Institute of Judicial Administration

American Bar Association

Juvenile Justice Standards

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*STANDARDS RELATING TO*

# *Dispositional Procedures*

83568

# *Dispositional Procedures*

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# *Dispositional Procedures*

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 III, which also includes the following volumes:

INTERIM STATUS: THE RELEASE, CONTROL, AND DETENTION OF ACCUSED JUVENILE OFFENDERS BETWEEN ARREST AND DISPOSITION
DISPOSITIONS
ARCHITECTURE OF FACILITIES
CORRECTIONS ADMINISTRATION

# *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 2.3 D. 2. was amended by substituting "juvenile prosecutor" for "attorney for the state."

2. Standard 2.4 D. was amended by substituting "juvenile prosecutor" for "attorney representing the state."

Commentary was revised accordingly.

3. Standard 3.1 was amended by adding "or their attorney" to reflect the parents' right to be represented by counsel at the dispositional hearing.

The standard was amended further by substituting "juvenile prosecutor" for "an attorney for the state."

Commentary to Standard 3.1 was revised by adding a reference to parents' waivable right to counsel at dispositional proceedings.

4. Standard 6.1 was amended by adding new subdivision A., requiring a disposition agreement to be introduced in open court and approved by the judge. Former subdivisions A. and B. were changed to B. and C., respectively.

5. Standards 6.3 B. and 6.3 D. were amended by substituting "juvenile prosecutor" for "attorney for the state."

6. Commentary to Standard 6.2 was revised by adding a statement that the court also may subpoena witnesses to testify at the hearing.

7. Commentary to Standard 7.1 B. was revised by adding a cross-reference to *Dispositions* Standard 5.1, describing the provision for a motion to reduce a disposition claimed to be illegal or unduly harsh or inequitable.

# *Contents*

# *Introduction*

## General Discussion

In fashioning a body of standards designed to govern dispositional procedures, we enter an area that has received practically no prior systematic attention. Whether our focus is on legislation, judicial opinions, existing proposals for reform, or scholarly writing, we encounter either silence or concern for only one or two aspects of dispositional procedure.

The ABA Standards for Criminal Justice, *Sentencing Alternatives and Procedures*, deals with sentencing procedures in Part V and contains only eight standards. Part IV, entitled Informational Basis for Sentence, is concerned with issues surrounding the presentence report and contains an additional six standards. The standards contained in this volume treat the issues contained in Parts IV and V of the ABA standards as well as a few issues located in other parts. The standards set out here will be somewhat more detailed than previous standards.

What this volume does not cover, and what was contained in the adult sentencing standards, are issues of statutory structure, the nature and duration of dispositional alternatives, and the development of disposition criteria. Thus, this volume of dispositional procedures is somewhat more detailed on procedural issues than the ABA standards, but also narrower in the scope of coverage.

A very recent effort at standard setting departs somewhat from previous approaches taken to dispositional procedures in delinquency cases. The National Advisory Commission on Criminal Justice Standards and Goals, "Courts" § 14.5 (1973), states: "The dispositional hearing in delinquency cases should be separate and distinct from the adjudicative hearing. The procedures followed at the dispositional hearing should be identical to those followed in the sentencing procedure for adult offenders."

Standards 5.11 through 5.19 of the NACCJ "Corrections" volume deal with adult sentencing procedures. These standards are among the most comprehensive available in this area and their influence will

be manifest here. It should be noted that those standards equate adult and juvenile delinquency dispositional procedures. However, just why this was done remains conjectural since the only explanation offered is simply that the procedures ought not to differ.[1]

The fundamental assumption of the standards in this volume is that a dispositional decision involves the vital interests of both the juvenile and the state, and those interests can best be evaluated and served through procedures that are more orderly than is presently the case. While orderliness and regularity are sought, no effort has been made to fully emulate the more formal requisites of the adjudicatory phase of a delinquency proceeding.

The judge, as opposed to a referee or panel, is designated as the preferred dispositional authority. The standards also deal with obtaining, using, and sharing of dispositional information; with suggested techniques for regularizing informally arrived at dispositions; and, finally, with the procedural format for formal dispositional hearings and the imposition and correction of a disposition. This volume begins at the point when a juvenile has been found to be delinquent and ends with the manner of imposing and then possibly correcting a disposition.

A threshold difficulty with dispositional procedures, one rarely voiced or faced, is that it is a process in search of a clear objective. The participants' roles are blurred, due in no small part to the absence of clearly stated dispositional objectives. Another dimension of this ambiguity, one which will be explored in more detail at another point, is the problem that the actual disposition decision rarely will be made at the hearing. To be more explicit, there is good reason to believe that dispositional hearings, not unlike adult sentencing hearings, too often are merely ceremonial events and simply provide the judicial imprimatur for a decision arrived at earlier and elsewhere.[2]

The historical development of the juvenile court in this country reveals why the dispositional process was, and remains, an extraordinarily casual and standardless process. As is well known by now, informality and a nonlegal approach to juvenile cases dominates the juvenile court reform movement.[3] "The goals were to investigate, diagnose, and prescribe treatment, not to adjudicate guilt or fix

[1] Other volumes of standards deal with dispositional alternatives and the criteria for imposing particular dispositions.

[2] *See* Rubin, "Now to Make the Criminal Courts More Like the Juvenile Courts," 13 *Santa Clara Law.* 104, 116 (1972); Arthur, "Disposition: The Forgotten Focus," 21 *Juv. Ct. J.* 71 (1970).

[3] *See generally Ex parte* Daedler, 228 P. 467 (Cal. 1924).

blame. The individual's background was more important than the facts of a given incident, specific conduct relevant more as symptomatic of a need for the court to bring its helping powers to bear than as a prerequisite to exercise of jurisdiction."[4]

Judge Richard Tuthill, a juvenile court judge in Chicago operating under the Illinois Juvenile Court Act of 1899, invited members of the Chicago Woman's Club to sit with him on the bench and help in the disposition of cases.[5] He referred to the decisional process as what he would do "were it my son who was before me in the library at home, charged with some misconduct."[6]

The emphasis on a clinical type approach, with its consequent informality, led naturally to the obliteration of any meaningful distinction between adjudication and disposition. An early description of the Boston Juvenile Court noted that the officials of the court viewed themselves as physicians in a dispensary.[7] Baker's rich and valuable description of early practices in Boston does suggest a concern for proceeding from a finding of delinquency, typically a judicial confession evoked by questions from the judge, to a dispositional decision. However, it is also clear that the adjudicatory facts were umbilically tied to the dispositional facts.

Over the years we may note some concern for the separate identity and function of the dispositional process, illustrated by the movement to separate the adjudicatory hearing from the dispositional hearing.[8] When, for example, a probation or social report is viewed by the judge prior to adjudication, the problems inherent in blurring the two decisions are sharply focused.[9]

Time and again the statement is made that "[t]he dispositional decision is likely to be the most important aspect of a juvenile court case."[10] Despite the fact that a substantial number of state statutes provide for a dispositional hearing distinct from the adjudicatory, or

[4] President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: Juvenile Delinquency and Youth Crime* 3 (1967).

[5] *A. Platt, The Child Savers: The Invention of Delinquency* 141 (1969).

[6] *Id.* at 144.

[7] Baker, "Procedure of the Boston Juvenile Court," 23 *The Survey* 643 (1910); reprinted in *T. L. Faust & P. J. Brantingham, Juvenile Justice Philosophy* 177 (1974).

[8] *See* Report of the Governor's (California) Special Study Commission on Juvenile Justice (1960). *See also* Elson, "Juvenile Courts and Due Process," in *Justice for the Child* 95, 100 (M. K. Rosenheim ed. 1962).

[9] *See In re* Corey, 266 Cal. App. 2d 295, 72 Cal. Rptr. 115 (1968), holding on both statutory and "fairness" grounds that it is an error for the court to receive the social report prior to adjudication, at least where the allegations are disputed.

[10] *M. G. Paulsen & C. H. Whitebread, Juvenile Law and Procedure* 167 (1974). Numerous authorities can be cited for the same proposition.

"fact-finding" hearing,[11] and despite (or some would argue, because of) the significance of the decision, the hearing remains extremely informal and standardless. Although *In re Gault*[12] has at least raised consciousness about the necessity for regularized and constitutionally fair adjudicative procedures, and even with *Gault*'s reliance on the failure of treatment ideals and practices as a major justification for due process safeguards, most dispositional decisions continue to reflect a clinical or therapeutic rationale.

## Characteristics of Current Dispositional Procedures

What follows is a description of five dominant characteristics of current dispositional procedures. These characteristics may be directly traced to an underlying treatment rationale.

I. The dispositional judge's discretion is maximal.

The judge is under few constraints, both in the selection of a particular disposition and the manner (or procedure) in which he or she selects the disposition.

II. Dispositional decisions, formal and informal, are determined at a low level of visibility.

Appeals of dispositions are not uncommon, and thus there is some surfacing of the decision itself. However, given the judge's control of the process and information, the limitations on participants and spectators, and the power to decide without formal fact finding or explicit reasons, the process may be accurately described as functioning at a low level of visibility.

III. Expertise, real or presumed, dominates the decisional process.

A clinical or therapeutic rationale necessarily relies heavily on experts for diagnostic, prescriptive, and prognostic conclusions. Given the rhetoric of treatment and benevolence, and the utilization of caseworkers and clinicians, the consequent reliance on their presumed expertise is not surprising.

IV. An identity of interest between the juvenile and representatives of the state is said to exist.

While an adversary format at adjudication may be accepted, however reluctantly, in the post-*Gault* era, the continued reliance on noncriminal terminology and at least the rhetoric of benevolent outcomes argue strongly for a dispositional model more akin to Judge Tuthill's "son in the library" approach than to the recognition of competing

[11] *Id.*

[12] *In re* Gault, 387 U.S. 1 (1967).

interests and the need for an opportunity to resist a potentially coercive intervention.

V. The roles of the primary participants are blurred and confused, especially so for the judge, the probation officer, and the juvenile's attorney.

The heavy reliance on expertise and the presumed identity of interest make it difficult to estimate what is a desirable outcome. The attorney's confusion may manifest itself in uncertainty as to what disposition to seek.[13] The probation officer, who must investigate, recommend, perhaps supervise, befriend, report, and possibly revoke, is in a most difficult position. The judge must frequently elicit aggravating factors surrounding the offense and clinical or social factors that may seem damaging, while at the same time maintaining the posture of a "wise parent." That prosecutors rarely are present at dispositional hearings, with dispositional facts and recommendations coming most often from probation personnel, contributes to judicial role confusion.

The characteristics noted above are meant to be more descriptive than evaluative. Indeed, those who prefer the clinical or therapeutic model for dispositions would likely not only argue for the continued reliance on high discretion, low visibility, expertise, identity of interest, and unitary roles, they also could logically argue for their strengthening. Ultimately, any procedural arrangement must be evaluated by two factors: How well does it facilitate the arrival at desired substantive outcomes; and, Does it meet independent criteria of fairness? If the youngster who is adjudicated delinquent is to be viewed as somehow impaired, either morally, physically, or psychologically, then a procedural format that has the trappings of a clinical model makes a good deal of sense.[14]

However, if an adjudication of delinquency is analogous to a judgment of personal responsibility, albeit tempered by notions of diminished capacity, and, if the dispositional process is seen as an effort to reflect the relative seriousness of the offense, then this

[13] Lawyers using adversary techniques that disrupt the smooth flow of cases might well be banished from the list of law guardians or simply not appointed in jurisdictions where the judge controls the appointment of counsel. *See* Duffee & Siegel, "The Organization Man: Legal Counsel in the Juvenile Court," 7 *Crim. L. Bull.* 544, 548 (1971).

[14] Leslie Wilkins, the noted criminologist, states: "At the present time, no known correctional methods support the use of the medical model." "Current Aspects of Criminology: Directions for Corrections," 118 *Proceedings of the American Philosophical Society* 235, 239 (1974).

alteration in rationale should be accompanied by an alteration in procedures. Between these two extremes lies the view that, while an adjudication of delinquency is closely analogous to a finding of criminal responsibility, dispositional procedures should be sufficiently flexible to allow for a determination of the youngster's needs, as well as to reflect the relative seriousness of the underlying conduct. An adversary type format, as will appear, can be made consistent with obtaining help as well as obtaining a just disposition.

The search for a preferred procedural format, then, is a search for a set of procedural arrangements that optimize the probabilities of achieving the desired outcome. But while the focus on outcome is primary, it cannot be exclusive. In addition, we must be concerned with such matters as fairness, economy, priorities in the utilization of scarce resources, accountability, orderliness, and the like. As can be seen, not all of these constraints, certainly not economy or orderliness, can be said to contribute in any direct way to the desired outcome.

## Objectives and Conceptual Underpinnings

This section focuses on the objectives sought to be attained by these standards, and on an analysis of the conceptual underpinnings for those objectives. It is not easy to find a single term, at least a familiar term, that accurately describes either the objectives or the specific standards. The characterizing dichotomy that most readily suggests itself is adversary or nonadversary. Take, for example, Professor Abraham Goldstein's description of the adversary model: "Adversary refers to a method of resolving disputes and takes its contours from the contested trial. Counsel for state and accused play an aggressive role in presenting and examining witnesses and in shaping legal issues. The judge is a relatively neutral participant who assures that the rules of evidence are satisfied and that the jury is properly instructed on the law."[15]

The adversary model rests on an "arms length" approach to decisionmaking.[16] As this approach specifically applies to dispositional decisions, it reflects a mistrust for those with power; rejects the notion of a mutuality of interests; indicates a lack of belief in the commitment, as well as the ability, to provide positive help;

[15] Goldstein, "Reflections on Two Models: Inquistorial Themes in American Criminal Procedure," 26 *Stan. L. Rev.* 1009, 1016-17 (1974).

