Institute of Judicial Administration

American Bar Association

Juvenile Justice Standards

STANDARDS RELATING TO

Appeals and Collateral Review

Recommended by the
IJA-ABA JOINT COMMISSION ON JUVENILE JUSTICE STANDARDS

Hon. Irving R. Kaufman, *Chairman*

Approved by the
HOUSE OF DELEGATES, AMERICAN BAR ASSOCIATION, 1979

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This book is printed on recycled paper.

Preface

The standards and commentary in this volume are part of a series designed to cover the spectrum of problems pertaining to the laws affecting children. They examine the juvenile justice system and its relationship to the rights and responsibilities of juveniles. The series was prepared under the supervision of a Joint Commission on Juvenile Justice Standards appointed by the Institute of Judicial Administration and the American Bar Association. Seventeen volumes in the series were approved by the House of Delegates of the American Bar Association on February 12, 1979.

The standards are intended to serve as guidelines for action by legislators, judges, administrators, public and private agencies, local civic groups, and others responsible for or concerned with the treatment of youths at local, state, and federal levels. The twenty-three volumes issued by the joint commission cover the entire field of juvenile justice administration, including the jurisdiction and organization of trial and appellate courts hearing matters concerning juveniles; the transfer of jurisdiction to adult criminal courts; and the functions performed by law enforcement officers and court intake, probation, and corrections personnel. Standards for attorneys representing the state, for juveniles and their families, and for the procedures to be followed at the preadjudication, adjudication, disposition, and postdisposition stages are included. One volume in this series sets forth standards for the statutory classification of delinquent acts and the rules governing the sanctions to be imposed. Other volumes deal with problems affecting nondelinquent youth, including recommendations concerning the permissible range of intervention by the state in cases of abuse or neglect, status offenses (such as truancy and running away), and contractual, medical, educational, and employment rights of minors.

The history of the Juvenile Justice Standards Project illustrates the breadth and scope of its task. In 1971, the Institute of Judicial Administration, a private, nonprofit research and educational organi-

zation located at New York University School of Law, began planning the Juvenile Justice Standards Project. At that time, the Project on Standards for Criminal Justice of the ABA, initiated by IJA seven years earlier, was completing the last of twelve volumes of recommendations for the adult criminal justice system. However, those standards were not designed to address the issues confronted by the separate courts handling juvenile matters. The Juvenile Justice Standards Project was created to consider those issues.

A planning committee chaired by then Judge and now Chief Judge Irving R. Kaufman of the United States Court of Appeals for the Second Circuit met in October 1971. That winter, reporters who would be responsible for drafting the volumes met with six planning subcommittees to identify and analyze the important issues in the juvenile justice field. Based on material developed by them, the planning committee charted the areas to be covered.

In February 1973, the ABA became a co-sponsor of the project. IJA continued to serve as the secretariat of the project. The IJA-ABA Joint Commission on Juvenile Justice Standards was then created to serve as the project's governing body. The joint commission, chaired by Chief Judge Kaufman, consists of twenty-nine members, approximately half of whom are lawyers and judges, the balance representing nonlegal disciplines such as psychology and sociology. The chairpersons of the four drafting committees also serve on the joint commission. The perspective of minority groups was introduced by a Minority Group Advisory Committee established in 1973, members of which subsequently joined the commission and the drafting committees. David Gilman has been the director of the project since July 1976.

The task of writing standards and accompanying commentary was undertaken by more than thirty scholars, each of whom was assigned a topic within the jurisdiction of one of the four advisory drafting committees: Committee I, Intervention in the Lives of Children; Committee II, Court Roles and Procedures; Committee III, Treatment and Correction; and Committee IV, Administration. The committees were composed of more than 100 members chosen for their background and experience not only in legal issues affecting youth, but also in related fields such as psychiatry, psychology, sociology, social work, education, corrections, and police work. The standards and commentary produced by the reporters and drafting committees were presented to the IJA-ABA Joint Commission on Juvenile Justice Standards for consideration. The deliberations of the joint commission led to revisions in the standards and commentary presented to them, culminating in the published tentative drafts.

The published tentative drafts were distributed widely to members of the legal community, juvenile justice specialists, and organizations directly concerned with the juvenile justice system for study and comment. The ABA assigned the task of reviewing individual volumes to ABA sections whose members are expert in the specific areas covered by those volumes. Especially helpful during this review period were the comments, observations, and guidance provided by Professor Livingston Hall, Chairperson, Committee on Juvenile Justice of the Section of Criminal Justice, and Marjorie M. Childs, Chairperson of the Juvenile Justice Standards Review Committee of the Section of Family Law of the ABA. The recommendations submitted to the project by the professional groups, attorneys, judges, and ABA sections were presented to an executive committee of the joint commission, to whom the responsibility of responding had been delegated by the full commission. The executive committee consisted of the following members of the joint commission:

Chief Judge Irving R. Kaufman, *Chairman*
Hon. William S. Fort, *Vice Chairman*
Prof. Charles Z. Smith, *Vice Chairman*
Dr. Eli Bower
Allen Breed
William T. Gossett, Esq.
Robert W. Meserve, Esq.
Milton G. Rector
Daniel L. Skoler, Esq.
Hon. William S. White
Hon. Patricia M. Wald, *Special Consultant*

The executive committee met in 1977 and 1978 to discuss the proposed changes in the published standards and commentary. Minutes issued after the meetings reflecting the decisions by the executive committee were circulated to the members of the joint commission and the ABA House of Delegates, as well as to those who had transmitted comments to the project.

On February 12, 1979, the ABA House of Delegates approved seventeen of the twenty-three published volumes. It was understood that the approved volumes would be revised to conform to the changes described in the minutes of the 1977 and 1978 executive committee meetings. The *Schools and Education* volume was not presented to the House and the five remaining volumes—*Abuse and Neglect*, *Court Organization and Administration*, *Juvenile Delinquency and Sanctions*, *Juvenile Probation Function*, and *Noncriminal*

Misbehavior—were held over for final consideration at the 1980 mid-winter meeting of the House.

Among the agreed-upon changes in the standards was the decision to bracket all numbers limiting time periods and sizes of facilities in order to distinguish precatory from mandatory standards and thereby allow for variations imposed by differences among jurisdictions. In some cases, numerical limitations concerning a juvenile's age also are bracketed.

The tentative drafts of the seventeen volumes approved by the ABA House of Delegates in February 1979, revised as agreed, are now ready for consideration and implementation by the components of the juvenile justice system in the various states and localities.

Much time has elapsed from the start of the project to the present date and significant changes have taken place both in the law and the social climate affecting juvenile justice in this country. Some of the changes are directly traceable to these standards and the intense national interest surrounding their promulgation. Other major changes are the indirect result of the standards; still others derive from independent local influences, such as increases in reported crime rates.

The volumes could not be revised to reflect legal and social developments subsequent to the drafting and release of the tentative drafts in 1975 and 1976 without distorting the context in which they were written and adopted. Therefore, changes in the standards or commentary dictated by the decisions of the executive committee subsequent to the publication of the tentative drafts are indicated in a special notation at the front of each volume.

In addition, the series will be brought up to date in the revised version of the summary volume, *Standards for Juvenile Justice: A Summary and Analysis*, which will describe current history, major trends, and the observable impact of the proposed standards on the juvenile justice system from their earliest dissemination. Far from being outdated, the published standards have become guideposts to the future of juvenile law.

The planning phase of the project was supported by a grant from the National Institute of Law Enforcement and Criminal Justice of the Law Enforcement Assistance Administration. The National Institute also supported the drafting phase of the project, with additional support from grants from the American Bar Endowment, and the Andrew Mellon, Vincent Astor, and Herman Goldman foundations. Both the National Institute and the American Bar Endowment funded the final revision phase of the project.

An account of the history and accomplishments of the project

would not be complete without acknowledging the work of some of the people who, although no longer with the project, contributed immeasurably to its achievements. Orison Marden, a former president of the ABA, was co-chairman of the commission from 1974 until his death in August 1975. Paul Nejelski was director of the project during its planning phase from 1971 to 1973. Lawrence Schultz, who was research director from the inception of the project, was director from 1973 until 1974. From 1974 to 1975, Delmar Karlen served as vice-chairman of the commission and as chairman of its executive committee, and Wayne Mucci was director of the project. Barbara Flicker was director of the project from 1975 to 1976. Justice Tom C. Clark was chairman for ABA liaison from 1975 to 1977.

Legal editors included Jo Rena Adams, Paula Ryan, and Ken Taymor. Other valued staff members were Fred Cohen, Pat Pickrell, Peter Garlock, and Oscar Garcia-Rivera. Mary Anne O'Dea and Susan J. Sandler also served as editors. Amy Berlin and Kathy Kolar were research associates. Jennifer K. Schweickart and Ramelle Cochrane Pulitzer were editorial assistants.

It should be noted that the positions adopted by the joint commission and stated in these volumes do not represent the official policies or views of the organizations with which the members of the joint commission and the drafting committees are associated.

This volume is part of the series of standards and commentary prepared under the supervision of Drafting Committee II, which also includes the following volumes:

TRANSFER BETWEEN COURTS
COURT ORGANIZATION AND ADMINISTRATION
COUNSEL FOR PRIVATE PARTIES
PROSECUTION
THE JUVENILE PROBATION FUNCTION: INTAKE AND PRE-DISPOSITION INVESTIGATIVE SERVICES
PRETRIAL COURT PROCEEDINGS
ADJUDICATION

Addendum of Revisions in the 1977 Tentative Draft

As discussed in the Preface, the published tentative drafts were distributed to the appropriate ABA sections and other interested individuals and organizations. Comments and suggestions concerning the volumes were solicited by the executive committee of the IJA–ABA Joint Commission. The executive committee then reviewed the standards and commentary within the context of the recommendations received and adopted certain modifications. The specific changes affecting this volume are set forth below. Corrections in form, spelling, or punctuation are not included in this enumeration.

1. Standard 2.1 C. was amended by adding "except when the juvenile requests that such order not become final." The standard was amended further by bracketing sixty.
2. Standard 6.3 was amended by bracketing six.
3. Commentary to Standard 2.1 C. was revised by noting that local practices will govern the tolling of time limitations caused by motions to modify or vacate a court order. A reference to the exception added to the standard also was included in the revised commentary.
4. Commentary to Standard 2.2 B. was revised by describing the position of the Legal Services and Defender Attorneys Juvenile Justice Consortium in opposition to the provision authorizing parents, custodians, or guardians to appeal a court order.

Contents

Introduction

In order to effectuate the goals of an appeal (Standard 1.1), these standards provide for an appeal of right wherein the court may review conclusions of law and fact from both the adjudicatory and dispositional phases.

The nature of that review is structured on several basic principles:

1. the jurisdictional authority of the juvenile court to exert governmental power against a juvenile should be finalized as quickly as possible;

2. a dispositional order of the juvenile court should never be so "final" that it is not possible to inquire whether that disposition is still in the juvenile's best interest;

3. dispositional orders of the juvenile court should be monitored by the court itself to insure that the system is moving toward its goals;

4. appeals from juvenile court should be speedily processed and the status quo ordinarily maintained pending the result of the appeal.

The first principle appears in Standard 2.3, allowing for an interlocutory appeal from a finding that jurisdiction exists over a juvenile, and in 2.1, allowing appeal of a decision regarding waiver to another court.

The second and third principles compose Part VI, which allows modification of juvenile court orders in certain circumstances, requires the court to monitor its orders which affect custody, and allows a party to petition the court to inquire into the adequacy of the system's delivery of services.

In accordance with the fourth principle, the standards provide for preferential treatment of juvenile court appeals (Standard 4.1) and suggest that in most cases, the positions of the parties should be maintained pending the appeal's result (Standard 5.3). When the juvenile court finds that it cannot or should not preserve such interim status, further expedition is provided for.

These standards are designed to fit within the framework of the Juvenile Justice Standards Project as a whole. Thus, Standards 1.1 B.

and 1.3 recognize the decision to elevate juvenile courts to a status co-equal with those of general trial jurisdiction. All of Part VI reflects the Juvenile Justice Standards Commission's attempt to structure a model based in part upon individual treatment aimed at rehabilitation of juveniles adjudicated delinquent.

