Institute of Judicial Administration

American Bar Association

Juvenile Justice Standards

STANDARDS RELATING TO

Juvenile Delinquency and Sanctions

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, 1980

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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. Twenty volumes in the series have been approved by the House of Delegates of the American Bar Association.

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, 1978, and 1979 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.

In February 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. Of the five remaining volumes, *Court Organization and Administration*, *Juvenile Delinquency and Sanctions*, and *The Juvenile Probation Function* were approved by the

House in February 1980, subject to the changes adopted by the executive committee. *Abuse and Neglect* and *Noncriminal Misbehavior* were held over for final consideration at a future 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 twenty volumes approved by the ABA House of Delegates, 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 founda-

tions. 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 I, which also includes the following volumes:

RIGHTS OF MINORS
ABUSE AND NEGLECT
NONCRIMINAL MISBEHAVIOR
YOUTH SERVICE AGENCIES
SCHOOLS AND EDUCATION
POLICE HANDLING OF JUVENILE PROBLEMS

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 than 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 1.3 was amended by adding "have the discretion to" in order to clarify the intention that the judge's decision to dismiss is discretionary under the circumstances described in the standard.

2. Standard 2.4, which eliminated delinquency liability for private offenses, was deleted on the ground that the definition of delinquency offenses in Standard 2.2 is sufficient.

3. Standard 4.1 (Part IV), which defined sexual offenses and assent by a juvenile to sexual behavior according to the ages of the participating juveniles, was deleted on the ground that each state's penal code should govern, as in other juvenile offenses.

4. Standard 5.2 (formerly 6.2) was amended by increasing the maximum custodial sanction from twenty-four to thirty-six months for a class one juvenile offense and from twelve to eighteen months for a class two juvenile offense. All time periods were bracketed, but the principle of establishing a graduated scale of specific maximum sanctions proportionate to the corresponding penalties in the state penal code was not affected.

Also, a new Standard 5.2 C. was added, authorizing the imposition of successive sanctions specifying a custodial and noncustodial dispo-

sition, provided that the total duration does not exceed the maximum term prescribed for the custodial sanction for the offense, in conformity with *Dispositions* Standard 3.3 C.

Commentary was revised accordingly.

5. Standard 5.4 (formerly 6.4) was amended by bracketing the twenty-first birthday as the date by which juvenile court orders imposing sanctions must terminate.

6. Commentary to Standard 1.1 was revised by adding a reference to rehabilitation in connection with recognizing the unique features of young persons as a purpose of the juvenile delinquency code, thereby coordinating with the *Dispositions* Standard 1.1 statement of the purpose of the juvenile correctional system, which includes "developing individual responsibility for lawful behavior."

7. Commentary to Standard 1.2 was revised by adding a notation that the ABA Section of Family Law recommended deletion of the provision on burden of proof, whereas the Section of Criminal Law did not oppose the standard.

Contents

Introduction

The center of any criminal justice system, whether applicable to juveniles or adults, consists of a set of officially prescribed rules for the behavior of persons within the system's jurisdiction. If these fundamental substantive prohibitions are defective, justice cannot be retrieved by the most meticulous observance of procedural due process or by the most enlightened system of correction.

The primary task enjoined upon those who would reform the delinquency jurisdiction of the juvenile court is, therefore, the revision of the substantive criminal law applicable to juveniles.

In general, present juvenile legislation simply incorporates the criminal provisions applicable to adults under federal, state, or local law, although some states exclude from such incorporation various categories of offenses. Most states supplement these incorporated standards by the addition of special standards dealing with offenses applicable only to juveniles which, in general, seek either to enforce the authority of the family, school, or government over juveniles, or to provide a basis for official intervention in the lives of misbehaving young persons whose conduct violates no criminal law.

This volume recommends complete repeal of all special offenses for juveniles; decriminalization of certain private offenses commonly included in state and local criminal codes (and thus applicable to juveniles by incorporation of those standards); tailoring of certain general principles of criminal law to reflect the special conditions and situations of juveniles; and creation of special grounds of justification and excuse applicable to juveniles.

Because existing juvenile law has almost uniformly consisted of the uncritical and wholesale incorporation of the substantive criminal law applicable to adults, the task of formulating a criminal code uniquely for juveniles has never before been undertaken. One cannot, therefore, begin by assessing the strengths and weaknesses of existing juvenile criminal codes; such codes do not exist. At the same time, one does not write on a clean slate. Much of the criminal law governing adult behavior is appropriately applicable to the same behavior

when engaged in by juveniles. The essence of the present task is to reassess existing criminal law, including proposals for *its* reform, and to recommend those exclusions, modifications, and additions that are necessary and appropriate if that body of law is to be applied to juvenile offenders in ways that promote the basic objectives of the juvenile justice system and preserve the respect and justice owed to juveniles.

A troublesome preliminary issue warrants discussion. To say that the substantive criminal law slate is not clean is something of an understatement. Viewed nationally, the criminal law is a compound of (1) limited federal law presently undergoing substantial revision;[1] (2) state criminal codes, most of which have either been revised or are currently under revision, but also including some for which no revision is presently contemplated; and (3) local criminal ordinances, ranging from uncodified miscellany to comprehensively revised codes. This great diversity in the form and, to a lesser extent, substance, of the criminal law applicable (by incorporation) to juveniles vastly complicates the task of proposing a general reform of juvenile delinquency law. To propose a comprehensive delinquency code for juveniles that includes all those standards now incorporated from adult standards would involve much needless duplication of general criminal law revision now completed or well under way in most jurisdictions.

The general approach adopted in this volume assumes that this revision process will eventually yield a substantially uniform body of federal and state criminal law—at least as to such central features as form, scope, basic definitions, and general principles. The following recommendations, therefore, are intended to be viewed within a criminal law matrix that resembles, in essential features, the Model Penal Code.

[1] National Commission on Reform of Federal Criminal Laws, Study Draft, Working Papers.

Standards

PART I: PRELIMINARY PRINCIPLES

1.1 Purposes.

The purposes of a juvenile delinquency code should be:

A. to forbid conduct that unjustifiably and without excuse inflicts or risks substantial harm to individual or public interests;

B. to safeguard conduct that is without fault or culpability from condemnation as delinquent;

C. to give fair warning of what conduct is prohibited and of the consequences of violation;

D. to recognize the unique physical, psychological, and social features of young persons in the definition and application of delinquency standards.