[16] *See* Thibaut, Walker, Latour, & Holden, "Procedural Justice as Fairness," 26 *Stan. L. Rev.* 1271 (1974), reporting the results of an experiment on procedural justice.

and requires justifications for the imposition of corrective measures. Ultimately, it may be said that the objective of this model is to provide procedural devices that minimize the harm likely to accompany a coercive intervention, as opposed to the more optimistic view that seeks to maximize the opportunity to "help."

A nonadversarial model, or "parental" in Llewellyn's terms[17] and "family" in Griffiths',[18] proceeds from different attitudes and assumptions. The cornerstone is a feeling of togetherness, or "weness," in Llewellyn's idiom, between the subject of the proceeding and those who sit in judgment. The subject, and here let us simply switch the reference to the juvenile, is viewed as an integral part of the community and the decisionmakers are unquestionably representative of the community. There is, therefore, no mistrust of officials, since they harbor genuine parental emotions, even affection. The goal of any activity directed toward the juvenile is reintegration into the community, and this is best done through admission of wrongdoing and repentence. Coercion, in whatever form, becomes an expiative, reintegrative, and educative tool. The official action is broadly supported and procedures are simple.[19]

It should be emphasized that the usual discussion of adversary and nonadversary models is addressed to the fact-finding or adjudicative stage of a legal proceeding. Proceedings that are characterized as of the sentencing type are generally not thought of in similar terms. The underlying rationale for "the almost unchecked and sweeping powers we give to judges in the fashioning of sentences"[20] relates to the shift in status that occurs when an individual moves from accused to convicted,[21] from the subject of a petition to an adjudicated delinquent. During the accusatory stages, the state has a number of procedural and proof hurdles to jump. The person cited or accused retains some power to control and shape the proceedings by, for example, insisting on hearings and raising procedural and substantive objections. The norms of the privilege against self-incrimination apply and, in a

[17] *K. Llewellyn, Jurisprudence* 444-50 (1962).

[18] Griffiths, "Ideology in Criminal Procedure or a Third 'Model' of the Criminal Process," 79 *Yale L.J.* 359 (1970).

[19] *See* Damaska, "Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study," 121 *U. Pa. L. Rev.* 506, 570-577 (1973).

[20] *M. E. Frankel, Criminal Sentences: Law Without Order* 5 (1973).

[21] One commentator uses the terms "free agents" and "legally bound agents" to describe the change in status that occurs after conviction. *See* Palmer, "A Model of Criminal Dispositions: An Alternative to Official Discretion in Sentencing," 62 *Geo. L. J.* 1, 3 (1973).

formal sense at least, silence cannot be punished and indeed may be rewarded.[22]

The adverse consequences of the shift in status are swift and dramatic. There can be no doubt that a legally correct judgment of guilt or delinquency gives the state a power to deal with the offender that it did not previously have. Indeed, the object of the proceeding is to arrive at the point at which an appropriate disposition may be fashioned and imposed.[23] However, the question that ought not to be avoided is: Why does the generally conceded significance of the decision lead inevitably to the vast and generally unscrutinized discretion of the judge? What is the logical link between the decision-maker's almost total control of procedure and substance, and the nature and significance of the dispositional decision?

It is submitted that the nature and the significance of the dispositional decision argue against the continuation of this procedural no man's land. As a matter of good sense and good law, there must be some balance in the procedural advantages at disposition. These standards are designed to redress the present imbalance, which severely disadvantages the juvenile and his or her representative. Governing "statutes merely direct that the disposition be made in the best interests of the child and for the protection of the community."[24] Some statutes call for periodic review of probation orders and others limit the time that a juvenile may be institutionalized, but generally the judge's discretion is unfettered. Taken by itself, the "best interests-protection" standard is close to meaningless, and creates contradictory and conflicting interests with no guidance on priorities or how to resolve conflicts.[25] From the standpoint of aiding the determination of relevance and materiality in dispositional facts, the best interests-protection standard is, again, so broad that nearly any item can be smuggled into the dispositional decision.[26]

The standards presented here reflect the view that the fact-finding

[22] That is, given the allocation of the burden of persuasion, if the state fails to meet its proof obligations, the accused wins, even if he or she remains silent. The textual description is not meant to be exhaustive, but simply representative of the sorts of weapons available to the accused prior to a determination of guilt.

[23] Undoubtedly, there are other objectives. These could include a public statement about the official concern for accusations of wrongdoing, as well as making orderly and organized efforts to prove or disprove an accusation. But, ultimately, the issue is what sanction, if any, is appropriate in a given case.

[24] *Paulsen & Whitebread, supra* at 174.

[25] *See* Brown v. Doeschot, 175 N.W.2d 280 (Neb. 1970), rejecting the argument that only the best interests of the child are to be considered. In *In re* Walter, 172 N.W.2d 603 (N.D. 1969), the court reversed an order of commitment based on overtly punitive factors and adopted an early "least drastic alternatives" approach.

[26] In discussing the role of counsel in juvenile proceedings, one author has

aspect of the dispositional process is at least as significant as its counterpart at adjudication. Indeed, given the vast number of uncontested cases, there is a strong argument for even greater concern for procedural regulation of the fact-finding process at disposition.[27] The nature of the charge, particularly as other standards move in the direction of greater statutory and charging specificity, defines and limits the nature of adjudicatory facts; it is recognized that dispositional facts certainly will be different in nature and perhaps inherently broader.

How such facts may be limited will be determined in the first instance by the standards related to dispositional alternatives and thereafter by the mechanisms recommended here.

### Liberty and Grievous Loss: Interest and Valuation

The preceding discussion has emphasized the significance of the dispositional decision without characterizing the legally recognized interests at stake. Certainly at this time, from the adjudicated delinquent's perspective, this is a legal "no rights" area. Judges on the whole may be more lenient than with adult offenders, but that is not based on legally cognizable claims nor is such lenience systematic or inherently equitable.[28]

stated that dispositional proceedings are less complex than adjudicatory proceedings, since rehabilitation is the only permissible objective. *See* Treadwell, "The Lawyer in Juvenile Court Dispositional Proceedings: Advocate, Social Worker, or Otherwise," 16 *Juv. Ct. Judges J.* 109, 110 (1965).

[27] "Since the majority of juvenile delinquency hearings involve pleas of guilty, . . .the disposition decision may be the most critical stage of all and the one most urgently requiring an advocate for the child." Skoler, "The Right to Counsel and the Role of Counsel in Juvenile Court Proceedings," 43 *Ind. L.J.* 558, 569 (1968).

[28] According to Law Enforcement Assistance Administration data for 1971, the average length of stay in state training schools was 8.7 months. L.E.A.A., "Children in Custody: A Report on the Juvenile Detention and Correctional Facility Census of 1971" 4 (undated). More recent data show a slight reduction to 8.6 months. G. Wheeler, "National Analysis of Institutional Stay: The Myth of the Indeterminate Sentence" 9 (Ohio Youth Commission, Division of Research, Planning, and Development, undated). Wheeler also makes the point that, nationally, younger juveniles and females appear to serve more time than is warranted by the offense, and that male status offenders often serve more time than the more serious felony index offenders. *Id.* at 20.

In conversations with the reporter, Wheeler has stated his belief that younger status offenders tend to remain institutionalized longer than the more serious offenders because they are more tractable, the "treaters" are more comfortable with them, and, since they probably should not be institutionalized to begin with, their success on release is high and thus the track record of the "treaters" is improved.

For legal analysis it is expedient to take a position on what interest or interests are at stake at disposition and then attempt some ordering of values. Recent Supreme Court decisions provide a framework for analysis and demonstrate that at the constitutional level the Court has evolved the following formula: the greater the defendant's potential loss, the greater the concern for procedural safeguards.[29] When the interest at stake has been characterized and a value assigned it (for example, "grievous loss") then the Court utilizes a balancing approach. In *Goldberg v. Kelley* this was expressed as follows: "The extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be condemned to suffer grievous loss, and depends upon whether the recipients' interest in avoiding that loss outweighs the governmental interest in summary adjudication."[30]

Thus, we have established a constitutionally based formula that first describes and then assigns value to an individual's interest, and from there proceeds to balance the competing interests at stake in order to arrive at a constitutionally mandated procedure. It would seem to be a rather easy logical progression from the liberty at stake in a juvenile proceeding to a constitutionally mandated due process type hearing. However, logic does not always prevail in such matters and there are some rather clear expressions from the Court that dispositional proceedings may constitutionally remain wide open affairs.

*In re Gault*'s limitation to adjudicatory processes was made plain when the Court stated: "While due process requirements will, in some instances, introduce a degree of order and regularity to juvenile court proceedings to determine delinquency, and in contested cases will introduce some elements of the adversary system, nothing will require that the conception of the kindly juvenile judge be replaced by the opposite, *nor do we here rule upon the question whether ordinary due process requirements must be observed with respect to hearings to determine the disposition of the delinquent*

[29] *See* Morrissey v. Brewer, 408 U.S. 471 (1972) (where conditional liberty in the form of parole was at stake, and procedural due process was required for revocation); Bell v. Burson, 402 U.S. 535 (1971) (involving suspension of a driver's license and requiring procedural due process); and Goldberg v. Kelley, 397 U.S. 259 (1970) (involving the loss of welfare benefits, and introducing the important term "grievous loss" as a way of describing the individual interest at stake).

[30] 397 U.S. 259, 262-63 (1970).

*child.*[31] A clearer expression of the Court's dispositional inclinations was provided by Justice Brennan in *In re Winship* when he wrote: "And the opportunity during post-adjudicatory or dispositional hearing for a wide-ranging review of the child's social history and his individualized treatment will remain unimpaired."[32]

The position taken here as to the characterization of the interest at stake, and the value placed on that interest, is as follows:

I. The interest at stake in a dispositional proceeding following an adjudication of delinquency is *liberty.*[33]

II. The potential loss of the juvenile's liberty at stake in a dispositional proceeding shall be weighted and treated as a *"grievous loss."*

The term liberty is used here in an expanded rather than a limited sense. That is, it is not intended simply to convey limitations on freedom of movement. Rather, it is intended to convey a complex of freedoms, including freedom of association and speech, freedom from physical and psychic intrusions, the right to one's individual personality and its manifestations, and the like.[34] This complex of freedoms encompassed by the term liberty is necessarily bounded by whatever legal restrictions relate to persons generally and juveniles in particular.[35]

A finding of delinquency necessarily gives the state a power to deal with the juvenile that it did not previously possess. That power

[31] 387 U.S. 1, 27 (1967) (emphasis added). While the Court clearly leaves the question open as to dispositional procedures, one may infer from the quotation that the Court assumed that a dispositional hearing was in order, although it did not discuss such a hearing.

Since *Gault*'s approach to nondispositional due process is at least somewhat dependent on the failure of the system to deliver its promised help, it may well be that the totally nonadversary nature of dispositional proceedings can be challenged (or conditioned) on a "right to treatment" basis.

[32] 397 U.S. 358, 366 (1970). In McKeiver v. Pennsylvania, 403 U.S. 528, 542 (1971), it was argued that allowing jury trials would not impair the benefit of the juvenile court's "flexible sentencing permitting emphasis on rehabilitation. . . ." This, however, was not seen as a compelling factor, and the Court rejected the claim of a constitutional right to a jury trial. It was also argued that jury trials reduce the prejudice inherent in the fact that, not infrequently, judges view the social file and prior record of the juvenile in advance of adjudication. This, too, was rejected as a compelling factor on the jury *vel non* question. *Id.* at 550.

[33] "However benignly motivated and executed, the deprivation of a child's liberty is punishment." Edwards, "The Rights of Children," 37 *Fed. Prob.* 34, 39 (1973).

[34] *See J. Rawls, A Theory of Justice* 201 (1971).

[35] No effort will be made here to describe the special limitations and affirmative rights associated with youth, since that is outside the scope of these standards.

may aptly be described as the power to negatively affect some aspect of liberty as it has been described above. The standards presented here relate to the manner in which that interest in liberty may be affected. As long as an adjudication of delinquency, or some particular aspect of delinquency, does not call for the automatic imposition of a liberty-depriving sanction, then there must be substantive and procedural standards by which to reach the deprivation decision, and those standards should reflect the decision's true significance. It will not do to say that the adjudication, by itself, is a grant of power to diminish existing liberty; the issue is *how*, not *whether*, that power may be exercised.

Numerous cases speak in terms of a juvenile's having a right not to liberty but only to custody.[36] More recent cases have cited that concept without approval, as in *In re Gault*, where Justice Fortas referred to it as having "led to a peculiar system for juveniles."[37] In characterizing the interest at stake here as liberty, this proposition must be dealt with. Like many legal slogans, this one has a germ of truth, but it is unlikely to resolve the question of appropriate dispositional procedures. We may concede that it means parental control until emancipation, and we may further concede that the state seeks no more than to substitute itself for the parents. However, the very act of substitution and the claim of no more control than that of the parents is itself a significant incursion into an ongoing relationship.

Looked at another way, the slogan has a comparative flavor; juvenile's rights are generally inferior to those of adults.[38] This also may be conceded, but once again the child's legal position relative to adults is hardly determinative of how those rights may be affected in a delinquency proceeding. Thus, the characterization of what is at stake as liberty is intended to make plain that the interest is identifiable, that it is personal to the juvenile, and that it is an interest deserving special procedural concern. The prospect of loss is real and not accurately described as merely the substitution of guardians.

