managed. Judicial administration of detention services does exist, however.[110]

c) Post-Trial Detention

Historically, post-trial detention has been provided by the state on a statewide basis, and presumably this has been an executive rather than judicial responsibility. Statistics indicate that all fifty states place responsibility for administration of post-trial detention at the state level.[111]

In summary, state statutes show the following pattern: Probation is generally administered at the local level within the judicial branch; detention is predominantly a local level function (statistics could not be found to indicate judicial or executive branch control); and, post-trial detention is largely a state administered function (again, statistics could not be found to indicate judicial or executive branch control).

2. Federal

The number of juveniles directly impacted by the federal criminal justice system is small. In 1975, only 304 juveniles were disposed to community supervision. As of February 2, 1976, only 263 juveniles were under the jurisdiction of the Federal Bureau of Prisons.[112]

Not only because of the minimal effect of the direct federal involvement with juveniles, but because of the schematic variance of federal procedure from state juvenile systems, this area will not be explored further.

III. ASSESSMENT OF EACH POSITION

Of the three sets of standards under analysis, the IJA/ABA and Task Force standards track fairly closely with each other with minor variations.

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106. Freed, Terrell and Schultz, supra, note 20, Standard II.1, at 103.
107. Corrections, supra, note 91
108. Id.
109. Id.
110. Unification, supra, note 79, at 178, n. 106.
111. Corrections, supra, note 91.
112. Cohen and Rutherford, supra, note 69, at 58.

The NAC Standards fail to address the major issue of judicial vis-a-vis executive branch administration of services and, generally, are less detailed and comprehensive than the other two.

IJA/ABA and Task Force Standards require the administration of probation, detention and post-trial detention by the executive branch of government. Unfortunately, the NAC Standards specifically do not answer this question, which could undermine other due process protections included in those Standards.

All three sets of standards call for administration of the three functions by a single state agency on a statewide basis. The NAC position appears more flexible than either of the other two, almost to the point of being discretionary.

All three sets of standards advocate specialization of functions of some degree. The IJA/ABA forcefully requires not only specialization of probation, detention and post-trial detention, but also the tasks of intake, predisposition investigation and community supervision within the probation function. The Task Force Standards argues that intake and predisposition investigation should be combined and seems to allow all three functions within probation to be handled by the same individual. Also, the Task Force Standard on organization appears to allow the combination of probation, detention and post-trial detention in a single agency, while the IJA/ABA would require different persons to handle each function. Finally, the NAC Standard again seems almost discretionary ind..ating that intake, predisposition investigation and community supervision should be specialized "whenever possible."

A) Philosophical Implications

Assuming the implementation of the IJA/ABA Standards, the intended implications seem clear. First, a system of due process for children. A system where the court is a court of law rather than a social agency with legal powers and authority. A system that will restore judicial integrity and charge judges to do that which they are trained for and have the skills to do.

Secondly, by specializing the functions of probation, detention and post-trial detention, the pervasive problem of role confusion could be reduced. A system that juveniles perceive as fair can only enhance the effectiveness of the court.

Thirdly, by function specialization and returning judicial integrity to the court, accountability of all parts of the system can be increased. The actors in the system will know what their respective roles are and how they are expected to implement them.

Finally, a host of administrative and management benefits, such as uniformity of resource allocation, coordination and communication within the system, greater financial resources, may be realized.

B) Implementation Issues

The issues surrounding implementation of these standards are largely administrative, save one.

The implementation issue outside of the administrative area involves researching state constitutions and statutes to determine where changes are necessary. If a constitutional change is necessary to remove the functions of probation, detention and post-trial detention to the executive branch, a general education program directed to the electorate public will be necessary if the amendment is to succeed. If only statutory changes are necessary, this same educational effort can be directed to the state legislature.

There will be a need to examine federal, state and local funding of the juvenile justice system within each state. This is a necessity not only to ensure a new cost-effective system, but to ensure that the system is adequately financed. Too often those working within the juvenile justice system have been mandated to provide laudable goals and services on inadequate budgets and resources.

Further, with the removal of services from the court there is a danger of a bureaucratic nightmare, if judges and lawyers are not part of the implementation system. While the legal profession will not have direct control over the new system, it must have input to ensure the new system meets all legal requirements.

Another implementation issue is the need of some mechanism to ensure retention of competent, trained, experienced and dedicated personnel when administrative changes are made from judicial to executive branch, state to local control and local to state control. It is not unknown for animosities to occur among the various components of the present fragmented juvenile justice system. This should be recognized and alleviated by training and education of present personnel to foster acceptance of the newly implemented system.

C. Proposed Changes

Adoption and implementation of the IJA/ABA Standards relating to administration of probation, detention and post-trial detention should proceed expeditiously.

(TRANSCRIPT FOLLOWS)

JUDGE KETCHAM: Sir, for purposes of identification, how would Mr. Fort and I fit in or Mr. Smith?

MR. MANAK: Well, everyone will have an opportunity. We have so many different labels.

JUDGE KETCHAM: I don't think that really answers it, but okay.

MR. MANAK: One of the labels of Mr. Smith is also Dean, so Charlie, you have had so many different labels, you are just going to have to pick and choose.

Okay, Mr. Kaimowitz?

MR. KAIMOWITZ: Keeping in mind what you have just stated about the judges, I am somewhat concerned that this not deteriorate into a battle between all of us and the judges; and following-up on Mr. Cattle -- Judge Cattle's remarks this morning about feeling that the judges have been made the scapegoat. I think that I would like to, again, allude to an area that -- not because Mr. Hege did not cover it, but because the standards did not contemplate it. Again, the gap in the reasoning and a gap that I think in this area in particular is vital; and that is, again, between all of us and the behavioral science professionals.

My basis here, and why I would like to see unity between the judges and other groups in this area is that the entire area that we are talking about in terms of court services is advocated to what

I believe to see in Michigan, to mental health services. That the child who is given due process, for example, in the Juvenile Court system, that the adjudicatory phase will wind up taken out of that system, and I think the danger is really there in two cases in front of the U.S. Supreme Court, and simply placed in the mental health system. Now, I don't know if the judges intend to run over and turn their heads around and become probate judges as responsible for mental health as well as for juvenile justice; but in terms of services and separation of services, I would have to enforce with Mr. Hege who is suggesting that at least in law, that we restrict ourselves to judicial functions and to legal process functions.

On those points, I wish a simple vocabulary change would have taken place somewhere in this situation and I don't think it has. That is, if we could stop referring to the adjudicatory phase and the dispositional phase and try to adopt the adult model in terms of simply talking about trial and sentencing, I think a large part of the problem would be solved -- that we would then have the sentencing phase, the professionals making their

recommendations to the judges and judges then entering into a very separate judicial function instead of, as I think Mr. Hege alluded to, the kind of merger of interest that takes over with the feeling -- the judges are trying to explain, look, we are your last resort to helping kids, that a judge would still talk like that in 1978 is still disturbing to me because I think that it mixes up the functions for a more desired over-all umbrella.

So at the risk of offending our moderator, I think I have gone on a bit long, but the reason, as I say, is that I am very concerned about this mental health gap and I would hope that others would allude to it in terms of court services being offered.

MR. MANAK: All right, that certainly is a new point, however, that you brought out.

Mrs. Connell?

MS. CONNELL: I just as soon respond to what some of the judges have to say afterwards.

MR. MANAK: All right, Mrs. Sufian?

MS. SUFIAN: I would state that, too.

MR. MANAK: Okay, Judge Ketcham?

JUDGE KETCHAM: I am in the category.

They comment and they question. The comment is that, are you aware, Mr. Hege, that Office of Juvenile Justice Delinquency Prevention in about September, I guess, awarded a very substantial grant to the Academy of Contemporary Problems in Columbus, Ohio. One of the four functions of that grant -- I think there are really four grants -- is to study non-judicial functions being performed by juvenile court judiciaries, and I would presume that, within the scope of that grant, I would not know, I think it's eighteen months, there should be -- the results should shed a lot of light on the present operations of court services.

And this is the question, what solution do you suggest for the concern of a lot of conscientious Juvenile Court judges, that, if services are to be provided by the executive branch, the judge may be unable to make good on his dispositional order insofar as treatment services are concerned?

MR. HEGE: Well, I guess my position on that is we have had, you know, a number of cases nationally with regard to conditions of confinement right to treatment suits, and the courts have seemed very willing to go in and, if the situation requires it,

to restructure what treatment was being given, you know, down to things like staff ratios, amount of exercise during the day, those types of things.

So, I guess I don't feel that the court is going to be in a position where they are not going to have power to act.

JUDGE KETCHAM: You mean through habeas corpus through the federal courts or things like that, all right.

MR. MANAK: Judge Fort?

JUDGE FORT: I have a couple of questions, and perhaps, in fairness to the reporter, on the court organization volume of these standards, I should say that the one point two section does not reflect the position of the reporter and that of all -- this was a position with as, I think, some of the members who are here recall, was forced in effect on the reporter, by the members of the Advisory Committee to department number two, and I should also say, in order that the position of the commentary and the responsibility for it will be fairly invested is that, as a member of the commission, I really was the one who led the battle to get one point two included and who largely wrote the commentary. Ted Rubin sent

it to me, and I rewrote it and sent it back and so on, as I think Dean Smith will remember.

JUDGE MOORE: Bill, you, in one sentence, alluded to this one point two before. I don't have a volume in front of me. In one sentence, could you tell me what one point two says?

MR. MANAK: The volumes, incidentally, are on the front table here, if anyone wishes to refer to any of these standards.

JUDGE FORT: One point two is a very short one. It is only one sentence. It says, "The juvenile intake function, juvenile probation services, and juvenile detention programs should be administered by the executive branch of government."

My personal view, as I explained in some length to the commission on various occasions at our meetings for this, is that it is at least as important as any other single provision in the entire standard. I know that I am not expressing the views of the members of the commission, but I think it's, in fact, adopted by the state will have the greatest single influence with respect to the operation of the Juvenile Court of any provision and standard. I am not expressing the opinion of the

commission when I say that, but I am expressing my own because of the reasons set forth here.

The separation of powers argument, I feel, although Mr. Hege advances it and I am in sympathy with it, I think should be qualified to reflect that this is a short diversity of opinion of the Appellate Courts of this country as to what lay in terms of the separation of powers is in this area. The Supreme Court of Pennsylvania has gone fairly far in that regard. The court in my own state has gone somewhat the other way, our Supreme Court, and in a number of the other states, I am not going to belabor the point here, but there is not, as Mr. Hege, indicated, unanimous agreement with Appellate Courts concerning it.

My own view, is that, in terms of the separation of powers, ultimately, is going to have to find it's way to the Supreme Court of the United States to be decided. I am not saying when, but I don't see where else it can be decided. Mr. Hege points out, as we pointed out at our discussion, particularly in Arizona, of our drafting committee, that -- and I think Lindsay, you were there, and Jim, you were there, too. You remember Jim Lincoln was

there and so on, was that the analogy in terms of mental health and in terms of the operation of county jails, if it's -- which has historically been accepted as within the concept of separation of powers and, therefore, exempt from the power of the judiciary, I am not now speaking of juvenile courts, but of any court in terms of administration, had equal application to the operation of detention office and of juvenile training schools, and whether they be state or county or municipally operated and so on; and I still have that feeling and those of the judges who have known me for twenty years know I don't change my mind very readily, whether it's right or wrong. And I have to take notice to that, and I only think it's fair, especially to Ted Rubin, who I know many of the judges would have figured led the billing for this to say in his defense that he resulted -- it had to be run -- jammed down his throat. He felt just the opposite, and those of us who are familiar with his operations in Denver when he was the court judge can well understand that. I am sure Jim, particularly, is not all mindful of that, so I want to make that comment, initially.

I understood, Mr. Hege, in a small manner, that you made a statement that wasn't clear to me in relation to a detention decision being an administrative decision. If that was what you meant to say, I would expect this great disagreement with that. I do not believe that a decision to detain anybody in the Juvenile Court or in a mental case or in an adult court can ever be an administrative decision. It must be judicial.

MR. HEGE: No, I -- if that's the way the comment came out, it was misspoken. I did not mean to state that.

JUDGE FORT: And I am not able to shed any light on the N.A.C. I hope someone else here is able to explain why this was next dealt with.

MR. MANAK: Okay.

JUDGE FORT: So I won't take any more time. I realize that there is a great deal more to be said and problems underly what we are now talking about having long and deep ramifications with respect to the future of the Juvenile Court operations; however, it is structured in the United States, and I think it warrants much more serious consideration than it has received from the L.E.A.A. from the

Juvenile Court Judge's organization or from any of the others, and I have one last point; that is, just in my mind, is that is the point involving finance. As the cost of the administration of the court systems are being taken over increasingly by the states, which is what is going gradually throughout America, then the power of the local county governments, unless they operate under something like the Smith Act in California, will come of necessity, be taken out from under the local courts and transferred to a state board administrator or it's equivalent under the court or under the special service department as has happened in Florida and as, you know, we are seeing various volatile situations nationally in this regard.

MR. MANAK: Judge Ketcham, did you wish to respond to a point?

JUDGE KETCHAM: Just to add a piece of factual information that I think Mr. Hege and others of us ought to consider is that the federal model, if it be that, is dubious. The federal courts operate probation. The federal courts do not operate their detention services or their jails. So I don't know that we can draw any conclusions from the federal document.

MR. MANAK: Judge Cattle?

JUDGE CATTLE: I think there is a distinct division between probation and correction, and certainly I would have no objection to even think about it as to once a juvenile may be committed to an institution, that corrections should take over. It's just like in adult court when the same thing happens. The probation services is a totally different matter, and I also wish to say that as a country boy, I am a little bit puzzled by Mr. Hege's exertions of what goes on in my neighboring state of Iowa, but certainly my probation officers have nothing to do with intake, my probation officers, except in emergency situations take care of a child, have nothing to do with the case prior to the same having been adjudicated. My probation officers then act to advise me after a post-trial, if you will, examination of what they can find out, which has an effect on my disposition or sentence. I don't know that the country boys accept probation like they seem to think we do, but there is a difference between probation which is an arm of the court prior to a making of final commitment and while there is still salvage available and corrections

is a totally different handle, that's after the delinquent juvenile has been committed to a state institution, and from then on, it's a matter for parole.

MR. MANAK: Charlie?

DEAN SMITH: I pass in favor of the act of the judges.

MR. MANAK: I don't know if we are all aware of the fact that he also is a former prosecutor. I don't know if he mentioned that. He got at least four labels.

DEAN SMITH: I have seldom dared desert the role of a judge, and I don't think I will start now.

MR. MANAK: Mr. Hutzler, you pass?

MR. HUTZLER: Yes.

MR. MANAK: Mr. Dale?

MR. DALE: Pass.

MR. MANAK: Okay, Judge McLaughlin?

JUDGE MC LAUGHLIN: The only comment I could make, is, coming from a state where probation was, at one time, an arm of the court, and now is somewhat state controlled; but it's definitely out of the court system. The only comment that I can make

is that it doesn't work any better when it's in the court than when it's out of the court.

MR. MANAK: Judge Moore?

JUDGE MOORE: I would agree with Judge Fort, that the way I read all these volumes, the two most significant statements in the volumes of the juvenile justice system as it currently operates, whether you like it or don't like the system as it operates, is this particular statement, removal from the judicial branch the operation of these three that I would consider to be judicial functions currently --

JUDGE KETCHAM: Can you speak a little louder?

MR. MANAK: Could all of us speak a little louder? Especially the observers, I think, are having problems.

JUDGE MOORE: I said that I would agree with Bill Fort that this statement in the volumes, along with one other statement, are probably the two most significant statements in any of the volumes concerning juvenile justice. The other statement is, unfortunately, one which we are not going to address because nobody has that topic. Now, maybe Lindsay Arthur might address that portion in determining sanity, and that's a statement which is in his

tradition volume, that the courts may not look at the needs of a child until after the court has decided whether to incarcerate or not to incarcerate the child, that is for another day.

I, personally, think that the best issue here is how do we get the best services as far as probation services are concerned for a child? I think we are erroring in fundamentally deciding that we are going to get by changing the system, and there is no question that the courts have not lived up to expectation of the public, and that we have not been able to involve all the problems that we were "supposed to" involve. That doesn't mean that we are going to do better by forcing everyone into a system by which the courts are no longer involved in probationary services. I think much better than that, we must devise a system which allows within local jurisdictions to control to be in that arm of the government which is going to provide for children the best kinds of probationary services.

As far as intake is concerned, my prediction is that eventually that will be right out of the court. I don't think the court should be making a determination what kind of kids are going

to be tried and then go on and try them. As far as operation of detention homes are concerned, again, I think that a relatively unimportant issue and I think that judge's problems are that they feel that the detention homes will be full and they will have a kid that they want detained and there will be no place to put him, and if a detention home isn't operated by the court, how are they going to force the detention homes to take the child; and that's what goes back to what we argued earlier about the habeas corpus or what have you.

The issue of probation, however, is a different issue and probation really is a function to try to change behavior, and it's my opinion that a court currently operates a probationary program under the auspices of the court and is doing a good job, and I don't think that court should be forced to turn over that responsibility to an unknown state agency.

The real issue is how do you marshal resources and how do you hold those resources accountable for what they are supposed to provide; and if in some states the marshall resources is better through the executive branch of government, and you have a governor who is concerned about these services

as not just one of twenty other departments that he may be responsible for and this may be at the bottom of his list, and then I presume that you are going to be more successful in this state by having the executive branch administer these services.

On the other hand, if you come to another state where the juvenile services on a state-wide level with the executive branch give very low priority and you have some courts in that state where you have a judge and an administrative staff who are concerned about providing services and are able to provide that community locally to provide services, then I say leave them where they are and don't foster upon any one state another state's structural requirements which may be a disservice, eventually, to the children the court seeks to serve.

MR. MANAK: Judge Arthur?

JUDGE ARTHUR: I seem to be cast somewhat in the role of defending what is, but I would suggest that the burden of proof is on those who wish to change, and I haven't seen in any of these, a proof of what they are proposing is going to do any more for children than what is, and certainly not a proof beyond all reasonable doubt.

MR. HUTZLER: You never get that in Juvenile Courts.

JUDGE ARTHUR: I don't know, even a fair preponderance, fair and convincing, but it seems to me that I came into a system some years ago -- I heard many people say too many years ago -- which was the way you are now proposing, and the standard disposition in my court when I came into it read, and I think I can quote it, "committed to the legal custody of the welfare department until age twenty-one, unless sooner released, period, end."

A total granting of all discretion to the county welfare department. I think it was one of my first acts as a juvenile court judge to change that and say that the court would make the dispositional order and the court will determine what this child needs and what the public needs in relation to this child, and the court will maintain jurisdiction to review whether its proposed disposition, it's ordered dispositions are, in effect, being carried out; but now you propose to go what I would say backwards, and give all this discretion to the social agencies and I would resist this strongly.

First of all, you are giving them

discretion as the administration of these functions and the administration of these services to non-elected people. Now, it's in the hands of the judge, and as I well know -- by the way, my phone rings and the mailman brings me letters -- I am the focal point for everybody's complaint, and I am up for election at regular intervals. Now, you want to turn this over to some bureaucrat over there who brings civil service protection. There is no focal point any more, there is no way for the public to make it's feelings felt. I am a strong believer in democracy, and I believe you are going away from that in going into an administrative system. I think, also, you are moving things strongly towards the state capitol rather than toward the local, and I am Smithsonian enough to think that we should keep these things on a local and practical level and let each community decide for itself what it wants to do with it's children, how it wants to protect itself, rather than send things to St. Paul or whatever the state capitol might be, for somebody over there who is often nameless to make a decision and send us a ruling that must be followed.

Lastly, on that point, I would suggest

that what we have now is quickly subject to judicial review. You can bring it in on a single simple motion, at least in my court, and I would assume that this would be easily adopted into any court whether it doesn't exist. If you don't like the way it's going, you bring a motion, it takes a day or two, you get it before the court where orders can be made, where lawyers can be heard on both sides, where we can have this thing determined on an adversarial basis of determining the facts of whether the child is or is not receiving beneficial treatment; but if you go into a bureaucracy, then I assume that you are going to go through all the administrative hearings that are necessary to challenge what the administration is doing; then after time has passed and months have passed while the child is trying to grow up, then you say, well then we could take it back to the court for review, and we can bring it back for a treatment suit or something of that nature. I think you are hurting the children's legal rights, the children's protective rights by moving them into an administrative system where it's too far removed from the processes to protect their rights for them.

Specifically, I would suggest that, as I follow the way you are proposing this, and this I would put as a question, the judges who also lose control of the P.S.I., would not know the social history. This would be determined for us because the administrators would say well, this is what we are going to tell you at the time of disposition. We are going to give you this much social information no more no less, whether you want it or not. We will or will not give you a recommendation, according to what we think. The recommendation will be generalized or specific according to what we think. Now, this is the most important of all tools in determining what should happen to a child. I think we would lose control of them, this I would resist very strongly. This is the right arm of the court, as much as the clerk, as much as the court reporter, as much as the bailiff is to know, is to have some control of what information is going to be given to us at the time of the disposition; and similarly, at the time in following-up what the court's disposition would be, and I should agree with Mr. Kaimowitz in his statement that we ought to clarify the semantics here so we know just where we are and maybe we should

get away from some of these nice children bits of jargon and factfinders and so on like that, and call it trial and disposition, trial and sentencing, would make language a lot easier for all of us to use.

JUDGE KETCHAM: Lindsay, while you are clarifying semantics, some of the people I think are in doubt as to what P.S.I. is.

JUDGE ARTHUR: Oh, Pre-sentence Investigation. It's a general phrase that we use, I am sorry --and lastly, you made a challenge that there was no due process in the Juvenile Court, and Mr. Kaimowitz named the same process before. I can simply say in passing that I was at a meeting most of yesterday noon in Minneapolis where the biggest problem was is there any way we can slow down some of the due process we have got. We have two lawyers whose sole job is to appeal the rulings of the Juvenile Court, and they are very busy. They are going up at the rate of at least one a month. Our Supreme Court has said somewhat lavenly we are going to set up a separate division in the Minnesota Supreme Court to handle Hennepin County Juvenile Court appeals. Our juvenile detention center used to average four point two days as the average length of stay. It's up past

twelve days now, the reason being that these children are on appeal and they are going up to eight, nine months in detention waiting for the Supreme Court to do something about their cases.

I would say that at least in my court, and I don't see any reason why it can't be adopted in any other courts of the land, we have a plither of due process.

Thank you.

MR. MANAK: Judge Delaney?

JUDGE DELANEY: We have only been into this thing about a half a day and I have heard so many different versions of what the Juvenile Court is, I wish the real Juvenile Court would please stand up.

Actually, I think one of the problems we have, and the IJA has had throughout, is a role identification that they have been looking at a court that doesn't exist or it doesn't exist at least as far as I know; but we have heard Mr. Kaimowitz worrying about the judge who can, you know, thwart judicial review. I'd like to know how they do it. I have been victims of it many times. We have heard about courts doing their own intake and

the question of whether we should -- the court should be a social service agency or a court, and talking about the parens patriae model.

Well, I think it should be made clear that no Juvenile Court judge that I know, and I have met a great many of them in a lot of different places around the country. There isn't a one of us that doesn't believe that a Juvenile Court should be a court in every sense of the word. I don't think that's a debatable thing in the context of the judge's concept of what a Juvenile Court is. Permeating these statutes is the theme that rehabilitation and special services are kind of dirty words. They are something that are unworthy of a court. The court should not be involved in this; and I understood -- if I understood Mr. Hege right, he was opposing the question of whether the court should provide and supervise and be responsible for these rehabilitated services. It seems to me that the question is not one of should the court be the rehabilitative agent, but should the court be concerned with the rehabilitation of the person. In other words, is it a proper jurisdictional matter for a court to be concerned about the quality of services that it provides when a person

comes into the judicial system. Should we be concerned about why he is in there and what can be done to preclude his return into the system.

Now, if that is a proper judicial concern, and in my view it is, the judge's role or the court's role is one of insuring while the child is within the jurisdiction of the court that these services are adequately provided. Now, if the judge is going to evaluate that somewhere along the line, and this would be what we call the dispositional aspect of the thing, we have to know several things: what happened, why did it happen, what are the factors that produced the immediate behavior, and how may we address this -- the restructuring of this person's environment because many or most of childhood problems are environmental problems,what comes from the family home, the peer group, and so on.

Now, if we don't know that and if we are not concerned about it, I don't see how we can make an intelligent and constructive judicial decision; and once that decision is made -- first of all, before we make the decision, certainly it should be participated in by the child, his family, his lawyer, by the public prosecutor, by anyone else

who had a concern or input into this problem. The judge is not the one who should make, you know, the sole decision. It is a composite or decision that is arrived at collectively by the best brains and the best talent we can bring together on this problem; but once it's done, it seems to me, the judicial function is to put the imprimatur of the court and the sanction of the law behind that program, not only to insist that the kid perform his function and the parents perform their function, but that the department of social services or the department of public health or the mental health situation or the probation officer, whoever it is, does his thing because there is no point in putting a kid on probation unless we give him a chance to succeed; and in my view, that is a court's responsibility.

In other words, we are enforcing not only the rights of the child to proper treatment, but the obligation of the community to provide that.

Now, if we look at it in that context, whether probation or any of the other various services that accompany a post-adjudication approach are under court supervision or under somebody else

I don't think is really the critical issue. It is the extent to which the court can mandate and evaluate and improve and insist on proper functions of these services. In our particular state, I felt that probation services should be under the court, and they still are, but recently or a few years ago we -- the state took over the funding of probation services and now our probation officer -- our services are regulated by the judicial department in Denver, and they might as well be regulated by, you know, the department of social services or somebody else for all we have to say about the funding and the selection and that sort of thing; but I haven't seen any material to the characterization or the quality of the services. As long as we can say to the probation officer, this is your function. If we can bring that case back for periodic review, whether it's an abuse or neglect case or delinquency or whatever it is and make both the subject of the reporter and the people who are providing the services give an account of their stewardship, if they all understand that they are going to have to come back and say this is what I did or if the recipient of the service says I didn't get this kind of help,

we should be in a position to say to the person, look, you haven't done your job, I'm going to insist that you do; and that's the kind of authority we need.

So I think we can get lost in this hassle about whether probation should be under the court or somebody else. On the issue of whether probation officers ought to be doing the intake and finding the case and presenting the evidence, I think that we are way beyond that. We are not even talking about that any more. There may be some archaic processes someplace in the country that still maintain that process, but I hope they are short-lived. I hope they will be gone.

MR. MANAK: Mrs. Szabo?

MS. SZABO: I have no questions since I will keep the time in mind.

MR. MANAK: Mrs. Bridges?

MS. BRIDGES: I just want to say I prosecute in the largest urban country, the section as the social services are executive, and I think that the courts have maintained a great deal of power in spite of that, and one reason being that the county has a Juvenile Court which is made up of the

juvenile judges county commissioners who are responsible for the funding and the heads of the various agencies. They oversee the facilities, inspection of juvenile facilities, and decide or attempt to decide policy questions that arise within the county. I think the roles are a little blurred because we deal with each other on a day-to-day basis, so there is constant communication between the service agencies and the courts and the prosecutors and the defense attorneys in some instances; but we all know, ultimately, that we have to go before the court, and we all know, ultimately, that we have to go before the county to get funding.

So I think it was very well to do this, and I think, like the judge said, probably a lot of this is because of the local nature of the funding and the fact that everybody's pretty much aware of what everybody's doing.

MR. MANAK: Mr. Rounds?

MR. ROUNDS: No comments.

MR. MANAK: Okay, Mr. Siegel?

MR. SIEGEL: I am in complete agreement with Mr. Hege's comments that the intake and probation should be in the executive and not in the judiciary.

I disagree with Judge Fort that we should be awaiting a decision of the Appellate Court and eventually the Supreme Court. I don't think it's basically a constitutional issue whether the Supreme Court and the Appellate Court say it's constitutional or not, it's still a policy question which has to be addressed by the legislatures. Even if it's decided that it's constitutional, that doesn't mean that the legislatures should advocate it's role of making a decision as to whether it's wise or policy to have intake and probation in the executive as opposed to the judiciary; and I think the reasons put forth by Mr. Hege for having the executive are highly convincing, and I also want to say I don't think we should lose sight of the fact that this really is a two-way street. It's not only the judge who is going to be influenced and biased by the opinions of his hand-picked and personally supervised intake staff, but the intake staff, of course, are deciding who is going to be filed upon and what charges are going to be filed. It is going to be influenced by their perceptions of their bosses, i.e., the judge's values; and so they are not going to be making independent -- any impartial decisions as to who should be filed

upon.

And finally, I also want to express the support for the speakers, that we really need a proof, much more in the direction of the due process model and away from parens patriae. I just can't agree with Judge Delaney that that's no longer a problem when in twelve states we have the right to jury trial. Even in those states where there is the jury trial, Michigan is one of those twelve states, and Mr. Kaimowitz and Judge Moore would verify this, and even though we have the right to jury trial in Michigan, many counties in Michigan have never had a jury trial in a Juvenile Court in Michigan. Many counties in Michigan have never had an appeal.

So, you know, I just can't accept that due process is no longer a problem. This gets back into the final point. Judge Cattle's comments, I am in disagreement with Judge Cattle, Judge Moore and with Judge Arthur's statements about the rotation system is bad. I think the rotation system is more likely to move us towards a due process model because these many Juvenile Court judges who are now steeped in the parens patriae

tradition of the lax in formal therapeutic type approach which, you know, puts much less emphasis on strict evidentiary rules, strict hearsay rules, less evidence to prove beyond a reasonable doubt. If their courts could spend a good deal of their time in the adult court with it's due process model and truth-finding model, they are much more likely to apply that methodology in the Juvenile Court.

MR. MANAK: All right, Mike?

MR. DALE: Have I unalterably waived?

MR. MANAK: No.

MR. DALE: I understood one of the questions for the body to be what would happen where the judge is unable to administratively control probation services, temporary detention services? How would they then enforce proper probation services, enforce proper conditions at facilities, and I would cling to the tension of the group, the body of law that exists in New York, where in the state law there is a -- in the Juvenile Court law, there is a statute which allows parties to a proceeding to bring before the court information where an agency or where a probation department is not carrying out a particular function, and where the court then has

the power to order that agency to carry out a proper function, and there is a rather extensive body of case law. The section of law for the purposes of our proceedings is Section 255 of the New York State Family Court Act.

MR. MANAK: Judge Fort?

JUDGE FORT: I just thought -- I guess I didn't make myself clear to Mr. Siegel. I was not suggesting that the separation of powers is interfering with the legislative policy-making. All I was trying to say was that essentially that is a constitutional question, and it's limitations can only be prescribed ultimately, by the Supreme Court of the United States. No legislature or no other congress can do that.

Otherwise, I think Mr. Hege and I are in substantial agreement.

MR. MANAK: Mr. Hege?

MR. HEGE: Yes, can I respond to some of the --

You know, I hesitate to say that maybe by cutting my presentation short and not going through the whole paper I may have been misconstrued. You know, I still believe that the judge should have the power to make judicial decisions. I am not talking

about taking thataway from the judges.

JUDGE ARTHUR: Thank you.

MR. HEGE: In terms of -- and I think Judge Fort wondered about the detention. I think the entering standards volume does say that the initial decision, when the child is first brought to an institution, is a qualified administrative decision. If the child is released at that point, there is no need for a detention hearing; but if they are not, then it is the judge who is going to make that ultimate decision. Like Mr. Dale was expressing about New York law, Iowa law does have a provision in it that when children are committed, it can be subject to the continuing jurisdiction of the court; and we have used that many times to go back to the court and say look, these services are not being provided where they should be. I think that is a proper function of the court.

I guess -- the distinction I see is between the court controlling and giving those services rather than just being concerned with them, and I think that's where the difference comes in. And I think the court has got to be concerned. I think the court's got to be concerned about what information

they get in that pre-sentence investigation, but I think the court can control that. If the reports you are getting you don't feel are proper, I think you can refuse to admit them and tell them to go back and redo it, and you want specific information.

I'm not suggesting that that power be taken away from the court, but I think the direct provision of those services should be out from under the court so in effect you can do that job properly.

Again, I am not sure who made the comment, there is a comment that the court should be making dispositional orders and we should not be giving discretion to social services. I think the court ought to make that dispositional order on the basis of the evidence presented to it, with competent evidence, and that then the services ought to be ordered, the judge ought to continue to review those. I don't think that's the same thing as the court actually providing those services.

MR. MANAK: Okay, one last comment.

JUDGE ARTHUR: Let me just say basically, we are almost in agreement.

MR. MANAK: Judge Ketcham?

JUDGE KETCHAM: Can I say, just to Mr. Siegel, that I agree with him on this point, and I think the services should administratively be under administrative or executive agencies, but I don't think it's a good idea to make the point to describe models that are not universal.

I served in a court in the District of Columbia in which there were forty-four judges, only one of whom had anything to do with administration, fortunately, and the probation department was set up so that I couldn't get the time of day from the probation officer. So this description that you give of this -- the judge personally hiring the probation officer and taking him to lunch every day just doesn't exist in some places. So I think we ought to mention the difference between the very personal small court and the big-city administrative court, accept the fact that there are wide differences in those when we talk.

MR. MANAK: Okay.

(WHEREUPON, A LUNCHEON RECESS WAS HAD.)

NCJ 76915

3. Jurisdiction of the Juvenile Court Over Non-Criminal Misbehavior (status offenses)

Consultant
Patricia Connell

ABSTRACT OF PAPER

Ms. Connell begins by observing that "[t]raditionally, status offenses have included the following types of behavior: truancy; substance abuse ...; running away; and unruly conduct [such as] curfew violations, disobedience to parents, sexual activity, etc." After presenting a brief history of the jurisdiction over such conduct, she summarizes the arguments for and against continuation of this authority. The rationale for retaining jurisdiction over non-criminal misbehavior by children includes the need to enforce parental authority, to protect children from harm or from becoming engaged in criminal activity, and to provide necessary and otherwise unavailable services. Critics of the status offense jurisdiction argue that courts are an ineffective means of intervening in family and personal problems, that such terms as "ungovernable" are unconstitutionally vague, that juveniles alleged to status offenders may be denied the constitutionally guaranteed procedural rights afforded those who are alleged to have committed an act of delinquency, even though the dispositional consequences may be similar, and finally, that the authority is subject to being applied in a discriminatory manner. Before turning to the standards, she notes the requirement in the federal Juvenile Justice and Delinquency Prevention Act which conditions receipt of federal revenue-sharing funds on the removal of status offenders from detention and correctional facilities, and indicates that several national organizations have taken positions on the jurisdictional issue.

Ms. Connell turns first to the recommendations of the IJA/ABA Joint Commission which urges elimination of the traditional jurisdiction over non-criminal misbehavior; establishment of a new limited intervention authority when a juvenile is found in circumstances which endanger his or her own safety, has run away, or appears to need emergency psychiatric care; and the creation of a broad range of voluntary services. She concludes, with regard to the IJA/ABA recommendations, that:

> No doubt some young people and their families will go without needed assistance if juvenile court jurisdiction over non-criminal misbehavior is eliminated. However, the problems of dealing with the resulting unmet service needs should be no more difficult than assuring that the inumerable and often inherent problems accompanying jurisdiction do not continue.

Turning to the Task Force standards, she questions the proposed jurisdiction over families with service needs, since the conduct listed is similar to, though somewhat more circumscribed than that found in many current statutes, and the focus is still on the juvenile despite the extension of the court's authority to the entire family and to service-providing agencies. The restriction on the exercise of the jurisdiction to those cases in which "all available and appropriate non-coercive alternatives" have been exhausted is noted as is the ban on placement in secure facilities. Also mentioned is the lack of any provisions on enforcement of orders which have been disobeyed or on the requisite standard of proof.

With regard to the NAC standards, Ms. Connell states:

> While resembling earlier status offender statutes, the actual provisions seem to mirror those for Families with Service Needs. Jurisdiction extends to the juvenile, his or her parents, guardian, or primary caretaker and any agency or institution with a legal responsibility to provide needed services to the juvenile, parents, guardian, or primary caretaker. Likewise, jurisdiction is restricted to those cases in which available and appropriate noncoercive alternatives have already been exhausted.

She comments on the attention paid to the due process rights of the juvenile and to the provisions on enforcement, but suggests that the latter may not be effective with regard to the juvenile, his or her parents or a service agency.

After reviewing the differing approaches toward noncriminal misbehavior taken by various states in light of the Juvenile Justice and Delinquency Prevention Act, Ms. Connell returns to an assessment of the standards, concluding that "so long as our best efforts at treatment have demonstrably positive effects in only a small number of instances, I cannot support their coercive imposition."

SUMMARY OF COMMENTS

Jurisdiction over noncriminal misbehavior was deemed the "hottest issue" addressed by the standards. As might be expected, a vigorous discussion ensued following the presentation of Ms. Connell's paper. This discussion was centered in large part on four issues. The first was whether abolition of jurisdiction over status offenses would really result in the availability and use of voluntary services. Mr. Spiegel argued strongly that it would, and Ms. Connell interpreted an ex-

ample raised by Mr. Rounds regarding the experience in California as an indication that voluntary services would be in high demand once the threat of police contact and institutionalization were removed. This view was challenged by Judge Arthur who argued that many of the people brought before the court in noncriminal misbehavior matters were those who did not wish to seek help on their own, and that the resources were not available to provide the range of services with the degree of accessibility urged by the IJA/ABA standards. In addition, Judge Moore and Judge Cattle both sharply disagreed that court intervention was worse than no services at all.

The second focus of discussion concerned other ways in which the juvenile court might exercise jurisdiction over youths alleged to have engaged in noncriminal misbehavior. Mr. Spiegel and Mr. Kaimowitz suggested that many alleged status offenders fell within the juvenile court's jurisdiction over neglect or delinquency. Judge Moore and Judge Delaney suggested that this was not usually true in cases involving substance abuse or sexual promiscuity. Mr. Kaimowitz responded that in such cases it would be possible to rely on the laws against possession of a controlled substance or statutory rape, but that too often, it was easier to charge a juvenile with a status offense because the burden of proof was lower. Judge McLaughlin commented that the idea implied in the family with service needs concepts that adults could be institutionalized is just "smoke."

The third theme in the discussion was disagreement over the philosophical basis for standards. For example, Judge Arthur stated that the effect of the IJA/ABA standards would be to:

> [E]mancipate ... kids at any age ...: an eight-year-old can decide whether to go to school or not ...; a ten-year-old, a fourteen-year-old girl can go live with whom you please.... Nobody can do anything about it.

Judge Delaney questioned how intervention on behalf of juveniles in danger of harming themselves could be prohibited while intervention on behalf of a mentally ill adult in similar danger was permitted. Furthermore, Judge McLaughlin observed that some juveniles found to have engaged in noncriminal misbehavior were more seriously disturbed than many delinquents and that a status offense adjudication often was considered more serious by the public than a single instance of delinquency.

The fourth point discussed was the enforcement power of the court if the standards were adopted. Judge McLaughlin, seconded by Ms. Sufian, suggested that if the court was unable to force an individual, particularly a juvenile, to obey an order, it creates disrespect for the legal system and encourages further law violations.

Judge Arthur asked whether the court's contempt powers might be used to enforce an order under the Task Force or NAC standards. Ms. Connell indicated that it could not, but Mr. Kaimowitz pointed out that at least contempt citations required proof beyond a reasonable doubt of a definable act.

76915

JUVENILE COURT JURISDICTION

OVER NONCRIMINAL MISBEHAVIOR

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INTRODUCTION

This paper will discuss the Standards' positions on the retention of juvenile court jurisdiction over children charged with acts of noncriminal misbehavior, or what are more commonly known as status offenses. Noncriminal misbehavior is that conduct which constitutes a violation of the law solely because of the actor's age. Traditionally, status offenses have included the following types of behavior:

(1) truancy;

(2) substance abuse (tobacco, alcohol, etc.);

(3) running away; and

(4) unruly conduct (curfew violations, disobedience to parents, sexual activity, etc.).

The assertion of juvenile court jurisdiction over children accused of noncriminal misbehavior had its genesis in laws dating back to early colonial times. See for example, Mass. Prov. Stats. 1699-1700, c. 8 §§2-6, in Mass. Colonial Laws 27 (1887 ed.), which vested courts with criminal jurisdiction over "stubborn servants or children."

In the early 1900's specialized courts began to replace courts of more general jurisdiction in dealing with children. These courts were established to provide the care, protection, and guidance for children that a wise parent would offer his own offspring.[1] Little wonder then, that premised as they are upon this doctrine of parens patriae, juvenile courts continue to spend considerable time and resources regulating conduct which is uncontrolled for adults.

Just as the colonial statutes were concerned with "the child's key role as a source of labor for the family unit,"[2] current laws governing unruly children stem in large part from our concern with the economic consequences of independence for those under eighteen. Compulsory education laws and the truancy jurisdiction which enforces these statutes are seen less and less as mechanisms for ensuring minimal literacy in all citizens, and more as methods for limiting the number of persons in the labor pool and ensuring that school boards remain eligible for maximum federal funding allocated on a per pupil basis.

Likewise, jurisdiction over the runaway or incorrigible child is often viewed as the only way to enforce parents' authority over their children so that society can enforce the parental responsibility to support. Further, if children are allowed to choose to live separate and apart from their parents,

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1. A. Platt, The Child Savers: The Invention of Delinquency, 138 (1969).
2. Note, "Ungovernability: The Unjustifiable Jurisdiction," 83 Yale L.J. 1383, at n. 5 (1974).

society is sure to be saddled with an increased burden of providing for many of these young persons.

At present, considerable controversy surrounds the effort to control the noncriminal misbehavior of children. Many reject the notion that such activity on the part of youth is an indicator of future criminality.[3] Rather, they see such behavior as part of the inevitable struggle to attain independence from the parent-child relationship, and, at worst, a transitory deviance that is best left alone to be outgrown.[4]

After considering the essentially private nature of these offenses and the lack of general community interest served by their control, Judge Orm Ketcham rejected coercive court intervention in these cases as being an "unprincipled use of judicial authority."[5] He argues that continued use of judicial power in these situations actually undermines society's confidence in the juvenile court since it is ineffective in bringing about the massive change being sought in these actions.

Objections to continuing jurisdiction also center on significant legal difficulties presented by most status offender statutes. Attempts to prohibit conduct defined as "ungovernable,"[6] or assert jurisdiction over youth who are "growing up in idleness and crime,"[7] are often attacked as being overbroad and vague.[8] Such provisions also appear ripe for challenge as being constitutionally deficient because they prohibit a status rather than a crime.[9] One commentator has also suggested that such provision may also offend the equal protection clause because they are underinclusive, since in most cases the child is subject to sanction while the parent, who must share responsibility for the acts of the child, is immune.[10]

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3. E. Shur, Radical Non-Intervention: Rethinking the Delinquency Problem, 46-51 (1973).
4. Rosenheim, "Notes on Helping Juvenile Nuisances" 2 (unpublished manuscript, 1973); Rosenheim, "Youth Service Bureau: A Concept in Search of a Definition," 20 Juv. Ct. Judges J. 69 (1969).
5. Ketcham, "Why Jurisdiction Over Status Offenders Should Be Eliminated from Juvenile Courts," 57 B.U.L. Rev. 645, 647-650 (1977).
6. D.C. Code §16-2301 (Supp. 1973).
7. Wyo. Stat. §14-41 (Supp. 1975).
8. Stiller and Elder, "PINS - A Concept in Need of Supervision," 12 Am. Crim. L. Rev. 33 (1974); Wald, "The Rights of Youth," 4 Human Rights 13, 21 (1974); Note, "Parens Patriae and Statutory Vagueness in the Juvenile Court," 82 Yale L. J. 745 (1973); but see, District of Columbia v. B.J.R., 332 A.2d 58 (D.C. App. 1975); and In re L. N., 263 A.2d 150 (N.J. App.), aff'd, 270 A.2d 409 (N.J. 1970), cert. denied sub nom., Norman v. New Jersey, 402 U.S. 1009 (1971), both of which denied vagueness challenges to unruly statutes.
9. Cf., Robinson v. California, 370 U.S. 660 (1972) (holding unconstitutional a California statute making it a misdemeanor to be addicted to the use of narcotics).
10. Sidman, "The Massachusetts Stubborn Child Law: Law and Order in the Home," 6 Fam. L.Q. 33, 49-56 (1972).

Additional legal attacks on status offender laws have concentrated on the lack of procedural due process afforded young persons alleged to have violated their provisions. Status offenders in some jurisdictions may be denied the right to counsel.[11] In most states the allegations in the petition need only be proved by a preponderance of the evidence[12] rather than by the more stringent beyond a reasonable doubt standard applicable in delinquency cases.[13] Finally, the rules of evidence, in some jurisdictions, permit the admission of evidence in status offender cases which would be prohibited in delinquency cases.[14]

With the limited number of procedural protections afforded the youth charged with noncriminal misbehavior, it follows that the court possesses great discretion in making adjudications. This unbridled discretion has caused some to speculate that status offender jurisdiction may lead to discrimination against juveniles along racial, sexual and economic lines.[15] While only sparse research is available, one study indicates that the majority of status offenders in New York City were nonwhite: 40 percent were Black, 31 percent were White, and 28 percent were Hispanic.[16]

Despite these significant objections to the continued assertion of juvenile court power over children accused of noncriminal conduct, the debate now focuses in large part on the need to provide services to certain youth. The young person asleep in the bus station at 3:00 a.m., or the youth found in New York's Tenderloin are pointed to as examples of children who will be lost forever without the possibility of coercive intervention for conduct that stops short of the criminal.

The second group that status offender jurisdiction is thought to aid is those children and families unable to obtain services because of a lack of personal or community resources. It is argued that through the use of the juvenile court's power and monetary resources, the judge may order that appropriate services be provided.

Critics of the use of coercive jurisdiction over these children and their families would reject some of their opponents' arguments as pure fantasy and others as misguided do-goodism. They insist that no coercive action against these individuals should be permitted.

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11. In re Spalding, 332 A.2d 246 (Md. 1975); In re Walker, 188 S.E. 2d 731 (N.C. App.), aff'd 191 S.E.2d 702 (N.C. 1972).
12. In re Henderson, 199 N.W. 2d 111 (Iowa 1972).
13. In re Winship, 397 U.S. 358 (1970).
14. Cal. Welf & Inst. Code §701 (West. Suppl. 1975) provides that civil rules of evidence are applicable in status offense cases rather than the criminal rules which are applicable to delinquency cases.
15. Institute of Judicial Administration/American Bar Association Joint Commission (IJA/ABA Standards Relating to Noncriminal Misbehavior 12 (Tentative Draft 1977).
16. Note, "Ungovernability: The Unjustifiable Jurisdiction," Supra n. 2, at 1387 n. 27.

It has been suggested and the literature tends to support the concept that services imposed upon persons reluctant to accept them rarely have a beneficial effect.[17] A family in real conflict is rarely made better by the interposition of outside forces in the form of lawyers, judges and probation officers.[18] Indeed, the process in status offense cases of responding to parental demands while viewing the child as basically helpless and incompetent may actually weaken the family unit by isolating the child from it.[19]

Some critics point out that there is a lack of data demonstrating any positive effects of court intervention into families.[20] More disturbing are a number of studies that indicate that many treatment programs have a negative impact on the youth they are intended to benefit.[21]

For the family needing services, however, the juvenile court may appear the sole option when voluntary community resources do not exist or are financially out of reach. An unfortunate side effect of the court's attempt to meet the expressed needs of these children is that communities may be encouraged by these efforts to ignore their responsibility to develop indpendent services. Likewise the development of a range and variety of services may be restricted when the juvenile court assumes a service brokering role.[22] Further, if the real problem is lack of financial access to services, energy should be spent to remove these barriers, so that families can receive desired services without the stigma of a juvenile court adjudication.

Alternatives to the traditional assertion of coercive juvenile court jurisdiction over children and families in conflict vary considerably. Some would argue that, given the attendant difficulties in gaining worthwhile results, one should simply cease all jurisdiction over status offenders and their families. Others would suggest that, instead of focusing upon the child as the one requiring attention, the family as a whole should be scrutinized, and jurisdiction should be asserted over the entire unit. While this approach has some cosmetic appeal, the actual difference in results will, perhaps, be minimal since parents will necessarily possess superior power and advocacy skills within the system.

The significance of this controversy within the realm of the juvenile justice system is considerable. While one would expect that juvenile courts would be kept busy dealing with the new wave of youth crime and the increased focus on abused and neglected children, it appears that at least one-third and

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17. Hayes, Meltzer, and Lundberg, "Information Distribution, Interdependence and Activity Levels," 31 Sociometry 162 (1968); Horowitz, "Effects of Volunteering, Fear Arousal and Number of Communications on Attitude Change," 11 J. Personal and Soc. Psychol. 34 (1969).
18. Mahoney, "PINS and Parents," in Beyond Control 161 (L. Teitelbaum and A. Grogh eds. 1977).
19. Andrews and Cohn, "PINS Processing in New York: An Evaluation," in Beyond Control 45, 87 (L. Teitelbaum and A. Grogh eds. 1977)
20. Dembitz, "Justice for Children - For Now and For the Future," 60 A.B.A.J. 588, 589 (1974).
21. R. Hood and R. Sparks, Key Issues in Criminology 191 (1970).
22. Bazelon, "Beyond Control of the Juvenile Court," 21 Juv. Ct. Judges J. 42, 44 (Summer 1970).

perhaps as much as on-half of the courts' time is being spent on status offenders.[23] While some of this activity may be explained by a judge's reluctance to label a young person as delinquent, or by the lower standard of of proof, it remains clear that many children are brought into the juvenile justice system for conduct which would be ignored if the individual were an adult. Far and away the majority of females brought before juvenile courts are there charged with status offenses;[24] indeed, females make up fully half the noncriminal misbehavior petitions filed.[25] Most of these young women are brought to court as a result of a conflict with parents or society with respect to their sexual mores.[26]

Increased attention was focused on these problems with the passage of the federal Juvenile Justice and Delinquency Prevention Act of 1974 which prohibited the placement of status offenders in detention or correctional facilities.[27] That this statute was passed is tribute to the fact that, although accurate data is not available, there exist thousands of children in secure correctional facilities as a result of adjudications of noncriminal misbehavior. The National Council on Crime and Delinquency has estimated that between forty-five and fifty-five percent of the youth in state training schools or their equivalents are status offenders.[28]

The promise of the availability of federal funds to states deinstitutionalizing these young people has prompted a reconsideration by many states of their treatment of the status offender. States have responded in a variety of ways, either totally relinquishing jurisdiction over the young person,[29] creating separate categories for such offenders which would result in their segregation from delinquent youth,[30] or placing this conduct under categories resembling abuse and neglect.[31]

As these proposals for change were debated, many national, state and local organizations became active in the controversy over continued court jurisdiction with many well respected groups aligned on each side. Judges, child welfare agencies, civic organizations, legal groups, professional associations, court correctional organizations, and many others expressed themselves on the issue.

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23. Klapmuts, "Children's Rights: The Legal Rights of Minors in Conflict with Law or Social Custom," 4 Crime & Del. Lit. 449, 470 (1972); President's Commission on Law Enforcement and Administration of Justice, Report of the Task Force on Juvenile Delinquency, Delinquency and Youth Crime, 4 (1967).
24. President's Commission on Law Enforcement and the Administration of Justice, The Challenge of Crime in a Free Society, 56 (1967).
25. Note, "Ungovernability: The Unjustifiable Jurisdiction," supra n.2, at 1387.
26. Id., at 1388-89 n. 41; Green and Esselstyn, "The Beyond-Control Girl," 23 Juv. Justice 13 (Nov. 1972).
27. 42 U.S.C.A. §5633 (a) (12) (A) (Supp. 1978).
28. M. Rector, PINS: An American Scandal, (1974).
29. See, Okla. Stat. Ann. tit. 10 §1101 (West Supp. 1978) which eliminates truancy from the definition of child in need of supervision.
30. Ark. Stat. Ann. §§45-601 to 45-607 (1977).
31. Pa. Stat. Ann. tit. 11 §50-102 (4) (Purdon Supp. 1978).

In April of 1975, the board of directors of the National Council on Crime and Delinquency issued a policy statement recommending the abolition of court jurisdiction over status offenders. Similar positions were taken by the American Civil Liberties Union's Children's Rights Project and the National Council of Jewish Women.

Significantly, many well known juvenile court judges and the National Council of Juvenile and Family Court Judges were opposed to abolition. Most interesting is the position taken by the National Advisory Committee for Juvenile Justice and Delinquency Prevention, the body established by the Juvenile Justice and Delinquency Prevention Act of 1974 to advise on planning and policy of juvenile delinquency programs.[32] Although originally advocating the position that court jurisdiction should be abolished, the group, after a major change in composition occurred because new appointees were seated, reversed itself to support continued jurisdiction.[33]

The three sets of standards give considerable attention to this question offering a variety of approaches to the inherent problems presented by this issue. A comparison of their provisions should illustrate the options available to those states interested in revamping the manner in which children accused of noncriminal misbehavior are treated.

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32. 42 U.S.C.A. §§5617-5618 (Supp. 1978).
33. "NAC Reverses Decision," Youth Alternatives, Vol. V, No. 3, at 7 (March 1978), but see, "NAC Can't Attack All the Problems All the Time," Youth Alternatives, Vol. 5, No. 9 at 5 (Sept. 1978)(in which the newly appointed NAC Chairman indicates the Committee will probably consider the issue again in the near future).

THE STANDARDS' PROVISIONS

The Institute of Judicial Administration/American Bar Association Standards Relating to Noncriminal Misbehavior set out very clearly at Standard 1.1 the elimination of juvenile court jurisdiction over children accused of noncriminal misbehavior. It states "a juvenile's acts of misbehavior, ungovernability, or unruliness which do not violate the criminal law should not constitute a ground for asserting court jurisdiction over the juvenile committing them."[34]

The volume does permit, in Part II, the assumption of certain limited custody over juveniles found in circumstances endangering their own safety.[35] Part III provides similar provisions with respect to runaway juveniles,[36] while Part VI establishes procedures for the temporary detention of youth evidencing a need for emergency psychiatric care.[37]

In Part IV, a range of services are described that should be available, on a voluntary basis, to families in conflict.[38] They include both crisis intervention services such as hot lines and runaway shelters, and continuing forms of psychological, welfare, legal and other social services. If the parent and child cannot agree to a choice of residence for the child, Part V sets up a procedure for court approval of an alternative residential placement.[39] The general theme of the IJA/ABA standards is clearly to eliminate the coercive nature of any intervention into the young person's decision making processes. If a child is found in a life endangering situation, that young person will be picked up, taken to a temporary non-secure residential facility and then advised of his rights and options for services.[40] If, within six hours from the time he is picked up by a law enforcement officer, no provision for a voluntary return to the parents can be made, provisions under Part III will apply.[41] These standards allow that a child may stay in a temporary non-secure residential facility for up to twenty-one days while attempting to work out his or her problems.[42] If the child and parents will not agree to reunification, provision exists for the juvenile court to review an alternative placement suggested by the child or parent.[43] Significantly, the juvenile court cannot impose its own will upon the child, it can only approve or disapprove an option acceptable to him or her.[44] The standards severely limit the decision maker's discretion in reviewing the placement, requiring approval of the placement

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34. IJA/ABA, Supra note 15, at 35.

35. Id., Standard 2.1.
36. Id., Standard 3.1.
37. Id., Standard 6.1.
38. Id., Standard 4.3.
39. Id., Standard 5.4.
40. Id., Standard 2.3A.
41. Id., Standard 2.3B.
42. Id., Standard 3.1C.
43. Id., Standard 5.4B.
44. Id., Standard 5.4C.

"unless the court finds upon a preponderance of the evidence that the placement when the juvenile resides or wishes to reside imperils or would imperil the juvenile."[45] Discretion is further limited since a placement can only be deemed to imperil a juvenile if it "fails to provide physical protection, adequate shelter, or adequate nutrition; or seriously and unconscionably obstructs the juvenile's medical care, education, or physical and emotional development, as determined according to the needs of the juvenile in the particular case; or exposes the juvenile to unconscionable exploitation."

The standards produced by the Task Force on Juvenile Justice and Delinquency Prevention suggest that juvenile court jurisdiction should be exercised over Families With Service Needs.[47] They indicate that such jurisdiction should apply in cases of school truancy [48] repeated disregard for or misuse of lawful parental authority,[49] repeated running away from home,[50] repeated use of intoxicating beverages,[51] and delinquent acts committed by a juvenile younger than ten years of age.[52]

Although the framework presented by these standards purports to focus on the family rather than the child, the types of behavior warranting jurisdiction still center attention on the youth. Opinion exists indicating that even children placed in foster care pursuant to neglect and abuse proceedings, which focus primarily on parental conduct, may consider themselves reponsible for the actions which brought them before the court. Thus they suffer stigma even though self-imposed.[53] One wonders, then, if the youth in these actions will escape the negative impact that so often attends juvenile court jurisdiction, despite the statement that "there should be no designation of fault attached to these determinations."[54] Standard 10.2 makes it clear that all available and appropriate non-coercive alternatives to assisting the child and family must be exhausted before court jurisdiction will be assumed over a family. Thus the family is given autonomy and primary responsibility for dealing with its own problems, and ultimately jurisdiction will not be exercised unless the child or family "is in need of court intervention for services."[55]

Since jurisdiction in Families With Service Needs proceedings extends to the child, his or her parents, and any public institution or agency with responsibility to provide services,[56] the juvenile court has broad discretion

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45. Id., Standard 5.4C.1.
46. Id., Standard 5.4D.
47. National Advisory Committee on Criminal Justice Standards and Goals, Report of the Task Force on Juvenile Justice and Delinquency Prevention, Standard 10.1 (1976) (hereinafter cited as Task Force).
48. Id., Standard 10.5.
49. Id., Standard 10.6.
50. Id., Standard 10.4.
51. Id., Standard 10.7.
52. Id., Standard 10.8.
53. Wald, "State Intervention on Behalf of Neglected Children," 27 Stan L. Rev. 985, 995 (1975) citing J. Goldstein, A. Freud, & A. Solnit, Beyond the Best Interests of the Child 11-12 (1973).
54. Task Force Supra note 47, at Standard 10.2(3).
55. Id., Standard 10.2.
56. Id., Standard 10.3.

in fashioning dispositional orders. The court may order the provision of services, cooperation with offered services, and the continuation or discontination of behaviors by any of the parties.[57]

Unfortunately, the standards do not make it clear how such orders will be enforced, except to include the placement of a child in alternative care as one dispositional alternative. This would seem to have the effect of allowing a judge to enforce an order against a child, or parent for that matter, by threatening the young person with alternative forms of care (albeit not an institution to which delinquents are committed).[58] Thus, while ostensibly focusing on the family and its needs, the system's coercive nature may be exercised solely against the youth.

The Advisory Committee standards differ from both the IJA/ABA standards and the Task Force standards by retaining a jurisdictional category labeled noncriminal misbehavior. While resembling earlier status offender statutes, the actual provisions seem to mirror those for Families With Service Needs. Jurisdiction extends to the juvenile, his or her parents, guardian, or primary caretaker and any agency or institution with a legal responsibility to provide needed services to the juvenile, parents, guardian, or primary caretaker.[59] Likewise, jurisdiction is restricted to those cases in which available and appropriate noncoercive alternatives have already been exhausted.[60]

At disposition, the focus once again center on the provision of needed services to child and family:

> The dispositional alternatives in noncriminal misbehavior matters should include orders requiring the provision of programs and services to the juvenile and/or his or her family; cooperation by the juvenile and family with offered programs and services; the continuation or discontinuation of behavior by the juvenile and family; or placement of the juvenile in foster care, a nonsecure group home, or other nonsecure residential facility.[61]

Dispositional orders are limited to six months in duration with the possibility of an extension for an additional six months, and may not result in the confinement of a youth in a secure detention or correctional facility.[62]

Enforcement of dispositional orders under the Advisory Committee standards is given considerable attention. If the court determines that an unjustified violation of a dispositional order has occurred, it may warn the noncompliant, modify existing conditions, impose additonal ones to induce compliance, or

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57. Id., Standard 14.23.
58. Id., Standard 14.23.
59. National Advisory Committee for Juvenile Justice and Delinquency Prevention (NAC) Report of the Advisory Committee to the Administrator on Standards for the Administration of Juvenile Justice, Standard 3.112 (1976).
60. Id., Standard 3.112.
61. Id., Standard 3.183.
62. Id., Standard 3.183.

extend an order to make up for missed time.[63] At no time, however, can a more severe type of sanction be imposed[64] as may occur when a delinquent violates a dispositional order.[65] Where the noncompliance is by a public agency, it is contemplated that the court's contempt powers might be used for enforcement when the warning procedure is unlikely to gain compliance.[66]

While, admittedly, great care was taken with the enforcement provisions of these standards, problems will always remain with imposing judicial solutions on families in conflict. For better or worse, the family and child are, in reality, at liberty to comply or not with the orders of the court, while remaining free from the possibility of lengthy dispositional orders that will extend until the child reaches the age of majority.

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63. Id., Standard 3.1811.
64. Id., Commentary to Standard 3.1811.
65. Id., Standard 3.1810.
66. Id., Commentary to Standard 3.1811.

EXISTING STATUTES

For all the furor which the passage of the federal Juvenile Justice and Delinquency Prevention Act of 1974 has caused, its provisions regarding treatment to be afforded status offenders are really quite sparse. Primarily, the act prohibits the placement of status offenders, or dependent or neglected children, in juvenile detention or correctional facilities, and requires that all juveniles be kept separately from adults in any detention or confinement.[68]

The 1977 amendments to this act extend the permissible period of time for compliance with these provisions to three years after submission of the initial state plan.[69] Thus, even states wishing to participate in the act and receive the substantial federal monies available under it will have a lengthy lead-in time in which to comply with its provisions.

Prior to the passage of the act most states included noncriminal misbehavior under the jurisdictional sections of their juvenile codes which define delinquent conduct for youth. This subjected the young person brought to juvenile court on a status offense charge to the same types of dispositions and secure confinement as the more serious delinquent offender.

A few states had established separate categories of "persons in need of supervision" or "unruly children" to cover conduct which would not be criminal if committed by an adult.[72] However, even in these jurisdictions, although the adjudication might have been different, the eventual disposition was most often the same as for the delinquent youth.[73] Even where separate dispositional alternatives existed, violation of a court order under a finding that a child was a person in need of supervision, in most instances, brought the child under the delinquency jurisdiction of the court.[74] Thus, a young person who had never committed a criminal act could, in fact, become a delinquent on a basis of failure to obey a probation order by a juvenile judge.

Those states reacting to the federal act have done so in a variety of ways. Some states have initially established a new category for status offenders and then limited the number of dispositional alternatives available to those children upon such a finding. In 1977, Arkansas enacted a Juvenile in Need of Supervision Act; one of its critical provisions is its limitation on placement or detention of juveniles falling under its authority:

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67. 42 U.S.C.A. §5633 (a) (12) (A) (Supp. 1978).
68. 42 U.S.C.A. §5633 (a) (13) (Supp. 1978).
69. 42 U.S.C.A. §5633 (a) (12) (A) (Supp. 1978).
70. Ala. Code tit. 13,§350 (3) (1959).
71. Ala. Code tit. 13,§361 (1959).
72. Ohio Rev. Code Ann. §2151.022 (Baldwin 1971).
73. Ohio Rev. Code Ann. §2151.354 (Baldwin 1971).
74. La. H.B. 288 tit. I, chap. 1, art. 13(7) (1978).

> A juvenile determined to be a "Juvenile in Need of Supervision" shall not be placed in a Secure Detention" facility, or in any facility utilized for the detention of alleged or adjudicated "Delinquent Juveniles," and shall not be placed in any facility utilized for adults held for, charged with, or convicted of a crime.[75]

Iowa has created a new category called "Child in need of assistance" which encompasses its old dependent and neglected children as well as children who commit status offenses which had previously been denominated delinquent.[76] The primary focus of the category is clearly on the family as a unit rather than on the child as an individual requiring correction. Pennsylvania has acted by simply putting offenses previously known as status offenses under its dependent child category.[77] This resulted in successfully limiting the dispositional alternatives to placement in foster care or other non-secure shelter care facilities.

A few states have really taken radicial steps in experimenting with limiting their jurisdiction over the noncriminal misbehavior of young persons. Under the new California provisions, youngsters thought to be runaways may only be held for a maximum of twenty-four hours. If within that time the parents have not been located the youth will be released.[78]

The state of Maine has truly revamped its method of dealing with status offenders, giving up all juvenile court jurisdiction over such conduct save for offenses involving intoxicating liquor.[79] The state has, however, enacted a totally new chapter to deal with the interim care of runaways.[80] One section would permit a law enforcement officer to pick up a youth believed to be absent without consent from the care of his or her parents.[81] The youth may then be returned home if both the parent and the child agree,[82] or placed in an emergency placement such as a foster home, group care home or other shelter or non-secure detention placement if there is conflict.[83] Finally, if the parent refuses to allow the juvenile to return home and no other living arrangements agreeable to the juvenile and the parent can be made, an in-take worker can refer the juvenile to the Department of Human Services, who will determine whether or not a neglect petition should be filed.[84] If the juvenile is the person refusing to return home, the intake worker's only option is to offer the juvenile shelter in a licensed emergency shelter care facility, group home or foster home which is located as close as possible to the residence of the parent, guardian or custodian.[85] As is evident, these provisions go quite far in offering the juvenile maximum independence from court and parental coercion.

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75. Ark. Stat. Ann. §45-606 (1977).
76. Iowa Code Ann. §232.2(13) (West Supp. 1978).
77. Pa. Stat. Ann.tit. 11,§50-102 (4) (Purdon Supp. 1978).
78. Cal. Welf. & Inst. Code §207 (West Supp. 1978).
79. Cf. Me. Rev. Stat. tit. 15,§2552(1965) with Me. Rev. Stat. tit. 15 §3103 (Supp. 1978).
80. Me. Rev. Stat. tit. 15,§§3501 to 3508 (Supp. 1978).
81. Me. Rev. Stat. tit. 15,§3501 (1) (Supp. 1978).
82. Me. Rev. Stat. tit. 15,§3503 (Supp. 1978).
83. Me. Rev. Stat. tit. 15,§3504 (Supp. 1978).
84. Me. Rev. Stat. tit. 15,§3505 (Supp. 1978).
85. Me. Rev. Stat. tit. 15,§3504 (Supp. 1978).

Many other states have struggled with revising their juvenile codes over the last few years. Michigan, for example has had a series of bills introduced into its legislature over the last four years, each eliminating juvenile court jurisdiction over status offenders.[86] For one reason or another none of the provisions has passed and attempts to rewrite the code continue.

The questions presented by limiting or totally eliminating juvenile court jurisdiction over status offenders remain open. Probably none of the states in which substantial code revisions has taken place have enough experience with the results to indicate clearly that a particular method of dealing with the problem will suffice. Perhaps the most important thing to be learned from an examination of statutes is that change in this area seems inevitable.

ASSESSMENT OF POSITIONS

The Task Force standards, proposing jurisdiction over Families With Service Needs, places primary emphasis on using the juvenile court's coercive powers to obtain needed services for the family unit. To do so jurisdiction is obtained not only over the child and the family but also over all agencies or institutions with legal responsibilities to the the parent and the child.[87] Crucial to an adjudication under its provisions is the requirement that a specified behavior be proven, an exhaustion of available non-coercive services be demonstrated, and also showing made that some other kind of services are needed.[88]

This focus on the family is also part of the attempt emphasized by this set of standards to ensure that the traditional harmful side effect of status offender jurisdiction, not accrue to those individuals coming under Families With Service Needs jurisdiction. Besides the concern with the possible stigmatization problems of status offenders, there is also a recognition that these youth are often confined in secure detention or commitment facilities with delinquents for lengthy periods of time.[89] To protect against such possible abuses the Task Force standards contain standard 12.8 which prohibits the use of pre-adjudicatory shelter care unless it is "clearly necessary to protect the juvenile from bodily harm and all available alternative means of adequate protection have been exhausted."[90] Even when such conditions do exist, efforts are to be made to be sure that the protection is afforded in the least restrictive setting and also to assure that the juvenile does not come into contact with juveniles who are being detained pending or post-adjudication or delinquency petitions.[91]

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86. Mich. H.B. 4704 (1975); Mich. H.B. 4376 (1977).
87. Task Force Supra, note 47, at Standard 10.3.
88. Id., Standard 10.2.
89. Id., at 312-313.
90. Id., Standard 12.8.
91. Id., Standard 12.8.

Similar protections are written into standard 14.23 defining disposition alternatives for Families With Service Needs. Although judges may place the youngsters in alternative care, they must not be sent to institutions in which deliquents are confined.[92] The commentary further makes it clear that confinement in any institution with a security system involving locked doors is inappropriate.[93] Thus, juveniles under the Task Force standards will be protected from one of the main problems of status offense jurisdiction in the past, i.e., commingling with delinquent youth, in detention and secure treatment facilities.

Perhaps this concentration on the family may also account for one serious omission in the Task Force standards, which is the lack of a delineation of the applicable standard of proof or rules of evidence to be used in Families With Service Needs cases. Since one of the major objections to earlier status offender jurisdiction over youth was the lack of procedural protections, one would think that these issues would be addressed by any set of standards proposing new provisions. Instead, although these issues are addressed in both the delinquency and the endangered child area there is a clear gap with respect to Families With Service Needs. In the delinquency area the standards make it clear that the standard of proof shall be "beyond a reasonable doubt"[94] and that criminal rules of evidence shall apply.[95] On the other hand, in the endangered child proceedings "clear and convincing evidence"[96] and the civil rules of evidence are being used.[97] State Families With Service Needs seem to fall somewhere in between the two, there is no clear guidance as to which set of standards should be applied in these cases.

The Advisory Committee standards, on the other hand, make it quite clear that in noncriminal misbehavior proceedings proof "beyond a reasonable doubt" will be required in order to sustain a petition.[98] Likewise a child will be provided with counsel and with all the protections of the criminal rules of evidence, the right to confront and cross examine witnesses, and the right to compel the attendance of witnesses.[99]

The Advisory Committee standards also go on to protect against harmful detention or confinement of youth charged with noncriminal misbehavior by only allowing detention in shelter facilities, and only then when "the juvenile is in danger of imminent bodily harm and no less coercive measure will reduce the risk or when there is no person willing and able to provide supervision and care."[100] Likewise, the youngster is protected at disposition with a provision that states "in no case should the dispositional order or the enforcement thereof result in the confinement of a juvenile in a secure detention or correctional facility or institution."[101]

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92. Id., Standard 14.23.
93. Id., Commentary to Standard 14.23.
94. Id., Standard 13.5.
95. Id., Standard 13.4.
96. Id., Standard 13.7.
97. Id., Standard 13.6.
98. National Advisory Committee, Supra note 59, at Standard 3.174.
99. Id., Standard 3.171.
100. Id., Standard 3.153.
101. Id., Standard 3.183.

Even with these excellent protections afforded youth by the Advisory Committee standards the issue must eventually be reduced to whether court ordered services will benefit these families. Both the Advisory Committee standards and Task Force standards, as mentioned earlier, have significant problems in the enforcement area. Although some potential for coercion exists over parents and their children, only limited power will exist over agencies and institutions required to provide services to youth.

Considerable difficulty has surrounded the attempts of judges to require agencies to provide a particular form of treatment for youth coming before their courts. A number of appellate courts have overturned juvenile court dispositional orders as being in excess of the authority of the court.[102] New York has attempted to solve this problem with the addition of a specific provision in the Family Court Act granting the court power to "order any state, county, municipal and school district officer and employee to render such assistance and cooperation as shall be within his legal authority...to further the objects of this act." N.Y. FAM. CT. ACT §255 (McKinney 1978). But even this broad grant of authority may be insufficient to enable courts to provide services to families and children since the need for services must be balanced against the particular circumstances of the agency,[103] and the actions of some agencies may not be reviewable at all.[104]

Of course this does not mean that courts are totally powerless to effectuate their treatment orders, since they can release from custody children who are not receiving necessary care. This, however, does not solve the problem, but only releases the child or parent from coercion if treatment is not forthcoming.

Unfortunately, the ability to coerce either child or parent into receiving certain services, even when available, does not mean that benefits will be derived therefrom. Further, reliance on juvenile courts to solve community problems may indeed encourage a locality to ignore significant difficulties existing in schools or other local institutions.

On the other hand immediate cessation of juvenile court jurisdiction over young persons is sure to create its own difficulties. Certainly numbers of children and families will be left without resources upon which they have come to depend. It is hoped that just as communities in the late 1960's and early 1970's responded to the large number of youth gathering in urban centers by opening runaway shelters, localities will take responsibility for the services needs of its members.

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102. In re Doe, 390 A.2d 390 (R.I. 1978); State of New Jersey in the Interest of D.F., 367 A.2d 1198 (N.J. 1976); Matter of L., 546 P.2d 153 (Ore. App. 1976).
103. In re M., 351 N.Y.S.2d 601 (Fam. Ct. 1974).
104. New York City Housing Authority v. Miller, 390 N.Y.S.2d 806 (Supr. Ct. 1977).

No doubt some young people and their families will go without needed assistance if juvenile court jurisdiction over noncriminal misbehavior is eliminated. However, the problems of dealing with the resulting unmet service needs should be no more difficult than assuring that the innumerable and often inherent problems accompanying jurisdiction do not continue. Finally, so long as our best efforts at treatment have demonstrably positive effects in only a small number of instances I cannot support their coercive imposition. If our focus is not upon placing guilt or punishing Families With Service Needs, they must be left on their own to make truly voluntary choices about services they will accept.

(TRANSCRIPT FOLLOWS)

MR. SIEGEL: I will go very quickly.

I just want to add a few additional reasons why I support the position that Ms. Connell took considering the IJA standards of elimination of jurisdiction. What is -- I think a lot of runaways fail to seek out help because they know -- fail to seek out help from crisis centers or runaway shelters or counselor programs because they have a fear that if they do, they are eventually going to come to police custody and go to the court; and if they were aware that it wouldn't be in the policy and court realm, many who now run and become prostitutes and get involved in crime and go to other states would affirmatively seek out help.

Another point I want to make relates to what Pat said about keeping the family together. The whole idea is to try to get the family together

or to try to get the kid and school together, and this seems to me to be entirely counter-productive because what you are doing is pitting one member of the family against the other -- the parent against the child -- which seems to be just the opposite of an effective therapeutic approach.

It's been -- another point I think should be made is that some studies have estimated that a third of these cases could still legitimately be in court as abuse and neglect cases, and I think it's a tragedy that we are dragging many of these kids in and labelling them as delinquents and, in fact, criminals, when it's really their parents who should legitimately be taken to court.

Also, many of these cases that prosecutors and schools are taking to court could legitimately be taken to court as delinquency violations; but it's much easier for a prosecutor of the school to try to prove a morphous nebulous term like ungovernable or incorrigible and they are taking the easy way out. If there really is a specific violation like a destruction of property or an assault, make them prove that and let's not give them this easy way out of the status offense

label.

The -- another point I think that should be made -- that Ms. Connell made very well, that these problems are much more effectively solved on a voluntary basis by use of a voluntary community agency; but many of the community agencies are unwilling to deal with court-associated youths. So people who have been -- to kids who have been dragged to court, really have been turned away by the programs that can actually help them because they have been labelled stigmatized because they have been taken to court; and a large argument that I know many of the judges make is, yes, it's better to deal with these problems through community and school and counselling agencies, but they just don't exist. Well, if they don't exist to be used on a voluntary basis, they don't exist to be used in a court-related basis. I mean, the court could only send kids to programs that exist within the community. So I just don't think that argument -- the research that is here is very persuasive because the court itself can't send kids to resources that don't exist. So it's up to the community to create the resources, and I guess those

are the only points I wanted to make,

MR. MANAK: Okay, Mr. Rounds?

MR. ROUNDS: We had a situation in California that sort of illustrated the problem in that California required no coercive detention of status offenders, and many of the counties simply dropped them -- didn't handle them, didn't file petitions. The anticipation was that they would automatically go over to private agencies. They did for a short period of time. The private agencies in at least two of the urban counties were immediately flooded and beseeched the Juvenile Court to get back in the act. Presumeably what the Juvenile Court had been doing what the private agencies couldn't were -- or were not set up to do, were placements in foster homes and supervision of the status offenders within their families.

I'd like your comments, really, on this situation; that is, that when we actually disbanded the status offender jurisdiction, the situation was chaos and still is.

MS. CONNELL: Okay.

I -- I would like a definition of what you mean by supervision of the young people

in their homes.

MR. ROUNDS: For the most part, the court would make a true finding on a status offense petition.

MS. CONNELL: I understand what a court would do, but what was the voluntary agency asking be done with these children?

MR. ROUNDS: There was none because the court would make a placement in the home under the supervision of the probation department with much talk of can we reconcile this whole situation; and it was working apparently in a substantial number of cases, at least to the extent that the child was staying in the home; and when the court stopped intervening, the private agencies were delighted, initially, of course, that the courts weren't going to intervene and were immediately just flooded with kids.

MS. CONNELL: Well, I think that's not too surprising. I think the point that you make is a very good one -- that when the court stops imposing services, there are a lot of people out there who would go and voluntarily look for them. If these services do not exist, I still don't think that's

a reason that there should be increased Juvenile Court jurisdiction.

If indeed the Juvenile Court is where the resources are, perhaps whatever body it is that funds the Juvenile Court in the first place should think seriously about realigning that set of resources. But the lack of existing resources is not, to me, a valid argument for the continuation of Juvenile Court jurisdiction. I understand that some -- that resources will be exhausted, but actually, that says to me that more people are going to get help once the court gets out of that system because people will be more likely to turn and ask for help if they realize they are not going to be stigmatized.

MR. ROUNDS: Thank you.

MR. MANAK: Is that it, Pat?

MS. CONNELL: Yes.

MR. MANAK: Miss Bridges?

MS. BRIDGES: I have no comment.

MR. MANAK: Okay, Mrs. Szabo?

MS. SZABO: Yes, you mentioned in your presentation that you recognized the problem as a result of eliminating status offenders from the court's

jurisdiction. The possible result may occur that you would not be giving services to families who may actually be needing them.

Now, what would be your solution, practical solution, for dealing with this problem? Would you advocate setting-up a statewide or some local division of youth and family services to act as a family agency to identify families who actually need the services and turn them -- channel them to the proper services to replace the court?

MS. CONNELL: I don't believe that there is a problem with families -- that the problem of finding services is really where the problem lies. I think the problem is with making services available to people who have very limited resources in the first place. I don't think we need a statewide system to set up a referral agency. I think what we maybe need is some statewide provision of services on a voluntary basis.

Now, I don't -- I am not so naive as to think that is going to happen. I don't think money is going to be taken out of Juvenile Court budgets to open new services, whether they be alternative services or services that are part of

a statewide system; but given that I realize that, I still think that the harms that happen in Juvenile Court jurisdiction are so great that if some people go without those needed services, the over-all effect will be of a benefit to most children who are now being brought under Juvenile Court jurisdiction.

MS. SZABO: Thank you.

MR. MANAK: Judge Delaney?

JUDGE DELANEY: I'd like to ask Ms. Connell this.

How do you distinguish between a -- say a thirteen year old kid who is destroying himself with drugs or abuse or excesses of one kind or another with his health to say or otherwise harming himself and the mentally ill adult who is doing the same thing?

In the latter case, we intervene on the basis of protecting himself from his own destruction. We hospitalize him, we confine him if necessary.

How do you distinguish the two? Why do you have one standard for the adult and a different standard for the juvenile?

MS. CONNELL: If the young person is mentally ill under our standards --

JUDGE DELANEY: I'm not talking about mental illness. I am talking about a child who, because of immaturity, lack of experience and control is doing these things, not a mentally ill person. I am talking about a child who, because of his immaturity is destroying himself versus an adult who presumeably has the maturity but not a capacity because of mental illness. How do you distinguish the treatment of the two or just how do you justify the treatment of one and the exclusion of the other?

MS. CONNELL: I think if there is incapacity by virtue of mental illness that can be demonstrated, you intervene in either person's life. I don't think there is a difference of standards -- well, I would not propose a difference in the standards. You would have the same standards, but I suggest that a child should not be interfered with simply because that person is younger than another person.

JUDGE DELANEY: Well, I am unable to make proper choices.

On the one hand, the adult is unable to make a proper choice because of mental illness.

On the other hand, the child is unable to make the proper choice and protect himself because of immaturity or lack of experience. You don't see -- you don't see any parallel.

JUDGE MC LAUGHLIN: I don't think she understands -- do you understand what the Judge is trying to say?

MS. CONNELL: Well --

JUDGE MC LAUGHLIN: A thirty-five year old man who wets his pants, can't tie his shoes, is mentally ill, right; and you know, you protect him from himself. Now, a ten-year old child is a perfectly, quotes,he is not mentally ill, he is a normal ten year old child; but because he has the discretion of a ten-year old child, and he is using that discretion, there is no one to protect him and he is out destroying himself. They are both doing the same thing. One is doing it because he is ill, the other is doing it because -- he is not ill, the child is not ill. The child is simply doing it because the child is simply a child; and we will not let the thirty-five year old man, because of illness, destroy himself. Should we let a ten-year old child destroy himself because he is

a child?

JUDGE DELANEY: That was the question I was asking. I would like your distinction between the two.

MR. MANAK: Mr Kaimowitz?

MR. KAIMOWITZ: I am sorry, Pat.

MS. CONNELL: That's okay.

MR. KAIMOWITZ: The reason that I am going out of turn, I will try to respond to Judge McLaughlin because I think I may have more experience with this kind of thing.

JUDGE MC LAUGHLIN: Don't respond to me, I was just trying to --

MR. KAIMOWITZ: I understand the question on both ends, and I think that several of us who have worked in both areas say about the thirty-five year old man can't tie his shoes or urinate that, (a), you have got to have at least a provable act that he is harmful to himself -- that in Michigan, about the same attack is used -- a goal clearly has been used in the other areas as well, and I think it cuts against those who want to retain control over the thirty-five year old adult as well. I think the analogy is very fitting, and the answer

is they are synonomous; but just the opposite from what the judge is suggesting by his question; that is, that until you have a provable act of destruction rather than your assumption that a is destroying himself rather than the thirty-five year old man, cannot care for himself, then according to the O'Conner vs. Donaldson Decision that clearly due process is needed, and at the other end, that unless you can show possible harm against the same difficulty, that you have to let your hands off of both; and I think that many of us have been working on parallel attacks, and I, you know, don't want to override Pat, but I am just saying that the analogy does work and the question is whether society can intervene when there is no destructive element to somebody else that is provable on a legal standpoint.

MS. CONNELL: I think, additional, if there is proof of evident bodily harm, there is a possibility of intervening that child's life on the basis of neglect jurisdiction.

JUDGE DELANEY: I am pretty sure a thirteen year old kid living in a jungle is going to be hurt, can't you? Just as you can be pretty sure

that a person who has not the capacity to cross a street and is going around loose on a busy thoroughfare is going to get hit by a car.

MS. CONNELL: Well, I think the decision about what eminent bodily harm is is a judicial decision.

JUDGE DELANEY: Can you exclude it?

MS. CONNELL: It's my -- you know, under my discretionary decision. It would be -- no, I don't think that just because he lives in the street that he necessarily is in bodily harm.

JUDGE DELANEY: You would take this out of the jurisdiction of the court so that we could not make a decision, you see?

MS. CONNELL: No, I think if the child were under eminent bodily harm you would have the ability under neglect standards.

MR. MANAK: Well, Judge Arthur?

Judge Delaney, are you complete on that point?

JUDGE DELANEY: Yes.

MR. MANAK: Okay, Judge Arthur?

JUDGE ARTHUR: I guess I agree with one statement Ms. Connell made, and that is the state-

ment, this subject has been so discussed and so written over and I assume everybody in this room sees him or herself to be an expert on the thing, and there have been some outstanding articles that I have written and I hope you all have read.

Let me just try to make three points and then pose a question; and frankly, it's a question to which I do not have the answer.

The points are first, and it's following up on Jim's point, that if by removing the status offenses completely from the Juvenile Courts, again I think you are saying you are emancipating kids at any age, you are saying to an eight-year old you can decide whether to go to school or not, nobody can compel you anymore. You are saying to a ten-year old girl, a fourteen-year old girl, you can go live with whom you please. Go live with any old dad. Nobody can do anything about it. Your parents aren't neglecting you, they are trying hard to protect you. But you just go do what you please because there is nobody out there that can tell you what to do.

Part of the equality argument is that children are to be treated as adults and given

equal rights; but by removing these status offenses you are saying to the kid, make all these decisions for yourself, that you have the maturity to know what your options are, you have the maturity to know what the consequences of following either option is, drop by the school if you want. I would say that's not eminent bodily harm, but I would say that's harm to the child to let a child drop out of school, the same as it's harm to a child if you let him decide whether to go to the dentist or not. If you give him freedom of choice, he is going to say no.

So, I think the first point is following-up from Jim's. I think the kids are by definition, immature. If you can find a maturity test, as one of these papers suggest, then that's swell, and let the kids have maturity when they are able to cope; but, by definition, I don't think they can at age six, seven, eight, ten, twelve, fourteen, and some of them up into sixteen and seventeen.

The second point, I think there are a lot of people out there that are not willing to go get help, and I think these are the ones that are

in the courts now. The people who are willing to get help -- there are plenty of resources out there for them and they can go to all kinds of places; but there is an awful lot of people out there who are not willing to go get help. They'd rather watch the tube. Frankly, I'd rather have a beer than to go talk to a social worker today, if you don't mind. Frankly, I am not going to give a darn. I care about my children and you know that and I am a loving father and I am a loving mother, but I am not going to go downtown and talk to that person and see that person or do this; and I think that what we are talking about is not the people who are willing to get help, but the people who are unwilling to get help. These, I think, we need to compel into a healthy situation, and I think compelled treatments can be demonstrated to function.

The third point I would make is that I don't see the alternatives. It's nice in the volume that Laden Gott (phon.) had spelled it out in great detail about all the things that the communities are going to provide, the wonderful service, close enough that everybody can walk to

the neighborhood family helping service, and each one will have a psychologist and each one will have a social worker and each one will have a job counselor, and all those wonderful things. It just isn't going to happen within walking distance, within a few square miles of every citizen of the United States. My God, what kind of money have we got for something like that? It isn't going to happen, and I think it's well enough that, as you had said in your own statement, that I heard you, it's not there and it won't get there for a long time. Abandon the generation of kids until we get something like this.

You make the analogy to the sixties when so much was done. Some of the minorities and people like that. There was a tremendous push and an urge in back of that. There is no push and no urge back here. There is no sub-cultural revolution pending. This kind of a thing. I don't think that the communities in the year of Proposition 13 are as willingly going to provide all the things that Laden Gott says they have got to to make these things work; and unless they are going to provide us, someone has got to order

them to provide us; and if they are not going to do this on their own, then it's up to the courts to order somebody to provide the help that this poor kid needs; and if you are not in the court, then there is no way to require the help and require the people to go.

Let me just end up with a query, and the query is this, and I have tried it out on quite a few audiences, and I always get a fifty-fifty view. If I get a child in court now for truancy, and I order the child to go back to school and the child doesn't go back to school, should I find him in contempt of court and send him to the training school because he was in contempt of court which is a criminal adult kind of an offense? In your paper, as I read it, you advocate that. In other words, he can be a status offender just once, then he becomes a criminal offender because he is not in a contempt situation. That doesn't strike me as logical to say that you can bootstrap in a contempt situation and accomplish by contempt what the legislature says you cannot do directly. I think your philosophy is off, and yet on the other hand, I am very much torn by the need

to get some help to some of these kids. So I don't know where you go in this contempt thing.

MS. CONNELL: Okay.

What I -- I think maybe what you are reading is some of my descriptive material. I indicate that that is true in some states at present. I also note that there are terrific enforcement problems with status offender jurisdiction, and that essentially there is one of them that I see as very troubling. That's one reason why I think the Juvenile Court jurisdiction cannot work. You cannot keep those young people from getting some kind of stigma, some kind or fairly coercive, you know, -- some hammer has to hang over those kids' head to get them to do what we believe is in their best interests. I don't think that's appropriate, and that's why I would suggest that Juvenile Court jurisdiction over these young people, over this kind of behavior, just is not effective.

JUDGE ARTHUR: So you also eliminate contempt jurisdiction?

MS. CONNELL: Oh, yes, in these kinds of cases.

MR. MANAK: Okay, Judge Moore?

JUDGE MOORE: I want to be very brief.

Again, this is obviously the hottest issue I would think, probably in the general public, of any of the standards. I think we ought to have a footnote here -- she did an excellent job -- and that footnote would be in one of the areas and not his eighth, but sixth volume, and I certainly would not the public to think there is now a consensus among the groups that do not have input in the criminal justice system that the IJA standards problems have all been resolved, including this one. Because I know of three organizations, one of which is the National Counsel, the other of which is the Judicial Administration section of the America Bar, and the third of the American Psychiatric Association which strongly disagrees with this proposed volume.

Secondly, I would indicate that I think a very simple issue, and that is whether or not you believe that the court's intervention is the last resort and is less detrimental to a child for allowing the child not to have any kind of intervention, and make all the decisions himself; and I

think that's where we have disagreement, and we are never going to resolve that issue because we come from a slightly different approach on that and we can argue all day.

Number three, is I don't think we can address the IJA/ABA standards and say that the child who leaves home and becomes -- who lives with her boyfriend every night, will be solved as an elect solution. I agree with the IJA/ABA standards that there is nowhere that you can plug that kind of child in. We can certainly plug the child into the neglect and abuse standards whose parents are sexually abusing the child, or a member of the household is sexually abusing the child. We can also plug a child into the neglect area if we find that the child is committing delinquent acts and the parents are the causes of that. But we cannot plug into the neglect volume the child whose parents are concerned, whose parents want that child to receive treatment, want that child to receive help, but the child is resistive to it, and the child continues to be involved in sexual promiscuity with a boyfriend, or what have you -- that child, -- let's not kid anybody, as far as the IJA/ABA

standards are concerned, he won't come under the delinquency, she won't come under the delinquency or he or she will not come under the neglect volumes either.

MR. MANAK: Judge McLaughlin?

Dave Gilman, do you want to comment?

MR. GILMAN: Just a clarification on Judge Moore's statement.

Declare that the only organization that took a position in not supporting our non-criminal misbehavior position was not the Counsel of Family Juvenile Court Judges. The other two were not organizational positions. One was by a special task force of the American Psychiatric Association, but the American Psychiatric Association did not endorse that, nor did they vote on it, nor did the Judicial Administration take a formal position. Only the special conference of Special Trial Court Judges of which Judge Cattle was the chairman, that was only on that principal and not a review of the volume. So there were nine organizations, only three and only one full organization took a position and two others were a special task force so --

JUDGE MOORE: When you talk about nine organizations, let's be clear on that. I am a member of the American Bar Association and I am also a member of the Judicial Administration and I am also a member of the Family Law section and I am also a member of the Criminal Law section, and none of those sections of the American Bar have ever asked the members of those sections to take a vote on any of these issues. What we are talking about is decisions which were made by the controlling body; and to say that we should give more weight to the Family Law or to the Criminal Law Committee of the American Bar, then you should give to Judge Cattle's group to me is lunatic because none of the groups have taken a vote of all members of that particular unit within the American Bar.

MR. GILMAN: I would suggest that that is true of all the organizations.

JUDGE MOORE: Right.

MR. GILMAN: Because it's certainly true of N.D.A.A., but that's not the way that decisions are ordinarily made by these organizations. The committee is appointed, in the case of N.D.A.A.

A special committee to consider the IJA/ABA standards was formed. Mrs. Thompson, as a matter of fact, was the chairperson of that committee, and that's the process.

JUDGE MOORE: All I am saying is that's unfair to Judge Cattle's committee to say that that committee should be given less weight within the American Bar, whether it would be the Family Law section or Criminal Law section or the Young Lawyers section, and those are merely committees of the Bar, and the decision was made for those sessions, again through a group of appointed people, just like Judge Cattle's committee within his section who made the decision.

MR. GILMAN: But that's representative government.

JUDGE MOORE: I am not saying that. I am saying what I heard at noon's speech was that his committee's recommendations have kind of been disregarded, and the American Bar's other committee's have been given support. I don't think that's a fair statement.

MR. GILMAN: I didn't make that statement, Judge. All I said was --

JUDGE KETCHAM: Mr. Gilman, I think you said that the section on Judicial Administration made a decision against this. I know that much.

JUDGE MOORE: I am saying that Judge Cattle's committee --

JUDGE KETCHAM: No, you didn't say it that way. You said Judicial Administration Division. Now, it has several parts that have taken different views.

JUDGE CATTLE: That's exactly right. They have taken different views. I think a point on that is that they -- at least from my committee, that's all I can speak for, what we did was, within the time allotted, we sat down with the major objections and changes. We would come to something we didn't like, but we -- simply didn't have time to go over to revise them. As it was, we came up with something like an inch thick piece of paper, and we didn't even -- we only pretended to cover about ten of the titles.

So, I don't think that there is any really consensus of agreement on it. I am not saying that my opinion is any better than anybody's but I hate to see -- and I heard it this noon, that

we were -- finally, that we were substantially in agreement now and everything's all right.

MR. MANAK: Okay, Judge McLaughlin?

JUDGE MC LAUGHLIN: I agree with Judge Arthur, but everyone here has probably stopped at a position, whether they afford it or I don't think anyone is going to change it because we are sitting around in Chicago. I do think, though, that we should get some facts out. Everybody wants to keep the PINS away from the J.D.'s, you know, I think anybody who has handled PINS will tell you that the J.D.'s need protection from the PINS, it's not the other way around. All right?

The PINS are an industrialized society like we have here today. The label of -- the person who is ungovernable, is much more of a danger to the society and is going to get in a lot more trouble ultimately than the boy who goes out and, you know, whatever -- steals an automobile.

I think we forget, however, that in industry, and we all know that these records aren't confidential as they quickly get out, all the people in the community know, it doesn't take you two minutes to find out what's happening. A boy

who is labelled or a girl who is -- a girl who is labelled PIN is automatically, structurally, promiscuous, I don't care what the Juvenile Court says, that's why she is there. A boy who is labelled the PINS has a much more difficult time, has a much more difficult time getting a job because he finds it much more difficult to explain away a PIN adjudication than he does a single JD event in his life, okay?

So that I think we tend to think the PINS label is something less bad, if you will, than a JD; and I think I personally think quite the opposite. Now, with Judge Cattle, I agree with Judge Cattle in one of his points -- a lot of his points, but one point particularly, that one of the functions of a Family Court -- there are many functions, but one of the functions is to provide a form by which children become aware of society's muscle. You know, we are not going to come down on them hard now; but the fact is, we are giving them the message that you are going to obey these rules, and, if you don't obey the rules, then some bad things are going to happen.

Now, the only reason I lean toward

taking the status offenders out of the court is that, along with Judge Cattle, if you are not going to lock the door -- in other words, if you can't use force, and that's the only function of a court, to use force, really, ultimately, all right -- where society's device is to decide how much force is going to be used and who is going to be the instrument of that force, you take a runaway child and the court puts him in an institution, and then you tell the institution he can't lock the child and the child walks out the door, he is beginning to get a message which is totally incorrect, and the message is that we are really not going to be very serious about breaking society's rules and if you can do -- you know, a judge will tell you to do something, but you really don't have to do it if you don't want to, and that can be absolutely fatal; and when you talk about well, I don't come from a big city, look. When you talk about big cities and survival on the streets, it can be absolutely fatal to get the idea that society won't kill you when you disobey it's rules because we will and we have done it and we will continue to do it like all other societies;

and that's -- it's this breeding in the child's mind, you know, the child who comes in as a PINS at eleven, twelve, thirteen, fourteen, and every -- everytime the judge makes an adjudication, you know he promptly disobeys it, then he suddenly gets this idea that he can keep doing it. I think it's very dangerous and very misleading.

Now, finally, as I say, you can argue on this thing both ways, but the idea of putting children in institutions, putting the family in need concept, I don't think anybody is going to talk about putting adults in institutions. Just as soon as you saying that you can put an adult in an institution because he or his family is in need, it's going to be up to the U.S. Supreme Court instantaneously. So we are talking about putting adults in institutions under this family need concept and I think that's smoke; but the neglect isn't the answer either, as Judge Moore pointed out. Even if you could bring these children in on a neglect provision, the fact of the matter is that who goes to the institution, you know? You are saying your mother neglected you so we are going to put you in an institution. You know, that

doesn't make sense; and then this idea that if we let children -- if the court isn't going to use force, then society is not going to use force.

I submit to you that what we are talking about, quote, helpful families who, you know, the non-neglecting family who is trying to help it's child and all that, the family has the right to use force, and it always has. You know, Judge Arthur said, you know, the child won't go to the dentist, you know.

Families make children go to the dentist. You pick them up by the scruff of the neck and drag him down to the dentist he goes; and that's how families function, through physical force; and as the kids get too big to use physical force, you then go to persuasion. But the fact of the matter -- what I am saying, is that the fact of the matter is that because the court's cannot use force does not mean that there is no force against children. The family still has the right to use force.

MR. MANAK: Okay.

We are getting pretty far behind on our time frame. I am going to ask the coordinators

to waive their comment time, unless, Anne, you feel that you want to respond?

Mr. Hutzler?

MR. HUTZLER: I have a very specific point to make in regard to this, but I perceive our role as somewhat secondary now, and I will defer in the hope that one of the Respondent's will say it.

MR. MANAK: Charlie?

DEAN SMITH: I pass.

I just want to commend the presentation for it's excellence, and beyond that, I have nothing else to say.

MR. MANAK: Judge Cattle?

JUDGE CATTLE: All I would like to know is what alternatives are going to be provided for a child, what we call a status offender runaway, for instance, because I have seen the alternative as a prosecutor and as a judge -- Juvenile judge, and in a dozen other hats, too, and what results is not very pretty; and now, granted that I am a total failure when I try to prevent it happening, but I am trying to prevent it from happening. I am doing everything in my power to keep it from happening, and if I fail ninety percent of the time, I am not

very happy about it, but I can't give up and let the failure be a hundred percent.

That's all I want to say.

MR. MANAK: Judge Fort?

JUDGE FORT: I have nothing to add.

MR. MANAK: Judge Ketcham?

JUDGE KETCHAM: Well, in law school I was taught evidence by a famous Texan by the name of Professor McCormick that you will remember, McCormick on Evidence, and with a good Texas drawl that I can fairly imitate, he gave me some practical advice along with other budding trial lawyers. It was that, "When you strike oil, stop boring."

Now, many of you know my views as expressed on the subject in an article I wrote in the Boston University Law Journal entitled "Why Jurisdiction Over Status Offenses Should Be Eliminated From The Juvenile Court." Even though Ms. Connell hasn't read or doesn't cite that article, she came to the same conclusions. I'll rest my case.

MR. MANAK: All right, Mrs. Sufian?

MS. SUFIAN: I will rest my case on Judge McLaughlin's statements.

MR. MANAK: Okay, Mr. Hege?

MR. HEGE: No.

MR. MANAK: Mr. Kaimowitz?

MR. KAIMOWITZ: Several comments.

First, let me retract the compliment that I paid Judge McLaughlin this morning. I don't want to be put in a totally unattainable position. I spoke much too quickly.

Let me try to put one thing that I think he started to point out in the discussion on Judge Delaney and Judge Arthur in some kind of perspective; that perhaps the most interesting case relevant to this discussion that is currently before the U.S. Supreme Court does not concern children at all, but concerns an adult by the name of Addington, where the question of committing against a person's will, an individual, whether that person can be committed on the basis of a preponderance of evidence test of a reasonable doubt test meaning, does the commitment or confinement become the focus, if so, a reasonable doubt becomes the question or; is it a question of something less, i.e., preponderance of evidence because the deprivation of liberty is somehow different if you

do it because a person purports to be mentally ill.

I think if we go back to what Judge Delaney said, in his example, of the thirteen year old destroying himself on drugs, as a juvenile defender or a person who has been in that, I have a simple answer to that. Prove that he is taking drugs. Not what you couldn't do with an adult, assuming the statutes, because what we are talking about, ultimately, in this area, is a burden of proof, in every example that was given, including Judge Arthur Moore's example of the fifteen year old who is sleeping with this man. Prove your statutory rape and separate the two. What the Juvenile judges are asking for consistently and why they need to hold onto the status offense, is that they need exactly what I think Mr. Siegel alluded to earlier, which is a lesser standard of proof. We know this person is destroying himself on drugs. We know this person is sleeping around. We know this person is incorrigible. What we are suggesting, I think, those of us who have come to the position,at this time, that status offense must be abolished, is that

the proof must be, in fact, a delinquent act.

I don't think it's just a question of a PIN label or a neglect label, though I would like to briefly comment on Judge McLaughlin's position along those lines; that if the problem is that you cannot tell a child that is neglected that you ought to be detained, I think you have very clearly phrased why status offenses have to be abolished; that in fact, that's what you have been doing for years; but now it would, ultimately, be put right there, that a child, let's say, who has run away from being sexually abused, but you can't prove his sexual abuse, might best be protected by being locked up on a ward somewhere. But if that was ludicrous to claim that you should detain a child because he or she is neglected; and I think that that part gets to be the crux of why the label becomes crucial.

And just one final remark, again, in an area that I think that none of the standards have alluded to and I do not understand why and it has caused a great deal of confusion, and I am -- Pat Connell did not cover it, and that is the status defense of curfew which has been, somehow, in

places like South Africa a very critical issue for minors. In this country, you can round-up in most communities any group of youngsters on the street corner, particular in the black neighborhood, I won't allude to a specific area, and have them put away on a curfew violation. The Supreme Court has made it clear that it does not want to consider that issue. I am troubled that at least in the area of standards that we do not recognize that curfew is as much of a status offense, and I do hope that the people who recognize that we are talking about getting rid of the abolution of standards offenses, we are talking about getting rid of the concept of the danger off the street, and that's where I most thought about what Judge McLaughlin said, that if you take your stand about danger, for instance, instead of pointing them to adults and the use of force for coercion, I think the kind of state that you are suggesting would be frightening and that's why I got up at that point.

JUDGE MC LAUGHLIN: I think I should make myself clear. I wasn't suggesting that. You probably misunderstood me. What I was saying

was that that was what was troubling me. That if you are going to take -- in other words, the plan -- ABA says take them out of court. The other two proposals, the task force and N.A.C. says keep them in court but do away with this business of locking them up, and this is what disturbs me.

I think if you are going to keep them in court, then I think you have to go to force. I am not saying we should do it, I am saying that court and force go together. If you are going to keep them in court, then you are going to have to say we are going to do it -- we are going to have to use force. You can't say you are going to be in court on the one hand and we are not going to use force on the other. That was the point I was trying to make,

MR. KAIMOWITZ: What I am trying to say is that you can use force separate from status offenses with a due process connection, and here I would have to, you know, go through the example that Judge Arthur used to begin with where, again, it's a question of contempt of court.

Well, I would have no trouble with contempt of court with Judge Arthur for a completely

different reason, unless you enforce it the way you envision. Contempt enforcement requires something else. You would have to prove, for example, that that youngster did not wilfully go to school, that that youngster could control that condition. Michigan, for example has had on its books that a youngster, to be found guilty of school truancy, has to be wilfully truant. I have tried in, I would say at least seven different courts, unsuccessfully, to raise that standard. If the child is not in school, there is a presumption of wilfulness.

The standard again for contempt becomes different. Again, the standard for proving the act which entitles you to force is quite different than simply saying sure, the kid ran away from home, we don't have to provide proof of anything else. He is not at home, is he; therefore, he has run away and it comes back to the fact that as long as you are going to have a real court, one that does use force, all I want to try to do, certainly, is a continuous connection with due process and if when you raise the concept, for example, of contempt, the standard is not simply a

retrial of, oh, you didn't go to school again, and, therefore, you are now to be found in contempt, that simply would not do as a standard.

MR. MANAK: Okay, Mrs. Thompson?

I am going to have to limit these last remarks to one minute.

MS. THOMPSON: Okay.

Well, let me just say on behalf of the American District Attorney's Association, a special committee was set up to review the IJA/ABA standard was at this particular volume on non-criminal misbehavior was probably not the volume of greatest focus in controversy, not so much, perhaps, the juvenile delinquency or the transfer volume or the policy handling of juveniles, but nevertheless, it certainly was a key volume which generated a great deal of discussion and interest on the part of the district attorneys. As you probably know, when the board voted on the final report, the Board of Directors of the National District Attorney's Association in July of this year, the Board voted to support the position of the IJA/ABA standards for the elimination of jurisdiction over status offenders in the Juvenile Court.

I might say that during the year of discussion, however, certainly that issue brought forth much diverse expression of opinion and concern and deliberation on the part of the district attorneys throughout the country. I am not sure this could be a hard and true observation, but I think that generally speaking, district attorneys in some larger, more metropolitan areas tended to favor the position of the standards more enthusiastically than the D.A.'s in the smaller, more rural areas where there was a tremendous concern that the coercive intervention of the court with status offenders wasn't very effective and the necessary force in the community. That there certainly was nothing else to substitute for it, that the suspicion of the kind of abusive discretion in the court with regard to status offense treatment was simply not the case, and unwarranted, and a tremendous concern on the part of millions of D.A.'s living in particularly some of the smaller parts of the country with regards to this particular recommendation.

So I just am adding to the controversy, I suppose, by saying that it certainly is an

issue that can be discussed.

MR. MANAK: Okay, Mr. Sandel?

MR. SANDEL: Ms. Connell, my concern about the standard is based upon the apparent assumption that voluntariness will be more effective than coercion involving this problem.

My question is this: Are there research data in which you consider to be sufficient to support this assumption or is the standard based on untried theory?

MS. CONNELL: There is certainly research to indicate that services entered into voluntarily are more likely to be effective than when coerced. There is probably data that also indicates that some kind of coerced services are effective.

MR. SANDEL: And that makes a question.

The question is, will the services dependent on voluntariness, be authorized sufficiently if one goes into them if they are effective. The question is, will these people go into them if not coerced? That is the question, I did not state it well.

MS. CONNELL: Okay, okay.

Well, I think we have the experience

of California where the services were flooded with people who were interested in help. I think that certainly runaway shelter programs indicate their greatest problem is not in finding clients but in finding enough space to keep those runaways, enough counselors to counsel, more families who are coming to them with problems.

MR. SANDEL: So, it's your position that the standard is based on valid research data and not on mere theory?

MS. CONNELL: Let me say that I participated in the American Psychological Association's review of the standards. It was very clear to me after spending a couple of days with these psychologists, because they made it very clear, you can find research data to support anything you choose to assert.

MR. SANDEL: I still don't understand your position.

MS. CONNELL: It's my position, yes, that there is data that supports that.

MR. SANDEL: And that the standard is based on those data and not merely on theory?

MS. CONNELL: Yes.

4. Jurisdiction Over Abuse and Neglect

Consultant
Hon. Eugene A. Moore

Rebuttal
Gabriel Kaimowitz

ABSTRACT OF PAPER

At the outset, Judge Moore observes that comparatively little attention has been given to the proposed standards on neglect and abuse despite the importance and difficulty of the subject matter. After setting forth the black letter standards on this topic recommended by the IJA/ABA Joint Commission, the Task Force and the National Advisory Committee, he compares them on the following issues: the inclusion of dependency as a ground for neglect; the specificity of the statutory language; should the focus be on parental behavior, parental fault, or specific harm to the child; the degree of harm required; the inclusion of emotional neglect as a ground for jurisdiction; and the inclusion of sexual abuse, parental encouragement of delinquent acts, placement in an unlicensed facility, and parental failure to provide an education for the child as grounds for finding of neglect. With a few exceptions which are discussed in more detail, the three sets of standards offer parallel recommendations and are based on "the positions that juvenile and family court intervention in the lives of families ... should only be as a last resort and only in exceptional circumstances."

However, Judge Moore points out that "a problem arises in determining" what is meant by exceptional circumstances. For example, he criticizes the IJA/ABA standards for failing to include as a basis for jurisdiction, some definition of abandonment such as those included in the other sets of standards.

> [They] fail to recognize that the children who have no means of support should not have to remain in limbo without the proper parental guidance and control indefinitely.

Judge Moore also criticizes, in this regard, the definitions of the degree of physical harm required before a court may exercise its jurisdiction over neglect and abuse. He expresses a preference for the NAC minimum requirement of "bodily harm" rather than the more stringent provisions adopted by the Task Force and the IJA/ABA Joint Commission, suggesting that cigarette burns and multiple welts might not otherwise be included. The same issue is raised with regard to "emotional neglect" for which all three sets of standards require evidence of "serious" harm.

The paper also sets forth the arguments pro and con on whether the definition of neglect should emphasize the harm to the child rather than the fault of the parent, so as to avoid impinging unnecessarily in the autonomy and varying lifestyles of a family. Judge Moore comments that:

> [I]t is clear that the drafters of all three of these standards intended not only to define neglect in terms of injury to the child rather than the acts of the parents (they were unable to totally do this in that harm is still tied to parental conduct), but they also intended clearly to eliminate parental fault as a basis for neglect intervention.

He notes, however, that this precept is somewhat contradicted by the inclusion of delinquent acts encouraged or sanctioned by a parent.

Judge Moore concludes that the greatest contribution of the proposed standards is the recommendation that the court should have jurisdiction over agencies with the "legal responsibility to provide needed services." However he suggests that all the standards, particularly the IJA/ABA provisions need to be redrafted to widen the scope of the harms sufficient to warrant judicial intervention. He offers the Model Statute for Termination of Parental Rights as an example.

REBUTTAL

A formal rebuttal paper was submitted by Gabriel Kaimowitz which urged that the IJA/ABA standards be adopted forthwith since "positive changes" were unlikely to result from the redraft and delay proposed by Judge Moore. Mr. Kaimowitz indicated that certain aspects of the IJA/ABA standards could be improved -- e.g., making the relationship between "abuse and neglect jurisdiction and the authority to terminate parental rights more explicit, and requiring that "children revert back" to their own home whenever the state "fails to provide a preferable setting" within a specified time. However, he suggests that they at least impose some affirmative duties on the state to limit intervention to those instances in which it will "do more good than harm."

The primary issue, in Mr. Kaimowitz' view, is not finding the proper balance between the rights and interests of the child and those of the parent, but rather controlling the arbitrary use of discretion by the state. He argues that the juvenile court should be considered to be an active participant in the process rather than as a "neutral observer."

Finally, Mr. Kaimowitz urges that the link between poverty and abuse and neglect be openly acknowledged. Quoting a recent article, he states that:

> "The myth of classlessness ... does a disservice to poor people and to the victims of child abuse and neglect by causing money and attention to be funneled away from the real poverty-related problems of the vast majority of abusing and neglecting families and toward remedies and approaches more oriented to middle class."

SUMMARY OF COMMENTS

Two issues dominated the discussion -- the strictness or looseness of the definition of neglect, and whether the juvenile court should have the authority to order executive agencies to provide specific services. Those arguing in favor of a strict standard included Judges Fort and McLaughlin, Professor Smith, Ms. Connell, Mr. Dale, Mr. Kaimowitz, Mr. Rounds, Mr. Siegel, and Ms. Sufian. Proponents of greater discretion included Judges Arthur, Cattle, Delaney and Moore. Almost all the panelists agreed that neglect was difficlut to define, but that "we know it when we see it." The implications drawn from this premise, however, differed sharply. For example, Ms. Sufian observed that "it's hard ... to accept that out of ... wanting to do good, we often do tremendous harm ...," and urged that because of the uncertainty of placements and the traumatic effects of removing children from their homes, neglect procebdings should not be initiated unless there is actual harm or a provable danger of harm to the child. Ms. Connell commented that vague definitions, such as those often applied to emotional neglect, permitted parents to be deemed neglectful because their value system differed from that of the social worker or judge in the case, even when there has been no demonstrable harm to the child. This point was reemphasized by Mr. Siegel who objected to giving "the judge the power to put on the robe and play God ... imposing their [sic] own moral judgments...."

In response, Judge Delaney stated that "no judge plays God if there are competent attorneys presenting the case," and Judge Cattle suggested that the complexity of the subject and the subcultural differences in our society requires judicial discretion to counteract subcultural bias. He cited as an example a bruised child might be neglected if the bruises resulted from a half drunken father knocking the child away from a television set, but would not be neglected had the bruises been caused by a disciplinary caning.

This example was countered by a suggestion that prosecution of a parent for assault might provide a better remedy. Judge Ketcham and Mr. Rounds responded that reliance on the criminal process was a "step backward" because of the lack of dispositional options and that the youth of the child in many cases would preclude proof. At another point, Judge Arthur commented while the juvenile court's authority should be circumscribed to prevent abuse and a finding of neglect must be based on sound evidence, the definition should be set low enough so that the court can intervene before major harm is done to the child.

With regard to the authority of the juvenile court to require services, Mr. Hutzler expressed concern about the court having the authority to allocate an agency's limited resources. He suggested that by ordering extraordinary services for one child, the court would be limiting the resources available to other children. In reply, Judge Arthur commented that if people are going to help, they must be held accountable. Judge Cattle acknowledged that the issue presented a "political problem," but that:

> I should have the power to tell you to provide services which you have available but which you decide not to use; but I may not have the power to go beyond that to force you to manufacture services and expense and money which is not in your budget....

Judge Ketcham added that in this regard, an explicit statutory right to treatment would be very helpful.

A third issue debated by some of the panelists was whether neglect and abuse was directly related to poverty as Mr. Kaimowitz suggested, or whether as contended by Judge Arthur and Mr. Rounds, the fact that poor persons were more often reported for or charged with neglect was due to the structural bias of the reporting and charging process.

JUVENILE (FAMILY COURT) JURISDICTION
OVER NEGLECTED AND ABUSED CHILDREN

Eugene Arthur Moore

Probate Court Judge

Oakland County
Pontiac, Michigan

Consultant for

The National Council
of Juvenile and
Family Court Judges

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As the various media and interest groups throughout the United States analyze and react to the various Juvenile Justice Standards being proposed by national groups, we hear far too little about the areas of neglect and abuse. Most Juvenile and Family Courts today recognize that the problems of abuse and neglect of children have a significant impact on society and provide a very large percentage of the caseload of Juvenile and Family Courts.

The praise or criticism of the various standards seem to focus in on the issues of delinquency and status offenders. While obviously these are extremely important areas, one cannot overlook the importance of adequate standards in the area of child abuse and neglect in order to protect children. Anyone who has worked for any time in any of the child related fields can attest to the fact that unfortunately delinquency is oftentimes the product of prior abuse and neglect.

The Joint Commission of the Institute of Justice and the American Bar Association, the Report of the Task Force on Juvenile Justice and Delinquency Prevention, and The National Advisory Committee on Juvenile Justice and Delinquency Prevention, have fortunately all three addressed the issue of jurisdiction over neglected and abused children by our Juvenile and Family Courts. It is hoped that while we debate the issues of disagreement that exist concerning the delinquency and status offender areas of these three Standards, that we don't overlook the importance of these proposed Standards as they relate to neglect and abuse.

Before any position can be reached concerning the pros and cons of any of the three above sets of Standards as they relate to neglect and abuse jurisdiction, one must become familiar with the exact language of the proposed Standards. Unfortunately, rumors, paraphrasing and reading out of context has complicated the whole problem of understanding these Standards. Therefore what follows is the exact text using language as proposed by these three groups as they relate to neglect and abuse.

IJA/ABA JUVENILE JUSTICE STANDARDS.

ABUSE AND NEGLECT VOLUME.

Part I. General Principles.

1.1 Family autonomy.

Laws structuring a system of coercive intervention on behalf of endangered children should be based on a strong presumption for parental autonomy in child rearing. Coercive state intervention should occur only when a child is suffering specific harms as defined in Standard
2.1 Active state involvement in child care or extensive monitoring of each child's development should be available only on a truly voluntary basis, except in the situations described by these standards.

1.2 Purpose of intervention.

Coercive state intervention should be premised upon specific harms that a child has suffered or is likely to suffer.

1.3 Statutory guidelines.

The statutory grounds for coercive intervention on behalf of endangered children:

A. Should be defined as specifically as possible;

B. Should authorize intervention only where the child is suffering, or there is a substantial likelihood that the child will imminently suffer serious harm;

C. Should permit coercive intervention only for categories of harm where intervention will, in most cases, do more good than harm.

1. Protecting cultural differences.

Standards for coercive intervention should take into account cultural differences in childrearing. All decisionmakers should examine the child's needs in light of the child's cultural background and values.

1.5 Child's interests paramount.

State intervention should promote family autonomy and strengthen family life whenever possible. However, in cases where a child's needs as defined in these standards conflict with his/her parents' interests, the child's needs should have priority.

1.6 Continuity and stability.

When state intervention is necessary, the entire system of intervention should be designed to promote a child's need for a continuous, stable living environment.

1.7 Recognizing developmental differences.

Laws aimed at protecting children should reflect developmental differences among children of different ages.

1.8 Accountability.

The system of coervice state intervention should be designed to insure that all agencies, including courts, participating in the intervention process are held accountable for all of their actions.

Part II. Statutory Grounds For Intervention

Courts should be authorized to assume jurisdiction in order to condition continued parental custody upon the parents' accepting supervision or to remove a child from his/her home only when a child is endangered in a manner specified in subsection A.-F.:

A. a child has suffered, or there is a substantial risk that a child will imminently suffer, a physical harm, inflicted nonaccidentally upon him/her by his/her parents, which causes, or creates a substantial risk or causing disfigurement, impairment of bodily functioning, or other serious physical injury.

B. a child has suffered, or there is a substantial risk that the child will imminently suffer, physical harm causing disfigurement, impairment of bodily functioning, or other serious physical injury as a result of conditions created by his/her parents or by the failure of the parents to adequately supervise or protect him/her.

C. a child is suffering serious emotional damage, evidenced by severe anxiety, depression, or withdrawal, or untoward aggressive behavior toward self or others, and the child's parents are not willing to provide treatment for him/her;

D. a child has been sexually abused by his/her parent or a member of his/her household (alternative: a child has been sexually abused by his/her parent or a member of his/her household, and is seriously harmed physically or emotionally thereby;

E. a child is in need of medical treatment to cure, alleviate, or prevent him/her from suffering serious physical harm which may result in death, disfigurement, or substantial impairment of bodily functions, and his/her parents are unwilling to provide or consent to the medical treatment;

F. a child is committing delinquent acts as a result of parental encouragement, guidance, or approval.

NATIONAL ADVISORY COMMITTEE

REPORT OF THE ADMINISTRATIVE COMMITTEE ON STANDARDS FOR THE ADMINISTRATION OF JUVENILE JUSTICE. SEPTEMBER 30, 1976.

Standards On Adjudication 3.113. Jurisdiction Over Neglect And Abuse.

a. Juveniles who are unable to provide for themselves and who have no parent, guardian, relative, or other adult with whom they have substantial ties willing and able to provide supervision and care;

b. Juveniles who have suffered or are likely to suffer physical injury inflicted nonaccidentally by their parent, guardian, or primary caretaker, which causes or creates a substantial risk of death, disfigurement, impairment of bodily function, or bodily harm;

c. Juveniles who have been sexually abused by their parent, guardian, primary caretaker, or a member of the household;

d. Juveniles whose physical health is seriously impaired or is likely to be seriously impaired as a result of conditions created by their parents, guardians, or primary caretaker or by the failure of such persons to provide adequate supervision and protection;

e. Juveniles whose emotional health is seriously impaired and whose parents, guardian, or primary caretaker fail to provide or cooperate with treatment;

f. Juveniles whose physical health is seriously impaired because of the failure of their parents, guardian, or primary caretaker to supply them with adequate food, clothing, shelter or health care, although financially able or offered the means to do so;

g. Juveniles whose physical health has been seriously impaired or is likely to be seriously impaired or whose emotional health has been seriously impaired because their parents have placed them for care or adoption, in violation of the law, with an agency, an institution, a nonrelative, or a person with whom they have no substantial ties;

h. Juveniles who are committing acts of delinquency as a result of pressure from or with the approval of their parent, guardian, or primary caretaker; and,

i. Juveniles whose parents, guardian, or primary caretaker prevent them from obtaining the education required by law.

Jurisdiction over neglect and abuse should extend to the juvenile, his or her parents, guardian or primary caretaker, and any agency or institution with a legal responsibility to provide needed services to those persons.

REPORT OF THE TASK FORCE ON JUVENILE JUSTICE AND DELINQUENCY PREVENTION
(National Advisory Committee on Criminal Standards and Goals)

Chapter 11. Endanger Children, Jurisdiction and Scope of Authority.

11.1 Respect for Parental Autonomy

Statutes authorizing coercive state intervention should be based on a strong presumption for parental autonomy in childrearing.

11.2 Focus on Serious, Specifically Defined Harms to the Child.

The statutory grounds for coercive state intervention should be:

1. Defined as specifically as possible;

2. Drafted in terms of specific harms that the child has suffered or may suffer, not in terms of parental behavior; and

3. Limited to those cases where a child is suffering serious harm or there is a substantial likelihood that he or she will imminently suffer serious harm.

11.3 Elimination of Fault as a Basis for Coercive Intervention.

Fault concepts should not be considered in determining the need for, or type of, coercive state intervention.

11.4 Consideration of Cultural Values

Standards for coercive state intervention should take into account cultural differences in child rearing. Decision makers should examine the child's needs in light of his or her cultural background and values and should take cognizance of the child's needs for continuity of cultural identity at every phase of the intervention process.

11.5 Protection of Child's Interests

Although coercive state intervention should promote family autonomy and

strengthen family life whenever feasible, in cases where a child's needs as defined in these standards conflict with parents' interests, the child's needs should be protected.

11.6 Promotion of Continuous, Stable Living Environments

The entire system of coercive state intervention should be designed to provide children, to the maximum degree possible, with continuous, stable living environments. Decision makers should take cognizance of this objective at every phase of the intervention process, from initial coercive involvement to proceedings for termination of parental rights.

11.7 Encouraging Accountability

The entire system of coercive state intervention should be designed to insure that all agencies and branches of government including courts, participating in the intervention process, are accountable for all of their actions. Decision makers should be required to specify the bases for their actions and mechanisms should be established to review important decisions.

11.8 Statutory Bases for Coercive Intervention

Courts should be authorized to assume jurisdiction, in order to condition custody upon the parents accepting supervision or to remove a child from the home, only when the child is endangered in a manner specified in Standards 11.9 through 11.15.

11.9 No Caretaking Adult

Coercive state intervention should be authorized when a child has no parent or guardian or other adult, to whom the child has substantial ties, available and willing to care for him or her.

11.10 Nonaccidental Physical Injury

Coercive state intervention should be authorized when a child has suffered or is likely imminently to suffer a physical injury, inflicted nonaccidentally upon him or her by his or her parent, that causes or creates a substantial risk or disfigurement, impairment of bodily functioning, or severe bodily harm.

11.11 Physical Injury From Inadequate Supervision or Protection

Coercive state intervention should be authorized when a child has suffered or there is a substantial risk that the child will imminently suffer disfigurement, impairment of bodily functioning or severe bodily harm as a result of conditions uncorrected by the parents or by the failure of the parents to adequately supervise or protect the child.

11.12 Emotional Damage

Coercive state intervention should be authorized when a child is suffering serious emotional damage, evidenced by severe anxiety, depression, or withdrawal, or untoward aggressive behavior toward self or others, and the parents are unwilling to permit and cooperate with necessary treatment for the child.

11.13 Sexual Abuse

Coercive state intervention should be authorized when a child has been sexually abused by a member of the household.

11.14 Need for Medical Care

Coercive state intervention should be authorized when a child is in need of medical treatment to cure, alleviate, or prevent serious physical harm that may result in death, disfigurement, substantial impairment or bodily functions, or severe bodily harm and the parents are unwilling to permit the medical treatment.

11.15 Delinquent Acts as a Result of Parental Encouragement or Approval

Coercive state intervention should be authorized when a child is committing delinquent acts as a result of parental pressure, encouragement or approval.

11.16 Intervention Under These Standards

The fact that a child is endangered in a manner specified in Standards 11.9 through 11.15 is a necessary but not a sufficient reason for a court to authorize coercive intervention. In every case a court also should find that the proposed intervention will prove to be a less detrimental alternative for the child than abstaining from intervention.

11.17 Parties

The following should be parties to all proceedings regarding a child alleged to be or adjudicated endangered:

1. The child;

2. The child's parents, guardians, and if relevant any other adult to whom the child has substantial ties who has been performing the caretaking role; and

3. The appropriate agency.

It is obvious to the reader of these proposed Standards that there are several key issues that are common to all the drafters thereof and that they must deal with in determining what is the best jurisdiction of family and juvenile courts as it relates to abuse and neglect.

There seems to be common agreement by all the drafters that children need to be protected by the judicial process from abuse and neglect. At the same time, however, the family needs to be protected from the excessive interference by the state in determining how parents should best raise their children.

In trying to develop a balance whereby a child's best interests are protected and at the same time parental rights are preserved, there are several key issues that need to be addressed. These issues are ably discussed in volumes entitled A Comparative Analysis of Standards and State Practices, Abuse and Neglect published by the Department of Justice.

Some of key issues are as follows:

1. Should dependency constitute a basis for family or juvenile court jurisdiction and if so, how should dependency be defined? Should abandonment constitute a basis for family or juvenile court jurisdiction and if so, how should abandonment be defined?

2. How specifically should neglect be defined?

3. Should the statutory basis for judicial intervention be defined primarily in terms of parental behavior or in terms of specific harming of the child?

4. What role should parental fault play in determining whether family or juvenile court jurisdiction should exist?

5. Should the mental or physical incapacity of a parent constitute a basis for family court intervention?

6. Should lack of proper parental care, constitute a basis for family court jurisdiction and if so, how should it be defined?

7. Should non-accidental injury constitute a basis for family court jurisdiction and if so, how should it be defined?

8. Should unsafe home conditions that jeopardize the safety or health of a minor be the basis of family and juvenile court jurisdiction? If so, how should these conditions be defined?

9. Should failure to provide medical care or support, constitute a basis for family court jurisdiction and if so, how should it be defined?

10. Should emotional harm constitute a basis for family court jurisdiction and if so, how should it be defined?

11. Should sexual abuse constitute a basis for family and juvenile court jurisdiction and if so, how should it be defined?

12. Should placement in an unlicensed or inadequate facility constitute a basis for family court jurisdiction and if so, how should it be defined?

13. Is parental "fault" required in order to determine parental neglect?

In addressing these key issues it is very helpful to see how our present state statutes address these problems. Currently we have those statutes that define conduct by parents in either specific or broad terms indicating that such conduct by parents is neglectful or abusive and therefore grounds for juvenile or family court intervention. In contrast, we have other state statutes that define injury to a child as the basis for family or juvenile court jurisdiction. Last, we have those states that combine the above in defining juvenile and family court jurisdiction as it relates to abuse and neglect.

It is important to recognize that in addressing the problems of neglect and abuse, we often approach the issues from different standpoints. Some approach it from the standpoint of the parent. We look through the eyes of the parent to determine what conduct by the parents is abusive or neglectful. On the contrary, others insist that we must look at the condition of neglect or abuse through the eyes of the child and determine the state of the child in determining whether neglect or abuse exists. Some states have combined both and indicated that we first look to determine whether or not the parental conduct or lack thereof is such as to constitute neglect or abuse and second even if we determine that conduct of a parent is not such as to constitute neglect and abuse, we still must look at the conditions under which the child may be found for the conditions may be so harmful as to be neglectful and require court intervention. This is a combination of the above two approaches.

Paramount in these two approaches is the issue of culpability or fault. Many believe that parents should "not be charged with neglect or abuse" if they are not at fault or have not done or failed to do something over which they have had no control. If this situation exists then the child is not neglected or abused. On the other hand, many argue that even if the parent is not culpable in his or her behavior or lack of behavior, if the child is still injured by the situation the child is regardless of parental culpability or fault still neglected.

Before addressing in detail the various sub-issues raised above, it is important to try to discern any underlying philosophy that surfaces itself in any of the three proposed sets of Standards. In doing so, it is very clear that the drafters of all of the sets of Standards support the position that juvenile and family court intervention in the lives of families, i.e., the coercion of the state, should only be as a last resort and only in exceptional circumstances. While most agree with this philosophy, the problem arises in determining what we mean by "exceptional circumstances" or what we mean by "only as a last resort".

In reading the introduction to these Standards as well as the commentary relating to those it is evident that the drafters of all three sets intend to restrict what is currently the law and practice in many states concerning juvenile and family court intervention as it applies to abuse and neglect.

In looking at the introduction in the Task Force Standards on Abuse and Neglect, key language provides as follows:

"At the heart of the proposed system is a strong presumption for parental autonomy in child rearing and the philosophy that coercive intervention is appropriate only in the face of serious, specifically defined harms to the child. The standards advocate substantial changes in existing laws and agency procedures. The concepts of neglect, dependency and abuse are discarded as the standards approach the subject of maltreated children under the rubric of the endangered child.

The standards seek to accommodate two sets of competing interest: (1) The interests of the state and the child, and (2) the interests of the parents and the child."...

"intervention disrupts family ties and can generate substantial psychological trauma for the child. Moreover, when a child is removed from his or her family and placed in foster care, society often lacks the ability to insure that the placement is superior to his own home."

..."In light of these facts the system outlined in this volume is grounded on a strong presumption for parental autonomy. Coercive intervention is clearly viewed as the exceptional case, rather than the rule. The Standards eschew reliance on formalistic concepts of parental "fault". Instead, the statutory bases for coercive intervention focus on serious, specifically defined harms to the child, actual or imminent."

Likewise the commentary following the National Advisory Committee's recommendations on Jurisdiction over Neglect and Abuse in part indicate as follows:

"This standard provides a definition of neglect and abuse for jurisdictional purposes. It is intended to focus attention on specific harms to the child rather than on broadly drawn descriptions of parental behavior. It weighs both the interests of the juvenile in avoiding harm and the interest of the family in avoiding unnecessary state interference in child rearing, but clearly recognizes that the protection of the juvenile is the primary purpose of state intercession."

In the IJA/ABA Abuse and Neglect volume the first general principle elicited is as follows:

"Laws structuring a system of coercive intervention on behalf of endangered children should be based on a strong presumption for parental autonomy in child rearing. Coercive state intervention should occur only when a child is suffering specific harms as defined in Standard 2.1."

The commentary goes on to say:

"Coercive state intervention should be limited for a number of reasons. Our potential commitments to individual freedom and privacy, diversity of views and life styles and free exercise of religious beliefs are all promoted by allowing families to raise children in a wide variety of living situations and diverse child rearing patterns."

"In addition there is substantial evidence that except in cases involving very seriously harmed children we are unable to improve a child's situation through coercive intervention. In fact, the intervention may worsen the child's situation.

The drafters within these three separate groups of Standards all support the philosophy that there should be a greater limitation on state intervention than currently exists in most of our state statutes.

I. Dependency

In specifically addressing these issues the prevailing philosophy of the drafters of these Standards can be no better demonstrated than in this reaction to the issue of dependency. The IJA/ABA standards have gone the furthest by totally eliminating any reference to dependency whatsoever. These standards go so far as to even eliminate what in many states is closely related to dependency, i.e. "abandonment" as a grounds for family court intervention.

In contrast, both of the other sets of standards still retain language relative to giving juvenile or family courts jurisdiction over children:

"...who are unable to provide for themselves and who have no parent, guardian, relative or other adult with whom they have substantial ties willing and able to provide supervision and care."

The above language from the National Advisory Committee standard 3.113 (a) is similar to the Task Force standard 11.9 which provides:

"Coercive state intervention should be authorized when a child has no parent or guardian or other adult, to whom the child has substantial ties, available and willing to care for him or her."

These two standard drafters unlike the IJA/ABA drafters recognize that there is indeed a need for court intervention if a child has no one available and willing to care for the child. Most states currently have language that allows court intervention on behalf of children who have a lack of parental care, control or guardianship. Thus the IJA/ABA standards are the most revolutionary as to current state practices in this area.

II. Specificity of Statutory Language

Another controversial area converning the standards is the issue of how specific should neglect be defined. While jurisdiction in many states today defines neglect in very broad terms many states by more recent legislation are beginning to "more specifically" define neglect with the recognition that the removal of a child from parental custody or the imposing upon parents certain conditions of child rearing by the state should not be left to the broad discretion of the court. They argue that children should be raised under intervention only if specific harm as specifically enumerated by the legislature is found. Again, the drafters of these three sets of standards strongly support the view that in defining neglect the statute should specifically define the term rather than leave the terms general and open to interpretation by varying judges.

Thus in all three sets of proposed standards we see specifically listed grounds for neglect by which the drafters attempt to specifically define conduct or harm which can be the only basis of juvenile and family court intervention.

III. Should The Statutory Basis For Judicial Intervention Be Defined In Terms Of Parental Behavior Or In Terms Of Specific Harm Of The Child?

This long debated issue was obviously considered by the drafters of these three sets of standards. The drafters of all three sets try to define specific harm or threat of harm to a child but in reality they still must recognize that this harm still must be defined in terms of specific parental behavior.

In looking at the National Advisory Committee proposed standards we find continuous reference to severe injury, harm, impairment of bodily function, but all in reference to the failure to provide or the infliction thereof by a responsible adult.

In the IJA/ABA proposed standards we find that the drafters refer to physical harm or serious emotional damage to the child, but again by a parent.

The Task Force refers to non-accidental physical injury, physical injury from inadequate supervision, emotional damage, sexual abuse, need for medical care. Again all list specific harms to the child, but the harm must come from a parent, etc.

IV. Parental Fault

Another far-reaching issue that has been addressed by these standards is the issue of what role should "parental fault" play in determining the basis for family court intervention. Currently most states employ some type of language in reference to lack of proper parental care, control, and guardianship. In many statutes parental fault is key language. It appears that historically neglect has traditionally defined the basis for court intervention in terms of parental behavior rather than result in general harm to the child.

The rationale therefore appears to be that:

1. Children suffer a wide variety of harms as a result of parental misbehavior.

2. One cannot articulate all of the harms in the statute without leaving out very important harms which must be protected. Thus most statutes reflect an attitude that a child's development can be substantially affected both intellectually and emotionally by the environment created by his parent's conduct and that once again rather than define the problems that may result to the child one should define the parental conduct which in turn causes the harm to the child.

On the other hand those who argue that neglect should be defined only in terms of a specific harm to the child argue that to do otherwise is an invasion of privacy, freedom of religion, diversity of ideas and the sanctity of the family and therefore the state without finding harm to a child has no right to control the diverse behavior of parents in rearing children.

In the commentary to all their standards, it is clear that the drafters of all three of these standards intended not only to define neglect in terms of injury to the child rather than acts of the parents (they were unable to totally do this in that the harm is still tied to parental conduct) but they also intended very clearly to eliminate parental fault as a basis for neglect intervention.

The Task Force for instance in Standard 11.3 provides:

"Fault concepts should not be considered in determining the need for or type of coercive state intervention."

Likewise in the IJA/ABA standards 1.2 in the Abuse and Neglect volume the authors say:

"Coercive state intervention should be premised upon specific harms that a child has suffered or is likely to suffer."

These IJA/ABA standards go on to indicate in 1.3:

"The statutory grounds for coercive intervention on behalf of endangered children:

a. should be defined as specifically as possible.

b. should authorize intervention only where the child is suffering, or there is a substantial likelihood that the child will imminently suffer serious harm.

c. should permit coercive intervention only for categories of harm where intervention will in most cases do more good than harm".

TheIJA/ABA standards go on to indicate in 1.4, 1.5, 1.6, 1.7 and 1.8 that we must protect cultural differences and developmental differences among children of different ages. And last but not least that once the state has intervened there should be accountability to insure that all agencies and courts are accountable for their actions to correct the harm and help the child.

V. What Is The "Degree Of Harm" That Serves As A Basis For Family Court Intervention?

As I indicated above all three sets of standards have eliminated the concept of parental fault enumeration of specific parental conduct but have in lieu thereof specifically addressed intervention based upon specific harm to the child. Even in this area however it is not easy to differentiate between harm to the child, parental conduct and relationship between the two. Even the most far reaching IJA/ABA standards retain the idea of court intervention if the child is in need of "medical treatment" or "care to alleviate or prevent harm" or "from suffering serious physical harm which may result in death, disfigurement or substantial impairment of bodily functions" and his or her parents are unwilling to provide or consent to the medical treatment.

The IJA/ABA standards in part provide:

"A child has suffered or there is substantial risk that a child will imminently suffer a physical harm where there is damage inflicted non-accidentally upon him/her by his/her parents which causes or creates a substantial risk of causing disfigurement, impairment of bodily functioning or other serious physical injury."

In standard 2.1B (IJA/ABA) the drafters have even included harm to the child provided it was created by his or her parents or by the failure of the

parents to adequately supervise or protect the child, said injury however having to either put the child in substantial risk that he will imminently suffer physical harm or the child already has suffered physical harm which results in disfigurement, impairment of bodily functioning or other serious physical injury.

The National Advisory Committee likewise uses the language "suffer physical injury inflicted non-accidentally by the parent, guardian... creates a substantial risk of death, disfigurement, impairment of bodily functions or bodily harm."

In contrast is the Task Force standards, non-accidental injury and injury from inadequate supervision or protection, are still included.

The IJA/ABA standards appears to be the most revolutionary in that they require substantial risk causing disfigurement, impairment of bodily functions or other serious physical injury. This language clearly is the most restrictive language and is much narrower than present statutes and perhaps is the language which causes some of the greatest concern for those who are opposed to the IJA/ABA standards on this issue.

The National Advisory Committee standards 3.113B end by saying "or bodily harm". This certainly would be much broader than the IJA/ABA standards and broader than the Task Force standards 11.10 which once again use the language disfigurement, impairment of bodily functions or severe bodily harm.

Obviously we are here discussing an issue of degrees and many concerned with these standards including the National Council of Juvenile and Family Court Judges, support more closely the National Advisory Committee on this issue indicating that bodily harm is a much better test than either severe bodily harm or disfigurement, impairment of bodily functions or other serious physical injury in that children are entitled to be protected from not merely severe injury but from injury which results in physical or emotional harm. How many doctors would say cigarette burns are "serious harm"? Are large welts and multiple black and blue marks serious illness?

VI. Emotional Neglect

Another controversial issue is the issue of emotional neglect. The IJA/ABA Standards indicate that court intervention is allowed if there is "harm" to the child and if a child is suffering under 2.1C "serious emotional damage evidenced by severe anxiety, depression or withdrawal or untoward aggressive behavior towards self or others and the parents are not willing to provide treatment for him or her."

Likewise the National Advisory Committee 3113 allows juvenile and family court intervention concerning juveniles "whose emotional health is seriously impaired and whose parents, guardian or primary caretaker fail to provide or cooperate with treatment."

The Task Force also provides for emotional neglect jurisdiction when under 11.12 "a child is suffering serious emotional damage evidenced by severe anxiety, depression and withdrawal or untoward aggressive behavior towards self or others and the parents are unwilling to permit or cooperate with necessary treatment for the child.