1.2 Burden of proof.

When there is some evidence supporting an affirmative defense to juvenile delinquency liability, the prosecution should be required to disprove such defense beyond a reasonable doubt.

1.3 Discretionary dismissal.

The juvenile court should have the discretion to dismiss a delinquency proceeding if, having regard to the nature of the conduct charged to constitute an offense and the nature of the attendant circumstances, it finds that:

A. the person or persons whose personal or property interests were threatened or harmed by the conduct charged to constitute the offense were members of the juvenile's family, and the juvenile's conduct may be more appropriately dealt with by parental authority than by resort to delinquency sanctions; or

B. the conduct charged to constitute the offense

1. did not actually cause or threaten the harm or evil sought to be prevented by the law defining the offense or did so only to a trivial extent, or

2. presents such other extenuations that it cannot reasonably be regarded as within the contemplation of the legislature in forbidding the conduct.

PART II: JURISDICTION

2.1 Age.

The juvenile court should have exclusive original jurisdiction in all cases in which conduct constituting an offense within the court's delinquency jurisdiction is alleged to have been committed by a person

A. not less than ten and not more than seventeen years of age at the time the offense is alleged to have been committed; and

B. not more than twenty years of age at the time juvenile court delinquency proceedings are initiated with respect to such conduct; and

C. for whom the period of limitations for such offense has not expired.

2.2 Offense.

A. The delinquency jurisdiction of the juvenile court should include only those offenses which are:

1. punishable by incarceration in a prison, jail, or other place of detention, and

2. except as qualified by these standards, in violation of an applicable federal, state, or local criminal statute or ordinance, or

3. in violation of an applicable state or local statute or ordinance defining a major traffic offense.*

B. For purposes of this standard, major traffic offense should include:

1. any driving offense by a juvenile less than thirteen years of age at the time the offense is alleged to have been committed, and

2. any traffic offense involving reckless driving; driving while under the influence of alcohol, narcotics, or dangerous drugs; leaving the scene of an accident; and such other offenses as the enacting jurisdiction may deem sufficiently serious to warrant the attention of the juvenile court.

C. Any offense excluded by this standard from juvenile court juris-

*Commission member Wald noted her disagreement with the limitation of juvenile court jurisdiction stated in Standard 2.2 A. 2. and A. 3. She feels that any offense that might result in detention, jail, or prison for a child should be included in juvenile court jurisdiction.

diction should be cognizable in the court having jurisdiction over adults for such offenses, notwithstanding that the alleged offender's age is within the limits prescribed by Standard 2.1 *supra.*

2.3 Elimination of uniquely juvenile offenses.

Juvenile delinquency liability should include only such conduct as would be designated a crime if committed by an adult.

PART III: GENERAL PRINCIPLES OF LIABILITY

3.1 *Mens rea*—lack of *mens rea* an affirmative defense.

Where an applicable criminal statute or ordinance does not require proof of some culpable mental state, it should be an affirmative defense to delinquency liability that the juvenile:

A. was neither negligent nor reckless with respect to any material element of an offense penalizing the unintended consequence of risk-creating conduct; or

B. acted without knowledge or intention with respect to any material element of an offense penalizing conduct or the circumstances or consequences of such conduct.

3.2 *Mens rea*—reasonableness defense.

Where an applicable criminal statute or ordinance penalizes risk-creating conduct, it should be a defense to juvenile delinquency liability that the juvenile's conduct conformed to the standard of care that a reasonable person of the juvenile's age, maturity, and mental capacity would observe in the juvenile's situation.

3.3 Consent.

A. Where delinquency liability is defeated or diminished by consent to the conduct charged to constitute the offense, such consent should not be deemed ineffective solely on the ground that it was given by a person who, by reason of youth, was legally incompetent to authorize the conduct.

B. Effective consent by a juvenile should be a defense to juvenile delinquency liability based on conduct that causes or threatens bodily harm where:

1. the bodily harm caused or threatened by the conduct consented to is not serious; or

2. the conduct and the harm are reasonably foreseeable hazards of participation in a contest, sport, game, or play.

C. Consent by the person whose interest was infringed by conduct

charged to constitute an offense should be implied in juvenile delinquency proceedings when such conduct was, within a customary license or tolerance, neither expressly forbidden by such person nor inconsistent with the purpose of the law defining the offense.

3.4 Parental authority.

A. A juvenile should not be adjudicated delinquent for complicity in an offense committed by another if he or she terminated his or her involvement in such offense prior to its commission and

1. gave timely warning to law enforcement authorities or to a parent, legal guardian, or custodian, or to an adult otherwise entrusted with the care or supervision of the juvenile; or

2. otherwise made a reasonable effort to prevent the commission of the offense.

B. It should be a defense to delinquency liability that a juvenile engaged in conduct charged to constitute an offense because a parent, legal guardian, or custodian, or an adult otherwise entrusted with the care or supervision of the juvenile, used or threatened to use force or disciplinary measures against him or her or another which a person of reasonable firmness in the juvenile's situation would have been unable to resist.

3.5 Responsibility.

Juvenile delinquency liability should not be imposed if, at the time of the conduct charged to constitute the offense, as a result of mental disease or defect, the juvenile lacked substantial capacity to appreciate the criminality of his or her conduct or to conform his or her conduct to the requirements of the law.

PART IV: SANCTIONS

4.1 Types of sanctions.

The sanctions that a juvenile court may impose upon a juvenile adjudged to have committed a juvenile offense should be of three types, from most to least severe, as follows.

A. Custodial, where the juvenile is ordered

1. to be confined in a secure facility as defined in these standards; or

2. to be placed in a nonsecure facility including a foster home or residence as defined in these standards.

B. Conditional, where the juvenile is ordered

1. periodically to report to probation or other authorities; or

2. to perform or refrain from performing certain acts; or

3. to make restitution to persons harmed by his or her offense or to pay a fine; or

4. to undergo any similar sanction not involving a change in the juvenile's residence or legal custody.