In a very real sense, the dispositional proceeding represents a "taking" and not a "granting" decision as those terms have been used by the courts. The prospect of a grievous loss is a compelling interest, and while the state's interest in efficiency, convenience, and even benevolence may be conceded, those claims are not sufficiently compelling to provide a continuing rationale for procedurally denuding

[36] *See, e.g., Ex parte* Januszewski, 196 F. 123 (C.C.S.D. Ohio 1911).

[37] *In re* Gault, 387 U.S. 1, 17 (1967).

[38] *See generally* Rodman, "Children under the Law," 43 *Harv. Ed. Rev.* 487 (1973).

the juvenile, whether or not the disposition is contested, but especially when there is no agreement on disposition.[39]

This "grievous loss-taking" analysis provides a conceptual basis for standards that require the state to come forward and demonstrate the need for a particular deprivation of liberty, and further require the creation of a record that includes findings of dispositional facts, a statement of reasons, the sharing of information, and the encouragement of challenge and increased participation in the dispositional process.[40]

## Objectives: General and Particular

The general and particular objectives of the standards contained in this volume are as follows:

I. General.

A. The primary objective of dispositional procedures is to maximize the opportunity to arrive at a disposition consonant with the stated objectives of the juvenile delinquency process and the particular objectives stated for dispositional alternatives.

B. Standards relating to the achievement as well as the appearance of fairness in the proceedings provide limits on the manner in which overall and dispositional objectives are to be achieved.

II. Particular.

The standards seek to:

A. maximize accuracy in dispositional fact finding;

B. maximize the opportunity for meaningful participation by the juvenile, the juvenile's counsel, the parents or guardians, representatives of the state, and, under certain conditions, the victim of the offense;

C. minimize the significance attached to hearsay and conclusions whether or not couched in the language of expertise;

D. utilize explicit fact finding and recorded reasons for the selection of particular dispositions;

E. encourage broad sharing of relevant information;

[39] *See* Gagnon v. Scarpelli, 411 U.S. 778 (1973), and Morrissey v. Brewer, 408 U.S. 471 (1972), both for the proposition that the "loss of liberty" interest survives even a valid conviction for crime, and that the taking of liberty, in the form of revocation of probation and parole, requires some form of procedural due process.

[40] *See* People v. Lewis, 183 N.E. 353, 387 (N.Y. 1932) (dissent), *cert. denied* 289 U.S. 709 (1932), for a perceptive statement that protections are needed "despite the best of purposes and the most benevolent of dispositions," even in the hands of just persons.

F. limit dispositional facts to those that are directly relevant to dispositional objectives;

G. balance formality with informality and create conditions whereby the dispositional hearing is a fair opportunity to influence an impartial decision maker's judgment within the allowable limits of discretion;

H. give recognition to the important interest at stake—liberty—and treat the prospect of a deprivation of liberty as a grievous loss; and

I. within the legislative limits fixed for the underlying offense, provide an opportunity to fashion a disposition responsive to the individual condition or situation of the juvenile.

# *Standards*

## PART I: DISPOSITIONAL AUTHORITY

**1.1 Authority vested in judge.**

**Authority to determine and impose the appropriate disposition should be vested in the juvenile court judge.**

## PART II: DISPOSITIONAL INFORMATION

**2.1 General principles.**

**A. Information that is relevant and material to disposition may be obtained by persons acting on behalf of the juvenile court only after an adjudication, with the exceptions noted hereafter.**

**B. The sources for dispositional information and the techniques for gathering such information are subject to legal standards, as provided in Standards 2.2 and 2.3.**

**C. The information required for the imposition of an appropriate disposition should be directly related to the stated objectives for the selection and imposition of available dispositional alternatives and the nature and quantum of discretion vested in the judge.**

**D. It should not be assumed that more information is also better information, or that the accumulation of dispositional information, particularly of the subjective and evaluative type, is necessarily an aid to decisionmaking.**

**E. Dispositional information should be subject to rules governing admissibility and burdens of persuasion as provided in Standard 2.5.**

**F. Information relating to disposition should be broadly shared among the parties to the proceeding and any individual or agency officially designated as appropriate for the custody or care of the juvenile, as provided in Standard 2.4.**

**G. Any such information should not be considered a public record.**

**2.2 Obtaining information.**

**A. No investigation for dispositional purposes should be undertaken by representatives of the state, nor any additional information of record gathered, until it has been determined that the juvenile has**

engaged in the conduct alleged in the charging instrument, unless the juvenile and the juvenile's attorney consent in writing to an earlier undertaking.

B. Information in the form of oral or written statements relevant to disposition may be obtained from the juvenile, subject to the following limitations:

1. The statement should be voluntary as determined by the totality of circumstances surrounding the questioning and the juvenile should have full knowledge of the possible adverse dispositional consequences that may ensue.

2. In determining voluntariness, special consideration should be given to the susceptibility of the juvenile to any coercion, exhortations, or inducements which may have been used.

3. The juvenile should be afforded the right to consult with and be advised by counsel prior to any questioning by a representative of the state when such questioning is designed to elicit dispositional information.

4. It should clearly appear of record that the juvenile was advised that the information solicited may be used in a dispositional proceeding and that it may result in adverse dispositional consequences.

2.3 Information base.

A. The information essential to a disposition should consist of the juvenile's age; the nature and circumstances of the offense or offenses upon which the underlying adjudication is based, such information not being limited to that which was or may be introduced at the adjudication; and any prior record of adjudicated delinquency and disposition thereof.

B. Information concerning the social situation or the personal characteristics of the juvenile, including the results of psychological testing, psychiatric evaluations, and intelligence testing, may be considered as relevant to a disposition.

C. The social history may include information concerning the family and home situation; school records, in accordance with the *Juvenile Records and Information Systems* volume; any prior contacts with social agencies; and other similar items. The social history report should be in writing and should indicate clearly the sources of the information, the number of contacts made with such sources, and the total time expended on investigation and preparation.

D. When the state seeks to obtain and utilize information concerning the personal characteristics of the juvenile, such information should first be sought without resort to any form of confinement or institutionalization.

1. In the unusual case, where some form of confinement or in-

stitutionalization is represented by the state as being a necessary condition for obtaining this information, and the juvenile or his or her attorney objects, the court should conduct a hearing on the issue and determine whether the proposed confinement is necessary.

2. At such hearing the juvenile prosecutor should set forth the reasons for considering the information relevant to the dispositional decision. The juvenile prosecutor should also indicate what nonconfining alternatives were explored and demonstrate their inefficacy or unavailability. An order for examination and confinement under this standard should be limited to a maximum of thirty days, and should specify the nature and objectives of the examinations to be undertaken, as well as the place where such examinations are to be conducted.

2.4 Sharing information.

A. No dispositional decision should be made on the basis of a fact or opinion that is not disclosed to the attorney for the juvenile. Should there be a compelling reason for nondisclosure to the juvenile, as for example when the names of prospective adoptive parents appear, the court may advise the attorney for the juvenile not to disclose.

B. The information that may be developed in accordance with Part II should be shared sufficiently prior to any predisposition conference which may be held, and sufficiently prior to the disposition hearing to allow for independent investigation, verification, and the development of rebuttal information.

C. The right of access to dispositional information creates a professional obligation that counsel for the juvenile avail himself or herself of the opportunity.

D. The juvenile prosecutor has a right to disclosure of dispositional information coextensive with that of the attorney for the juvenile.

2.5 Rules of evidence.

A. Dispositional information should be relevant and material.

B. When a more severe dispositional alternative is selected in preference to a less severe one, the selection of such alternative should be supported by a preponderance of the evidence.

## PART III: PARTIES PRESENT

3.1 Necessary and allowable parties.

The juvenile, the attorney for the juvenile, the juvenile's parents or guardian or their attorney, and the juvenile prosecutor should be

present at all stages of the disposition proceeding. Other parties with a bona fide interest in the proceedings may be present at the discretion of the court.

3.2 Summons.

The parents or guardian may be summoned to appear. Should the parents or guardian fail to appear after notice, or if reasonable efforts to locate and produce them fail, then the proceedings may be conducted but the court should determine whether or not the interests of the child require the appointment of a guardian *ad litem*.

## PART IV: CUSTODY AWAITING DISPOSITION

4.1 Custody or release.

Decisions concerning the custody or release of juvenile offenders after adjudication and prior to final disposition should be governed by the standards in the *Interim Status* volume.

## PART V: PREDISPOSITION CONFERENCE AND DISPOSITION AGREEMENTS: EXPERIMENTATION SUGGESTED

5.1 Predisposition conferences.

Jurisdictions concerned with the administration of juvenile justice are encouraged to experiment with various forms of predisposition conferences. Such conferences should follow the formal adjudication and precede any formal dispositional hearing.

5.2 Objectives.

Such conferences may be designed to achieve all or some of the following objectives:

A. the identification of dispositional facts that may be at issue;

B. the determination of whether any controversy on dispositional facts will require the production of evidence;

C. the determination of whether any person who has prepared a written report or provided significant information to one who has prepared such a report will be called to testify at the disposition hearing; and

D. to present and discuss dispositional alternatives and, wherever possible, to arrive at an agreed upon disposition.

5.3 Written agreements and judicial approval.

If the parties arrive at a disposition agreement, such agreement

should be reduced to writing and provide for review and final approval by the judge who has ultimate dispositional authority.

5.4 Adoption of rules; evaluation.

Jurisdictions that experiment with such conferences should provide administrative rules to govern such details as place, time, who shall be present, who shall conduct the conference, whether a record should be kept, and any limitations or guidelines that should apply concerning the agreed upon disposition.

B. A jurisdiction that adopts a comprehensive program for predisposition conferences should consider the incorporation of an evaluation component designed to test such matters as costs, efficiency, patterns of agreement and disagreement, the juvenile's sense of justice concerning such proceedings, and similar items.

## PART VI: FORMAL DISPOSITION HEARING

6.1 Prerequisites.

A. If a predisposition conference results in a dispositional agreement, the agreement should be introduced in writing in open court and approved by the judge, as required in Standard 5.3.

B. If a predisposition conference held in accordance with Part V does not result in an agreed upon disposition, or if the judge disagrees with such disposition in any material respect, a formal dispositional hearing should be conducted, with a full record made and preserved.

C. The court should provide written notice to the parties concerning the date, time, and place for such hearing, sufficiently in advance of the hearing to allow adequate time for preparation.

6.2 Compulsory process.

The parties should be entitled to compulsory process for the appearance of any persons, including character witnesses and persons who have prepared any report to be utilized at the hearing, to testify at the hearing.

6.3 Conduct of the hearing.

As soon as practicable after the adjudication and any predisposition conference that may be held, a full disposition hearing should be conducted at which the judge should:

A. be advised as to any stipulations or disagreements concerning dispositional facts;

B. allow the juvenile prosecutor and the attorney for the juve-

nile to present evidence, in the form of written presentations or by witnesses, concerning the appropriate disposition;

C. afford the juvenile and the juvenile's parents or legal guardian an opportunity to address the court:

D. hear argument by the attorney for the juvenile and the juvenile prosecutor concerning the appropriate disposition;

E. allow both attorneys to question any documents and cross-examine any witnesses;

F. allow both attorneys to examine any person who prepares any report concerning the juvenile, unless the attorney expressly waives that right.

## PART VII: IMPOSITION AND CORRECTION OF DISPOSITION

7.1 Findings and formal requisites.

A. The judge should determine the appropriate disposition as expeditiously as possible after the dispositional hearing, and when the disposition is imposed;

1. make specific findings on all controverted issues of fact, and on the weight attached to all significant dispositional facts in arriving at the disposition decision;

2. state for the record, in the presence of the juvenile, the reasons for selecting the particular disposition and the objective or objectives desired to be achieved thereby;

3. when the disposition involves any deprivation of liberty or any form of coercion, indicate for the record those alternative dispositions, including particular places and programs, that were explored and the reason for their rejection;

4. state with particularity the precise terms of the disposition that is imposed, including credit for any time previously spent in custody; and,

5. advise the juvenile and the juvenile's attorney of the right to appeal and of the procedure to be followed if the appellant is unable to pay the cost of an appeal.

B. The court may correct an illegal disposition at any time and may correct a disposition imposed in an illegal manner within [120 days] of the imposition of the disposition.*

*Commission member Justine Wise Polier regards this provision for correcting dispositions as too narrow. She does not believe it should be limited to illegal dispositions, but should embrace the requirement to review dispositions when the child, the parents, or the agency having custody of the child requests review by reason of a change of circumstance or evidence that the child is ready for a less restrictive placement.

# *Standards with Commentary**

## PART I: DISPOSITIONAL AUTHORITY

**1.1 Authority vested in judge.**

**Authority to determine and impose the appropriate disposition should be vested in the juvenile court judge.**

*Commentary*

Unlike adult criminal proceedings, the choice in the juvenile process is not between the trial judge and a jury. Here one must take into account proposals to strip the courts of dispositional authority and place it in the hands of panels.[41] The panel would be composed either of experts or lay persons, depending on the characterization of the problems associated with judge-imposed dispositions.

It is a truism that judges are not likely to be trained in the psychological or social sciences, and thus, to the extent that this sort of expertise is deemed significant in achieving the objectives of disposition, the case for experts is made. It is also true that juvenile or family court judges rarely belong to, or in any way identify with, the community from which most of the youngsters appearing before them come.

The profile of an American juvenile court judge that emerges from a comprehensive survey conducted in 1973 is that of a male, over fifty years of age, married with children, Protestant, a law school graduate, with a long career of public service, and spending less than one-fourth of his judicial time on juvenile matters. See Smith, "A Profile of Juvenile Court Judges in the United States," 25 *Juv. Justice* 27 (1974).