The positions of serious emotional harm appear to be consistent with the positions of serious physical injury in that once again the drafters are indicating that the court cannot intervene unless "serious injury results". Those who criticize these standards once again indicate that children should be protected not only from serious emotional harm but from emotional neglect if it can be shown that the neglect causes harm to the child.

VII. Sexual Abuse

Allof the standards address the issue of sexual abuse and indicate that this is such a disturbing harm to a child that the juvenile or family court should clearly have jurisdiction over a child who has been sexually abused by his or her parent.

VIII. Delinquent Acts

Many statutes currently indicate that delinquent acts committed by children as a result of parental encouragement and guidance should be the basis for family court intervention and basis of neglect against the parent.

The IJA/ABA standard 2.1F merely supports this as does standard 3.113h of the National Advisory Committee standards and standard 11.15 of the Task Force Standards.

This position appears to be a significant departure from the idea of harm to the child. While the drafters of the standards don't say so it appears here the drafters are willing to again focus on the conduct of the parents indicating that encouragement or guidance towards this end by parents is the act that is sought to be prevented.

IX. Should Placement In An Unlicensed Or Inadequate Facility Constitute A Basis For Family Court Intervention?

Such a current basis existing in many states for family court intervention is clearly eliminated under the IJA/ABA standards, the National Advisory Committee standards and the Task Force standards.

X. Educational Neglect

One other primary area of conflict in family court jurisdiction drafters is the issue of parental neglect based upon the failure of a parent to secure an education for a child as required by law. The IJA/ABA standards no longer provide this as a grounds for judicial intervention nor does the Task Force Standards. However the National Advisory Standard 1.113I still provides for this as a basis for judicial intervention (similar to the laws currently existing in many states).

"Juvenile whose parents, guardian or primary caretaker prevent them from obtaining the education required by law."

OVERALL OBSERVATIONS

1. It is very clear that the standards drafters in all three commissions are desirous of greatly restricting the grounds upon which a juvenile and family court can intervene on the basis of neglect. Likewise they are focusing on the issue of harm to the child rather than behavior of the parents. They are also eliminating as far as

possible the issue of fault. They all support the concept that harm to the child can be not only physical harm but emotional harm but to varying degrees talk about "serious" or substantial" injury or harm.

2. The most revolutionary standards are the IJA/ABA standards which have gone the farthest in requiring substantial harm or substantial injury to a child before the state may intervene to protect him. Likewise the IJA/ABA standards fail to deal with the issue of abandonment and dependency and fail to recognize that the children who are abandoned or who have no means of support should not have to remain in limbo without the proper parental guidance and control indefinitely. Many are concerned that these IJA/ABA standards will result in many children being raised by public agencies rather than being placed in secure adoptive homes where they can have the necessary guidance and love which the "entity" of an agency in many circumstances cannot provide.

3. Task Force standard 11.16 indicates that the court must also find that the proper intervention will prove to be a less detrimental alternative to the child than abstaining from intervention. This concept in part is supported by the IJA/ABA standards in 2.2 that indicates "in order to assume jurisdiction the court should also have to find intervention is necessary to protect the child from being endangered in the future". This is obvious and to accomplish this the court must have the tools to effectuate this end to provide a better world for the child and family. The National Advisory Committee Standards seek to protect the interest of children by extending court jurisdiction not only to the juvenile, his or her parents, guardian or primary caretaker but also to an agency or institution to require them to provide needed services to those persons.

4. In reviewing the various standards it appears that the National Advisory Committee standards take the broadest approach of the three as they relate to neglect and abuse. While they certainly address specific harm to the child they more broadly define that harm specifically in 3.11B in allowing bodily harm rather than merely disfigurement, risk of death or impairment of bodily function. Likewise the standards protect a child who is seriously impaired or is likely to be seriously impaired because of inadequate supervision. They also include the jurisdiction over the child whose emotional health is seriously impaired.

I would suggest that the drafters of the National Advisory Committee standards modify these "emotional neglect" standards to eliminate the word "seriously" in conformity with 3.11B where the drafters merely indicate bodily harm as a sufficient grounds for intervention.

CONCLUSION

The greatest contribution of these three proposed juvenile justice standards is the granting of court jurisdiction over an agency or institution where their legal responsibility is to provide needed services. If the court has statutory grounds for intervention but has no power to provide the tools that will help solve the problem and protect the child, then the statutory intervention in many cases will not benefit the child.

In my opinion, unless all the standards can be broadened to protect children from both physical and emotional harm (not serious injury) the standard will shift too far the balance between protecting children and protecting parental rights, and children will be subject to far too much injury by parents and the courts will not be able to help them.

Perhaps this concern for the "non-interference" philosophy proposed by these standards has best been described by Judge James L. Lincoln, former President of the National Council of Juvenile and Family Court Judges. In addressing the proposed IJA/ABA standards, Judge Lincoln has said:

> A. "The proposed standards are designed to limit the number brought into the Court's jurisdiction as well as having the acknowledged purpose of limiting the Judge's discretion in the disposing of cases. (Under these standards) Children must not only be damaged, they must be severely damaged, before the court can obtain jurisdiction."
>
> B. "The IJA/ABA proposed standards tacitly admit that many children who would be in need of governmental and/or court intervention would be excluded from any possible assistance. It is clearly asserted in these proposed standards that "most children will be protected, etc." How many is "most" - 51% or 75%? Will 49% of the children who need protection be excluded or 10%?
>
> C. "The fact that stands out very clearly is that under the proposed IJA/ABA standards, thousands of neglected and abused children who need governmental and/or court intervention will be excluded from any help whatsoever. Surely we have reached a time when the law should do better than protect "most children" who are abused and/or neglected."
>
> D. "It is an act of futility to attempt to amend this lengthy document in order to represent a more centralist position. One proposed amendment might be to simply substitute the Model Act for Termination of Parental Rights developed by the Neglected Children's Committee of the National Council of Juvenile Court Judges. This would constitute a substantial improvement but leave untouched the greater part of the proposed standards. The standards should be opposed by the National Council of Juvenile Court Judges because the statements within the standards and commentary clearly assert that only most children will be protected from abuse and neglect and that the proposed standards as a matter of policy would exclude thousands of neglected and abused children from government and/or court intervention."

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* Juvenile Justice 27,4 (November 1976):3-8.

Judge Lincoln is asking for those of us deeply concerned about the implications of these proposed standards:

"How many broken bones, how many burns, how many bruises, how deep a cut, how much blood must flow to have a 'disfigurement, impairment of bodily functioning, serious physical injury'?"

Judge James Delaney of Colorado expresses the concerns of many when he says:

"Well, I certainly disagree with the limited definitions in the standards: disfigurement, impairment of bodily functioning, or serious physical injury. It sounds like a formula for whipping slaves. The standard there was you didn't mar their face, you whipped them on the back because it didn't show. You didn't maim them in such a way they couldn't function, you didn't impair your chattel, but otherwise you can do anything you wanted.

Well, that's exactly what these standards are saying and I wonder if we really want to limit our concern for children in this fashion. The thing that's overlooked, it seems to me, in this standard, is the rights of a child, the right in a secure home to parents who care about them, to a decent education, to adequate nutrition, to guidance and direction. These are the things that seem to me that constitute neglect or actual abuse if they are not met and it seems to me there must be a forum for a child to be able to come in and opt for the needs of the child.

These standards are predicated on a couple of myths. One of these myths is that all parents love their children, which is not so. There is another myth that all children want to be with their parents. That isn't so, either. What I would like to suggest is that we need a broad definition.

... It seems to me that abuse and neglect are very much akin to negligence. Negligence is a concept that we, in the legal profession, have dealt with for a couple hundred years without too much trouble. What we should do is give the child a break. It seems to me that these standards should address themselves to the needs of the child rather than just to the needs of the parents. So I would like to suggest that we consider that concept being very much akin to the concept of negligence and leave it broad."

As an alternative to these standards, this writer supports the standards of the National Council of Juvenile and Family Court Judges Accreditation Committee as they relate to Neglect and Abuse in that they are based on the following principles:

1. The interest of the child should be paramount and when in conflict with parental rights must be adequately protected.

2. Definitions of neglect should relate to <u>both</u> harm to child and to parental conduct.

3. These must be minimum child rearing standards that protect children and parental inability should not be a defense to judicial intervention.

4. Definition should not be so specific as to overlook child harm or parental conduct that needs judicial scrutiny.

5. Court must have power and resources to correct neglect and abuse once judicial intervention has taken place.

6. Courts should intervene only if voluntary resources cannot protect children. Likewise, the National Conference of Special Court Judges Committee on Juvenile Justice Standards, is so upset with the IJA/ABA standards that they propose a complete rewrite by knowledgeable practitioners deferring considerations until 1981.

As stated in the National Council of Juvenile and Family Court Standards Committee report unanimously adopted by the National Council of Juvenile and Family Court Judges, we need language revision of the volumes on Abuse and Neglect of all three standards to better insure protection of children from abuse and neglect. The National Advisory Committee standards come closest to the goal of protecting parental rights while recognizing that children's rights to protection are paramount. With the removal of the word "serious" in the standards, they could be the basis for a workable jurisdictional statute.

Mr. Kaimowitz presented a formal rebuttal to Judge Moore's paper:

FORMAL REBUTTAL
BY
CONSULTANT GABE KAIMOWITZ

Speaking for the National Legal Aid and Defender Association, I strongly urge adoption of the IJA/ABA Volume on Abuse and Neglect in accordance with the suggestions and modifications made by the NLADA and others in light of their experience with the juvenile justice system. The delay urged by Judge Moore in such adoption and the request for referral of this Volume to a committee for further consideration would not result in any positive changes but simply permit juvenile judges to do with what they will about relationships between parents and children until such power as they generally exercise today is codified by law.

I would add two suggestions of my own of a general nature. First, recognition should be given to the interrelationship between jurisdictional determinations and findings on abuse and neglect, and termination of parental rights; any intervention by the State may some day lead to such termination and the heaviness of that consequence should weigh from the onset of proceedings even when the court apparently intervenes for benign purposes. Second, I would ask that children be allowed to "revert" back to their parents whenever the State has failed to provide a preferable setting for minors removed from their homes within certain specified periods of time. In any instance of separation between parent and child because of the alleged failure of the former caused by the State, society should bear the burden of establishing not only the familial wrongdoing but its ability to do better.

Nowhere is his paper does Judge Moore state or imply that the State has any obligation to families other than to assure them due process of law before a

court acts to separate parent from child temporarily or permanently. The recognition for example shown by the IJA/ABA Juvenile Justice Standards that state intervention must be assumed to be coercive and therefore should be allowed sparingly is given short shrift by Judge Moore. While those Standards perhaps do not go far enough in imposing duties on the State when it intervenes, they permit such intrusion only "for categories of harm where intervention will, in most cases, do more good than harm".

Judge Moore, however, interprets all of the standards, including the IJA/ABA version, to provide protection to families only from "excessive interference by the state in determining how parents should best raise their children." His use of language does comport with views of many juvenile judges whom I have encountered who see themselves as balancing "a child's best interests" against "parental rights" but they do not mesh with statements in the various standards concerning the tremendous power the state has to tip the scales any way it wishes through its juvenile courts.

Judge Moore also ignores the emphasis of at least the IJA/ABA Standards in favor of a no-fault system of determination of abuse and neglect on the basis of specific harm to the child; instead, he again would have us weigh the <u>degree</u> to which parental behavior should be taken into account. He urges us to examine how current state statutes, which invariably are based on parental responsibility, are adapted to abuse and neglect situations. Nowhere in his paper does Judge Moore seem to recognize that many interests involved in the juvenile court systems are dissatisfied with the present <u>modus operandi</u> and it is that dissatisfaction which has resulted in recommendations to alter particularly the extent to which juvenile courts and judges are empowered to act with <u>total</u> discretion in each instance; nowhere is that power more manifest than in determinations as to which homes and families are fit and which are not in the judges' estimations.

It is such skepticism which caused drafters of the Standards to assure that juvenile and family court intervention should only occur "as a last resort and only in exceptional circumstances." While Judge Moore professes not to understand the limits that terminology places on juvenile courts, neither he nor we can fail to comprehend the intention to prevent the juvenile court from interfering in any family situation which it may find displeasing. Judge Moore himself later admits: "It is evident in reading these Standards that the drafters within these three separate groups of Standards all support the philosophy that there should be a greater limitation on state intervention than currently exists in most of our state statutes." Yet Judge Moore asks for time for reconsideration, perhaps in the naive belief that drafters and others will come to recognize how good a job the courts currently are doing and, although there might be some need for improvement and some rotten apples in their number, they should be allowed to go about business as usual.

Time and again, Judge Moore asks us to view the Standards on his terms. "The drafters of all three sets try to define specific harm or threat of harm to a child but in reality they still must recognize that this harm must be defined in terms of specific parental behavior." By analogy, a no-fault divorce system would seem to be impossible because we all kn ow that one, two or more are to blame to some extent when a marriage breaks down. But despite that knowledge, a no-fault system can be developed by assuming that blame is irrelevant to the solution of the problem. Likewise, the various Standards of

Abuse and Neglect impose on juvenile and family courts the obligation to look at the specific harm likely to befall the child should he/she remain in the home without court intervention rather than at the conduct of the parent or responsible adult. Under such a no-fault system, juvenile judges' "sermons" or "pronouncements" castigating parents or responsible adults as an 18th Century minister might do would be uncalled for.

Time and again in his arguments, Judge Moore can be seen opting for terminology that will give juvenile courts the greatest discretion in exercising their judgments. Therefore it is not surprising that he prefers a standard that allows intervention when there is "bodily harm" rather than "severe bodily harm" or that would allow it when the child is endangered by emotional neglect rather than limit such intrusion to situations when there is "serious emotional harm."

The crux of Judge Moore's argument is presented in the first paragraph of his conclusion:

> Unless all the standards can be broadened to protect children from both physical and emotional harm (not serious injury) the standards will shift too far the balance between protecting children and protecting parental rights, and children will be subject to far too much injury by parents and the courts will not be able to help them. (Emphasis added.)

In Judge Moore's view, the Standards come down on the side of parental rights and away from the protection heretofore provided to children. The juvenile court is seen as a neutral observer weighing and balancing the interests of parents and children.

Therein lies the fallacy. The Standards have set forth a legal awareness of the danger of "coercive state intervention" and the power the juvenile court has in controlling the scales. No longer is the juvenile court viewed as a benign or neutral observer but as actual participant in the lives of families who come before it, a participant whose ability to help hardly is assured. As long as Judge Moore does not want to accept this more skeptical view of the juvenile court's role in neglect and abuse proceedings, he is bound to come to the conclusions he does, but not ones we should follow.

Significantly his last plea is couched in terms of the Model Statute for Termination of Parental Rights. In this respect, he wisely knows what the Standards do not express; the possibility of termination of parental rights lies behind every court intervention in families; with such a weighty outcome possible, the limitations on discretion should be stringent, not lax, and certainly the various standards, especially the IJA/ABA Standards, move in the direction of placing limitations on the "coercive state intervention" that takes place in every abuse and neglect proceeding.

We in legal services and public defender offices particularly are concerned about abuse and neglect jurisdiction because what often may be characterized as a legal or psychological problem more often is simply one of poverty. In this respect the Standards do not reflect our concern:

> The most abuse is found in families living in the most extreme poverty, and they are subject to no more public scrutiny than other poor families. Moreover, severe injuries and death are the least likely to be hidden at any social level, and the severest injuries appear in the poorest families.
>
> The classlessness argument may be politically convenient... because it allows mental health professionals 'to view child abuse and neglect...in the context of a medical model of 'disease,' 'treatment,' and 'cure,' rather than as predominantly sociological and poverty-related....The mundane problems of poverty and poverty-related hazards hold less fascination for them, and direct, concrete approaches to these problems appear to be less glamorous professionally than psychologizing about the poor and prescribing the latest fashions in psychotherapy.' Politicians also prefer not to see the issue as poverty-related, since poverty has less political appeal these days than does psychology....
>
> The myth of classlessness...does a disservice to poor people and to the victims of child abuse and neglect by causing money and attention to be channeled away from the real poverty-related problems of the vast majority of abusing and neglecting families and toward remedies and approaches more oriented to middle class.
>
> "Child Abuse II", Psychology Today 50 (December 1978)

(TRANSCRIPT FOLLOWS ON NEXT PAGE)

(WHEREUPON, Eugene Moore's presentation was given and the following is the discussion that ensued.)

MR. MANAK: Okay.

We are going to be starting at the opposite end with Mr. Kaimowitz first.

MR. KAIMOWITZ: To start with, Judge Moore and I come from a state which still has on it's neglect standard the ability for a court to rescind jurisdiction over any welfare mother in the state; that is, the inability to support in and of itself now constitutes sufficient grounds and has historically. We also come from a state where emotional well-being and neglect, based on emotional well-being have a lengthy history going back all of three years, that the state had no difficulty for at least a century getting along very well without that concept.

The other point that I want to make, specifically, to try to frame it because I am getting somewhat concerned about it is that Judge Moore while going very rapidly through his paper

didn't come to the conclusions that the paper does -- I am sure it's an omission because he certainly would seem to believe it, which is that this question requires generally more study and that it should be referred back into committee.

I'm not happy or pleased with the standards on abuse and neglect. I think, however, to characterize the abuse and neglect volume, particularly, as one to go back into committee, points up the difficulty some of us have had with reconciling the position of the judges on various issues. That is, as long as this area goes back into committee, the judges will continue to have the same kind of reign that they have had in this area since 1899, if not prior to that under other guises and dealing with questions that Judge Moore does provide in his paper concerning dependency as well as neglect.

I think this is a particularly crucial area because of what was alluded to by Judge McLaughlin this morning, and that is specifically in the area of neglect and abuse -- the focus on the poor family, the focus on the family that is culturally different comes into play with

the standards of morality, that I think Judge Moore alluded to, not in his position on neglect and abuse, but his own intolerance of teenage promiscuity. I don't know how he characterized it, but that's how I would see it. We are talking in this area, more than any other area about morality, and unfortunately, more so about that than about law, and all of the hedging as to whether we want to focus on the child or whether we want to focus on the parent, until we reach the point that I think Judge McLaughlin reached earlier, that is, until we reached the absolutely incongruity of locking up a child for being neglected or sexually abused, and I at one point represented in Wayne County a child who, because she had been beaten and required hospitalization had spent six months on two separate occasions in the Wayne County Youth Home, that's in the Detroit area, and said the next time she would rather be killed than go back and face detention; and until you got that kind of extreme anamoly, the problem of neglect and abuse seems far more complicated than it is.

What do I mean by that, and here I think language, again, can upset the various

stands which do not consider coming into play. The word has been shifted on us folks to abuse. It's not abuse, it's assault. If you can prove assault, a very concept; but what is the difficulty? Do we then lock up the parent, let's say, for great physical bodily harm on assault one, assault two, or assault three? No, we have go the psychological overtone, and this bothers me again in terms of what has been accepted or not accepted by the standards and that is an assumption that we can trust in this entire area of neglect and abuse to the behavioral scientists; that we do know what emotional harm is, we do know what emotional well-being is, and we can define it a certain way.

I would point out, particularly, because the literature has fully gone the other way to the most recent issue of Psychology Today, which alludes in it's newsline to two recent studies on child abuse, one with regard to hidden factor, which I think suggests that the profile of who the abusers are is somewhat different than that which has been presented publicly; and the second, even more importantly, makes it very clear that child abuse and neglect are pervasively a low-income

problem, and the reason that is important is because the behavioral scientists -- not the judges or not faulting judges in particular or anybody else here, but behavioral scientists have considered it very important to regard it as an across-the-board concept, and that we treat the problem as some kind of mythological abuse and neglect question separate from assault, separate from rape, separate from statutory rape, separate from, perhaps, permissible conduct in my mind of leaving home as my wife can do, but my child cannot do, separate from all of that.

I would briefly finish on the note of quoting two paragraphs which I think sum up a basic difference between myself and those particularly held here for some reason by Juvenile judges espousing what I regard not as their position, but having adopted a position on the behavioral scientists, at least since that notorious book called Beyond the Best Interest is concerned.

I am quoting a man by the name of Pelton -- Leroy Pelton, a psychologist at the New Jersey Division of Youth and Family Services who concluded from his research that the problem

was one of poverty rather than one of a question of a scientific intervention.

"The classlessness argument will be politically convenient," Leroy Pelton suggests, "because it allows us mental health professionals' to view child abuse and neglect in the context of the medical model of disease, treatment and cure, rather than it's predominantly sociological and poverty-related. The mundane problems of poverty and poverty-related hazards hold less fascination for them, and direct, concrete approaches to these problems appear to be less glamorous professionally than psychologizing about the poor and prescribing the latest fashions in psychotherapy."

If we would follow the earlier discussion on status offenses and follow this discussion on neglect and abuse, I am afraid the door in the late twentieth and twenty-first centuries will be to allow, as I indicated this morning, mental health professionals within a door open now by Juvenile Court judges, to have free reign on any family or any group that supposedly needs help. Now, until somebody shows the judges in particular, and here I do allude to them, that

this help works, I don't think the burden is on us. Simply those who want to abolish status offenses, those who claim that the criteria for neglect and abuse should be made so stringent that only in the most extreme cases should the intervention be allowed and certainly detention not be allowed under any circumstances unless a delinquent act is committed would be responsible for bearing the burden of proof.

I think much of this discussion in both the areas this afternoon does revolve around burden of proof, and who has the obligation of proving what study or proving the one situation therein right now I know where the power lies and I know who will have to do the proving, but I don't think that's the way it should be. I will ask the judges as well to consider whether they have the data or research to talk about help treatments and the like, particularly in this area of neglect and abuse, and particularly in the morphous concepts that Judge Moore, who earlier could not accept the concepts of doing away with the court as a last resort, on page thirteen of his paper suggests that in the area of neglect and abuse, however, that we have a problem because

we cannot define what a court of last resort should be on the neglect and abuse area; and I think if you are going to wear the shoe on one foot, you better wear it on the other as well.

MR. MANAK: Mr. Hege?

MR. HEGE: I waive at this point.

MR. MANAK: Ms. Connell?

MS. CONNELL: I just would like to say, generally, that I believe I understood you to indicate that you thought, particularly in the area of emotional neglect, the standards should be loosened up a bit, am I right? I mean, that was what I got from your paper, and what you said.

I think the difficulty with cultural differences are particularly great in the area of emotional neglect because it is so difficult to define. I have some actual instances where petitions were brought on parents where the real conflict with the social worker seem to be that parents belong to a rather bizarre religious group, where they believed that everybody should be vegetarians.

While I may not particularly agree with those kinds of beliefs myself, I see that a

broad emotional neglect jurisdiction leaves that possibility open. I think that there are, particularly in rural areas where you do not have a large number of highly trained people who are going to be making these judgments about one kind of emotional balance or whatever a child has, that there is a possibility that too many children will be caught in a web where there is a broad -- a broad definition of emotional neglect.

MR. MANAK: Because of cultural problems.

Judge Moore, would you care to respond to this?

JUDGE MOORE: Well, I guess my experience has been that I don't come from a rural community and I don't see those kinds of problems existing.

I agree that most neglect is a very difficult word to define, and when we just say emotional neglect, we are leaving the child and the family at the mercy of what the judge means by emotional neglect; and that judge down the street and down the alley might mean something totally different. Most neglect cases that we have had in our county are failure to decide cases. Again, maybe the judicial field is all wrong on

that. Maybe they are wrong that they don't decide because of emotional deprivation. We require testimony in our state not -- not by preponderance, but by clear and convincing evidence.

I know on the issue of morality, I don't know what we mean by morality since that -- again, we are talking about the parents who beat each other up in front of the child or parents who create -- who commit all kinds of sexual acts in front of their children, whether behavioral scientists are right or wrong when they say being exposed to some of those kind of activities will be emotionally harmful to a child, and I guess it's again, an issue of prudence. If the child is not going to be effected at all by seeing the parents all day long or not all day long, when the child is in front of the parents beating each other up or yelling and screaming at each other, that isn't going to effect the child's development and that kind of behavior is all right? The state isn't going to intervene to correct that behavior? I just, you know, believe in the realm of the court.

MS. CONNELL: I just believe that in this area there should be some fairly high standards except it's --

JUDGE MOORE: I agree. I don't think that because I necessarily think that that's detrimental to a child to see their parents creating sexual activity or what-have-you or want to show him the latest, so bring in the five and six year old kid or beat each other up. I think you have to go to the next step and not rely on the judge's defense to that kind of behavior, but you are going to have an expert testimony to say that that kind of behavior does have an emotional impact upon a child that is detrimental. Otherwise, I don't think the child should intervene.

MR. MANAK: Mrs. Sufian?

MS. SUFIAN: Well, somewhat along these lines, I think one of the problems we are getting into is that it's difficult for those of us to find juvenile justice and it's presumed that one of the elements of our psychology in going into it is that we care about children and about helping people, and that it's hard for us to accept that out of this wanting to do good, we often do tremendous

harm; and my experience in representing children in -- among other things in neglect cases was what Judge McLaughlin pointed out before, was that very often often what happens is that the child is the person who is punished, that the child will be placed in a home where they will see just as horrible sexual acts performed not just between other people, but on themselves, and where the removal of just their own family is in itself a tremendous harm, and unless you can show that there are real harmful acts, physical abuse, something that is provable along the lines of assault, as Gabe has suggested, I think we have to be tremendously reluctant to initiate a process where children are separated from people about whom they care and a regular life like other kids around them who have parents, even if they do bad things to them, as long as they are not harming them or are not actual provable danger to those children.

MR. MANAK: Okay.

At this time, we are going to break for approximately ten, fifteen minutes and then we will come back and continue the discussion.

(WHEREUPON, A SHORT RECESS WAS HAD.)

MR. MANAK: All right, back on the record.

Judge Ketcham?

JUDGE KETCHAM: Well, I look in two directions, sort of. One, as far as the consultant, my good friend, Judge Moore is concerned, I hear him state that he is in general support of the abuse and neglect standards, and that's good, and I agree. I see no need for postponement, redrafting, or delay. I don't know whether that's part of his paper, because I confess I haven't read it all.

But when I hear Mr. Kaimowitz, if I hear him correctly, he seems to be saying that he believes that abuse cases should be narrowed to matters of criminal assault in jurisdiction over the parents; and if so, presumably this would be in the adult criminal court; and I would take very strong acception to any such authorized proposal. In my opinion, this concept would turn such matters over to adult criminal prosecution and it would mean an almost certain inability to proceed because of the age of the child, and I think it would be a

major step backward.

MR. MANAK: All right, Judge Cattle?

JUDGE CATTLE: Well, I was -- the thing that worries me is that -- it worries me every case I have, the matter of at what -- I am quite aware of the cultural differences in every case I have and I am -- neglect means different things to different people. I am not sure that anyone can devise a set of rules that can tell me what is neglect and what isn't because if I have a -- three different children with -- and three different -- who come from three different backgrounds and situations, it is quite possible, although the purists can't believe it, that one of them could be a distinct and deliberate neglect and deprivation, a second one could be a matter of ignorance or inability, and the third one could be something entirely different. This is one of the problems that justifies that people who want to draft rules don't seem to understand and certainly in all of these three cases, I might proceed in three different ways if I got involved.

I heard a complaint a while back on -- well, let's take physical abuse. What is

physical abuse, as Judge Moore said? In two cases, two exactly similar abrasions of the skin or what-have-you, one might be abuse and one might be purposely justifiable punishment; in other words, an old man or -- sitting in front of his TV and the kid needs attention and he swats him across and says get the hell out of here with no purpose and has no compunction about blackening the kid's eye or anything else, that's one thing; or the housewife who is so upset with her husband and everything else that she is continually beating on the child as a substitute for ther matters, that is possible abuse. On the other hand, as I was telling Professor Smith, when I went to school, I went under the British system. My headmaster was permitted to cane. Now, that sounds horrible to some of these people here. I don't ever remember that old man laying a cane to me or anybody else in which any young child, as we were, fourteen to seventenn, ever felt that we were being abused. Every time we got it, we knew we had it coming; in other words, it was a punishment, and it was with an idea in mind, and believe me I remembered it each time and

I altered my behavior in accordance with it; but the cane across my backside raised very distinguishable welts mathematically precise in their placement; and I don't consider that abuse at all. But if the old man sitting in front of the TV drinking his beer or the old layd fussing raises the same kind of a welt on a child, and perhaps does it repeatedly, this is a matter of court, I think it's abuse. But I don't know what rules can be written in case histories that define it.

That's all I am saying.

MR. MANAK: Judge Fort?

JUDGE FORT: Just a supplement there, that it's easy to lose sight of the fact that the purpose of the definition is not just to help the judge but to inform the person who is going to be charged with some violation, and therefore, the growing of definition, whether it's necessary or any other, is an extremely difficult thing, and it is one in which there is a challenge to every legislature.

The only other problem that I would state is, as far as I recall, of the comments

received from any of the participants, or not of the participants, or the agencies and groups who have examined the standard, the one most critical in terms of both abuse and neglect as well as some other aspects was in the American Psychiatric, their objection was contrary to the suggestion at the end of the table here was, that we were abandoning the medical model, not helping it.

MR. MANAK: All right, Dean Smith?

DEAN SMITH: I could tell hundreds of horror stories relating to this subject and I will not because I am sure I am not the only one who could. Some standards are better than no standards. I opt for standards.

MR. MANAK: All right, Mr. Hutzler?

MR. HUTZLER: I had a point that I had hoped to make in connection with Ms. Connell's presentation, but it applies equally to the abuse and neglect standards; and although I would have preferred not to speak in rebuttal to a presenter from the organization I represent, time constraints force me to speak now rather than earlier.

That isn't -- the point I'd like to

make is in regards to the provisions in the task force standards and also, I believe, the Advisory Commission standards relating to the jurisdiction of the court under the family with service needs provision and similar provisions in the Advisory Commission standards, which extends court jurisdiction to any public agency of delivering services to children in order to allow the court to direct those agencies, to provide the services that it feels are required to deal with the child's problem. I am -- I am troubled by that urge for extended jurisdiction.

I think that it's easy to understand the frustration that Juvenile Court judges have when they are faced with a problem of dealing with the problems of these children that come before them and lack the authority to insure that these services are provided. The same sort of frustration exists among -- among workers in those agencies, administrators in those agencies, that have to provide services when they don't have the funds required to provide services to all the children who need such services.

I don't -- I don't want to express

any opinion in regard to the -- to whether or not the court should have jurisdiction over those source of children and their problem, but merely to the question of whether the court should or expect ever to get jurisdiction over the agency that provides services.

JUDGE FORT: Are you talking about Morales vs. Turman?

MR. HUTZLER: I have -- excuse me, I will allow you to ask questions in a minute. I have for a little over two years, been editor of the Juvenile Law Digest and have had the unusual opportunity in that time to review every reported decision having anything to do with kids. I have also been contacted by -- by numerous Juvenile Court justices and their clerks who have been faced with the problem of how do I insure that the kid in this particular case who needs particular services is going to get them.

I was just talking with Helen. There is a fellow who works in her office now who used to work for Judge Page in New Jersey, and he contacted me a couple of years ago about a case that was before Judge Page where everyone

that -- everyone who testified before the court agreed that this kid needed a particular type of treatment which was available in a psychiatric hospital in Philadelphia, but the Department of Children's Services or whatever the department is in New Jersey refused to send the kid and to pay for that care, and Judge Page directed that they do that. He entered an order specifically directing them to place the kid in this facility.

Also similar decisions have been handed down by other -- by other trial courts, from the one that Judge Arthur alluded to earlier, which, frankly, in my opinion, worked because his bluff was not called. The case was not appealed, to the most recent case I have seen which was a case out of New York, where a judge in the Family Court decided that a New York statute which allowed the Division for Youths to refuse a Juvenile Court placement if that placement would not be in the best interests of the child. The Family Court judge, curiously enough, upheld that to be an unconstitutionally vague standard and struck down the statute and forced them to accept the placement. But those have all been trial court decisions.

In, as I say, the two years or more that I have been reviewing cases, I have not seen a single Appellate Opinion that supports that kind of authority in the Juvenile Court, and in fact, Appellate Courts in seven states, have specifically reversed attempts by Juvenile and Family Courts to control a part of their commitment to the state department particularly in placement of the child or delivery of particular services to a child that they felt needed particular services from that agency. Those have ranged from the New Jersey case I mentioned to a case in Georgia where the agency was directed to place the child or to provide the child with direct rehabilitation services, to attempt to require a particular out-of-state placement to be paid for by the department to recently a decision in Rhode Island which, when I was at the -- at the Convention of the National Council of Juvenile Court Judges in -- in July, was on appeal to the Supreme Court of Rhode Island, and the Juvenile Court judges from Rhode Island were very optimistic that for the first time they were going to get a favorable decision. Within the month, the decision

came down and it was adverse. The court held that the Rhode Island was in error in holding the Director of Children's Services in contempt for failing to place the child in the particular program that it felt was needed. The Director had agreed that, and everyone had agreed, that that was the appropriate place for this child; but by the time there was space for that child in that particular program, there was no money left in the agency budget to pay for the placement.

Now, the easy answer, I suppose, to that -- to those cases is -- and those cases are decided under present statutes, and these standards are proposing that statutes be revised, so it's just a matter of getting those standards passed and the courts will have that authority. Perhaps then, what I am raising, is -- falls under the category of implementation problems which was to be addressed by the papers as well. And it goes really to the question of is it reasonable to expect that state legislatures are going to pass legislation that will grant that kind of authority to the court, and I think that the -- that the opinions of the Appellate Courts, although they

turn on present legislation, address, in a couple cases, at least, address the policy reasons behind that legislation; and if I could quote for a moment from the most recent one which was that Rhode Island decision, the court said, and relied on the earlier New Jersey case, and the language in that, that the court in the New Jersey case had held that the Division of Youth and Family Services should have the right to determine which private institutions are within its budgetary capabilities. Although a court may refer a juvenile to the appropriate state agency for treatment, the court does not have the authority, specifically, to select a given facility. The setting of priorities among those who are deemed to be suitable candidates for treatment is most suitably performed by the administrative agency rather than bya court. A court must eliminate it's adjudication only to the parties who are actually before it and those respective did not include the needs and demands of persons who are not represented in the controversy of the immediate issues. Unfortunately, where a court may order a large sum to be expended, particularly if it should

require transfers from other items in a comprehensive budget, it is impossible to receive the ramifications of such a decision. The agency has the responsibility of allocating it's scarce resources among myriads of competing requirements, and is constituted to perform such a function. A court is simply not constituted by it's inherent nature to achieve the required bread of the program.

And my question is, I guess, can we reasonably expect that the legislatures which I think, lots of people who have any experience in the juvenile justice system will agree, have not allocated the required resources for dealing with the problems of kids in the juvenile justice system. Can we reasonably expect that the legislatures are going to turn over the power of the purse to the Juvenile Courts; that is, permit the courts to direct the provisions of services regardless of budgetary limitations that the legislature can impose; and if not that, is it reasonable to expect that the legislature will permit the court in -- through a variety of judges throughout the state to direct the agency in each particular case to expend it's funds for the services needed for

the particular child before it and risk that in six months the entire annual budget may be depleted by these services that courts have decided are needed for the kids that have come before them.

As the Rhode Island opinion says, the courts can deal only with the individual child they are faced with. They are not in the position to consider what the impact of ordering a $50,000 per year service will be about and upon the other thousands of children who will require throughout the state. Only an administrative agency can do that. I haven't seen that in any of the papers nor have I heard anyone address that problem which I see is raised by -- by those two sets of standards in the attempt to expand court jurisdiction in what on it's face certainly appears to be a reasonable answer to the problem faced by the courts in their inability to insure that the required services are provided and those who feel that -- that the problem is not that jurisdiction over these children should be taken away from the court, but rather that the court should be given the power to -- to insure that social services required in which they feel contrary

to others can solve the problems that the children face, that they can insure that those services will be provided.

How do you feel with the other problem; that is, will the legislature surrender it's power over the purse; and if not, will it compel the executive to surrender it's administrative power over how to allocate the resources which the legislature provides them.

MR. MANAK: Mike?

MR. DALE: No.

MR. MANAK: Mrs. Thompson?

MS. THOMPSON: No.

MR. MANAK: Did you have a point, Judge Cattle?

JUDGE CATTLE: Well, I'd just thought I'd say that we are all political animals whether we like it or not. In the end, it's the people who are going to decide. I think that judges have they -- are also in a peculiar position of influencing, hopefully, public opinion.

In your case you are talking about, I would say this isn't a sure view at all. It's a practical view. It's that I think I should have

the power to tell you to provide services which you have available, but which you decide not to use; but I may not have the power to go beyond that to force you to manufacture services and expense and money which is not in your budget; but if I have problems with administrators who know better than I do which may very well be true, but they have the available service, but they determine that I am dead wrong so they are not going to provide it in this particular --

MR. HEGE: If I have $50,000 in my budget as an administrator which would be available to provide for extensive psychiatric placement and treatment for the child that you are -- that you now have before you, yet I know if I spend that $50,000 on that child, that fifty other children who are going to come before me from other courts throughout the state are not going to receive service.

JUDGE CATTLE: I didn't disagree with you on that dilemma. My problem is where you have the budget money, you have the services available, you have a variety of services available, say it's just a matter of foster homes, I determine we don't

have so much in the city as you do out in your rural areas because I know a great deal of the foster homes, I know a great deal of the agency people, I know the social service people, and they have arbitrarily decided that this is what the placement will be, and I say this isn't going to work because I know something about this child, x. I said it would be, y, and you have got, y; I think we should have the right to tell you.

MR. MANAK: Okay, Judge Ketcham?

JUDGE KETCHAM: Can I just add a point of information maybe for John?

A lovely set of standards that was developed by the Counsel of Judges of N.C.C.D. which would have, if it had been published, would have been the eighth edition of the model Juvenile Court Act, is that right, seventh, eighth, something like that, had a provision that might have relevance to what you are saying. I never saw the light of day for it, but Bill Fort and I were on it, and it had a provision in it for the concept of right of treatment that gave another string to the bone, that if the services were ordered by the judge and they were not provided, for whatever reason, and could not

be provided, that the client, the juvenile, had a right to ask for discharge.

MR. HUTZLER: That's true, and someone mentioned Morales vs. Turman. I think, also, a big difference between decisions of the federal courts which decide that minimum constitution are requirements for treatment are not being met and the kind of jurisdiction which is contemplated by the standards which would permit the court to direct particular treatment not necessarily that which would meet a minimum constitution requirement but that which the judge feels is needed which may well be the needed service, but, you know, the problem being the judge is not in a position to decide how that may affect all the other children who need services and resources.

JUDGE KETCHAM. I recognize your problem, I am just saying that this is -- at least would be a workable alternative to a problem.

MR. HUTZLER: Oh, yes, sure.

MR. MANAK: Judge McLaughlin?

JUDGE MC LAUGHLIN: Well, I want to congratulate Judge Moore on his effort and certainly the people who try to wrestle with this difficult

problem as opposed to standards. I think all the judges suffer from the same difficulty. I know I do. We know it when we see it and that's about the best way you can define neglect and abuse.

Judge Cattle talks about the motivation of the person who is proposing the punishment being the determining factor. I think you put that Rodney C. Decision that I wrote in the Juvenile Justice Digest. I don't know, but I tried to gather together all of the cases -- mostly British cases. The British, I think, have been world's leaders in the use of torture, the only Western country to have been condoned by the world since World War II for using torture. I think they are looking for expertise in this area, we have to go to the British, but in any event, that's exactly what the standard is. To Judge Cattle, it depends on whether I do it. If youe heart is coiled, again, when you hit them with the chain, it's okay. If it's to satisfy some sexual appetite that you have or for some other reason, it's an adult. But -- so they say the difficulty in doing is as we all know, it's recognized when we see it.

As the Dean said, you know, we can all tell war stories. When I was rewriting the United States Penal Law, I got so frustrated at some points that I felt that we should do away with all sections of the Penal Law, and just have one section. It was a felony to avoid to do good and avoid all evil, and I kind of feel that this is the same kind of a standard that the -- that they come up with here, using a lot more words, but that's what it amounts to. I do opt for the fact that some standards are better than no standards, for what that's worth. I don't think we do any harm by establishing a standard. I think we can do a great deal of harm, and I don't think we should have no standards. I think we have to have a standard, and I think we better have a standard throughout the gutter, that's for good or evil determinable, so that people can be put on notice.

The -- and with regard to the comments about services, this is probably the most emotional area of every judge who runs for reelection. That is, Judge Ketcham, I don't think had to go out into the hustling. They will -- the

public will be mad at you if they are dissatisfied with a wrong decision that you make in a delinquency case. They may think you should have put the kid away and there will be letters to the editor. You know, we all can write them, but you will lose the election if you return a child to the home and the abuse is repeated. You know, that is one thing that the -- that the public simply will not tolerate and it puts a tremendous amount of pressure on the elected judges to get the child out of the home regardless of whether that is good or bad usually, you know. It's just get him out of the home, and we end up where the service is not available through a variety of reasons, where housing a child -- and I think, I don't know how you can say it.

Now, I think the standards have not approached the problem, but I think that they are going to have to face it and bite the bullet. This is a tryer situation. What you are going to do is you are going to let some children be beaten to death in order that you don't harm ninety-nine children by fitting them in institutions, and that's what nobody is willing, you know, to say. That we know that under these standards, there are going to

be unfortunate tragedies which will be in the headlines. The child who does remain in a home and is not harmed by being removed from the family and makes it, that's the train that arrives on time, that doesn't make the headlines; and I think the standards that I opt for, IJA/ABA, I think they do a better job; but it's just great, but I think there should be something in this -- some recognition of the fact that the judges who would follow these standards are going to "make mistakes" if you want to describe it as that; and at least it gives them service, to the defense of the poor family and the judge who "makes the mistake," that's the only thing I ask be put in brackets or unbracketed.

MR. MANAK: Mr. Dale?

MR. DALE: I would just simply say in response to the Judge that I think the Judge might not make a mistake and the child would still be greatly harmed while being kept in the home. That is to say that everyone who does all they possibly can, my colleagues who represent children and parents have seen that when all the reports came in. Everybody did his job, all the data was there, all the

testimony was taken, the child went home, and something terrible happened.

JUDGE CATTLE: And I, as a judge, might have known that damn well, but I didn't have no basis for preventing it.

MR. MANAK: Judge Arthur?

JUDGE ARTHUR: Just briefly.

I would agree with quite a bit of what Mr. Kaimowitz said. First of all, most of the neglect is in the range, to my point, of over ninety percent, of -- involves the poor and the minorities, the people who are visible to welfare and -- so welfare is able to discern this situation and bring it to the attention of the authorities. I think that in itself speaks volumes of what the present definitions of neglect and abuse are doing. I think the present stand, however, is -- as so many of you stated, is a pendulum in swinging too far. I think we need a standard for neglect, but I think we need it at a low enough level so that we can get to the kids before major damage is concerned.

Gene has in here a quote from Judge Lincoln about how much blood must flow before some-

one should be allowed to intervene. Unless -- using his own language, "unless all the standards can be brought in to fair the balance between protecting children and protecting parental rights and the children will be subject to far too much injury by parents, and the courts will not be able to help them." I think we need a broader standard than the present laws by far allow. I think we need a broader standard than the standards allow, but I would agree with Mr. Kaimowitz, it's not here and we -- most of the conversation has been paid, we don't know what the language is, we need the definitions, we need to circumvent the court's power.

I say give the court's power to help and protect these kids, but for god's sakes, circumvent it so courts cannot go overboard with their discretion. It might be a constitutional discretion that's given under the trend laws and under these standards, too, so I say let's find a standard that applies to the rich and the poor, but let's define that in such a way that it is subject to evidence, it is subject to a statutory system as to whether it exists or not exists.

And the last point I will make, Gene says it in here, if people are going to help these kids, they should be held accountable to keep their promises for helping. The right to treatment as it's here, and we can all talk about it, but how many right to treatment cases do we see? I got my first one this week in seventeen years.

MR. MANAK: Judge Delaney?

JUDGE DELANEY: Well, I certainly disagree with the limited definitions in the standards, disfigurement, impairment of bodily functioning, or serious physical injury. It sounds like a formula for whipping slaves. I was just reading Jessipee (sic) and the standard there was you didn't mar their face you whipped them on the back because it didn't show. You didn't maim them in such a way they couldn't function, you didn't impair their chattel, but otherwise you can do anything you wanted.

Well, that's exactly what we are saying here, and I wonder if we really want to limit our concern for children in this fashion. The thing that's overlooked, it seems to me, in

this standard, is the rights of a child, the right in a secure home to parents who care about them, to a decent education, to adequate nutrition, to guidance and direction. These are the things that seem to me that constitute neglect or actual abuse if they are not met and it seems to me there must be a form for a child to be able to come in and opt for the needs of the child.

This thing is predicated on a couple of myths. One of the myths is that all parents love their children, which is not so. There is another myth that all children want to be with their parents, that isn't so, either. Anybody that works in this field knows that, but what I would like to suggest is that we need a broad definition. It seems to me that abuse and neglect are very much akin to negligence. If we try to -- negligence is a concept that we, in the legal profession, have dealt with for a couple hundred years without too much trouble. If we try to defend it, we would take hundreds of volumes. Nevertheless, you get competent advocates, if you're getting a person representing the people, a person representing -- a lawyer representing the parents

and a lawyer representing the child, any competent judge is going to be able to make a judgment as to whether neglect or abuse actually exists, and if he makes the wrong decision, the thing is subject to appeal. But I think what we should do is give the child a break. It seems to me that these standards should address themselves to the needs of the child rather than to the needs of the parents. So I would like to suggest that we consider that concept being very much akin to the concept of negligence and leave it broad.

MR. MANAK: Ms. Szabo?

MS. SZABO: No comment.

MR. MANAK: Okay, Mrs. Bridges?

MS. BRIDGES: No comment.

MR. MANAK: Mr. Rounds?

MR. ROUNDS: I have three comments in reference to Mr. Kaimowitz' statements.

The proposal that you charge parents with assault simply does not answer the question what do you then do with the child. The statement that abuse and neglect are low-income problems may well be the expense or statistics, but I think more correctly the case is recorded of neglect and abuse

that is, those that come to the attention of the courts are a low-income problem. I think the remaining possible cases of abuse and neglect are a totally unknown quantity because of the nature of the reporting system.

And the comments regarding the invasion of or the imposition of public or personal morality standards in the courts of abuse and neglect jurisdiction, is at least what is trying to be avoided in the standards in their focus on their harm to the child. I am all for that, as I suppose everybody would be, but to the extent that all law is at least -- all criminal law is a combination of public morality. You can't avoid legislating in an area simply because it might entail moral judgments, therefore, avoid the individualization of moral judgment by requiring an injury to the child, but not the less particular child.

MR. MANAK: Mr. Siegel?

MR. SEIGEL: I don't have much to say.

I just -- what Judge Delaney said really bores me though. It just sounds like you want to give the judge the power to put on the

robe and play god in the lives of these families imposing their own moral judgments on what mothers, on what good moral standard is in a family, and there is -- it's just what you were talking about, was just so broad and so vague, and I mean, I am not a parent, but I mean I would be frightened that if I was -- that if some judge who just happened to have a different value system, a different moral system, a different idea of how kids should be placed, could come in and say my kids should be taken away. I just think it's a real big danger to have it as broad and as vague and as discretionary as you were describing it.

JUDGE DELANEY: I would only say to Mr. Siegel that no judge plays god if there are competent attorneys presenting the case, so it's back in the court of the legal profession to provide the safeguards that the law does afford.

MR. SIEGEL: But you are just having attorneys appeal to the value system of a particular judge as to what a good parent is or isn't. You talk about some parents are loving, some parents are caring, some parents aren't. I don't think those

are the kind of decisions a judge should be making on the basis of attorneys putting arguments before them.

JUDGE DELANEY: I think the only suggestion I was making is if the child is not being permitted to realize his full potential as a free American citizen, the law has an obligation to him to intervene and to insure those protections. It boils down to that.

MR. MANAK: I don't think really I developed some of the First Amendment issues involved here; for example, the cultural differences. They have been alluded to here, family lifestyle, they have been alluded to here, but I don't think we have really fully developed this. Some of the first limit issues involved in blood transfusion cases, for example.

Mr. Kaimowitz, since much of the comment was directed to your comments, I am going to give you the chance to make some final comments.

MR. KAIMOWITZ: Briefly, to clarify. I am for the standards and I am not opposed to the standards and do not want to lay with regard to abuse and neglect. I agree that the area is amorphous

but I do think that the standards do attempt to define them. As I said, I am not personally pleased, but in terms of an over-all guidelines, even in keeping with Judge Delaney's over-all concept of negligence, that such a guideline has to exist, and I think the standards to impose that.

As to what you do with the child, Mr. Rounds' questions, I think, really bothers me, because I think it's a kind of analogy of youth in our area. If you hit your neighbor's child, it's clear that that's like in the caning story of years ago. I am not sure it's clear what that is either, but I would presume that if I hit my neighbor's child, that that would be assault and the assumption would be that the parents could prosecute. I think that Judge Ketcham's argument on that score is very interesting because I think that is what is at the crux of what we are talking about. Proof in this area is almost impossible, and I do recognize that; but I think we ought to then start to analyze it from that point of view, that is why we have loosened the standard that, in fact, it is not for reasons of morality or otherwise, but because particularly,

if you have an infant who is badly burned or who may have suffered brain damage as a result of physican abuse, and each parent is denying it, you are going to be able to prove it; but the problem is, that if we come back to what Judge McLaughlin says, that if we want this kind of obscenity standard, over-all I know I can see it, I mean that just as what I regard as . . . . *regards about pornography really being carried over into this area; that's where I get concerned. That is why I need some standard so that at least as has been alluded to at the end of this table, that parents and people facing this know what will occur.

What bothers me is to hear judges at this kind of session say I have two cases exactly the same, I would look at the evidence, but I know what he is thinking he is going to get it. I know what he is thinking, and he is not going to get it, and if you listen to what happened at the caning incident versus what the guy at the television said. I think the argument about what is evidence in that story, I don't know what else to say. I mean, we are sitting around with basically

* Word unclear.

a middle-class group who this issue will invariably contain, and without ever hearing the sides of the poor people, and I think that -- by the way, Mr. Rounds, if you check out that Psychology Today article and the subsequent article in the Journal, after author psychology that it was not based on that usual law, that it was because of exposure to the courts; but they did a control group on various people who were not involved in the process to begin with altogether, and they tried to ascertain whether that written group of middle-class people were involved in abuse, and what I am suggesting is that we accept these standards. We accept them in keeping what was talked about in the earlier hour; that is, of non-criminal behavior not being punishable and recognizing that we are talking about both areas about helping families, about in judicial restraints, within legal restraint.

I do not want to hear, I hope, five years from now, talk like I know it when I see it, because I don't need a legal system at that point. If that's how we start enforcing the law, and that's my major concern. So I do endorse the standards, I do not now think that you can never get

in this area standards that have got enough, and I think we ought to start examining, however, the reasons why it is so difficult to feel in this area, and I suggest that we haven't found it despite all the rhetoric in standard offenses and the rhetoric in abuse because so many of the facts that I enjoyed hearing today for the first time are generally not contracted by various groups.

As I said, I am very impressed with Mr. Ketcham's argument because it's the first time that I have ever been confronted with that argument.

MR. MANAK: Okay.

NCJ 76917

1. Pre-Trial Detention: Delinquency Cases Only — Consultant Jane Sufian

ABSTRACT OF PAPER

Ms. Sufian begins by noting that every recent study of detention practices have supported the view that too many juveniles are being detained unnecessarily, under harsh conditions, at great expense to both the juvenile and the public. She points out that the bases for detaining juveniles are broader than those for adults and that in most jurisdictions, procedural protections available to adults such as probable cause hearings, are not provided to juveniles. The deprivation of a juvenile's liberty prior to trial in order to protect him or her is cited as "a quintessential example of the tension that currently exists between the parens patriae and constitutional rights approaches to juvenile justice."

In this context, Ms. Sufian examines how the three sets of standards seek to resolve this tension. She indicates that each set of standards "start from the premise that the detention of juveniles is currently being overused and misused," identify similar causes for these problems, and adopt similar solutions for solving them. In particular, they seek to increase the accountability and visibility of judges and other persons making decisions affecting detention and limit the scope of discretion, by establishing detention criteria, by requiring that the reasons for detention be stated on the record, and by providing for review hearings. To reduce delay, more stringent time limits are set for cases in which a juvenile is detained than for cases in which the juvenile remains at home and sanctions are provided for violations of these limits. A further limitation on detention proposed by the standards is the requirement of a determination that there is probable cause to believe a delinquent offense has been committed and that the juvenile committed it. Ms. Sufian observes that all three sets of standards go beyond the requirements imposed by the Supreme Court for adult criminal cases, in that they call for a full due process hearing to determine probable cause rather than merely an ex parte determination. She notes, however, that the National Advisory Committee standards, unlike the IJA/ABA and Task Force provisions would permit the determination of probable cause to be based upon hearsay.

There is then a detailed analysis of the criteria set for detention by the standards. Ms. Sufian sets forth the criteria proposed by the IJA/ABA Joint Commission, commenting that they "precisely delimit the circumstances and procedures whereby detention may be imposed at each level of penetration into the juvenile justice system." The NAC and particularly the Task Force standards

are less detailed although they attempt to make the detention criteria used by police officers, intake officers and judges more consistent. While the NAC standards strictly limit secure detention, shelter care is permitted when a noncustodial alternative is unavailable. She stresses that the IJA/ABA standards unlike the other sets would not permit coercive detention for a child's protection, for substitute care, or to deter serious property offenses. She concludes that:

> Severe limits on juvenile detention practice are not an abandonment of a separate juvenile justice system. Such an approach proceeds from a belief that the best way to help children is to utilize the full panorama of due process procedures developed to protect adults from the arbitrary use of government power. It should now be beyond cavil that locking children up does not help them.

SUMMARY OF CONTENTS

The discussion centered on the question of preventive detention. More specifically, the panelists discussed whether detention was proper to prevent property crimes, a practice which would be prohibited under the IJA/ABA and Task Force standards, but not under the NAC provision. It was raised initially by Mr. Rounds who asked why the standards would preclude the detention of a youth charged with burglary who had been adjudicated for twelve prior burglaries. This hypothetical question was asked with slight variations by Judge Arthur, Judge Delaney and Judge Fort. Ms. Szabo, Judge McLaughlin, Judge Moore and Ms. Thompson suggested that there was a legitimate public concern and much interest in protection against repetitive offenders.

In reply, Ms. Sufian pointed out that even repeat offenders enjoy a presumption of innocence with regard to new charges, and Mr. Hutzler argued that under current interpretations of the Eighth Amendment to the Constitution, the only legitimate rationale for pretrial detention is to assure a person's presence at trial. Mr. Hege commented that pretrial detention violated the non-punitive premise of juvenile court proceedings. Mr. Dale noted that predictions of future conduct were highly unreliable and Mr. Kaimowtiz suggested that identical standards should govern adults and juveniles accused of committing crimes.

Responses to these comments occurred throughout the discussion. Judge McLaughlin explained that New York justified preventive detention for juveniles on the grounds that children can receive no harsher penalty for multiple offenses than for a single

offense. Judge Ketcham pointed out that the District of Columbia had preventive detention provisions for adults as well as juveniles. Judge Fort suggested that under McKeiver v. Pennsylvania, it may be possible to have a different basis for detaining juveniles than for adults.

Two related issues were raised during the discussion of preventive detention. The first was whether money bail should be extended to delinquency proceedings. Mr. Kaimowitz favored use of bail since it would help to equalize the standards applied to juveniles and adults. Judge Cattle indicated that he occasionally used money bail. Judge Arthur stated that bail was only effective if it was meaningful to the juvenile, and holding a youth's driver's license instead of money was often a highly effective means of guaranteeing his or her return. Ms. Sufian was somewhat ambivalent, stating that if bail were the only means for release, it would be difficult for most juveniles to obtain the necessary funds, but that if it were one alternative, it might reduce the number of youths detained. The second issue was whether children who could not be controlled by their parents should be detained pending trial. As Judge Delaney phrased it, "should we release him and set him up for ... [a transfer to adult court], or should we detain him?" Ms. Sufian countered that given the condition of many juvenile detention facilities, children should not be detained for their own protection.

Finally, a number of speakers including Judges Ketcham and McLaughlin and Mr. Kaimowitz suggested that a reduction of the time between arrest and adjudication and the development of noncustodial alternatives would greatly reduce the problem of detention.

76917

Of the Detaining of Children

"Yank. Sure! Lock me up!
Put me in a cage! Dat's de
on'y answer yuh know. G'wan,
lock me up!"

-- The Hairy Ape, Eugene O'Neill.

"It is a true proverb, that if you
live with a lame man you will learn
to halt."

-- Of the Training of Children, Plutarch.

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INTRODUCTION

Nearly fifteen years ago, two noted commentators examined the detention of children who were involved in the juvenile justice system and concluded that juvenile detention practice was "in desperate need of overhaul."[1] Few observers would gainsay that judgment to this day. To the contrary, every recent study continues to testify to the problems involved in juvenile detention: excessive numbers of children detained,[2] unnecessarily,[3] under harsh conditions.[4]

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1. D. Freed & P. Wald, Bail in the United States: 1964, 111 (1964).
2. It is estimated that nearly one million children a year are detained in juvenile detention facilities and jails. Sarri, The Detention of Youth in Jails and Juvenile Detention Facilities, 24 Juv. Just. 3, (1973). On a single day in 1975, 13,555 juveniles were held in short-term juvenile detention facilities (exclusive of jails). National Criminal Justice Information & Statistics Service, Law Enforcement Assistance Administration, U.S. Dep't of Justice, Children in Custody: Advance Report on the Juvenile Detention and Correctional Facility Census of 1975 (October 1977) [hereinafter Children in Custody, 1975]. Two sociologists concluded from their study of the differential selection of juveniles for detention that "short-term detention/jailing has become America's primary 'correctional' response to arrested juveniles." Kramer & Steffensmeier, The Differential Detention/Jailing of Juveniles: A Comparison of Detention and Non-Detention Courts, 5 Pepperdine L. Rev. 795-806 (1978) [herein fter Kramer & Steffensmeier, Differential Detention].
3. A very small percentage of the cases of juvenile pretrial detainees result in placement in an institution. See Ferster, Snethen & Courtless, Juvenile Detention: Protection, Prevention or Punishment? 38 Fordham L. Rev 161, 193 (1970) [hereinafter Ferster, et al., Detention]; Hoffman & McCarthy, Juvenile Detention Hearings: The Case for a Probable Cause Determination, 15 Santa Clara Law.J.267, 295 (1975): "In many California counties, on every Monday, a large number of children who have been detained over the weekend are released without a petition being filed or a detention order being sought," citing Boches, Juvenile Justice in California: A Re-Evaluation, 19 Hastings L.J. 47, 77 n. 167 (1967). Freed and Wald reported that 43% of all children detained overnight or longer are eventually released without ever being brought before a judge. Freed & Wald, supra note 1, at 100.
4. E.g., R. Sarri, Under Lock and Key: Juveniles in Jail and Detention, 13, 65 (1974); Sarri, Services Technologies: Diversion, Probation and Detention, in Brought to Justice? Juveniles, the Courts and the Law 168-173 (R. Sarri & Y. Hasenfeld eds. 1976) [hereinafter Brought to Justice]; Children's Defense Fund, Children in Adult Jails 27-37 (1976). One "candid appraisal of the facilities" led to the conclusion that "anything that succeeds in keeping a child out of detention should be encouraged." M. Midonick & D. Besharov, Children, Parents and the Courts: Juvenile Delinquency, Ungovernability and Neglect 78 (1972).

At great financial expense to the state[5] and grave psychological and physical cost to the juvenile.[6]

Moreover, it is considered particularly important that the detention of juveniles during the pretrial period[7] receive attention because of the legal significance of this stage in the juvenile justice system.[8] Not only does pretrial detention impede the preparation of a defense,[9] it also negatively affects the disposition of cases[10] in that the detained juvenile is unable to demonstrate a satisfactory home adjustment, a heavily weighted factor in dispositional decisions.[11]

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5. E.g., Kramer & Steffensmeier, Differential Detention, supra note 2, at 807; Children in Custody, 1975, supra note 2.
6. E.g., Komisaruk, Psychiatric Issues in the Incarceration of Juveniles 21 Juv. Ct. J. 117 (Winter 1971); Senate Comm. on the Judiciary, Subcomm. to Investigate Juvenile Detention, 91st Cong., Part 20, Statement of Joseph R. Rowan 5140 (1970); J. Downey, State Responsibility for Juvenile Detention Care 3 (1970).
7. A juvenile may be detained before adjudication, pending disposition or post-dispositionally while awaiting effectuation of long-term placement.
8. Pretrial juvenile detention is a "significant phase in the juvenile justice process because it constitutes the initial critical contact with the system for many youth." R. Sarri supra note 4, at 14.
9. Interviews between client and attorney and the identification and location of defense witnesses, for example, are more difficult when the client's mobility is restricted. In addition, the defense attorney may fail to explore alternative avenues of defense because of the pressure for a speedy trial when his or her client is detained. See Note, Juvenile Justice: Preventive Detention, 43 Brooklyn L. Rev. 551, 558 (1977).
10. National Criminal Justice Information & Statistics Service, Law Enforcement Assistance Administration, Analytic Rep. No. 4, Juvenile Dispositions: Social and Legal Factors Related to the Processing of Denver Delinquency Cases 28-29 (1975). See also studies cited in Campbell v. McGruder, 580 F.2d 521, 531-532, (D.C. Cir. 1978).
11. Guggenheim, Paternalism, Prevention, and Punishment: Pretrial Detention of Juveniles, 52 N.Y.U.L. Rev. 1064 (1977) [hereinafter Guggenheim, Pretrial Detention]; National Juvenile Law Center, Law and Tactics in Juvenile Cases 184, 190 (3d ed. 1977).

In order to place this subject in proper perspective, it should initially be noted that the detention of juveniles is a very different animal from adult detention. To begin with, in the criminal justice system adults may be detained only when they are charged with violating the penal code. Detained juveniles, in contrast, in addition to being alleged law violators, may also be status offenders -- incorrigibles, runaways and truants -- or neglected and abused children.[12] The differences in detention systems appear particularly anomalous, however, when it is the juvenile charged with the commission of an act that would be a crime if he or she were an adult who is compared with the adult defendant.

First, the only valid bases for detaining an adult prior to trial are to ensure his or her presence at trial or otherwise to protect the processes of the court (to prevent interference with witnesses, for example).[13] Juveniles, however, may be detained not merely to guarantee their appearance in court but also to prevent them from harming other people or property, as well as to protect them from others or themselves.

Second, although an adult detainee is constitutionally entitled to a probable cause determination of the legal sufficiency of the charges against him or her,[14] the overwhelming majority of juvenile codes do not require a probable cause determination for juveniles detained pending trial.[15]

Finally, although bail is generally available to detained adults charged with a noncapital offense, the majority of jurisdictions do not permit bail for juveniles.[16]

The explanation for the current state of juvenile detention practice is readily found in the history of the juvenile justice system. Since its formal inception with the creation of the first separate juvenile court in Illinois in 1899, the juvenile justice system has been based on the parens patriae power of the state to intervene in the lives of its citizens for their welfare. At least theoretically concerned with treatment rather than punishment, and relying on its benevolent motivation, the juvenile court largely eschewed due process in favor of informal and discretionary procedures designed to determine what disposition was in the best interests of the child.[17]

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12. It is estimated that half of the number of juvenile detainees are charged with noncriminal offenses. Ferster, et al., Detention, supra note 3, at 195.
13. See Campbell v. McGruder, supra note 10, 580 F.2d at 528; Tribe, An Ounce of Detention: Preventive Justice in the World of John Mitchell, 56 Va L. Rev. 371 (1970).
14. Gerstein v. Pugh, 420 U.S. 103 (1975).
15. See Guggenheim, Pretrial Detention, supra note 11, at 1077 note 61.
16. M. Levin & R. Sarri, Juvenile Delinquency: A Comparative Analysis of Legal Codes in the United States 29 (1974).
17. See e.g., Fox, Juvenile Justice Reform: An Historical Perspective, 22 Stan L. Rev. 1187 (1970); and D. Rothman, The Discovery of the Asylum 206-236 (1971).

Conversely, adults have been considered to possess a constitutional right to liberty that could be interfered with in penal matters only on the basis of a finding of probable cause of commission of a crime and pursuant to due process of law.[18]

More recently, in the 1960s and early 1970s, a string of Supreme Court cases, which acknowledged failures of the parens patriae approach in certain areas, incorporated into the juvenile justice system constitutional rights for accused juveniles at the adjudicatory[19] and choice-of-forum stages.[20] The Supreme Court has not yet directly addressed the preadjudicatory stages of juvenile justice. Consequently, pretrial detention practice, which involves the deprivation of a child's liberty often for the stated purpose of protecting him or her, is a quintessential example of the tension that currently exists between the parens patriae and constitutional rights approaches to juvenile justice.

It is in this historical and philosophical context that this paper will examine the treatment of pretrial juvenile detention by three sets of juvenile justice standards currently competing for national influence. The standards are the produce of 1) the Juvenile Justice Standards Project of the Institute of Judicial Administration and the American Bar Association (hereinafter "IJA/ABA"); 2) the Task Force on Juvenile Justice and Delinquency Prevention (hereinafter "Task Force"); and 3) the National Advisory Committee for Juvenile Justice and Delinquency Prevention (hereinafter "National Advisory Committee"). The discussion will be restricted to pretrial detention of juvenile delinquents[21] with particular emphasis on secure detention[22] and on the determination of probable cause prior to extended detention.

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18. See e.g., Gerstein v. Pugh, 420 U.S. 103 (1975); Coleman v. Alabama, 399 U.S. 1 (1971).
19. In re Gault 387 U.S. 1 (1976) (right to notice of charges, right to counsel, right to confront and cross-examine witnesses, privilege against self-incrimination); In re Winship, 397 U.S. 358 (1970) (charges must be proved beyond a reasonable doubt); contra, McKeiver v. Pennsylvania, 403 U.S. 528 (1971) (denial of jury trial).
20. Kent v. United States, 383 U.S. 541 (1966) (right to due process hearing on issue of transfer to adult criminal system); Breed v. Jones, 421 U.S. 519 (1975) (retrial in criminal court after adjudication in juvenile court violates double jeopardy clause).
21. IJA/ABA would abolish the family court's jurisdiction over noncriminal misbehavior. Institute of Judicial Administration/American Bar Association Joint Commission (IJA/ABA) Standards Relating to IJA/ABA Noncriminal Misbehavior Standard 1.1 (Tentative Draft 1977); National Advisory Committee on Criminal Justice Standards and Goals, Report of the Task Force on Juvenile Justice and Delinquency Prevention Standard 10.3 (1976) (hereinafter Task Force) 10.3 (1976), and National Advisory Committee for Juvenile Justice and Delinquency Prevention, Report to the Administrator on Standards for the Administration of Juvenile Justice, Standard 3.112 (1976 and 1977) (hereinafter NAC), would retain such jurisdiction. "Delinquents" refers to juveniles accused of doing acts that would be crime if they were adults.
22. One commentator on "the gross overuse of secure custody" noted that " r ates in the United States generally exceed those of other industrialized nations for which data are available." R. Sarri, supra note 4, at 65.

COMPARISON OF STANDARDS

All three sets of standards start from the premise that the detention[23] of juveniles is currently being overused and misused.[24] Moreover, there is general agreement regarding the causes of the problem and, therefore, the areas for reform: lack of accountability and visibility;[25] delay;[26] and inadequate information and excessive discretion in the decision-making process.[27]

Further, the standards propose similar techniques for increasing the amount of accountability and visibility in the system, such as requiring decision makers to state in writing or on the record their findings and the basis therefore;[28] reserving the detention decision for judicial personnel rather than referees,[29] establishing a separate, single statewide agency with responsibility for nonjudicial personnel and facilities involved in the detention process.[30]

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23. The Task Force defines "detention" in traditional fashion as placement in "physically restrictive facilities" (Task Force, supra note 21, at 661) as distinguished from "shelter care," or "unrestrictive facilities, such as foster homes or group boarding homes." Id. IJA/ABA, echoed by the National Advisory Committee NAC supra, note 21, Commentary to Standard 3.151) departs from the popular definitions to emphasize that "detention" involves any removal from the juvenile's "usual place of abode." IJA/ABA, Interim Status (hereinafter I.S.) Standard 2.9, commentary at 45 (Tentative Draft 1977). A "secure detention facility" then has "physically restrictive construction and procedures that are intended to prevent the ... juvenile ... from departing at will" (id. Standard 2.10; see NAC commentary to Standard 3.151, "secure facility") and a "nonsecure detention facility" is nonrestrictive, shelter care (IJA/ABA, I.S., 211; see NAC Standard 3.131, commentary at 80, "nonsecure facility").
24. IJA/ABA, I.S., 1; Task Force, 374; NAC, at Commentary to Standard 3.151.
25. IJA/ABA, I.S., 2; Task Force, 374; NAC, at Commentary to Standard 3.151, and id. NAC Commentary to Standard 3.155.
26. IJA/ABA, I.S., 3; Task Force, 375; NAC Commentary to Standard 3.151, and id. Commentary to Standard 3.155.
27. IJA/ABA, I.S., 3; Task Force, 374; NAC Commentary to Standard 3.151, and id. NAC, Commentary to Standard 3.155.
28. IJA/ABA, I.S., at Standard 4.3 (would invalidate any decision or order unaccompanied by reasons); Task Force, Standard 12.11 (refers to judges only); NAC Standard 2.242 (police) and id. Standard 3.155 (intake officers and judges).
29. IJA/ABA, Standards Relating to Court Organization and Administration, Standard 3.2 (Tentative Draft 1977); Task Force, Standard 8.3; NAC, Standard 3.124.
30. IJA/ABA, I.S., Standard 11.1; Task Force, Standard 19.2, id., Standards 21.1, 22.1; NAC, Standard 3.141 (a specialized intake unit, not necessarily statewide), id. Standard 4.11 (statewide administration of detention facilities).

Mandating judicial detention hearings,[31] periodic detention review hearings[32] and appellate review[33] are judicial techniques.

There is also consensus on a procedure for dealing with delay in the system: the establishment of mandatory time frames for processing the cases of detained juveniles,[34] with sanctions for failure to comply with the time limits.[35]

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31. IJA/ABA, I.S. Standard 7.6; Task Force, Standard 12.11; NAC, Standard, 3.155.
32. IJA/ABA, I.S. Standard 7.9; Task Force, Standard 12.11; NAC, Standard, 3.158.
33. IJA/ABA, I.S. Standard 7.12; Task Force Standard 12.11; NAC, Standard, 3.158.
34. The time periods are as follows:

	IJA/ABA, I.S.	TASK FORCE	NAC
Police Detention	Prohibited (5.4)	No longer than necessary for referral to intake (5.9)	Bring to intake within 4 hours (2.242)
Judicial Detention Hearing	Within 24 hours after intake officer files a petition (7.6); intake official must file petition at next court session or within 24 hours after arrival at intake (6.5)	Within 48 hours after taking into custody (12.1)	Within 24 hours after taking into custody [3.161(b)]; intake official must file notice and reason with court within same time period [3.161(a)]
Detention Review Hearing	At or before 7 days (7.9)	Each 10 court days (12.1)	At or before 7 days (3.158)
Appeal of Detention Hearing	Within 24 hours (7.12)	Expedited procedure to permit speedy review (12.11)	As expeditiously as possible (3.158)
Adjudicatory Hearing	Within 15 days after arrest or filing of charges whichever earlier (7.10)	Within 20 days after arraignment (at detention hearing) (12.1)	Within 15 days of filing of petition [3.161 (i)]; petition to be filed within 2 judicial days after intake notice filed [3.161 (c)].

35. IJA/ABA, I.S. Standard 7.10 (mandatory dismissal with prejudice); Task Force, Standard 12.1 dismissal only when prejudice to juvenile results; release from confinement preferred over case dismissal (id. commentary at 377) ; NAC, Standard 3.161 (graduated sanctions, ranging from release to dismissal with prejudice).

Probable Cause Determination

As indicated above, the three sets of standards further agree that excessive discretion in the decision-making process is one of the major causes of the problems in the detention system.[36] To limit discretion, specific procedures and criteria are therefore established. One limitation imposed by each of the standards is to require that before the court may consider the detention issue, the state must establish the existence of probable cause to believe that the juvenile committed the offense charged.[37] If probable cause is not established, the juvenile must be released.[38]

At present, few juvenile codes require that a probable cause determination be made prior to pretrial detention.[39] Federal and state courts, however, have held on due process grounds that a probable cause determination is a constitutional prerequisite to juvenile detention.[40] Recently, the Supreme Court has held, solely on the basis of the Fourth Amendment, that a judicial determination of probable cause is a prerequisite to extended detention of an accused adult.[41] There is no reason at this juncture to think that the Fourth Amendment probable cause requirement should not be extended to juvenile detainees.[42]

The more difficult question, however, is whether the probable cause issue must be determined at a hearing comporting with traditional due process safeguards. Gerstein answered this question in the negative for adult defendants,[43] but extremely persuasive arguments, emphasizing the graver consequences for juveniles of lack of procedural safeguards at the pretrial detention stage, have been offered as to why the Gerstein reasoning should not be extended to juveniles.[44]

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36. Numerous reports have documented the enormous variations in detention rates within, for example, a single state [Sumner, Locking Them Up, 17 Crime & Delinquency 168 (1971)], or even the same court [J. Polier, A View from the Bench 2 (1962)]. See, generally, R. Sarri, supra note 4.
37. IJA/ABA, I.S. Standard 7.6. F.; Task Force, Standard 12.11; NAC, Standard 3.155.
38. Id.
39. See Guggenheim, Pretrial Detention, supra note 11, at 1077 n. 61.
40. See, e.g., Cox v. Turley, 506 F. 2d 1347 (6th Cir. 1974); Cooley v. Stone, 414 F.2d 1213 (D.C. Cir. 1969); Black Bonnett v. State, 357 F. Supp. 889 (D.S.D. 1973); In re Edwin R., 60 Misc. 2d 355 (N.Y. Fam. Ct. 1969).
41. Gerstein v. Pugh, 420 U.S. 103 (1975).
42. See, e.g. Moss v. Weaver, 525 F.2d 1258 (5th Cir. 1976), where the court stated that "[p] retrial detention is an onerous experience, especially for juveniles, and the Constitution is affronted when this burden is imposed without adequate assurance that the accused has in fact committed the alleged crime." 525 F.2d at 1260.
43. Gerstein v. Pugh, 420 U.S. 103, 121-122 (1975).
44. See National Juvenile Law Center, Law and Tactics 189-191 (3d ed. 1977).

Nothing, of course, precludes a state from providing more than the constitutional minima. The Advisory Committee points out that every recent model act and set of standards has recommended that there be the opportunity for a judicial detention hearing,[45] and IJA/ABA, the Task Force and the Advisory Committee each would require that probable cause be established at a mandatory due process detention hearing.[46] Of the three standards, only the Advisory Committee, following Gerstein, would not require that the determination of probable cause be based on competent evidence.[47]

A second crucial mechanism utilized by the three sets of standards to limit the extensive discretion in the juvenile justice system is the establishment of criteria pursuant to which removal from home in general and confinement in secure detention in particular are permitted. This is the major area in which the standards differ on the subject of pretrial detention. A detailed examination of these criteria follows.

Criteria for Detention

IJA/ABA

The IJA/ABA criteria are informed by a first premise that "the danger of too much detention before trial ... currently outweighs the danger - both for juvenile and society - of too much release."[48] Thus, the Interim Status volume finds that public policy favors the unconditional release of accused juveniles,[49] and would permit the removal of juveniles from their home for three narrow purposes only: to protect "the jurisdiction and process of the court";[50] to prevent the juvenile from inflicting "serious bodily harm on others";[51] and to protect the juvenile "from imminent bodily harm."[52] Secure detention, moreover, is permissible only to serve the first and second purposes, not to protect the juvenile.[53] In all cases, the alternative that least interferes with the juvenile's liberty is to be chosen.[54]

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45. Commentary to NAC, Standard 3.155. Less than half the juvenile codes require a detention hearing. M. Levin & R. Sarri, supra note 16, 30-31.

46. IJA/ABA, I.S., Standard 7.6.F; Task Force, Standard 12.11; NAC, Standard 3.155.
47. Id., commentary at 94.
48. IJA/ABA, I.S., supra note 21, at 3.
49. Id., Standard 3.1. This policy is to govern the police (id. Standard 5.1); intake officials (id., Standards 6.4); the court id. Standard 7.7(B) ; and the prosecutor (id. Standard 9.2).
50. Id., Standard 3.2.A.
51. Id., Standard 3.2.B.
52. Id., Standard 3.2.C.
53. Id., Standard 6.6.C. 3. The use of jails is totally prohibited. Id. 10.2.
54. Id., Standard 3.4.

Underscoring the restrictive nature of the justifiable bases for detention, the volume specifically prohibits resorting to pretrial detention for several other, traditional purposes: "to punish, treat or rehabilitate the juvenile";[55] "to allow parents to avoid their legal responsibilities";[56] "to satisfy demands by a victim, the police, or the community";[57] "to permit more convenient administrative access to the juvenile";[58] or as the result of "a lack of a more appropriate facility or status alternative."[59]

Most important, IJA/ABA does not leave it to individual decision makers to exercise the detention purposes according to their own rights. To the contrary, the standards precisely delimit the circumstances and procedures whereby detention may be imposed at each level of penetration into the juvenile justice system.[60]

First, the police must release the juvenile arrested for a crime that in the case of an adult is punishable by a less-than-one-year's sentence, unless the juvenile is a fugitive, needs emergency medical treatment or requests protective custody.[61] In all other cases, release is also mandatory unless custody is shown to be necessary.[62] In determining the necessity for custody, the police may consider only four factors and only when reliable information is available[63] that the juvenile: 1) is charged with murder in the first or second degree;[64] 2) is a fugitive;[65] 3) "has a recent record of willful failure to appear at juvenile proceedings";[66] and 4) is charged with a violent crime which for an adult carries a sentence of one year or more and the juvenile is already under juvenile court jurisdiction.[67]

Next, the intake official of the juvenile detention facility, to which the police must take the non-released juvenile, is initially required to release the child in any situation where the police were "required to release the juvenile but failed to do so."[68]

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55. Id., Standard 3.3.A.
56. Id., Standard 3.3.B.
57. Id., Standard 3.3.C.
58. Id., Standard 3.3.D.
59. Id., Standard 3.3.E.
60. Id., Standard 3.2.
61. Id., Standard 5.6.A. The juvenile requiring emergency medical treatment or requesting protective custody may be held in non-secure detention only. Id., Standard 4.5.A.1.b. and 5.7.
62. Id., Standard 5.6. The standard of proof here is "clear and convincing evidence."
63. Id., Standard 5.6.
64. Id. An allegation of murder in the first or second degree is the only situation in which the seriousness of the charges alone may justify detaining a child.
65. Id., Standard 5.6.B.1.
66. Id., Standard 5.6.B.2.
67. Id., Standard 5.6.B.3.
68. Id., Standard 6.4.

The intake official is further enjoined to release the juvenile unless he or she 1) is a fugitive from another jurisdiction that has formally required the juvenile's detention,[69] or 2) is charged with a violent crime, that for an adult is punishable by a sentence of one year or more and for the juvenile is likely to result in his or her placement in a secure facility[70] if convicted,[71] and, additionally, a) the crime is murder in the first or second degree,[72] b) the juvenile is currently under the court's jurisdiction,[73] c) the juvenile has escaped from a placement made pursuant to a prior adjudication of criminal conduct,[74] or d) the child has a "demonstrable recent record of willful failure to appear at juvenile proceedings, on the basis of which the official finds that no measure short of detention" would ensure the child's presence in court.[75] Further, even where a juvenile would qualify for detention, automatic detention is prohibited:[76] instead, the intake official must first consider the effectiveness of diversion programs and of less intrusive alternatives to accomplish the purposes of detention.[77]

Once a decision to detain is made, secure detention may be resorted to only where there is a "probability[78] of serious physical injury to others, or serious probability[79] of flight."[80]

At the final level of decision making,[81] the court must release the child in all cases where first, the police or the intake official failed to authorize a release mandated under the standards,[82] and second, the state fails to establish probable cause that the juvenile committed the offense charged.[83] In all other situations, the court is to review the factors that the police and intake considered and the adequacy of their reasons for detaining the juvenile.[84]

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69. Id., Standard 6.6.A.2.
70. IJA/ABA, Standards Relating to Juvenile Delinquency and Sanctions, Standard 6.2 (Tentative Draft 1977) and id., Standards Relating to Dispositions Standard 3.3.2. (Tentative Draft 1977) authorize secure placement as a last resort for serious misdemeanors and felonies.
71. IJA/ABA, I.S. 6.6.1.
72. Id., Standard 6.6.1.a. See supra note 64.
73. Id., Standard 6.6.1.b.
74. Id., Standard 6.6.1.c.
75. Id., Standard 6.6.1.d.
76. Id., Standard 6.6.B.
77. Id., Standard 6.6.C.1.
78. The probability must be established by clear and convincing evidence. Id., Standard 6.6.C.3.
79. Id.
80. Id.
81. Interlocutory appeal of the court's decision to detain is, however, available. Id., Standard 7.12
82. Id., Standard 7.7.B.
83. Id.
84. Id., Standard 7.7.C.

Task Force

The Task Force criteria are based on the proposition that "[n]o child should be detained or removed from his home pending adjudication unless the measure is clearly necessary to achieve the purposes set forth as legal criteria for such action."[85] The permissible purposes of detention are fivefold: to ensure the juvenile's presence in court;[86] to provide substitute care for the juvenile for whom no suitable person is "able and willing to supervise and care";[87] to prevent the juvenile from "threatening the orderly process" of the court;[88] to prevent the juvenile from inflicting bodily harm on others;[89] and to protect the juvenile from bodily harm.[90] Shelter care is favored over secure facilities "[w]henever feasible."[91] The least restrictive setting possible should be chosen.[92] These criteria apply to decision makers at all levels of the process.[93]

Police detention, intended to be "protective" not "punitive,"[94] should endure "no longer than is necessary for referral to juvenile intake or return to the parents."[95] The commentary to the standard minimally elaborates the standard: police detention is to be "rarely utilized,"[96] and only for juveniles charged with serious delinquent acts... [who] pose a threat to themselves or others."[97] Other alleged delinquents who are not a "security risk"[98] and "who will be returning to their homes,"[99] should be released.[100]

The decision-making process of juvenile intake officials is more circumscribed than is police practice. Skeletal criteria are set out, in commentary rather than standard form, to guide the exercise of each purpose of detention. Thus, detention is necessary to ensure the juvenile's presence in court when there is a "substantial threat" of flight from the jurisdiction,[101] and necessary as substitute care where either the parent refuses to allow the child home or the child refuses to return home.[102]

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85. Task Force, 374. "Necessary" implies that alternatives have been considered and found insufficient to serve the purposes of detention. Id., Standard 12.7, commentary at 391.
86. Id., Standard 22.4.1.
87. Id., Standard 22.4.2.
88. Id., Standard 22.4.3.
89. Id., Standard 22.4.4.
90. Id., Standard 22.4.5.
91. Id., 374. The use of jails is prohibited. Id., Standard 22.3.
92. Id., 374.
93. Id., Standard 21.1, commentary at 654.
94. Id., Standard 5.9.
95. Id.
96. Id., Standard 5.9, commentary at 214.
97. Id.
98. Id.
99. Id.
100. Id.
101. Id., Standard 22.4, commentary at 670.
102. Id.

A juvenile threatens the orderly process of the court[103] when a "strong indication exists that he or she will threaten a victim or witness,[104] and the facts justifying detention to prevent the infliction of bodily harm on others must be "specific to the individual situation at the particular time."[105] Finally, detention to protect the juvenile from bodily harm may be required to guard the child from retaliation, as well as from self-harm when the child's "reaction to his or her situation becomes so self-destructive as to require constant supervision."[106]

The same five purposes govern judicial personnel in detention decisions,[107] although detention for the purpose of preventing juveniles from inflicting bodily harm on others is elaborated on here as referring to "the violent or recidivist delinquent who presents a clear threat" to the public.[108] Before the court may consider the detention question, however, the prosecution must establish the existence of probable cause that the child committed a crime.[109] If that is established, the prosecutor must then establish that there is a need for continued detention.[110]

Advisory Committee

The Advisory Committee standards are motivated by an intent to release most juveniles "without imposition of any substantial restraints on liberty."[111] Like the Task Force standards,[112] they establish a single set of detention purposes and criteria for all detention decision makers.[113]

Initially, for the police or the court to take a child into custody, there must be probable cause to believe that the juvenile falls within the court's delinquency jurisdiction and that a summons or citation would not 1) adequately protect the court's jurisdiction or process; 2) adequately protect the juvenile from an imminent threat of serious bodily harm; or 3) adequately reduce the risk of the juvenile's inflicting serious bodily harm on others or committing serious property offenses.[114]

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103. Id.
104. Id.
105. Id.
106. Id.
107. Id., Standard 12.7.
108. Id., commentary at 391.
109. Id., Standard 12.11.
110. Id. The necessity must be established by clear and convincing evidence.
111. NAC, Commentary to Standard 3.151.
112. Task Force, Standard 21.1, commentary at 654.
113. Standard 3.151 and Commentary to Standard 3.155.

114. Id., Standard 2.231.

The determination is to be based on specified criteria: the nature and seriousness of the alleged offense;[115] b) the juvenile's record of delinquencies, including whether he or she is currently within the court's jurisdiction;[116] c) the juvenile's record of willful failures to appear in court;[117] and d) the availability of noncustodial alternatives.[118]

At the next stage, the intake official must unconditionally release the child unless detention or conditional release is necessary to serve the above-mentioned purposes.[119] The factors to be considered are identical to those involved in the original custodial decision.[120] The least restrictive alternative is preferred,[121] and secure detention is reserved for only five situations: where the child 1) is a fugitive from another jurisdiction;[122] 2) requests protection in writing when an immediate threat of serious physical injury exists;[123] 3) is charged with murder in the first or second degree;[124] 4) is charged with a serious property crime or a violent felony other than murder in the first or second degree and a) is already detained or on conditional release from another delinquency;[125] b) has a demonstrable recent record of willful failure to appear at court;[126] c) has a demonstrable recent record of violent conduct resulting in physical injury to others,[127] or d) has a demonstrable recent record of adjudications for serious property offenses;[128] and 5) there is no less restrictive alternative that will reduce the risk of flight or serious harm to property or physical safety of the child or others.[129]

Finally, the court must review the intake officer's detention decision in the context of a detention hearing at which the state must first establish probable cause of the commission of a crime by the juvenile.[130] If probable cause is established, the court may continue detention only if the state further shows that it is "warranted."[131]

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115. Id., Standard 2.231(a).
116. Id., Standard 2.231(b).
117. Id., Standard 2.231(c).
118. Id., Standard 2.231(d).
119. Id., Standard 3.151.
120. Id., Standard 3.151(a)-(c).
121. Id., Standard 3.151.
122. Id., Standard 3.152(a).
123. Id., Standard 3.152(b).
124. Id., Standard 3.152(c).
125. Id., Standard 3.152(d)(i).
126. Id., Standard 3.152(d)(ii).
127. Id., Standard 3.152(d)(iii).
128. Id., Standard 3.152(d)(iv). The evidence must be more than allegations but can be less than a certified copy of a prior adjudication order. Id., Commentary Standard 3.152.
129. Id., Standard 3.152(e).
130. Id., Standard 3.155.
131. Id. The standard of proof is "clear and convincing evidence."

SUMMARY AND CONCLUSION

The purposes of detention and the factors to be considered in deciding what status and/or facility are necessary to serve the purposes are most narrowly drawn by the IJA/ABA standards; IJA/ABA would never permit coercive detention for a child's protection, in contrast to the Task Force and the Advisory Committee. IJA/ABA does not permit detention for substitute care, as do the Task Force and the Advisory Committee; nor to deter the commission of serious property offenses, as does the Advisory Committee.

IJA/ABA provides strict criteria to guide the discretion to remove a child from his or her home, be it to shelter care or a secure facility.[132] The Task Force offers only general principles. The Advisory Committee establishes strict criteria to control secure detention, but would permit shelter care whenever no noncustodial alternatives were available.

Since the clarion call for a drastic overhaul of juvenile detention practice standards have been proposed to remedy the system. Juvenile detention continues, however, to be excessive. More radical surgery is clearly required. Of the three sets of standards reviewed here, IJA/ABA has devised the system that most severely curtails the overbroad discretion currently present in the system.

Severe limits on juvenile detention practice are not an abandonment of the goals of a separate juvenile justice system. Such an approach proceeds from a belief that the best way to help children is to utilize the full panoply of due process procedures developed to protect adults from the arbitrary use of governmental power. It should now be beyond cavil that locking children up does not help them. Changes in the system that will actually result in limiting the number of children detained before conviction of any wrongdoing deserve the support of persons concerned with the welfare of children.

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132. Despite the fact that the IJA/ABA standard is most restrictive of the three, given the acknowledged current inability to predict future dangerousness with any significant degree of accuracy, even the IJA/ABA standard leaves room for abuse. See, e.g. Ennis & Litwak, Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom, 62 Calif. L. Rev. 693 (1974); Diamond, The Psychiatric Prediction of Dangerousness, 123 U. Pa. L. Rev. 439 (1974); and Wenk, Robison & Smith Can Violence be Predicted? 18 Crime & Delinquency 393 (1972).

TRANSCRIPT FOLLOWS BELOW)

(WHEREUPON, Ms. Jane Sufian's presentation was given, and the following is the discussion that ensued.)

MR. MANAK: Okay, Mr. Siegel?

MR. SEIGEL: David, what did you say is a key provision in the detention when they can with a modification made on it?

MS. SUFIAN: It was the time frame, wasn't it?

MR. SIEGEL: Not the time frame, but the

circumstances under which --

MR. GILMAN: No, do you have the volume?

MR. MANAK: We have the volume up here.

MR. SIEGEL: It's -- I think it was four point something.

MR. GILMAN: No, it's six point six one a -- six point six reads, Guidelines for Status Decisions and it talks about mandatory release, and it says that the intake officer should release the accused juvenile unless the juvenile, 1, is charged with a crime of violence, which in the case of an adult, would be partial by sentence of one or more and which if proven is likely to result in commitment to a secure institution and one or more of the following additional factors is present, and,a,is the crime charged is one of first or second degree murder. There we have a -- we have deleted a crime -- the crime charge as one of first or second degree murder, and substituted is a class one felony involving a crime of violence.

MR. SIEGEL: Oh, okay.

Now, you find that acceptable with the modification or do you find it acceptable in it's original form because I know that the N.D.A.A.

recommends that expansion, that it includes more than just murder one and murder two, and that it includes class one felonies.

Do you find it acceptable with that change or in it's original form?

MS. SUFIAN: Well, I find that which restricts it is most acceptable. I still find that with the amendment more acceptable than other standards which aren't as strict.

MR. SIEGEL: Okay, fine.

MR. MANAK: Mr. Rounds?

MR. ROUNDS: Well, when I read this standard, it obviously omits poverty from almost the possibility of detention and also a more interestingly point, to be the repetitive offender, the twelve-time burglar.

Do you have any comments on those omissions? Do you think they are appropriate?

MS. SUFIAN: Well, just let me find the standard. As I read it, the standards are viewing secured detention, any detention, any removal from home as a very severe act, and a more severe restriction of secure detention than shelter care; but they restrict all forms of it.

I just think that there has to be a presumption of innocence for a person whether they have already committed eleven property offenses. There is still a presumption of innocence that this time, the person is known to the police as someone who has committed them, that he may be someone who is sought out when a particular type of crime occurs, yet, on the previous statutes, on all previous occasions, this person has appeared in court, and to me that is the main function of the detention, is to make sure someone appears for their trial.

MR. ROUNDS: That gives rise to two comments or questions. The first is, after a probable cause hearing, you have at least initially resolved the question or probability and the common concept of detention or incarceration pre-trial coming from criminal law simply ignores the presumption of innocence in determing the question of whether to incarcerate before trial. For the purposes of that determination, the adult courts traditionally assume guilt.

MS. SUFIAN: Well, one of the problems in the Juvenile Court system, which doesn't exist in the

adult court system, is that even if the detention system is made where you don't have that outlet and very few statutes provide that outlet, so a detention is a very pertinent decision.

MR. MANAK: Mrs. Bridges?

MS. BRIDGES: You make a point in here that the detention negatively affects this position because the child is not at home. It has been my experience that frequently the child who is released from a detention is negatively affecting his disposition more frequently than otherwise. Texas has a standard for detention which is the lack of supervision and the record that the judge uses a number of times that the juvenile has been before the court or the number of referrals is an element in deciding what is lack of supervision. I think that's a legitimate ground for detention, and I think that in a lot of cases, if the juvenile with that kind of background is released, he is being done a disservice because he will have a more restrictive disposition because of the trouble he gets into being, x point, the time he gets picked up and time he comes to court. Another thing which we don't have, but which apparently

the standards would recognize, is a protection of the community and I think I am pleased to see it included violent crimes as a consideration and detaining juveniles. We don't do that.

MS. SUFIAN: I would just like to address the first point that you made, the concept of detaining children in order to protect them, basically, from themselves, is I think, part of the tradition of the parens patriae, and I would feel that due process model would be more appropriate, that children should not be detained for their own protection.

MR. MANAK: Mrs. Szabo?

MS. SZABO: Getting to Mrs. Bridges' comment to some extent, regarding the protection of the community, that in many states is a very important criteria for adults. Do you feel that that should be a determinary factor in determining juvenile detention; and also on those lines, would you feel that substitution of bail within the juvenile system for the detention would be an attractive alternative from your point of view?

MS. SUFIAN: Well, it's -- that is a very good question, but I have not entirely resolved myself

so I do think it is a question that needs a lot of discussion. It's obviously been a mess in the adult system. If there were some ideal way to restrict it for juveniles that once the detention decision was made and only then, using the standards, bail was raised to the child for a way out, I might be in favor of it.

MS. SZABO: Would you favor bail in terms of the release of recognizance as to many states in terms of low, very low minimal monetary bail, because obviously juveniles in many cases have very limited financial resources?

MS. SUFIAN: Aside from having very limited financial resources, it's very difficult for children to demonstrate the kind of conditional things that adults do in having a job and adults having a job. They may have parents who move a lot, then we are in trouble.

MS. SZABO: Could I get a response with regard to my other questions with protection of the community for the purpose of release?

MS. SUFIAN: Well, I feel that if detention on the basis of the liklihood that a child who commits a crime will commit another crime before

being adjudicated on this one because there is a presumption of innocence and so far this child has done nothing and you are trying to make a prediction that the child is going to do something or else you are really saying that you are giving up the presumption of innocence, the kid has already done something and he is likely to get a second thing done before we can get him in our clutches through an adjudication. I just can't go along with that.

MR. SIEGEL: So you would be -- I am sorry.

MR. MANAK: Mr. Siegel?

MR. SIEGEL: Well, I mean, hearing this, let me carry that to it's furthest point.

Would you be against detention in murder one? I mean, even in an optional degree, if a kid was charged with murder one?

MS. SUFIAN: To be consistent with my position, I would.

MR. MANAK: Judge Delaney?

JUDGE DELANEY: These are just things for judges to decide, too, and you know, I don't think there is any easy answer. But I had a detention hearing earlier this week. A little

kid, fourteen, I think he was, had about twelve burglaries. He was in there for a specific one, with his brother, and under our Code, if an admission is made in the presence of the parent and with the parent's consent, it is admissible. Well, not only this burglary, but twelve others, or eleven others were admitted, over a period of time, and the mother said I can't do anything about this boy.

What would you do in this situation? How should the standards address a problem that well, we have probable cause to believe that not only this offense, but numerous others had been committed. How would you deal with it?

MS. SUFIAN: First of all, I would change the Code so that kind of information wouldn't be admissible.

JUDGE DELANEY: Well, I am dealing with it as it is now, and many Codes are like this.

JUDGE KETCHAM: Can I suggest that -- why not accelerate the adjudication and hold it that afternoon?

JUDGE DELANEY: Well, we can't move quite that fast, and I was going to come to this meeting so I couldn't stick around and hear that case.

MS. SUFIAN: One thing that I really find

difficult in -- and I represented kids in Family Court for about a year and a half, was that very often judges added to the statute permissible for detention where the parent refuses to take the child home, and I think that is quite common. I would be interested in hearing from the judges here what criteria they feel they really use in making detention decisions.

JUDGE DELANEY: I can tell you what criteria I use. We always release a kid if the parents will take him back and the kid will go home, unless in a situation such as this. Now, in this case, the mother said I can't manage the kid, I don't want him back home, but it's not because I don't love him, but because he is out of control. And if you send him home, you are really setting him up for misconduct. But as far as unity of defense and as far as standard detention, we don't normally indulge in that. We send a kid every time we can home, if he has got a place to go.

The alternative, though, if you turn him loose on the street, and you worsen his condition, if he continues to offend and perhaps come in a transfer hearing, the next time, this is

the kind of thing we have to struggle with. Should we release him and set him up for that, or should we detain him, and I don't know the answer. Those are the problems that we are faced with every day.

MR. MANAK: Judge Arthur?

JUDGE ARTHUR: Again, just a few comments.

To answer your other question, in our court, at least we have three standards for detention, to us they are quite simple. A kid is a danger to others, he is a danger to himself, or he wouldn't come back for the next year. We find very little difficulty in enforcing these standards. If they don't apply, we don't even go as far as Jim. If he doesn't fit one of those three, we will put him in a foster home, shelter care, something like that. If he doesn't fit one of those three, that's it. Police want us to hold kids, to keep witnesses apart from each other, but we won't do it. Prosecutors want us to hold kids to make sure that they come back to court, we don't do this kind of thing either.

I think the issue of bail should be handled somehow, whether you are going to say no bail or lots of bail or bail under the following

provisions, somewhere we ought to answer the question of bail for kids. I don't know if the standards answer it in any way, your paper alludes to it once or twice, I think we ought to take a position somewhere on what bail is all about.

Would you concur in that?

MS. SUFIAN: I think we have, sure.

JUDGE ARTHUR: I am happy you are writing the answers too.

MS. SUFIAN: The IJA/ABA, those standards come out again as bail.

JUDGE ARTHUR: Well, we bail kids in our court if the bail is meaningful to the child. If the kid is mature enough, sophisticated enough to understand what it is, why we bailed the child, and I bailed a kid for his driver's license. That was a pretty good guarantee that I'd get him back.

The next point I would make and it's proper cause here, I get mixed feelings about it, I like the idea about it, as long as it doesn't mean more detention, because if you are going to have a probable cause hearing and then somebody's got to assemble the evidence to

prove the probable cause and the prosecutor wants a couple of days to get witnesses in and to get that in, we may have to detain a couple of extra days in order to find out whether we should detain him in the first place.

Now, we handle that in our court, and I am not sure it's the best way of relying heavily on the hearsay of the police report, which is, you know, one side of the thing, and we let the kid answer to some extent, but I don't want him to answer very much and his lawyer doesn't want him to answer very much until the lawyer has had a chance to talk to him; and if you are going to have this detention hearing in the first twenty-four hours of detention, the lawyers aren't going to be too prepared for any kind of probable cause hearing.

So I like the idea if you can find a way to do it without making more detention in the process. The standards as I understand them seem to take a position you can never detain a misdemeanor. A child being held for a crime which is only a misdemeanor for adults, and I am not sure whether the public would ever stand still for that

because a persistent shoplifter, you are going to release him, he is going to go out and shoplift some more clothes, or he is going to do this or that, or the kid is involved in a lot of street-fighting or battery-type of thing, misdemeanor-type of thing, you are going to release him, and he is going to go out and do it again. He is going to get somebody, this kind of a thing. I just can't agree with that misdemeanor thing. I would rather fall back on these other tests, and get away from this defense-oriented focus that David loves so much and get over onto what this particular kid is about. If he is going to hurt somebody, is he going to get hurt, will he come back? The last thing I would certainly subscribe to this idea of due process, but we are going to have a little problem on due process on a detention hearing because we are required to notify both parents and sometimes you cannot find both parents within the first twenty-four hours. Are we supposed to delay the hearing until we can get the parents, the pop's out hunting somewhere, or the mother's gone wherever. Do we delay everything in order to have full due process, and again, I wouldn't like to see us suspend deten-

tion in order to give the kid more rights, deny him liberty in order to give him some rights.

I think we got a nice little problem here, and again, I am happy it's your paper to answer that.

MS. SUFIAN: I think those are all tensions that the standards are trying to balance and I feel IJA/ABA has balanced the best.

MR. MANAK: Judge Moore?

JUDGE MOORE: Just two comments.

One is in Michigan every kid who is charged with a delinquent act has a right to review. Now the legislature has said that, and the Michigan Supreme Court has modified that by court rule to indicate that there is no right to bond in a neglect case if you can show that the child is subject to injury by being bound back to the parents who allegedly burned him or abused him.

And the second point I'd like to make is that I think the issue of probable cause is a broad question. I think as far as I'm concerned, Burnstein vs. Buber, specifically addressed that issue; and I don't think we should

debate it anymore. I still have some judges in my state that want to debate it and fine, go ahead and debate it; But at least in Burnstein vs. Buber, in how you do that, whether you got hearsay in, and whether you have the right to have all eyewitnesses at this preliminary hearing, whatever have you; but there is no question that you have got to have a probable cause hearing, whatever that may be.

MR. MANAK: Judge McLaughlin?

JUDGE MC LAUGHLIN: Well, the only comment I would have is, again, it's a difficult area. In New York state, we don't have a waiver. In other words, we just adopted this serious felony thing where you go directly into adult court; but in terms of the number of crimes that affects, most of the people that come into family court are not -- are simply not -- in other words, whether it's one burglary or five hundred burglaries, you only can be placed, the same thing can happen to you, all right? And -- which is not true of an adult, you know. He gets released, he commits a second burglary, he at least exposes himself to additional punishment. We have totally different concepts in

New York, and that's why the court went the way it did in New York in Wayburn vs. Shaft. They said, you know, in a sense, what they were saying is that you might as well hang for sheep as a lamb. You can commit one burglary, if you are released, then you can commit five hundred more, and you will pay no penalty for that; and they therefore said that was not true of adults. That's justified "preventive detention."

I -- you know, I have to agree with it. The problem with a probable cause hearing -- I go along with Judge Arthur here, the problem with probable cause hearings, we have no jury. It becomes fairly difficult for the judge to have a probable cause hearing, decide that more probable than not you're guilty, and then the kid comes in two days later and he now has the same factfinder, you know, he has a feeling that maybe the judge has made up his mind. I don't know why he has that feeling, but he does. I know that every judge likes to reverse himself. I was wrong on Monday, I am going to be right today. So you do have these problems that Judge Arthur pointed out, that in giving children rights, we -- sometimes they

pay a higher penalty than if we never gave them the right at all.

As far as what the standards are, and you asked for this, in New York, it's serious and I agree with Judge Ketcham, that the answer to that -- the answer to detention is not to detain, it's prompt hearings. I mean, it seems to me, detention becomes a lot less wrong if it's forty-eight hours, than if it's forty-eight days, all right, and that's the real answer. It's to put pressure on the court and say to the judge, all right, you want to detain him, fine, but you must give him a hearing within "x" period of time. That's really the answer. They are two two official reasons, failure to return substantial risk. he will not return serious risk, he will commit another crime. The reason most children get detained -- the reason most children get detained, and I say three quarters of all children who are detained, remember, three quarters of the children we can actually detain, are PINS.

MS. SUFIAN: We are just talking about delinquents.

JUDGE MC LAUGHLIN: Only delinquents, right.

Now, the twenty-five percent of the children that are delinquents, three-quarters of those children are detained for the simple reason that the child doesn't want to go home and the parents don't want to accept him, and it costs $100 a day to put the children in our detention homes, we have quite a nice detention home, rugs on the floor, you know, very nice; they meet all their friends up there, they get all the great phone numbers, and I -- the most common reason is a probation officer will say Judge, I want the kid to stay home. The child says, Judge, I don't want to go back to the detention home, I like it there, I don't have to go to school, nobody hassles me, I sit around and watch television over there all day, and the parents say, besides I don't want him home; and that's the most common reason, I call it administrative convenience, and it's terribly expensive, it's terribly damaging to these children they don't realize it's damaging. Just being able to sit there for a month and do nothing is certainly damaging.

I adopted the ABA standards for

the same reasons that you suggested, that they come closest to making the price very high to detain; but there is a practical matter that you are going to have continue to prevent a detention even from misdemeanors because the public simply demands it.

MS. SUFIAN: I would like to respond to just a couple of things you said.

One, you were talking about the price doesn't get any higher for the --

JUDGE MC LAUGHLIN: In New York. You have to remember we are talking about all different states here.

MS. SUFIAN: Yes, I am from New York, or were you talking about in terms of possible penalty because of the changes in the law, there is a predicate felony that comes into that -- comes into effect at a certain point where it then three times becomes a designated felony which subjects you to the stricter penalties of up to five years.

JUDGE MC LAUGHLIN: I wasn't really thinking of that so much because that law has only been in effect about two months, okay? Whether that's

going to have any effect, whether -- a predicate felony is going to have any effect, I don't know. But drop it down, make it a misdemeanor, you know. It doesn't matter. It's the fact that the child, once he is in jeopardy for one, it doesn't make any difference thereafter how many he is in jeopardy for.

MS. SUFIAN: One other thing, I would just like to -- you were talking about the rugs on the floor whatever-have-you. I could --

JUDGE MC LAUGHLIN: I don't like it -- I mean the jail is jail. I don't care what the facilities are.

MS. SUFIAN: Well, aside from the rugs on the floor, the juvenile facility -- detention facility here in the city is a hell-hole. I mean -- it is not a place to go to to get good treatment. You are required to go to school, children do get beaten up, it is not a place where children go for a good time.

JUDGE MC LAUGHLIN: I know, the whole world is not New York City.

MS. SUFIAN: Yes, I know, it's not, but you have to create a standard that takes -- you have to

develop standards that will take care of New York City and other places, other large urban areas, that have these kind of detention standards.

JUDGE MC LAUGHLIN: But the way that you answer that, I am in favor of the ABA standards. I mean, I have struck oil, don't bore, okay? Don't be boring.

What I meant was the answer to this situation, this is true of all of us, is not to limit the courts. The answer is to make them provide adequate detention services. If you are going to detain them, I think they should meet adequate standards because detention facilities don't meet those standards. I don't think that that is the reason -- you may not want to detain, but don't not detain because of the detention facilities available.

MR. MANAK: Okay, Mrs. Thompson?

MS. THOMPSON: Well, a couple of Judge McLaughlin's comments really struck home with me because if there is anything more moral with regard to our community, the public simply will not stand for it and complains with increasing stridency with regard to liberal pre-trial release, with

regard to violent crime offenders in the Juvenile Court as well as the adult court. We are able to waffle on the constitutionality with regard to high bails or by just setting high monetary bail in adult court, but -- and it's done, and we duck in facing up to the fact that it's preventive detention and it's in need -- we simply have to in response to expectation and to community safety, we have to face up to it, it seems to me, and adequate consideration of the safety of the community. Unfortunately, hearing trials, not just detention hearings, but hearing trials within two, five, six days, are simply not realistic in most of our communities. Certainly our Juvenile Court moves on an accelerated calendar as opposed to the adult court, but we are not talking about trials that can be held within two weeks, ultimate trials and I think that is just a consideration that cannot be avoided.

MS. SUFIAN: Okay, just a very short response.

I recognize what you say, it is a political situation one must deal with to know how the community feels, and judges have to be elected often. But I think we also should recognize

that the medium at election year does have a lot to do with the pressure at that particular time in that we shouldn't run around changing our juvenile code every election year as happened this past year and one month in New York City.

MS. THOMPSON: No, I am just talking about the very realistic crime picture in the community, you know. I think I speak as a prosecutor in a community where we have just had fighting instances of repeat offenses by arrestees charged with violent crimes, repeat offenses during the period of actual arrest to the time that they can be brought to trial. It's just a realistic consideration that has to be faced.

JUDGE MOORE: Michigan just passed a constitutional amendment which took "x" number of votes to get it on the ballot and it competed on the ballot with about fourteen or fifteen other propositions, including Proposition 13, which restricted pre-trial. I am just illustrating how much the public is concerned about this issue.

MR. MANAK: Is this in adult cases? Adult and juvenile cases?

JUDGE MOORE: Well, they are talking about

adult. I think the public would like to do the same thing in juvenile cases, but a different code.

MR. MANAK: Okay.

For those of you who may have forgotten, Mrs. Thompson is from Trenton, New Jersey, which is not in an election year, this is an urban concern.

MS. THOMPSON: We have non-elective, non-political prosecutors, and the same -- absolutely you have to in response to the community, it is the same concern.

MR. MANAK: Okay, Mr. Dale?

MR. DALE: Well, perhaps the judiciary would be able to determine which child, while out pending trial, would be likely to commit another act. But I would-- never been able to predict which of my clients, while out, would commit another criminal act; and that was regardless of how many they have committed in the past. I recognize that one can find documentation to stand for any proposition. I have found there is very little documentation that stands for a proposition that one can predict violence and predict repetitiveness in the commission

of crime.

Ms. Sufian's paper cites to several of the major articles, and I don't think it cites to the recent book, The Violent Delinquent, by Paul Strasburg, which takes Mercer County, West Mercer County, New York. I think It's New York County, Manhattan in New York City and does an analysis of repeat offenses, violent offenses, and shows there is no way to predict future dangerousness or future violence. But that doesn't answer the question of the community's desire not to have the repeat offender on the streets, but it does -- it does go to the, it seems to me, the question of equal protection between two children in the context of a detention hearing. If that issue is before a court right now, before federal courts in New York City, and the name of the case is United States vs. Rail Martin, and I am not sure of the status of that case, when it's going to trial; but that issue and the question of arbitrariness and equal protection violation, how do you decide which child to detain and which child not to detain in terms of prediction of future criminal acts is in litigation.

MR. MANAK: Mt. Hutzler?

MR. HUTZLER: Perhaps I misunderstood, but I get the impression from what you are saying is that in your opinion, a pre-trial detention is justified constitutionally only to insure an appearance at trial, and we do bind ourselves to constitutional principals when we establish excessive bail and when we face up to that question as a result of community pressure.

MS. THOMPSON: No, not necessarily. Just that alone, there is some differences between federal constitution and certain state constitutions with regard to pre-trial liberty and excessive bail and so on; but I just think that the safety of the community is a consideration which should be made a part of the decision which regard to pre-trial detention of juveniles as well as adults.

MR. HUTZLER: Are you suggesting that it should be -- that the constitution should be amended to provide for that or that the constitution permits that now?

MS. THOMPSON: I would say, that in the United States Constitution, generally speaking, does, but certain states, and the state constitutions

might.

MR. HUTZLER: What's the situation in New Jersey?

MS. THOMPSON: Well, in New Jersey, we waffle. We feel that we are -- that excessive bail cannot be set, but nevertheless, we waffle it and we set high bail and we keep -- you know, keep violent adult offenders and juvenile offenders, it's -- we have very liberal pre-trial release practices.

MR. HUTZLER: And I don't know whether this is the case, do you have a decision of the state Supreme Court that the purpose of bail is to insure appearance at trial, then it seems to me that your district attorney's office and judiciary is not sufficient far removed from public pressure, even if it is appointed and not elected, if that in fact enters into the decision.

I mean, the only community pressure which would justify bail for another purpose would be community pressure sufficient to amend your constitution, if that's what your constitution provides.

JUDGE MC LAUGHLIN: I don't think that that

is what Ms. Thompson is saying here.

When we say we are sensitive, we are, in other words, waffling on the issue. I think what you have to say is that the present system releases, you know, a great number of children. There are some that are held, probably not -- or detained, with not appropriate constitutional standards, but if we ignore community pressure, just like you can ignore any of these other problems, they will impose a solution on you. And the solution that the public will impose on you is as in they did in that new war now, they are requiring children to put up bail. Well now, when you have a thirteen year old, you know, what's the sense of bail? Fifty cents, seventy-five, you know. So if I say $500, in other words, if you are not sensitive to pressure in these extreme cases -- if the court is not sensitive to pressure in the extreme cases, the result is going to be just what you don't want, and that's poor children being held; and I think we have to realize I think -- as judges we have to realize this. We have got to be sensitive to it. Because if we are not, the solution that the

public is going to give us as they gave us in New York is a much more restrictive system than anybody in their right mind can give us, and that's I think, all Ms. Thompson is really saying.

MR. MANAK: Okay, Dean Smith?

DEAN SMITH: I pass.

MR. MANAK: Judge Cattle?

JUDGE CATTLE: All I will say is that there seems to be a word that I am unaware of that no child under sixteen is detained in my jurisdiction unless one of the judges of the district, usually the one that is closest, authorizes it overnight, and that child, if he is detained, immediately has a detention hearing on the first court date, ragardless of what the calendar says, and this louses up every calendar inthe place because we are in a separate juvenile court.

The -- we do permit bail, but bail in a juvenile situation is an oddball. You have got to figure out, there are no rules for it, whether this kid is answerative -- has a job, whether he has money that he saved up from a summer job, whether it would be $50 or $25 or whatever it is, ten bucks sometimes would be an

effective means of getting him back when he is a rover, sometimes he will -- if you set bail from the parent, if you feel that the kid did know -- if you are trying to get the parent's attention, this isn't really the kid that's being bailed, it's really the parents in that case. We take care of the pre-disposition or that disposition hearing. I have an associate judge, a magistrate, who will normally handle that hearing if he is available, and then I have the adjudication.

In other words, I don't hear any part of the -- if I do have to hear it, which occasionally happens, then that child, whether he's got an attorney or not, we usually try and get them an attorney, has a right to demand another judge, and on occasion, when he is convinced that the judge has already made up his mind, he gets -- and he gets another judge, and I call up my friend on the circuit and I swap dates with him and he comes down and takes care of him. I don't know, I don't think a lot of these things have been thought out here. I think there are a lot of things we can to do to improve

what we have got without changing the entire system, because there isn't a judge in this room, I won't speak for those out and I won't speak for judges who are now retired, that is anywhere near perfect, and no set of rules and regulations is going to make them perfect, and the same holds true for defense counsel and prosecutors. We all try and do, I hope, the best job we can do to give due process, and I think we give a hell of a lot more due process than we are getting credit for.

MR. MANAK: Judge Fort?

JUDGE FORT: A request for Ms. Sufian to straighten me out for what the constitutional provision as it is now construed has with respect to bail as -- in terms of application to its usual cases. There is no case in the Supreme Court of the United States, is there?

MS. SUFIAN: No.

JUDGE FORT: I wasn't aware of one.

In terms of that condition, and their refusal to hear it, which Judge Ketcham reminded me.

In view of that, why is it necessary

to adopt a concept that the right to bail is dependent solely on juveniles, solely as to whether you think they are going to appear for trial?

MS. SUFIAN: I didn't say that the right to bail --

JUDGE FORT: The right to release.

MS. SUFIAN: Well, for -- I just think because the trend in the Supreme Court and the Juvenile area has positive decisions. The adjudicatory stage is engulfed that they -- that this is a procedure which does not significantly interfere with philosophy and the procedures of the Juvenile Court and that there would be no reason to rebut in a Juvenile Court.

JUDGE FORT: Well, why isn't the fact or, for example, that's been discussed by a number of the people of repeated offenses, as you say, burglaries -- the kid has committed a dozen burglaries before and this is established on the record, why isn't that a factor that may be considered by the judge without violating any constitutional principals, indeed, any right of this juvenile, even though he has not been tried

and adjudicated on a particular decision?

MS. SUFIAN: The argument that I just made is because, for an adult, the sole justifiable basis in theory is that -- is to assure his presence at trial.

JUDGE FORT: Then you would -- then if I understand you correctly, the reasoning which was used by the Supreme Court in McKeiver for example, with respect to the jury trial,that there were certain conditions and problems of childhood which justify a different constitutional guarantee has no application of the right to bail, but does have to the right of trial by jury?

MS. SUFIAN: I think that it would disagree to the right of jury trial and I think that the development in juvenile law since then, perhaps the next case --

JUDGE FORT: Perhaps McKeiver would be decided the other way?

MS. SUFIAN: I think there is a chance that it could be, yes.

MR. MANAK: Judge Ketcham?

JUDGE KETCHAM: Just to suggest that Ms. Thompson, with whom I agree, that the community

feels very strongly that pre-trial detention is necessary for adults and perhaps juveniles in some instances, the present situation is that there is an interpretation of the constitution which says that the bail must only be related to return and not to dangerousness. Yet, the Congress of the United States adopted an act which has been on the books for seven and a half years and in operation in the District of Columbia which provides for pre-trial detention, and that has not been taken to the Supreme Court for challenge, and I think that the clear reason is because the community -- neither side wants to challenge it, and I think that pre-trial detention, whether by interpretation or amendment to the constitution, will be a fact within the next five years.

JUDGE CATTLE: It's more predictable in the Supreme Court action, I agree with you.

MR. MANAK: Mrs. Connell?

MS. CONNELL: I will pass.

MR. MANAK: Mr. Hege?

MR. HEGE: I guess the only thing I'd address is that question to the safety of the community.

I was under the impression from what little reading I have done about the urban history of juvenile court that the reason that it was formed as a separate court was to alleviate the harsh treatment of children in the adult system; and that as a result of that, we came upon a theory that this is court is going to be here to help children. It would be non-punitive, and in a number of the papers and the discussions, we keep getting back to this community protection; and I just think that if that is in fact now a basis in juvenile law, that we ought to recognize that and we shouldn't keep saying that juvenile court is not punitive, it's not meant to be punishing, because I think that that's what it boils down to. When they are locked up in that type of a situation with the probability or possibility that they might commit another crime, you know, we are looking at the safety of the community and I am not saying that that's wrong, but we should recognize it.

MR. MANAK: I think the community safety is recognized in the IJA/ABA standards. I don't think the next step is necessarily that then the system is punitive. Though, I don't think they are tied

together.

MR. HEGE: Well, I think they are, to a certain regard. I think to that child, it seems punitive.

MR. MANAK: Well it might be a perception. No doubt the perception is punitive now to the child. You know, it will always be.

I think the community safety factor, thought, I think all would agree, has been recognized by all three sets of standards.

MR. HEGE: What I am saying is that I don't think it's recognized now in many states. I think the standards would do that, but I don't think it is being recognized now. I think it is an underlying feeling of many people that that's there, but in the law books -- and you go to the cases, it's not mentioned, and I think that's a real dichotomy.

MR. MANAK: Okay, Mr. Kaimowitz?

MR. KAIMOWITZ: I think, to my mind, that a lot of this discussion is kind off the subject partly because of what at least the IJA/ABA standards did in this area, and Mr. Gilman, correct me if I am wrong, but made it fairly clear that bail was considered and wasn't rejected; and I

think starting from the question posed by Ms. Szabo, I think the discussion got thrown off because the question related to a standard that is used in consideration as to whether adults get bail, when that, in fact, is precluded entirely when you are talking about juveniles.

If I heard the presenter right, the position is simply, in this area, the position with regard to adults should be the same as with regard to children or vice versa, I think I hold this same position. Therefore, I am less troubled than either Mr. Fort or Mr. Ketcham, as to the constitutional relationship; but I don't think that the constitutional question in any way has been decided that in absence of taking up the federal office for seven and a half years doesn't prove anything to me, and I don't think the docket case, if you mean the one that arose out of Nebraska, can touch on that issue or anywhere near all fours; and I think what we are trying to do is mix-up two different things. If Mr. Fort is right, than we are looking really to try to examine how do we want to hold onto these children, the same way how do we want to hold onto adults. That means

then we simply apply the same standards throughout the record to the U.S. Constitution. In other words, if a recent ruling is to come down line and it is acceptable and we amend the United States Constitution, so be it; but this argument that a state constitution or a referendum in Michigan would change the constitution that some way we got rid of bail at the start of this discussion and then every analogy that proponents of these standards try to develop off of an adult's right to bail and these two are just too confusing as far as I'm concerned.

What I would like to see us do is adopt the principal which I think, in effect, the presenter has done, which is that we follow what happens with adults and means that the bail system is screwed-up for adults, but it's not going to be hurt or helped one way or another. What I get shocked about hearing is that when we give due process and we give a process right to a probable cause, under these circumstances, or when I consider this person not dangerous or when this person, you know, has committed many offenses, what bothers me about that is to listen in a room

full of lawyers and judges, as if the constitution or some vague due process concept was off to one side. You are talking about one of the first amendments -- eight amendment that was incorporated according to judicial decision to be applicable to the states. This is not a discretionary question and I guess that's the only thing that I want to bring home; that the discussion seems to be what can we do and that bothers me because I would at least like to force us to look back and say all right, for juveniles, the constitution does not apply -- the eighth amendment does not apply. We can decide that it seems to be pleading, the standard can decide that.

If we decide that the constitution does apply at that point, all of these other standards become nonsense to me and it is that mix that has really troubled me around this question.

Mr. Moore, can I make one comment that is interesting here since we have legal decisions. It's been a legal difference most of the day. I think one of the things we have missed entirely is the fact that part of this issue

is premised on the fact that unfortunately in our juvenile process as well as our adult process, we have not explored and not utilized the alternative to a decision on a prevailing bases that are existing and do work in many communities, and we have spent a hundred dollars a day to detain a kid, for that hundred dollars a day, you can pay two or three case workers a daily salary to go out and to meet with that youngster and that family on a daily basis, to insure the support that is necessary to be sure that the child does appear on the day of trial, and secondly, to make sure the kid doesn't commit another offense; and I think we have marshalled our assets because of public objection to continuation of procedures saying the only solution is to lock them up, and there are other solutions which currently are in existence. They don't work for everybody, but they are certainly being tested, and St. Louis is probably the greatest earner in this area note that there are many alternatives to prevent future criminal activity and to assure appearance at trial other than security detention and that most of them are much cheaper.

MS. SUFIAN: The standards do provide for that.

2. Waiver of Jurisdiction

Consultant
Helen Szabo

ABSTRACT OF PAPER

Ms. Szabo begins her paper by outlining the bases for having a separate court for juveniles. "With rehabilitation as the predominant goal of the entire system, a clinical, sociological approach has been adopted with emphasis upon individualized diagnosis and disposition." She then observes that not all delinquent children "fall within the rehabilitative rationale of the juvenile court," and argues that other reasons must be used to deal with minor transgressors and with "gravely antisocial youth on whose behalf rehabilitative efforts would clearly be worthless." She states that:

> Protection of the public as well as the proper allocation of resources both demand that the court thoroughly evaluate the juvenile's rehabilitative potential.

Three current means for transferring cases are identified: transfer to the criminal court at the juvenile's request; concurrent jurisdiction between the adult and juvenile courts; and most commonly, authority in the juvenile court to transfer a case if certain criteria are satisfied. Ms. Szabo notes that the three sets of standards rely on this third option, and proceeds to compare and assess the approaches which they take. She begins with the standards recommended by the IJA/ABA Joint Commission, observing that although the commentary to those standards reject the parens patriae or rehabilitative model in favor of a due process approach modeled after the procedures used in adult criminal proceedings, "the IJA/ABA proponents have adopted a strong presumption of retention of the juvenile court's jurisdiction ... over youths falling within ... its age limits."

> Consequently the [IJA/ABA] Standards support juvenile court handling of even serious habitual youthful offenders, considering it the obligation of the juvenile justice system to devise appropriate dispositional alternatives for such individuals.

She states that the NAC and Task Force standards, on the other hand:

> ...[A]ttempt to siphon off those offenders who are youthful only in years rather than in terms of criminal activity, thereby preserving

> the juvenile court's jurisdiction where it may be most effectual. As a result, the transfer process is utilized as a safety value in order to relieve the pressure that would otherwise exist to greatly reduce the maximum age for the juvenile court's jurisdiction.

All three sets of standards prescribe a range of procedural protections, though the Task Force standards appear to permit a somewhat more informal hearing than would be allowed by the IJA/ABA or NAC standards. "The end product of these procedural standards," according to Ms. Szabo is "a fair and reasoned determination of the waiver issue."

The specific criteria for transfer prescribed by the three sets of standards are then compared. The IJA/ABA provisions are found to be the most restrictive in that:

> [T]he futility of past juvenile court proceedings with respect to juveniles who continuously commit serious property or other non-violent offenses, is not given decisive weight. Rather, a combination of "seriousness of the latest offense plus a past record of violence must be present....
>
> Waiver under the ... [Task Force] and NAC formulations may be premised upon either the nature of the present offense or upon the juvenile's past record of adjudications.

She notes also that the IJA/ABA standards, unlike the others, would also require an assessment of whether the adult criminal system had the means for addressing the juvenile's problems and needs.

After further discussing both the philosophic underpinings and the specific recommendations of the standards, Ms. Szabo proposes her own procedures for transfer which would focus on two categories of alleged offenders: those who are "a danger to others because of a propensity to violence" and "recidivists" who have been "frequently treated in juvenile court to no avail." She concludes that although the juvenile court performs and can continue to perform a vital service ..., total success can neither be expected nor required.... Once this fact is acknowledged, the juvenile court may be relieved of hopeless cases and will be able to direct its energies to the youths who most deserve an opportunity to reform.

SUMMARY OF COMMENTS

The discussion ranged over a number of topics, with several panelists asking questions of Ms. Szabo and others expressing agreement with her presentation.

Mr. Gilman, at Judge Moore's request, explained the most recent changes in the IJA/ABA standards on transfer. Professor Smith stated that the development of the transfer volume included more intense discussion by the IJA/ABA Joint Commission and more revision than any of the other volumes. Mr. Kaimowitz then asked several questions, two of which became points for more general discussion. The first was why not simply use amenability to rehabilitation as the sole criteria. Ms. Szabo indicated that amenability to rehabilitation was the first among several factors. Judge McLaughlin suggested that amenability to rehabilitation was a far more important criteria than the seriousness of the offense since in some cases, a youth alleged to have committed a homicide is more responsive to rehabilitation programs than someone who writes bad checks. Judge Arthur suggested that the juvenile court should also be able to consider whether the adult system offered any greater opportunity for assisting the juvenile.

The second question was whether transfer of a child to adult criminal court meant that the child could never again be the subject of a delinquency petition before the juvenile court. Mr. Hege phrased the question in the context of an illustration of a child who is arrested on a minor charge 6 months after he or she was transferred. Ms. Connell put it in terms of the child who elects to waive the jurisdiction of the juvenile court and is subsequently charged with another offense. Ms. Szabo, Judge Cattle and Judge McLaughlin indicated that while prior transfers should be considered, each case should be judged on its own merits.

This led to a discussion of the degree of scrutiny which should be given to a juvenile's decision to foresake the jurisdiction of the juvenile court. Judge Fort suggested that it may not always be in the juvenile's interests to voluntarily subject him or herself to the authority of the adult criminal court. Ms. Szabo urged that a waiver of jurisdiction not be accepted unless the juvenile has an attorney and has had an opportunity to discuss the waiver with the lawyer, and there is a hearing to assure the waiver was knowing and voluntary. She added, however, that the court need not make any determination regarding the actual amenability of the juvenile to rehabilitation when the waiver is sought by the juvenile rather than the government.

Another issue raised, was whether transfer actually protected the public as is suggested in the paper. Judge Moore cited the high recidivism rate among defendants who pass through the adult criminal justice system, and Ms. Szabo and Mr. Rounds acknowledged that many juveniles who are transferred, are treated as first offenders by the adult court and placed on probation.

Judge Fort, Ms. Szabo, and Mr. Hutzler discussed whether trying a juvenile in adult court following a determination or probable cause in juvenile court during a transfer hearing, constituted double jeopardy. It was concluded that in Breed v. Jones, the Supreme Court had indicated that a probable cause determination did not raise the double jeopardy problem. It was noted that the juvenile court's determination of probable cause was more like a preliminary hearing in a criminal case than the adjudication challenged in the Breed case.

Judge Moore and others agreed with Ms. Szabo that if the emphasis on rehabilitation were removed from the juvenile court as is suggested in some volumes of the IJA/ABA standards, the basis for having a separate court would be severely undermined.

Finally, Judge McLaughlin and Judge Arthur offered a spirited defense of transfers. Judge McLaughlin suggested that the juvenile court often receives publicity on the 5% of the cases which should have been waived, rather than the 95% of the cases in which it is providing assistance. He cited that the recently enacted statute in New York which automatically treats juveniles alleged to have committed certain offenses as adults, as an example of the effects of not having transfer authority. Judge Arthur agreed with Ms. Szabo that transfer authority was an indispensible safety valve which, inter alia, avoids the need to duplicate the full range of secure adult facilities for juvenile offenders.

JUVENILE JUSTICE STANDARDS SYMPOSIUM

WAIVER

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I. THE SIGNIFICANCE OF WAIVER WITHIN THE JUVENILE JUSTICE SYSTEM

The polestar of juvenile court proceedings has traditionally been the rehabilitation of youthful offenders. Based upon the parens patriae concept, the responsibility of the State toward juvenile delinquents has been historically viewed as one of care and solicitude, rather than that of punishment for their misdeeds.[1] Accordingly, in the past, the juvenile justice system has not focused upon the culpability of the minor, but upon his needs for regenerative treatment. With rehabilitation as the predominant goal of the entire system, a clinical, sociological approach has been adopted with emphasis upon individualized diagnosis and disposition.[2]

Consequently, in formulating the juvenile court system, the rigidities and technicalities which characterized the criminal adversary process were discarded in favor of informality and flexibility. Since the State was acting in loco parentis for the purpose of protecting the juvenile, its power to deny him various procedural rights available to his elders was not initially disputed. On this basis, actions involving delinquent minors were considered "civil" rather than "criminal." and were therefore not deemed subject to the safeguards applicable to proceedings involving their adult counterparts.[3]

The underlying premise of the entire juvenile court system has thus rested upon the assumption that the wayward child will in some fashion benefit from rehabilitative treatment. Conversely, juvenile court proponents have also posited an adverse impact upon both the child and society if the full rigors of adult criminal proceedings are pursued.

Even without questioning the wisdom or accuracy of these assumptions, a critical analysis of the system's efficacy necessarily suggests that not all delinquents will fall within the rehabilitative rationaleof the juvenile court. At one extreme are the children who commit minor transgressions of adult society's expectations. Rather than squandering its resources upon these youths, the appropriate arm of the court will typically issue a warning and release the child to his or her parents, or funnel the youth out of the system via various diversionary avenues.

At the other end of the spectrum is the offender who is a juvenile in calendar years only. Repeated delinquency adjudications evidencing an escalating pattern of recidivism are regrettably not uncommon. Some of the most savage and heinous crimes are currently perpetrated by juveniles who in past decades would have been viewed as being capable of little more than adolescent exuberance.

In this context, the fundamental assumptions of a separate juvenile court have been questioned.

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1. Mack, The Juvenile Court, 23 Harv. L. Rev. 104, 119-20 (1909) [hereinafter referred to as The Juvenile Court].
2. The President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society, at 80 (1967).
3. See Pee v. United States, 274 F.2d 556 (D.C. Cir. 1959).

The court may all too frequently be confronted with a gravely antisocial youth on whose behalf rehabilitative efforts would clearly be worthless. This prognosis, which in effect concedes the failures and inadequacies of the juvenile system, is not easily reached. Nevertheless, there are compelling reasons requiring that this judgment be made.

From the broad perspective of society, the failures of the juvenile court are not merely statistics. Rather, each repeated delinquency adjudication represents not a number but another victim of crime. Responsibility for these depredations has been increasingly shifting toward the younger segments of the population. In 1975, persons under 18 years of age committed 43% of all serious crimes.[4] This proportion is even higher in urban areas.[5]

The net result of rising youthful criminality has been increased attention upon the problems of the juvenile justice system. Proposals to restrict or abolish juvenile court jurisdiction have been espoused as one method of societal self-protection. At the same time, enhanced procedural formality and duplication of the adult adversarial format have raised the question whether the juvenile court is a redundant and superfluous remnant of a bygone era.[6]

Caught in the midst of this controversy, the juvenile justice system must focus its priorities. Experimentation with various types of dispositions for serious, violent offenders must be cautiously undertaken. Protection of the public as well as the proper allocation of resources both demand that the court thoroughly evaluate the juvenile's rehabilitative potential.

This is not to suggest that waiver of jurisdiction is appropriate in every case. The point is simply that the juvenile court should not myopically retain jurisdiction without a conscientious assessment of the youth's prospects and the impact upon the safety of the public.

The reasons requiring this evaluation are both compelling and multifaceted. Initially, as suggested previously, the theoretical foundation of the juvenile court is the presumed amenability of the youth to reformation. Without this prospect upon which to base its decisions, the court's eventual disposition will be a meaningless exercise in futility and a mere "holding action" until the juvenile graduates to the adult criminal courts. Further, the firmly antisocial youth, if treated as a juvenile, may well infect others who might otherwise have been dissuaded from future criminality. Both of these considerations suggest that to the extent possible, juvenile court resources should be allocated to those who will benefit the most.

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4. Juvenile Delinquency Annual Report 1976, United States Senate Committee on the Judiciary, Subcommittee to Investigate Juvenile Delinquency, p. 25.
5. Federal Bureau of Investigation, Uniform Crime Reports 1974; Kaufman, Protecting the Rights of Minors: On Juvenile Autonomy and the Limits of Law, 52 N.Y.U.L. Rev. 1015, 1016 (1977).
6. McCarthy, Delinquency Dispositions Under the Juvenile Justice Standards: The Consequences of a Change of Rationale, 52 N.Y.U.L. Rev. 1093, 1115-1119 (1977) [hereinafter cited as Delinquency Dispositions Under the Juvenile Justice Standards]; Wizner and Keller, The Penal Model of Juvenile Justice: Is Juvenile Court Delinquency Jurisdiction Obsolete, 52 N.Y.U.L. Rev. 1120 (1977) [hereinafter cited as The Penal Model of Juvenile Justice].

Moreover, it bears repeating that this decision is of more than theoretical or academic interest. Aside from avoiding pointless expenditure of resources, waiver of jurisdiction in appropriate cases acknowledges the fundamental interest of the public in protection from criminal attack. The sharp increase in youthful criminality has rendered particularly acute the problem of the severely antisocial juvenile. When the juvenile court cannot offer an adequate remedy for this type of delinquent, an outlet must be provided. Under these circumstances, transfer to the criminal courts provides an indispensable safety valve. Indeed, it is no exaggeration to state that the continued existence of a separate juvenile court may well depend upon its ability to protect the public from recidivists.[7]

As a result, the concept of waiver has been widely recognized. Three methods of transferring cases are possible. The youth may elect to be treated as an adult and request that the juvenile court waive jurisdiction. Alternatively, the court may decide to transfer the case against the juvenile's will if the pertinent criteria are satisfied. A final option arises when the applicable state statute provides for concurrent jurisdiction between the juvenile and criminal courts. In this situation, the appropriate forum may be decided in the first instance by the criminal court. This practice, known as "reverse certification", is relatively uncommon.

By far the most common of the three types of waiver is the second. Transfer against the will of the juvenile, as previously noted, is permitted in virtually all jurisdictions. The crucial emphasis, therefore, must be upon the findings to be made by the court as a prerequisite to waiver. A variety of approaches to this important area have been suggested. The following section analyzes those provided in contemporary standards.

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7. Rosen, Juvenile Justice Waiver Standards in New Jersey, Seton Hall L. Rev. 62 (1977)

II. COMPARATIVE ANALYSIS OF THE IJA/ABA, LEAA TASK FORCE AND NAC STANDARDS

In order to better evaluate the Standards in issue, it may be useful to briefly examine the bases from which they were derived. Ab initio, the IJA/ABA Standards, in their commentary, expressly reject the rehabilitative treatment ideal in favor of the due process justice model.[8] In eschewing the diagnostic/medical format, the IJA/ABA Standards view the juvenile court's dispositional alternatives as ineffectual and unnecessary.[9] Thus, the standards favor minimal or no intrusion into the lives of youths, and, in cases where intervention is inescapable, the utilization of the least restrictive alternative.[10] Despite their pessimistic view concerning the likely prognosis of dispositional modalities, the IJA/ABA proponents have adopted a strong presumption of retention of the juvenile court's jurisdiction over youths falling within that tribunal's age parameters.[11]

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8. The Commentary to IJA/ABA Standard 2.4, entitled "Basic Principles", expresses the rejection of the rehabilitative ideal thusly:

> The unarticulated but fundamental premise of all of these principles relating to dispositions is genuinely shattering with regard to the function of juvenile court-that the prescribing of treatment or services by the court is not inherently beneficial to the juvenile or other respondent and should be restrained. Heretofore the court's intervention was assumed to be in the best interests of the child, designed to help the child to overcome difficulties in conforming to society's expectations because of his or her deficient home environment or psychological problems. Interviews, social investigations, and testing were expected to identify the cause of the problem with scientific precision and the court would attempt to remove the symptoms by placing the child in a program or setting selected to cure the problem that caused the unacceptable behavior, i.e., to rehabilitate the juvenile offender. Therefore, the major decision of the project was to reject the medical or rehabilitative model of the juvenile court.

Institute of Judicial Administration/American Bar Associations Joint Commission.(IJA/ABA) Standards for Juvenile Justice: A Summary and Analysis, 23 (1977) hereinafter cited as IJA/ABA, A Summary and Analysis emphasis added.

9. Id.

10. Id.

11. IJA/ABA, Standards Relating to Transfer Between Courts, §, 36 (Tentative Draft (1977) hereinafter cited as IJA/ABA, Transfer Between Courts and IJA/ABA, A Summary and Analysis, at 208.

Consequently, the Standards support juvenile court handling of even serious habitual youthful offenders, considering it the obligation of the juvenile justice system to devise appropriate dispositional alternatives for such individuals.[12] Finally in order to minimize the likelihood of waiver, and consonant with its adoption of the due process model, they mandate numerous procedural safeguards to be observed during the transfer process.[13]

In contradistinction from the IJA/ABA Standards, the LEAA version does not view the dichotomybetween the parens patriae and the constitutional approaches in such dialectical terms. Rather, the Task Force Standards rely upon both of these philosophical bases, attempting to strike a balance between the two.[14] As such, the Task Force model emphasizes procedural regularity and due process of law in delinquency proceedings, yet, at the same time, continues to accept the rehabilitative orientation of the juvenile system.[15]

Nevertheless, the NAC and Task Force approaches recognize the inappropriateness of juvenile court jurisdiction for certain minors, who, except for their chronological age, are indistinguishable from their adult counterparts in terms of culpability.[16] With regard to this group, waiver is viewed as a "necessary evil" and is authorized under broader circumstances than those posited by the IJA/ABA. Yet the waiver process is still governed by numerous attendant procedural protections.[17] By this means, the NAC and Task Force models attempt to siphon off those offenders who are youthful only in years, rather than in terms of criminal activity, thereby preserving the juvenile court's jurisdiction where it may be most effectual. As a result, the transfer process is utilized as a safety velve in order to relieve the pressure that would otherwise exist to greatly reduce the maximum age for the juvenile court's jurisdiction.[18]

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12. IJA/ABA, A Summary and Analysis, at 24.
13. See, e.g., IJA/ABA, Transfer Between Courts, Standards 2.1 and 2.3.
14. National Advisory Committee on Criminal Justice Standards and Goals, Report of the Task Force on Juvenile Justice and Delinquency Prevention at 268 (1976) (hereinafter cited as Task Force).
15. Id. at 293.
16. National Advisory Committee for Juvenile Justice and Delinquency Prevention, Report of the Advisory Committee on Standards for the Administration of Juvenile Justice, 30 (September 30, 1976) (hereinafter cited as NAC); Task Force supra at 293.
17. See Task Force Standard 9.5 and NAC, Standard 3.116.
18. Task Force, at 303; NAC, at 29.