C. Nominal, where the juvenile is reprimanded, warned, or otherwise reproved and unconditionally released.

D. For purposes of this standard,

1. the following institutions or designated portions thereof are secure facilities:

. . . . [to be designated by the enacting jurisdiction]

2. the following types of facilities or designated portions thereof are nonsecure facilities:

. . . . [to be designated by the enacting jurisdiction]

4.2 Classes of juvenile offenses.

A. Offenses within the criminal jurisdiction of the juvenile court should be classified as class one through class five juvenile offenses.

B. Where, under a criminal statute or ordinance made applicable to juveniles pursuant to Standard 2.2, the maximum sentence authorized upon conviction for such offense is:

1. death or imprisonment for life or for a term in excess of [twenty] years, it is a class one juvenile offense;

2. imprisonment for a term in excess of [five] but not more than [twenty] years, it is a class two juvenile offense;

3. imprisonment for a term in excess of [one] year but not more than [five] years, it is a class three juvenile offense;

4. imprisonment for a term in excess of [six] months but not more than [one] year, it is a class four juvenile offense;

5. imprisonment for a term of [six] months or less, it is a class five juvenile offense;

6. not prescribed, it is a class five juvenile offense.

PART V: LIMITS ON TYPE AND DURATION OF DELINQUENCY SANCTIONS

5.1 Orders imposing sanctions.

Juvenile court orders imposing sanctions should specify:

A. the nature of the sanction; and

B. the duration of such sanction; and,

C. where such order affects the residence or legal custody of the juvenile, the place of residence or confinement ordered and the person or agency in whom custody is vested*; and

D. the juvenile court judge's reasons for the sanction imposed, pursuant to *Dispositions* Standard 2.1.

5.2 Limitations on type and duration of sanctions.

A. The juvenile court should not impose a sanction more severe than,

1. where the juvenile is found to have committed a class one juvenile offense,

a. confinement in a secure facility or placement in a nonsecure facility or residence for a period of [thirty-six] months or

b. conditional freedom for a period of [thirty-six] months;

2. where the juvenile is found to have committed a class two juvenile offense,

a. confinement in a secure facility or placement in a nonsecure facility or residence for a period of [eighteen] months, or

b. conditional freedom for a period of [twenty-four] months;

3. where the juvenile is found to have committed a class three juvenile offense,

a. confinement in a secure facility or placement in a nonsecure facility or residence for a period of [six] months, or

b. conditional freedom for a period of [eighteen] months;

4. where the juvenile is found to have committed a class four juvenile offense,

a. confinement in a secure facility for a period of [three] months if the juvenile has a prior record, or

b. placement in a nonsecure facility or residence for a period of [three] months, or

c. conditional freedom for a period of [twelve] months;

5. where the juvenile is found to have committed a class five juvenile offense,

a. placement in a nonsecure facility or residence for a period of [two months] if the juvenile has a prior record, or

b. conditional freedom for a period of [six] months.

B. For purposes of this standard, a juvenile has a "prior record"

*Commission member Wald would not require that the disposition order specify the "place of residence" but only the level of secure or nonsecure confinement and would leave the precise placement to the discretion of corrections officials. Commission member Polier concurs with this opinion.

only when he or she has been formally adjudged previously to have committed:

1. an offense that would amount to a class one, two, or three juvenile offense, as defined in Standard 4.2, within the twenty-four months preceding the commission of the offense subject to sanctioning; or

2. three offenses that would amount to class four or five juvenile offenses, as defined in Standard 4.2, at least one of which was committed within the twelve months preceding the commission of the offense subject to sanctioning.

C. The juvenile court may impose a sanction consisting of confinement or placement for a specified period of time followed by conditional freedom for a specified period of time, provided that the total duration does not exceed the maximum term permissible as a custodial sanction for the offense.

5.3 Multiple juvenile offenses.

A. When a juvenile is found to have committed two or more juvenile offenses during the same transaction or episode, the juvenile court should not impose a sanction more severe than the maximum sanction authorized by Standard 5.2 for the most serious such offense.

B. When, in the same proceeding, a juvenile is found to have committed two or more offenses during separate transactions or episodes, the juvenile court should not impose a sanction

1. more severe in nature than the sanction authorized by Standard 5.2 for the most serious such offense; or

2. longer in duration than a period equal to one and a half times the period authorized by Standard 5.2 for the most serious such offense.

C. When, at the time a juvenile is charged with an offense, the charging authority or its agents have evidence sufficient to warrant charging such juvenile with another juvenile offense falling within the court's jurisdiction, the failure jointly to charge such offense should thereafter bar the initiation of juvenile court delinquency proceedings based on such offense.

5.4 Termination of orders imposing sanctions.

A juvenile court order imposing sanctions should terminate no later than the [twenty-first] birthday of the juvenile subject to such order.

*Standards with Commentary**

PART I: PRELIMINARY PRINCIPLES

1.1 Purposes.

The purposes of a juvenile delinquency code should be:

A. to forbid conduct that unjustifiably and without excuse inflicts or risks substantial harm to individual or public interests;

B. to safeguard conduct that is without fault or culpability from condemnation as delinquent;

C. to give fair warning of what conduct is prohibited and of the consequences of violation;

D. to recognize the unique physical, psychological, and social features of young persons in the definition and application of delinquency standards.

Commentary

This recommendation, drawn substantially from the Model Penal Code[2] and proposed Federal Criminal Code[3] statements of purpose, describes the broad objectives of the juvenile delinquency code here proposed. Its purpose is to provide a general rationale and guide for the interpretation and application of the standards recommended.

Subsections A., B., and C. express the general bases for any criminal code. Subsection C. departs from conventional juvenile delinquency theory and practice by requiring that governing norms be set forth with specificity.

Subsection D. also requires consideration of the special characteristics and needs of juveniles, which would include the need to develop individual responsibility for lawful behavior, consistent with *Dispositions* Standard 1.1 on the purpose of the juvenile correctional

*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.

[2] Model Penal Code Proposed Official Draft § 1.02.

[3] National Commission on Reform of Federal Criminal Laws, Study Draft § 102.

system. Although rehabilitation is not specified as a fundamental or exclusive purpose in the standards, access to rehabilitative programs would be encompassed in the juvenile's basic right to services. As stated in the commentary to *Dispositions* Standard 1.1, "The standards are intended to encourage the development of more meaningful ways of providing rehabilitative programs."