The most fundamental questions inherent in the project also are apparent in these standards: primarily, the difficult question regarding the nature of the parent-child relationship creates the problem of what to do when the child is satisfied with the dispositional order of the juvenile court, but the parent wishes to appeal. See commentary to Part II.

Standards

PART I: THE NATURE OF THE APPELLATE STRUCTURE

1.1 Appellate court structure.

A. The structure of appellate courts should be consonant with the goals of appellate review:

1. to correct errors in the application and interpretation of law and in the finding of facts;

2. to insure substantial uniformity of treatment to persons in like situations;

3. to provide for growth in keeping with the legislatively defined goals of the juvenile justice system as a whole.

B. Appeals from juvenile court should be heard by that court of the state designated to hear and decide the initial appeal from the highest court of general trial jurisdiction.

1.2 The necessity of appellate review of juvenile court judgments.

A. In order to recognize the goals of the entire juvenile justice system, it is essential that there be one appeal of right afforded to all parties materially affected by a juvenile court order, to review the facts found, the law applied, and the disposition ordered.

B. Additional review by the initial court of appeals or by any higher appellate court may be had by leave of that court.

1.3 Facts found by a juvenile court judge or jury should be afforded the same weight as those found in the highest court of general trial jurisdiction.

1.4 No person who attains the age of eighteen years during the pendency of an appeal other than from a grant of waiver to adult criminal court, may thereafter be criminally prosecuted as an adult for any conduct arising from the same transaction that was the cause of juvenile court intervention.

PART II: REVIEWABILITY

2.1 Upon claim properly filed by any party, review should be had of any final order of the juvenile court. A final order should include:

A. any order finding absence of jurisdiction;

B. any order transferring jurisdiction from the juvenile court to another court;

C. any order finding a juvenile to be delinquent in which no disposition is made within [sixty] days or where disposition is to be extensively deferred, except when the juvenile requests that such order not become final;

D. any order of disposition after adjudication;

E. any order finding a juvenile to be neglected or abused;

F. any order terminating or modifying custodial rights.

2.2 An appeal may be taken by any of the following parties:

A. the juvenile;

B. his or her parents, custodian, or guardian;

C. the state,

1. of any final order in other than delinquency cases;

2. of only 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 cause of action is not stated under a statute, or by granting 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.

2.3 Review may be sought by leave of the court of appeals from interlocutory orders of the juvenile court, including a finding that juvenile court jurisdiction exists over the subject matter or juvenile in question.

PART III: THE RIGHT TO COUNSEL AND RECORDS

3.1 Any party entitled to an appeal under Standard 2.2 is entitled to be represented by counsel, and the appointment of counsel at public expense upon a determination of indigency.

3.2 Any party entitled to an appeal under Standard 2.2, or his or her counsel, is entitled to a copy of the verbatim transcript of the adjudication and dispositional hearings and any matter appearing in the court file.

3.3 Upon a determination of indigency, the above material should be provided the appellant at public expense.

PART IV: PROCEDURES

4.1 A system for expediting and granting preferences to appeals from the juvenile court should be provided.

4.2 It should be the duty of the juvenile court judge to inform the parties immediately after judgment and disposition orally and in writing of the right to appeal, the time limits and manner in which that appeal must be taken, and the right to court-appointed counsel and copies of any transcripts and records in the case of indigency.

4.3 The parties or their attorneys may agree to proceed upon a written stipulated statement of the facts and procedural development without procuring a transcription of the stenographer's minutes of the testimony, and that statement, signed by the parties or their attorneys, should be transmitted to the appellate court as the record of testimony in the case.

PART V: STAYS OF ORDERS AND RELEASE PENDING APPEAL

5.1 The initiation of an appeal should not automatically operate to stay an order of the juvenile court.

5.2 Any party, after the filing of a notice or claim of appeal or the entry of an order granting leave to appeal, may request the juvenile court to stay the effect of its order and/or release the juvenile pending appeal.

5.3 Upon the filing of an appeal of judgment and disposition, the release of the appellant, with or without conditions, should

issue in every case unless the court orders otherwise. An order of interim detention should be permitted only where the disposition imposed, or most likely to be imposed, by the court includes some form of secure incarceration; and the court finds one or more of the following on the record:

A. that the juvenile would flee the jurisdiction or not appear before any court for further proceedings during the pendancy of the appeal;

B. that there is substantial probability that the juvenile would engage in serious violence prior to the resolution of the appeal.

Juveniles should be given credit at disposition for any time spent in a secure facility pending appeal.

5.4 In neglect and abuse cases, the juvenile court may order the juvenile removed to a suitable place pending appeal if the court finds that the juvenile would be in imminent danger if left with or returned to his or her parents, guardian, or other person who is a party to the appeal.

5.5 In those cases in which a stay of judgment or disposition or release pending appeal is denied, the appellate court should afford the appeal the speediest treatment possible.

5.6 In those cases in which a stay of judgment or disposition or release pending appeal is denied by the juvenile court, the appellate court should be empowered to grant the relief requested upon application of a party.

PART VI: COLLATERAL AND SUPPLEMENTARY PROCEEDINGS

6.1 Orders of the juvenile court may be modified by that court at any time when it has jurisdiction over the matter after notice and opportunity for hearing to all parties, upon the petition of a party or by the juvenile court sua sponte.

6.2 Modification of the court's dispositional orders should be governed by the *Dispositions* volume, Standard 5.1 A., and the *Corrections Administration* volume, Standard 5.1 A.

6.3 Every order committing any juvenile into the custody of the state and every order adjudicating a juvenile to be neglected,

regardless of custody, should be reviewed by the juvenile court without the request of any party not less than once in every [six] months.

6.4 The juvenile, his or her parents, custodian, or guardian may petition the juvenile court to inquire into the adequacy of the treatment being afforded the juvenile.

*Standards with Commentary**

PART I: THE NATURE OF THE APPELLATE STRUCTURE

1.1 Appellate court structure.

A. The structure of appellate courts should be consonant with the goals of appellate review:

1. to correct errors in the application and interpretation of law and in the finding of facts;

2. to insure substantial uniformity of treatment to persons in like situations;

3. to provide for growth in keeping with the legislatively defined goals of the juvenile justice system as a whole.

B. Appeals from juvenile court should be heard by that court of the state designated to hear and decide the initial appeal from the highest court of general trial jurisdiction.

Commentary

Juvenile proceedings have been variously characterized as legal, administrative, equitable, and even sui generis in nature. The result of this complex mix of judicial descriptions is a collection of appellate procedural statutes and court rules which have little internal consistency and little in common with one another but vagueness and ambiguity, coupled with a surprising dearth of cases. It is the intent of these standards to look beyond the procedural labels to the goals sought as the guide to the form desired.

Standards 1.1 A. 1. and 3. state the generally accepted goals of appellate review of any lower court determination: the correction of error; the provision of a check upon the use of discretionary power in the individual case; and the use of judicial interpretation to fill in the divinable gaps in legislative pronouncements. See, *e.g.*, ABA Standards for Criminal Justice, *Appeals*, Standard 1.2 (1970). Standard 1.1 A. 2. is a broad amalgam of democratic ideals and learning theory which asserts that any system of constraints which hopes to

*On July 21, 1976, *Morales v. Turman*, 364 F. Supp. 166 (E.D. Tex. 1973), cited herein, was reversed on technical grounds by the Fifth Circuit Court of Appeals, *Morales et. al. v. Turman et. al.*, 535 F.2d 864 (1976).

be effective must be predictable: that is, the system must be uniformly perceived to be even-handed in the application of generally acceptable factors in making the decision of whether to deprive a constituent of freedom of choice (liberty), and in deciding to what degree restraints should be levied upon that freedom. Viewed from another vantage point, the system must be equitable, as well as operate under humanitarian principles, if it is to be perceived as just. Since there is much evidence that our youngest citizens, at a very early age, learn the principles upon which their elders operate, it would serve us well to recognize that a goal of an appeal in the juvenile justice system should be to assure the demonstration of predictability and uniformity both in the adjudication of facts and in the exercise of restraint.

Different kinds of court structures could be designated to hear appeals from juvenile courts: the appellate court might specialize in juvenile court cases, or be a trial court with a review function limited to an inferior juvenile court; or the appellate court might be a juvenile court itself located, for example, in an urban center performing a review function of superintending control over other juvenile courts. Standard 1.1 B. reflects the belief that while many exotic combinations of judges and others could be devised, there appears to be no reason to suppose that any group would be better able to perform these review functions over a long period than the intermediate, appellate courts which are already extant in a great number of our states. Moreover, such a structure is in keeping with the general intent of the standards to elevate juvenile courts in those areas where they are not now co-equal with the highest courts of general trial jurisdiction, and eliminates a wasteful duplication of facilities and effort. See Bowman, "Appeals from Juvenile Courts," 11 *Crime & Delinq.* 63 (1965); *Cf.* Note, "Appellate Review of Sentences," 32 *Ohio S.L.J.* 410 (1971); ABA, Standards for Criminal Justice, *Appellate Review of Sentences*, Standard 2.1 (Approved Draft 1970).

1.2 The necessity of appellate review of juvenile court judgments.

A. In order to recognize the goals of the entire juvenile justice system, it is essential that there be one appeal of right afforded to all parties materially affected by a juvenile court order, to review the facts found, the law applied, and the disposition ordered.

B. Additional review by the initial court of appeals or by any higher appellate court may be had by leave of that court.

Commentary

Although the United States Supreme Court has never held that the United States Constitution guarantees a right to appeal either criminal

or juvenile court determinations—*Griffin v. Illinois*, 351 U.S. 12 (1956); *In re Gault*, 387 U.S. 1 (1967)—the right to an appeal is specifically and affirmatively granted by statute to adults convicted of crime in every state, and to juveniles in virtually every state. In addition, the equal protection clause of the fourteenth amendment probably requires that juveniles be given the same right to appeal as is held by similarly situated adults in those states where the right in juvenile cases is not expressly granted—*In re Brown*, 439 F.2d 47 (3d Cir. 1971)—since "it is now fundamental that, once established, these avenues [of appeal] must be kept free of unreasoned distinctions that can only impede open and equal access to the courts." *Rinaldi v. Yeager*, 384 U.S. 305, 310 (1966). The due process clause also demands that whatever appeal is afforded be effective and attended by the rights to a transcript and the assistance of counsel. *Douglas v. California*, 372 U.S. 353 (1963) (appellate counsel); *Griffin v. Illinois*, 351 U.S. 12 (1956) (transcript); and *Mayer v. Chicago*, 404 U.S. 189 (1971) (same misdemeanors). Comment, "Appellate Review for Juveniles: A 'Right' to a Transcript," 4 *Colum. Hum. Rts. L. Rev.* 485 (1972). See also Part III, *infra*.

The unique nature of juvenile courts, with their professed desire to effect beneficent individual treatment of juveniles, should not extend to the point of denying any party materially affected by an order of such a court the right to appellate review. The National Probation and Parole Association, Standard Juvenile Court Act § 28 (6th ed. 1959) (hereinafter cited as Standard Act), provides for the right to appeal questions of law and fact. See also Bowman, "Appeals from Juvenile Courts," 11 *Crime & Delinq.* 63 (1965). Standard 1.2 A. also provides for such a right.

The right to appeal should extend to all final orders of the juvenile court. Standard 1.2 A. approves the developing recognition that the rationale for review of adjudicatory determinations applies as well to the review of the merits of dispositional determinations. Review in either case aims toward the development of a greater uniformity of practice within the jurisdiction; development of a consistent rationale behind dispositional or adjudicatory decisions; and rectification of error made in individual situations.

Review of dispositions in juvenile matters is roughly analogous to review of sentencing in adult criminal cases. Judge Sobeloff, speaking at the appellate review of sentencing symposium, Judicial Conference of the United States Court of Appeals, 2d Circuit, observed:

> Discretion in the trial judge there should certainly be but the objective is to provide a technique whereby discretion shall be allowed ample creative scope and yet be subject to some degree of discipline. It is true that in the case of abuse the appellate review would call that discretion

> into question. But that is as it should be. Totally unsupervised discretion is anarchy. 32 F.R.D. 249, 273 (1962).