These differing perceptions of the function of waiver are reflected in the procedural aspects of the three standards. Initially, the temporal restrictions upon the initiation of waiver proceedings, are worthy of mention. In this respect, IJA/ABA Standard 1.3 has adopted a 3 year statute of limitations for waiver or adjudication decisions, unless the corollary adult[19] offense is governed by a shorter or no limitations period, in which case, the adult standards would apply.[20] Incorporated into this standard is the rejection of the adult statute of limitations unless the latter sets forth a term shorter than 3 years or no limitation period at all for certain specified offenses.[21] Thus, when interpreted in conjunction with Standards 1.1A and 1.2A, Standard 1.3 in most cases, empowers the juvenile court to exercise waiver or adjudicatory jurisdiction over a youth, just short of age eighteen at the time of the offense, until immediately before his twenty-first birthday.[22]

In contrast with the IJA/ABA version, NAC Standard 3.115 explicitly incorporates in all cases the statute of limitations governing adult criminal prosecutions.[23] However, regardless of the limitations period, this standard restricts the duration of the juvenile court's disposition order to the youth's twenty-first birthday.[24]

Unlike the explicit terms of the IJA/ABA and NAC Standards, the Task Force Standard does not directly specify the duration of the limitations period. Rather, Standard 9.4 refers to any "applicable statute of limitation", without any recommendation as to the time limit for such a statute.[25] Additionally, though not explicitly mentioned in the body of the standard, the Commentary indicates that dispositional authority past the maximum jurisdictional age, i.e., 18, is envisioned.[26]

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19. IJA/ABA, Transfer Between Courts, supra at 22. These, as well as all other temporal restrictions set forth by the IJA/ABA Standards, as outlined, infra, have been bracketed pursuant to the most recent 1978 revisions. The time frames, therefore, merely express the preference of the IJA/ABA Standards, but leave the time scheme up to determination by individual states. See Minutes of Meeting of the Executive Committee of the Joint IJA/ABA Commission on Juvenile Justice Standards at 88 (October 19, 1978) [hereinafter referred to as Minutes of the Meeting of Executive Committee].
20. Id.
21. Id.
22. In effect, the Juvenile Court is vested with dispositional jurisdiction over such a youth at the maximum until age twenty-one. Id..
23. NAC, Standard 3.115.
24. Id.
25. Id.
26. Id.

Finally, it must be noted that unlike the IJA/ABA Standards, both the NAC and the Task Force models seem to refer to the statute of limitations only with respect to the jurisdiction of the juvenile court as to adjudicatory, rather than waiver hearings, while their IJA/ABA counterpart specifies, that its limitations period governs the court's jurisdiction as to waiver hearings as well.[27]

In addition to the statute of limitations, further temporal restrictions are placed upon the waiver proceedings by IJA/ABA Standard 2.1A through F. For instance, pursuant to Standard 2.1A, the juvenile court clerk is allotted two court days after the filing of a petition charging a waivable offense within which to advise the prosecutor in writing of the possibility of waiver.[28] Pursuant to Standard 2.1B, within 3 court days of the filing of such a petition, the prosecutor is obliged to give the youth written multilingual notice, if appropriate, of the possibility of transfer. Failure to provide timely notice is deemed to constitute a fatal defect to any waiver proceeding,[29] thus empowering the juvenile court to consider the petition on the merits.[30] The prosecutor is then afforded a total of 7 days upon the filing of the complaint to request waiver via a written motion to the juvenile court, and, within 24 hours, to deliver a copy of the motion to the youth in question.[31]

Under the IJA/ABA model, the decision to seek waiver is limited to the prosecutor, thus precluding the juvenile court from sua sponte initiating a transfer proceeding.[32] Pursuant to Standard 2.1D, the juvenile court is expected to hold a waiver hearing within 10 court days after the filing of the prosecutor's motion.[33] Nevertheless, the youth is permitted to suspend this requirement, in which case, the waiver hearing must transpire within a reasonable time thereafter.[34] Finally, ten days after the conclusion of the transfer hearing, the court is to issue its written decision.[35]

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27. Compare IJA/ABA, Transfer Between Courts, Standard 1.3 with NAC Standard 3.115 and Juvenile Justice and Delinquency Prevention, supra at 301 Task Force Standard 9.4; see also National Task Force to Develop Standards and Goals for Juvenile Justice and Delinquency Prevention, A Comparative Analysis of Standards and State Practices: Jurisdiction--Delinquency, 19 (1977).
28. IJA/ABA, Transfer Between Courts, 24-25.
29. Id., at 25-26.
30. Id., at 26.
31. Id., at 26.
32. Id., at Commentary to Standard 2.1C.
33. Id., at 29.
34. Id.
35. Id., at Standard 2.1E.

In contradistinction with the IJA/ABA Standards, the NAC and Task Force do not specifically prescribe temporal parameters with regard to waiver proceedings. Rather, both of the latter provisions merely set forth guidelines for the various events occurring withing the juvenile justice system, including the scheduling of adjudicatory hearings. In this respect, Task Force Standards 12.1 (1)(b) and (2)(a) require that the adjudicatory hearings of detained youths be held within 20 calendar days and for non-detained youths, within 60 calendar days.[36] Its NAC counterpart, in Standard 3.161, has imposed analogous 15 and 30 day deadlines.[37] However, under both Standards, delays attributable to a motion for transfer to a court of general jurisdiction are specifically exempted from the above time-computation strictures.[38] Both Standards have also imposed a 30 day calendar limit upon the determination of any issue taken by the trial court under advisement.[39] In the absence of specific indication to the contrary, it must therefore be presumed that waiver proceedings are only governed by the above time strictures.

Finally, in the case of non-compliance with the above time limits, both Standards authorize the release of the youth, as well as the imposition of sanctions upon the responsible juvenile justice personnel.[40] Additionally, the NAC Standards permit dismissal of the case with or without prejudice, with the type of dismissal depending upon the seriousness of the offense, the underlying facts and circumstances, the impact of reprosecution upon the administration of justice, the length of the delay and the prejudice, if any, to the youth.[41]

Also warranting comparison is the rather divergent format utilized by the three Standards regarding the nature of the waiver proceedings, as well as the attendant procedural protection provided therein. A common thread running through the three Standards in issue is their avowed dependence upon the criteria promulgated by the United States Supreme Court in Kent v. United States.[42]

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36. Task Force supra at 376.
37. NAC, supra at 104
38. Id., at 107.
39. Id., at Standard 3.161 h; Task Force, Standard 12.1(3)(b).
40. Id.
41. NAC, Commentary to Standard 3.161.
42. 383 U.S. 541 (1966).
    In Kent, the Supreme Court ruled that prior to a waiver determination by the juvenile court, a youth must be afforded a waiver hearing consistent with the requirements of due process and fairness, including the right to counsel at the waiver hearing, access by counsel to the juvenile's social and other records and a statement of reasons for the court's decision. Id.

All of the Standards as a minimum accept the safeguards with regard to the waiver process that were set forth in that case.[43]

The most comprehensive provisions are set forth by the IJA/ABA Standards. The Standards envision an adversarial format for waiver hearings, in which a youth is afforded the right to confrontation and cross-examination and to present evidence on his own behalf.[44] For instance, the State bears the burden of proof in demonstrating the impropriety of the juvenile court's retention of jurisdiction by clear and convincing evidence. This decision, along with the probable cause determination, may only be based on evidence that is admissible in adjudicatory hearings.[45] Moreover, expert opinion is to be considered in predicting the efficacy of the dispositional alternatives available under the auspices of the juvenile court.[46] In case of indigency, the juvenile court is required to compensate an expert witness for the youth, should he desire the services of such as expert, unless, the court, in its discretion determines that no need for the services of the expert has been established.[47] Finally, Standard 2.1E requires the juvenile court to issue a written decision setting forth its findings, including the evidence relied upon, as well the reasons for its determination.[48]

Several substantive and procedural rights are also extended to youths at waiver hearings. Rejecting the teachings of Faretta v. California,[49] a non-waivable right to counsel, free to indigents, is mandated.[50]

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43. Since Kent involved the interpretation of the District of Columbia statute, it has not been definitively established whether the United States Supreme Court's pronouncements are of constitutional magnitude or merely constituted an exercise of the Court's federal supervisory powers. The IJA/ABA, NAC and Task Force Standards appear to have adopted the former view which prevails in most jurisdictions. IJA/ABA, NAC, Commentary to Standard 3.116; Commentary to Standard 9.5.
44. IJA/ABA, Transfer Between Courts, Standards 2.3E., F, G, and H.
45. Id., at Standards 2.2A2; 2.2B, 2.2C and 2.3E.
46. Id., at Standard 2.2C.
47. Id., at Standard 2.3C; Minutes of the Meeting of the Executive Committee, supra at 92.
48. IJA/ABA, Transfer between Courts, 31.
49. 422 U.S. 806 (1975). In Faretta, the United States Supreme Court affirmed the constitutional right of adult criminal defendants to waive their right to counsel and to proceed pro se.
50. IJA/ABA, Transfer Between Courts, Standards 2.3A and 2.3B. Cf. Standard 6.2 authorizing the waiver of certain rights only upon consultation with counsel. IJA/ABA, A Summary and Analysis, 161.

The Fifth Amendment's protection against double jeopardy also obtains. In accordance with the Supreme Court's ruling in Breed v. Jones,[51] IJA/ABA Standard 2.1F prohibits consideration of waiver after the inception of adjudicatory hearings.[52] In addition, juveniles are afforded broad discovery rights. Standard 2.3D entitles them to access to all evidence available to the juvenile court which could be used to either support or contest the waiver motion.[53] Moreover, a juvenile is also provided with the right to remain silent at a waiver hearing, and any admissions made by him at such proceedings are inadmissible at subsequent criminal (but not juvenile) proceedings to establish guilt (except in a criminal perjury prosecution) or to impeach testimony.[54] Lastly, regardless of the outcome of the waiver hearing, a youth may request the recusal of the judge who had presided at that hearing from any subsequent juvenile court or criminal proceeding against him relating to any transaction or episode alleged in the petition.[55]

Similar to the IJA/ABA provisions, both the NAC and the Task Force Standards incorporate the due process safeguards outlined by the United States Supreme Court in Kent.

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51. 421 U.S. 519 (1975). In Breed, the Supreme Court, applying the protection against double jeopardy to juvenile proceedings, held that jeopardy attaches when the juvenile court begins to hear evidence. On this basis, the Court struck down the challenged statutory scheme, pursuant to which a waiver hearing was held after the adjudicatory determination. However, transfer decisions made prior to an adjudicatory hearing do not fall within this proscription. Breed v. Jones, supra
52. IJA/ABA, Transfer Between Courts, 32-34.
53. Id. at 45. See also Standard 4.7, which mandates the disclosure of favorable evidence by a juvenile court prosecutor to the same extent as one in adult criminal court. IJA/ABA, Standards Relating to the Prosecution Function, 62 (Tentative Draft, 1977) hereinafter, Prosecution.
54. IJA/ABA, Transfer Between Courts, Standard 2.31 and Commentary thereto. In this respect, the Standard rejects the holding of Harris v. New York, 401 U.S. 222 obtained in violation of Miranda v. Arizona, for the purpose of impeachment. See also Minutes of Executive Committee Meeting, supra at 93.
55. Id., at Standard 2.3J.

For instance, NAC Standard 3.116 entitles a juvenile to a "full and fair waiver hearing" at which he is "accorded all essential due process safeguards", while Task Force Standard 9.5, in similar language, requires the provision of a transfer hearing "that comports with due process criteria and a decision rendered in accord with specific criteria promulgated by either the court or the legislature."[56] Additionally, the Task Force Standard refers to Kent as putting forth the "minimum specific criteria on which a waiver decision may be based." Various other procedural protections which may be applicable with respect to waiver are also extended to juveniles. Nevertheless, the Commentary to Task Force Standard 9.5 specifically eschews the need for wholesale adoption of all the indicia of an adult criminal trial, preferring instead to utilize an informal hearing.[57]

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56. In this respect, NAC Standard 3.171 extends the following rights to juveniles:

    a. To Prior Notice of All Proceedings;
    b. To Be Present At All Proceedings:
    c. To Compel The Attendance of Witnesses;
    d. To Present Evidence And Confront And Cross-Examine Witnesses;
    e. To An Impartial Decision-Maker; And
    f. To All The Other Rights Accorded To Defendants In Criminal Cases Except For The Right To Indictment By A Grand Jury, The Right To A Trial By Jury, The Right To Bail, And In Neglect And Abuse Cases, The Right To Have The Allegations Proven Beyond A Reasonable Doubt.

Task Force Standard 12.3 similarly provides as follows:

> Court procedures in delinquency cases prior to adjudication should conform to due process requirements. Except for the right to bail, grand jury indictment, and trial by jury, the juvenile should have all the procedural rights given a criminal defendant.
>
> The juvenile should have the following rights in addition to the right to counsel;
>
> 1. An impartial judge;
> 2. Upon request by the juvenile, a proceeding open to the public or, with the court's permission, to specified members of the public;
> 3. Timely written notice of the proceeding, and of the juvenile's legal rights;
> 4. The presence of parent or guardian;
> 5. The assistance of an interpreter when necessary;
> 6. The right to avoid self-incrimination;
> 7. The right to avoid waiving his or her constitutional rights without prior consultation with an attorney; and
> 8. The right to the keeping of a verbatim record of the proceedings.

57. Task Force, 304.

Furthermore, the NAC Standards require a clear and convincing evidence of the youth's non-amenability to rehabilitation, while the Task Force proposal does not specify the level of proof.[58] Moreover, NAC Standard 3.167, though providing for discovery in general terms, does not specifically refer to discovery at waiver hearings.[59] Although the scope of discovery is not specified by the NAC Standards, disclosure is intended to occur on an informal basis, and is not pre-conditioned upon the filing of a motion therefor.[60] The NAC Standard, instead defers to local practice while encouraging states to permit, under the supervision of the court, "as full discovery as possible" prior to judicial proceedings.[61] With respect to discovery, the Task Force Standards impose the same obligation upon the State to disclose evidence favorable to a youth in juvenile court proceedings as would be required of the prosecutor in a criminal trial.[62] More specifically, according to the Commentary to Task Force Standard 9.5, the youth and his counsel are entitled access to the records utilized by the juvenile court in its waiver determination.[63] Pursuant to NAC Standard 3.132, juveniles are vested with a right to counsel in all proceedings arising from delinquency and in any proceeding at which a youth's custody, detention or treatment is in issue.[64] Presumably, representation at waiver hearings is within the ambit of this Standard. This Standard takes no position with respect to a youth's waiver of counsel, pending further investigation into the implications of self-representation.[65] Task Force Standard 9.5 clearly confers upon a juvenile the right to counsel at waiver hearings.[66] Waiver of this right is only authorized after consultation with an attorney and if the court determines that such waiver is performed competently, voluntarily and with full understanding of the consequences.[66]

The end product of these procedural standards is, of course, a fair and reasoned determination of the waiver issue. As a logical corollary, this judgment has not been relegated to unstructured judicial discretion. Each set of standards provides detailed criteria to be applied to the decision. The most rigid delineations have been employed by the IJA/ABA Standards.[68]

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58. NAC, Standard 3.116.
59. Id., at Standard 3.16.
60. Id.
61. Id.
62. Task Force Standard 15.17.
63. Id., at 304
64. NAC, at 50.
65. Id., at Commentary to Standard 3.132.
66. Task Force, 303; see also Standards 16.1 and 16.7.
67. Id., Standard 16.1.
68. Transfer Between Courts, 10-12.

This model sets the minimum age for waiver at 15.[69] In order to support transfer of jurisdiction, the juvenile court must find that: the juvenile has committed the class one offense or class two offense[70] alleged in the petition;[71] and

2. that by clear and convincing evidence the juvenile is not a proper person to be handled by the juvenile court."[72] A finding that a youth is not a proper candidate for handling by the court must include a determination by clear and convincing evidence, of:

> 1. "The seriousness of the alleged class one juvenile offense:
> 2. The likely inefficacy of the dispositions available to the juvenile court as demonstrated by previous dispositions of the juvenile; and
> 3. The appropriateness of the services and dispositional alternatives available in the criminal justice system for dealing with the juvenile's problems, and whether they are, in fact, available,

Where charged with a class two offense, the youth must have a prior record of adjudicated delinquency involving the infliction or threat of significant bodily injury. The existence of a prior record need not be demonstrated in the case of a youth who is charged with a class one offense.[73]

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69. IJA/ABA, Transfer Between Courts, Standard 1.1, Minutes of Executive Committee Meeting, supra at 88. This age category has been bracketed, thereby leaving the age specification up to the option of individual states.
70. A class one offense is defined as a criminal offense punishable, if committed by an adult, by death, or imprisonment for life or for more than 20 years. IJA/ABA, Summary and Analysis, supra at 193, while a class two offense constitutes a criminal offense, punishable, if committed by an adult, by imprisonment in excess of 5 but no more than 20 years. Id., at 193. In juvenile court, a class one offense may be punished by confinement for a maximum of 3 years, while a class 2 offense may be punished by confinement for a maximum of 18 months. Id., at 194.
71. But see IJA/ABA, Prosecution, Standard 4.3(A)(3), which, though intending to summarized the waiver recommendations, contains a provision in direct conflict with the language utilized in the volumes on Transfers. Prior to waiver, Standard 4.3(a)(3) requires proof by clear and convincing evidence that the conduct alleged in the petition would constitute a class one juvenile offense. In contrast, Standard 2.2(a)(1) of the Standards on Transfer Between Courts requires a finding of probable cause which has a threshold considerably lower than clear and convincing evidence that the juvenile has committed the class one juvenile offense alleged in the petition.
72. IJA/ABA, Transfer Between Courts, Standard 2.2A.
73. Id., at Standard 2.2C; Minutes of Executive Committee Meeting, supra at 90-91

As a prelude to waiver, the above-outlined criteria must be found to coalesce, and must be proven on the basis of clear and convincing evidence. Nonetheless, even if these preconditions are satisfied, waiver need not occur, and still lies within the discretion of the court.[74]

Finally, pursuant to IJA/ABA Standard 2.2D, a finding of probable cause at a waiver hearing becomes law ofthe case only with respect to subsequent or a lesser included offense.[75]

By comparison, the NAC and Task Force Standards provide as follows:

> The family court should have the authority to transfer a juvenile charged with committing a delinquency offense to a court of general criminal jurisdiction if:
> a. The juvenile is at least age 16;
> b. There is probable cause to believe that the juvenile committed the act alleged in the delinquency petition;
> c. There is probable cause to believe that the act alleged in the delinquency petition is of a heinous or aggravated nature, or that the juvenile has committed repeated serious delinquency offenses; and,
> d. There is clear and convincing evidence that the juvenile is not amenable to treatment by the family court because of the seriousness of the alleged conduct, the juvenile's record of prior adjudicated offenses, and the inefficacy of each of the dispositions available to the family court.
> This authority should not be exercised unless there has been a full and fair hearing at which the juvenile has been accorded all essential due process s safeguards.
> Before ordering transfer, the court should state, on the record, the basis for its finding that the juvenile could not be rehabilitated through any of the dispositions available to the family court. (NAC Standard 3.116).
>
> The family court should have the authority to waive jurisdiction and transfer a juvenile for trial in adult criminal court if:
> 1. The juvenile is charged with a delinquent act as defined in Standard 9.1.
> 2. The juvenile was 16 years or older at the time of the alleged commission of the delinquent act.

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74. Id., at 41.
75. Id., at 41-42.

3. The alleged delinquent act is:
   a. aggravated or heinous in nature or
   b. part of a pattern of repeated delinquent acts.
4. There is probable cause to believe the juvenile committed acts that are to be the subject of the adult criminal proceedings if waiver and transfer are approved.
5. The juvenile is not amenable, by virtue of his maturity, criminal sophistication, or past experience in the juvenile justice system, to services provided through the family court.
6. The juvenile has been given a waiver and transfer hearing that comports with due process including but not limited to the right to counsel and a decision rendered in accord with specific criteria promulgated by either the court or the legislature. The Kent v. United States, 383 U.S. 541 (1966), criteria should be the minimum specific criteria on which these decisions are based.

Task Force Standard 9.5.[76]

Even a cursory reading of these two standards reveals a much less restrictive approach to waiver than that espoused by the IJA/ABA proposal. Waiver under the Task Force and NAC formulations may be premised upon either the nature of the present offense or upon the juvenile's past record of adjudications. The IJA/ABA proposals, in contrast, focus upon the adult sentencing exposure as an indicator of the gravity of the crime and in addition require that the court independently make a finding of "seriousness." Furthermore, when charged with a class two offense, the youth must have previously been adjudicated delinquent for an act involving the infliction or threat of significant bodily injury.

The difference in emphasis is thus well-defined. The drafters of the IJA/ABA standards have evidently concluded that for youths charged with class two offenses, waiver may not transpire, regardless of the frequency of their prior adjudications, unless those adjudications involved acts of violence. Simply stated, the futility of past juvenile court proceedings with respect to juveniles who continuously commit serious property or other non-violent offenses, is not given decisive weight. Rather, a combination of "seriousness" of the latest offense plus a past record of violence must be present.

An even more grudging and nagative approach is evidenced in the prognosticative elements of the IJA/ABA criteria. The court must in effect conclude both that the juvenile system will fail and that the adult system will succeed before jurisdiction may be relinquished. In other words, the "likely inefficacy" of all juvenile dispositions will nevertheless shield a juvenile from adult prosecution unless the criminal justice system has "available" and "appropriate" means of "dealing with the juvenile's problems."

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76. NAC, 30; Task Force, 303.

Thus, under the IJA/ABA standards, waiver may be refused for a juvenile committing a "serious class two offense" with a prior adjudication(s) for violent conduct and an utter lack of amenability to dispositional alternatives so long as the juvenile court is unpersuaded that its adult counterpart has no available appropriate mode of sentencing. This approach necessitates the retention of jurisdiction by the juvenile court over youths who may well be unrehabilitatable under its auspices simply because of the absence of adult facilities. Concomitantly, the impact upon the public safety is ignored.

In contrast, Task Force and NAC standards focus upon the amenability of the youth to reformation, exclusively within the juvenile court system. As such, these formulations place the emphasis where it properly belongs -- upon the capacity of the juvenile court to perform its avowed funciton, regardless of the ability of the criminal process to deal with the youth.

III. THE PHILOSOPHICAL IMPLICATIONS AND CRITIQUE OF THE STANDARDS

As evidenced by these divergent positions, markedly different philosophies underlie the three types of standards. As outlined previously, the IJA/ABA Standards proceed from the premise that rehabilitation is most frequently an unreachable star, thereby decrying, in most instances, intervention into the lives of youths.[77] Although rejecting "treatment" as an avenue of reformation, and giving youths the right to refuse the services of such modalities[78] the IJA/ABA proposal, nevertheless, requires the state to "provide appropriate services needed for the normal growth and development of residents in corrections facilities."[79] Yet, despite its dim view of rehabilitative alternatives, the IJA/ABA implicitly sanctions retention of the juvenile court's jurisdiction over habitual offenders who, regardless of the frequency of their delinquency adjudications, did not previously commit violent offenses, yet are not likely to be rehabilitated within the juvenile court. Equally significantly, though acknowledging the inefficacy of dispositional alternatives for youthful offenders, in general, the Juvenile Justice Standards Project places the onus upon the system to devise effective and appropriate programs for these intractable individuals. In effect, what is advocated is a mandate to the juvenile court to reform the unreformable by means of treatment in which the intended beneficiaries may refuse to participate and which, assertedly, fails to accomplish its purpose. Clearly, this constitutes a logical non sequitur. It is difficult, indeed, to fathom any rationale for retaining recidivistic offenders in a system from which they are not expected to derive some sort of benefit. In fact, followed to its natural conclusion, acceptance of the IJA/ABA model bodes the demise of the juvenile court as a distinct entity. Stripped of its greatest pillar of strength, i.e., its emphasis upon rehabilitation, rather than retribution, little rationale remains for the retention of a separate tribunal dedicated to youthful offenders.[80] Viewed in this light, the juvenile court would be readily subsumed into the adult criminal process, while merely providing separate sentencing options for minors. By thus opening the door to the employment of retributive measures, obviously all youths, rather than only the most culpable and intractable ones, would be severely disadvantaged.

Even if amalgamation of the family court were not to transpire, the utilization of overly rigid waiver criteria would nonetheless have a grossly deleterious effect upon the entire juvenile justice system.

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77. IJA/ABA A Summary and Analysis, 23,34. See R. Clark, Crime in America 219 (1972) hereinafter cited as Crime in America ; cf. H. Weeks, The Highfields Study, 3 Crime and Justice 283 (1971).
78. IJA/ABA A Summary and Analysis, 45, 178, 196, 199.
79. Id., at 45
80. See Delinquency Dispositions Under the Juvenile Justice Standards, supra, at 115-119; and The Penal Model of Juvenile Justice, supra.

In failing to funnel out indiviiduals who share the criminal sophistication and recidivistic tendencies of their adult counterparts, the Standards in issue cause a strain upon the juvenile court's facilities both quantitatively and qualitatively. By retaining wholly inappropriate youths within the court's parameters, existing facilities would be taxed beyound their numerical capacity and their ability to accomplish effective modification in the offender's behavior. As a result, the caliber of the services provided would necessarily be reduced, thereby decreasing the overall effectiveness ofthe programs. Additionally, the presence of gross miscreants in these facilities would frequently exert a detrimental influence upon the less criminally experienced, more malleable individuals who are thus given additional lessons in the school of crime.[81] Consequently, the continuous retention of unreformable recidivists within the family court's jurisdiction would counteract whatever specific deterrent effect the prospect of waiver may hold. Therefore, the offender would become even more entrenched in the quagmire of recidivism.

Finally, of great import is the implication that the IJA/ABA provisions take little cognizance of the public weal. In fact, at one point the Commentary to Standard 2.2C rejects the public interest as a justification for waiver, deeming this factor to be a "political consideration" and "external to the juvenile".[82] Although at another point it is acknowledged that juveniles who are genuine threats to community safety may be referred to the adult criminal process,[83] the Standards emphasize that a prior adjudication involving a serious violent offense does not necessarily warrant waiver.[84] In light of this restriction, it is evident that even if safeguarding the citizenry ma, be of some concern to the IJA/ABA commentators, adequate protection of the public is not being provided by the proposals. This short-coming would, in all likelihood, reduce the public confidence in the juvenile justice system, thereby dealing a serious blow to irs integrity. Such a response could well encourage the reduction of the maximum jurisdictional age limit and/or the increase of frequency and duration of institutionalization. Surely, the general public would be well warranted in clamoring for protection from unreformable individuals who prey upon its citizens. In light of the plethora of property offenses perpetrated by youths,[85] causing the loss of untold millions of dollars, as well as other forms of damage, mandatory removal from juvenile court could well receive widespread approbation. A legislative response drastically curtailing family court jurisdiction and increasing the severity of dispositional alternatives would not be unlikely.

In light of the above analysis of the IJA/ABA Standards, the adoption in their present form appears to be unfeasible.

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81. See Bough, Juveniles and the Law: An Introduction, 12 Am. Crim. L. Rev. 1, 5 (1974).
82. IJA/ABA, Transfer Between Courts, 37.
83. Id., at 38-39.
84. Id., at 39.
85. Department of HEW, Office of Human Development, Office of Youth Development, Juvenile Court Statistics (1973). See also Crime in America, supra at 219.

The rigid eligibility criteria create a severe bar to the waiver of violent youth, having countless delinquency adjudications, though of a non-violent nature. By retaining jurisdiction in such grossly inappropriate cases, the efficacy of the entire juvenile justice system is impaired. Lastly, the public at large is inadequately safeguarded from the continued depredations of unreformable individuals. Viewed in this light, adoption of the existing IJA/ABA proposals seems impracticable, unless counterbalanced by a reduction in the maximum jurisdictional age limits and/or an increase in the severity

In contradistinction form the IJA/ABA approach, the NAC and the Task Force versions portend a far more optimistic assessment of the juvenile justice system. Rather than constitutiong harbingers of gloom regarding the efficacy of the rehabilitative ideal, the NAC and Task Force formulations manifest acceptance, though not blind adherence to the treatment model. Moreover, by simultaneously extending numerous procedural and constitutional safeguards to youths involved in the waiver process, the NAC and Task Force adopt a rational balance between the parens patriae and the due process approaches.

In further divergence from the IJA/ABA, the NAC and Task Force formats recognize the unsuitability of juvenile court programs for a wider range of hardened youthful offenders, as well as the necessity for reserving the dispositional avenues available under the auspices of the court for individuals most likely to benefit therefrom.[86] By the employment of broader waiver standards, the most culpable youths, whose retention within the juvenile system would be un-or counterproductive, are channeled to the adult criminal process. At the same time, the citizenry is shielded from the ravages of such intractable individuals. The net effect is a much more practicable and visible model, whose adoption would be far more feasible.

As is evident from the foregoing discussion, an ideal waiver statute should protect the public, comport with the concept of fairness to the juvenile, and effectively distinguish the hopeless recidivist from the salvageable youth. The eventual judgment may rely upon the social sciences, penology, or common sense tempered by past experiences. In hopes of achieving these ends, the following recommendations are offered.

At the outset, it is submitted that the waiver issue should be promptly heard and determined. Since the nature of the future proceedings is dependent upon the outcome of the hearing, unwarranted delays should not be countenanced. More particularly, rehabilitative possibilities should not be dissipated by dilatory tactics. Nevertheless, the importance of the decision requires that both parties have sufficient time to prepare. Justice is not served by a hasty determination based upon a sketchy presentation of the facts. Accordingly, the waiver hearing should be held as soon as practicable, with an outside limit of 30 days after the filing of the petition for detained and 60 days for non-detained juveniles. Adjournments beyond this period should only be granted upon a showing of good cause.

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86. See Task Force, Commentary to Standard 9.5, and NAC, Commentary to Standard 3.116.

A motion to waive jurisdiction should be permitted to be made by the juvenile, the prosecutor, or the court. Certainly both parties as well as the court have an interest in selecting the appropriate forum.[87] Permitting any of the above individuals to make the motion will acknowledge this fact and heighten awareness ofthe alternative of waiver.

The factual foundation for the court's decision should not be left to chance. While expert testimony is not an inexorable prerequisite to waiver, the court should nevertheless have the discretion to appoint its own expert in the event the proofs presented by the parties are inadequate to support an informed judgment. If a court-appointed expert is deemed advisable, either before or during the waiver hearing, the court should inform defense counsel and the prosecutor of the name and qualifications of the proposed witness. Both parties should thus be afforded the opportunity to obtain their own experts, and the juvenile, if indigent, should be advised that the public will bear the expense for any necessary expert testimony.

Additionally, to encourage full disclosure of the facts, no statements made by the juvenile at the waiver hearing should be admissible in any subsequent criminal or juvenile proceeding other than a prosecution for perjury or false swearing. Furthermore, if the juvenile court decides to retain jurisdiction, a different judge should preside at the adjudicatory hearing.

The juvenile court should waive its jurisdiction only in well-defined circumstances. The first prerequisite should be probable cause to believe that the offense charged in the petition has been committed by the juvenile. In conjunction with this determination, a series of offender and offense criteria must be applied. Basically, two categories of juveniles should be subject to waiver. One is the offender who is a danger to others because of a prospensity for violence. The other is the recidivist who has been frequently treated in juvenile court to no avail. An appropriate format might be the following:

(A) The juvenile court, after a hearing, should transfer a case to the criminal court if it is satisfied that the requirements of subsection (1)(2) or (3) have been met, that protection of the public requires transfer, and there is probable cause to believe that the juvenile committed the crime alleged in the petition.

(1) A juvenile 14 or older, who commits an offense directly involving violence or threats of violence against the person of another, in a willful manner, or who attempts or conspires to commit such an offense should be transferred if the court finds that he or she is not likely to benefit from available dispositional alternatives

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87. The juvenile's perspective on this issue may well reflect procedural or dispositional advantages of one system over the other. It may not be entirely accurate to assume that juvenile court will invariably be preferred. Moreover, allowing the juveniles to initiate the transfer proceedings injects a measure of self-determination into the process. On the whole, therefore, it would seem to be desirable to allow a youth above the minimum age for waiver to elect to be tried as an adult.

(2) A juvenile, 14 or older, who has been the subject of repeated delinquency adjudications for acts which would be a felony if committed by an adult should be transferred if the court finds that he or she is not likely to benefit from available dispositional alternatives

(3) A juvenile, 14 or older, who is not addicted to a controlled dangerous substance, and who distributes, or attempts or conspires to distribute a controlled dangerous substance should be transferred if the court finds that he or she is not likely to benefit from available dispositional alternatives

(B) If the court is satisfied that transfer is appropriate under the preceding section, it shall enter an order transferring to the criminal court all offenses arising from the same criminal transaction.

(C) A juvenile who has been transferred to the criminal court, and who has been convicted and has served a sentence in an adult penal institution should be presumed to be an appropriate candidate for transfer for any subsequent criminal act committed prior to his or her eighteenth birthday.

Several collateral consequences should follow from the waiver decision. The determination of probable cause should become law of the case obviating the need for any further hearing on this issue. Further, the waiver of jurisdiction should be deemed a final judgment and a direct appeal should be authorized on an expedited basis. Any appeal of the juvenile court's judgment should stay further proceedings in the criminal court.

These proposals are designed to promote judicial efficiency and provide a meaningful avenue of review. There would appear to be no sound reason for duplicating the probable cause portion of the hearing. Similarly, the propriety of the waiver should be a matter for appellate review rather than reconsideration by the criminal trial judge who presumably has no expertise in juvenile matters.

A prompt appellate determination as well as a stay of the criminal proceeding are imperative. If the waiver decision is ultimately reversed after a lengthy delay, the juvenile may have matured in the interim to such a degree that the facilities of the juvenile court will no longer be beneficial. If on the other hand, the criminal case proceeds to a conviction, this judgment will necessarily be invalid if the juvenile court erroneously waived jurisdiction. In this manner, review will hopefully be accomplished without impeding either the interests of the juvenile or the orderly process of the criminal court.

The foregoing proposals rest upon two basic premises. The first is that the juvenile court performs and can continue to perform a vital service in dealing with the problems of youth. Total success, however, can neither be expected nor required.

This absence of perfection is precisely the reason for waiver. Once this fact is acknowledged, the juvenile court may be relieved of hopeless cases and will be able direct its energies to the youths who most deserve an opportunity to reform. A national set of standards reflecting this philosophy will in all likelihood be well received.

(WHEREUPON, Ms. Helen Szabo's presentation was given and the following is the discussion that ensued.)

MR. MANAK: The final draft of this paper, like others, will reflect the changes made by the executive committee of the joint commission of IJA/ABA, of course, and Mrs. Szabo has alluded to some of those changes, as did David Gilman yesterday at lunch.

We will start.

MR. MOORE: Could David repeat those, again, so we can have our discussion right in front of us?

MR. MANAK: David, do you wish to repeat the changes?

MR. GILMAN: Yes, there were four changes made -- four policy decisions taken on the waiver volume. There were a number of other changes made in the volume that you will see when you look at the minutes of the meeting which I do not have

before me. There were more than these,but these were the ones that were of a policy nature.

The first change was that the age for waiver was dropped from sixteen to fifteen; and that a general policy to bracket numbers and time frames was also approved so that fifteen would be bracketed with commentary to explain that -- that bracketing each individual state's determination of what the appropriate time frame or number, the time within the bracket is the preference of the members of the joint commission.

Secondly, that class one offenders would be eligible for waiver under the IJA standards without -- without having a prior record, in other words, first offenders, two offenses would be also subject to waiver, if the other criteria spelled out in the standards were met.

Those are the four major changes in the way of volume. There are a number of additional changes, but they -- you will have to see that when we get to look at number two.

MR. MANAK: Let me just point out that I will have the minutes in my hand next week and that Dave is in the process of mailing them out

to the members of the commission, and that our office will have a copy next week. They will be edited and reproduced for those consultants who are involved in some of the changes made on the executive committee.

So we will send out copies of the minutes -- portions of the minutes, I should say, to the consultants who need them in making any changes -- final changes in their papers.

David?

MR. GILMAN: Well, the waiver -- there were some changes already made in 1977 executive committee minutes. You could take a look at those.

MR. MANAK: Those will go out also.

MR. GILMAN: Yes, because there were a number of groups that had commented on materials that the executive committee had looked at in 1977 and they still took another look at in 1978. So you have to use both sets of minutes.

MR. MANAK: Okay, very good.

Now, we will be starting with Mr. Kaimowitz.

MR. KAIMOWITZ: A number of questions.

Ms. Szabo, does the concept of

whether the child is able to be reviewed as an adult have anything to do with your formulation? In other words, do you conceive of the child's being treated like an adult as being waived or is he being waived without regard to the question of majority or minority? Is it an emancipating process, is what I am asking. In other words --

MS. SZABO: It is a maturation process.

MR. KAIMOWITZ: It is, maturation would be something that you would take into account?

MS. SZABO: Yes, I think that the maturation process would be specially relevant on the juvenile in their ability to use rehabilitation.

MR. KAIMOWITZ: Along those lines and along the constitutional lines then, would you give any consideration of ex post facto of that person becoming after the fact, punished by law in a certain way, simply because he is not graduated to becoming adult?

MS. SZABO: No, because in my mind, I would definitely advocate a prompt waiver decision. There would not be that time lapse to allow for such an ex post facto decision. That is one of the provisions I proposed, for speedy waiver.

MR. KAIMOWITZ: That's not what I am saying because it seems to me that what we are talking about when we talk about an ex post facto violation is that because of a change in the law, i.e., that the law now treats you as an adult instead of child, you are subject to different penalties. In other words, what -- when I shot so-and-so when I was breaking into the store, I could assume that I was a child knowing that I am fourteen or fifteen. I come into the proceeding, and all of a sudden, I found out I am an adult and I am saying at that point is there not a constitutional consideration that has not been given to the waiver question?

MS. SZABO: I have not seen it raised in that context anywhere. I don't think it's a significant thing.

MR. KAIMOWITZ: Technically, using your formulation, why not use the rehabilitation model? Why play games with anything else? In other words, why should the sole criteria be is this child rehabilitatable or is this child not?

MS. SZABO: Because I think the protection of the public is also a very vital consideration.

I believe that's very true.

MR. KAIMOWITZ: Would the public not benefit from a child who was rehabilitatable, not being waived solely on that ground. In other words, the public is -- the -- in other words, I committed a very heinous act solely on that grounds, you know, a very bad rape, in fact, it was under violence and force, and the like, but the doctor claims he or she can treat me and you have faith in this person and the public is outraged by the act but here in two years from now, I will never be doing that again. If I get the proper treatment, I won't.

MS. SZABO: I am not suggesting in terms of a demagogue or in terms of a public clamor necessarily. What I am suggesting is allowing the juvenile just enough discretion to use the public protection as one of his determinations, one of his considerations. Equally important, of course, much more important in the view of many, many people, is the amount of people to rehabilitation. To some extent, there is tension between those two concepts. I tend to think from my experience with many of the judges whom I have

worked with that many judges would probably weigh the juvenile amenability to rehabilitation very heavily.

MR. KAIMOWITZ: Okay, and the last thing that I don't understand, having read your paper, I am not sure what you are talking about in terms of the due process model in this area?

MS. SZABO: From what I understand, the IJA/ABA standards call their formulation the due process of court that was revised terminology used in the commentaries. At the same time, the IJA/ABA standards consistently rejected the rehabilitative ones. I am simply using the same terminology. There is not necessarily tension between the two. The IJA --

MR. KAIMOWITZ: I would take it the due process we are talking about is procedural and not substantive?

MS. SZABO: No.

MR. KAIMOWITZ: And therefore, the procedural -- substantive processes would just have to be, I would think, the loss of liberty or gaining of liberty.

MS. SZABO: Right.

MR. KAIMOWITZ: I am not sure I understand, then,

what the difference in the formulation between a due process model and how does a rehabilitative model take away from due process in this instance?

MS. SZABO: My term rehabilitative model referred initially to the parens patriae approach. As I understand the IJA/ABA standards rejected the parens patriae approach completely and at the same time rejected the rehabilitative effect of the Juvenile Court. I don't agree with that at all.

MR. KAIMOWITZ: That I understand. I just, you know, I would not accord them the credit that they call -- do they refer to it as a due process model?

MS. SZABO: I believe the commentaries have.

MR. MANAK: I believe there have been references to it as the due process model, yes.

MS. SZABO: I believe also that there are commentaries to that effect, yes.

MR. KAIMOWITZ: Okay.

MR. GILMAN: I think what the -- I think that is where the parens patriae model negates due process in order to fulfill a parens patriae ideal. The standard rejects the concept. And that way, it's

a due process model. If you can melt a parens patriae philosophy within a due process procedure --

MR. MANAK: Then it is permissible.

MR. GILMAN: I have not -- I think that's generally true, the standards would be supportive of that.

MR. MANAK: Right.

MR. GILMAN: Only where the parens patriae ideal negates procedural due process in the standards is that where it varies.

MR. KAIMOWITZ: Meaning, for example, we are not seriously considering probable cause in this thing. We know this act is a really heinous act and let's get him over to the, you know, the adult court, as quickly as possible. I think you would reject that, and I think everybody here would reject that.

MS. SZABO: Would it be helpful if I clarified this point by reading from which I derived --

MR. KAIMOWITZ: Please?

MS. SZABO: Page twenty-three, states, "The arbitrary and the fundamental status of all these principals are in the pre-disposition that is generally staggering with regard to the function of

juvenile court, that the prescription of treatment for services by the court is not arbitrarily beneficial to the juvenile or the respondents and should be restrained." Later on, "therefore, the major decision of the project was to reject the medical rehabilitative model of the juvenile court."

MR. KAIMOWITZ: I agree with that. That does not mean that was in contrast of that that has come up several times. That's why I am pursuing it. If there is somehow a weighing of a due process model against a medical model or rehabilitative model. A due process has constitutional considerations that would have nothing to do with whether we accept the parens patriae approach or not, is what I am saying.

MS. SZABO: I agree. I was merely using the same that was mostly used in the commentaries. I agree there should not be a tension. There is a building, there is a molding.

MR. MANAK: Mr. Kaimowitz, it seems to me that for purpose of the constitutional question of notice to the juvenile of his status as an act or when he commits the act, he would be on notice

not only as to the jurisdiction statutes, pertaining to the juvenile courts, but any waiver statutes as well for constitutional purposes. You know, as to the total scheme, so there is no question, it seems to me, that he has not had notice in the constitutional sense of the general provisions as to his status and any exceptions to the general provisions.

MR. KAIMOWITZ: Just that that wouldn't be true, Mr. Manak, because if you have at any point a youngster who cannot in any way know at the time that he commits an act reading the law, you know, I mean, given the theoretical situation as to whether or not he or she will be treated as an adult or a child, which is a different kind of thing.

MR. MANAK: Because it depends on a discretionary act at some time because he has notice of the possiblity of the exercise of discretion by a judge by virtue of the statutory scheme, and that satisfies the constitution requirement. I mean, that is an example of -- you can cite several other examples in the statutory law where a discretionary act may take place at some point changing

the course of direction. You have notice of the statutory scheme and that's all that is required. Well, well, why don't we move on to Mr. Hege.

MR. HEGE: I was just wondering, do the standards allow the child to voluntarily waive jurisdiction?

MS. SZABO: I looked for that very hard. I proposed it. I did not find a waiver upon request. I would endorse that concept and did endorse it in my paper.

MR. HEGE: Do you think that should require you know, prosecutorial support, or just the mere act of the child requesting it should be enough to transfer jurisdiction?

MS. SZABO: I would not require prosecutorial support. I would require, of course, consultation with an attorney, and some sort of hearing to assure that the juvenile is waiving his "right to remain in juvenile court completely voluntarily knowingly and understanding of the consequences."

MR. HEGE: I think Gabe asked you a question that included the term emancipation. Is this waiver process -- I guess what I am looking at is it a permanent emancipation for purposes of all

proceedings thereafter, and I am thinking of the case where a child of sixteen may be waived for theft of a motor vehicle, and never spend time in prison or an adult prison, comes right back to the community and gets picked up for shoplifting. By virtue of that first transfer, is the child subsequently -- suppose that the child is sixteen and a half and only gets caught shoplifting six months later. When the child comes back in, is the child going to have to go through the waiver process again, or are we just talking about a practical situation where they figure -- the court figures the child has already been determined not to be immunable to juvenile court and the rehabilitative treatment; and therefore, practically is going to be transferred to the adult court for any further offenses?

MS. SZABO: I wouldn't conceive waiver under your original formulation of such a broad standard for a status offense. Waiver upon the criteria that I have endorsed,, the more serious aggravated, heinous offense, the serious offense, the virtual failing offender, rehabilitation would probably be involved in a subsequent finding of similar

non-amenability,when a serious similar offense comes up.

In my own formulation, I proposed waiver of individuals who had been previously waived and convicted and served in juvenile institutions. I didn't advocate it mandatory. I proposed it as an assumption that the english would be appropriate data for subsequent transfer on similar offense.

MR. MANAK: Mrs. Connell?

MS. CONNELL: To pursue Brent's point, you do have a problem in some states like Missouri where Juvenile Courts have jurisdiction over traffic court; and what I see coming up particularly, is that if you allow the child to ask for waiver, even with the advice of counsel, you know, a youth may well wish to be treated in the adult system for a traffic offense because he knows he will get a fine. Then you have the possibility of that youngster coming back and in reality, you know, he has a traffic offense, maybe he didn't stop at a red light or something, you know. How would you view that fitting into it? Would you still require some kind of a hearing even if a

hearing and finding of non-amenability -- even if the youngster wished the transfer?

JUDGE KETCHAM: Sir, can I just ask a question of information?

I can't conceive of a child being waived for a traffic offense. What are we talking about?

MR. HUTZLER: We are talking about his electing.

MS. SZABO: If the individual wishes to be waived, there is no --

MS. CONNELL: In Missouri, you can be waived for any offense whatsoever.

MS. SZABO: In that case, there is no showing or finding of non-amenability to rehabilitation. There would be no reason to have a subsequent treatment in an adult court. The promise of subsequent treatment in an adult court would be that the juvenile has --

MS. CONNELL: So, your plan would be if a youngster asks for waiver, you wouldn't make a finding of non-amenability?

MS. SZABO: No, no finding by choice, voluntarily.

MS. CONNELL: Okay, and therefore, the next

time the youngster came in, the decision to waive, if it wasn't made by the youngster, would have to be done through the full court process?

MS. SZABO: Yes, yes.

MR. MANAK: All right, Ms. Sufian?

MS. SUFIAN: Nothing.

MR. MANAK: Judge Ketcham?

JUDGE KETCHAM: Just a brief comment.

I feel uneasy when I hear Ms. Szabo say that the juvenile courts are the white hats and the adult courts the black hats. It seems to me that with this self-righteous view juvenile courts are only for rehabilitation and efficacy and the adult courts are the jumping grounds. It sounds very much like the school process. We will deal with all the kids that are educable but if we don't think they are educable, you take care of them.

I have seen that too much in the Juvenile Court, and I'd hate to see that philosophy developed. As far as I'm concerned, a much better analogy would be like mental health. You've got civil and you've got criminal commitment, and some fit better in circumstances than others.

But if there is somebody who has violated the criminal law, then I think the court must be responsible, one court or the other.

MS. SZABO: I don't take that approach. I believe that --

JUDGE KETCHAM: I realize that. I do.

MS. SZABO: Briefly, very briefly, I admit in my presentation I did mention that at times referral to the adult court would be more appropriate and preferential and beneficial from the individual's point of view.

JUDGE KETCHAM: Oh, I'm sorry.

MS. SZABO: I only mentioned that in one sentence. And it was camouflaged, but I don't believe that the Juvenile Court is necessarily or exclusively more beneficial in all cases. In many cases, an individual would get with the facilities maybe more prepped for that individual hearing.

JUDGE MOORE: What do you mean by more appropriate?

Let's be honest here. There is no question in my mind that most juvenile judges that waive a kid from juvenile court to adult

court are not convinced that it is now consistent whether you like it or from any success or from protecting the community or the safety of society is zero or maybe five percent; and if you come to Michigan, you might as well all know, that's what the facts are. Seventy percent of every many and woman who walked out of our state prison would return to our state prison in five years. Now, you can put a kid in that system, you might as well not be kidding yourself about what's going to happen because he probably is going to end up within the seventy percent value statistics.

Now, it may be as bad in juvenile court, or it might be better than adult court, but I do think that we ought to be honest and say that waiver is probably the most significant step that you can have in the whole concept because he is now in a system where it's been demonstrated that -- at least in my state, that he is subject to failure.

MS. SZABO: Can I respond to that?

MR. MANAK: It's up to you.

MS. SZABO: Just very briefly, in terms of my familiarity with New Jersey, and an individual

very frequently receives an lenient treatment and he at that point is a first offender -- a first adult offender, that is an absolutely horrendous case, they well escape incarceration, pre-trial intervention which would not be avoidable to him in the Juvenile Court in the exact same basis. So it is not necessarily the worst treatment for him.

In some cases, it may be beneficial.

JUDGE MOORE: Well, you are waiving kids in New Jersey, but in Michigan they don't get waived until they have committed many offenses. The likelihood of the kid who has had a very serious offense and who has committed many in the past will be put on probation by an adult court judge. But in my county, it's about zero. The first thing they want to know is the juvenile's record and when they see the kid has been through the juvenile process, has seven or eight offenses, you tried probation repeatedly, tried putting the kid in treatment programs, and all those have failed, circuit judges are not stupid. They say, why should we repeat all that in the adult process when in the Juvenile Court, he would have had one

probation officer for maybe thirty-five or forty kids. The judge knows that out there I got one probation officer for two hundred probationers. Why should I repeat the same thing with a four times worse ratio with what we have already tried in Juvenile Court.

Now, maybe if you waived them for a serious offense and you have judges waive more easier and much more rapidly than those in Michigan, it probably wouldn't. But I don't think it happens in Michigan.

MR. MANAK: Judge Fort?

JUDGE FORT: Briefly on the question of voluntary waiver, if I understand you correctly, if a youngster waives, I don't see any objection to that for any need for a hearing, is that correct?

MS. SZABO: No, I would advocate a hearing after consultation with an attorney.

JUDGE FORT: We got, every freshman was picked up for minor possession of alcohol and wanted to be waived to adult court without exception. It was an insult to be in juvenile court, and their lawyers would insist on being waived and better, but they wouldn't waive them. I only mention that

because the other extreme in terms of traffic. The other -- Judge Ketcham surmise in traffic only causes me to make a comment. In my state, the judge has a right by statute to waive all juveniles just under a single order, that all traffic cases involving juveniles should be heard in an adult court, and this has been done in a great many parts of the state.

I am not clear and I'd like to know what your position is with respect to double jeopardy hearings which are being advocated here with respect to findings, whether they be probable cause findings, or otherwise, with reference -- and the extent to which you see a double jeopardy problem being raised.

MS. SZABO: I believe the standards -- certainly the IJA/ABA standards adopted the Jones formulation to avoid the double jeopardy problem, avoiding adjudicatory hearings, and subsequently waived their determination. So, I would definitely advocate adopting that kind of formulation.

With respect to the law of the case on probable cause determination, is that the other double jeopardy concern?

JUDGE FORT: Well, the extent to which I think it's a narrow-mind some times in a probable cause hearing which involves a finding under the Juvenile Code and, in effect, that the individual has committed whatever the offense is, and the question of double jeopardy when he gets to the -- at least to the adult court where the finding is beyond a probable cause basis, and it's beyond original doubt basis and whether or not there is a serious difficulty in determining at what point, if any, with respect to waiver hearing findings which aren't required by any of these standards may shop over into finding that when you get him into the adult court that you no longer really have a viable case.

There are many -- as you know, Ms. Szabo, there are many waiver statutes which expressly avoid even any resemblance of probable cause here or around the country, and that's the reason why they do it is to avoid it. It's simply a presumption made assuming that the youngster has committed whatever the charge is then in terms of rehabilitation and other standards that the individual is not amenable to treatment

and should be weighed by whatever all the factors are; and to my mind, the line is not as clear as -- in terms of double jeopardy.

MS. SZABO: I believe the IJA approach is that a probable cause finding in a waiver hearing constitutes a law of the case with respect to subsequent juvenile and adult proceedings. To that extent, the probable cause findings would be carried over and I am assuming, of course, that the probable cause in juvenile court would be the same as probable cause in adult court.

JUDGE FORT: But, the rule is, I think -- am I not correct, that the rule is if there has been a determination in the Juvenile Court on the standard not beyond a reasonable doubt, but the standard that most juvenile statutes have in terms of either a preponderance of the evidence which is still a majority rule as far as I know in the state around the country in juvenile hearings, whether that alone is not.

MR. HUTZLER: Reed vs. Jones specifically answered that question, Judge.

Reed vs. Jones specifically stated that the Juvenile Court could make a probable cause

finding before a waiver, it does not make adjudication. That's where double jeopardy causes a problem. You can't adjudicate the juvenile delinquent and waive him to adult court. You can make a probable cause finding which is really the equivalent of a -- of an arraignment in the adult court for probable cause and that is made before a trial.

MS. SZABO: I believe in Reed vs. Jones, any United States Supreme Court struck down only the system whereby an adjudicatory hearing was heard first with a full determination, and subsequently, the waiver hearing was held; and Mr. Hutzler is absolutely correct that the probable cause was held not to constitute double jeopardy with a subsequent date.

JUDGE FORT: Would you call subsequent to that date -- they only went as far as he stated.

MS. SZABO: The IJA/ABA does carry the probable cause finding over because of law of the case rather than double jeopardy.

MR. MANAK: Judge Cattle?

JUDGE CATTLE: To me fate here is prosecutorial discretion, and how many others have it in which

county attorneys or district attorneys file in whichever court he desires, then the minor has an inviolable right to request a transfer if it -- if he filed in adult court, he has a right to ask for a transfer into the juvenile jurisdiction, and we have to have a very prompt and complete hearing on that, and there are any number of criteria. The burden is on the state in that case to show why he should be tried in an adult court. In other words, the burden -- in this case, the burden is entirely on the state just as it would be in trial, and we have a list of criteria which the judge must -- and he must hit all of them, maturity of the individual, the lack of rehabilitative services for the offense charged, and for this individual, there is a whole list of them, and when we write the opinion this time, we have to write an opinion in which we state why we -- we believe he should remain in the adult court.

The traffic offense never even comes up because if you are of age in our state for the license, you are tried in an adult traffic court period. If you are fourteen or fifteen or sixteen, these screwball school permits or learners permits

or things like that, they will retain them since they are under sixteen in juvenile court because I can whack them better and teach them a better lesson than I could in adult court because there is practically no punishment in adult court except the loss of the license. So, where you have an absolute discretionary right on the part of the prosecutor to trial where he wants to and an absolute right on the part of the minor to request transfer with the odds all loaded in his favor, I think the public is protected in the extreme cases and the minor has all the benefits of being retained in the juvenile system, and I don't believe that there is any constitution problem that rises, and certainly we try to protect the public in this matter or allow that protection to be asserted and at the same time, the odds are nine -- ten times more that he will be allowed, automatically to be waivered back into the juvenile jurisdiction.

MR. MANAK: Dean Smith?

DEAN SMITH: I will not be defensive on behalf of the IJA/ABA standards, partly because of the category rejection of it's position.

I will merely footnote my comment by saying this. That this volume represents the ultimate dynamics of the consensus reaching the process. Originally, the drafting committee being somewhat attuned to the principal enunciated in Camp vs. United States came up with one proposal to the Commission which the Commission rejected. It was sent back to the drawing board, essentially, over the dichotomy between the treatment model or the rehabilitations model. The document as it was finally developed is a result of a great deal of editorial surgery which achieved it's present form; and even though it doesn't speak for the Commission and does speak for the project, there was just as much division of opinion between the framework of the thinking persons who participated in the project as there is reflected in the kind of dynamic observations that have been made this morning.

Therefore, I again commend Ms. Szabo, as I have the other persons who have had such an insight, if you will, to the IJA/ABA standards, and I think that's it.

MR. MANAK: Judge McLaughlin?

JUDGE MC LAUGHLIN: Coming from a state that

I just gave you what happens, I agree with Ms. Szabo, if you make the waiver too tight. In New York State, we were one of the few, possibly the only state that didn't have any waiver at all. Everything was age. If you were over seven but had not yet reached your sixteenth, regardless of what you did, there was just no possibility of waiver, leaving the Family Court in New York with exactly type of child Ms. Szabo talked about. The child everybody agreed was totally untreatable. New York had a philosophy that every child who committed a delinquent act was in need of treatment and for every child who needed treatment, there was a treatment available and that simply wasn't the case on either side of the line.

The result was that you got more and more cases or people going back out into the community and the newspapers again, to ponder away at the wrist-slapping revolving door, Family Court, and they were right. They were absolutely right. They were putting the blame on the Family Court when the blame belonged more probably on the statute. The child would come in -- the worse he was, the more likely he was

to go out because it was less likely, you know, that no institution would take him. You know, we had him, it didn't work, we don't want him back again, and in New York state, the Family Court had no right to commit a child to any institution without the institution's permission.

There was one little exception with regard to state institutions, but it didn't matter because the state institution -- if you can limit the child to the institution of the state without prior consent of the state institution, they had the right to ask him when they got there and to see if he wasn't treatable to send him right back to you again; and, of course, that's what was happening. The court did not respond to the -- I don't think the people involved in the court really realized the amount of animosity that this was building up against the family court.

Now, we were helping, probably ninety, ninety-five percent of the children that came in, we were getting the publicity on the five percent who shouldn't have been there. The result was that New York state last year in the midst of a very heated election campaign simply went a

hundred and eighty degrees the other way, and they simply kicked out, willy-nilly, some crimes which attract the public eye, you know, the crimes involving violence, and they simply said every child goes into the adult court now, and whether the child comes back to the juvenile process would then depend on the, essentially, the unfitted discretion of various offenses, okay?

So what I am saying here is that if the Family Court is going to continue, and I keep saying this triax situation, if we are going to continue to be able to provide rehabilitative services to the needy children, we've got to realize that there are some children who simply shouldn't be there. I object to the decision being made on the basis of the act being committed. Some of the most rehabilitative children who have come into my court have been guilty of homicide, you know, and some of the most unrehabilitative children have been involved in the property crimes which is not too different from what you have in the adult system. You know, the people who, I think it's bad checks, the rehabilitative right for bad-check writing is zero, okay? So the point I am making is

that while the ABA -- I mean, I am in favor of the standards. I would support the ABA standard, but I tell you, if it came in my state, I couldn't accept it, I couldn't enforce it on the legislative basis. The waiver has got to depend, I think, on the treatableness of the child, not -- and I don't want to tie it into the crime. We don't have the problem with traffic cases in New York, so I don't know if you have the same thing in Nebraska; in other words, when you have a license, you are also out of the Juvenile Court, and that's all I have to say is that the waiver has to be sensitive to the fact that where you can't treat the child and there is no treatment available and that's all I have to say is that the waiver has got to be sensitive to the fact that where you can't treat the child or there's no treatment available, then -- then you have got to be able to provide for transfer and you shouldn't hog-tie yourself into a lot of really artificial standards because I think here when you put the artificial standards in -- when I say artificial standards meaning serious crime instead of some other. In other words, the seriousness of the crime is not really

connected to rehabilitation. I don't think there is any necessary relationship, but I do think we should have our realistic standards and they should be based on essentially the standard of can this child benefit from the Juvenile Court process. If he can't, then I should keep him. I don't care how tough he is, I mean, as long as there is some reasonable hope. But where there is no reasonable hope, then I think the court has got to be permitted to transfer the child.

JUDGE CATTLE: I should say that in connection with our system, which I think happens to work better than any of these, that the choice is not a final choice; that is, the -- if the minor is determined to be tryable in the adult court, it's on this case only and that has no precedence. In other words, he can come up for something else, petty larceny, or whatever it may be, and that's a whole new question.

JUDGE MC LAUGHLIN: The treatment decision is made at the time the child arrives in court, not what happened before.

JUDGE CATTLE: Of course, his past record is one of the many factors.

MR. MANAK: Judge Moore, did you have any additional remarks?

JUDGE MOORE: Very briefly, I would indicate that this is a very excellent paper in my opinion, and I think this volume may be -- and perhaps been rewritten, perhaps not to the extent this was before, the straw that broke the camel's back as far as the public is concerned. I agree with really all of that, the number one which I support related mostly to adult due process in the juvenile court; and on the other side of that coin now, we have, as Lindsay will point out this afternoon, eliminated the treatment model and rehabilitation model; and this volume very clearly stays in the commentary of that issue; and if we are going to number three, if may be very difficult to waive youngster's from juvenile court to adult court; and basically, we have no need at all for the juvenile court and while the proponents of this statute or standards I don't think support that proposition, I maintain that we are strong supporters of the juvenile process and I think they are right, and I don't think they have any alternative motives as far as the public is concerned; and if the public

could see no difference in the method of determining guilt or innocence in the juvenile versus the adult court, then the public can see no difference in determining what disposition should be made, then the public is going to say that the greatest way to save a hell of a lot of money is to eliminate the juvenile court, and I am sure it isn't going to be the adult court, it is going to be this court.

MR. MANAK: Judge Arthur?

JUDGE ARTHUR: Just two short comments and two questions.

First of all, I agree with your paper very much, and I would like to suggest stressing that it's an indispensable safety valve to have that in there in one phrase; and I think it's a nice phrase, and I think you've got to have something in the area of the Juvenile Courts, the only reason a nice place just plain isn't going to fit because you don't want to spend all the money duplicating the adult facilities. The second comment, in our state, the state commissioner's have a great many children who should not, I think, be certified because he has

carried power to the ultimate. We have zero security that's for a juvenile, anywhere in the state of Minnesota; therefore, if a child requires security for any reason, he must be certified, making the certification process a very indispensable safety valve, at least in Minnesota, as a public safety.

The other comment I would make, is that I would hope you would stress the point about your priority appeals because this, as I mentioned yesterday is one of the things that is really jamming up our system. The appeals which are mandatory, and we are building a whole case law, in Minnesota, under this whole process, but in time, for each one of these cases, some kid has to sit in security for nine to twelve months to build that case law, and I wish we do get some way to get the Supreme Court to give priority to kids who are locked up when their appeals come up.

The two questions I would put to you is, one, whether we should be allowed in the juvenile system to compare with the adult facility what it can do for the child. Gene mentions the

fact that, in Michigan, the state prisons aren't going to accomplish very much except keep the kid out of mischief for a while and I think Minnesota is pretty much the same way. Minnesota law now says that we cannot compare the adult system, you can only look and see if the juvenile system is adequate. I think this is incorrect and I don't know that your paper touches on that.

I would ask you the question, should we be allowed to compare the immunibility of the adult and the immunibility of the child?

MS. SZABO: I would endorse, compare. The only limitation I would have is keeping the youth in Juvenile Court, only because there is one thing about an adult for any other reason, he deserves to be waived.

JUDGE ARTHUR: My other question is, the gadget we are using more and more in Minnesota and a victim of one of our Supreme Court decisions called state waiver, we find that the kid is completely immunible to certification except one last little facility that might be tried in juvenile, and it would only work if the kid knows that's it or adult; and we are using the state waiver pro-

cedures and using them just for the past two years with remarkable success.

I don't know if that's touched on in either of the standards or your paper, but do you have any comment on that?

MS. SZABO: I didn't touch on that because I had double jeopardy problems with that.

JUDGE ARTHUR: Oh, we get the kids to waive all those wonderful things.

Okay, thank you.

MR. MANAK: Judge Delaney?

JUDGE DELANEY: I would like to say that I agree very much with Ms. Szabo's presentation period.

MR. MANAK: Okay, Mrs. Bridges?

MS. BRIDGES: No comment.

MR. MANAK: Mr. Rounds?

MR. ROUNDS: Just a comment on comparative jurisdiction.

California, like New Jersey, rarely put a waived child into a prison system. In other words, the treatment they get as adult on the first case waived to adult is far lighter than they would receive if they remained in juvenile. The worst

thing that happens to them in sort of a first degree murder case is to be sent to the same state facility that they would normally go to in the event of juvenile treatment.

MS. SZABO: May I just respond? New Jersey would have the exact situation too.

JUDGE ARTHUR: How can you justify labor law on an amenability basis if you -- if the adult court does the same thing? I mean, isn't he just as amenable as the juvenile court would be?

MR. ROUNDS: Two things.

When they go into the same state juvenile facility, the jurisdiction of the adult court is longer than the juvenile court, and the same situation, and of course, there is the fact that he then picks up an adult record, and those are the only two distinctions between that kind of treatment.

JUDGE MOORE: When you say in the same facility, are they being comingled?

MR. ROUNDS: Yes.

MS. SZABO: Not in New Jersey.

MR. MANAK: How many states are they being comingled in, I mean, certified juveniles with

juveniles?

JUDGE CATTLE: Where the trial courts send them, yes.

MR. MANAK: You mingle the real juveniles with the certified juveniles?

All right, Mr. Siegel?

MR. SIEGEL: No comment.

5. Intake and Diversion

Consultant
Kenneth Siegel

ABSTRACT OF PAPER

Mr. Siegel addresses four issues concerning intake and diversion:

-- How do intake officials handle a case which is legally insufficient to support a petition?

-- What criteria should apply to intake decisions?

-- Should intake be a function of the judicial or executive branch? and

-- Should prosecutors monitor diversion programs?

With regard to the first question, he points out that in adult criminal cases, an attorney determines whether there are sufficient facts to establish the jurisdiction of the court and whether there is sufficient legally admissible evidence to support the petition, but that in delinquency proceedings, this function is carried out by a non-legally trained intake officer. He indicates that this raises dangers for both the individual juvenile and the juvenile justice system as a whole. These include the possibility that an innocent youth or one against whom a petition cannot be sustained may be coerced into a treatment or supervision program as well as the risk that some police officers may be tempted into using unlawful investigative techniques since there is little likelihood of the evidence being challenged at trial. This "vitiates the integrity of ... and causes loss of respect for the justice system."

Mr. Siegel views the presence of defense counsel as the "most effective approach" to overcome these problems and sets forth the relevant provisions from the IJA/ABA and Task Force Standards. He views the referring of questionable cases to the prosecutor for an opinion on their legal sufficiency as suggested in the Task Force and NAC standards, or the requiring of prosecutorial screening of every case as helpful, but still inadequate. He notes also the importance of the juvenile's right to remain silent and the IJA/ABA provision calling for dismissal of proceedings at intake where the legal evidence is insufficient, as means of lessening the danger of coercion during intake.

The discussion on the second question begins with a description of the dangers in vesting "unbridled discretion in the intake officer."

> Decisions may be made on a discriminatory, arbitrary or capricious basis. Factors such as race, ethnic background, sex, lifestyle and appearance may unfairly come into play. Intake officers may make a decision based on their own, highly subjective value system.... These disparities cause juveniles and others to question the fairness of the juvenile justice system.

Mr. Siegel acknowledges that written guidelines must leave some room for discretion but that they "must be specific enough to minimize abuse." He then presents the detailed guidelines included in the IJA/ABA standards, and the more general criteria recommended by the NAC. In most instances, he favors the approach taken in the IJA/ABA provisions, although he questions permitting consideration of a juvenile's behavior in school and the juvenile's relationship with his or her family in determining whether a petition should be filed, and requiring that all juveniles charged in connection with a particular incident be treated identically. On both points, he states a preference for the position adopted by the NAC. On another point, he refers approvingly to the IJA/ABA provision recommending that prior contacts not resulting in a legally sufficient petition should not be considered in making intake decisions.

Regarding the controversy over whether intake should be an executive or judicial branch function, Mr. Siegel observes that both the IJA/ABA and Task Force standards place intake in the executive branch and that the NAC provisions take no position. He states that the IJA/ABA commentary best supports the basis for the position favoring locating intake units in the executive branch, and then outlines the arguments in favor of executive placement. [For a more detailed discussion of this topic, see Paper A.2.]

Finally, he urges that prosecutors monitor the operation and effectiveness of diversion programs to protect both the public and individual youth. He states that while this activity is not covered by the standards, it is consistent with the prosecutorial monitoring of post-adjudication dispositional alternatives recommended by the IJA/ABA and Task Force Standards.

SUMMARY OF COMMENTS

The two issues which drew particular attention during the discussion were placing the intake function in the executive branch and prohibiting a child from waiving counsel. On the first issue, Judge Arthur stated that the court should set the policies governing intake decisions but should not control individual intake decisions. Judge Cattle on the other hand, expressed the view that intake should be under the control of the prosecutor, since only matters requiring adjudication should be considered by the court. Judge Ketcham suggested that the basic issue is who should be vested with discretion.

> Clearly all of us are very much in favor of it when we exercise it, but somewhat dubious of it if it's exercised by others.

He asked how the controls which Mr. Siegel suggested should be imposed on intake, comported with the absolute discretion accorded prosecutors in adult criminal cases.

On the second issue, Judges Arthur, Cattle and Moore, and Mr. Kaimowitz spoke out against prohibiting waivers of counsel. Judge Arthur suggested that requiring an attorney for every juvenile at every stage would be prohibitively expensive, and might result in added delay for the juvenile, particularly in rural areas. Judge Moore stated that court should be able to accept a waiver after first assuring that it had been given voluntarily and knowingly. Judge Cattle added that counsel should be assigned when a juvenile did not fully understand the effects of waiver. Mr. Kaimowitz suggested that intake was purely a social function and that until a petition had been filed, there was no need for an attorney, since most juveniles were capable of taking care of themselves. Mr. Manak disagreed, analogizing intake to at least the custodial situation discussed in Miranda vs. Arizona, and Judge Moore observed that intake can often be the most important decision in the whole process.

In the course of an exploration by Judge Fort of the legal basis for requiring cases to be initially referred to intake, there appeared to be agreement that intake is a statutory not a constitutional requirement, and that the prosecutor, as the chief law enforcement official, should have the final authority to decide whether a petition should be filed.

Finally, Ms. Thompson suggested that most law enforcement officers would prefer a full trial after making an arrest and would not alter their conduct on a presumption that a juvenile would not be diverted. Mr. Hege, on the other hand, supported Mr. Siegel in stating that such alterations did occur when most juveniles taken into custody for a particular offense were being diverted.

PROTECTING INDIVIDUAL RIGHTS AT INTAKE: HOW THE STANDARDS ADDRESS THE PROBLEM

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INTRODUCTION

The purpose of this paper is to examine four questions of juvenile rights relating to intake and diversion. These four are: (1) The issue of intake officials' treatment of cases lacking in legal sufficiency. Should dismissal, as opposed to diversion, be guaranteed in such cases? (2) Should the intake decision on whether to divert the juvenile be based on written and formalized criteria? If so, what should those criteria be?; (3) Should the intake agency making the diversion decision be judicially or executively controlled?; (4) Should the prosecutor have the responsibility of monitoring programs that juveniles are diverted to by intake officials.

These issues will be examined in terms of how they are addressed by the three major juvenile justice standards projects: (1) The tentative draft of the Institute of Judicial Administration/American Bar Association, Juvenile Justice Standards Project (IJA/ABA Standards), (2) Report of the Task Force on Juvenile Justice and Delinquency Prevention, National Advisory Committee on Criminal Justice Standards and Goals (Task Force), and (3) The National Advisory Committee on Juvenile Justice and Delinquency Prevention, Report for the Administrator on Standards for the Administration of Juvenile Justice (NAC).

THE JUVENILE'S RIGHT TO DISMISSAL RATHER THAN DIVERSION IN THE ABSENCE OF A LEGALLY SUFFICIENT CASE: A RIGHT TO COUNSEL ISSUE

Under our system of criminal and juvenile justice, it is basic, at least in theory, that the state is not to coercively intervene in the life of an individual unless that individual is guilty of a violation and there is a legally sufficient case to establish that guilt. The term "legally sufficient" involves a two-part test: (1) Whether the facts and alleged circumstances are sufficient to establish the court's jurisdiction over the youth and (2) whether the evidence is sufficient to support the petition.[1] Part (2) of the test will often involve difficult questions as to the constitutionality of an arrest, search or confession.

In the adult system questions of legal sufficiency and constitutionality are determined by lawyers, i.e., prosecutors, before an individual is placed into the system, whether the court system or the diversionary system. In the juvenile system an individual can be put into the diversionary system without the benefit of a lawyer's scrutiny. Such legal and constitutional decisions are made by non-lawyer intake workers. Thus the danger is real that coerced into diversion or non-judicial dispositional programs will be some juveniles who are innocent; juveniles who are not innocent but who, nonetheless, do not have legally sufficient cases established against them; and juveniles whose cases are based on unconstitutional arrests, searches and statements.

This category of cases just discussed, i.e., the diversion of juveniles whose cases are based on constitutionally-defective evidence, creates problems which transcend the issue of justice for the individual juvenile involved in a case.

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1. Task Force, Commentary to Standard 15.13 p.532.

If police know that constitutional evidentiary issues are not going to be scrutinized by prosecutors, defense attorneys, or the court; that most cases are going to be disposed of through the non-lawyer controlled diversion process, the incentive (for some police) to adhere to constitutionally valid investigative procedures is lessened. If the police continually see juveniles whose cases are based on illegally obtained evidence being effectively channeled into informal probation or diversion programs, some officers will, in approaching future investigations, adopt the attitude of "I know this search or procedure is legally questionable or prohibited but I'll go ahead anyway because it will never come to light in that the case will be disposed of through a non-attorney supervised diversion process". When police adopt such an attitude the constitutional rights of the innocent as well as the guilty become jeopardized. The deterrent impact of the exclusionary rule is attenuated if police believe that the manner in which they obtain statements and evidence or make arrests will not be subjected to legal scrutiny.

Another danger to the juvenile's constitutional rights results from the therapeutic approach of some intake officals. These officials will sometimes refer a juvenile to informal probation or to a program even though the official knows or suspects that a legally sufficient case is lacking. This decision may be made with good intentions because the official believes that the informal probation or the treatment program is in the best interest of the juvenile. In point, of fact, the same services or similar community services could often be offered to the child without juvenile justice system coercive intervention. This is true, however, only in those cases where the juvenile is willing to voluntarily accept such services.

The key point of this discussion is that in a free society the state has no right to coercively intervene in the life of an individual in the absence of a legally sufficient case -- whether or not the individual is guilty or innocent and whether or not he is in need of help. This basic civil libertarian principle is as applicable to juveniles as it is to adults. Yet, many officials in the juvenile justice system do not even pay lip service to the principle.

In some cases, the juvenile may be led -- or, more accurately, misled -- into believing that if he does not participate in a diversionary program, prosecution and court action will follow. In actuality, however, if the juvenile were to refuse program participation and the case were referred to the prosecutor or court it would be dismissed for lack of legal sufficiency or on constitutional grounds (assuming the prosecutor and court are acting in good faith). Such deception-based coercion vitiates the integrity of the justice system, causes a loss of respect for the justice system and should not be tolerated.

Some soft-pedal the above-discussed problem of innocent juveniles or juveniles whose case is based on insufficient or illegally-obtained evidence being coerced into a diversionary program. They would object to the use of the term coercion, arguing that participation in the program is entirely voluntary. This is false because the threat of adjudication or the court is used to induce the juvenile to do something.

The Task Force states that diversion programs use:

> "The threat or possibility of conviction to encourage an accused to agree to do something . . . . This agreement may not be entirely

voluntary as the accused often agrees to participate in a diversion program only because he fears formal criminal prosecution."[2]

Similarly, a Comment in the Harvard Civil Liberties Law Review states;

"Diversion programs use the threat of possible conviction to encourage the accused to participate in a rehabilitation program, undergo psychiatric treatment, modify his behavior or hold certain employment."[3]

It is submitted that the presence of defense counsel at intake is the most effective approach to the problem of (1) innocent juveniles being coerced into diversion programs; (2) juveniles who do not have a legally sufficient case established against them being coerced into diversion programs; and (3) juveniles whose case is based on unconstitutional police practices being coerced into diversion programs.

The words of the Task Force are again appropriate here:

"Diversion also poses potential threats to the legitimate interests of those charged with criminal offenses. . . . An innocent individual because of ignorance or other factors, may agree to participate in a diversion program, even though he does not have to because the prosecution cannot establish his guilt."[4]

The IJA/ABA Standards guarantee the juvenile the unwaivable right to assistance of counsel at the intake stage. Standard 2.13 of The Juvenile Probation Function volume reads as follows:

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

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

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

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

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2. Working paper on Courts, National Conference on Criminal Justice 1 January 23-26, p. 14 (emphasis added).
3. Harvard Civil Liberties Law Review, 10, 180 (1975).
4. Working paper on "Courts", p. 22.

The juvenile's rights are further protected by the specificity of proceedings to be followed at the intake interview and dispositional conferences. Standard 2.14 reads as follows:

"2.14 Intake interview and dispositional conferences.

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

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

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

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

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

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

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

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

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

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

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

The danger of the juvenile being unfairly coerced into a diversionary program when the government does not have a legally sufficient case is lessened by Standard 2.12 which guarantees the right against self-incrimination.

Standard 2.12 reads:

> "2.12 Juvenile's privilege against self-incrimination.
>
> A. A juvenile should have a privilege against self-incrimination in connection with questioning by intake personnel during the intake process.
>
> B. Any statement made by a juvenile to an intake officer or other information derived directly or indirectly from such a statement is inadmissible in evidence in any judicial proceeding prior to a formal finding of delinquency unless the statement was made after consultation with and in the presence of counsel."

The Council for Private Parties volume of the IJA/ABA Standards sets forth provisions designed to ensure that defense counsel takes proper preparatory steps to see that the juvenile's rights are protected at the intake stage. Standard 4.1 reads:

> "4.1 Prompt action to protect the client.
>
> Many important rights of clients involved in juvenile court proceedings can be protected only by prompt advice and action. Lawyers should immediately inform clients of their rights and pursue any investigatory or procedural steps necessary to protection of their clients' interests."

Standard 4.2 reads:

> "4.2 Interviewing the client.
>
> (a) The lawyer should confer with a client without delay and as often as necessary to ascertain all relevant facts and matters of defense known to the client.
>
> (b) In interviewing a client, it is proper for the lawyer to question the credibility of the client's statements or those of any other witness. The lawyer may not, however, suggest expressly or by implication that the client or any other witness prepare or give, on oath or to the lawyer, a version of the facts which is in any respect untruthful, nor may the lawyer intimate that the client should be less than candid in revealing material facts to the attorney."

As the commentary to this section points out, effective representation often requires that the lawyer learn the circumstances of his client's case early. Without doing so, the attorney will often be unable to properly represent the juvenile's interest during the intake stages.[5]

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5. Institute of Judicial Administration/American Bar Association Juvenile Justice Standards Project, Counsel for Private Parties, p. 98-99.

Thus, despite representation, the legal sufficiency and individual rights problems discussed in this paper may still occur. Standard 4.3, if followed, is highly valuable in protecting the rights herein being analyzed. It reads:

> "4.3 Investigation and preparation.
>
> (a) It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts concerning responsibility for the acts or conditions alleged and social or legal dispositional alternatives. The investigation should always include efforts to secure information in the possession of prosecution, law enforcement, education, probation and social welfare authorities. The duty to investigate exists regardless of the client's admissions or statements of facts establishing responsibility for the alleged facts and conditions or of any stated desire by the client to admit responsibility for those acts and conditions.
>
> (b) Where circumstances appear to warrant it, the lawyer should also investigate resources and services available in the community and, if appropriate, recommend them to the client and the client's family. The lawyer's responsibility in this regard is independent of the posture taken with respect to any proceeding in which the client is involved.
>
> (c) It is unprofessional conduct for a lawyer to use illegal means to obtain evidence or information or to employ, instruct or encourage others to do so."

The commentary to this section is highly relevant to the issue of protecting the rights of those who might be guilty but do not have legally sufficient cases established against them as well as to the issue of protecting the rights of the innocent. The commentary explains that the attorney is obligated to prepare all factual and legal matters. Quoting the commentary:

> "These duties of investigation and preparation are not relieved by the client's confession of responsibility or by an expressed desire on the part of a client to admit the charge pending. Investigation may reveal facts mitigating the seriousness of the offense or reflecting favorably on the child and the child's family which can lead to informal or diversionary treatment of the matter."[6]

The observations of the ABA Standards Relating to the Defense Function Standards are also meaningful here.

> "The accused's belief that he is guilty in fact may often not coincide with the elements which must be proved in order to establish guilt in law.

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6. IJA/ABA, Counsel for Private Parties, p. 103.

In many criminal cases, the real issue is not whether the defendant performed the act in question but whether he had the requisite intent and capacity. The accused may not be aware of the significance of facts relevant to his intent in determining his criminal liability or responsibility. Similarily, a well-founded basis for suppression of evidence may lead to a disposition favorable to the client. The basis for evaluation of these possibilities is the lawyer's factual investigation for which the accused's own conclusions are not a substitute."7

Standard 16.1 of the Task Force Standard entitled "Juvenile's Right to Counsel", reads as follows:

"A juvenile should be represented by a lawyer at every stage of delinquency proceedings. If a juvenile who has not consulted a lawyer indicates intent to waive assistance of counsel, a lawyer should be provided to consult with the juvenile and his or her parents on the wisdom of such waiver. The court should not accept a waiver of counsel unless it has conferred at least once with a lawyer, and is waiving the right competently, voluntarily, and with full understanding of the consequences."

Standard 16.7, entitled "Stages of Representation and Family Court Proceedings", reads, in part, as follows:

"Except as provided in Standard 16.6, legal representation should be made available at the earliest feasible stage of family court proceedings. Each State at least should adopt procedures whereby counsel can be appointed:

1. At the intake stage where the juvenile is not detained; . . . ."

The Comparative Analysis does not per se address the issue. There is a memorandum in the Prosecution and Defense volume entitled Issues Relating to the Role of Defense Counsel and Juvenile Court Proceedings. The author of the memorandum asks the reader to "forgive the generality of the following discussion, remembering with charity the time limitations under which the draft was completed." The following language is contained in the memorandum:

"It cannot, in my view, seriously be doubted, however, that legal representation at the earliest opportunity is most important. There is near unanimous agreement that advice of counsel is necessary for the protection of the juvenile's right after arrest. An attorney can also, through investigation and planning for alternatives to judicial treatment, contribute substantially to the diversion of cases at the intake stage which might otherwise be referred for court action."8

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7. ABA, Standard Relating to the Defense Functions, 226-7 (Approved Draft, 1979).
8. National Task Force to Develop Standards and Goals for Juvenile Justice and Delinquency Prevention, A Comparative Analysis of Standards and State Practices: Prosecution and Defense, 57 (1977); Accord NAC, Standard 3.132.

Although the Task Force standards imply it, the IJA/ABA Standards state that a case is to be dismissed, not diverted, if a legally sufficient case does not exist. Standard 2.7 of the Juvenile Probation Function volume, entitled "Legal Sufficiency of Complaint," states:

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

Standard 2.7 also directs the intake officer to consult with the prosecutor when he has doubts concerning legal sufficiency. 2.7A reads:

"2.7 Legal sufficient of complaint.

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

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

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

Standard 15.13 of the Task Force Standards provides, in part:

"Responsibilities of Family Court Prosecutor at Intake Stage of Family Court Proceedings

Family court prosecutors should be available to advise intake officers of the appropriate State agencies to whether the facts alleged by a complainant are legally sufficient to file a petition of delinquency."

Although the Standard does not state it, the commentary to 15.13 clearly implies that diversion should only take place if legal sufficiency exists:

"Initial intake is performed by the intake officer of an appropriate State agency. This officer makes a preliminary determination as to whether the facts alleged by a complainant are legally sufficient to warrant the filing of a petition. The role of the family court prosecutor at this stage of intake is limited to advising the intake officer on the legal sufficiency of the

facts alleged."[9]

The position that intake officials should consult with the prosecutor when there is doubt as to legal sufficiency or when there is doubt as to the constitutionality of police procurement of evidence is certainly sound and will lessen the likelihood that diversion, rather than the proper disposition of dismissal, will occur when legal sufficiency is absent. But what about those cases where the intake official, being a non-lawyer, fails to recognize that there is a legal sufficiency issue that should be brought to the prosecutor's attention? And what about those intake officials who for therupeutic reasons, desire diversion rather than dismissal and purposely fail to bring the legal sufficiency or constitutional issue to the attention of the prosecutor? There dangers add to the strength of the position that the juvenile should have unwaivable right to defense counsel at intake.

What about, as an alternative to unwaivable right to counsel at intake, mandating that the prosecutor review all cases prior to diversion for legal sufficiency and constitutional defects? This is the position taken by the National District Attorneys Association in their evaluation of the IJA/ABA Standards.[10] Such a system is preferable to having an intake officer make the legal decision, consulting with the prosecutor only when he sees fit. But this system would not be as protective of the juvenile's rights as unwaivable right to counsel. It is true that some prosecutors are highly protective of constitutional rights and are vigilant in assuring that cases are not brought unless they are legally sufficient. However, this certainly cannot be said of all prosecutors.

Robert W. Balch, Assistant Professor of Sociology at the University of Montana, has pointed out that a system like the one just-described is based on the assumption "that the prosecutor is a nice guy and won't try to railroad anyone".[11] As Professor Balch points out:

> "The assumption . . . is highly questionable. At any rate, the protection of the defendant's rights should not depend on something as ephemeral as the prosecutor's good will."

In conclusion then, unwaivable right to counsel at intake is the most effective way to protect the juvenile rights discussed in this section. The Supreme Court put it well in Powell v Alabama, 287 U.S. 45, 69 (1932), when it said that the individual "requires the guiding hand of counsel at every step in the proceeding against him".

THE JUVENILE'S RIGHT TO WRITTEN GUIDELINES AT INTAKE

An intake officer has three basic alternatives in the disposition of a complaint -- judicial disposition, dismissal or non-judicial disposition (diversion).

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9. Task Force, p. 532.
10. National District Attorneys Association Special Committee to Review IJA/ABA Juvenile Justice Standards, July 9, 1978, p. 13
11. Balch, Robert W., "Deferred Prosecution: The Juvenilization of the Criminal Justice System," Federal Probation, p. 48 (June, 1974).
12. Balch, p. 48.

Because of the lack of meaningful criteria, intake officers usually have almost unbridled decision-making discretion in deciding upon these alternatives. Intake officers can abuse this largely uncontrolled discretion in intake dispositional decisions. Decisions may be made on a discriminatory, arbitrary or capricious basis. Factors such as race, ethnic background, sex, life-style and appearance may, unfairly, come into play. Intake officers may make a decision on the basis of their own highly subjective value system. A juvenile may receive one disposition if he lives in an affluent neighborhood and another if he comes from the ghetto. A juvenile may receive one dispostion if he comes before Infake Officer A and a very different one if he comes before Intake Officer B who possesses different values. Serious questions of fairness arise when there is unequal processing of juveniles who have engaged in similar behavior. These disparities cause juveniles and others to question the fairness of the juvenile justice system.

That written guidelines are mandated is not inconsistent with the principle of individualized justice which is basic to the juvenile justice system. Mitigating, unusual and extenuating circumstances should be considered in making intake dispositional decisions and, because of the limits of language, specific criteria cannot be written which envision the facts of all future cases. Thus, some discretionary decision-making power on the part of the intake officer is necessary and desirable.[13] The written criteria, however, must be specific enough as to minimize abuse of discretion.

Because of these considerations the IJA/ABA Standards wisely contain standard 2.6:

> "2.6 Necessity for and desirability of written guidelines and rules.
>
> A. Juvenile probation agencies and other agencies responsible for intake services should issue written guidelines and rules with respect to criteria for intake dispositional decisions. The objective of such administrative guidelines and rules is to confine and control the exercise of discretion by intake officers in the making of intake dispositional decisions so as to promote fairness, consistency, and effective dispositional decisions.
>
> B. These guidelines and rules should be reviewed and evaluated by interested juvenile justice system officials and community-based delinquency control and prevention agencies.
>
> C. Legislatures and courts should encourage or require rulemaking by these agencies with respect to criteria for intake dispositional decisions."

The IJA/ABA Standards and the NAC Standards set forth criteria for intake dispositional decisions; the Task Force Standards do not. The IJA/ABA criteria are in standard 2.8 and read as follows:

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13. IJA/ABA, Standards Relating to the Juvenile Probation Function, p. 59 (Tentative Draft, 1977).

"2.8 Disposition in best interest of juvenile and community.

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

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

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

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

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

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

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

6. The attitude of the juvenile to the alleged delinquent conduct and to law enforcement and juvenile court authorities may be relevant to an intake dispositional decision, but a nonjudicial disposition of the complaint or the unconditional dismissal of the complaint should not be precluded for the sole reason that the juvenile denies the allegations of the complaint.

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

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

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

NAC Standard 3.143 puts forthe the following criteria to be used in making intake decisions.

(a) The seriousness of the alleged offense;

(b) The role of the juvenile in that offense;

(c) The nature and number of contacts with the intake unit and family court which the juveniles has had and the results of those contacts;

(d) The juvenile's age and maturity; and

(e) The availability of appropriate services outside the juvenile justice system.

Although only these general criteria are put forth, the commentary to Standard 3.143 states that detailed rules and guidelines should be developed to operationalize these criteria.

The Task Force Standards do not put forth actual criteria for intake decision-maker. However in the commentary to 18.2, it is mentioned that there should be written guidelines for such decisions.

Questions of fairness arise in regard to certain of the IJA/ABA and NAC criteria for intake decision-making. Also, while the IJA/ABA criteria and the NAC criteria have basic similarities, there are important substantive differences.

The commentary of IJA/ABA Standard 2.8B(2) points out that if the allegations that led to a prior contact were not legally sufficient to establish a case, that contact should not be taken into account in making an intake dispositional decision. In such cases the individual, under our system, is still presumed innocent and thus it is arguably wrong to give emphasis to such prior contacts. Still, a persuasive argument can be made that a series of arrests, even if unaccompanied by adjudication, is often at least a partially valid indicator of a pattern of anti-social behavior and that therefore it is not improper to take such a series of arrests into consideration in the intake decision.

A significant problem with this approach -- is that individuals can be unfairly arrested on the basis of such factors as race, ethnicity, socio-economic level, and life style.

The commentary to Standard 2.8B(3), supra, states that this policy is designed to ensure that all juveniles allegedly engaged in the same conduct receive equal treatment. Obviously equal treatment is a basic policy goal, but the policy that appears - at least by its wording - to be intended by the Standard commentary is needlessly rigid, overly simplistic and would not always result in the equal application of justice. Participation of other juveniles is one factor which must be taken into account, but this must be done in the context of the other criteria specified in Standard 2.8B. But it would be wrong to blindly and automatically apply the principle "(i)f it is determined that a petition should be filed against one of the juveniles, a petition should be filed against the other juvenile for substantially similar conduct." (arising out of the same transaction). For example, what if Juvenile A is 16 and Juvenile B is 12 and though they committed the same conduct in the same transaction and it is clear that Juvenile A has strongly influenced Juvenile B to act as he did? Might not those circumstances justify filing a petition against A but diverting B despite their having engaged in substantially similar conduct? Or what if the act involved was Juvenile C's fourth offense and Juvenile D's first offense? Despite similar conduct, it would seem that this would provide a valid basis for filing on C while diverting D. In fact, very unequal justice might C may have been given the benefit of diversion after his first few offenses, while D is being denied this benefit after his first offense because his act was committed in concert with C.

The commentary to NAC Standard 3.143 recognizes the competing considerations of this problem and takes a balanced approach to it.

> (The IJA/ABA standards propose . . .)that when a group of juveniles are alleged to have committed a delinquent act together, equity requires that they be treated alike. Hence, in a leader/follower situation, if the intake determines on the basis of the seriousness of the prior record and other factors that a petition should be filed against the leader of the group, a petition should ordinarily be filed against all. Although not intending to denigrate the importance of equal treatment, the standard goes no further than recommending role as an appropriate point to consider.

Standard 2.8B(5) of the IJA/ABA Standards refers to school attendance and behavior records and the juveniles relationship with his or her family. These factors are not a part of the NAC criteria. The NAC approach is preferable on this issue. The commentary states that;

> Serious questions can be raised regarding the equity in differentiating between two youths accused of burglary or armed robbery on the basis of their school attendance or ability to communicate with their parents. However, if the listed criteria point to dismissal, these social factors may be considered in determining which if any available services may be appropriate.

Student suspension from school for attendance and behavioral problems are inexcusably overused throughout the nation. Use of suspension for minor disciplinary violations -- violations which do not necessitate such a serious action -- are common place. Also, suspension frequently take place absent legally required due process. Given all this, it does not seem wise or fair to inject the result of school disciplinary actions into the intake process.

THE JUVENILE'S RIGHT TO AN EXECUTIVE-MADE INTAKE DECISION

The question of whether intake services should be placed in the judicial or executive branch of government is highly controversial. In the most jurisdictions supervisory power over intake is presently lodged in the judiciary. Most juvenile judges believe that this is the way it should be. Obviously, making intake an executive function would diminish the administrative power and responsibility of the judiciary. The IJA/ABA Standards and the Task Force Standards strongly take the position that intake services properly belong in the realm of the executive. The NAC Standards take no position on the issue, but do examine the competing arguments in its analysis.

Standard 4.2 of the Juvenile Probation Function volume of the IJA/ABA Standards reads:

> "4.2 Executive agency administration vs. judicial administration.
>
> Intake and predisposition investigative services should be administered by an executive agency rather than by the judiciary."

Standard 21.1 of the Task Force Standard states:

> "State Agency Responsibility for Intake Services.
>
> Intake services should be the responsibility of the State agency. These services should be designed to serve three functions:
>
> 1. To act for the family court in screening applications for petitions;
>
> 2. To act for the family court in developing the necessary information to make a dispositional order; and,
>
> 3. To act as the intake apparatus for the State agency in the cases of children or families for which the State agency has responsibilities for carrying out dispositional orders."

Complete and analytical arguments are important in standards and commentaries. The persuasiveness of the commentary can be important in legislators and other policy-makers' decisions on whether to adopt particular standards. In this regard, the tentative IJA/ABA Standards are superior to the other two standards in analyzing the issue of whether intake is properly lodged in the executive or judicial branch of government.

The issue of whether intake properly belongs in the executive or the judiciary goes to the question of whether a judiciary-controlled intake system lessens the likelihood that the juvenile will receive a fair and impartial adjudicatory hearing, in those cases where it is determined that a hearing is necessary.[14]

Judges select and supervise intake officials. Under these circumstances, it is questionable whether some judges can conduct a genuinely detached and impartial hearing.

Since the judge selects and supervises the intake staff, it is argued that he is, at least to some extent, improperly performing both the prosecutorial and judicial role. There is a very real separation of powers issue here.

Judicial supervision of intake may not only lessen the likelihood of objective decision-making by judges, but, likewise, by intake officials. As the commentary in the IJA/ABA Standards puts it:

> "Intake . . . officers are more likely to make intake screening decisions . . . based upon an impartial and independent evaluation of all relevant factors without being unduly influenced by the perceived view of the judiciary when the judiciary does not appoint and supervise them."[15]

It is also questionable whether most judges have the time, interest and ability to effectively carry out the often extensive administrative functions associated with supervision of intake. And if they do devote the time necessary to carry out such functions, is it going to be at the expense of less energy devoted to traditional judicial functions? It is true that judges can delegate the responsibility for administering intake services to professional administrators, but "organizational effectiveness and continuity of policy are apt to be impaired in an agency subject to the administrative direction of both judges and professional administrators."[16]

THE JUVENILE'S AND COMMUNITY'S RIGHT TO PROSECUTORIAL MONITORING OF PROGRAMS

It is submitted that the prosecutor should monitor the effectiveness of classes of programs or classes of dispositions that young people are referred to through diversion. This prosecutorial responsibility is not imposed upon the prosecutor by any of the three standards but is consistent with the requirement of the IJA/ABA and Task Force standards that the prosecutor perform such a monitoring function for post-adjudication dispositions. Since often times the programs that yought are referred to through diversion are the same as those used by the courts, the additional burden being recommended here would not appear to be an unmanageable one.

The post-adjudicatory dispositional monitoring function stems from the requirement of all three standards that the prosecutor take an active role in the dispositional hearing.

14. IJA/ABA, The Juvenile Probation Function, p. 128.
15. IJA/ABA, The Juvenile Probation Function, p. 130.
16. IJA/ABA, The Juvenile Probation Function, p. 130.

Standard 7.1 IJA/ABA volume on the Prosecution Function states:

> "7.1 Permissibility of taking an active role.
>
> A. Juvenile prosecutors may take an active role in the dispositional hearing. If they choose to do so, they should make their own, independent recommendation for disposition, after reviewing the reports prepared by their own staff, the probation department, and others.
>
> B. While the safety and welfare of the community is their paramount concern, juvenile prosecutors should consider alternative modes of disposition which more closely satisfy the interests and needs of the youth without jeopardizing that concern."

Task Force Standard 15.19 states:

> "Family court prosecutors should take active roles in dispositional hearings, making independent recommendations after reviewing reports prepared by their staff, the probation department, and others. While the safety and welfare of the community are a paramount concern, family court prosecutors should consider alternative modes of disposition that more closely satisfy the interests and needs of juveniles without jeopardizing public safety."

In its analysis of the issue, the Task Force Standards seems to support a similarly active role for the prosecution at the dispositional stage.

In order to be able to make intelligent post-adjudicatory dispositional recommendations, the prosecutor must be familiar with available programs. Accordingly, IJA/ABA Standard 7.2 states:

> "7.2 Duty to monitor the effectiveness of various modes of disposition.
>
> A. Juvenile prosecutors should undertake their own periodic evaluation of the success of particular dispositional programs that are used in their jurisdiction, from the standpoint of the interests of both the state and the juvenile.
>
> B. If juvenile prosecutors discover that a juvenile or class of juveniles is not receiving the care and treatment contemplated by the family court in making its dispositions, they should inform the family court of this fact."

The Task Force Standard is silent on this issue but the commentary to 15.19 strongly endorse prosecutorial monitoring of modes of post-adjudicators dispositions. The NAC project takes no position on such monitoring.

Given the above, prosecutors are in a position to also monitor the quality and effectiveness of community program that youth are referred to through diversion. It would seem to be sound policy to impose this additional monitoring obligation upon the prosecutor. The monitoring responsibility here would be similar to the post-adjudicatory dispositional monitoring functions just described. Certainly the juvenile prosecutor would not be required to review the program involved in each diversion decision made by the intake agency. Rather total programs or classes of dispositions would be monitored by the juvenile prosecutor. When the prosecutor becomes aware of program inadequacies, he would inform intake and the people who have supervisory power over the programs.

There are sound arguments why it is reasonable to require the prosecutor to carry out this responsibility. First the prosecutor, as the chief law enforcement officer in the community, has an obligation to protect the safety and well-being of the citizenry. If diversionary programs are not effectively addressing the problems of referred youth, there is probably increased likelihood of future anti-social or delinquent behavior on the part of the youth. Thus, in monitoring diversion programs the prosecutor is helping to deter future deviant behavior. This is consistent with Standard 1.4 of the IJA/ABA Prosecution Function volume which states:

> "1.4 The relationship of the juvenile prosecutor to the community.
>
> Juvenile prosecutors should take an active role in their community in preventing delinquency and in protecting the rights of juveniles. They should work to initiate programs within their community and to improve existing programs designed to deal with the problems of juveniles."

Another reason why it is wise policy to require prosecutorial monitoring of diversionary programs relates to the fact that many of the young people referred to diversionary programs at intake are indigent. Although the juveniles may have counsel at intake, it is unlikely that counsel for affected juveniles will monitor the programs that their clients are referred to.

Because the prosecutor's office has power and prestige in the community, he is in a peculiarly good position to compel the attention of those controlling diversionary programs and to influence them to improve such programs.

TRANSCRIPT FOLLOWS BELOW:

(WHEREUPON, Mr. Kenneth Siegel's presentation was given and the following is the discussion that ensued.)

(WHEREUPON, A SHORT RECESS WAS HAD.)

MR. MANAK: Mr. Rounds?

MR. ROUNDS: The only comment I have is that we, as a local practice, do screen all cases prior to diversion, and the virtues are those suggested by Mr. Siegel, perhaps, and the drawback is that we have three out of our twelve people doing nothing but screening cases as a result. I think that it's at least a partial safeguard for the situation that Mr. Siegel suggests, that it's a diversion of people who have no valid case against them. It's

obviously not a totally perfect safeguard since district attorneys tend to interpret cases in the light of prosecutive ability.

MR. MANAK: All right, anything else, Mr. Rounds?

MR. ROUNDS: No, thank you.

MR. MANAK: Okay, let's see. Ms. Szabo?

MS. SZABO: No comments.

MR. MANAK: Judge Delaney?

JUDGE DELANEY: No comment.

MR. MANAK: Judge Arthur?

JUDGE ARTHUR: Just a few.

I would like the standard amended, if that's what it means to do, to get rid of a non-judicial disposition, as Ken calls it in his paper. We don't allow it in my court. The intake is allowed to talk to the child for one visit, conceivably two, if necessary, on a totally voluntary basis. I resist this idea that the intake can make a disposition of a case before there has been any protection for the child as to whether he is guilty or innocent, and I would resist that even if the child had a lawyer present because I think it will be coming down to a bargain. We

will agree to go to a social service if you don't prosecute, and so on like that. So we just don't allow this non-judicial disposition at all.

We do have the intake as a part of court, and I subscribe to that as long as the judge doesn't interfere in a particular case. We merely set a policy, and as Ken said, our policy is very simple. If the family can and will obtain help elsewhere, divert. I like that idea, and I think it's useful to keep it under the court where that kind of policy can be set. It's not based on ability to prosecute and so forth.

I would certainly agree with Ken's idea and Ms. Szabo's idea that this can be monitored. If we send the kid out, we ought to find out whether he goes and secondly whether they can live up to their promise to do what they said they'd do for the child and I think we need some monitoring. I think it's nice to have the prosecutor do the monitoring, but I think it would be useful to have the legal aid do the monitoring, too, and I think it would be useful if we could get some totally neutral service to kind of audit all of these on a completely independent basis, to monitor this right to treatment

thing. I think it's the biggest gap in our system; and lastly, I guess I am opposed to unwaivable counsel. The cost is horrendous, maybe some of the metro areas can afford it, I am not sure that all the rural areas can afford, and get assigned counsel who may or may not know anything about what anything in the system is, and I think too often the kid is just going to have one more delay in the system. While the child waits to find a lawyer, he has got to have time to come down and time to prepare and there's goes another week in the child's life.

MR. MANAK: All right, Mrs. Bridges?

MS. BRIDGES: I have nothing.

MR. MANAK: Okay, Judge Moore?

JUDGE MOORE: Only one comment.

First, I want to reiterate that it's an excellent paper. I think it's raised a lot of key issues. He has addressed them very well. I do concur with Lindsay on the waiver of counsel. My problem with that is that rather than making counsel mandatory, that there are other ways to safeguard a determination of whether a waiver is a free, voluntary, understandable waiver

of case law. Generally, with exceptions, that is. Some states have indicated that it must be on the basis of a child consulting with a friendly adult, quote, unquote, and I think I would add one step beyond that, a friendly adult who is knowledgeable of the juvenile justice system, that may or may not be a lawyer, it certainly cannot be a professional officer and it certainly cannot be the parent, if the parent is the complainant, but I don't think it should be mandatory that that friend or adult who helps the child on consultation of the issues to waive counsel has to be a lawyer.

MR. MANAK: All right, Judge McLaughlin?

JUDGE MC LAUGHLIN: I don't have any comments, thank you.

MR. MANAK: Okay, Mrs. Thompson?

John?

Dean Smith?

DEAN SMITH: Nothing.

MR. MANAK: Judge Cattle?

JUDGE CATTLE: I am in an unfortunate position because, first of all, I am going to be in conflict with Judge Arthur, and I am going to find myself agreeing with the other end of the

table which sorts of takes me -- my reputations at stake.

There are three points. One, I believe firmly that diversion is a matter for the prosecutor. Once he gets into court, it's in court. There are safeguards in the prosecutorial process. I really haven't -- I have enough troubles of my own without getting into that. It does need some safeguards, though, I can see that; but nevertheless, the diversion program I feel should be entirely under the prosecutor. The thing that horrifies me is when the court gets involved in diversionary programs which places them immediately in a position of conflict, and I don't know, maybe I am old-fashioned enough about it, but I think that once it's in court, then it's in court period, and I have to handle it on either a guilty or innocent standpoint, and that any -- it may result -- the case may be such in which it is guilty, but it probably should have been diverted in the first place and I will let the prosecutor know what I think about it, but I still have to handle it; and the matter of waiver of counsel, I think that counsel should be

waivable, but it should be based upon whether or not the court, once it gets into court I'm talking about, that the court has to be greatly concerned, first of all, that the child -- minor understands -- is old enough and mature enough and had enough experience to understand the problems, that he has had an opportunity and has had some decent advice, and I am very sensitive to any conflict between parent and child, and I am in trouble constantly with parents and with the county on indigent people.

When I get a case in which I don't believe the child fully understands or has been getting full advice, I insist on an attorney and so this doesn't make me very popular.

MR. MANAK: Judge Ketcham?

JUDGE KETCHAM: Well, as I hear the thing develop over the last couple of days, I find that one of the major issues that's surfacing during this symposium, is discretion. Clearly all of us are very much in favor of it when we exercise it but somewhat dubious of it if it's exercised by others. I suppose this is our natural biases, but specifically, Mr. Siegel, if you recommend that

intake be operated by an independent executive branch, how do you distinguish between the absolute and the unrevealable discretion which all prosecutors like Judge Cattle was, demand on their decision to file an adult court petition and the recommendation that the intake decision be governed by rigid guidelines, that the juvenile be entitled to counsel at the intake proceeding, and that the prosecutor oversee any diversion programs or practices? Would that not be comparable to the area of adult situation where the prosecutors do not accept any review or guidance or control?

MR. SIEGEL: Okay.

I am not sure I exactly understand. You say would that be comparable to the adult --

JUDGE KETCHAM: Well, do you distinguish, philosophically anyway, between your suggestion that the intake person in an independent agency outside the court should not have this absolute discretion and a prosecutor should?

MR. SIEGEL: Well, now, I said that I agreed that the prosecutor should have the final say on whether a petition should be filed, whether intake records recommend it or not.

JUDGE KETCHAM: Yes, why?

MR. SIEGEL: Because --

JUDGE KETCHAM: Is it just because you have greater faith in the prosecutor than in the intake person?

MR. SIEGEL: Well, because he has been elected by the community as the chief law enforcement officer and really has the most direct -- since it's electoral, the direct responsibility to the community to safeguard their protection and well-being, and that's why I think the final decision as to who should go to court and who shouldn't should be left up to him because ultimately, he has the responsibility of providing -- ultimately I think the elected official -- the elected chief law enforcement official should have the final decision-making power relating to decisions on protection -- protecting the well-being and safety of the community.

But -- so I don't -- I think intake should be independent of the court.

JUDGE KETCHAM: But summarized by the prosecutor?

MR. SIEGEL: But not be served powers that the

prosecutor has in the adult system.

JUDGE KETCHAM: I can't see a philosophical reasoning in it, but that's good, that's a clear answer.

MR. SIEGEL: But intake and prosecutor are still -- if you are going to have separate agencies, they are both still in the executive realm, and you don't have that confusion of roles that you presently have in the juvenile facility with a judicially controlled intake system. You still -- intake and prosecutor are both executive agencies and you are just giving ultimate decision-making power to the prosecutor, but it's still ultimately an executive made decision as to whether or not to charge rather than one made by the judiciary as it is under the present system.

JUDGE KETCHAM: I am not satisfied with that answer.

JUDGE MC LAUGHLIN: Can I just ask a question in light of Judge Ketcham's observation?

Is there -- I don't think the paper touched it. Is there the right to intake? Has any court held that a child has a right to intake?

MR. MANAK: Mr. Siegel?

Has a right to an intake service?

JUDGE MC LAUGHLIN: Yes.

In other words, there is only one lower court case that I am aware of where the probation department didn't give the child -- they called him up and said to come down, but his mother wouldn't bring him, so they went ahead and filed a petition. When it came to court, the judge held the child had a right to intake and dismissed the petition, to have it go back so that he could get the opportunity to go through the intake process. Now, that's the only case I know of and as I say, it's a lower court case. The judge didn't cite any authority. I think it's something that he felt is correct, but I was wondering, is there any right to intake?

MR. SIEGEL: I don't know the answer.

MR. HUTZLER: If you are talking about a statutory right, it would depend upon the statutes. I have seen statutes that are very clear that it must go through the intake process.

JUDGE MC LAUGHLIN: Has any court held --

MR. HUTZLER: There is a constitutional right, no.

JUDGE MC LAUGHLIN: No?

MR. HUTZLER: None that I am aware of.

MR. SIEGEL: Nor I.

MR. MANAK: Judge Fort?

JUDGE FORT: Following up on Judge Ketcham's statement, did you base your decision primarily on direction, what is your position with respect to the federal prosecutors where they are all all appointed and in those states where they are appointed like Ms. Thompson?

MR. MANAK: Of course, the federal prosecutors can be removed.

JUDGE FORT: Could you distinguish between the prosecutor or the elected prosecutor?

MR. SIEGEL: Well, that's a good argument. I think maybe I should put more emphasis on that being structurally the chief law enforcement officer.

MR. MANAK: I think, of course, Ken, that since the -- since the federal prosecutors are responsible to the elected executive, isn't that the connection? I mean, there may be one layer of removal from the electorate, but still the federal prosecutors are responsible for the elected

executives who can be removed.

MR. SIEGEL: Right, although someone else is going to say intake is responsibility to the elected judges, so.

MR. MANAK: Perhaps Mrs. Thompson would like to respond to that because she is from a state where the local prosecutors are appointed rather than elected.

MS. THOMPSON: Well, No, I would agree with Ken that we are talking about a structural interpretation and a definition of functioning here, and the authority and responsibility of the prosecutor, whether elected or appointed to enforce the criminal laws in the community and to make decisions with regard to diversion or non-diversion; and we have intake in each county now by court rule in New Jersey, in the juvenile system, and the adult system may -- just to kind of you -- use that -- to illuminate the issues, there is a pre-trial diversion program by court rule in almost each county in the state and there, the decision of the prosecutor to deny that diversion is reviewable through the court, and most defense attorneys who are turned down for diversion

file a motion to be heard in the court, and they go right up on -- sometimes to the Supreme Court, but the standard is merely whether the prosecutor was arbitrary and capricious in exercising the judgment to deny diversion.

It's a very heavy burden for the defendants to show the arbitrariness and the exclusion from a program.

JUDGE KETCHAM: Just to say, one -- in the court of the district attorney, the superior court of the District of Columbia, the court or the prosecutor's office, the U.S. Attorney's Office and they are not elected in any manner of speaking, operate a number of diversion programs, Operation Crossroads and First Defendant treatment, and other things, and neither the judge nor anybody else has any power to review those decisions. It is regarded as absolute prosecutorial discretion, and I just don't see the philosophical difference when you are in a juvenile court.

MR. MANAK: Judge Fort?

JUDGE FORT: Well, another question that I wanted to ask Mr. Siegel, are you aware of any state where the grand jury has the authority to

direct the filing of a petition in the juvenile court, and if not, why not?

MR. SIEGEL: Where the grand jury has the discretion -- no, no, I am not; but I can tell you these standards and --

JUDGE FORT: Are you aware that a decision -- any decision that says that the grand jury cannot?

MR. SIEGEL: No, I am just not familiar with the law in -- I can say that these standards, and I will report to it because I was referring to them by the wrong names, these volumes go beyond allowing the complainant to appeal to the prosecutor if the prosecutor won't file a petition. These standards allow the complainant to appeal to the judge and have the judge order that a petition be filed, even if the prosecutor opposes the filing of the petition.

JUDGE FORT: There is nothing, actually, in any of these standards that deals with that question, even in those states where an indictment can be found and then the statute provides that an offense charge, filed in the adult court, and then if they find the kid is under eighteen or seventeen, whatever the age is, then it is transferred -- the

case is transferred on the basis of that complaint to the adult -- or to the juvenile court.

Is there anything -- I don't recall seeing anything in any of the standards, any of them, that deal with this problem.

MR. SIEGEL: No, not that I know of.

MR. MANAK: Mrs. Sufian?

MS. SUFIAN: I will pass.

MR. MANAK: Mrs. Connell?

MS. CONNELL: I will pass, too.

MR. MANAK: Mr. Hege?

Mr. Kaimowitz?

MR. KAIMOWITZ: Just briefly, and I think it arises from some of Judge Ketcham's concern.

I am not sure this has much to do in my mind with the juvenile court justice process, and I think what Mr. Fort has pointed out again points out the difficulty, that to me the process starts when a legally complaint for a petition is filed. Now, before that, you are talking about a total social agency function that has nothing to do with law, that's what we are talking about in terms of prosecutorial discretion, is something that's happening within that office; and therefore, I would

resist, certainly, Ken, from my perspective, mandatory counsel for two reasons.

One, that, as I say, I wouldn't want counsel now in a position where a legal process, at least in my mind, had not in fact started; but secondly, my objection to counsel would be that if you mandated counsel, you are belying entirely the child's ability to function and what you have done is reinstitute the guardian-ad-litem system, in effect, that kid, I am telling you, this is a good diversion program, and you want to go into it, and the person then becomes a, quote, appointed officer. It seems to me, rather than in any way an independent counsel.

MR. SIEGEL: No, but one of the principals that guide the IJA/ABA standards throughout is that the counsel isn't allowed to make that decision for the child.

MR. KAIMOWITZ: I am saying here that you are in an area where you are not in front of any legal process that will determine if counsel has, in fact done that or not. That's what I am saying.

MR. SIEGEL: Oh, okay.

MR.KAIMOWITZ: In other words, this is a free

standing counsel at this point because nothing legally has happened. It is all prior to the state of a legally sufficient petition for complaint being filed. The same on a grand jury indictment. So what I am saying is that we have incorporated in the whole question of intake something that the standards might well have left alone, any of the standards, that it was not connected with the process that you might as well be talking about, what programs did the schools offer, what programs did the social welfare agencies offer, how do you get somebody into this program or that good program, and they happen to touch base at one given point.

You know, policy in Michigan and Taylor and several other communities have diversion programs. I would hope they wouldn't hope to be incorporated in this program. I am saying nothing legal was started; and therefore, I would recommend that the whole question of intake, except as Judge McLaughlin has raised it where it was proscribed by statute, then I would say it is an administrative function. It should occur, and intake should take place, but never be raised as the concept of a

right to intake for the child because there is no -- there is nothing happening that the child can necessarily benefit from.

MR. MANAK: Well, there is nothing judicial happening at that point. But aren't there some things of legal significance that have happened at that point, such as the collection of some information, the filing of an informal citizen's complaint, perhaps, which could lead to probable cause to believe that the child has committed a crime violation that could be used as the basis for a petition. Isn't this similar to a policy investigatory stage?

MR. KAIMOWITZ: Right, analogize that to an adult system. Analogize that to any adult process. You have somebody who filed a spouse abuse complaint, the police come down, the legal process is not yet involved until something else happens. So I call up and complain that I think that somebody has broken into my house, somebody comes out and investigates. There is no legal process yet, but no legal process has been started. There has been no information gathered. The police don't have my address at that point or other information.

MR. MANAK: But there might be a custodial setting, for example, sufficient to trigger the right to counsel in any interrogation that takes place at this point. This is my comparison to the adult model.

JUDGE MC LAUGHLIN: In other words, he is arrested.

MR. MANAK: No, not arrested, but he is in custody for purposes of, oh, let's say, the Miranda. So, he would have a right to counsel and this in an interrogation sense.

Might not the child be in a somewhat similar situation where he is called into an intake office to be, in effect, interrogated?

JUDGE MOORE: I hate to defend the right to counsel because I think that you ought to be able to waive the right to counsel, but the reason it's included in my opinion is that the decision to file or not to file or to divert may well be the most important decision made in the whole process concerning this kid. In our courts, five out of every six kids who somebody comes to our court with a petition against, are

diverted to some other program. And if that kid happens to be the one that ends up in court versus society, the judge has a pretty darn hard decision before somebody might, perchance find him guilty, whereas, if he is diverted, he will never be found guilty.

So, what I am saying is this. In that process, the decision-making, the kid should have some input as to whether he is going to be one of the five or to whether he is going to be the one that ends up in court.

MR. KAIMOWITZ: And I'm saying, Gene, that if you do it that way, you are sending it back to the police and to the diversion-type program. If you send him back into the school, and you start a steady diversion-type process. A child is called in to find out if he has marijuana in his locker. At that point, doesn't intake start? You know, do we then incorporate an entire juvenile court process? I am saying that I kind of object to extending it further than the filing of a legal and sufficient complaint of some sort; but until then, it's everybody's discretion, and to say that the kid has an input, the kid has an input with

the police officers, too; and maybe he said, "Police officer, I was just going home. I am out past the curfew law, but it's with my parent's permission." The police officer says, "Okay, go ahead, kid," and that's the diversion; or the police officer says, "Well, I see you are drinking. Why don't you go down and check this social agency?" That's a diversion. But I am saying to call it a diversion in the sense that we are talking about, I think that's to build a bigger structure than any of us need and we get involved in trying to argue about an area in which none of us can have any significance.

MR. MANAK: Well, we may be confusing diversion with intake-type activity.

Judge Fort, did you want to respond?

JUDGE FORT: I just want to ask a further question of the district attorneys in terms of the intake, particularly with reference to counties where they don't have a deputy who is assigned to juvenile court and smaller places. Is there anything in the law in any of the states or bars that prohibits the district attorney from filing a petition in the court without going through any

type of intake process that he or she sees fit to do so? Is there anything --

MR. ROUNDS: In California, when any form of complaint arises, it goes first to probation who determines whether to divert. In the event that probation decides to divert, the police or the agency who requested the petition, can request that the district attorney file a petition; and the district attorney has the ultimate right to do so over the objections of probation if there is, in effect, a profile from the agency; but automatically, it goes to a probation process first.

JUDGE FORT: Well, isn't the district attorney still the chief enforcement officer in the county?

MR. ROUNDS: Yes, that's why they have the provision for the appeal to the district attorney.

JUDGE MOORE: Michigan is very clear on the statute that the prosecuting attorney or a private individual or anybody else can come in to the juvenile court and file a petition, but the juvenile court has the power by statute to take that petition and throw it in the nearest wastepaper basket or to put a signature on the bottom of that petition

which allows the matter to be heard by a judge.

JUDGE FORT: It does seem to me that the standards, all of them, fail to pay any attention to that aspect. I don't recall anything in any of the standards that deals with this.

MS. BRIDGES: No, that's not true. In terms of prosecution rate all three address the question of who has authority in filing --

JUDGE FORT: I meant the intake.

MS. BRIDGES: Okay.

They also say that anybody may appeal from the intake officer to the prosecutor.

JUDGE FORT: The implication is that it must go through intake first.

MR. MANAK: Well, there is a structure provided, but the final decision-making lodges with the prosecutor, as I am sure Mrs. Bridges will point out when she covers the prosecution volume, and that particular intake structure is modeled on the Florida statutes, as I recall, that which is provided in the prosecuting volume. The structure may vary, Judge Fort, but it's still the final decision-making potential lies with the prosecutor. We have the same model.

MR. HUTZLER: Judge Fort said there are a number of states in which the prosecutor does not have the authority to file a juvenile petition, only intake may make that decision. So that's to answer your specific question.

MR. SIEGEL: I just want to finish this with two things.

Barbara Allen-Hagen showed that I mistakenly didn't discover that the L.E.A.A. standards do have a very specific list of criteria that should be used in the intake decision; and in fact, in some ways, they seem to remedy some of theproblems that I had with the IJA one. Just quoting one sentence, it says, "Absent from this list --" talking about the list of factors -- "to be considered are factors such as school attendance, behavior, and the juvenile's relationship with his or her family." So I missed that in my research and will incorporate it in the final paper, and I just want to make one last point about the problem of not having an attorney. The prosecutor or defense attorney involved in the intake and subsequent diversionary decision. The vast majority of cases are disposed of -- the vast

majority of cases that are disposed of are disposed of through some sort of diversionary type program or non-judicial disposition. Now, if the police know that an attorney is never going to really be looking at that case, a defense attorney or a prosecutor, but especially if they know that a defense attorney is never going to be looking at the case, and that's eighty percent of the cases are going to be resolved through diversion which in many districts they are, you are going to remove some of the incentive for the police to behave or to conduct themselves according to the constitutional standards. I mean, in deciding whether to make this search or whether to get this statement. They are going to know -- this search is never going to be scrutinized by an attorney, this confession is never going to be scrutinized by an attorney. This arrest is never going to be scrutinized by an attorney. It's all going to be disposed of with finality through -- by some social worker through the intake diversionary process. So, he is not going to have the same incentive to avoid -- the same incentive to avoid engaging in unconstitutional investigatory

tactics because he knows the search or the confession is not likely to be scrutinized by a lawyer.

So, I think to some extent you attenuate the deterrent or emasulate the deterrent effect of the exclusionary rule. I think the same thing happens in adult court in plea bargaining. They know that, you know, ninety percent of the cases are plea bargained and that they figure, "well, I really don't have to worry too much about this search." You know, the prosecutor is going to get some sort of a disposition and it's never really going to come to court. But even more so, the juvenile system because they know an attorney is never going to look at it. So I think to some extent, you have removed the incentive for them to behave, to adhere to the constitutional standard.

MR. MANAK: Mr. Kaimowitz, do you have anything else additional?

MR. KAIMOWITZ. No.

MR. MANAK: Mrs. Thompson?

MS. THOMPSON: As the PBA representative in this room, I just can't help but tease Ken a little

bit here by saying that I really don't -- I take some exception to the notion that the police officers would skate along in an unlawful way with the thought that this is going to be diverted, and therefore, it doesn't matter. I can't help but think that many times, obviously, we do have unlawful searches and procedures and many procedures which we have to deal with and are not happy about, but I can't help but the impression I get from law enforcement officers is not that they hope it's going to be diverted. They thought they were going to go right straight on to the most effective conviction with a lot of publicity maybe even the best jury trial, and straight on up through the courts. I just have some doubts whether an officer somehow sees a victory in the diversion of the juvenile, and that this would encourage him to unlawful search and seizure.

MR. MANAK: Mr. Hege?

MR. HEGE: I have got to speak out in support of Ken. I have seen that happen.

We have got a program that is a diversion program called the Youth Guidance Program which is run by the court and, what, in effect, goes

into that program are school cases where drugs are involved, and in almost every instance, there is an unconstitutional search and seizure, but because of the set-up of this program, the police know very well that all these cases are going to be diverted, and they don't make any effort. They just out-and-out search the lockers at school, go through strip searches of kids. You know, when there is a police officer in each school, they are called a police liaison officer, and that happens -- that's what that program is designed to do and I think what Ken is getting is at is that, you know, we got a perfect example in Des Moines, Iowa.

So, it does happen.

MS. THOMPSON: I am sure, it's a legitimately held view, I just don't see it that way.

MR. MANAK: Okay.

NCJ 76920

C. ADJUDICATION ISSUES

1. Jury Trial and Public Trial

Consultant
Hon. Edward J. McLaughlin

ABSTRACT OF PAPER

Judge McLaughlin introduces his paper with a brief description of the purpose and role of juries and open trials, the benefits and problems inherent in full press coverage of litigation, and the relationship of these essential features of criminal practice to juvenile proceedings. Regarding the significance of jury trials, he quotes the statement in Duncan v. Louisiana that the constitutional provision for a right to a jury trial reflects a "fundamental decision about the exercise of official power -- a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or one group of judges." After reviewing some of the rationales for not extending this right to juveniles he commented that:

> ...[T]he very nature of juvenile proceedings as they are now conducted in most states, grant vast de facto discretionary powers to a judge who acts as both trier of fact and unbiased decision-maker, and who is strictly accountable to no one and cannot help but develop an individualistic approach to the juvenile delinquency problems with which it is confronted -- a power that substantially refutes the fundamental decision of our forebearers ... [quoted above].

Public trial is described as "so absolute and fundamental a right that the Supreme Court has had few occasions to deal with the issue." Accordingly, Judge McLaughlin urges that juveniles in delinquency proceedings be permitted to choose whom he or she "wishes to have in the courtroom," but he notes the tension between admitting the press and continuing the practice of not publicizing a juvenile's identity.

A comparision of the differing approaches taken by the three sets of standards follows. After summarizing the different positions adopted by the standards on these three issues, the relevant provisions and commentary are discussed. Judge McLaughlin concludes that:

> The philosophical differences between the standards are most apparent on the issue of whether or not a child who denies an allegation in a juvenile delinquency proceeding

> is or should be entitled to ... a trial by jury. The IJA/ABA Standards, recognizing the child as a person with individual rights assert the right to a jury trial for juveniles in contested adjudications. The Task Force and NAC Standards, clinging to the traditional understanding of the juvenile court system, say that a jury trial is not appropriate in a juvenile proceeding.

Regarding the right to a public trial, while all the standards would permit the juvenile to open the proceedings, the IJA/ABA standards are found to place somewhat more emphasis on the juvenile's prerogatives and less reliance on the discretion of the court. The same difference in emphasis is noted regarding the IJA/ABA and NAC standards on the press. (The Task Force is silent on this issue.) Although he questions the proposed extension of jury trials by the IJA/ABA standards to neglect and abuse proceedings, Judge McLaughlin finds those standards to be "particularly meritorious."

An extensive historical analysis is then presented on the development of the current legal concepts of the criminal responsibility of children. This is followed by an explanation of the decision in McKeiver v. Pennsylvania and the laws of each of the states and the federal government regarding jury trials in delinquency cases. Next, Judge McLaughlin examines the "erosion of the treatment concept and the efficaciousness of the juvenile court system," and the recent changes in the New York statutes governing delinquency which he feels undermine the "treatment premises" of the juvenile justice system and the "punishment precepts" of the criminal justice system. The analysis concludes with a discussion of the evolution of children's rights in U.S. Supreme Court decisions, and of state court decisions on the rights to public trial and a jury in delinquency proceedings.

Finally, Judge McLaughlin discusses the practical problems which have been raised to applying jury trials, public trial and press access to delinquency proceedings. He points out that where jury trials are available, they are employed infrequently and suggests that this fact, plus the recommendation in the IJA/ABA standards of a 6-person jury should substantially reduce administrative problems. He comments that the IJA/ABA standards present "articulate clear guidelines" on which legislation can be drafted regarding public trials, but indicates that they do not reflect recent Supreme Court cases attempting to balance the right to a free press and the right of a defendant to a fair trial. "Clearly, legislation must be written with great caution if both the rights of the press and the privacy of the juvenile are to be protected."

In the conclusion to the paper, Judge McLaughlin briefly explores the relationship between the right to a jury and the right to a public trial. He suggests:

> Providing a jury trial makes tolerable ... the provisions for limiting the right of the public to be present at a juvenile proceeding. [However,] [w]hile no jury trial might be acceptable if there was a completely public trial for juveniles, a totally closed proceeding which allowed a jury trial would not be acceptable.

SUMMARY OF COMMENTS

The panel members were highly complimentary of Judge McLaughlin's paper. Several stated that they had nothing to add. Others pointed out the beneficial role which could be played by juries and opening juvenile court proceedings to the public, at least to some extent. For example, Judge Ketcham observed that:

> [A] right to a public and jury trial is a balancing mechanism. It's a pressure reduction valve, for the purposes of protecting against the arbitrary and the over-reaching and seemingly biased all-powerful judge.

Judge Fort also considered public trials to be a device to relieve pressure on the juvenile court and juvenile court judges, and as one method, albeit not a wholly successful one, of conveying to the public the problems with which the juvenile court was faced and the means through which it seeks to handle those problems. Ms. Thompson agreed that jury trials may be important for increasing public participation in the juvenile justice process, and Judge Delaney added that jury trials have "a very humbling [effect] and [are] a very good method of keeping judges honest."

However, questions were raised as well. For example, Ms. Thompson, among others, inquired whether jury trials were administratively feasible given already crowded dockets. Ms. Connell replied that recent surveys of states permitting jury trials in juvenile proceedings revealed that, at most, jury trials were requested in 3.9% of the cases. Judges Delaney, Ketcham, and Moore, confirmed on the basis of their experience that few jury trials were actually requested and that the administrative problems were solvable. Mr. Dale, though

concluding that overall public trials would be beneficial, was concerned about the public reaction to defense tactics. Judge Delaney discussed defense tactics in a different vein, observing that although some lawyers may use jury trials "purely as a delaying tactic," that was no basis for deciding not to extent a fundamental right. Ms. Szabo asked whether the age of eligibility for jury service would have to be lowered if jury trials were available for delinquency cases. Judge McLaughlin responsed that this was the type of "nuts and bolts question" best left up to the individual states to determine. Finally, Mr. Rounds queried whether in extending the right to a jury to juvenile procedings, the juvenile court would become so similar to the criminal court that its raison d'etre would disappear, and suggested that juries and public trials would spell the end of confidentiality in juvenile court proceedings. Mr. Siegel replied that, in his view, delinquency and criminal factfinding proceedings should be similar procedurally, though the dispositional hearing and alternatives must differ.

Following these questions, a discussion ensued on whether jury trials should extend to neglect proceedings as well as delinquency cases. Judge Cattle suggested that a distinction should be made. Mr. Hutzler pointed out that in neglect proceedings, both the parents and the child's interests had to be protected, and that, for example, demands by a child for a jury which were opposed by a parent would be difficult to resolve. Judge McLaughlin noted that neglect jurisdiction grew out of juryless chancery court proceedings, and Judge Moore suggested that jurors may be less tolerant of abusing parents than are judges. Judge Delaney, on the other hand, commented that juries should be available across the board.

76920

JURY TRIAL, PUBLIC TRIAL AND FREE PRESS IN JUVENILE PROCEEDINGS: AN ANALYSIS AND COMPARISON OF THE IJA/ABA, TASK FORCE, AND NAC STANDARDS

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I. INTRODUCTION: KEYSTONE RIGHTS

A. Jury Trial: In Juvenile Delinquency Adjudications[1]

The Sixth Amendment[2] right to a jury trial "reflect[s] a profound judgment about the way in which law should be enforced and justice administered..." [and a] "fundamental decision about the exercise of official power - a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges."[3] The Constitution specifically grants the right in criminal prosecutions.

While juvenile adjudications have primarily been considered as non-criminal, protective, equitable, or civil proceedings,[4] this characterization of juvenile statutes as non-penal in nature[5] does not negate the fact that juveniles alleged to have committed criminal acts and adjudicated as juvenile delinquents are often deprived of their liberty for considerable periods of time.

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1. While the IJA/ABA Standards propose jury trials for abuse and neglect cases as well as in juvenile delinquency proceedings, this paper addresses the issue of jury trials in juvenile delinquency adjudications only.

2. U.S. Const. Amend. VI, which states that: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

3. Duncan v. Louisiana, 391 U.S. 145, 155-156 (1968), where the Court held that the right to a jury trial extended to the States through the Due Process Clause of the Fourteenth Amendment, the Court stated also that: "Those who wrote our constitutions knew from history and experience that it was necessary to protect against unfounded criminal charges brought to eliminate enemies and against judges too responsive to the voice of higher authority. The framers of the constitutions strove to create an independent judiciary but insisted upon further protection against arbitrary action. Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt overzealous prosecutor and against the complaint, biased, or eccentric judge.

4. See, Sect. III, 8, infra.

5. The Court has long since noted that not every characterization is not indeed what it appears to be at first glance. In the case of Trop v. Dulles, 356 U.S. 86, 94 (1958), for instance, the Court taught us: "But the government contends that this statute does not impose a penalty. ...We are told that this is so because a committee...said it 'technically is not a penal law.' How simple would be the task of constitutional adjudication and of law generally if specific problems could be solved by inspection of labels pasted on them. Doubtless even a clear legislative classification of a statute as 'non-penal' would not alter the fundamental nature of a plainly penal statute."

Nor are juvenile delinquency offenses particularly petty offenses.[6] A juvenile may often, for instance, be confined for more than six months,[7] and the very nature of juvenile proceedings, as they are now conducted in most states, grant vast de facto discretionary powers to a judge who acts as both the trier of fact and unbiased decision maker and who is strictly accountable to no one and cannot help but develop an individualistic approach to the juvenile delinquency problems with which the court is daily confronted -- a power that substantively refutes the fundamental decision of our forebearers that "plenary powers over the life and liberty of the citizen" [should not be entrusted] to one judge or to a group of judges."[8]

Thus, to protect the courts, our young citizens, and our judicial process, it is essential that juveniles be granted the right to a trial by jury. Indeed, the right to a trial by jury is the keystone which locks into place all the other rights of juveniles into a coherent system of justice.[9]

B. Public Trial

The right to a public trial is considered so absolute and fundamental a right that the Supreme Court has had few occasions to deal with the issue.[10] When it has, it has reiterated the fundamental importance that has attached to the right throughout Anglo-American history.[11] Yet, at present, juveniles are often not accorded this basic right.[12] It is absolutely fundamental that an accused juvenile be allowed to choose who he wishes to have in the courtroom when he is confronted by his accusers.

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6. The standard as to what is and what is not an offense serious enough to merit a jury trial has long been debated. Early in the century, the Court established a standard which requires the consideration both of the nature of the offense and the amount of punishment prescribed. See, e.g.: Schick v. United States, 195 U.S. 65 (104). The fact that the components of the standards may vary from generation to generation has also been noted by the Court. See, e.g.: District of Columbia v. Clawans, 300 U.S. 617 (1937); See, also, Baker v. City of Fairbanks, 471 P.2d 386 (1970), where the Supreme Court of Alaska noted that "not only must the maximum possible punishment be considered, but one must look also at the social and moral opprobrium which attaches to the offense, the degree to which it may be regarded as anti-social behavior, the possible consequences to the defendant in terms of loss of livelihood, and whether the offense is one traditionally regarded as a crime or is predominately in the nature of a regulatory offense." At 393.
7. See, Baldwin v. New York, 399 U.S. 66 (1970), where the Court held that an individual charged with a crime where the penalty could exceed six months imprisonment was entitled to a trial by jury.
8. 391 U.S. 145, 155, supra.
9. See, 1 Bentham, Rationale of Judicial Evidence 524 (1827) at 30, supra.
10. Congressional Research Service, Library of Congress, U.S. Const. Annotated (1973) 1200.
11. See, e.g., In re Oliver, 333 U.S. 257 (1948).
12. See, Statutory Appendix, infra.

C. Free Press

The balance between the right of the juvenile to a public trial and the right of the press to be present at and report juvenile proceedings raises more subtle and troubling questions. The confidentiality of juvenile proceedings has been long regarded as a hallmark of the beneficial aspects of the juvenile justice system. While the juvenile should have the right to have persons of his choosing with him at his trial, should he also be subjected to the full light of public scrutiny provided by an unrestricted press? This fundamental question was answered positively by the Supreme Court recently in the case of Oklahoma Publishing Co. v. District Court[13] where the Court, depending on its recent decisions in Nebraska Press Assoc. v. Stuart[14] and Cox Broadcasting Corp. v. Cohn,[15] held that when members of the press are at a juvenile hearing with the full knowlege of the presiding judge, when no objection is made to the presence of the press in the courtroom or to the photographing of the juvenile as he leaves the court house, the press is free to publish the information so gathered, since the information has been placed in the public domain.

In light of this holding, how to protect the juvenile's identity, if such protection is deemed desirable, becomes a challenge.

These rights then, jury trial and public trial, as noted by the United States Supreme Court in the cases of In re Oliver[16] and Duncan v. Louisiana,[17] form the linch pins to our system of justice. The Standards merely extend these rights to juveniles. Without these rights, none of the other constitutional rights accorded to juveniles have substance. With them, the constitutional rights of juveniles are secured.

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13. 97 S. Ct. 1045,____U.S.____(1977).
14. 427 U.S. 539 (1976).
15. 420 U.S. 469 (1975).
16. 333 U.S. 257 (1947).
17. 391 U.S 469 (1975).

II. THE PROPOSED STANDARDS

A. How the Standards Evolved

For some years public and private groups have pondered a systematic approach to the problems of the juvenile justice system.[18] Subsequently, three different sets of standards have emerged--the IJA/ABA Standards, the Task Force Standards, and the NAC Standards. While often apparently similar, there are substantive differences between the standards as they address the issue of jury trial, public trial and the press. To provide orientation, and an admittedly overly simplified birdseye view of the approach taken by the three groups, a chart is helpful.

Issue	IJA/ABA	Task Force	NAC
Jury Trial	Yes	No	No
Public Trial	Yes	Sometimes	Yes
Press	Yes	?	Sometimes

However, to more comprehensively appreciate the substantive standards proposed by the three groups, a more detailed analysis is necessary.

B. What the Standards Say

1. IJA/ABA Standards -

The IJA/ABA Standards succinctly state that a juvenile should have a right to a trial by a jury of six where a respondent has denied the allegations of a petition.[19]

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18. Over six years ago "the Institute of Judicial Administration (IJA) recognized that piecemeal 'solutions' to the problems of juvenile justice were ineffective and were squandering needed resources and energy ... [and] formed the Juvenile Justice Standards Project (JJSP) .. [In 1973] the American Bar Association (ABA) joined in sponsoring the JJSP, and a joint Commission was created with final authority over the contents of the [IJA/ABA] volumes." Kaufman, Protecting the Rights of Minors: On Juvenile Autonomy and the Limits of the Law, 52 N.Y.U.L. Rev. 1015, 1018 (1977). Concurrently, the Law Enforcement Assistance Administration (LEAA) National Advisory Committee on Criminal Justice Standards and Goals Task Force on Juvenile Justice and Delinquency Prevention developed a set of standards for juvenile proceedings (Task Force). Meanwhile, an advisory committee to the Administrator on Standards for the Administration of Juvenvile Justice was established by Section 208(e) of the Juvenile Justice of Delinquency Prevention Act of 1974 (Pub. Law 93-415) as a subdivision of the National Advisory Committee for Juvenile Justice and Delinquency Prevention (NAC). This group also developed a set of standards.
19. "Each jurisdiction should provide by law that the respondent may demand trial by jury in adjudication proceedings when respondent has denied the allegations of the petition. Each jurisdiction should provide by law that the jury may consist of as few as six persons and that the verdict must be unanimous." Institute of Judicial Administration and American Bar Association, Juvenile Justice Standards Projects, hereinafter [IJA/ABA Standards], Adjudication, Standard 4.1(A)(B) (Tentative Draft 1977).