The case for assigning the duty of fixing dispositions to the putative experts is hardly a strong one. That is, there is good reason 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.

[41] *See* Elson and Rosenheim, "Justice for the Child at the Grassroots," 51 *A.B.A.J.* 341 (1965), proposing such a system, and the reply of Woodson, "Lay Panels in Juvenile Court Proceedings," 51 *A.B.A.J.* 1141 (1965).

doubt the existence of the expertise,[42] particularly as it relates to predictions of future conduct. To the extent that such expertise exists, there is little evidence that we shall ever have available the supportive resources and time needed for the diagnostic-prognostic treatment process. As stated in the introduction to this volume, the dispositional decision affects vital interests of the juvenile and the family and the decision is one that calls for expertise in matters of law and procedure. To the extent that clinical or social material is deemed relevant, the legally trained jurist can be expected to play the role of intelligent consumer of such data.[43]

As the juvenile court moves further in the direction of functioning as a court of law, the need increases for persons educated in law and familiar with its processes. With delinquency no longer viewed as some form of human pathology, and the court itself no longer seen as a dispensary employing physicians, this hardly seems the time to resurrect the call for experts.

There is virtually no experience in this country with the use of lay panels. Scandinavian countries—see Tappan, "Judicial and Administrative Approaches to Children with Problems," in *Justice for the Child* 144, 159-66 (Rosenheim ed. 1962)—and Scotland pursue a social welfare philosophy in their approach to children in trouble. See Fox, "Juvenile Justice Reforms: Innovations in Scotland," 12 *Am. Crim. L. Rev.* 61 (1974). This, in turn, leads quite naturally away from judicial decisionmaking, particularly at the disposition stage. Professor Sanford Fox has made an intensive study of the system in Scotland and described the process as follows:

> The Children's Hearing is a lay panel of volunteers who meet with the child at the dispositional stage. The hearing can result in a disposition only where the child pleads "guilty" to the offense he is charged with having committed, or, in proceedings of a "care and protection" nature, where the parents agree that the allegations of neglect are true, that is, where they "accept the grounds of referral." If the grounds are not accepted—if the child says he did not do it, or if the parents deny that they are not bringing the child up properly—the case must be dismissed or sent to a court. Once a court adjudicates a child guilty or

[42] Ennis and Litwack, "Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom," 62 *Calif. L. Rev.* 693 (1974). After studying the literature the authors conclude that there is *no* evidence warranting the assumption that psychiatrists can accurately determine who is dangerous, and there is little evidence that psychiatrists are more expert in making predictions relevant to civil commitment than are laymen.

[43] The training and education programs conducted by the National Council of Juvenile Court Judges are committed to sensitizing juvenile court judges to just such matters. *See* Arthur, "Disposition, the Forgotten Focus," 21 *Juv. Ct. Judges J.* 71 (1970).

> neglected, the case is returned to the lay panel for a disposition decision. Thus, it should be noted that the hearing is somewhat limited, for it cannot make an adjudicatory decision on contested facts. The hearing can be analogized to the sentencing stage of the American judicial process. Guilt has been established by admission or by the criminal courts, and the new system must decide what to do with an offender.
>
> The dispositions reached by the lay panels are binding on the children, although they may be appealed to a court. The panel might, for example, order the child committed to a "List D" school—a reform school, or it might leave the child at home subject to supervision by a social worker, acting somewhat in the capacity of a probation officer. The most important characteristic of the system is that the three lay persons at the hearing have dispositional powers as extensive as those commonly found in an American juvenile court. *Id.* at 79-80 (citations in quoted text omitted).

Professor Fox, while clearly impressed by the Scottish system, has serious doubts as to its transferability to the United States.

One hesitates to say that such a system has no applicability here or that it could not prove workable. However, in the context of the entire standards project, and given the increasing emphasis on a legal arena and format, the use of lay panels for dispositional decisions is not recommended.[44]

Serious consideration was given to a proposal that the judge who presides at adjudication be replaced at disposition. This can be recommended on an experimental basis and limited to jurisdictions where adequate judicial resources exist. The basic reason for limiting this proposal to a recommendation for experimentation is that the dispositional scheme contemplated relies heavily on factors related to the finding of delinquency. Thus, it may be counterproductive to replace the judge who presides at adjudication and lose the knowledge of the offense necessarily gained at that time. See Note, "Rights and Rehabilitation in the Juvenile Courts," 67 *Colum. L. Rev.* 281, 340 (1967) for a similar view in commenting on the District of Columbia practice at that time of using different judges at adjudication and disposition.

[44] For a description of an interesting experiment in New York City with a so-called "community court," *see* Statsky, "Community Courts: Decentralizing Juvenile Jurisprudence," 3 *Capital L. Rev.* 1 (1974).

New Jersey's experiment with juvenile conference committees is exhaustively described and analyzed by D. Hubin, "An Analysis of the Juvenile Conference Committees of New Jersey" (unpublished Ph.D. thesis, New York University, Graduate School of Arts and Science, February 1963).

It should be noted that neither the community court described by Statsky nor the conference committees described by Hubin have any coercive authority. In this respect they are dramatically different from the Scottish system.

## PART II: DISPOSITIONAL INFORMATION

**2.1 General principles.**

**A. Information that is relevant and material to disposition may be obtained by persons acting on behalf of the juvenile court only after an adjudication, with the exceptions noted hereafter.**

**B. The sources for dispositional information and the techniques for gathering such information are subject to legal standards, as provided in Standards 2.2 and 2.3.**

**C. The information required for the imposition of an appropriate disposition should be directly related to the stated objectives for the selection and imposition of available dispositional alternatives and the nature and quantum of discretion vested in the judge.**

**D. It should not be assumed that more information is also better information, or that the accumulation of dispositional information, particularly of the subjective and evaluative type, is necessarily an aid to decisionmaking.**

**E. Dispositional information should be subject to rules governing admissibility and burdens of persuasion as provided in Standard 2.5.**

**F. Information relating to disposition should be broadly shared among the parties to the proceeding and any individual or agency officially designated as appropriate for the custody or care of the juvenile, as provided in Standard 2.4.**

**G. Any such information should not be considered a public record.**

*Commentary*

With the exception of 2.1 D. and G., the above stated general principles are reflected in the more precise and detailed standards that follow. Thus, any elaborate commentary here would be redundant. The general principles, and subsequent standards, are concerned with what information is gathered, the sources of such information, issues of relevancy, and, finally, the sharing and availability of dispositional information.

An overriding objective is to place some limits on the heretofore untrammeled discretion surrounding the treatment of dispositional information.

This concern is reflected in the admittedly precatory statement in 2.1 D. that "[i]t should not be assumed that more information is also better information, or that the accumulation of dispositional information, particularly of the subjective and evaluative type, is necessarily an aid to decisionmaking." Since this statement is not explicitly

dealt with elsewhere in this volume, some indication of its rationale and intent is in order.

Whether one refers to judicial opinions, the writings of lawyers and social scientists, or earlier versions of model or uniform rules, the overwhelming weight of opinion is favorable to the collection and utilization of social investigatory reports and clinical evaluations whenever possible. "The juvenile judge's use of social investigatory reports on the child's background and history is indispensable to sound and informed dispositional decisions." The President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: Juvenile Delinquency and Youth Crime* 35 (1967) (hereinafter cited as *Task Force Report: Juvenile Delinquency.*) The HEW Children's Bureau, "Legislative Guide for Drafting Family and Juvenile Court Acts" § 30 (1969) (hereinafter cited as "Legislative Guide"), goes so far as to require a predisposition study in every case involving delinquency. The other leading proposals clearly favor the collection of such information, but give the judge discretion as to whether or not to order its preparation. See NCCD, "Standard Juvenile Court Act" § 23 (6th ed. 1959) (hereinafter cited as "Standard Act"),[45] and "Uniform Juvenile Court Act" § 28 (1968) (hereinafter cited as "Uniform Act").

The premise underlying the support for social investigatory information is "to provide a basis for individualized treatment so that the disposition will not simply be made by reference to the kind of misbehavior that is the ground for the juvenile's involvement with the court." M. G. Paulsen and C. H. Whitebread, *Juvenile Law and Procedure* 171 (1974). See also *In re Patterson*, 499 P.2d 1131 (Kan. 1972). To the extent, therefore, that a proper disposition is related to traditional notions of culpability and arrived at with reference to the "just desserts" principle—see American Friends Service Committee, "Struggle for Justice" (1971)—the case for dispositional information about the individual is weakened.

There are other problems associated with the collection and use of information for dispositional purposes that are not directly connected with the objective of a disposition. That is, whether the dispositional goal is individualized treatment or the meting out of just punishment, there are still problems of racial and class bias, as well as lack of reliability and validity, in the "objective" intelligence tests. See Sussman, "Psychological Testing and Juvenile Justice: An Invalid Judicial Function," 10 *Crim. L. Bull.* 117 (1974). Clinicians are frequently

[45] A proposed revision of the "Standard Act," October 1973, would make the report mandatory for any disposition except for discharge.

not able to make the sorts of judgments and predictions asked of them. See IX *Psychiatric News* 1 (1974).[46] And it has been pointed out that of fifty possible data items that might appear in a complete social history, it is unlikely that the decisionmaker could actually use more than seven in reaching a dispositional decision. See L. Wilkins, *Social Deviance* 297-98 (1964), and Wilkins, "Information Overload: Peace or War with the Computer," 64 *J. Crim. L. & Crim.* 190 (1973).

In questioning the utility of dispositional information and citing the existence of information overload, the objective is not to discredit the collection and use of relevant data. Rather, the objective is to challenge those who might subscribe to a "more is better" philosophy, in the belief that the quality of decision making is thereby improved. Further, the commitment to "more is better" has real costs in terms of money, the allocation of other scarce resources, and the privacy of the juvenile and those closest to him or her.

This policy is reflected in the standards, which do not require the preparation of a predispositional report[47] and specify procedural safeguards for the acquisition and use of information.

Standard 2.1 G. provides that dispositional information should not be considered a public record. This standard is intended to impose a general limitation on access by private and public agencies as well as individuals, except as access is expressly provided for in these and related standards. The information is designed for dispositional decisions and for the use of those with postdisposition correctional functions to perform, and access should be limited to those purposes and individuals and agencies.

**2.2 Obtaining information.**

**A. No investigation for dispositional purposes should be undertaken by representatives of the state, nor any additional information of record gathered, until it has been determined that the juvenile has**

[46] An American Psychiatric Association task force reports that they have reached the conclusion that neither psychiatrists nor anyone else has reliably demonstrated an ability to predict future dangerousness or violence. For a complete summary of the literature on this point see Ennis and Litwack, "Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom," 62 *Calif. L. Rev.* 693 (1974).

[47] In Strode v. Burby, 478 P.2d 608 (Wyo. 1970), the failure of the judge to order a social investigation under a mandatory statute; *held*, a reversible abuse of discretion. Under a permissive statute it was determined that failure to obtain a probation report did not impair the judge's jurisdiction to commit the juvenile. People v. Aronson, 195 Misc. 609, 91 N.Y.S.2d 121 (1949).

**engaged in the conduct alleged in the charging instrument, unless the juvenile and the juvenile's attorney consent in writing to an earlier undertaking.**

*Commentary*

This standard is designed to ensure the separation of the adjudicatory and dispositional phases, and thus guard against the premature disclosure of information relevant to disposition but irrelevant, and quite possibly prejudicial, to the adjudicatory decision. As stated by a California court: "Throughout the United States, probation officers have commonly followed the practice of preparing for the judge's perusal before the jurisdictional hearing a single report covering both the jurisdictional and the dispositional aspects of the case. This practice has been condemned repeatedly as taxing unnecessarily the capacity of the judge to wall off in his mind, as he determines the issue of jurisdiction, detrimental information included in the social study." *In re Corey*, 72 Cal. Rptr. 115 (1968).

The position taken in this standard is that whatever may be lost by some delay is outweighed by reducing the risks of confusing dispositional and adjudicatory information, and keeping information that may be highly prejudicial from the judge. The "Standard Act" § 23, the "Legislative Guide" § 30, and the "Uniform Act" § 28 all are in agreement with the position expressed here.

For many juvenile offenders, in virtually all juvenile justice systems, some information is likely to be available that is arguably relevant to disposition without undertaking an independent investigation. This standard prohibits an investigation until after the adjudication (unless there is consent), and this prohibition refers both to the development of new facts and to the consolidation of existing record items. Any confusion on a given set of facts should be resolved in favor of the basic objective of reducing the opportunity for prejudice at the adjudicatory stage and of respecting the juvenile's rights to silence and privacy.

It is possible that the judge making the dispositional decision may have presided over preliminary decisions in the present case, or may know the juvenile from prior judicial contacts. It should be plain that at the adjudicatory stage the juvenile, through counsel, may move that the judge be excused. In certain instances a judge may wish to do so *sua sponte*.

No sanction for violation of this standard has been set forth here since the potential prejudice is to the adjudicatory decision. However, it is strongly suggested that unless the juvenile and his or her

attorney consent in writing to an earlier undertaking, that the prohibition be the subject of strong administrative control and, where needed, correction on appellate review.