See also Frankel, "The Sentencing Morass, and a Suggestion for Reform," 3 *Crim. L. Bull.* 365, 371 (1967): "The mere fact that review could prevent egregious error argues strongly in its favor." See ABA, Standards for Criminal Justice, *Appellate Review of Sentences* (Approved Draft 1968); Standard 2.1 D., *infra.*

Most states already operate upon a three-tiered system: trial level; intermediate appellate court entertaining both mandatory and discretionary appeals; and final appellate court, often with review only by writ of certiorari or application for leave to appeal. Standard 1.2 A. provides for at least one appeal of right without addressing the question of the location for exercise of that right. Standard 1.1 B. sets the location at that court which would hear the initial appeal from the highest courts of general jurisdiction.

Standard 1.2 B. restates the already extant practice of most states in adult criminal cases of allowing interlocutory appeals of important questions which would not be final orders under Standard 2.1, and additional review by leave or right in the top-tiered appellate court, should there be one. See also Standard 2.3.

It is also contemplated by these standards that leave to appeal may be allowed of important questions unlikely ever to be raised in any case that would not become moot, so long as the constitutional principles regarding the actuality of a real case in controversy are not violated. The state may wish to provide for something in the nature of a class action appeal of such important questions of general policy, with the additional benefit, both to litigants and court, of having ready access to much relevant statistical information. See, for example, *Cleaver v. Wilcox*, 499 F.2d 940 (9th Cir. 1974), a class action presenting the question of whether indigent parents of dependent children are entitled to the appointment of counsel at government expense.

1.3 Facts found by a juvenile court judge or jury should be afforded the same weight as those found in the highest court of general trial jurisdiction.

Commentary

Facts found by a juvenile court judge or jury should have the same weight as those found in the highest court of general trial jurisdiction, since one of the basic purposes of these standards is to make

juvenile courts co-equal in status with the highest court of general trial jurisdiction in the state. An integral part of that goal must be the provision of the same scope of review for juvenile court judgments as would be given judgments from those trial courts.

Most state juvenile court acts are unclear as to the scope of review for juvenile court judgments. For example, many states, like Utah, provide that appeals from the juvenile court are to be "taken in the same manner in which appeals are taken from judgments or decrees of the district courts." Utah Code Ann. § 55-10-112 (Supp. 1973). Presumably, this means that not only the procedures for taking appeals shall be the same, but also the extent of the review by the appellate court shall be the same as for review of district court decisions.

Even some statutes that purport to define the scope of review with precision, do so with a decided lack of clarity, as is evident from the following Connecticut statute:

> The superior court upon such appeal shall review the record so certified of the proceedings of the juvenile court and determine whether or not the court has found facts without evidence or has reached conclusions which cannot be reasonably derived from the facts found or the law applicable thereto or both, or has acted illegally or arbitrarily. Conn. Gen. Stat. Ann. § 17-70 (Supp. 1973).

While many statutes are merely unclear as to the scope of review afforded juvenile court judgments, often the statutes are silent on this aspect of the appeal entirely.

The juvenile court acts that do deal with the weight to be given juvenile court findings of facts vary from one extreme to the other. Several states provide for trial de novo of juvenile court appeals. See, *e.g.*, *In re Hans*, 174 Neb. 612, 119 N.W.2d 72 (1963) (review de novo with evidence improperly admitted in the lower court disregarded by the reviewing court); Minn. Stat. Ann. (Juvenile Court Act) § 260.291 (1971) (trial de novo in district court, then an appeal to the Supreme Court in same manner as civil appeals); Tenn. Code Ann. § 37-237 (Supp. 1972). There is, in addition, substantial variation among jurisdictions as to just what an appeal de novo is. See, *e.g.*, *In re Logsdon*, 380 P.2d 111, 112-113 (Ore. 1963).

California uses a "substantial evidence test," affording weight similar to that given in review of administrative agency decisions. Cal. Welf. & Inst'ns Code § 800 (West 1966). Still other state juvenile court acts provide that review shall be on questions of law and fact. See Fla. Stat. Ann. § 39.14(3) (1972):

> On appeal no new evidence may be presented, but the appeal shall be

> heard upon the law and the facts shown by the official records of the juvenile courts.

See also La. Rev. Stat. Ann. § 13-1591 (1960). Others, like Indiana, define the scope of review as being limited only to assignments of error that the juvenile court's decision was contrary to law. Ind. Ct. R. 2.

The Standard Juvenile Court Act § 28 (6th ed. 1959) provides for a scope of review essentially the same as that envisioned by this standard. It states that "questions of law and fact" shall be reviewable by the "same provisions applicable to appeals from the highest court of general trial jurisdiction."

The policy underlying this standard is that judgments, orders, and dispositions of the juvenile court should be considered to be no more or less prone to error than a judgment or order from any other court of general trial jurisdiction. Bowman, in his article on appeals from juvenile courts, supports this policy:

> [T]here is no reason to suppose that its [juvenile courts] findings of fact and interpretations of law are any more correct than those of any other tribunal administering a loosely drawn statute. Bowman, "Appeals from Juvenile Court," 11 *Crime & Delinq.* 63, 74 (1965).

The difficulties of setting either a very broad or very narrow review of facts found by the juvenile court has been recognized:

> The argument against broad review looks to the special qualifications of the juvenile court, to the fact that its primary interest is the welfare of the child, and to the supposition that the informality of the proceedings gives the juvenile judge a special vantage point in determining credibility. Those militating for a broad scope of review point to the "flip side" of some of the very same attributes of the juvenile court system. It is argued that the informality of the proceeding may contribute to the errors made at the trial level due to the relaxation of strict procedures. As to the court's primary interest in treating the child it can be argued that this concern with treatment may blur the court's objectivity in initially determining whether the youth actually committed the acts with which he is charged. Comment, "Appellate Review of Juvenile Court Proceedings and the Role of the Attorney," 13 *St. Louis U.L.J.* 90, 98-99 (1968).

In order to insure that the juvenile court be given equal credibility while remaining legally accountable, facts found in that court should be given no more or less deference than that accorded to other courts of general jurisdiction within the state.

A standardized scope of review, conforming to general appellate

court practices, will also ease the burden on appellate judges by allowing them to utilize the already developed modes of review in that state, and thereby increase the efficiency of appeals from the juvenile courts.

1.4 No person who attains the age of eighteen years during the pendency of an appeal other than from a grant of waiver to adult criminal court, may thereafter be criminally prosecuted as an adult for any conduct arising from the same transaction that was the cause of juvenile court intervention.

Commentary

This standard recognizes that juvenile courts are courts of competent jurisdiction and that proceedings against a juvenile before such a court are sufficient to bring a subsequent prosecution for the conduct arising from the same transaction within the fifth amendment prohibition against double jeopardy and the corresponding provision of most state constitutions. It is the intent of the standard that if conduct of a juvenile brings him or her within the delinquency jurisdiction of the juvenile court, that jurisdiction should not be frustrated for exercising the constitutional or statutory right to seek appellate review.

The United States Supreme Court, in *Benton v. Maryland*, 395 U.S. 784 (1969), in applying the fifth amendment to the states through the fourteenth amendment held that "the double jeopardy prohibition of the Fifth Amendment represents a fundamental ideal in our constitutional heritage," and emphasized that "the fundamental nature of the guarantee of double jeopardy can hardly be doubted." *Id.* at 794, 795. The fifth amendment prohibition against double jeopardy is intended to protect against a second prosecution for the same offense after acquittal, a second prosecution for the same offense after conviction, and against multiple punishments for the same offense. See, *e.g.*, *North Carolina v. Pearce*, 395 U.S. 711 (1969).

It must be recognized that while there is considerable reluctance to describe juvenile court proceedings as purely criminal, the realities of intervention by a juvenile court are sufficient to expose the juvenile to jeopardy within the meaning of the constitutional proscription. In a case prior to *Benton*, the Fifth Circuit Court of Appeals held that a second prosecution as an adult of a juvenile adjudicated delinquent and confined to the age of twenty-one years by order of the juvenile court, did not meet the fundamental fairness test of the due process clause:

> Both courts [federal and state courts in Texas] have agreed that "a juvenile cannot be adjudged a delinquent child and held in custody as

> such, and without regard to how he may respond to the guidance and control afforded him under the [Texas] Juvenile Act, be indicted, tried, and convicted of the identical offense after he reaches the age of 17." *Hultin v. Beto*, 396 F.2d 216 (1968). (Citing *Garza v. State*, 396 S.W.2d 36, 39 [Tex. Cr. App. 1963], and *Sawyer v. Hauck*, 245 F.Supp. 55, 57 [W.D. Tex. 1965].)

The fifth circuit in *Hultin* also noted that the United States Supreme Court, in *In re Gault*, 387 U.S. 1, 20-21 at n. 26 (1967), implicitly approved of the *Sawyer* decision.

The California Supreme Court, in *M. v. Superior Court of Shasta County*, 4 Cal. 3d 370, 482 P.2d 664 (1971), also recognized the necessary application of the double jeopardy prohibition to an adult criminal prosecution filed subsequent to juvenile court intervention over the same conduct. The court held that since the juvenile court was of competent jurisdiction, and the petition to bring the matter before that court was sufficient in both substance and form, and since the juvenile in question was exposed to the risk that an adjudication of delinquency and disposition would be made, the juvenile had been exposed to jeopardy once, and could not again be put in jeopardy:

> The protection is not against being twice punished but against twice being put in jeopardy, and it applies whether the accused is convicted or acquitted. *Id.* at 668.

But see *State v. F.*, 251 So. 2d 672 (Fla. Ct. App., *aff'd* 265 So. 2d 701) (1971), where the state appealed a circuit court order dismissing with prejudice a grand jury indictment for forcible rape because the juvenile had already been subject to juvenile court proceedings. On appeal, the Florida Court of Appeals reversed, reasoning:

> It is upon the foregoing declaration of public policy as embodied in the provisions of the juvenile court act that appellant relies to demonstrate that juvenile court proceedings and an adjudication rendered therein cannot constitute the basis for former jeopardy as a bar to a subsequent prosecution of a child for the act found to constitute the basis for his delinquency. 251 So. 2d 672, 675 citing Fla. Stat. § 39.10(3).

See also *State v. Ferrell*, 209 S.W.2d 642 (Tex. 1948).

However, after the above two cases on the application of double jeopardy to a criminal prosecution following juvenile court intervention, it has been rather consistently held that the prohibition applies when the former jeopardy was a juvenile court intervention other than a hearing for waiver of jurisdiction. See *Brown v. Cox*, 481 F.2d

622 (4th Cir. 1973), where the alleged former jeopardy, a waiver of jurisdiction hearing, was held not to violate the fifth amendment. See also *Fain v. Duff*, 488 F.2d 218 (5th Cir. 1973), where the court stated, citing *Hultin v. Beto*, 396 F.2d 216 (1968):

> **Fain's mere status as a juvenile, although it may subject him to the jurisdiction of an entirely different court system, cannot deprive him of rights that adults enjoy in the criminal justice system. If Florida wants to punish Fain as an adult, it must give him all the rights of an adult. We need not deal at all with Fain's rights in the juvenile court system. And in that [adult, criminal] system, the Constitution's command that no person shall be twice placed in jeopardy for the same offense unquestionably applies.** 488 F.2d at 225.

In *Waller v. Florida*, 397 U.S. 387 (1970), the Supreme Court held that for both a state and a municipality to prosecute someone for the same acts is a violation of the prohibition against double jeopardy. Recognizing a juvenile court intervention as the former jeopardy is at least as clear a denial. As the court in *Fain* pointed out, they "have not only the same sovereign, we have in addition exactly the same acts being punished and exactly the same elements in each offense." 488 F.2d at 226.

The Supreme Court has recently made much of the intent of this standard constitutional mandate. In *Breed v. Jones*, 421 U.S. 519 (1975), the court was presented with the question of whether a juvenile who had been adjudicated delinquent and, at the dispositional hearing had been found "unfit for treatment as a juvenile," could subsequently be charged as an adult for the same acts. Unanimously holding that he could not, the Court again recognized "that there is a gap between the originally benign conception of the [juvenile justice] system and its realities, . . . that the system has fallen short of the high expectations" its sponsors had held. 421 U.S. at 528-29. In the face of these realities, the court rejected the argument of California that the situation was akin to a waiver of juvenile court jurisdiction.