Further, the IJA/ABA Standards state that the respondent in a juvenile court adjudication proceeding has a right to a public trial.[20] Moreover, specific steps are suggested for implementing the right to a public trial. For instance, the IJA/ABA Standards suggest that a respondent be allowed to waive the right to a public trial after consulting with counsel,[21] that by law the judge has discretion to admit members of the public who have a legitimate interest in the proceedings, including representatives of the news media,[22] that the judge should honor any request by the respondent, the respondent's attorney, or family that particular members of the public be allowed to observe the adjudication proceeding after the respondent has waived the right to a public trial,[23] but that the judge should be recognized as having the power to order any member of the public causing a distraction or disruption[24] removed from the courtroom. Further, it is suggested that state laws should provide that members of the public admitted to a proceeding where a juvenile has waived the right to public trial should not disclose to others the identity of the respondent[25] and that a state law should require a judge to announce this restriction to any members of the public present in the courtroom in such an instance.[26]

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20. "Each jurisdiction should provide by law that a respondent in a juvenile court adjudication proceeding has a right to a public trial." Id., Standard 6.1.
21. "Each jurisdiction should provide by law that the respondent, after consulting with counsel, may waive the right to a public trial." Id., Standard 6.2(A).
22. "Each jurisdiction should provide by law that the judge of the juvenile court has discretion to permit members of the public who have a legitimate interest in the proceedings or in the work of the court, including representatives of the news media, to view adjudication proceedings when the respondent has waived the right to a public trial." Id., Standard 6.2(B).
23. "The judge of the juvenile court should honor any request by the respondent, respondent's attorney, or family that specified members of the public be permitted to observe the respondent's adjudication proceeding when the respondent has waived the right to a public trial." Id., Standard 6.2(C).
24. "The judge of the juvenile court should use judicial power to prevent distractions from and disruptions of adjudication proceedings and should use that power to order removal from the courtroom any member of the public causing a distraction or disruption." Id., Standard 6.2(D).
25. "Each jurisdiction should provide by law that members of the public permitted by the judge of the juvenile court to observe adjudication proceedings may not disclose to others the identity of the respondent when the respondent has waived the right to a public trial." Id., Standard 6.3(A).
26. "Each jurisdiction should provide by law that the judge of the juvenile court should announce to members of the public present to view an adjudication proceeding when the respondent has waived the right to a public trial that they may not disclose to others the identity of the respondent." Id., Standard 6.3(B).

The major assumption underlying these standards regarding contested adjudication proceedings is "that it is important that the juvenile process provide a formal adjudication proceeding when the respondent has denied the allegations of the petition."[27] The commentators submit that when the respondent has put the government to its proof "accuracy of fact finding must assume precedence over whatever benefits may arise from informality elsewhere in the process."[28] The commentators further note that jury trials would be provided only upon the demand of the respondent and that "there is every reason to believe that jury trials in juvenile cases would be at least as rare as they are in criminal cases and would probably occur even less frequently."[29].

A variety of policy reasons are also put forth by the commentators in support of jury trials for juveniles. For instance, it is posited that jury trials neutralize the biased judge, that jury trials make it necessary for the trial court judge to articulate the court's view of the appellate review, and that jury trials often provide significant evidentiary protections.[30] On the negative side of the issue, the possible cost of jury trials for juveniles is raised.[31] Advisory juries are also mentioned by the commentators but the concept is discarded "because they are impaneled at the discretion of the trial court and because they render nonbinding verdicts."[32]

While clearly articulating the right to a public trial as a standard for juvenile adjudications, the commentators place primary emphasis in their analysis of this standard upon the reasons previously put forth by various courts and commentators for having closed juvenile proceedings - confidentiality, interference with the caseworker-child relationship, excessive punishment for the child, identification of the child as delinquent, and the potentially negative effect of providing the child with an audience to recount with delinquent acts.[33] However, the commentary does allude to Mr. Justice Brennan's concurring and dissenting opinion in McKeiver v. Pennsylvania,[34] in which he stressed that openness in juvenile proceedings "works analogously to jury trial to protect the accused from possible oppression by exposing improper judicial behavior to the indignation of the community at large."[35]

A more positive approach is taken by the commentators with regard to public trial when implementation of the standard is considered. Noting that "protection of the child is integral to these standards,"[36] the commentators mention statutory provisions and case law upholding the right to public trial.[37] Mention is also made of the diametrical arguments on the issue - that relaxation of the curb on publicity betrays the juvenile court philosophy and that publication of names would act as a deterrent to others and as a rehabilitative force to the named child.[38]

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27. IJA/ABA, at 51.
28. Id.
29. Id., at 52.
30. Id., at 53.
31. Id., at 55.
32. Id., at 56.
33. Id., at 71.
34. 403 U.S. 528, 554-55 (1971).
35. IJA/ABA, supra., at 72.
36. Id., at 73.
37. Id.
38. Id., at 74.

Caution is expressed as to the presence of excessive media paraphernalia.[39]

The standard dealing with confidentiality when a juvenile has waived the right to a public trial is premised upon the observation that "confidentiality of hearings can be adequately preserved in the context of open proceedings, provided that names and identifying details are not published."[40] The commentators stress that such restriction should apply only where the respondent has waived the right to a jury trial, noting that "in the absence of such a waiver, the press and other members of the public are free to disseminate reports of the proceeding, including identifying the respondent."[41]

2. Task Force Standards -

The Task Force Standards state that a juvenile in a contested proceeding should be given all of the constitutional rights granted to a criminal defendant with the exception of the right to a trial by jury.[42] However, upon the request of the juvenile, a proceeding should be open to the public or "with the court's permission to specified members of the public."[43] The Task Force Standards are silent as to the specific issue of the relationship of the press to juvenile court proceedings.

Essentially, the underlying assumption of the Task Force Standards appears to be the continuation, with some modification, of the juvenile justice system it has evolved in the past seventy some years in the United States. For example, in its commentary, the Task Force rejects the premise that all the constitutional criminal procedural rights to which a criminal defendant is entitled should be extended to a juvenile, positing that the need for such protection as well as "its potential harmful impact on the goals of the system"[44] should be evaluated. With specific regard to jury trial, the commentators note that "jury's disadvantages, which include increased formality, expense, and delay, seem to outweigh its admitted usefulness in a small proportion of cases."[45] The Task Force commentators view the right to a public hearing as a sufficient safeguard "for assuring that the family court judge is absolutely impartial."[46]

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39. Id.
40. Id., at 75.
41. Id., at 76.
42. "Adjudications of delinquency petitions should conform to due process requirements. The hearing to determine whether the juvenile is delinquent should be distinct and separate from the proceedings at which - assuming an adjudication of delinquency - a decision is made as to what disposition should be made concerning the juvenile. At the adjudicatory hearing, the juvenile alleged to be delinquent should have all the rights given a criminal defendant except the right to trial by jury." National Advisory Committee on Criminal Justice Standards and Goals, Juvenile Justice and Delinquency Prevention, Report of the Task Force on Juvenile Justice and Delinquency Prevention (1976), Standard 13.4, hereinafter (Task Force Standards). See, also Task Force Standard 12.3.
43. Id., Standard 12.3.
44. Id., at 380.
45. Id., at 381.
46. Id.

Further, the Standards recommendation that the juvenile be allowed to open the proceeding to the public, or, if the court permits, to specified members of the public, is also calculated to insure fair fact-finding,"[47] citing Mr. Justice Brennan's concurring and dissenting opinion in McKeiver,[48] supra. The Task Force commentators do not evision an absolute right to a public trial on the part of a juvenile, or on the part of the public, however, but leave the right to be one which is ultimately achieved through the discretion of the trial court judge:

> Although the Standard contemplates that the judge will normally grant a juvenile's request to open the proceeding to nonparticipants, this report does not intend to foreclose the exercise of sound discretion in special circumstances to keep the proceedings partially or completely closed. This might be done, for example, to protect a young victim testifying to sexual abuse by the alleged delinquent.[49]

The commentary also contemplates that the judge whould exercise power where appropriate "to prevent distractions from and disruptions of court proceedings by any persons, and if necessary order them removed from the court room"[50]

3. NAC Standards -

Under these standards "parties to matters filed pursuant to the jurisdiction of the family court over delinquency, noncriminal misbehavior, and neglect and abuse should be entitled ... to all the other rights accorded to defendants in criminal cases except for ... the right to a trial by jury."[51] Another specific standard underscores this exception for the right to a trial by jury.[52] As to public hearings, the NAC Standard suggest that at the beginning of their initial appearance in court a litigant be informed that there is a right to a public hearing, which may be waived in which case the hearing will "be closed to everyone but the judge, necessary court personnel, the parties, their counsel and families, and other persons approved by the court."[53] Further, the Standard declares that if the right to a public trial is waived the proceedings should be confidential[54] and that "written voluntary guidelines should be developed by the news media in consultation with the family court to outline the items related to family court proceedings that are not generally appropriate for reporting."[55]

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47. See n. 15, supra.
48. See n. 15, supra.
49. Task Force, at 381.
50. Id.
51. National Advisory Committee for Juvenile Justice and Delinquency Prevention Report of the Advisory Committee to the Administrator on Standards for the Administration of Juvenile Justice, Standards 3.171; 3.173 (1976) (hereinafter NAC Standards).
52. Id., Standard 3.173.
53. Id., Standard 3.172. This standard applies to delinquency, noncriminal misbehavior, or neglect and abuse proceedings.
54. Id.
55. Id.

The NAC Standards also provide that on the motion of any party or on its own initiative, the court should be allowed discretion to close the proceedings temporarily or to order excluded from the court room, anyone creating distractions or disturbances.[56]

The commentary supporting the NAC Standards duplicates the reasoning supporting the IJA/ABA and Task Force Standards as regards trial by jury. It appears that the NAC Standards reject jury trials primarily because McKeiver held that jury trials are not constitutionally required in delinquency proceedings.[57] The NAC commentators analysis of the issue of the right to public trial is, however, somewhat more profound. While reiterating the conclusions reached in the IJA/ABA and Task Force Standards commentary, the NAC also considered Mr. Justice Brennan's concurring opinion in Nebraska Press Association v. Sturat,[58] considered arguments that public trials would destroy the atmosphere of the juvenile court, or, on the other hand, that closed proceedings may encourage some judges to become lax in their application of the law, and concluded "that the respondent should have the option of opening or closing the proceedings to the general public."[59] The NAC commentators suggest that when a proceeding is closed, the judge notify the party as to who may still be included in a closed session.[60] Further, the commentary states that "witnesses are not included in the list of persons automatically admitted as spectators to closed proceedings."[61] When a hearing is open, the judge in deciding whether or not to allow witnesses in the courtroom "should determine that there is reasonable likelihood that accurate fact-finding cannot be achieved without prohibiting witnesses from watching the proceedings."[62]

The problems of free press and fair trial are also discussed in the commentary. Concern with and sensitivity to the particular problem of prior restraint of the press is expressed. For hearings that are closed, the NAC Standard "limits the controls over identification of juveniles and their families to those persons present in closed proceedings - i.e., the parties, their counsel and families, court personnel, witnesses and other persons admitted with the express permission of the court."[63] For open hearings, the Standard suggests that voluntary guidelines be developed. "Such guidelines should reflect the 'fiduciary-like' duty of the press to exercise the protected rights responsibly."[64] The commentary further takes the position that public trial is not absolutely the right of the respondent but is the privilege of the public at the discretion of the judge, thus relieving the juvenile court judge "of delicate decisions regarding observation by the media in cases that are nominally open to the public."[65]

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56. Id.
57. Id., Commentary to Standard 3.173.
58. 427 U.S. 539, 572, 96 S. Ct. 2791, 2816 (1976).
59. NAC, Commentary to Standard 3.172.
60. Id.
61. Id.
62. Id.
63. Id.
64. Id.
65. Id.

C. Comparison of the Three Standards

1. Introduction -

The significant and essential difference between the three sets of standards is a philosophical difference. The IJA/ABA Standards are a clear extension and systematic application of the emergent concept of children as persons with individual rights and responsibilities as first envisioned in the landmark decision of In re Gault[66] and developed by the United States Supreme Court in subsequent decisions.[67] The Task Force and NAC Standards, on the other hand, are a recapitulation of the conventional wisdom of the separate system of justice for juveniles with a few trills acknowledging the changes in the conceptual formulation of the juveniles' role in that justice system. The solid chords of the status quo, however, drown out any creative inventions, with the result that the composition has a comfortable familiar sound to those who have listened to the opus that is the juvenile justice system.

2. The Right to Trial by Jury -

The philosophical differences between the standards are most apparent on the issue of whether or not a child who denies an allegation in a juvenile delinquency proceeding is or should be entitled to the right of a trial by jury. The IJA/ABA Standards, recognizing the child as a person with individual rights, assert the right to a jury trial for juveniles in contested adjudications.[68] The Task Force and NAC Standards,[69] clinging to the traditional understanding of the juvenile court system, say that a jury trial is not appropriate in a juvenile proceeding. As previously stated,[70] jury trials for abuse and neglect cases present very different issues than do jury trials for alleged delinquents and the inclusion of a discussion of the right to a jury trial for the parties in abuse and neglect proceedings, as posted in the IJA/ABA Standards and commentary, obfuscates the variables which must be considered in accessing a child's right to a jury trial in a contested delinquency proceeding. Similarly, the inclusion in the NAC Standards of noncriminal misbehavior as an exception to the right to a jury trial leads to analytical confusion and underlines the traditional approach taken by the NAC in developing its position.

3. The Right to Public Trial -

While somewhat more subtle, the differences in philosophy which underlie the three sets of standards are apparent in the approach taken to the issue of the right to public trial. The IJA/ABA Standards[71] illustrate the presumption that public trial is the absolute right of the respondent, but concomitantly that it is also the right of the public.

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66. 387 U.S. 1 (1967).
67. See, e.g., Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976); Breed v. Jones, 431 U.S. 519 (1975); Goss v. Lopez, 419 U.S. 565 (1975); In re Winship, 397 U.S. 358 (1970); Tinker v. Des Moines School District, 393 U.S. 503 (1969); Kent v. United States, 383 U.S. 541 (1966).
68. IJA/ABA, Adjudication, Standard 4.1(A)(B).
69. Task Force, Standard 13.4; NAC, Standards 3.171; 3.173.
70. See Introduction, supra.
71. IJA/ABA, Adjudication, Standards, 6.1, 6.2.

While acknowledging these parallel traditional interpretations of the right to a public trial, the Task Force[72] and NAC Standards[73] provide access to the right through the discretion of the trial court judge. The Task Force Standards, in commentary, particulary emphasize the discretionary powers given to the presiding judge.[74] The IJA/ABA Standards also allow for discretion on the part of the judge in, for instance, removing persons from the court room,[75] but the IJA/ABA Standards clearly indicate that the respondent has the primary right of asserting or waiving the right to a public trial.[76] When, however, the respondent's right is waived, the right of the public comes into play and the court has discretion to admit interested persons to the proceedings, including members of the press.[77] This is a subtle but important difference in emphasis.

4. The Press -

The three standards each address the issue of the presence of the press in juvenile proceedings from a different perspective. The IJA/ABA Standards[78] grants the press access to all proceedings, the Task Force Standards are silent as to the role of the press at adjudicated juvenile proceedings, while the NAC[79] Standards allow the admission of the press in certain situations under certain restrictions in an attempt to preserve confidentiality while avoiding prior restraint. Once again the underlying philosophies of the standards emerge, the IJA/ABA Standards indicating an overriding concern with the constitutional aspects of the question and the NAC revealing its adherence to the paradigm of the traditional juvenile justice system.

While the Task Force Standards do not specifically address the presence of the press at contested juvenile adjudications, the guidelines for the release of information and photographs to the news media[80] contained in the Task Force Standards as well as the provisions for privacy articulated[81] would indicate a purposeful exclusion from the standards on adjudication of a discussion of the proper role of the press in such proceedings. It should be noted that the IJA/ABA Standards preserve the privacy of the individual involved in the juvenile proceeding while at the same time providing a means whereby juvenile anti-social acts may be made public and the process of the courts monitored.[82]

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72. Task Force, Standard 12.3.
73. NAC, Standard 3.172.
74. See, n. 49, supra.
75. IJA/ABA, Adjudication, Standard 6.2(D)
76. Id., Standard 6.2.
77. Id., Standard 6.2(B)
78. Id.
79. NAC, Standards 3.172.
80. "Each state should enact legislation to require confidential police handling of identifying information about juveniles. With the exception of dangerous fugitives, law enforcement agencies should not release the names or photographs of juvenile law violators to the news media." Task Force, Standard 5.13.
81. Id., ch. 28, Security, Privacy, and Confidentiality of Information about Juveniles.
82. IJA/ABA, Adjudications, Standard 6.3.

Thus, the beneficial aspects of confidentiality are maintained, while the child is protected from any irregularities that might occur in a totally closed hearing.[83]

5. Conclusion -

For reasons that will be more exhaustively examined subsequently, the IJA/ABA Standards are particularly meritorious. With the exception of the IJA/ABA Standard which promulgates the right to a trial by jury for parties to abuse and neglect proceedings,[84] the IJA/ABA Standards are responsive to emergent rather than reversionary attitudes towards children and place emphasis upon the protection of children, not in a paternal, discretionary manner, but within the framework of the law. Protection under law has always been the best safeguard against arbitrary and capricious treatment for any class of people. Children are no exception to this maxim.

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83. IJA/ABA, A Summary and Analysis, 23-24 (1977).
84. IJA/ABA, Abuse and Neglect, Standard 5.3(E)(1)(Tentative Draft, 1977).

III. ANALYSIS

A. Parallel Flow — Criminal Responsibility of Children / Parens Patriae

1. Introduction -

Two separate and distinct historical traditions influence modern thinking with regard to children and their relationship to the state. One tradition involves a commission on the part of the child, or a criminal act, before the state becomes involved, while the other tradition involves an omission, a certain destitution, before the state enters into the life of the child.

2. Criminal Responsibility of Children -

As Blackstone noted, "infants, under the age of discretion, ought not to be punished by any criminal prosecution whatever. What the age of discretion, in various nations, is matter [sic] of some variety."[85] For instance, under Roman Law, infancy was divided into three stages with criminal liability attaching during the pubertas (fourteen years and upwards) stage.[86] By ancient Saxon Law, the age of twelve was considered as the age of possible discretion.[87] In England, five distinctions were made as to culpability under the maxim that "malitia supplet aetatem," or, malice supplies age.[88] Thus, while children under fourteen were presumed to be "doli incapax," incapable of criminal intention or malice, "yet if it appear to the court and jury that he was "doli capax," [or capable of malice or criminal intention] and could discern between good and evil, he may be convicted and suffer death.[89] It was left to the jury to determine whether at the time of committing an offense the person had guilty knowledge that he was doing wrong.[90] Thus, children who were alleged to have committed criminal acts were given the procedural rights that were granted to adults tried during the same period of time. This included the right to an indictment by a grand jury and trial before a petit jury. The results of this total access to adult procedure were often appalling where viewed through twentieth century perceptions.

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85. 4 Blackstone, Commentaries 21 (London 1809).
86. Id.
87. Id., at 22.
88. Id., at 23.
89. Id., Harsh results sometimes occurred. i.e. "Thus a girl of thirteen has been burnt for killing her mistress: and one boy of ten, and another of nine years old, who had killed their companions, have been sentenced to death, and he of ten actually hanged; because it appeared upon their trials that one hid himself, and the other hid the body he had killed, which hiding manifested a consciousness of guilt, and a discretion to discern between good and evil. And there was an instance in the last century where a boy of eight years old was tried at Abington for firing two barns; and, it appearing that he had malice, revenge, and cunning, he was found guilty, condemned, and hanged accordingly. See, also, 3 Chitty, A Practical Treastise on the Criminal Law 724, 1 Russell, A Treastise on Crime and Misdemeanors 3.
90. Rex v. Owen, 4 C & P 236 (1830).

York's case,[91] an extremely vivid factual case illustrates, however, how the eighteenth cenury criminal justice system functioned for children.[92]

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91. York's case, Fost. 70 et seq. (1748).
92. "In 1748, W. York, a boy of ten years of age, was convicted for the murder of a girl of about five years of age; but Willes, C.J., out of regard to the tender years of the prisoner, respited execution till he could take the opinion of the rest of the judges, whether it was proper to execute him or not.

The boy and girl were parish children, under the care of a parishioner; and on the day of the murder he and his wife went out to their work, and left the children in bed together. When they returned the girl was missing; and the boy, being asked what was become of her, answered that he had helped her up and put on her clothes, and she had gone he knew not whither. Upon this, strict search was made for the child. During this search, the man observed that a heap of dung near the house had been newly turned up; and, upon removing the upper part of the heap, he found the body of the child about a foot's depth under the surface, cut and mangled in a most barbarous and horrid manner. Upon this discovery, the boy, who was the only person capable of committing the fact, that was left at home with the child, was charged with the fact, which he stiffly denied. When the coroner's jury met, the boy was again charged, but persisted still to deny the fact. At length, being closely interrogated, he fell to crying, and said he would tell the whole truth. He then said that the child had been used to foul herself in bed; that she did so that morning (which was not true, for the bed was searched and found to be clean), that thereupon he took her out of the bed and carried her to the dung-heap, and with a large knife, which he found about the house, cut her in the manner the body appeared to be mangled, and buried her in the dung-heap; placing the dung and straw that was bloody under the body, and covering it up with what was clean; and having so done, he got water and washed himself as clean as he could. The boy was the next morning carried before a neighboring justice of the peace, before whom he repeated his confession, with all the circumstances he had related to the coroner and his jury. The justice of the peace very prudently deferred proceeding himself. Accordingly he warned him of the danger he was in if he should be thought guilty of the fact he stood charged with, and admonished him not to wrong himself; and then ordered him into a room where none of the crowd that attended should have access to him. When the boy had been some hours in this room where victuals and drink were provided for him, he was brought a second time before the justice, and then he repeated his former confession:--upon which he was committed to gaol. On the trial, evidence was given of the declarations before mentioned to have been made before the coroner and his jury, and before the justice of the peace; and of many declarations to the same purpose which the boy made to other people after he came to gaol, and even down to the day of his trial; for he constantly told the same story in substance, commonly adding that the devil put him upon committing the fact. Upon this evidence, with some other circumstances tending to corroborate the confessions, he was convicted. The judges having taken time to consider this report, unanimously agreed; 1. That the declarations stated in the report were evidence proper to be left to the jury. 2. That, supposing the boy to have been guilty of this fact, there were so many circumstances stated in the report which were undoubtedly tokens of what Lord Hale calls a mischievous discretion, that

In York's case, a ten year old boy was accused of the brutal murder of a five year old girl. He "confessed" to the coroner's jury. He was indicted and convicted. On appeal, the court noted that the confession was proper evidence for the jury and that the jury had sufficient evidence to find a 'mischievous discretion' on the part of the boy. Still, two of the three judges asked for additional inquiries, reasoning that further inquiry might reveal that the boy was attempting to protect someone else, perhaps since he appeared very upset throughout the initial stages of the proceeding and claimed that the devil made him do it. Eventually, having run out of reprieves, he was pardoned by the king upon the condition that he immediately go into 'sea service'. Thus, an adjustment was made because of youth after the proceeding rather than before the proceeding, as is the current custom.

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he was certainly a proper subject for capital punishment, and ought to suffer; for it would be of very dangerous consequence to have it thought that children may commit such atrocious crimes with impunity. That there are many crimes of the most heinous nature, such as (in the present case) the murder of young children, poisoning parents or masters, burning houses, etc., which children are very capable of committing; and which they may in some circumstances be under strong temptations to commit; and therefore, though the taking away the life of a boy of ten years old might savour the cruelty, yet, as the example of that boy's punisment might be a means of deterring other children from the like offenses, and as the sparing the boy, merely on account of his age, would probably have a quite contrary tendency; in justice to the public, the law ought to take its course; unless there remained any doubt touching his guilt. In this general principle all the judges concurred: but two or three of them, out of great tenderness and caution, advised the chief justice to send another reprieve for the prisoner; suggesting that it might possibly appear, on farther inquiry, that the boy had taken this matter upon himself at the instigation of some person or other, who hoped by this artifice to screen the real offender from justice. Accordingly the chief justice granted one or two more reprieves; and desired the justice of the peace who took the boy's examination, and also some other persons, in whose prudence he could confide, to make the strictest inquiry they could into the affair, and report to him. At length he, receiving no further light, determined to send no more reprieves, and to leave the prisoner to the justice of the law at the expiration of the last; but, before the expiration of that reprieve, execution was respited till further order, by warrant from one of the secretaries of state; and at the summer assizes, 1757, the prisoner had the benefit of His Majesty's pardon, upon condition of his entering immediately into the sea service."
Russell, I-A Treastise on Crime and Misdemeanors, 3.

While the origin of trial by jury in England is not clear,[93] by the time that the United States Constitution was drafted, some of the framers appeared to believe "that the Constitution designated trial by jury as the exclusive method of determining guilt."[94] Undoubtedly, the right to a trial by jury is a basic right in the scheme of constitutional protections for persons accused of committing crimes. It was a right granted to juveniles during the early part of the nation's history. Even after the reform movement directed toward the means of dealing with juvenile delinquents began in the late 1800's, "major offenders were ... left in the adult criminal system."[95] Customarily, guilt in such cases had been determined by a jury.[96] For example, in an 1828 case, State v. Guild,[97] where a twelve year old boy was accused of murder, the judge in his charge to the jury called attention to the youth of the accused, stating that "this fact ... should make you more cautious in admitting the confessions, and induce you to resolve your doubts in his favor."[98] The boy was found guilty, sentenced and executed.[99]

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93. Singer v. United States, 380 U.S. 24, 27 (1964).
"English Common Law. The origin of trial by jury in England is not altogether clear. At its inception it was an alternative to one of the older methods of proof--trial by compurgation, ordeal or battle. I Holdsworth, A History of English Law 326 (7th Ed. 1956). Soon after the thirteenth century trial by jury had become the principal institution for criminal cases, Jenks, A Short History of English Law 52 (5th ed. 1938); yet, even after the older procedures of compurgation, ordeal and battle had passed into disuse, the defendant technically retained the right to be tried by one of them. Before a defendant could be subjected to jury trial his "consent" was required, but the Englishmen of the period had a concept of "consent" somewhat different from our own. The Statute of Westminster I, 1275, 3 Edw. 1, c. 12, which described defendants who refused to submit to jury trial as "refuse[ing] to stand to the Common Law of the Land," marks the beginning of the horrendous practice known as peine forte et dure by which recalcitrant defendants were tortured until death or until they "consented" to a jury trial."
94. Id., at 31. See, the Federalist, no. 83 (Alexander Hamilton) (Cooke ed. 1961); IV Elliot's Debates 145, 171 (James Iredell) (2d ed. 1876); III Elliot's Debates 521 (Edmund Pintleton) (2ed. 1876).
95. Fox, Juvenile Justice Reform: An Historical Perspective, 22 Stan. I. Rev. 1187, 1191 (1970).
96. See, e.g.: State v. Guild, 10 N.J.L. (5 Halst.) 163, 18 Am. Dec. 404 (S. Ct. 1828). "But that a youth [the boy was twelve] like the prisoner should carefully treasure up from time to time the fragments of information which he might have heard; that he should weave them together into a connected and consistent tale; that he should uniformly and repeatedly relate them, and in the same manner, and all this, not as an avowal or argument of innocence, but as a declaration of atrocious guilt, was, in our opinion, very properly considered by the jury to be beyond all reasonable bounds of credibility. And it could not have escaped their observation that in no particular, not even the slightest, was his confession contradicted, or found inconsistent with the facts, or in any wise disproved." Id., at 415, 416.
97. Id.
98. Id., at 417.
99. Id.

Thus, so long as juveniles were deemed to be capable of criminal responsibility there was no question of their right to a trial by jury.

The origins of the right to public trial for criminal offenses, while obscure as to date,[100] reflect a sentiment that has been paramount throughout the history of the United States--"the traditional Anglo-American distrust for secret trials."[101] This distrust arose from the preceived notorious use of the Spanish Inquisition,[102]

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100. In re Oliver, 333 U.S. 257 (1947), n. 71.
"Radin, the Right to a Public Trial, 6 Temp. L. Q. 38-384. Early commentators mention that public trials were commonly held without attempting to trace their origin. Sir Thomas Smith in 1565 in his De Republica Anglorum bk. 2, pp. 79, 101 (Alston ed. 1906); Sir Matthew Hale about 1670 in his History of the Common Law of England 343-345 (Runnington ed. 1820). In 1649, a few years after the Long Parliament abolished the Court of Star Chamber, an accused charged with high treason before a Special Commission of Oyer and Terminer claimed the right to public trial and apparently was given such a trial. Trial of John Lilburne, 4 How. St. Tr. 1270, 1274. "By immemorial usage, wherever the common law prevails, all trials are in open court, to which spectators are admitted." 2 Bishop, New Criminal Procedure § 957 (2d ed. 1913).
101. Id., at 268.
102. Id., at n. 78.
"Radin, The Right to a Public Trial, 6 Temp. L. Q. 381, 389. The criminal procedure of the civil law countries long resembled that of the Inquisition in that the preliminary examination of the accused, the questioning of witnesses, and the trial of the accused were conducted in secret. Esmein, A History of Continential Criminal Procedure 183-382 (1913); Ploscowe, Development of Inquisitional and Accustorial Elements in French Procedure, 23 J. Crim. L. & Criminology 372-386. The ecclesiastical courts of Great Britain, which intermittently exercised a limited civil and criminal jurisdiction, adopted a procedure described as "in name as well as in fact an Inquisition, differing from the Spanish Inquisition in the circumstances that it did not at any time as far as we are aware employ torture, and that the bulk of the business of the courts was of a comparatively unimportant kind...." 2 Stephen, History of the Criminal Law of England, 402 (1883). The secrecy of the ecclesiastical courts and the civil law courts was often pointed out by commentators who praised the publicity of the common law courts. See e.g., 3 Blackstone, Commentaries *373; 1 Bentham, Rationale of Judicial Evidence, 594-595, 603 (1827). The English common law courts which succeeded to the jurisdiction of the ecclesiastical courts have renounced all claim to hold secret sessions in cases formerly within the ecclesiastical jurisdiction, even in civil suits. See, e.g., Scott v. Scott, [1913] A.C. 417."

the excesses of the English Court of Star Chamber,[103] and the French abuse of the lettre de cachet.[104] Over 150 years ago, the English philospher, Jeremy Bentham, succinctly expressed the reasons why a public trial has been thought to provide both a protection for the defendant and a protection to the judicial process in a free society. Bentham said:

> Suppose the proceedings to be completely secret, and the court, on the occasion, to consist of no more than a single judge, - that judge will be at once indolent and arbitrary: how corrupt soever his inclination may be, it will find no check, at any rate no tolerably efficient check, to oppose it. Without publicity, all other checks are insufficient: in comparison of publicity, all other checks are of small account. Recordation, appeal, whatever other institutions might present themselves in the character of checks, would be found to operate rather as cloaks than checks, as cloaks in reality, as check only in appearance.[105]

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103. Id., at n. 79.
"Davis v. United States, 247 F. 394, 395; Keddington v. State, 19 Ariz. 457, 459, 172 P. 273; Williamson v. Lacy, 86 Me. 80, 82-83, 29 A. 943, 944; Dutton v. State, 123 Md. 373, 387, 91 A. 417, 422; Jenks, The Book of English Law 91 (3d ed. 1932). Some authorities have said that trials in the Star Chamber were public, but that witnesses against the accused were examined privately with no opportunity for him to discredit them. Apparently all authorities agree that the accused himself was grilled in secret, often tortured, in an effort to obtain a confession and that the most objectionable of the Star Chamber's practices was its asserted prerogative to disregard the common law rules of criminal procedure when the occasion demanded. 5 Holdsworth, A History of English Law, 163, 165, 180-197 (2d ed. 1937); Radin, The Right to a Public Trial. 6 Temp. L. Q. 381-386-388; Washburn, The Court of Star Chamber, 12 Am. L. Rev. 21, 25-31."

104. Id., at n. 80.
"Radin, The Right to a Public Trial, 6 Temp. L. Q. 381, 388. The lettre de cachet was an order of the king that one of his subjects be forthwith imprisoned or exiled without a trial or an opportunity to defend himself. In the eighteenth century they were often issued in blank to local police. Louis XV is supposed to have issued more than 150,000 lettres de cachet during his reign. This device was the principal means employed to prosecute crimes of opinion, although it was also used by the royality as a convenient method of preventing the public airing of intra-family scandals. Voltaire, Mirabeau and Montesquieu, among others, denounced the use of the lettre de cachet, and it was abolished after the French Revolution, though later temporarily revived by Napoleon.
13 Encyc. Brit. 971; 3 Encyc. Soc. Scie. 137."

105. 1 Bentham, Rationale of Judicial Evidence 524 (1827).

The potential evils of closed trials were, of course, incomprehensible to the creators of the juvenile court. That evil may lurk in closed juvenile proceedings today, to the juvenile, to the court, and to the public as well, is a precept that has not been given careful consideration and indeed is inconceivable if one is guided in one's thinking by the concept of parens patriae.

3. The Concept of Parens Patriae

Two principles of the English equity courts have been merged in our modern concept of parens patriae. On the one hand, as an inheritance from the feudal system, is the principle that fatherless children are the wards of the court,[106] while, on the other hand, is the principle that "the king, as parens patriae has the general superintendence of all charities; which he exercises by the keeper of his conscience, the chancellor."[107] "The doctrine that the state was parens patriae of the people who compose it, for the purpose of the care, protection, discipline, and reform of those of its citizenship, whether dependents, lunatics, minors, or criminals needing these offices, ... became a part of the British system of government and of jurisprudence, and the jurisdiction of courts of equity over minors thus firmly established in the English law passed to this country upon the establishment of courts of law and equity in its various states, and came regularly into our system of jurisprudence upon the consolidation of these courts."[108] Thus, the idea that the state had a duty to protect children was established long before the juvenile justice reform movement of the late 1800's.

B. Convergence: The Juvenile Justice System

1. Stated Objectives for the Juvenile Court -

The objectives of those who established the early juvenile courts were nothing if not lofty.

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106. "Upon the abolition of the court of wards, the care, which the crown was bound to take as guardian of its infant tenants, was totally extinguished in every federal view; but resulted to the king in his court of chancery, together with the general protection of all other infants in the kingdom. When, therefore a factualless child has no other guardian, the court of chancery has a right to appoint one (1): and from all proceedings relative thereto, an appeal lies to the house of the lords." Blackstone, III Commentaries 426, 427.

107. Id., at 427. See, Eyre v. Shaftsbury, 2 Piere Williams 103 (1722) for an exposition on how these equitable principles evolved through English case law.

108. Ex parte Daedler, 194 Cal. 320, 228 P. 467, 469 (1924).

> They believed that society's role was not to ascertain whether the child was 'guilty' or 'innocent,' but 'what is he, why has he become what he is, and what had best be done in his interest and in the interest of the state to save him from a downward career.' The child--essentially good, as they saw it--was to be made 'to feel that he is the object of [the state's] care and solicitude,' not that he was under arrest or on trial. The rules of criminal procedure were therefore altogether inapplicable. The apparent rigidities, technicalities, and harshness which they observed in both substantive and procedural criminal law were therefore to be discarded. The idea of crime and punishment was to be abandoned. The child was to be 'treated' and 'rehabilitated' and the procedures, from apprehension through institutionalization, were to be 'clinical' rather than punitive.[109]

The juvenile court judge was envisioned as a paragon of fatherly concern[110] and "the juvenile court's procedures were fashioned so as to accord the judge the greatest possible opportunity to exercise a quasi-parental influence over the impressionable child."[111]

2. Analysis of the Underlying Assumptions of the Juvenile Court System -

While the enunciated objectives of juvenile reform were lofty, the underlying assumptions upon which the humanitarian system for helping children were based are suspect when examined in retrospect. It has been suggested that the early reforms were "(1) a retrenchment in correctional practices, (2) a regression in poor-law policy, (3) a reaction to the phenomenon of immigration, [and] (4) a reflection of the repressive side of Quaker education."[112] Surely, the assumptions underlying juvenile court reform were paternalistic.[113]

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109. In re Gault, 387 U.S. 1, 15, 16 (1967); See, Fox, Juvenile Justice Reform: An Historical Perspective; 22 Stan. L. Rev. 1187 (1970); Mack, The Juvenile Court, 23 Harv. L. Rev. 104 (1909); Platt, The Child Savers, The Invention of Delinquency (2d ed. 1977)
110. [It is]"absolutely essential that he be a trained lawyer thoroughly imbued with the doctrine that ours is a 'government of laws and not of men.' He must, however, be more than this. He must be a student of and deeply interested in the problems of philanthropy and child life, as well as a lover of children. He must be able to understand the boy's point of view and ideas of justice; he must be willing and patient enough to search out the underlying causes of the trouble and to formulate the plan by which, through the cooperation, oftentimes, of many agencies, the cure may be effected." Mack, supra. at 119.
111. Note, Rights and Rehabilitation in the Juvenile Courts, 67 Colum. L. Rev. 281 (1967).
112. Fox, supra. at 1195, where a detailed analysis of these theses may be found.
113. E.g. "The judges of the juvenile court, recognized that the lack of proper home care can best be supplied by the true foster parent." Mack, supra. at 105.

Not surprisingly, they were also sexist.[114]

3. Effect of the Convergence of Criminal Responsibility of Children with the Concept of Parens Patriae -

A. Jury Trial

1. Introduction -

The salient and immediate effect of the state statutes creating juvenile courts was the annullation of the protection for juveniles of constitutional criminal procedures. Parens patriae was ascendant and provided the rationale for upholding the statutes[115] and denying constitutional protections, including the right to a trial by jury.[116]

In 1971, the United States Supreme Court in McKeiver v. Pennsylvania,[117] held that there is no constitutional right to a trial by jury in a juvenile court adjudication. In summary, Mr. Justice Blackmun, writing for a plurality of the Court, stated that a jury trial, if required as a matter of constitutional precept, will remake the juvenile proceeding into a full adversary process and will put an effective end to what has been the idealistic prospect of an intimate, informal, protective proceeding....Meager as has been the hoped-for advance in the juvenile field, the alternative would be regressive ... and would tend once again to place the juvenile squarely in the routine of the criminal process.[118] The supremacy of the concept of parens patriae in juvenile proceedings was highlighted in the conclusion of the plurality opinion. There, the Court stated that equating the adjudicative phase of the juvenile proceeding with a criminal trial ignores the aspect of fairness, concern, sympathy and parental attention inherent in the juvenile court system.[119]

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114. E.g. [In reference to children in adult correctional facilities] "The result of it all was that instead of the state's training its bad boys so as to make them decent citizens, it permitted them to become the outlaws and outcasts of society; it criminalized them by the very methods that it used in dealing with them. It did not aim to find out what the accused's history was, what his heredity, his environments, his associations; it did not ask how he had come to do the particular act which had brought him before the court. It put but one question, 'Has he committed this crime? It did not inquire, 'What is the best thing to do for this lad?' It did not even punish him in a manner that would tend to improve him; the punishment was visited in proportion to the degree of wrongdoing evidenced by the single act; not by the needs of the boy, not by the needs of the state." Mack, supra. at 107.
115. See, cases listed at n. 92 Horowitz and Nickerson, McKeiver v Pennsylvania: A Retreat in Juvenile Justice, 38 Brooklyn L. Rev. 650, 658 (1972).
116. See, e.g., In re Turner, 94 Kan. 115 145 P. 871 (1915), where the court stated that "Statutes of this kind are paternal, rather than criminal, so that a jury may not be demanded as a matter of constitutional right." Id., at 873.
117. 403 U.S. 528.
118. Id., 545-550.
119. Id., at 500.

The McKeiver decision has been the subject of extensive commentary.[120] Not surprisingly, McKeiver has been followed in the federal courts[121] and has greatly influenced the thinking of state courts[122] on the issue of trial by jury for juveniles.

2. The Statutory Provisions of the Several States with Regard to Trial by Jury for Juveniles -

The great majority of the states do not at this time provide jury trials in juvenile proceedings.[123] Since most states have waiver provisions,[124] however, juveniles accused of major crimes are often transferred into the criminal justice system and, therefore, become entitled to a trial by jury.

In light of the IJA/ABA Standards recommendation that juveniles be granted the right by law to "demand trial by jury in adjudication proceedings when respondent has denied the allegations of the petition,"[125] an examination of the state statutes that do provide for trial by jury in juvenile proceedings is informative.

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120. See, e.g. Horowitz and Nickerson, McKeiver v. Pennsylvania: A Retreat in Juvenile Justice, 38 Brooklyn L. Rev. 650 (1972); Juvenile Problems--Trial by Jury in Adjudicational Stage of State Juvenile Court Delinquency Proceedings not Constitutionally Required, 28 U. Kan. L. Rev. 369 (1972); Ketcham, McKeiver v. Pennsylvania: The Last Word on Juvenile Court Adjudications? 57 Cornell L. Rev. 561 (1972); Note, Constitutional Law - Due Process: No Constitutional Right to Trial by Jury for Juveniles in Delinquency Proceedings, 56 Minn. L. Rev. 249 (1971); Note, Constitutional Law - Jury Trials in Juvenile Court - Juveniles in Delinquency Proceedings not Constitutionally Guaranteed the Right to a Jury Trial, 24 Vand. L. Rev. 1281 (1971); Note, Constitutional Law - Right to Trial by Jury in Juvenile Delinquency Proceedings, 9 Duquesne L. Rev. 651 (1971); Note, Juvenile Courts - Juveniles in Delinquency Proceedings are not Constitutionally Entitled to the Right of Trial by Jury - McKeiver v. Pennsylvania, 70 Mich. L. Rev. 171 (1971); Note, McKeiver v. Pennsylvania: A Retreat in Juvenile Justice, 38 Brooklyn L. Rev. 650 (1972); Note, The Juvenile Jury Trial Case - A Regrettable "Policy Decision," 32 Louisiana L. Rev. (1971).
121. United States v. Hill, 583 F.2d 1072 (4th Cir. 1976); United States v. Cuomo, 525 F.2d 1285 (5th Cir. 1976); United States v. Torres, 500 F. 2d 944 (2d Cir. 1974); United States v. King, 482 F.2d 454 (6th Cir. 1973); United States v. Salcido-Medina, 483 F.2d 162 (9Cir. 1973); United States v. James, 464 F.2d 1228 (9th Cir. 1972); Cotton v. United States, 446 F.2d 107 (8th Cir. 1971).
122. See, e.g. Robinson v. State, 227 Ga. 140, 179 S.E. 2d 248 (1971); In re McCloud, 110 R.I. 431, 293 A.2d 512 (1972); Rusecki v. State, 56 Wis.2d 299, 201 N.W.2d 832 (1972); In re J.T., 290 A.2d 821 (1972).
123. See, Statutory Appendix.
124. See
125. IJA/ABA, Adjudication, Standard 4.1(A).

a. Alabama

While there is no express statutory provision providing for trial by jury for juveniles, case law in Alabama has held that "a juvenile court may, in its discretion grant a juvenile's motion for jury trial in a delinquency proceeding even though such person enjoys no constitutional or statutory right to demand one."[126] Such a jury serves as an advisory jury only.

b. Alaska

While in Alaska an informal hearing may be held, the statute is explicit in stating that the provision allowing informal hearings may not "be applied in such a way as to deny a child his rights ... to a trial by jury."[127] Further, the highest state court in Alaska has held that "whenever a child in a delinquency proceeding is charged with acts which would be a crime, subject to incarceration if committed by an adult, the Alaska Constitution guarantees him the right to jury trial."[128] The Alaska court noted in dicta that if an analysis of their constitutional requirements lead them to believe that they applied to children, the court had no authority to defer to a "popular social theory" and deny the child's constitutional rights.[129]

c. Colorado

Under the Colorado statute the child, his parent or guardian, or any interested party or the court on its own motion may demand a jury trial in adjudicatory hearings on delinquency, a child in need of supervision, or neglected or dependent child proceedings.[130] If a jury is not demanded, the right to a jury trial is deemed to have been waived.[131]

d. Indiana

In all cases where a child is committed to a state or other institution, the child is entitled to a trial by jury of twelve if he wishes it.[132] This statute applies to placement in a public hospital or confinement with adult convicts. In a juvenile delinquency proceedings, however, no right to jury trial is provided by statute.[133] There is in Indiana, however, a waiver provision for persons fourteen and over who are accused of acts which would be crimes if committed by an adult.[134]

e. Iowa

Iowa has no statutory provision for trial by jury in juvenile adjudications.

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126. In re State ex rel. Simpson, 288 Ala. 535, 263 So2d 137 (1972).
127. Alaska Stat. (Supp. 1974), Sec. 47.10.070.
128. R.L.R. v. State, 487 P.2d 27, 33 (1971).
129. Id., at 31.
130. Colo. Rev. Stat. § 19-1-106(4)(a)(I) (1973).
131. Colo. Rev. State. § 19-1-106(4)(a)(II) (1973).
132. Ind. Stat. Ann. § 35-5-21 (1973).
133. Ind. Stat. Ann. § 31-5-7-15(b) (Burns, Supp. 1975).
134. Ind. Stat. Ann. § 31-5-7-14 (Burns, Supp. 1975).

Under Iowa case law,[135] however, a jury trial has been held to be constitutionally required if the only issue to be considered is if a crime was committed. If there are issues pertaining to general delinquency, however, and the crime is but the first evidence of that delinquency, the jury trial is not consititutionally required.

f. Kansas

While Kansas does not specifically provide for jury trials in juvenile adjudications on issues of fact, the statutory scheme essentially provides a mechanism for jury trials as an adjunct to the juvenile court system. In certain felony cases, the judge may refer the child to a district court for trial by jury. Upon a verdict that the child is a juvenile delinquent, the case is remanded to the juvenile court for judgment.[136] In addition, Kansas has a traditional transfer statute.[137] It should be noted that the Kansas statute gives discretion to the judge rather than providing a right to demand a jury to the accused juvenile.

g. Michigan

Any person interested may demand a jury trial in Michigan, or the court on its own motion may order a trial by jury.[138]

h. Montana

When a youth denies all the offenses alleged in a petition, the youth, his parent, guardian, or attorney may demand a jury trial. If there is no demand, the right is waived.[139] The jury's function in such cases is also defined by statute--"the jury's function shall be to determine whether the youth committed the contested offenses."[140]

i. New Mexico

In New Mexico "a jury trial on the issues of alleged delinquent acts may be demanded by the child, parent, guardian, custodian or counsel in proceedings on petitions alleging delinquency when the offense charged would be triable by jury if committed by an adult."[141] The jury is the trier of fact only. Jury trials are available in delinquency proceedings only.

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135. State ex rel. Shaw v. Breon, 244 Iowa 49,55 N.W.2d 565 (1952).
136. Kan. Stat. Ann. § 38-808(a)(1973).
137. Kan. Stat. Ann. § 38-808(b)(1973).
138. Mich. Stat. Ann. § 27.3178(1962).
139. Mont. Code Ann.§ 10-1220(1)(West Supp. 1975).
140. Mont. Code Ann.§ 10-1220(2)(West Supp. 1975).
141. N.M. Stat. Ann. § 13-14-28(1976).

j. Oklahoma

Under the Oklahoma statute in adjudicatory hearings on the issues of delinquency, a child in need of supervision, or deprivation, the child informed against or any person entitled to service of summons has the statutory right to demand a trial by jury.[142] The court on its own motion may also call for a jury of six to try the case.[143]

k. South Dakota

In South Dakota, the court on its own motion may order a jury trial.[144] No right to a jury trial upon demand is given to the juvenile.

i. Tennessee

While the Tennessee statute provides that hearings shall be informal and without a jury,[145] a Tennessee appellate court has held that "there is ... no constitutionally sufficient reason to deprive the juvenile of the right to a jury trial where the charge of delinquency brought against him is predicated upon the commission of an offense declared to be a felony by the Legislature of the State of Tennessee."[146]

m. Texas

The Texas law provides one of the strongest provisions for jury trial. "At the beginning of the adjudicatory hearing, the juvenile court judge shall explain to the child and his parents, guardian or guardian ad litem ... the child's right to trial by jury."[147] Unless trial by jury is waived, trial will be by jury. Moreover, jury trial cannot be waived in felony cases.[148] The statute clearly spells out the distinction between an adjudicatory hearing and a dispositional hearing. There is no right to a jury at the dispositional hearing.[149]

n. West Virginia

Any interested person may demand a trial by jury or the court on its own motion may order a trial by jury to try any question of fact.[150]

o. Wisconsin

A jury trial is provided by statute if one is demanded.[151]

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142. Okla. Stat. Ann. tit. 10, § 1110 West (Supp. 1977)
143. Id.
144. S.D. Code Laws § 26-8-31 (1977).
145. Tenn. Code Ann. § 37-224(a) (1977).
146. Arwood v. State, 62 Tenn. App. 453, 463 S.W.2d 943 (1970).
147. Tex. Code Ann. tit. 3, § 54.03(b) (Vernons 1975).
148. Tex. Code Ann. tit. 3, § 54.03(c) (Vernons 1975).
149. Tex. Code Ann. tit. 3, § 54.04(a) (Vernons 1975).
150. W. Va. Code Ann. § 48 (Supp. 1978).
151. Wis. Stat. Ann. § 48-25(2)(Supp. 1978).

p. Wyoming

A party against whom a petition is filed or the county attorney may demand a trial by jury at an adjudicatory hearing.[152] The right is deemed waived if it is not demanded.[153]

3. Public Trial

Public trials were also influenced by the ascendency of the parens patriae concept. If the informality, flexibility, and confidentiality of juvenile proceedings, lauded by the United States Supreme Court in McKeiver, are dominant, public trial is the antithesis of these values. Thus, the great majority of the states do not provide for public trial at the demand of the juvenile in adjudicatory proceedings.[154] A greater number of states, however, provide for public trial at the discretion of the court.[155]

4. The Federal Approach to Jury Trial and Public Trial for Juveniles -

Until 1938 "juvenile offenders were prosecuted in our courts in the same manner as adults."[156] Then, in 1938, the Federal Juvenile Delinquency Act[157] was passed which expressly precluded jury trials in juvenile proceedings.[158] Under the federal law a juvenile alleged to have committed an illegal act punishable by death or life imprisonment was to be proceeded against as a juvenile if he consented to the prosecution and unless the Attorney General, in his discretion, expressly directed otherwise.[159] In 1968, prior to the United States Supreme Court's decision in McKeiver, the United States District Court for the Southern District of New York held that this waiver provision impaired a juvenile's free exercise of his Sixth Amendment right and was an invalid denial of that constitutional right.[160]

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152. Wyo. Stat. Sec. 14-8-124(C) (1977).
153. Id.
154. Public trial by demand of the juvenile is provided in a few states. See, e.g., R.L.R. v. State, 487 P.2d 27 (1970); John Doe v. State, 487 P.2d 47 (1971); Me. Session Laws of 1977, ch. 520, § 330 7(2)(a)(b); N.M. Stat. Ann. § 13-14-28 (1970); Ore. Rev. Stat. § 419.498 (1977); S.D. Code Laws § 26-8-32 (1977); Va. Code § 16.1-302 (1975).
155. See Statutory Appendix.
156. Nieves v. United States, 280 F. Supp. 994, 999 (1968); See, United States v. Bordus, 154 F. Supp. 214 (N.D. Ala. 1957), aff'd., 256 F.2d 458 (5th Cir. 1958).
157. Nieves, supra. at 999.
158. 18 U.S.C. § 5033 (Supp. 1977).
159. 18 U.S.C. § 5032 (Supp. 1977).
160. Nieves v. United States, supra.

In 1974, post McKeiver, the federal law regarding juveniles was amended.[161] Extensive due process provisions were incorporated into the new law, but the statute was completely silent as to the right of a juvenile to a trial by jury.[162] As to public trial, the 1974 revised statute is also silent.

Interestingly, the bill as it was originally presented contained provisions stating that a juvenile was entitled to all the rights that would be accorded to an adult in a criminal trial, except the right to a grand jury.[163] Provisions were also made for a right to a public trial limited in that the press would only be permitted on the condition that information which would identify the individual juvenile would not be disclosed.[164] These innovations in the federal law died while aborning.

5. Erosion of the Treatment Concept and the Efficaciousness of the Juvenile Court System -

In 1967 the President's Commission on Law Enforcement and Administration of Justice Task Force Report on Juvenile Delinquency and Youth Crime prefaced its remarks upon the premise that the juvenile court system was a failure.[165] Moreover, the Commission observed that "while statutes, judges, and commentators still talk the language of compassion, help and treatment, it has become clear that in fact the same purposes that characterize the criminal law for adult offenders - retribution, condemnation, deterrence, incapacitation - are involved in the disposition of juvenile offenders too."[166]

Confidentiality of juvenile proceedings is one of the major tenets of the those who place faith in the treatment model. While believers in the rehabilitative aspirations of the juvenile justice system cling to the notion of confidentiality, such confidentiality as there is, is perforated, if not rent, by employers, the FBI, and the military.[167]

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161. Pub. Law 93-415, Title V, § 513, Sept. 7, 1974, 88 Stat. 113.
162. Pub. Law 93-415.
163. Pub. Law 93-415, Title III, § 207 amending 18 U.S.C. § 5037, 3 U.S. Cong. & Adm. News 5321 (West 1974).
164. Id.
165. E.g., "one reason for the failure of the juvenile courts has been the community's continuing unwillingness to provide the resources - the people and facilities and concern - necessary to permit them to realize their potential and prevent them from taking on some of the undesirable features typical of lower criminal courts in this country. ... The dispositional alternatives available even to the better endowed juvenile courts fall far short of the richness and relevance to individual needs envisioned by the court's founders. ...Further, no one really knows how to prevent delinquency or to rehabilitate those who commit delinquent acts." President's Commission on Law Enforcement and Administration of Justice, Report of the Task Force on Juvenile Delinquency and Youth Crime, 7, 8, (1967) hereinafter President's Commission .
166. Id., at 8. N.B., The President's Commision did not, however, recommend public trial or jury trial. Id., at 38.
167. Note, Jury Trials for Juveniles: Rhetoric and Reality, 8 Pacific L.J. 811, 826 (1977).

Indeed, the United States Supreme Court has held in Davis v. Alaska,[168] that, in a criminal prosecution a juvenile delinquency adjudication may be used to impeach a witness. Chief Justice Burger, writing for the majority stated that "the State's policy interest in protecting the confidentiality of a juvenile offender's record cannot require yielding of so vital a constitutional right as the effective cross-examination for bias of an adverse witness."[169] Thus, it can be concluded that confidentiality in juvenile proceedings is a myth.

Rehabilitation may also be a myth. The logical positivism expressed by the early juvenile reformers has been subverted by the evolution that has occurred in the behavioral sciences since the beginning of the 1900's. The idealistic, yet simplistic, notions expressed by the reformers[170] fail to recognize the complexities of the causes and cures for, if indeed there be any cures for,[171] delinquent behavior in the 1970's. Moreover, observers of the courts note that no satisfactory device has been developed for predicting future behavior and that rehabilitation processes are most often based on intuitive reactions, best intentions and good will, but that "expertise, the keystone of the whole venture, is lacking."[172] Thus, the juvenile justice system, as it is now constituted, does not meet the goals which were set forth as the justification for its denial of legal protections and procedures to juveniles. Indeed it may be argued that placement for rehabilitation, no matter how well intended is a deprivation of liberty, if not an outright punishment, and the person for whom placement is desired should be entitled to a jury trial on the facts that precipitate the adjudication of juvenile delinquency.

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168. 415 U.S. 308 (1974).
169. Id., at 320.
170. E.g., "A thorough investigation, usually made by the probation officer, will give the court much information bearing on the heredity and environment of the child. ... The physical and mental condition of the child must be known, for the relation between physical defects and criminality is very close. It is, therefore, of the utmost importance that there be attached to the court, ... a child study department, where every child before hearing, shall be subjected to a thorough psycho-physical examination. In hundreds of cases, the discovery and remedy of defective eyesight or hearing or some slight surgical operation will effectuate a complete change in the character of the lad. ... The judge on the bench, looking down upon the boy standing at the bar, can never evoke a proper sympathetic spirit. Seated at a desk, with the child at his side, where he can on occasion put his arm around his shoulder and draw the lad to him, the judge, while losing none of his judicial dignity, will gain immensely in the effectiveness of his work." Mack, supra. at 120.
171. "No one really knows how to prevent delinquency or to rehabilitate those who commit delinquent acts. President's Commission 8.
172. Note, Juvenile Delinquents: The Police, State Courts, and Individualized Justice, 79 Harv. L. Rev. 775, 809 (1966).

6. Divergence from the Experience of the Past 70 Years: The New York Experience as an Illustration -

New York state in recent years has developed a hybrid system of juvenile justice. In New York, there is no statutory, or waiver, provision for transferring certain juveniles to the adult criminal justice system. Nor is there any provision in New York for trial by jury in fact-finding hearings in juvenile proceedings. Instead, New York has tried to appease both those who want to be tough on violent juveniles and those who want to protect children and has developed a cumbersome approach that lends itself to accomplishing neither goal.

Prior to 1976, New York state was one of the few states that had a "pure" juvenile justice system. No person under the age of sixteen who committed an act which would be a crime if committed by an adult was subject to anything other than treatment. If a child was found to be "cured," the child could petition the court for a termination of placement,[173] since the only rationale for holding the child was that the child needed help. There were no transfer provisions in the New York law, so even the most violent of offenders could not be transferred to adult criminal court.

In response to the reported increase in the frequency and severity of crimes committed by juveniles, the New York State Legislature in the 1976 session enacted the Juvenile Justice Reform Act.[174] The express purpose of Article 7 of the New York Family Court Act was redefined to include, for the first time, consideration of the needs of the community.[175] To this end, the Legislature created restrictive placement. Rejecting proposals to transfer seriously violent juveniles to the adult criminal justice system, the Legislature adopted restrictive placement as a method of dealing with the juveniles within the juvenile system.[176]

The 1976 amendments defined new terms - designated felony act,[177]

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173. N.Y. Fam. Ct. Act, Art. 7, Part 6 (McKinney's Supp. 1977-1978).
174. 1976 N.Y. Laws, ch. 878 (McKinney 1976).
175. N.Y. Fam. Ct. Act § 711 (McKinney's Supp. 1977-1978). "In any juvenile procedure under this article, the court shall consider the needs and best interests of the respondent as well as the need for protection of the community."
176. N.Y. Fam. Ct. Act § 753-a, Gottfried and Barsky, Practice Commentaries, McKinney's Supp. 1977-1978).
177. N.Y. Fam. Ct. Act, § 712(h) (McKinney's Supp. 1977-1978), which states "Designated felony act - an act committed by a person fourteen or fifteen years of age which, if done by an adult, could be a crime (i) defined in sections 125.27 (murder in the second degree); 135.25 (kidnapping in the first degree); or 150.20 (arson in the first degree) of the [N.Y.] penal law; (ii) defined in sections 120.10 (assault in the first degree; 125.20 (manslaughter in the first degree); 130.35 (rape in the first degree); 130.50 (sodomy in the first degree); 135.20 (kidnapping in the second degree), but only where the abduction involved the use or threat of use of deadly physical force; 150.15 (arson in the second degree); or 160.15 (robbery in the first degree) of the [N.Y.] penal law; or (iii) defined in the penal law as an attempt to commit murder in the first or second degree or kidnapping in the first degree.

secure facility,[178] and restrictive placement.[179]

178. N.Y. Fam. Ct. Act, § 712(j)(McKinney's Supp. 1977-1978), which states that a secure facility is "a residential facility in which a juvenile delinquent may be placed under this article, which is characterized by physically restraining construction, hardware and procedures, and is designated as a secure facility by the division for youth."

179. N.Y. Fam. Ct. Act, § 712(k)(McKinney's Supp. 1977-1978), which defines restrictive placement as placement pursuant to N.Y. Fam. Ct. Act §, 753-a (McKinney's Supp. 1977-1978), which states:

"1. Where the respondent is found to have committed a designated felony act, the order of disposition shall be made within twenty days of the conclusion of the dispositional hearing and shall include a finding, based on a preponderance of the evidence, as to whether, for the purposes of this article, the respondent does or does not require a restrictive placement under this section, in connection with which the court shall make specific written findings of fact as to each of the elements set forth in paragraphs (a) through (c) in subdivision two of this section as related to the particular respondent. If the court finds that a restrictive placement under this section is not required, the order of disposition shall be as provided in section seven hundred fifty-three, not including paragraph (d) of subdivision one. If the court finds that a restrictive placement is required, it shall continue the proceeding and enter an order of disposition for a restrictive placement. Every order under this section shall be a dispositional order, shall be made after a dispositional hearing and shall state the grounds for the order.

2. In determining whether a restrictive placement is required, the court shall consider: (a) the needs and best interests of the respondent; (b) the record and background of the respondent, including but not limited to the information disclosed in the probation investigation and diagnostic assessment; (c) the nature and circumstances of the offense, including whether any injury involved was inflicted by the respondent or another participant; (d) the need for protection of the community; and (e) the age and physical condition of the victim.

2-a. Notwithstanding the provisions of subdivision two of this section, the court shall order a restrictive placement in any case where the respondent is found to have committed a designated felony act in which the respondent inflicted serious physical injury, as that term is defined in subdivision ten of section 10.00 of the penal law, upon another person who is sixty-two years of age or more.

3. When the order is for a restrictive placement in the case of a youth found to have committed a designated class A felony act, (a) the order shall provide: (i) The respondent shall be placed with the division for youth for an initial period of five years. (ii) The respondent shall initially be confined in a secure facility for a period set by the order, to be not less than twelve nor more than eighteen months. (iii) After the period set under clause (ii) of this paragraph, the respondent shall be placed in a residential facility for a period of twelve months. (iv) The respondent may not be released from a secure facility or transferred to a non-secure facility during the period provided in clause (ii) of this paragraph, nor may the respondent be released from a residential facility during the period provided in clause (iii) of this paragraph.

(b) Notwithstanding any other provision of law, during the first twelve months of the respondent's placement, no motion, hearing or order may be made, held or granted pursuant to part six of this article; provided, pursuant to section seven hundred sixty-two of this act, but only upon grounds set forth in section 440.10 of the criminal procedure law. (c) During the placement or any extension thereof: (i) After the expiration of the period provided in clause three of paragraph (a) of this subdivision, the respondent shall not be released from a residential facility without the written approval of the director of the division for youth or his or her designated deputy director. (ii) The respondent shall be subject to intensive supervision whenever not in a secure or residential facility. (iii) The respondent shall not be discharged from the custody of the division for youth, unless a motion therefor under part six of this article is granted by the court, which motion shall not be made prior to the expiration of three years of the placement. (iv) Unless otherwise specified in the order, the division shall report in writing to the court not less than once every six months during the placement on the status, adjustment and progress of the respondent. (d) Upon the expiration of the initial period of placement, or any extension thereof, the placement may be extended, on a motion of any party, the division for youth or the court, after a dispositional hearing, for an additional period of twelve months, but no initial placement or extension of placement under this section may continue beyond the respondent's twenty-first birthday. (e) The court may also make an order pursuant to subdivision two of section seven hundred sixty.

4. When the order is for a restrictive placement in the case of a youth found to have committed a designated felony act, other than a designated class A felony act, (a) the order shall provide: (i) The respondent shall be placed with the division for youth for an initial period of three years. (ii) The respondent shall initially be confined in a secure facility for a period set by the order, to be not less than six nor more than twelve months. (iii) ... (iv) The respondent may not be released from a secure facility or transferred to a non-secure facility during the period provided by the court pursuant to clause (ii) of this paragraph, nor may the respondent be released from a residential facility during the period by the court pursuant to clause (iii) of this paragraph. (b) Notwithstanding any other provision of law, during the first six months of the respondent's placement, no motion, hearing or order may be made, held or granted pursuant to part six of this article; provided, however, that during such period a motion to vacate the order may be made pursuant to section seven hundred sixty-two of this act but only upon grounds set forth in section 440.10 of the criminal procedure law. (c) During the placement or any extension thereof: (i) After the expiration of the period provided in clause (iii) of paragraph (a) of this subdivision, the respondent shall not be released from a residential facility without the written approval of the director of the division for youth or his or her designated deputy director. (ii) The respondent shall be subject to intensive supervision whenever not in a secure or residential facility. (iii) The respondent shall not be discharged from the custody of the division for youth. (iv) Unless otherwise specified in the order, the division shall report in writing to the court not less than once every six months during the placement on the status, adjustment and progress of the respondent.

Further, the amendments allowed the County Attorney to be assisted by members of the District Attorney's Staff,[180] provided that the probation service might not attempt to adjust some cases without the prior written approval of a judge,[181] and eliminated in designated felony cases the judge's discretionary right to prevent disclosure of portions of the juvenile's reports and histories to either the respondent or the petitioner.[182]

Restrictive placement[183] was the most significant innovation made by the Juvenile Justice Reform Act. Once restrictive placement is ordered by court, the delinquent must remain in placement for 12 months, if the placement results from an adjudication on a class A designated felony.[184] During the period of restrictive placement, the right to petition the court to stay the execution, to set aside, modify, terminate, or vacate the disposition is suspended. Thus, the Legislature created a definite sentence of placement nearly indistinguishable from definite sentences imposed upon adults by the Penal Law.[185] Further, in mandating the minimum period of restrictive placement, when restrictive placement has been found to be needed at all, the Legislature introduced two other concepts of the criminal justice process previously unknown in the juvenile system in New York. First, the length of the commitment was to be determined by the act committed rather than by the needs of the child, and second, the sentence was mandatory. In effect, the Legislature determined that a child, when at the time of his dispositional hearing, required restrictive placement would continue to require restrictive placement for the entire period of the minimum sentence. Prior to the enactment of this statute, the court was only required to determine that at the time of the dispositional hearing the needs of the child were for placement in an institution and that at any time during that initial period, if the child was successfully rehabilitated, he was entitled to released. Consistent with this philosophy of treatment was the provision that if at the end of the initial placement the child was not successfully rehabilitated, then, the period of placement could be extended. Under the 1976 law, once the court made a finding that restrictive placement was needed at the time of the disposition, a minimum sentence was mandated, a result which is more harsh on the juvenile than is the criminal procedure for the adult who is entitled to an indeterminate sentence in nearly all cases.[186]

(d) Upon the expiration of the initial period of placement or any extension thereof, the placement may be extended, on motion of any party, the division for youth or the court, after a dispositional hearing, for an additional perod of twelve months, but on initial placement or extension of placement under this section may continue beyond the respondent's twenty-first birthday. (e) The court may also make an order pursuant to subdivision two of section seven hundred sixty."

180. N.Y. Fam. Ct. Act, § 254(c)(McKinney's Supp. 1977-1978).
181. N.Y. Fam. Ct. Act, § 734(a)(ii)(McKinney's Supp. 1977-1978).
182. N.Y. Fam. Ct. Act, § 750(McKinney's Supp. 1977-1978).
183. N.Y. Fam. Ct. Act, § 753-a, supra., at n. 180
184. Id.
185. N.Y. Penal Law § 70.20(2)(McKinney's Supp. 1977-1978).
186. N.Y. Penal Law § 70.00(McKinney's Supp. 1977-1978).

The distinction between indeterminate and determinate sentencing is not semantic, but indicates fundamentally different public policies. Indeterminate sentencing is based upon notions of rehabilitation, while determinate sentencing is based upon a desire for retribution or punishment.

Not satisfied with these more stringent provisions of the Family Court Act, the New York State Legislature in 1977 and 1978 made sweeping changes in the laws concerning juveniles. First, the designated felony provisions of the Family Court Act were expanded[187] to include both new persons,[188] thirteen year olds for certain offenses, and new designated felony acts,[189] assault in the second degree and robbery in the second degree. Then, a whole new status of criminal offender, the juvenile offender was created[190] and a whole new category of offense, the violent felony was established.[191]

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187. 1978 N.Y. Laws, ch. 478, § 2, amending N.Y. Fam. Ct. Act § 712(h) (McKinney 1978).
188. Id.
189. Id.
190. 1978 N.Y. Laws, ch. 481, § 27, adding N.Y. Penal Law § 10.00(18)(McKinney 1978. The term "juvenile offender" as well as appearing in § 10 of the Penal Law will appear in § 1.20 of the New York Criminal Procedure Law (CPL). The definition will also be incorporated in the definition of"infancy," which will not be available as a defense, in § 30 of the Penal Law and in the list of crimes for which a grand jury can indict a person under 16, to be contained in a new section, § 190.71, of the CPL. "Juvenile offender" means (1) a person 13, 14, or 15 years old who is criminally responsible for acts constituting murder in the 2nd degree ... and (2) a person 14 or 15 years old who is criminally responsible for ... kidnapping 1, arson 1, assault 1, manslaughter 1, rape 1, sodomy 1, burglary 1, burglary 2, arson 2, robbery 1, robbery 2, attempted murder 2, and attempted kidnapping 1.
191. 1978 N.Y. Laws, ch. 481, adding N.Y. Penal Law § 70.02 (McKinney 1978). (1) A violent felony offense is a class B violent felony offense, a class C violent felony offense or a class D violent felony offense. (a) Class B violent felony offenses: an attempt to commit the Class A-1 felonies of murder in the second degree as defined in section 125.25 (of the Penal Law), kidnapping in the first degree as defined in section 135.25, and arson in the first degree as defined in section 150.20, manslaughter in the first degree as defined in section 125.20, rape in the first degree as defined in section 130.35, sodomy in the first degree as defined in section 130.50, kidnapping in the second degree as defined in section 135.20, burglary in the first degree as defined in section 140.30, arson in the second degree, as defined in section 150.15, robbery in the first degree as defined in section 160.15 and criminal possession of a dangerous weapon in the first degree as defined in section 265.04. (b) Class C violent felony offenses: an attempt to commit any of the class B felonies set forth in paragraph (a); assault in the first degree as defined in section 120.10, burglary in the second degree as defined in section 140.25, robbery in the second degree as defined in section 160.10 and criminal possession of a weapon in the second degree as defined in section 265.03. (c) Class D violent felony offenses: an attempt to commit any of the class C felonies set forth in paragraph (b); assault in the second degree as defined in section 120.05, and sexual abuse in the first degree as defined in section 130.65.

Moreover, a whole new sentencing structure has been erected for juvenile offenders. While not as stringent as the adult sentencing provisions of the law, the sentences approved are considerably more stringent than are juvenile placements.[192] Youthful offender status was also changed by the 1978 amendments.[193]

The procedural provisions of the new law are notable for their complexity. Essentially, the progress of the juvenile offender through the criminal justice system parallels that of the adult offender, but at various points along the way, numerous special procedures will apply to the juvenile offender (JO) and the interface may reroute the JO from the criminal system to the juvenile system. Presumably the JO will be arraigned before a local criminal court in the same manner as an adult.[194] The JO may be admitted to bail, released, or ordered to preventive detention if there is a serious risk that the JO may commit a crime before the court return date.[195] Next, a preliminary hearing is held to determine if there is reasonable cause to believe that the JO committed one of the enumerated juvenile offender crimes.[196] At this stage of the proceeding, the charge against the JO is dismissed if there is no reasonable cause to believe that a criminal act was committed, removed to family court, if there is reasonable cause to believe a criminal act was committed but not a crime for which a juvenile is criminally responsible, or, if reasonable cause is found, the case may be transmitted to a superior court for action by the grand jury.[197]

Again, at the grand jury stage of the proceeding, various outcomes may occur. The grand jury may indict a juvenile offender only for specifically enumerated crimes.[198] If the grand jury finds that the juvenile did not commit one of the enumerated acts but did commit an act which would constitute an act of juvenile delinquency, the grand jury may vote to remove the case to family court, or the grand jury may dismiss the charge or indict the JO.[199]

Once an indictment is entered, an elaborate set of plea bargaining guidelines become operative.[200] In some cases a JO, upon the district attorney's recommendations and in the interests of justice, if the court concurs, may plea bargain down to a "charge of juvenile delinquency." Such a plea shall then be deemed to be a juvenile delinquency fact determination.[201] When murder in the second degree is the charge, fourteen and fifteen year olds must plead to a crime for which they are criminally responsible.[202] For other crimes, and for a thirteen year old indicted for murder in the second degree, when the District Attorney recommends removal, JO's may plead to a crime for which they are not criminally responsible.[203]

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192. Compare N.Y. Penal Law § 70.05 (McKinney Supp. 1978) and N.Y. Fam. Ct. Act § 753 (McKinney 1977).
193. 1978 N.Y. Laws, ch. 481, § amending N.Y. Crim. Pro. Law § 720.10 (McKinney
194 1978).
194. N.Y. Crim. Pro. Law § 180.75(1)(McKinney 1978).
195. N.Y. Crim. Pro. Law § 180.75(1)(McKinney 1978).
196. N.Y. Crim. Pro. Law § 180.75(3)(a)(McKinney 1978).
197. N.Y. Crim. Pro. Law § 180.75(3)(McKinney).
198. N.Y. Crim. Pro. Law § 190.71 (McKinney 1978).
199. N.Y. Crim. Pro. Law § 190.60 (McKinney 1978).
200. N.Y. Crim. Pro. Law § 220.10 (McKinney 1978).
201. N.Y. Crim. Pro. Law § 220.10(h)(iii)(McKinney 1978).
202. N.Y. Crim. Pro. Law § 220.10(h)(i)(McKinney 1978).
203. N.Y. Crim. Pro. Law § 220.10(h)(ii)(McKinney 1978).

If the District Attorney does not recommend removal, then the JO may only plead guilty to a crime for which juveniles are criminally responsible.[204] Further, juveniles who have been indicted for more than one crime may not plead guilty to an offense for which they are not criminally responsible on the condition that it constitutes a complete disposition of one or more of the other indictments against the defendant.[205]

If there is no admission, the case goes to trial. Since no new provisions have been added to the Criminal Procedure Law, it is presumed that the trial of a JO will be identical to that of an adult offender, including the right to a trial by jury, a constitutional right not available in the "treatment" setting of the family court.[206]

However, even after a jury trial, the case may still find its way to family court after a verdict has been rendered. If the jury returns a verdict of guilty to an offense for which a juvenile is not criminally responsible and no verdict of guilty is entered for a juvenile offense, and if the juvenile is not awaiting or serving sentence on another criminal conviction, then the verdict is set aside and replaced by a Finding of juvenile delinquency and the court orders that the case be removed to Family Court for disposition.[207] In certain other cases the verdict, even if it is one of guilty, may still be set aside upon the submission by the district attorney of a memorandum supporting the removal to Family Court in the interests of justice.[208] A plea of guilty to a crime for which juveniles are not criminally responsible is then entered and the plea is deemed to be the equivalent to a fact-finding of juvenile delinquency.[209]

This hybrid legislation creates murkiness in both theory and practice. The treatment premises of the juvenile justice system are undermined, for what is to be done with the child remanded to Family Court for whom there is not treatment available? The punishment precepts of the criminal justice system are also undermined, for there is a great likelihood that very few juveniles will actually proceed from arraignment to sentencing in the criminal justice system. Accordingly, New York has created a hotchpot that leaves a great deal of what happens to any particular child up to Lady Luck -- how the arresting officer reacts to him, what kind of evidence can be marshalled against him, what the attitude of the District Attorney is towards varieties of youthful crime, factors which, of course it may be argued, apply to anyone who allegedly commits a criminal act, but which put the fourteen and fifteen year old in a particularly vulnerable position just because too many persons have unrestricted, de jure, unreviewable discretion to determine his future, and because, commonsensically, he may be unlucky and get the worst of both the criminal justice and juvenile justice systems.

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204. N.Y.Crim.Pro.Law, § 220.30 (McKinney 1978).
205. N.Y.Crim.Pro.Law, § 220.30(c)(McKinney 1978).
206. See, In the Matter of Henry Felder, 93 Misc. 2d 369, 402 N.Y.S.2d 528 (Fam. Ct. Onondaga Cnty. 1978).
207. N.Y.Crim.Pro.Law, § 310.85, 725 (McKinney 1978).
208. N.Y.Crim.Pro.Law, § 330.25 (McKinney 1978).
209. N.Y.Crim.Pro.Law, § 330.5 (McKinney 1978).

7. Evolution in the Concept of Children as Persons with Individual Rights -

The idea that a child is a person with rights independent from those of his parents is a concept that has only come of age in the United States Supreme Court within the past few years. Previously, the Court concerned itself with the liberty of parents to bring up their children in a manner which the parents considered proper.[210] While recognizing "that the custody, care and nurture of the child reside first in the parents,"[211] the Court, by 1944, in the case of Prince v. Massachusetts, incorporated the percept of parens patriae into its holding that "the power of the state to control the conduct of children reaches beyond the scope of its authority over adults.[213]

Then, in the late 1960's the Court embarked upon a series of decisions that extended due process rights to juveniles. For instance, in Kent v. United States,[214] the Court raised a warning that fundamental due process rights must be applied to juvenile proceedings to assure a juvenile fundamental fairness and constitutionally required due process of law. In Kent, supra., a case involving waiver, the Court held that waiver proceedings were a "critically important" stage of a juvenile delinquency proceeding and that the juvenile is entitled to a hearing, including access by his counsel to the social records and probation or similar reports which presumably are considered by the court, and to a statement of reasons for the Juvenile Court's decision."[213]

Then, in the seminal case in the area, In re Gault,[216] the Court found that age alone should not determine whether or not a citizen was entitled to the protections of due process of law.[217]

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210. See, e.g.: Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923).
211. Prince v. Massachusetts, 321 U.S. 158 (1944).
212. Id.
213. Id., at 170.
214. 383 U.S. 541 (1966).
215. Id., at 557.
216. 387 U.S. 1 (1967).
217. The significance of the Gault decision, acknowledging that children are entitled to the constitutional protections provided by due process, become manifest when one considers previous Court decisions which consider the rights of a particular class. For instance, in Dred Scott v. Sandford, 19 How. 393 (1856), the Court held that people of African decent were not part of the "people of the United States" at the time the United States Constitution was adopted and was thus not a "citizen" who enjoyed the protection of the constitution. Similarly, in Roe v. Wade, 410 U.S. 113 (1973), the Court while upholding the right of a woman to have an abortion during the first trimester of her pregnancy noted that "the unborn have never been recognized in the law as persons in the whole sense." Id. at 162. Thus, Gault, in recognizing that persons under sixteen were entitled to enjoy the constitutional protections of due process of law, opened the door to granting the full panoply of constitutional rights to the accused in juvenile proceedings.

In Gault, the Court held that the juvenile was entitled to the particular due process rights of counsel and sufficient notice of the charge against him. The child was also found to enjoy the constitutional privilege against self-incrimination, the opportunity for cross-examination, and, further, the Court held that "absent a valid confession, a determination of delinquency and an order of commitment to a state institution cannot be sustained in the absence of sworn testimony."[218] Later, in In re Winship.[219] the Court further extended the child's right to due process by holding that in a juvenile delinquency proceeding, the charges must be proved beyond a reasonable doubt. More recently, in Breed v. Jones,[220] the Court found that a juvenile is entitled to full protection from double jeopardy as guaranted by the Fifth Amendment.

During this period the Court also made other decisions that recognized the independent rights of children. In the case of Tinker v. Des Moines School District,[221] For example, the Court found that First Amendment rights apply to students as well as to teachers. In another important children's rights case, Goss v. Lopez,[222] the Court held that students have a sufficient property right in educational benefits and a sufficient liberty interest in reputation to be entitled to protection under the due process clause of the Fourteenth Amendment when facing temporary suspension from school. In a truly precedent shattering case, Planned Parenthood of Central Missouri v. Danforth,[223] the Court upheld the right of a minor to have an abortion without the consent of either parent. Mr. Justice Blackman, speaking for the Court said:

> Constitutional rights do not mature and come into being magically only when one attains the state defined age of majority. Minors, as well as adults are protected by the Constitution and possess constitutional rights.[224]

Thus, McKeiver v. Pennsylvania,[225] which denies the right to a trial by jury to a juvenile, is an anomaly in the long series of cases in which the Court has recognized and expanded the constitutionally protected rights of children. Indeed, it is interesting to note that in Breed, decided three years after McKeiver, the Court held that the Fifth Amendment right of double jeopardy, a right which in its constitutional content protects a person from being "twice put in jeopardy of life or limb,"[226] a result that would be difficult to conceptualize in the benign setting of the juvenile court described in McKeiver. In Breed, the Court restated the proposition first articulated in Gault that:

> We believe it is simply too late in the day to conclude ... that a juvenile is not put in jeopardy at a proceeding whose object is to

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218. Id., at 57
219. 397 U.S. 358 (1970).
220. 431 U.S. 519 (1975).
221. 393 U.S. 503 (1969).
222. 419 U.S. 565 (1975).
223. 428 U.S. 52 (1976).
224. Id., at 75.
225. 403 U.S. 528 (1971).
226. U.S. Const. Amend. V. (Emphasis added).

> determine whether he had committed acts that violate a criminal law and whose potential consequences include both the stigma inherent in such determination and deprivation of liberty for many years. For it is clear under our cases that determining the relevance of constitutional policies, like determining the applicablilty of constitutional rights, in juvenile proceedings, requires that courts eschew "the civil labels-of-convenience which have been attached to juvenile proceedings."[227]

In light of the language in the recent cases, Breed and Danforth, for example, the fact that the Court rejected the constitutional necessity of a trial by jury in a juvenile adjudication in 1971 in a plurality decision, which left the door open to the states to allow jury trials to juveniles if they so desired, does not firmly close the door to this constitutional protection for children in the future.

8. A Sampling of Case Law on the Issues of Public Trial and Jury Trial -

A. Public Trial

In the case of In re Oliver,[228] the Supreme Court of the United States noted that "without exception all courts have held that one accused is at the very least entitled to have his friends, relatives and counsel present, no matter with what offense he may be charged.[229] This reference to public trial,is, of course, in the context of adult criminal proceedings. Reasoning that a juvenile proceeding was not a criminal proceeding one federal court found that no public trial was required in a juvenile proceeding in a case where the juveniles had been transferred to a criminal court and, therefore, were "entitled to all the protections and privileges accorded to accused persons in criminal cases."[230] In a case where a child was adjudicated a delinquent and sent to a state training school after his only parent and brothers and sisters were excluded from the hearing because they were witnesses, the Supreme Court of Mississippi held the lower court order to be invalid.[231]

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227. In re Gault, 387 U.S. 1, 21 as quoted in Breed v. Jones, 421 U.S. 519 at 529.
228. 333 U.S. 257 (1947).
229. Id., at 271, 272. See n. 29 at 272. n.29 See, e.g., State v. Beckstead, 96 Utah 528, 88 P.2d 464 (error to exclude friends and relatives of accused); Benedict v. People, 23 Colo. 126, 46 P. 637 (exclusion of all except witnesses, members of bar and law students upheld); People v. Hall, 51 App. Div. 57, 64 N.Y.S. 433 (exclusion of general public upheld where accused permitted to designate friends who remained). "No court has gone so far as affirmatively to exclude the press." Note, 35 Mich. L. Rev. 474, 476. Even those who deplore the sensationalism to criminal trials and advocate the exclusion of the general public from the courtroom would preserve the rights of the accused by requiring the admission of the press, friends of the accused, and selected members of the community. Radin, The Right to a Public Trial, 6 Temp. L.Q. 381, 394-395; 20 J. Am. Jud. Soc. 83."
230. Pee v. United States, 274 F.2d 556, 561 (C.A.D.C. 1959).
231. Hopkins v. Youth Court, 227 So.2d 282 (1969).

In its notable decision on the right of a juvenile to a public trial and a jury trial, the Supreme Court of Alaska, in the case of R.L.R. v. State,[232] held that "children are guaranteed the right to a public trial by the Alaska Constitution."[233] The rationale of the court is interesting:

> The appellate process is not a sufficient check on juvenile courts, for problems of mootness and the costs of prosecuting an appeal screen out most of what goes on from appellate court scrutiny. We cannot help but notice that the children's cases appealed to this court have often shown much more extensive and fundamental error than is generally found in adult criminal cases, and wonder whether secrecy is not fostering a judicial attitude of casualness toward the law in children's proceedings.[234]

B. Jury Trial

From the enactment of the first juvenile justice statutes until the present, state courts have developed various rationale on the question of whether or not a child should be entitled to a trial by jury. A favorite rationale has been that juvenile proceedings are not criminal and that, therefore, constitutional criminal protections are inappropriate,[235]

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232. 487 P.2d 27 (1971).
233. Id., at 38.
234. Id.
235. See, e.g.: Shioutakon v. D.C., 98 U.S. App. D.C. 371, 236 F.2d 666 (1956); Thomas v. United States, 74 App. D.C. 167, 121 F.2d 905 (1941); Arizona State Dept. of Public Welfare v. Barlow, 80 Ariz. 249, 296 P.2d 298 (1956); Ex parte Daedler, 194 Col. 320, 228 P. 467 (1924); Ex parte Kitts, 109 Fla. 202, 147 So. 573 (1933); Bible v. State, 253 Ind. 373, 254 N.E.2d 319 (1970); Dryden v. Commonwealth, 435 S.W.2d 457 (Kent.1968); Wade v. Warden of State Prison, 145 Me. 120, 73 A.2d 128 (1950); Wheeler v. Shoemahe, 213 Miss. 374 57 So.2d 267 (1952); State ex rel. Palagi v. Freeman, 81 Monet. 132, 262 P. 168 (1927); In re Geiger, 184 Neb. 581, 169 N.W.2d 431 (1969); State ex rel. Miller v. Bryant, 94 Neb. 754, 144 N.W. 804 (1913); Ex parte Newkosky, 94 N.J.L. 314, 116 A. 716 (1970); People v. Lewis, 260 N.Y. 171, 183 N.E. 353 (1932); Cope v. Campbell, 175 Ohio 475, 196 N.E.2d 457 (1964); Killian v. Burnham, 191 Okla. 248, 130 P.2d 538 (1942); In re Holmes, 379 Pa. 599, 109 A.2d 523 (1954); Givandi v. Juvenile Court, 49 R.I. 336, 142 A. 542 (1928); State v. Thomasson, 154 Tex. 151, 275 S.W.2d 463 (1955); State ex rel. Hinkle v. Skeen, 138 W. Va. 116, 75 S.E.2d 223, cert. den. 345 U.S. 967 (1953); In re Santillances, 47 N.M. 140, 138 P.2d 503 (1943). See also, 100 ALR2d 1241.

and that such statutes were not punative but rehabilitative.[236] The doctrine of parens patriae has also been a popular rationale in sustaining the constitutionality of juvenile statutes which denied to the juvenile the right to a trial by jury,[237] while some state courts, which have both granted and denied jury trial, have favored the proposition that the right to a trial by jury is a statutory right.[238] Other courts have based their decisions that jury trials are not appropriate for juvenile proceedings upon the premise that they would disrupt the flexibility, informality, and confidentiality of such proceedings,[239] while still other courts have stated that they would not consider the issue of juries in juvenile cases until the United States Supreme Court rules affimatively on the issue.[240]

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236. See, e.g., Prince v. State, 19 Ala. App. 495, 98 So. 320 (1923); Clinque v. Boyd, 99 Conn. 70, 121A. 678 (1923); Marion v. Commonwealth, 142 Ky. 106, 133 S.W. 1137 (1911); Moquin v. State, 216 Md. 524, 140 A.2d 914 (1958); Peterson v. McAuliffe, 151 Minn. 464, 187 N.W. 226 (1922); State ex. rel. Olson v. Brown, 50 Minn, 353, 52 N.W. 935 (1892); Bryant el al v. Brown, 151 Miss. 398, 118 So. 184 (1928); State ex. rel. Matacia v. Buckner, 300 Mo. 359, 254 S.W. 179 (1923); Laurie v. State, 108 Neb. 239, 188 N.W. 110 (1922); Ex parte Newkowsky, 94 N.J. 314, 116 A. 716 (1920); In re Poulin, 100 N.H. 458, 129 A.2d 672 (1957); State v. Burnett, 179 N.C. 735, 102 S.E. 711 (1920); Ex parte Watson, 157 N.C. 340, 72 S.E. 711 (1920); In re Benn, 18 Ohio App.2d 97, 249 N.E.2d 335 (1969); State v. School, 167 Wis. 504, 167 N.W. 830 (1918); Wisconsin Industrial School for Girls v. Clark County, 103 Wis. 651, 79 N.W. 422 (1899); In re Gomez, 113 Vt. 224, 32 A.2d 138 (1943). See, also, 100 ALR2d 1241.

237. See, e.g., United States ex rel. Yonick v. Briggs, 266 F.434 (W.D. Pa. 1920); Ex parte Januszewski, 196 F. 123 (S.D. Ohio 1911); Ex parte King, 141 Ark. 213, 217 S.W. 465 (1919); Taylor v. Means, 139 Ga. 578, 77 S.E. 373 (1913); In re Sharp. 15 Idaho 120, 96 P. 563 (1908); Lindsay v. Lindsay, 257 Ill. 328, 100 N.E. 892 (1913); Wissenberg v. Bradley, 209 Iowa 813, 299 N.W. 205 (1930); In re Turner, 94 Kan. 115, 145 P. 871 (1915); Marlow v. Commonwealth, 142 Ky. 106, 133 S.W. 1137 (1911); Farnham v. Pierce, 141 Mass. 203, 6 N.S. 830 (1886); Bryant v. Brown, 151 Miss. 398, 118 So. 184 (1928); State v. Buckner, 300 Mo. 359, 254 S.W. 179 (1923); State ex rel. City of Minot v. Grouna, 79 N.D. 673, 59 N.W.2d 514 (1953); Commonwealth v. Fisher, 213 Pa. 48, 62 A. 198 (1905); Childress v. State, 133 Tenn. 121, 179 S.W. 643 (1915); Mill v. Brown, 31 Utah 473, 88 P.609 (1907); In re Johnson, 173 Wisc. 571, 181 N.W. 741 (1921). See, also, 100 ALR2d 124.

238. See, e.g., In re Perham, 104 N.H. 276, 184 A.2d 449 (1962); In re W., 106 N.J. Super. 129, 254 A.2d 334 (1969); Ex parte Bartes 76 Tex. Cr. R. 365, 174 S.W. 1051 (1915).

239. See, e.g., In re Fletcher, 251 Md. 520, 248 A. 2d 364 (1968); Commonwealth v. Johnson, 211 Pa. Super. 62 234 A.2d 9 (1967); Estes V. Hopp, 73 Wash. Deo. 2d 272, 438 P.2d 205 (1968); Inrre Estes, 73 Wash.2d 263, 438 P.2d 205 (1960); State ex rel. Marcum v. Ferrell, 140 W.Va. 202, 88 SE.2d 648 (1954); Newman v. Wright, 126 W.Va. 502, 29 S.E.2d 155 (1944).

240. See, e.g., In re State, 57 N.J. 144, 270 A.2d 273 (1970); Turner v. State, 538 Ore. 235, 453 P.2d 910 (1969).

Then, too, some courts have based their decisions denying jury trials upon the premise that such trials are not a fundamental requirement of due process,[241] that juvenile proceedings are equity proceedings,[242] and that a right to a jury at the time of the adoption of a state constitution.[243] Interestingly, adults who happened to be tried in juvenile court, have been held to be entitled to a trial by jury.[244] With an inventive bit of judicial logic, one court found, in a state which had a statutory provision for a jury trial on demand for proceedings in which a juvenile was charged with a crime, that the complaint, which alleged that the child had unlawfully taken an automobile, did not charge the child with a crime but "had reference only to the charge of delinquency" and thus the child had no right to a trial by jury.[245]

The reasoning of some of the courts that have found juvenile to be entitled to jury trials is an illuminate. For instance, in Commonwealth v. Thomas,[246] a court held that juveniles charged with crimes have the same rights to trial by jury as do adults. The court stated that:

> The legislative design to protect juveniles from such things as the stigma of a criminal record and from serving sentences in adult correctional institutions ought not to be distorted to deprive juveniles of their fundamental right to a trial by jury in the determination of their guilt.[247]

In the case of Peyton v. Nord,[248] a New Mexico court reasoned that a juvenile could not have been imprisoned without a jury trial at the time the state constitution was adopted. "This being true, no change in terminology or procedure may be invoked whereby incarceration could be accomplished in a manner which involved denial of the right to a jury trial."[249] The court reasoned further that the juvenile court's jurisdiction attaches not where the juvenile is charged, but where it is determined that he has violated the law. Since the juvenile court makes that determination, the court could find nothing "that in any way inhibits against jury trials in juvenile court to determine whether the juvenile charged with violation of state law has in fact violated the law."[250]

In the case of R. L. R. v. State,[251] which upheld the right of a juvenile to a trial by jury, the court raised but did not answer some questions that should be considered when contemplating jury trials for jury trials for juveniles.

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241. See, e.g., In re Fucini, 44 Ill.2d 305, 255 N.E.2d 380 (1970); In re Agler, 19 Ohio St.2d 70, 249 N.E.2d 808 (1969).
242. Weber v. Doust, 81 Wash. 668, 143 P. 148 (1914).
243. In re McCloud, 110 R.I. 431, 293 A.2d 512 (1972).
244. See, e.g., State v. Smith, 209 La. 363 24 So.2d 617 (1945); Mill v. Brown, 31 Utah 473, 88 P. 609 (1907).
245. In re Hans, 174 Neb. 612, 119 N.W.2d 72 (1963).
246. 359 Mass. 386, 269 N.E.2d 277 (1971).
247. Id., at 278 See also, Arwood v. State, 62 Tenn App. 453, 463 S.W.2d 943 (1970).
248. 78 N.M. 717, 437 P.2d 716 (1968).
249. Id., at 723.
250. Id., at 725.
251. 487 P.2d 27 (1971).

The court queried as to whether the jury list should include persons as young as the child or should the age requirements be such as to insure "sufficient maturity and freedom from parental and other pressure for fairness and impartiality?"[252] Other questions raised by the court were whether the right should be retroactive and whether the right could be waived by the child. The court held that children who are constitutionally entitled to a jury trial "should first consult with his counsel and his parents or guardians when appropriate, and then affirmatively assert the right to a trial by jury before it is finally granted."[253]

Thus, from a review of the cases it may be safely surmised that there is no lucid and connective legal theory set forth by the courts of the several states as to the rights of the juvenile to a trial by jury. Further, even in those states where a trial by jury is considered of right in a juvenile proceeding, the implementation of the right is not clearly agreed upon.

Jury trials in juvenile proceedings are different from the jury trial that results from waiver in that the jury trial is wholly within the province of the juvenile court and is for the submission of facts for jury determination. As a Maryland court which denied such a trial by jury opined: "Such a mechanism is not without a certain attractiveness, and could someday become part of our juvenile practice."[254] How to implement the right to a jury trial and a public trial becomes the issue.

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252. Id., at 33.
253. Id., at 35.
254. In re Johnson, 254 Md. 517, 255 A.2d 419 (1969).

IV. IMPLEMENTATION OF JURY TRIALS AND PUBLIC TRIALS AND RESOLUTION OF THE QUESTION OF FREE PRESS IN JUVENILE PROCEEDINGS

A. Jury Trials: Problems to Overcome

1. Burden on System -

For numerous reasons, referred to previously, it is abundantly clear that a jury trial has merit in a juvenile proceeding when the scales of tradition and reflexsive, rather than reflective, thought are pried from the concept. Still, those who doubt the merit of changing the status quo raise the spectre of the excessive costs and the administrative night-mares that would arise if jury trials in juvenile proceedings became a right.

However, in Denver, Colorado, for instance, where jury trials have long been available upon demand for a juvenile alleged to have committed a crime,[255] one judge in Denver has had two requests for a jury trial in a twenty-five year period and both requests were withdrawn before trial.[256] Further, it is well documented that even in adult criminal trials the number of jury trials actually occur are small as compared with the number of indictments returned each year.[257] Thus, merely because there is a right to a trial by jury does not mean that the juvenile court system would, necessarily, become overburdened.

2. Six Person Jury -

The IJA/ABA recommendation that a six person jury be allowed in juvenile proceedings should result in no difficulties. The Supreme Court in William v. Florida,[258] held that a six member jury is constitutionally permissible.

3. The Juvenile's Ability to Waive the Right -

The ability of a juvenile to waive the right to a trial by jury has not been widely discussed. It has been suggested, however, that such a decision "seems peculiarly suited for collaborative determination by guardian, counsel and child. This is exactly the type of decision the juvenile should not be permitted to make alone."[259]

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255. See, Statutory Appendix.
256. Note, A Due Process Dilemna--Jurisdiction for Juveniles, 45 N.D. L. Rev. 251, 273 (1969).
257.

Period	Defendents Indicted	Defendents Pleading Guilty	Defendants Convicted After Trial
July 1, 1969 to June 30, 1970	29,414	18,535	996
July 1, 1968 to June 30, 1969	28,446	17,035	761
July 1, 1967 to June 30, 1968	23,632	13,513	803

New York State Joint Legislative Committee on Crime, Its Causes, Control and Effect on Society, Report for 1971 at 12.

258. 399 U.S. 78 (1969). See, also, e.g., State v. Scholl, 167 Wis. 504, 167 N.W. 830 (1918).
259. Note, Waiver in the Juvenile Court, 68 Colum. L. Rev. 1149, 1165 (1968).

The question of the waiver of a jury trial was not addressed specifically by the Standards. The IJA/ABA Standards do recommend, however, that the right to counsel be non-waivable.[260]

The factors which constitute a constitutionally permissible waiver of counsel in a juvenile proceeding have, however, been often considered by the courts.[261] If the child is represented by counsel when the decision is made to demand or to waive the right to a jury trial, an intelligent and knowing waiver by the juvenile should be possible.

B. Public Trial

The IJA/ABA Standards[262] articulate clear guidelines for states to use to implement the right to a public trial.[263] The rights and duties of both the defendant and the court are recognized.[264] With care, both these rights and duties may be protected by the enactment of sound legislation by each state.

C. Free Press

By far the most delicate and difficult implementation problem occurs in the area of free press and the juvenile courts. The IJA/ABA Standards do not incorporate the reasoning and holding of the United States Supreme Court in Oklahoma Publishing Co. v. District Court,[265] where the Court held that when members of the press are at a juvenile hearing with full knowlege of the presiding judge and no objection is made to their presence in the courtroom, the press is free to publish the information gathered, since it has been placed in the public domain. In Oklahoma Press a court had enjoined members of the press from publishing further information based on the identity of a juvenile gathered at a detention hearing which involved an eleven year old boy who was charged with second degree murder.

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260. IJA/ABA Standards, Adjudication, 1.2. "The juvenile court should not begin adjudication proceedings unless the respondent is represented by an attorney who is present in court and the government is represented by an attorney who is present in court."
261. See, e.g., Application of Estrada, 1 Ariz. App. 348, 403 P.2d 1 (1965); People v. Lora, 67 Cal.2d 365, 62 Cal. Rptr. 586, 432 P.2d 202 (1967); In re Dobson, 125 Vt. 165, 212 A.2d 620 (1965). See, also, 71 ALR2d 1160, where a discussion of case law on the subject yields the following factors that are often considered by the courts--mental ability, ability to understand, whether an accused was confused or bewildered, whether an accused was advised of his rights by the court, the seriousness and complexity of the charge, the pressure imposed to enter a guilty plea, advise given by officers or lawyers, including relatives, education and experience of the accused, illiteracy, and knowledge of legal procedure.
262. IJA/ABA Standards, Adjudication, 6.2.
263. See, Sect. II, supra.
264. The tenet that the dignity and decorum of the courtroom are an essential ingredient in process of justice is incorporated into the Standards. See, Uviller, Adjudication, 472 (West 1975). See, also, Mayberry v. Pennsylvania, 400 U.S. 455 (1971); Illinois v. Allen, 397 U.S. 337 (1970); See, also, e.g., N.Y. Jud. Law § 4 (West. 1978), See, also, 49 ALR3d 1011.
265. 97 S. Ct. 1045 (1977), See, Sect. I., C., supra.

In Oklahoma, there is a state statute that provides for closed juvenile hearings unless expressly opened by court order. In the instant case, the judge had not ordered that the hearing be made public. The Court, however, took the position that since the trial court, the prosecutor, and the defense counsel all had knowledge that members of the press were present and made no objections, there was no evidence that the press acquired the information they published unlawfully.

Nor do the IJA/ABA Standards take into consideration the United States Supreme Court decision in Nebraska Press Association v. Stuart,[266] where the Court came down strongly against the prior restraint of the press. In that case, a "gag order" which had been modified by the Nebraska Supreme Court prohibited the press from reporting or commenting upon a judicial proceeding which had been held in open court.

The current Supreme Court continues to have an interest in questions of free press as is evidenced by the recent decision of the Court in Landmark Communications, Inc. v. Virginia.[267] The Court also recently granted certiorari in a case that deals specifically with the question of juveniles and free press, Smith v. Dailey Mail Publishing Co.[268] In Landmark, the Court struck down a Virginia statute that permitted criminal punishments to third persons who are strangers to a judicial inquiry for divulging or publishing truthful information regarding confidential proceedings. In the Dailey Mail case, the question before the Court is whether a state can prohibit newspaper reporters and editors from publishing the name of a juvenile charged with a crime.

Clearly, legislation must be written with great caution if both the rights of the press and the privacy of the juvenile are to be protected. The public's right to know and the state's interest in protecting the juvenile are, obviously, conflicting concepts. When the general public is excluded from a proceeding, the press is not privileged to have special access to information not generally available to the public.[269] There is no doubt that a respondent should not be subjected to needless prejudicial publicity.[270] But when the information about an individual is part of a public record, the United States Supreme Court has expressed grave concern about the chilling effect on the First Amendment of the assertation of an interest in privacy over and above the interest of the public to know and the right of the press to publish.[271]

Essentially what the IJA/ABA Standards[272] suggest is a limitation upon the right of the public to be present in juvenile proceedings.

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266. Nebraska Press Association v. Stuart, 427 U.S. 539 (1976).
267. Landmark Conmunications, Inc. v. Virginia, 46 U.S.L.W. 4287 (1978).
268. Smith v. Dailey Mail Publishing Co. (No. 78-482) New York Times, November 14, 1978, p. A 24, col. 2 and 3.
269. See, e.g., Saxbe v. Washington Post, 417 U.S. 843 (1974); Pell v. Procunier, 417 U.S. 817 (1974); Brauzburg v. Haynes, 408 U.S. 665 (1972); Gannett Co., Inc. v. De Pasquale, 43 N.Y.2d 370, 372 N.E.2d 544, 401 N.Y.S.2d 756 (1977), cert. granted, 46 U.S.L.W. 3679 (1978).
270. Sheppard v. Maxwell, 384 U.S. 333 (1966).
271. Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975).
272. IJA/ABA Adjudication, Standard, 6.2.

By restricting the press from identifying a respondent when that respondent has requested that the proceeding be partially closed, the court is closed to the general public and only persons approved by the court and who are willing to abide by special rules are permitted to attend the proceeding. Since neither the public nor the press has an absolute right to attend all stages of all criminal trials,[273] the restrictions suggested for juvenile proceedings appear reasonable. With careful drafting the states should be able to protect the privacy of the respondent while at the same time not infringing upon the freedom of the press.

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273. See, e.g., Estes v. Texas, 381 U.S. 532, 538 (1965).

V. SUMMARY

The IJA/ABA Standards proposal for jury trial in juvenile court is the most persuasive of the three proposals in that it achieves the objectives most desired under our system of justice, that is, providing for children those protections ennunciated by the United States Supreme Court in Duncan v. Louisiana, namely, protecting children from incompetent, arbitrary and capricious judges as well as from overreaching prosecutors. The Task Force and NAC Standards, on the other hand, by denying a respondent the right to a trial by jury, allow to creep into the system flagrant errors which cannot be corrected on a practical basis by appellate review. In a word, the continuing deprivation of trial by jury in juvenile proceedings creates an atmosphere of secrecy inimical to the concepts of American justice, and in the end, sows the seeds for the total abolition of the juvenile court system, as has happened to other court systems which, for purpose of efficiency, have dispensed with public trials.

The right to a public trial is, essentially, a corollary to the right to a jury trial and is probably the more important of the two concepts. However, given the restrictions suggested by all of the proposals upon the absolute right of the public to a public trial, and, given the acceptance of the concept of a jury trial, the restrictions on the public trial are tolerable.

If the jury trial proposal is not accepted, then the right of the public to a public trial becomes essential and the limitations on that right of the public becomes less tolerable. While no jury trial might be acceptable if there was a completely public trial for juveniles, a totally closed proceeding which allowed for a jury trial would not be acceptable. Providing a jury trial makes tolerable, however, the provisions for limiting the right of the public to be present at a juvenile proceeding. Accordingly, the IJA/ABA Standards best protect and promote the rights and interests of the juvenile and of the system of juvenile justice.

MR. MANAK: Mr. Kaimowitz?

MR. KAIMOWITZ: I am indebted to Judge McLaughlin and Ms. Weissman for what I regard as a very brilliant position paper, and I differ with the analysis, obviously, and this will become clear tomorrow on what the status of children is and I see the cases somewhat differently, I think, but other than that, I really found this an outstanding presentation.

MR. MANAK: Yes, certainly, we join in that Judge McLaughlin. A true work of scholarship paper, and I am sure that Mr. Kaimowitz' comments speak for all of us. All of the papers were excellent, certainly.

Mr. Hege?

MR. HEGE: What can you add to that?

MR. MANAK: Mrs. Connell?

MS. CONNELL: That's all I had to say , too.

MR. MANAK: Judge Ketcham?

JUDGE KETCHAM: Well, I certainly want to align myself with Judge McLaughlin's views that the juvenile court has got to be considered as part of the whole system. I guess this is what I am trying to say, and I think this is very

clearly what I am trying to say and what Ms. Szabo seemed to be suggesting, that we are the good guys, and if we don't have things that don't work with us, then drop them over in that silly criminal court process. I -- maybe that's an exaggeration, but I do think it's important that the juvenile courts recognize that they are part of a whole system. The public is set-up for criminal justice, and the fact that they have different procedures and so on is good, and I hope that we can change the juvenile court by making sure that we are aware of it.

I do agree with his view that there is a need for the checks and balances. Mrs. Szabo described the waiver process as an escape or safety valve for the juvenile court and Judge McLaughlin has described the public and/or jury trial as something that is of the same nature, and I agree that both of them are. And in a similar fashion, a right to a public and jury trial is a balancing mechanism, it's a pressure reduction valve, for the purposes of protecting against the arbitrary and the over-reaching and seemingly biased all-powerful judge -- juvenile judge. These do exist.

Many of them are here, and there are fewer of them in the country today than there were. But they do exist, and I think it's very important that those who apply the theory of parens patriae as though it were their very own and to their own liking as through they were the great white father, there needs to be this right to deal with it differently, and this is not all going off into experimental theory.

I sat for thirteen years in the juvenile court of the District of Columbia which offered and provided jury trials in the juvenile court. There were about twenty five hundred of them filed in that period of time. My colleagues didn't like to try them. I tried them all, not all twenty five hundred, but about three hundred and fifty were, in fact, tried to juries in the District of Columbia juvenile court. It was time-consuming, as far as fact-finding, it was not better or worse in my judgment than a thoughtful judge, but it worked and it was a suitable and effective pressure reduction valve. The man that is now the chief judge of the United States District Court used to practice before me, William Bryant,

a very outstanding jurist today, and this discussion came up in those days, and Bill Bryant had tried twenty-five, thirty cases before me in juvenile court and had never asked for a jury trial; and I say with pride I asked him why and he said, "Well, I always want there, but when I come before you, I feel that I will get a fair answer; but there may be other people sitting on that bench that I may want to ask for a jury trial;" and I think this right to a public and jury trial is a very valuable pressure reduction valve that should be in the system, and I do not expect that it will be excessively used.

MR. MANAK: Judge Fort?

JUDGE KETCHAM: I agree very much with Judge McLaughlin that it will not be excessively used.

MR. MANAK: Judge Fort?

JUDGE FORT: I agree very much with Judge McLaughlin's comments, particularly in regard to the safety valve aspect. I think most juvenile judges who have attempted to deal with this question of public relations, and I think this ties into this, after all, I know I did, in my years in that court, that you couldn't take the pressure.

We got court policy fourteen years inviting them such to their not using the name.

Once that invitation was extended, you couldn't have gotten, a subpoena couldn't have brought them in, and I raise this now as some -- as I have heard it used as a reason why you should do it to keep them out, but to pose the question which none of these standards deal with and none of the discussions that I recall of the commission deals with, and we don't talk about this, and that is how is it possible for some of us to have been active or are active in the juvenile court process to educate the public in terms of problems as you allude to them. This is the natural vehicle that we look to accomplish it as the media; and yet, our experience and I know in the West generally this has been true, I can't say how it is elsewhere, but the biggest problem is to get any awareness out by any method out to the public on an intelligent basis; and if I feel that this is a consideration of major importance in terms of the future, the balance of the juvenile court, whether it should exist or whether it shouldn't, is obviously not going to be dependent on the people like ourselves here.

It's going to be dependent upon the public and media entirely, and I do think there is a great need to find some methods of dealing with this problem, and I only mentioned that, Mr. Manak, because I don't see it anywhere in any of the standards -- the L.E.A.A.'s or our own.

JUDGE KETCHAM: It's true.

MR. MANAK: Judge Cattle?

JUDGE CATTLE: This problem has been very much on my mind, and I am certainly going to read Judge McLaughlin's paper. I certainly enjoyed his presentation and his analysis of what we are up against and this -- I am so reluctant on the jury bit, but I think he is right, it is one way of getting to the public.

I know I have been experimenting with public advocation because we had a big flurry of court watchers and all the rest of it; fortunately for me, the head gal was at one time my secretary, and I trusted her. She had a little better understanding of what the heck was going on, but she would come into me just frustrated as heck saying she couldn't get any of these women's clubs that made all these wonderful,

you know, resolutions on how they would go down and do it, she couldn't get any volunteers to come with her, and she would sit in my court all day, that's the way it should be.

So she got the whole picture, and of course, she had a little better understanding of those of them -- I mean, at least the office part of it and -- the public demands the right to know, but they don't make any necessary effort to do so, and I am inclined, as I listen to Judge McLaughlin, I am on a waiver position on the jury, but that this might be a very viable way of doing that; and certainly I agree with Judge Ketcham, I don't have one jury trial a year. My attorneys wouldn't be caught asking for -- the only jury trials I get are from some outside counsel, but -- and that's all right with me, because I don't like explaining the law to juries that much. I'd much rather explain it to myself. It's more fun, but I think it was a very thoughtful speech and certainly I'm going to give it a great deal of thought.

MR. MANAK: Judge Smith?

DEAN SMITH: I pass, but not before joining

in the commendation for the excellent quality of the document, and also for the fine presentation by Judge McLaughlin.

MR. MANAK: Mr. Hutzler?

MR. HUTZLER: The only thing I would like to say and either folks from the standards project or the judges can correct me, and perhaps they are going to address themselves to it, but as I recall,the council has taken a position in opposition to this standard so that I -- I am not prepared to address that, but I hope we don't go all the way around without hearing it.

MR. MANAK: Will it be addressed?

JUDGE MOORE: I will.

MR. MANAK: Okay, fine.

That will be addressed.

Mr. Dale?

MR. DALE: I will, and I just want to raise an issue.

MR. MANAK: Okay, fine.

That will be addressed.

MR. DALE: This issue is often discussed amongst defense counsel with regard to public trial.

The personal professional concern that a defense lawyer will have is that, in a given case, he or she believes that he or she has a certain body skill and can -- just as perhaps a prosecutor can go through, and still the defense counsel will simply wheel and deal and get a good resolution for a client in such a way and in such a fashion, that with a public proceeding, he or she could not do so; and so both of us, who say, practice it today as a public defense or legal aid society context where there is not a public trial situation say to ourselves, "well, we are really good at it and we get good trials for our client, and we really wouldn't want the public to know how good we are at what we do."

Now, perhaps that is a little bit supercilious, but that is the decision that some of us may take. The difficulty is that when we look beyond, say, our own office, we look to another part of the state or look to another jurisdiction and we see, perhaps, a very different situation where other colleagues, other defense lawyers are not putting on any defense, are not

doing anything for the client. We say to ourselves good, but the public really ought to know what is going on there and so I think the position of the defense lawyers is that, even though some of us feel we are quite skilled and we can work a real deal in private, if it were public, it is probably possible more kids than the public understands and are perhaps the incompetence of other attorneys, the power that certain judges probably enter into our minds; and therefore, we come down perhaps as a general proposition favor that people be allowed to see what goes on in the courts.

JUDGE KETCHAM: Can I respond to that?

This isn't the -- the proposal of the IJA/ABA is not to make all juvenile proceedings public and/or to have a jury trial on all public cases, it's to give a right, and . . a sense, you would be representing the child. It would be your decision.

MR. DALE: Very definitely.

JUDGE KETCHAM: But, I think it's not to make an either/or process.

MR. DALE: But sometimes it would make it a lot easier if it were public and I didn't have that --

JUDGE KETCHAM: Maybe if it were public, but you would probably choose to not make it public for the reasons those other attorneys would probably not choose to make it public, too, unless they had great powers with the jury.

JUDGE MC LAUGHLIN: Can I say one little comment? That those not from New York City -- if you ever get in trouble in New York City, if you can afford Edward Bennett Williams, take him, and if your pocketbook will go that high, then take the Legal Aid Society, divest yourself of all property, and give it away. I say this, they are rarely disliked by the Family Court judges in New York, which is, I think, the greatest compliment they can have.

But let me say this, in the whole state of New York, there is only the Legal Aid Society in New York City that actually defends children.

MR. MANAK: Yes, I think that's true coming from upstate New York, I certainly would agree that that's true.

JUDGE MC LAUGHLIN: The upstate lawyers who are appointed as law guardians see themselves as

some sort of social worker. I mean, if you want to see a child really get a bad result, it's when his lawyer tailor-makes the treatment offices and process. Judges may be bad, but I tell you, lawyers are terrible, and so they say. I think the only one place in New York where I think the children really get legal representation is with the Legal Aid Society.

JUDGE KETCHAM: I just add that I did hear of William Bennett's name, and I did appoint him and he served at the Juvenile Court in the District of Columbia and I agree.

MR. MANAK: Mrs. Thompson?

MS. THOMPSON: I might just comment briefly.

I felt that Judge McLaughlin's paper and presentation were certainly very persuasive in favor of an issue of which or standard which I think I basically disagree with and which the organization and the National District Attorney's Association has taken a position in opposition to; that is, the extention of the right to a jury trial in a juvenile court. I am strictly supportive of an argument which Judge McLaughlin made, and I just want to mention that in favor of the jury trial

because the value of bringing the public into the criminal justice process, and that's something which those of us who live within the criminal justice machinery are constantly concerned about, is the participation of the community and the public in the process. I think it's a very great value, and so that argument I think is a very fine one.

Over all, however, I think the concern of the district attorney has to do with more of the practicality of whether it can be managed within our present facilities. I would like to ask Judge Ketcham, is it not the case in the District of Columbia that the right to a jury trial was actually abolished or done away with after --

JUDGE KETCHAM: Yes, in 1971 when they established -- in 1970 the Act was passed, but it became effective February 1st of 1971 when the juvenile proceedings became part of the family division of the superior court, and that old organization, the juvenile -- I mean the jury trial was eliminated, but between 1938 and 1971, it was a statutory right and implemented in the juvenile court itself, not by waiver or certification.

MS. THOMPSON: And was the experience of the last few years before this legislation in 1970 that the request became one which facilities could not handle, that there were so many such requests?

JUDGE KETCHAM: They were growing, and this was one of the arguments that was made. They were growing and the court had grown and there were calendaring difficulties, and I guess the best, most generous way to say it is that the chief judge that was operating then did not favor jury trials, so he didn't schedule very many. The lawyers learned that if you asked for a jury trial, this could delay the thing for a very long time. I don't think they were insurmountable, but there were reasons.

MS. CONNELL: Could I respond to that just a little bit?

In our San Francisco office, they had occasion to participate in a case in which a juvenile court judge had ordered a jury trial and then the state appealed that decision; and in the course of that, and in fact, a little before that, we conducted what we considered to be

a survey of the states in which jury trials are presently provided, and I wanted to give Judge McLaughlin this information, but I didn't want to take up the time. But what the available evidence indicated and the way we did it was to call administrators and juvenile court justices in the major cities and states in which jury trials are provided, and in no case, and this was just done about eight months ago, they gave figures for the last period of time in which they had, which was about usually a year ago, and in no case had jury trials been requested any higher percentage of time than 3.9 percent of petitions that were actually adjudicated.

Now, we never went to rural areas, because we assumed that requests for jury trials were going to be a lot greater in the cities, okay; and there were some states in which there were no figures, but we relied on Alaska, you know, where they have had them for a while, and therewere about five other states where there were some figures available; and the figures were so low that we felt confident in asserting in the brief, you know, we included those things in the brief. But we largely

asserted that it was not that great of an administrative difficulty.

MR. MANAK: Okay, we have -- and did you want to respond?

We are a little bit behind.

Judge Moore?

JUDGE MOORE: Excellent paper, excellent presentation, I agree a hundred percent with what he has to say. Michigan hasn't had a jury trial for as long as I can remember. I don't see a problem even in the large metropolitan area. We are still able to get jury trials heard. I think there are going to be abuses. I think there are going to be attorneys using a jury in a case purely as a delaying tactic, but I don't think we should decide whether we are going to grant somebody a right or not grant somebody a right based upon the fact that we think people are obnoxious. We still give them the rights, and if that's the way they want the lawyers, fine.

So as far as the National Council's position is concerned, there is a lot of debate on this issue. There are a lot of states who don't

have jury trials and a large number of judges come from what their own experience has been and I obviously come from my experience has been because we have it and we live it and we find that it works very well. The National Council, however, as I recall -- as I remember from memory, it's final position would not be opposed to the standard of giving a jury trial but to ask that the standard be modified, which Judge White indicated to me about a week ago that the board did not approve, and that was to modify and to elicit the facts that the child had a right to demand a jury period, rather than the way the standard is currently written in the IJA/ABA, that you will have a jury unless you waive that right.

So we asked for the reverse. We do have statutes generally, but it's on the counsel or the child to demand a jury trial.

MR. MANAK: Judge Arthur?

JUDGE ARTHUR: A single comment.

I think Judge McLaughlin is the only one among us who had the courage and the courtesy to give credit to the person who did most of the work.

MR. MANAK: Judge Arthur, anything else?

JUDGE ARTHUR: No.

MR. MANAK: Okay, Judge Delaney?

JUDGE DELANEY: I subscribe to what McLaughlin said. We have had jury trials in Colorado since 1967 and they work very well.

There are two things I would like to comment on. I think Judge McLaughlin was very kind in saying that those of us who are here today don't need the -- don't need jury trials, and that those are akin to seminars and so on who probably don't. I think all of us need it. I think it has a very humbling and it's a very good method of keeping judges honest. So from that standpoint, I think it's very true.

One other problem in connection with it, I think one of the other reasons judges sometimes want to avoid it is that it does crowd your docket; and unless you set yourself up to give prompt attention to jury demands, you can get in trouble. But that's an administrative problem. They can't be solved with an intelligent approach.

MR. MANAK: Judge Fort?

JUDGE FORT: I can't ever recall a group of judges who don't almost unanimously agree that the nicest kind of a case to try is a criminal case with a jury because I don't have to make up their mind, and it's the greatest -- it's the greatest relief from the standpoint of judicial responsibility that the law affords, is a jury trial. So don't forget that it isn't just a one way street. The judges like it better than anybody else.

MR. MANAK: Mrs. Szabo?

MS. SZABO: This is a technical question.

Would you see a slight lowering in the age limit for jurists provided?

JUDGE MC LAUGHLIN: I am sorry, I didn't understand it.

MS. SZABO: Would you see a slight lowering in the age limits for the purpose of providing a jury for one's peers?

JUDGE MC LAUGHLIN: I always think of that joke, I don't want to be tried by a bunch of burglars.

I don't know, I think that would be -- that's the type of question that you would have to give to each individual state. I think that

because we have so many variations in the age of you know, juvenile court jurisdiction, where I think New York, is probably the low -- one of the lowest, we cut them off at sixteen, but other states, I believe California is up to twenty-one or eighteen.

MR. ROUNDS: Eighteen now.

JUDGE MC LAUGHLIN: I think that's the type of thing that -- nuts and bolts that you leave to the state legislature for the usual political pushing and shoving.

JUDGE ARTHUR: I certainly can't see a jury of twelve years old.

JUDGE MC LAUGHLIN: Well, I think that's best left up to the individuals.

MR. MANAK: Was it Syracuse that had a youth court for the traffic offenders at one time?

JUDGE MC LAUGHLIN: We have had everything.

JUDGE KETCHAM: That's ethic.

MR. MANAK: Ethic.

JUDGE MC LAUGHLIN: Ethic, that's right.

JUDGE KETCHAM: High school students.

MR. MANAK: True peers.

JUDGE MC LAUGHLIN: You have to remember

that in New York -- now, New York State delinquency only applies to crimes, see? So that means, for example, we don't have curfew violations, we don't have -- like, when they decriminalized -- they decriminalized marijuana and they made it an offense which automatically also eliminated all the children from the jurisdiction because the statute said that you had to commit a crime. But we didn't worry about that. We just added smoking marijuana as a PINS violation. It didn't slow us up any.

MR. MANAK: Mrs. Bridges?

MS. BRIDGES: No.

MR. MANAK: Mr. Rounds?

MR. ROUNDS: I think that there is a possibility at least of an opposite effect in the jury and public trials, not under the limitations and the standards where there are matters of waiver, but it seems to me that to the extent that a juvenile trial becomes identical with an adult trial, it's going to be inevitable process that someone in the interest of efficiency is going to point out that they then could be tried anyplace by anyone; and I think it's possible, at least that there would be

an impetus to merge the entire juvenile system with the adult criminal system on that basis since someone could rationally say that the only distinction is sentencing. At least up to the time of verdict, it's identical with an adult trial.

The other obvious implication of both juries and public and press admission in the juvenile court is that it's the effective end of confidentiality at least in terms of the case or the situation where the public wants to come in to see what is going on and to see the sensational case; and I think that's then perhaps been too little discussed as an inevitable repercussion.

MR. MANAK: All right, Mr. Siegel?

MR. SIEGEL: I thought the analysis was excellent. I completely agree with it.

I am bothered by what Mr. Rounds said, I mean, I think that more and more of -- what goes on in the juvenile court should look like what goes on in the criminal court with the exception of the dispositional stage, which should be very different. That does not bother me.

MR. ROUNDS: My comment was not that that's

definitely bad, but rather that it will merge within it's own system, inevitably.

MR. MANAK: Any further comments, we have a few minutes.

JUDGE CATTLE: Only one comment, there might be -- and I haven't thought this thing out, I am just throwing it out, that there might well be a distinction between the delinquents and the others In other words, publicity in the delinquency,so what, everybody knows about it anyway. What matter where confidentiality can have a far more broad reach probability. This is why I am wavering on the question of open jury. I do allow my young people to permit, or I ask them if they want the thing closed, and if they don't want it closed, why of course, nobody ever comes, but I will make them at least think that they can have it open if they want it to.

But in delinquency, I can't see any real problem with the jury or even letting in the press, although I have had some notable views with them. But you can get beyond that, and then you have totally different problems. Maybe we can make a distinction there, I don't know.

MR. MANAK: Any further comments?

JUDGE DELANEY: I would say to that, Judge, that I don't think we need to make a distinction. We covered everything, abuse and neglect, maturity, those are the two other general areas of contested issues of fact; but I think that if you are going to have juries, you better have it for everybody.

JUDGE CATTLE: Well, as I say, I haven't really firmed up on it.

MR. HUTZLER: I think that there may be a legitimate distinction between the delinquency cases and status offense cases and the other jurisdiction of the court. The distinction I see is that -- and this protection of confidentiality is one that I think the juvenile should be in a position to waive if he prefers to have a public trial. I have no concern about the loss of confidentiality in that situation, because it is his decision, but when you get into the situation of abuse and neglect proceedings, you are involved not only with -- not only with the child, but also with the parents, and their interests may conflict. The child may be injured in that situation by public disclosure of what has

happened. The parents may want a public trial for their own protection or vice versa, and the child may be interested in a public proceeding and the parents not, but you have more than a single party who is in a position to exercise his own interests in deciding whether he wants a public trial or not, and they may have a difficult question posed there.

MR. MANAK: You know, that's true. We haven't really considered the parental interest in public trial, have we?

JUDGE MC LAUGHLIN: No, I just wanted to comment.

Right in the beginning of the paper, we note that we did not touch the jury trial in a neglect and abuse case because the two systems are entirely different. The juvenile delinquency route is, you know, it is in the criminal court with the right to a jury, then it went into the juvenile system without the right. The -- abuse and neglect has always been a "chancery court proceeding" so that there never was a right to a jury trial in an abuse and neglect proceeding; and I think that that would require an entirely

different approach on the research. I don't know what the results would be, but in other words, you can't research jury trials -- abuse and neglect jury trials, and delinquency in the same paper, they are apples and oranges.

MR. MANAK: Certainly, though, there could be a parental interest in jury trial in the delinquency cases.

JUDGE MC LAUGHLIN: I don't know, the kids going to do the time.

MR. MANAK: In public trial.

JUDGE MC LAUGHLIN: I think the fact that the parents are going to be embarrassed because their son got himself in trouble, but I don't think that's important.

MR. MANAK: Are there not some parental responsibility statutes and ordinances --

JUDGE MC LAUGHLIN: There are.

MR. MANAK: -- holding parents financially responsible, say, for acts of vandalism?

MR. HUTZLER: This is regardless of the jury.

MR. MANAK: But that may be the key to parental interest in having a public or perhaps jury trial.

JUDGE MOORE: I would say that the vast

majority of defense counsel who represent both delinquent children and alleged neglectful parents in the issue of a jury trial would much be -- more want a jury trial for a delinquent child than neglectful parents. I think their experience has been that jurors are much harder on parents than they are on kids, and that if we think judges have a broad view of abuse and neglect as I indicated yesterday, that the jury is much less tolerant of parents who, by their standards, are abusing their children. They are the hardened "judge" who has "handled" those kinds of abuse.

MR. MANAK: Okay.

(WHEREUPON, A LUNCHEON RECESS WAS HAD.)

NCJ 76921

2. Adjudication: Plea Negotiation

Consultant
Charles Z. Smith

ABSTRACT OF PAPER

Professor Smith points out that the standards vary significantly in what they include under the rubric of adjudication. While the adjudication chapter of the Task Force volume focuses primarily on the factfinding hearing, the NAC adjudication standards run the gamut from the jurisdiction and organization of the family court, to disposition, enforcement of orders and appeal. The IJA/ABA volume is in between.

Professor Smith observes that as the criminal justice process adopts diversion from the juvenile justice system, delinquency proceedings are adopting, as a result of In re Gault and other cases, more of the procedures and due process safeguards developed for the criminal courts. With the increasingly adversarial nature of delinquency proceedings comes the question of plea bargaining. After first setting forth the ABA standards for plea bargaining in the criminal courts, Professor Smith quotes and discusses the recommendation of the three juvenile justice standards groups on this controversial subject. He reports that both the Task Force and NAC recommend the elimination of plea bargaining from the delinquency proceedings as a procedure which is "detrimental to the fairness and effectiveness of the juvenile justice process." The IJA/ABA standards, on the other hand, provide a choice. The primary standards recognize the existence of plea bargaining in juvenile proceedings, "concede its legitimacy, and seeks to regulate it" in a similar manner to the criminal justice standards. Alternative standards provide measures for prohibiting plea bargaining. Thus, Professor Smith concludes that the three sets of standards "are not necessarily in conflict."

SUMMARY OF COMMENTS

Three related issues dominated the discussion: should there be plea bargaining in delinqueny proceedings; if so, what is the role of the judge; and, should plea bargaining cover the disposition or only the charge.

With regard to the first question both Mr. Siegel and Judge Cattle saw plea bargaining as inevitable. Judge Cattle called it a "necessary evil" necessitated by the volume of cases. Judge Moore, however, saw plea bargaining, at least when the disposition could be included in the plea agreement, as "the ability to coerce the respondent into admitting to something so that he will not be able to get a stiffer sentence."

In Judge Cattle's view, the judge should not participate in any way in the plea negotiation process, and the process must be limited to discussion of the charges, not the disposition. Professor Smith, in response to questions from Judge Fort, indicated that under the IJA/ABA standards, both charge and dispositional bargains are permitted, and the role of the court is to monitor the process and not to be a direct participant.

Judge McLaughlin commented that under traditional juvenile justice practices, bargaining over the disposition was inadvantageous since the release date was not set by the court. But, Mr. Gilman and Mr. Manak pointed out that, a respondent could still seek agreement to probation rather than placement, and that the IJA/ABA standards recommend judicially imposed determinate sentences. It was agreed that much will depend on state decisions and practices.

Judge McLaughlin also noted that admissions to offenses not borne out by the facts or defined by law is a problem in adult criminal courts. Careful judicial scrutiny was seen as the primary remedy.

76921

ADJUDICATION: PLEA NEGOTIATION IN THE JUVENILE JUSTICE SYSTEM

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INTRODUCTION

The subject to be covered by this paper is "Adjudication," with a focus on plea negotiation.

Comparison will be made between standards promulgated by (1) the National Advisory Committee on Criminal Justice Standards and Goals, Task Force on Juvenile Justice and Delinquency Prevention; (2) the National Advisory Committee for Juvenile Justice and Delinquency Prevention; and (3) the Institute of Judicial Administration/American Bar Association, Juvenile Justice Standards Project.

ADJUDICATION DEFINED

A basic assumption is made throughout the literature that the word "adjudication" is "an act of a court in making an order, judgment, or decree" or "a judicial decision or sentence."[1] Or put another way, "the giving or pronouncing a judgment or decree in a cause; also the judgment given."[2]

There is small likelihood of disagreement on the meaning of the word.

Each set of standards varies with respect to the range of subjects included under the category of "adjudication."

The Table of Contents for each volume or set will suggest that variation.

TASK FORCE ON JUVENILE JUSTICE AND DELINQUENCY PREVENTION

The Task Force Report, Chapter 13, is entitled "Adjudication Processes," and contains, in addition to the Introduction, eight standards: Plea Negotiations Prohibited (Standard 13.1); Acceptance of an Admission to a Delinquency Petition (Standard 13.2); Withdrawal of Admissions (Standard 13.3); Contested Adjudications (Standard 13.4); Adjudication of Delinquency--Standard of Proof (Standard 13.5); Endangered Children--Rules of Evidence (Standard 13.6); Endangered Children--Standard of Proof (Standard 13.7); and Appeals (Standard 13.8).[3]

The Task Force Report contains a separate chapter on "Dispositions," Chapter 14, which might, under the definition, also be included under "adjudication."

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1 The American College Dictionary, Random House (New York: 1967)

2 Black's Law Dictionary (Rev. 4th Ed.), West Publishing Company (Saint Paul: 1968).

3 National Advisory Committee on Criminal Justice Standards and Goals, Report of the Task Force on Juvenile Justice and Delinquency and Prevention, hereinafter Task Force (1976).

NATIONAL ADVISORY COMMITTEE FOR JUVENILE
JUSTICE AND DELINQUENCY PREVENTION

The National Advisory Committee includes a wider range of subjects in its "Standards on Adjudication," which include "provisions on the jurisdiction and organization of court hearing matters relating to juveniles, the rights of the parties to judicial and administrative adjudicatory proceedings, and the alternatives, criteria, and procedures for intake, detention, and disposition."[4]

The Table of Contents includes, after an Introduction, ten standards with designated subsections: The Courts (Standard 3.1); Jurisdiction (Standard 3.11); Court Organization (Standard 3.12); Counsel (Standard 3.13); Intake (Standard 3.14); Detention, Release, and Emergency Custody (Standard 3.15); Preadjudicative Procedures (Standard 3.16); Adjudication Procedures (Standard 3.17); Dispositions (Standard 3.18); Appellate Procedures Standard 3.19); and Noncourt Adjudicatory Proceedings (Standard 3.2).[5]

JUVENILE JUSTICE STANDARDS PROJECT

The IJA/ABA Juvenile Justice Standards Project similarly includes a wider range of subjects in its "Standards Relating to Adjudication," based upon the assumption that, "as compared to other stages in the juvenile process, the adjudication stage is and ought to be relatively formal . . . (with the purpose of making) the factual and legal findings that determine whether the court may take certain coercive measures that significantly affect the lives of the respondent and his or her family."[6]

The Table of Contents includes, after an Introduction, six standards (designated as Part I through VI) with designated subsections: Requisites for Adjudication Proceedings to Begin (Part I); Standards Applicable to Uncontested and Contested Adjudication Proceedings (Part II): Uncontested Adjudication Proceedings (Part III); Contested Adjudication Proceedings (Part IV); The Adjudication Decision (Part V); and Public Access to Adjudication Proceedings (Part VI).[7]

More specifically, Part III (Uncontested Adjudication Proceedings) includes the following standards: Capacity to plead (Standard 3.1); Admonitions before accepting a plea admitting an allegation of the petition (Standard 3.2); Responsibilities of the juvenile court judge with respect to plea agreements (Standard 3.3); Determining voluntariness of a plea admitting the allegations of the petition (Standard 3.4); Determining accuracy of a plea admitting the

4 National Advisory Committee for Juvenile Justice and Delinquency Prevention, Report of the Advisory Committee to the Administrator on Standards for the Administration of Juvenile Justice, (1976). (Hereinafter NAC).

5 Id.

6 Institute of Judicial Administration/American Bar Association, Standards Relating to Adjudication, (Tentative Draft 1977). (hereinafter IJA/ABA, Adjudication).

7 Id.

allegations of the petition (Standard 3.5); Inquiry concerning effectiveness of representation (Standard 3.6); Parental participation in uncontested cases (Standard 3.7); and Plea withdrawal (Standard 3.8).[8]

It is noted particularly that the Juvenile Justice Standards Project "Standards Relating to Adjudication" also contain an Appendix with alternate standards (Standards to Eliminate Plea Bargaining) as follows: Responsibilities of officials to prohibit plea bargaining (Alternate Standard 3.3); Determining voluntariness of a plea admitting the allegations of the petition (Alternate Standard 3.4); and Plea withdrawal (Alternate Standard 3.8).[9]

THE PLEA BARGAINING ISSUE

The issue of "plea bargaining" is one which has stirred debate in the criminal justice system and there is no single position on it.

Professor Frank J. Remington and others, writing in Criminal Justice Administration, make this comment:[10]

> The guilty plea is sometimes the result of an offender's conscience pangs or of his despair in the face of overwhelming evidence of his guilt. At other times it is a strategic choice, made in exchange for advantage. The exchange may not be overt, but may flow from routine practice of extending leniency in some manner when a defendant pleads guilty. The bargain may also be openly agreed upon. Such actual negotiations for guilty pleas are common but not universal. Apparently there is little explicit bargaining in Baltimore, for example. One suspects that the pressures which elsewhere are alleviated by plea bargaining are accommodated in Baltimore some other way.
>
> The frequency of guilty pleas may be affected by several factors, among them the fear by attorneys that their failure to contest vigorously their client's case may be characterized later as ineffective representation and the hope by clients that if they fight their cases all the way something--such as a new Supreme Court ruling--may occur to save them.

8 Id.

9 Id.

10 Remington, Frank J., et. al., Criminal Justice Administration, (Indianapolis: (1969), 586, citing The President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Courts 126 (1967), and Myhre, Conviction Without Trial in the United States and Norway: A Comparison, 5 Houston L. Rev. 647 (1968).

Remington calls attention to the growing adversariness of juvenile proceedings subsequent to In Re Gault[11] and makes the following statement:[12]

> In the pre-court stages of the juvenile process, we have seen instances of the adult criminal system moving closer to the juvenile one, particularly in terms of disposition of cases without official court action. But while the adult system is becoming more like the juvenile in the pre-court phase, the opposite is true of adjudication. Here the juvenile system is moving into the format and procedures of the adult one.
>
> The original juvenile court statutes were primarily concerned with substituting for the adversary format of the criminal court an atmosphere of friendly inquiry conducive to rehabilitation of the child. . . .
>
> The departure from the adversary system has been called the "essential conceptual flaw in the juvenile court" (citing authorities). The adversary system is thought by many to be the heart of due process. The courts and legislatures today, faced with a conflict between due process requirements and the current informal procedures of the juvenile courts, have tended to turn to the criminal law for guidance. . . .

It stands to reason that, in the pursuit of due process following In Re Gault, we continue to look to the adult court for answers to procedural problems such as plea bargaining.

The American Bar Association Project on Standards for Criminal Justice provides a focus for this subject. In the Standards Relating to Pleas of Guilty, attention is given to "Plea Discussions and Plea Agreements" in Part II. More particularly, the standards relating to the subject state:[13]

3.1 Propriety of plea discussions and plea agreements.

(a) In cases in which it appears that the interests of the public in the effective administration of criminal justice (as stated in section 1.8) would thereby be served, the prosecuting attorney may engage in plea discussions for the purpose of reaching a plea agreement. He should engage in plea discussions or reach a plea agreement with the defendant only through defense counsel, except when the defendant is not eligible for or does not desire appointment of counsel and has not retained counsel.

(b) The prosecuting attorney, in reaching a plea agreement, may agree to one or more of the following, as dictated by the circumstances of the individual case:

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11 387 U.S. 1 (1967).

12 Remington, Frank J., op. cit., pp. 1047-1048.

13 ABA Standards Relating to Pleas of Guilty, 10-14 (Approved Draft 1968).

(i) to make or not to oppose favorable recommendations as to the sentence which should be imposed if the defendant enters a plea of guilty or nolo contendere;

(ii) to seek or not to oppose dismissal of the offense charged if the defendant enters a plea of guilty or nolo contendere to another offense reasonably related to defendant's conduct; or

(iii) to seek or not to oppose dismissal of other charges or potential charges against the defendant if the defendant enters a plea of guilty or nolo contendere.

(c) Similarly situated defendants should be afforded equal plea agreement opportunities.

3.2 Relationship between defense counsel and client.

(a) Defense counsel should conclude a plea agreement only with the consent of the defendant, and should ensure that the decision whether to enter a plea of guilty or nolo contendere is ultimately made by the defendant.

(b) To aid the defendant in reaching a decision, defense counsel, after appropriate investigation, should advise the defendant of the alternatives available and of considerations deemed important by him or the defendant in reaching a decision.