**B. Information in the form of oral or written statements relevant to disposition may be obtained from the juvenile, subject to the following limitations:**

**1. The statement should be voluntary as determined by the totality of circumstances surrounding the questioning and the juvenile should have full knowledge of the possible adverse dispositional consequences that may ensue.**

**2. In determining voluntariness, special consideration should be given to the susceptibility of the juvenile to any coercion, exhortations, or inducements which may have been used.**

**3. The juvenile should be afforded the right to consult with and be advised by counsel prior to any questioning by a representative of the state when such questioning is designed to elicit dispositional information.**

**4. It should clearly appear of record that the juvenile was advised that the information solicited may be used in a dispositional proceeding and that it may result in adverse dispositional consequences.**

*Commentary*

Standard 2.2 B. sets out minimal rules governing the acquisition of dispositional information from the juvenile. The two major objectives of the standard are to prevent the use of coercion or the promise of reward in obtaining the juvenile's cooperation and to make certain that the juvenile has an awareness of the dispositional consequences of providing such information. To this extent a new right is recognized, that of an adjudicated juvenile not to cooperate as a source of dispositional information. The logical corollary of this is that cooperation shall be based on informed consent.

The concept of a "privilege of noncooperation" at sentencing has received little judicial or scholarly attention. One exception is the work of Professor Larry Palmer, who writes:

> A major purpose of sentencing rules is to clarify whether a particular dispositional policy interferes with an individual's right of noncooperation. By construing rules so that they do not infringe on the individual's right not to cooperate with state processes, the court can use sentencing rules to influence the conduct of other officials in the

criminal law process. Palmer, "A Model of Criminal Dispositions: An Alternative to Official Discretion in Sentencing," 62 *Geo. L.J.* 1, 54 (1973).

Given their currently unlimited discretion in sentencing and dispositions, it is true that the courts have not been highly receptive to the notion of limits on dispositional information. See *Williams v. Oklahoma*, 358 U.S. 576 (1959) (hearsay); *Williams v. New York*, 337 U.S. 241 (1949) (prior crimes for which defendant was not tried, and hearsay); *United States v. Schipani*, 435 F.2d 26 (2d Cir. 1970), *cert. denied*, 401 U.S. 983 (1971) (evidence obtained in violation of fourth amendment); *United States v. Doyle*, 348 F.2d 715 (2d Cir. 1965), *cert. denied*, 382 U.S. 843, 86 (1965) (charges dismissed without adjudication of merits).[48] The second circuit recently affirmed the right of a trial judge to rely at disposition on information as to crimes of which the defendant was acquitted, as well as the trial judge's right to hold out the prospect of a reduction of sentence in exchange for the defendant's cooperation with the government's investigation of influence peddling. *United States v. Sweig*, 454 F.2d 181 (2d Cir. 1972).[49]

Whether one agrees or disagrees with these decisions, it should be noted that juveniles are a class that has been judicially recognized as being particularly susceptible to the influence of those in authority. *Gallegos v. Colorado*, 370 U.S. 49 (1961). The thrust of this standard is to assure voluntariness and informed participation by the juvenile, concepts that go to the heart of any fact-finding process. The fact that the protections provided here for juveniles may exceed the protections afforded adults at sentencing grows out of the relative incapacity of youth to deal with those in authority in an informed and voluntary manner.

Cooperation with the investigator may be tactically advantageous—Kleczek, "Procedure in the Juvenile Court System," 6 *John Marshall J. Prac. & Proc.* 48, 73 (1972)—but that, of course, does not obviate the need to assure voluntariness and informed participation.

[48] *But see* Verdugo v. United States, 402 F.2d 599 (9th Cir. 1968), *cert. denied*, 397 U.S. 925 (1968); United States *ex rel.* Brown v. Rundel, 417 F.2d 282 (3d Cir. 1969).

[49] Whether the same result would—or more properly, should—obtain when an involuntary confession is sought to be used for dispositional purposes is quite another matter. An involuntary confession raises doubts as to trustworthiness and it can be argued that the literal limitation of the fifth amendment to excluding the confession at trial bears no logical relationship to the equal need for trustworthiness at the vital dispositional stage.

Standard 2.2 B. 1. uses the "totality of circumstances" test to determine voluntariness, and requires "full knowledge." The "totality of circumstances" approach, of course, is not a novel test and, should the question arise, courts would not be expected to have much difficulty in applying the relevant standards and isolating the relevant facts. Those facts are divisible into two major categories: the circumstances surrounding the questioning; and any special attributes of the particular juvenile.

Examples of the factors that would be taken into account are the length of the questioning, promises made as to the use of the information, when and where the questioning occurred, misleading information, etc. Characteristics of the juvenile to be taken into account include age, prior experience with the juvenile system, any temporary disabilities (*e.g.*, being under the influence of liquor or drugs) or more permanent disabilities (*e.g.*, mentally retarded), educational level, etc.

Standards 2.2 B. 3. and 4. impose additional requirements on those who would question the juvenile seeking dispositional information. Rather than imposing the full burden of providing advice and counsel on the questioner, who is not likely to be perceived as the juvenile's advocate but should be viewed as neutral, it is preferable to require prior consultation with the juvenile's attorney. Again, this approach rests on the premise that dispositional information has the capacity either to ameliorate or aggravate the dispositional decision, and the juvenile ought not to face an adult interrogator without adult advice concerning how to proceed.

One example may serve to make the point. If the juvenile is asked to admit to other offenses, or to admit that the actual offense was more serious than appeared from the record at adjudication, such an admission may mean the difference between probation and confinement. When such questions are asked in a "we only want to help" fashion, the inducement to speak freely may be too powerful to resist. Given the fact that juvenile dispositions can no longer be viewed primarily as benevolent-therapeutic interventions, it is vital that the juvenile not be made the unwitting agent of his or her own undoing.

Whoever conducts the questioning, which may be done in private after Standard 2.2 B. 3. is complied with, must record the fact that the juvenile was informed of the possible adverse consequences of providing information.

Subject to the possible application of the "harmless error" rule, if it is determined that damaging dispositional information was involuntarily obtained, obtained without the prior advice of counsel, or obtained without providing the necessary warnings, then the dis-

positional judge should clearly exclude such information from consideration, and failure to do so should result in vacation of the disposition.

2.3 Information base.

**A. The information essential to a disposition should consist of the juvenile's age; the nature and circumstances of the offense or offenses upon which the underlying adjudication is based, such information not being limited to that which was or may be introduced at the adjudication; and any prior record of adjudicated delinquency and disposition thereof.**

**B. Information concerning the social situation or the personal characteristics of the juvenile, including the results of psychological testing, psychiatric evaluations, and intelligence testing, may be considered as relevant to a disposition.**

**C. The social history may include information concerning the family and home situation; school records, in accordance with the *Juvenile Records and Information Systems* volume; any prior contacts with social agencies; and other similar items. The social history report should be in writing and should indicate clearly the sources of the information, the number of contacts made with such sources, and the total time expended on investigation and preparation.**

*Commentary*

Standard 2.3 A., B., and C has several objectives: first, to make plain—and reaffirm the existing rule—that dispositional information is distinguishable from adjudicatory information and that the former may be considerably broader than the latter; and second, to indicate that information concerning the social situation and personal characteristics of the juvenile may be useful in a particular case but that acquisition of such information is not mandatory. The admonition contained in Standard 2.1 D. should be consulted in this connection. Finally, the social history report must contain information that will enable the judge and counsel for the juvenile to determine how much time and effort were expended and which sources were consulted.

There are numerous sources for the suggested form and content of the social history report. See L. G. Arthur and W. A. Gauger, *Disposition Hearings: The Heartbeat of the Juvenile Court* 5-14 (1974); and M. G. Paulsen and C. H. Whitebread, *Juvenile Law and Procedure* 170-71 (1974). These standards do not recommend any particular form nor do they provide detailed content requirements.

The kind of information that is relevant and helpful in arriving at a

suitable disposition cannot be separated from the goal or goals sought by the disposition and, to some extent, the nature of the dispositional discretion afforded the judge. As a general proposition, it can be said that the stronger the commitment to a benevolent or therapeutic objective, the stronger the claim to broader information about the juvenile and his or her situation. On the other hand, the stronger the commitment to a disposition fashioned on "just desserts" principles, the less need for information, beyond the nature and circumstances of the offense, age, and the prior record of adjudicated delinquency.

It is not within the scope of this volume to resolve the issues relating to the proper objectives for dispositions. Thus, the standards are drafted to accommodate both "just desserts" and benevolence, and by separating the factors expressed in Standards 2.3 A., B., and C. the distinction between culpability factors and so-called treatment factors is clear.

Standard 2.3 A. states that an *essential* item of dispositional information consists of "any prior record of adjudicated delinquency and disposition thereof." Whether or not prior convictions or adjudications should be used is itself an item of some dispute. See Palmer, "A Model of Criminal Dispositions: An Alternative to Official Discretion in Sentencing," 62 *Geo. L.J.* 1, 54 (1973), taking a negative view.

Nothing in subsections B. and C. prohibits the inclusion of other information relating to prior delinquency. However, such items as "warnings" and arrests, or conclusions about being an important member of a gang—*cf. United States v. Weston*, 448 F.2d 626 (9th Cir. 1971) (an unsupported charge that the defendant was the chief supplier of heroin for the area led to vacation of the sentence)—should be carefully scrutinized both for accuracy and weight. Since disclosure of all dispositional information is mandatory under Standard 2.4, the risks of false or misleading information are minimized.

The dispositional judge should be cautious, therefore, in drawing conclusions of previous misconduct from information that has not resulted in official action. In *Townsend v. Burke*, 334 U.S. 736 (1948), the Court invalidated a sentence imposed on an uncounseled defendant where the trial judge relied on misinformation, or on an erroneous reading of the defendant's prior record. Where a judge relied on a prior conviction obtained in violation of *Gideon v. Wainwright*, 372 U.S. 335 (1963) for sentencing purposes, the Court once again reversed, *Tucker v. United States*, 404 U.S. 443 (1972). These decisions would appear to have equal applicability in the juvenile delinquency process.

The caution with which dispositional judges should seek and utilize clinical evaluations and intelligence tests is discussed in the commentary to Standard 2.1. This additional note of caution was recently voiced: "Thus, we may ultimately discover that the presentence report, rather than serving as an instrument of justice and enlightenment, in effect facilitates and justifies punishment for differences in culture or lifestyle and impresses a particular set of cultural norms upon a dominated minority." Berkowitz, "The Constitutional Requirement for a Written Statement of Reasons and Facts in Support of the Sentencing Decision: A Due Process Proposal," 60 *Iowa L. Rev.* 205, 215-16 (1974).

**D. When the state seeks to obtain and utilize information concerning the personal characteristics of the juvenile, such information should first be sought without resort to any form of confinement or institutionalization.**

**1. In the unusual case, where some form of confinement or institutionalization is represented by the state as being a necessary condition for obtaining this information, and the juvenile or his or her attorney objects, the court should conduct a hearing on the issue and determine whether the proposed confinement is necessary.**

**2. At such hearing the juvenile prosecutor should set forth the reasons for considering the information relevant to the dispositional decision. The juvenile prosecutor should also indicate what nonconfining alternatives were explored and demonstrate their inefficacy or unavailability. An order for examination and confinement under this standard should be limited to a maximum of thirty days, and should specify the nature and objectives of the examinations to be undertaken, as well as the place where such examinations are to be conducted.**

*Commentary*

The use of observational or diagnostic processes and commitments is endemic both to the criminal and juvenile justice system. While the subject has received some attention in the criminal justice area, it has been virtually ignored as a legal issue in the juvenile justice area.

Standard 2.3 D. represents a modest effort to bring some procedural regularity to what is always an incursion into privacy and, when institutionalization is employed, also a deprivation of liberty. If a diagnostic or testing procedure may be conducted without resort to confinement, then this section is not applicable. However, if confine-

ment, however brief, is sought, this section contemplates a hearing, if the juvenile or his or her counsel objects, to determine if the proposed confinement is necessary.

The burden is on the attorney for the state to demonstrate that the least drastic alternatives were explored, and to make a showing as to their inefficacy or present unavailability. If the judge is convinced both of the necessity and that the "least drastic alternative" test has been met then an order for examination and confinement may issue. Such order should be specific, according to Standard 2.3 D. 2., and should be limited to a nonrenewable thirty-day term. It should also be noted here that Standard 6.2 requires the availability of any person who prepares any report that is utilized at the disposition hearing.

The commission gave serious consideration to adding the substantive criteria that no commitment for observation or diagnosis be permitted unless the disposition available to the judge allows for a form of incarceration. This requirement ultimately was rejected for the reason that dispositions short of confinement—for example, probation, with a condition that psychiatric care be made available—may also call for diagnostic information about the juvenile.

The "Standard Act" § 22 and the "Uniform Act" § 28 permit examination of the juvenile at a hospital or other suitable place, but are silent as to whether a nonconfining approach must first be explored. The "Legislative Guide" § 30, however, states that such examinations "shall be conducted on an outpatient basis unless the court finds that placement in a hospital or other appropriate facility is necessary." Thus, the approach taken here is quite similar to the views expressed in the "Legislative Guide."

None of the proposals noted above articulates any procedural requirements, nor do they place any limits on the judge's discretion to order the commitment. One reason for the requirement of a hearing in this standard is the belief that while the Supreme Court has not directly addressed the issue, it has provided some important and relevant analogues. See *Baxstrom v. Herold*, 383 U.S. 107 (1966); *Specht v. Patterson*, 386 U.S. 605 (1967); *Humphrey v. Cady*, 405 U.S. 504 (1971); and *Jackson v. Indiana*, 406 U.S. 715 (1972). See also *Tippett v. Maryland*, 436 F.2d 1153 (4th Cir. 1971), *cert. dismissed* as improvidently granted, *Murel v. Baltimore City Criminal Court*, 407 U.S. 355 (1972).