1.2 Burden of proof.

When there is some evidence supporting an affirmative defense to juvenile delinquency liability, the prosecution should be required to disprove such defense beyond a reasonable doubt.

Commentary

The reconstruction of an historical event—including events that are alleged to constitute a violation of the criminal law—always remains subject to a certain amount of doubt. When, in a criminal case, the trier of fact has a "reasonable" doubt whether the offense occurred or was committed by the person charged, the Constitution requires that such doubts be resolved against the government. Accordingly, the United States Supreme Court held, in *Winship*, that "proof beyond a reasonable doubt is among the 'essentials of due process and fair treatment' required during the adjudicatory stage when a juvenile is charged with an act which would constitute a crime if committed by an adult."[4]

Although it is clear that the reasonable doubt standard applies to juvenile court delinquency adjudications, its applicability to *defenses* of criminal or juvenile delinquency liability is not as well established. Some jurisdictions purport to put the burden on the defendant to prove the existence of an exculpating defense. The Supreme Court has not explicitly ruled that the *Winship* rule governs defenses,[5] but it is clear in principle that a reasonable doubt concerning whether or not the defendant was justified or excused should also be resolved against the government. An adjudication of guilt (or delinquency) is equally doubt-ridden regardless of whether such doubt relates to the proof of the ordinary elements of the offense or to the disproof of defensive elements with respect to which there is "some evidence." In either case, such doubts undermine one's confidence in the culpability of the accused. A juvenile who acted in self-defense or under duress is not, by definition, culpable. If there are doubts about such

[4] *In re* Winship, 397 U.S. 358, 359 (1970).
[5] *But see* Mullaney v. Wilbur, 421 U.S. 684, 19 95 Sup. Ct. 1881 (1975).

defensive issues, they are, by definition, doubts as to the guilt of the alleged offender. If those doubts are "reasonable," it follows that the guilt or blameworthiness of the accused has not been adequately demonstrated. The proposed standard recommends only that whenever such reasonable doubt exists—whether with respect to an element of the prosecution's affirmative case or with respect to a defense to liability—there may not be an adjudication of delinquency.

The recommended standard also makes it clear that the government is not obliged to disprove an affirmative defense until there is "some evidence" that the accused's conduct falls within a recognized category of justification or excuse.

In reviewing this volume, the ABA Section of Family Law recommended the deletion of Standard 1.2, whereas the Section of Criminal Law did not object to the standard.

1.3 Discretionary dismissal.

The juvenile court should dismiss a delinquency proceeding if, having regard to the nature of the conduct charged to constitute an offense and the nature of the attendant circumstances, it finds that:

A. the person or persons whose personal or property interests were threatened or harmed by the conduct charged to constitute the offense were members of the juvenile's family, and the juvenile's conduct may be more appropriately dealt with by parental authority than by resort to delinquency sanctions; or

B. the conduct charged to constitute the offense

1. did not actually cause or threaten the harm or evil sought to be prevented by the law defining the offense or did so only to a trivial extent, or

2. presents such other extenuations that it cannot reasonably be regarded as within the contemplation of the legislature in forbidding the conduct.

Commentary

This standard is designed to provide the juvenile court judge with discretionary authority to ameliorate the harsh results that may attend strict application of the criminal law, a function informally but effectively served by the jury in adult criminal proceedings.[6]

Subsection A. authorizes the exercise of the judge's dispensing power in intrafamily offenses deemed more appropriately dealt with

[6] *See H. Kalven & H. Zeisel, The American Jury* (1968).

by family discipline. In effect, it allows the judge to make an individualized judgment that justice will be better served by requiring, in suitable cases, the exhaustion of family remedies prior to recourse to the official organs of government.

Subsection B. substantially incorporates the de minimis standard proposed by the Model Penal Code.[7] The authority granted is similar to that commonly exercised by the prosecutor in deciding whether (and for what) to prosecute. This section allows the juvenile to invoke (by a motion to dismiss under this section) immediate judicial review of the prosecutor's decision, but only in cases deemed trivial or outside the spirit of the legislative prohibition.

PART II: JURISDICTION

2.1 Age.

The juvenile court should have exclusive original jurisdiction in all cases in which conduct constituting an offense within the court's delinquency jurisdiction is alleged to have been committed by a person

A. not less than ten and not more than seventeen years of age at the time the offense is alleged to have been committed;

B. not more than twenty years of age at the time juvenile court delinquency proceedings are initiated with respect to such conduct; and

C. for whom the period of limitations for such offense has not expired.

Commentary

Whether stated as a jurisdictional prerequisite or contained in the definition of "child" or "delinquent," all states impose age limitations on the delinquency jurisdiction of the juvenile court. The most common requirement, imposed by nearly two-thirds of the states and the District of Columbia, is that a person must be less than eighteen years of age to come within the juvenile court provisions.[8] Other jurisdic-

[7] Model Penal Code § 2.12 (approved draft 1962).

[8] *Ariz. Rev. Stat. Ann.* § 8-201(5) (Supp. 1972); *Ark. Stat. Ann.* § 45-201 (Supp. 1971); *Cal. Welf. & Inst'ns Code* § 506 (West 1972); *Colo. Rev. Stat. Ann.* § 22-1-3(3)(1963); *Del. Code Ann. tit.* 10, § 901 (Supp. 1972); *Idaho Code* § 16-1802(c) (Supp. 1973); *Kan. Stat. Ann.* § 38-802(b) (Supp. 1972); *Ky. Rev. Stat. Ann.* § 208.010(2) (1972); *Md. Ann. Code* art. 26, § 70-1(c) (1973); *Minn. Stat. Ann.* § 260.015 (2) (1971); *Miss. Code Ann.* § 43-21-5(c) (1972);

tions limit delinquency jurisdiction to persons less than sixteen,[9] less than seventeen,[10] and less than nineteen.[11]

A small number of states[12] specify minimum age limits for delinquency jurisdiction ranging from seven to ten years of age. More frequently, such limitations are imposed in the form of minimum age limits on commitment to specified institutions for delinquent children, discussed below. In a few states, delinquency jurisdiction is terminated when the juvenile attains age twenty-one, even though the delinquent conduct is alleged to have occurred while the juvenile was within the specified maximum age.[13]