There remains open within federal constitutional interpretation the question of whether the fifth amendment double jeopardy provision requires the prosecution to join at one trial all charges against an accused that grow out of the same transaction, occurrence, or episode. See the concurring opinion of Justice Brennan advocating the same transaction test in *Ashe v. Swenson*, 397 U.S. 436, 450-454 (1970); and *People v. White*, 390 Mich. 245 (1973), adopting the test. This standard also advocates the adoption of the same transaction test as essential both for maintaining the integrity of the juvenile

justice system and as necessary to fulfill the purposes of the amendment. The standard would not permit the adjudication of a juvenile with regard to one crime in juvenile court, and a subsequent waiver to adult court with regard to another alleged crime which occurred in the same episode.

It is the intent of this standard to specifically prohibit subsequent proceedings of the sort condoned in *State v. R.E.F.*, 251 So. 2d 672 (Fla. Ct. App., *aff'd* 265 So. 2d 701 [1972]), and to recognize the reality that juvenile court delinquency intervention, whether labeled civil, beneficent, or otherwise, invokes the same necessity for protection from the sovereign as an adult criminal prosecution.

PART II: REVIEWABILITY

2.1 Upon claim properly filed by any party, review should be had of any final order of the juvenile court. A final order should include:

A. any order finding absence of jurisdiction;

B. any order transferring jurisdiction from the juvenile court to another court;

C. any order finding a juvenile to be delinquent in which no disposition is made within [sixty] days or where disposition is to be extensively deferred, except when the juvenile requests that such order not become final;

D. any order of disposition after adjudication;

E. any order finding a juvenile to be neglected or abused;

F. any order terminating or modifying custodial rights.

Commentary

Parties entitled to an appeal of right from final orders of the juvenile court are defined in Standard 2.2. Particular note should be made of the limitations placed on the right of the state to appeal in certain cases. See Standard 2.2 C. 2. and commentary.

Standard 2.1 seeks to define those orders which should be considered final in the sense that their decision so alters the direction of the proceedings that an immediate appeal should be available. The standard does not mean to suggest that other orders should not be appealable of right and other jurisdictions may add to the list.

Again, this standard promotes the recognition that juvenile courts occupy a position in the judicial structure co-equal to the highest courts of general trial jurisdiction. The final orders suggested by this standard include those which parallel the adult criminal and civil

systems, as well as those that reflect the unique position juvenile courts have traditionally occupied.

Subsection A. provides that a final order is one which determines that the juvenile court has no jurisdiction over either the subject matter or the parties. Such orders include those finding statutes unconstitutional. Absence of jurisdiction is clearly a final order, because it results in a termination of the proceedings in the juvenile court. Since this is a most specialized system of justice, adjudicating such unique relationships as that between parent and child, and weighing individual rights against state authority where quasi-criminal and noncriminal behavior is at issue, the refusal of the juvenile court to accept jurisdiction over the controversy is quite significant. Remedies available in the juvenile court may not be available in the other courts of trial jurisdiction. Thus, the sustaining of a demurrer on constitutional grounds or a dismissal for reasons of lack of jurisdiction may ultimately preclude the parties from obtaining relief, or may result in a vastly different or more limited remedy.

Subsection B. of this standard refers to an order of the juvenile court which terminates juvenile court jurisdiction in favor of another court. Most often these appeals are taken from an order transferring or waiving a juvenile to an adult trial court for criminal prosecution. The importance of the right to appeal at this point in the proceedings is based on the flexible powers and protections of juvenile courts to adopt dispositions and relief granted to the individuals involved, in contrast to the relative inflexibility and potential for punishment, both more severe and less tailored to individual needs, found in the adult criminal system.

> It is clear beyond dispute that the waiver of jurisdiction is a "critically important" action determining vitally important statutory rights of the juvenile. . . . The Juvenile Court is vested with "original and exclusive jurisdiction" of the child. This jurisdiction confers special rights and immunities. *Kent v. United States*, 383 U.S. 541, 556 (1966). (Citations omitted.)

The United States Supreme Court held in *Kent*, 383 U.S. at 561-563, that the waiver decision, being "critically important," entitled the child to a hearing, held in accordance with due process standards, including the right to counsel and access to records used in the decision-making process. Similarly, *In re Doe*, 519 P.2d 133 (N. Mex. 1974), held that a transfer order was appealable, specifically following the majority position and citing a long list of jurisdictions in accord. The court found that if an immediate appeal were not

allowed, such special protections as separation from adult offenders and the necessity of a court order for fingerprinting or photographing would be lost. The New Mexico court concluded that to disallow an appeal from such an order would be to defeat the entire purpose behind a separate juvenile system. *Cf. Welfare of A.L.J. v. State*, 220 N.W.2d 303 (Minn. 1974), holding the state had no right to appeal an order denying the transfer of juveniles for adult prosecution because if the state had a limited right to appeal, the proceedings were not terminated, and the order was not an unconditional denial of referral; and *United States ex rel Bombacino v. Bensinger*, 498 F.2d 875, 879 (7th Cir. 1974).

Subsection C. includes within final orders that order which adjudicates a juvenile delinquent and where disposition is intentionally or unintentionally deferred for more than sixty days. The goal promoted here is the speedy resolution of matters coming before the juvenile court. See Standard 4.1 and commentary. The procedural necessity for an appeal from delayed or deferred disposition after an order finding a juvenile to be delinquent stems from the premise that the juvenile concerned will benefit from the authority of the juvenile justice system. Since the court, by adjudication, has found an exercise of power necessary and beneficial, review must be made available to insure that an expedient disposition is made. See Standard 4.1 and commentary. The necessity of the right to appeal at this point in the proceedings is recognized in Mass. Gen. Laws Ann. ch. 119, § 56 (Supp. 1976):

> A child adjudged a delinquent child may appeal to the superior court upon adjudication, and also may appeal to said court at the time of the order of commitment or sentence, and such child shall, at the time of such order of commitment or sentence, be notified of his right to appeal.

See also Minn. Stat. Ann. § 260.191 (1971), which provides:

> An appeal may be taken by the aggrieved person from a final order affecting a substantial right of the aggrieved person, including but not limited to an order adjudging a child to be dependent, neglected, delinquent, or a juvenile traffic offender.

But see La. Rev. Stat. Ann. § 13:1591 (Supp. 1976).

Many state statutes merely provide for appeals from "final orders, judgments, or decrees" without any other specificity. Presumably, at least in some of those jurisdictions, an adjudication would fall within one of the above categories. See, *e.g.*, Mo. Rev. Stat. § 211.261

(Supp. 1976); N.J. Stat. Ann. § 2A:4-40; and N.D. Cent. Code § 27-20-56 (1974).

In order for the goals of rapid disposition and individualized treatment to be reached, juvenile courts must be held accountable for delays and deferments of dispositions. See *Creek v. Stone*, 379 F.2d 106, 111 (D.C. Cir. 1967), where the court, faced with a habeas corpus petition, stated that "the fact that the custody is 'interim' as opposed to 'final' does not end the matter," and *State ex rel. Harris v. Larson*, 64 Wis. 2d 521, 219 N.W.2d 335 (1974), finding no statutory authority for temporary detention awaiting permanent placement for a period greater than five days without a hearing. *Cf. In re Logsdon*, 380 P.2d 111 (Ore. 1963), a custody proceeding which depicts the precise situation this standard seeks to avoid. Thus, in accordance with the above policies, this subsection seeks to provide a remedy for those situations where the juvenile court causes or allows final disposition to be delayed, following an adjudication of delinquency, without interfering with the juvenile's right to proceed in a petition for habeas corpus. It should be noted that local practices governing the tolling of time limitations by motions to modify or vacate final orders apply to the time limitations prescribed in these standards.

Subsection C. was amended by adding an exception authorizing the juvenile to request that the order not be final, on the ground that this provision is for the benefit of the juvenile and therefore should be at the juvenile's option.

Subsections D. and E. represent orders traditionally held to be final. Orders of disposition are the corollary to orders of sentence in adult criminal prosecutions, and as a general rule, are the point at which an appeal becomes available. It is the intent of these standards that review of right may be had of the merits of the dispositional order. See Standard 1.2 and commentary. Both disposition and orders finding a child to be neglected or abused, in the usual case, end the proceedings in the juvenile court, and are thus final.

Subsection F. lists as a final order the termination or modification of custodial rights. See Utah Code Ann. § 55-10-112 (1953), which provides that appeals from "direct change of legal custody of a child" shall be heard at the earliest practicable time; and Wis. Stat. Ann. § 48.47 (Supp. 1971), which grants appeals to the Supreme Court from an order granting or denying adoption, and for orders of foster home placement. Examples of situations that this subsection was intended to include are an order of permanent termination of parental rights, a decree which many jurisdictions deem to be final and appealable—see, *e.g.*, La. Rev. Stat. § 13:1604 (Supp. 1974); Wis. Stat.

Ann. § 48.47 (Supp. 1971); Utah Code Ann. § 55-10-109 (1953); Mo. Rev. Stat. § 211.261 (Supp. 1976)—and an order detaining a juvenile in a custodial environment pending final adjudication on the merits of the delinquency petition.

The final orders enumerated in this standard are not intended to be exclusive. It is assumed that in all events juveniles shall have the right to file habeas corpus petitions. Indeed, many jurisdictions may expand the list. The situations above are seen to exemplify crucial stages of the juvenile court proceedings where review should be made available in order to best promote the goals and values of the juvenile system as a whole.

2.2 An appeal may be taken by any of the following parties:

A. the juvenile;

B. his or her parents, custodian, or guardian;

C. the state:

1. of any final order in other than delinquency cases;

2. of only 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 cause of action is not stated under a statute, or by granting 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.

Commentary

Standard 2.2 B. presented the commission with a difficult problem: where custody is affected by a dispositional order following a finding of delinquency, neglect, or the like, does a parent, or other former custodian, have the right to take an appeal if the juvenile does not wish to do so. The flip side of this problem was readily solvable, since to the commission there was no doubt that the juvenile should be able to take an appeal against the wishes of his or her parent. After all, even though the state's authority over children may presently be broader than over adults—*Prince v. Massachusetts*, 321 U.S. 158, 168 (1944); *Tinker v. Des Moines School District*, 393 U.S. 503 (1969); *Levy v. Louisiana*, 391 U.S. 68 (1968)—it has been repeatedly held that children are persons entitled to fourteenth amendment protection. *Tinker v. Des Moines School District*, 393 U.S. at 511; *Levy v. Louisiana*, 391 U.S. 68 (1968). This right of the juvenile does not, however, readily admit of a "sauce for the goose" analogy.

Initially, the commission looked to the nature of the parent-child relationship in constitutional terms, since it was the general reaction that without a showing of some fundamental and compelling interest in another human being, allowing someone to force inquiry into a relationship that is satisfactory to both the state and the individual actually involved, smacked of a property relationship—slavery, of a sort. The following cases were consulted: *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Skinner v. Oklahoma*, 316 U.S. 535 (1942); *May v. Anderson*, 345 U.S. 528 (1953); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Levy v. Louisiana*, 391 U.S. 68 (1968); *Boddie v. Connecticut*, 401 U.S. 371 (1971); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Stanley v. Illinois*, 405 U.S. 645 (1972); and *Roe v. Wade*, 410 U.S. 113 (1973).

All of the above cases deal directly with questions of due process in diverse situations. They present, however, some direction, since in determining whether the state has a right to intervene in a relationship, the "nature of the relationship at stake" must be ascertained to determine whether it is de minimus. *Goss v. Lopez*, 43 U.S.L.W. 4181 (Jan. 1975). See also *Wisconsin v. Constantineau*, 400 U.S. 433 (1971).

Meyer presented the question of whether a state could enact a statute prohibiting the teaching of any language but English to children below eighth grade. In holding the statute unconstitutional, the court held that liberty "without doubt . . . denotes not merely freedom from bodily restraint but also the right . . . to marry, establish a home and bring up children. . . ." *Meyer v. Nebraska*, 262 U.S. at 399.

In *Pierce*, the question was whether the state could require that parents within its jurisdiction send their children only to state schools. In holding the statute unconstitutional, the court declared that it "unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control. . . . The child is not the mere creature of the State. . . ." *Pierce v. Society of Sisters*, 268 U.S. at 534–35.

Skinner questioned the right of the state to require the sterilization of persons convicted of felonies of moral turpetude. Holding the statute to violate equal protection, Justice Douglas noted that the court was dealing with "one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race." *Skinner v. Oklahoma*, 316 U.S. at 541.