3.3 Responsibilities of the trial judge.

(a) The trial judge should not participate in plea discussions.

(b) If a tentative plea agreement has been reached which contemplates entry of a plea of guilty or nolo contendere in the expectation that other charges before that court will be dismissed or that sentence concessions will be granted, upon request of the parties the trial judge may permit the disclosure to him of the tentative agreement and the reasons therefor in advance of the time for tender of the plea. He may then indicate to the prosecuting attorney and defense counsel whether he will concur in the proposed disposition if the information in the presentence report is consistent with the representations made to him. If the trial judge concurs but the final disposition does not include the charge or sentence concessions contemplated in the plea agreement, he shall state for the record what information in the presentence report contributed to his decision not to grant these concessions.

(c) When a plea of guilty or nolo contendere is tendered or received as a result of a prior plea agreement, the trial judge should give the agreement due consideration, but notwithstanding its existence he should reach an independent decision on whether to grant charge or sentence concessions under the principles set forth in section 1.8.

3.4 Discussion and agreement not admissible.

> Unless the defendant subsequently enters a plea of guilty or nolo contendere which is not withdrawn, the fact that the defendant or his counsel and the prosecuting attorney engaged in plea discussions or made a plea agreement should not be received in evidence against or in favor of the defendant in any criminal or administrative proceedings.

It is against this background that the juvenile justice standards promulgated by the Task Force on Juvenile Justice and Delinquency, the National Advisory Committee on Juvenile Justice and Delinquency Prevention and the Juvenile Justice Standards Project are compared.

(a) TASK FORCE ON JUVENILE JUSTICE AND DELINQUENCY PREVENTION

The Task Force position is clear and unequivocal: plea negotiations are prohibited. Standard 13.1 reads as follows:[14]

Standard 13.1 Plea Negotiations Prohibited

> Plea bargaining in all forms should be eliminated from the delinquency adjudication process. Under no circumstances should the parties engage in discussions for the purpose of agreeing to exchange concessions by the prosecutor for the juvenile's admission to the petition.

In the commentary to Standard 13.1, the Task Force explains its position, in in part, as follows:[15]

> Having considered the negative consequences of plea bargaining, as well as its alleged benefits, this report recommends that the practice should be wholly and immediately eliminated from delinquency proceedings in family courts. Immediate prohibition, rather than regulation or gradual elimination of plea bargaining, is both sound and practical. Indeed, it is the only effective way to eliminate the evils of the practice.
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> * * * * *
>
> The prohibition against plea bargaining is not intended to discourage discussions between counsel regarding delinquency cases. Indeed, free and open discussions about the merits of a case are necessary to give the respondent a sound basis for a decision to admit to any particular allegation in a petition. This standard only prohibits discussion with the intent of securing a concession in return for an admission. Good faith on the part of both counsel will be necessary to enforce this prohibition. Similarly, if the prosecutor in good faith realizes that he can not prove the delinquent act alleged in the petition, he or she may ask the court to reduce or dismiss that petition.

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14 Task Force, p. 409.

15 Id.

The Task Force recognizes that there are areas where plea bargaining is now practiced and will continue to be practiced in the juvenile justice system. It has recommended "regulations and safeguards" designed to reduce or eliminate, where possible, the abuses currently encountered in the plea bargaining process:[16]

(1) A juvenile should not be permitted to bargain in his or her own behalf without the opportunity to confer with counsel.

(2) Plea negotiations should be conducted in private sessions. Juveniles should be able to have their parents present, or they should also have the opportunity to participate in the plea discussions without the presence of their parents.

(3) The government should conduct plea negotiations through the prosecutor. The prosecutor should undertake plea discussions with both the interests of the State and those of the juvenile in mind, although the prosecutor's primary concern should be protection of the public interest.

(4) The parties should be able to negotiate only for the purpose of reaching an agreement as to a reduced charge or the dismissal of other petitions. It is not proper under any circumstances for the parties to negotiate with regard to the disposition a juvenile will receive or the particular rehabilitative program the juvenile will enter. Nor should they agree to exclude pertinent social information or court records from the court's knowledge.

(5) No admission to a delinquency petition that is the result of negotiation among the parties should be entered or allowed to stand unless the family court judge concurs with the agreement reached by the parties. Although the judge should not participate in plea discussions, the court should inquire of the government, the juvenile, and the juvenile's counsel whether the plea is the result of any negotiation and agreement. If the plea is the result of an agreement, the court should require full disclosure of the substance and basis of that agreement. If the court at any time decides it cannot concur with the agreement, it should allow the juvenile full opportunity to withdraw the plea.

(b) NATIONAL ADVISORY COMMITTEE FOR JUVENILE JUSTICE AND DELINQUENCY PREVENTION

The National Advisory Committee position is also clear and unequivocal: plea negotiations are prohibited.

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16 Id., pp. 412-413.

Standard 3.175 reads as follows:[17]

3.175 Plea Negotiation

All forms of plea negotiations, including negotiations over the level of charging as well as over the disposition, should be eliminated from the family court process. Under no circumstances should the parties engage in discussions for the purpose of agreeing to exchange concessions by the prosecutor for an admission to the allegations in the complaint or petition.

In the commentary to Standard 3.175, the National Advisory Committee explains its position, in part, after discussing conflicting opinions and authorities:[18]

After careful consideration of these contrasting views, the Advisory Committee on Standards concluded that plea negotiation, in any form, would be detrimental to the fairness and effectiveness of the juvenile justice process. It concluded further that because most jurisdictions do not rely on plea bargaining as the basic mode for disposing of delinquency, non-criminal misbehavior, and neglect and abuse cases, there is a real opportunity for the juvenile justice system to avoid the inequities that result from dependence on obtaining negotiated pleas.

* * * * *

(c) JUVENILE JUSTICE STANDARDS PROJECT
INSTITUTE OF JUDICIAL ADMINISTRATION/AMERICAN
BAR ASSOCIATION

The IJA/ABA provides for amendment of petitions as follows:[19]

Standard 2.2 Amending the petition.

A. Each jurisdiction should provide by law that the petition may be amended in the same manner as a charge in an adult criminal proceeding:

1. prior to the tender of a plea admitting an allegation of the petition, or

2. at or before the close of the government's case in chief unless amendment at that time would work an injustice.

B. Each jurisdiction should provide by law that if the petition is amended, the respondent should be permitted a reasonable opportunity to prepare a defense to the amended allegations.

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17 NAC, 138.

18 Id., p. 139.

19 IJA/ABA, Adjudication, p. 22, as amended by Executive Committee of Juvenile Justice Standards Commission in November 1977.

The Juvenile Justice Standards Project provides for plea alternatives as follows:[20]

Standard 2.4 Plea Alternatives.

A. Each jurisdiction should provide by law for oral pleading by a respondent to the allegations of a petition.

B. The respondent should be permitted to admit or deny the allegations of the petition ;(or to enter a plea of nolo contendere if such a plea is permitted in the State for adults. The nolo contendere plea would have the same legal effect as such a plea in an adult proceeding.) If the respondent refuses to plead, a plea of deny should be entered by the court.

The IJA/ABA standards provide in Standard 2.5 (at p.25) that "an admission of an allegation of the petition should be regarded as consent by the respondent to an adjudication by the court of the admitted allegation without proof of it, submect to the requirement of Standard 3.5, relating to verifying the accuracy of the plea."[21]

Concomitantly, they provide in Standard 2.6 (at p. 26) that "a denial of an allegation of the petition should be regarded as an assertion by the respondent of the right to require the government to prove its allegation and not as an assertion that the allegation denied is untrue."[22]

The IJA/ABA standards also make provision in its standards to assure that juvenile respondents have the capacity to make a plea admitting allegations in a petition (Standard 3.1) and that a court properly admonishes a respondent before accepting a plea admitting an allegation in the petition (Standard 3.2).[23]

The IJA/ABA Juvenile Justice Standards Project makes reference to "uncontested adjudication proceedings" in its volume on Prosecution, and particularly with reference to "plea agreements" as follows:[24]

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20 Id., p. 24. Bracketed and italicized material suggests text for amendments by Executive Committee of Juvenile Justice Standards Committee in November 1977.

21 Id.

22 Id.

23 Id.

24 IJA/ABA, Standards Relating to Prosecution, pp. 62-63 (Tentative Draft 1977). Deleted from the tentative draft in November by the Executive Committee was this sentence included in 5.1A: However, the juvenile prosecutor may not enter into a plea agreement concerning the disposition which he or she will subsequently recommend at a disposition hearing.

Standard 5.1 Propriety of plea agreement.

A. A plea agreement concerning the petition or petitions that may be filed against a juvenile may properly be entered into by the juvenile prosecutor.

B. Plea agreements should be entered into with both the interests of the state and those of the juvenile in mind, although the primary concern of the juvenile prosecutor should be the protection of the public interest, as determined in the exercise of traditional prosecutorial discretion.

The IJA/ABA standards on Prosecution also provide that "a plea agreement should not be entered into by the juvenile prosecutor without the presentation on the record of the family court of independent evidence indicating that the juvenile has committed the acts alleged in the petition.[25]

The standards on Prosecution also provide that "if juvenile prosecutors find that they are unable to fulfill a plea agreement they should give notice to the juvenile and cooperate in securing leave of court for the withdrawal of the admission, and take such other steps as may be appropriate and effective to restore the juvenile to the position he or she was in before the plea was entered."[26]

The IJA/ABA position is perhaps clear, but perhaps also equivocal. Standards 3.3, 3.4, and 3.8 relate to the subject of these standards, according to the commentary, (1) recognizes the existence of plea bargaining in juvenile proceedings; (2) Concedes its legitimacy; and (3) seeks to regulate it.

The pertinent standards read as follows:[28]

Standard 3.3 Responsibilities of the juvenile court with respect to plea agreements.

A. Subject to the qualification contained in Subsection B. of this standard, the juvenile court judge should not participate in plea discussion.

B. If a plea agreement has been reached that contemplates entry of a plea admitting an allegation of the petition in the expectation that other allegations will be dismissed or not filed (or that dispositional concessions will be made), the juvenile court judge should require disclosure

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25 Id., Standard 5.3.

26 Id., Standard 5.4.

27 IJA/ABA, Adjudication, p. 35.

28 Id., pp. 7-8. Bracketed and italicized material suggests test for amendments by Executive Committee of Juvenile Justice Standards Commission in November 1977.

of the plea agreement and the reasons therefor in advance of the time for tender of the plea. Disclosure of the plea agreement should be on the record in the presence of the respondent. The court should then indicate whether it will concur in the proposed agreement. If the court concurs, but later decides not to grant the concessions contemplated by the plea agreement, it should so advise the respondent and then call upon the respondent either to affirm or withdraw the plea.

C. When a plea admitting an allegation of the petition is tendered as a result of a plea agreement, the juvenile court judge should give the agreement due consideration, but notwithstanding its existence, should reach an independent decision whether to grant the concessions contemplated in the agreement.

Standard 3.4 Determining voluntariness of a plea admitting the allegations of a petition.

A. The juvenile court should not accept a plea admitting an allegation of the petition without determining that the plea is voluntary.

B. By inquiry of the attorneys for the respondent and for the government, the juvenile court should determine whether the tendered plea is the result of a plea agreement and, if so, what agreement has been reached.

C. If the attorney for the government has agreed to seek concessions that must be approved by the court, the court should advise the respondent personally that those recommendations are not binding on the court and follow the procedures provided in Standard 3.3B.

D. The court should then address the respondent personally and determine whether any other promises or inducements or any force or threats were used to obtain the plea.

Standard 3.8 Plea withdrawal.

A. The juvenile court should allow the respondent to withdraw a plea admitting an allegation of the petition whenever the respondent proves that withdrawal is necessary to correct a manifest injustice.

1. A motion for withdrawal is not barred because made subsequent to adjudication or disposition.

2. Withdrawal is necessary to correct a manifest injustice when the respondent proves:

a. denial of the effective assistance of counsel guaranteed by constitution, statute, or rule;

b. that the plea was not entered or ratified by the respondent;

c. that the plea was involuntary, or was entered without knowledge of the allegations or that the disposition actually imposed could be imposed;

d. that respondent did not receive the concessions contemplated by the plea agreement and the attorney for the government failed to seek or not to oppose those concessions as promised in the plea agreement; or

e. that respondent did not receive the concessions contemplated by the plea agreement concurred in by the court, and did not affirm the plea after being advised that the court no longer concurred and after being called upon to either affirm or withdraw the plea.

3. The respondent should be permitted to move for withdrawal of the plea without alleging innocence of the allegations to which the plea has been entered.

B. Before the disposition of the case, the court should allow the respondent to withdraw the plea for any fair and just reason without proof of manifest injustice as defined in subsection 2. of this standard.

The IJA/ABA standards fully recognize that the phenomenon of plea bargaining in the juvenile court is not without controversy. Indeed, in the commentary, the IJA/ABA Adjudication volume states:[29]

> Finally, the law should deal with the questions of plea bargaining in juvenile cases. The phenomenon of guilty plea bargaining is virtually universal in the criminal justice system and accounts in large part for the high rate of disposition of criminal cases by plea of guilty. The extent of plea bargaining in juvenile cases is not certain, but it is known that plea bargaining does exist in at least some metropolitan juvenile justice systems. See commentary to Standard 3.3 infra. Plea bargaining in criminal cases is a subject of current controversy. The Supreme Court has accepted the constitutionality of plea bargaining, and the American Bar Association, Standards for Criminal Justice, Pleas of Guilty (Approved Draft 1968), is based on the express assumption that plea bargaining in criminal cases is proper if correctly regulated. On the other hand, the National Advisory Commission on Criminal Justice Standards and Goals, "Courts," S 3.1 (1973), recommends the elimination of plea bargaining in criminal cases by 1978.
>
> Most commentators would probably agree that plea bargaining, where it exists in the juvenile justice system, represents the "worst of both worlds," since it is invisible and unregulated. Most would also agree that plea bargaining in juvenile cases must move in one of two directions: either plea bargaining should be recognized and regulated or it should be eliminated. Which direction to take appears to be a close question; certainly it is one that closely divided various committees of the Juvenile Justice Standards Project as well as the commission. These standards take the "recognize and regulate" approach. Accordingly, Standards 3.3, 3.4, and 3.8 assume that plea bargaining will exist and propose a regulatory mechanism to avoid its abuses. . . . (Emphasis supplied)

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29 Id., pp. 28-29.

The IJA/ABA standards, however, because of some ambivalence on the subject, nevertheless proposed in its appendix an "alternate" standard which clearly prohibits plea bargaining. The commentary to Part III (Uncontested Adjudication Proceedings) states further:

> . . . . On the other hand, there is recognition that the matter is a close question and that, perhaps unlike the criminal justice process, it may be possible, by serious and sustained effort, to eliminate plea bargaining in the juvenile justice process. Therefore, alternate standards have been drafted on the assumption that plea bargaining can and should be eliminated in the juvenile justice process. Alternate Standards 3.3, 3.4, and 3.8 appear, with appropriate commentary, as an Appendix to this volume. While it may be a close question whether the approach of the main standards or of their alternatives is preferable, it seems indisputable that the juvenile justice process must move in one of those directions.[30] (Emphasis supplied)

The alternate standards referred to read as follows:[31]

Alternate 3.3 Responsibilities of officials to prohibit plea bargaining.

A. Each jurisdiction should provide by law that its public policy is to prohibit plea bargaining in all forms in the juvenile courts of that jurisdiction and should endeavor to implement that policy by mandating the measures recommended in subsections B. through L. of this standard.

B. The juvenile court should not permit its disposition of a case to be affected by whether the respondent tendered a plea admitting an allegation of the petition.

C. The judge of the juvenile court should use all reasonable means to prevent the recommendations or contents of social history reports from being affected by whether the respondent tendered a plea admitting an allegation of the petition.

D. The attorney for the government should not permit a recommendation of a disposition of a case or the representations made in a dispositional hearing to be affected by whether the respondent entered a plea admitting an allegation of the petition.

E. The attorneys for the respondent and the government should not discuss with each other any disposition of the case contemplating that the respondent will enter a plea admitting an allegation of the petition.

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30 Id., p. 29.

31 Id., pp. 80-88.

F. The attorney for the respondent should not advise or suggest to the respondent or respondent's family that the disposition of the case may be affected by whether the respondent tenders a plea admitting an allegation of the petition.

G. The attorney for the government should not refrain from filing allegations or refrain from prosecuting allegations already filed in the expectation that the respondent will thereby be induced to tender a plea admitting an allegation of the petition.

H. The attorney for the government should not file or threaten to file a motion to transfer a case to criminal court for prosecution of respondent as an adult or refrain from pressing such a motion or move to dismiss such a motion in the expectation that the respondent will thereby be induced to tender a plea admitting an allegation of the petition.

I. The attorney for the government may move to dismiss a petition or to strike an allegation in a petition, but should not move to dismiss or strike in the expectation that the respondent will thereby be induced to enter a plea admitting an allegation of the amended petition.

J. The attorney for the government may move to amend a petition in accordance with Standard 2.2, but should not move to amend to allege less serious conduct in the expectation that the respondent will thereby be induced to enter a plea admitting an allegation of the amended petition.

K. The judge of the juvenile court should require the attorney for the government to state the reasons for moving to dismiss a petition, to strike an allegation in a petition, or to amend a petition to allege less serious conduct and should scrutinize such motions and statements of reasons with particular care to determine their compliance with the jurisdiction's policy of prohibiting plea bargaining.

L. If the juvenile court determines that a motion to dismiss a petition, to strike an allegation in a petition, or to amend a petition to allege less serious conduct was made in the expectation that the respondent would thereby be induced to enter a plea admitting a remaining or amended allegation, it should deny the motion.

Alternate 3.4 Determining voluntariness of a plea admitting the allegations in a petition.

A. The juvenile court should not accept a plea admitting the allegations of the petition without determining whether the plea is voluntary.

B. The juvenile court should address the respondent personally and determine whether any promises or inducements or any force or threats were used to obtain the plea.

C. The juvenile court should address the respondent personally and inform the respondent that the disposition of the case, if there is an adjudication, will not be affected by whether respondent admits or denies the allegations of the petition.

D. By inquiry of the respondent and the attorneys for the respondent and the government, the juvenile court should determine whether there have

been plea discussions or a plea agreement, and, if so, the nature of the discussions or agreement.

E. If the juvenile court determines that the tendered plea is the result of plea discussions or a plea agreement, it should reject the plea, enter a plea for the respondent denying the allegations of the petition, and set the matter for trial.

Alternate 3.8 Plea Withdrawal.

A. The juvenile court should allow the respondent to withdraw a plea admitting the allegations of the petition when the respondent proves that withdrawal is necessary to correct a manifest injustice.

1. A motion for withdrawal is not barred because made subsequent to adjudication or disposition.

2. Withdrawal is necessary to correct a manifest injustice when the respondent proves:

a. denial of the effective assistance of counsel guaranteed by constitution, statute, or rule;

b. that the plea was not entered or ratified by the respondent;

c. that the plea was involuntary, or was entered without knowledge of the allegations or that the disposition actually imposed could be imposed; or

d. that the plea was entered as a result of a plea agreement.

3. The respondent should be permitted to move for withdrawal of the plea without alleging innocence of the allegations to which the plea has been entered.

B. Before disposition of the case, the court may allow the respondent to withdraw the pleas for any fair and just reason without proof of manifest injustice as defined in subsection A. of this standard.

SUMMARY AND CONCLUSIONS

Plea bargaining does exist in the criminal justice system and has been recognized as a vital part of that process at the adult level. Not all persons are in agreement concerning its efficacy.

The juvenile justice system, particularly after In re Gault, has retreated from the antiquated parens patriae approach to the adversary approach, thus taking upon itself due process safeguards and procedures previously known only in the adult criminal justice system.

It may be said that plea bargaining in the juvenile justice system does indeed represent the "worst of both worlds," and there is no agreement whether it ought to be permitted.

The Task Force in its standards (Standard 13.1) prohibits plea negotiations, i. e., plea bargaining.

However, the Task Force does recognize that plea bargaining does occur in some juvenile justice systems; and recommends "regulations and safeguards" designed to reduce or eliminate the abuses currently encountered in the plea bargaining process.

The National Advisory Committee on Juvenile Justice and Delinquency Prevention in its standards (Standard 3.175) simply prohibits plea negotiations, i. e., plea bargaining.

The IJA/ABA Juvenile Justice Standards Project in its standards (Standards 3.3, 3.4 and 3.8) recognizes the existence of plea bargaining in juvenile proceedings, concedes its legitimacy, and seeks to regulate it. At the same time, however, the project concedes that there are two distinct points of view on plea bargaining, viz., (1) that plea bargaining should be recognized and regulated or (2) that plea bargaining should be eliminated.

The IJA/ABA Standards thus provide a choice between the two: (1) Standards 3.3, 3.4 and 3.8 which seek to recognize and regulate plea bargaining; and (2) Alternate Standards 3.3, 3.4 and 3.8 which seek to eliminate plea bargaining.

In the final analysis, the Task Force, the National Advisory Committee and the IJA/ABA Juvenile Justice Standards Project are not necessarily in conflict in their standards inasmuch as the IJA/ABA Alternate Standards are not inconsistent with the standards promulgated by the other two groups.

(WHEREUPON Dean Smith's presentation was given and the following is the discussion that ensued.)

MR. MANAK: Thank you, Dean Smith.

Okay, we are going to start at this end here so we will be starting with Ken Seigel.

MR. SIEGEL: I have no comments at this point except to say, you know, I support the position that plea bargaining is necessary.

But, I hold off for further comment until I hear other remarks.

MR. MANAK: Mr. Rounds?

MR. ROUNDS: No comments.

MR. MANAK: Ms. Bridges?

MS. BRIDGES: No comments.

MR. MANAK: Ms. Szabo?

MS. SZABO: No comments.

MR. MANAK: Jim Delaney?

HON. DELANEY: Pass.

MR. MANAK: Wait a minute -- Ms. Thompson? Mr. Dale? Mr. Hutzler? Judge Cattle?

HON. CATTLE: The defendant's counsel, the Prosecutor and Judge -- I think it is a necessary evil -- whether it is good, bad or indifferent,

depends in a large extent upon the defense counsel.

And of course if I note obvious problems -- in other words, I am not going -- I never allow anything to be bargained which wasn't implicit in the original charge -- that is that I know that there are some reasonable beliefs that they could prove the charge to which it is plea bargained down to.

In other words, I don't want a dumping from murder to grand larceny -- that sort of thing.

But until the public is willing to build a tremendous court with a hundred judges, where there is only one day, and judges can -- and attorneys can continue to multiply as they are, why I think we have to live with it.

The only thing we can do with it is examine our own consciences -- I don't think the Court has any business participating in the affair except when there is something obviously gone haywire.

It is strictly a matter of the prosecution defense.

MR. MANAK: Judge Fort?

HON. FORT: May I ask the Dean a question?

MR. MANAK: Certainly.

HON. FORT: I didn't hear you define the term "Plea bargaining" as used in the standard or as you see it -- and who specifically is involved in it and what do they do?

DEAN SMITH: Plea bargaining is a negotiating disposition without a trial as a consequence of which a position is made in the disposition -- that is the general definition.

The published standards, as they appear on paper by the Juvenile Justice Standards Commission, however, appears to limit it to the charge.

We have, however, in a regular fashion, modified the published standard to embrace not only negotiation for the definition of a charge, but also a negotiation with respect to disposition.

This, therefore, is -- source of the Juvenile Justice Standards process.

Essentially on the same level as the plea bargaining process in the adult court.

HON. FORT: What if any is the role of the Judge in this process?

DEAN SMITH: The role of the Judge is as our

standards suggest, and as suggested also by criminal justices -- it is not to participate in the initial discussions -- but to become aware of the plea bargained agreement prior to the time of disposition.

So that the Judge can then monitor the process by which the promising authority in those instances -- the prosecuting attorney, leads up to the promising authority's agreement with respect to the agreement.

HON. FORT: Does this process require, then, that the Judge, prior to him hearing anything about the case, commit himself to a disposition?

DEAN SMITH: It does -- it does not.

HON. FORT: What rights, if any, are left to the child in the event he denies the bargain? And who hears the case?

DEAN SMITH: I'm not sure, Bill, there is a specific answer to your question as it is stated.

However, the Judge has a responsibility for determining the providency of the plea, and whether the bargain agreed to has been provided.

And if for any reason the plea is not considered by the Judge to be provident, it should be withdrawn and I think our standards do

reflect that.

If a child or the attorney for the child wishes to withdraw, the child and the child's attorney or the child's attorney has the option up until disposition is made to withdraw that plea of guilty, which is the first step toward the agreement.

My best recollection of reading and interpreting the standards is that the discussion with respect to accepting the plea of guilty and the discussion with respect to whether it should proceed to its promised disposition is largely in the hands of the Judge -- but with some control on the part of the child and the child's counsel.

HON. FORT: What if any rights does the Prosecutor have in the event that the Judge indicates he is unwilling to go along with the plea?

DEAN SMITH: I'm not certain that our standards address themselves to that.

HON. FORT: Does he have a right to withdraw under any of these standards or ours or any of these others -- does he also have the right to withdraw?

DEAN SMITH: I do not have a recollection that any of the standards covered that point.

MR. MANAK: Ms. Bridges will cover the role of

the prosecution and the plea negotiation process.

Of course, there have been some changes worked by the executive committee -- specifically as I recall in the area of cases whe the child refuses to admit the facts that are alleged in the petition.

The Alford type plea, whether the prosecution can then continue with the plea negotiation process.

HON. FORT: One last question, if I may?

MR. MANAK: Yes.

HON. FORT: Just to get this clear in my mind -- do I understand then that a new Judge takes the place in the event that the Judge refuses to go along with the agreed upon result or does he go ahead then, try it on the facts having already heard what they are?

DEAN SMITH: I am not sure.

HON. McLAUGHLIN: It is the same problem.

MS. BRIDGES: I don't think the standards say anything about what is going to happen once a plea is withdrawn and I don't think they can give any -- as I recall, any right to the Prosecutor to say, "Withdraw the whole thing if the Judge is going to

give another disposition that has been agreed upon."

HON. CATTLE: I just want to make it clear that when I spoke I don't believe the Judge has any part in a disposition plea.

I think that any agreements made between counsel and the Prosecutor have to be at least in my position, clear -- with the clear understanding that the Court is going to do whatever subsequent evidence may indicate they ought to do.

It's got nothing to do with the disposition and the Prosecutor is out of luck.

MR. MANAK: Judge McLaughlin?

HON. McLAUGHLIN: I have just had two interesting cases I will throw out.

This was my area of specialty for a long time.

This one case that holds that you have a constitutional right to plea bargain.

The facts are rather amusing -- It is a Florida case where the husband beat up his wife -- rather badly. And she went to an attorney to represent her in the divorce action.

It just so happened that same attorney was a part-time District Attorney, and ended up

trying it.

And the case was conducted according to all the rights and no due process deviation to it at all, and he was convicted.

And the nature of his appeal was to the Federal Court that anybody in Florida who beats up his wife has the right to bargain down from felonious assault to misdemeanor assault.

But he wasn't given this right because the attorney had a vested interest in convicting him to a felony because then it would look worse for him in the divorce action -- which I thought was somewhat amusing.

I didn't realize that Florida was quite so liberal.

But apparently in the history of man, no man was ever convicted of feloniously assaulting his wife.

They were all down to misdemeanor.

The Federal Court was much impressed by it and said that he had a constitutional right to discuss this case with the Assistant District Attorney who was not involved in the outcome -- and they have together the constitutional right to plea

bargain.

Now, in that case it never went any higher, but for those who were looking for some authority, I give you that thin straw.

MR. MANAK: Was that recorded, Judge McLaughlin?

HON. McLAUGHLIN: Yes, it is.

The other case is out of the Court of Appeals of the State of New York, which again is an interesting case.

A fellow was indicted for murder and permitted to plead guilty after a bargaining process for an attempted manslaughter which is a non-existent crime in New York.

You can't attempt manslaughter and he got five years as all part of the deal.

And then he committed the mortal sin of appealing.

And he said, "How can I be in a State prison for committing a non-existent crime?"

And, you know, it is impossible.

So he had to do five years for it.

So the Court of Appeals, I think took an intelligent deal.

He said, "We know what you guys are

doing down in New York -- you aren't bargaining him for what he did, you are bargaining him for the sentence and we don't care what label you put on him.

So you know whatever -- you are bargaining to the sentence and that is it.

Now, that is the adult system.

You see, you can't bargain to a disposition. That is where the -- that is where you have the -- you have the break -- the breakdown in the juvenile justice system that once a child is adjudicated, in most states, how long he stays in the institution is largely up to the person who is running the institution.

MR. MANAK: Well, from a prosecution standard it would be impossible for the Prosecutor to engage in plea bargaining to the disposition -- that is as originally structured.

But that has been changed, also, isn't that correct, David, by the Executive Committee?

If -- I'm sorry, this is David Gilman.

We have a new court reporter incidentally, so we are going to have to use names again for a while.

MR. GILMAN: Under the ABA standards, as revised, you can now plead -- you can now plea bargain to charge and to disposition, and you will be able to, under the standards, at least, be able to plea to disposition because the standards operate for a determinant sentence set by the Judge.

So if you, by determinant sentence and you by plea bargaining he can't respond to your question.

But if he had plea bargaining and indeterminant sentencing, then you can't plea bargain because you don't have the ability to release.

MS. BRIDGES: Well, you can a little bit.

You can still plea bargain on whether a commitment to a State institution.

MR. GILMAN: No, you only have an out.

You have the in-out decision, but you don't have how much -- how much time was spent in as opposed to how much time you will spend out.

HON. MOORE: I don't understand what you are talking about, probably ignorance.

MR. MANAK: This is Judge Moore.

HON. MOORE: I understand why you plead to, under your proposed standards, to the offense which

has a lesser maximum i.e., 18 months instead of two years.

But I don't -- so that if the kid pleads guilty of an attempted murder, the most he can get from the Judge is 18 months under that schedule as opposed to murder which would be two years.

But I don't understand how you can plead within the minimum to anything.

The Judge may not be able to give you more than 18 months, but the Judge may be able to put you on probation or give you some other alternative.

And I think if -- that if you say to the defendant, "I guarantee that if you plea bargain to this other offense, that the Judge, I guarantee will give you probation."

He doesn't have ------* to plea bargain.

You can say to him, "I guarantee that the Judge can't put you away for more than 18 months because the offense is only punishable by 18 months."

But you can't guarantee what you are going to get.

MR. GILMAN: Judge, that is the maximum.

So you can enter a bargain where, say you had a maximum duration for a class offense of say

* Word uncertain.

three years -- all right?

Now, you can enter to a plea bargain where you will say, "Well, if you will take -- if you will plead to a lesser offense, I will see to it that the Judge doesn't give you three years which is the maximum that he can give you, but he will give you six months or he will give you one year," and then he has the power to have the Judge fix that determinant sentencing within the range.

So he would be able to do that.

HON. MOORE: But you are telling your client is all you can guarantee to him is the most he can get from the Judge is six months as opposed to three because you can't take away from the Court the discretion to put the kid on probation as opposed to six months?

MR. GILMAN: No, I'm -- you missed the point.

MR. HUTZLER: If the Court doesn't accept the bargain, then you withdraw the plea.

MR. GILMAN: That's correct.

In other words, if you have an indeterminant sentencing scheme, it is difficult to fix within the maximum -- the exact term of incarceration.

If you have a determinant scheme, then it aids you in the plea bargaining process, because you -- because the Judge would have the power to fix any term less than the maximum from one day up to the maximum where you could plea bargain -- and that is the ability to bargain.

HON. MOORE: It is the ability to coerce the respondent into admitting to something so that he will not be able to get a stiffer sentence from the Judge?

MR. GILMAN: Absolutely.

HON. MOORE: And there is no question, then, that when you have to get into the constitutional issue as to whether that is a free involuntary plea or whether it is a blackmail plea.

We don't have blackmail pleas in Michigan because you didn't do what we are talking about -- all you can do in Michigan is shift the person from a maximum term of 20 years down to a maximum term of ten years, but you can't get the Court to commit itself -- that it is going to give him two years or five years or probation within that ten.

MR. GILMAN: Well, those are the differences among the states.

HON. MOORE: I agree.

MR. MANAK: Judge Ketcham?

MR. KETCHAM: I heard Judge Cattle, and I certainly agree that the plea bargaining is an administrative matter that's not likely to disappear over night.

But I think here we are talking about principles, and goals, and I was going to conclude by just saying I agree with what I heard Dean Smith say about the standards.

But now I am a little confused.

Are the standards -- the standards you mentioned what we are talking about -- but now I thought I heard Dave say that now they are accepting plea bargaining.

MR. GILMAN: No, no.

They -- there are two different options that you can accept under the standards.

MR. KETCHAM: I guess I see now.

MR. GILMAN: The standards as written in those tentative drafts say that if you are going to plea bargain, you could only plea bargain to charge and not to disposition.

MR. KETCHAM: I see.

MR. GILMAN: But the Executive Committee has altered that to allow that if you decide to plea bargain, that you can plea bargain not only to charge, but also to disposition.

MR. MANAK: Dave, I think an important question here perhaps, in the minds of consultants is which of these alternatives will be properly before the House of Delegates in February?

Do they have a choice or must they take the Executive Committee?

MR. GILMAN: No, no, the Executive Committee has printed both of them, and allows the states to decide for themselves which option they would like to take.

So they are put in the alternative.

There will be two -- correct me if I'm wrong, Dean Smith, but both alternatives are going to be before the House of Delegates, because it is printed in the volume.

And allows for the states to determine for themselves, if they wish to have a plea bargain system, that there are standards for that.

And if they wish to choose a non-plea bargain system, then the standards for that are

also described.

DEAN SMITH: Right.

Gentlemen, if I could put it in perspective -- the amendment by the Executive Committee came as a result of the input from the Family Law Committee.

The Executive Committee agreed with that, and therefore decided to extend the first optional set of standards which is pro-plea bargaining to include the additional language.

We have, in this volume, as far as I recall, the only set of standards which has alternate standards.

You can take your choice.

You can be for plea bargaining and use the standards we are proposing. You can be against plea bargaining and use the alternate standard we are proposing, but a package consists of the primary standards which is pro-plea bargaining, and the alternate standards which is anti-plea bargaining.

MR. MANAK: I think that is clear.

David, one other point, other changes that have been made by the Executive Committee, for example in the waiver filing that we were talking

about this morning, those changes go before the House of Delegates in February.

They have no choice between those changes and the original or the interim draft, do they?

MR. GILMAN: That's correct.

MR. MANAK: Okay.

MR. GILMAN: Both the minutes of the 1977 Executive Committee minutes -- meeting, and the minutes of the 1978 Executive Committee meeting, will all be before the House of Delegates.

They will be combined into one set of minutes volume by volume, and they will be before the House of Delegates as the revision is made by the Executive Committee on two different dates that will reflect the changes in all the volumes.

MR. MANAK: So the House of Delegates does not have open to it the option of checking the interim draft as it was before the changes were made by the Executive Committee, is that correct?

MR. GILMAN: That is correct.

HON. ARTHUR: Just amended on the floor..

MR. MANAK: That is what I am trying to get at.

Whether it is final from the Executive

Committee or whether the House of Delegates has any additional choice that can be made.

MR. GILMAN: Yes, the House of Delegates can always raise on the floor of the House additional changes or modifications as it wishes to raise.

But, this is the product of the IJA/ABA joint commission.

These are the revisions that it has agreed to make, and will make.

What the ABA does is purely a question that has to be answered by people in the ABA. But this is what the joint commission is proceeding to present to the ABA, as its position.

MR. MANAK: But Judge Arthur's question, however, was whether the House of Delegates can make amendments to the product as it comes to them from the joint committee?

MR. GILMAN: That is an open question, as one whether they can make it -- that it would be accepted, and I have no -- I don't know -- I simply do not know.

MR. MANAK: All right, Judge Fort?

HON. FORT: There is no question that the House of Delegates can make any changes it wishes before

it endorses any of these standards or anything else.

They are not bound by recommendations that come to them in the form of any type of printed material in whole or in part.

I know nothing about the roles of the ABA House of Delegates that authorizes that.

MR. MANAK: Judge Ketcham, did you have anything?

MR. KETCHAM: No, I now understand everything proposed as alternates, and --

HON. DELANEY: What it really amounts to, then, Charlie, is that the Commission isn't taking any position?

DEAN SMITH: Right.

HON. DELANEY: Is what it amounts to.

DEAN SMITH: It is the only volume we have done.

The Commission was divided -- whether we should be in favor of plea bargaining or whether we should oppose plea bargaining, and the compromise within the Commission was to submit an alternate set of standards.

And this is the only volume in which it was done.

HON. FORT: I am sorry, I missed the meeting -- is there one I missed.

MR. MANAK: Ms. Sufian? Pass?

Ms. Connell?

MS. CONNELL: Nothing.

MR. MANAK: Mr. Hege?

MR. HEGE: Nothing.

MR. MANAK: Mr. Kaimowitz?

We have time for some additional comments, if there are any.

However, if not, we will move on to the next paper.

NCJ 76922

3. Role of the Prosecutor

Consultant
Elizabeth Bridges

ABSTRACT OF PAPER

According to Ms. Bridges, the Supreme Court's decision in In re Gault not only established protections for juveniles, but "irreversibly changed" the role of the prosecutor as well. However, she points out that the increasing number of prosecutors in delinquency proceedings is due not only to the increasingly adversarial nature of the juvenile justice system, but also to the significant increase in juvenile crime. The history of juvenile justice reform efforts from the establishment of the New York House of Refuge in 1825 through Gault and subsequent cases is sketched to further place the standards in context.

Ms. Bridges then outlines the positions taken by the three sets of standards on issues ranging from the size and organization of the prosecutor's office to the prosecutor's role in case screening and diversion, adjudication, disposition. She states that the standards are characterized by consensus regarding the significant role which prosecutors should play in juvenile proceedings.

> The IJA/ABA, the NAC, and the Task Force Standards have for the most part formulated criteria which would create an able prosecutorial staff that would contribute to the juvenile justice system. The only flaws in the approach of these Standards are attempts to limit the authority of prosecutors in their representation of the interests of the state.

These limits, according to Ms. Bridges fall in two areas. The first is the recommendation in the Task Force standards to permit complainants to file a petition if the prosecution and intake staff decline to do so. The second is the standards seeking to limit or prohibit plea bargaining.

> If the power to file, amend and dismiss petitions is vested in the prosecutor's office, it is naive to then attempt to restrict agreements between defense counsel and prosecutor as to what charges will be ultimately heard by the court.... The standards which limit plea bargaining seem to treat

> the situation as one in which the juvenile does not have the benefit of counsel. Abuses of plea bargaining are inhibited by vigorous defense counsel, careful admonitions by the court, and ethical conduct by prosecutors.

She also questions the need for probable cause hearings when a juvenile is not detained.

Ms. Bridges concludes with a strong assertion of the value of the adversary system, stating that:

> An adversary system combined with procedural due process will protect the rights of juveniles and of the community..., [and] may also prove an effective aid in rehabilitation of the juvenile.

SUMMARY OF COMMENTS

The discussion was characterized by questions to Ms. Bridges about various aspects of the standards. Ms. Thompson began by asking Ms. Bridges' opinion of the IJA/ABA provision calling for prosecutors to monitor the effectiveness of dispositional programs. Ms. Bridges replied that she thought such information was necessary both to protect the public and for plea bargaining purposes. While not all prosecutor offices may be able to conduct such monitoring, it was a worthwhile objective.

Judge McLaughlin asked whether a prosecutor could withdraw from a plea bargaining if the judge decided upon a lesser sentence than that agreed upon. The response was that such withdrawals were not contemplated by the IJA/ABA standards.

Judge Arthur raised two points. The first was that the IJA/ABA provision recommending a minimum size for the juvenile division of a prosecutor's office was applicable only to urban areas and did not consider the problems of rural communities. Mr. Manak pointed out that the text of the standard conditioned the recommendation on population and caseload. The second was the question of what would happen if there were disagreement between the probation officer and the prosecutor regarding the dispositional recommendation. Would the probation officer need independent counsel since he or she might feel uncomfortable "in a room full of lawyers?" Ms. Bridges stated that the standards did not address the issue, but that the judge could always question the probation officer. Judge Cattle commented that

the views of the prosecutor, defense counsel and the probation officer ought to be solicited each time, and neither Mr. Manak nor Judge Delaney felt an attorney for the probation officer was necessary.

Judge Delaney then asked whether the prosecutor should be involved in modification of probation orders. The answer was yes, regardless of whether the alleged violation was criminal or civil in nature.

Ms. Szabo inquired whether transfer for criminal prosecution was a proper subject for plea negotiation. Ms. Bridges stated that it was.

Finally, Mr. Siegel initiated a discussion of whether it was proper for a prosecutor to continue with plea negotiations when a juvenile maintained his or her innocence. Ms. Bridges stated that it goes without saying that a prosecutor should not press for a plea from respondents who feel they are innocent. In response to a further question, she suggested that a prosecutor has a duty to alert the court when a child's parents are trying to force him or her to plead. Judge Ketcham added that unlike in adult criminal cases, pleas of guilty or no contest should not be accepted by the court from juveniles who maintain that they are innocent. Professor Smith and Mr. Manak pointed out that such so-called Alford pleas were not permitted by the standards.

ROLE OF THE PROSECUTING ATTORNEY

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The role of the prosecutor in juvenile court was irreversibly changed by the decision of the Supreme Court in its review of juvenile court procedure in In re Gault.[1] Ironically, dramatic changes in the prosecutional role were wrought by case law establishing greater protection for the rights of juveniles and, as a consequence, strengthening the defensive position in such cases.

Because the juvenile justice system was most drastically altered by a series of Supreme Court decisions in the late 'Sixties and early 'Seventies, it is necessary to examine the national philosophy of juvenile justice prior to those decisions in order to gauge their impact. Sanford Fox, who has written on the history and philosophy of juvenile justice,[2] notes three major reform movements.

The first reform movement culminated in the opening of the New York House of Refuge in 1825.[3] The second major change was the institution of the juvenile court by the state of Illinois in 1899.[4] The Supreme Court decision in Gault was the beginning of the third major reform movement in dealing with juveniles.[5]

Prior to 1825, juveniles had been prosecuted in criminal courts and housed in adult prisons and jails. The establishment of the House of Refuge in New York was the culmination of humanitarian efforts to get juveniles into separate facilities. The necessities of survival such as food, shelter, and education were to be provided for juveniles in a setting away from adult prisons.[6] These efforts by New York did not alter the nature of proceedings against juveniles, only the institutions in which they would be confined.

The "treatment" or "rehabilitative" approach to deviant juveniles did not fully flower until Illinois created the first juvenile court system in the United States. For the next seventy years the juvenile justice systems throughout the country would focus on juveniles as wayward children in need of treatment, not underage criminal offenders who must be tried and convicted.

Lawyers were superfluous to such a system. Indeed, there was an attitude of hostility in many courts toward lawyers' involvement in what was thought to be an effort between court, parents, social worker, and, of course, child, to determine how best to deal with the child's misbehavior and treat him.

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1. 387 U.S 1 (1967).
2. Fox, "Juvenile Justice Reform: An Historical Perspective."
3. Pickett, House of Refuge 67 (1969).
4. Act of April 21, 1899, (1899) Ill. Laws 131.
5. 387 U.S. 1 (1967).
6. 22 Stan L. Rev., supra note 2, at 1189.

The juvenile court was, in a legal sense, another parent as recognized in the doctrine of parens patriae.[7] One writer in discussing the concept of parens patriae points out why the logical conclusion of this concept was that an adversary system was not necessary: "The delinquent on the other hand, is not the enemy of society. He is society's child, and therefore the interest of the state and the child do not conflict but coincide. Since the interests coincide, there is no need for the criminal adversary procedure."[8]

As a result of these attitudes prosecutors were scarce in juvenile courts.[9] However, prosecutors had been involved in these earlier movements. Prosecutors were active in the efforts to establish the New York House of Refuge. There was vocal support for the Illinois Juvenile Court Act by the Assitant State's Attorney for Cook County.[10] Other than their efforts to reform, prosecutors played little definitive part in the juvenile justice system. The role of the prosecutor was primarily limited to appearances in cases involving the most serious crimes. These appearances were often early at the invitation of the juvenile judge.[11]

As a practical matter there was little need for a prosecutor. If a juvenile was brought within the jurisdiction of a juvenile court, charges against him were presented by an officer of the court or a representative of the social agency designated to deal with juveniles in that jurisdiction.[12] Evidence regarding those charges and the juvenile's culpability were presented in a informal fashion. without regard for the procedural guidelines and evidentially requirements of other types of legal actions.

Although fashionable thought does not presently bemoan the passing of pre-Gault juvenile justice theories, it must be remembered that procedures that characterized the juvenile justice systems of the first seventy years of this century were not conscious attempts to violate or circumvent the constitutional rights of a large class of individuals. These procedures were rather a dedicated effort to deal with juveniles as individuals who yet lacked the maturity, the education, and the capacity to make life choices that society demanded of its adult members. A reaction to earlier methods of dealing with juveniles in the same manner as adults had led to these procedures.[13]

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7. Handler, "The Juvenile Court and the Adversary System: Problems of Function and Form." 1965 Wis. L. Rev. 7.
8. Id., p. 70.
9. Fox, "Prosecutors in the Juvenile Court: A Statutory Proposal," 8 Harv. J. Leg. 33 (1970)
10. Id ., 33, 34.
11. Whitlach "The Gault Decision - Its Effect on the Office of the Prosecuting Attorney, " 41 Ohio B. J. 41 (1968)
12. McCarthy, "Delinquency Dispositions Under the Juvenile Justice Standards: The Consequences of a Change of Rationale," 52 N.Y.U. L. Rev. 1093, at 1112.
13. Fox, supra note 9.

In the Sixties there began to be heard the faint rumblings of a major shift in philosophy regarding deviant juveniles. The role of the prosecutor would be dramatically changed as a result of that shift. The most conspicuous portent of change came with a series of Supreme Court rulings in cases challenging various procedural aspects of the juvenile justice system. In the past decade extensive legislative changes have occurred as a result of the rulings.

The first examination by the Supreme Court of juvenile court practices came in Kent vs. United States.[14] The Supreme Court established in Kent the requirement of procedural due process in hearings in which the state sought a waiver of juvenile court jurisdiction. While the court did not at that time address broader questions of procedure in juvenile proceedings, it did set out certain guidelines which had to be met before a juvenile could be tried as an adult. The Court held that prior to a waiver of jurisdiction there must be a full investigation of the juvenile, there must be a hearing with representation by counsel for the juvenile, and the court must state reasons for the waiver. The discussion by the Supreme Court of its ruling noted its concern with the functioning of the juvenile justice system. "While there can be no doubt of the original laudable purpose of juvenile courts, studies and critiques in recent years raise serious questions as to whether actual performance measures well enough against theoretical purpose to make tolerable the immunity of the process from the reach of constitutional guaranties applicable to adults."[15]

The following year in 1967, the Supreme Court rendered the more wide-ranging opinion in In re Gault.[16] Gault has been called the beginning of a "procedural revolution."[17] It was certainly the beginning of serious consideration of an adversary system in juvenile justice. When the Supreme Court decreed in Gault that juveniles have a constitutional right to counsel, the death knell sounded for non-adversary proceedings.[18]

The juvenile's right to defense counsel placed the judges in juvenile courts in a curious position. If defense counsel was vigorously advocating the position of the juvenile, who was to present the position of the community?

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14. 383 U.S. 541 (1966).
15. Id. at 555.
16. 387 U.S. 1 (1967).
17. 22 Stan. L. Rev., supra note 2, at 1237.
18. Dixon, "Juvenile Justice in Transition," 4 Pepperdine L. Rev. 469 (1977).

Judge Whitlach of the Guyahoga County Juvenile Court warned Ohio prosecutors, in late 1967, that Gault would result in the greater need for assistance to the court by the prosecutor's offices.[19] In a speech to a meeting of the Ohio Prosecuting Attorneys Association, he noted that "In a recent survey 23 Ohio Juvenile Courts out of 48 were using the prosecutor in delinquency cases when the charges were denied."[20] Yet even in this realization that Gault was going to have an impact on the courts, there was not a complete comprehension of the extent of that impact or the changes that would be proposed in all facets of juvenile justice.

In 1970 the Supreme Court established reasonable doubt as the standard of proof in juvenile delinquency cases in the case of In re Winship.[21] The procedural requirements were thus further tightened in juvenile courts. The outcry continued that the Supreme Court was turning juvenile Courts into mini-criminal courts.[22]

In 1971 a decision was handed down by the Supreme Court which seemed to slow the march toward the adversary system. In McKeiver v. Pennsylvania the Court, in denying that juveniles had a right to trial by jury before confinement, held that the right to trial by jury was not a fundamental element of due process in juvenile cases.[23]

Confusion continued as to the role of each of the parties traditionally appearing in juvenile court.[24] Was defense counsel to be motivated primarily by protection of the due process rights of his client. Or was counsel more importantly charged with determining the "best interest" of his client. Perhaps these considerations were one and the same.[25]

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19. Whitlach, supra note 11.
20. Id. at 43.
21. 397 U.S. 358 (1970)
22. Kay and Segal, "The Role of the Attorney in Juvenile Court Proceedings: A Non-Polar Approach" 61 Geo. L. J. 1401 (1973).
23. 403 U.S. 528 (1971)
24. Dixon, supra note 18.
25. Kay and Segal, supra note 22.

The role of the prosecutor was even more confusing. As late as 1967, one group which had studied the problem, the President's Commission on Law Enforcement and Administration of Justice, was arguing against the use of a prosecutor in juvenile Court.[26] Sanford Fox, in a draft of proposed legislation, sought to avoid the "adversary atmosphere" by creating a sort of compromise prosecutor.[27] He suggested the creation of an "Office of Community Advocate" to carry out the functions of prosecutor. The "Assistant Advocates" were to be rotated on a yearly bais into the Public Defender's Office and back to the Community Advocate's Office.[28]

While his suggestion indicated a reluctance to create a purely adversarial system, Fox recognized the practical realities of having no one to represent the community. He also worried that with no prosecutor involved in the proceedings, the defense counsel might be able to "frustrate the rehabilitative aims of the juvenile court".[29]

A conclusion might be drawn that the best interest of the juvenile required an adversary system, not vice versa. Advocates of an adversary proceeding in juvenile cases have argued forcefully that an informal atmosphere is detrimental to rehabilitation. According to this theory, it is unrealistic to expect the experience in court be a constructive experience if rules of procedural fairness are not strictly adhered to by the personnel in the court. A juvenile must sense hypocrisy in the lip service being given to his best interests unless his point of view is being aggressively presented. Further, if the probation officer who shall be working with the juvenile is also the person presenting evidence against him in court, the relationship between them must surely be damaged.

Justice Fortas, in the majority opinion of Gault, spoke of recent studies on the subject of informal procedure. "They suggest that the appearance as well as the actuality of fairness, impartiality and orderliness - in short, the essentials of due process - may be a more impressive and more therapeutic attitude as far as the juvenile is concerned." [30]

The various points of view regarding an adversarial juvenile system that have emerged since Gault have resulted in many inconsistencies among the various jurisdictions throughout the country and even within the jurisdictions. Informal procedure has not disappeared since Gault. [31] For instance, in California prosecutors were not placed in juvenile courts by statute until 1976, even though they had been appearing at the invitation of the courts prior to that time.[32]

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26. President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Juvenile Delinquency and Youth Crime (1967)
27. Fox, supra note 9, at 34.
28. Id., p. 51.
29. Id., p. 36.
30. 387 U.S. 1, at 30.
31. Streib, "The Informal Juvenile Justice System: A Need for Procedural Fairness and Reduced Discretion," 10 John Marshall J. 41 (1976)
32. Cal. Welf. & Inst. Code § 681 (West 1976).

Some writers question whether the increased use of prosecutors in juvenile court has been solely the result of the Supreme Court decisions in the area. A Deputy District Attorney for Alameda County, California, describes his role in juvenile court between 1974 and 1978 as changing for another reason.[33]

"During that time, the role of the prosecutor in the juvenile court changed from 'kiddie court' advisor to state's trial attorney. The principal reason for this transition has been the alarming increase in the commission of serious crimes by children."[34]

Statistics compiled by a California legislative committee indicate that the number of juveniles arrested in California for crime against the person rose 46.8% between 1968 and 1973.[35] Statistics for adults arrested in California for similar crimes for the same period rose only 18.5%.[36] Such statistics as the above and a national increase of 59% in the number of juveniles arrested for murder between 1968 and 1973 have given greater emphasis to the demand for a strong prosecutorial voice in juvenile proceedings.[37]

There has been an overall dissatisfaction on the part of society in the results of the traditional juvenile system. The results of "treatment" or "rehabilitation" have not been overwhelmingly successful in the eyes of the public. The obviously unrealistic expectation that juvenile courts will heal the social ills of all children has resulted in a public displeasure with the system.[38]

In addition to the effect that the rise in violent crimes committed by juveniles has had in strengthening the prosecutor's role, a series of federal decisions has upheld certain rights of the prosecutor in dealing with juveniles.[39] The decisions have upheld the prosecutorial discretion as to whether a juvenile should be filed on as an adult or a juvenile.[40]

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33. Hicks, "Here's Looking at You, Kid: Prosecutors in the Juvenile Court Process," 5 Pepperdine L. Rev. 741 (1978)
34. Id. p. 741.
35. Dixon supra note 18.
36. Id., p. 469.
37. Id., p. 470.
38. Pena, "Introduction: The Role of the Juvenile Court - Social or Legal Institution?" 5 Pepperdine L. Rev. 633 (1978).
39. United States v. Bland, 472 F. 2d 1329 (D.C. Cir. 1972), cert. denied, 93 S. Ct. 2294 (1973); Cox v. United States, 473 F. 2d 334 (4th Cir. 1973)
40. Comment, "Youthful Offenders and Adult Courts: Prosecutorial Discretion v Juvenile Rights," 121 U. Pa. L. Rev. 1184 (1973).

The exact nature of the role of the prosecutor remains a perplexing one. The prosecutor who practices in juvenile court is frequently uneasy about his position.[41] Factors exist in juvenile court that do not exist in adult court. Prosecutors, while trying to carry out normal prosecutorial duties, must interact with several other agencies in the prosecution of juveniles. Frequently representatives of a probation department make both policy and what are essentially legal judgments before a prosecutor reviews a case. Unique questions are raised in juvenile cases as to whether to file charges. Such factors as the number of prior offenses of the juvenile, the seriousness of the offenses, and whether the complainants are the parents of the juvenile are questions peculiar to the prosecution of juveniles. Perhaps more than in any other situation , the prosecutor must weigh criminal conduct and community interest.[42] An additional factor is that the prosecutor who appears in juvenile court may have little or no voice in the disposition of the juvenile.

A combination of the above factors and others have led to efforts to resolve the various legal and philsophical problems arising in the laws affecting children. To that end have been the efforts by various organizations that have resulted in proposed standards for the juvenile justice field. These standards cover the broad spectrum of juvenile or children's laws, proposing legislation and criteria for social agencies, courts, corrections, schools, and law enforcement.

Among those groups which have the most thorough and comprehensive proposals are the Institute of Judicial Adminstration-American Bar Association Joint Commission on Juvenile Justice Standards, hereafter referred to as (IJA-ABA), the National Advisory Committee for Juvenile Justice and Delinquency Prevention (NAC), and the Task Force on Juvenile Justice and Delinquency Prevention (Task Force). Both the work of the Task Force and NAC are funded by the Law Enforcement Assistance Administration.[43] The IJA-ABA project was funded by LEAA, by the American Bar Association and by grants from private foundations.[44] The work done by these groups through the mid-Seventies has resulted in detailed standards for the guidance of legislators and professionals in the juvenile justice field throughout the country.

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41. Hicks, supra note 33, at 743.
42. Id., p. 741.
43. Report of the Task Force on Juvenile Justice and Delinquency Prevention, "Statement of the Administrator," (1976)(hereinafter Task Force); Report of the Advisory Committee to the Administrator on Standards for the Administrator of Juvenile Justice, "Letter of Transmittal," (September, 1976). (hereinafter NAC).
44. Institute of Judicial Administrator/American Bar Association, Standard Relating to the Prosecution Function, Preface." (1977).(hereinafter IJA/ABA, Prosecution).

While the recommendations of the three groups vary from topic to topic, the standards relating to the role of the prosecuting attorney are characterized by a consensus as to what most aspects of that role should be. The role of the prosecutor is addressed by all three sets of standards and the necessity for a prosecutor in the juvenile system is uniformly agreed upon.[45] The extent of the authority of the prosecutor is not uniformly treated by the three sets of standards, however.

ORGANIZATION OF THE PROSECUTOR'S OFFICE

All three sets of standards address the question of the organization of the Juvenile Prosecutor's Office.[46] There is no conflict in the treatment of this subject by the standards. All contemplate a special division or attorney to act as prosecutor in family or juvenile court in any prosecutor office of six or more attorneys. Additionally, the standards recommend support personnel such as attorneys, investigators, interns or law clerks, and clerical staff. The primary point of interest is the fact that the standards unanimously recommend representation of the state by the local prosecutor's office.

The representation of the state's interest by the office of the prosecutor is consistent with the increased formality of procedure either currently in practice in some states or recommended by the standards. The rejection of a prosecutor in the juvenile court by the President's Commission on Law Enforcement and Administration of Justice[47] is ignored by all of the proposed standards. Likewise there appears no continuation of the President's Commission belief that the state should be represented by government counsel with civil duties outside the sphere of the criminal prosecutor's office.[48]

Recognition of the increasing procedural complexity of juvenile cases is seen in the standards attention to the size and staff of the juvenile prosecutor's division within the office of the prosecutor. A concern for continuing education and training of the juvenile prosecutor is also reflected in the standards. The training suggested by the standards includes specialized legal training for family court and education with regard to the support and rehabilitative juvenile services.[49] The standards also call for continuing inservice training for prosecutors and staff not only as to law and procedures but also as to the causes of delinquency and treatment of same.

The IJA/ABA standards further recommend a division of juvenile prosecutors within each statewide organization of prosecuting attorneys.[50]

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45. IJA/ABA, Prosecution, Standard 1.1; Task Force, Standard 15.7; NAC Standard 3.131.
46. IJA/ABA, Prosecution, Standards 2.1 to 2.6; Task Force, Standards 15.1 to 15.6; NAC, Standards 0.423 and 3.131.
47. President's Commission, supra note 26.
48. Id.
49. Supra note 46.
50. IJA/ABA, Prosecution, Standard 2.6.

The language of the three sets of standards as they relate to the organization of the prosecutor's office is quite similar. The standards on this subject generally reflect a desire for specialization and professional conduct by prosecutors dealing with juveniles. As a practical matter, in jurisdictions in which the state is represented in juvenile matters by a member or members of the prosecutor's staff, there is presently little specialization. The prosecutor usually has concurrent responsibilities in adult court or other matters within the office.

PARTICIPATION IN JUVENILE COURT PROCEEDINGS

The participation in juvenile court proceedings by the prosecutor is approached by the three sets of standards in two ways - when the prosecutor should appear and what his function is when he does appear. The standards agree that the prosecutor should participate in every proceeding arising under the jurisdiction of the family court in which the state has an interest. [51] As noted before, the standards reject the recommendation of the earlier President's Commission that a prosecutor not be a participant in juvenile proceedings.

The language of the Task Force standard on this subject is somewhat weaker than the NAC and IJA/ABA standards.[52] The Task Force standard makes a distinction between contested and uncontested cases. According to the Task Force standard, prosecutors "should participate" in contested cases and then "may determine when to appear" in uncontested cases.[53] The standard further provides that the family court may order the prosecutor to participate. The NAC and IJA/ABA standards do not make these distinctions. The wording of the Task Force standard as noted above seems to retain some attitudes of the traditional role of prosecutors in family or juvenile courts.

Each of the sets of standards states explicitly that the primary duty of the juvenile prosecutor is to seek justice.[54] The Task Force and IJA/ABA standards further elaborate that the prosecutor shall "fully and faithfully represent the interests of the state, without losing sight of the philosophy and purpose of the family court."[55] While the NAC standard does not contain this additional language, the commentary to the NAC standard mentions that "the state has multiple interests, which include both protection of the public and the development of children into productive, law-abiding citizens."[56]

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51. IJA/ABA, Prosecution, Standard 1.1; Task Force, Standard 15.7; NAC Standard 3.134.
52. Task Force, Standard 15.7.
53. Id.
54. IJA/ABA, Prosecution, Standard 1.1; Task Force, Standard 15.8; NAC, Standard 3.134.
55. IJA/ABA, Prosecution, Standard 1.1; Task Force, Standard 15.8.
56. NAC, Commentary to Standard 3.134, p. 57.

The question of the prosecutor as an adversary in juvenile court is, of course, one of the major debates in the definition of the role of the prosecutor. The Task Force standard which sets out the role of the family court prosecutor in general states that:

"The family court prosecutor shall function as an adversary, but shall avoid the typical role of an adult crime prosecutor."[57]

This language seem somewhat ambiguous. The commentary to this section reiterates several times that the prosecutor must be careful "not to assume the traditional criminal adversary role" although the distinction which is being made between juvenile prosecutor and criminal prosecutor is not explained.[58] The commentary does mention that the standards otherwise prohibit the prosecutor entering into plea discussions or agreements.[59] The commentary also makes a distinction between the prosecutor's activities at the adjudicatory and dispositional stages of the proceedings as to the extent of the adversary stance the prosecutor should take.[60]

The IJA/ABA standards address the question of the adversary role of the prosecutor specifically in the standards dealing with adjudication. "At the adjudicatory hearing the juvenile prosecutor should assume the traditional adversary position of a prosecutor." [61]

The standard on the dispositional phase states that the juvenile prosecutor may take an active role in the dispositional hearing.[62] There is no mention in the language of the standard of the adversary role at this state of the proceedings. However, the standard also mentions that the prosecutor should make an independent recommendation if he wishes. The commentary discusses the fact that the standards contemplate an adversary system and that in defining the prosecutors' part in that system "the standards give them a clear voice in the dispositional phase in order to make certain that this role is carried out effectively." [63]

The NAC standards do not expressly define the role of the prosecutor as that of an adversary. The NAC standards specifically prohibit all forms of plea negotiations.[64]

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57. Task Force, Standard 15.8.
58. Id., p. 519.
59. Task Force, Standard 15.18.
60. Task Force, supra note 58.
61. IJA/ABA, Prosecution, Standard 6.2.
62. IJA/ABA, Prosecution, Standard 7.1.
63. Id., p. 78.
64. NAC, Standard 3.175.

Both the Task Force and IJA/ABA standards carefully prescribe the relationships between the prosecutor and other participants in the juvenile justice system.[65] These standards recommend an atmosphere of detachment between the prosecutor and defense counsel and between the prosecutor and the court.

The standards call for mutual respect and cooperation between the juvenile prosecutor and the police and between the prosecutor and probation, intake and social workers and officers. The duties of the prosecutor also include legal advice to these groups and assistance in training. The requirements illustrate that special characteristic of the duties of the juvenile prosecutor - the numerous agency personnel with which he must work to carry out his duties.

An interesting aspect of the Task Force and IJA/ABA standards is a definition of the relationship of the juvenile prosecutor to the community.[66] The prosecutor is called upon to "take an active community role in preventing delinquency and protecting the rights of young people, and should work to help others initiate and improve existing programs designed to prevent delinquency."[67] This language considerably broadens the role of the prosecutor from simply that of an adversary in the courtroom.

The IJA/ABA standards cover certain other traditional aspects of the prosecutors role such as the avoidance of the reality or appearance of conflicts of interest, public statements, and dealings with witnesses and jurors.[68] As the commentaries note, these standards are based on the American Bar Association Standards for Criminal Justice, "The Prosecution Function." The Task Force standards contain similar criteria.[69]

INTAKE AND THE FILING OF PETITIONS

According to the three sets of standards, the entry of a juvenile into the juvenile justice system is a shared responsibility of the prosecutor and a separate social agency such as a probation department. Realistically the process would be divided as follows: the initial interview and/or counseling of a juvenile and his parents and receipt of complaints would be by an intake division of a designated agency and the determination of legal sufficiency, the nature and form of the charges, and the preparation of the petition would be done by the office of the prosecutor.[70]

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65. IJA/ABA, Prosecution, Standards 3.1 to 3.7; Task Force Standard 15.12.
66. IJA/ABA, Prosecution, Standard 1.4; Task Force, Standard 15.11.
67. Task Force, Standard 15.11.
68. IJA/ABA, Prosecution, Standards 1.2, 1.3, 3.3, 3.4, 3.5.
69. Task Force, Standards 15.9, 15.10, 15.12.
70. IJA/ABA, Prosecution, Standards 4.1 to 4.5; Task Force, Standards 15.13 to 15.16: NAC, Standards 3.142 to 3.147, 3.163.

The various standards provide for screening of charges by an intake officer, but would allow complainants to appeal to the prosecutor's office any rejection of charges by an intake officer.[71] The commentary to IJA/ABA standards, Section 4.1, points out that presently in some jurisdictions the prosecutor has the final authority to file petitions but in others an intake officer has the statutory authority to file the petition and the prosecutor cannot overrule that decision to file.[72] The commentary states that the better approach is to give the prosecutor the right to file and to make the final decision on whether to file. As the commentary notes "Obviously, this standard requires the juvenile prosecutor to exercise a great deal of discretion in deciding the appropriateness of the filing of petitions, given legal sufficiency. It is unlike the main thrust of many other standards dealing with the prosecution function that seek to limit the scope of discretion."[73]

The commentary cites the recognized concept of prosecutorial discretion as the basis for the broad authority given the prosecution in Section 4.1. The commentary to the similar Section 3.163 of the NAC standards also mentions that the section would expand the authority of juvenile prosecutors in many jurisdictions.[74]

The IJA/ABA and the NAC standards give the prosecutor the absolute authority to refuse to file a petition.[75] The Task Force standards would allow a complainant to request a verified petition be filed in the court even if the prosecutor refused to file.[76] This method of direct filing in the juvenile court by a complainant would seem to be an invasion of the prosecutorial discretion.

As to time limits for filing, the Task Force standards would require the filing of a petition against a juvenile being detained in custody within forty-eight hours of his being taken into custody.

The NAC and IJA/ABA standards require filing of a petition within two judicial days if the juvenile is detained and within five judicial days if he is not detained.[78]

The Executive Committee of the Joint Commission approved a change in the IJA/ABA standard which should allow for discretionary extensions of the periods by the court.

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71. IJA/ABA, Prosecution, Standard 4.1; Task Force, Standard 15.13; NAC, Standard 3.163.
72. IJA/ABA, Prosecution, p. 53.
73. Id., 54-55.
74. NAC, Commentary p. 110 to Standard 3.163.
75. IJA/ABA, Prosecution, Standard 4.1; NAC, Standard 3.163.
76. Task Force, Standard 15.13.
77. Id.
78. IJA/ABA, Prosecution, Standard 4.4; NAC, Standard 3.161.

In summation, the standards provide for a screening of juvenile cases by an intake agency, with a review of intake decisions by the prosecutor and actual filing by the prosecutor. The drafting and filing by the prosecutor should avoid problems of legal sufficiency of the petitions.

ADJUDICATION

The standards set out several preadjudication duties for the prosecutor. One of those is the requirement that a juvenile be afforded a probable cause hearing. The Task Force and NAC standards would require a probable cause hearing for any juvenile in custody within twenty-four hours of his being taken into custody.[79] This is in line with the Supreme Court decision of Gerstein vs. Pugh.[80]

The IJA/ABA standard would extend that requirement for a probable cause hearing to the first appearance of the juvenile in family court whether or not the juvenile is in custody.[81] This would seem to be an unnecessary burden on the family court if the juvenile is not in custody.

The NAC standards would extend the requirement for a probable cause hearing to non-detention situations if the juvenile requests such a hearing.[82] The commentary to this section states that such hearings might protect juveniles from unwarranted prosecution even though not required by Gerstein vs. Pugh.[83] The fact that the prosecutor is charged with the obligation to determine that the allegations are legally sufficient before filing and the broad discovery provided for in the standards should make such hearings unnecessary, as the commentary to this section notes.[84]

The disclosure of evidence favorable to the juvenile is an obligation imposed by the Task Force and the IJA/ABA standards.[85] The NAC standards call for each state to develop rules for discovery and that such discovery be as full as possible.[86] The standard also recommends that discovery in a juvenile case be on an informal basis between counsel.

There are presently statutory requirements in some states that the prosecutor's file on a juvenile case is open to defense counsel. This would include investigative reports from a probation agency and law-enforcement files and records.[87] The NAC and Task Force standards provisions seem less broad than these statutes.

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79. Task Force, Standard 12.11; NAC, Standard 3.155.
80. 420 U.S. 103 (1975).
81. IJA/ABA, Prosecution, Standard 4.6.
82. NAC, Standard 3.165.
83. 420 U.S. 103 (1975).
84. NAC, Commentary to Standard 3.165.
85. IJA/ABA, Prosecution, Standard 4.7; Task Force, Standard 15.17.
86. NAC, Standard 3.167.
87. Tex. Fam. Code Ann. tit. 3, § 51.14. (Vernon 1976).

The IJA/ABA standards on Pretrial Court Proceedings describe in detail discovery procedures and the material which the prosecutor must or may disclose to defense counsel.[88] The only matters not subject to discovery by defense counsel under these standards are the actual work product of the prosecutor and the identity of an informant.[89]

The most controversial aspect of the role of prosecutor is the question of plea negotiation. Each of the sets of standards specifically covers the subject although the standards are not in agreement.

The NAC standard is the strongest in opposition to plea bargaining by the prosecutor. The language is as follows:

> All forms of plea negotiations including negotiations over the level of charging as well as over the disposition, should be eliminated from the family court process. Under no circumstances should the parties engage in discussion for the purpose of agreeing to exchange concessions by the prosecutor for an admission to the allegations in the complaint or petition.[90]

As the commentary to this standard points out, the controversy arising over plea bargaining is not confined to the area of juvenile law.[91] The practice of plea bargaining in adult criminal court was approved by the Supreme Court in Santobello vs. New York in 1971.[92] However, discussion of the propriety of plea bargaining and its usefulness as a law enforcement tool has not diminished seven years later. The commentary discusses the contrasting arguments on the subject, then sums up its position, "the Advisory Committee on Standards concluded that plea negotiation, in any form, would be detrimental to the fairness and effectiveness of the juvenile justice process." Mentioned as reasons for this position are eliminating admissions which are the result of or in exhange for an agreement by the prosecutor to reduce or drop a charge, to change a delinquency petition to a noncriminal misbehavior or neglect and abuse petition, or to recommend a particular disposition." [94]

According to its Tentative Draft of 1977, the IJA/ABA standard on plea negotiation would specifically allow agreements concerning the petition or petitions filed against a juvenile. The standard would, however, prohibit an agreement based upon a particular recommendation by the prosecutor concerning disposition.[95] The commentary explains the position of the standard as being "that juvenile prosecutors may properly engage in plea discussions concerning the charges that may be filed against a youth but that they should not use their power to recommend a harsh disposition in the process of plea discussion with the youth and his or her counsel"[96]

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88. IJA/ABA, Pretrial Court Proceedings, Standards 3.1 to 3.20 (Tentative Draft 1977).
89. Id., Standard 3.8.
90. NAC, Standard 3.175.
91. Id., Commentary to Standard 3.175.
92. 404 U.S. 257 (1971).
93. NAC, supra note 91.
94. Id.
95. IJA/ABA, Prosecution, Standard 5.1.
96. Id., pp. 64-65.

According to the commentary, one of the proper subjects for negotiation is whether the prosecutor will seek transfer of the case to a criminal court.[97] An agreement that a juvenile admit to petition filed in the family court in return for the prosecutor not filing a motion to transfer jurisdiction is specifically approved by the commentary. This reasoning seems somewhat contradictory to the explanation of the standard's prohibition regarding dispositional agreements.

The commentary states that the prosecutor might dissuade the juvenile from vigorous assertion of his constitutional rights by threatening to seek the most restrictive disposition obtainable if the juvenile does not admit to the allegations of the juvenile petition.[99] It would seem that an argument could be made that the possibility of transfer is equally coercive to a juvenile.

Changes in the IJA/ABA standard on plea negotiation were accepted by the Executive Committee, meeting on November 18, 1977. The Executive Committee voted to simply strike the language prohibiting negotiation as to the disposition which a prosecutor might recommend at a dispositional hearing.

An IJA/ABA standard prohibits plea negotiation if the juvenile maintains factual innocence of the charges.[100] The first duty to prevent admissions by juvenileswho are maintaining factual innocence must be that of defense counsel. This standard would, however, act as an additional safeguard against the coercion of an involuntary or untrue admission. As the commentary states, "It requires the juvenile prosecutor to share the responsibility of the youth's attorney in protecting the youth's privilege against self-incrimination." [101]

The Task Force standard on thissubject prohibits plea negotiation "at any stage of juvenile proceedings."[102] It defines plea negotiation as the following:

1. Reduction in seriousness of a charge originally filed;
2. Dismissal of individual counts or number of charges: or
3. Recommendations on action or inaction with regard to the ultimate disposition of a case. [103]

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97. Id., p. 66.
98. Id.
99. Id.
100. IJA/ABA, Prosecution, Standard 5.2.
101. Id., p. 67.
102. Task Force, Standard 15.18.
103. Id.

The commentary reiterates the usual arguments against plea bargaining. An additional warning by the commentary is that prosecutors should not recommend the filing of any charge which they do not believe can be proven and juveniles should not be permitted to admit to charges that they did not commit.[104]

DISPOSITION

The responsibility for investigating the background of a juvenile, formulating a report on that investigation, and making recommendations as to disposition is primarily that of a probation or social agency under the three sets of standards.[105]

The Task Force standards provide for prosecutors to make independent recommendations as to disposition after reviewing reports made by the probation department and others.[106] According to Standard 15.19, the prosecutor should be guided by safety and welfare of the community in considering alternatives of disposition that "satisfy the interests and needs of juveniles without jeopardizing public safety."[107] The commentary to this standard states that if the prosecutor is to function as an advocate in an adversary system, he must have a "clear voice in the disposition phase of juvenile proceedings."[108]

The benefits of such participation are, according to the commentary, that the prosecutor may serve as an additional monitor of the effectiveness of various dispositions being assessed by the court and "are more likely to command the respect and cooperation of the entire community."[109]

The wording of the IJA/ABA standard on the prosecutor's role in disposition is almost identical.[110] The IJA/ABA standards contain a further requirement that the prosecutor monitor the effectiveness of various modes of disposition.[111] This is similar to the concept which the Task Force commentary set out as a hoped for benefit of prosecutional participation. The IJA/ABA commentary expresses the belief that the prosecutor is in a better position to do such monitoring than the court appointed defense counsel who will be representing many indigents.[112]

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104. Id., pp. 541-542.
105. IJA/ABA, Prosecution, Standard 7.1; Task Force, Standard 14.5; NAC, Standard 3.186.
106. Task Force , Standard 15.19.
107. Id.
108. Id., p.543.
109. Id., p. 544
110. IJA/ABA, Prosecution, Standard 7.1.
111. IJA/ABA, Prosecution, Standard 7.2.
112. Id., p. 81.

The NAC standard on this subject indicates that the attorney for the state, like the other parties, should be given an opportunity to present evidence.[113] There is no mention in the NAC standards of a prosecutorial duty to monitor modes of disposition as to effectiveness.

ABUSE & NEGLECT PROCEEDINGS

According to the IJA/ABA standards, a petition in an abuse and neglect case should be referred by the court to a designated agency, which should be separate from the court and from criminal prosecuting agencies, for prosecution of the petition.[114] The language of the standard would seem to indicate that the prosecutor whose duties are described in the IJA/ABA standards on Prosecution would not carry out the prosecution of abuse and neglect petitions. However, the commentary states that the designated agency referred to in the standard may be "the same as that agency responsible for prosecuting juveniles charged with delinquent acts." [115]

The NAC standards do not indicate that abuse and neglect cases should be treated differently from juvenile cases in so far as prosecution. In fact, the standards call for representation for the state in all proceedings arising under the jurisdiction of the family court in which the state has an interest.[116]

The Task Force standards on "Endangered Children: Jurisdiction and Scope of Authority" specify the parties to proceedings regarding a child alleged to be or adjudicated endangered.[117] Included in the list are the child, the child's parents or guardians, and the "appropriate agency." No mention is made of who shall represent the agency in court. As earlier noted, however, Chapter 15 of the Task Force standards, "Family Court Prosecution Services," calls upon the local prosecutor's office to represent the state in family court.[118]

RIGHT TO APPEAL

The IJA/ABA standards provide that the state shall have a right of appeal in the following:

1. final orders in other than delinquency cases:
2. the following orders in delinquency cases:
   a. an order adjudicating a state statute unconstitutional;
   b. any order which by depriving the prosecution of evidence, by upholding the defense of double jeopardy, by holding that a caus . of action is not stated under a statute, or by granting

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113. NAC, Standard 3.188.
114. IJA/ABA, Standards Relating to Abuse and Neglect, Standard 5.1 (Tentative Draft 1977).
115. Id., p. 97.
116. NAC, Standard 3.131.
117. Task Force, Standard 11.17.
118. Task Force, Standard 15.1.

a motion to suppress terminates a delinquency petition;
   c. an order which denies a petition to waive juvenile court jurisdiction in favor of adult criminal prosecution.[119]

The commentary notes the fact that under the case law the state does not have the right to appeal criminal or juvenile proceedings unless expressly granted by statute.[120] The IJA/ABA standards for Prosecution specifically designate the juvenile court prosecutor as the person to handle appeals from family court.[121] The commentary states that the juvenile prosecutor will be the most familiar with the case and with the applicable law of juvenile cases.[122]

The NAC standard on right to appeal provides that the state may appeal adjudication and disposition orders in neglect and abuse proceedings and the following orders in delinquency and noncriminal misbehavior cases:

1. orders that declare a statute unconstitutional;
2. orders that dismiss a case on such grounds as double jeopardy, failure to comply with time limits in processing cases, or failure of the petition to state a cause of action;
3. orders that by suppressing state evidence are likely to result in dismissal of the case; and
4. orders that deny transfer of the case to a court of general jurisdiction.[123]

The Task Force standards provide for a right of appeal for a juvenile but are silent as to a corollary right by the state.[124]

CONCLUSION

The standards discussed in this article are clearly indicative of the direction of juvenile justice for the past ten years. The increasing necessity for a prosecutor functioning within the juvenile system has been partly the result of efforts to strengthen the procedural protections for juveniles and partly the result of the recognition of the need to protect interests of those other than juveniles.

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119. IJA/ABA, Standards Relating to Appeals and Collateral Review, Standard 2.2 (Tentative Draft 1977).
120. Id., p. 26-27.
121. IJA/ABA, Prosecution, Standard 8.1.
122. Id., p. 82.
123. NAC, Standard 3.191.
124. Task Force, Standard 13.8.

As has been stated "The failure to embrace officially the protection of society as a valid purpose of the juvenile court has been criticized prominently."[125] Committee hearings by the National Advisory Committee for Juvenile Justice and Delinquency Prevention presently being held on the subject of violent crime throughout the country indicate the concern held by the general public with the problem of violent crimes committed by youth. The increase in violent crime and the increase in public awareness and indignation has translated into pressure on courts and prosecutors to deal in an effective, professional manner with juveniles. In the face of the Supreme Court decisions on procedural safeguards for juveniles, that pressure necessitates a strong statutory prosecutor who is well-trained and has the powers long granted to prosecutors in criminal courts. This prosecutor must at the same time be aware of and sympathetic to the philosophical goals of juvenile courts and treatment agencies.

The IJA/ABA, the NAC, and the Task Force standards have for the most part formulated criteria which would create an able prosecutorial staff that would contribute to the juvenile justice system. The only flaws in the approach of these standards are the attempts to limit the authority of prosecutors in their representation of the interests of the state. If the power to file, amend and dismiss petitions is vested in the prosecutor's office, it is naive to then attempt to restrict agreements between defense counsel and prosecutor as to what charges will ultimately be heard by the court. Certainly providing for the prosecutor to make independent recommendations on disposition makes restriction of plea agreements somewhat contradictory. The authority to plea bargain inevitably arises from the other powers.

The standards which limit plea negotiation seem to treat the situation as one in which the juvenile does not have benefit of counsel. Abuses of plea bargaining are inhibited by vigorous defense counsel, careful admonitions by the court, and ethical conduct by prosecutors.

In contrast to the wariness with which the standards approach plea bargaining is the opinion that allowing defense counsel and prosecutor to negotiate may very well work to the benefit of the juvenile rather than the detriment. A peculiarity of the juvenile system is the fact that a prosecutor may have a number of pending charges against a juvenile. Frequently, the probation department may have recommended not filing on certain of the charges for a variety of reasons, including the background of the juvenile or the nature of the changes. It is not unusual for a juvenile to be referred for several offenses in a short period of time. A defense attorney may be able to achieve a more beneficial position for his client by negotiating with the prosecutor. That ability to negotiate should include questions of the prosecutor's position or recommendations on disposition. The standards provide for the training of prosecutors, carefully describe their relations with other parties in the system, remind the prosecutor of duty to the overall goals of rehabilitating the juvenile as well as protecting the interests of the community, and yet

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125. Guggenheim, "Paternalism, Prevention, and Punishment: Pretrial Detention of Juveniles," 52 N.Y.U.L. Rev. 1064, 1068 (1977).

agonize over possible coercion by those prosecutors.

The requirement of the IJA/ABA standards for a probable cause hearing at the juvenile's first appearance in court even if he is not in custody seems unreasonable in light of the broad discovery provided for in the standards. Certainly a juvenile in custody should be entitled to a probable cause hearing at the earliest feasible time. Perhaps a better approach is that of the NAC standards which would provide for probable cause hearings for juveniles in custody and for other juveniles who request such hearing.

The authority to file petitions should be final with the prosecutor. Allowing a complainant to file a verified petition in family court over the rejection of the prosecutor does not seem advisable. There should be a provision for prosecutional review of intake decisions when requested by a complainant.

Florida and California have recently passed statutes which give the state's attorney the final authority to file delinquency petitions but would allow a dependency petition to be filed by, in addition to the prosecutor, an individual with knowledge of the facts. Both states now require an intake officer to notify both complainant and prosecutor if the charges are rejected at the intake level.[126]

These states, have made, as have other states, many changes in the past few years in the area of juvenile law. Many of these changes have incorporated criteria recommended by the various standards. Some states and the standards, themselves, seem somewhat uneasy about the statutory creation of an adversary system for juvenile justice.[127]

The evolution of juvenile justice has forced the creation of a procedurally formal system. As Justice Fortas stated in Gault, "Due process of law is the primary and indispensable foundation of individual freedom. It is the basic and essential term in the social compact which defines the rights of the individual and delimits the powers which the state may exercise."[128] An adversary system combined with procedural due process will protect the rights of juveniles and of the community. Such a system may also prove an effective aid in rehabilitation of the juvenile.

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126. Fla. Stat. Ann. § 39.04, 39.05 (West 1976); Cal. Welf. & Inst. Code § 655 (West 1976).
127. Gilman, "IJA/ABA Juvenile Justice Standards Project; An Introduction," 57 Boston U. L. Rev. 617 (1977).
128. 387 U.S. 1, at 20 (1967).

TRANSCRIPT FOLLOWS BELOW:

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(WHEREUPON, Elizabeth Bridges' presentation was given and the following is the discussion that ensued.)

MR. MANAK: Thank you, Ms. Bridges.

We will be starting with Mr. Kaimowitz.

MR. KAIMOWITZ: Pass.

MR. MANAK: Mr. Hege?

MR. HEGE: Nothing.

MR. MANAK: Ms. Connell?

Ms. Sufian?

Judge Ketcham?

MR. KETCHAM: Pass.

HON. CATTLE: Pass.

DEAN SMITH: I am grateful that someone likes our standards.

MR. MANAK: So am I.

As the reporter --

DEAN SMITH: I think Jim should take a bow -- his name is on it.

MR. MANAK: Mr. Hutzler?

Mr. Dale?

MR. DALE: No.

MR. MANAK: Ms. Thompson?

MS. THOMPSON: Ms. Bridges, how did you react to the provision and the standards, the IJA/ABA standards dealing with the monitoring of dispositions by the Prosecutor after sentencing or after the disposition has been set?

MS. BRIDGES: I approve of that because I think if we are going to be involved in bargaining or negotiation or discussion with defense attorneys about what our attitudes are or our position is on disposition, that we should know what the dispositions are, and how they are affecting juveniles once they get into them -- and I don't think Prosecutors obviously are the only people who should be monitoring

any -- perhaps -- but I think Prosecutors in a juvenile court have a duty to be as knowledgeable as possible and not just about the disposition things, but as someone else mentioned -- the diversion programs and everything -- that the juveniles may be getting into.

MS. THOMPSON: Well, I agree with you on that, and I may agree ultimately with that standard, but I just wondered whether you saw any problem in terms of realistically whether it is even possible for Prosecutors -- not just to know what dispositions are available, obviously they do have a duty to know that, but -- and to know what institutions exist and what programs.

MS. BRIDGES: You mean the monitoring on continuously?

MS. THOMPSON: Yes, monitoring -- after -- you really think Prosecutors can, or do you think it is a --

MS. BRIDGES: Well, I am not sure that we can, but I approve it as an objective -- let's say.

MR. MANAK: Judge McLaughlin?

HON. MCLAUGHLIN: Yes, I would like the -- I mean I don't know how this happened in adult

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6 OF 11

criminal court -- no judge was ever so -- never had the nerve to go and give menses (sic) after I had decided what the deal was going to be, you know.

But I can see it happening.

I could see it happening in Juvenile Court -- much more than adult court.

How do you handle Judge Fort's -- I think a very critical thing.

The Prosecutor and the defense counsel agree on a certain sentence, if you will.

The Judge now determines that that is wrong, and gives a different sentence.

Now, most of us, in the Family Court don't look upon sentences as being more or less large -- hopefully, we look at them as more or less beneficial.

The Prosecutor is not going to look at it that way -- you know, in their minds -- in their mind they have decided what they want.

Now, so let's assume that it is -- to use the same example -- the defense counsel and the Prosecutor have agreed to six months, and the Judge says, "Probation."

Now, if we know a Judge said a year

that the child would have the right to withdraw.

But now does the standard adjust itself to the problem?

Does the Prosecutor have any right now to say "Well wait now, I withdraw my agreement to satisfy this complaint on this particular plea."

MS. BRIDGES: No, I don't think the standards do that.

I think that you always have to keep in mind, in a Juvenile Court, that if the Court rather than the jury, has the right to decide disposition, the Prosecutor is going to have to live with a certain amount of that where the Court, you know, might be rightly decides that at least harsh disposition is proper.

And you know I don't think that the prosecution would necessarily have the right to do anything about that.

HON. MCLAUGHLIN: Okay, but in other words -- the point of that --

MS. BRIDGES: I don't think the standards cover that.

MR. MCLAUGHLIN: The standards do not address themselves.

MS. BRIDGES: No, they definitely address the problem where it is objectionable disposition as far as the defense is concerned, but I don't think that they cover the other.

MR. MANAK: Judge Moore?

HON. MOORE: Pass.

MR. MANAK: Judge Arthur?

HON. ARTHUR: A statement, not a question.

The statement, and to my mind, this applies to a lot of the standards.

It says in here that there should be a standardization of prosecutors in the Juvenile Court, and I believe it operates for a staff of six or seven Prosecutors assigned to the Juvenile Court.

None of us, I think, could possibly object to that except as I recall two-thirds of the counties and therefore two-thirds of the Juvenile Courts in the United States have a population of less than 10,000 people.

They don't have six or seven lawyers -- there is one county in Minnesota only has two lawyers -- one of them has got to be the Judge and one has got to be the Prosecutor -- they don't have anybody to defend them up there.

And if they are going to have a highly specialized Prosecutor, and he is going to have to go to all these schools, he isn't going to have much time to do anything else.

I guess my comment is that too often these standards are built around the metropolitan areas and they are not built around all those other people out there in the rest of the country.

My question that I would put to you -- if the probation officer comes to a disposition hearing, and is recommending a particular disposition, should the Prosecutor be the Advocate for the probation officer -- should the Prosecutor be the Advocate for some law -- if it is public out there, and therefore, basically, the Prosecutor make his or her own decisions as to what should be advocated.

If the Prosecutor is not the Advocate for the probation officer is the probation officer entitled to a separate counsel?

MS. BRIDGES: Well, I think the standards, as I said, definitely say that the Prosecutor should have the right to make an independent recommendation.

In my jurisdiction, the State introduces into evidence the disposition of the

report which includes a recommendation of the Probation Department.

So I don't think that -- well -- that fact plus the fact that the Court is more inclined to listen to the Probation Department's recommendations than to prosecute his recommendations as a general rule -- I think covers that problem.

But I see what you mean, yes.

There may be instances where they -- that probation should be represented by counsel.

Now, I don't recall whether the standards address that or not -- do you, Mr. Manak?

MR. MANAK: I was looking at different standards to answer the first comment made by Judge Arthur -- I'm sorry.

MS. BRIDGES: I see what you mean, but I just don't know.

HON. ARTHUR: Who is your client when you are at the disposition hearing?

MS. BRIDGES: Well, if I agree with the Probation Department, then I am advocating their position.

But I am always introducing their representation and they always have a representative there who the Court may question -- if it has some.

HON. ARTHUR: Yes, but you are going to have all those lawyers in there, and we do this and you have a lawyer for the child, you may have a lawyer in there for the mother, you have got the Prosecutor in there and then one lonely social worker sitting over there in the corner, and if our profession is as good as we think it is -- it is kind of a hardship on that lonely social worker.

HON. DELANEY: Well, the social worker isn't the party to the problem.

MR. MANAK: I think I can answer that.

The standards do not say that it is at disposition stage.

HON. ARTHUR: Well, the social worker probation officer then entitled to counsel?

MR. MANAK: These standards do not address that question.

HON. ARTHUR: Well, one more --

MR. MANAK: Well, I can tell you that the standards don't address the question, counsel for the probation officer or the social worker.

On the other point that you made about the recommendation of the standards that there be a specialization, the standard specifically says,

Judge Arthur, this is Standard 2.1, "Where population and case load warrant, in each Prosecutor's office, in which there are at least six attorneys, there should be a separate unit or attorney."

And the commentary built on that.

In other words, where it would be warranted by the population and the case load, but certainly this is not recommended for every office.

HON. ARTHUR: I was reading it from Ms. Bridges -- page 11 of her paper.

MR. MANAK: It would be essentially the urban office where a population would warrant that to be a specialization.

However, the commentary also does point out that it is desirable to specialize where possible in any office.

HON. ARTHUR: Before --

MR. MANAK: That is what Ms. Bridges was actually alluding to.

Was there a comment over here?

HON. CATTLE: You have got another one.

MR. MANAK: Judge Cattle?

HON. CATTLE: I am just a country boy, but it seems to me that a probation officer is an independent

arm of the Court to advise the Court on its position, and the -- when I make a disposition, in either adult or juvenile, the defense counsel gets up and makes a wonderful oration and I listen to him carefully -- the Prosecutor gets up and he claims about the damage to the public, and I have -- which I have both seen, the probation officer's report, and I make up my mind from all three of them.

I don't think the Prosecutor -- that maybe administratively that you present the agreement, but you don't necessarily present the probation officer, and certainly I am not going to accept one or the other of these things merely because of who they are.

I am going to accept the ideas they give me, and I will take, maybe one or, one and two of another -- that is my problem. It is not theirs.

They do the best they can -- and then it is up to me.

MR. MANAK: The probation officer, at the disposition stage is a separate executive branch professional making a recommendation.

I don't understand why he would need bolstering or representation by counsel.

HON. ARTHUR: Non-lawyers sometimes feel lost in a room full of lawyers.

HON. CATTLE: I feel lost in a room full of lawyers.

MR. MANAK: Judge DeLaney?

HON. DELANEY: Yes, I would like to ask Ms. Bridges, where do you see the Prosecutor's role in the area of modification and rehabilitation and probation?

First of all, when is the basis a criminal act on the part of the probationer, and secondly, where it is a non-criminal act such as, you know, failing to attend school or something of that kind?

MS. BRIDGES: I don't see any distinction between the original charge and the violation of probation.

I think that the Prosecutor is -- should have the right to file that, and tne right to prosecute it such as they would in adult court.

HON. DELANEY: Whether it is a criminal violation or a non-criminal?

MS. BRIDGES: Yes, sir.

HON. DELANEY: Okay.

MR. MANAK: Ms. Szabo?

MS. SZABO: What is your reaction to the use by the prosecution of waiver, Prosecutor agreeing to so go, seeking waiver for a juvenile -- perhaps agreeing to testify against a code?

MS. BRIDGES: Well, I -- the IJB/ABA standards, and I think in their commentary mentioned the fact that they have waiver of jurisdiction as legitimate plea bargaining issue, and I think it is.

I think -- I think it's probably more harsh than plea bargaining on ordinary dispositions within the juvenile system, but I -- I think that all of those things are legitimate to the Prosecutor -- I think the Prosecutor should be able to negotiate on anything.

MR. MANAK: Mr. Rounds?

MR. ROUNDS: I have no comment.

MR. MANAK: Mr. Siegel?

MR. SIEGEL: Yes.

I thought the presentation was very good.

I just wanted to ask you about Standard 5.2 which I think may have been changed, the one that says that a Prosecutor -- if a Prosecutor

learns that the juvenile is maintaining factual innocence has to refrain from engaging in plea negotiation.

MS. BRIDGES: You know -- I -- I just think that is kind of excess verbage.

I don't even know why that is necessary.

I think that kind of goes with that -- without saying.

You don't -- maybe other people think that is necessary -- I don't.

MR. SIEGEL: See, well I think it was intended for the situation where the parent may be pressuring the defense attorney maybe taking his direction from like the parents, and the parents want the child to plea to something because he knows it will go on a particular program and the parent doesn't mind that disposition.

MS. BRIDGES: Well, I think that running through the standards that has been my experience that all of the officers of the Court, if they become aware of conflict like that, like between the defense attorney and the family, and the child, have an obligation to call that to the Court's attention so

that it gets straightened out. And definitely I see no ethical basis for continuing with any kind of negotiation when you know that the juvenile maintains innocence.

MR. SIEGEL: Okay.

But in adult -- I mean the Supreme Court has said that it is okay -- in the adult criminal system.

But an innocent person can engage in prenegotiations.

MS. BRIDGES: Okay.

Defense attorneys will, you know, in negotiation will -- may start out the whole negotiation by saying, "You know, my man or my kids didn't do that," you know, and I don't necessarily regard that section of the standards as addressing that -- you know.

MR. SIEGEL: Okay.

MS. BRIDGES: I think what you do is you say, "Well, if he did do it, here's what I will -- here's what I am going to do on the subject."

MR. SIEGEL: Okay. Fine.

MR. MANAK: Judge Ketcham?

MR. KETCHAM: That is also right -- because I

heard something about Alford.

It is my hope that you did not adopt Alford into this possible plea bargaining, because that is ghastly.

It is bad enough in the adult courts, it would be worse in the juvenile court.

MR. MANAK: Well David, perhaps you can fill us in on this point, but the prosecution standard at one point, so that the Prosecutor to continue in plea negotiations if a child maintains his innocence and that is Alford.

If he were to continue and a plea were entered -- was that not changed by the Executive Committee to permit the continued plea negotiation process even if the child maintains factual innocence?

MR. GILMAN: It is not my recollection.

MR. MANAK: Okay.

Well, let me ask you this, and this would also be addressed to --

MR. GILMAN: It is my recollection that it was discussed a great deal before the Executive Committee on a number of -- at both their meetings, and '78 and --

MR. SIEGEL: '77.

It is not my recollection that there was a change made.

Since I probably would have noted that change when I made my comments at lunch as one of the important changes in the volume.

But that is not to say that there wasn't a change.

It is just that I do not recollect it, and I literally would have to go back to the minutes to take a look at that.

I remember a great deal of discussion on that point.

MR. GILMAN: Yes, it was a hot issue.

MR. MANAK: A great deal of opposition by the NDAA committee on that particular point -- as far as the judicial volume is concerned, can a Judge accept a guilty plea if a child maintains factual innocence?

DEAN SMITH: No.

MR. MANAK: He cannot.

DEAN SMITH: That is right.

MR. MANAK: So he cannot accept an Alford plea.

HON. ARTHUR: That is all I wanted to know.

DEAN SMITH: I think this -- the discussion over Ayleford was part of the reason that we were divided.

There was a strong feeling, that if this is acceptable at the adult level, the Supreme Court has tendered to sanction it, one might also do it in the Juvenile Court?

We say it as of Illinois which we must live with.

We will not take it with all its consequences. Therefore, we will not adopt Alford.

So I know the Commission never did adopt the Alford concept and all it entails.

MR. GILMAN: Yes, that is my recollection.

HON. ARTHUR: Makes me feel better.

MR. MANAK: We have a few minutes.

Are there any additional comments that anyone cares to make?

If not, I think we will break at this point and come back at 3:30.

(WHEREUPON, a short recess was had.)

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D. DISPOSITIONAL ISSUES

1. Proportionality and Determinate Sentencing — Consultant: Hon. Lindsay G. Arthur

ABSTRACT OF PAPER

Judge Arthur begins by describing the current controversy over the efficacy and fairness of the juvenile court as follows:

> Traditionally Juvenile Courts have given deep allegiance to the principle of Individualized Justice. The Juvenile Courts have believed in rehabilitation: treating personality which caused the child's delinquency and thus reduce future delinquency.... But the Juvenile Courts and their colleagues in the behavioral sciences over the years promised too much: they promised to treat every delinquent's problems ... if only given enough resources. Disillusion set in and led to the sophistry since it doesn't work for every child, it doesn't work for any child. Then the civil libertarians saw inequalities ..., [t]he public saw more and more violence on its television, and assumed there was more violence on the street ..., [and] with the well funded IJA/ABA, academicians saw a chance profitably to lead a whole new reform. [Emphasis as in original]

One facet of the proposed reform is the concept of proportionality -- i.e., that the sanction should be related to the seriousness of the offense. Judge Arthur states that the standards "all opt for limiting the discretion of the judge on the basis of offense, not the offender." He suggests that although the standards propose only the maximum sentence which may be imposed for each class of offense, they could become "the foot in the door" for full proportionality and "push button justice" in which the judge would have no dispositional discretion whatsoever. He labels this "the complete antithesis of the juvenile court philosophy" and argues that it transfers "discretion" to the prosecutors and defense counsel who can auction the years of offenders' lives in private sessions of plea bargaining.

In describing current practices, Judge Arthur urges that "children are not small adults" and that they can be rehabilitated, "even against their wills." He acknowledges, however, that the juvenile justice system has operated with too few guidelines, too little interest by the bar, too little appellate oversight, and too little accountability, particularly in its correctional programs.

Judge Arthur briefly outlines the recommendations of the three sets of standards noting that under the IJA/ABA provisions, the decision whether or not to incarcerate a juvenile offender must be made prior to examining the social history report and solely on the basis of the offense, and the offender's age, culpability and prior record. He also points that the standards would permit the juvenile to decline to talk to the probation officer preparing the report and to refuse to participate in correctional programs, although he or she could demand services.

Judge Arthur then resumes the analysis of the proportionality doctrine, elaborating on many of the points noted above. He emphasizes the shift in discretion to those "concerned with getting the defendant off, or making an example of him, or clearing calendar jams, or maintaining a peaceful prison." He notes that the motivation of juveniles engaging in delinquent conduct differs from that of adult criminals, and points out that involuntary treatment -- e.g going to the dentist -- is commonplace and effective in the home and can be effective if properly used by the court. He discounts the deterrent potential of proportional punishment because of the small risk of being caught, and also suggests that the same offense may have very different dispositional implications because of the circumstances. He concludes that the standards present a clear choice between individualized justice and the adversary system in a judicial context on the one hand, and a system of legislative sentencing administered through plea bargaining "with less tailoring of the disposition to meet the needs of either the public or the child" on the other.

SUMMARY OF COMMENTS

Judge Arthur's paper and comments sparked a lengthy and heated discussion. Many panelists argued strongly for proportional dispositions as proposed in the standards (e.g., Messrs. Gilman, Hege, Kaimowitz, and Siegel, Ms. Connell and Ms. Sufian, and Judge Ketcham), while others concurred equally as strongly with Judge Arthur (e.g., Ms. Szabo and Judges Cattle, Delaney, McLaughlin and Moore).

At the inception of the discussion, several speakers explored alternative means for controlling discretion, particularly the use of appeals to develop a body of case law to prevent excessive sentences (Mr. Rounds, Ms. Szabo and Judge Delaney). Mr. Hutzler asked

whether, in fact, the standards recommended greater discretion for the judge, since in many jurisdictions, the judge's dispositional authority is limited to deciding whether a juvenile will be placed in an institution or on probation, and correctional officials decide on the release date. Judges Moore and Arthur responded that at least in their jurisdictions, only a very small percentage of juveniles were committed to the state correctional authority.

Judge Ketcham then observed that the recommendations in the IJA/ABA standards were far more limited than had been implied. He pointed out that they provided a range of possible dispositions, imposing only a maximum which would be more than sufficient in most cases. While disagreeing with the restrictions on what the judge could look at in determining the priority, he felt the standards did not spell the end of the juvenile court and that they were not an opening wedge for more severe restrictions. Judge Arthur disagreed, particularly with the latter point, indicating that the drafter of the IJA/ABA standards on delinquency and sanctions had sought agreement on a totally fixed sentence plan.

Mr. Siegel stated that in his view, fairness dictated that a sentence bear a relation to the offense, and that a child perceives a juvenile court disposition as punishment. Ms. Sufian added an example of a case in which a juvenile received a long sentence for a minor crime. She commented that such disparities would be eliminated by the standards, and Ms. Connell argued that proportional, definite sentences would help juveniles take responsibility for their actions since they could better understand the consequences.

Mr. Gilman offered an explanation of the position adopted by the IJA/ABA standards. He stated that in most states, juvenile court judges only have a choice between residential placement or probation while under the standards the judge would not only determine the seriousness of the offense category, but the length restrictiveness of and type of services which must be made available during the disposition. He also alluded to studies which showed the age, offense, culpability and prior record were the factors which judges relied on in most cases in determining the disposition, and he questioned placing added restrictions on a youth because of his or her poor educational record. In response to a question from Judge Moore, he stated that the IJA/ABA standards provided for a social history, because they were not intended to forsake the rehabilitative ideal, and that they called for every effort to provide needed services. The infomation in the social report was needed to determine what those services should be. Ms. Connell added that examination of social factors prior to determining the length of a sentence often worked against poor and minority youth.

Judge McLaughlin noted the inconsistency and volatility of legislatively determined sentences, and Judge Moore suggested that although the standards did not require harsher punishments, more restrictive dispositions were likely to result since judges, denied an opportunity to examine the social history, would choose the safer course of imposing a more restrictive disposition. Mr. Gilman replied that the current system was already harsh, especially since release was often based on good behavior in institutional settings, a factor unrelated to recidivism. He stated that interviews with juvenile offenders indicated that they wanted to know what they had done. wong, how long their punishment was, and when they would be released.

Finally, Judge Cattle stated that there had not yet been a convincing showing of how the standards were better than the current system, that current practice was probably neither as good nor as bad as its proponents and critics have indicated, and that if the standards do place controls on the discretion of correctional authority, their proponents should be "half as articulate on that subject as they are in their [criticism] of judges."

PROPORTIONALITY

Focus on the Offense or on the Offender?

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I. THE JUVENILE COURT

A. Present Concepts

Traditionally Juvenile Courts have given deep allegiance to the principle of Individualized Justice. The Juvenile Courts have believed in rehabilitation: treating personality problems which caused the child's delinquency and thus reducing future delinquency.[1] It is popular now to denounce this as the "medical model", as though those who help others are somehow suspect. But the Juvenile Courts and their colleagues in the behavioral sciences over the years promised too much: they promised to treat every delinquent's problems...if only given enough resources. The behavioral sciences were not that far advanced, the Courts didn't have the staff, the System couldn't deliver, too many delinquents continued their delinquencies. Disillusion set in and led to the sophistry: since it doesn't work for every child, it doesn't work for any child. Then the civil libertarians saw inequalities: different children were treated differently for the same offense. The public saw more and more violence on its television, and assumed there was more violence on the street. Finally with the well funded IJA/ABA, academicians saw a chance profitably to lead a whole new reform. The pendulum swung.

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1. Minnesota long had as the preamble to its Juvenile Corrections Act:

> 242.01 PURPOSE
> The purpose of Minnesota Statutes, Chapter 242, is to protect society more effectively by providing a program looking toward prevention of delinquency and crime by educating the youth of the state against crime and by substituting for retributive punishment methods of training and treatment directed toward the correction and rehabilitation of young persons found delinquent or guilty of crime. MINN. STAT. 242.01(1975).

This was repealed in 1978 as part of shifting juvenile parole from a citizen's commission directly into the sole hands of the Commissioner of Corrections. The following preamble to the Juvenile Code fortunately still remains almost as a banner for the IJA/ABA Standards:

> 260.11 TITLE, INTENT, AND CONSTRUCTION
> Subd. 2. The purpose of the laws relating to juvenile courts is to secure for each minor under the jurisdiction of the court the care and guidance, preferably in his own home, as will serve the spiritual, emotional, mental, and physical welfare of the minor and the best interests of the state; to preserve and strengthen the minor's family ties whenever possible, removing him from the custody of his parents only when his welfare or safety and protection of the public cannot be adequately safeguarded without removal; and, when the minor is removed from his own family, to secure for him custody, care, and discipline as nearly as possible equivalent to that which should have been given by his parents. The laws relating to juvenile courts shall be liberally construed to carry out these purposes. MINN. STAT. 260.11, Subd. 2(Supp. 1978).

The rejected law of Exodus[2] was revived but with the shiny modern name of "Proportionality": punish the offense regardless of the offender, sentence by a matrix instead of by the discretion of a Judge. Americans love change. "New" is a favorite word for designers, even though today's new fashions are often yesterday's cast-off styles. So thousands of pages of new standards were written.

B. Proposed Limits

The Standards all propose a clean issue: should individualization be used for all children, for some children, for no children? Should proportionality be used for all children, for some children, for no children? Should we look at the child, the whole individual...or at the offense, the whole record of misconduct? The three Standards recommend that "the juvenile court's dispositional authority in delinquency cases be rigorously limited in type and duration according to the age and prior record of the juvenile and the seriousness of his or her offense,"[3] "...determinate maximums on the type and duration of juvenile court sanctions,"[4] "all conduct...should be classified (so as to) reflect substantial differences in the seriousness of the offense."[5] The Standards thus all opt for limiting the discretion of the Judge on the basis of the offense, not the offender. One commentator takes the opposite position. "Judicial discretion seems to me essential to the fine-tuning required for morally necessary distinctions between crimes and criminals for just sentencing."[6]

C. Impact of Proportionality

Proportionality is an increasingly popular concept. There is a trend towards it which is strong in the adult system and which might in time infect the juvenile system. The Standards only go part way, with ceilings, but they could become the foot in the door. Thus it may be appropriate to consider here what full proportionality could mean to the juvenile system. Proportionality or its synonym, Determinate Sentencing, are the new catchwords to replace "Law and Order" as the simple, emotional demand that "criminals must pay"...despite how much society is hurt in the process.

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2. "If any harm follows, then you shall give life for life, eye for eye, tooth for tooth, hand for hand, foot for foot, burn for burn, wound for wound, stripe for stripe." Exodus 21: 23-25 (Revised Standard Version).
3. Institute for Judicial Administration/American Bar Association Juvenile Justice Standards Project, (IJA/ABA) Standards Relating to Juvenile Delinquency and Sanctions, at 40 (Tentative Draft, 1977) (Hereinafter cited as IJA/ABA, Sanctions).
4. Report of the Task Force to Develop Standards and Goals for Juvenile Justice and Delinquency Prevention, 461 (1976) (Hereinafter cited as Task Force).
5. Report of the Advisory Committee of the Administrator on Standards for the Administration of Juvenile Justice, Standard 3.181 (1976) (Hereinafter cited as NAC).
6. Morris, Conceptual Overview and Commentary on the Movement Toward Determinacy, a trascript of the keynote address to the Special Conference on "Determinate Sentencing, Reform or Regression?" at Boalt Hall School of Law, University of California, Berkeley, National Institute of Law Enforcement and Criminal Justice, Law Enforcement Assistance Administration, U.S. Department of Justice at 9. (June 2, 1977) (Hereinafter cited as Special Conference).

In the name of equality it punishes all offenses equally...and therefore all offenders unequally because of their widely varying sensitivities. It deprives judges of their discretion to tailor sentences publicly on the record...and gives that discretion to the prosecutors and defense counsel who can auction the years of offenders' lives in private sessions of plea bargains...and this in the name of liberalism. It will fill up the prisons...yet it guarantees every prisoner his release at a fixed time, whether he is ready or not, like a "social promotion" in school. It is the complete antithesis of the juvenile Court philosophy of individualized justice where each child who is reachable is taught respect for others and is given the skills to cope with his particular world rather than ordered to sit for a pre-determined number of months and days and hours in a lockup which guarantees him the freedom to do nothing, and to learn nothing except maybe to hate. Children are not small adults, the pressures and influences on them are different; they are more amenable to being changed. They can be rehabilitated, even against their wills.

D. Present Methods

The Juvenile Justice System focuses on the individual, treating him as a person, seeing what the public needs for its protection from his particular conduct and the circumstances causing it, seeing what the needs for the best available help with the least restriction on his liberty. It tailors plans to community resources and to individual problems, against the trend of adult criminal sentencing which finds the average times past offenders have served and assigns this as the required time future offenders must serve, which by simple logic is bound to be too long for half the criminals, frustrating them into further criminality, and too short for the other half, releasing them uncorrected.

The Juvenile Justice System favors working through a child's problems as best this can be done, for as long or as short a time as this may require, regardless of offense, considering the possibilities of future conduct rather than beating the dead horse of past conduct.

The Juvenile Justice System relies heavily on counselling, social work, guidance, probation, treatment to change the child for the better...for his own betterment and thus for the public's betterment. It uses accountability and "just deserts" programs, work squads and drivers license suspension and house arrest, when these are needed to teach; ordering restitution to the extent the child can pay and needs its purging or disciplinary effect. It commits children to institutions when they need intensive treatment or when they can't cope with liberty or when the public can't cope with them.

The Juvenile Justice System sends children to the Adult Criminal System when, after a full hearing, it is shown that they are too much a threat to the public safety for the Juvenile Justice System to handle, or when they are not amenable to the treatment approach. The Prosecutors have their right to be heard when they feel the public is endangered. The children have their right to be heard as to why juvenile treatment is still feasible. The Court decides, according to guidelines set by the Legislature and the case law, according to the rule of law.

E. Present Shortcomings

But the Juvenile Justice System has had shortcomings. There have been too few Legislative guidelines as to when restitution should be ordered and how much, as to how much counselling can be required for the child...and for his parents...for their chemical problems and their disrespect of the rights and dignity of others or their apathy, as to when and against whom fines can be used, as to the range of the Court's power to devise individualized plans involving the child, the parents, public and private agencies, and to compel obedience by contempt of court proceedings.

The Juvenile Justice System has had too few lawyers to make an effective adversarial system, and the lawyers assigned are too often at the bottom of the ladder or over the hill; the private bar has shown little interest.

The Juvenile Justice System has had too few appeals to develop an adequate caselaw, partly at least because the appellate courts have been so slow in handling appeals that defense counsel are unwilling to make the child pay the price of being stalled in limbo for a year or more.

The Juvenile Justice System has had too little accountability to the Court. There is no enforced concept of malpractice against the social agencies who promise help and fail to deliver. There are few strong procedures for review hearings at the instance of counsel for the public or counsel for the child or counsel for an ombudsman to test out whether the court's plan is in fact working, whether it needs modifications, whether it has accomplished its purpose and dismissal is in order. And in most states, when a child is committed to the state correctional authority...which is often the only resource available to smaller courts...the court wholly loses jurisdiction:[7] it cannot designate which state program is to be used, it cannot order the creation of new programs or the termination of brutal or ineffective programs, it cannot review a child's progress nor order his release for an institution nor order his retention in an institution; the state administrator has unfettered authority.

7. In re M.D.A., 306 Minn. 390, 237 N.W. 2d 827 (1975).

II. THE STANDARDS

A. IJA/ABA Standards

The scheme devised by the IJA/ABA Standards for children is oriented to offenses of adults.[8] It divides all delinquencies into five categories based on the maximum sentences adults could receive.[9] It then divides all possible dispositions into three categories based on degree of deprivation of liberty.[10] Then it provides a correlation between the categories of offenses and the categories of dispositions,[11] setting a ceiling on the authority of the court based on the misconduct as it has been filtered to the court through the police and the plea bargainers. It makes provision for multiple offenses[12] and a maximum total duration of up to the child's twenty-first birthday.

The standards deprive the Court of two valuable adjuncts. The decision to incarcerate or not to incarcerate must be made before the Court is allowed to see the social background of the child.[13] They do allow for preparation of a Social History in the traditional form and the use of it after the incarceration decision. They also create a Right of Non-Cooperation[14] allowing the child at the outset to refuse completely to talk to the social history investigator, and then allowing the child after the disposition on the one hand to refuse to participate in any correctional program[15] and on the other hand to demand "all services necessary for their normal growth and development" and to be released if these are not available.[16]

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8. IJA/ABA, Sanctions, Introduction at 37 et. seq.
9. Id., Standard 5.2
10. Id., Standard 5.1.
11. Id., Standard 6.2.
12. Id., Standard 6.3.
13. IJA/ABA, Standards Relating to Dispositions, Standard 2.1 (Tentative Draft 1977). (hereinafter cited as Dispositions).
14. "1. The statement should be voluntary as determined by the totality of circumstances surrounding the questioning and the juvenile should have full knowledge of the possible adverse dispositional consequences that may ensure." IJA/ABA, Standards Relating to Dispositional Procedures, Standard 2.2 (Hereinafter cited as Dispositional Procedures).
15. IJA/ABA, Dispositions, Standard 4.2.
16. IJA/ABA, Dispositions, Standard 4.1. "A child in a placement...has a right to whatever services are necessary for normal growth and development. Now that covers everything. And, if a kid isn't getting those services, the remedy is either to reduce the disposition or to discharge the kid from custody. That sounds very much like a right to treatment to me, and it seems quite far from proportionality and just desserts if, for example, you're going to take a rapist who's in for two years and release him because he hasn't got a goot vocational educational program or good treatment for his learning disability.. That's not proportionality." Professor Stanley Z. Fisher speaking at The Standard Recommendations: A Panel Discussion as reported in 57 B.U.L. Rev. 754, 771 (1977). (Hereinafter cited as Panel).

B. Task Force Standards[17]

The scheme devised by the JJDP Standards orients juvenile dispositions to adult offenses. It provides four classes of delinquent acts based upon adult penology: (1) misdemeanors, (2) property felonies, (3) personal crimes or second offense property crimes, and (4) felonies for which death, life, or more than twenty years is authorized for adults.[18] It provides three types of dispositions: (1) reprimand, (2) required conduct while living at home, and (3) removal from home,[19] with well-defined descriptions of each type.[20] It provides for correlation of classes of offenses with types of dispositions.[21] It makes provision for multiple offenses[22] and it limits the total disposition to the child's twenty-first birthday.[23]

The standards not only allow for, but encourage, the preparation and use of a traditional Social History, so long as the child is aware of the reason for the investigation and his lawyer receives a copy of it.[24]

C. National Advisory Committee Standards

The schemes accepted by the Advisory Committee are offense-oriented. Juvenile delinquents are to be divided into a "few" groups reflecting the "seriousness of the offense" with a maximum term for each. Dispositions are to be divided into a "few" categories which "reflect differences in the degree of restraint on personal liberty."[25]

The standards allow the court to consider social data if it is (1) probative, (2) relevant to the objectives of the hearing, and (3) was not unconstitutionally obtained.[26]

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17. Task Force, supra note 4.
18. Id., Standard 14.13.
19. Id., Standard 14.9.
20. Id., Standards 14.10 - 14.12.
21. Id., Standard 14.14.
22. Id., Standard 14.17.
23. Id., Standard 14.12.
24. Id., Standard 14.5.
25. NAC supra note 5.
26. Id., Standard 3.188.

III. THE EFFECTIVENESS OF PROPORTIONALITY

A. The Public's Expectations

In analyzing the issue and the responses of the Standards to it, probably the first question that must be answered can be simply put: what does the public want from its criminal/delinquency justice system? And it can be as simply answered: it wants crime reduced...and a little retaliation. The second question: how to do this, has no simple answer. Will individualized justice reduce crime better than proportionality? It certainly provides less retaliation, but can it provide less recidivism? The answer is also cluttered up with emotional catchwords, such as "judicial discretion","plea bargaining", "equality", "just desserts", "rehabilitation", "medical model", and other easily used words that grow and have a life of their own, too often sinking debate to mere argument. The Standards deem children to be like adults basing dispositions on the sentences devised for criminals. The Standards currently provide only ceilings on judicial discretion, but the Reporters in the Drafting Committees as the writer can certainly attest, argued vigorously for full proportionality, almost to the extent of legislatively mandated sentences. They were tempered by the Standards but they are still waiting.[27] But the answer for children, the non-hard-core children, may well be a lot different than the answer for adults.[28]

B. Children Are Not Small Adults

Children are different, they have pressures on them long forgotten by adults: they must adapt to teachers and mothers, they must adapt to changing size and immaturity, they are governed by curfew and incorrigibility, they must respond to puberty, chemicals affect them differently, they cannot choose the world they live in, neither their residence by night nor their occupation by day. And they are constantly growing and learning and their bodies are changing, today's basics are not the same as yesterday's.[29] Their reasons are not adult reasons. When they steal a car it may be to escape a drunken father, or to show off to a girl friend, or simply to drive a car, or sometimes it may be for the same reason as adults: to use the car for a getaway, or to sell it for profit. The causes are manifold.[30]

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27. "A juvenile corrections administrator asked whether the points made in favor of determinate sentencing had the same validity for juveniles as for adults. Professor Foote responded with an unqualified 'yes'." Foote, Deceptive Determinate Sentencing, Special Conference, supra note 6, at 141.
28. "...childhood and adolescence is, among other things, a somewhat plastic period. These youths are accessible to one or more behavior-changing techniques, and, given an encounter between the right delinquent and the right technique, behavioral change will result..,"D. Mann, Intervening with Convicted Serious Juvenile Offenders, Research prepared by the Rand Corporation under Grant Number 76-JN-99-0007 from the National Institute for Juvenile Justice and Delinquency Prevention, Law Enforcement Assistance Administration, United States Department of Justice at 73 (1976) (Hereinafter cited as The Rand Study).
29. See McKeiver v. Pennsylvania, 403 U.S. 528, 551 (1971) (White, J. concurring).
30. The Rand Study, supra note 28, at 88.

To treat them all alike would be meaningless to children: they don't think alike. To fall back on the make-the-costs-of-crime-greater-than-its-rewards principle, the essence of proportionality, would have no effect: a boy running from a stormy home doesn't think about the penalties of car theft, nor does he even if he just wants to joy ride. Unsophisticated children don't think like adults: they can't; they don't respond like adults; they can't.[31] When they're on the run, they may steal a car, but they may just as likely shoplift a coat, or burglarize a store; the reason is the same, the problem is the same, the offenses are different...should there be punishments different for each offense or should there be rehabilitation different for each child, looking to resolving the reason for the running which brought on the various offenses? Children are different. The Standards assume all criminal acts by children are criminally motivated;[32] they aren't, they're usually brought on by some peculiarly adolescent problem. The Standards base their assessment of the effectiveness of juvenile institutions on research into adult institutions.[33] But Martinson himself found that children respond to rehabilitation better than criminal adults.[34] Children's offenses often are not the logical consequences of their problems. Judicial response therefore should be to the problem more than to the offense.

C. Discretion by Whom?

Currently discretion is being exercised by at least eight persons as a defendant proceeds through the criminal/delinquency justice system. Proportionality would change this. The total amount of discretion exercised in the system would be about the same, but it would be considerably shifted.[35]

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31. Arthur, Should Children be as Equal as People? 45 N. Dak. L. Rev. 204 (1969).
32. "Where the Standards say that, in a sense, juvenile justice is viewed as a part of the larger criminal justice system, I think that's accurate. But it has to be said that the Standards Project is focusing on crimes committed by young people, not the kind of social welfare cases that come through by the label of PINS or neglect. So we are talking about crimes by young people." Cohen speaking at Panel, supra note 16, at 762.
33. Judge Howard Levine speaking at Panel, supra note 16, at 757.
34. Halleck & White, Is Rehabilitation Dead? Crime and Delinquency at 377 (October 1977) (Hereinafter cited as Halleck & White).
35. Law Professor Alan Dershowitz of Harvard, who served on the Twentieth Century Fund's Task Force on Criminal Sentencing warns us, in the New York Times Magazine (December 28, 1975) concerning mandatory minimum sentencing: "Discretion and disparity will not be eliminated; policemen will still decide whom to arrest; prosecutors will still engage in plea-bargaining and Presidents and Governors will still pardon and commute." (P. 27). His conclusion represents a pessimistic endorsement of a judicial method of dealing with crime that will neither limit nor reduce it. Moreover, two of the main sources of injustice in the criminal justice system - plea bargaining and political influence - will not be eliminated. See Alper & Weiss, The Mandatory Sentence: Recipe for Retribution Federal Probation at 18-19 (Dec. 1977).

The law enforcers would gain, Judges and behavioral scientists would lose.

> The Policeman has the discretion to arrest or not to arrest, to write his report in a sympathetic tone or in a hostile tone, to aim his report towards a greater charge or a lesser charge. Their report necessarily influences their advocate, the Prosecutor.
>
> The Prosecutor has the discretion to decide the charge and to amend it throughout the proceedings. If dispositions and sentences are more and more welded to offenses, Prosecutors more and more can decide the sentence.[36]
>
> The Plea Bargain between the Prosecutor and Defense Counsel currently gives them the discretion to determine the charge and to determine the sentence, subject to the Judge's discretion to approve or disapprove their bargain. But as the Judge's discretion is reduced by offense oriented ceilings and limits, both the charge and the sentence become increasingly the province of the lawyers.[37] The IJA/ABA Standards actually encourage plea bargaining by providing for a "Pre-Disposition Conference" to work out a disposition which the Judge must accept or show cause why not.[38]

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36. "There is hardly any objection to judicial sentencing discretion that does not apply in full measure to prosecutorial sentencing discretion - a discretion which has been in practice, every bit as broad and broader. As much as judicial discretion, the discretion of American prosecutors lends itself to inequalities and disparities based on disagreements concerning issues of sentencing policy; it permits as least the occasional dominance of illegitimate considerations such as race and personal or political influence; and it may lead to a general perception of arbitrariness and uncertainty, contribute to a sense of unfairness, and even undercut the deterrent force of the criminal law." Alschuler, Sentencing Reform and Prosecutorial Power: A Critique of Recent Proposals for "Fixed" and "Presumptive" Sentencing Special Conference, supra note 6, at 69.
37. "There are additional objections to prosecutorial sentencing discretion that do not apply with nearly so much force to judicial discretion. The exercise of prosecutorial discretion is more frequently made contingent upon a waiver of constitutional rights; it is generally exercised less openly; it is more likely to be influenced by considerations of friendship and by reciprocal favors of a dubious character; it is commonly exercised for the purpose of obtaining convictions in cases in which guilt could not be proven at trial; it is usually exercised by people of less experience and less objectivity than judges; it is commonly exercised on the basis of less information than judges possess; and, indeed, its exercise may depend less upon considerations of dessert, deterrence and reformation than upon a desire to avoid the hard work of preparing and trying cases. The discretion of American prosecutors, in short, has the same faults as the discretion of American judges and more." Id.
38. IJA/ABA, Dispositions, Standards 5.1 - 5.4.

> The Jury usually has the discretion to find guilt to a lesser included charge and thus under offense-oriented sentencing to a lesser sentence.
>
> The Probation Officer who prepares the Social History is usually expected to recommend a sentence or disposition plan based upon her or his view of the prognosticated amenability to rehabilitation and threat to the public safety. As dispositions are limited by proportionality, so this discretion would be limited.
>
> The Judge currently has broad discretion to decide the sentence or the disposition. To the extent that there are abuses or illogical variances between Judges, these can be readily corrected by sentencing guidelines,[39] by a strong adversarial system, and by facilitating appeals and a sentencing case law. But under the ultimate of proportionality, to which the Standards are tending, the Judge, more than any of the others, would no longer have any discretion.[40]

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39. "We propose the retention of a judicial sentencing system, but with the safeguards of articulated reasoning and structured discretion. The quantitative and qualitative sentencing guidelines approach...retains that degree of judicial discretion required for sentencing that is both humane and socially conscious, yet structures that discretion in such a manner as to prevent the injustices of the indeterminate or mandatory sentencing systems." Wilkins, Kress, Gottfredson, Calpin & Gilman, Sentencing Guidelines: Structuring Judicial Discretion, National Institute of Law Enforcement and Criminal Justice, Law Enforcement Assistance Administration, United States Department of Justice at xvi (1978)
40. "Consider, however, a criminal code in which offenses have been defined in great detail and in which the legislature has attached a single fixed sentence to each offense. Suppose, in other words, that not an ounce of discretion remains in the hands of trial judges and parole boards - and then suppose that prosecutors retain an unchecked power to substitute one charge for another in the plea bargaining process. It seems doubtful that even Ray Bradbury or Franz Kafka could devise a more bizarre system of criminal justice that this one." Alschuler, supra note 6, at 71.

Under the Standards the Judge would have little discretion even to modify the disposition[41] however much the child might change or mature, except for improprieties in the original disposition.[42] There could be no modification except for "good time" and that could only be granted by the Warden.[43]

The Superintendent of the correctional facility currently has discretion in most states to allot "good time."[44] Under the Standards, the discharge date would be fixed at the disposition and, other than for irregularities[45] the only possible reduction would be good time, at the Warden's discretion for as much as five percent.[46]

In summary, the more pure the adherence to proportionality, the more discretion is taken from the Judge, the Probation Officer and added to the Prosecutor, the Plea Bargain, and the Warden. Rephrased, proportionality takes away authority from those concerned with helping the defendant and protecting the public from him as an individual with distinctive problems requiring distinctive management and gives authority to those concerned with getting the defendant off, or making an example of him, or clearing calendar jams, or maintaining a peaceful prison.

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41. "I think that one of the issues in which this came up most pointedly was the question of releasing the child from some sort of control because he had turned out to be a better kid than he was thought to be when he was before the court, or because his home situation had turned around or had turned out to be a more secure, safe and nourishing place than before. Well, in order to adopt the position that you would release control upon the occurrence of those events, you must take the position that you would have opposed the control had those conditions originally existed. That is, the reason why the child was sent away was because there was something about his personality that was rubbing the wrong way, socially rubbing the wrong way, and, if he could turn that around, okay, we'll let him out; or that the reason he was sent away was because the probation investigation turned out to show too many skeletons in his closet, and, once the family had cleaned up those skeletons, we'll let the kid out." Professor Sanford Fox speaking at Panel, supra note 16, at 768.
42. IJA/ABA, Dispositions, Standard 5.1.
43. Id., Standard 5.3.
44. "The third justification, to facilitate prison control and discipline, is an important, latent, pragmatic justification of parole. But it is vulnerable to attack on grounds of injustice. I think it unjust to use the parole discretion in relation to disciplinary behavior." Morris at Special Conference, supra note 6, at 7.
45. IJA/ABA, Dispositions, Standard 5.1.
46. Id., Standard 5.3.

D. Domination by Plea Bargainers

The Standards increase the use and power of plea bargaining. Its only defenders are the efficiency experts who correctly say it moves cases through the calendar with minimum expense neither of which has much relation to justice. It is not dictated by fair play for either the public or the defendant. It may well result in a charge having little resemblance to the actual misconduct, since weapons, violence, the nature of the conduct can all be bargained into oblivion in the compromising.[47] At its worst, several defendants can be bargained against each other.

As the Judge's discretion is reduced plea bargaining will take over and dominate the disposition process. In California, which so avidly acts as an experimental laboratory for her sister states, proportionality through Determinate Sentencing is in place for adults...and so is plea bargaining. A prestigious seminar was held on June 2-3, 1977, in Berkeley, which produced almost unanimous agreement that proportionality increases the use of plea bargaining and decreases the effectiveness of the Judge to control it.[48]

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47. "Dean Morris reiterated his reason for opposing legislative term-setting: inevitable "inflation of term lengths." He said predictions of prison populations had to be tentative because a "minority of prisoners are in prisons for what they have done. The majority are in for what they have pleaded to." Morris at Special Conference, supra note 6, at 11.
48. "I disagree with Alschuler's argument that sentencing reform should wait on the achievement of better control of charge and plea bargaining, but I certainly agree with his view and such bargaining may well frustrate reforms in legislative and judicial sentencing. Certainly we should hesitate long before, by legislatively prescribed fixed sentencing, we shift discretion from the judge to the prosecutor, which is the powerful tendency of such sentences - achieving, incidentally, neither larger equalities nor more severe sentences." N. Morris, Id., p. 6.

"Even more of the most significant decisions will be made in the generally invisible halls of prosecutors; judges will be able to plead 'not guilty' on grounds of 'constraint' should there develop any considerable dissatisfaction with the length of prison terms." S. Messinger and P. Johnson, Id., p. 56.

"In my view, fixed and presumptive sentencing schemes of the sort commonly advocated today (and of the sort enacted in California) are unlikely to achieve their objectives so long as they leave the prosecutor's power to formulate charges and to bargain for guilty pleas unchecked. Indeed, this sort of reform is likely to produce its antithesis - to yield a system every bit as lawless as the current sentencing regime but one in which discretion is concentrated in an inappropriate agency and in which the benefits of this discretion are made available only to defendants who sacrifice their constitutional rights." A. Alschuler, Id., p. 59.

Surely basic justice dictates something better for our children than delivering them over to the mercies, however tender, of Prosecutors, invariably overworked, concerned with showing a good percentage of convictions.

The argument is made that the discretion of the plea bargainers should be circumscribed. But how? No effective method is even suggested. Surely the Prosecutor has the right to determine what charge he can prove and to change his mind as he reviews the evidence and hears what the defense has. Surely a Prosecutor is entitled to work and confer privately in his office. Must the Prosecutor show cause at a hearing every time he wants to reduce a charge? Who will be his adversary? A Judge is properly required to explain what he does publicly, in his courtroom. Is discretion better constrained in a private office or a public courtroom?

E. Equality, But of Offense or Offender?

If a principal goal of the Juvenile Justice System is public safety...and what else could constitutionally justify intervention into a citizen's life... is public safety better served by punishing each plea-bargained offense equally regardless of whether the punishment is too little or too much for the particular offender, or would the public be better protected by restraining or rehabilitating the particular offender according to his individual motivations and disabilities? "Equal protection" is the clause invoked: how can the protection be most equal for the public as well as for the offender: by equal impact of the time served or by equal days of the time served?

- Should a woman who kills her abusive husband receive the same punishment as a man who kills the cashier during a robbery? Does public protection need the same sentence from both?

- Should a boy who commits robbery with a weapon because he likes to see people grovel receive the same treatment as a boy who commits a robbery with a weapon to get money to take his girl to a dance?

- Should a fifteen year old girl who prostitutes because she needs her pimp as a father-figure be treated the same way as a fifteen year old girl who prostitutes because she wants the money? Or should prostitution by fifteen year old girls be deemed a "private offense" and not disposed of at all, as the IJA/ABA Standards propose?[49]

- Should a boy who commits homosexual rape on a five year old boy be punished the same as a boy who commits heterosexual rape on a sixteen year old girl?

- Should a boy who is an alcoholic and burglarizes a residence to get liquor be treated the same as a girl who burglarizes a residence to get money to pay for an abortion?

How is the public interest best served: by focusing on the offense ...or on the offender?

F. Is Rehabilitation Ineffective?

The reformers in 1899 said that offense-oriented punishment didn't work for children, that problem-oriented treatment was more effective. They were able to secure the creation of the Juvenile Courts. The reformers of 1978 say that problem-oriented rehabilitation doesn't work, even for children; they say that nothing works so revert to a punitive offense-oriented basis. Should we continue with treatment which can be proven effective?[50] Should we revert to proportionality which can be proven ineffective?[51] Should we follow the unproven compromise of using proportionality only to the extent of using offense-category ceilings on judicial discretion?[52]

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49. IJA/ABA, Sanction, Standard 2.4.

50. "Martinson is looking for a cure-all, a program that works for everyone all or almost all of the time. If one subscribes to the medical model, a search for a cure-all certainly seems inappropriate. Rather, this model suggests that we should tailor the treatment to fit the disease. It should not be surprising that programs designed to deal with personality problems are not effective for people who do not have these problems. Indeed, one of the great contributions of Martinson's work is that it points to a number of programs which seem to work consistently for certain types of individuals or in certain treatment situations. Martinson scorns such limited successes because programs with such limited success do not reduce the crime rate. But perhaps the correct matching of programs and offenders can at least help to achieve this goal." Halleck & White, supra note 34, at 376.

51. "No evidence exists that longer prison terms or fixed mandatory sentences will deter crime, says Silberman. The real problem with the court system is not that it works badly but that it appears to work badly. Image is of no small importance. Making people believe that the law works - and works fairly - is a better way to stop crime, says Silberman, than stuffing more criminals into already overcrowded jails. Bringing plea-bargaining negotiations out into the open, establishing formal sentencing guidelines, and simply treating victims and witnesses more decently would help restore respect for the law. Nevertheless, Silberman cautions, the courts alone cannot do the job. "As American as Jesse James" Time, November 6, 1978.

52. American Psychiatric Association Response to Juvenile Standards Project, p. 10, (1978).

The response of the Juvenile Courts is resoundingly to work with the child to meet his needs whether by counselling or by discipline. They believe something does work, and that it certainly has not been shown that correctional treatment does not work.[53]

Hennepin County, Minnesota, has two programs at its County Home School: "Alpha" and "Beta". Both are residential programs conducted in a non-secure cottage campus near Minneapolis. Alpha is for an indeterminate time, Beta for a determinate time. Neither accepts status offenders. Both of them work, but for different types of children, for children with different needs even though they are children who committed the same offense.

Alpha is for boys who violate the law because it's a way of life or a pattern of behavior or because they lack the skills to live lawfully. It is designed to teach each student and his family how to cope with their particular world lawfully. It provides and requires intensive schooling, group counselling and family counselling. Monthly progress reports are made to the court. Staff determines release but a child is entitled to a court hearing if he thinks he has progressed sufficiently to merit release. The average stay is about four and a half months.

Beta is a "logical consequences" model in juvenile corrections for those first challenging society's rules, first flagrantly disobedient, for those first contemptuous of rules, for those who think nothing can happen to them because they are juveniles. "The Beta Program is designed for unsophisticated juvenile offenders who have had no prior institutional experience and who will benefit from a structured program which requires them to think and to act like good citizens. It is a program which will benefit those youth who commit acts as part of peer group activity and feel immune from the consequences of their acts."[54] It is for twenty-one days but a half day of "good time" vests for each full day of participation without misconduct. It provides a short intensive, residential program, with close control of behavior and immediate consequence for misbehavior, supported by individual and group counselling, academic training, and recreation. Its program consists of required hard, useful, physical work and intensive schooling; there is no "right of non-treatment". The program has been effective in reducing recidivism.

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53. "Those who found Robert Martinson's 'nothing works' writings on correctional treatment to be too negative now have unexpected company - Martinson himself. The flamboyant City University of New York professor treated one of the evaluation conference workshops to a blistering critique of his own book, The Effectiveness of Correctional Treatment (ECT), and similar surveys of the literature. This abrupt about-face led one questioner to ask what he should tell his students about Martinson's famous appearance on the television show "60 Minutes". Never at a loss, Martinson replied "Tell them I was full of crap." He later re-phrased this to read, "Martinson naively assumed that the kind of evaluation research assumed in ECT was the proper way to do the research." Criminal Justice Newsletter, 12/04/78, p. 4.
54. Bench Book, Hennepin County, Minnesota Juvenile Court at 79 (4th Ed. 1977).

"Consumer satisfaction was high."[55] It is strongly felt by the local court, its unusually good probation officers and the social workers at the County Home School that Beta would not work for Alpha children, and Alpha would not work for Beta children. Accountability and rehabilitation each are effective ...for different children.[56]

G. Are Potential Offenders Really Deterred?

It is argued that proportionality will deter: that a person will not commit a crime if the cost of it is greater than the reward; and so the advocates of proportionality are enamored with the prim balance of their scientific appearing matrix. But there is a missing element in that equation: getting caught. If potential offenders were sure of getting caught, there would be few crimes other than by the impulsive or the impassioned. Very few drivers go over fifty-five when there is a squad car in sight, or a "fuzz buster" warns of radar or the CB rattles its Arkansan warning. No one tries to take weapons onto airplanes anymore because there is a ninety-nine percent chance of being caught. But most criminals are never caught, and most criminally-motivated criminals know this, and every professional criminal knows that he is enough smarter than the police that he won't be among the few who are caught. Being sure in their own minds that they won't get caught, the penalty doesn't matter, however big or small or painful or rehabilitative. If deterrence is the goal, we should have more police, not more jails.

H. Is There A Right of Non-Treatment?

Proportionality and its handwarden, equality, dictate the "right of non-treatment", that a convicted offender has a right not to be changed, that he can do his time and leave whether he has changed his ways or not. Beyond the offender's right of privacy, is there a public right of safety, do future victims have some kind of a right not to be future victims? The IJA/ABA says a child can refuse all treatment, at his immature option, except for things required of non-delinquents.[57] Yet they turn around and say that treatment must be available if the child wants it. If only one child in a treatment center wants a program it must be provided... or the child must be released! A rapist need only look around for a missing program and demand release when it is not provided.[58]

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55. "In the consumer satisfaction survey, approximately 80 percent of both the juvenile respondents (14/18) and the adult respondents (18/22) reported that their experience with the Beta Program made a positive difference with respect to the juvenile's involvement in new delinquent behavior." Evaluation of the BETA Program: A Logical Consequences Model in Juvenile Corrections, Hennepin County Court Services at 9 (1978).
56. "'Serious" offenders may share only one characteristic - that of having committed a serious crime. Lumping them into a single treatment modality precludes the individualized strategies they require." The Rand Study, supra note 28, at 17-72.
57. IJA/ABA, Dispositions, Standard 4.2.
58. See note 16, supra.

I. Is Involuntary Treatment Effective?

The Standards require that programs must be provided, thus admitting that voluntary treatment works. But children can't be required to submit to treatment because involuntary treatment allegedly doesn't work. But how many children go voluntarily to the dentist? How many people sucessfully complete an alcoholism treatment program because they chose it "voluntarily" instead of some less pleasant alternative like the Workhouse. How many children would even go to school if they were told they could drop out any time they, in their immature judgment, decided? They go, and they learn, however unwillingly.