The age criteria for an adjudication of delinquency recommended by the model acts and standards herein reviewed[14] are substantially

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Mont. Rev. Codes Ann. § 10-602(1) (1947); *Neb. Rev. Stat.* § 43-201 (1969); *Nev. Rev. Stat.* § 62.020(1,b) (1967); *N.J. Rev. Stat.* § 2A:4-14 (Supp. 1973); *N.M. Stat. Ann.* § 13-143(A) (Supp. 1972); *N.D. Cent. Code* § 27-20-02 (Supp. 1971); *Ohio Rev. Code Ann.* § 2151.011(B,1) (Supp. 1972); *Okla. Stat. Ann.* tit. 10, § 1101(a) (Supp. 1972); *Ore. Rev. Stat.* § 419.476(1) (1972); *Pa. Stat. Ann.* tit. 11, § 50-102(1) (Supp. 1973); *R.I. Gen. Laws Ann.* § 14-1-3(C) (1971); *S.D. Compiled Laws Ann.* § 26-8-1(3) (Supp. 1972); *Tenn. Code Ann.* § 37-202(1) (Supp. 1972); *Utah Code Ann.* § 55-10-64(3) (Supp. 1971); *Va. Code Ann.* § 16.1-141(3) (Supp. 1973); *Wash. Rev. Code Ann.* § 13.04.010 (1962); *W.Va. Code Ann.* § 49-5-2 (Supp. 1972); *Wis. Stat. Ann.* § 48.02(3) (Supp. 1973); *Wyo. Stat. Ann.* § 14-115.2(e) (Supp. 1971).

[9] *Ala. Code* tit. 13, § 350(3) (1958); *Conn. Gen. Stat. Ann.* § 17-53(a) (Supp. 1973); *N.Y. Family Ct. Act* § 712(a) (McKinney 1963); *N.C. Gen. Stat.* § 7A-728(1) (1969); *Vt. Stat. Ann.* tit. 33, § 632(9,1) (Supp. 1972).

[10] *Fla. Stat. Ann.* § 39.01(4) (Supp. 1973); *Ill. Ann. Stat.* ch. 37, § 702-2 (1972); *La. Rev. Stat. Ann.* § 13:1569(3) (Supp. 1973); *Me. Rev. Stat. Ann. tit.* § 15, 2502(4) (1964); *Mass. Gen. Laws Ann.* ch. 119, § 52(1965); *Mich. Stat. Ann.* § 27.3178(a); *Mo. Ann. Stat.* § 211.021(2) (1959); *N.H. Rev. Stat. Ann.* § 169:1(a) (Supp. 1972); *S.C. Code Ann.* § 15-1103(9) (1962); *Tex. Rev. Civ. Stat.* art. 2338-1, § 3 (Supp. 1973).

[11] *See, e.g., Iowa Code Ann.* § 232.2(4) (Supp. 1973), which defines "minor" as a person less than nineteen, or less than twenty-one if regularly attending an approved high school.

[12] *Mass. Gen. Laws Ann.* ch. 119 § 52 (1965); *Miss. Code Ann.* § 43-21-5-(g) (1972); *N.Y. Family Ct. Act* § 712(a) (McKinney 1963); *S.C. Code Ann.* § 15-1103(9) (1962); *Tex. Rev. Civ. Stat.* art 2338-1, § 3 (Supp. 1973); *Vt. Stat. Ann.* tit. 33, § 632(9,1) (Supp. 1972).

[13] *See, e.g., D.C. Code Ann.* § 16-2301(d) (Supp. V 1972); *Ga. Code Ann.* § 24A-401(c) (Supp. 1972).

[14] Uniform Juvenile Court Act (Handbook of the National Conference of Commissioners on Uniform State Laws 1968) (this act, hereinafter referred to as the Uniform Act, was drafted by the National Conference of Commissioners on Uniform State Laws and was approved by the American Bar Association on August 7, 1968); Standard Juvenile Court Act (*N.P.P.A. Journal*, vol. 5, 1959) (this act, hereinafter referred to as the Standard Act, was drafted by the National Probation and Parole Association in cooperation with the National Council

the same as those for the great majority of jurisdictions reviewed above—limiting the juvenile court's delinquency jurisdiction to persons less than eighteen years of age.[15] None of the model acts or standards specifies a minimum age below which a child may not be adjudicated delinquent.

This standard is designed to dispose of several vexing problems of juvenile court jurisdiction that depend on the age of the juvenile at certain relevant times. (Whether any particular offense committed by a juvenile within the age limits here specified is within the juvenile court's delinquency jurisdiction is the subject of Standard 2.2, *infra.*) The minimum age set forth in this standard departs from the pattern of most existing laws and recent model acts, which contain no such limitation.[16]

Liability for criminal conduct by children under seven was precluded at common law by the defense of infancy. Moreover, as Professor Sanford Fox has noted, "even in the absence of a minimum age in the statutes, there are no reported cases involving an attempt to charge delinquency against a child under the common law immunity age of seven."[17]

Since a finding of juvenile delinquency liability necessarily implies some measure of culpability with respect to the juvenile's offending behavior, common sense requires the specification of some age below which such liability cannot extend. By vote of the commission at its December 1974 meeting, it was decided that delinquency liability ought not be imposed upon juveniles younger than ten years old.

Subsection A. also limits juvenile court jurisdiction to persons not more than seventeen years old at the time of the alleged offense. Because the rate and degree of maturation is variable among young persons, any upper age limit on juvenile court jurisdiction is bound to be arbitrary. The proposed standard adopts the age limits most commonly contained in existing legislation on the ground that, in

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of Juvenile Court Judges and the U.S. Children's Bureau); Children's Bureau, Standards for Juvenile and Family Courts (Pub. No. 472) (these standards, hereinafter referred to as the Children's Bureau Standards, were drafted by the U.S. Children's Bureau in cooperation with the National Council on Crime and Delinquency and the National Council of Juvenile Court Judges); President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: Juvenile Delinquency and Youth Crime* (Washington, D.C.: U.S. Government Printing Office, 1967) (these recommendations will hereinafter be referred to as the President's Commission Report).