Whether a state could convict a guardian for violation of state child labor laws for permitting the child to assist in the distribution of religious magazines came before the court in *Prince*. The guardian,

an aunt, claimed "authority in her own household and in the rearing of her children." Declaring the issue to be a clash between "sacred private interests" and "the interests of society to protect the welfare of children," the court held:

> It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary functions and freedom include preparation for obligations the state can neither supply nor hinder. . . . And it is in recognition of this that these decisions have respected the private realm of family life which the state cannot enter .
>
> But the family itself is not beyond regulation. . . . And . . . rights of parenthood are [not] beyond limitation. Acting to guard the general interest in youth's well being, the state as parens patriae may restrict the parents' control . . . in many other ways. . . . [T]he state has a wide range of power for limiting parental freedom and authority in things affecting a child's welfare. . . . *Prince v. Massachusetts*, 321 U.S. at 166-167.

Justice Burton, writing for the court in *May v. Anderson*, held that full faith and credit need not be given an order removing custody of children from their mother where there was personal jurisdiction over the children, but not over the mother, calling these custodial rights "personal rights . . . far more precious . . . than property rights." 345 U.S. at 534, 533. Justice Jackson, in dissent, felt that

> [c]ustody is viewed not with the idea of adjudicating rights *in* the children, as if they were chattels, but rather with the idea of making the best disposition possible for the welfare of the children. To speak of a court's "cutting off" a mother's right to custody of her children, as if it raised problems similar to those involved in "cutting off" her rights in a plot of ground, is to obliterate these obvious distinctions. 345 U.S. at 541.

Justice Goldberg, concurring in *Griswold*, cited *Meyer* and *Pierce* for the recognition of a constitutional right "to raise a family."

In *Boddie*, questioning the right of the state to require fees of indigents to process a divorce, the court again held that liberty includes the right to "raise children."

Three recent cases have more direct bearing on the problem. In *Stanley v. Illinois*, the court held that custodial rights of a father in his illegitimate child required a due process notice and hearing. In so doing, in addition to reaffirming the entire line of the above cases, the court held:

> The private interest . . . of a man in the children he has sired and raised, . . . of a parent in the companionship, care, custody, and management of his or her children "come[s] to this court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements." 405 U.S. at 651.

Subsequently, in *Wisconsin v. Yoder*, the question arose as to whether a state could compel Amish children between fourteen and sixteen years of age to attend secondary school. The court resolved this clash between the state interest in educating its citizens and the "interest of parents in directing the rearing of their offspring" by, in effect, exempting the Amish. Noting that the question involved the authority of the state "as *parens patriae* to 'save' a child from . . . his Amish parents," Justice Berger wrote:

> The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition. 406 U.S. at 232.

The court closed by noting that "the power of a parent . . . may be subject to limitation . . . if it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens."

Only Justice Douglas, in dissent, felt that the case presented a question of the liberty of a child vis-a-vis the parents:

> Where the child is mature enough to express potentially conflicting desires, it would be an invasion of the child's rights to permit such an imposition without canvassing his views. 406 U.S. at 242.

Douglas concluded by citing substantial authority to the effect that there exists "substantial agreement among child psychologists and sociologists that the moral and intellectual maturity of the 14 year old approaches that of the adult." 406 U.S. at 245, n. 3.

Finally, in the recent abortion case, *Roe v. Wade*, the court held that the unborn are not persons under the Constitution—410 U.S. at 158—but that the state has a compelling interest in protecting fetal life at viability. 410 U.S. at 150, 163. See also cases cited in the commentary to Standard 3.1, *infra*.

Thus, the Supreme Court has recognized a concept of family privacy which to some considerable degree is impenetrable by the state. That is, there is a right of the parents to procreate, but no

individual right of the embryo at conception. From this point on, however, the rights of the child slowly increase in correspondence with the erosion of those of his or her parents or guardian: at viability, the state has a compelling interest; at majority, the parents have no interest. This latter point may be reached earlier in those states which recognize emancipated minors.

The commission concluded that parents' custodial rights to their children were so independently significant and so rooted in a citizens' right to family privacy as to mandate an independent right in the parent or custodian to appeal an order which affected custodial rights even though the juvenile may not wish to appeal it.

The Legal Services and Defender Attorneys Juvenile Justice Consortium found this reasoning unconvincing, claiming it is inconsistent with the policy in the standards, which generally resolves conflicts between juveniles and their parents in favor of their parents.

Standard 2.2 C. 1. refers to those matters before the juvenile court which can be characterized as truly civil in nature, and as to which the state should normally have the right to appeal as an interested party. An example of such a proceeding is where a neglected child is either found or not found to be a ward of the state.

Standard 2.2 C. 2. involves matters where the proceedings could be more accurately characterized as criminal. Traditionally, in these matters, the state does not have the right to appeal, except as such right may be expressly granted by statute. The third circuit has recognized and reaffirmed this principle as a "well-settled rule that an appeal by the prosecution in a criminal case is not favored and must be based upon express statutory authority." *Government of Virgin Islands v. Hamilton*, 475 F.2d 529, 530 (3d Cir. 1973). *United States v. Beck*, 483 F.2d 203, 205 (3d Cir. 1973).

The Supreme Court has also staunchly maintained that appeals by the government are only to be taken in rare cases. Moreover, "in the federal jurisprudence, at least, appeals by the government in criminal cases are something unusual, exceptional, not favored." *Well v. United States*, 389 U.S. 90, 96 (1967), citing *Carroll v. United States*, 354 U.S. 394, 400 (1957). The rationales variously expressed as justifying this rule are that the traditional common law rule gave the government no right to appeal at all—*United States v. Sisson*, 399 U.S. 267, 291 (1970)—and that to allow governmental appeals threatens the basic constitutional concepts of a right to a speedy trial and the prohibition against double jeopardy. See *Well v. United States*, 389 U.S. at 98.

The final rationale, and perhaps the most compelling, is that the rights of the accused must be carefully protected when faced with as

powerful an adversary as the state. In discussing the traditional English common law rule that the government had no right even to a rehearing after an acquittal, Justice Gray, in 1891, stated:

> The common law maxim, and the Constitution are founded in the *humanity* of the law, and in a jealous watchfulness over the rights of the citizen, when brought in unequal contest with the state. It is doubtless, *in the spirit* of this benign rule of the common law, embodied in the Federal Constitution—a spirit of liberty and justice, tempered with mercy—that, in several of the States of this Union, in criminal causes a writ of error has been denied to the State. *United States v. Sanges*, 144 U.S. 310, 315-316 (1891), citing *State v. Jones*, 7 Georgia 422, 424, 425 (1849). (Emphasis original.)

See generally ABA Standards for Criminal Justice, *Appeals*, Standard 1.4 and commentary (Approved Draft 1970).

Several recent opinions have held that the state does not have a broader right to review of a juvenile court delinquency proceeding than any other criminal prosecution, unless expressly granted by statute. The Supreme Court of Kansas refused to grant the right of appeal to the state from a juvenile court order refusing to waive jurisdiction, stating that the right to appeal is strictly statutory, and since it was not granted explicitly, "the omission is significant and meaningful." *In re Waterman*, 512 P.2d 466, 470 (Kan. 1973). See also *State v. Marshall*, 503 S.W.2d 875 (Tex. 1973), holding that a delinquency proceeding was essentially criminal in nature and that appeal by the state, despite the fact that the juvenile court act gave "any interested party the right to appeal," was prohibited under the Texas Constitution—Tex. Const. Ann. art. 5, § 26 (Vernon's 1955)—which provided that "the State shall have no right of appeal in criminal cases"; and *District of Columbia v. M.E.H.*, 312 A.2d 561 (D.C. Ct. App. 1973), allowing an appeal from a juvenile court order suppressing evidence, when such an appeal was statutorily granted to the government in adult criminal proceedings.

The focus of this standard relating to appeals by the state is to recognize that delinquency proceedings are essentially criminal in nature, and the common law tradition of refusing the right of appeal to the state should be generally recognized and followed. However, in a few limited and well-defined instances, many of the states have statutorily granted appellate review to the state from a criminal proceeding. The extent to which states have departed from the common law denial is in flux. See ABA Standards for Criminal Justice, *Appeals*, Standard 1.4, and the Federal Criminal Appeals Act, 18 U.S.C. § 3731 (amended 1971). The purpose behind this standard is to provide

guidelines to the state consistent with those granted to the state in adult criminal proceedings.

Standard 2.2 C. 2. a. grants the state the right to appeal from an order adjudicating a state statute unconstitutional. The state should have the opportunity to defend its statutes in a higher tribunal. A more definitive ruling on the constitutionality of state statutes is also necessary to provide citizens of that state with a predictable guide by which to order their behavior. See *United States v. Vuitch*, 402 U.S. 62 (1971).

Standard 2.2 C. 2. b. lists four instances in which it has been felt reasonable to allow the state to appeal, with minimal burden placed on the juvenile in delinquency cases.

The first instance in which the government is allowed an appeal is from an order suppressing evidence which terminates a proceeding. The argument for allowing the government to appeal from pretrial grants of motions to suppress evidence is that the law of search and seizure is an area of rapid change, and that to allow an appeal by the state aids the courts and practitioners in defining the limits of constitutional searches and seizures. See ABA Standards for Criminal Justice, *Appeals*, Standard 1.4, Commentary b, 37, 38 (Approved Draft 1970), citing the President's Commission on Law Enforcement and Administration of Justice, *The Challenge of Crime in a Free Society* 140 (1967):

> The Commission reasoned that the law of search and seizure and of confessions is uncertain, that the issue of admissibility of such evidence is of great significance to both prosecution and defense, and that therefore lower court decisions restricting police conduct should be open to testing on appeal. ABA, *Appeals*, *supra* at 38, citing President's Commission on Law Enforcement and Administration of Justice, *supra* at 140.

See also Crime Control Act, 18 U.S.C. § 3731 (as amended, 1971); *District of Columbia v. M.E.H.*, 312 A.2d 561 (D.C. Ct. App. 1973) (allowing appeal by the state from an order suppressing evidence in delinquency proceedings); *United States v. Beck*, 483 F.2d 203 (3d Cir. 1973), *cert. denied*, 414 U.S. 1132; *United States v. Greely*, 413 F.2d 1103 (D.C. Cir. 1969).

The state may also appeal from a pretrial order granting a defense of former jeopardy, under Standard 2.2 C. 2. b. The policy for granting appellate review here is to allow the state the benefit of higher court review of an order of constitutional dimensions, which could potentially prevent any prosecution by the government for alleged delin-

quent conduct. See *United States v. Jorn*, 400 U.S. 470 (1971); *United States v. Goldstein*, 479 F.2d 1061 (2d Cir. 1973), *cert. denied*, 414 U.S. 873; *United States v. Castellanos*, 478 F.2d 749 (2d Cir. 1973), all allowing appeals by the state from an order dismissing an indictment on double jeopardy grounds.

Similarly, it is felt that the state should have the right to appeal from an order dismissing an indictment. Orders dismissing indictments in adult criminal proceedings are equivalent to orders holding that a cause of action is not stated under a statute, which terminates a delinquency petition. As in the above orders in which the state has been granted the right to appeal, dismissal of an indictment or a delinquency petition should be appealable in order to define the scope and constitutionality of the reasons for dismissal. However, the philosophy of preventing appeals by the state to protect the accused from the unnecessary anxiety and harassment of continued prosecution by a powerful state government should not prevent the valid bringing to justice of conduct violating the law. Just as the state may appeal pretrial determinations of deprivation of evidence and the upholding of a defense of double jeopardy, the state should also be able to subject the dismissal of a petition of delinquency to a higher authority. See *United States v. Weller*, 466 F.2d 1279 (9th Cir. 1972).

Standard 2.2 C. 2. c. allows the prosecution to take an appeal from the juvenile court's determination to refuse a waiver to an adult criminal court.

2.3 Review may be sought by leave of the court of appeals from interlocutory orders of the juvenile court, including a finding that juvenile court jurisdiction exists over the subject matter or juvenile in question.

Commentary

While Standard 2.1 details those orders that are final and therefore appealable of right, Standard 2.3 recognizes that in some cases other orders may affect such substantial rights or result in such serious consequences in the factual situation in which they are presented, that an appeal should lie.