The Constitution requires some attention to procedural safeguards when a prison term is to be extended or when an extended term is imposed on an offender as a result of a finding of a particular status. Further, when a pretrial commitment could lead to extended or in-

definite confinement, then due process requires that the continued exercise of state power over the individual be accomplished through ordinary civil commitment processes.

The brief, temporary commitment addressed in this section does fall within the cracks of the Court's holdings. However, as a matter of preferred policy, the minimal requirements of Standard 2.3 should be observed. Liberty is at stake, to say nothing of the potential stigma that may attach.

**2.4 Sharing information.**

**A. No dispositional decision should be made on the basis of a fact or opinion that is not disclosed to the attorney for the juvenile. Should there be a compelling reason for nondisclosure to the juvenile, as for example when the names of prospective adoptive parents appear, the court may advise the attorney for the juvenile not to disclose.**

**B. The information that may be developed in accordance with Part II should be shared sufficiently prior to any predisposition conference which may be held, and sufficiently prior to the disposition hearing to allow for independent investigation, verification, and the development of rebuttal information.**

**C. The right of access to dispositional information creates a professional obligation that counsel for the juvenile avail himself or herself of the opportunity.**

**D. The juvenile prosecutor has a right to disclosure of dispositional information coextensive with that of the attorney for the juvenile.**

*Commentary*

Standard 2.4 creates a broad right of disclosure of dispositional information to the attorney for the juvenile. Although no time limits are specified, disclosure is to be made sufficiently in advance of any conference or dispositional hearing, so that its availability is meaningful for the purposes specified. The facts in *Sorrels v. Steele*, 506 P.2d 942, 945 (Okla. Crim. 1973), in which counsel was given ten minutes to read the social summary and recommendations, would be an obvious violation of Standard 2.4 B.

Standard 2.4 A. addresses disclosure to the attorney for the juvenile and anticipates certain arguments raised against broad disclosure. It is often argued that some information may be harmful, or at least distressing, to the juvenile or the parents. For arguments against disclosure, and rebuttal, see Cohen, "Sentencing, Probation, and the Re-

habilitative Ideal: The View from *Mempa v. Rhay*," 47 *Tex. L. Rev.* 1, 22-23 (1968). That possibility is real, but to use it as grounds for the absolute denial of disclosure would appear to miss the mark. As Judge Lindsay Arthur puts it, the report "should not be directly available to the child or parents, inasmuch as some information as to psychological data, parental police records, marital problems, etc., can frequently be detrimental if known by them. Lawyers should be cautioned to use discretion as to sensitive items that should be discussed with their clients only with care, in order to prevent harm to their clients." L. G. Arthur and W. A. Gauger, *Disposition Hearings: The Heartbeat of the Juvenile Court* 18 (1974).

Nondisclosure of dispositional information, particularly the social report, to the parents may create problems. Indeed, in the *Sorrels* case it was found to be error not to disclose to the parents under an Oklahoma statute that specified that the court should advise the district attorney, *parents*, guardian, custodian, or responsible relative, *or their counsel*, of the factual contents of the reports. Since Standard 2.4 does not prohibit disclosure to the parents, disclosure can be made pursuant to the exercise of sound judicial discretion.

It must be emphasized that the right to disclosure is neither an abstraction nor an effort simply to provide scrutiny by one who is not connected with the court. The right to disclosure arises in the context of a right to a full dispositional hearing as provided in Part VI, and the right and duty of counsel both to rebut and challenge. As stated by Justice Fortas:

> We do not agree with the Court of Appeals' statement, attempting to justify denial of access to these records, that counsel's role is limited to presenting "to the court anything on behalf of the child which might help the court in arriving at a decision; it is not to denigrate the staff's submissions and recommendations." On the contrary, if the staff's submissions include materials which are susceptible to challenge or impeachment, it is precisely the role of counsel to "denigrate" such matter. There is no irrebuttable presumption of accuracy attached to staff reports. . . .[I]t is equally of "critical importance" that the material submitted to the judge. . . be subjected, within reasonable limits having regard to the theory of the Juvenile Court Act, to examination, criticism and refutation. *Kent v. United States*, 383 U.S. 541, 563 (1966).

Full disclosure is one of the essential components of a larger series of objectives connected with dispositional proceedings. Those objectives proceed from seeking openness, visibility, and increased accuracy in fact-finding and the conclusions derived therefrom, to the achievement of rational and consistently applied dispositional principles.

The issue of disclosure of juvenile social history reports incident to

dispositional proceedings has not been raised frequently on appeal. This is surprising in light of the holding in *Kent* that counsel has a right to disclosure of such reports at the critically important waiver hearing. In *In re J*, 38 App. Div. 2d 711, 329 N.Y.S.2d 349 (2d Dept. 1972), involving a neglect proceeding, the court held that a psychiatric report prepared by the Family Court Mental Health Clinic could properly be used for dispositional purposes without disclosure to appellants or their counsel. The court noted that there was no objection to the examination and even an effort to receive favorable consideration by the submission of an independent psychiatric report. The relationship between no objection to the examination and the submission of favorable psychiatric opinion to the disclosure of the report prepared by the clinic never was explained.[50]

A better view was expressed in *State v. Lance*, 464 P.2d 395, 400 (Utah 1970), where a social report had been used by the judge but not put in evidence. The court said, "the use of the social file was a denial of due process of law, since appellant had no opportunity to know, cross-examine, explain or rebut this secret evidence."

Broad disclosure is consistent with the policies of the "Legislative Guide" § 45 (b), and the "Uniform Act" § 29 (d), although the latter provides that "[s]ources of confidential information need not be disclosed." The "Standard Act" is silent on that point.[51]

It is recognized that requiring disclosure of all *written* reports or documents submitted to the court does not, by itself, achieve the more basic objective of full disclosure of all dispositional facts and conclusions. Thus, Standard 2.4 A. provides: "No dispositional decision shall be made on the basis of a fact or opinion which is not disclosed to the lawyer for the juvenile."

The quoted language is intended to include oral and written statements. Still, an important issue remains, one that is rarely addressed and difficult to deal with: Can the dispositional judge pick up the telephone and elicit information about the juvenile from the school principal? Can the judge speak privately with the person preparing the report and seek additional facts or clarification? To the extent that the judge is permitted to do so, and if such discussions are not disclosed, then counsel still faces a dispositional proceeding without information that may be vital to the outcome. *In re Gonzalez*, 328

[50] For a carefully considered opinion to the contrary, see *In re* Blaine, 54 Misc. 2d 248, 282 N.Y.S.2d 359 (1967), involving a neglect proceeding.

[51] See ABA Standards for Criminal Justice, *Sentencing Alternatives and Procedures* 210-25; "Model Penal Code" § 7.07 (Proposed Official Draft 1962); President's Crime Commission, *Courts* 20 (various provisions for disclosure and an opportunity to challenge or controvert the contents of the report).

S.W.2d 475 (Tex. Civ. App. 1960) appears to allow *in camera* receipt of evidence by the judge in a case involving a juvenile. Judge Marvin Frankel, in discussing the utility of sentencing councils, indicates that it is a mistake to assume that nobody may influence the course of the sentencing decision outside the courtroom. Probation officers regularly confer with judges, and while Judge Frankel perceives the confrontation issue, he would not prohibit, and presumably would not feel constrained to disclose, such influences. M. E. Frankel, *Criminal Sentences: Law Without Order* 72–73 (1973).

The requirement of reasons, Standard 7.1, ameliorates the problem, but no such rules can eliminate selectivity in the selection and statement of reasons for a given disposition.

In answer to the questions posed above, perhaps all that may be said is that while the judge certainly is not discouraged from seeking relevant information, and while there may be occasions when it is proper to do so in *ex parte* fashion, the judge should disclose to counsel any such contacts and provide counsel with at least the major points of the information received.

Failure to disclose dispositional information should be viewed as reversible error, with vacation of the disposition the most suitable remedy. The judge has no discretion on the disclosure issue, and thus judgment as to what is or is not required must be left to the attorney for the juvenile.

Standard 2.4 D. provides that an attorney who appears for the state, the juvenile prosecutor, has an equal right of access to dispositional information. This right is, of course, subject to applicable privileges if the prosecutor seeks information given in confidence to the juvenile's attorney, or to a doctor who has a treatment relationship with the juvenile, and no such information is provided to the judge.

**2.5 Rules of evidence.**

**A. Dispositional information should be relevant and material.**

*Commentary*

The language of this standard is identical to that found in the statutes of an increasing number of jurisdictions. See N.Y. Family Ct. Act § 745 (a) (McKinney 1963); D.C. Code Encycl. Ann. § 16-2316 (b) (Supp. IV 1971); Fla. Stat. Ann. § 39.03 (3) (Supp. 1973). The standard has several objectives. First, there must be some parameters to what is admissible at disposition. Second, by not including the term "competent"—"Only evidence that is competent, material, and relevant may be admitted in an adjudicatory hearing," N.Y.

Family Ct. Act § 744 (a) (McKinney 1963)—it should be clear that there is greater flexibility in the admission and consideration of evidence at disposition than at adjudication. See "Uniform Act" § 29 (d).

While it is clear that the use of hearsay evidence, at least where there are indicia of trustworthiness in addition to relevance, is not objectionable per se, there are other issues worthy of consideration. See *Gregg v. United States*, 394 U.S. 489 (1969). First, this section is limited by the provisions in Standard 2.2 B. See especially note 49 *supra*. Second, there is serious question, both on constitutional and policy grounds, as to whether information obtained in violation of the fourth, fifth, or sixth amendments, and consequently excluded at the adjudicatory stage, should find its way into the dispositional stage.

Take, for example, a confession that is found to be involuntary and not merely in violation of procedures designed to assure voluntariness. A confession that results from the application of coercion raises the gravest question of untrustworthiness. See C. T. McCormick, *Evidence* 225–34 (1954). For the same reasons that it is abhorent to rely on such a confession at adjudication, it should be similarly viewed at disposition.

Violations of the fourth amendment relating to illegal searches and seizures present a different question. See *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973). That is, the protections of the fourth amendment are not directed to the ascertainment of truth at trial. Rather, the protection afforded is the security of one's person. To be sure, the remedy of exclusion can be said to promote deterrent ends, although even there serious doubt has been expressed. *Bivins v. Six Unknown Agents*, 403 U.S. 388 (1971) (C. J. Burger's dissenting opinion). On the other hand, in *Verdugo v. United States*, 402 F.2d 599 (9th Cir. 1968), Judge Browning stated: "Unless the [illegally seized] evidence were unavailable for sentence as well as conviction, the agents had nothing to lose by risking an unlawful search." *Id.* at 612. In *United States v. Schipani*, 315 F. Supp. 253 (E.D.N.Y.), *aff'd* 435 F.2d 26 (2d Cir. 1970), *cert. denied* 401 U.S. 983 (1971), *Verdugo* was distinguished and the sentencing judge, who also presided at the suppression hearing, permitted to consider conversations overheard by illegal wiretapping. Judge Weinstein appeared to accept the *Verdugo* rule, if it could be shown that the tainted evidence was seized to enhance the possibility of a heavier sentence but found no such factors in the case before him.[52]

[52] *See also* United States v. Rao, 296 F. Supp. 1145 (S.D.N.Y. 1969) (mere allegations of underworld activities improper to consider); People v. White, 267

The law relating to the use of illegally obtained evidence for sentencing or dispositional purposes clearly is in flux. There is no reason to believe that the juvenile delinquency process can long remain immune from grappling with these issues. While no particular standard is set forth herein dispositional judges should be especially alert to claims that dispositional information is untrustworthy, false, or misleading. The extent to which evidence seized in violation of the fourth amendment should be excluded may well turn on whether the seizure was designed to enhance the disposition. Flannery, "The Applicability of the Fourth Amendment Exclusionary Rule to Juveniles in Delinquency Proceedings," 4 *Colum. Human Rights L. Rev.* 417, 446 (1972), argues against the exclusionary rule in dispositional proceedings.

Case-by-case review leading to the enunciation of general principles may well be the best approach to the problem. The increased opportunities for review provided in these standards should expedite the development of case law on point.

**B. When a more severe dispositional alternative is selected in preference to a less severe one, the selection of such alternative should be supported by a preponderance of the evidence.**

*Commentary*

This section is designed to give procedural expression to the "least drastic alternative" doctrine and, at the same time, make clear that a factual basis is required for the selection of a disposition more severe than that which represents the least interference with the juvenile's liberty. See Standard 7.1. In a related context, Professor Richard Singer urged a similar approach in these words:

> [b]efore the state (including the trial judge) may constitutionally send a man to prison, the record must conclusively demonstrate that all other "less drastic" alternatives have been considered and rejected as unsuitable for this particular offender; that in effect the. . .government bears the burden of demonstrating that the defendant cannot be allowed in the community, even under partial supervision, but must be removed from the community to a penal institution. "Sending Men to

N.E.2d 129 (Ill. 1971) (improper to increase sentence based upon judge's opinion that the defendant gave perjured testimony at trial). In United States v. Tucker, 404 U.S. 443 (1972), it was held that the sentencing judge could not consider previous illegal arrests.

Prison: Constitutional Aspects of the Burden of Proof and the Doctrine of the Least Drastic Alternative as Applied to Sentencing Determinations," 58 *Corn. L. Rev.* 51, 55 (1972).

Although it is no longer unusual for a statute to call for a statement of reasons, particularly when confinement is ordered, *e.g.*, Ill. Ann. Stat. ch. 37, § 705-1 (5) (Smith-Hurd 1972), no statute has been found that requires a given level of proof for a particular disposition. Thus, the preponderance test provided for in this section is novel but deemed vital.