[15] Uniform Act § 2(1); Children's Bureau Standards, p. 36; Standard Act § 2.

[16] *See* Uniform Act § 2 (1); W. Sheridan, Children's Bureau, Legislative Guide for Drafting Family and Juvenile Court Acts § 2(a) (1966).

[17] *S. Fox, Juvenile Courts in a Nutshell* 18 (1971).

the absence of other controlling criteria, uniformity ought to be encouraged.

Subsections B. and C. of the standard limit the juvenile court's power to adjudicate juvenile delinquency charges by terminating its jurisdiction when the juvenile attains the age of twenty-one or when the statutory limitation period has elapsed, whichever occurs first. These provisions yield several dividends. They eliminate an issue that has been the source of considerable litigation[18] when the governing statute fails to provide for jurisdiction over the juvenile offender who graduates from juvenile status prior to the initiation of proceedings. Moreover, they effectively eliminate the possibility of prosecutorial delay in filing charges for the purpose of avoiding juvenile court jurisdiction, since that would require, under the recommended standard, at least a three-year delay. Although the limitations period applicable to serious offenses would not, in many states,[19] have expired during such a delay, an attempted criminal prosecution would be exceedingly vulnerable to dismissal on speedy trial[20] or due process [21] grounds.

Finally, since sanctions imposed by the juvenile court commonly may extend until the juvenile attains age twenty-one, it makes little sense to bar the court's original jurisdiction to adjudicate during this same period.

2.2 Offense.

A. The delinquency jurisdiction of the juvenile court should include only those offenses which are:

1. punishable by incarceration in a prison, jail, or other place of detention, and

2. except as qualified by these standards, in violation of an applicable federal, state, or local criminal statute or ordinance, or

3. in violation of an applicable state or local statute or ordinance defining a major traffic offense.*

[18] *See, e.g.*, State *ex rel.* Koopman v. County Court Branch No. 1, 38 Wis. 2d 492, 157 N.W.2d 623 (1968); State v. Jones, 220 Tenn. 477, 418 S.W.2d 769 (1966).

[19] *See* Model Penal Code, Tent. Draft 5, at 18-19.

[20] Barker v. Wingo, 407 U.S. 514 (1972); "A deliberate attempt to delay the trial in order to hamper the defense should be weighed heavily against the government."

[21] *See* United States v. Marion, 404 U.S. 307 (1971).

*Commission member Wald noted her disagreement with the limitation of juvenile court jurisdiction stated in Standard 2.2 A. 2. and A. 3. She feels that any offense that might result in detention, jail, or prison for a juvenile should be included in juvenile court jurisdiction.

B. For purposes of this standard, major traffic offense should include:

1. any driving offense by a juvenile less than thirteen years of age at the time the offense is alleged to have been committed, and

2. any traffic offense involving reckless driving; driving while under the influence of alcohol, narcotics, or dangerous drugs; leaving the scene of an accident; and such other offenses as the enacting jurisdiction may deem sufficiently serious to warrant the attention of the juvenile court.

C. Any offense excluded by this standard from juvenile court jurisdiction should be cognizable in the court having jurisdiction over adults for such offenses, notwithstanding that the alleged offender's age is within the limits prescribed by Standard 2.1 *supra*.

Commentary

All jurisdictions incorporate in some form and with various exceptions the criminal law applicable to adults as the dominant source of substantive rules governing the behavior of juveniles. Commonly, such incorporation is in the form of a statutory provision that defines a delinquent act to be " . . . an act committed by a child, which would be designated a crime under the law if committed by an adult. . . ."[22]

The extent of such incorporation varies considerably among the states. Arkansas limits incorporation to acts that would render an adult subject to prosecution for a felony or misdemeanor.[23] The Colorado Children's Code, while incorporating municipal ordinances, requires that they be punishable by a jail sentence.[24] Virginia law, however, not only incorporates all federal, state, and municipal criminal law, it also brings within the delinquency jurisdiction of the juvenile court (and thus subject to commitment in the same degree as those who violate penal laws) juveniles who violate any ordinance of a service district.[25]

The Kansas Juvenile Code illustrates a not uncommon variation on the incorporation of adult criminal standards. A delinquent child is defined as one who, *inter alia*, commits an act that if committed by an adult would make him or her liable to be prosecuted for a felony; or has been adjudged a "miscreant child" three times or more, defining

[22] *N.M. Stat. Ann.* § 13-14-3(N) (Supp. 1972).
[23] *Ark. Stat. Ann.* § 45-204(a) (Supp. 1971).
[24] *Colo. Rev. Stat. Ann.* § 22-1-3(17a) (1963).
[25] *Va. Code Ann.* § 16.1-158(k) (Supp. 1973).

"miscreant child" as one who commits an act that would be a misdemeanor if committed by an adult; or one who has been adjudged a "wayward child" (runaway, disobedient, etc.) three times or more.[26] Similar provisions for the accumulation of minor offenses are included in Rhode Island[27] and Texas.[28]

Many jurisdictions specifically exclude traffic offenses as a basis for juvenile delinquency liability.[29] Most such jurisdictions, however, also limit the type of traffic offense excluded. Thus, for example, in Montana, a child who operates a motor vehicle so as to endanger life or property, or while under the influence of alcohol or other drugs, or who so commits other traffic violations as to show a lack of respect for traffic laws, may be adjudged delinquent.[30] Driving without a valid license or permit (often specified in terms of driving under the age required to operate a motor vehicle) is included as a ground of delinquency liability in several states that generally exclude traffic offenses from the delinquency jurisdiction of the juvenile court.[31]

A few states exclude from incorporation a variety of minor violations other than traffic offenses. California excludes from delinquency jurisdiction nonfelony violations of the Fish and Game Code and violations of the equipment and registration provisions of the Harbors and Navigation Code.[32] Colorado also excepts game and fish laws and regulations.[33]

Beyond incorporation of the criminal laws applicable to adults, in many states delinquency liability may be premised on behavior (or status) for which an adult could not be prosecuted. In Connecticut, a juvenile may be adjudged delinquent on a finding that he or she is beyond the control of parents, guardians, or other lawful authority, or has engaged in indecent or immoral conduct.[34] In Delaware, a

[26] *Kan. Stat. Ann.* § 38-802 (Supp. 1972).