As stated earlier, juvenile courts often deal with noncriminal or quasi-criminal situations wherein the dispositional order may affect custodial rights. See commentary to Standard 2.1, *supra*. There is substantial disagreement regarding the wisdom and constitutionality of these juvenile status offenses; and, in addition, given the difficulty of defining these offenses, there may be a serious question as to the

existence of juvenile court jurisdiction. There can be no doubt that an involvement with any court is often a traumatic experience—*cf. Klopfer v. North Carolina*, 386 U.S. 213 (1967)—and one should not be put through the rigors of litigation where the question of jurisdiction is substantial. When, for example, a statute grants state power over juveniles "otherwise in need of the protection of the State"—La. Rev. Stat. § 13:1591 (Supp. 1972)—the juvenile may wish to contest that the facts stated in the petition do not, as a matter of law, show that he or she needs state protection.

It should be noted that the Juvenile Justice Standards Project has advocated the removal of status offenses from juvenile court jurisdiction. See the *Noncriminal Misbehavior* volume.

PART III: THE RIGHT TO COUNSEL AND RECORDS

3.1 Any party entitled to an appeal under Standard 2.2 is entitled to be represented by counsel, and the appointment of counsel at public expense upon a determination of indigency.

Commentary

Representation by counsel is fundamental at all stages of juvenile court proceedings, and this is certainly no less true at the appellate stage. See *Kent v. United States*, 363 U.S. 541 (1966).

Although the Supreme Court, in *In re Gault*, 387 U.S. 1 (1967), refused to require appeals as a matter of constitutional right, the Court did hold that due process requires representation by counsel, whether retained or appointed in the case of indigency, in proceedings which may result in the deprivation of freedom to the child. It seems clear that once the right to appeal is provided, both *Gault* and *Kent* would carry the right to counsel to the juvenile appellate level.

The equal protection clause of the fourteenth amendment also suggests that juveniles, once given an appeal of right, be treated in substantially the same manner as similarly situated adults. *Cf. Douglas v. California*, 372 U.S. 353 (1963).

The President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: Juvenile Delinquency and Youth Crime* 40 (1967), has cited one of the major problems in the juvenile courts as the absence of counsel:

> The quality of justice in the juvenile court system has thereby been adversely affected in several ways. First, there has been no appellate

> forum to rectify errors and injustices in particular cases. Second, the system has been deprived of the kind of sustained examination and formulation of law and policy that appellate review can provide. Third, it has not been possible to develop, through appellate review, uniform application of the law throughout a state. Two factors contribute substantially to the lack of review. The absence of counsel in the great majority of the cases is the first. Thus an additional advantage to the providing of counsel is that it will contribute to making meaningful the right to review normally provided in the statutes. The other important factor is the general absence of transcript of juvenile court proceedings.

See also the Standard Juvenile Court Act § 19 (1959), which provides for the right to counsel on appeal and for the right to appointed counsel upon proof of indigency.

Standard 3.1 adopts the position that each party entitled to an appeal under Standard 2.2 is entitled to have his or her interests represented by counsel, at state expense, if necessary, to insure that the true interests of that party are clearly defined and protected. See commentary to Standard 2.2 *supra.*

In *Boddie v. Connecticut*, 401 U.S. 371, 377 (1971), the United States Supreme Court noted that the due process clause "requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard." The Court has also recognized that "any person hauled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him." *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963). See also *Argersinger v. Hamlin*, 407 U.S. 25 (1972).

That this is no less true regarding an indigent parent's ability to defend against a governmental intention to affect that parent's custodial rights, has led several courts to find a right to counsel in those parents. In *Cleaver v. Wilcox*, 499 F.2d 940 (9th Cir. 1974), the court was confronted with a class action suit by parents of juveniles subject to dependency proceedings under the California Welfare and Institutions Code, § 600. Citing *Gagnon*, the court stated:

> When an agency of the state seeks to remove a child from the custody of parents who say they are qualified to rear the child, both the parents and the state have interest in accurate findings of fact and informed juvenile-court supervision. The state's interest in saving public money does not outweigh society's interest in preserving viable family units and the parent's interest in not being unfairly deprived of control and

> custody of a child. Protection of a right as fundamental as that of child custody cannot be denied by asserting that counsel in civil litigation has always depended upon the free-enterprise generalization that one usually gets what one pays for. The "civil litigation" generalization overlooks the nature of the rights in question and the relative powers of the antagonists. Despite the informality of the juvenile dependency hearings, the parent, untutored in the law, may well have difficulty presenting his or her version of disputed facts, cross-examining witnesses, or working with documentary evidence. *Cf. Gagnon v. Scarpelli*, 411 U.S. at 787.

In addition, several state courts have extended similar constitutional protections to indigent parents who are parties to proceedings to terminate or modify custodial rights: *State v. Oakley*, 203 S.E.2d 140 (W.Va. 1974) (due process); *Danford v. State Dept. of Health & Welfare*, 303 A.2d 794 (Me. 1973) (due process); *In Interest of Friesz*, 208 N.W.2d 259 (Neb. 1973) (due process); *In re B.*, 334 N.Y.S.2d 133 (1972) (due process); *White v. Green*, 332 N.Y.S.2d 300 (1972) (equal protection). Other states have found that the indigent parent is entitled to counsel as a matter of statutory interpretation: *State v. Jamison*, 444 P.2d 15 (Ore. 1968); *Chambers v. District Court of Dubuque County*, 152 N.W.2d 818 (Iowa 1967). See also Justice Black dissenting from denial of certiorari in *Kaufman v. Carter*, 402 U.S. 954 (1971).

Although the Supreme Court has now repudiated the case-by-case approach for determining which criminal defendants are entitled to counsel for their defense, it has retained that approach for determining a convict's right to counsel in parole and probation revocation proceedings, because an automatic right to counsel, "would impose direct costs . . . without regard to the need or the likelihood in a particular case for a constructive contribution by counsel." *Gagnon v. Scarpelli*, 411 U.S. 778, 787 (1973); *Morrissey v. Brewer*, 408 U.S. 471 (1972).

The *Cleaver* court adopted this case-by-case balancing approach for determining when parents are entitled to counsel. This standard contemplates rather that, as in the other cited cases, once a parent has been found under Standard 2.2 to have an independent interest subject to protection, the parent is entitled to counsel.

It should also be noted that in any parental appeal against the wishes of the juvenile and any appeal in which interests adverse to the juvenile's are at stake, the juvenile is entitled to separate, appointed counsel. The commission declined to take a position on the question of whether the state should charge an affluent parent for such appointed counsel for the juvenile.

3.2 Any party entitled to an appeal under Standard 2.2, or his or her counsel, is entitled to a copy of the verbatim transcript of the adjudication and dispositional hearings and any matter appearing in the court file.

Commentary

The President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: Juvenile Delinquency and Youth Crime* 40 (1967), found that one factor which contributed substantially to the lack of effective appellate review of juvenile court judgments was the "general absence of transcripts of juvenile court proceedings." Agreeing with a California report that "[a]ppeal is only as effective as the record upon which it is based," the Task Force concluded that

> [a]ll jurisdictions should have provisions, such as now exist in some states, for the recording of court hearings by court stenographers, preferably on a routine basis without court orders. *Id.*

While most juvenile court acts are silent on the rights of appealing parties to a transcript, six states specifically grant transcripts without cost to indigents. It is unclear whether transcripts of juvenile court proceedings are made in the states which provide that juvenile court appeals shall be made in the same manner as civil or criminal appeals. A few of the states which provide for transcripts, or states in which transcripts are in fact available, whether provided for by statute or otherwise, indicate that transcripts shall be made available *upon request.* See also the Standard Juvenile Court Act § 19, which requires that a record be made unless the court otherwise orders and the parties waive the right to such a record.

It is the intent of these standards to provide all parties entitled to appeal with a full copy of a verbatim record of all proceedings in the juvenile court by requiring that complete verbatim transcripts of juvenile court proceedings be recorded as a matter of course.

The recognition of juvenile court proceedings as competent judicial proceedings clearly envisions the right to an effective appeal. A transcript of those proceedings is necessary to facilitate that right to appeal, and, even if an appeal is not taken, a complete record would create a higher level of accountability within the system. See Comment, "Appellate Review of Juvenile Court Proceedings and the Role of the Attorney," 13 *St. Louis U.L.J.* 90, 100-102 (1966).

While the United States Supreme Court in *In re Gault*, 387 U.S. 1

(1967), refused to hold a transcript of the proceedings constitutionally necessary to insure the provision of due process, the Court clearly recognized that the result of

> [f]ailure to make a record, may be . . . to saddle the reviewing process with the burden of attempting to reconstruct a record, and to impose upon the Juvenile Judge the unseemly duty of testifying under cross-examination as to the events that transpired in the hearings before him. 387 U.S. at 58.

The due process and equal protection clauses require that once the right to appeal is granted, a transcript must also be made to provide a fair and adequate appeal. See Bowman, "Appeals from Juvenile Courts," 11 *Crime & Delinq.* 63 (1965). Since *Griffin v. Illinois*, 351 U.S. 12 (1956), holds that once an appeal is allowed the equal protection clause disallows indigency as a burden on exercising that right, the equal protection clause would also seem to guarantee to similarly situated juveniles the right to a transcript, once the right to appeal is granted. See *Agnew v. Superior Court*, 118 Cal. App. 2d 230, 257 P.2d 661 (Dist. Ct. App. 1953), which held that the denial of a transcript to a juvenile appealing from the juvenile court was a denial of equal protection.

It may also be argued that once the right to appeal is provided, the due process clause would be offended if that appeal were not fair and adequate. *Griffin v. Illinois*, 351 U.S. 12 (1956). See also Comment, "Appellate Review for Juveniles: A 'Right' to a Transcript," 4 *Colum. Hum. Rts. L. Rev.* 485 (1972).

In juvenile court proceedings, matters other than actual transcripts of the proceedings are often used in the decision-making process. To insure full and fair review, as well as protection of the child's right to an accurate presentation of the facts, social records, school reports, staff reports, as well as any other record included in the juvenile's file must be available to the party appealing or to counsel. See *Kent v. United States*, 363 U.S. 541 (1966), where the Supreme Court pointed out that it was counsel's role to discover and bring to the juvenile court's attention any inaccuracies contained in such reports, and that these reports must be made available to counsel in order to protect the child. Clearly, all records, reports, and other matters contained in the juvenile's file, and which may be used by the court in rendering a judgment, disposition, or any other order, must be made available.

The state may wish to provide that in certain very limited situations, disclosure be made solely to counsel rather than to the juvenile. For example, there may be included in the file a report that

describes the juvenile as possessing a very low intelligence quotient. The court may feel that such a disparaging assessment would be detrimental to the rehabilitative prospects of the juvenile, and disclose that portion of the file to counsel. Counsel, then, must decide whether the client need have actual knowledge of the file's contents.

3.3 Upon a determination of indigency, the above material should be provided the appellant at public expense.

Commentary

Griffin v. Illinois, 351 U.S. 12 (1956) (transcripts on appeal) and *Douglas v. California*, 372 U.S. 353 (1963) (counsel on appeal), provide that the equal protection clause of the fourteenth amendment requires these rights be granted to indigents. These rights attach to indigent juveniles and other indigent parties appealing from a juvenile court order or judgment in the same manner as they attach to indigent adults appealing a criminal conviction. Thus, although in *In re Gault*, 387 U.S. 1 (1967), the court refused to hold that neither an appeal nor a transcript is constitutionally necessary, once an appeal is provided, these rights are attendant to it.

Again, as has been argued in other standards, the due process clause requires that once an appeal is granted, the parties have a right to a fair and adequate appeal. Thus the state must "establish machinery to assure fairness and uniformity." See Bowman, "Appeals from Juvenile Courts," 11 *Crime & Delinq.* 63 (1965), and Comment, "Appellate Review for Juveniles: a 'Right' to a Transcript," 4 *Colum. Hum. Rts. L. Rev.* 485, 492 (1972).

See also *Task Force Report*, *supra;* commentary to Standards 3.1 and 3.2 *supra;* and the Standard Juvenile Court Act § 19 (1959), which provides for both counsel and transcripts upon a determination of indigency.