IV. THE CHOICE

And so, the final analysis: how is the public best protected: by looking at each individual child as defined by Probation Officers, and meeting as best we can his particular needs and his particular threat to the public with little attention to his offense...or by looking at the act which was done, as defined by plea bargainers, and allocating according to a chart based on averages a predetermined fixed restraint with little attention to the child. Our primary concern is to determine how the "right of the people to be secure in their persons, homes, papers, and effects..."[59] can best be accomplished.

Someone must determine what happens to a convicted offender. Various options are available. Presently in the Juvenile Justice System the Judge has almost unfettered discretion to design a plan which he deems will best meet the particular needs of the individual child and the needs of the public as to that child. The discretion has been too broad. There have been too few legislative guidelines such as requiring counselling and accountability for defining restitution, for protecting children from over-institutionalization. There have been too few lawyers for an effective adversarial system, the appellate courts have been too busy for a case law system to develop. Yet the discretion also has not been broad enough. The Right to Treatment has been unenforceable as to non-institutional and private facilities. The Court has had no jurisdiction over state facilities, children could be held too long or too briefly, or provided with nothing more than lock-up custody.

A clear choice is now presented:[60]

a. The Adversarial System - provide the Juvenile Courts with the tested checks and balances of an adversary system and dispositional case law so that they can continue their concept of individualized justice with fair opportunity for both the child and the public to be heard in each case; or

b. The Legislative Sentencing - turn to the Legislature to impose sentences based upon the plea bargained offense with less tailoring of the disposition to meet the needs of either the public or the child.

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59. U. S. Const. Amend. XIV.
60. "We must weigh the values of repentance and forgiveness against the values of retribution and vengeance. In a sense, we must continue the 2,000-year old dialogue on the desirability of New Testament versus Old Testament values." Halleck & White, supra note 34, at 390.

SUMMARY

The Standards seek increased monitoring by the Legislature, the Juvenile Courts seek increased monitoring by the adversary system. The Standards open a trend to more and more detailed sentencing definitions by the Legislature which could end in mandated sentences restrained only by plea bargainers. The Juvenile Courts seek more use of hearings under due process to allow for more and more input by the public and the child at all stages of the proceedings until final release, with more and more guidance from a dispositional caselaw.

The thesis of the Standards and of proportionality is that nothing works, but something must be done, so we'll modernize the discarded concept of an eye for an eye. Others of us hold that juvenile delinquents can be socially diagnosed by competent professionals, that most of them, the unsophisticated juveniles, can be changed for the socially better by rehabilitative treatment tailored to each individual child with input from the public and the child, that others of them can be changed by logical consequences, by holding them accountable with input from the public and the child and that for the rest, the few tenths of a percent, the reformers are right in their defeatism, they must be certified to the criminal system with input from the public and the child... but in time we'll learn how to reach these, too.

(WHEREUPON, Hon. Lindsay Arthur's presentation was given and the following is the discussion that ensued.)

MR. MANAK: Thank you, Judge Arthur.

We will be starting with Mr. Siegel.

MR. SIEGEL: I support the concepts and standards of plea bargaining and determinant sentencing.

I just -- just basic fairness dictates that the severity of the punishment has to bear rational relationship to the severity of the act.

Now I note that men in the Juvenile Justice System don't call it punishment, that originally it started out to be the child's problem, helping the child rehabilitate and, you know, those were verbal, admirable goals, but I think in effect it has turned out to be punishment every bit as much as it is punishment in the adult system and it's perceived as punishment by the child or by the juvenile, and -- if it is punishment, I think it's got to be punishment that fits the act.

And I think it is the only -- otherwise I think juveniles are going to walk away from the system perceiving it as just flagrantly unfair.

I mean, it would be like analogous to the adult system we find our first offender shoplifter, then the Judge decides, "Well, he comes from a -- a disadvantaged background, and he is emotionally deprived and he never really had a chance. So I think four or five years on this program will really help him solve his problems."

I mean, there is, you know, there is just no indication that the rehabilitative efforts have worked to the extent to the -- the type of a discussion.

So I again, I completely support the standards of the -- the standards, principles of proportional identification and determinant sense.

MR. MANAK: Mr. Rounds?

MR. ROUNDS: I somewhat disagree.

We, as the Judge alluded to, initiate determinant sentencing in Juvenile Court as a by-product of an adult system, and further its inception.

We've read a petition to a juvenile that involved 15 counts of burglary in it, announced that his maximum term of incarceration was 45 years and it took us about twelve minutes to get his mother calmed back down again.

It has no relevant position in the Juvenile Court in most instances -- so that we are talking about adult penal maximums.

The Juvenile Court's moral is totally ignored and it is rare that this would be a need to exceed or to affirm to exceed the penalties involved.

The problem is perhaps the small misdemeanor offender with a 90-day maximum who the Judge feels needs some longer period or something.

And that problem has always existed with us.

Insofar as the philosophical aspects -- I think that there is a body of respectable case authority throughout the United States that possibly would prohibit untrammelled discretion to put children away for an incredible length of time for minor offenses and I would see reliance on that, and on the sense of the judiciary as opposed to the sense of the legislature in this area.

MR. MANAK: Ms. Bridges?

MS. BRIDGES: I would like to bring up something which I am not sure whether the Judge realizes -- and it may not exist too much in many jurisdictions, but as I said, Texas does not have determinant

sentencing now, and if the Judge is going to commit a juvenile to the State School, all he can do is commit him to the infamous Texas Youth Council.

I have some control over what happens to him when he gets there, because what the Texas Youth Council does with a juvenile once they get him within their clutches depends upon what charge he has been found guilty on.

And I can control by the charge whether he is 250 miles away from Houston or whether he is back in a halfway house within thirty days inside the community.

And a Judge can't -- absolutely has -- does not have that power.

HON. ARTHUR: I had not heard of that situation.

Of course one possible answer to that is the Morales case.

MS. BRIDGES: Well --

MS. SUFIAN: How many years has that been going on?

HON. ARTHUR: If that ever gets decided.

MS. SZABO: I agree with Judge Arthur's comments completely.

I had originally thought about writing

on that topic and I reached the exact statement -- conclusions.

I feel that the view is proper by requiring judges to specify their reasons to articulate these reasons orally as well as in writing -- also by exercising appellate control to make sure that the discretion is properly being exercised to make sure that no dispute of discretion has occurred.

I feel that it is far more hopeful for the Juvenile Court -- I think -- I don't think they should be rejected as the standards have.

Also, with respect to the arguments that I believe perhaps I am foreseeing that or maybe made what adults have determinant sentencing and juveniles don't -- it is not true in all cases.

In New Jersey youthful offenders below age 30 sentencing of the same nature as a juvenile.

MR. MANAK: Judge Delaney?

HON. DELANEY: I concur certainly with Judge Arthur.

I think there are some built-in restraints that ought to be imposed on judges.

For instance, in our statutes we place a child with the Department of Youth Services for an indefinite period.

If he hasn't been called within a year, he may come back and petition the Court for a hearing on that issue.

He can't be kept more than two years at the outside.

I think there are some limitations of that kind that should be built in, but I certainly share Judge Arthur's view that a judge should have those broad deadlines discussion.

MR. MANAK: Judge Moore:

HON. MOORE: I again would concur with Lindsay.

I would like to add a few footnotes, however.

Number 1, I think the IJA/ABA standards probably have made the most revolutionary change in the juvenile system under this -- these particular -- these particular volumes, because they are three volumes, and obviously had eliminated one of the reasons for the founding of the Juvenile Courts. And obviously if you don't believe in the Juvenile Court, then you don't have any problem eliminating

reasons for founding it.

But one of the reasons was that adults and children, one being younger than the other, and less mature, should have different dispositions, different things should be done with them -- that was certainly the Rice theory in Illinois. It was the history in Michigan.

It was the outgrowth of the Dickens v Dales that that were told in the industrial revolution, and the public felt that children were not adult and they shouldn't receive the same kinds of punishment as adults.

Now, just -- Judge Kaufman, in his comments some three years ago, when the IJA/ABA standards were released wasn't smart enough to recognize that the public was upset with many instances the Mickey Mouse thing on the rights of juveniles and the public may very well support these standards as the public felt that these standards were going to be, get tough, that there were now certain penalties that were now going to be for certain offenses that we were now going to punish children, and the large majority of the public has picked up on that and supports that concept today. And in New York there is

obviously evidence that the Juvenile Courts are too soft and we need to make them harder.

This standard does not do that, and unfortunately the public is not aware of that, and I don't think the average members of the ABA House of Delegates is not aware of that fact, either.

I think that the assumption may be that because you are going to have to -- determinant sentencing, that means you are going to be harder on kids than you currently are with the system that exists in most states.

I wish we could correct that error, and I hope the House of Delegates understands that this doesn't necessarily mean to be tough on kids.

The second footnote I would like to add is that oftentimes overlooked is the disposition volume and the dispositional procedure volumes, and not only is what Lindsay is saying is focusing on the offense rather than the child in determining what should happen to him. But we can't even do unto these volumes now what the adult sentencing judge can do.

The adult sentencing judge certainly has a category, and he knows in Michigan, for armed

robbery you can go to prison for life and for armed robbery you can go to prison for twenty years, which is your maximum category.

But the adult sentencing judge -- in most cases is able to look at a long list of items in determining how long that prison sentence should be or whether the person should get proper days or perhaps be released and dismissed.

These volumes specifically prohibit the juvenile judge from doing that.

Volume or Section 2, Point 1 of the dispositions volume says that in determining what category of sanction the Court shall use, the Court may look at only three items -- the offense, the culpability and the prior record.

So that I envision at the beginning of the dispositional hearing, the only evidence which is going to be admissible for the Court to decide which category of sanction will be Number 1, a rehearing of what the offense was, the child was convicted of, Number 2, some statements about culpability, and Number 3, a statement on the record as to whether he does or doesn't have a prior record.

That must be looked at and nothing

else for the Judge to see, decide whether this child were to be reprimanded and released , whether he is to be put in the penal program, whether he is to have a suspended sentence, whether he is to make restitution, whether he is to make a fine, whether he is to be placed in community.

Whether he is to be placed in day custody, whether he is going to be placed in a custodial secure or unsecured program.

Then, and only after the Judge has decided on those three bases, the culpability, the offense, and the past record, once he has placed this category, then we may go into the second phase of a dispositional hearing, and that is based upon the social history of the child -- which may now look at that, and only then to determine whether or not that is to happen within those various programs.

And again, I think that this is going one step even further than what Lindsay has indicated in saying to the Judge.

You may not use a social history in making the most important decision, and that is which category shall this child go into -- will he be locked up or not locked up?

And once you have decided whether he is to be locked up or not locked up, then and only then can you decide to look at his social history.

If we were to say that to our circuit judges and our sentencing judges in adult court that the only thing they can look at is the past record and the offense and the culpability and not to look at anything that there is gathered currently in most of the presentencing investigations, I think we would see a revolution by our trial bench in the criminal procedure.

And I envision that perhaps this is the first step of the American Bar perforce this consent in Juvenile Court.

It eventually may become a part of our criminal system.

But to equate this to the criminal system -- and to say when you have the same latitude under the system that the criminal charge does is totally serratious.

MR. MANAK: Judge McLaughlin?

HON. MC LAUGHLIN: Well, I read Judge Arthur's report before I came, and I agree with what he says.

He says it very well.

I really don't know how to say it.

I had a little chat with Ketcham today.

I think there is so much good in the standards. I think the standards are so valuable that -- my opposition to the determinant sentencing is so broad, so deep seated, you know, all the reasons that Judge Moore gave and others -- that I think that when left to the states, this will probably be modified.

I have great hope in it.

I don't think it is the correct approach to make, but I think there is so much good in the standards that I will support the standards even though it has this in it.

Reluctantly.

MR. MANAK: Ms. Thompson?

MS. THOMPSON: I will pass for now.

MR. MANAK: We are going to have time.

MR. HUTZLER: One thing I would like to address myself to is the question of whether the standards, by imposing a maximum upon the judge's discretion really results in a restriction of the discretion that judges now enjoy.

In the vast majority of states, the Judge does not control the sentence of a child to institutional services.

In most states, that -- a disposition to the Department of Youth or Children's Services, or whatever, whatever the State agency is, which controls State facilities, particularly your facilities is an indefinite commitment to age 21, and release is not somthing that the Judge -- that the Judge determines when he sets the sentence. He doesn't decide, "This child needs six months in that facility," and another child needs three years.

He makes the commitment to the Department, and the Department determines when the child should be released.

These standards give that discretion to the Judge with only -- with only an upper limit.

So that in many ways, in many ways they increase the judicial discretion rather than restrict it from what is presently.

HON. MOORE: May I respond to that?

MR. MANAK: Yes, yes.

HON. MOORE: Just to cite Michigan as an example -- We come from Oakland County, we commit to the

State of Michigan less than one percent of all the children that come into our Court or are a juvenile delinquent.

The other 99 percent are not committed to the State, but are placed in several and various alternatives -- one includes probation, obviously, one other includes Camp Oakland, which is operated by the Court. Another one includes Children's Village which has got four or five different units -- there are probably 25 or 30 different private institutions which can be put into directly by the Court.

There are in -- similar to probation services, certain kinds of acts like malicious destruction of property -- we have a program where the youngster will go work for other people, donate their time, what have you.

Those to me are all different categories of disposition.

These standards would clearly say to me, before I decide whether this should be the one percent who is committed to the depths of social services or a part of that 99 percent that might be put on probation or might be placed in a private

place, or might be placed in a group home operated by the Court, I am going to look at what the offense, the culpability and prior records are, period.

And I cannot look at the social history until I have made that decision.

MR. HUTZLER: I have not addressed myself to what information you can have before you -- only to the question of -- on the standards and does this guide result in restriction or an expansion of judicial discretion in regard to the length of sentence.

And I am of more particularly concerned about secure placements because I think that is where the real abuse to most kids has come.

HON. ARTHUR: Well I think your point is well taken and it should be addressed to her to what you are saying.

But in some states -- the State Training School or the Commissioner, whatever you want to call it is the predominant disposition.

My State is Michigan, plus -- we use the State Training Schools very little.

We used to have five of them. We are down to two, and they are going to close one of those

two that are open because they're only used to 60 percent capacity.

We seldom use it.

Because they have no program -- they are purposely forcing you not to use it.

The community resources -- that is the name of the game in the community.

I may be addressing myself to my own state -- but the states that provide nothing for the Judge except to go to the Commissioner for an indefinite period of time, and I think that that point should be addressed.

MR. MANAK: Okay.

Dean Smith?

DEAN SMITH: I pass.

MR. MANAK: Judge Cattle?

HON. CATTLE: I have trouble not just in the juvenile, but I have trouble in the adult.

In all the years that I have practiced law, or been a Judge, I don't ever remember seeing two petty larceny cases ever the same.

And for the life of me, I cannot -- I just can't swallow any of it because I simply don't believe it.

I think -- it is the most ridiculous assumption in the world.

And not only when you say two petty larceny cases, but you categorize a number of other offenses -- all of them in the same -- same way -- you are merely compounding the error.

And it would seem to me that if defense counsel ever thought this went on, they would be a lot stronger against it than the Judges might be.

I am not even sure if the Prosecutors ever thought this out, really want this -- if they think they are protecting the public and have some discretion in determining what sort of thing would protect the public.

I know that I am in a minority, I know what the public clamor is -- the public wants some simple and easy answer, and good Lord, that is the easiest answer in the world.

You provide one little box for petty larceny or whatever you want to call it -- poke a button and out -- you don't need Judges any more.

You don't need Judges at all.

All you need is a few social scientists who have learned this routine, and you have poked the button, and bingo, you have everything wrapped up in a neat little package, nothing more to worry about, and it is all over.

So I don't know why the standards really didn't go ahead and say, "We really don't need Judges, but we are going to give them a Grandfather Clause and those that are on the bench now may continue to wear the robes.

And I think that is about where it is.

That is all.

MR. MANAK: Judge Fcrt?

HON. FORT: I think the discussion is already covered under his issues.

I am looking at it.

MR. MANAK: All right. Judge Ketcham?

MR. KETCHAM: Well, I would agree with Lindsay.

His opposition to what he calls the possible imposition by the legislature of mandatory determined sentences for juveniles, which I think is what Judge Cattle is addressing.

Parenthetically, I would oppose I would oppose such statutes for adult criminals just

as vigorously.

I think that specific push-button punishment for adults or juveniles is a great mistake, but this isn't what the IJA/ABA standards recommend.

They recommend proportionality which is to set a maximum range of sentence or disposition -- a range, and a maximum for five categories of offenses.

And I have looked at the maximums, and I believe that they provide ample discretion to any Juvenile Court disposition that I might ever want to make.

In every case except Class 5 offense, which is the most minor misdemeanor or ordinance violation, as a Judge, I could choose between confinement in a secure facility, placement in a non-secure facility, or conditional freedom such as probation.

I could decide whether it would be for one week, one month, and so on to the maximum.

And I can envision no case that I wouldn't waive to in adult court in which I would feel the need to confine the juvenile for more than

three years, that the new maximum for the Class 1 offenses provide.

So there may be threats and dangers to the Juvenile Court on the horizons, but I would rather meet those bogies when they materialize.

HON. ARTHUR: Just as a response, I was on one of the four Task Forces and we were concerned with this as part of our Task Force meetings, and I suppose as all Task Forces, we met six or eight times at various places around the country.

There were thirty of us on a Task Force, and we had four or five reporters.

But at almost every meeting, we headed that Task Force, the group took either of the -- the reporters were saying, "This is the future. You are not going to get any social history."

The fact that it is in the standards was because we kept battling and holding out to the bitter end that this is what -- you have got to have something in there about social history.

But Fred Cohen kept saying time after time and meeting after meeting the only social history any Judge ever needs is the age of the offense in the prior years.

And we have got it through this far, at these standards, but I fear for whether we should allow the foot in the door even this far.

MR. KETCHAM: Well, I guess what I am saying is that Fred Cohen won't be before the House of Delegates. The IJA/ABA standards will, and the IJA/ABA standards, in that code category, I think are perfectly fine. And I would support them.

I do agree with Gene Moore, that this notion that at the disposition hearing itself that there would be a restriction on what the Judge could consider before he decides which category to go in, and then would later see social reports as a foolish effort to separate the matter, and certainly should be eliminating it.

I think it is doomed and I don't think any State would ever adopt it anyway.

But for the proportionality thing, I think it is a reasonable discretion upon the discretion of the Judge.

MR. MANAK: Ms. Sufian?

MS. SUFIAN: Yes, I just want to say that I agree with Ken Siegel's support of proportionality in the determinant sentencing and I agree with Judge

Ketcham, that the standards retain discretion for the Judges.

Just to point out a case that -- one of many cases that I had in Family Court where I represented a kid that was just a classic case where he had been originally placed in neglect, spent many years with foster care, was released without any follow-up of a care basis and he and his brother started to come in on a couple of delinquency petitions where there was not sufficient evidence -- until he was brought on fare beating -- He got on a subway without paying.

He was adjudicated on that and he was sentenced to day training school for a maximum period of time.

That kid did not perceive that as anything having to do with justice.

And I think that that is not, from my experience, a unique event.

I think that the penalty should have some relationship to the offense. And I think that for it to happen the way it happened with this kid is in essence really a mockery of goals.

He was adjudicated really on the

petitions for which there was not sufficient proof to convict him.

MR. MANAK: Ms. Connell?

MS. CONNELL: I would sort of like to go along with the things that Jane said and indicate that particularly in states in which you have a vast disparity between -- with urban facilities and so on -- that are available to the different kids -- youth who come through -- the necessity for some matrix, if you will, within which Judges are asked to function, I think cannot help but convey to the youth some sense of justice and fairness.

I believe that as children are asked to mature and take responsibility for their actions, they do so far better when they understand the consequences of their action, and that is what I believe in -- that setting up some sense of proportionality will do for them.

HON. MOORE: Can I ask her a question?

MR. MANAK: Yes.

HON. MOORE: How as a defense attorney do you feel about the fact that when you are being an advocate now for what a Judge should do with your client, now that he has been found guilty, that he

will not be able to present to the Judge, before he decides what category he is going to select or she is going to select and how long the kid is going to be in that because I only talked about the category, but the standards all say the length that the child is going to be in that category.

MS. CONNELL: How lazy can it get -- a lot of stuff on social history --

HON. MOORE: Yes, wait, you are not going to do any of it -- the Court should employ the least restrictive category and duration of disposition that is appropriate to the seriousness of the offense as modified by the degree of culpability indicated by the circumstances of the particular case, and by the age and prior record of the juvenile.

The next paragraph, "Once the statutory duration of the disposition has been determined, the choice of a particular program within that category should be governed by the needs and desires of the child."

So you can't tell me that your kid -- your client has got a job, that your client has got family commitments, that your client is willing to get counselling in an agency someplace in the

community until after I have said, "Because of the kid's offense, because of the culpability, and because of the age and past records, I have already decided that I am going to lock him up and he is going to be there for a year."

Then you can start telling me about his job and everything else.

And I think this crosses both ways.

It crosses the Prosecutors and it crosses the defense counsel.

Now, I didn't write the standards, all I am telling you is what they say.

And I have nothing to do with the meaning of the issue of whether they ought to set maximums, and that is all I see these standards have done as far as setting this chart up is say, "We don't want the kids to waste away in institutions."

For this specific crime, all we are going to do is lock him up for 18 months.

I do not quarrel with that, but you do have a quarrel -- well, I have already said.

MR. MANAK: Does anybody dispute the accuracy of Judge Moore's process -- and this is from the dispositions volume.

Does anyone dispute?

HON. MOORE: The National Council of -- my understanding is through Judge White at the last meeting of the Executive Committee raised this issue, and I, Judge White told me once we were turned down --

MR. MANAK: Mr. Gilman?

MR. GILMAN: Judge Moore has raised this issue many times -- so has Judge Arthur.

And perhaps I -- to give you a little background on some of the thinking of the members of the Joint Commission. When this issue came up, it was discussed, and of course Dean Smith, who was present at more of these things than I was, can correct me or make any additions as he wishes, but -- there are two separate questions: One is the question that Judge Arthur raised about judicial discretion, about boxes.

We just have put the kid in the box, and decided upon the offense, and that is the end of it.

It was particularly because of those concerns that the Commission took the position on determinant sentences. Because in most states, where

you have indeterminant sentences, the Judge only makes one decision -- whether the kid goes in or he stays out.

Once he goes in, he goes to the Youth Authority, and the Youth Authority has the discretion to keep the child to the age of 21 or release him sooner depending upon their assessment of his ability to live in a free society.

So the Judge gives up totally any individualized plan for the child if he decides to put the child or place the child in -- with the Youth Authority -- who then will make their own determination, administrative determination about release.

So Joint Commission was very much concerned with that abuse of authority because the problems in re Gault where Gault made an obscene phone call, allegedly, close reading of the record shows that the call wasn't really obscene, and he could have spent six years in confinement unless the people who ran the secured facility were willing to allow him out sooner.

Judge could not enter indeterminant sentencing set at a lesser period of time.

All he could do is leave it to the correctional authorities to release at will either at the six-year limit or any time sooner.

What the standards do is, all they do is say, "Well, the legislature should set the upward maximums, based upon the most horrendous case that could possibly be before you, if it is a Class 1 offense."

What is the worst thing we are going to do to a kid who commits the worst kind of murder if he is still in Juvenile Court? How long should we hold him?

And what should we do for the worst kind of Type 2 offender or Type 3 offender, or 4 or 5?

What is the maximum?

And the maximum should somehow, for the worst kind of case, be related to the seriousness of the crime -- it should be some consent of proportionality when you decide the maximum.

That is all the standards talk about in terms of proportionality.

You as the Judge can decide whether this kid has committed the worst kind of Class 1

offense or something less than that, and you can -- you can give him a lesser period of time to serve and to win if you decide he should be incarcerated in the first place.

You can decide it is a Class 1 offense for murder and you feel under the circumstances of the case that that kid should go home.

You have the ability to do that under these standards.

Judge Moore's point is a question of what information should be before the Judge when he makes a determination.

All the studies that have been done on sentencing -- there have been a great deal of them -- have asked Judges what kind of factors go into your decision when you make a sentencing decision?

What are the things that you will look at? And Judges have said, "We want to know about the conditions of the child psychologically, the conditions of the home, the educational patterns, employment, social ability, seriousness of crime, mitigating aggravating circumstances surrounding the act, age of the offender, culpability -- this is what Judges have said."

But when you look at, and studies have been conducted and looked at actual decisions made by Judges, they found that there were four factors that predominate -- and the four factors that Judges continually tell researchers, and continually put in their opinions when they make sentencing decisions are, one, they are concerned with the age of the offender, two, the seriousness of offense, three, mitigating and aggravating circumstances surrounding the act, and four, the prior record.

The fifth issue was the stability of the home.

Those were the five most important characteristics that Judges looked at when they made sentencing decisions.

It wasn't education, and it wasn't failure to nurture and it wasn't psychological this and that.

And studies have indicated that the more information you have, the more information you need.

But when you come to making a decision, there is only four or five critical issues.

Those are the four or five critical issues that are in the standards. But those are the ones that are most important.

It doesn't really matter, says the Juvenile Justice Standards project, whether the child has a need for psychological services or a need for education, when you as a Judge are making a determination about punishment.

Maybe the child does have a need for education. Maybe a lot of non-criminals have a need for education.

Should he be punished because he has a need for education? Should he be incarcerated and removed from the community because his mother is an alcoholic?

Should he be stigmatized by the fact that he is poor and desperate and deprived?

Those are the factors we are going to use for making a sentencing decision if those are -- they are rejected by the standards.

The standards want you to look at what the child did, and what is important to making a decision based upon acts -- not upon whether he is a poor kid from a poor neighborhood and has

suffered from social deprivation.

So that is some of the thinking of the members of the Joint Commission that was raised.

It was a hotly debated issue -- it was not something that was gone over lightly.

The discussion was plentiful.

HON. MOORE: Let me ask you this, if I should only look at those four categories that you are talking about, and they are on my mind, how long are you going to lock him up? And whether he is or he isn't going to be locked up, why in your next paragraph do you allow me, now that I have decided that I am going to lock him up, whether I am going to lock him up in any obnoxious program or one that isn't quite as bad because now at that point, you will let me, within the category, with his social history to decide what program I want him in.

Now, why is it good for the latter and not good for the former?

MR. GILMAN: Because now this was inter-disciplinary effort.

There was still a feeling, and it is pervasive in this time -- it is pervasive with all

of us here, that no one truly wants to give up on the rehabilitative idea.

It is still an attractive issue.

And try as we may, that ideal keeps coming in the back door, coming in the front door and under the window and through the shades -- you cannot keep it out totally.

And the feelings were and this was very strong from the non-lawyers, that once you decided on the basis of proportionality, and fairness, the length and the severity of a sanction, that every effort should be made to provide the child with services that will meet his or her needs. Because of the attractiveness of the rehabilitative idea.

In other words, if based on those four or five factors you sentence Johnnie to two years in a State institution rather than have him play checkers for two years, can you send him to an institution that can help him with his reading, can help him with his psychological problems, can train him to be a productive member of society -- that was the desire of the members of the Joint Commission because they still cannot say to themselves, "That treatment has nothing to do with the Juvenile Court,"

and that is the way the concept was conceived.

HON. MOORE: Was this discussed again at the last Executive Committee and rejected?

MR. GILMAN: It's been discussed any time any of us get together under any circumstances.

MS. CONNELL: Can I add something to Judge Moore -- I have to admit I was a little taken aback by the question, because when I started to think about it a little bit, my clients don't usually have a job.

And their families are usually in such bad shape that I don't really want to bring up a lot of that.

And I think maybe a lot -- hopefully this is what some of the standards address in the sense that clients that are black and poor have in many courts, done a lot worse in terms of disposition than the child of the middle class parent who is standing right there.

And those children see those differences and wonder why.

And do not perceive the justice they receive as fair or just.

The second thing about David's point,

and in response to your question about why later on you should be able to look at that, I think that one of the things that assessment of treatment programs say about whether or not they work is that it is very hard to predict success in a particular treatment program, but certainly the type of child you are dealing with has some effect upon whether a particular form of treatment would be appropriate in a given case.

Now that certain factors about the child's background and the child's psychological makeup and educational level has something to do with whether or not a particular treatment will work for that child.

MR. MANAK: Does Judge Moore or Lindsay Arthur -- do you care to respond to that since it is directed to you?

HON. ARTHUR: I am glad to say that David got at least equal time to pose his response -- rebellion here.

MR. MANAK: Judge McLaughlin?

HON. MC LAUGHLIN: The only -- not the only -- but one of the main problems I find with this thing, you know, depending, looking at the physical realities

-- you are opening a door here which I don't know -- I know -- we are talking about two different people, right?

This is part of the problem.

You are talking about proportionality, you know, for the poor child who is being dealt with -- who has been dealt with more harshly, and as opposed to the middle class child.

But you are going to find his, on this thing, that you've created an opportunity for the juvenile system to be approached, be touched by the same peculiar reactions that legislators have had in the adult system -- particularly in the area, let's say, of the controversial area like narcotics.

The sentences in narcotics are like a whore's knickers, they go up and down.

Two pounds of heroin in his life, one pound, it is six months.

It is the Federal system, it is up and it is down.

Now, one, you have decided this, what you are doing is, you are inviting the legislators, various State legislators to begin to

begin to increase -- they can't do it, I realize they can't do it above the adult system, but to begin to increase these times.

Now, when it comes before the legislature, I guarantee that nobody is going to argue punishment because rehabilitation is going to come through the door or under the window.

What they are going to argue is -- like God made little apples -- the institutions are going to say, "We cannot treat in three months" -- and "We need more time" -- and "How much more time do you need, Mr." -- you know, institution.

And they are going to say, "Well, you know, we need at least six to eight months or a year."

So flying under the flag of treatment is going to be additional punishment.

And it is this concept which this standard brings into the juvenile system that makes me nervous -- okay?

MR.------:* You gave us a choice.

You said he wanted he wanted -- didn't want to say any more. I would like to make one further comment.

* Name of speaker unclear in transcript.

We have disadvantaged children in our county of a million. We have a lot of black kids. We have kids that are white that are disadvantaged as well as blacks.

We have many whose defense counsel at the time of disposition are in there themselves willing to be the parole model for that kid when he doesn't have a father in the home perhaps or has worked with a caseworker or independently of a caseworker to get the kid a job or do many other kinds of things -- of positive things for these children.

And I think that they shouldn't assume, which I am afraid that we are going to have a lot of Judges assume that he, everybody that appears before us does not have these strings to help and rehabilitate and therefore we are going to lock them all up because all I can look at is his age, his culpability, offense and his past record. And I know that once I decide not to lock him up, I am stuck and I can't change my mind once I look at the social history.

Then what am I going to do? I am going to take the most of their punishment first

and give him that in assuming that everything else about him is bad.

And I think that is going to be a guide and advantage to kids.

I think we are going to find harsher treatment by Judges, but not being able to look at the social history where I think it will be easier or softer on kids -- and I don't think it will be.

MR. MANAK: Mr. Gilman?

MR. GILMAN: The question is not whether the Judges will be softer or harder.

Since most Judges in this country as compared with Judges in the other countries are harsher on them all.

And our children spend longer terms in institutions for minor offenses than they do for serious offenses because the minor offenders who are more amenable to treatment will stay longer, while the more serious offenders who stub their toes and can manipulate the system get released earlier.

When we have taken these standards and have discussed them with kids who are in institutions, and we have had this very same discussion, their feelings were that they would

like to know what they did that was wrong, how long the punishment was going to be, and when they would be released.

The danger of allowing release not to be in the hands of the judiciary, but turning it over to administrators means that a kid is going to be like a clockwork orange victim.

If the caseworker in the institution likes him, if he behaves himself, if he can con and sham his way through the procedure, he will get released earlier.

And if he does get released earlier, there is absolutely no evidence that he can function crime-free once he is out.

Good behavior inside an institution has nothing to do with productive behavior once he is out -- vis-a-vis the 70 percent citizen's rate that we all discussed.

So what the standards suggest is that treatment at best is an ideal.

But then so are the standards.

And for that purpose, you should look at the standards as goals toward which you would like to work in your particular State -- not as model

legislation.

And you attempt to move your legislators as your code revisions along the lines of trying to fulfill some of these goals with an eye toward some of the practical realities that Judge McLaughlin suggested.

But you have to give and take within the system.

MR. MANAK: Ms. Connell, did you have another comment on that?

MS. CONNELL: No.

MR. MANAK: Mr. Hege?

MR. HEGE: I would just say that most of the issue has been covered and that I would just support the position of the standards.

MR. MANAK: All right, all right.

Mr. Kaimowitz?

MR. KAIMOWITZ: First of all I would like to make it clear that I come from a different State than Judge Moore and I seem to have never been Oakland County because we don't recognize the set -- same rule, and I think that is very relevant to what is embodied in this paper.

I would like to respond to the

standards, but unfortunately Judge Arthur doesn't want me to do that. Judge Arthur wants me to respond to a hypothetical political position with regard to the worst possible position that determinant sentencing can be viewed.

And I am really troubled by that, because what has occurred to me, starting, I suppose this afternoon with Judge White's comments, that who is going to show what system works? Do all have the burden of showing that you did well, and that the Juvenile Justice System works or do we have the burden of showing that the system has not worked?

I think perhaps people like myself have been remiss in not bringing home why this question of determinant sentencing becomes a real important issue.

Judge Ketcham's remark yesterday about what it boils down to often is a matter of discretion, is keyed in this area.

I come from a state where Judges, and here I would respond to Judge Delaney because that really upset me earlier -- where, how do I help a child come back, Judge Delaney, from Haiti? How do I help -- to Michigan?

How do I help a child come back from Morales territory in Texas to Michigan? How do I help him come back from the Dominican Republic? How from Florida, how from institutions that have been absolutely heinous in terms of Chicago, newspapers in Louisiana?

Children from Michigan, children can be sent wherever there is a treatment program. That has been the general pervasive philosophy, if you turn to Camp Oakland and we start with a suit that maybe we should start to bring.

Why do you need status offenses to bring that out as part of this issue of determinant sentencing? Why? Because we suspected in Michigan for a long time -- and I see Judge Moore already smiling, that without studies on offenses many jurisdictions wouldn't be able to show anything but black children in their institutions and that was another liberal states that you needed a status offender to kind of mix up the population.

You need the concept of indeterminant sentencing to mix up the population whichever way the institution sees fit -- Camp Oakland is a lovely place for middle class women, predominantly white.

You couldn't find a facility like that anywhere in the State for men, but aside from that, when Judge Moore speaks in my State, for example, of Oakland county, this for those of you who don't know Michigan is the equivalent of the New York Scarsdale, the equivalent of Glencoe Park, and yes it does have Pontiac which is an industrial community, that is where the black population comes from.

And in terms of treatment programs, you measure the treatment program along the lines of race, poverty, and the like.

Now, what we haven't been able to do, and this bothers me because we should have this foundation before this kind of issue was even addressed.

Because of confidentiality, because of privacy, we have not been able to do in the Juvenile Courts that which was done in the last, I guess 50 years in the schools to prove that the courts have operated racistly, operated sexistly, economic class lines -- there is just no question.

When you look, Judge Arthur, at your own examples on Page 15, I would suggest you play a little with them.

I am just -- Should a white middle class boy who commits homosexual rape on a five-year-old boy be punished the same as a black poor boy who commits heterosexual rape on a mentally retarded 16-year-old girl?

What I would suggest, after you get done eliminating -- and obviously the question of race, economics, and mental status, I have added in those examples, after you get done eliminating those, then you want to start to look at social history.

That is why as Ms. Connell indicated earlier she was taken aback -- What is Judge Fort talking about -- what jobs do our children have, the ones that we represent? What good families pay way on the other side? What make way on the other side if you have a middle class child who has gone along, maybe stolen a car for a joy ride instead of because he actually needs the car to pick up some loot because he has to have something that would make him feel good -- then we treat that child differently -- and what we have never been able to do is pin all this down because we don't have the statistics -- as I have indicated, the kinds

of systems that the Juvenile Justice System operates.

What I would ask you to do again, and I would ask the other people to do is look at your own justifications for the Alpha and Beta program you refer to in Hennepin County -- if that is the kind of research Judge White was talking about today, in terms of justifying a kind of program where Judges should have discretion, then I will eat my hat -- that is not research.

That is self-fulfilling prophecy -- that is self-justification, and that is what is continually happening and that comes back to what I am troubled by, you know, what David is raising, where the standards then become hypercritical.

What happens then is they don't really believe in treatment and rehabilitation any more, but because it is too politically heavy to say that you cannot continue a child indefinitely in the Alpha program from month to month doing physical work, I presume without monetary remuneration or certainly not at the minimum wage.

But you cannot bring that kind of action over and over again, and then claim that you have got a program that is efficient, that works,

that is not, you know, should not be reached by intruders who want to limit you in terms of determinant sentencing.

I think I am way beyond our standard.

And I should be limiting my remarks -- my problem is your paper doesn't do that.

And I think my remarks are certainly apropos of your paper, and I am very concerned because of all the journals submitted, and it is not to fault the paper in any way, to my mind, this is a political document. This is not a document that in any way deals with the standards and limits its comments to that.

Now, if this is going to be the cutting edge where it will have to be between the outside world, so to speak, and the juvenile Judges that maybe this is the issue that was picked out as the drawn line.

But to me, in your paper, all of the philosophical questions that have underlined the text that lies between the various kinds of groups we represent, culminate in this paper, and I am particularly, alluding to Pages 15, 16, and I suppose almost to the end.

Particularly I am surprised, especially in light of Judge Cattle's remark, the reliance that you place in the American Psychiatric Association's expressed great discomfort with the classification of juvenile offenses. They ought to be. They still have the runaway reaction.

They still have in their American Psychoanalytical Association Diagnostic Volume No. 2, the runaway problem.

They have no problem -- they don't want to deal with running away as a status offense or anything else.

It is really a mental health condition which requires indefinite treatment -- they don't need a juvenile system -- they don't need a medical system -- and what you have proposed is an accumulation of that model -- with the Judges having the absolute discretion to plug into whatever behavioral scientists excuse, prejudiced on this, nothingness that comes along with, whether it is ESP this Monday, positive pure cultural -- it doesn't matter. It is a new program in almost any jurisdiction to be tried.

And you want to try them all -- you know.

When you show me the studies that show that indeterminant sentencing has worked, that Gerald Gault, and here I would challenge Mr. Rounds' earlier remark that, you know, went by that point.

Gerald Gault, you know, wouldn't spend today, you know, six years for an offense up to 30 days.

Well, in Michigan he would. In Michigan I can bring you the kids who would and this is in a liberal state.

You know, children who were neglected or abused spending more than a year in treatment in the detention facilities because they needed treatment.

Word got to me to just kind of wrap up on this note, in that what the Juvenile Judges have historically requested, why plea bargaining, and all the other discussions become irrelevant is simply one thing -- Give us jurisdiction over the child -- whether it is for one hour of school truancy or first degree murder, we don't care.

After that, then we have the right to discretion at disposition to do with what we will.

I am saying the standards clearly, in a very reasonable thought-out fashion, admitted exactly to that discussion.

I know why it is so crucial to you all, but I am saying that if you want to be efficacious, if you really want to set out a standard that may work, not necessarily in terms of rehabilitation and not necessarily in terms of treatment, that is a difficulty, but it may work in terms of fairness -- it may work in terms of lack of discrimination, lack of prejudice, then you will accept the standards as they were written, and not worry about a danger down the pike that you are trying to say says something else than the standards in any way say.

So my comments, you can feel, Judge Arthur, are directed to your paper, and are not directed to the standards which I will simply, on that basis, say that I support and let it go at that.

MR. MANAK: Let me say --

HON. ARTHUR: This is between us, Mr. Kaimowitz.

MR. MANAK: Let me say this, that there is time for additional rebuttals and comments.

(WHEREUPON, a short interruption was had.)

MR. MANAK: Judge Arthur?

HON. ARTHUR: Well, as I said before she ran

out of paper, I think Mr. Kaimowitz has clearly displayed the abyss between his point of view and mine. I have laid mine out in the paper -- I have laid it out in somewhat in the oral presentation.

He has very skillfully laid out the other side of the picture, and I think he has brought up all the points.

We have been discussing this this not just today, we have been discussing this for quite a few years.

There is a lot in the literature. He is not going to persuade me, I am not going to persuade him this afternoon.

I don't think that there is even a way to build up much of a bridge between the two extreme positions on this. I don't think the standards have.

I have noted his points and I think some of them are well taken -- and I intend to revise some of his points.

His points on the very issues that he related on the various points on his political response -- some of your points I think are well taken, but I don't know that there is much point in

debating it much further.

I think the positions are clear.

MR. MANAK: I think that is true.

Dean Smith?

DEAN SMITH: This is not relevant to the philosophical debate.

It is largely editorial reference.

It relates to the maximum duration of sanctions -- the so-called grid, the class of juvenile offenses, and the discussion of Judges.

I call attention, particularly to the disposition standard -- Standard 3, which provides a Judge, the wide range of dispositions, classified as follows: Nominal Dispositions 3.1, Conditional Dispositions 3.2, and Custodial Dispositions 3.3.

And in particular, I call attention to Standard 3.2 A which reads as follows: "Suspended sentence, the Court may suspend imposition or execution of a more severe comma permissible sentence with the provision that the juvenile meet certain conditions agreed to by him or her and specified in the sentencing order. Such conditions should not exceed comma in severity or

duration comma the maximum sanction permissible for the offense."

While I recognize that everybody else here has read the standards, as have I, if I were to read the cold record of what has occurred earlier today, I would have been misled into believing that the standards dictate that Judges must play dispositions according to the grid.

The disposition is stated and the grids are as they have been referred -- the maximum.

It does not say that the Judges cannot go beyond the maximum in making the typical usual traditional discretionary decisions that are made by Juvenile Court Judges in dispositions in our Juvenile Courts.

Thank you.

MR. MANAK: Mr. Kaimowitz?

MR. KAIMOWITZ: I think, Dean Smith missed the point on the point being on the custodial aspect.

In fact, Dean Smith, I would suggest that the argument comes down to the fact that the lesser sentencing alternatives or the lesser dispositional alternatives that are given to the Judges are not what concerns them. It is simply,

and I think I have to agree with Judge Arthur, that we have at this point, met the issue that they want the opportunity to place a child who needs help or rehabilitation in a treatment program.

That almost invariably requires one of those standards -- that is the custodial standard.

A treatment program for the reasons Judge McLaughlin said earlier, necessarily cannot be limited in legal terms in terms of time.

You have got to give us time to work with the child.

So the critical issue comes down to keeping a custodial treatment related concept as open as possible.

I think in -- and I think it is belying the point to talk about all of these alternatives of a necessary nature which basically gives the child his or her freedom and gives the child his or her opportunity to accept this treatment program or not.

It is that coercive aspect of the treatment program which requires custodial time that I think is what brings about the difficulty or tension that was produced between Judge Arthur and

myself.

DEAN SMITH: And I do not disagree with your comment.

My comment was a parenthetical one, somewhere between where you are now and the beginning of it.

MR. MANAK: Yes, Judge Cattle?

HON. CATTLE: There is something wrong here. If I were 40 years younger, I might be able to pick it up -- but some of this stuff just doesn't ring very true.

I heard the word "freedom," and I heard the word "coercive medical treatment" which apparently are the two supposed alternatives here. And if the -- And I am not taking any side here, but I say if the course of treatment or rehabilitation of treatment is all as bad as it is cracked up to be, what is the result of absolute freedom on the other side?

We have taken -- you have taken the worst of us, and have presented only the best with this wonderful world of freedom and there is something missing.

What are going to be the results in

freedom?

Are we going to restrict this young lady over here from Texas because I happen to know, probably before, she was a Prosecutor, some Prosecutors that did some things that were just about as horrible as the gentleman says we Judges do.

Are we going to try and improve the things we have -- or the things we want, or are we going to be so firm that we either have to destroy the one or destroy the other?

I heard a very stirring argument for freedom, but I didn't hear -- and I am already aware of many of the faults of the judicial system -- every time I look in the mirror, I realize my deficiencies, but I have also seen a little bit of what happens to those who want absolute freedom. And I don't come -- well, I come from a middle class family -- I have gotten around a little bit -- not just in the United States, but in places like Naples, which would horrify our juvenile Judges beyond -- to never recover from that. And I am not sure either that we are doing -- we are certainly not doing the best we can.

The rules we are operating on certainly are not the best possible rules, but I -- I question, I haven't seen anything yet that tells me that your rules are so infinitely better.

I think maybe we need to be turned back a bit, but the fashion that is getting into this thing now is polarizing, and this is not just here -- I mean this is out in the wide world we are supposed to be working for -- are so polarizing the populace that I have some very serious doubts as to whether we are going to accomplish anything or whether we are going to destroy ourselves.

I don't have any answers except that I am inclined to think maybe we are both pretty badly wrong.

And certainly we are not making the progress that we Courts think we are, and certainly we are not anywhere near as bad as the other side says we are. And I think maybe if we did get down to ultimate fairness, maybe we both would be better off -- and I think most of us try to, and I think the young man means exactly what he says -- there is no question about that, but you can't -- that is a whole world, and there is evil that lurks in the

hearts of all of us, or whatever it is that The Shadow used to say, and hopefully if we can eliminate some of it, we will be making some progress. But we are never going to make any progress when we are polarized to the extremes we are. And we are going to get the political repercussions that are going to destroy us both.

So that is about all I have to say.

MR. MANAK: I would only call on Ms. Thompson to indicate what the position of the National District Attorneys' Association through the Special Committee with respect to the general principles dealing with proportionality in terms of sentencing is -- just so we complete the record.

MS. THOMPSON: Well, I -- this is one instance in which the National District Attorneys' Association would appear and the Prosecutors agreed.

The position of the Board of Directors to the NDAA would support the concept of the determinant sentencing.

I don't know if -- just to be humorous at this point, I don't know if it was a mixture of the Civil Libertarian concerns of Prosecutors or whether the thought that -- as Judge Moore mentioned,

CONTINUED

7 OF 11

that the indeterminant sentence provided for the more severe type sentence, but at any rate the Board of Directors supported the concept of determinant sentencing.

MR. MANAK: In proportionality?

MS. THOMPSON: And proportionality, on the theory that the indeterminant sentence provided a sentence which was controlled mainly by the institutions and did not provide the kind of predictability which the Prosecutors felt was desirable.

HON. CATTLE: I never did address the proportionality bit.

I think there is nothing more -- I hope the gentleman from Corrections isn't going to be unhappy, but I think there is nothing more absurd than our whole system of justice by which the Judge sentences to an institution which thereafter can either -- can do what it likes with the sentence.

I mean, if the Judge has strived to be conscientious and in making his sentence to the crime proportionality, if he will, he has to somehow learn some of those complicated ways in which the institutions devise release.

And in order to make a man stay in a

prison for three years for something, he has got to give him a sentence of 20 years or some other damn thing.

So that it will fit in the institutional programs so that it will all come out, if he has calculated right, at three years.

And I haven't heard a word from anybody worrying about that aspect of our whole system.

Here we have the Corrections people who are -- they are not responsible in any way, parole people.

The Judge, he gets it in the neck because this guy is out on the street tomorrow. And he thought he was sentencing him to five years -- the legislature told him he could.

Now maybe some of this enthusiasm, if we call it that, should be directed against that.

I think that has as much effect on proportionality as any of these -- as the Judge has.

MR. MANAK: Mr. Siegel?

MR. SIEGEL: Well, responding to what Judge Cattle said, I think the standards cope with that very well.

They put -- almost eliminate totally

the power of these institutions and Corrections people to implement this very early release.

The early --

HON. CATTLE: Well, I am aware of that -- I should have remarked, because I am somewhat too critical of IJA/ABA standards -- I think they have --

But I think that nobody is really, and of course we get down to it, we have that in here at all.

On the list -- I don't think we do.

But of all the -- all the rhetoric that is addressed by the Judges in this proportionality issue, I really haven't heard very much about that particular standard.

I have noted that, and I -- I think that is a darned good idea.

But I would hope that some of -- this is all going to end up in a political mess one way or the other. And I would like to be -- feel sure that the advocates of the IJA/ABA standards would be at least half as articulate on that subject as they are on the Judges.

MR. MANAK: Okay.

E. INDIVIDUAL RIGHTS

1. Right to Counsel in Delinquency Proceedings

Consultant
Hon. William S. Fort

ABSTRACT OF PAPER

Judge Fort begins by tracing the changing judicial views regarding a child's right to counsel in delinquency proceedings from an unequivocal denial of the right in 1904, through the declaration in In re Gault that:

> We conclude that the Due Process Clause of the Fourteenth Amendment requires that in respect of proceedings to determine delinquency which may result in commitment to an institution ..., the child and his parents must be notified of the child's right to be represented by counsel retained by them, or if they are unable to afford counsel, that counsel will be appointed to represent the child.

He notes that while there have been many decisions since Gault discussing the right to counsel, few decisions address the role of attorneys in juvenile proceedings.

The relevant sections of the three sets of standards are quoted, and Judge Fort observes that they agree on broad rights to counsel and to appointed counsel beginning at the time a juvenile is taken into custody. He then identifies two issues for further discussion: whether a juvenile can waive his or her right to counsel, and the relationship between the role of counsel and competency of representation. With regard to the first issue, Judge Fort states that the decision in In re Gault implies that a juvenile may make a knowing and voluntary waiver of counsel, and that Faretta vs. California, which holds that adult criminal defendants have a right to represent themselves, contains no indications that juveniles should be excluded from its holding. He points out that the sets of standards are split on this point. The Task Force standards indicate that Faretta controls, but that the court must take great care in accepting a waiver. The IJA/ABA standards expressly reject the applicability of Faretta on the basis that few juveniles have the sufficient "maturity and perspective" to waive counsel and that attempts

to determine which juveniles do and which do not have the requisite perspective are prone to error. The NAC standards are silent on the issue, but the commentary states that: "further investigation into the ramifications of the right of self-representation on police practices and family court cases is necessary before a standard can be recommended.

With regard to the role of counsel, Judge Fort indicates that there are three possible roles: that of an advocate; that of a guardian; and that as "simply 'amicus curiae.'" On this point the standards appear to be consistent, though with varying degrees of clarity. All three groups urge attorneys to serve as an advocate whose "principal function ... lies in furthering the lawful objectives of his client through all reasonably available means permitted by law."

Judge Fort concludes that:

> Until there is substantial agreement concerning the proper role of counsel throughout the entire representation of a client in a juvenile delinquency case ... this writer sees little likelihood of defining when counsel is competent.... Certainly there is need to delve into the combined problems of role and competence of counsel in juvenile and family court matters far more deeply than has been done thus far. Each of these standards is an important first step in that direction.

SUMMARY OF COMMENTS

The discussion was dominated by Judge Fort's question regarding the role and competence of counsel at delinquency proceedings. Although it was acknowledged that, as Mr. Manak pointed out, there are no studies demonstrating the inadequacy of the representation received by juveniles, several speakers agreed with Ms. Connell that "counsel provided for children is not very adequate." Several reasons were suggested for this including the low salaries, low status of the juvenile court in the minds of many attorneys lack of independence, high caseloads, and the lack of lawyers in the field, particularly in rural areas. Both Ms. Connell and Judge Fort noted that most lawyers who appear in juvenile court want to move on. Judge Moore and Judge Cattle added that this could be said for some judges as well, and Mr. Hutzler pointed out that there were similar problems following the extension of the right to counsel to adult defendants in state courts by the Supreme Court in Gideon vs. Wainwright.

Judge Fort reiterated that it was impossible to determine competency of counsel without more clearly defining the role which an attorney should play, and stated that there was considerable disagreement on this issue. Some of that disagreement was evident in the discussion, with Judge Delaney suggesting that it was up to the lawyer to determine the vigorousness of advocacy, Judge Cattle noting that advocacy did not mean pulling out the stops in every case, and Mr. Dale commenting that a lawyer for a juvenile should carry out the client's wishes, even if he or she disputes the wisdom of the alternative chosen. Mr. Hutzler stated that appellate court guidance was needed.

A number of panelists including Mr. Gilman and Judge Ketcham observed that legal aid and public defense attorneys were often "overly harsh with themselves," that the juvenile court is continuing to evolve, and that it is far better than it used to be. Judge Moore commented that the advent of lawyers had proved to be the most important change in the juvenile justice system in the last 15 years.

Another point for discussion was raised by Judge Arthur's questions regarding the criteria for appointing counsel, particularly when the juvenile's parents decline to pay, and whether the court should select the attorney to be appointed. Judge Fort saw orders to the parents to pay for an attorney to be no different than requests for contribution to other non-education public services received by their child. Judge Arthur suggested that giving the power to select counsel to the court might be an invitation to corruption.

76924

WHENCE, WHERE AND WHITHER

AND

RIGHT TO COUNSEL IN DELINQUENCY PROCEEDINGS

Hon. William S. Fort

Senior Judge

Member, IJA/ABA Joint Commission
on Juvenile Justice Standards
Springfield, Oregon

Consultant for

American Bar Association
Judicial Administration
Division

WHENCE

In reversing a trial court order granting a writ of habeas corpus issued to secure the release of a seventeen-year old girl, fifteen when she was committed in 1903 upon petition of the father, to the District of Columbia Girl's Reform School, a unanimous District of Columbia Court of Appeals held:

> "...The child herself, having no right to control her own action or to select her own course of life, had no legal right to be heard in these proceedings. Hence, the law which does not require her to be brought in person before the committing officer or extend her the privilege of a hearing on her own behalf cannot be said to deprive her of the benefit of due process of law. . ."
> Rule v. Geddes, 23 App. D.C. 31, 50 (1904).

Fifty-odd years later the United States Court of Appeals, D. C. Circuit in Shioutakon v. District of Columbia[1] considered the right to counsel in a delinquency matter under the then District of Columbia statute[2] in 1938 and referring specifically to the right to counsel, said:

> "Although the Act in terms neither recognizes nor withholds such assitance, the legislative history reflects Congressional understanding that all alleged delinquents would be represented by counsel.... Our concern for the fair administration of justice impels us to hold that, in this and in similar cases in the future, the juvenile must be advised that he has a right to engage counsel or to have counsel named on his behalf. And where that right exists, the court must be assured that any waiver of it is intelligent and competent."

There, in n. 18, the Court also said:

> "We do not reach consideration of due process requirements since our holding resets on our view of the statute."

And, in n. 25, it said:

> "We do not hold that counsel is essential in the preliminary stages before a petition is filed."

Ten years later, another District of Columbia case became the first juvenile court case to reach the United States Supreme Court. That Court concluded that waiver hearings of juveniles to adult criminal court "must measure up to the essentials of due process and fair treatment[3]. . ."and stated:

> "We do not mean by this to indicate that the hearing to be held must conform with all of the requirements of a criminal trial or even of the usual administrative hearing; but we do hold that the hearing must measure up to the essentials of due process and fair treatment."

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1. 98 App. D.C. 371, 236 F(2d) 666, 60 ARL (2d) 686 (1956)
2. 52 Stat. 596 (1938, D.C. Code § 11-901ff (1951)
3. Kent v. United States, 383 U.S. 541, 562 (1966)

Since this, too, was a federal not a state case, it was not clear whether the Court intended the due process rule to apply to state proceedings by application of the Fourteenth Amendment or whether it was simply an application of the due process clause of the Fifth Amendment.[4]

During the latter part of the first sixty-five years of the juvenile court, the states, as well as the lower federal courts, both pursuant to statute and by decisions, were struggling with questions relating to right to and role of counsel, both in delinquency and other juvenile court cases. A variety of positions among the states is found prior to Kent.[5]

A succinct summary of them, as of 1960, has been set forth as follows:[6]

"So it may be stated, that while counsel clearly have a right to appear and represent parties in a juvenile, as in any, court proceeding, in the state courts they do not have a right to be advised that they are entitled to counsel.

"Clearly, this general rule is inapplicable should the proceedings lack the 'fair play' required by the so-called due process clause. But at present there appears to be no state Juvenile Court law which requires that any of the parties be advised of the right to counsel.

"Let us examine these state laws:

"(a) Some of them require the court to appoint counsel, but only when requested to do so. This seems to be the trend, and is found in states which have recently revised their Juvenile Code.

"(b) Other states provide for counsel only in certain classes of cases.

"(c) Still others permit appointment of an attorney in the discretion of the court. Such permissive statutes would seem to add nothing to inherent power but could be construed to impose a greater duty when considered in the light of the 'fair play' doctrine.

"(d) The same may be said of those state laws which explicitly permit representation by counsel.

"(e) Although not providing for counsel in specific terms, some states require the appointment of a guardian ad litem, at least in certain circumstances.

(f) Some states have provisions which are ripe for judicial construction, as New Jersey, which provides:

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4. See Monrad G. Paulsen and Charles H. Whitebread, Juvenile Law and Procedure (National Council of Juvenile Court Judges Juvenile Justice Text Book Series 1974).
5. In Re Gault, 387 U.S. 37-38 (1967).
6. Reiderer, The Role of Counsel in the Juvenile Court, 2 Fam. L.J. 16, 18-20 (1962).

"'In cases affecting a child under the age of sixteen years, the court may conduct the examination of witnesses without the assistance of counsel.'

"And a 1955 New Mexico Act contains the following provision:

"Before or at the time of a hearing, the judge shall explain the powers of the court. . . to set aside the natural guardianship rights of a parent over the person of a child, and shall give the persons responsible for the juvenile or their counsel an opportunity to be heard.'

"(g) But the most substantial body of state Juvenile Court laws are silent on the question of counsel. This is in keeping with the generally accepted early pattern. Noteworthy is the fact that the model acts had never made any provision for counsel until the 1959 Revision of the Standard Juvenile Court Act."

WHERE

This then, greatly capsulized, was the situation when in 1967, the Supreme Court of the United States decided In Re Gault, supra. The holding of that case, as viewed at that time, was perhaps best summarized by the then Attorney General of the United States:

"'In urging the reversal of the judgment of the Supreme Court of Arizona, young Gault's parents argued that his following basic rights had been denied: (1) notice of charges; (2) right to counsel; (3) right to confrontation and cross-examination; (4) privilege against self incrimination; (5) right to a transcript of the proceedings; and (6) right to appellate review. The Court found that Arizona court's adjudication of juvenile delinquency was deficient under due process standards of fundamental fairness on the first four of these grounds; it did not consider the last two.

"'In writing for the Court, Justice Fortas emphasized that the only part of the process relating to juvenile delinquents which was being considered was that which "relates to the proceedings by which a determination is made as to whether a juvenile is a "delinquent" as a result of alleged misconduct on his part, with the consequences that he may be committed to a state institution.'"[7]

"In Gault, at 36-37, 41, the Court stated:

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7. Letter of Hon. Ramsey Clark, Att. General of the United States to Hon. Roman Pucinski, Chairman, Subcommittee on Education, House of Representatives, June 23, 1967; as set forth in Browne and Fort, Gault -- Its Impact, 5 Willamette L.J. 1, 2 (1968).

"Just as in Kent v. United States, supra, at 561-562, we indicated our agreement with the United States Court of Appeals for the District of Columbia Circuit that the assistance of counsel is essential for purposes of waiver proceedings, so we hold now that it is equally essential for the determination of delinquency carrying with it the awesome prospect of incarceration in a state institution until the juvenile reaches the age of 21.

". . .

"We conclude that the Due Process Clause of the Fourteenth Amendment requires that in respect of proceedings to determine delinquency which may result in commitment to an institution in which the juvenile's freedom is curtailed, the child and his parents must be notified of the child's right to be represented by counsel retained by them, or if they are unable to afford counsel, that counsel will be appointed to represent the child."

Since Gault, there has been a great proliferation of court opinions concerning the Right to Counsel[8] and Role of Counsel[9], and the many facets of each inextricably entwined within those general topic headings. So, too, with learned publications.[10] And, in the period since that index was published, there has been, if anything, an increased number of court decisions.[11] Most of these, however, deal primarily with constitutional and statutory issues outside the scope of this paper.

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8. See, for partial list of cases in the first six years after Gault, Juvenile Court Digest, Index to Previous Digest Articles, Right to Counsel, 4 National Council of Juvenile Court Judges 5, 6, (August 1973).
9. Op. cit., n. 8. pp. 6, 7.
10. Op. cit., n. 8, pp. 1-23
11. See, for example, State in Interest of Dino. 359 So2d 586, ____La_____ (1978). There, in a juvenile case involving a charge of murder by a 13-year old boy, the Supreme Court of Louisiana, relying primarily on its state constitution, said:

"The constitutional privilege against self-incrimination and the rights to counsel and to confront and cross-examine witnesses are applicable in the case of juveniles as they are with respect to adult accuseds. Article I, § 13 of the 1974 Louisiana Constitution requires that any person arrested or detained in connection with the investigation or commission of any offense must be advised fully of the reasons for his arrest or detention, his right to remain silent, his right against self-incrimination, his right to the assistance of counsel and, if indigent, his right to court appointed counsel. By the adoption of this provision Louisiana enhanced and incorporated the prophylactic rules of Miranda v. Arizona, which in essence require that the state, before it may use a confession at trial, establish that a defendant was informed of his right against self-incrimination and to have an attorney present at the interrogation; that he fully understood the consequences of waiving those rights; and that he did in fact waive those rights voluntarily

PROPOSED STANDARDS RELATING TO RIGHT TO COUNSEL

A number of proposed 'recommendations' and standards, both partial and 'complete', have been suggested by various groups, agencies and scholars in addition to the three sets which, together, comprise the central focus for this conference.[12] Sections of each related primarily to right to counsel follow.

I. National Advisory Committee for Juvenile Justice and Delinquency Prevention (NAC)

3.132
Representation by Counsel -- For the Juvenile

A juvenile should be entitled to be represented by counsel in all proceedings arising from a delinquency, noncriminal behavior, neglect, or abuse action and in any proceeding at which the custody, detention, or treatment of the juvenile is at issue.

In delinquency and noncriminal misbehavior proceedings, the right to counsel should attach as soon as a juvenile is taken into custody by an agent of the state, a complaint is filed against a juvenile, or a juvenile appears at intake or at an initial detention hearing, whichever occurs first.

In all other actions in which a juvenile is entitled to representation by counsel, the right to counsel should attach at the earliest stage of the decisional process, except when temporary emergency action is involved and immediate participation of counsel is not practicable.

In any proceeding in which a juvenile is entitled to be represented by counsel, an attorney should be appointed whenever counsel is not retained for the juvenile; whenever it appears that counsel will not be retained; whenever there is an adverse interest between the juvenile and the juvenile's parent's guardian, or primary caretaker; or whenever appointment of independent counsel is otherwise required in the interests of justice.

II. Report of the Task Force on Juvenile Justice and Delinquency Prevention of the National Advisory Committee on Criminal Justice Standards and Goals. (1976) (Task Force)

Standard 16.1

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11. and without physical or mental coercion. This protection must have been given 'when the individual (was) first subjected to police interrogation while in custody at the station or otherwise deprived of his freedom of action in any significant way." State in Interest of Dino, 359 So2d 586, 589 (1978).

Juvenile's Right to Counsel

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

Standard 12.3

Court procedures in delinquency cases prior to adjudication should conform to due process requirements. Except for the right to bail, grand jury indictment, and trial by jury, the juvenile should have all the procedural rights given a criminal defendant.

The juvenile should have the following rights in addition to the right to counsel:

1. An impartial judge;
2. Upon request by the juvenile, a proceeding open to the public or, with the court's permission, to specified members of the public;
3. Timely written notice of the proceeding, and of the juvenile's legal rights;
4. The presence of parent or guardian;
5. The assistance of an interpreter when necessary;
6. The right to avoid self-incrimination;
7. The right to avoid waiving his or her constitutional rights without prior consultation with an attorney; and
8. The right to the keeping of a verbatim record of the proceedings.

Standard 16.5

Representation for Children in Family Court Proceedings

Legal representation should be made available, without cost if necessary, to any child whose liberty, custody, or status may be affected by delinquency, Families With Service Needs, Endangered Child, child custody, termination of parental rights, or civil commitment proceedings.

Standard 16.7

Stages of Representation in Family Court Proceedings

Except as provided in Standard 16.6 legal representation should be made available at the earliest feasible stage of family court proceedings. Each State at least should adopt procedures whereby counsel can be appointed:

1. At the intake stage where the juvenile is not detained; and
2. At the judicial detention hearing stage where the child has been removed from the home.

Legal representation should continue throughout the family court proceedings and, if necessary, through postdispositional matters that may charge the level of deprivation of liberty or the kind or amount of treatment the juvenile receives, such as proceedings to determine or change the place or course of treatment or to revoke probation or parole.

III. Report of the IJA-ABA Joint Commission on Juvenile Justice Standards:

A. Counsel for Private Parties

Section 1.1

Counsel in juvenile proceedings, generally.

The participation of counsel on behalf of all parties subject to juvenile and family court proceedings is essential to the administration of justice and to the fair and accurate resolution of issues at all stages of those proceedings.

Section 2.4

Stages of proceedings.

(a) Initial provision of counsel.

(i) When a juvenile is taken into custody, placed in detention or made subject to an intake process, the authorities taking such action have the responsibility promptly to notify the juvenile's lawyer, if there is one, or advise the juvenile with respect to the availability of legal counsel.

(ii) In administrative or judicial postdispositional proceedings which may affect the juvenile's custody, status or course of treatment, counsel should be available at the earliest stage of the decisional process, whether the respondent is present or not. Notification of counsel and, where necessary, provision of counsel in such proceedings is the responsibility of the judicial or administrative agency.

(b) Duration of representation and withdrawal of counsel.

(i) Lawyers initially retained or appointed should continue their representation through all stages of the proceedings, unless geographical or other compelling factors make continued participation impracticable.

B. Pretrial Court Proceedings

Section 5.1

Scope of the juvenile's right to counsel.

A. In delinquency cases, the juvenile should have the effective assistance of counsel at all stages of the proceeding.

B. The right to counsel should attach as soon as the juvenile is taken into custody by an agent of the state, when a petition is filed against the juvenile, or when the juvenile appears personally at an intake conference, whichever occurs first. The police and other detention authorities should have the duty to ascertain whether a juvenile in custody has counsel and, if not, to facilitate the retention or provision of counsel without delay.

Section 5.2

Notification of the juvenile's right to counsel.

As soon as a juvenile's right to counsel attached under Standard 5.1B, the authorities should advise the juvenile that representation by counsel is mandatory, that there is a right to employ private counsel, and that if private counsel is not retained counsel will be provided without cost.

Section 5.3

Juvenile's eligibility for court-appointed counsel; parent-juvenile conflicts.

A. In any delinquency proceeding, if counsel has not been retained for the juvenile, and if it does not appear that counsel will be retained, the court should appoint counsel. No reimbursement should be sought from the parent or the juvenile for the cost of court-appointed counsel for the juvenile, regardless of the parent's or juvenile's financial resources.

B. At the earliest feasible stage of a delinquency proceeding the intake department should determine whether a conflict of interest exists between the juvenile and the parent, and should notify the court and the parties of any finding that a conflict exists.

C. If a parent has retained counsel for a juvenile and it appears to the court that the parent's interest in the case conflicts with the juvenile's interest, the court should caution both the parent and counsel as to counsel's duty of loyalty to the juvenile's interests. If the parent's dominant language is not English, the court's caution should be communicated in a language understood by the parent.

Section 6.1 Waiver of the juvenile's rights: in general.

A. Any right accorded to the respondent in a delinquency case by these standards or by federal, state, or local law may be waived in the manner described below. A juvenile's right to counsel may not be waived.

C. Transfer Between Courts

Section 2.3 The hearing.

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

B. The juvenile court should appoint counsel to represent any juvenile unable to afford representation by counsel at the waiver hearing.

D. Adjudication

Section 1.2 Attorneys for respondent and the government.

The juvenile court should not begin adjudication proceedings unless respondent is represented by an attorney who is present in court and the government is represented by an attorney who is present in court.

COMPARATIVE ANALYSIS OF STANDARDS AND STATE PRACTICES

Volume VII, Preadjudication and Adjudication Processes, of the comparative Analysis prepared for the Task Force states:

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

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

It may also be stated that there is general agreement among the standards that the right to counsel exists at the time a child is taken into custody, at the inception of and through all pretrial court proceedings, adjudication, disposition, transfer and postdispositional court proceedings, and throughout any appeals. Nor has the writer's attention been drawn to any other proposed standards which take a contrary position since Gault.

The three 'standards', however, are obviously not in agreement on the question of waivability of the right to counsel by a juvenile. The IJA/ABA proposed standards take the position in the various sections, set out above, that a juvenile may not waive the right to counsel.

A broader approach to the term 'right to counsel' would seem necessarily to require consideration of the term 'counsel,' if it is taken to mean, as it generally is, performing the functions reasonably to be expected of an attorney at law representing a client in a court proceeding. In a narrow sense, it can be contended that the role of 'counsel' in juvenile delinquency is a problem separate from the right to counsel. If, however, the view is taken that 'the right to counsel; means the right to competent counsel,' as in the adult criminal court, then one cannot escape considering the diverse views which have been expressed. The memorandum relating to defense in the Comparative Analysis on Prosecution and Defense, pp. 46-71, is devoted largely to a discussion of "Guardianship" theory, the "Amicus Curiae" theory, each of which the author implies is embraced within a 'non-adversarial' role, and the 'adversarial' theory.[13]

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12. For example, see Standard Family Court Act, (National Probation and Parole Association (now National Council on Crime and Delinquency) 1959); Standard Juvenile Court Act NPPA, U.S. Children's Bureau, and National Council of Juvenile Court Judges, (1959), Procedure and Evidence in Juvenile Courts Advisory Council of Judges (NCCD, 1962); President's Commission on Law Enforcement and the Administration of Justice, Task Force Report: Juvenile Delinquency and Youth Crime (1967); Uniform Juvenile Court Act (1968); Department of H.E.W. Model Act (1974).
13. See also: The Continuing Turbulence Surrounding the Parens Patriae Concept in American Juvenile Courts (Part 2), VI Right to Counsel and Waiver of Counsel, Kechin Wang, Q.C., 18 McGill L. J. 418-29 (1972) and authorities cited therein.

WAIVABILITY OF RIGHT TO COUNSEL

If it is constitutional, a standard of any kind may be adopted as a matter of legislative policy. Gault not only does not hold the right to counsel cannot constitutionally be waived by a juvenile, it seems to indicate that it can.[14] Its clear indication is that a juvenile, just as an adult, can waive the constitutional privilege against self-incrimination. The Court stated:[15]

> We conclude that the constitutional privilege against self-incrimination is applicable in the case of juveniles as it is with respect to adults. We appreciate that special problems may arise with respect to waiver of the privilege by or on behalf of children, and that there may well be some differences in technique--but not in principle--depending upon the age of the child and the presence and competence of parents. The participation of counsel will, of course, assist the police, Juvenile Courts and appellate tribunals in administering the privilege. If counsel was not present for some permissible reason when an admission was obtained, the greatest care must be taken to assure that the admission was voluntary, in the sense not only that it was not coerced or suggested, but also that it was not the product of ignorance of rights or of adolescent fantasy, fright or despair."

The constitutional problem is directly raised here by Faretta v. California.[16] In that case, the court expressly held that under the Sixth Amendment an adult defendant in a criminal case is guaranteed an absolute right to defend himself without counsel, when he voluntarily and intelligently elects to do so, that he cannot be forced against his will to accept a court-appointed attorney and he may not be denied the right to conduct his own defense.[17] The NAC, Standard No. 1, supra, concluded (p550-51) that Faretta had application to 'competent' juveniles as well as adults. It suggests at 551 that:

> "Before accepting a waiver of counsel, the court should probe deeply into the juvenile's competence, his or her understanding of the consequences of dispensing with counsel, and the voluntariness of waiver decision. For these purposes the court should address the juvenile personally. Counsel should be provided despite the juvenile's desire to waive the right, unless the court is satisfied that the juvenile is sufficiently mature to make the decision and understands the nature of the allegations and of possible defenses, his or her procedural rights, and the possible consequences of an adverse finding on the merits. The court also should determine whether the desire to waive counsel rests on any expectation of leniency. Throughout this inquiry, the court's language and tone should be calculated to encourage exercise of the right to counsel."

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14. In Re Gault, 387 U.S. 1, 42 (1967).
15. In Re Gault, 387 U.S. 1, 55 (1967).
16. 422 U.S. 806 (1975).

NAC Standard 3.132, does not say whether the right to counsel can be waived, The commentary to that standard, after describing the holding in Faretta, supra, states:

> ". . . Although the court did not discuss the impact of the Faretta decision on proceedings involving juveniles, and there is a possible distinction on the basis of the juvenile's lack of maturity, education, and experience, the constitutional status given the right of self-representation calls provisions barring waiver of counsel into serious question. . .
>
> ". . . It was the conclusion of the Advisory Committee . . . that further investigation into the ramifications of the right of self-representation on police practices and family court cases is necessary before a standard discussing the application of this right to juveniles can be recommended."

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17. The court in Faretta, supra, note 16, states at 807:

> "The question before us now is whether a defendant in a state criminal trial has a constitutional right to proceed without counsel when he voluntarily and intelligently elects to do so. Stated another way, the question is whether a State may constitutionally hale a person into its criminal courts and there force a lawyer upon him, even when he insists that he wants to conduct his own defense. It is not an easy question, but we have concluded that a State may not constitutionally do so."

The IJA/ABA Standards, supra, reject Faretta as having application to the juvenile court. The Commentary to Standard 2.3, Transfer Between Courts, at p. 43, states:

> "This standard rejects, for the juvenile court, the Supreme Court's decision in Faretta v. California, 422 U.S. 806 (1975). Faretta affirms the constitutional right of an adult criminal defendant to represent him or herself without benefit of counsel.
>
> "Some, perhaps all, juveniles may be legally incapable of a knowing and intelligent waiver of the right to counsel. The thirteen year-old is unlikely to have sufficient maturity and perspective. The seventeen-year-old may. Any method of determining which juveniles are capable of an intelligent and knowing waiver of the right to counsel will inevitably err on occasion. Rather than accept the inevitable error, Standard 2.3 A. imposes counsel on the hypothetical juvenile who rejects the right to counsel.
>
> "A fundamental premise of this volume is that juveniles are different from adults in material respects. Being a juvenile should seldom justify reduced procedural protections. That state does justify the imposition of a protection which should in most cases benefit the juvenile."

And in the Adjudication Volume, in the Commentary to 1.2, the Commission less dogmatically states:

> "A state appears free to provide a nonwaivable right to counsel in juvenile cases despite the fact that it may not constitutionally do so in criminal cases. In Faretta v. California, 95 Sup. Ct. 2525 (1975), the United States Supreme Court held that an adult charged with crime has a federal constitutional right based on the sixth amendment to self-representation in a criminal trial. So long as adults waive the right to counsel knowingly and intelligently, they are entitled to represent themselves, even if it is the opinion of the trial court that it is not in their own interests to do so: 'Although a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation, he should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that "he knows what he is doing and his choice is made with eyes open."' Id. at 2541. If Faretta were applicable to juvenile proceedings, then a respondent who insisted upon self-representation could not be denied the right to proceed as his or her own attorney. Presumably, also, the judge of the juvenile court would have to routinely inform the respondent of the right to self-representation in order to permit an intelligent exercise of the choice the Constitution makes available. Thus, the right of self-representation would open the door to waiver of the right to counsel in juvenile proceedings and to all of the difficulties that have historically accompanied such waivers of counsel.

"Faretta may be distinguished on the ground that the right of self-representation in that case is based on the sixth amendment as applied to the states through the fourteenth amendment, while the federal constitutional right to counsel in juvenile proceedings is based directly upon the due process clause of the fourteenth amendment. In re Gault, 387 U.S. 1, 34-42 (1967). This position is reinforced by the Court's holding in McKeiver v. Pennsylvania, 403 U.S. 528 (1971), that the sixth amendment right to trial by jury is not applicable in state juvenile proceedings.

"The court in Faretta noted that the trial court may provide standby counsel to be available to assist criminal defendants who are representing themselves. 95 Sup. Ct. at 2541, n. 46. Presumably, the trial court may also appoint counsel to advise a defendant on whether he or she should assert a right to self-representation. This would obviously be preferable to the trial court attempting to do so, since the attorney appointed for this purpose could delve into the facts of the case without endangering the defendant's privilege against self-incrimination. If a right of self-representation is asserted by a juvenile respondent, the juvenile court judge, at a minimum, should appoint counsel to confer with the respondent and the respondent's parents and to advise them on whether the respondent should assert that right."

Obviously, there is no agreement among the three proposed sets of Standards. Each takes a different position, and none can be reconciled with any of the others.

In the light of Gault, which, as pointed out above, recognizes that a juvenile has a constitutional right upon a proper showing[18] to waive specific fifth and sixth amendment rights, including right to counsel, and Faretta's pronouncement that counsel cannot constitutionally be forced upon a defendant in criminal court, this writer finds it difficult indeed to conclude that a juvenile upon a proper showing cannot constitutionally waive the right to counsel.

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18. See: In State in Interest of Dino, supra, at pp. 590 - 591 the Louisiana court said.

"This Court has not expressly stated under what circumstances a juvenile may be deemed to have knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel. . . ."(Continued on next page.)

COUNSEL -- OR COMPETENT COUNSEL?

Putting aside the constitutional question, few, if any, of this sophisticated group would deny that any proposed standard relating to 'right to counsel' necessarily embraces the right to competent counsel[19], and that this must indeed be required in the juvenile court if the right is meaningful.

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18. (continued)
Then apparently adopting the "Totality of the Circumstances Test" articulated in West v. United States, 399 F2d 467 (5th Circuit 1968), cert. denied 393 U.S. 1102 (1969), it said:

"That test consists of an illustrative list of factors to be considered in determining whether a juvenile has knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel:

"'* * * 1) age of the accused; 2) education of the accused;3)knowledge of the accused as to both the substance of the charge, if any has been filed, and the nature of his rights to consult with an attorney and remain silent; 4) whether the accused is held incommunicado or allowed to consult with relatives, friends or an attorney; 5)whether the accused was interrogated before or after formal charges had been filed; 6) methods used in interrogation; 7) length of interrogations; 8) whether vel non the accused refused to voluntarily give statements on prior occasions; and 9) whether the accused has repudiated an extra judicial statement at a later date. 399 F.2d 467, 469.'"

No attempt in this paper is made to analyze the necessary components of a knowing and intelligent waiver, although a most important and difficult topic. (See Blackmun, J., dissenting in Faretta, supra, at 852). The foregoing quote from Dino and West is included only to focus on the difficulties inherent in the "totality of the circumstances" concept.

19. In re Bacon, 240 Cal. App. 2d 34, 49 Cal. Rep. 322, 327-28 (1966).

In terms of the juvenile court, however, such recognition poses special and difficult problems. Much of the Memorandum relating to Defense Counsel[20] discusses some of these difficulties. Is counsel a "guardian" is discussed at 47-49. Is counsel simply "amicus curiae", is discussed at p. 49. Or is the role in juvenile court the usual adversary role found and expected in adult criminal court?

That there is a wide disparity of view concerning these matters cannot be doubted. A 1973 law review article[21] discussing many of the problems is headnoted by the editor as follows:

> "The role of the attorney in juvenile court proceedings has become increasingly difficult to define since the Supreme Court has extended many due process requirements to those proceedings. The authors demonstrate that characterizing the attorney's role in any but a very flexible fashion is unwise and may be detrimental to the youth who is being represented. The attorney must be prepared to assume widely varying roles depending on the facts of the particular case and the stage at which that case may be."

The authors in their conclusion, at p. 1423-24, say:

> "In the final analysis the tentative solutions to many of the dilemmas facing the defense attorney in juvenile court present a less than satisfying answer to the question: 'What is the attorney's role in juvenile proceedings?' It would be a good deal more reassuring to be able to pose a clear-cut model applicable at all phases of the process, with all clients, and in all courts. What has been suggested is that almost every specific choice the lawyer must make as to appropriate tactics in any given situation is a function of a large number of variables.
>
> "....
>
> "For a juvenile lawyer to fulfill his professional obligation, it is therefore crucial that he reject all-or-nothing role models and that he resort to the more demanding task of determining in each case how he can best represent his client."[22]

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20. National Task Force on Standards and Goals for Juvenile Justice and Delinquency Prevention, A Comparative Analysis of Standards and State Practices: Prosecution and Defense 46-71, (1977).
21. Kay and Segal, The Role of the Attorney in Juvenile Court Proceedings, 61 Georgetown L.J. 140 (1973).
22. See also, Children in the Courts -- The Question of Representation, Institute of Continuing Legal Education, esp. Part III, "Representation of Children in Delinquency Proceedings," pp. 185-354; Wang, Supra, note 13, and authorities cited therein; Ketcham, Legal Renaissance in the Juvenile Court, 60 N.W. Univ. L. Rev. 585 (1965); Wizner, Adversaries in the Juvenile Justice System, 4 Col. Human Rights Law Rptr. 389, 398 (1972).

The various standards and their commentaries here under review are not in harmony. The Commentary to NAC Standard, 3.134 expressly rejects both the 'Amicus' and the 'Guardian Ad Litem' concepts. Task Force Standard 16.2 does not discuss either the 'Amicus' or the'Guardian Ad Litem' directly. Its general tenor, however, would seem to indicate approval in principle of the adversary role. The IJA/ABA standards, though recognizing on occasion a place for a guardian ad litem (Counsel for Private Parties, Standard 3.1(b)(ii)(c)(1), (2) and (3), pp. 17 and 18, "generally reject both guardianship and amicus curiae definitions of counsel's role and require instead that attorneys in juvenile court assume those responsibilities for advocacy and counseling in other areas of legal representation. Accordingly, counsel's principal function is a derivative one; it lies in furthering the 'lawful objectives of his client through all reasonably available means permitted by law.' "(Introduction, p.3, supra).

Briefly, the foregoing paper seeks only to deal kaleidoscopically with the 'whence' and the 'where' of these matters. The writer, who is at heart an evolutionist, leaves the 'whither' to the sophisticated and learned members of this conference and those to come.

Until there is substantial agreement concerning the proper role of counsel throughout the entire representation of a client in a juvenile delinquency case, or indeed in other juvenile or family court proceedings, this writer sees little likelihood of defining when counsel is competent in his performance and when he is not. It is not a crystallization which will rapidly occur. Widely differing views may be anticipated in legislation, court opinions, trial judges, rules of court, Bar Association positions, standard setting groups, individual lawyers and other individuals and professions intimately engaged in juvenile court and related activities. Certainly there is a need to delve into the combined problems of role and comptetence of counsel in juvenile and family court matters far more deeply than has been done thus far. Each of these standards is an important first step in that direction.

(WHEREUPON, Judge Fort's presentation was given and the following is the discussion that ensued.)

MR. MANAK: Thank you again, Judge Fort.

And certainly we want to thank you, too, for focusing on the question of competency of counsel.

The point is dealt with briefly in the prosecution volume. It is dealt with briefly in the right to private counsel or the role of private counsel volume as well, but obviously it has not been really explored in the depth that we would like to consider it in 1978.

I think our thinking in terms of the outline of the various volumes was pretty well crystallized by '74, 1975, and before some of the interest developed on competency questions.

So perhaps that is one of the things that this symposium could focus on for benefit of

those who will read our report and our final report.

Clear the role definitions and a question of competency -- Mr. Kaimowitz?

MR. KAIMOWITZ: Pass.

MR. MANAK: Mr. Hege?

MR. HEGE: I guess my only question would be with regard to competency and the two basic roles we are talking about -- the adversary and the guardian ad litem -- Judge Fort, do you see the possibility of, you know, a competency suit based on the fact that the lawyer took the guardian ad litem role as opposed to what was stated in the Gault which seems to push them more to an adversary due process type role?

HON. FORT: I have the greatest admiration for the position by all good lawyers -- and I have no doubt that that will be raised, of course, at times, but there are a great many other problems that go along with it.

It is a tough case -- tough.

I am not raising this because I -- they are simple answers, but I think that somewhere those answers are going to have to be dealt with and found.

Whether it is the Trial Court level, where they come in for a new hearing on the grounds that they didn't have adequate counsel, or whatever.

MR. MANAK: Ms. Connell?

MS. CONNELL: I guess I would like just a question to ask your opinion -- I think Professor Teitelbaum, in his book, in the IJA/ABA standards made pretty clear what his choice is in terms of Gault.

And granted there has been a lot of writing on both sides of, you know, or maybe there certainly are more than one side, but now there has been a lot of writing that would suggest other roles that are appropriate, but he certainly seems to come out in every sense for a very adversary role.

HON. FORT: Well, this generally is what the standards do -- there is no question about that.

I mean, whether we are speaking of their right to counsel for private parties or any of the other volumes -- they all come out, virtually, of the adversary role, but the fact of the matter is that is not what the situation is in a great many places.

I did not read the NAC standards which

are quoted in there.

And the Advisory Commission one -- necessarily go that far.

I don't -- I don't think that.

MR. MANAK: No, they don't.

HON. FORT: They just don't.

MR. MANAK: They don't go that far.

HON. FORT: So here you have the three standards we are talking about here -- they are not in agreement in themselves on this.

This -- What could this group of 16 do? Say we or any other 16? Do you agree with 1, 2, 3, whatever?

MS. CONNELL: Certainly my position and the position of Legal Services and Public Defender attorneys, when we approached this question, was to very strongly accept the adversary role, and the position of the trial as expressed -- in situations, and I think Professer Teitelbaum fudges a little bit where you have a very young child, but in -- situations in which the young child can express an opinion to an advocate for that -- that position is feeling, I think, at least in part, that it is really the Judge's prerogative when presented in all

the facts, to what is the proper disposition.

And that if the child is going to be provided with a spokesperson, that spokesperson should express what the child, him or herself, articulate to.

On the issue of competency, I think that certainly we are quite well aware that the majority of counsel provided for children is not very adequate.

One of the things that the counsel for private parties volume indicates is a problem, and certainly we all recognize this, who represent young people -- is that salaries and so on, for a private defense counsel, for Legal Aid attorneys, or Public Defenders who represent these young people, are probably not general commensurate with salaries for other people.

We all know that, you know, it is the youngest attorneys in most offices who get sent into Juvenile Court and it is only people who develop a particular interest for one reason or another who will stay there.

With respect to training and so on, when you have separate -- separate offices to provide counsel for children, I think the experience is

generally that those offices develop an expertise in developing truly competent representation for young people.

With that in mind, I would remind you that you sit on State juvenile justice planning committees that review grants for -- for the disbursement of LEAA money and when you review those grants for efficacy programs, you might consider that.

HON. FORT: If I can respond to the first portion of her comments -- I think that the -- on Page 19 here, the quotation from Role of the Attorney in Juvenile Court Proceedings, which takes a very strong position on the adversary position, and was written by two able lawyers, naturally able, because they went to Harvard, and that is a side joke between us -- and the difficulty in trying to just brush those things aside into the adversary framework is not simple.

And I want to -- I keep coming back to getting these things through the legislature, which is what is really relevant.

That is what they -- all these standards are about.

Get them adopted into law of some kind -- whether you like them or whether you don't, or whatever they are.

When you go before a legislature and you start talking about standards which tell the lawyers how they are going to act, you either are going to have some major support from the Bar Association or it's never going to see the light of day in the Judiciary Committee -- don't kid yourself.

I speak with some feeling on it -- my wife is chairman of the Senate Judiciary Committee in our State for about six or seven years, and I -- I have a little idea of the practical aspects of what goes on in those things.

Insofar as the salary question, that is administrative, not to be brushed aside, but to many places around the country where I have been, they -- they tell me that most of their good ones, who are coming along, the young ones want to move on it -- and the Prosecutors want to move out. They don't want to stay there.

There is no -- there is nothing that is built into the system to assure a continuing

arrangement for or help for competence.

There are a few dedicated, but they -- there are very few -- in all of these -- even the large offices as well as the small.

That is my understanding.

If I am wrong, I would be delighted to learn of it.

HON. MOORE: I think we ought to say the same is true of Judges.

There are some people in the juvenile field who want to stay there for life, but many Judges want to much graver and vaster --

MR. MANAK: Why don't we make a statement that the majority of counsel representing children are not competent? I suppose we assume some responsibility since we are on the record.

Are there any studies that would support that statement of majority of counsel representing children are not competent?

HON. FORT: I am not personally aware of any study either way.

I am not aware of any that has been made.

MR. MANAK: This is a feeling.

MR. FORT: Part of that is tied up with this question of role of counsel -- until that can be identified, it is extremely difficult to state what is competent is not possible.

MR. MANAK: Definitions of competency have been changing radically in recent years -- How can we make a statement -- I was just wondering if we have any higher data in terms of what Judge Fort is saying?

MS. CONNELL: I guess what we are concerned with is with what see so often happening -- our case loads of Public Defenders in Juvenile Court are just far-out way what the Public Defender in an adult courtroom is expected to handle.

You know, case loads far surpass what the Prosecutor is expected to handle in the same Juvenile Court.

And those kinds of things -- tend to make us think, you know, those of us who see, you know, those kinds of figures. that the representation that children are getting cannot be the best, and --

MR. MANAK: It seems to be the experience that most have had.

But again, it is just simple experience.

I always get a little nervous when we simply state that as a fact.

MR. MANAK: Mr. Hege?

MR. HEGE: In Des Moines, there was a study done in 1974, I guess. It was entitled, "The Role of Counsel in Juvenile Court."

I inserted it in my paper.

It doesn't dwell on the issue of the role of counsel, but it also talks about through various interviews with children who have been incarcerated at State institutions, and also with lawyers who acted in certain cases.

It comes to the conclusion, based on the adversary model that the general court appointment panel in Powell County is doing an adequate job.

MR. MANAK: Were they following -- not adversary model, but a guardian ad litem model? They probably were.

MR. HEGE: No, no -- I think they were specifically looking at an adversary model and that is the conclusion that they came to based on interviews with lawyers, some of whom said, "You only contacted this child five minutes before the hearing, why?" And the lawyer's response might be,

"Well, the Courts are doing a great job placing them, and they seem to keep the training schools full, so why should I worry about it?"

You know, comments like that.

So, you know, it is hard to tell if the study -- it doesn't really go into both the guardian ad litem and the adversary properly, but it does as to what kind of representation kids are getting.

MR. MANAK: Okay. Ms. Sufian?

MS. SUFIAN: In light of what Judge McLaughlin said about Legal Aid in New York City, in light of what -- where I work, I just thought it might be helpful of how the juvenile rights are organized.

Juveniles' Rights Division has a contract with the State to provide representation for children in Family Court on neglect and abuse opinions, and delinquency cases use its role as an adversarial role.

Implied players at the trial level, at the appellant level -- there is a training unit, there is an affirmative action unit, which tries to bring conditions of consignment suits in to respond to the problems because they can review the overall

case load of the trial lawyers, and listen to what kind of problems they see on day-to-day basis, and try to adjust those --

We represent children in mental health commitment hearings, and we also try and participate in kinds of legislative, legislative process by a liaison person.

It is not perfect, by any means -- the different levels complain about each other.

There was a tremendous amount of work, case load, and a training unit is only two people for a staff of trial lawyers of about 70, but we do see, in the Family Court, lawyers who were appointed when we can't represent kids because of conflict of interest or some other situation, who view their role more as a help to the Court in processing the kids through the Court.

I'm not saying that they are doing this in bad faith -- they have a different view of their role -- that can be brought in out of the halls to do a hearing in fifteen minutes.

Usually it doesn't go to a hearing -- some type of an admission.

And we feel that viewing our role as

an adversarial role is getting our kids the best representation, and ultimately the best help that they can get.

MR. MANAK: Judge Fort?

HON. FORT: You are saying that your organization is following a different standard and concept, than, for example -- the Law Guardian concept at least as developed in Buffalo Law Review article -- in describing the Law Guardian concept and its purposes in New York came out about?

MR. KETCHAM: Yes.

MS. CONNELL: It is of you, you know, helping the child control.

MR. KETCHAM: Three purposes.

HON. FORT: You don't have the Law Guardian in effect.

MR. KETCHAM: We are called Law Guardians.

HON. FORT: You are abandoning what was originally foreseen -- since as the role of the Law Guardian is really then being abandoned, which if I understand you correctly, in your organization, method of operation in New York, is that right?

MR. KETCHAM: Michael Dale is.

MR. MANAK: The article was written in 1963.

MS. SUFIAN: The Family Court Act does state that an attorney who represents a child will be called a Law Guardian, but he is -- he or she is an attorney and I just don't feel, my organization does not feel that an attorney is anything but an attorney and has the obligation to represent the interest of his or her children, and in Juvenile Court, you are representing someone in delinquency petition, and they are facing the loss of liberty that that requires definitely an adversarial type of representation.

HON. FORT: Well, all of Charley Schamitsky and all of his staff were all lawyers, though, were they not?

MS. SUFIAN: Yes, they always were.

MR. KETCHAM: But, Bill, if I can say so, Charley Schamitsky took sharp issue with Jake Isaacs (phonetic) back then -- Charley Schamitsky is the one that developed the Juvenile Law Guardians.

His view was that they should remain in the normal adversary role.

Jake Isaacs felt differently, but I don't think they are abandoning.

MR. MANAK: I don't think the statute ever really

defined the role of that title -- the Law Guardian Statute which remains.

But the concept has evolved from Isaacs 1963 -- obviously it is not recognizable.

MS. SUFRAN: Mr. Schamitsky has always viewed the role of the Law Guardian as an adversarial one and Mr. Schamitsky says it is the same position. It hasn't changed.

MR. MANAK: I might say that in some upstate counties the role has not evolved.

HON. FORT: That is exactly the point I was driving at.

And I suspect what Judge McLaughlin was referring to, earlier, when he made that comment this morning, I am sorry he isn't here, but this is just an example, and I am trying to visualize in my own mind, thinking why I say there is so much confusion in terms of the role of a lawyer.

Wherever one goes both within a state and even within the lawyers practicing in a particular Court, though around.

You fellows are a lot closer now to that than I am.

I haven't been on a trial bench for

ten years -- maybe it is better than it used to be.

MR. MANAK: Mike, did you want to comment on it?

MR. DALE: No, I just wanted to make certain that the record would reflect that that's in New York, as you know, perhaps an example, and I think that Judge Fort is absolutely correct when he says that the majority of lawyers representing children are not what they ought to be, and that is our -- was my experience, and I believe to be some of my colleagues' experience in New York.

It certainly was my experience defending children in a less urban county in New York State, and I would expect that we will see litigation brought by lawyers representing children -- if not challenging on an appeal competence of counsel, perhaps challenging by way of class action litigation -- the process in a given county whereby on the one hand perhaps the Court does not appoint counsel or appoints counsel late or on the other hand the lawyers as a group who represent children, do not carry out an effective job.

The evidence in the minds of the lawyers, perhaps in the New York City Legal Aid

Society,was that we saw, I saw my, my colleagues still see on a regular basis, a large number of cases that come back from all the other counties of the State to New York City where a child is returned to the city, after the fact finding hearing, returned to New York City for the dispositional hearing.

In a juvenile delinquency case where there is an admission for fact finding --

In fact, our research indicated that there -- we never got a case where there had been a fact finding hearing. We got, as I remember the statistics that I developed three to five cases a week, from other counties -- not one fact finding hearing -- always an admission.

And that was considered a serious concern to us.

MS. SUFIAN: We always found in doing -- in visiting facilities around the State where kids had been placed from all different counties that the children from upstate were placed at more severe -- more restricted too -- facilities for much more minor things as for truancy. They were in training schools, and --

MR. MANAK: I think another issue here could be raised about the independence of Legal Aid attorneys and Juvenile Court in Cook County, Illinois, for example.

The Public Defender's office is appointed by the Judges, and it is really a political appointment.

In fact, the Public Defender's office is more political than the State's Attorney's office.

Individual appointments are made upon recommendations of the Judges.

And you know that really raised questions of the independent nature of the attorneys who appear, as advocates before the Judges who appoint them.

Mr. Gilman?

MR. GILMAN: As probably one of the ex-Legal Aid lawyers and probably one of the oldest in the room, at least in terms of service, I'd like to suggest that there's a tendency for Legal Aid lawyers, and Public Defender lawyers to be overly harsh with themselves in terms of their competency, and the competency of other Legal Services lawyers in the

performance of their duty.

There is a certain amount of self-criticism which I just do not think is warranted.

When I began to practice in the Juvenile Court in the very early 60's, what I observed was a great lack of respect in the entire legal profession where all of us who worked in the system, that legal -- that Juvenile Court Judges did not get the respect of their brethren who said in higher courts, or at least subsidiary courts on the same level that probation and social workers were usually subjected to the crassest kind of comment in terms of their work, and their dedication -- that lawyers who worked for the poor, for disenfranchised were considered to be either strange or aberrations, and that -- their skills and their dedication never were appreciated, and that all of us who worked in the Juvenile Justice System, lawyers or Prosecutors, regardless of the roles, and Judges, have suffered from the fact that the lawyering professional itself, and since we all have that one thing, we all are lawyers -- whether we are now Judges, or are now Prosecutors, or whether we are defense counsel, we have always suffered from the

fact that our profession itself has considered us to be low men on the totem pole.

And in small communities where you would be the defense counsel, or you would be a concerned Judge, if you did not go along with the system as it was, you soon became a laughing stock.

You soon became the one who was pointed to as "that stupid" or "that advocate" or "that one who is working outside of the norms."

And the pressure to conform and the pressure of legal -- especially on lawyers who represent poor children, to conform to the system as it runs, and to help to enable that system to move the calendar, to move cases is enormous.

And what I have seen is that in spite of that, tremendous roads have been creased, and traveled to bringing the level of advocacy up about as high as one can expect in the system where you usually get five minutes before a Judge.

So I just would like us to remember that, when we begin the process of condemning what is the cause of some inability of ourselves to raise the standard higher.

There is tremendous pressure to keep

the standard lower.

MR. MANAK: Yes, but now there is pressure to raise it.

And David, your experience is New York City experience -- it is as simple as that.

MR. GILMAN: Well no, that -- --

MR. MANAK: The vast difference between the level of representation in New York City today and compared to some 15 or 20 years ago, as compared to within the same state -- okay, and keep going farther west and comparison becomes even greater.

MR. GILMAN: I was saying to you, that although my experience has been in New York, I have travelled in the country and spoken to people who have worked all over and the problems are the same, if you are working in Utah and you are a Legal Services lawyer doing Juvenile Court work from there as it is in Oregon.

I mean these -- the interesting thing is no matter where you go in this country, the smae kinds of problesm surface.

MR. MANAK: I would suggest it is not paranoia -- that there is some basis of fact, though, in the

criticism of the quality of representation of Legal Aid and Public Defender and I say that as a former Legal Aid attorney myself.

Mr. Ketcham or Judge Ketcham?

MR. KETCHAM: I am with Judge Fort, Bill Fort, as an evolutionist, and I am also an optimist.

HON. FORT: So am I.

MR. KETCHAM: And things are a lot better than they were a long time ago.

Bill cites in here, two District of Columbia cases to start the papers, and the second one, Scheudigan, was decided a little bit more than a year before I took the bench.

And in that year before I took the bench, the District of Columbia, which had about -- then about 10,000 juvenile cases a year, there had been four lawyers appeared.

About 1960, here in Chicago, the National Council of Juvenile Court Judges held a conference on the role of the lawyer.

And some pretty eminent people came, and there were some very good papers delivered and the thing began to move.

Things are changing and they are

changing well, I think.

In the District of Columbia, today, every juvenile is represented by a lawyer before the juvenile Court.

It is a mandate of the Rules of Court.

The Public Defender, not the Public Defenders -- yes, the Public Defender Service as it is now called, it was called Bill "Legal Aid" -- I don't know what it was called first, but developed, in that period, today they have something like seven or eight attorneys there -- whose sole business is the Juvenile Court.

In that first year, when I was in the Juvenile Court in 1957, as I was explaining to Ms. Thompson at lunch, the Corporation Counsel, the Prosecutor had a person in there three days a week -- today it has 15 lawyers in that same Court.

So things are moving.

Don't be too discouraged.

MR. MANAK: Okay.

Judge Cattle?

Judge Fort?

HON. FORT: I am not discouraged.

(Laughter.)

HON. FORT: There isn't anybody in this room who is discouraged or wouldn't any of us be here.

HON. CATTLE: I agree with what has been said -- that we do need improvement.

But the question is how are we -- How are we going to get it any farther than we are trying to get it now?

For instance, where I am, we can't get Public Defenders, and where I have -- where we have Public Defenders, they are so overloaded that they might as well be useless.

The Court, being me, and my colleagues, attempt to rotate the cases through the entire practicing bar so that they get the same counsel as the adults do.

That is about all we can do.

The young lawyers come out of law school and outside of those who have seen the light, they gravitate to the larger centers -- whether it is New York or Omaha or Lincoln, it doesn't make any difference.

And the lawyers who go to the country are largely probate lawyers -- and we are forced to use them -- they used to use me, and that is -- what

we -- can we do to improve that?

Can I -- can the legislature or all grads from the school to disperse according to a rule of thumb.

I think we are getting improvement really because lawyers everywhere are beginning to improve. Everybody is improving, but the Judges.

And there is another question, and we have the increase in case loads which is due not so much to faulty court administration, although we can do a lot better, it is outside of the Courts, what is happening, increasing these case loads.

And I was glad to get Judge Fort's sympathetic note on that -- that not everything is the judge's fault.

And yet many of the problems for which we are castigated, both here and elsewhere, arise out of things over which we have almost no control.

And sometimes I think we are the only ones that are trying to help them.

In other words, this rotation of making sure that juvenile has the same -- the best we can get, which is maybe none too good -- I am

not even going to argue about the adversary system because I think that the only question I have about the adversary advocates, I believe in the adversary system myself.

In juvenile law, as in adult law, I think sometimes they get a bit confused on what the role of the adversary lawyer is.

In other words, I believe the adversary lawyer is there to do the best job he can for his client -- at least that is what I always try to do.

And this does not necessarily mean that we had to try three days' cases to get that result -- but too many who are on the kick, think that the adversary system involves pulling out all the stops.

The point is that we have a lot of problems here. I don't fault counsel.

Most of them are doing the best they can, and I would only hope that some of us would, on the bench, would get a little of the same sympathy.

We don't have enough Judges, we don't have enough lawyers, we don't have enough of a lot of things.

An I guess it goes right back to the public -- and until the public decides that they want better hypotheses and more lawyers for the Board, the juveniles and everything else, maybe we will get them.

Maybe they will even provide enough Judges to handle the cases.

I think the harder we can work to improve in all areas at best, but I don't think it is the fault of either the Bar or the Courts. I think we are trying to cope with it the best we can. Okay?

MR. MANAK: Dean Smith?

DEAN SMITH: No.

MR. MANAK: John?

MR. HUTZLER: I am aware of only one case dealing with the competency of counsel in Court and that was a case that came out of New York where, as I understand it, the Law Guardian system may result in a consideration with Legal Aid or there may be a panel of attorneys from whom Law Guardians are appointed.

In this particular case, the panel of attorneys was -- composed of people who had

some experience or had taken a course -- some special training in juvenile law, and the attorney who was appointed to represent the juvenile was apparently unable to appear because he was involved in another case.

And another attorney from his office represented the juvenile in Juvenile Court.

The adjudication was reversed on the grounds that says that attorney had no expertise in juvenile field, there was a denial of the assistance of counsel.

I would come into places like the Juvenile Law Center to look for cases to work out. I was most concerned that this one that really, I think, needs to be examined -- both -- both to establish standards, and also to help to clarify the role of counsel and perhaps the Appellate Court will step and decide whether counsel should be-- should play the advocacy role and at the same time that clearly or whether counsel has some obligation to exercise his own judgment in deciding what is right for -- what is the right position to advocate for a juvenile who may be too immature to exercise his own discretion.

HON. CATTLE: The lawyers might also pursue this which is a very real threat.

Well, we had the last suit against Jim Thompson, juvenile lawyers -- Consider the ramifications of what that is going to do to an already crowded systems.

We simply don't have these people.

And so we use the best we have, and then they are sued or there are appeals based on the fact that they are incompetent.

This thing can just go through the roof and it is a concern of the attorneys.

MR. HUTZLER: Same problem exists in the criminal system before the right to counsel was guaranteed there.

You know, it is just -- just something you have to deal with by coming up with enough public funds to pay for attorneys where they have to be appointed by indigents and a burden that the Courts have imposed upon society that it just has to bear.

HON. CATTLE: Can we find them?

MR. HUTZLER: You could find them -- you can find them -- there are plenty of attorneys coming

out of law school now who can't find anything better to do.

MS. SUFIAN: And you get millions of resumes.

MR. MANAK: Mike?

MR. DALE: I have nothing.

MR. MANAK: Ms. Thompson?

Judge Moore?

HON. MOORE: I am optimistic, too.

I think the most important system in the Juvenile Court in the last 15 years has been the appearance of the lawyer.

I think they have probably brought about the most important changes in the Juvenile Justice process -- whether it be for the Prosecutor or the defense counsel.

I think in the future, I see them playing more and more of a role not even as an advocate, but for the child -- and I think that is their role.

Not only adjudication but also the advocate of the child and disposition.

I constantly see lawyers -- both Prosecutors and defense counsel, who are out there who are defending new methods of -- at least who are

being advocates to private facilities and private agencies saying, "Why won't you go with me," and saying, "We will participate with a treatment plan," when the agency says, "We are full, we don't want your client," and I don't think it should be discouraged at all.

MR. MANAK: Judge Arthur?

HON. ARTHUR: A couple of questions.

They are appropriate.

The first is: When is a child entitled to assigned counsel?

The answer is if he cannot afford it, of course -- if he cannot afford it, if his parents cannot afford it -- What is the test?

And I ask it somewhat from a personal point of view -- We have a large battery of Public Defenders in our particular county, 13 of them who are assistants from Legal Aid, and in addition they are good, apparently they are better than the average I have been hearing about, but when can I assign them?

There is a group of cases in here where the parents won't get a lawyer for the child and the parents have to pay the fee -- what lawyer

is going to take it when he has to sue for his fee and when is a child --

HON FORT: I don't know that there is any statute beyond the one that he is financially unable to pay -- and of course darned few kids who have any money of their own.

The question of whether the statute requires the parents to contribute to the fee is no different, is it, really, than for example, providing medical care or paying if the statute requires it, to the State for its care in an institution or the county's institution.

HON. ARTHUR: I would understand it as a necessary service the same as medical -- can you get lawyers to take it on that basis because they have to sue for their fee or can the Courts order a fee and order without a separate trial?

HON. FORT: Normally the County would be the one who would bring the thing forth because if the Court orders it when it is a charge against the County or the State -- whatever the agency is that pay it.

And then if they think that the Attorney General or the District Attorney thinks it

is recoverable from the parents, as is necessary, under the old common law theory, then it would seem to me that it would be up to the agency to bring it, but -- the fee ought to be paid to the lawyer,

HON. ARTHUR: Public Defenders have taken the position that they will not take a case where the -- where somebody is going to pay half or all the fee.

In other words, they want to preserve their relations with the general Bar among other things -- They claim their case loads are already high, but they won't take a case if there is some question of reimbursement.

Well, I guess --

MR. KETCHAM: Isn't there a statement -- or there was a -- an earlier stage in the standards that the determination of indigency should be solely on the basis of the child.

HON. FORT: Yes, that is -- what I understand.

HON. ARTHUR: Well, in that case almost all children would get assignment counsel -- Okay?

My second question is a little bit what Judge Cattle alluded to -- If you are going to have assigned counsel, in small communities, you are

not going to have Public Defenders, they are going to justify.

The usual practice, as I understand it, is to have a panel of lawyers who have agreed to serve, or whatever, or else they're just -- the Judges pick one out of the sky or Orm Ketcham happens to have Williams that we can pick out of the sky -- we don't all have that.

My question there is: If a Judge has got this kind of a panel that he has built up, then he picks a name from that panel, that is immediately a corrupt appointment because the Judge has selected the lawyer for the job.

Should we go to the president of the Bar to do the selecting, so to speak?

HON. CATTLE: We do it strictly on a rotation basis.

HON. ARTHUR: But you have approved the panel.

HON. CATTLE: Well, I have approved the panel because it is the entire Bar.

HON. FORT: Well, from another standpoint, the law imposes on the Court the duty to appoint counsel.

And it imposes on counsel the duty to accept the appointment if appointed by the Court.

They are going to participate.

And therefore, I think it is sufficient that the Court, but for the lawyer, I can't see any problem with that.

HON. ARTHUR: Well, the point was raised earlier that the Court should have nothing to do with appointing the Public Defender and therefore can the Courts appoint the lawyer in a smaller community?

MR. MANAK: Well, actually the point was whether there is any question of independent counsel, where the Court does -- and I raised a situation in Cook County where the Public Defender's office is appointed by the Cook County Circuit Court.

They also, the Judges established the budget of the Public Defender's office, that they can control how many new staff members will be added next year or perhaps retrench many within that office.

I just think that we ought to consider it.

HON. MOORE: A related issue on the reimbursement, we don't have a Public Defender for juvenile -- we do have a Legal Aid.

Legal Aid takes the position, again,

overworked and swamped and therefore they are going to use the limited staff they have in our County -- in other matters.

The Juvenile, because the Juvenile Court can reimburse -- there are problems with this, however, because we have to recognize that there are kids who come into Court and you ask them whether they want a lawyer, and they give a kind of a laugh and they look to their father he says he'll be damned if he's going to pay for any lawyer, so you better not ask for one. And if you do I'm going to whip the hell out of you -- Now that is an over-statement, but that is a problem.

HON. FORT: Sure it is.

MR. MANAK: But it would be a problem under the standards -- there would be a lawyer no matter what the kid says -- he won't be asked the question.

Let's see, Judge Delaney?

HON. DELANEY: As far as role confusion, I don't see any of that.

Certainly the Public Defenders and Legal Aid lawyers who appear in our Court know exactly what they are doing, and nobody has to tell them, and I think they have set the standard of

excellence and other lawyers are following that role.

One area, though, of confusion I think is this guardian ad litem.

I think the term itself is confusing because lawyers ...* are used to doing a perfunctory job as a guardian ad litem as perhaps their role in the Juvenile Court.

And I would like to see us get away from the term altogether.

I would like to see us use the word "lawyers" or "counsel."

I think the lawyer representing the child should be a lawyer in every sense of the word and that he should be the one that determines the degree of advocacy.

I don't think we should impose on him the obligation of being a social worker or anything else.

I think he should represent the kid's position -- and I think that is one of the -- one of the things we should make very clear.

An advocate for him.

MR. MANAK: Ms. Szabo?

MS. SZABO: No comment.

* About five words unclear.

MR. MANAK: Ms. Bridges?

Mr. Rounds?

MR. ROUNDS: No comment.

MR. MANAK: Mr. Dale?

MR. DALE: One final comment with what Judge Delaney said -- because lawyers for children in some instances are not to be overruled adversaries, if you will, I -- in my view, a good lawyer for a child does recognize that he or she also has the obligation as any other lawyer does, as counsel and client under the canons of professional ethics -- require that we do that -- that we advise, and that we counsel and that if the youngster wants to do something that in our professional view is not wise, then we are obligated to do that to carry out that task -- But now it is not a social worker's task, but it is the obligation of a lawyer and I think it is clearly our obligations.

MR. MANAK: Okay.

Any further comments?

Is there any desire to start earlier tomorrow morning? 8:30?

HON. MOORE: That is the time my Court opens every morning.

76925

2. Termination of Parental Rights

Consultant
Hon. Orm W. Ketcham

ABSTRACT OF PAPER

Judge Ketcham defines the termination of parental rights as:

> [S]evering legal bonds between the biological parents and child.... Court-ordered termination can be either voluntary, as when a parent consents to place a child for adoption or involuntary....

He traces the different concepts of the parent-child relationship, observing that "despite the confusion about the exact nature of parental rights, our society overwhelmingly agrees that a natural parent has a special interest in his child." Although this special interest is not absolute, he states that courts are generally reluctant to sever the "primordial bond."

Judge Ketcham points out that the frequency of state intervention into the parent-child relationship increased markedly during the ascendancy of the "historically dubious" parens patriae doctrine, but that parens patriae "has been challenged and found wanting." He then frames the remainder of the paper by stating that:

> In a termination proceeding under modern doctrine, the paramount concern of the court should be the child's need to receive the consistent love and care of an adult in an environment conducive to successful personality development essential for all children.

He notes that this love and care need not necessarily come from a biological parent, and describes the concept of the "psychological parent." The termination proceeding is viewed as "an essential legal mechanism for assuring for a child his right to a 'psychological parent' in cases where his natural parent has failed...."

The similarities of the three sets of standards regarding termination of parental rights are greater than the differences, according to Judge Ketcham, although the variations "suggest different philosophical attitudes." All three treat the matter as a three party problem -- parent, child, and state -- rather than as a dispute over a child between the state and the parent.

A comparative analysis is presented beginning with the 1961 Children's Bureau Legislative Guide and the 1968 Uniform Juvenile Court Act. Judge Ketcham then turns to the NAC standards, noting that although the Committee set forth criteria to guide termination decisions, the matter is still left to the court's discretion rather than making termination mandatory when a child who has been placed outside the home following a finding of neglect or abuse cannot be returned home safely within a prescribed period of time. Both the Task Force and the IJA/ABA standards adopt the latter approach, because of "the numerous failures of existing judicial procedures and of social agency practices...." All three standards, however, prescribe circumstances under which termination should not be granted, including in the case of the NAC and IJA/ABA standards, when the child objects. Judge Ketcham notes that the IJA/ABA standards "limit this absolute veto power to children over ten years of age, [but that the] Commentary indicates that the wishes of children under ten years about termination should be given great weight...." The comparative analysis concludes with a brief description of the unpublished 1978 draft of the Model Act to Free Children for Permanent Placement.

Judge Ketcham then highlights a series of issues involved in determining the appropriate procedures for termination of parental rights. The first of these are the time limits applicable to termination proceedings. He points out that the time periods prescribed must provide parents with sufficient opportunity to fully protect their rights including an opportunity to appeal, while also:

> [Minimizing] the time that a child's home life is disrupted or the child is without parental care ... because of the immediate damage that a child will suffer when it lacks the love and care of an adult.... This urgency stems from the child's heightened sense of the passage of time. What may seem an acceptable delay to an adult can be a profoundly damaging period of loneliness and lovelesness to a child.

He notes that all three sets of standards recognize that the longer a child remains in foster care, the less are his or her chances for a permanent placement. However he comments that the Task Force and IJA/ABA standards, by providing for virtually automatic termination after a child has been in out-of-home placements for a prescribed period, reduce the likelihood of abuses of discretion.

The second issue is the relationship between termination and adoption. Judge Ketcham observes that the purpose of termination is not to punish the parent, nor to protect the child. Rather, it is to enhance the chances for permanent placement. He states that the

record of social service agencies in finding adopting parents, is too uncertain to permit a presumption that adoption will automatically follow from a termination. He indicates that the standards recognize the need to link adoption and termination, and that the NAC standards call for periodic court review hearing until adoption or permanent placement is achieved. In light of the fact that the IJA/ABA Neglect and Abuse volume was being revised, he proposes another alternative for consideration by the Joint Commission.

> The judge should enter an interlocutory or provisory order terminating the rights of the natural parent conditional upon the successful adoption of the child. The court would then retain jurisdiction of the case for a specified period of time. If at the end of that period the child had not been adopted, the court could either rescind the termination order ..., extend ... the interlocutory order ..., or as a last resort, place the child in long-term foster caré.

The third issue is the protection of the individual rights of the parents and child. Judge Ketcham lists the minimum rights which each party should be afforded, stressing in particular the need of the child for an independent attorney to represent his or her interests. He states that all three standards place a premimum "on the human rights of the child."

The fourth issue discussed is from whose perspective should the termination decision be made, the parent's, the state's, or the child's. All three standards lean toward the third alternative.

Finally, Judge Ketcham raises again the question of whether the procedures and decision-making criteria for termination proceedings should be statutorily set or left to judicial control. He observes that detailed statutes may yield too little flexibility, and reliance on judicial discretion in the absence of guidelines would do little to remedy existing problems. A list of possible grounds for termination is presented with the caveat that the grounds selected will depend on the perspective from which the statute or standard is written. In addition, Judge Ketcham points out that stringent time limits can be imposed regardless of the perspective chosen.

SUMMARY OF COMMENTS

The paper was well received by the panel. The discussion was dominated by responses to the provisions in the NAC and IJA/ABA standards permitting children to veto a proposed termination, and to Judge Ketcham's suggestion of an interlocutory termination decree.

With regard to the first issue, Mr. Siegel and Mr. Dale expressed agreement with the child's ability to control his or her placement. Ms. Szabo asked whether there were procedures to determine when a child was not objecting. Judge Ketcham responded that there were not explicit provisions in the standards on that point, but that determining the child's position should not be a problem for the court, since the child would be represented by counsel and possibly a guardian ad litem. Judge Cattle and Judge Moore both had reservations about giving a child an absolute veto over termination. Judge Moore offered the illustration of a child being used by his father in a prostitution ring who did not want to leave his father. He asked whether the court should not be able to override the child's wishes in such a case. Judge Ketcham responded that in all likelihood the father would be in jail anyway, and Judge McLaughlin suggested that even if the father were available, the boy would be likely "to vote with his feet" regardless of the court's order -- i.e., he would run away from his foster family to be with his father. Mr. Murphy and Ms. Sufian commented that if a child were with an agency for a period of time, it was likely that the agency could "brainwash" him or her to accept a substitute placement. Judge Delaney pointed out that an older child's consent to adoption is a feature of many state laws, and Judge McLaughlin observed that few people would be willing to adopt a child who did not want to be adopted.

Most panelists agreed that some means was required to prevent "statutory orphans," -- that is, children whose relationship with their parents had been severed by a court, but who have not yet found an adopting home. Many seemed intrigued with the idea of an interlocutory termination order. For example, Judge Moore stated that establishing some monitoring mechanism would be more important than resolving all the fine points on the criteria for termination. Judge McLaughlin described the problems encountered with New York's suspended judgment procedure in assuring that the case was reviewed by the court and endorsed the interlocutory decree as a practical alternative. Mr. Dale also emphasized the importance of providing a means for the child's attorney to bring the matter back into court. Judge Arthur said the proposal was similar to a new Minnesota statute and Judge Cattle stated that it could be a very worthwhile tool.

However, a number of questions and concerns were raised. For example, Judge Delaney suggested that agencies might hesitate to find an adopting family when the termination order was not final and suggested judicial review hearings every 60 days to monitor agency activity. Mr. Hutzler asked whether the interlocutory order would constitute a final judgment for purposes of appeal. Judge Ketcham responded that there was no reason why it could not be deemed to be an appealable order. Mr. Manak inquired whether the child would be able to receive a share of his or her parent's estate if they died during the interlocutory period. Judge McLaughlin stated that it was his understanding that the child would be eligible for at least the V.A. benefits to which he or she would otherwise be entitled. Finally, Judge Fort asked whether only the court issuing the interlocutory order could approve the child's adoption, and suggested that if so, it may raise problems when the adopting family was out of state.

A few other issues were touched on during the discussion including whether a child can seek to terminate his parents rights, the difficulty of presenting evidence of parental nurturing, and the quality of legal representation in termination proceedings. The first issue was deferred until the discussion of Mr. Kaimowitz's paper. With regard to the other issues, Judge Fort commented that the quality of the evidence presented in termination hearings was often poor, noting that this was sometimes attributable to poor preparation by counsel. Judge Delaney observed that many lawyers as well as judges are prone to bringing middle class attitudes to termination proceedings and refuse to believe that some parents do not want their children. He also suggested that many custody and termination fights could be avoided if there were a way of letting a parent give up his or her child without a feeling of guilt.

TERMINATION OF PARENTAL RIGHTS:

FUNDAMENTAL ISSUES AND PROPOSED STANDARDS

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TERMINATION OF PARENTAL RIGHTS:

FUNDAMENTAL ISSUES AND PROPOSED STANDARDS

Introduction

All three of the standards for juvenile justice published within the past two years have recommended increased use of judicial authority to terminate involuntarily parental rights in order to enhance the prospects of finding more permanent placements for abandoned, abused and neglected children. The similarities between the three approaches are greater than their differences, but certain of the variations suggest different philosophical attitudes. In order to understand fully the significance of the several standards recommended, it is necessary to examine the fundamental issues involved.

I. SIGNIFICANCE TO CHILDREN AND PARENTS OF JUDICIAL TERMINATION OF PARENTAL RIGHTS

Terminating parental rights by court order means severing legal bonds between the biological parent and child. In the eyes of the law, a parent whose rights have been terminated becomes a stranger to the child, with no right to custody, visitation, or communication. Court-ordered termination can be either voluntary, as when a parent consents to place a child for adoption, or involuntary, as when the court orders the termination over the objections of a natural parent.

The fields of parental and juvenile rights are replete with conflicts and confusion emanating from the very organizations and governmental bodies designed to facilitate such rights. No one seems able to agree on a suitable legal explanation of a biological parent's rights in his child. In the nineteenth century, these rights were likened to property rights, with the child having the status of a chattel. Such an analysis has been largely discarded in this century. The right has also been likened to a trust relationship, conferred by natural law on the biological parent but revocable by the state in certain circumstances. More recently, a parent's relationship to a child has been conceived of as a compact, with the parent's rights balanced against certain responsibilities owed to the child. Still another line of analysis describes the natural parent's rights in his child in terms of the bundle of rights and duties encompassed by parenthood. Included in this bundle are the right to have custody, the right to visit, the right to determine education, the right to choose the child's name, the right to consent to marriage, the right to appoint guardians, and the right to consent to adoption. These rights dwindle as the child approaches maturity; several or all of them may be abruptly terminated by court action.

Despite confusion regarding the exact nature of parental rights, our society overwhelmingly agrees that a natural parent has a special interest in his child. This interest has been consistently protected by the courts. The United States Supreme Court with Justice White writing for the majority in Stanley v. Illinois said: "The court has frequently emphasized the importance of the family. The rights to conceive and to raise one's children have been deemed 'essential,'

. . . .'basic civil rights of man,' and rights far more precious. . . than property rights' . . ."[1]

Although frequently called upon to sever one or more of the rights emcompassed in parenthood, courts often express a particular reluctance to terminate permanently all rights of the biological parent in his child against the will of the parent, since such action severs absolutely the "primordial bond"[2] between parent and child. It is widely recognized that "both by law and by nature parents have the primary right as against the world to their children."[3] Thus, involuntary termination of all parental rights is ordered only when absolutely necessary to the child's welfare.

The law in the United States reflects the cultural preference for the traditional family and supports the hereditary rights of biological parents. But, there has long been a recognition in law that the special interest of the natural parent in a child is not absolute and unbounded. For generations, it has been accepted legal practice for the state to intervene when the parent abandons, abuses or neglects the child. Until this century such judicial authority was used most sparingly--ordinarily only in cases of heinous acts of physical violence by the parent upon the child or where the child was nobly born and the heir to great wealth.

With the advent of the juvenile court movement, commencing in 1899, judicial interventions between child and parent increased markedly. The philsophical alternative to absolute parental rights in a child was traditionally thought to be the benevolent state, or parens patriae concept, which reached its apotheosis in the juvenile court movement from about 1900 to 1955. Under this historically dubious English doctrine, based on monarchial rights in a feudal society, adherents reasoned that the state should intrude into private family life when necessary to assure that the welfare of the child was being served. In the past decades, concepts of parens patriæ have been challenged and found wanting.[4] In its place, there has been a growth of the idea that the child is a person whose full individual rights the state and its legal system should recognize, just as it recognizes parental rights. In the quasi-criminal setting of juvenile delinquency hearings, this has resulted in laws that assure each child most of the same legal protections afforded to adult criminal defendants. Of equal importance, has been the development of neglect and termination laws intended to protect the basic human needs of children.

In a termination proceeding, under modern doctrine, the paramount concern of the court should be the child's need to receive the consistent love and care of an adult in an environment conducive to successful personality development essential for all children. It should be emphasized, however, that this love and care to which a child is entitled need not come only from the biological parent. Our society expresses a preference for the natural parent, but

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1. 405 U.S. 645, 651 (1972)
2. In re Garnet, Civil No. 515 (Ct. Spec. App. Md. 1974).
3. E.g., S.K.I. v. Smith, 480 S.W. 2d 119, 123
4. See In re Gault, 387 U.S. 1, 14-19 (1967)

children are fully capable of thriving under the loving care of a nonbiological parent. This, of course, is the basis of adoption. In their seminal book, Beyond the Best Interests of the Child, Joseph Goldstein, Anna Freud, and Albert Solnit use the term "psychological parent"[5] to describe an adult with whom the child develops a consistent, loving relationship. They point out that this relationship is based upon

> . . . day-to-day interaction, companionship and shared experiences. This role can be fulfilled either by a biological parent or by an adoptive parent or by any other caring adult--but never by an absent, inactive adult, whatever his biological or legal relationship to the child may be.[6]

It is clear that a child separated from his psychological parent for a significant period of time suffers intense trauma and possibly permanent emotional damage.

The termination proceeding, therefore, is an essential legal mechanism for assuring to a child his right to a "psychological parent" in cases where his natural parent has failed to establish a loving and caring relationship. While this need of the child to have the attention of a psychological parent lacks the venerable legal credentials of the natural parent's hereditary right to the child, it is an interest that is increasingly being recognized by the courts.

The three standards under consideration all operate on the philosophical premise that a child has an inalienable right to consistent love and adequate parental nurture in a home or family environment. The issue is no longer a two-sided one between parents and the state with the child as a chattel or pawn to be fought over. It has, in the past decade or two, become a triangular problem with parent, state, and child each having rights, powers, privileges, immunities, duties, and obligations. Often the state, through the juvenile court, is expected to act as an arbitrator between the competing claims of parent and child.

Moreover, because of a child's heightened sense of time, a child's rights must be responded to more quickly than those of an adult. The need of a child to receive love and care from an adult is both crucial and urgent. This need must be fulfilled at an early age to insure normal emotional growth. A child who is without parental care and affection suffers profound and immediate damage. Hence, Goldstein, Freud, and Solnit think that courts must act with "all deliberate speed: to place the child with an adult who is or can soon become a "psychological parent."

> The courts, social agencies, and all the adults concerned with child placement must greatly reduce the time they take for decision. While the taking of time is often correctly equated with care, reasoned judgment, and the assurance of fairness, it often also reflects too large and burdensome

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5. (The Free Press 1972).
6. Id., at 19.

> caseloads or inefficiently deployed resources. Whatever the cause of the time-taking, the costs as well as the benefits of the delay to the child must be weighed. . . .Therefore, to avoid irreparable psychological injury, placement, whenever, in dispute, must be treated as the emergency that it is for the child.[7]

As a result of the potentially countervailing interests of parent and child, there are two major conflicts which can arise in the involuntary termination proceeding, one substantive and the other procedural. The substantive conflict puts the parent's hereditary interest in a child against the child's need to receive love and care from a suitable psychological parent. This is the underlying substantive conflict in all involuntary termination cases. The procedural issue is usually phrased in a dispositional context - whether termination of parental rights will be in the best interests of the child. Thus, today, a child's interests are of significant importance in deciding whether to terminate; in fact, it is customary to state that the child's interests are paramount.

II. COMPARISON OF PROPOSED STANDARDS

A. Prior Model Statutes

1. Children's Bureau Legislative Guides. The creditable national standard for termination was proposed by the U.S. Department of Health, Education and Welfare's Children's Bureau in 1961. Under the supervision of Harriet L. Goldberg, LLB, and Ph.D., a 41-page pamphlet, entitled "Legislative Guides for the Termination of Parental Rights and Responsibilities and the Adoption of Children"[8] was published. The philosophy expressed therein reflects the social work approach of two decades ago. Primarily, it sought to balance the parental rights against parental responsibilities rather than to establish an equation between parent's and children's rights. Moreover, these H.E.W. guidelines were predominantly concerned with the social phenomena of voluntary relinquishment of an unwanted child preparatory to its placement for adoption.

The primary thrust of these 1961 guidelines for suggested legislation was revealed by its Purpose clause which states, in part:

> . . . the issue of severing the parent-child relationship is of such vital importance as to require a judicial determination in place of attempts at severance by contractual arrangements, express or implied, for the surrender of relinquishment of children.[9]

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7. Id. at 42-43.
8. Children's Bureau Publication No. 394 (1961).
9. Id. at 37.

The tenor of the discussion as well as the suggested legislative language was to the effect that judicial action is a more dependable method for the voluntary severance of parental rights by an unwed mother seeking to place her child for adoption than informal relinquishment procedures. Its stated purpose was to establish an efficacious and legally valid seal of approval upon the transference of legal rights from biological parents to adoptive parents. This goal was intended to prevent social agencies from being placed in awkward or difficult positions.

Involuntary termination of parental rights was described as infrequent. Nevertheless, the guide suggested certain procedures for the filing of a petition for involuntary termination. It proposed that such petitions could be filed by:

a) either parent where termination is sought with respect to the other parent;
b) the guardian of the child's person or legal custodian or person standing in loco parentis to the child;
c) an authorized agency; or
d) any other person having a legitimate interest in the matter.[10]

These 1961 Legislative Guides for the Termination of Parental Rights and Responsibilities recommended four grounds for involuntary termination, namely;[11]

a) that the presumptive parent (legal father) is not a natural parent of the child;
b) that the parent has abandoned the child, in that the parent has made no effort to maintain a parental relationship with the child;
c) that the parent has substantially and continuously or repeatedly neglected the child; or
d) that the parent is unable to discharge parental responsibilities because of mental illness or mental deficiency, and there are reasonable grounds to believe that such a condition will continue for a prolonged indeterminate period.

No mention was made of a child's rights in the proceeding. But, where involuntary termination is discussed, the legal procedures recommended are similar to those enunciated in more recent standards.

2. Uniform Juvenile Court Act. In July 1968, at its Annual Conference in Philadelphia, Pa., the National Conference of Commissioners on Uniform State Laws approved and recommended for enactment in all the states a Uniform Juvenile Court Act.[12]

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10. Id. at 14.
11. Id. at 40-41.
12. Published by the National Conference of Commissioners on Uniform State Laws (1968).

Section 47 of that Act is entitled "Termination of Parental Rights" and reads as follows:

SECTION 47. (TERMINATION OF PARENTAL RIGHTS.)
(a) THE COURT BY ORDER MAY TERMINATE THE PARENTAL RIGHTS OF A PARENT WITH RESPECT TO HIS CHILD IF:

1. THE PARENT HAS ABANDONED THE CHILD:
2. THE CHILD IS A DEPRIVED CHILD AND THE COURT FINDS THAT THE CONDITIONS AND CAUSES OF THE DEPRIVATION ARE LIKELY TO CONTINUE OR WILL NOT BE REMEDIED AND THAT BY REASON THEREOF THE CHILD IS SUFFERING OR WILL PROBABLY SUFFER SERIOUS PHYSICAL, MENTAL, MORAL, OR EMOTIONAL HARM: OR,
3. THE WRITTEN CONSENT OF THE PARENT ACKNOWLEDGED BEFORE THE COURT HAS BEEN GIVEN.

(b) IF THE COURT DOES NOT MAKE AN ORDER OF TERMINATION OF PARENTAL RIGHTS IT MAY GRANT AN ORDER UNDER SECTION 30 IF THE COURT FINDS FROM CLEAR AND CONVINCING EVIDENCE THAT THE CHILD IS A DEPRIVED CHILD.[13]

Thus, by 1968, the order of importance, as between voluntary and involuntary termination, seems to have been inverted. Abandonment and deprivation precede consensual relinquishment as grounds for termination. The commentary to this section of the Act states:

> The second ground goes beyond many statues in requiring the irremediable character of the deprivation and a serious harm to the child. If these conditions are not found to exist, the last sentence permits the court to make the usual order in deprivation cases.
>
> Acknowledgement of consent before the court is designed to assure the consent will not be given in a climate of emotional stress or under undue pressure.[14]
>
> The balance of the comments are concerned with the finality and efficacy of the judicial termination procedure as compared to the uncertainty of relinquishment for adoption by written consent. Sections 48 and 40 establish the nature of the judicial process and the effect of an order terminating parental rights.

A trend from proceedings that were ministerial (in order to provide validity for social service adoptive actions) rather than obligatory upon the judiciary (in order to protect children's rights) is implicit in the change in emphasis from the 1961 Children's Bureau Publication No. 394 to the 1968 Uniform Juvenile Court Act.

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13. Id. at 38.
14. Id.

B. National Advisory Committee Standard 3.185

The First of the three LEAA-supported groups to publish its recommendations on termination of parental rights was the Advisory Committee to the Administrator on Standards for the Administration of Juvenile Justice, a subcommittee of the National Advisory Committee for Juvenile Justice and Delinquency Prevention. With the Honorable Wilfred W. Nuernberger as Chairperson and Richard Van Duizend as Staff Director, this group made its report on September 30, 1976. Even though it published first, it frankly acknowledged that its principal sources were (1) the R. Burt and M. Wald Draft which, in large part, became the IJA/ABA Standard on "Abuse and Neglect" and (2) Task Force Standard 14.32 which was then in final draft form and was published two months later.

Nevertheless, the approach of the National Advisory Committee is broader and more traditional than the recommendations of the other two standard groups. It seems to have drawn upon both Children's Bureau Publication No. 394 and the Uniform Juvenile Court Act. It authorizes a Family Court to terminate parental rights in both voluntary and involuntary petitions. Its recommendations make the decision subject to judicial discretion by authorizing but not requiring termination. In this respect, it differs from its two counterparts that mandate judicial action if certain circumstances and conditions are established. However, the trend towards more initiative and a more active role by the courts previously noted continued. The National Advisory Committee's Comments quote with approval from Judith Areen's article, "Intervention Between Parent and Child: A Reappraisal of the State's Role in Child Neglect and Abuse Cases"[15] and speak of situations in which the judiciary "should consider terminating a juvenile's legal relationship to his or her parents."

Like its two counterpart groups, the National Advisory Committee spells out circumstances when parental rights should not be terminated--a sort of self-denying ordinance. These conditions include cases where:

a) such closeness of the natural parent-child relationship exists that termination would be detrimental to the child;
b) the child has been committed to a residential facility because of physical or mental health problems and termination is not necessary to provide a permanent family home;
c) the child has been placed with a relative who does not wish to adopt;
d) the child cannot be placed in a family environment; or
e) the child objects to termination of parental rights.[16]

The transition from a focus upon the rights, responsibilities and fitness of the parent in their interface with social service agencies to a concern for the child's rights and interests is striking. Fifteen years earlier the entire emphasis was upon overt acts committed by the parent or the parent's incapacity to discharge their duties. Two of the above five conditions recommended by the

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15. 63 Geo. L.J. 887 (1975).
16. National Advisory Committee for Juvenile Justice and Delinquency Prevention, Report of the Advisory Committee to the Administrator on Standards for the Administration of Juvenile Justice, 157 (September 30, 1976).

National Advisory Committee in 1976 are entirely subjective to the child. (The quality of the parent/child relationship concerns both the child's and the parent's feelings. The final condition, by placing the termination decision solely in the control of the child, grants full reign to the child's right of self-determination.)

The full text of the NAC's recommended criteria for termination of parental rights is as follows:

> THE FAMILY COURT SHOULD BE AUTHORIZED BUT NOT REQUIRED TO TERMINATE PARENTAL RIGHTS WHEN:
>
> a. A JUVENILE HAS BEEN ABANDONED, AS DEFINED IN STANDARD 3.113(a);
> b. A JUVENILE HAS BEEN PHYSICALLY ABUSED AS DEFINED IN STANDARD 3.113(b);
> c. A JUVENILE HAS BEEN REMOVED FROM THE HOME PURSUANT TO STANDARD 3.184 AND HAS REMAINED IN OUT-OF-HOME PLACEMENT FOR 6 MONTHS OR MORE;
> d. A JUVENILE'S PARENTS HAVE PREVIOUSLY BEEN FOUND TO HAVE NEGLECTED OR ABUSED THAT JUVENILE OR ANOTHER JUVENILE IN THE SAME HOUSEHOLD; OR
> e. A JUVENILE'S PARENTS COMPETENTLY, VOLUNTARILY, AND INTELLIGENTLY CONSENT.
>
> PARENTAL RIGHTS SHOULD NOT BE TERMINATED IF: TERMINATION WOULD BE DETRIMENTAL TO THE JUVENILE BECAUSE OF THE CLOSENESS OF THE PARENT-CHILD RELATIONSHIP; THE JUVENILE HAS BEEN PLACED IN A RESIDENTAL FACILITY BECAUSE OF HIS OR HER PHYSICAL OR MENTAL HEALTH PROBLEMS AND TERMINATION IS NOT NECESSARY TO PROVIDE A RELATIVE WHO DOES NOT WISH TO ADOPT HIM OR HER; THE JUVENILE CANNOT BE PLACED IN A FAMILY ENVIRONMENT; OR THE JUVENILE OBJECTS.[17]

C. Task Force Standard 14.32

Soon after the NAC published its Report, the National Advisory Committee on Criminal Justice Standards and Goals, in December 1976, published its 822 page Report of the Task Force on Juvenile Justice and Delinquency Prevention. Its views on the termination of parental rights are set forth with economy of expression in Standard 13.32. Under the heading of Postdispositional Monitoring of Endangered Children-Termination of Parental Rights, Standard 14.32 states:

> STATUTES GOVERNING TERMINATION OF PARENTAL RIGHTS SHOULD BE PREMISED ON THE CHILD'S NEED FOR A PERMANENT, STABLE FAMILY HOME, NOT ON PRINCIPLES RELATED TO PARENTAL FAULT. THEREFORE, TERMINATION SHOULD BE REQUIRED IF THE CHILD CANNOT BE RETURNED HOME WITHIN 6 MONTHS TO 1 YEAR AFTER PLACEMENT, DEPENDING ON THE CHILD'S AGE, UNLESS:
>
> 1. TERMINATION WOULD BE HARMFUL TO THE CHILD BECAUSE OF THE STRENGTH

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17. Id.