[27] *R.I. Gen. Laws Ann.* § 14-1-3(F) (1971).

[28] *Tex. Rev. Civ. Stat.* art. 2338-1 § 3 (Supp. 1973).

[29] *Cal. Welf. & Inst'ns Code* § 562 (West 1972); *Colo. Rev. Stat. Ann.*, § 22-1-3(17a) (1963); *Fla. Stat. Ann.* § 39.01(9) (Supp. 1973); *Ga. Code Ann.* § 24A-401(e) (Supp. 1972); *Kan. Stat. Ann.* § 38-802(c) (Supp. 1972); *Minn. Stat. Ann.* § 260.015(5) (1971); *Nev. Rev. Stat.* § 62.040 (1967); *Ohio Rev. Code Ann.* § 2151.02(a) (Supp. 1972); *Okla. Stat. Ann.* tit. 10, § 1101(b) (Supp. 1972); *R.I. Gen. Laws Ann.* § 14-1-3(F) (1971); *S.D. Compiled Laws Ann.* § 26-8-7 (Supp. 1972); *Vt. Stat. Ann.* tit. 33, § 632(3) (Supp. 1972).

[30] *Mont. Rev. Codes Ann.* § 10-602(2f) (Supp. 1971).

[31] *D.C. Code Ann.* § 16-2301(5) (Supp. V, 1972); *N.M. Stat. Ann.* § 13-14-3 (N4) (Supp. 1972); *S.C. Code Ann.* § 15-1103(9a) (1962).

[32] *Cal. Welf. & Inst'ns Code* § 562 (West 1972).

[33] *Colo. Rev. Stat. Ann.* § 22-1-3(17a) (1963).

[34] *Conn. Gen. Stat. Ann.* § 17-53 (Supp. 1973).

child who is uncontrollable by school authorities may be adjudicated delinquent.[35] Similar bases for the adjudication of delinquency exist in many states.[36] Perhaps the most common uniquely juvenile offense is that of habitually so deporting oneself as to injure or endanger the health or morals of oneself or others.[37] Other common provisions include: leading an idle, dissolute, lewd, or immoral life, or associating with vicious or immoral persons;[38] violating curfew;[39] running away from home;[40] and being truant.[41] Failure to obey a lawful order of the juvenile court is a basis for delinquency liability in eight states.[42]

The Uniform Act defines "delinquent act" as an act designated a crime under the law, except for offenses applicable only to a child.[43] The Children's Bureau Standards and the Standard Act do not use the term "delinquent child," but rather define the situations that give the court jurisdiction of a child, such as neglect, dependency,

[35] *Del. Code Ann.* tit. 10, § 901 (Supp. 1972).

[36] *Ala. Code* tit. 13, § 350(3) (1958); *Ark. Stat. Ann.* § 45-204(d) (Supp. 1971); *Ind. Ann. Stat.* § 9-3204(6) (Supp. 1972); *Iowa Code Ann.* § 232.2(13c) (1969); *Ky. Rev. Stat. Ann.* § 208.020(1b) (1972); *Minn. Stat. Ann.* § 260.015 (5d) (1971); *Miss. Code Ann.* § 43-21-5(g) (1972); *Mont. Rev. Codes Ann.* §10-602(2c) (Supp. 1971); *N.H. Rev. Stat. Ann.* § 169:2 (IIb) (Supp. 1972); *N.J. Rev. Stat.* § 2A:4-14(2); *Pa. Stat. Ann.* tit. 11, § 50-102(2) (Supp. 1973); *S.C. Code Ann.* § 15-1103(9) (1962).

[37] *Del. Code Ann.* tit. 10, § 901 (Supp. 1972); *Ind. Ann. Stat.* § 9-3204(17) (Supp. 1972); *Iowa Code Ann.* § 232.2(13d) (1969); *Minn. Stat. Ann.* § 260.015 (5c) (1971); *Miss. Code Ann.* § 43-21-5(g) (1972); *Mont. Rev. Codes Ann.* § 10-602(2c) (Supp. 1971); *N.H. Rev. Stat. Ann.* § 169:2(IIa) (Supp. 1972); *N.J. Rev. Stat.* § 2A:4-14(2m) (Supp. 1973); *S.C. Code Ann.* § 15-1103(9j) (1962); *Tex. Rev. Civ. Stat.* art. 2338-1, § 3(f) (Supp. 1973).

[38] *Ala. Code* tit. 13, § 350 (1958); *N.J. Rev. Stat.* § 2A:4-14(2h) (Supp. 1973); *Tex. Rev. Civ. Stat.* art. 2338-1, § 3(g) (Supp. 1973).

[39] *Idaho Code* § 16-1803(1a) (Supp. 1973); *Ind. Ann. Stat.* § 9-3204(10) (Supp. 1972); *N.J. Rev. Stat.* § 2A:4-14(2k) (Supp. 1973).

[40] *Ark. Stat. Ann.* § 45-204(b) (Supp. 1971); *Conn. Gen. Stat. Ann.* § 17-53(b) (Supp. 1973); *Ind. Ann. Stat.* § 9-3204(4) (Supp. 1972); *S.C. Code Ann.* § 15-1103(9d) (1962).

[41] *Ark. Stat. Ann.* § 45-204(c) (Supp. 1971); *Conn. Gen. Stat. Ann.* § 17-53(e) (Supp. 1973); *Idaho Code* § 16-1803(1a) (Supp. 1973); *Ind. Ann. Stat.* §9-3204(3) (Supp. 1972); *Ky. Rev. Stat. Ann.* § 208.020(c) (1972); *Minn. Stat. Ann.* § 260.015(c) (1971); *Miss. Code Ann.* § 43-21-5(g) (1972); *Mont. Rev. Codes Ann.* § 10-602(d) (Supp. 1971); *S.C. Code Ann.* § 15-1103(9c) (1962); *Tex. Rev. Civ. Stat.* art. 2338-1, § 3(e) (Supp. 1973).