PART IV: PROCEDURES

4.1 A system for expediting and granting preferences to appeals from the juvenile court should be provided.

Commentary

The very nature of the matters dealt with by the juvenile courts demands that resolutions be reached quickly and finally. Juvenile

dispositions calling for institutionalization are generally short, and often have ended before an appeal may be heard. Changes in a juvenile's environment, such as in custody, adoption, and other cases, should not be made more often than is critically necessary. See commentary to Standard 5.3, *infra.* Thus, due to the unique nature of the status of juveniles, appeals from the juvenile court should be afforded preferential treatment.

Accelerated appeals take on even greater importance if a stay is denied. Lack of stays is generally a deterrent to appeals. (See Standard 5.5 *infra.*) In order to protect the rights of juveniles, the right to appellate review must be granted, be available, and be realistic in terms of time. Accelerated treatment of juvenile appeals is one solution. See Comment, "Appellate Review of Juvenile Court Proceedings and the Role of the Attorney," 13 *St. Louis U.L.J.* 90, 102 (1968):

> If a stay of treatment were not granted, it might be quite pointless to permit appellate review unless the jurisdiction allowed for accelerated review of juvenile cases as does the *Standard Act.*

Several states already provide for expedited appeals in juvenile court matters. Cal. Welf. & Inst'ns Code art. 12, § 800 (West 1966) provides "such appeal shall have precedence over all other cases in the court to which the appeal is taken." Conn. Gen. Stat. Rev. § 17-70(b) (Supp. 1969) grants: "Appeals from the juvenile court shall be privileged cases to be heard by the Superior Court unless cause is shown to the contrary as soon after the return day as is practicable." And the Standard Juvenile Court Act § 28 (6th ed. 1959) says "the appeal shall be heard at the earliest practicable time."

Court rules in some states provide for accelerated appeals in certain cases. For example, Mich. Gen. Ct. R. 816.6 provides that in interlocutory appeals in criminal cases and in contests as to custody of minor children, "such appeals shall have precedence over other cases in the hearing of cases on any session calendar." The rule also provides that all filing times will be reduced by half. Comment 5 to the rule states: "The circumstances of such cases involving as they often do the physical and emotional welfare of the children, make expeditious disposition of the proceedings especially imperative." See also D.C. Ct. R. 33(c), providing expedited appeals for orders denying the reduction of bail before trial, citing *Stack v. Boyle*, 342 U.S. 1 (1951).

The mechanics for effectuating a preferential treatment of juvenile court appeals can vary widely. The legislature may enact the

necessary provisions; the legislature may empower the judiciary to do so; or the judiciary may proceed under its inherent power. This standard does not mean to prefer one method over another, but it does intend that expedited appeals be effected by each jurisdiction. Because of the age of the persons before the juvenile courts, and the fact that if confined, confinement is based in part on rehabilitation, it is critically important that final determination in the appellate court be rapid.

4.2 It should be the duty of the juvenile court judge to inform the parties immediately after judgment and disposition orally and in writing of the right to appeal, the time limits and manner in which that appeal must be taken, and the right to court-appointed counsel and copies of any transcripts and records in the case of indigency.

Commentary

This standard is provided as a protection of the right to an effective appeal, and as an emphasis on the importance of that right. The burden is placed upon the juvenile court judge to insure that all parties are notified of their rights on appeal and to make a record of the fact that notice has been given. It cannot be expected that those persons subject to the jurisdiction of the juvenile courts will bring with them a high degree of sophistication concerning the full extent of their rights with respect to the intricate workings of the legal system. This would appear to be particularly true with the reduced level of formality often found in juvenile court proceedings. Therefore, in order to promote accountability within the system, and to insure that the rights granted may be realized by the parties, full knowledge of the existence of these rights is imperative.

The time chosen for the court to inform the parties as to their rights on appeal is immediately after judgment and disposition. The notification to the parties of their rights must be made at a point in the proceedings where such information will be useful and impressive. Little or no impression of their rights on appeal will be made on the parties if notification is made at the commencement of the action. It is only immediately following judgment and disposition that appeal can be primarily focused upon.

Obviously, knowledge of a right is necessary before that right can be exercised. *Johnson v. Zerbst*, 304 U.S. 458 (1938). The purpose of this standard is to place the burden upon the juvenile judge to clearly inform the parties of their rights to appeal, to counsel,

and to transcripts upon appeal, if taken. It is hoped that awareness of these rights, as well as knowledge of the procedures necessary to effectuate them, will aid the parties wishing to appeal to meet the time limits, to make the proper requests, and will avoid dismissal of appeals for failure to meet procedural requirements.

See Standard Juvenile Court Act § 19 (1959), which has a similar section placing the burden on the juvenile court judge to notify the parties of their rights on appeal. See also Part III *supra*. *Cf. Boykin v. Alabama*, 395 U.S. 238 (1969).

In those situations in which the juvenile or the parents do not speak English, a fact which should have been discovered long before the appellate stage of proceedings, these standards envision the continuing services of an interpreter to translate the information imparted by the judge.

4.3 The parties or their attorneys may agree to proceed upon a written stipulated statement of the facts and procedural development without procuring a transcription of the stenographer's minutes of the testimony, and that statement, signed by the parties or their attorneys, should be transmitted to the appellate court as the record of testimony in the case.

Commentary

As part of the process of expediting juvenile court appeals, the parties may proceed upon an agreed statement of facts in lieu of waiting for the verbatim record to be transcribed by the juvenile court stenographer. The importance of quick and final resolution of matters before the juvenile court is one of the basic policies underlying these standards, and has already been emphasized. See Standard 4.1 and commentary. By permitting the parties, if they so desire, to submit a stipulated statement of facts as the record to the appellate court, the parties themselves will be granted some additional control over the speed with which their appeal is heard.

Cases in which there is little dispute over the finding of facts, and where the primary issues lie in the interpretation of law made by the juvenile court, exemplify the typical situation in which such a stipulated statement of facts will be chosen by the parties. These statements should, of course, accurately reflect the true consensus of the parties as to the facts and the procedural development below, and may not pose questions not actually developed in the juvenile court.

However, the right to have a transcript made of the juvenile court proceedings should not be impaired simply because, at their option,

the parties have chosen to proceed upon a stipulated statement of facts. These standards envision that a record of those proceedings will always be made; it is only the transcription of the record which may be avoided, by the agreement of the parties. See Standard 3.2 and commentary regarding the right to a transcript. If necessary, the appellate court, even though the parties have agreed to proceed upon a statement of facts, may order that the record of the proceedings below be transcribed and delivered up to it.

A stipulated statement of facts is a common procedure in the appellate courts of most jurisdictions. It can provide the reviewing court with a succinct background to the relevant issues on appeal. For example, Michigan provides for such a statement of facts by court rule:

> The parties or their attorneys may agree upon a statement of facts without procuring the stenographer's minutes of the testimony taken at the trial, and the statement so signed by the parties or their attorneys shall be transmitted as the record of testimony in the case. Mich. Ct. R. 812.10.

The purpose behind this standard is to make possible a more rapid progression through the appellate system, but not at the cost of fairness.

PART V: STAYS OF ORDERS AND RELEASE PENDING APPEAL

5.1 The initiation of an appeal should not automatically operate to stay an order of the juvenile court.

Commentary

No state now appears to expressly prohibit the staying of a juvenile court order pending appeal. See Ark. Stat. Ann. § 45-208, repealed 1973. The great majority of states which specifically deal with this problem provide that a stay of the juvenile court order is discretionary with the appellate court upon application or petition, but occasionally the power to stay the order rests solely with the juvenile court itself. In the remaining states, no provision at all for stays is made in the statutes, although it is possible that these states would allow a discretionary stay upon petition or application in appropriate cases.

Because of the tremendous diversity of matters which come before

the juvenile courts, the wisdom of an automatic stay in all cases is questionable. For instance, a stay of an order removing an abused or neglected child from the home, and placing the child in foster care, may or may not be detrimental to the best interests of the child. See generally Wald, "State Intervention on Behalf of 'Neglected' Children: A Search for Realistic Standards," 27 *Stan. L. Rev.* 985 (1975). However, where a juvenile is adjudicated to be delinquent and the disposition is institutionalization, a stay of the order until the appeal is heard may often be desirable.

It is the intent of this standard to recognize that while an automatic stay may be unwise, a stay should ordinarily be favored, and any denial of a stay should be supported by specific reasons entered upon the record. See Standards 5.2 and 5.3 *infra*. Where a stay is not granted in a particular case for valid reasons stated on the record, expedited treatment of the appeal is crucial. See Standard 4.1 *supra*.

5.2 Any party, after the filing of a notice or claim of appeal or the entry of an order granting leave to appeal, may request the juvenile court to stay the effect of its order and/or release the juvenile pending appeal.

Commentary

It is the intent of these standards to insure that juveniles are afforded the full protection of the law. It may be that to grant automatic stays or release pending appeal could be detrimental to the best interests of the parties in certain classes of cases within the purview of the juvenile court's jurisdiction. See commentary to Standard 5.1 *supra*. However, it is also the intent of these standards to insist that the general rule in juvenile court matters be the stay of judgment or release of the juvenile pending appeal, unless the juvenile court clearly shows good cause why such relief should not be granted and that cause is entered upon the record. See commentary to Standard 5.3 *infra*.

This standard provides the procedure by which any party with the right to appeal may seek a stay or release, as is traditionally granted to adults appealing from civil judgments or criminal convictions.

Notice of appeal should be filed with the juvenile court. Requests for stays of juvenile court judgments or orders and/or release should be treated with expediency by the juvenile court. One of the major aims of these standards on appeal is to promote rapid final determination of juvenile court matters. One excellent solution is presented by the Kentucky Juvenile Court Act, Ky. Rev. Stat. § 208.380

(Supp. 1976), which provides for a hearing on release before the juvenile court within three days after the filing of the appeal, and if the request for release is denied, an expedited appeal of that denial may be taken to the Court of Appeals.

An immediate determination by the juvenile court of a request for stay or release is also necessary because these standards provide that a refusal to grant stay or release may be appealed to the appellate court. See Standard 5.6 *infra*. Any delay on the part of the juvenile court would operate to deny the petitioning party an actual right to seek such relief. See generally Standard 4.1 *supra* on expedited appeals and Standard 5.3 *infra*.

It should be noted that the *Interim Status* volume contains a prohibition on the use of bail in juvenile court.

5.3 Upon the filing of an appeal of judgment and disposition, the release of the appellant, with or without conditions, should issue in every case unless the court orders otherwise. An order of interim detention should be permitted only where the disposition imposed, or most likely to be imposed, by the court includes some form of secure incarceration, and the court finds one or more of the following on the record:

A. that the juvenile would flee the jurisdiction or not appear before any court for further proceedings during the pendancy of the appeal;

B. that there is substantial probability that the juvenile would engage in serious violence prior to the resolution of the appeal.

Juveniles should be given credit at disposition for any time spent in a secure facility pending appeal.

Commentary

See the *Interim Status* volume, Standard 7.13.

5.4 In neglect and abuse cases, the juvenile court may order the juvenile removed to a suitable place pending appeal if the court finds that the juvenile would be in imminent danger if left with or returned to his or her parents, guardian, or other person party to the appeal.

Commentary

The safety of the children subject to the jurisdiction of the juvenile court should be of first concern. However, these standards do

not envision indiscriminate removal of children from their families or guardians.

In neglect and abuse cases, it must be made very clear that institutionalization is not envisioned as a suitable solution for care of a child removed pending appeal of such a finding. These children have not been adjudicated to be delinquent or even in need of treatment. They are subject to the court's jurisdiction only because of the unsuitability of their home environment. A suitable place obviously should be a home environment more conducive to the emotional and physical needs of a growing child than is available from institutional treatment. In short, the standard envisions a foster home placement.

5.5 In those cases in which a stay of judgment or disposition or release pending appeal is denied, the appellate court should afford the appeal the speediest treatment possible.

Commentary

This standard is a corollary to Standard 4.1 *supra* on expedited appeals. Because of the youth of those persons subject to juvenile court jurisdiction and the rehabilitative theories that partially underlie juvenile court legislation, rapid final determination is essential.

Correspondingly, once a party to the juvenile court matter takes an appeal, and a stay of judgment or release of the juvenile is denied, the case should be treated preferentially to insure that the right to an appeal is not merely illusory. See Kentucky Juvenile Court Act, Ky. Rev. Stat. § 208.380 (Supp. 1976), providing that appeal of a denial of release shall be given expedited treatment in the court of appeals.