## PART III: PARTIES PRESENT

**3.1 Necessary and allowable parties.**

**The juvenile, the attorney for the juvenile, the juvenile's parents or guardian or their attorney, and the juvenile prosecutor should be present at all stages of the disposition proceeding. Other parties with a bona fide interest in the proceedings may be present at the discretion of the court.**

*Commentary*

The need for the juvenile and his or her attorney to be present at all stages of the disposition proceeding would seem to require little elaboration. An argument may be raised that there may be some information presented that may be traumatic, or at least difficult, for the juvenile to hear. This is not intended to be a nonwaivable right to presence, but before a juvenile may be absent from any part of the dispositional proceedings it must appear of record that such absence was on the advice of counsel and with the consent of the juvenile. Such temporary excusals should be the exception to the rule.

It is the juvenile's liberty that is at stake and he or she therefore has a compelling interest in participating in the proceedings. Those who now have custody of the juvenile have a recognizable interest in continued custody and may also be the source of significant dispositional information. In *Stanley v. Illinois*, 405 U.S. 645 (1972), the Court held that a natural parent has a cognizable and substantial interest in the custody of his child, notwithstanding the fact that the child was born out of wedlock. A series of decisions in New York insist not only on the right of parents to be present—*In re Smith*, 21 App. Div. 2d 737, 249 N.Y.S.2d 1016 (1964)—but also on their right

to participate and speak at the hearing—*In re Raul P.*, 27 App. Div. 2d. 522, 275 N.Y.S.2d 449 (1966).[53] Parents also have a waivable right to be represented by counsel at the dispositional hearing.

Numerous statutes bar the general public from juvenile proceedings, including the dispositional phase. That position is adopted here. See, *e.g.*, Hawaii Rev. Stat. § 571-41 (1968); Idaho Code § 16-1801 (Supp. 1973); Ky. Rev. Stat. Ann. § 208.060 (1) (as amended 1972). Standard 3.1 does allow the judge to admit persons other than the formal participants to the proceeding if the judge believes that they have a "bona fide interest" in attending. Those with such an interest could include legitimate researchers, students, individuals connected with other juvenile justice systems, law clinic interns, etc.

3.2 Summons.

**The parents or guardian may be summoned to appear. Should the parents or guardian fail to appear after notice, or if reasonable efforts to locate and produce them fail, then the proceedings may be conducted but the court should determine whether or not the interests of the child require the appointment of a guardian *ad litem*.**

*Commentary*

The interest of the parents or guardian creates a right to be present. If, after notice, they elect not to appear, that may be taken as a voluntary waiver of the right. However, the court may determine that it is in the interests of the juvenile, or of value to the court, that the parents or guardian appear. In that event, a summons may be issued to produce them.

Fla. Stat. Ann. § 39.09 (6) (Supp. 1973) provides:

> It shall not be necessary to the validity of a proceeding covered by this chapter that the parents or legal custodians be present if their identity or residence is unknown after a diligent search and inquiry have been made, or if the parents or legal custodians are residents of a state other than Florida, or if they evade service, or ignore a summons, but in this event the agent of the Division of Youth Services or the agent of the Division of Family Services, or other person who made the search and inquiry shall file in the case a certificate of those facts and the judge may appoint a guardian Ad Litem for the child.

The Florida statute reflects the concern expressed in this section and, in calling for a determination of need for a guardian, recognizes

[53] *See also* Land v. State, 114 S.E.2d 165 (Ga. 1960); *In re* Barajas, 249 P.2d 350 (Cal. App. 1952); Karnb v. Bailey, 180 N.W. 386 (Mich. 1920).

the distinction between the interests of the parents or guardians and the interests of the child. Given the pervasive right to counsel provided by these and other standards, it will be infrequent for a guardian to be required in addition to counsel. *In re Sippy*, 97 A.2d 455 (D.C. 1953).

## PART IV: CUSTODY AWAITING DISPOSITION

**4.1 Custody or release.**

**Decisions concerning the custody or release of juvenile offenders after adjudication and prior to final disposition should be governed by the standards in the *Interim Status* volume.**

*Commentary*

The above cited standards deal comprehensively with interim status detention or release decisions, including the period between adjudication and final disposition. These standards should be consulted for the procedure and criteria applicable to the detention or release issue.

## PART V: PREDISPOSITION CONFERENCE AND DISPOSITION AGREEMENTS: EXPERIMENTATION SUGGESTED

**5.1 Predisposition conferences.**

**Jurisdictions concerned with the administration of juvenile justice are encouraged to experiment with various forms of predisposition conferences. Such conferences should follow the formal adjudication and precede any formal dispositional hearing.**

**5.2 Objectives.**

**Such conferences may be designed to achieve all or some of the following objectives:**

**A. the identification of dispositional facts that may be at issue;**

**B. the determination of whether any controversy on dispositional facts will require the production of evidence;**

**C. the determination of whether any person who has prepared a written report or provided significant information to one who has prepared such a report will be called to testify at the disposition hearing; and**

**D. to present and discuss dispositional alternatives and, wherever possible, to arrive at an agreed upon disposition.**

**5.3 Written agreements and judicial approval.**

**If the parties arrive at a disposition agreement, such agreement should be reduced to writing and provide for review and final approval by the judge who has ultimate dispositional authority.**

**5.4 Adoption of rules; evaluation.**

**A. Jurisdictions that experiment with such conferences should provide administrative rules to govern such details as place, time, who shall be present, who shall conduct the conference, whether a record should be kept, and any limitations or guidelines that should apply concerning the agreed upon disposition.**

**B. A jurisdiction that adopts a comprehensive program for predisposition conferences should consider the incorporation of an evaluation component designed to test such matters as costs, efficiency, patterns of agreement and disagreement, the juvenile's sense of justice concerning such proceedings, and similar items.**

*Commentary*

The commentary to Part V is consolidated and of a somewhat different tone than the rest of the commentary to this volume. While the commission is somewhat favorably disposed to the practices and objectives expressed in Part V, the general view is that since there is little or no experience or precedent with regularized predisposition conferences it is premature to recommend such conferences in the form of standards. Hence, Standard 5.1 is phrased in terms of "encouraged to experiment" and thus lacks the degree of certainty expressed in the other standards.

Although jurisdictions are only encouraged to experiment with all or some of the sections in Part V, a "black letter" guide is provided in the belief that this might be of aid to those who wish to implement a form of predispositional conference. The commentary provided is designed as an additional aid.

It was stated in the Introduction to this volume that a major objective of these standards is to "balance formality with informality and create conditions whereby the dispositional hearing is a fair opportunity to influence an impartial decisionmaker's judgment within the allowable limits of discretion." A predispositional conference may be a strategy that can aid in achieving that objective.

Too often our justice system finds itself focusing its procedural concerns on the most visible aspects of the particular process, while allowing the effective decisionmaking to proceed at a low level of visibility, untouched by ceremony and unregulated in its outcomes.

Perhaps 90 percent of all convictions in the lower criminal courts are the result of negotiated pleas or deals. Blumberg, "The Practice of Law as a Confidence Game: Organizational Cooptation of a Profession," 1 *L. & Soc'y Rev.* 15, 18 (1967). Only recently has the practice of plea bargaining emerged from its "everybody does it but no one talks about it" status and become subject to contract-like rules by the Supreme Court. See *Brady v. United States*, 397 U.S. 742 (1970); *McMann v. Richardson*, 397 U.S. 759 (1970).

It is generally accepted that the great majority of juvenile cases are handled by pleas to the charges, although no hard data on point appear to exist. However, given the fact that most juvenile codes presently make no distinction between varying offenses and the severity of the possible disposition, plea bargaining is less likely to occur than in adult cases.

Two authors who studied the practices in Cook County state: "There are limited opportunities for plea bargaining in juvenile court, however, because a defendant only can be found guilty of delinquency, no matter what criminal charge is proved. Nothing is gained by reducing aggravated assault to assault if the outcome is the same in both cases." Platt and Friedman, "The Limits of Advocacy: Occupational Hazards in Juvenile Court," 116 *U. Pa. L. Rev.* 1156, 1171 (1968).

On the other hand, there are reports that both post- and preadjudication bargaining of a sort occurs, although the bargaining may be with the probation officer and not a prosecutor. See Cayton, "Emerging Pattern in the Administration of Juvenile Courts," 49 *J. Urban Law* 371, 389 (1971). Since the project is committed to the proposition that the severity of a disposition should be limited by the seriousness of the underlying conduct, although not to the exclusion of treatment or rehabilitation efforts, it is conceivable that the inducement to negotiate pleas will increase proportionately.

The potential merit of the predispositional conference is to regularize and control what some believe to be the inevitable dispositional or plea discussions prior to hearing. The conference provides a participatory format for the parties, and even if agreement cannot be reached, the parties come to the more formal proceedings with their factual disputes clarified.

Even if the parties cannot agree on a disposition to be presented for judicial approval, Standard 5.2 lists the other possible benefits of a predisposition conference, including the identification of factual disputes, and the determination of whether the production of evidence will be needed, whether witnesses will be called, and whether certain dispositional alternatives have been agreed upon as inappropriate.

The recommendations in Part V should be distinguished from the more commonly recommended consent decree. As described by the President's Crime Commission:

> Another method of employing the arbitrating and treating authority of the juvenile court without the disadvantages of adjudication is the consent decree. It is appropriate for cases in which adjudication appears unnecessary but some control seems essential to assure community protection or, in incorrigibility cases, the well-being of the juvenile.
>
> Consent decree negotiations, like preliminary conferences, would be conducted by intake officers and would involve the juvenile and his parents and lawyer (the presence of whom, unless waived, would be required) and the probation officer assigned to the case. President's Crime Commission, *Juvenile Delinquency and Youth Crime* 21 (1967).[54]

The essential difference, of course, is that the consent decree is preadjudicatory while the predisposition conference is postadjudicatory. See *The Juvenile Probation Function: Intake and Predisposition Investigative Services.* What is suggested here more closely resembles the Colorado Council of Juvenile Court Judges, "Standards of Juvenile Justice" (1974):

> 8.2 Dispositional Hearing
>
> (a) The dispositional hearing may immediately follow the adjudicatory hearing if a joint recommendation for disposition is presented by the parties and the court concurs.
>
> (b) If the judge or a party feels there is a need for more in-depth information, there should be sufficient time between the adjudicatory hearing and dispositional hearing for preparation of a pre-disposition social history containing a case plan and specific recommendations. The elements and presentation of this report are set forth more specifically in the section on Probation Services of these Standards.

The commentary makes clear that some discussion concerning disposition is not only anticipated but approved:

> In many cases there will have been sufficient contact between the parties and the probation department that a mutually agreed dispositional recommendation has been arrived at subject to the judge's approval. In these instances the court is encouraged to proceed to a dispositional hearing following the adjudicatory hearing.

Standard 5.4 A. suggests that a jurisdiction which adopts a predisposition conference should provide for administrative rules governing the conference and give consideration to the incorporation of an

[54] *See also* "Legislative Guide" § 33.

evaluation component. See S. Adams, *Evaluative Research in Corrections: A Practical Guide* (1975); C. W. Weiss, *Evaluation Research* (1972).

Once again it should be stressed that while the predisposition conference may have much to commend it, it is offered here without the force of standards and on the basis of its consideration as an experimental program.

## PART VI: FORMAL DISPOSITION HEARING

**6.1 Prerequisites.**

**A. If a predisposition conference results in a disposition agreement, the agreement should be introduced in writing in open court and approved by the judge, as required in Standard 5.3.**

**B. If a predisposition conference held in accordance with Part V does not result in an agreed upon disposition, or if the judge disagrees with such disposition in any material respect, a formal dispositional hearing should be conducted, with a full record made and preserved.**

**C. The court should provide written notice to the parties concerning the date, time, and place for such hearing, sufficiently in advance of the hearing to allow adequate time for preparation.**

*Commentary*

Standards 6.1 B. and C. state the basic due process components of a right to notice and a hearing. The formal requisites of the dispositional hearing are set out in Standard 6.3 *infra*.

Previous efforts at standard setting ignore the procedural format of a dispositional proceeding and are inconclusive as to the right to any hearing. The "Standard Act" § 24, for example, merely specifies what orders may be entered after a finding of jurisdiction over the child.

A major exception is the National Advisory Commission on Criminal Justice Standards and Goals, "Courts" § 14.5 (1973), which goes further to state:

> The dispositional hearing in delinquency cases should be separate and distinct from the adjudicatory hearing. The procedures followed at the dispositional hearing should be identical to those followed in the sentencing procedure for adult offenders.

The commentary states that:

> The Commission believes that the only manner in which disposition in delinquency cases should differ from sentencing in adult criminal

> prosecutions is that the court should have a wider range of dispositional alternatives available in the delinquency case. The procedure followed to determine the appropriate disposition for a juvenile adjudicated delinquent should not differ from that used to determine the appropriate sentence for an adult offender. The recommended adult procedure is set out in the Corrections Report chapter on sentencing. The right to counsel, the right to present evidence and argument favoring a more lenient disposition, and the right to access to the information upon which the decision is made should not differ. Consequently, the standard simply takes the position that no procedural differences between the two situations should exist. *Id.* at 304.