OF THE CHILD'S FAMILY TIES;

2. THE CHILD IS PLACED WITH A RELATIVE WHO DOES NOT WISH TO ADOPT THE CHILD:

3. THE CHILD IS PLACED IN A RESIDENTIAL TREATMENT PROGRAM AND TERMINATION IS NOT NECESSARY TO PROVIDE A PERMANENT FAMILY HOME; OR

4. THERE IS A SUBSTANTIAL LIKELIHOOD THAT A PERMANENT PLACEMENT CANNOT BE FOUND AND THAT THE FAILURE TO TERMINATE WILL NOT JEOPARDIZE THE CHILD'S CHANCES OF OBTAINING A PERMANENT PLACEMENT.[18]

The page and a half of commentary accompanying this terse standard reveal an explicit change in emphasis, stating:

> This standard proposes a major shift in the structure of termination laws. Most State statutes now focus largely on the parents rather than the child. They allow termination only if the parents are in some way blameworthy, because they have either abandoned the child or engaged in other types of disapproved conduct. Few statutes require that the need for termination be considered after the child has been in care for a given period of time. As a result, termination is an infrequent occurrence. . . .These standards require that every effort be made to either return the child to the home or provide another permanent placement in a reasonable period of time.[19]

Because of numerous failures of existing judicial procedures and of social agency practices described in the commentary, Task Force Standard 14.32 does not recommend that the matter be left to judicial discretion. Instead, it calls for generally automatic judicial action, stating: "termination should be required if the child cannot be returned home within 6 months to 1 year after placement."[20] However, like the National Advisory Committee, it proposes four exceptions to the operation of its presumptively-mandatory rule. In fact, its conditions are substantially the same as those urged by the National Advisory Committee. But, they do not provide that the child's own objections should be one of the grounds for not granting an otherwise justified termination.

By its tendency to command termination by the judiciary in specified circumstances, rather than to authorize it subject to judicial discretion, the Task Force Standard differs markedly from the National Advisory Committee's recommended criteria. In this respect, it exceeds even the requirements of the IJA/ABA Standards which use less preemptory language -- "a court should order termination".[21] The Task Force seems more concerned with requiring the court to enforce diligence by social service agencies and to act to break the impasse when results have not been achieved, than with the child's right to self determination.

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18. National Advisory Committee on Criminal Justice Standards and Goals, Report of the Task Force on Juvenile Justice and Delinquency Prevention, 500 (1976).
19. Id., at 500-01
20. Id., at 500.
21. IJA/ABA Juvenile Justice Standards Project, Standards Relating to Abuse and Neglect, 154 (Tentative Draft 1977).

D. IJA/ABA Tentative Standard

Curiously, the last standard to be published was the product of research which began two or three years prior to the work of the other organizations. In fact, the thoroughness of the IJA/ABA basic research so commended itself to the other two groups that the fundamental principles underlying both the National Advisory Committee Report and the Task Force Report depend to a large extent upon the work of the IJA/ABA Joint Commission on Juvenile Justice Standards. The Joint Commission's views on termination are included in the tentative draft volume of "Standards Relating to Abuse and Neglect" published early in 1977. They were prepared by Drafting Committee I of the Commission under the cochairmanship of Margaret K. Rosenheim and William S. White. Robert Burt and Michael Wald were the reporters. Part VIII contains the standards pertaining to "Termination of Parental Rights."

At its meeting in November 1977, the IJA/ABA Executive Committee accepted a number of suggested revisions to Part VIII and voted to rewrite that entire section in order to insure that termination of parental rights should have separate pleadings and that termination should not be considered at the initial dispositional hearing. Consequently, Part VIII is currently being redrafted. Its new black-letter standards and commentary will be resubmitted to the American Bar Association for consideration by the House of Delegates later in 1979.

Regardless of the current revisions, the purpose of these recommended termination procedures is made clear in the existing Commentary:

> . . . a central goal of these standards is to end long-term, unstable foster placements. To do this, the standards propose that, in general, a child either should be returned home or freed for adoption or other permanent placement within a year of the time he/she enters foster care. The preferred disposition is to return a child to his/her natural parents. Standards to accomplish this are found in Part VII. However, in a number of cases, perhaps even the majority of cases, if children are removed only as a last resort, return will not be possible. In such cases termination of parental rights may be essential in order to provide the child with a permanent home.[22]

The language of the IJA/ABA standards on termination might be termed "insistent commendatory"; they stop just short of being mandatory. The intent seems to be to require courts to explore the possibility of termination as a means of finding a permanent home for an abandoned, abused or neglected child. The IJA/ABA Standard speaks in terms of "general rules", but do allow a certain degree of discretion. The attitude of IJA/ABA is well stated in the following quotations from the Commentary:

> Regular consideration of the issue of termination is essential if children are to be provided permanent homes. No other system has generated adequate agency action. The tendency to leave children in foster care for years is so great that strong measures are needed to change the system.

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22. Id., at 149.

. . .The proposed standards do not require termination; the exceptions may provide judges with a way to keep open the possibility of reuniting parents and child. However, the standards should force courts, agencies, and parents to face realistically the question of whether reunion will occur.[23]

The plan of action recommended by the tentative draft of the IJA/ABA standards on termination of parental rights provided that, with certain urgent exceptions, the court should not consider termination immediately following the original disposition hearing, but that consideration of termination at a separate hearing should be required at regular intervals of time thereafter. The circumstances (standard 8.2)[24] which were regarded as sufficiently urgent to permit a judge to consider termination immediately following an initial disposition hearing include abandonment, repeated physical abuse of children in the same family, or removal of an abused child followed by return and subsequent removal again. But, as a result of concerns expressed, the IJA/ABA Executive Committee has recommended that the important issue of termination should never be considered at an initial dispositional hearing, but should be considered separately from other dispositional or review matters in an independent judicial hearing. As indicated above, new language is being drafted to make this explicit.

The most convincing reason for this revision seems to be the need to exercise such an awesome authority as permanent severance of family ties with great caution and deliberation. The recommended exceptions to such intended delay are all instances in which the risks to the child seem to outweigh the benefits of patient deferment of the decision. In all cases, judicial proceedings which might result in termination would be the subject of separate legal pleadings.

IJA/ABA Standard 8.3 recommends two different fixed time periods of placement at the end of which the court should order termination unless the child can be returned home. For children under three at the time of placement, the period proposed is six months, for children over three, the suggested period is one year. As the Commentary says:

> Termination would be the norm after a child has been in care a given period of time unless there are specific reasons, spelled out in 8.4, why termination should not be ordered. . . Because the harms of lengthy placements are likely to be greater when the child is younger, and the harm from termination greater for older children, the time periods chosen vary with the child's age.[25]

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23. Id., at 150, 156.
24. Id., at 151.
25. Id., at 155.

Although references are made to social and behavioral research, the exact periods (six months and one year) and the specific age chosen as a division point seem essentially arbitrary. However, since they are novel among the several standards, there is nothing with which to compare or contrast them.

Like Task Force Standard 14.32 and the National Advisory Committee's criteria, IJA/ABA Standard 8.4 provides that a court should not order termination if any one of four defined situations exist which would make termination unnecessary or might make it detrimental[26]--the self-denying provision mentioned previously.

The IJA/ABA Joint Commission joined the National Advisory Committee in honoring a child's personal and individual right to object to termination, but limited this absolute veto power to children over ten years of age. The Commentary indicates that the wishes of children under ten years about termination should be given great weight, but should not be conclusive. The IJA/ABA Commission concedes that selection of the age ten is essentially arbitrary. But their decision does reflect a growing conviction that children should be given substantial powers of self determination in decisions affecting their lives, in accordance with their maturity and their capacity to exercise judgement.

III. MODEL ACT TO FREE CHILDREN FOR PERMANENT PLACEMENT

(Unpublished July 1978 Draft)

In 1975 H.E.W.'s Office of Child Development engaged Professor Sanford N. Katz of Boston College Law School to draft a model termination statute. This project has not yet been completed, but a current draft (revised July 5, 1978) was made available by Professor Katz. It contains 43 pages of recommended statutory language and an equal number of pages of commentary. It suggests judicial procedures for both voluntary and involuntary termination of parental rights in much greater detail than the other three standards under consideration. Although complete and specific evaluation of his proposals may be inappropriate at this time, because it is still in the drafting stage, certain trends are evident.

The philosophical roots of the Model Act to Free Children for Permanent Placement are clearly in the 1961 Legislative Guides published in H.E.W.'s Children's Bureau Publication No. 394. Many of its provisions concern the establishment of precise legal relationships of special importance to social service adoptive agencies. It declares that:

> . . . because termination of the parent-child relationship is so drastic, all non-judicial attempts by contractual arrangements, express or implied, for the surrender or relinquishment of children, are invalid unless approved by the court.[27]

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26. Id., at 157-58.
27. Katz, S., Unpublished draft of Model Act to Free Children for Permanent Placement (With Commentary) 2 (Revised July 5, 1978).

As currently drafted, the Model Act is much more solicitous of the views and rights of the child than was the earlier H.E.W. publication. It provides that, when the child's interests and parental rights conflict, the interests of the child shall prevail. It requires the appointment of an attorney as guardian ad litem for a child in all petitions for involuntary termination, directs the court to evaluate the child's wishes and feelings towards natural parents, and provides a child over 14 years with veto power over the termination process.

However, the proposed Model Act would depend to a large extent upon the wise discretion of the juvenile court judge before whom a termination petition is brought. Its purpose section provides:

"(3) if a child has been removed from his home for one year and cannot be returned home within a reasonable time thereafter, the state should promptly find an alternative arrangement to provide a stable, permanent home for him."[28]

This provision accepts the importance of prompt judicial action--after one year of placement -- but has none of the automatic features of the IJA/ABA standards or Task Force Standard 14.32. Instead, it urges that the court intervene after one year and adjudicate issues according to specific criteria of abandonment, abuse and neglect. The burden of proof remains upon the petitioner and is subject to affirmative findings by the court. In these respects the draft Model Act parallels the approach of the National Advisory Committee Report but with far greater detail.

IV. TIME LIMITS FOR TERMINATION DECISIONS

The procedural conflict involved in a termination proceeding concerns time. Any statute that authorizes termination of parental rights must provide the natural parent with every reasonable legal right in the presentation of his case. The exercise of these rights, especially the right to appeal, can take considerable time unless expedited by statute or court rule. On the other hand, because of the immediate damage that a child will suffer when it lacks the love and care of an adult even for a short period, the termination statute should mimimize the time that a child's home life is disrupted or the child is without parental care. The statute must, therefore, ensure that justice be done, but swiftly. Even the wisest and most humane disposition may be in vain if the child is forced into limbo for too long. Additionally, such legislation will need to provide the parent with the full range of legal rights which is his due, but minimize the time during which the status of the child is uncertain.

Petitions for termination of parental rights come to the court with an urgency not present in most other cases. This urgency stems from the child's heightened sense of the passage of time. What may seem an acceptable delay to an adult can be a profoundly damaging period of loneliness and lovelessness to a child. Since the status of the child is the gravamen of the termination proceeding, that proceeding should be conducted according to the demands of a child's sense of time, not an adult's.

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28. Id., at 1.

Several of the guidelines for termination of parental rights advanced have had as one of their main purposes the prodding of those responsible to make swift decisions regarding the future of the child. Termination statutes should authorize explicitly the court to hear the termination proceeding on an expedited basis. Only such time as is necessary to provide for adequate representation should be permitted between the filing of the petititon and the hearing of the case. Once a decision has been reached by the trial court, the appeals process should also be expedited. Statutory language to insure suitable time limits is recommended.

Goldstein, Freud, and Solnit have argued persuasively that durational standards are artificial where children are concerned since the "process through which a new child-parent status emerges is too complex and subject to too many individual variations for the law to provide a rigid statutory timetable."[29] It is true that the court should not be concerned with questions of the passage of arbitrary periods of time, but with whether the child's relationship with his natural parent is irreparably damaged, or whether the child has entered into a new psychological parent-child relationship. However, until behavioral scientists can provide more objective criteria for the determination of such factors, more traditional time concepts acceptable to the judicial system may be necessary. For the sake of both the parent and the child, there should be some outer limit to the period of time during which a decision to terminate can be effected. While durational "limits" of this sort too frequently become timetables for acting rather than the cut-off points they were intended to be, such limits are necessary either to encourage the responsible social service or placement agency to act promptly in those cases in which termination may be warranted, or to remove the threat of termination from the natural parent whose child has been adjudicated neglected.

The central issue in appraising the three currently proposed standards for termination is not whether they recognize the urgency of time in child placement and termination cases. To a large degree, all three standards accept the principle that the longer a child remains in a foster care or substitute home placement, the less chance there will be to establish permanent parent/child relationships. Commentators have indicated that a child who is not returned home within 12 to 18 months tends to remain in foster care for many years, often until his or her adulthood.

Under most existing state laws, the Children's Bureau Legislative Guidelines, and the Uniform Juvenile Court Act, no time limits are set for termination decisions. Similarly, there is no fixed time frame for judicial review of the status of children in placement. Under such procedures, termination occurs upon a petition by the agency or other interested party when specific criteria have been established in an adjudicative procedure. Proponents of this approach strongly support a wide reading of parens patriae powers and favor vesting social service agencies and courts with considerable discretion in the application of standards.

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29. Goldstein, Freud & Solnit, Beyond the Best Interests of the Child 48, (Free Press 1972).

The NAC criteria for termination suggest flexible time periods during which certain rebuttable legal presumptions will apply, all subject to the exercise of judicial discretion. In contrast, the IJA/ABA tentative standards and Task Force Standard 14.32 provide for automatic termination after the child has been in placement for a specified period of time, subject to certain qualifying exceptions. Thus, the IJA/ABA tentative standards (8.3) recommend that the court order termination after six months in placement for a child under three years of age and after one year in placement for a child over three. Task Force Standards 14.32 is not as explicit, but suggests similar time frames.

The difference between these positions is based on fundamentally different philosophies about the effectiveness of human choice in such proceedings. Because the exercise of such discretion has not been successful previously in providing permanent placements for abandoned, abused and neglected children, those who drafted the Task Force and IJA/ABA standards felt compelled to make judicial action mandatory. The National Advisory Committee followed past procedures and continued to rely upon the wisdom of judicial and social agency deliberations.

V. THE RELATIONSHIP BETWEEN TERMINATION AND ADOPTION

For both the parent and the child, the essence of the law's function in termination proceedings is to provide the greatest permanence of parent-child relationships and thereby insure that the child is receiving love and care. Termination of parental rights should not be used as a judicial sanction or expression of community censure for parental inadequacy. Nor is termination usually necessary to protect the immediate welfare of the child since, in most instances, that function is served by neglect statutes. A decision to terminate parental rights should not simply extinguish an unsuccessful parent-child relationship without making provision for the creation of a more promising relationship. Yet current termination statutes usually do not require the court to plan for or even look into the child's future adoption.

The primary purpose of a termination process is the assurance of the child's adoption or some other permanent placement. A child is better served by continuing ties to the natural parent than by serving all rights of the natural parent with only the vague hope that the child will one day be adopted. The record of social service agencies in finding suitable adoptive placements for troubled children is too uncertain to presume that the child will be eventually be adopted. No termination proceeding should make a child an orphan moving from one institution or foster home to another, without even nominal ties to a natural parent.

The three standards currently under consideration (NAC criteria, Task Force Standard 14.32, and IJA/ABA Abuse and Neglect Standards, Part VIII) all explicitly or implicitly recognize the intimate connection between termination proceedings and the creation of a new parent-child relationship in a permanent, stable family home. The National Advisory Committee's Report, for example provides that:

> FOLLOWING TERMINATION, THE JUDGE SHOULD BE AUTHORIZED TO ORDER THE JUVENILE TO BE PLACED FOR ADOPTION, PLACED WITH A LEGAL GUARDIAN, OR IF NO OTHER ALTERNATIVE IS AVAILABLE, PLACED IN LONG-TERM FOSTER CARE. THE CASE SHOULD BE REVIEWED BY THE FAMILY COURT EACH YEAR UNTIL A PERMANENT PLACEMENT HAS BEEN MADE.[30]

In similar fashion, the IJA/ABA tentative standards declare:

> WHEN PARENTAL RIGHTS ARE TERMINATED, A COURT SHOULD ORDER THE CHILD PLACED FOR ADOPTION, PLACED WITH LEGAL GUARDIANS, OR LEFT IN LONG-TERM FOSTER CARE. WHERE POSSIBLE, ADOPTION IS PREFERABLE. HOWEVER, A CHILD SHOULD NOT BE REMOVED FROM A FOSTER HOME IF THE FOSTER PARENTS ARE UNWILLING OR UNABLE TO ADOPT THE CHILD, BUT ARE WILLING TO PROVIDE, AND ARE CAPABLE OF PROVIDING, THE CHILD WITH A PERMANENT HOME, AND THE REMOVAL OF THE CHILD FROM THE PHYSICAL CUSTODY OF THE FOSTER PARENTS WOULD BE DETRIMENTAL TO HIS/HER EMOTIONAL WELL BEING BECAUSE THE CHILD HAS SUBSTANTIAL PSYCHOLOGICAL TIES TO THE FOSTER PARENTS.[31]

In addition, this consultant and another attorney, Richard F. Babcock, Jr., recommended in an article entitled "Statutory Standards for the Involuntary Termination of Parental Rights",[29] Rutgers Law Review 530, 543 (1976) that the judge should enter an interlocutory or provisory order terminating the rights of the natural parent conditional upon the successful adoption of the child. The court would then retain jurisdiction of the case for a specified period of time. If at the end of that period the child had not been adopted, the court could either rescind the termination order and restore parental rights to the natural parent, extend the duration of the interlocutory order to permit further efforts to find an adoptive home, or, as a last resort, place the child in a long-term foster home. Ideally, the child whose ties to the natural parent had been severed on on an interlocutory or conditional basis would be swiftly placed in an adoptive home. If the adoptive home were then tested and found satisfactory, the court would then approve the final order of adoption, thus closing the last link in the proceeding and justifying the court in making the termination order final and irreversible. Should the agency responsible for placing the child be dilatory, the court, through its continuing jurisdiction, would have the supervisory power to spur it on. Furthermore, the placement agency would be working under a deadline, the date the interlocutory order expires, and therefore, would have a continuing incentive to find an adoptive home as quickly as possible.

The article recommended that an interlocutory termination order, authorized by statute, be used as a standard procedure in most, if not all proceedings for the involuntary termination of parental rights. This should serve as a procedural mechanism for insuring both that the child is provided with new and better parents through adoption and that the adoption is effected swiftly enough to comport with the child's heightened sense of the passage of time. Proposed language (which the IJA/ABA Executive Committee might use to effect such a linkage between termination and permanent placement could be included when the IJA/ABA rewrites Part VIII, 8.5(A) of the Tentative Draft Standards relating to Abuse and Neglect) is as follows:

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30. NAC, supra note 16, at 157.
31. IJA/ABA, supra note 21, at 161-62.

8.5 Actions Following Termination

A. When parental rights are terminated, a court should enter an interlocutory order terminating parental rights and should also order that the child be placed for adoption or otherwise permanently placed within one year. As soon thereafter as the court receives written notice of the child's adoption or otherwise permanent placement, the court shall make its interlocutory order final. If at the end of one year the child in question has not been adopted or otherwise permanently placed, the court shall hold a hearing to review the case. After such a judicial hearing the court should either (a) extend its interlocutory order and make further efforts to place the child permanently or (b) terminate its previous interlocutory order and restore parental rights to the biological parents, or (c) place the child in a long-term foster home under the supervision of the court. Where possible, adoption is preferable... etc. ...

B. ... etc. ...

Although the ultimate goal should always be adoption because of its desirable status in American family life, it is conceded that difficulties in finding an adoptive family for every abandoned, abused or seriously neglected child do exist. Because of this shortfall of adoptive homes, other permanent, stable solutions that have been developed are given recognition by the new standards.[32] Some states have developed laws which subsidize potential adoptive families otherwise unable to accept total financial responsibility for a child. In some instances, a new type of long-term, permanent foster home placement has been created to fill this gap in services to children needing adoption who, by existing standards, are not adoptable. In some areas special social service agencies have been established to serve the hard-to-adopt child. And finally, increasing use is being made of guardians ad litem, with or without legal expertise, compensated or volunteer, who make it their responsibility to persistently seek a final, permanent solution for their juvenile clients.

VI. THE PROTECTION OF INDIVIDUAL RIGHTS OF PARENTS AND CHILDREN

In view of the importance of parental rights to our family-oriented community norms, it is of critical importance that any legal procedures concerned with termination provide for the protection of individual rights.

Any statute which authorizes a judge to terminate involuntarily all parental rights will have to ensure that the parent's interest is not unnecessarily infringed by arbitrary state action and that the parent is provided with the full panoply of legal rights necessary before termination is ordered. As a minimum, this requires that the basis for the state's intrusion of family autonomy is clearly delineated. In addition, the parent who is brought to court in termination proceedings must receive notice and a fair hearing, including representation by counsel, an opportunity to cross-examine witnesses, to present evidence, and, if necessary, to appeal.

The child as well as the parent also must be provided with due process of law if his or her rights are to be protected. This requires that the child, even more than a parent, be guaranteed the assistance of legal counsel in all involuntary termination proceedings. The tentative draft of the Model Act to Free Children for Permanent Placement recommends, in Section 12(d) and 14, that an independent attorney, "preferably one who is experienced in the field of

32. Id. at 162-63.

children's rights"[33] be appointed as a guardian ad litem for every such child. Not only do most of the new standards provide that the legal rights and the best interests of the child be paramount, they also recommend that the child's right of self-determination be honored or at least given serious consideration in accord with the child's maturity and capacity to make independent judgments. Thus, the IJA/ABA existing commentary states:

> "The standard reflects the conviction that children should be given a substantial say in decisions affecting their lives in accordance with their capacity to exercise judgement."[34]

Attorneys appointed to represent such children are expected to consult the child's wishes and to give them great weight in formulating the child's posture towards the termination proceedings.

All three standards under consideration, in contrast to the legislative standards suggested 17 years ago, place a high priority upon the individual human rights of the child as a person. The new attitude towards children's rights is a refreshing change that has occurred in recent years. It is especially pertinent because the United Nations has declared 1979 to be the International Year of the Child in celebration of the twentieth anniversary of the adoption of the U.N. Declaration of the Rights of the Child on November 20, 1959.

VII. FUNDAMENTAL ISSUES TO BE RESOLVED BY THE STANDARDS

A. From Whose Perspective Should the Decision to Terminate Be Made?

Throughout history parents have been accorded special privileges and assigned extraordinary obligations towards their natural offspring. The relationship has been called a "primordial bond." Thus, in a society such as ours which cherishes family autonomy and integrity, the parental point of view is a strong contender. If this is the perspective to be chosen, termination should only be decreed if the parent has breached his or her duties to the child and to the state.

The creation of the nation state with special concern for its citizens in return for national allegiances has led to a steady growth in state intervention into private lives allegedly for the best interests of the person or the nation. This has been especially true of children in American society during the twentieth century. The principle of parens patriae suggests that a decision to terminate parental rights ought to be viewed from the perspective of the state in assuring the welfare of all its citizens, particularly the potential of the children who will become its future citizens.

Finally, during the past decade, there has been an emerging belief that every individual has a substantial right of self-determination. Thus, the child whose associations and ties to his or her natural parent may be terminated has a

33. Model Act, supra note 28, at 48.
34. IJA/ABA, supra note 21, at 161.

particular and very personal point of view on the issue. If it is true, as has often been proclaimed, that the child's interest is the polestar of all juvenile court proceedings, termination procedures should be viewed primarily from the child's point of view. Certainly, this is the direction towards which the three standards under consideration all lean.[35]

B. By Whom Should Procedural Standards for Termination Be Established?

American constitutional theory describes our government as one of checks and balances among three independent branches --executive, legislative and judicial. But, there has been continuous debate about the nature and degree of power exercised by each independent branch of government. This continuing argument relates to the termination issue in that there is disagreement among the standards as to whether judicial authority to terminate parental rights should be tightly controlled by the legislative branch through explicit, detailed statutes, whether judicial action should merely be ministerial and in aid of executive decisions made by social service agencies, or whether the judiciary itself should be granted broad discretion to exercise its authority on a case by case basis according to the Judge's personal beliefs as to where the best interests lie.

The National Advisory Committee Report and the unpublished Model Act to Free Children for Permanent Placement suggest broad standards which would allow wide discretion. They tend to give ascendance to judicial authority in deciding when, how and upon what grounds to sever parental rights. On the other hand, Task Force Standard 14.32 and the IJA/ABA tentative standards relating to termination assign much greater power to the legislature because of an expressed distrust of either social service or judicial discretion in termination proceedings.

C. What Substantive Criteria Should Govern the Decision to Terminate?

There is a significant interrelationship between the question of who should have the power to decide the procedure and forum for the termination of parental rights and what criteria should be the basis for such a decision. If the original authority is vested in the legislature, detailed statutory provisions will tend to control. In that case there will be little room for flexible, empirical standards developed in individual cases. When direction by social agencies or by the judiciary exists, there is a greater need to provide guidelines as to what acts or omissions by a parent constitute that degree of abuse or neglect which justifies termination, or how the best interests of the child and his or her prospects for a stable, permanent family environment can be measured. The decision as to what grounds should govern also is effected directly by the perspective from which the termination process is viewed. Certain of the tests

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35. See, for example the essential elements in termination as viewed from the child's perspective set forth in Ketcham & Babcock, Statutory Standards for the Involuntary Termination of Parental Rights, 29 Rutgers Law Review 530 (1976), especially Part III at pp. 544-553.

identified below are much more relevant to the state's interest than that of the child or the parent, and vice versa. For example, alleged immorality or unfitness by the parent is primarily a societal judgment which pays little heed to the child's or parent's perception. Abandonment or physical abuse of a child as a ground for termination chiefly concerns actions from the parent's point of view, while the fact that biological parent has failed to develop a satisfactory psychological relationship with the child is a matter subjective to the child.

Depending upon how each set of standards answer Questions A and B above, there may be need to consider some or all of the following criteria for termination:

1. Abandonment of the child,
2. Physical abuse of the child,
3. Repeated or continued neglect of the child,
4. Failure to correct inadequate home conditions despite social service intervention and assistance,
5. Failure to support the child although able to do so,
6. Prolonged mental or physical incapacity of the parent,
7. Extended penal incarceration of the parent,
8. Illegal placement of the child by the parent,
9. A presumptive parent who is not the biological parent,
10. Placement of the child in impermanent foster care in excess of a pre-determined, maximum period of time,
11. Unfitness or immorality of the parent, or
12. A biological parent who has failed to establish a psychological relationship to the child.

D. What Time Restraints Should Be Used to Accelerate Termination?

As has been stated in the discussion under IV above, time and timing are matters of critical imporance in the termination and adoption continue. But there are many time related factors to be considered and balanced. Immediate termination after adjudication in most cases is too drastic, although complete abandonment or severe physical abuse may justify it. There is little reason to believe that a child will suffer significant harm by placement in a temporary foster home for six months or a year and then either be returned home or be provided with an adoptive home. However, after a child has been in foster care for longer than one year, the chances of returning home diminish rapidly. Moreover, as a rule of thumb, the older a child is, the smaller are his or her chances of being placed successfully in an adoptive home. The existing Commentary to the IJA/ABA tentative standards state:

> This standard is based on data indicating that length of time in care is the critical variable with regard to the likelihood of a child's being returned home, the amount of harm a child is likely to suffer as a result of being in foster care, and the likelihood of finding a permanent placement following termination.[36]

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36. IJA/ABA, supra note 21, at 155.

There is a tendency to associate time restraints, especially fixed time periods after which termination generally would be automatic, with those current standards that approach the issue from the child's perspective and utilize the power of the legislative branch to establish specific statutory provisions. But this need not be their only use. Even in statutes that authorize wide social agency or judicial discretion, it may be desirable to include time periods as frames of reference.

E. How Will Termination Be Linked to Permanent Placement of the Child?

Termination of parental rights is a judicial procedure used to reach a beneficial result for a child; a means to an end. It is vital to any termination standards that they be placed in context and not considered as substantive results in the best interests of a child. By analogy, it would be futile to establish exemplary procedures for the adjudication of juvenile delinquents if they were not followed by dispositional hearings. Various methods of linking the termination process to adoption or other permanent placement of the child have been described in V above. It is urged that specific language linking termination to adoption or some other form of permanent family placement, such as that proposed under V above, be included in any standards selected. The question is repeated here because of its importance and because it is often overlooked.

F. What Procedures Will be Used to Protect Individual Rights?

The significance of this issue has already been discussed in VI above. The question is included here solely to emphasize the need for standard-setting groups and state legislators to answer it in any comprehensive statute dealing with the termination of parental rights.

(WHEREUPON, Orm Ketcham's presentation was given and the following is the discussion that ensued.)

MR. SIEGEL: I thought the presentation was excellent.

I was especially glad that you pointed out dangers of the standard which mandates circumstances under which termination must take place.

I really think that is the wrong approach, and I am glad that he emphasized the importance of the rights -- excuse me -- of the child's right to object to termination.

Under what circumstances -- I mean, is that right controlling or would it be overridden under certain circumstances?

MR. KETCHAM: I think it is controlling.

Let's see, the language is --

MR. SIEGEL: Okay.

MR. KETCHAM: That parental rights should not be terminated if -- and I skipped the others, the juvenile objects.

Now, it is in the word "should," so I don't know.

But this is after all, all these are not statutes per se. It certainly seems to me that that is language which recommends that it be controlling.

The IJA/ABA says, "A Court should not order termination if it finds a clear and convincing evidence that a child over age ten objects to a termination.

It seems to me to be mandatory.

MR. SIEGEL: Okay. Good.

MR. KETCHAM: Or very controlling.

MR. MANAK: Okay, Mr. Rounds?

MR. ROUNDS: I have no comments.

MR. MANAK: Ms. Bridges?

MR. BRIDGES: Oh, I just wanted to say that the Simms case, which the Supreme Court has agreed to hear, is out of my Court -- if any of the Legal Aid people wish to harass me about it --

MR. MANAK: Okay.

Ms. Szabo?

MS. SZABO: I have the same problem Mr. Siegel raised.

Is there any provision to ascertain whether or not the child is voicing no objection?

MR. KETCHAM: No.

HON. CATTLE: At the insistence of the parents?

MR. KETCHAM: All of these standards, I believe, although in other sections, assure that anybody that is party to the proceedings, and a child is deemed party to the proceedings, certainly in the IJA/ABA, in the Advisory Committee standard, and I believe the Task Force standards, I don't think it's very -- I think it is in the Model Act, too, although it doesn't call them a party.

It does provide for counsel, and if a very young child, even for a guardian ad litem, plus a counsel.

So I think that the mechanism for expression is there, but not in this particular package.

MR. MANAK: Judge Delaney?

HON. DELANEY: I agree very much with what you say about the Court retaining jurisdiction, too, you know, monitor the placement of the child and to see that it is done expeditiously.

The suggested interlocutory decree is troublesome because a lot of the agencies won't take a case unless, you know, they undertake placement.

It seems to me if we -- if the Court has terminated parental rights, the child is still an order*of the Court, and the placement of custody with a child placement agency is a -- may be contingent upon their placement within a certain time.

What we do is set it for a review hearing every 60 days, and if the -- there is any material delay, for any unexplained reason, we threaten to place the child with somebody else -- keep the child away from the placement agency and we place the child or Court may place the child for adoption.

But I -- I agree that we have erred in the past in setting kids loose and turning them over to organizational service and forgetting about them.

I am sure the Court is not performing its judicial function if it does that.

MR. KETCHAM: Well, I obviously have chosen a startling mechanism -- interlocutory order, in this, because I think it needs a little jolting. And the social agencies have controlled this process over and above the Courts, too much in the past, and I

* "a ward"? "under order"?

think have done a poor job of it.

So I don't think we should defer to the social agencies and say that because they won't touch it, we won't involve ourselves.

And I think we better put pressures on them.

I have had the cases, and I am sure to have, too, Jim, in which what comes before you eventually is a child whom the mother wished to place for adoption, and wished to sign a consent order, at an early stage, but the agencies wouln't even accept the piece of paper because they didn't yet have an adoption home.

Then a year or so later they find an adoption home and they can't find the mother or anybody else, and they come into Court and ask us to pick up the pieces.

I know what you mean, but they won't tough it.

But I don't think we should stand on that.

MR. MANAK: Judge Arthur?

HON. ARTHUR: We have got a little procedure, a little bit like Jim's, this interlocutory thing we

review and so forth -- It hasn't worked very well, because as you are saying, the social agencies are monitoring these and it hasn't been very effective.

A bunch of us got to the legislature last spring to pass new law, and it's going along very heavily with what you are suggesting. Orm, if you need some backup, you might look at a Minnesota statute that passed this past spring.

MR. KETCHAM: Is this in place now?

HON. ARTHUR: Yes -- and we have only had a few cases on it, so it isn't tested, and it's probably got some rough edges, but it was put together with a little effort.

The other thing I would ask you, Orm, is on Page 5 in your paper you talk about inalienable rights, in which to me is maybe the guts of quite a bit of this termination process -- at least it is the place which has brought about most of the appeals I get in this area, and our Supreme Court has struggled with it on both ways.

They ususally start out by saying, "We are interested in the best interest of the child," but the parents rights are predominant.

My question is: Do any of the standards

go into any standards of evidence of what might prove this parental nurture, this consistent love, this kind of a thing -- is there any way of developing a whig more of evidence on this area?

MR. KETCHAM: The standards do not.

The standards commentary have some suggestions, but not much.

I think safely, although it is still imperfect, I think, that I will suggest this article that the concept in it, of these A and B categories, and the standards that would be required for developing that, I take no credit for because Dick Babcock developed the, but it is in that article on that.

A two-pronged type -- two types of cases with an effort, I think imperfect, but unless an effort to set forth those standards would be used to meet --

HON. ARTHUR: For those of us who may miss your other article, would it be possible to shift part of that as a footnote into this article?

MR. KETCHAM: As a footnote to the article? It is touch -- there is lots of footnotes.

HON. ARTHUR: I mean can you leave your language

and put it in here so that it would be available to those who read this?

MR. KETCHAM: Yes, yes, I can put that as an appendix to this, un huh.

HON. ARTHUR: We need the guidelines badly.

MR. MANAK: Judge Moore?

HON. MOORE: Again, I think it was excellent, I will emphasize that I concur that you, in your emphasis on interlocutory orders, I am not sure I exactly agree with that as a method.

I think that unfortunately the standards are not addressing themselves to this issue, and to me. This issue is much more important than perhaps how we dot the i's and cross the t's when we terminated.

MR. KETCHAM: Thank you.

MR. MANAK: Judge McLaughlin?

HON. MC LAUGHLIN: Just two comments.

One, I am fascinated by this interlocutory order.

New York State attempted to resolve this problem by what they call the Suspended Judgment.

In other words, we had a permanent termination hearing -- and then after there were

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8 OF 11

certain facts that you had to find and after you found those facts, then you had the jurisdiction to make a disposition.

One of the jurisdictions on one of the dispositions was termination.

The other, another alternative disposition was suspended judgment for one year under certain conditions.

The problem was that the legislature never set forth what happened at the end of the suspended period.

And I got myself into this -- this box, and I don't -- quite unanticipatedly, the mother lived in New Orleans and she was coming back to Syracuse and whatever -- She would be, you know, wanted to get these children back. She just couldn't get her life together.

So I suspended judgment and, you know, gave her one more year.

A year went by, and no one brought it back to Court -- neither the mother or the social agency.

And of course I completely had forgotten about the case, and a second year goes by and now they

have an adoptive home for these children, two children.

Now, what happened at the end of the suspended period if anyone did anything?

Did the suspension ripen into a permanent termination or did it ripen into, you know, back where we started again.

And I will tell you, I struggled and wrestled -- there isn't anything I can tell you right now. There is no satisfactory answer to the problem.

I fashioned an answer to fit the case, but -- the interlocutory thing, I think, is good -- simply because I think at the end of the period something does happen -- if nothing happens, then the order simply, you know, stops.

The thing -- the question I wanted to ask you -- I don't know whether it is fair to ask you, Judge, or Mr. Gilman, but while you're right, we talk about the children and the children and the children, you know.

But the fact, did anyone consider that the child being able to terminate his parents' rights?

MR. MANAK: David?

MR. GILLMAN: It does not spell out in the abuse of the Court file -- the standards generally have in volume rights -- In another volume of the standards they talk about the questions of emancipation, but not in terms of abuse and neglect, and that is your question, isn't it?

HON. MC LAUGHLIN: Yes, I just wanted to know if it was considered?

MR. MANAK: Gabe, are you about perhaps going to touch on it?

MR. KAIMOWITZ: I am going to touch on it.

HON. FORT: I was just going to say that to my recollection it was not discussed at any of the meetings I attended -- either at the drafting committees or sessions, and it should have been.

We just -- I don't think we ever did.

MR. GILMAN: I don't remember it in terms of abuse of the court.

HON. FORT: This is what I meant.

MR. MC LAUGHLIN: I am talking about termination. Okay?

MR. KETCHAM: Just one simple and rather broad response to Judge McLaughlin --

I think that it is a -- problem of many legislative acts that they are quite apt to suggest that they are going to throw the book at somebody, but they never quite get to that point of deciding what went on or how or what they are going to do with the booking.

It is not an easy problem to decide in advance what you would do if these things failed, I recognize that, but I think it needs to be addressed and thought out.

MR. MANAK: Okay, Ms. Thompson?

MS. THOMPSON: Pass.

MR. MANAK: Mr. Dale?

MR. DALE: Just a couple of comments with regard to what I thought was a very cogent and helpful discussion.

I for one am -- quite happy to hear of a child's right to refuse placement as a standard.

It seems to me that stands in juxtaposition or stands in opposition to the notion that the standard for placements might be the best interest of the child -- that would allow the child a voice in determing what -- or that allows the child to say what the child's interests are.

The difficulty that many of us feel exists when one tries to use standard of best interest as placement standard is that that doesn't appear anywhere in the law -- never appeared anywhere in the law that any of us -- at least that I have ever seen.

It's not the standard for neglect in the first instance -- it is not -- it's not a tort standard, and it seems to me it rises out of a dissertation in the form of a book.

And --

MR. KETCHAM: No, no, it goes back earlier than that.

Many statutes -- the District of Columbia, for example, has provided for many years that a Court may hear termination of parental rights and has a right to decide to consent to such termination.

I don't know whether the word is to consent, but to order such termination, but to order such termination if it determines after a hearing that the parent has withheld consent against the best interest of the child.

MR. DALE: That strikes me as something

different than what is best for the child.

MR. KETCHAM: Well, the words are in statutes, yes.

MR. DALE: Okay.

And it is also true that when one looks at custody matters, in such a balancing, one may decide which parent is better for the child once certain precepts have occurred.

So I simply say that the child's right to reject the placement is very helpful with regard to what I view to be a concern for the best interest standards.

And the other point that I wish to make was that -- the status of being a statutory orphan -- the term you used, I think is quite correct, and quite serious, and I think the interlocutory order is a way to deal with that. But it must be made clear that there will need to be an endorsement mechanism and that is a cost that will have to be borne either in the form of Court officers bringing matters back to Court or some enforcement power given to defense counsel in some way. The attorneys for parents or attorneys for children to bring the matter back to the Court because if that does not

happen, then one starts to encounter the anomaly where -- four years later where there is no Court order in effect that the child is brought back to Court. Somebody wants to adopt and now the Court has to figure a way to -- to devise an order nunc pro tunc to go out, after them and all the rest of the problems that are raised by them.

MR. MANAK: Mr. Ketcham?

MR. KETCHAM: Just to respond -- I read the language quickly because I wanted to get on, but I think that the language that I have here, and which I will suggest to Dave, he says he would like to see it when -- so when they do any revisions -- it does provide the interlocutory order is a one-year order, and that it must come back to Court for something -- either then or before -- if an adoption comes before.

MR. MANAK: Okay, Mr. Hutzler?

MR. HUTZLER: A couple of things with regard to the interlocutory order that is proposed.

In most cases only final judgments are appealable.

Is it your intention to defer the

parents' rights to appeal for a year until that judgment becomes final or would you make the interlocutory order an appealable order?

MR. KETCHAM: There are numerous statutory exceptions to that general rule, and I certainly would make this interlocutory order appealable.

MR. HUTZLER: And my second question would be: What are the rights of the parents during the year in which the interlocutory order is in force and does that order have the effect of terminating all parental rights -- they have no right to see the child or --

MR. KETCHAM: Right.

Going on the presumption that we hope that we can effect what we want, a permanent placement.

MR. HUTZLER: So the idea is to place a one-year limit on the child's orphan status?

MR. KETCHAM: Right.

MR. Hutzler: But he is an orphan for that -- until placement occurs?

MR. KETCHAM: Yes.

MR. HUTZLER: Okay.

MR. MANAK: This would be true if the parents die,

for example, during that time -- as far as testate, intestate matters?

MR. KETCHAM: Yes -- you are getting me into areas that I guess I haven't thought of -- I tell them to tell you that the legislature to think out all these things and I hadn't thought that one out, but yes, I think so.

MR. MC LAUGHLIN: I think I --

MR. MANAK: Yes.

MR. MC LAUGHLIN: I had -- had a permanent termination where the mother was deceased and the father was a very badly and permanently disabled veteran, was in the hospital in Texas.

And they brought a permanent termination order there -- The first thing I wanted to know was whether or not these children would then lose the Veterans' Administration benefits -- that they were entitled to because of the total disability of their father.

And I appointed a Law Guardian, the Law Guardian came back from the Veterans' Administration indicating that that was not the fact -- that they did continue to be eligible for Veterans' Administration benefits even though the natural

father's parental rights had been terminated.

And I was delighted, of course, with the results, but I really think that in all of these questions, this artificial -- you know, you can't terminate a natural parent's rights by some kind of a fiat.

I think it becomes a legal fix and I think in a lot of these areas people treat it as that.

In other words, the attitude seems to be if having a connection with the parent is going to benefit the child, then the rights aren't terminated.

If the relationship with the parent is not going to benefit the child, then they are.

It is merely a case-by-case business.

I think it would be impossible for people doing standards to anticipate all of the fact situations that could arise in testacy and things like that.

I think they have to leave that to legislatures.

MR. MANAK: Okay.

Dean Smith?

DEAN SMITH: I am not certain that there is presently available a mechanism by which the IJA/ABA Commission might consider the proposed amendment.

However, with lawyers almost anything is possible -- with respect to process.

Other than that comment, I wish merely to join in the commendation for the excellence of Judge Ketcham's document, and his presentation.

MR. MANAK: Yes, Mr. Sandel.

MR. SANDEL: The mechanism would be to have a member of the House of Delegates from your State or your Bar Association, whatever, post the amendment on the floor when that particular volume is offered, or if they are offered as a box, propose it just like an amendment to another motion.

MR. MANAK: Judge Cattle?

HON. CATTLE: I agree almost entirely with Judge Ketcham.

I think the presentation was very good.

The only thing, I have no problem with the interlocutory order -- I think that can be mechanically fixed so that it is a very worthwhile tool.

The only problem that I have is the

parent rights of the minor to object to termination as a controlling matter.

And while the wishes of a minor have always had a higher rating in my Court, there are any number of questions that might arise to competency of the minor, and whether his entitlement to his love and affection et cetera, of its natural parents -- is all that compelling.

I can just see all sorts of problems arising if the minor is going to have an absolute right when nobody else has an absolute right -- to stop termination -- even the parent doesn't have that.

I just question how workable that could be.

Other than that, I am entirely in agreement.

MR. MANAK: Judge Fort?

MR. KETCHAM: I should point out, I think I did, maybe I didn't, that the IJA/ABA standard limits this to children over the age of ten.

The Advisory Committee indicates that the wishes of children will be given serious consideration.

The Advisory Committee makes no such limitation -- it is just the right of the child to object.

HON. CATTLE: I think he should have a right to object, but certainly he should have a right to be heard -- to give him an absolute right at any age when nobody else in the world has any right to object -- absolute right -- I think seems to be carrying the idea just a little bit far -- that is all.

MR. MANAK: Judge Fort?

HON. FORT: The interlocutory suggestion -- I only raise the question, Orm, of jurisdiction in terms of any subsequent adoption as to what Court would have jurisdiction in that regard.

Is it vested still in the one that enters the interlocutory order or is it vested in the placement of the placement of the adopting parents and child when residing -- whether it is within the same state or another?

I would anticipate that this could pose a serious legal problem in terms of the method of draftsmanship of any proposed statutes.

Because formally and obviously the

jurisdiction is exclusive in the Court which retains -- which has entered the interlocutory order, and the kids have been placed in California and the order was entered in Illinois or somewhere -- that could pose some major problems in terms of proceedings.

I think that because of the sound of having a rapid or as rapid as possible, at least, final determination.

I have trouble in the concept of the interlocutory, because that normally conveys with it, as I think Judge McLaughlin probably found out in his research, that there must be some further Court act which -- with reference to that -- in other words, whether it is an order really to terminate jurisdiction of that Court and allow another Court to act with respect to the same subject matter.

The second question I wanted to ask in terms of the under ten-over ten -- If a guardian ad litem has been appointed for the child, as is now common in many jurisdictions in terms of the parental rights case, does the guardian ad litem then, under the standard NAC standard have the right to object?

In other words, it in effect replaces the Judge and determines whether the rights should be terminated?

MR. KETCHAM: Well, I can't really speak for the drafters of any of these -- maybe Dave can, when they say that the right to object -- now, whether that means that that is an absolute veto or is it to be heard? I don't know.

The words are essentially the Court should order termination unless one of five things happens or exists -- conditions exist, and the fifth of those is if the child objects.

Now, whether this constitutes a mandatory or absolute right to reject termination, I don't know.

But it certainly gives a strong hand to the child's interest.

HON. FORT: Does the right with respect to the guardian ad litem -- are they spelled out at being parallel for the child in the standard or is that not --

MR. KETCHAM: The standard, I frankly didn't do any research on the function of a guardian ad litem -- ad litem, because that is in another

volume, and is generic to the whole set of standards.

HON. MOORE: Let's take the extreme. We have an eleven-year-old that happens to be in Oakland County in which the father was running a ring of young boys who were being furnished to older men to be used in homosexual activities and we have an eleven-year-old son who is engaged in this.

The father is the ringleader and the eleven-year-old son enjoys it, he likes it, he thinks this is the only thing he has experienced. He thinks this is what all kids do and you're determining parental rights and the son says he does not want to be terminated.

Does he have the veto power -- that is the extreme, but I suppose veto or no veto is what we are talking about.

MR. KETCHAM: The suggestion you make, Gene, really isn't parental rights. It seems to be a much more important problem than that.

MR. MANAK: What is the answer, though, to the question?

MR. KETCHAM: Well, the problem is tne illegal activity.

HON. MOORE: Do you lock the father up which

has already been done -- he has been put in the prison, but does the son then remain in limbo if there is no mother?

He doesn't have an opportunity then to have had a family.

HON. MC LAUGHLIN: Well, I think that is -- the old -- once they get to be ten years old, there is really very little the Courts can do.

They vote with their feet.

You know, the twelve-year-old comes in, you have a four-week hearing, and decide the child is to go with the mother. That is very nice. He probably goes and lives with his father. And what are you going to do about it?

Are you going to put the child in jail for contempt or something?

I think ten -- maybe we can quibble over -- this ten is too young or whatever, but the fact of the matter is that certainly somewhere around ten years old -- whether you give the children a de facto right or the jury right, they are going to do what they want anyway.

And certainly I never heard of an unwilling adoptee. I can just imagine, a ten-year-old

child, the Judge saying, "Now son, we are going to free you for adoption anyway. We are going to get you out of this limbo." Then the kid refuses to consent to an adoption in the sense that he tells the adoptive parents he wants nothing to do with them. And what -- person is going to adopt a child that looks him in the eye and says, "Look, I don't care what you say, I am going to wait until my father gets out of jail."

MR. MURPHY: This may have been true many years ago, where we have private agencies who they used to think were totally impossible.

HON. MC LAUGHLIN: No, no, no, what I am trying --

MR. MURPHY: Is that the children refused having their rights terminated -- and the other agencies were able to work with the children and they were able to brainwash them -- quote unquote -- if that is your philosophy, into another family which they could develop attachments, love for.

You don't believe the brainwashing if you believe the children can make -- the decision, at all for social agencies, fine.

HON. MC LAUGHLIN: The agency has generally had those children -- don't care how soon you move. The

children have been in with the agency anywhere from a year and a half to three years, to where the -- the grounds -- I'm not talking about grounds for placement, I'm talking about the grounds for termination.

In spite of all our efforts to speed these things up, they just seem to prolong.

And if they haven't brainwashed the child up to that point, I think it is just too late to really even, even getting a Court involved in something where any order that it makes is just -- plain futile.

MR. MANAK: Judge Delaney?

HON. DELANEY: I was just going to say, at least ours does require consent of a child if he is over twelve.

So that pretty well takes care of that.

MR. KETCHAM: For adoption?

HON. DELANEY: Uh huh.

And we adopted a model act, so I think that a great many states probably have the same provision.

MR. MANAK: Okay.

Ms. Sufian?

MS. SUFIAN: I just point out that in New York law, an agency cannot bring a petition for permanent neglect or termination of parental rights until the child has been in the custody and care of an agency for a period of one year so they would have already had an opportunity to work with the child, and the child would know whether or not they wanted to be adopted.

MR. MC LAUGHLIN: They never even do it in a year anyway, even if they are supposed to do it.

MS. CONNELL: I don't have anything substantive to add except to say that the group of Legal Services Defender attorneys who review these standards asked for something similar to the interlocutory appeal kind of situation that we suggest as a very necessary part of, you know, as a necessary amendment to the abuse and neglect standard.

MR. KETCHAM: Would you send me this in writing?

MS. CONNELL: Yes.

MR. KETCHAM: I would love to see a copy of it.

MR. MANAK: Mr. Hege?

Mr. Kaimowitz?

MR. KAIMOWITZ: I will reserve my comments since

I am next.

MR. MANAK: Does anyone else care to make a comment on this very important topic before we close up?

HON. DELANEY: I would like to make a suggestion, Orm -- One is the thing we talked about yesterday, the role of counsel, both for the parent and for the child.

We have heard a lot about the imposition of the Judge's middle class values, but I think we get a lot of middle class values from attorneys, too, in determination of parental rights.

There are attorneys who insist, from their own viewpoint, that the last thing in the world that ought to happen is the severance of parental rights, and I think attorneys should be encouraged to be sensitive to the actual feelings of those people.

We know that parental rights should be terminated, that people should love their children, but they don't. There are -- there is just a significant number of people who hate their children.

And still they are ashamed to admit it -- They might think, the attorney who represents parents, in these termination hearings, who insists

on the preservation of parental rights may be doing them a serious disservice.

So I think that those who work in this field should be sensitive to the body language, and to the non-verbal communications that are available to them, and probably find a way to let the parent give up his rights without feeling guilty about it.

MR. KETCHAM: Well, I agree, and I guess one of the ways that I think that can be advanced, and one of the reasons I guess I do favor the IJA/ABA standards in this, and other things, is by intelligent complete commentary on these things.

This is very valuable, I think, to someone who is going to go into a Court for the first time in representing a parent or others to have gone in reasonably descriptive, more than just the bare language of the recommendations.

MR. MANAK: Judge Fort?

HON. FORT: Just in supplement to what Judge Delaney, and Judge Ketcham were saying -- I think from our experience, in our Appellate Court, the greatest lack with respect to attorneys' competence is found in termination of parental rights cases.

They are -- they pose, as far as Appellate Court is concerned, and we happened to get a number of them in the years I was on the Court, it was a very substantial number -- more than we did of all of the kinds of juvenile cases put together.

The records that came up were frequently so grossly lacking in competent evidence or convincing evidence, reasonably convincing evidence to support the conclusion of the Trial Judge that it was difficult indeed to find anything in the evidence that support the findings that that Judge had made.

And I so -- this somehow could be conveyed to the lawyers so that they really make a record in those cases, because nobody, of course, any more than the Trial Judge is going to terminate if there isn't some powerful evidence there.

MR. DALE: As one who takes up on appeal the trial records of others, I couldn't agree with you more -- I couldn't find argument.

HON. FORT: You know they are there, probably, and they are not in the record -- YOu know what that means, just --

MR. KETCHAM: I might just say, and hope that our

good reporter won't feel concerned, but in a case that I thought was very important in this field, which was published now is in JSR, and so on -- I took great pains because I had the sense to see that it was going to be a very important decision-making process to take it -- It was about a -- altogether, covered about four days of hearing with the report and everything else -- The reporter then left the Court. We could not find the reporter to transcribe her notes. She did not come in. We finally had to get a marshal to arrest her and bring her in for fear of contempt.

She finally broke down in my office and began crying and said she couldn't read them.

So we had to piece together a record from the lawyers.

There are sometimes difficulties in records.

MR. MANAK: All right, very good.

Mr. Hege?

MR. HEGE: I have got something that is off the subject -- we are talking about, but the legislature is going to be convening in Iowa probably as it is in other states.

I was wondering, with the restrictions we have got on publishing these works, whether it is still permissible to take some of the work that we have had here, and be able to use them, make those public to the legislature even though they have not been printed, and put out in a normalized --

MR. MANAK: That would be up to Barbara.

The answer, Barbara, on the record?

MS. ALLEN-HAGEN: It is fine; I think we had agreed on February 1st date.

MR. MANAK: We had agreed on a February 1st date, but are you talking about prior?

MR. HEGE: You have got two weeks.

In two weeks I will be appearing before the legislature and I would like to give them some of this material that is in the papers.

I am wondering if that is possible without it actually being published?

MS. ALLEN-HAGEN: Yes.

MR. MANAK: It is really not a publication in the sense that we were directing our thoughts to.

It is a publication, legally, what you are going to be doing.

You may want to talk to the people

involved, though, the authors, in other words, of the papers who may have some feelings about that, including some copy which concerns about circulation -- at this point in time, they have plans to perhaps publish in a Law Review book later, under a copyright.

So I would talk to the individual authors before you circulate them publicly.

HON. ARTHUR: Who will own the copyright of the papers when they are finally done?

MR. HEGE: You will own the copyright, we are not going to own the copyright.

Neither NDAA as the grantor nor LEAA will own the copyright, if you publish.

It was -- at your discretion.

The grantee, usually--

MR. MANAK: Well, NDAA has no desire to own the copyright of the individual papers.

And if anyone cares to -- wishes to publish his papers in a Law Review, there is no problem.

Although we will want to have a formal letter of why for permission to publish anything.

And I -- there won't be any problem with that but -- okay?

3. Rights of Minors in Non-Delinquent Settings

Consultant
Gabe Kaimowitz

ABSTRACT OF PAPER

Mr. Kaimowitz begins by drawing an analogy between a group of adults discussing what rights children should have, and a group of white persons determining the rights of black people or a group of men defining the rights of women.

> ... I would limit the roles at this time of ... concerned adults to the development of systems and services for the benefit and protection of young people. We should not try to establish rights for others who do not have power themselves.... Any attempt [by the standards] to create or establish such rights ... has been naive at best, and downright dangerous at worst by limiting the constitutional and statutory protections afforded to all persons. [Emphasis in original]

He analyzes a series of recent Supreme Court cases affecting juveniles and points out that the Court balanced interests rather than rights and seldom took the views of the adversely affected juvenile into account. He states that:

> To date, we have formed our positions in terms of the roles adults play or should play, in the care custody, and control of young people -- not in terms of the rights of minors which would be modified in the light of conflicting rights.

Mr. Kaimowitz then turns to the IJA/ABA volume on the rights of minors. He lists some of the topics covered but concludes that as drafted, they "deal with the peripheral roles adults can have in exercizing their authority over minors," and that the results can sometimes appear "ridiculous." As one example, he observes that under the standards:

> A young person of any age could get treatment for venereal disease or drug [ab]use without parental consent and/or knowledge but not for possibly related urinary infections or serum hepatitis. Societal concerns

> about teenage sexual and drug activities might be served but surely such lines as have been drawn have little to do with a minor's so-called right to medical care. [Emphasis in original]

The solution proposed for this problem and the others posed is to:

> Let any young person willing and able to do so choose to live where he/she wishes no matter how much the setting might offend or digust us.

Mr. Kaimowitz suggests that if a child is being physically or sexually taken advantage of, the laws against assault and rape should be used rather than those on neglect and abuse. He identifies "the core of the problem of the rights of minors ... [as] finding that they are 'persons' at law for all purposes." This would include application of the right to privacy and freedom of movement. He points out that the last time personhood was "fully debated" was in the Dred Scott case prior to the Civil War.

> Were children to be declared persons, the benefits to the United States Constitution automatically would attach to them as a group. Courts then would be required to balance rights between groups rather than weigh interests....

Mr. Kaimowitz states that acknowledging minors as persons legally would not necessarily require children to be treated the same as adults in all instances. Just as with adults, distinctions in the equal protection of the law could be premised upon a compelling state interest, or, when fundamental rights are not at issue, upon a rational basis. He urges further that where children are incompetent to make a decision, this could be determined on an indvidual basis just as is now done for adults. He recognizes that this may result in more hearings than occur now "when the rights of one group who we call minors are bypassed every day," but argues that the increased burden carries little weight in comparison to the expansion of individual rights.

Mr. Kaimowitz contends that the proposed changes would have little effect for the "vast majority of youngsters who have satisfactory upbringings and accept parental authority...." Rather, the primary beneficiaries would be "those children who are not delinquent but whose activities have caused some public agency or private person to question his/her living or school situation." He stresses

that consent of a minor is rarely sought before he or she is placed or treated, and when it is, the circumstances often make a knowing and voluntary consent impossible.

> If we recognize that they do have rights, they should be as free to reject as they are to accept such aid or placement. To the extent that we intend to disregard questions of consent as voluntary, knowingly and competently given because it might not be given, we have walked back into the trap of offering protections diguised as rights.

The final topic discussed is the importance of advocates for minors including independent counsel. Mr. Kaimowitz points out that this would result in separate attorneys for each sibling in a custody dispute involving a multichild family. He cites with approval the provisions in the standards prescribing that attorneys for children should be advocates and not substitute decision-makers "unless it is obvious ... that harm is about to occur which none of us would want in a similar situation" such as imprisonment, corporal punishment, involuntary aversive therapy, arbitrary transfers and unreasonable commands.

Mr. Kaimowitz summarizes his position as follows:

> Overall what I simply am cautioning against is invoking the terminology of "rights" to substitute our own judgments for those of other professionals who have failed to protect children in the way we deem satisfactory.... Unfortunately that is what I believe almost all of the proposed standards affecting minors in non-delinquent settings ... do, except for those which provide counsel to act as advocates for children in trouble.

SUMMARY OF COMMENTS

Judge McLaughlin summed up the response of many of the panelists to Mr. Kaimowitz's presentation when he stated "it opened windows in perspective.... I am certainly going to go home and think about many of the things he said." Judge Ketcham added later that "while I find some of ... [the] proposals extreme, and not always persuasive, ... they do tend to dramatize the issues and I think they will lead to significant debates...."

Several members of the panel including Mr. Rounds, Ms. Bridges and Judge Arthur, were concerned that Mr. Kaimowitz's proposals provided too wide discretion to the juvenile court judge and that a great divergence of decisions and policies would result, particularly concerning a child's competency to make a decision. Mr. Rounds and Mr. Sandel also commented that the current limitations would be quickly reimposed under the guise of declarations of immaturity. Mr. Kaimowitz responded that the balancing process would change, but the overall effect on the law would not be that different if children were fully recognized as legal persons. He also suggested that increased use of the appellate process would help curb abuses in discretion and define both parental rights and children's rights, concepts which are very vague today. Judge McLaughlin cautioned that rights often have a way of being transformed into duties and that children should not be afforded more rights than they can handle as duties. He cited as an example, the right to an education being transformed into a duty to go to school. Mr. Dale responded that in many ways, juveniles now had duties without rights.

Ms. Szabo and Mr. Hutzler pressed Mr. Kaimowitz on how he would determine which rights were applicable to minors and balance conflicts. In response, he stated that each right set forth in the constitution would have to be examined to see whether it makes sense to exclude minors. He suggested that through these determinations and better definitions of parental and children rights, the solutions would emerge.

Mr. Hutzler then commented that Mr. Kaimowitz's point "ignores the basic concept of family life in America" and that the state should not be interjected into every intra-family dispute. Mr. Kaimowitz replied that few families now fit the traditional mold, and that in most cases, disputes would continue to be resolved within the family context. However, if a child felt strongly enough to take a case to court, the case deserved to be there since the compulsion of the situation must be very great. Mr. Hutzler expressed doubt whether the cases could be so limited, since some lawyers might file a case on behalf of a child whom they felt ought to be unhappy under the circumstances.

Judge Moore stated that rights were of little use unless the child is advised of his or her rights and the means for enforcing them. Mr. Kaimowitz responded that there is no harm in telling children they have access to the courts regardless of their parent's or school's wishes, and that such access in Michigan has not resulted in a flood of litigation. Judge Moore raised the example of the child who refused to come down for breakfast, clean up his or her room, or go to the dentist. Mr. Kaimowitz and Judge McLaughlin pointed out that parents can take their children to court over such matters now pursuant to "ungovernability statutes," but that this seldom occurs.

Mr. Kaimowitz repeated that most children will accept the implicit family social contract, but if the situation was serious enough for the child to initiate court proceedings, it was appropriate for the court to accept jurisdiction. Mr. Hege concurred stating that although the potential for court cases would be present, most disputes will be resolved within the family. Mr. Siegel added that family disputes are likely to be resolved more fairly because of the potential for litigation, in the same way that decision-making in the schools has become more equal. Mr. Sandel, on the other hand, thought the idea "seductive in its simplicity, but ... based on fundamental confusion between equal and equivalent." Both Judge McLaughlin and Judge Cattle felt that the proposed changes in law and attitude would have to evolve slowly.

During the course of discussion, Judge Arthur and Judge Fort both commented that they had appointed separate counsel to represent individual siblings in custody cases and that this had not presented any problem other than a crowded courtroom.

THE "RIGHTS" OF MINORS IN NON-DELINQUENT SETTINGS

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RIGHTS OF MINORS IN NON-DELINQUENCY SETTINGS

Consider a gathering of whites who meet to discuss the rights and respon- of blacks in our society. Presume those Caucasians have the best interests of the Negroes at heart but see little purpose in actual involvement of the latter since nothing they would say is likely to have significant impact on the actions of a majority of people in the United States toward them.[1]

Or, what if men met to assist women and produced a myriad of papers to further the cause of their sisters? What would be acceptable to women as an outcome from such a convocation? Probably very little. Are either blacks or women analogous to minors? In fact, about the time the first juvenile court system was being created, one panel of judges was deciding that women, like children and idiots, could not seek public office except to the extent allowed by the male state legislature.[2]

If you belive that the comparison of women and children is farfetched in the 1970's, I would simply point out that the case about women I've mentioned was cited by the Attorney General of Michigan to a three-judge panel as recently as 1972 to prevent the name of a woman from being placed on a ballot for consideration by Ann Arbor, Michigan voters.[3] Voters were to select candidates for a Board of Education. Only this time the critical factor in keeping her off the ballot was not her sex but her age. She was only 15 years old at the time she wished to have a say in the operation of the public school system she attended. The United States Supreme Court, all responsible males each more than 50 years old, summarily affirmed that decision without comment.[4]

Obviously, I believe the analogies of blacks and women to children are applicable to current consideration of the rights of minors by adults. Therefore, adults at this time are in no position to talk about such rights. I recognize many of the adults working on juvenile justice standards have spent much of their adult lives concerned about young people. I would hope most have been parents. Do I then think that we cannot be of assistance in providing systems for, and services, to minors and expanding and extending possible alternatives for them? I do not.

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1. Young people registered and voted in record numbers in Michigan in November, 1978, because of a proposition on the ballot to raise the drinking age from 18 to 21. While polls showed that young people were voting more than five-to-one against it in the university cities of East Lansing and Ann Arbor, the voters as a group approved the measure by a nearly three-to-two margin.
2. Attorney General v. Abbott, 121 Mich. 540, 555-556 (1899) (Justice Moore dissenting).
3. Human Rights Party v. Secretary of State, 370 F. Supp. 921 (E.D. Mich. 1973, three-judge court).
4. 94 S. Ct. 563 (1973).

However, I would limit the roles at this time of such concerned adults to the development of systems and services for the benefit and protection of young people.[5] We should not try to establish rights for others who do not have power themselves, to vote, to be elected or for the most part even be appointed to public office. As I already have noted, their names usually cannot be placed on the ballot even for selection by an exclusively adult population.

To the extent that the bulk of the work done to develop juvenile justice standards has been concentrated in aiding courts, schools, social welfare agencies, even families to develop more modern systems and approaches to assist youth, I am in concurrence. To the extent that some of us perceive a necessity or the desirability to consider the rights to minors as well, outside of those plans being designed to further the opportunities of youth, I respectfully dissent.

Any attempt to create or establish such rights I intend to demonstrate has been naive at best, and downright dangerous at worst by limiting the constitutional and statutory protections afforded to all persons.

I hope I have made it clear at this point that the subject matter I have been entrusted to discuss is one I believe for the most part should be excluded from the formulation of juvenile justice standards.

I and others of my persuasion already have convinced the legal services community concerned about minors of this position. Formulation by an exclusively adult group of rights of minors separate from the juvenile justice system would be as anathema to me as similar work done for blacks by whites, for women by men, especially to the degree that the constitutional basis for determining the rights of all of us is limited or exceeded.

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5. The Report of the Task Force on Juvenile Justice and Delinquency Prevention, Standard 2.7, (1976) perhaps takes the most realistic position in its reference to "Youth Participation" rather than to minors' rights. The Report of the Advisory Committee to the Administrator on Standards for the Administration of Juvenile Justice in my view properly goes further by focussing almost exclusively on the procedures and services which should be made available through a justice system for juveniles, to minors and their families. If Institute of Judicial Administration/American Bar Association Juvenile Justice Standards Project, Standards Relating to the Rights of Minors (Tentative Draft 1977). The Report of the Task Force hereinafter will be cited as Task Force, Standard 1.1; The Report of the Advisory Committee hereinafter will be cited as NAC Standard 3.1; the IJA/ABA Standards hereinafter will be cited as IJA/ABA, Rights of Minors, Standard 1.1.
6. Meeting of Legal Services Corporation representatives and others to consider the IJA/ABA Standards in November 1977 in St. Louis, Mo.

We all were thrown off the track by the United States Supreme Court decision in re Gault, 387 U.S. 1 (1967). Many of us too readily assumed that the decision could be used as a basis for establishing once and for all the rights of minors, at least extending the full panoply of the Bill of Rights to them.[7] We sought to guarantee minors whatever protections adults had from intrusion by federal authority and, under the Fourteenth Amendment, by the States. Some of us failed to notice that minors were to be assured of their rights on a case by case basis and then, presumably, only when their positions did not conflict with the rights and responsibilities of their parents.[8] Ruefully I now believe that if the State of Arizona had informed Gerald Gault's parents of the charges against him and their right to gain counsel for him and for themselves, and to protect him from self-incrimination, the United States Supreme Court might not have seen the necessity of granting the minor anything more than parental protection.

Some years later, the Supreme Court ignored the lone dissenting words of Justice William Douglas and determined the respective rights of a State and of parents when the education and religious training of the children of a particular sect were at issue.[9] Justice Douglas fruitlessly urged his colleagues to consider the children's wishes before reaching the merits of the dispute, since the parents' religious views might be depriving them of educational and employment possibilities in later life and the State's action might run counter to the expressed positions of the minors themselves.[10]

Am I then suggesting that children do not have any rights at all as yet? In essence, yes, which is why we have been led to look among the words of public authority in each instance, to deduce how far the judiciary and to a lesser extent legislatures are willing to go to grant benefits and protections to children; then we have to decide for ourselves how much more beneficent we would like to be toward youth.[11] That has nothing to do with rights.

The U.S. Supreme Court still is wrangling about how far it can go to balance the interest (not rights) of children and parents when young women

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7. Kaimowitz, Legal Emancipation of Minors in Michigan, 19 Wayne L. Rev. 23, 30-31 (1972).
8. See, e.g., in re Gault, 387 U.S. 1, 31 (1967).
9. Wisconsin v. Yoder, 406 U.S. 205, 241 (1972) (Douglas, J., dissenting in part).
10. Id., at 245.
11. Kaimowitz, "The 'Rights' of Institutionalized Children," in Bundy & Whaley, ed., The National Children's Directory, at 26 (1977).

find themselves bearing fetuses.[12] It ignored children altogether when it settled the dispute between natural parents, and foster parents who were regarded as agents of the state, as to who had better rights to protect minors in the care of latter.[13] The Court seems so certain that children still should only be seen and not heard that it seeks to limit the use of dirty words to protect youngsters, presumably from their impact.[14] Two dissenters pointed out that literature in educational research indicated that some youngsters were raised to accept those words as part of their everyday vocabulary.[15] Such children undoubtedly will speak and hear them even if the court--or we--think they shouldn't.

Some of the commentary in the formulation of juvenile justice standards rightly has noted that even when children were in conflict with schools rather than with parents, the U.S. Supreme Court took courage in restraining the hands of public authority primarily because those youngsters might have been exercising their First Amendment expressions as agents of their families, rather than in their own right.[16] Ironically, the highest court allows schools to assault

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12. The United States Supreme Court recently granted certiorari to review the circumstances in a case to determine if and when a minore requires parental consent or approval before she can abort a fetus. The citation is unavailable to me at this time. See, however, Bellotti v. Baird, 96 S. Ct. 2857 (1976), in which the Supreme Court remanded the matter to the Massachusetts courts for its decision based on a state law applicable to the question.
13. Smith v. O.F.F.E.R., 97 S. Ct. 2094 (1977)
14. See; e.g., F.C.C. v. Pacifica Foundation, 98 S. Ct. 3026 (1978); also Pinkus v. United States, 98 S. Ct. 1808, 1812 (1978).
15. In the F.C.C. case, Justice Brennan, speaking for himself and Justice Marshall, said:

    > The words that the Court and the Commission find so unpalatable may be the stuff of everyday conversations in some, if not many, of the innumerable subcultures that comprise this Nation. Academic research indicates that this is indeed the case.

    F.C.C. v. Pacifica Foundation, supra, at 3054 (Brennan, J., dissenting).
16. See; e.g., Kaufman, Protecting the Rights of Minors: On Juvenile Autonomy and the Limits of Law, 52 N.Y.U.L. Rev. 1015, 1028 (1977):

    > The distinction (between a right accorded a juvenile and a benefit from protection of a right granted to another) is often difficult to perceive: even the Supreme Court on occasion has not spelled it out with sufficient clarity. In Tinker for example, Justice Fortas held that juveniles could wear black armbands in school as an expression of their dissatisfaction with the war in Vietnam. His opinion has been widely heralded as articulating a first amendment right for minors. But the minister-father of the children in Tinker vigorously opposed the war and actively encouraged his children's protest. Isn't it possible, therefore, that the first amendment right articulated in Tinker can be interpreted as the father's prerogative to use his children as the vehicle for his own views?

    Id.

children if necessary to impose discipline.[17] Apparently, a child can't be suspended for his/her vocal views but can be spanked for such expression.[18] And if some of us took heart from a bare majority of the Supreme Court finding that children were entitled to some degree of due process in the schools[19] just as it allowed them such protection in the juvenile and criminal justice systems, we again were brought up short by a 1978 decision. The Court ruled students could not recover damages for denial of even the limited due process afforded by public schools which wrongfully suspended them, unless those youngsters could prove actual damages.[20] Finally, I would wrap up my litany of seemingly relevant Supreme Court cases by pointing to its first decision in Kremens v. Bartley;[21] seven members altogether found that a court could bypass constitutional considerations when policy questions of the relationship of parents, children and the state had not yet been resolved at law.[22]

The Supreme Court has not decided any of these questions in terms of competing rights between children and those in conflict with them; instead it has simply determined to date how far adults could go catering to or using children for their own purposes and ends. Such formulation might be of use to us and others if we could be certain how far the highest court intends to go in allowing control over children to lie in the hands of the family, the schools, the social welfare agencies, and professionals. I would suggest that to date in fact we do not know at law what rights adults have in their roles as parents, school personnel, public agents, and professionals; what is within the province of the family and what is outside that terrain.[23]

Each of the matters I have alluded to are better understood within the framework of balancing of interest between competing groups, without regards to rights, than it is as the basis of understanding of what rights people have in their respective roles in the family, especially when one or more of them is in conflict with the State.[24]

If the theory I have formulated herein, that the common or constitutional law as yet has not been applied except in the loosest sense in setting forth the rights of any party in relation to the minor, appears to have any validity, it should not be surprising that I conclude that we who are concerned about juvenile justice standards cannot formulate any acceptable position for the present regarding the rights of children.

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17. Ingraham v. Wright, 97 S. Ct. 1401 (1977).
18. Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969).
19. Goss v. Lopez, 419 U.S. 565 (1975).
20. Carey v. Piphus, 98 S. Ct. 1042 (1978).
21. 97 S. Ct. 1709 (1977).
22. Id., at 1714.
23. See; e.g., IJA/ABA Rights of Minors, "Introduction," pp. 1-2.
24. Id., at 2.

In looking toward statutory and case law interpretation, we have been trapped in an examination of the problems of minors that cannot depend on an attribution of rights to anyone in this context, particularly not to minors who have been the objects rather than the subjects of attention given to them by adults. To date, we have formed our positions in terms of the roles adults played, or should play, in the care, custody, and control of young people - not in terms of the rights of minors which would be modified only in the light of conflicting rights.[25]

Various standards have addressed how and how far minors should be controlled, even when couched in terms that would appear to recognize the rights of minors. Proposed standards correctly have tried to avoid so-called philosophical pitfalls that are beyond legal parameters. But because no guidelines exist to respond to the central question of a legal bill of rights for children, at least in part for the reasons I have stated, the standards are drafted to deal with the peripheral roles adults can have in exercising their authority over minors.

A close reading of all proposed standards for the development of the of the rights of minors reveals:

-- the responsibility parents and their surrogates have to support children;[25A]

-- the conditions under which physicians and other mental and physical health physicians can treat minors without incurring liability;[26]

-- the extent to which school and other adult authorities can keep children in school;[27]

-- the time periods adults can employ minors without incurring liability;[28]

-- enforcement of contractual agreements made by minors with the business community.[29]

True, minors may receive benefits and protections from each of those standards, albeit in the most haphazard and sometimes ridiculous fashion. For

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25. Id., at 21. In most instances emancipation will be found only where the parent has consented, either expressly or implicitly to the 'emancipating' activities of the emancipated by his or her own act but the courts have not reached uniform results where the child's acts alone are relied upon.

25A. IJA/ABA, Rights of Minors, Standards 3.1 et seq.
26. IJA/ABA, Rights of Minors, Standard 4.4A.1.
27. IJA/ABA, Standards Relating to Schools and Education, Standards 1.10 and 1.11 (Tentative Draft 1977) (Hereinafter cited as IJA/ABA, Schools and Education).
28. IJA/ABA, Rights of Minors, Standard 5.4, D.
29. IJA/ABA, Rights of Minors, Standard 6.1, A.

example, a minor may get support from an adult until he/she reaches the age of majority, unless he/she can establish a residence and an independent means of employment.[30] But he/she would seem to be precluded either from legally working sufficient hours until he/she is 16 years of age, or from emancipating himself/herself by having a right to or privilege to gain public assistance on on his/her own.[31] The minor most likely to benefit from such a standard of "emancipation" according to my experience would be one who is prostituting himself/herself for pay, or selling drugs or otherwise engaging in illegal activity for remuneration. The Shirley Temple standards as I would refer to them, are beyond meaningful discussion for young people who cannot rise to the top of a legitimate high paying profession.

A young person of any age could get treatment for veneral disease or for drug (ab)use <u>without parental consent and or knowledge</u> but not for possibly related urinary infections or serum hepatitis.[32] Societal concerns about teenage sexual and drug activities might be served but surely such lines as have been drawn have little to do with a minor's so-called right to medical care.[33]

Adult concern about the need for youngsters to be educated and for them to get gainful employment again has little bearing on young people falling rapidly behind in reading and writing level, becoming disillusioned (truant) with the school system, and finally contributing to the vast number, particularly of black male teenagers, who are unemployed.[34] No obligation has been placed in the various standards on the schools and educational systems, or the families, which have failed to prepare for some children. Without such a duty on the part of adults involved, it is meaningless to discuss a so-called right to an education. Talk of rights in these areas certainly has done no more than sink to the level of platitude.

Without the "enlightenment" of the standards on minors rights to contract, the young on occasion still could get away with "tricking" the business community. As adults, I presume, we intend to be too responsible to allow young people this loophole; hence we grant them the right to contract, that is to have terms enforced against them sooner and easier than those conditions can be today. I totally fail to grasp what pretense of benefit, let alone right, a minor has from those standards about a right to contract.

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30. IJA/ABA, <u>Rights of Minors</u>, Standard 2.1C2.
31. IJA/ABA, <u>Rights of Minors</u>, Standard 5.1, <u>et seq</u>.
32. IJA/ABA, <u>Rights of Minors</u>, Standard 4.7 and 4.8.
33. IJA/ABA, <u>Rights of Minors</u>, Standard 4.1.
34. IJA/ABA, <u>Schools and Education</u>, Standard 1.3.
    Standard 1.3 does not assume that educators are guarantors of particular educational results; nor does the standard suggest that a perfect decision of appropriateness can be guaranteed. Standard 1.3 mandates a reasonable good faith effort to provide each student an appropriate education in the light of the state of existing and available resources. <u>Id</u>., at p. 37.
    See also <u>Donahue v. Copiague Union Free School District</u>, 47 U.S.L.W. 2096 (July 31, 1978).

Finally, the most difficult issues I think the various panels have had to work with shed light on what injury we have done by toying with the euphemism of rights of, by, or for minors. I refer specifically to conflicts about if and when the state can act on a minor's behalf to protect youth from sins of commission and omission by adults in charge of care, custody and control.

Who is at fault when a youngster runs away from home or some other setting where he/she has been placed?[35] What can be done to protect a minor from abuse --without incurring an obligation of equal or better care that the young person himself/herself can enforce against the State when it fails to do better than his/her family to provide for him/her?[36] Are status offenses and standards for abuse and neglect two sides of the same coin?[37] How do we resolve disputes when one or another adult professes to be better at providing care/custody and control for the child? Simply, I am encompassing all of the basic questions of power and authority adults--families, courts, social welfare agencies--are trying to resolve when children who are not delinquent come under their control.

If we could leave aside all of those young people functioning appropriately within the context of the caring family, as I believe we should and can, and focus on those who are troubled in a familial setting whether because of abuse, or unwanted but non-criminal conduct, I offer a solution that may shock some, but should offend no one, <u>if we were serious about the establishment of legal rights of minors</u>.

<u>Let any young person willing and able to do so choose to live where he/she wishes no matter how much the setting might offend or disgust us</u>.

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35. IJA/ABA Standards <u>Relating to Noncriminal Misbehavior</u>, Standards 2.1 and 3.1 <u>et seq</u>. (Tentative Draft 1977).
36. National Task Force to Develop Standards and Goals for Juvenile Justice and Delinquency Prevention, <u>A Comparative Analysis of Standards and State Practices: Abuse and Neglect</u>, (1976). (hereinafter referred to as Comparative Analysis Abuse and Neglect). Nothing in these volumes or elsewhere in the compiled material reflects any enforceable obligation on the State to provide the desired environment or as good an environment as reasonable persons can expect if it seeks to remove a child because of neglect, abuse or family conflict from his/her home and place the minor temporarily or permanently elsewhere.
37. See especially the rhetoric in IJA/ABA, <u>Noncriminal Misbehavior</u>, Standard 5.3, and "Commentary" on page 56 thereunder.
    <u>See also</u>, IJA/ABA, <u>Standards for Juvenile Justice: A Summary and Analysis</u>, 4.2 and 4.5 (1977). No specific consideration is given to the possibility that similar conduct may give rise to intervention against the child or against the parent(s) at the discretion of the State. In fact, in my experience, the State often pins the responsibility to avoid abuse and neglect on the parents on the basis of age and maturity of the individual minor, and on the child himself/herself when the State deems the child, by virtue of age and maturity.

But what of the minor who wants to live one place one day, another the next? My reponse: What if he/she were adult? How many spouses separate, then come together as a matter of choice? But what of minors so abused physically that there can be no doubt in anyone's mind that they are not safe or that they will be coerced in the setting they have selected? My response: Do we not have criminal laws against assault, battery, or rape? Have we not further undermined discussion of these issues by talking about amorphous terms like "abuse" and "neglect"? We have accepted social models in this respect and abandoned legal ones.[38]

Leaving aside for the moment those minors who, because of lack of intelligance, immaturity, or inability to comprehend, and/or those who cannot get an adult to provide care, custody and control, the key to unlocking the vexing dilemmas posed by how we care for those who do not fall afoul of the criminal law lies in the actual intent we adults have of guaranteeing at least some fundamental rights to minors.

The rights to privacy[39] and freedom of movement[40] developed to aid adults not protected by the literal language of the Bill of Rights must be granted to young people if any other meaningful right they have is to be exercised.

As long as we do not intend to afford such basic rights to minors, the entire construct we will build may serve the needs of society, but it will not guarantee anything meaningful legally, to young people. Not only will minors continue to be economically dependent on the adult community, but they will go on being dependent on adults in every meaningful way. Perhaps that is necessary now, but those formulating juvenile justice standards should not embalm the rights of minors for the foreseeable future.

Instead, we must get to the core of the problem of the rights of minors, if we are to understand the appropriate questions, let alone the right answers. All of this discussion and others on the rights of minors, particularly in placement settings outside the family and unrelated to unlawful behavior, depends upon a finding that they are "persons" at law for all purposes, a

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38. Cussman, Judicial Control Over Noncriminal Misbehavior, 52 N.Y.U.L. Rev. 1051, 1060 (1977).
39. Planned Parenthood of Central Missouri v. Danforth, 96 S. Ct. 2831 (1976).
40 Shapiro v. Thompson, 394 U.S. 618 (1969); Apetheker v. Secretary of State, 378 U.S. 500, 520 (1963) (Justice Douglas, concurring).

finding that those applying the law have been reluctant to make.[41]

I am heartened that an appeals court in my base state of Michigan now has discoursed on "the emerging rights of children";[42] earlier it perhaps was the first to recognize in published opinion that a generation gap existing between adults and minors might widen if at least older teenagers were not granted access to court, even if such entry were opposed by schools and parents.[43] Still to my knowledge no jurisdiction has granted "personhood" to minors.

The distinctions I am making cannot be characterized as petty or insignificant if one realizes that the last time the issue of personhood was debated to its fullest was in the infamous Dred Scott decision preceding the Civil War (War Between the States). Scott had to be returned to slavery because he was deemed property rather than a person in his own right, by a majority or the U.S. Supreme Court in 1856.[44] In more recent times, granting or withholding personhood was deemed by Justice Douglas to be the central issue in assessing the status of anyone who has been a prisoner and thereby deprived of certain basic rights.[45]

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41. The assumption made explicitly and implicitly that minors are "persons" at law in the IJA/ABA Standards is incorrect. See, e.g., IJA/ABA Rights of Minors, pp. 119-120. The U.S. Supreme Court in Gault, supra, made it clear that its ruling was limited to the concept that "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone. We do not in this opinion consider the impact of these constitutional provisions upon the totality of the relationship of the juvenile and the state." Id., at 13. Judge Irving R. Kaufman, in his article on Protecting the Rights of Minors: On Juvenile Autonomy and the Limits of the Law, 52 N.Y.U.L. Rev. 1015 (1977) further clarified the issue:

> The very mention of minors' rights invites our inundation by platitudes as meaningless as they are resonant. Consequently I shall resist the too often heeded temptation to suggest that juveniles have 'absolute' rights. The notion of a right has meaning only if we can articulate its source and nature, and describe how it can be enforced.

Id., at 1021.
To my knowledge, no court has yet found that minors are persons protected by law, specifically by the U.S. Constitution. If they were so recognized, the entire concept of developing a separate judicial system and a separate body of law would seem to be unnecessary. Though I envision a time when that may happen, that day is not yet here.
42. Berger v. Webber, 82 Mich. App. 199, 203 (1978).
43. Buckholz v. Leveille, 37 Mich, App. 166, 167, 194 N.W.2d 427, 428 (1971).
44. Scott v. Sanford, 19 U.S. (How) 393 (1856).
45. Wolff v. McDonnell, 418 U.S. 539, 594 (1973) (Justice Douglas, concurring in part, dissenting in part).

Were children to be declared persons, the benefits to the United States Constitution automatically would attach to them as a group. Courts then would be required to balance rights between groups rather than weigh interests, as it now does between disputing adult parties.

For children, the matter could be one of life or death. Clearly, if they were declared persons from time of conception, of from the computed inception of brain birth, or from their physical separation from the mother's "housing," questions concerning abortion would have to be resolved differently from the way in which they now are considered.

Also decisions affecting newborns entering the world with serious defects could not be arrived at as they often are now, by balancing the interests of the family members, the professionals involved, and the future prospects of these "things". Certainly each creature recognized as a person would have the most basic right to life without regard to the competing interests of others involved.[46]

I am not only referring here to the inception of life but to termination as well. Several cases recently have referred to compensation to parents who have suffered the burden of responsibility for the "wrongful life" of another when, for example, they have been assured that the mother was sterilized and a baby subsequently was born,[46A] or when the mother was misinformed about the risks of giving birth to a baby who was considered defective.[47] In the famous Karen Ann Quinlan case, parents were granted the right to dispense with the life of their child even though she was an adult![48] I suggest such anomalies will continue to arise until and unless we define who we consider persons. From the time the label attaches, basic constitutional rights must be granted and the necessity to preserve whatever we call life must be recognized without regard to competing interests.

My reasoning would not result in children necessarily being treated in all respects like adults when the judiciary is presented with a claim of a denial of equal protection by a young person. States could show a compelling interest to justify a distinction they make, or simply a rational basis when fundamental rights of young people are not at stake. They or other parties might simply point to specific constitutional mandate as they now can do when a 30-year-old decides to seek the public office of President of the United States.[49]

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46. Swinyard, M.D., ed., Decision Making and the Defective Newborn, Proceedings of a Conference on Spina Bifida and Ethics (Thomas, Springfield, Ill., 1978).

46A. Rivers v. New York, 46 U.S.L.W. 2586 (N.Y. Ct. of Claims, 1977).

47. Park v. Chesin, 46 U.S.L.W. 3278 (N.Y. S. Ct. 1978).

48. Garger v. New Jersey, 97 S. Ct. 319 (1977). The U.S. Supreme Court denied certiorari in the matter decided by the New Jersey Supreme Court.

49. U.S. Constitution, Art. 2, §1, Clause 4. "(N)either shall any person be eligible to that Office (of President) who shall not have attained to the age of thirty-five years...."

Clearly, however, a child would have as much right as an adult has to a hearing under similar standards to determine if he or she wished to have, or refuse, care or treatment for mental or emotional difficulties. But what if the child were unable at one year old, say to form such a decision? At a hearing, the judge could rule that the child, like an adult, was not competent to make that judgment for himself/herself. If not, a guardian could be appointed just as one would be for an incompetent adult. Age alone might give rise to an irrebuttable presumption that the minor was unable to comprehend the event. Surely there might be many more hearings on all levels to determine competency or maturity than there are now when the rights of one group who we call minors are bypassed every single day. However, the argument that the floodgates of litigation will be opened should have little merit against the compelling argument that the fundamental rights of a particular part of the human population are ignored daily.

The future shock I have attempted to provide should suffice to underscore the overall conclusion I have reached that standards cannot be molded now to fit the rights that minors should some day have, to challenge many of the liabilities children face which the drafters of juvenile justice standards have earnestly tried to erase or alleviate.

Could we seriously continue, by our standards to deny or discourage a minor on his/her own behalf from bringing legal action to:

-- at age 15, seek employment or public aid rather than continue in attendance at school;

-- at age 13, obtain medical treatment for, say, leukemia, when his/her parents refuse on religious grounds;

-- at age 11, live with adults who have made him/her happy and comfortable, rather than with his/her parents who have humiliated him/her daily by saying they wished he/she had never been born or that they had to get married because of him/her;

-- at age 9, live with his/her Native American parents accused of deserting him/her because they could not be found anywhere in the child's vicinity while they were drinking for 72 hours straight;

-- at age 7, attend a public school in the district where his/her maternal grandparents reside because the mother cannot assure the same quality of schooling because of her chosen residency.

None of the standards provide for any of these future visions but rather stifle each.

Simply, are we serious about extending rights to minors or do we really intend to reach out a protective covering to them, and supplant parental knowledge and authority with professional supervision whenever the children become visible to society because something has gone wrong at home or in schools?

Which minors am I talking about? I have been talking about children charged with engaging in delinquent behavior akin to adult criminal conduct, the subject others will address and the one I believe appropriate for the formation of juvenile justice standards. Again I would stress neither I nor we intend to talk about the vast majority of youngsters who have satisfactory upbringings and accept parental and school authority over their care, custody, control, and education. Even those from single adult households; those with relatives or guardians other than their natural parents; and minors in institutions unable or unwilling to question their situations are not within my consideration as long as there is an acceptance by the parties concerned that they can operate without state assistance (other than financial aid) and have given no grounds for state interference. Certainly short term placement by a child with his/her implied or expressed consent in a hospital, recreational facility, or home of a relative need not trigger our attention.

Primarily I am concerned about those children in trouble who are not delinquent but whose activities have caused some public agency or private person to question his/her living or school situation. In most instances, I would add that we have reasonable grounds to believe (if we do not already know) that the child has or might object to what is being done to him/her if he/she were an adult in similar circumstances.

I have been especially careful in this description, and these limitations, of those I am discussing, because I want to focus on the problems arising from failure to obtain legal consent from children in certain circumstances, and it is important to decide if and when such consent is needed. The consent of children to almost any activity or setting has been disregarded and supplanted by some form of substitute judgment by an adult.[50] This has been especially troublesome to me since I became aware that children in public mental health facilities for those said to be emotionally disturbed or mentally retarded were being used as subjects for medical research unrelated to any benefit they might receive directly. Most often, parents were consenting for them when requested to do so by medical and other public officials who reminded those adults that the children's participation could be regarded as a return for the care, custody, and control given by the institutions in which the minors were held.[51]

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50. Perhaps the fullest discussion on consent of minors is embodied in Mitchell, Experimentation on Minors: Whatever Happended to Prince v. Massachusetts?, 13 Duquesne L. Rev. 919 (Summer, 1975).
51. Jobes v. Department of Mental Health, Civil No., 74-004-130-DC (Cir. Ct. Wayne Co., Mich. filed Jan. 19, 1974). An opinion in the case on October 31, 1974, gave persons acting on behalf of two identified children the right to question the manner consent was obtained, and separately afforded real property holders to question the public policy of state expenditures for research involving the use of children as human subjects.

Rarely do we seek consent of children before placing them in such mental health facilities.[52] Neither do we do so before we place children in temporary or longterm foster care because they have been neglected or abused.[53] Unfortunately, few parents are better than the State in this regard when they place their children through child welfare agencies or other institutions in temporary or permanent placement.[54]

Society does not ask consent of the child before requiring his/her attendance at some accredited school facility where he/she spends many hours of his/her childhood. Group homes, nursing homes, and residential treatment centers likewise rarely depend upon the agreement of the child to accept him/her in their midst. Children are not even asked when they are shuffled from one institution to another, or back home or into foster care or placement with a relative. Since no such consent is required, rarely is control of the movements of children questioned except insofar as it affects respective rights of the adults involved. Even in custody disputes, the child's wishes may be asked and his/her preference required, but his/her consent is rarely considered vital to the outcome.[55]

Finally in these circumstances I would suggest that his/her consent really is not obtained knowingly, voluntarily, and competently even when he/she seemingly chooses a runaway shelter. To suggest otherwise to me would be to conjure up the idea that a slave who runs away chooses to remain in hiding or to be in a particular setting when in fact I believe he/she merely has expressed his/her desire for freedom. Certainly those who have marched with their feet away from communism could be said to have exercised a choice of sorts but certainly could not be said to have "consented" to relinquishment voluntarily of their home or property or security.

These are the minors I am concerned about in this paper, the youngsters whose consent should be needed or expected because they no longer can rely on family support and now have to look toward some state assistance or interference.

If we recognize that they do have rights, they should be as free to reject as they are to accept such aid or placement. To the extent that we intend to disregard questions of consent as voluntarily, knowingly and competently given because it might not be given, we have walked back into the trap of offering protections disguised as rights.

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52. The U.S. Supreme Court currently is reviewing the admission of minors into mental health facilities in Pennsylvania and Georgia. Secretary of Public Welfare of Pennsylvania v. Institutionalized Juveniles, 98 S. Ct. 3087 (formerly Kremens v. Bartley), and Parham v. J. L. 98 S. Ct. 761. Three-judge federal courts below have found that minors could not be admitted without hearings; in the Pennsylvania case, the court outlined proceedings it believed would be necessary for the state to comply with due process.
53. Smith v. O.F.F.E.R., supra see note 13.
54. For example, no reference is made to such consent in the IJA/ABA, Standards Relating to Abuse and Neglect, 166 et seq. (Tentative Draft 1977).
55. See, e.g., Lewis v. Lewis, 73 Mich. App. 563, 252 N.W.2d 237 (1977).

This conflict between an extension of rights or of protection permeates the entire discussion about minors in non-delinquent settings who are not protected by the normalcy of their own family lives. Most often such minors will be found to be children of the poor; significantly too often they will be be members of racial and ethnic minorities whose conduct does not conform to the mean, the average, the median, the norm.

Yet economic deprivation and incidence of behavior warranting societal intervention being significantly higher among some minorities hardly is reflected in the commentary, certainly not in the standards.[56] And I suggest they ought not to be our concern, unless we decide that the real failure of the juvenile justice, school, social and medical agencies in providing assistance to minors has been their inability to actually protect children to the extent If that is the case, I suggest that we in fact are not talking about rights at all but in reality we intend to divide up the umbrella society places over children differently from the way we have in the past.

What difference does it make here what we call it, right or protection, as long as children are helped? Envision yourself perhaps 120 years ago in a similar discussion, only it is the slave or the black who you would aid and ask yourself the same question. Shall we reverse the mistake of treating niggers like children by treating children like niggers?[57]

We can continue to give children all the benefits we wish or which we think they need and distribute them more equally or fairly then in the past; but as long as we seriously intend to respect their individual rights to life, liberty, property, expression, mobility, and privacy, as the proposed standards would seem to imply, we must limit our role to advocating their position, or those of guardians duly appointed for them if they are found to be too incompetent or immature to exercise their own judgments.

All of the proposed standards with regard to providing counsel for minors in non-delinquent settings, when advocates are needed, do seem to be so self-limiting and as such probably do more to guarantee the rights of minors, at least to counsel, than all of the volumes directly concerned about children as potential victims or as objects of adult authority.[58]

Yet even in the standards providing for counsel, there is a certain naivete apparent. Do we, for example, intend to have counsel for each child in an institutional setting when he/she may have been deprived of procedural or, more likely, substantive due process? Are we serious about providing counsel for each child in a custody dispute as the only legitimate way to avoid conflicts and coercion between and among siblings? I, of course, would opt for the right

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56. Some allusion is made in the historical overview presented in the IJA/ABA A Summary and Analysis, 35-36. No assessment in any of the various suggested Standards seems to allude to the relationship between economic conditions and/or discrimination, and removal of children from the homes of their natural parents.
57. Farber, Student as Nigger (1968).
58. IJA/ABA, Standards Relating to Counsel for Private Parties (Tentative Draft 1977).

of each individual to have counsel whenever he/she is threatened with a deprivation or discrimination in violation of state or constitutional law. Hopefully, these standards about counsel for private parties do mean what they say and we will use them to educate others to avoid the substitute judgment role of guardian, guardian ad litem, or officer of the court acting in the best interests of the minor, unless we have been appointed to the latter role after hearings to determine that said child is unable or unwilling to express himself/herself on his own behalf.

That does not mean I am suggesting that any of us stop doing our own thinking; but certainly we should not substitute judgment any more than we do when representing adults unless it is obvious to us that harm is about to occur which none of us would want in a similar situation. A child like any other person does not want to be subjected to:

-- imprisonment;

-- corporal punishment or other mayhem to his/her person;

-- involuntary behavior modification, particularly involving the use of aversive therapy;

-- arbitrary transfer from place to place; and

-- unreasonable commands from adults.

We may differ in how we define any of those terms but once we have identified them I would expect those of us confronted by them to act narrowly to prevent the unwanted behavior, even when the child himself/herself is unable or unwilling to express himself/herself on his/her own behalf. Each of us should never relinquish his/her own standard of ethics as to what I/we would do and I surely am not suggesting anything to the contrary.[59] Overall what I simply am cautioning against is invoking the terminology of "rights" to substitute our own judgments for those of other professionals who have failed to protect children in the way we deem satisfactory until now. Unfortunately, that is what I believe almost all of the proposed standards affecting minors in non-delinquent settings, as I have defined them, do, except for those I laud which provide counsel to act as advocates for children in trouble. I and my colleagues in legal services who have addressed the issue have determined that proposed standards concerning the rights of minors in troubled families or

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59. In my own case, see Kaimowitz v. State Department of Mental Health, 2 Prison L. Reptr. 433 (July 31, 1973) Wayne Co. Cir. Ct., three-judge state court. I successfully sued to have psychosurgery declared illegal when it was to be used on a prison inmate. The inmate did not ask me to intervene on his behalf; in fact, he "consented" to the surgical intervention to modify his behavior. However, the court ruled that he could not give lawful consent voluntarily, knowingly and competently since he was in the inherently coercive atmosphere of an institution at the time he agreed to the experimental procedure.

worrisome school situations are too confused and would require such wholesale revision, in accordance with a threshold resolution of the rights/protection dilemma, that they should be set aside, at the present time.[60]

Those involved with juvenile justice systems should emphasize the improvement of such structures and the assurance that minors charged with delinquent behavior or conduct that would be criminal if they were adult be given every constitutional right afforded to defendants brought to the bar under criminal codes. To the extent that this is done, the development of juvenile justice standards will have proven useful; to the extent that minors are further subjected to further state or professional intrusion in the name of "rights," we all have done children a major disservice.

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60. My views perhaps are mostly in accord with the dissenting view expressed by Commissioner Patricia Wald, IJA/ABA, Rights of Minors, 123 et seq.

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(WHEREUPON, Gabe Kaimowitz's presentation was given and the following is the discussion that ensued.)

MR. MANAK: Okay, on the record, it has been agreed here that the Executive Summary to be prepared by the Project Director will be sent to the House of Delegates, if possible, early in February, 1979, so that the Executive Summary can be available to the House of Delegates for their consideration.

The Executive Summary will consist of the abstracts of papers to be prepared, and possibly to be redrafted by January 1st, 1979, and submitted to the Project Director, as well as the summary of the presentations, the rebuttal, and the Questions and Answers at the symposium.

In addition, it has been agreed that each consultant may take the opportunity independently to submit his paper to individual members of the House of Delegates and may do so prior to the meeting

of the House of Delegates in February, 1979, but that each consultant taking that opportunity will make certain to state on the paper -- on the face of his paper, that the paper does not represent the viewpoint of the symposium project or the organization that the individual consultant represents.

DEAN SMITH: Unless in fact he does.

MR. MANAK: Unless the consultant has authority of his or her organization to represent it as the viewpoint of his or or organization.

In that event, however, can the consultant represent the paper to be the position of the symposium project.

Off the record.

(WHEREUPON, a short discussion was had off the record.)

MR. MANAK: All right, now we are ready when for the response to Gabe's paper, and sorry for the break in time.

We have lost some of the emotional drain, Gabe.

MR. KAIMOWITZ: That may be desirable.

MR. MANAK: Where did we begin last time?

Okay, I think we probably still should

start with Ken Siegel -- at that end, because --

So we will start with the Prosecutors.

MR. SIEGEL: Want to hold off until I hear some of the other remarks.

MR. MANAK: Good suggestion.

DEAN SMITH: A very judicious position.

MR. MANAK: Bob Rounds?

MR. ROUNDS: Well, the question that both his paper and your comments raised in my mind is probably basically rhetorical, but assuming that a competent forum decided that children were persons and all that implies, wouldn't immediately thereafter, every relevant agency or forum immediately qualify all of the rights a person had in terms of the limitations that now exist based upon the doctrine of immaturity?

In other words, were you to seek to arrive or we to go back to the same inherent problems, and the question has implied that if that is in discussing the rights of children even though they don't exist, according to your hypothesis.

MR. KAIMOWITZ: The difficulty, and I think it goes back to what Judge Arthur had raised as children by definition being immature.

I think I would have no trouble and I think most of my colleagues would have no trouble, and I represent the children as young as three for the purpose of in Court we were establishing that the child was not immature.

In additional to that Juvenile Judges do that every day.

When a child comes into Court as a witness, to testify, the Judge will generally determine whether the child understands the meaning of the oath, whether the child is mature enough to be able to present a given problem, or make a a statement with regard to something he or she observed.

I would suggest that that is the kind of test that I would subject any kind of Court action concerning children to.

In other words, find out if that child is immature, because that is a different thing than a categorical blanket by age, and that is why it becomes an entirely different matter, and the structure would have to depend on a case by one eight-year-old maybe, too immature -- another eight-year-old may be able to consent to a Discovery deposition.

As I suggest in my instant paper, the one area that I concede I will concede without any difficulty, is 95 percent of the child custody matters that are rankling this child custody proceeding, by simply letting, if any adult were to receive the child, the child move back and forth.

That many of the areas that I have alluded to have not come to the Court's attention and therefore it would not be a revolution to declare a child a person.

I think that that is the only thing that I really ought to stress.

Then all that would happen would be, the balancing would be a difficult kind of balancing than goes on now and I claim to be a more important one to the child.

MR. ROUNDS: That implies that the only limitation on the vocational act of the children should be their relative immaturity or their ability to decide, is that your view -- or some other standard?

MR. KAIMOWITZ: That I would regard to be more reasonable than an abridgeable bracket that comes. So from, as males being able to wear armor

in a certain period in history in Medieval England, the problem is where were Puegot and the other scholars in the area, the age would improve drastically to 13, 14, which would be another way to go.

In other words, if we were to accept psychological testing, we would have to start the job to 13, 14 on that. Thirteen is a rough area where the children mature into adulthood and at that point everything would begin to attach.

MR. ROUNDS: But in the last comment or questions, if that were the basic situation, wouldn't the rights of children be where they are now -- that is decided by their -- their age superiors on a case-by-case basis?

MR. KAIMOWITZ: No, I would suggest one of the confusions -- two of the confusions that I think could be avoided -- and I think they arose in the questions of parental rights -- on the conflicts of the business interest of the child would have to be loaned out -- I think categorically if you accept my view.

Secondly, that the parental rights which I didn't allude to in the paper, I contend has

been -- is ill-defined in the Court as children's rights.

This would have to be definitions of parental rights, too, and then the balance would be a term of balancing a child's right versus a parent's right or versus a State's right in a given particular situation.

This is just kind of an assumption -- blanket assumption of children's rights -- one of the things that I think has created confusion under my system, and I suspect under any Court system that when a far-sighted judicial system comes up with a family in need of -- you know -- in need of services, concept, I will have no trouble destroying that and I will, for my own reasons, by constitutional challenge.

Because the law does not recognize the entity. It is not a corporation as an entity -- it is a person under law, but the family is not.

And the reason I suggest it cannot be is because of all of the conflicts that come up.

And one thing that I was thinking of testing Judge Fort about yesterday, and this somewhat bothers me, when we talk about the right of counsel

to a child, do we mean for example, in a family where there are five children, and you want to terminate parental rights as the famous Alsenger case in Iowa occurred, does that mean, in Judge Arthur's term, that not only do we have a lawyer and guardian ad litem for each of the five children because I would have no trouble showing that each of those five children have a separate interest.

And so when we, you know, kind of s a y "counsel for children," do we really mean that?

And a Judge in Oakland County, as a matter of fact, in a custody dispute said, "No, I am not going to grant you the right to appear for a child in a custody dispute because I have had custody disputes for eight children and -- each case would be an anti-trust suit at that point."

So, I would suggest that we are talking about shifting the emphasis, but overall it would not be a revolution except in terms of family -- the concept of the family would have to get defined by law, in a much clearer way than it is at this point.

MR. MANAK: Judge Fort?

HON. FORT: I might just respond to him -- I agree that that is true, and that has been done.

I have done that myself, in Court, and appointed a lawyer for each of the four or five kids involved, and I see, requested a custody, whether it was in a divorce court or whether it was in a juvenile court -- with reference to custody en gardium or those who were of an age where it was impossible, and they were all represented by counsel.

And it did not develop into an anti-trust hearing, it was disposed of in a manner which was competent under the Rules of Evidence, and it can be done, it is no great problem.

You are making mountains out of mole hills.

MR. MANAK: Judge Ketcham still is with us-- very good.

Ms. Bridges?

MS. BRIDGES: Perhaps I am missing the point, but it seems to me that you are taking an inconsistent position with what we have been voicing over the past few days.

It seems to me that you are, instead of limiting the discussion of Courts, which you seem to want to do, instead granting them an incredible discretion, in opening up the possibility of, you know, just divergent holdings all across the country.

It seems that you would be more comfortable with certain minimum recognition of rights within the standards than nothing - although I didn't quite understand whether you were advocating that the standards themselves recognize minors as persons or whether you just were being silent on the subject.

MR. KAIMOWITZ: If I had my druthers I would subject each of the Bill of Rights to a constitutional test on behalf of a given child all the way to the U.S. Supreme Court separately -- that is starting with the Bill of Rights.

In other words, we do not yet know whether a child has a constitutional right to bail.

We do not yet know, in any way, what cruel and unusual punishment constitutes with regard to children.

We do not yet know -- I could -- you know, the right to bear firearms, I presume would

be denied, but at least I would still like to see the case go up -- and I am not sure it would be denied if you have a community where a 13-year-old is permitted to go hunting with his or her parents.

So what I am saying with regard to constitutional rights, would want those, at this point, defined individually for minors because I don't think I can get the blanket thing that I am looking at.

What I have been arguing about, otherwise, is the competing interests that do take place in Juvenile Court.

And there I take a great exception to allowing the discretion that the Judges have and why, I am suggesting even in that area that my answer is more and more appeals rather than any question of a blanket ruling by a legislative or regulatory standard being imposed from the top.

So, it is in that sense, and I don't think it is contradictory.

MR. MANAK: Ms. Szabo?

MS. SZABO: You have mentioned in your presentation the example of the rights of the newborn, a mongoloid, defective newborn.

In your paper you allude to the opposite extreme, the Quinlan situation.

My question is --

MR. KAIMOWITZ: I am sorry?

MS. SZABO: In your paper you alluded to the Quinlan situation, right? The opposite type?

MR. KAIMOWITZ: Right.

MS. SZABO: How do you resolve the problem of conflicting rights -- an abortion request by a 13-year-old whose rights are different than that of the fetus or that of the woman-girl wanting an abortion.

At the other extreme, in the Quinlan case, which you described as a -- where parents were granted the right to dispense with the life of their child even though she was an adult.

Actually, in the Quinlan case, the reason her life supports were withdrawn was the wishes of -- Karen Quinlan's own wishes, not because the parents wanted it, but because she had told her parents that that is what she would want.

MR. KAIMOWITZ: First of all, I disagree with your analysis -- In New Jersey --

MS. SZABO: I was on that case, and the Trial

Court did --

MR. KAIMOWITZ: No, the Trial Court's opinion, I was very much in favor of, and the shock by the New Jersey Supreme Court opinion, as being something separate.

I think the whole question of fetus that you raise, was answered in Roe vs Wade as the Whisenand-McLaughlin paper indicated.

It is clear that unborns have not been granted the status of persons and therefore have no rights.

I mean, in that case it was clear at least up to three months until we begin to even raising the question of personhood -- there is no issue as far as the Supreme Court is concerned because there is no person there.

I think it becomes, so my -- I have no conflict between the 13-year-old and a fetus.

The 13-year-old and the parent, I would say that that gets back to what I just responded to Mr. Rounds.

Something has got to define what we mean by parental rights -- what we mean by children's rights, and I don't mean in a piecemeal basis that

I am talking about.

I would suspect that we are not going to be able to define parental rights, and that is the real rub that I don't think anybody, including many of the commentators, have really responded to, because too many of them recognize the right, you know, of -- of a parent. In the old days a parent might have a right to have the child work the farm for him or her. But I think at this point, it is very unclear what a parent has a right to -- when we are talking about a child.

And that is why I suspected that the Family in Need consent would be so enormous that that would be readily destructible by a constitutional challenge.

So the problem is much more than in that sense than parental rights.

I would argue very strongly if you decided the minor is a person in the case you have indicated, there is no question that the parent has no rights.

This is not a competition between the parent and the 13-year-old with a baby that the 13-year-old is controlling or -- her body the

same way her mother would be, in that situation.

And therefore, there would be no distinction possible because the parent could not -- be said to have no right in relation to that.

MS. SZABO: The question with respect to the young girl was that I understand that Roy and Ray X. Bolton found that a fetus is not a human being in the first trimester of pregnancy -- I was wondering --

HON. MC LAUGHLIN: I don't think -- I don't mean to cut you off, but I didn't find a human being, they found that wasn't a person -- a human being can be a person.

MR. KAIMOWITZ: I mean person in a legal sense having nothing again to do --

MR. MANAK: Not a legal person.

MS. SZABO: Right.

And you do adopt that?

MR. KAIMOWITZ: I'm sorry?

MS. SZABO: You adopted the Roe versus Wade definition?

MR. KAIMOWITZ: I probably -- no, I probably adopt a different definition, but I don't think that is relevant here.

DEAN SMITH: I can't hear the answer.

MR. KAIMOWITZ: I say I probably adopt a different definition, but I don't think --

MR. MANAK: Definition of a legal person?

MR. KAIMOWITZ: Legal person, right.

MR. MANAK: Would you care to state your definition of legal person?

MR. KAIMOWITZ: Evolved out of several -- At the moment, I am most comfortable because I am told medical science can determine it's going from brain birth to brain death, and I think there has been a lot of attention paid to brain death -- almost no legal attention, and I have tried to research the question of brain birth.

But there was a series of articles, in the TIMES, some time back, that indicated that the brain could be measured as to when it started and started functioning -- that would be an acceptable definition.

It, by the way, occurs some time between the seventh and eight month months on an ad hoc basis, but that would be the one I would be talking about.

MR. MANAK: Judge Delaney?

HON. DELANEY: Pass.

MR. MANAK: Judge Arthur?

HON. ARTHUR: Just one or two comments.

MR. MANAK: Yes.

HON. ARTHUR: One of your strong criticisms of my paper was that it dealt heavily with things that were not in the standards.

I would suggest without the same eloquence that yours did the same thing.

You are apparently willing to give to the Courts a huge new area of jurisdiction of enforcing all these rights of the minors, but you mainly put this all on the basis of when does a child become mature, and you, and I agree with you on that point that it should not be artificial ages if we could ever determine "maturity."

You give this to the counsel, and I would certainly agree with you on that point to follow up Bill Fort's point a minute ago -- I had a case, not too long ago, where I not only appointed a lawyer for each child, but a guardian ad litem for each child and a lawyer for the guardian ad litem since their positions were different.

We had almost no room in the courtroom for people -- it was only eight lawyers.

HON. DELANEY: Nobody left then the --

HON. ARTHUR: I agree with your position on that, I think it is well taken.

But the question I would come to is, and I think you have passed it over much too lightly is: How do you determine maturity?

Is there an I.Q. test for it -- you say, "Well, do it the same way you do when you have a witness, a child witness coming under oath," and all.

If you are going to advocate this position, I would certainly urge that you don't give us this broad discretion that you were so critical about yesterday, but rather circumscribe our discussion by giving us the guidelines for determining maturity by evidence that can be presented in adversarial hearings.

MR. KAIMOWITZ: I would, the evidence is very clear to me the same, and I wouldn't call it immaturity, by the way, but I would call it incompetence that the evidence is ruled the same that he would use in declaring an adult incompetent.

That with children it might be much more expeditious.

It is very clear that you could say that a newborn baby for an individual person would be incompetent and I would never have an individual person declared incompetent across the board.

It would still depend on the person.

By the way, I agree with Judge Fort.

I am very pleased to hear that occurred, and I may have been making a mountain out of a mole hill if the Juvenile Courts have reached the stage where they recognize where both Judge Lindsay Arthur and Judge Fort, you know, are saying that they do recognize that each child has a separate in that family kind of situation, and to appoint more than one counsel at that point. I applaud it and say that I am certainly for that position.

HON. ARTHUR: Just as a fast comment, I had a case a few years ago that was just a perfect case for what you are advocating -- It was like a Gault case, it had everything in it and it was well tried by a lot of lawyers and I wrote an opinion that I hoped would be persuasive for the Supreme Court to recognize the problems as you are presenting them here today.

But my opinion was apparently so persuasive that nobody bothered to appeal.

DEAN SMITH: Shucks.

MR. MANAK: Judge Moore?

HON. MOORE: I pass.

MR. MANAK: Judge McLaughlin?

HON. MC LAUGHLIN: Well, one of the most pleasant -- in the whole two days has been pleasant, but certainly this, Mr. Kaimowitz, was one of the most pleasant.

MR. HUTZLER: This is agreed.

HON. MC LAUGHLIN: It opened windows, in perspective. It was a breath of fresh air. I like it. I am certainly going to go home and think about many of the things that he said.

In defense of the paper, the Arthur case was not relevant to what we were writing -- It wasn't overlooked, but it was -- but that, I disagree with one thing. I think that Mr. Kaimowitz's point is well taken, and that it is a very significant point.

We are going to have to come to grips with what we mean by persons, you know, in relation to children, we are going to have to come to grips

with rights, at some point.

I don't know when that is going to be -- I don't know what format it is going to take, but I think it is something he's going to have to face up to.

To withdraw the volume that Mr. Kaimowitz says I think would be a bad move.

I think it would tend to cut off the bait.

I think it would be -- maybe be presumptuous on our part.

I think the House of Delegates is a lot of -- there is a lot of talent there.

I would like to see them, I would like these kind of points brought up to them, and see if the House of Delegates and the Bar throughout the United States begin to realize that this is our problem.

I don't think we think about it very much, and I think when I say "we," meaning the legal profession, doesn't think about it.

Now you just sort of assume certain things, and we go along.

So I would be all for leaving the

volume in even accepting Mr. Kaimowitz's cautions about it, because I think we should keep this debate going, and I think it should get, you know, ultimately to the Supreme Court.

The thing that -- I think we have to just keep two little points here, personness or personhood or legal person -- is defined by the society -- and the society does not have to justify its definition -- in words of Eamon de Valera, the noted politician, the majority has got a right to be wrong.

And whether we like it or not, that is the way, you know, every country, every society, every tribe, they decide who is going to have access to the Courts and that is what makes you a person in access to the Courts.

If you don't have the right to go to Court to enforce your right, then you don't have a right.

And that distinction of who is a person -- an alien is not a person, for example -- okay?

You know, that is it. You are not a person in that society.

If you don't like it, if you don't like it, just like the criminal code, you can't argue that a criminal law is immoral before a Court.

There is no statute in the criminal code that somebody doesn't think is immoral.

It is not the way societies run themselves.

You have two choices, you leave the society and go live with some other society, you pay the price of disobeying the society's rule, or you attempt to persuade 51 percent of the people who were in the tribe to change it.

Now, the thing that does concern me, though, is that in democracies rights tend to become duties.

You know, the right to go to school, how many people put an effort for the right of children to go to school? Only fifty years later to have the right to go to school evolved into the duty to go to school.

You know, the right to defend your country by force of arms, which many -- which many of our black citizens fought for -- I wonder whether some black guy in Viet Nam thought it was much of a

victory when the right to defend the country by force of arms became the duty to defend the country.

I have an Irish thing. I know what it is not to be -- to be a non-person.

In our own country we were made non-persons. We are still not allowed on British Naval ships, which I think is probably a pretty good idea.

But in any event, the idea -- the idea is that we have to remember that as we give children rights, we are creating a situation where those rights are going to become duties -- The right to die in the Quinlan case, I don't know if the Courts have any business getting involved in that because if you have the right to die, what I am concerned about is that in 2025 when the Social Security System begins to go bankrupt, somebody is going to say, "You have a duty to die."

If the State can create the right, it can make the right into a duty -- Every election day or the day after -- every election day they will always say 52 percent of the people or 48 percent only voted, you know, that is a -- You know, we should make that a crime. You should have to vote.

The right to vote becomes the Humphrey-Hawkins Act, the right to work. The right to a job can be -- become the duty to a job.

You shall work -- the new Constitution -- in Panama has it in the Constitution -- you have a duty to work, you know.

On the Alaskan Pipeline, you know, it could be frightening what would happen if the right to a job became the duty to a job.

And when we think about children and giving them rights, I have to -- I think I have to agree with Judge Cattle, it is an evolving process, that we don't want to give them any more rights -- not because we want to hold the rights -- we don't want to give them any more rights than they are going to be able to handle as duties.

And I think when we talk about -- we have to remember that.

We have to remember that.

When we -- It is very nice to say, "Let's give children more rights," but at the same time, I think what we have to say that there is a parallel to that, and we are saying, "Let's give more duties to children," and I think that is what

we have to be careful of.

And so I congratulate Mr. Kaimowitz, I was very impressed by his presentation and his paper, and I do think we should submit it.

I think the ideas that he is presenting should be debated and they shouldn't be lost at the House of Delegates by withdrawing the file.

MR. MANAK: Ms. Thompson?

Mr. Hutzler?

MR. HUTZLER: Pass.

MR. MANAK: Mr. Dale?

MR. DALE: The problem I see is that we have placed -- we have given to children a body of duties without first handing them the rights.

HON. MC LAUGHLIN: That is not uncommon.

MR. HUTZLER: It seems to me the basics of what Dave was addressing himself to was presumptions of incompetence that now exists -- am I right? That you would do away with presumptions of incompetence in regard to children?

MR. KAIMOWITZ: The category I --

MR. HUTZLER: I assume that all children are competent for all things until they are proven otherwise.

MR. KAIMOWITZ: That is right.

MR. HUTZLER: For example, it would have to be proven in each -- in the case of each child that he was not competent to vote.

MR. KAIMOWITZ: That circumstance -- to prove that the child was not competent to vote --

MR. HUTZLER: To vote in elections --

MR. KAIMOWITZ: O no, I don't think I -- you see, there I have to agree with Mr. McLaughlin.

You can, at that point, specifically declare that women have the right to vote or not have the right to vote at a given point. Children have the right to vote, blacks, whether we can stand up to Constitutional challenges on the right to vote as an entity -- as a concept fits into that argument.

In other words, part of the difficulty with one you raise is that the -- there is no Constitutional right to vote.

And therefore, you have a difficulty at that point -- the right to travel.

What I am saying is that at that point you look at that point you look at the right and what is involved in that.

It is rational to exclude all children?

In my statement, the argument that I commonly use is that any mentally retarded person of a chronological age over the age of 18 can be a living vegetable, can be institutionalized for life -- that is the right to vote in the State of Michigan by an attorney, Gene Pine, and they do vote and the votes are gathered and solicited in the institution.

A mature --

HON. MC LAUGHLIN: Frequently it is a majority.

MR. KAIMOWITZ: So, I am saying that you look at the right to vote and what is embraced within that, and I am saying that that is not the same thing as declaring children incompetent.

We are talking about apples and oranges.

MR. HUTZLER: I think -- the problem with the idea you are talking about, is that it really -- it really ignores the basic concept of family life in America.

Now, you speak of the family as not being a legally recognized entity as a corporation is, or an individual is, but it is difficult to

dispute that. It is a basic American value.

MR. KAIMOWITZ: There I would simple refer to a -- a recent NEWSWEEK compilation that pointed out that in the historic sense of what we mean by family, the U.S. population is now roughly down to six percent living in that context of a male, working male head of household, female at home, men working and two children.

I think the female can be working or not working and only six percent said that.

And I think part of the problem --

MR. MURPHY: That is not what he said -- that is not what he said.

MR. KAIMOWITZ: I am willing to be corrected.

MR. MANAK: You have to have the two children to fit that definition.

MR. KAIMOWITZ: No, you did have to have the two children -- it did --

MR. HUTZLER: What I am talking about is the concept that you have a group of persons living together, some of whom, usually two of whom are adults and who have, as offspring, children, and that within that unit it is the adults who have the authority to make decisions -- all right?

It is not -- a situation in which we want to interject the State into every dispute to determine whether in fact the adults should be the ones to make the decisions.

But that is a State intrusion that Americans traditionally have not -- have not wished to allow in more than limited circumstances.

MR. KAIMOWITZ: I think increasingly, and while I am certainly willing to be corrected by Judge Moore as to what can be corrected -- that I can state as to one vexing problem that should concern every juvenile Judge in the sense that you are talking about.

That in certain communities, especially in the black communities that you could show that the mothers are teenagers, minors themselves, and more than 50 percent of the cases in major metropolitan areas, and that you have competing rights between two minors -- in effect, and you have no present male head of the household.

That then, at that point constitutes a family unless you recognize as well as the extended family of the grandparents, so to speak, or the grandmother being around.

But I am talking about statistically and I don't have the statistics here to fully bear it out, but I remeber reading something about Washington, D. C. In the black population more than half of the births now are illegitimate.

In that I cannot say say how many of those were minors, but I am sure that a significant number were minors.

And I am saying, when you have got that kind of thing which should come before the Juvenile Court as frequently as many of the problems we are talking about, that is a teenager, unwed mother with a baby, that you are talking about a concept, two minors, not an unborn, that has to be dealt with in a totally new style.

MR. HUTZLER: Fine, but I am talking about generally -- the general principle, which it seems to me your position would interject the State into every family dispute -- between parent and child because it would -- before the parent could make a decision, a declaration of incompetence of the child to make that decision would have to be made.

It seems to me that -- that kind of State intervention runs a serious -- a very serious

risk of -- of the State making those decisions.

Now perhaps -- perhaps what I have in mind is simple -- It's simply going into Juvenile Court, having the parent persuade the Juvenile Court Judge not what the parent wants to do is right, but merely that the child is incompetent to make that decision and that once -- once it's been determined that the child is incompetent, then whatever decision the parent wishes to make, would be the decision to be made -- That decision on the particular matter would not be before the Court.

I think -- I think, though, that there is a serious risk that one that comes before the Court before a State body, that the State will be making those decisions.

MR. KAIMOWITZ: See, the problem is -- that I think you are missing what I said earlier in terms of there being various kinds of relationships.

I would suggest most family relationships are well handled, aside from Juvenile Court, by what I would call an interlocking of both the biological ties I alluded to in the important relationship -- that is a kind of a contract that is not a contract -- meaning most children

feel happy and secure in the environment they are at.

And this does not give rise, and I said in my paper very clearly, that I would exclude the vast majority of family problems that simply are taken care of.

In other words, a child in fact accepts the jurisdiction of his or her parents, and the matter is taken care of within that framework quite apart from anything that we should be concerning ourselves with.

Where the problem arises is where, for example, in the dentist problem, I can go into specifically the only case like it is a Jehovah's Witness child of 13 who, for reasons that were unclear, refused to have medical treatments that would have straightened him out -- he was like bent double -- okay?

Now, I have had to use that case in argument in Michigan Courts, and the argument against me was interesting.

That the only reason that the case even prevailed four to three was that even though the case alluded to a 13-year-old, that the Supreme

Court had in fact decided the case when the minor was 18.

And that the case, the opposition counsel ably argued would have perhaps been very different had it still been a 13-year-old.

What I am suggesting is that that may come to pass at a given point, for example, that child may have a right, and I can envision this kind of a case, saying, "I don't want chemotherapy at age 9 to continue my pain and suffering as a leukemia victim."

That kind of case -- I would suspect -- under my analysis would come to the floor -- but it would not be when you simply take a child to the dentist, because most children are going to say that, "I accept that relationship."

If they are willing to reach the extent of going to Court to fight it, I am perfectly happy saying that that case does belong in Court because that child has some very compelling reason for saying that, "I don't want to go to the dentist."

MR. HUTZLER: I would agree, first, whether -- whether you are correct in saying that we can

exclude all of those cases, where the parent is happy in his present environment --

MR. KAIMOWITZ: The child.

MR. HUTZLER: Or the child is happy in his present environment.

I mean if we have Legal Services, attorneys who are going to file cases on behalf of children that they have never met who may be happy in the foster environment in which they are living, and when in reality that petition is being filed as by an attorney who is representing the mother, then I think -- I think there may be many circumstances in which although the child is happy in his present environment, an attorney who feels that that child doesn't realize that he doesn't want to go to the dentist, or that it is not what he wants to have straighted, maybe by their filing a petition on his behalf.

MR. KAIMOWITZ: I think that that matter has to be resolved, you know, in the framework.

I was teasing the respondent -- I have done that for adults, too.

HON. MOORE: One step beyond that, I think we have to not only look at the issue of whether or not

we have some children who may be very happy in the environment who Legal Aid or some other attorney they want to represent on these issues, but don't we also have an obligation to tell all the children who appear to be happy in their environment that maybe they aren't really happy in their environment, and that we should tell them that their rights are such that the State should be intervening and making the decisions as to whether or not the child should go to the dentist or whether or not the child should make his bed or whether or not the child should do the dishes -- We are going to let all those happy children, we are not going to advise them of their rights, we are not going to tell them that they have a right to show the Court that the State is wrong in making -- something that they shouldn't be making decisions in those areas, and they should be making them for them.

MR. MANAK: In other words, Gabe, do they have the right to know all of --

MR. KAIMOWITZ: I think that that has already occurred and I think without upsetting the system at all -- that it has in fact occurred without relating the child to the public school.

That the child has been informed of that over the last ten years, in the first Amendment -- in due process areas -- it has not mooted the Courts, it has not disrupted, you know, the judicial process in any way.

If the child were similarly informed in the family situation, which by the way I think in Michigan is unique, Judge Moore, in having a case that I happen to have been involved in, in which a Court of Appeals has said that a child specifically has access to a Court, against the wishes of his or her parents as well as the school -- that case is unique. It's interesting that it is unique that it doesn't open up floodgates even in Michigan, but that that kind of principle, perhaps, should be told to the child.

I was saying, there would be no great harm in that situation.

As I say, it may produce kinds of conditions where a child who really suffers tremendously about going to the dentist might come forward and say that, "I don't want to go, and I have such a strong need to stay away from that dentist, I am willing to go to Court even against my parents

to say that I should not go.

HON. MOORE: Well, my kids fuss tremendously about having to make up their beds every morning, and having to pick up their clothes and having to eat meals on time and about going to the dentist, oh, they don't like that either.

I am asking you who is going to be responsible every time your wife shouts up to the kids, "Breakfast is ready, but you have the right to make the mature decision as to whether or not to come down or make your beds -- I told you an hour ago to do that, but you have a right to go into Court and be able to convince the Court that you are mature enough so that you don't have to follow any instructions."

Now, that is different than the school issue.

MR. KAIMOWITZ: I would say, again, what I would say -- according to what you have said, Judge Moore, in most states, the parent now, if we are going to reach that level when the child does not come down to breakfast, has the right, under ungovernable and incorrigible statutes to take the child into Court and say, "You are not obeying the

reasonable commands of the parents."

I am suggesting those cases as well have not flooded the Courts -- that it has not reached that level -- that a child, as a child in a given situation, in your home or in anybody's home, is so disturbed by that kind of a relationship, yes, that case will wind up in Court.

But I would suggest then you do not have an ordinary implied contract, as I was alluding to earlier, that I contend exists in most families, in the United States of children accepting their roles of parents accepting their roles.

And to the degree that you have a quote revolution of children overwhelmingly refusing to come to breakfast or making their beds unquote, at that point you have got a basic trouble that cannot be answered by a simple statutory situation.

So what I am saying is it does not threaten every family -- it does not come close to threatening the family.

HON. MOORE: Let me just close by saying, that I promised Lindsay I would not say anything, but I had to.

The problem I have saying to children

that you have rights, but not allowing children to exercise those rights, and have knowledge of those rights unless they are placed in a situation which they utterly detest enough so that they are going to somehow become involved in a legal process.

And to me if that is a situation, that they really don't have those rights -- if those rights don't exist, if they don't know about them, they aren't warned in advance that they have an opportunity to have those rights -- the right is no good unless they know about it.

MR. KAIMOWITZ: They have the Bill of Rights, which I would respond to Judge McLaughlin -- which is where I would disagree with Eamon de Valera, and I think on -- because I think your analysis was brilliant at that point, and the only exception I would make and why I am so concerned about it is the Bill of Rights that was supposed to insulate the majority in that respect.

And what I am saying, Judge Moore, is that children learn about the Bill of Rights very rapidly. And they are given a vague idea that you can speak out, you can print news, et cetera.

And again that that has not created

overwhelming problems for anyone.

And for almost 200 years of history in this country, it wasn't even attempted to be exercised or enforced by any child.

Now, there I will agree that there will be some of the cases coming to the floor as happened in Gault, that you needed Gault in order to bring tender.

There would be a change and you would see different kinds of cases, I do agree, as children became defined as parents.

Now, if we don't want to throw out the baby with the bath water, I don't know how you could make it fit Judge McLaughlin, but I would suggest that instead of Part 1 of the IJA/ABA standards referring to an age of majority, that I think it would simply declare that all children, all persons who are born, are to be regarded as legal persons.

Now, if the -- if the standards could be modified in that way, I would have to object -- I would say it would make anomalous everything else.

HON. MC LAUGHLIN: Let me just respond to that.

Orm, the Bill of Rights is there because the majority put it there.

Now, true, the Bill of Rights is there to protect minority rights, but it is only because the majority chose to do this.

I mean nobody walked up on Mt. Sinai and came down with the Constitution -- a group of men sat down and decided that this was the best way to run a government.

I think it is an excellent way to run a government. Don't get me wrong, but we have to keep in mind that the Bill of Rights today could be changed tomorrow if sufficient people, in fact, you even alluded to it, if you don't like it, change it kind of thing -- right?

So, there is no question that the majority -- any right that you have in the Bill of Rights is simply a right granted by the majority.

In response -- I wanted to respond to Judge Moore, and I was interested in that.

It raised an absolutely -- the idea that the parent can bring the child into Court for being ungovernable -- The only difference, I see between you and Judge Moore is that while the parent,

if he thinks strongly enough about breakfast, can bring the child into Court on an ungovernable petition, and by the way, in New York State, there is no minor -- no bottom age on ungovernability -- all right?

The -- you know the kid won't shut up, I want you to put him in an institution -- I am serious, I mean, nobody has done it, but it is there.

You know, consistent with the question I was asking about the kid's right to terminate the parents' rights -- if we are going to have the right of the parent to bring the child into Court for no -- not eating breadfast, shouldn't, in elemental instances.

I am not saying something to be a terrible problem, and I don't want to have the case, but to permit the child to bring the parents into court because the parent needs supervision.

Now, we tend to talk about that in terms of neglect -- but I don't think that ungovernability rises to the dignity of kinds of neglect.

I think there is a ground there.

And I agree with both you and Judge Moore, here, that it will present problems, and I think (...word missing) we have got to discuss them and that is why I want this volume to go in.

MR. MANAK: Mr. Kaimowitz, to bring that Judge McLaughlin's statement that the Bill of Rights was constructed by majority --

MR. KAIMOWITZ: I certainly do --

MR. MANAK: For the benefit of minority and that it can be changed by minorities?

MR. KAIMOWITZ: That is why I want children incorporated within that minority so that when the change occurs it occurs for all persons and not for native Americans, not for women, and not for children.

In other words, I would like, briefly to respond to Judge McLaughlin, because it was out of a problem that you raised that most of my thinking came from and was when Michigan passed a law concerning emotional neglect -- I got the bright idea to take every runaway that I represented and say clearly, if there is a reason to run, and kind of vague reason, there has got to be emotional neglect.

And we encourage children, and I did myself attempt to get the Juvenile Court to change any runaway petition into an emotional neglect petition.

I would say I was totally unsuccessful, we could not get one change even in cases where we could prove tremendous emotional neglect -- "Kid, get out of the house, I don't want you."

It was easier to deal with a child and that comfort and convenience is one thing I would like to take away from the Juvenile Courts.

Then I want Juvenile Courts to recognize they have got two equal parties in that area.

MR. MANAK: We are going to have to move to new items -- really, because of time, Dean Smith?

DEAN SMITH: I am impressed with Mr. Kaimowitz's intelligence -- his dedication and his enthusiasm for his point of view.

I, of course, do not agree with his position that the IJA/ABA standard on rights of minors should be withdrawn.

I have a single nit to pick in the interest of consciousness raising simply because

incidentally it raises reference that has been made to the handicapped child -- the Mongoloid child.

In the Asian context, Mongoloid is raised, and in the new language, since we are sanitizing our language of sexist references, we must also sanitize our language of racist references.

And the appropriate designation for what has heretofore been referred to as the Mongoloid child is the Downs Syndrome child.

I merely call that to his attention because you dealt with it as well as I, but we must be careful in the casual use of our language that we not use unintentionally offensive racist language.

MR. MANAK: Judge Cattle?

HON. CATTLE: I have to say that I was intrigued by this, because as I wanted to remind Judge Moore, our committee decided that since we had so darned much to do we couldn't cover anyway, that -- and since many of the problems raised by the rights of minors situation -- we all recognize whether we have come out with this level or not, that children are persons, at least in some context, and have, therefore, inherited certain rights, and at

that the approach of the IJA/ABA standards defining all these rights of minors was largely moved, and that we would not further consider it, and get on to other matters.

I am also intrigued with the historic -- I think that the historical of -- them, of Mr. Kaimowitz is excellent.

I think that many of these problems, we are trying to approach on a theoretical basis before we had enough experience as we will get -- there is no question about it -- these matters are going to come to our attention, but that a -- how many of them can be taken care of in time, and because some of us may feel that we aren't getting there fast enough, there are others who feel that we are getting there too fast, and in due time, the political consciousness of the people will arrive at the final decision.

And I am glad that Judge McLaughlin realizes that he is a non-person, because I would like to make that point as an Englishman, except that -- except I could also point out to him that I am primarily not an Englishman, but a Scot, and a Welshman, we went through that terrible struggle,

and eventually he will win in the historical development of time -- he will be considered a person.

HON. MC LAUGHLIN: 500 pounds of plastic -- come closer.

HON. CATTLE: Just another bomber over there and you will be all right.

HON. MC LAUGHLIN: That thing about losing -- racist -- I am sorry, one of the ladies down at the end of the table used the word "emasculate."

MR. MANAK: I was worried about that, too. I heard that yesterday.

MR. HUTZLER: Next time she will use "neuter."

MR. MANAK: Judge Fort?

HON. FORT: Just what happens to the Dean's comments, and to Judge Cattle's comment, was that led to Judge McLaughlin's comments -- In concept of the evolutionary development of these thoughts -- I think it is interesting to note that Dean Smith is the president of the American Baptist Church -- which is quite a step from what the American Baptist Church at one time stood for -- he would not have heard that in the church 25 years ago.

MR. MANAK: Judge Ketcham?

CONTINUED

9 OF 11

MR. KETCHAM: Well, I am pleased to hear a serious effort to increase the discussion, the legal, analytical discussion about children's rights -- and while I find some of Mr. Kaimowitz's proposals extreme, and not always very persuasive, I commend him because they do tend to dramatize the issues and I think they will lead to significant debates, as they already have.

MR. MANAK: Ms. Sufian?

Ms. Connell?

MS. CONNELL: My only comment, I guess, is just a response to your -- to the Judge's comments about the publication of the volume or bringing it to the House of Delegates raising the issue with many people,

I fear that by proposing this volume at all, and whatever the ABA tends to, you know, decides to do with it, I fear that in some cases, it will knock you off the debate-raising issue.

I doubt seriously that, you know, the complexities of this issue can be debated on the floor of the House of Delegates.

Therefore, I fear that if the volume is approved -- the rights or instances or privileges of children may stop exactly where that volume, you

know, is, and I would just say that I think you know anyone who has examined loosely would be shocked at the point at which the volume stopped, because I would agree with Mr. Kaimowitz, that I think the volume stopped five years ago -- even from what we see from cases, and I certainly, you know, and just be recording it, and promulgating it, I think you tend to cut off some of the discussion that I would like to see.

HON. MC LAUGHLIN: What I am hoping -- I didn't mean so much as in the House of Delegates -- this was at the February meeting.

What I was talking about is it is not withdrawn -- if it does get approved, it becomes viable on the floors of the legislatures in the fifty states, and that is where the issue is going to be debated.

I am afraid it is not included in the ABA submission to the legislatures, and I am afraid what is going to happen is we are going to -- Mr. Kaimowitz is not going to be given an opportunity to debate it.

That is what I am afraid of.

MS. CONNELL: And what I would fear is that in

the House of the legislature someone would raise this at the point at which the legislature should stop --

MR. MANAK: Judge Cattle?

HON. CATTLE: I think we have got -- all of the standards are going to have problems when we get onto the legislature floors, and it is going to be able to tell you what is going to happen, and I think the young lady introduced as to whether or not they are included in this package that goes to the House, it is a matter of -- a complete matter of chance as to whether that particular volume will become an issue on the floor -- and that you -- at this time, I think it is totally unpredictable as to what arguments will be raised, or will, on both sides, when this thing hits the floor, because we don't know yet what the circumstance is, and it is a political body, it is a volatile body, and I don't think it really makes much difference whether that is included or not -- as to becoming an issue, but when it gets to the legislature, you have another problem.

MR. MANAK: Mr. Hege?

MR. HEGE: I guess the only thing I would like to comment on, Mr. Hutzler, and I guess Judge Moore

also, is the potential impact of what Dean is putting forth and analyze that to what we -- I think the fairly close consensus we have got the right to a jury trial.

One of the things that was stated was that even though we have given that right it does not necessarily mean it's been exercised or it's going to be consistent.

And I think what Gabe is saying is that potential is going to be there -- but in reality most of the time, those issues are going to be resolved withing the family.

MR. MANAK: Okay.

Now, Mr. Siegel?

MR. SIEGEL: And I think they will be resolved because the potential is there, they will be resolved much more fairly -- and that gets to the point that Judge Moore was making about what good is it to inform kids that they will have the right -- these rights -- the right to bring an action in Court for -- since the parent wants to make them make the bed or take them to the dentist or clean their room when in fact they are not going to be able -- what do you say -- they would be informed of their rights,

but in fact they wouldn't be able to carry them out.

HON. MOORE: I said what good is it to give them the right if they don't know that the right exists?

MR. SIEGEL: Okay.

But I think giving them the right, and then giving them knowledge of the right, will have a really -- will have a significant deterrent effect as far as abusive action by parents the same way it has in the schools.

You know, only in -- it's true only of every small minority of the violations of due process rights of first Amendment rights in schools to Courts, but those school administrators know that there is still the chance, you know, that this particular case could end up there, or get a contact by ACLU or the Civil Rights Commission -- and it is produced and its -- even though they don't believe in it -- to provide some semblance of due process or some respect for first Amendment rights.

It has deterred them from suppressing this publication or deterred them from preventing students from bringing in that type of speaker.

It has made them work out with the students where the students really have had more say

of their rights, have become somewhat more specific and I think the same thing might happen in the family type of situation.

The parent would know that the potential -- if the kid -- if the rights were there, the children were informed of the rights, the parents would know that at least there was the potential -- there was at least the possibility that their order to clean his room could end up in Court, and instead of acting in a totally dictatorial fashion, maybe the parent would have somewhat more of an incentive to try to work it out in more of an equal type of decision making relationship.