5.6 In those cases in which a stay of judgment or disposition or release pending appeal is denied by the juvenile court, the appellate court should be empowered to grant the relief requested upon application of a party.

Commentary

This standard suggests that the appellate courts, as well as the juvenile court, be empowered to grant stays and provide for release pending appeal. This could either be handled as a matter for interlocutory appeal to the higher court or as an original application therein. In either event, the recorded reasons of the juvenile court for denying relief and any transcript of testimony that was adduced to support those reasons should be made available to the appellate court. See Standard 5.3 *supra*.

The appellate court, based on the juvenile court record, may choose either to refuse to hear the application, or review the reasons for denial and uphold the juvenile court, or review the juvenile court record and grant the relief requested. A clear record is crucial in enabling the appellate court to make a speedy determination, without having to either remand for clarification or to make extensive fact findings of its own.

PART VI: COLLATERAL AND SUPPLEMENTARY PROCEEDINGS

6.1 Orders of the juvenile court may be modified by that court at any time when it has jurisdiction over the matter after notice and opportunity for hearing to all parties, upon the petition of a party or by the juvenile court sua sponte.

Commentary

This standard provides that the juvenile court should have the continuing power to modify its orders, while it still has jurisdiction. The importance of this power is evidenced by the unusual character of the matters within the province of the juvenile courts. The circumstances of a child's life change more rapidly and are subject to a wider range of external factors than is true for most adults. Children move from childhood to adolescence to adulthood in a relatively short period of time. In addition, total family situations are often fluid, with the child being able to exercise little control over his or her environment. The factors of age and changing circumstances create a substantial possibility that an order of the juvenile court, valid at the time it was rendered, may no longer be in the best interests of the child or his or her family rather shortly thereafter.

However, even though this power may be viewed as beneficial and remedial, constitutional limitations must, of course, be recognized. Notice and opportunity to be heard are required by the due process clause, and basic due process rights are granted to juveniles. *In re Gault*, 387 U.S. 1 (1967). These strictures are especially important if the modification is by order of the court upon its own motion.

Most state juvenile court acts provide the court with continuing power to modify its disposition. These statutes usually only provide for the modification of dispositional orders and not an alteration of an adjudication or a finding of delinquency. In these cases, appellate remedies must still be pursued. See Comment, "Appellate Review of Juvenile Court Proceedings and the Role of the Attorney," 13 *St.*

Louis U.L.J. 90 (1968). See, *e.g.*, Mo. Rev. Stat.§§ 221, 251 (1959); Conn. Gen. Stat. § 17-69 (1958) (for modification of commitment orders; statute allows parents or guardian to apply for a modification up to two times per year of commitment); Minn. Stat. Ann. § 260.81 (1971) (allows modification on the grounds of new evidence within ninety days of original court order); Cal. Welf. & Inst'ns Code § 775 (1972) (orders of the juvenile court can be changed at any time); and Alaska Stat. § 47.10.180(i)(a) (1971).

The Standard Juvenile Court Act § 26 (6th ed. 1959) allows for "modification of decree" and a rehearing based on: 1. new evidence; 2. a wrongful denial of a petition for release; 3. the welfare of the child; or 4. the public interest. The Standard Act also provides that the court may hold a hearing to reconsider upon its own motion.

6.2 Any modification of a dispositional order of the juvenile court should be governed by the *Dispositions* volume, Standard 5.1 A., and the *Corrections Administration* volume, Standard 5.1 A.

Commentary

See commentary to Standard 5.1 A. of the *Dispositions* volume and Standard 5.1 A. of the *Corrections Administration* volume.

6.3 Every order committing any juvenile into the custody of the state and every order adjudicating a juvenile to be neglected, regardless of custody, should be reviewed by the juvenile court without the request of any party not less than once in every [six] months.

Commentary

Just as the parties should not have to depend solely on the court for review of dispositional orders, neither should particular orders of the court go unreviewed if no party applies to the court for review. This standard provides for mandatory review at least semi-annually. See Standard 6.1 and 6.2 *supra*, and commentary to these standards for the policy behind modification provisions generally.

The minimum standard acceptable is review not less than every six months. There may arise instances where review of an order should be made more often than such a minimal standard would require. The court should be sensitive to these possibilities, and attempt to make more frequent review available when the circumstances dictate. This standard, coupled with the making of the right to petition the court

for review available to the parties (Standard 6.2), will provide protection against the continuance of an order no longer beneficial to anyone. See Alaska Stat. § 47.10.180(e) (1971); Minn. Stat. Ann. § 260.285 (1971); Tenn. Code Ann. § 37-237 (Supp. 1972). Secondarily, it is the intent of this standard to place the dispositional progress of the child and the performance of the system for that child before the juvenile court itself on a regular basis. A court which alters the liberty of a juvenile ought not to be able to thereafter wash its hands of the situation. Review of the performance of both the juvenile and the system will enable the court to monitor the results of its dispositional programs.

6.4 The juvenile, his or her parents, custodian, or guardian may petition the juvenile court to inquire into the adequacy of the treatment being afforded the juvenile.

Commentary

From the inception of the juvenile court system, the clearly professed goal has been to seek to rehabilitate, rather than punish. *Wisconsin Indus. School for Girls v. Clark Co.*, 103 Wis. 651, 79 N.W. 422 (1899); Schultz, "The Cycle of Juvenile Court History," 19 *Crime & Delinq.* 457 (Oct. 1973). It appears to be equally clear that the system has failed to attain that goal. The President's Task Force found that

> [t]he rhetoric of the juvenile court movement has developed without any necessarily close correspondence to the realities of court and institutional routines. *Task Force Report* at 9.

And the Supreme Court has indicated its belief that

> [t]here is evidence, in fact, that there may be grounds for concern that the child receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children. *Kent v. United States*, 383 U.S. 541, 556 (1966).

See also "Persons in Need of Supervision: Is There a Constitutional Right to Treatment," 39 *Brooklyn L. Rev.* 624 (1973) (demonstrating a high recidivist rate); Schultz, "The Cycle of Juvenile Court History," *supra*. Despite this recognition, virtually all recent judicial pronouncements have continued to approve less than full due process

protection for juveniles on the alleged exchange of these guarantees for rehabilitation and "treatment." See, *e.g.*, *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971); *In re Winship*, 397 U.S. 358 (1970). The result has been a series of cases in which juveniles have forced the courts to examine the realities of juvenile court dispositions, to assure that the price paid by the juvenile at least purchases the professed exchange. These cases have been labeled the right-to-treatment cases.

Treatment, as a legal right, is a somewhat uncomfortable transplant to the juvenile justice area from mental health civil commitments. See *Rouse v. Cameron*, 373 F.2d 451 (D.C. Cir. 1966); Birnbaum, "The Right to Treatment," 46 *A.B.A.J.* 499 (1960). Generally, the basis for acknowledging this right has been constitutional rather than statutory, and premised upon fourteenth amendment due process and equal protection, and eighth amendment cruel and unusual punishment. The due process argument is essentially one of substantive due process, that is, based upon a finding that since the goal and underlying purpose of the juvenile justice system is rehabilitative (through statutory interpretation or the *parens patriae* doctrine), if rehabilitation is not a significant part of the confinement, then the deprivation of liberty is a violation of due process. See, *e.g.*, *Inmates of Boys' Training School v. Affleck*, 346 F. Supp. 1354, 1364 (1972): "Thus due process in the juvenile justice system requires the post-adjudicative stage of institutionalization [to] further this goal of rehabilitation." See also *Nelson v. Heyne*, 355 F. Supp. 451 (1973).

The operation of the eighth amendment prohibition against cruel and unusual punishment is premised on the fact that detention of juveniles for punishment without rehabilitative services may be unconstitutional, given the statutory goal. See, *e.g.*, *Inmates of Boys' Training School v. Affleck*, 346 F. Supp. at 1366:

> The fact that juveniles are *in theory* not punished, but merely confined for rehabilitative purposes, does not preclude the operation of the Eighth Amendment. (Emphasis original.)

See also *Nelson v. Heyne*, 355 F. Supp. 451 (1973); and *Martarella v. Kelly*, 349 F. Supp. 575, 585 (1972):

> Where the State, as parens patriae, imposes such detention, it can meet the Constitution's requirement of due process and prohibition of cruel and unusual punishment if, and only if, it furnishes adequate treatment to the detainee.

The equal protection clause is rarely used as a separate basis for finding a right to treatment for juveniles; rather, it is generally used

in combination with due process and cruel and unusual punishment. However, *Inmates of Boys' Training School v. Affleck* held that to allow the state to "treat" a juvenile under the guise of *parens patriae* in a manner proscribed to the parents themselves, would be violative of the equal protection clause:

> **If a boy were confined indoors by his parents, given no education or exercise and allowed no visitors and his medical needs were ignored, it is likely that the State would intervene and remove the child for his own protection. 346 F. Supp. at 1367.**

These constitutional challenges to the conditions of confinement of juveniles are generally brought in the procedural context of a petition for habeas corpus or as a civil rights action, under 42 U.S.C. 1983. There are problems inherent in basing a claim for adequate care on constitutional provisions. In the first place, the basic focus in such a case is toward drawing the bottom line—the state's constitutionally accepted minimum performance. The courts in drawing this line are greatly influenced by nearly two centuries of having guarded federalism as a form of government. When this focus is complicated by the state operating in loco parentis, thereby raising questions as to what care a state can require natural parents to provide, the minimum of care may be still further reduced.

Some courts have found a statutorily based right to treatment in the existing juvenile court acts. This determination generally is made by interpreting the opening sections which state the goal and purpose of detention under the act, commonly "care, guidance, and control," to mean more than mere maintenance and custody of the juvenile. See *Nelson v. Heyne*, 355 F. Supp. at 459, interpreting the Indiana Juvenile Court Act; Ind. Ann. Stat. §§ 9-3201(1c), 31-5-7-1 (Burns 1971); and *Creek v. Stone*, 379 F.2d 106, 111 (D.C. Cir. 1967), interpreting D.C. Code tit. 16, § 2316 (1973).

It is the intent of this standard to encourage the adoption of statutes providing a forum for determining the adequacy of the juvenile justice system's delivery of services to the individual juveniles whose liberty it has restricted. It may be that this is quite different from a right to treatment. For example, the Federal Youth Corrections Act, 18 U.S.C. 5006(a) defines treatment as "[c]orrective and preventive guidance and training designed to protect the public by correcting the antisocial tendencies of youth offenders." If this treatment were offered in a juvenile system which retained such status offenses as persons-in-need-of-supervision, then there is indeed a difference, for one can imagine schemes of treatment aimed at correcting antisocial

conduct that would be far more obnoxious than mere confinement. Juveniles, as well as adults, should have the right to be free from the control of the state over their philosophical, religious, political, and other legitimate preferences. Any form of doctrinaire treatment offered by the state should only be made available to the juvenile at his or her choice. Obviously, these concerns are critical for members of minority groups, and protection of their civil rights, customs, and mores is crucial, despite the fact that they are juveniles and that they are confined to an institution by court order.

Another problem raised by the issue of treatment is the potential conflict that may occur if there is disagreement among the parties, particularly between the juvenile and the parents, as to the adequacy of the treatment offered or rejected by the juvenile. It is of dubious validity to permit the parents, custodian, or guardian of an institutionalized juvenile to be able to force treatment on an unwilling juvenile. The juvenile court, in its consideration of the petition to order inquiry into the adequacy of treatment, must fully consider the juvenile's rights and interests independently of any other party. *Cf.* Standard 2.2.

This standard merely provides judicial recourse for the affected parties regarding the state's performance in living up to its part of the exchange. It is not intended to prevent other collateral remedies available to the juvenile once the right to petition the juvenile court is exhausted. The purpose of the standard is to provide rapid review by the juvenile court of the adequacy of the services offered and delivered, and to encourage follow-up by juvenile courts which do not already do so. See *Inmates of Boys' Training School v. Affleck*, 346 F. Supp. 1354 (1972); *Martarella v. Kelly*, 349 F. Supp. 575 (1972); and *Lollis v. N.Y. State Department of Social Services*, 322 F. Supp. 473 (1970), which discuss standards for finding of cruel and unusual punishment for juveniles institutionalized with rehabilitation as the underlying purpose.