Despite some uncertainty as to the theoretical right to a dispositional hearing, such hearings are now either the accepted practice or required by statute. Under a law calling for a separate disposition hearing, a New York court held: "Even though the court may be so familiar with all of the facts that it believes that a dispositional hearing will be of no benefit to the child, the requirements of Sec.'s 743-49 [Family Ct. Act] must be followed and a dispositional hearing held." *In re Dennis*, 20 App. Div. 2d 86, 244 N.Y.S.2d 798, 801 (1963). A California court, also dealing with a statutory provision for a hearing, went a bit further, stating: "We conclude that this right is basic, that its denial is violative of due process and constitutes prejudicial error." *In re Mikkelsen*, 226 Cal. App. 2d 467, 38 Cal. Rptr. 106, 107 (1964). Two authorities in this field concur and argue: "The opinion in *Kent v. United States*, 383 U.S. 541 (1966) suggests that dispositional decisions in the juvenile court must, on constitutional grounds, be preceded by a hearing." M. G. Paulsen and C. H. Whitebread, *Juvenile Law and Procedure* 167 (1974).

The parties must be given written notice of the hearing in sufficient time to adequately prepare. No specific time period in which to hold the hearing is provided here. There are an infinite variety of circumstances that may contribute to the speed of the hearing, not the least of which is the amount and type of information that may be sought. When an extremely mild disposition seems called for, an admonishment, for example, it is probably in everyone's interest to conduct the dispositional phase as soon as possible. In any case a delay of nine months awaiting a social report is unconscionable and should not be tolerated. See *People v. Cato*, 283 N.E.2d 259 (Ill. 1972).

**6.2 Compulsory process.**

**The parties should be entitled to compulsory process for the appearance of any persons, including character witnesses and persons who have prepared any report to be utilized at the hearing, to testify at the hearing.**

*Commentary*

Compulsory process is a necessary component of the parties' right to a hearing, with the right to present evidence through witnesses. The court also may subpoena witnesses to testify at the hearing.

When written reports are submitted, it is vital that "[t]he parties or their counsel be afforded an opportunity to. . .cross-examine individuals making the reports." "Uniform Act" § 29 (d). Having the person who prepares a report available for examination does not depend on the quality of the report. However, the lower the quality of the report, the stronger the case for providing an opportunity to examine the person who prepared it.[55]

Given the significance likely to be attached to such reports, and given the questionable relevance of material likely to be included, counsel must have the opportunity to examine the preparer. See *Kent v. United States*, 383 U.S. 541, 563 (1966). Of particular interest is how information was obtained, from whom, the link between facts and conclusions, the tests or examinations performed, their reliability and validity, the experience and background of the witness, etc. See J. Ziskin, *Coping With Psychiatric and Psychological Testimony* (2nd ed. 1975), for the most thorough exploration of these matters.

It could be argued that requiring the attendance of such witnesses will place a further burden on an already burdened staff, and that diagnosticians and clinicians, already wary of court appearances, will be even more reluctant to become involved. However, if information is to be provided that may affect the juvenile's liberty, that may stigmatize, and that will accompany the juvenile to other agencies, it must be insured that such information is accurate, relevant, and material. If this is considered overly burdensome, the judge may always reduce the amount of information sought. If the person who prepares a report is not made available, then it should frankly be recognized that economics or convenience has prevailed over a right basic to our jurisprudence—the right to confront and examine those who give evidence.

Standard 6.3 F. provides that the attorney for the juvenile may waive the right to examine any person who prepares a report for the

[55] In interviews conducted with the highest ranking officials of the New York State Division for Youth, in Albany, New York, June 27, 1973, the reporter was told that the social reports that accompany a youth to the division are generally of poor quality. Aside from specific record information, the division feels compelled to conduct its own evaluation and, where indicated, clinical studies. Those officials also stated that they knew of no compelling argument against disclosure of the reports.

court. Also, it should be noted that in the event such person is unavailable, and the judge is convinced that the unavailability is bona fide, and that, on the facts, delay would be even more prejudicial to the juvenile, the judge may elect to consider the document and hear any challenges to the document, without the presence of the preparer.

**6.3 Conduct of the hearing.**

**As soon as practicable after the adjudication and any predisposition conference that may be held, a full disposition hearing should be conducted at which the judge should:**

**A. be advised as to any stipulations or disagreements concerning dispositional facts;**

**B. allow the juvenile prosecutor and the attorney for the juvenile to present evidence, in the form of written presentations or by witnesses, concerning the appropriate disposition;**

**C. afford the juvenile and the juvenile's parents or legal guardian an opportunity to address the court;**

**D. hear argument by the attorney for the juvenile and the juvenile prosecutor concerning the appropriate disposition;**

**E. allow both attorneys to question any documents and cross-examine any witnesses;**

**F. allow both attorneys to examine any person who prepares any report concerning the juvenile, unless the attorney expressly waives that right.**

*Commentary*

As stated in the ABA Standards for Criminal Justice, *Sentencing Alternatives and Procedures* 253:

> The purpose of the in-court proceedings prior to the pronouncement of sentence is three-fold: to inform the court as an aid to the exercise of its sentencing discretion, to give the parties an opportunity to assure both that the court's information is accurate and that factors which they think relevant to the sentencing decision will come to its attention, and to allow for the imposition of sentence in an atmosphere which, while it may not affirmatively contribute to the rehabilitation of the offender, will at least not give him further cause to leave the sentencing stage with a sour attitude.

The juvenile is recognized as having a right to be heard as a matter of fundamental fairness. *State in the Interest of A.H.*, 279 A.2d 133, 135 (N.J. 1971). The right of the parents or guardians to be present and speak out has also been given recognition. See cases cited in the commentary to Standard 3.1.

This standard seeks to achieve procedural regularity, but what is provided herein still falls short of the more elaborate trial-type hearing. Previous standards and commentary in this volume have explored the rationale and provided relevant authority for most of the provisions in this standard. For additional discussion and support for the approach taken here, see generally M. Frankel, *Criminal Sentences: Law Without Order* (1973); National Advisory Commission on Criminal Justice Standards and Goals, "Corrections" § 5.11 and commentary (1973).

## PART VII: IMPOSITION AND CORRECTION OF DISPOSITION

**7.1 Findings and formal requisites.**

**A. The judge should determine the appropriate disposition as expeditiously as possible after the dispositional hearing, and when the disposition is imposed,**

**1. make specific findings on all controverted issues of fact, and on the weight attached to all significant dispositional facts in arriving at the disposition decision;**

**2. state for the record, in the presence of the juvenile, the reasons for selecting the particular disposition and the objective or objectives desired to be achieved thereby;**

**3. when the disposition involves any deprivation of liberty or any form of coercion, indicate for the record those alternative dispositions, including particular places and programs, that were explored and the reason for their rejection;**

**4. state with particularity the precise terms of the disposition that is imposed, including credit for any time previously spent in custody; and**

**5. advise the juvenile and the juvenile's attorney of the right to appeal and of the procedure to be followed if the appellant is unable to pay the cost of an appeal.**

*Commentary*

Standard 7.1 has several objectives. First, it is designed to improve the quality of justice and dispositional decisionmaking. The court is required to make findings on controverted issues of fact and to indicate the weight attached to all dispositional facts regarded as significant. In addition to fact finding, the judge is required to provide the reason or reasons for the selection of any disposition and to state the objective or objectives to be achieved.

The provisions noted above, as well as those contained in Standards

7.1 A. 3. and 4., are designed to facilitate the appellate review of dispositions. Certainly one of the objectives of appellate review of dispositions is the development of a body of dispositional principles. Without a record of sufficient completeness, as provided for here, effective review is impossible.

No specific time is mandated for the determination and execution of the order of disposition. Rather, the judge is urged to act "expeditiously." It should be rare that the decision cannot be arrived at very soon after the proceedings are completed. However, flexibility is provided to allow for such activities as the additional investigation of a placement, the very process of deciding in a difficult case, the evaluation of a substantial change in circumstances, etc. The rule, however, should be a speedy, concrete, and definite dispositional order. See L. G. Arthur and W. A. Gauger, *Disposition Decisions: The Heartbeat of the Juvenile Court* 58–61 (1974).

The judge should make specific findings on all controverted issues of fact. If a controversy develops on facts such as regularity of school attendance, prior record, or the juvenile offender's role in this or other offenses, the resolution of such a controversy can be vital to the outcome. In the context of the "full disclosure" required by Standard 2.4, there may well be substantial disagreement on factual presentations, and this standard provides for their open and recorded resolution. It is hoped that this standard will prevent the type of error present in such cases as *State v. Pohlabel*, 160 A.2d 647 (N.J. 1960); and *United States v. Malcolm*, 432 F.2d 809 (2d Cir. 1970).

Whether or not a "significant" dispositional fact is controverted, the judge is to indicate for the record the weight attached to all "significant" facts in arriving at the dispositional decision. This should not be an onerous requirement, and it is a judicial activity not without precedent.

What this requirement envisions is not a point-by-point summary and weighting of every evidentiary item before the court. Rather, it asks the judge to isolate and identify the facts such as prior record, factors in aggravation or mitigation surrounding the instant offense, restitutive efforts, and the like, that weigh most heavily in arriving at the actual dispositional decision. Judges are discouraged from resorting to "boiler plate" summaries and, as a safeguard, it is well within the function of counsel to ask for specific findings and the weight attached thereto.

For state laws or rules of court calling for dispositional fact finding see Alaska R. Juv. P. 22 (d); and Cal. Welf. & Inst'ns Code § 726.

The judge is also required to state the reasons for a particular disposition, in the presence of the juvenile, as well as the objective or

objectives sought to be achieved thereby. See *State ex rel. Palagi v. Freeman*, 262 P. 168 (Mont. 1927). Curiously, there is more precedent for requiring the articulation of reasons in juvenile than in criminal dispositions. As Judge Frankel puts it: "Criminal sentences, as our judges commonly pronounce them, are in these vital respects tyrannical. Largely unfettered by limiting standards, and thus having neither occasion nor meaningful terms for explaining, the judge usually supplies nothing in the way of a coherent and rational judgment when he informs the defendant of his fate." M. E. Frankel, *Criminal Sentences: Law Without Order* 39 (1973).

Another writer recently has stated that the due process clause of the federal Constitution should be construed to require that each sentencing decision be accompanied by a written statement of reasons for the sentence imposed, and should indicate the supporting facts relied upon. Berkowitz, "The Constitutional Requirement for a Written Statement of Reasons and Facts in Support of the Sentencing Decision: A Due Process Proposal," 60 *Iowa L. Rev.* 205, 207 (1974).[56]

The requirement of reasons is not dependent on any particular philosophical view concerning the objectives of juvenile dispositions; rather, requiring reasons is intended to provide some control over the judge's discretion. Although a treatment or rehabilitation philosophy envisions more dispositional discretion than a "just desserts" philosophy, judicial supervision is called for in both instances, and a statement of reasons is a sine qua non for such supervision.

For statutes or court-made rules requiring reasons in juvenile cases, see D.C. Code Encycl. SCR Juvenile 32 (b) (Supp. 1976), when an order involves placement outside of home; Ill. Ann. Stat. ch. 37, § 705-1 (5) (Smith-Hurd 1972), when commitment to department of corrections is ordered; Minn. R. Juv. Ct., Rule 6-6; and N.C. Gen. Stat. § 7A-285 (1969), which details four mandated findings.

Standard 7.1 A. 3. contains the "least drastic alternative" rule and sets forth procedures to ensure its enforcement. In the exercise of the judge's dispositional discretion, he or she should be guided by the presumption of minimal interference in the life of the juvenile. Thus, the judge must move from considerations of "nominal" sanctions to custodial dispositions, if appropriate, and under this section indicate what was considered and the reason for rejection. Standard 7.1 A. 2.

[56] *See* United States *ex rel.* Johnson v. Chairman, N.Y. St. Bd. of Parole, 500 F.2d 925, 934 (2d Cir. 1975), holding that due process requires the parole board to furnish prisoners a written statement of reasons when release on parole is denied.

combined with Standard 7.1 A. 3. provides a comprehensive treatment of the "reasons" requirement.

Standard 7.1 A. 4. calls for precision in the order of disposition and for credit for time in custody. Failure to observe these requirements may cause serious problems. In *R.L.R. v. State*, 487 P.2d 27, 45 (Alaska 1971), the court found an order of disposition to be overly broad and noted: "An overbroad disposition order may subject a child to harmful collateral consequences by implying to later sentencing judges or others that his misconduct was more serious than a narrower order would have suggested. . . ."

Standard 7.1 A. 5. provides that the court, in the presence of counsel, advise the parties of their right to appeal. See Ohio Juv. R. 34 (E). This is simply to assure that the right is known and, in the case of one unable to pay the costs of appeal, that the proper procedure is made explicit.

**B. The court may correct an illegal disposition at any time and may correct a disposition imposed in an illegal manner within [120 days] of the imposition of the disposition.***

*Commentary*

A disposition that exceeds in nature or duration that which the legislature has allowed is an illegal disposition and raises issues as to the court's jurisdiction. On petition, at any time after the imposition of such an illegal disposition, the court is empowered to modify or even vacate it. This standard is in conformity with *Dispositions* Standard 5.1, which provides for a motion by juveniles, their parents, the correctional agency, or the sentencing court to reduce the nature or duration of a disposition on the grounds of illegality, undue harshness, or inequity.

Whether a new hearing is required would seem to turn on whether new or additional facts are at issue. The judge has discretion on the hearing issue, but should be alert to claims of new or additional facts.

When the disposition imposed violated a procedural rule, and jurisdiction is not at issue, then a time limit for correction is appropriate, especially in light of the broad-based right to counsel provided in these standards.

*Commission member Justine Wise Polier regards this provision for correcting dispositions as too narrow. She does not believe it should be limited to illegal dispositions, but should embrace the requirement to review dispositions when the child, the parents, or the agency having custody of the child requests review by reason of a change of circumstance or evidence that the child is ready for a less restrictive placement.

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