So I think in that sense, just the existing, the potential existence of Court action, and of the right -- on the part of the kid and the parent would result in just an informal way, in a more equal decision making, and more syndication of rights.

MR. MANAK: Okay.

Is there any final comment?

Yes, Ms. Bridges?

MS. BRIDGES: I must be the only person concerned about this, but I am curious as to whether

or not either your Bar Association or your Court was by the fact that you were filing a suit on behalf of individuals that you did not in fact represent, and in reality you represented someone whose interests might be in conflict with those individuals.

MR. KAIMOWITZ: Congress, but short of Congress, I don't know of any other agency that has expressed its concern.

MS. BRIDGES: That was not raised when you filed this action?

MR. KAIMOWITZ: You are not the only other one concerned, Ms. Bridges.

I think in a sense I would be happy to talk to you about that separately because I think in terms of ethics, I have found in many respects, I have found in many respects, what I have done not in regard to this situation, but in regard for example, where an adult had consented to a medical procedure with a physician, and without ever consulting the adult intervened on his behalf, and stopped the medical procedure from taking place.

I think from the time that I did that, in my State, it cut off the debate over that question.

I had been allowed carte blanche, and

I think in an area that I am somewhat troubled has not been raised, and therefore I took that one step forward with regard to children.

MR. MANAK: Mr. Sandel?

MR. SANDEL: First, the question I am raising as to whether or not Mr. Kaimowitz has any children of his own.

He does?

I am troubled by his opposition -- It is one of those ideas which is seductive in its seeming simplicity, but -- I get the impression that it is based on a fundamental confusion between equal and equivalent.

And based on the last comment down at the end of the table, it seems to me that I can think of nothing more potentially destructive of the family relationship, whatever that relationship turns out to be, in the proposition that has been advanced.

It seems apparent from the -- apparent from the sense of the comments which have been made here this morning, that even if the proposition were accepted, there would be such an automatic instantaneous and vast congress of exceptions that

it would turn into nothing but an exceedingly frustrating exercise in futility.

Because we have learned how many times it wouldn't in fact even be communicated to the owner of the rights -- we have learned how many times the Court would be expected to do the same kinds of things that they are already doing in judging each individual case.

So simply to say to a group of human beings, "You are now persons," and then to go back to the list of things and duties and responsibilities of the Judges to impose the exceptions in the appropriate case, we wouldn't have made any forward progress, and he would simply have thrown onto the table such a confusion of identity, and such a confusion of duty as to make the matter much worse than it is now.

I would be very disheartened to see that volume withdrawn on the basis of a proposition that has been presented.

MR. KAIMOWITZ: Can I defend myself in one respect? I am a grandfather -- not only a parent.

And I raised one child who -- was a runaway from school on two occasions, and

had to be removed from school, and who has -- is graduating from the University of California in Berkeley at 19, and my daughter, proudly I will say, 17, is a junior at Yale.

And I think that the point that you raised is extremely well taken, and I think I made it in my, in my paper for the same reason.

I think it is important in this area for people particularly to, in capacities as Judges, lawyers and the like, and I notice that there was not even a vague suggestion in terms of specialization that somebody would have to be a parent before they specialized in a given area.

I think that one does have to undergo the rigors of parenthood before one can take the kind of drastic view I took.

I should also point out that my son at age 11 was a founder of something called KRUMA Youth Liberation, and that kind of revealed the reason for my prejudices.

MR. SANDEL: I must say you are the youngest looking grandfather I ever saw in my life.

MR. KAIMOWITZ: Thank you.

MR. MANAK: No further comments? All right ...

ADDENDUM BY MR. KAIMOWITZ IN FINAL REPORT

My primary purpose in submitting this addendum is to clarify what I mean by "rights". As a result of the discussions at the Juvenile Justice Standards Symposium in Chicago on December 2, 1978, I came to realize that others concerned about minors tend to use the term "rights" more broadly than I do.

I specifically am concerned about rights expressed and implied in federal and state constitutions and laws. Bestowing "personhood" on minors would only resolve some of the confusion about the extent to which young people have legal rights. Without personhood, any individual is at the mercy of the court, legislative fiat, popular referendum, or administrative rulings. He/she may be afforded certain relief from discrimination or oppression or receive certain benefits, but he/she can never be certain of his/her status at law as others can who are entitled particularly to the benefits of the Fourteenth Amendment to the United States Constitution, and the application of the Bill of Rights to the different states.

"Legal personhood" therefore should not be construed to mean that minors will be given something no other segment of the population has. Further, it will neither enhance nor detract from benefits such as food, clothing, shelter, medical care, education, others would afford children to a greater or different extent than they would the adult populace. I perceive those items as "protections" for minors, not as rights.

"Legal personhood" also would not interfere with biological ties between individuals, including those between parents and children. Nothing done at law in fact can do so. Even when, for example, parental rights are terminated, such biological ties do continue to exist and cannot be severed.

Most significantly, I do not believe the extension of personhood to minors would jeopardize the power relationship that now exists between parents and children, as it does between other segments of the population, which the law does not regard as being within its jurisdiction. Parents still could make their children come to breakfast on time or make beds without fear of being successfully sued; they could make their children go to the dentist or the doctor, say, without worry that their children could take legal action to make them cease and desist. Where parents extend their power to interfere with legal rights of children, perhaps by vetoing abortions desired by the pregnant teenagers, minors afforded personhood could alter to some extent the power relationship. But they only could do so to the extent that courts regarded such questions as legally cognizable for any person.

Judge Edward McLaughlin at the Symposium strongly urged that the demand for withholding the volume on "Rights of Minors" until legal personhood is recognized at law be denied. He supports full discussion of the relationship between legal personhood to the rights of minors but suggests that this can be accomplished more readily if the volume is approved.

As I pointed out in my oral rebuttal, simple recognition of personhood would obviate the need of any declaration of the specific "rights" set forth by the volume's drafters and reporters. With such a declaration, the volume would serve no purpose.

Judge McLaughlin's admonition that society might not be prepared to accord juveniles personhood and attendant legal rights, because minors are perceived as having no corresponding duties or responsibilities concerns me more. Minors never will be able to have such "abilities" because they lack the fundamental "economic" rather than legal right to make themselves financially independent. If legal rights are to be earned and society assured of a return, present or future, before it will tolerate freedom of expression, protection of privacy independent of parental concern, or freedom of movement by minors, I believe that any expression of "rights of minors" would be useless, since society will do as it has done, that is, view children as objects of its largesse rather than entities entitled to their own expression, because the fundamental status of children in our society is unlikely to change.

My only response is a plea, a hope, rather than a legal position, that the state in the long run will benefit more by treating such a large segment of the population with the same respect or dignity it should accord others. Some of the cynicism and frustration exhibited by youngsters who know that they are being treated hypocritically, say by being considered mature enough to fight in a war but not adult enough to drink, or by being required to attend school regardless of parental wishes but not being able to get medical care without parental approval, surely would be dissipated.

What I believe a declaration of personhood would do most is give minors access to courts. Then it would be up to the judiciary to determine which of the issues presented were legally cognizable. Perhaps then we would have a generation with more faith in the system than young people have now.

F. MISCELLANEOUS

1. Interim Status Pertaining to Abuse and Neglect and Noncriminal Misbehavior

Consultant
Robert E. Rounds

At the outset, Mr. Rounds states that all three standards "express a strong preference for parental autonomy in child rearing, and emphasize avoidance, whenever possible, of government intervention in the family structure." He notes that intervention is seen in the standards as traumatic in and of itself, and should be limited to the minimum intervention necessary to achieve the desired results." To reduce the frequency and length of preadjudication removals the standards impose procedural complexities on what Mr. Rounds views as an "already burdened system." He summarizes some of the procedural mechanisms recommended in the standards to accomplish these objectives, and comments that the substantive recommendations tend to "emphasize the rights of the parents" rather than those of the child. He suggests that such changes at the initial stages of the proceedings would result in the reduction of the number of removals at disposition.

Mr. Rounds then compares, in somewhat more detail, the recommendations in the neglect and abuse and the noncriminal misbehavior volumes of the IJA/ABA standards, the Task Force proposals, and the standards in the adjudication chapter (but not the intervention chapter) of the NAC standards.

In describing the IJA/ABA standards regarding neglect and abuse, Mr. Rounds comments that requiring that there be probable cause to believe removal is necessary, burdens neglect proceedings with inapplicable criminal law standards, and that by requiring serious bodily harm the standards may exclude removal due to sexual molestation or emotional trauma. Mr. Rounds suggests the word harm would be sufficient. He observes also that very brief time limits are imposed without attention to how notice will be provided or the necessary evidence gathered to meet the high burdens of proof prescribed.

The Task Force standards are described as a bit less restrictive but suffering from many of the same definitional and practical problems. Many provisions are seen as laudable but vague. The NAC standards are subjected to similar criticisms although the criteria for intervention are seen as broader than those of the Task Force and IJA/ABA recommendations. Mr. Rounds is particularly critical of the proposed requirement in the NAC standards of a hearing within 24 hours after a child has been taken into custody with no exception for non-judicial

days, stating that meaningful compliance is manifestly impossible. He states also that the requirement for review hearings every seven days will often result in meaningless hearings, and that releasing the child is the wrong sanction in neglect and abuse cases if the time limits are not met.

With regard to the standards on noncriminal misbehavior, Mr. Rounds briefly describes the three sets of provisions, and then comments that "the standards all accept the concept of shelter care, [but] [n]one of them face the most frustrating and prevalent problem in this area ... the juvenile who is a habitual runaway, who is thereby endangered and who refuses to remain in secure custody."

In his conclusion, Mr. Rounds states that:

> The crucial question remains: what is the minimum degree of mistreatment of children in which the court process should become involved? The solution requires a weighing of conflicting interests ... [and] is further complicated ... because society clearly has a greater burden to protect persons unable to protect themselves.... [T]he standards propose less frequent governmental involvement. To the extent that this represents a shift in focus from the needs of the child to the rights of the parents, it creates serious questions....

SUMMARY OF COMMENTS

The discussion was dominated by comments about what should be the threshold criteria for intervention. It began with Mr. Rounds clarifying his views in response to questions from Mr. Hege and comments by Ms. Connell. He stated a preference for phrasing the threshold for intervention in terms of probable injury or harm to the child with the least possible qualifiers in front of it. He acknowledged that a higher standard may be appropriate for the courts, but that doctors, police officers, agency personnel, neighbors and other legal lay people should not be hamstrung in their on-the-scene efforts to protect a child.

> Get the child out of the home where the situation demands it in the layman's view, then apply a judicial standard later.

Ms. Connell stated that in such situations she trusted the courts more than lay people and expressed the view that the trauma to a child of out-of-home placement is "tremendous," that the standards were directed at the reduction of such trauma, and accordingly, that as an attorney for both parents and children, she supported them. Mr. Rounds replied that in considering the trauma of removal, the age of the child has to be taken into consideration since the trauma would be far less for an infant than for a twelve year old, and that the risk that a child might die from or be injured by abuse far outweighed the possible trauma of removal.

Mr. Hutzler suggested that Mr. Rounds appeared to be against any change in current practices and that his paper indicated a basic difference in the "view of the real world" from that propounded by the standards drafters. As an illustration, he observed that in Mr. Rounds' view, it is better to remove five or six children even if the risk of trauma to them is substantial, than to have one child die. In response, Mr. Rounds indicated that he may have "overemphasized objections to the standards" and that they are "a vast improvement over what you might describe as the average statute in effect today." He reiterated in response to Mr. Hutzler's questions that his primary objection was the high burden of proof imposed on those seeking to protect a child from harm.

Judge McLaughlin remarked that a major difficulty in setting and assessing a standard for intervention is that its effectiveness is based on uncertain predictions of future conduct. He questioned whether there was data which proved the traumatic effects of removal, but admitted that he believed that such an effect would be shown, since in his experience few children removed at the beginning of a neglect proceeding were returned home prior to the dispositional stage. Mr. Siegel concurred, but Judge Delaney objected that the high standard may deny abused children their day in court and that in his experience, arrangements were often made by the social worker to return a child home quickly and safely. Mr. Rounds added that one-third of the children removed from their homes in his jurisdiction were returned at the initial hearing. Judge McLaughlin concluded that often the policy set by the probation supervisor determined whether a child would be returned home. He also cited the family's economic status as a determinative factor noting that a mother who was poor and whose child was removed might lose her AFDC and other child care benefits and as a consequence, have no home for the child to return to. He pointed out also that once a child is removed, all the arguments against transferring a child begin to work against returning the child to his or her original home.

During the course of the discussion, both Ms. Sufian and Judge McLaughlin commented on the difficulties faced by probation officers. Ms. Sufian noted that the social worker often becomes pitted against

both the parents and the child, and Judge McLaughlin observed that the social worker sometimes has to betray a trust relationship developed with the parents in order to protect the child. Judge Fort remarked that the problems raised during the discussion illustrate the point made by Mr. Kaimowitz in his paper that the rights of parents and of children require clarification. Judge Cattle agreed.

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INTERIM STATUS IN ABUSE, NEGLECT AND NONCRIMINAL MISBEHAVIOR CASES

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DESCRIPTION OF TOPIC

The assigned topic is Interim Status Pertaining to Abuse and Neglect and Non-Criminal Misbehavior. The discussion will focus on pre-adjudication and detention. Since two sub-topics are involved, each pertinent segment of the various proposed standards will be approached as it pertains first to abuse and neglect, then to non-criminal misbehavior.

The proposed standards coincide in several important respects in their treatment of this topic. They express a strong preference for parental autonomy in child rearing, and emphasize avoidance, wherever possible, of government intervention in the family structure. Where intervention is mandated, it is limited to the minimum intervention necessary to achieve desired results. The standards assume that intervention itself is traumatic, not only for parents and custodians, but also for the child who is the subject of intervention.

To accomplish their broad aims, the standards seek to impose upon the Juvenile Justice System numerous procedural and substantive rules. These are predicated upon the assumption that pre-adjudication removals from the home have in the past, occurred too frequently, for too long a duration, and upon inadequate underlying facts.

The standards, if adopted, would tend to add procedural complexities to an already-burdened system. They would impose the need for additional hearings. They condense time limitations for court action, and thus the time for preparation for court proceedings, by all involved parties and agencies. If the standards were to accomplish their stated goals, they would substantially reduce the number of pre-adjudication removals of children from their homes, and thus the extensive mechanisms now in operation for care of such children.

The standards are designed to accomplish these objectives in several ways: By alteration of the legal basis for bringing an abused or neglected child within the jurisdiction of the court; this consists of narrowing jurisdiction to situations involving clearly defined harm to the child. By increasing the quantum or kind of evidence sufficient to accomplish jurisdiction; this is not necessarily done by a stated evidentiary standard, but rather by a requirement to prove a degree of harm. An example of the latter is the requirement of "serious" bodily injury. By mandating release of allegedly abused or neglected children under described circumstances; this mechanism pervades the proposed standards, and is imposed not only upon the courts, but also upon personnel involved at each stage of the detention process. When a case is presented to the court, it is encouraged to release children to their home by the general presumption that that is the appropriate action. Other mechanisms include the necessity to make specific findings of endangerment to justify detention, the creation of an evidentiary hearing to justify removal, and strict criteria.

Having increased materially the difficulty of pre-trial removal, the standards treat only minimally the period between initial court appearance and disposition. They do permit, generally, reconsideration of a decision to remove during this period.

The significance of the decision whether to remove the child during the interim period is greater than the fact of governmental interference for a limited period in the familial situation.

A statutory framework within which the decision is made imposes upon the juvenile justice system a complex of value judgments. Compared to existing law and practice, the standards emphasize the rights of parents in dependency cases. They presume that, except in the most serious cases, the intervention of the state is potentially more injurious than the status quo. They assume that it is not the business of government to evaluate or punish parents because of their life-style, mores, morals or parenting methods, unless there is damage, or the imminent threat of damage, to a child.

An inevitable result of such changes would be a substantial reduction in the proportion of removals from the home during the interim period. An important, although intangible, result of this reduction would be to reduce the proportion of removals at disposition. The standards require, generally, some evaluation of the evidence available at the first court appearance. Leaving the child with the parents at that stage would tend to reinforce the presumption against removal at disposition; first, because a previous review of the evidence resulted in continued parental custody; second, because the child was not harmed during the pendency of the proceedings.

Legislative enactments consistent with the general thrust of the various standards would impose upon the courts drastic alterations in point of view. Emphasis would shift from the best interests of the child to ill-defined rights of parents. Abused or neglected children would be divided into categories heretofore considered primarily in dispositional hearings, i.e., seriously injured or threatened children, as contrasted with something less. Presumably, something less would consist of children who were not seriously injured, and were not in danger of serious injury. It can be argued that the latter category has no standing to be in court. If so, the requirement of serious injury is reduced to question-begging semantics.

In summary, the importance of the interim status detention standards is that they reflect a drastic alteration in long-standing precepts in the juvenile court system, and they govern a threshold determination of the quality and nature of the case which will color the ultimate outcome.

COMPARATIVE ANALYSIS OF THE STANDARDS RELATING TO ABUSE AND NEGLECT

Three sets of proposed standards are considered: The Institute of Judicial Administration-American Bar Association Juvenile Justice Standards Project, specifically the Abuse and Neglect section, hereafter referred to as IJA/ABA Standards; The Report of the Task Force on Juvenile Justice and Delinquency Prevention to the National Advisory Committee on Criminal Justice Standards and Goals, hereafter referred to as the Task Force Standards, and the Report of the Advisory Committee to the Administrator on Standards for

the Administration of Juvenile Justice of the National Advisory Committee for Juvenile Justice and Delinquency Prevention, hereafter referred to as the NAC Standards.

The first area of consideration in comparing the standards is what criteria are established for determining whether to remove the child from the home during the pre-adjudication period.

In the IJA/ABA Standards, this is governed by the Standards Relating to Abuse and Neglect section; the Interim Status and Pretrial Court Proceedings sections are limited to consideration of delinquency cases. The operative standards are grouped in the Emergency Temporary Custody of an Endangered Child section, and are numbered 4.1 through 4.4.

Standard 4.1 deals with the initial removal from the home by medical, law enforcement or public agency personnel. It severely restricts such removals. The person must have probable cause to believe removal is necessary to prevent the child's "...imminent death or serious bodily injury..." and that the parents or caretaker "...is unable or unwilling to protect the child from such imminent death or injury...." If the danger to the child results solely from being left unattended at home, it authorizes only provision of an emergency caretaker until "...the child's parent returns or sufficient time elapses to indicate that the parent does not intend to return home...." It requires prior approval of a court pursuant to standard 4.3 unless risk to the child is so imminent that there is no time to secure such approval.

The use of the phrase "probable cause" utilizes a standard formulated in criminal law, and would tend to impose an immense array of decisional law upon an area to which it is irrelevant. A more appropriate standard might be, "reasonable belief." The standard can be interpreted to refer only to physical injury. If so, it might preclude detention for sexual molestation and severe emotional trauma.

The requirement for provision of a caretaker presupposes the publicly-supported existence of a full time force of baby-sitters, and raises the question whether the rights of parents who presumably created the situation are being unduly exalted.

Subsection B of standard 4.1 creates limited immunity for persons removing children in good faith. Subsection C creates a department of social services.

Standard 4.2 subsection A governs the conduct of any agency taking custody of a child after removal. It requires a nonsecure setting appropriate to the needs of the child; provides for emergency medical care; and for daily visitation by the parents during detention.

Standard 4.2B requires the agency to report removal to the court on the first business day thereafter, and either to submit a petition or release the child at that time.

A nonsecure setting might be inappropriate where the parents have a history of illicit removals of children from such custody. There are numerous

valid arguments to support the most rapid possible procedures in cases of this kind. At some point reductio ad absurdum applies; any procedure can be hastened until proper performance is impossible.

Standard 4.3A governs court procedures upon receipt of a petition pursuant to 4.2. The court must immediately give notice to the parties, appoint counsel for the child, and refer the petition for prosecution. It requires a hearing on custody on the same day if possible, and in any case no later than the next business day. It requires a decision whether investigation of the petition should be authorized, and to approve the plan for investigation.

This standard does not explain how notification is to be accomplished within such time limits. It also refers to procedures contained in Standard 5.2 whereby the court decides whether an investigation should occur, and if so, how. A discussion of separation of powers problems is beyond the scope of this paper.

Standard 4.3B states requirement for continued emergency custody. Paragraph 2 states the evidentiary standard:

> "Custody of the child with his/her parent(s) or other such caretaker(s) named in the petition would create an imminent substantial risk of death or serious bodily injury to the child, and no provision of services or other arrangement is available which would adequately safeguard the child in such custody against such risk";

As previously mentioned, it is questionable whether this provides for sexual abuse or emotional traumas. The requirement of serious bodily injury will create the need for clearer definition. It is unclear whether the most typical sort of injury - such as inflicted bruising with an implement - would fit within the standard. "Imminent" requires a finding, implied or actual, as to whether the hazard will occur in the immediate future; "substantial" requires a finding that the risk is somewhere between, "more likely than not" to happen, and "is certain to happen." The last quoted clause requires the court to determine (within two days of detention) that no public, private or familial resource is available which would enable the child to return home. This standard creates an extremely high burden to be met in order to continue removal of a child.

Standard 4.4 permits the court to authorize removal at any time during pendency of the proceeding, after a hearing at which the above-described standards are met.

The Task Force Standards relevant to this topic are numbered 5.3, 11.1 through 11.17, and 12.9. The first of these should be considered in conjunction with 12.9. Standard 5.3 recommends clear authority for police to intercede to procted endangered children. Subsection 1 deals with an endangered child not in its own home. It permits removal, and requires maximum possible efforts be made to return the child to the home. Subsection 2 states, "When a child is endangered in the home, police should make maximum possible efforts to protect the child without resorting to removal from the home."

Subsection 3 governs the situation where the child is in the home and removal is deemed necessary by the police. The stated standard for doing so is "bodily injury." In the event the criteria are fulfilled, the police are to conform to the procedures in standard 12.9.

Notable in this standard is the underlying presumption that the child should be left in the home whenever possible. The standard for removal is less restrictive thant that of the IJA/ABA Standards. There is no requirement that the threatened injury be serious. A similar defect is apparent in that the standard does not cover emotional or sexual harm to the child, although these are specific jurisdictional grounds in standards 11.12 and 11.13.

More stringent requirements are imposed by Standard 12.9. It governs police conduct because of the reference to it in Standard 5.3. Standard 12.9 restates the bodily injury requirement, but also requires that, "...the child's parents or other adult caretakers are unwilling ot unable to protect the child from such injury." It requires prior court approval unless there is not time to secure approval, emergency caretaker services similar to the IJA/ABA Standards, and daily parental visitation. It omits the requirement that transportation be provided the parents, but implies it in the phrase, "...is required to assure the opportunity for daily visitation...."

Standard 12.9 is virtually identical to IJA/ABA Standard 4.2B in petition filing requirements. It requires filing or return to the home within 24 hours, and an immediate hearing after filing. The latter requirement is more stringent than IJA/ABA Standard 4.3, and probably unworkable, in that it makes no provision for notice, appointment of counsel, non-judicial days or unavoidable delays.

Standard 11.1 states a strong presumption for parental autonomy. Standard 11.2 reverts to a higher standard of harm to the child as a prerequisite for coercive state intervention, requiring serious harm or the substantial likelihood of imminent serious harm. This is preferable to IJA/ABA Standard 4.1, discussed above, in that it does not require physical harm, the definitional problems inherent are otherwise similar.

Standard 11.3 states, "Fault concepts should not be considered in determining the need for, or type of, coercive State intervention." While beyond dispute as a statement of appropriate law, this should not be construed to eliminate the concept of causation, and its consideration in disposition. The commentaries to this standard state, "Intervention should be a nonpunitive act." Such statement do little to clarify the law, and ofter confuse it. Although not designed to punish parents, removal inevitably does so.

Standard 11.4 requires taking into account cultural differences in child rearing. The commentary offers as an example a cultural heritage in which members of the extended family provide caretaking services. The suggestion is that intervention is not authorized where care under these circumstances is adequate. Intervention in that situation is unlikely in any present jurisdiction. The danger of a statute in terms of the standard would be the availability of the argument that the parental culture includes severe physical punishment. In such a situation, intervention should be permitted.

Standard 11.5 States:

"Although coercive State intervention should promote family autonomy and strengthen family life whenever feasible, in cases where a child's needs as defined in these standards conflict with parents' interests, the child's needs should be protected."

This is a restatement of the traditional "best interests of the child" test. The commentary suggests that public funds are expended on the child after removal in the typical situation, and that thought should be given to channeling funds to the home. Historically, there is little evidence to suggest that funding improves the home environment. Massive welfare programs in effect for many years apparently do not do so. This standard seems in conflict with the stringent standards for removal and for protection of parental rights.

Standard 11.6 requires that intervention systems be designed to provide children with continuous, stable living environments. This is a laudable and necessary attack upon the typical system in which the child is shunted among a variety of foster homes.

Standard 11.7 requires that all agencies and branches of government involved in the intervention process, incuding courts, be accountable for all of their actions. It states that, "...decision-makers should be required to specify the basis for their actions and mechanisms should be established to review important decisions." The standard and commentary are vague. The inference is that mechanisms should exist to identify the decision-maker to require a complete record of the process, including the basis for decisions, and to create rapid and responsible review of decisions. The only concrete suggestion made is for creation of grievance officers.

Standard 11.8 limits jurisdiction either to situations involving parental consent or when the child is endangered pursuant to Standards 11.9 through 11.15.

Standards 11.9 through 11.15 specify situations justifying intervention. These standards describe situations in which court jurisdiction, as opposed to initial detention, is justified. They are apparently not detention criteria, because of the removal of the standard described in Standard 12.9.

The National Advisory Committee standards relevant to the topic are 3.113, 3.132, 3.133, 3.145, 3.147, 3.156, 3.157, 3.158, 3.161, 3.165, and 3.166.

Standard 3.113 establishes general jurisdiction basis in neglect and abuse cases. It is the most comprehensive of the jurisdictional standards. It is divided into nine lettered paragraphs, each stating a criterion for jurisdiction. Paragraph (a) includes juveniles who are unable to provide for themselves (the possibility of emancipation is little-mentioned in the other standards); and who have no responsible adult willing and able to provide supervision and care. Paragraph (b) describes nonaccidental physical injury causing a substantial risk of death, disfigurement, impairment of bodily function, or bodily harm. Paragraph (c) covers sexual abuse. Paragraph (d) is failure to provide supervision and protection causing or likely to cause serious impairment of physical health; (e) is serious impairment of

emotional health; failure to provide adequate food, shelter, clothing or health care is (f); (g) describes parental placement in illegal care or adoption situations; (h) is juvenile committing acts of delinquency as a result of pressure from or approval of parent or guardian; and (i) deals with parents or guardians preventing minors from obtaining legally required education. The standard also permits jurisdiction in these situations over parents, guardians, and involved agencies or institutions.

Compared to the other standards, the most notable distinction of the NAC jurisdictional requirement is that no degree of bodily harm is required. IJA/ABA Standards require "serious bodily injury"; the Task Force Standards require "bodily injury" for emergency removal (standard 12.9), but "serious harm" for jurisdiction (standard 11.2). The NAC has four criteria, one of which is bodily harm.

There is no injury criterion in the sexual abuse provision. The emotional and physical neglect paragraphs state a requirement for "serious impairment" of emotional or physical health. The only prospective language in this standard relates to physical abuse, contained in subparagraph (b), which states in part, "Juveniles who have suffered or are likely to suffer physical injury...," and in paragraph (d). The other paragraphs require that the impairment to the child be in existence.

The commentary to Standard 3.113 states that it, "...clearly recognizes that the protection of the juvenile is the primary purpose of State intercession. As formulated, the standard does not require a showing of 'parental fault.'" Nonetheless, the standard is phrased in terms of parental action or inaction; e.g., "...as a result of conditions created by their parents...," subsection (d); "...whose physical health is seriously impaired because of the failure to their parents...," subsection (f) .

The ommentary is also enlightening in terms of prospective jurisdiction and degree of harm: "A child should not have to be permanently maimed before assistance is available, but neither should court intervention be authorized when the risk of harm is highly speculative."

Standard 3.132 states in part, "A juvenile should be entitled to be represented by counsel in all proceedings arising from a ...neglect, or abuse action and in any proceeding at which the custody, detention, or treatment of the juvenile is at issue." It requires that counsel be appointed in abuse and neglect cases in which counsel has not been retained, or it appears that counsel will not be retained, or there is a conflict between parents and child, or when required in the interests of justice.

Standard 3.133 entitles parents to appointed counsel. Standard 3.145 establishes criteria for intake decisions, and relates to Standard 3.142. The latter standard requires evaluation of a complaint for legal sufficiency by an intake officer, and a determination by that officer whether a petition should be filed. The factors to be considered in Standard 3.145 are contained in six lettered paragraphs. They include: The seriousness of the alleged neglect or abuse and the circumstances (a); the age and maturity of the juvenile (b); the nature and number of prior contacts with the family (c); the results of those

contacts (d); availability of outside services not involving removal (e); and the willingness of the family to accept services (f). The Commentary states that the standard is intended to channel as many cases as possible to services outside the juvenile justice system.

Standards 3.146 and 3.147 deal with intake investigation and require the intake officer to make a report explaining the reasons for a decision to file a petition. The report is to be sent to the prosecutor, and the juvenile, his parents, and attorneys.

Standard 3.154 governs first, whether the intake officer should impose conditions to protect a juvenile alleged to be neglected or abused, and second. standards for emergency custody.

The first portion assumes placement with the family pending the outcome of a filed petition. The factors to be considered by the intake officer repeat the first three criteria under Standard 3.145, and add the presence of someone with whom the juvenile has substantial ties who is willing and able to provide supervision and care. This standard also prohibits the imposition of conditions on the parents unless it is necessary to protect the juvenile against the harms described in the jurisdictional standard,(3.112 (b) - (i)) .

The second section of the standard states that juveniles should not be placed in emergency custody care unless they are unable to care for themselves and there is no parent, guardian, relative, or other person willing and able to provide supervision and care (language identical to Standard 3.113(a)); or: There is a substantial risk that they would suffer one of the harms in Standard 3.113 (b) through (h) if returned home. This omits (i), parent-caused truancy. Standard 3.154 add two additional detention criteria: "There is a substantial risk that they will fail to or be prevented from appearing at any family court proceeding..." (Standard 3.154(c)), or there is no other measure that will provide adequate protection, (subsection (d)).

The standard further provides that where custody is required, it be in the most homelike setting possible, and that abused or neglected minors not be placed with delinquents or adults.

It should be noted that this standard seeks to establish guidelines for detention applicable to intake service officers. Initial criteria governing police or medical personnel are omitted.

The NAC makes clear in the commentary to Standard 3.154 that they concur in general philosophy with the other groups promulgating juvenile standards:

> "Because removal of a child from his/her house, even on an emergency basis, is often emotionally "very painful" to the child, ...and because the emphasis throughout these standards on the use of the least intrusive form of intercession that is appropriate, ...the standard recommends that a juvenile alleged to have been neglected or abused should not be placed in emergency custody unless no other alternative will provide adequate protection."

Standard 3.156 creates a hearing procedure applicable to minors released on conditions. The hearing is conducted if the parties request it, and consists of judicial review, and impliedly, revision of such conditions where appropriate.

Standard 3.157 requires that where juveniles have been placed in emergency custody, a hearing should be held before a judge no more than 24 hours after custody commenced. At the hearing, the state is required to establish that there is probable cause to believe that the juvenile has been neglected or abused pursuant to jurisdictional standards. In the event such probable cause is established, the court is required to reconsider custody. It requires appointment (and presumably, presence) of counsel, and disclosure to the parties of all facts or opinions relied upon in making the decision to detain.

The commentary compares this time limitation to those contained in other proposals, and concludes that, "Although the recommended 24 hour limit may cause some difficulties, especially in rural areas, the emotional impact on a juvenile of removal from even a bad home requires that the mechanism for correcting improper emergency custody decisions be available as quickly as possible." The commentary also states, "As in the other standards dealing with determinations of probable cause, standard 3.157 does not preclude such determinations from being based in part on hearsay."

From the viewpoint of the prosecution, and presumably of the courts, this standard creates immense procedural problems. There is no exception for non-judicial days. Therefore, assuming emergency detention on Friday afternoon, the court must convene an evidentiary hearing on Saturday. The standards are uniformly meticulous as to giving notice to all parties, and decidedly in favor of the presence of counsel at all hearings. Many abuse cases, and some neglect cases, require expert opinion, especially of a medical nature. Thus it is necessary to convey notice of the hearing to the parents (bearing in mind that one of the basis for jurisdiction may be that the whereabouts of the parents is unknown), appoint counsel and give them notice, presumbaly require them to accomplish some discovery, since the courts uniformly hold that hearings without discovery are meaningless, assemble evidence, including hearsay, and present enough sufficient to create probable cause. It is the belief of the writer that meaningful compliance with this standard is manifestly impossible.

Standard 3.158 requires review of either detention of the imposition of conditions each seven days after detention, or whenever new circumstances warrant earlier review. It provides for appeal of adverse rulings. The Commentary cites IJA/ABA recommendations that the appeal be heard by a single appellate judge within 24 hours of the filing of notice of appeal, with immediate appellate decision.

This standard imposes an obligation to conduct meaningless hearings in the situation where detention is amply justified and there are no relevant changes of circumstances. Most jurisdictions already permit such hearings where a change of circumstances exists; this would appear adequate. The suggested 24 hour appeal would seem irreconcilable with the calendar situation of most appellate courts.

Standard 3.161 establishes time limits for proceedings from initial contact through appeal. It requires adjudication within 15 calendar days where the juvenile is detained (subparagraph (f)); arraignment within 5 calendar days after petition filing (subparagraph (e)); and requires that where the stated time limits are not met, there should be authority to release a detained juvenile to impose sanctions against the persons within the juvenile justice system responsible for the delay, and to dismiss the case with or without prejudice.

The time limits are generally consistent with those in other standards; subject to previous objections, they are in accord with the goal of speedy juvenile court proceedings. The sanctions for failure to comply with the limits, however, are subject to criticism. The release of a minor previously found to be in imminent danger of bodily harm due to ministerial failure is extreme. When the law endangers children to assure compliance with its forms, the law is wrong.

Standards 3.165 and 3.166 govern probable cause hearings not otherwise controlled by Standard 3.157, and arraignment procedures.

NONCRIMINAL MISBEHAVIOR

The significance of this area of juvenile justice involves the magnitude and seriousness of the problem it confronts, and the extreme difficulty of formulating workable methods of coping with the problem without infringing the rights of persons involved. The crux of the latter problem is the fact that the system is dealing with children who are in trouble but have violated no laws. There is probably more variation in statutory formulations in this area than in any other aspect of juvenile justice. The mechanisms for handling the "beyond control" child, or the "person in need of services" range from equating the situation to delinquency and the employment of long-term secure detention, to simply abandoning the situation to the private sector. The former is manifestly unjust and the latter tends to overwhelm the meager resources available outside the juvenile court systems. The magnitude of the situation does not require repetition of the overwhelming statistics regarding runaways or parental requests for assistance.

COMPARISON OF STANDARDS

The IJA/ABA Standards are contained in the section labelled "Noncriminal Misbehavior." Those dealing with pre-adjudicatory treatments are standards 2.1 through 2.4; 3.1 and 3.2; 4.3; and 6.1 and 6.2. Standard 2.1 governs the conduct of law enforcement officers; it requires a threshold determination by the officer that the juvenile be in circumstances which constitute a substantial and immediate danger to the juvenile's physical safety, and a determination that the safety of the juvenile requires the prescribed action. In such case, the officer may take the juvenile into limited custody. Then, with consent of the juvenile, he may be taken home or to any appropriate residence. Lacking consent, the officer must take the juvenile to a temporary nonsecure residential facility. The limited custody cannot extend more than six hours from initial contact.

Standard 2.2 requires notice to the parents, and release to them with consent of the juvenile. It provided for release to responsible adults other than parents, and for arrangement for appropriate services where requested.

Standard 2.3 applies when the officer cannot place the juvenile because the juvenile refuses consent or no responsible adult can be contacted. In that event, the nonsecure detention facility requirements of 2.1 apply. If the juvenile then cannot be placed, and refuses to return home, the runaway provisions of part III apply. The officer is granted civil and criminal immunity for his good faith actions in standard 2.4.

Standard 3.1 C permits the juvenile in the last-described situations to remain in the facility for up to twenty-one days, unless he and his parents agree in writing to permit him to remain longer. Standard 3.2 essentially provides for the filing of a neglect petition in the event the parents refuse to permit the juvenile to return home.

Standards 4.1 through 4.3 provide a panoply of services, including crisis intervention for noncriminal juveniles. Standards 6.1 and 6.2 permit appropriate emergency treatment and custody for juveniles who are "...suicidal, seriously assaultive or destructive, or otherwise similarly evidence(s) need for emergency care."

The Task Force Standards refer to noncriminal situations as "Families With Service Needs." The jurisdictional requirements are contained in standards 10.1 through 10.8. Included in the topic are runaways (10.4), truants (10.5), juveniles who disregard or misuse parental authority (10.6), those who abuse alcohol (10.7), and those under age ten who are involved in delinquent acts (10.8). Standard 12.8 governs preadjudicatory shelter care. It prohibits use of such facilities unless clearly necessary to protect the juvenile from bodily harm, and requires exhaustion of all other means for providing protection. It also requires the least restrictive setting possible, and prohibits comingling with delinquents. The standard does not specify police procedures, and ignores voluntariness problems, parental wishes and refusal to remain.

The NAC Standards are virtually identical to the Task Force Standards. The jurisdictional criteria contained in standard 3.112 repeat those of the Task Force, except for omission of alcohol abuse. Intake criteria, described in Standard 3.144, consider the seriousness of alleged conduct, the age and maturity of the juvenile, prior contacts and their result, and availability of appropriate services outside the juvenile court system.

Standard 3.153 covers criteria and procedures for detention and release. It provides for shelter care facilities pending disposition, prohibits secure detention, and requires a danger of imminent bodily harm for detention. It requires exhaustion of less coercive measures. The stated criteria for detention are identical to the jurisdictional standard,(3.114), with the additional consideration of the availability of an adult able and willing to provide care and supervision. It provides for use of the least restrictive alternative for detention.

Both the NAC and Task Force Standards establish proceedings for jurisdiction of the court over status offenders.

Since all three standards provide for nonsecure detention for status offenders, for referral to private agencies, and utilize approximately the same criteria for detention, the basic distinction among them is detail. Their differences in terms of ultimate dispositional methods are not included in this topic. The IJA/ABA Standards are superior in that they govern police conduct with particularity, and resolve the matter either by suitable placement or neglect adjudication and supervision. The standards all accept the concept of shelter care detention. None of them face the most frustrating and prevalent problem in this area; the juvenile who is a habitual runaway, is thereby endangered, and who refuses to remain in nonsecure placement. Even the best of the standards are ineffectual, since the IJA/ABA requires parental refusal of placement before neglect jurisdiction can apply. Perhaps the standards plus private resources available describe the maximum effort society reasonably can attempt in these cases.

The philosophical difficulties presented by the various standards in the area of abuse and neglect occur in the marginal situations. The cases involving inhuman brutality - multiple fractures in infants, inflicted severe burns - cause no problem in that the standards and all jurisdictions agree on intervention, removal and out of home placement pending correction or majority of the child. Similarly, there is little difficulty with the most serious forms of neglect, such as life-endangering malnutrition or chronic abandonment of infants.

It must be conceded that there are forms of inappropriate parental behavior beyond the scope of court intervention. To attempt to correct all misfeasance would necessarily result in judicial dictatorship over the parenting process. Most jurisdictions have recognized this and have established a hierarchy of escalating responses to parental failings. Financial support in the form of welfare benefits, unemployment assistance and aid to dependent children are offered with comparatively minor interference in family functioning. Demonstrative methods ranging from parenting classes to public health nurse visits are often available. These are frequently used in preference to court intervention when agencies receive reports of mistreatment.

The crucial question remains: What is the minimum degree of mistreatment of children in which the court process should become involved? The solution requires a weighing of conflicting interests. It is necessary to protect children, and the degree of protection should be in proportion to the danger to the child. The danger to the child should be measured both in terms of its nature and extent, and the ability of the child to flee, report and protect itself. It is also necessary to protect parents from unwarranted interference in two areas: first, their general right to be free from the activities of government unless justified; and second, freedom from interference with parental rights in relation to children.

The question is further complicated in the area of child neglect and abuse because society clearly has a greater burden to protect persons unable to protect themselves. This undoubtedly gave rise to the concept that the primary duty of the courts was to protect the child, and that the rights and interests of the parents were secondary to that goal.

All of the standards considered present a shift in emphasis to the parental interest. Most of them try to do both; for example, IJA/ABA Standard 1.1 in the Child Abuse topic states: "Laws...on behalf of endangered children should be based on a strong presumption for parental autonomy in child rearing." Standard 1.5, however, states: "...in cases where a child's needs...confilct with his/her parents' interests, the child's needs should have priority." In resolving this conflict, the standards impose presumptions in favor of home placement, court hearings to assure that parental rights are not violated in detention, the need for findings, and higher standards for neglect or injury than is typical in existing law.

Similar conflicts exist in the National Advisory Committee standards:

> "This standard provides a definition of neglect and abuse for jurisdictional purposes. It is intended to focus attention on specific harms to the child rather than on broadly drawn descriptions of parental behavior. It weighs both the interests of the juvenile in avoiding harm and the interest of the family in avoiding unnecessary State interference in child rearing, but clearly recognizes that the protection of the juvenile is the primary purpose of State intercession."
>
> Commentary to Standard 3.113

The same commentary states the problem: "A child should not have to be permanently maimed before assistance is available, but neither should court intervention be authorized when the risk of harm is highly speculative."

The Task Force Standards also define the problem and the proposed solutions:

> "The standards in this report outline a general philosophy and set forth basic value judgments regarding coercive intervention. At the heart of the proposed system are a strong presumption for parental autonomy in child rearing and the philosophy that coercive intervention is appropriate only in the face of serious, specifically defined harms to the child. The standards advocate substantial changes in existing laws and agency procedures. The concepts of neglect, dependency, and abuse are discarded as the standards approach the subject of maltreated children under the rubric of the Endangered Child."
>
> Introduction to ch. 11.

In determining that the threshold for intervention involves the existence or threat of serious injury, the standards propose less frequent governmental involvement. To the extent that this represents a shift in focus from the needs of the child to the rights of the parents, it creates serious questions as to the propriety of adoption of the standards.

All right, we are almost at noon -- and we have a couple of ways we can go at this point.

We could break briefly for people to get food, or we could continue on.

We have two papers to go and I am going to hold them to our limit.

(Discussion off the record.)

* * * * * * *

(WHEREUPON, Robert Rounds' presentation was given and the following is the discussion that ensued.)

MR. MANAK: Thank you, Bob.

We are going to start down at the end here with Mr. Hege.

MR. HEGE: Just one comment, Mr. Rounds. You seem to disagree with the use of the adjective "serious," in terms of bodily injury.

One of the standards apparently just says "bodily injury."

Is that no also -- don't we also have trouble with that standard just plain "bodily injury" the same as we do with the serious bodily

injury?

MR. ROUNDS: Yes, and without belaboring it speaking, I mentioned in the paper that that could certainly be construed not to include emotional injury or sexual molestation not involving bodily injury -- I object to that as well.

And if you have to have a sentence involving any kind of injury, or the prediction of the likelihood of injury, then it is the least stringent of the standards before us, and therefore the one of preference.

I think that probable injury or harm to the child where the least possible qualifiers in front of it is the best way to go.

If you have to have something to take away the trivial injury, then make it serious damage or harm or the threat of damage or harm without limiting it to bodily. And by defining "serious" better, what do you mean by "serious"? At what point can we go in? I would rather see a standard phrase in terms like that.

MR. MANA:: Okay.

Ms. Connell?

MS. CONNELL: As an attorney who represents

children, but also parents, I have a sense that some of what you are saying, you know, we are going to protect the child.

But that bothers me in the sense of talking about have a fairly low level at which one can intervene.

And I think the reason for my concern, I will grant you that hearings are going to be very prompt on stands, and certainly that is wonderful.

But too often children are, you know, the trauma of being placed out of the home is tremendous.

It really is tremendous, and when you see kids that are placed in shelter care because most often that is the option that is available -- at least until that emergency hearing, because in so many communities there are no mechanisms for placing in something like emergency foster care.

That harm, I think, is what these, you know, rigid standards are trying to protect.

And as someone who represents kids as well as parents, you know, I would be in favor of that because of the harm.

MR. ROUNDS: Two comments -- I am not in disagreement.

Seven of the ten years I have spent in Juvenile Courts have been defining.

I think that the first, the initial or threshold standard is going to necessarily involve physicians, police officers, agency personnel, neighbors, and grandparents.

If we have to go into serious harm criteria, then at least cases like it -- in other words, at the first hearing, makes the criteria higher when you have the Court to evaluate evidence precedented in -- in a judicial form.

The point that I am making is you're hamstringing laymen by using legal language in terms of what you do at two a.m. out at the Department.

And I agree with you that the removal is traumatic, and the standards say so.

The point is that that becomes say less relevant as the danger increases.

By that I mean when you get children below two and down to three weeks of age, this is going to be a whole lot of trauma involved in removing a three-week-old baby for a limited period.

That is the one that needs the most help, and there I don't like to have a physician saying, "Is this disfigurement -- is this serious bodily injury?"

I would infinitely prefer that the next day or two days later the Court have a higher standard to look at.

What I am saying is, get the child out of the home where the situation demands it in the view of a layman -- then apply judicial standards at a later time.

MS. CONNELL: I guess I trust Courts much more that I trust the layman, the social worker, the neighbor, who is offended.

HON. DELANEY: Thank you.

MR. ROUNDS: I tend to also -- So often we are confronted with the situation that the failure to remove, results in a dead baby as opposed to the hasty removal creates trauma, for the family, and possibly for the child.

The danger is greater on one side than the other.

MR. MANAK: Ms. Sufian?

MS. SUFIAN: I was going to make the same point

as Ms. Connell.

That as often as not clearcut that the rights of the parents are close to the rights of the child -- in removal that have often takes it of the parent and the child versus the right of the social worker to follow their own values.

And that then -- and a removal decision, in early stage often makes it -- more difficult for the social work to actually work with the family on an ongoing basis.

It is almost like termination of a relationship between the social work and the family at that point.

It is just a comment.

MR. ROUNDS: Yes.

And I think again, the first was shown of interference against arbitration action by the social worker is going to be the first Court hearing, and I regret as much as anyone else the chaos created by the removal for 4, 24, or 48 or 72 hours.

I definitely prefer it to having children further injured.

MR. MANAK: Judge Fort?

HON. FORT: This volume, and Mr. Kaimowitz's, is particularly -- I think focused on what in all of these standards, should legitimately be considered to be a right, at least in my view. Nowhere do any of these standards deal, for example, in a separate volume or an affirmative manner with parental rights in relation to the children.

Nor do any of the standards deal with the question of duties -- whether from the child or the parent or the parent and the child except in an occasional indirect manner by stating that a right is given to a child or to a parent in a particular context.

This was one of the problems that, if my memory serves me, that at the planning stage of the ABA standards was discussed to some degree, but at that time it was the belief of, I know, I think of most of us, that we had to confine it to the Juvenile Court to what was going on within the Court -- otherwise it would open up the door to more than could be undertaken.

But I do think that as one examines the standards, all of the, I am not just talking about this one, Mr. Rounds, or Mr. Kaimowitz's one,

or the one I commented on or anyone else's.

One can't help but come away from the examination of all the standards and the destruction of this kind without forming at least a pretty strong tentative belief that there is a need for the undertaking of a major type of study by persons or organizations that -- that are qualified to do so of these areas.

To do so -- in my view, would sharpen very much this whole basic area in terms of family relationships, parent and child -- what the current status is, what society today recognizes or does not recognize with respect to these -- really difficult areas.

And would perhaps bring into focus in terms ultimately of dealing with legislation which ultimately I keep coming back to as the prime objective of any type of standard, whatever it may be.

A simpler, easier, and probably more accurate type of result.

I don't know if anyone else shares this feeling, but I did want simply to make that comment as I see it as a long range need which has not been met by any of the organizations.

MR. MANAK: Judge Cattle?

HON. CATTLE: I don't have much to comment except that I think that I would reserve with Judge Fort in his remarks -- There are a lot of unmet problems, and we try to do a lot of problems, and these standards have gone to great lengths, and yet earlier we have left a lot of voids in there, and it would be all right, and everybody recognized this and proceeded to improve and amend it as time went on, but there is a tendency to look on these things at least temporarily as the final word, and it will worry me, but that is all.

MR. MANAK: Mr. Smith?

DEAN SMITH: I pass.

MR. MANAK: Mr. Hutzler?

MR. HUTZLER: As -- I view the paper that Mr. Rounds has presented, and the position he takes, it seems to me that he resists any change in the present system, and opts for that standard which suggests the least change -- in the area of interim status, overabuse and neglect -- and I think he demonstrates a basic -- a basic philosophical difference or a basic difference in his view on the real world, and that of the drafters of the standards.

And I assume, from his position, that he feels that the drafters of standards are in error in their views that there is an overuse of removal of children from their homes on the basis of abuse and neglect jurisdiction by the social workers or whatever agency worker is making that decision.

Or that the risk of harm to the child from removal is much lesser than -- than those -- than the Commission feels that risk is -- and that for example, the risk of one more dead child who is not removed is much greater than the risk to the hundred children who are removed perhaps unnecessarily because the danger of removal is not as serious or as I said before, it is not a hundred that are being removed unnecessarily, it may only be five or six -- and it's better to remove those five or six, even if risk to them is substantial or the trauma to them is substantial, than to have one -- one child die.

Am I correct on that?

MR. ROUNDS: No, I think probably I overemphasized objections to the standards, and omitted compliments, because they would be surplussage -- and I am not entirely the voice of reaction.

I think that the standards ideally would make some differentiation based upon the age of the child being removed, for example, on the hypothesis that it is not terribly traumatic for a three-week-old baby to be removed for a few hours, but it may be for a five-year-old or a 12-year-old.

I think the standards are a vast improvement over what you might describe as the average statute in effect today.

I like the prospective or fright of harm idea which often is not present in State statutes.

I like the focus upon harm to the child as opposed to fault of the parents, and I agree with almost everything in the commentary as a basis for the position that they take.

The objection or crippling is simply that we impose the standards, seek to impose a little bit too high a burden for removal, too many resumptions against removal -- in my view.

MR. HUTZLER: But, as I understand it, the standard which you would propose is some form of harm to the child which is pretty much the standard that now exists, plus the risk of harm which, as you

say, broadens the circumstances under which most -- statutes would permit removal.

So that it seems to me your position would result more likely than not in removal of children.

MR. HUTZLER: Then the standards would result. Then present statutes.

MR. ROUNDS: No, less.

In a criteria that says, "serious bodily harm for removal," I am all in favor of the harm.

I am not sure about the bodily, because I think it excludes things -- emotional abuse, sexual molestation.

And I am not sure about serious, one, because it doesn't say how serious.

The only attempts in the standards say how serious involves destruction of bodily function or disfigurement, otherwise it is left unsaid -- and I think that is too high.

MR. HUTZLER: Are you saying that you feel that a standard such as harm is a more strictive standard than an environment injury just to his welfare, which is the traditional language?

MR. ROUNDS: No, I am saying, I like harm.

I think that they are calling for too much harm before temporary removal and I stress "temporary."

I think that in escalated systems in which one, the harms were more carefully defined than simply the word "serious," and two, where you acquire a higher burden to Court review than you do on the normal or emergency removing of, you have got a better chance to look at the facts in an adversary form.

But to impose a burden of say disfigurement on a doctor who is examining the child as intake into an emergency room is, I think, a bit much.

But I do, I think the standards are infinitely better than existing statutes.

MR. HUTZLER: The other point I wanted to make is that it seems to me that the language such as, "serious bodily harm," is not -- I mean it is language that is contained in a lot of aggravated assault, and battery statutes.

I mean, it is not language with which the legal system is unfamiliar.

MR. ROUNDS: Precisely, but I don't know that aggravated assault is a desirable burden.

MR. HUTZLER: But it is.

MR. ROUNDS: As a pre-condition for removal.

MR. HUTZLER: It is an understandable term.

MR. ROUNDS: Yes.

Serious bodily harm -- I think would be interpreted by the Courts in light of aggravated assault statutes.

And I think at the moment it is, that it establishes too much injury as criteria.

MR. MANAK: Mr. Dale?

MR. DALE: No comment.

MR. MANAK: Ms. Thompson?

MS. THOMPSON: I would concur with the presentation of Mr. Rounds and with the ideas and positions which he expressed.

MR. MANAK: Judge McLaughlin?

HON. MC LAUGHLIN: Well, I was -- I am sorry, Mr. Kaimowitz is not here, because again, we seem to be talking about, in this document, we are talking about children's needs versus parental rights, which I think again brings to focus the point that Judge Fort has made here, that, and Mr. Kaimowitz made,

so eloquently, that at some point here, we are going to have to come to grips with this thing.

It is the standard, you know, children's needs, you know, service, parental rights, you know, needs and rights somewhat different -- are they the same thing?

I really don't know.

But I think -- I think seriously that it is sometning we have to look at at some point, I suppose.

With regard to some of the criticisms Mr. Rounds made about the words being used, I just suggested to those people in the States which have adopted no-fault insurance, they use words like "disfigurement," you know, whether or not you can sue under no-fault.

They use words like "interference with a bodily function," you know, that kind of thing.

I think maybe some of those cases would be helpful to us.

The problem with -- and I agree with Mr. Rounds here, the problem was the difference between aggravated assault, let's say, in the

criminal context, and aggravated assault in terms of abuse context, and removal context is that in the criminal context, you are talking about "has occurred."

Judges have very little trouble in talking about determining whether or not a fact has occurred.

What happens in the abuse and neglect field is they get us into the fore-tunnelling business, you know, see?

Will aggravated assaults occur in the future?

In other words, if a child has a broken arm, I don't think any Judge has problems with that, all right?

The problem that the Judge gets is that at -- four o'clock on a Friday afternoon, when the worker comes in, and says, "I want to remove this child from the home," now it is not going to be a few hours -- it is going to be until Monday -- okay?

And now, why do you want to remove the child from the home?

And then they give you one of these

words, one of t h o s e words -- there is a threat of serious injury.

What do you mean exactly?

Well, of course, the worker doesn't know what she means because in effect she is also speculating.

And this gets us into the area which is very disturbing to most Judge's statments made to workers, all right?

The -- I would say if I had to pick one category of temporary removal which exceeded all others, it is the area of the young mother. When I say "young," you know under 18 who makes a statement to her worker during the period of pregnancy, "I hate this baby, and I am going to kill it."

All right, and "You know, I want to get an abortion but they won't abort me because it is past 142 days," or whatever it is.

I don't know what the standards are.

In any event, now this bothers me because it is very disturbing to see a worker get on the stand, you know, in an adversary hearing and talk about some very confidential conversation she had with the defendant, if you will -- now she is the

defendant, in a situation where she has told the person that she is her friend, she wants to help her, you know, and now suddenly that worker gets on the stand and now begins to repeat things which were said over coffee, you know --

All right, non-custodial interpretations, not a Miranda situation, but what I am saying is that this is a problem -- I would like to say that statements made to workers under those friendly -- not under that friendly kind of a basis are not admissible.

But on the other hand, it would be absolutely intolerable to have a worker come in and say, "Well, she told me she is going to kill the baby," and I said, "Well, I am sorry that was not admissible because it was not made under those circumstances," and you give the baby back and -- she killed the baby.

And, I mean the person wouldn't tolerate that -- nobody would tolerate that.

Now getting back to Judge Fort -- these are things we are going to have to work -- look at, standards which we are not addressing ourselves to.

The problem I have with Mr. Rounds in saying, that the standard for removal should be lower than the standard for, you know, proof in the future, the thing that bothers me about that is the practical problem that once the Judge has removed the child -- I don't care what standard he has done, the returning the child to the parent then becomes responsible totally.

And while I agree emotionally with Mr. Rounds, as a practical matter, I think that the removal test should be higher -- or the highest reasonable test we can attain, because once, as I say, once the child has been removed, the odds on that child's going back to the parent before ultimate disposition is made, are practically zero -- are practically zero.

Unless -- unless at the hearing there is some conflict over facts.

The problem is there generally isn't -- over the basic facts.

It's a lot of conflicts over what the facts are going to prove in the future.

So again, I support the ABA standards

because I think the test for removal should be very high.

But that is only the prejudice that I have.

MR. MANAK: Judge Arthur?

HON. ARTHUR: What I was going to say has been said -- thank you.

MR. MANAK: Judge Delaney?

HON. DELANEY: Okay.

You know, I think, we are overlooking the right of a child, and whether you call it a need or a right, whatever it is -- he has a right to be -- he has his right to his day in court -- if he is getting the hell beat out of him by his parents or they are starving him to death, he has a right to be in Court.

And if the standard is so high that this doesn't happen, he may never get his day in court, you see?

My experience has been quite different from Judge McLaughlin's, in that he says a child once removed almost never goes home or doesn't go home for a long time.

As a matter of fact, it seems to me

if you hold a detention hearing, within a very limited time, and if you probe a little bit, and do give the thing more than five minutes' cursory look at, you are probably going to find a way to return the child, if not at that hearing, at some time down the line.

It seems to me that if there is good dialogue, there is good working relationship between the Protective Service Bureau and the Bar Association and the people who represent parents in Court, and the Court itself -- that earnest removal can be almost completely eliminated.

I think, in fact, most of the detention hearings I hear, I think removal appropriate.

So, my experience has been the effect that caseworkers are capable of using excellent judgment -- so long as the criteria is established.

Now, we had a little trouble adjusting to this, I will agree, but once they know what we all agree to, what the standards are, we haven't had much trouble.

So I would -- I have much -- I am very apprehensive about these two restrictive suggestions.

MR. MANAK: Okay.

Ms. Szabo?

MS. SZABO: No comments.

MR. MANAK: Ms. Bridges?

MS. BRIDGES: No comments.

MR. MANAK: And Mr. Siegel.

MR. SIEGEL: I concur in Judge McLaughlin's unsupported prejudice.

HON. MC LAUGHLIN: Do you have any support for it?

MR. SIEGEL: I share your unsupported --

HON. MC LAUGHLIN: I know that, but you don't have any support, either?

MR. SIEGEL: No, no reason.

HON. MC LAUGHLIN: That used to be give -- Oh, I don't know.

MR. SANDEL: You are not mutually supporting.

MR. ROUNDS: I have one comment.

In relation to the jurisdictional variances that we have seen throughout, approximately one-third of the minors removed coming into our Courts, are returned to their homes on detention hearings.

HON. MC LAUGHLIN: That is -- the problem with

fiddling around with numbers is that there are -- a lot depends on the supervisor in the child protective units -- There are some supervisors who establish very stringent standards for their workers.

Therefore, that Court sees very few pickups.

Then, you have another supervisor that is picking up everybody -- They figure dump it on the Court, let them make the decision.

So you can't really talk -- whether a Court is being hard or easy -- on the number of children that are returned.

Now, what happens that I find on these pickups -- on these emergency removals, the child is not just removed from the home.

The whole -- most of these are poor people -- I never saw them walk into the Mayor's house, you know.

I have never seen that.

I am waiting -- One time a young fellow went to Lieutenant Williams, Williams asked him why he wants to work in his office.

He said, because he wanted to be able

to defend an innocent man and save him.

Williams says, "When that guy walks in, he belongs to me."

(Laughter.)

But the problem is these are poor people.

Most of them are on welfare and the reason that they are picked up on the neglect is because the welfare workers are in and out of the house all the time, see?

Now, the child is picked up -- and we are talking about a Friday afternoon.

On Friday afternoon, by Monday -- by Monday morning, they have got the child in a foster home, all the arguments that you were making against removal in the first instance, you know, the social worker uses in the second -- and they say, "Well done, take the child out of the foster home because now it is adopted through the foster home."

You see -- so all the arguments that have been used are turned against you.

The second thing is they immediately use -- they cut them off welfare -- the child's grant

-- because the child is out of the home -- So now you give the lady a lawyer and she comes in three days later and the lawyer said, "Well, I would love to have you give the child back to my client, your Honor, but now she doesn't have any place for the child to live. And as soon as she gets a place for the child to live, I want a hearing."

Whereupon the welfare says, because it is a difficult Department, you see -- they say, "You can't have a grant for the child until the child is with you."

You know, and that is what I mean about the removal.

It just seems that once -- it springs up that he goes into detention.

The important decision is neglect and abuse cases to take the child out of the house.

Once you do that, a whole chain of things happen.

And the odds on the child getting back into the house with -- they all go back, you know, ultimately. But not within a reasonable period of time.

MR. MANAK: Okay.

Any further comments, Mr. Hege?

MR. HEGE: Just one -- I think one of the instances we should also look at possibly in terms of a child a little older, meaning five -- something like that, is detention still does occur for children who are removed from their homes, so that in seeking to protect the child, we may in fact inflict some of the damage that we have none that exists when we place them in detention.

2. Records and Confidentiality

Consultant
James J. Delaney

ABSTRACT OF PAPER

Judge Delaney begins by contrasting the general approach taken by the three sets of standards. He states that the Task Force and National Advisory Committee standards are "directed toward the improvement of an existing structure ..." of juvenile courts and related agencies, while the IJA/ABA standards aim to "destroy the existing system and restructure it in the mold conceived by a group of law school theorists...." He indicates that the IJA/ABA position is "premised on the proposition that juvenile courts constantly violate the rights of children, fail to prevent crime ..., [and] stigmatize and worsen the lot of those who come into the court system." He then comments that the IJA/ABA standards are based on a pre-Gault view of juvenile justice and fail to acknowledge that:

> ...[T]he legal profession, the judiciary and the legislatures are quietly, systematically and effectively eliminating deficiencies in the Juvenile Justice System and [that] juvenile courts have become true courts in every sense of the word.

With this introduction, Judge Delaney examines what he terms the realities from which recordkeeping must be assessed. The first is the pervasiveness of records in America today.

> It is not a question ... of whether all of us will be the subject of records, public and private. It is a matter of our right, as citizens, to limit the extent of recordkeeping and its use, a right to personal privacy and to be secure from the misuse of such data.

The second reality is that the right to privacy is contingent upon obeying the law. The third is that just because a court or agency is dealing with juveniles, does not mean its recordkeeping policies and practices can or should be the same. Despite this fact, Judge Delaney contends that certain basic principles apply.

> Juvenile records should contain only those materials necessary for legitimate purposes of that agency. They should be accurate and relevant. Even though such records are gathered at public expense and might be useful to others ... access and use must be restricted, confidentiality must be preserved [with three exceptions].

The exceptions are identified as the general public when there are events of extraordinary public concern; the victim and insurer in order that they might recover damages; and other juvenile justice agencies.

Judge Delaney outlines some of the purposes for which juvenile justice agencies maintain records, noting that many records are required by law and that standards should assist, not impede an agency in performing its duties. He then compares the recommendations of the three sets of standards regarding records and information systems, beginning with a summary of the IJA/ABA standards. He strongly criticizes those provisions for some of their assumptions concerning the operation of the juvenile courts, and for their "copious triva and 'preachy' detail." He also considers the attempt to encompass all private and public youth serving agencies to be "simplistic and highly impractical," urging that the subject should be limited to the traditional components of the juvenile justice system. He suggests further that "just about the last thing this country needs is just another regulatory bureaucracy" such as the proposed "privacy committees." With regard to the recommendations on court recordkeeping practices, he observes that the proposed dual file system and notice provisions would unnecessarily burden courts already "engulfed in a sea of paper work" and that some of the more reasonable proposals are already in practice.

The NAC standards are examined next. Judge Delaney comments that they "cover much the same ground as the IJA effort, but in more succinct form. After summarizing the provisions, he states that with the exception of the "Privacy Council," the NAC standards are sensible and worthy of adoption.

Regarding the Task Force standards, Judge Delaney observes that they manage to state "the essentials of the subject in five succinct standards," and restrict their scope to the agencies within the "official juvenile justice system." In concluding that the Task Force standards are "the most realistic, the most practical, the most worthy of support," Judge Delaney argues that:

> There should be little disagreement with the principles stated in the Task Force standards. Perhaps the same is true of the IJA/ABA standards. The essential difference lies in the former's limita-

> tion of application to components of the juvenile justice system and recognition that implementation of these principles requires flexibility and adaptability to a state's circumstances. The latter would seek to regulate recordkeeping practices of virtually every child and youth-serving agency in the country. It would impose rigid, detailed procedures, as to how information may be gathered, used, disseminated and stored.

Finally, Judge Delaney suggests that the real danger to privacy occurs after a youth turns 18, when prospective employers, educational institutions, and government agencies become interested in juvenile justice records. He urges strongly that such inquiries be prohibited unless special permission is given by the juvenile court. He then endorses the NAC standard recommending destruction of all police, court and correctional records concerning a juvenile after he or she attains majority unless preservation is authorized by the juvenile court. He concludes:

> The misuse of dormant records can be obviated by automatic destruction. Such provision, plus statutory prohibition from inquiring into a juvenile record, will insure maximum protection.

SUMMARY OF COMMENTS

The discussion focused primarily on Judge Delaney's endorsement of the destruction of records. Several panelists suggested exceptions or reasons why records should not be destroyed. For example, Mr. Siegel and Ms. Szabo commented that juvenile court records were useful for sentencing purposes when the juvenile is later convicted of a crime. Judge Delaney agreed, but suggested that there may be other means for obtaining the information such as through a letter from the probation officer. Judge Arthur, on the other hand, objected to the use of juvenile records in adult courts. Ms. Bridges, Mr. Hutzler and Ms. Connell cited the importance of records for research and evaluation purposes, particularly for studies of the effectiveness of juvenile justice programs. Judge Delaney suggested that a sample could be used rather than maintaining all juvenile's records. Ms. Szabo, Judge Cattle and Mr. Hutzler proposed that the records could be coded and stripped of their identifiers, but Ms. Connell stated this might still inhibit some research. She noted that as a result of the standards, the American Psychological Association was looking into the confidentiality problems involved in research.

Judge Arthur was bothered by expungement of records since it implied that persons could lie about their past with impunity. He noted that a person might later need a juvenile record to prove that he had not been adjudicated, or at least had been found to have committed only a minor offense. Judge Delaney observed that the "advantage to the rank and file of the kids that go through the system would be so much greater than the loss of an occasional record...." Mr. Kaimowitz pointed out that in his experience, juvenile court records were often too ambiguous to determine whether there had been an adjudication and of what the child had been adjudicated. Judge Delaney indicated that his experience had been different. Judge McLaughlin noted that the military often dishonorably discharged adjudicated delinquents who denied involvement with the juvenile justice system and who committed offenses while in the service on the grounds of false enlistment so that authority to deny involvement was a real issue.

Another question which received attention from several members of the panel was the practicality of prohibiting the state and federal governments as well as private employers from inquiring about past records. Mr. Siegel supported Judge Delaney's suggestion, but Judge McLaughlin stated that in New York, such a prohibition had developed into a race between legislators and designers of forms and that the problems may be insoluble. Judge Cattle added that often a youth or young adult is induced to waive the right to keep the records confidential.

A third issue addressed by the panel was whether there was indeed a problem concerning juvenile records. In response to questions from Mr. Hutzler, Judge Delaney repeated the points made in his paper that most states accept the principle that juvenile records should remain confidential, that few people seek to obtain information on current juvenile offenders, and therefore, that at least IJA/ABA standards would impose an unnecessary burden. Professor Smith, supported by Ms. Sufian, characterized "the maintenance, control and access to juvenile records ... [as] nothing short of a nightmare" especially when records were stored in shared computer systems. The many conflicting interests which had to be balanced to develop and enforce a records policy were noted.

JUVENILE RECORDS AND CONFIDENTIALITY

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INTRODUCTION

This symposium offers the opportunity to examine, compare and evaluate three separate proposed sets of standards for the Juvenile Justice System: those developed by the Institute of Judicial Administration/American Bar Association Juvenile Justice Standards Project; those promulgated by the National Task Force to Develop Standards and Goals for Juvenile Justice and Delinquency Prevention; the standards adopted by the National Advisory Committee for Juvenile Justice and Delinquency Prevention.

While all of the proposed standards have much in common, each has emanated from a different source and vantage point and the objectives of IJA/ABA are distinctly different from the other two.

The Task Force recommendations have a uniquely "grass roots" flavor in that they are a composite of state studies which identified and addressed problems of the Juvenile Justice System.

The work of the National Advisory Committee, written from the vantage point of data assembled by Standards and Goals, has refined the latter's recommendations and added its own findings and criteria.

By far the most publicized, the most voluminous, the most costly and those taking longest to prepare are the standards by the Joint Commission of the Institute of Judicial Administration and American Bar Association. These facts, coupled with a prestigious list of commission members, consultants and writers attached to the project, are urged by the commission as a measure of their worth, a basis for their unquestioned acceptance and immediate adoption.

Purpose of Standards Developed By the Task Force and National Advisory Committee

Both groups have accepted the Juvenile Justice System as presently constituted. Their recommendations, therefore, while recognizing need for updating a constantly changing system, are directed toward the improvement of an existing structure rather than its destruction.

The Purpose of the IJA/ABA Standards

The IJA/ABA standards are premised on the proposition that juvenile courts consistently violate the rights of children, fail to prevent crime and delinquency, stigmatize and worsen the lot of those who come into the court system. This is no mere assumption; it is the stated position of the commission and that theme will be found in the commentary of every standard. Judge Irving Kaufman, chairman of the Commission, to justify the tone of the Standards, blames the juvenile justice system for the rising tide of crime. He states:

It has become increasingly apparent that our traditional system of juvenile justice is a failure---Children between the ages of ten and seventeen - a mere 16% of the population - now account for almost 50% of all arrests for thefts and criminal violence. [1]

And Judge Kaufman would also hold juvenile justice accountable for a breakdown in the family:

Unfortunately, the existing juvenile justice system has de-emphasized the role of the family and community as the proper and natural context for a child's development, and has, instead, relied on massive state intervention--- and the results of the state's excessive involvement are now apparent in a generation of children who lack an internalized sense of society's values. [2]

David Gilman, former counsel for the National Council on Crime and Delinquency and the present director of the standards project has, with NCCD, been an equally vocal critic of the juvenile courts. Here is a sample of his position:

In the last ten years three U.S. Supreme Court decisions---mandated a number of reforms that systematically limited the powers of the juvenile court to deprive children of their constitutional rights to due process of law.

These Supreme Court decisions---said that the juvenile courts can no longer yield extremely broad and largely non-reviewable discretionary power over children.

Juvenile court judges have resisted changes in their practices, goals and procedures simply by ignoring the decisions (of the U.S. Supreme Court) entirely or by subverting their spirit. [3]

And Barbara Flicker, a former director of the standards project states the project's objectives:

After the (standards) project assessed the problems in the system, the goal became the reform of the juvenile justice system as a whole - a revolution, not just another phase of the evolution. [4]

It thus becomes apparent that the aim of the standards project is not to provide new or upgraded standards for an existing system which has evolved

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1. American Bar Journal, June, 1976.
2. 52 N.Y.U. L. Rev. 1020 (1977).
3. Crime and Delinquency, January, 1976.
4. IJA/ABA, Standards for Juvenile Justice: A Summary and Analysis, 257 (1977) (Hereinafter cited as IJA/ABA, Summary and Analysis).

over eighty years, but to destroy it and restructure it in the mold conceived by a group of law school theorists, all with the unwitting aid and approval of the American Bar Association.

If, in fact, a system of law can in this fashion be destroyed, by a small group of theorists, no matter how well intentioned or idealistic, then perhaps no institution in our society may be secure.

It is most regrettable that the IJA/ABA standards effort is premised on the assumptions stated above and that the objective is a complete restructuring of the juvenile justice system. It is unfortunate because the assertions are not true, because this arbitrary assumption of all-knowing and unqualified authority has polarized those who should be supporting the effort, and because it casts considerable doubt on the integrity of the program.

The Present Juvenile Court

Whatever may have been the faults of the Juvenile Justice System in the past, these defects have, during the past decade, been largely rectified by pronouncements in Kent vs U.S. [5] and In re Gault [6] and the proliferation of appellate court decisions in their wake; by the updating and revision of state juvenile codes; by transfer of juvenile jurisdiction into the state's highest trial courts. Due process has been insured by almost universal presence of public prosecutors, legal aid attorneys and public defenders, as well as private counsel. There are few juvenile courts today not staffed with competent lawyer judges. Half of the states have abolished specialized juvenile courts, placing jurisdiction in the highest trial court; many more are in the process of so doing. Most states have updated their juvenile laws and procedures to conform to the mandates of In re Gault. Thus the legal profession, the judiciary and the legislatures are quietly, systematically and effectively eliminating deficiencies in the Juvenile Justice System and juvenile courts have become true courts in every sense of the word.

The IJA/ABA Standards, apparently viewed from the juvenile court's pre-Gault posture of a decade or two ago, are actually far removed from present day judicial reality, and these standards must be evaluated in that light.

RECORDS ARE INEVITABLE

The evaluation of any record-keeping system, and any attempt at setting standards for privacy and confidentiality, must take into account certain realities.

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5. Kent vs. United States, 383 U.S. 541 (1966).
6. In re Gault, 387 U.S. 1 (1967).

Record Keeping - An American Way of Life

It is obvious that every human being in the United States, and much of the rest of the world, will be the subject of a multitude of records. At birth the first identifying record is entered. Thereafter, the only way to avoid the record keeping process is to never work, never drive a car, never own anything, never go to school, never get sick, never break a law, never wed. Doubtless, we would all agree this is a bleak alternative. Thus, records on all of us are inevitable. Juveniles are no exception.

It is not a question, then, of whether all of us will be the subject of records, public and private. It is a matter of our right, as citizens, to limit the extent of record keeping and its use, a right to personal privacy and to be secure from the misuse of such data.

Privacy - A Qualified Right

Our right to privacy and security from disclosure of derogatory or harmful information is relative, not absolute. It is contingent upon our meeting our obligation to observe society's rules. We may forfeit or limit that right by violating these rules.

When a juvenile steals an automobile and wrecks it, does he still have the same right to privacy as another who does not offend? Or does the victim have a right to know who stole the car, to learn how the juvenile justice system responds, to expect restitution from the offender. Is the same not true if a juvenile burglarizes or vandalizes one's home or assaults one's child?

When a person breaks a public law, whether adult or juvenile, does he/she not know the act will result in police investigation, in a recording of the incident, or prosecution for the offense, or the probability of sanctions? Does the fact that a juvenile is less mature, more impulsive, alter the fact that the juvenile justice system must respond? When such events occur, to whom does the system owe the greater duty; to society, including the victim, or to the offender? Should we curtail or impede or render less effective the capacity of the juvenile justice system to protect society and deter lawless behavior by limits imposed out of concern for the offender?

The juvenile justice system's first responsibility is to society, to promote voluntary compliance with society's rules, to safeguard the public. It also has the duty to protect the rights of individuals. Hence, we must address the issue of juvenile records and confidentiality with reason. There must be a balancing of rights and obligations, on the part of both the juvenile and society.

CRITERIA FOR RECORD KEEPING

Evaluation of any information system should consider these factors: its

purpose, i.e. how it is to be used; its structure, i.e. how it is put together; and its utility, i.e. how it in fact serves its purpose.

The matter of setting standards for record keeping is not as simple as may first appear. Merely because a number of agencies or entities may have a common interest or relate to the same general subject, it does not follow they have the same needs or practices in the maintenance and use of records. Thus, while a G-M parts dealer, the Bureau of Public Roads and the Teamsters Union all relate to motor vehicle transportation, their record keeping practices would have nothing in common. The same is true of child servicing entities: the record keeping practices of a childrens' hospital would have little relevance to a public grade school and neither process would have much relation to the operation of a juvenile court. Therefore, proposed standards for record keeping must take into account the purposes and the needs of each individual agency rather than the converse of assuming each can adapt to a common set of rules.

Despite problems of varying practices and needs and the difficulty of precise definitions, certain basic principles are obvious.

Juvenile records should contain only those materials necessary for the legitimate purposes of that agency. They should be accurate and relevant. Even though such records are gathered at public expense and might be useful to others - the news gathering media, personnel inquiries, credit reporting - access and use must be restricted, confidentiality must be preserved.

In the context of the Juvenile Justice System, it is established public policy that the right of the child or parent to privacy outweighs the rights of the public to such information. There are, of course, notable exceptions. Sometimes the conduct of a child or adult, or the occurrence of an event coming within the jurisdiction of the Juvenile Justice System is of such widespread public concern that the public's right to know outweighs an individual's right to privacy. Such exceptions are difficult to define and should be the subject of judicial discretion. Victims of delinquent offenses and their insurers should likewise be entitled to limited access, for the purposes of recovering property, assessing losses and for possible tort action against child or parent. The third exception is the interchange of information within the Juvenile Justice System: between law enforcement agencies; between law enforcement and the court; between courts (transfer of jurisdiction, courtesy supervision, interstate compact cases); between courts and corrections and inter-correctional exchanges.

If a standard is to address the question of interchange of information within the Juvenile Justice System, it can do little more than state that such must be for legitimate agency purposes. Attempting to define circumstances under which exchange is permissible would be virtually impossible.

THE JUVENILE JUSTICE SYSTEM - A LIMITATION

As used in the various standards considered, the phrase "Juvenile Justice System" appears to have different meanings.

For IJA/ABA the standards on records and confidentiality attempt to relate to every child-serving agency and institution in the country.

The Task Force would encompass a similarly broad category.

The NAC standards are less inclusive; they relate to the actual components charged with administering juvenile laws, i.e. law enforcement, the courts and the correctional systems.

Since the term "Juvenile Justice" is so frequently and often so loosely used, it needs a more precise definition. For purposes of this discussion, we define it as the functions of those public institutions charged with administering the law regulating the behavior and the care of children. These agencies are: law enforcement, the juvenile court; those juvenile facilities loosely termed "correctional" which hold or detain children so placed by court order. Also included are community "diversion" programs, whether attached to law enforcement, courts or corrections or functioning independently. Purposely excluded are many other public and private institutions which deal with children: schools, hospitals, medical clinics, social service agencies and the like. These frequently become directly or peripherally involved with the Juvenile Justice System, although not as a part of it.

We are to consider here the collection and use of information about children and youth involved in, or at least touched by, the Juvenile Justice System.

Records and the Juvenile Justice System

The major components of the Juvenile Justice System, law enforcement, the juvenile courts and juvenile corrections, have a common mandated purpose, dealing with children and youth involved with the law. Thus, they share certain inherent requirements:

Since they are public agencies, they must maintain sufficient records to give a public account for their activities.

Each component is legally mandated to develop and preserve certain data.

Each is a program under law, demanding appropriate "due process" records and procedures.

Because each agency deals primarily with individuals and their behavior, records relate to that subject and are of personal concern to the subjects.

Each component must measure performance, both as to its overall operation and as to the individuals who perform the work. This assessment depends, at least in part, on agency records.

Beyond this broad commonality, each component has its own unique information gathering and record-keeping requirements, and there may be substantial

differences within each component, differences created by geography and population. Further, there are vast amounts of information thrust on each, over which the agency has little control if it is to fulfill its mandated purpose.

Law Enforcement

Law enforcement must receive, record and retain a large variety of communications: law violations, missing persons, abused children, runaways, accidents and injuries. In most instances these relate to identifiable individuals.

Because police work entails many unknown factors, the police accumulate a great amount of detail which may or may not be relevant. They also retain such material, for what is not obviously useful today may be of great importance tomorrow. High on the list of such data are individual records of known or suspected offenders.

Police record-keeping is further complicated by the need for linkage within the law enforcement community, the demand for prompt retrieval of information and its exchange, locally, regionally and nationally. Such a system, in turn, requires centralized, impersonal data banks accessible to a great many individuals, access which is difficult to restrict and control.

The public prosecutor, the chief law enforcement officer in each community, likewise must develop additional records. Besides the data furnished by police, the prosecutor interviews prospective witnesses and assembles other details about the offender, his habits, his associates, his prior conduct. In doing so he must reveal the identity of the offender and the offense.

It can be seen, therefore, that it is extremely difficult to establish standards which restrict and regulate law enforcement agencies in the nature, extent and use of such records as they deem essential. Efforts at restriction are generally viewed as interference with effective law enforcement. When there is a conflict between individual privacy and public safety, public opinion will tip the scale in favor of the latter.

Generally, because both law enforcement and the public recognize that juveniles should be held to a lower degree of accountability than adults, there is tolerance of restriction and the accumulation and use of juvenile records. Even in the light of rising juvenile crime, these limitations will be accepted so long as they are reasonable.

The Juvenile Court

Juvenile courts are no longer masters of their own destiny. There was a day when such courts determined what would come in, what would be excluded. They investigated referrals from the police, filed the petitions, prepared the case for trial presented their own evidence, ruled on it, entered judicial findings and orders and made disposition. Little public accountability was re-

quired of such courts, nor were they given much choice in the manner of court operation. Because of low judicial standards, limited funds and personnel and because judges were expected to handle impossibly large caseloads, many judicial functions were delegated to clerks and probation officers. Lawyers and the rest of the judiciary alike ignored these courts and the legislatures and the public itself were little concerned, so long as the courts met the public expectation of removing troublesome children from the community. Doubtless such courts merited the contempt and criticism leveled at them. It is not surprising they "cut corners" and often ignored due process. One must wonder, however, where the present critics were during these dismal days of the juvenile courts. Where was NCCD? Where was the American Bar Association, the judiciary, including the Federal Judiciary? Where were the law schools and the law school professors? Responsibility for the juvenile courts' past deficiencies must be shared by these present day critics. Their indifference helped create those former problems.

The juvenile court which is the target, today, of so much comment and criticism, exists only in the minds and memories of those who have had little contact or exposure to the modern day juvenile court. Much of the present "scholarly" comment about the court is an incestuous repetition of one "authority" quoting another until they come full circle and begin quoting themselves.

The modern juvenile court is a public agency, accessible to the public; it is a court in every sense of the word. Hence, certain records must be received and retained although access to such information is limited by the court rule and by statute. Any standard relative to records and their use must recognize that due process and judicial procedures require recording certain minimum detail and affording limited access thereto.

The juvenile court, therefore, receives a great quantity of detail, the receipt of which it does not control.

The public prosecutor files petitions in delinquency. These must allege the juvenile's name and age, identify parents and their address and state the precise nature of the offense. This becomes and remains a permanent court record unless and until sealed or expunged. A preliminary hearing will reveal further detail about the alleged offender and offense, preserved in a stenographic record. Motions to suppress evidence or for greater particularity further increase the record. An admission to the petition will develop yet more recorded detail about the child and the offense. A contested hearing, whether to court or jury, will add to the record. Jurors and witnesses are made privy to the child and his behavior. Statutes or court rule may open a juvenile trial to the public and it has also been held, that failure to assert a right or claim to privacy may be a waiver thereof.[7]

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7. Oklahoma Publishing Co. vs. District Court, 97 Sup. Ct. 1045 (1977).

In event a child is declared delinquent, due process again demands a pre-dispositional report. This, in turn, must examine not only the offense and the offender but his home, his parents, his peers, his school record, his physical and mental health and such other details as may be necessary for a fair disposition of the case.

Finally, if the juvenile is placed on probation, due process again requires a written case plan, for essential fairness demands he be told what is expected of him during probation and he should be given every reasonable chance to succeed. During his probationary period, a probation officer must observe and record the child's progress and compliance, because due process requires the child be discharged from probation upon successful completion of the term and conditions prescribed by the court. If revocation or modification is sought, a documented record of performance is likewise essential.

If, as a disposition, a child is placed outside the home, the court should require periodic progress reports to insure the child is not "lost" or placement unduly extended.

In non-criminal proceedings, CHINS, PINS, CINS and in abuse and neglect, much the same record-keeping process occurs. Adoptions, relinquishments, paternity, support and custody proceedings, all common to the juvenile court, likewise routinely produce a volume of records.

It should be obvious, therefore, that most of the records which accumulate in the juvenile court do not depend on the whim or discretion of the judge or probation officer or clerks or anyone else. They are mandated by law, by court rule or by due process requirements. They cannot be restricted by standards.

Corrections

This writer has had little direct experience with record keeping processes in the juvenile correctional institutions except for the periodic reports received by the court on the child's progress and notice of return to the community. Generally, upon commitment, the court supplies the juvenile institution with information on nature of the offense, the pre-dispositional report, a report of progress and performance on probation (probation is almost always tried before an institutional placement), medical, psychological and educational records to whatever extent they may be in the court's file. Most correctional facilities have school accreditation and obtain their own information on the child's prior school records. They may also administer their own psychological tests and provide medical care.

From experiences in visiting juvenile correctional institutions, it appears that record keeping within the institution is largely a report of the child's progress, in education, behavior, peer relationship and motivation, data of little use to anyone other than the institution. Further, because such institutions are outside the mainstream of any community, they are seldom noticed or queried as a source of information.

Finally it should be noted that correctional institutions probably receive less than five per cent of the children moving through the Juvenile Justice System, so their contribution to the volume of juvenile records is minimal. That is not to say, however, that the same standards of privacy and confidentiality should not apply to them; they should so apply.

Other Generalized Use of Juvenile Records

In addition to the uses of juvenile records as already discussed, they can and should be and are used for case management, tracking, for statistical detail and for cross reference to other involved agencies. All but the latter two are largely intra-agency uses.

A supervisor, whether of police, caseworkers and probation counsellors, or of correctional officers, should have ready access to juvenile records to determine: caseload or volume of assignments to a given employee; rate of completion of tasks, effectiveness; need to redistribute workload; additional personnel or equipment needs; other specialized management problems.

Out-of-home placement of children should be monitored at regular intervals, probably at least each three months, thus insuring that all reasonable efforts are made to return the child to his home. If a child is awaiting adoptive placement, even more frequent monitoring may be indicated.

Where "on line" data processing is available, it would seem desirable to cross reference children in the Juvenile Justice System with related child serving agencies to avoid duplication of services. This could be done by name only or some other identifying detail without disclosing the nature or reason for the agency's involvement.

Statistics are an important element in the Juvenile Justice System; for accountability, for determining trends and projecting future needs, for budgetary justifications, for measuring effectiveness. Unfortunately, meaningful and reliable statistical data in the Juvenile Justice System are scant indeed. This dearth, in turn, has allowed juvenile court critics a good deal of license in stating as fact their own speculation, suppositions and conclusions.

An objective, intelligent study of how juvenile records might be used to improve the quality of service within the Juvenile Justice System is long overdue. First, we have no reliable data on what works, what doesn't. Instead we have the vague comments of a David Gilman, a Rosemary Sarri, a Judge Kaufman and a myriad of law school instructors and students to the effect the Juvenile Justice System stigmatizes children and leaves them worse than before. What we need is a follow-up process, to measure success or failure in the system; what caused delinquent conduct, how it can be modified, how much recidivism occurs and why.

A REVIEW AND COMPARISON OF THE STANDARDS

It is evident that the three components of the Juvenile Justice System,

law enforcement, the juvenile courts and juvenile corrections, are created by law, with clearly defined duties and objectives prescribed by law. Hence, their record-keeping practices must serve these ends. It is not the duty of the agency to adjust to the generalized norms established by some commission or group of "experts". Rather, proposed standards must serve and further, not impede and restrict, the legally mandated work of such agencies. It is in this context that the proposed standards are considered.

THE IJA/ABA STANDARDS

In "A Summary and Analysis" of the proposed Standards by Barbara Flicker, the IJA/ABA volume on Juvenile Records and Information Systems is characterized thus:

> "Simple regulations are recommended in the standards for data systems, planning and monitoring for the police, courts, agencies, and other resources of the juvenile justice system."[8]

There is nothing about the manner in which the subject is treated by IJA that bears out Ms. Flicker's reference to "simple regulations." The standards mentioned require twenty-two parts, with 93 separate sections and 192 subsections. With commentary it is a volume of 152 pages.

These standards are apparently founded on the supposition that agencies dealing with children, but more particularly the juvenile courts, at every opportunity not only collect and store huge quantities of needless information about those they serve, but systematically misuse it. Hence, these abuses must be cured by the IJA/ABA Standards

Michael L. Altman, a law professor at Arizona State University, is the writer. In his introduction he states the premises on which the standards are based:

> Historically, institutions which affect juveniles have often felt the need to collect large quantities of information before making decisions with respect to juveniles. This perceived need for information is manifested by the philosophy of many juvenile courts --- These practices (diversion, probation, rehabilitation) of juvenile courts, rooted in a philosophy of social welfare, have produced information systems which generate great quantities of information and decision-makers who feel uncomfortable without these quantities of information.

As a basis for this profound observation, Professor Altman cites no less an authority than himself. He says: "See, Altman, 'Watching Children', 10 Trial No. 3 (1974)."

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8. IJA/ABA, Summary and Analysis, 7.

It should be stressed, again and again, that juvenile courts are created by constitution or statute and have those duties and functions which the law defines. Thus, juvenile court records, as is true of records of all other courts, are not created or maintained at the whim or compulsion of a judge. Judicial record-keeping procedures are established by statute, rules adopted by the state supreme court or out of necessity for the mandated functions of the court.

The professor then goes on to remark on the obtuseness of judges:

> "Juvenile courts have rarely scrutinized the relationship between quality decisions and quantities of information and have rarely attempted to balance the need for information against the privacy and economic costs of collecting information."

There are, of course, no sound data to support Altman's statements; they are pure speculation, apparently conjured up from a textbook world. Nevertheless, from his flawed and limited perspective, it is not surprising he would feel compelled to restructure the juvenile record-keeping process. It is these assumptions which result in the voluminous IJA/ABA Standards, the same material dealt with in five succinct standards by the Task Force.

Because of the volume of material involved, the contents of the five sections and twenty-two parts will be summarized rather than dealt with on a paragraph basis. The attempt is to state the essence, ignoring the copious trivia and "preachy" detail.

SECTION I

GENERAL STANDARDS

PART I Definitions

A Juvenile: Any person under eighteen or one (over eighteen) subject to probation or restrictive placement under a delinquency or neglect petition.

A juvenile agency: A court (other than a divorce court) with jurisdiction to determine custody or restrict the liberty of a juvenile.

OR

Any publicly funded agency with legal authority to offer or deny clinical, evaluative counselling, medical, educational or residential services to a juvenile.

OR

A private agency licensed to provide the same services listed above; or which performs these services under contract with a public agency; or which receives referrals from a public agency.

Note: Law enforcement is not included in the definition.

PART II GENERAL POLICIES PERTAINING TO INFORMATION

This part recommends a state statute to create one or more privacy committees.

This committee would be authorized to examine record keeping practices of all juvenile agencies; promulgate rules regulating record keeping; investigate suspected violations; initiate civil and criminal proceedings and invoke sanctions.

PART III Collection of Information

Part III states a juvenile agency should collect information only for making lawful decisions, management, agency evaluation, and research.

Information relating to an identifiable juvenile should be: safeguarded against improper use; relevant; to be used within a reasonable time; reliable; cost effective; and accurate.

Juvenile agencies should scrutinize their record keeping practices periodically to insure the above stated criteria are met.

PART IV Retention of Information

A juvenile agency should retain collected information on an identifiable juvenile only if it is: authorized (as provided in these standards); accurate; to be utilized; it is not misused; or it is part of a formal judicial or administrative proceeding.

If so retained, the agency must inform the juvenile, parents and attorney of the right to access and to challenge the information.

Data which identify a juvenile should be retained only if necessary for the person's evaluation.

"Labeling" should be avoided.

If an agency contemplates use of automated data processing, the program should be first submitted to and approved by the privacy committee.

The system should be implemented only if:

The agency's efficiency will be enhanced.
It insures accuracy and security.
The juvenile is identified by number, not name.
The system is cost effective.

If the privacy committee approves the proposed system, details should be made public.

States, by legislation, should limit interchange of information of automated data on identifiable juvenile or family to names of agencies providing them with services.

PART V Dissemination of Information

An agency's access to its own records should be restricted to approved personnel.

The juvenile or a representative should have access to the record but parent's access to some portions may be contingent on juvenile's permission.

Third parties should have access to a record only with juvenile's consent or other limited condition.

Researchers may have access to juvenile records only on showing of legitimate purposes, limits on use and assurance the juvenile will not be publicly identified.

Law enforcement agencies may not have access to juvenile records except with the juvenile's consent or on order of court.

Statutes should provide for systematic and periodic destruction of juvenile records.

SECTION II

SPECIFIC STANDARDS FOR JUVENILES' SOCIAL AND PSYCHOLOGICAL HISTORIES

Part VI Definition

A social or psychological history is data assembled for counselling, providing services or placement or predicting future conduct.

Part VII Preparation of Social Histories

Before collecting information, the juvenile or parents should be informed of the purpose and sources to be queried.

Part VIII Retention of Social Histories

Social histories should be stored in a secure place, not commingled with other records.

Part IX Dissemination of Social Histories

A social history should be made available to the subject.

Social histories are confidential and should avoid unqualified "labeling."

Part X Destruction of Social Histories

A juvenile agency with a juvenile social history should destroy the same when the juvenile is 18 unless the juvenile requests otherwise. If copies were furnished other agencies, they should be notified and destroy their copies.

This history may be destroyed prior to 18 when the case is closed.

Part XI Legislation

States should adopt comprehensive statutes regulating use and dissemination of juvenile records.

Part XII Records of Juvenile Courts

Juvenile courts should maintain accurate and up-to-date records of their proceedings. These should be separated from probation records.

Part XIII Records of Legal Proceedings

Juvenile courts should create "summary records," a separate summary of the court's records.

The standard gives courts specific details on how to maintain such "summary records."

Part XIV Probation Records

Probation officers should maintain "temporary" probation files. Only verified information should go into a "permanent" file and only verified detail may be submitted to a judge.

Probation officers should inform the juvenile that material is being assembled for a probation report and disclose and explain the contents before submitting it to the court.

Part XV Access to Juvenile Records

Juvenile records should not be public records.

Access should be controlled and limited to the subject, parents and attorney, the public prosecutor, the judge and probation officer.

"Summary" records are less restricted.

Neither the juvenile nor parents may waive the prohibition of disclosure.

Part XVI Destruction of Juvenile Records

The juvenile court should destroy all unnecessary information on a juvenile.

Records should be destroyed if a petition is dismissed.

If a juvenile is adjudged delinquent, the record should be destroyed two years after jurisdiction ends.

Records on neglect proceedings should be destroyed when the children are no longer subject to the court's jurisdiction and the youngest sibling is more than sixteen.

When the juvenile court destroys a juvenile record, any agencies involved in the incident should be notified to destroy its records on the same subject.

When a record is thus destroyed, the incident will be deemed never to have occurred and the juvenile may legally state he or she has never been involved with arrest, detention or court proceedings.

Part XVII Use of Juvenile Records

Prospective employers, credit companies, and the like should be prohibited from inquiring about a juvenile record.

If an unauthorized person inquires about a juvenile record, the court should state no record exists.

SECTION IV

STANDARDS FOR POLICE RECORDS

Part XIX General

Each law enforcement agency should establish and promulgate rules relating to juvenile records. These rules should provide that:

Records should be complete and accurate and should be maintained by a specially designated person.

Records should be separated from adult files.

Fingerprints and photographs may be taken if necessary for investigations. They should be destroyed if the case is not referred to court; or if referred and the case is dismissed.

Part XX Access to Police Records

Police records on juveniles should not be public.

Access should be available only to:

Other law enforcement agencies; probation officer, prosecutor or judge.

Disclosure should reflect disposition or current status.

Part XXI Correction of Police Records

Law enforcement agencies should develop rules to allow a juvenile subject to challenge the accuracy of police records.

Part XXII Destruction of Police Records

Police records should be destroyed if the juvenile has not been referred to court or if a court's record is expunged.

COMMENTS ON THE IJA/ABA STANDARDS

The simplest subject can, with persistent effort, be made to appear complex. Such effort has reached fullest fruition in the IJA Standards on Juvenile Records and Information Systems. From beginning to end the standards are filled with banal references to limitations on collection of information; strident admonitions as to quality, accuracy and relevance, with requirements of separate precautions in the maintenance and use of records.

SECTION 1 GENERAL STANDARDS

Juvenile Agency

The first, and most serious problem presented by this section begins with a definition of a "juvenile agency". This description relates not only to the usual components of the Juvenile Justice System, i. e. law enforcement, the courts and court officers, and corrections, but is so all-encompassing as to include practically every child-serving agency in America. Thus hospitals, medical clinics, schools, recreational organizations, day care centers, nursery schools, the YMCA, Brownies, and Boy Scouts; millions of agencies and organizations not even remotely related to the Juvenile Justice System, would be made subject to the IJA/ABA standards.

IJA/ABA effort, then, to regulate the maintenance and use of records for a large segment of agencies, just because they relate to or serve children, appears simplistic and highly impractical.

If we are concerned with standards for records and information systems in the field of juvenile justice, let the subject be limited to the logical components, those charged with administering the laws regulating the conduct of children and youth and their relation to and with parents or caretakers.

Let us not implicate the American Bar Association or the legal profession in setting standards for health care agencies, educators, social scientists and recreation specialists. To whatever degree the Institute of Judicial Administration feels compelled to engage in such effort, let it do so with the professional organizations in those fields, the American Psychiatric Association, American Association of Public Welfare, American Academy of Pediatrics and the like.

Juvenile Privacy Committee

Equally impractical and unrealistic is the proposal for establishing statutory "privacy committees."

One must wonder to what extent the advocates of this standard have considered the impact of such recommendation.

First, are those described as "Juvenile Agencies" even a proper subject of record keeping regulation? Federal public agencies are already regulated: by HEW or Public Health, the Veterans Administration, the Department of Commerce, the Department of Labor, and many others. State agencies are likewise regulated, both by Federal rules if they receive Federal funds and by a large number of state bureaus and commissions. Private agencies and individuals serving the public are also controlled, by licensing and other means. Professionals who work in such organizations are also bound by their professional codes of ethics, including strict limits on divulging confidential information.

Second, practical problems of operation and enforcement would require a huge investigative and prosecutorial staff. The alternative would be to thrust upon an already overworked law enforcement apparatus additional duties totally unrelated to their normal functions.

Third, an administrative, regulatory agency authorized to determine policies, dictate procedures and apply sanctions to the judiciary would be a clear violation of the constitutional separation of powers, or an unlawful delegation of legislative authority, or both.

Finally, just about the last thing this country needs is yet another regulatory bureau.

Additional Comment on Section I

To the other parts of Section I, it might be remarked that the standard's commentary on records, record keeping and use are about what would be found in a freshman textbook on Principles of Management. Certainly a reiteration of them does no harm, but the proposals will scarcely be news to any competent administrator or supervising clerk. One may also wonder why the writing took five years.

SECTION II SOCIAL AND PSYCHOLOGICAL HISTORIES

There is little here requiring comment. Codes or professional ethics pretty well inhibit improper use of such material.

SECTION III SPECIFIC STANDARDS FOR THE RECORDS OF JUVENILE COURTS

This entire section presumes to dictate to the courts how they may conduct their business, how they should maintain and use their records.

Most of us in the court system are attempting to cope with impossible caseloads; we are engulfed in a sea of paper work. We need, and would welcome, constructive suggestions which would improve efficiency. The proposals in this section would do just the opposite.

The standards propose a duplicate or "summary" record on each case, with a secret key to the same record in another place. Only select, designated employees would have access to the records and they would be subject (under Section II) to disciplinary action, discharge, civil liabilities and criminal prosecution for deviation from the myriad restrictions and limitations set up by the standards.

Probation officers would have to maintain dual files and would be precluded from stating conclusions.

Under this Section, the standards writers apparently view the court's record keeping processes, not as incidental to and furthering the judicial process, but as a separate, independent function, creating some sinister threat to the juvenile subject. Thus, such records must be curtailed, their use restricted, not for the benefit of the court or to enhance its efficiency; not to deter or deal more effectively with delinquent behavior or child abuse and neglect; not to protect the public or foster respect for and compliance with the law, but for the benefit of the juvenile.

This "tail wagging the dog" distortion of priorities might be amusing but for the fact many may take these recommendations seriously. There is grave danger the American Bar Association may endorse these standards and, in so doing, may unwittingly do a disservice to the judicial system and to the public it serves.

There are some fifteen (and probably more) specific requirements that the court notify the juvenile of an entry or intention to make an entry in the court records.

This almost pathologic anxiety over juvenile records should be put in proper perspective.

When a juvenile has been brought within the court's jurisdiction (after trial or by confessing the petition), some disposition must follow. If it

is a delinquency proceeding, the court is required to obtain and consider a pre-disposition report unless waived by the juvenile through counsel. The juvenile usually applies for probation although such right may also be waived.

If a pre-disposition or probation report is waived, the court may then make an immediate disposition: deferred adjudication, commitment, fine, restitution, dismissal. In this event no further records are made; the case is terminated.

If, however, the juvenile and parents wish to present their position in the most favorable light, as they generally do, they consent to such personal inquiry and generally authorize access to medical, psychological, school and similar records. Hence all parties know, from the beginning that such inquiry is being made, who will be queried, that a report will be furnished the court and that such detail will become a part of the court's record. The juvenile and family also know, if the juvenile is placed on probation there will be regular monitoring of, and notations made, concerning behavior and progress.

It should be evident, therefore, that juvenile courts do not initiate or conduct secret investigations. Social histories and similar data are assembled, if at all, with the full knowledge and consent of the juvenile and parents, to aid in the most beneficial and constructive disposition possible. Continuous notices, as the standards demand, are wholly unnecessary.

The standards are also replete with continuous references as to who may have access to records, who may have limited access, who may have access to limited records, who may have limited access to limited records and on and on.

It seems elementary that the juvenile and parents who are the subject of court records, and their attorney, should have access to all records, at all reasonable times. A simple statement to this effect would be sufficient.

There are two positive recommendations in Section III; provision for expungement of juvenile records and statutory prohibition against inquiry into such records. The former is already in general practice; the latter needs implementation or making recommendations for disposition.

SECTION IV STANDARDS FOR POLICE RECORDS

The standards for police records appear reasonable. They are in substantial accord with most state statutes.

NATIONAL ADVISORY COMMITTEE STANDARDS

The NAC standards on Security and Privacy of Records cover much the same ground as the IJA/ABA effort, but in more succinct form. Because of their length, the contents are paraphrased.

Sec. 0.51 Security and Privacy of Records

This standard recommends each state enact statutes governing collection, retention, disclosure and expungement of juvenile records. It recommends periodic review of record-keeping practices and suggests creation of "privacy council" to assist in review and to enforce statutes and regulations concerning juvenile records.

Sec. 0.52 Collection and Retention of Records

Information on juveniles and families should be collected only:

To provide necessary services
To make decisions concerning need for filing or entertaining a petition in delinquency, non-criminal misbehavior or abuse neglect.
To make decisions regarding appeal.
To provide services directed by a dispositional order.
To administer the agency efficiently, to monitor and evaluate performance and for research.

Also recommended: the retained material should be accurate, protected from unauthorized access or disclosure; the subject should be notified of the record and the right to question accuracy and need for retention.

Sec. 0.53 Confidentiality of Records

Juvenile records should not be public records and access should be strictly controlled.

Sec. 0.531 Access to Police Records

Access to police records should be limited to:

The subject, counsel and parents.
Law enforcement officers, for law enforcement purposes.
Judge and court staff for purposes of performing their proper duties.
Research and administration.
Intelligence information, i.e. that compiled in investigation, prevention or diversion should be maintained separately and access limited to that agency's personnel.
Exchange of juvenile information with other law enforcement agencies only where there is an ongoing investigation of the juvenile or an order to take into custody.

Sec. 0.532 Access to Court Records

Court records should be restricted to:

The juvenile and counsel.

The parents and counsel.
Other parties to the proceeding.
Judges, prosecutors and designated staff.
Proper research and for administrative management.

Sec. 0.533 Access to Intake, Detention, Emergency Custody and Dispositional Records

Access to such records should be limited in the same fashion as those in 0.532 above.

If the juvenile is placed or is receiving services, essential portions of the record may be disclosed.

Medical and mental health records should be governed by the physician-patient privilege.

Sec. 0.534 Access to Child Abuse Records

Access to child abuse records should be limited to:

The child and attorney.
Parents and attorney
Investigating agency and the agency receiving custody and providing services.
Judge, prosecutor and court staff.
For proper research and for administrative management.

Sec. 0.535 Access for the Purpose of Conducting Research, Evaluative or Statistical Studies

Access to records for research should be allowed only on written application which states:

Purpose of the study.
Qualification of the researcher.
The information sought and why it is necessary.
Precautions to be used to insure anonymity of the subject.
Method to insure physical security.

Sec. 0.54 Completeness of Records

Procedures should be developed to insure that records are complete, including a report back to the investigative or referring agency of the disposition.

Sec. 0.55 Accuracy of Records

Procedures should be developed to insure accuracy of records. Included should be access by the subject and the right to correct or challenge the record.

Sec. 0.56 Destruction of Records

Juvenile records concerning delinquency should be destroyed not more than five years after date of origin unless:

The petition was proved, in which case the record should be destroyed no more than five years after termination.

The petition was not proved, in which case the record should be destroyed forthwith.

Records relating to non-criminal misbehavior should be destroyed no more than five years from origin, or at majority of the subject, whichever comes first. If the petition was not proved, the record should be destroyed forthwith.

Notice should be given the subject of intent to destroy the record and the subject may thereafter state that no such incident occurred.

Notice of destruction should be sent to all agencies with copies or motions of the record, and each should likewise destroy its records.

COMMENTS ON NATIONAL ADVISORY COMMITTEE STANDARDS

These standards are sensible and worthy of adoption. The writer would take exception only to the suggestion of a "Privacy Council" as recommended in Sec. 0.51. It would seem that such an agency is neither necessary nor desirable for the same reasons stated in comments on a similar proposal by IJA/ABA.

TASK FORCE STANDARDS FOR SECURITY, PRIVACY AND CONFIDENTIALITY OF INFORMATION ABOUT JUVENILES

The Task Force has managed to state, in five succinct Standards, the essentials of the subject. The Introduction states the broad principles concerning use and restrictions of juvenile records and offers reasonable, attainable solutions.

In contrast to the all-encompassing scope of the IJA/ABA Standards, the Task Force takes a more realistic view by stating:

"A wise approach initially is to be restrictive, covering only the records of agencies within the official juvenile justice system. This approach would include police and diversion organizations, as well as the Courts, custodial institutions and community supervision agencies."

Instead of attempting to inhibit possible employee violations of confidentiality by threat of criminal and administrative sanctions, the Task Force would appeal to reason:

> "Perhaps a better approach is through employee education and motivation, stressing the responsibility for confidentiality and the need to destroy any personal notes or records no longer needed to perform a task."

The Task Force further notes that in the subject considered there are few absolutes; that there must be flexibility in the application of any stated principle. The introduction states:

> "Though the principles of good information practice appear on face value to be reasonable, their application to particular information systems may be questioned. This is especially true with the juvenile justice system."

The five standards recommended by the Task Force are summarized as follows:

Standard 28.1 Collection and Retention of Information on Juveniles

The recommendation is for state legislation regulating collection and retention of juvenile records and for establishing rules governing use and dissemination.

Differing from the IJA/ABA approach, which would lock every state and every agency into a rigid pattern, the Task Force suggests flexibility in adapting to local conditions:

> "Each state must establish standards to its individual requirements. For example, a state with many social agencies and institutions and a large population concentrated in urban areas has different needs than one with a small, mostly rural population and few social agencies and institutions."

Standard 28.2 Access to Juvenile Records

The standard states juvenile records should not be made public and their use and disclosure strictly limited to prevent misuse or misinterpretation.

The limitations discussed in the commentary seem reasonable.

Standard 28.3 Children's Privacy Committee

The Privacy Committee recommended as similar to that contained in the IJA/ABA Standard and the same comments apply.

Standard 28.4 Computers in the Juvenile Justice System

The standard states use of automated data processing should insure compliance with Standard 28.1, Collection and Retention; with Standard 28.2, Access to Juvenile Records; and Standard 28.5, Sealing of Juvenile Records. A computerized system should be adopted only if it improves service to children and families and is cost efficient.

Standard 28.5 Sealing of Juvenile Records

The standard recommends state legislation which would provide:

A juvenile's record be sealed when a petition is dismissed or the juvenile is no longer within the system. Upon sealing, notice to all persons or agencies which have any part of the record to destroy the same.

When a record is sealed, the proceedings are deemed never to have occurred and the juvenile may state there is no record of arrest or court involvement.

COMMENTS ON TASK FORCE STANDARDS

There should be little disagreement with the principles stated in the Task Force standards. Perhaps the same is true of the IJA/ABA standards. The essential difference lies in the former's limitation of application to components of the juvenile justice system and recognition that the implementation of these principles requires flexibility and adaptability to a state's circumstances. The latter would seek to regulate record-keeping practices of virtually every child and youth-serving agency in the country. It would impose rigid, detailed procedures, as to how information may be gathered, used, disseminated and stored.

On balance, it appears the Task Force Standards are by far the most realistic, the most practical, the most worthy of support.

CONCLUSIONS

In considering standards for juvenile record keeping, the material to be included, how it is stored and used and its ultimate disposition, we need to understand and apply some basic facts.

Inherent Limitations on Records and Information

As stated previously, certain basic records are thrust upon the major components of the juvenile justice system, reports or records which result not from any volition or seeking by the agency but from the behavior of the subject. It is the juvenile or his family, who by conduct, initiate the juvenile record and likewise provide much of its contents.

Because of budgetary limitations and constantly increasing workloads, law enforcement, the juvenile court and juvenile corrections are hard pressed to keep abreast of their uncontrollable record keeping obligations. Hence, there is neither the time nor the manpower for voluntary accumulation of additional data. These personnel and monetary restrictions of the various components of the juvenile justice system are, in themselves, almost a foolproof guarantee against collecting and maintaining other than absolutely essential records and information.

Who Seeks Access to Active Juvenile Records?

Before we spend a lot of time and effort setting up safeguards for active juvenile records, let's ask "From whom are we protecting juvenile records?" or, stated another way, "Who seeks access?"

Again the assumption that there are hordes of information seekers wishing to pry into juvenile records, is a fallacy. Who, then, seeks access to such information?

The child, his family and his attorney know about an offense or occurrence and have access to the record.

The police already have a record of the offense.

Neighbors and the juvenile's peer groups usually know when a juvenile is involved in the system, and why. The school usually knows, too.

The victim of a delinquent act, relatives of an abused child, may have a limited interest, the former to recoup damages or to learn whether an injury has been redressed by the law; the latter to be assured a child is protected.

Occasionally, if the case is bizarre or sensational, the news media may have an interest.

It seems obvious, therefore, that while a juvenile is within the juvenile justice system and juvenile status continues, there is almost no one, other than those directly concerned with the case, who have the slightest interest in the juvenile or in the record.

That is not to say there should not be restrictions on use and observance of privacy and confidentiality. It does illustrate that the elaborate precautions recommended by the IJA/ABA Standards are unnecessary.

Who Seeks Access to Closed Juvenile Records?

By the time a juvenile reaches eighteen he is generally out of the juvenile justice system and any record is no longer of any use to the juvenile agency. It is then and thereafter, when the juvenile is actively seeking employment and otherwise exposing education and prior conduct to scrutiny that others become interested in the juvenile record. At that point the protection against dis-

closure becomes crucial.

If the juvenile has already revealed his involvement in the juvenile justice system, as is often required on an application, the juvenile agency is confronted with a serious dilemma: a wish to avoid exposing the record, yet realizing it may do the applicant a serious disservice by refusing information, especially as to exculpatory matters. Such refusal may lead to rejecting the application.

Restriction Should Apply to Inquirer

A large percentage of inquiry about closed juvenile records comes from governmental services: the Civil Service Commission, the military recruiters and from most state and local public employers.

This demand for access to juvenile records could be stopped overnight by the simple expedient of a federal statute making it illegal to ask anyone about a police or court record arising prior to age eighteen. If the statute related to federal agencies, and to any other funded in whole or part with federal funds or operating under federal contract, it would reach a large segment of employer-inquirer community. Federal grants to states and other political subdivisions for aid to the juvenile justice systems could also be made contingent on state statutes and city ordinances to the same effect.

If it is argued such a restriction would be too stringent and might affect public safety, the juvenile courts, if the record existed, could be authorized to entertain inquiries upon showing of such public need.

Sealing or Destruction of Records

Most states have provision for expungement of juvenile records but conditions vary. The IJA/ABA Standards recommend destruction by the juvenile court of "all unnecessary information" when the court's jurisdiction ends. It also provides that the court notify other agencies to destroy their records. The Task Force standard is to the same effect, except that sealing rather than destruction is recommended. The National Advisory Committee recommends total destruction. All would provide that, upon expungement the record would be deemed never to have existed and the juvenile is authorized to state no arrest or court involvement has ever occurred.

Either the IJA/ABA or Task Force recommendations would be preferable to permanent and open retention. The National Advisory Committee's proposal for complete destruction after five years or upon reaching majority is the best of the three proposals.

None of these, however, wholly solves the problem. If the records remain available even to the juvenile's majority (unless deemed to be eighteen) this is a vulnerable time, the period most likely to generate inquiry about a juvenile record. If the information is once disclosed, even to a limited source such as a single prospective employer or to the military, this informa-

tion will be forever open to further dissemination. Once the information is in the hands of an unrestricted source, expungement by the juvenile court, whether by sealing or destruction, may be meaningless.

A further difficulty results from the fact that court, even though it expunges its own record, has little control over police or other agency records, especially of those not related to the expunged incident.

A better method would be a mandate for destruction of all juvenile records when the subject reaches eighteen or as soon thereafter as the court's jurisdiction terminates. Under such provision all police records, court records and correctional records would be destroyed automatically rather than upon the contingency of notice. If an agency believed, for good cause, a particular record should be preserved, upon proper application and jurisdiction the court could authorize such retention.

As to need for continuing research, by court authorization, records so involved could be preserved, until the research was completed.

Summary

The IJA/ABA Standards on Juvenile Records and Information Systems devotes its major effort to generalized restrictions on the information a juvenile agency receives, how it may be used, how maintained.

This is the wrong focus. The standard's obvious purpose should be the protection of the juvenile, to insure his right to privacy, to avoid undue stigma arising out of misconduct, to preclude improper dissemination of derogatory information.

If this is in fact the aim then, instead of trying to tell juvenile agencies what records they should have, how they may use them, the standards should be concerned only with their misuse.

As has been pointed out, when the juvenile is actively involved in the juvenile justice system, the court's records are open to and are well known by the juvenile and the family. In fact, both are the source of much of the court's information. During this period of active involvement, the juvenile record is seldom of interest to anyone other than the agency, or the family. If the record should be misused, as by improper disclosure, this fact is usually known immediately to the juvenile and the parent and they may take steps to rectify the misuse.

While there must be well-defined limitations on divulging information on active cases, the greater threat to the juvenile occurs after the case is concluded. Then the record no longer is of use to the agency; it is not under the active scrutiny and control of the judge or probation officer or whoever has been in charge of the juvenile's case, but lies dormant in the agency files. It is then, too, that outside interest develops in the juvenile's past, that prospective employers and credit reporting agencies seek information because the subject, now an adult, has begun to move into the economic mainstream of the community.

The misuse of dormant records can best be obviated by automatic destruction. Such provision, plus statutory prohibition from inquiring into a juvenile record, will insure maximum protection.

It is urged that the IJA/ABA Standards on records and information, in its present form, be rejected. If a standard is to be considered, it should be redrafted to provide for simple and effective safeguards against misuse of juvenile records.

SUMMARY

The purpose of this paper is to first identify certain principles and problems in the establishment, maintenance and use of juvenile records; then relate these principles to proposed standards addressing this subject.

The standards to be considered are:

IJA/ABA Joint Commission

Juvenile Records and Information Systems

National Advisory Committee For Juvenile Justice and Delinquency Prevention

National Task Force to Develop Standards and Goals for Juvenile Justice and Delinquency Prevention

Standards advanced by the National Advisory Committee and the Task Force are designed to improve the juvenile justice system as it presently exists.

The IJA/ABA standards appear to be directed to a restructuring of the system. These would undertake to regulate the record keeping procedures of virtually every child serving agency in the United States, whether or not related to the juvenile justice system.

This paper limits the discussion to those public institutions administering the law regulating the behavior of children and parent-child relationships, namely law enforcement, the juvenile courts and juvenile corrections.

Record keeping by these three components is largely determined by their statutory obligations, by requirement of due process, and by the extent they must respond to public demand.

Police records are created largely by violations of public law, observed or reported.

Juvenile court records are created by petitions filed by the public prosecutor or other authorized persons and are the result of behavior by the subject; and by ensuing legal process.

Correctional records likewise arise from court placement or referral for supervision.

Hence records maintained in the juvenile justice system are not those created on the initiative of the components, but are thrust on them by the conduct of others. The assumption that the origin of such records can be limited or controlled by standards is erroneous.

While standards cannot limit or control the nature and volume of materials that must be accepted by the police, the juvenile courts or juvenile corrections, they can be of help in defining limitations on use and dissemination outside the immediate agency. To this extent objective standards are helpful.

Juvenile records should be succinct, accurate and relevant. They should be used only for legitimate agency purposes. Use outside the juvenile justice system should be forbidden and reasonable agency safeguards should be established to insure privacy and confidentiality.

Information on a juvenile is seldom sought by outside sources while the subject is in the juvenile justice system. When he begins an active search for employment and indulges in other adult pursuits, he subjects himself to inquiry by others, inquiry as to education, behavior, reputation. Interested parties often make diligent inquiry as to any involvement in the juvenile justice system.

Juveniles should be protected from required disclosure of juvenile indiscretions by legislation which prohibits such inquiry. As a further protection to juveniles, all juvenile records should be destroyed automatically when the juvenile reaches his eighteenth birthday.

* * * * * *

(WHEREUPON, Judge Delaney's presentation was given and the following is the discussion that ensued.)

MR. MANAK: Okay, thank you, Judge Delaney.

HON. DELANEY: Okay.

MR. MANAK: Okay, we are going to start -- Where did we start the last time -- Mr. Siegel?

MR. SIEGEL: I strongly support your idea of prohibiting employees in State and Federal governments from asking questions about juvenile records, and I thought you showed some really excellent sensitivities to the problems of records following juveniles after they are through with the Juvenile System -- or at

least sensitivity to the problems of confidentiality while they are in the system.

And I guess, I think I have some sympathy with the destruction of records, although I think there are some circumstances under which I think maybe an adult sentencing Judge should have some access.

I mean, if a kid has committed two murders in the Juvenile Justice System, I think maybe an adult sentencing Judge has the right to know about that.

HON. DELANEY: Yes, I would agree.

I didn't mention that, as I mentioned it in my paper, but I think the police and the District Attorney ought to have a right to ask that certain records be preserved.

But I think it should be a judicial determination.

And there should be a showing that there is some materiality or some good reason for retaining it -- yes.

I think there needs to be that provision.

MR. MANAK: Mr. Rounds?

MR. ROUNDS: I have no comments.

MR. MANAK: Ms. Bridges?

MS. BRIDGES: Well, the only thing I would say about destruction of records, and you still may not agree that this is strong enough interest to consider it, but I am continually asking my people why don't we keep records on kids after -- so that we can determine after they get out of the system whether or institutions were helping them at all while they were within the system?

In other words, so you can study what happens to them later -- that may cause a lot of concern on something to even consider doing that, but that is something that is asked every now and then.

HON. DELANEY: Well, if we wanted to do that, I wonder if we couldn't get a control group that would do just as well.

I don't think we need to keep the records on all the kids, but we could take every 50th kid or something like that, and file it in that fashion for a while.

MR. MANAK: Ms. Szabo?

MS. SZABO; Partially to answer Ms. Bridges concern, you could do the job study by an anonymous

system, because the name, initials, or whatever, and get statistical involvement -- I am mostly concerned with the point Mr. Siegel mentioned in terms of preserving some sort of records for the sentencing -- Judge -- before -- not only to show that the first time an adult defender has something, but cutting the other way, that he made a very good judgment on probation, is one juvenile involvement, and therefore, should be given more of a sentence as an adult defendant -- I think for that and it would be worth it to have some preservation on the records.

HON. DELANEY: Well, I think Ms. Szabo, you could probably get the Probation Officer to come in and write a letter or something to tell him the same thing.

I believe there would be other ways of producing that information.

As far as the prior record that has been destroyed at Juvenile Court, I suppose there may be other talk around, information in the neighborhood or talking to the peers or something like that.

But even if it didn't have it, I think

the advantage to the rank and file of the kids that go through the system would be so much greater than the loss of an occasional record that would be useful, that probably that outweighs the advantage of preserving the records.

MR. MANAK: Judge Arthur?

HON. ARTHUR: I am bothered by the whole thing about punishment.

First of all, the mechanical problem -- If you have got two or three kids involved in the same offense -- if you are going to -- if their names are mentioned in a police report at all, their names are often mentioned in the petition, the charges, you know, and the company with and so forth like that.

It may be mechanically impossible to expunge all of your records without spoiling the whole deal for all the rest of the cases unless the youngest kid is 18 or something like that.

Another problem I see, is in reading your paper, I haven't read the standard on it, is that presumably it lets the child, say in later life, commit perjury.

"Have you ever been in Juvenile Court?" "No, I haven't." Well, the kid knows he has been in

Juvenile Court. You are telling him to go ahead and lie now. It's okay.

You can commit perjury and the Federal governmen may -- deny you a chance to go to foster school, but it is okay, you go ahead and tell your lies and we will protect you.

And somehow you can't buy that part of it.

And another part of expungement which always bothers me is that the kids may need the records later.

Somebody -- it may leak out in later life, the kid is 21, 22, "Hey, you were charged with robbery." "Well, I was found not guilty." "Prove it." Or the charge was dismissed or the charge was marked out -- "Well, prove it." "Well, I can't, the record has been destroyed."

So this whole bit of expungement kind of bothers me.

The other part of the use of these records by the adults bothers me -- the adult court.

Ours is a division of the Court of General Jurisdiction.

So, I proposed at a meeting of our

whole bunch once that the Juvenile Court records be destroyed, expunged, kept secret from the adult system.

Well, it went to a vote and the vote is 18 t0 1, you know -- I lose hands down on that one.

So on this expungement thing bothers me, the multi-name thing, the perjury thing, the child's own needs for his own records.

Do you have any comment on that?

HON. DELANEY: Yes, it bothers me, too.

We have a statute that provides for expungement.

And it says that the incident will be deemed never to have happened, and the child may state so.

We are inviting a disrespect.

We are inviting perjury just in that.

I would much prefer to make it illegal to even ask about it.

We did that, when you take the onus off the youngster, and he doesn't have to lie.

HON. ARTHUR: What about the child's own need for the records later?

HON. DELANEY: I think that is pretty minimal.

I don't know -- there might be a situation where it would be -- but -- I wouldn't think that would be a big deal.

I have never had any desire to go back and look at my juvenile records.

HON. ARTHUR: The other point I would raise is I don't know if you covered it -- When you released it to the victim, the kid has wrapped a car around a tree -- do you tell the victim so he can bring a civil suit?

HON. DELANEY: Yes, I think you do.

Because I think the right of privacy is a qualified right, and I think we owe the, you know, if you damage somebody else's car, I think the person who is injured has a right to know that.

And the insurance company has a right to know it -- remember -- I feel strongly that that is essential.

MR. MANAK: Judge Mc Laughlin?

HON. MC LAUGHLIN: I think Judge Arthur, Judge Delaney, you know has taken both sides of the problem.

There really isn't any answer.

New York has tried this business, but

you can't ask.

And it is a race between the form makers and the legislators.

You can't think about it so then the form doesn't say "arrest," it says "Have you ever had contact with the police?" You can't ask about contact with the police -- have you ever been invited down -- you know -- I am convinced that there is no -- given the imagination of man, there is no way that you can prevent these people from asking the question.

HON. DELANEY: We can slow them down, though.

HON. MC LAUGHLIN: What?

HON. DELANEY: We can slow them down.

HON. MC LAUGHTLIN: Yes.

But what happens -- The Military -- I don't know how many people know about this, but this, I think, is a very, very critical area.

The Military says to the children, "You know, have you ever been -- talked to by the police? Has your brother ever been talked to." Very broad.

If they say, "No," they never checked. You see, they are not interested.

But if you get in any trouble in the

service within the first year, then they go back and check on you, and then they give you a dishonorable discharge on the grounds on fraudulent enlistment.

Now, that to me is a terrible, terrible penalty, because I tell you some of these kids, just as you say, they don't remember, really, that the fact that the police talked to them, or something, you know, went into a record and the Military uses it to get rid of their trouble makers, which I think, that is a really impressive point.

I don't know, I -- I sympathize -- I think I lean more to Judge Delaney's theory than, you know, sort of Pontius Pilate washing our hands.

We just destroy our record and then we are out of it.

Now, and I sympathize with all the arguments that Judge Arthur makes about the child's ability to -- in fact, wasn't there a Congressman or something that just turned on somebody being accused of a juvenile record?

They were -- they made a big thing out of it.

I think it was in Rhode Island -- it was in Rhode Island.

In any event, how do you prove your innocence?

I don't know -- I suppose for lack of a better alternative, I will go with -- I will go along with those standards.

MR. MANAK: Ms. Thompson?

MS. THOMPSON: Well, I think this is an area of tremendous concern right now in the focusing on the Juvenile Court -- confidentiality, availability of records, availability of information as to what goes on in the Courts. Without actually expressing a personal position, I might just mention that in New Jersey, just in this year, the early part of this year, a -- by statute, made available the results of a juvenile when adjudication to a victim.

We have had case laws with regard to the turning over of such information to the insurance companies, and the results being available with regard to certain kinds of more serious offenses.

By the way, I should mention that offenses which would be commonly thought of as felonious, and misdemeanors in New Jersey.

I just think it is a real important

area in the whole juvenile court of law, right now.

MR. MANAK: Mr. Dale?

MR. DALE: Well, I -- until recently I agreed with Judge Delaney that the collection of data about people was absolute massive.

I applied for a VISA card recently holding one presently in New York, and applying for one in California, and filled out a massive form, told them that the FBI had once checked me out for the foreign service, that I had "X" number of credit references, that I was an attorney admitted to practice, in whatever courts, and back came the application, denied on the grounds that they couldn't find out anything about me.

No documents about me whatsoever.

So I am no longer sure.

MR. MANAK: No record is worse than a bad one.

MR. DALE: I was very upset about that.

DEAN SMITH: You are among friends.

MR. DALE: Right.

MR. MANAK: Mr. Hutzler?

MR. HUTZLER: Once again. I think the position that judge Delaney takes indicates a disbelief that

there is a serious problem concerning records and --

HON. DELANEY: I think it is serious the way it is.

I think if we got rid of them it wouldn't be serious.

MR. HUTZLER: Well, okay.

I think -- it is a little bit inconsistent to say, at one point, that the Court gets all of this information thrust upon it, and then to say that the people who are involved in the Court proceeding, and the kids, neighbors, and friends, and so forth are already aware of the fact that the kid has committed an offense.

The need for control on the records is important because it is not merely the fact that an offense has occurred, and if this kid has committed all of this social data, what his home environment is like, what his school records are, he don't want to get to the point where -- where although his teacher may know that he has been charged in criminal Court with a burglary, the teacher has ready access to social rights that are contained in his juvenile record, and all of that

And that the standards are really

directed toward trying to first, well as I say in the general principles, all of which I think you agree with, to limit those records to information that is essential, and to limit access to those records to the people to whom that information is essential.

So that I think if you accept the proposition that the standards drafters take, that this information is at present, too readily available to people to whom it should not be available, then the kind of elaborate restrictions on availability and maintenance of records, that the standards proposed is necessary.

HON. DELANEY: Of course I don't accept that.

I don't believe that is true.

MR. HUTZLER: That is where I stand.

HON. DELANEY: I believe that most cases, States, I am not sure what their statutes are, but there is a general acceptance that juvenile records are confidential. And I know of no Court that, you know, says, "Come in and look over our records," or the one which comes in and says, "I want to see what Joe Blow looks like," and you hand him a record and let him make several copies of it.

We don't do that at all.

The point I was making is in most cases, nobody takes the trouble to come to Court and ask for the information.

There aren't hordes of people lurking around the corners trying to, you know, pry information out of a gullible clerk or a venal judge or somebody like that, handling him a $10 bill.

There is just no real interest in the records generally while the kid is going through the system.

It is after he gets out that I am worrired about.

MR. HUTZLER: But what I am protesting is, if people are not asking for the records, or if your Court is not releasing them, then a standard which imposes restrictions upon you is no problem for you.

HON. DELANEY: None at all unless it makes us keep --

MR. HUTZLER: It is one you can support.

HON. DELANEY: Yes, except this -- One of the things the standard wants us to do is set up two sets of records -- something over here with something

in it and something over here so you have to have sort of a code to find out who this guy is, vis-a-vis this person.

Now, I don't think that is necessary. I don't want more work thrown on us, that is all.

MR. HUTZLER: The only other point I would make is this -- and this is a result of the fact that I work for an organization that does research in juvenile justice -- and that is -- I would strongly urge the -- not the destruction of records, but the removal of identifiers in records, because the information is about the fact that Individual A was completely unknown as B handled the system in such and such a way with such and such a result is very valuable information -- in terms of, you know, figuring out how the system is operating, planning, improvements, all of that sort of thing.

So the elimination of those -- that information in the record which enables you to find out who the person is that the record is about -- I would favor very strongly.

But the destruction of those records would be a big loss.

MR. MANAK: Mr. Sandel?

MR. SANDEL: Judge Delaney, I am not sure this is the right volume, but maybe it should have been for adjudication -- I got a call last week, Friday I think it was, from an editor of a newspaper in another state, who has been indicted under a State statute for having published the name of a juvenile in a story about the arrest the day following the arrest.

There are some other circumstances that another paper had published in the previous edition and so forth.

He had called me to ask whether or not the standard directly addressed that question.

I was not able to determine that they do.

I have not memorized all the 23 volumes -- I must confess -- I couldn't find any direct reference -- there was an indirect -- there were some of the things, I think in the adjudication volumes with by necessary implication saying that the papers don't have the right to publish those data.

My question is, I guess, should the standards address themselves to the first Amendment

rights of the news media to deal with the names of juveniles?

HON. DELANEY: Well, the standards recommend the drafting of or adopts the statute that would preclude the use of juveniles' names and pictures.

MR. SANDEL: In a news article -- where is that -- I missed it.

If it is there -- we don't need to take the time.

MR. MANAK: We really don't have the time.

MR. HUTZLER: I think that is the issue pending in the United States Supreme Court.

MR. MANAK: Why don't the two of you get together after the meeting, becuase we are going to try to conclude this.

And then give an opportunity for any final remarks to individuals who feel the need.

Dean Smith?

DEAN SMITH: As we all know from the discussion and experience, the maintenance, control and access to juvenile records is nothing short of a nightmare. And that is with reference only to traditional record keeping processes.

It becomes even more a nightmare with

electronic record keeping processes, especially where some agency wishes to obviate a control by a Juvenile Court system, and feeds the record into a computer, and then the Juvenile Court has absolutely no control.

If it is a police agency or something like that, absent a statute which specifically regulates it, and then how do you enforce the statute?

The legitimate interest of research need to be recognized and the ultimate concern is the privacy of the individual and the integrity of the system.

I don't know the answer.

Perhaps one day we will find it out.

MR. MANAK: Judge Cattle?

HON. CATTLE: Well, I agree with Judge Delaney in general.

But if you add the removal of identifying data, I would substitute the removal of identifying marks.

I am not sure that there is anything on earth that can prevent a Federal agency from obtaining this information, and most of them really

have no interest in it except to -- by God we are entitled to it.

In the recruiter business, one of them -- the favorite thing is that they make, before they will take the kid on, they make him sign a waiver of all this.

So what does it mean anyway?

The kid waives his right to protection in order to get in, and there is nothing we can do to that darned recruiter -- that is all.

MR. MANAK: Judge Fort?

HON. FORT: Judge Delaney, what if anything, does the standards, any of them, say with respect to the control if any by the Juvenile Court of the records of private agencies to which kids have been admitted?

HON. DELANEY: Well, the standard, Bill, is very broad.

It sets up, as the agencies, subject to this, any public funded agency that has legal authority that confirm or deny clinical evaluative counselling, medical, educationa, or residential services to a juvenile.

HON. FORT: You are talking about privately

funded?

HON. DELANEY: Well, then, it goes on to say, "Any private agency that regularly provides such services to juveniles as a result of research as private agency by a public agency."

So it -- this would, or any private agency that receives public funds, would be subject to that.

This would be a broad spectrum of agencies -- I would suggest seriously whether we would have any constitutional right to regulate -- the record keeping of a hospital or clinic, or something of that kind.

But that is what is included in this standard.

MR. MANAK: Ms. Sufian?

MS. SUFIAN: I would just support Dean Smith's comments about the vast familiarity that just one example is the druges that are used in treatment of children, if they are C4 level of the drug control drug that has to be reported to the Federal government and the child is permanently labelled as a drug user in institutions which are sent by the Court as an example.

MR. MANAK: Ms. Connell?

MS. CONNELL: The question of preserving some kind of records for the purposes of research, I think is a very serious one, and eliminating identifiable, you know, identifying marks will not solve all researchers' needs while protecting the child.

One thing that did come out of the American Psychological Association's review of the standards was that they have take to their Board of Ethical and Social Responsibility the need for psychologists as researchers to consider the problem, and they are planning on using their facts, money, to good, solid review of those problems, and I think they will probably be starting from the reocrds an information system volume and try to address some of the problems.

I don't think they are confident they are going to get -- come up with, you know, an ideal system either, but we will be able to look to another opinion on that issue, probably in about a year or so.

MR. MANAK: Okay.

HON. DELANEY: I think really the most destructive

records are those in the Police Department that are under no control at all.

If we need the police record and the explanation and the evaluation of the events, and so on, so that we can explain away, that is one thing.

But the ones I would be most concerned about are the police records -- where they didn't get in Court.

MR. MANAK: Okay.

Mr. Hege?

MR. HEGE: I have nothing further.

MR. MANAK: Mr. Kaimowitz?

MR. KAIMOWITZ: Very briefly, and I don't know if it is a local problem or national, but Judge Delaney, have you come across the problem of -- on the record itself -- confusion as to what has been disposed of, what has been in contact stage, what has been adjudicated?

I have picked up a client, let's say, who has told me that he or she has never been adjudicated by the Juvenile Court, and I go in there and find that there are eight records -- eight contacts made, but as far as the child was concerned,

there had never been a disposition, that as far as he was concerned, there was no record, and I am concerned as to whether, for example, you have experienced any confusion or difficulty in marking that this is the stage the proceeding is at -- that is the stage or the following is a stage.

It may be a local problem, as you say -- meaning that there is no clear demarcation between arrests, contacts, he would have to be an expert really going through the records -- all you see is assault and battery, arson, and the like, and it is really hard to tell whether it was the Smith, whether the Fairchild was acquitted, and the like.

Have you had any experience with that and is that addressed by the standards?

HON. DELANEY: No.

That is the writing of appropriate orders and every stage of this thing, should reveal what has happened to it.

Whether it is stamped on the outside of the jacket, I don't know, but our practice is to expunge a record if the case is dismissed without adjudication -- dismissed at the Prosecutor's

application or on a continued petition or anything of that kind.

If there has been an adjudication, of course, we can't expunge that until two years, but addressing your question, I would think any Court that was doing the stuff, was recording its progress by order, if nothing else, so there would be a ready access to what the status of the case is.

MR. MANAK: Okay.

At this point I would like to give anyone an opportunity briefly to make any closing comments on any of the topics that we have covered in the last three weekends -- three days, in very brief -- We have 15 minutes, I would like to ask Barbara Allen-Hagen to make some final remarks, if you feel it would be appropriate -- Why don't we take your remarks first, Barbara Allen-Hagen?

MS. ALLEN-HAGEN: The only thing that I have to say is that there --

HON. FORT: Speak a little louder, please.

MS. ALLEN-HAGEN: This symposium came off much better than I had ever hoped for, and I just hope that we can get the proceedings completed, and published so

that others can benefit from what has transpired here, and I would like to thank everyone for their cooperation in light of the time constraints that were imposed on you, and the quality of work, and the quality of the discussion has to be commended -- thank you.

MR. MANAK: Again, let me just remind you of the deadline dates -- We will have the transcript by the 20th, we have got to have your revisions or your addendums, and your rebuttal written, formal, if you are going to submit one, by the first of the year.

It looks very good that we will be able to get the Executive Summary into the process and to the House of Delegates after talking to Mr. Sandel.

And basically that is it.

Also, again, if you didn't do an abstract, please do one as soon as possible, and send it in.

MR. SANDEL: Two things I would like to say -- First of all, I would like to echo the remarks that were made by the lady from the LEAA. As with many of you my works require me to attend many seminars

and conferences and meetings throught the year and in terms of the quality of work, the density of the intellectual level of discussion that has been one of the finest it's ever my privilege to attend.

We are honored to have co-sponsored this. It's really one of the highlights of this kind of thing that I have observed.

Secondly, if you have any difficulty in locating a representative from your area to the House of Delegates, and can't get it through your Bar Association, contact me, of course, because I have all the names -- I will be happy to tell you who an appropriate representative might be.

MR. MANAK: Sandy, would you want to give them your telephone number?

See -- don't contact me if you want to find out about the HOuse of Delegates, contact Sandy.

Do you want to give them your numbers right now?

MR. SANDEL: It is Area Code 312/947-3840.

My name is Sandel -- I'm Director of the Division of Judicial Service Activity, American

Bar Association, 1155 East 60th Street, Chicago, 60637.

MR. MANAK: I would simply close with remarks on my own part. Certainly I was very, very happy -- We were delighted with the quality of the papers and the discussion, both the formal presentations and rebuttal.

And I think we really have achieved the purpose of the program that we had outlined originally of not reaching conclusions, not making recommendations, but have a very healthy discussion by spotlighting of issues and give and take on those issues.

So I think in that sense we really have been successful.

We hope that that discussion will be of benefit to other professionals in the field.

JUDGE FORT: I would just like to -- speak my appreciation and I suspect all the rest of us to you for all you have done in carrying through on this program.

I think you are entitled to a great deal of credit.

(Applause.)

MR. MANAK: Does anybody care to make any additional remarks?

Ms. Thompson?

Dean Smith?

DEAN SMITH: Could I make an editorial comment in brackets?

We have referred to a November meeting of the Executive Committee of the Juvenile Justice Standards Commission.

It was instead an October meeting, and wherever we referred to a November meeting, we meant October meeting.

HON. CATTLE: You didn't mean what we said in the first place.

MR. MANAK: Yes, it is kind of sad that we have to end because I am sure we could continue on for many, many hours.

Thank you.

(WHICH WERE ALL THE EXCERPTS REQUESTED.)

END