[42] *Ariz. Rev. Stat. Ann.* § 8-201(8) (Supp. 1972); *Cal. Welf. & Inst'ns Code* § 602 (West 1972); *Colo. Rev. Stat. Ann.* § 22-1-3(17a) (1963); *Conn. Gen. Stat. Ann.* § 17-53(f) (Supp. 1973); *Ill. Ann. Stat.* ch. 37, § 702-2 (1972); *N.C. Gen. Stat.* § 7A-273(2) (1969); *Ohio Rev. Code Ann.* § 2151.02(b) (Supp. 1972); *Wis. Stat. Ann.* § 48.12(1) (Supp. 1973).

[43] Uniform Act § 2(2)(4).

etc.[44] Each includes as one such situation, however, the violation of federal, state, or local law.[45] The President's Commission Report recognizes the necessity of utilizing some standards from criminal codes,[46] and, although it does not specifically recommend what sorts of adult crimes should be incorporated, the report recommends that "[t]he range of conduct for which court intervention is authorized should be narrowed, with greater emphasis upon consensual and informal means of meeting the problems of difficult children."[47]

Juvenile traffic offenses are recognized as a problem warranting special consideration by all the model acts and standards. The Uniform Act excludes juvenile traffic offenses as a basis for a delinquency adjudication, but limits the definition of juvenile traffic offense so that driving while intoxicated, driving without a license, and negligent homicide are excluded from the exception.[48] The Children's Bureau Standards recommend that juvenile traffic offenses either be removed from the jurisdiction of the juvenile court or be retained only in the event that special procedures and limited dispositions are provided for by statute.[49] The Standard Act would allow the juvenile court to retain jurisdiction over juvenile traffic offenders, but recommends that separate procedures be developed for handling such cases.[50] The President's Commission Report concurs with the recommendations of the Children's Bureau.[51]

This standard restricts the delinquency jurisdiction of the juvenile court in three important ways. First, only offenses punishable by imprisonment may be used as a basis for juvenile delinquency liability, thus excluding violations and infractions for which the prescribed sanction is only a fine or forfeiture. The Model Penal Code and state criminal codes based on it create such classes of nonimprisonable offenses and include therein such petty crimes as unaggravated trespass and criminal mischief.[52] Offenses so lightly regarded by the law ought not yield delinquency liability, and the stigma and condemnation such liability often entails, in juvenile court.

Subsection A. represents a compromise between two more extreme positions concerning the extent to which juvenile delinquency lia-

[44] Children's Bureau Standards 33; Standard Act § 8(1).
[45] Children's Bureau Standards 33; Standard Act § 8(1).
[46] President's Commission Report 23.
[47] *Id.* at 2.
[48] Uniform Act § 44.
[49] Children's Bureau Standards 37.
[50] Standard Act §§ 12(2) and 19.
[51] President's Commission Report 24.
[52] Model Penal Code, Proposed Official Draft §§ 220.3(2); 221.2(2).

bility ought to be based upon offenses located outside the criminal code. The difficulty arises from the fact that although the traditional body of crimes is contained within a discrete chapter, title, or code in all jurisdictions,[53] the general laws of every jurisdiction are laden with miscellaneous offenses that, for a variety of reasons, have not been codified in the criminal code. Revenue and regulatory codes, for example, commonly include offenses peculiar to that subject matter, perhaps on the sensible assumption that such placement will provide more adequate notice of the prohibition to those most likely to be affected by it. These extra-code offenses range from regulatory schemes governing such activities as professions and trades, fish and game, and food processing to serious narcotics offenses.[54]

In an earlier draft of this standard, it was proposed that delinquency liability be limited to those offenses contained in "an applicable federal, state, or local *criminal code*," on the ground that juveniles would rarely be in a position to violate laws regulating commercial activity, and because the thrust of such laws is commonly regulation rather than the assessment of culpability or dangerousness. The opposite extreme is exemplified by the law of New Hampshire, which permits delinquency liability to be predicated on the violation of any federal, state, or local statute or ordinance without reference to whether such laws are penal or criminal in character and effect.

Reflection suggests that both of these extremes should be rejected: the criminal code limitation as too narrow, the "any-law-violation" model as too broad. Accordingly, this standard proposes that delinquency liability extend to any violation of an applicable federal, state, or local *criminal* statute or ordinance. Its effect would be to incorporate—except in so far as other standards may specifically exclude—violations of an applicable criminal code and such extra-code offenses as may be deemed criminal by the enacting jurisdiction.

Several considerations support the present treatment as opposed to the more narrow incorporation previously recommended. To the extent that juveniles are rarely charged with offenses arising out of the regulation of commercial activity, their inclusion has little significance for juvenile delinquency liability. To the extent that juveniles may well violate some categories of prohibitions commonly excluded from the criminal code—*e.g.*, narcotics, fish and game, and, perhaps, revenue laws—the issue is whether such violations ought to be proc-

[53] *E.g.*, Title 18, *U.S.C.*; Ch. 28, *Neb. Code; Texas Penal Code;* Title 9, *Rev. Code Wash.*

[54] *E.g., Ariz. Rev. Stat. Ann.* § 32-145 (Supp. 1975); *Id.* § 17-309 (1956); *N.J. Stat. Ann.* ch. 18 (Supp. 1976); *Tex. Rev. Civ. Stat.* art. 4476-1, § 7 (1976).

essed by the juvenile court, the criminal courts, or not at all. Complete exemption from the law for juveniles seems anomalous at best and, at worst, potentially destructive to the regulatory scheme. Thus, the effect of nonincorporation amounts to automatic declination of juvenile court jurisdiction in favor of criminal prosecution, a step that ought not be taken in the dark. For these reasons it is recommended that delinquency jurisdiction include *criminal* offenses codified outside the criminal code, thus empowering the juvenile court (1) to determine whether such offenses are truly criminal; (2) to assess the nature of the offense; and (3) to impose an appropriate disposition within the recommended sanction limits for such ordinarily minor offenses.

Subsection B. limits delinquency jurisdiction to major traffic offenses and is consistent with the legislative trend toward removing juvenile court jurisdiction over ordinary traffic violations. These provisions reflect the judgment that most traffic violations do not evidence sufficiently serious deviation to warrant the expenditure of the juvenile court's limited time and specialized resources.[55] The effect of this recommended exclusion from juvenile court jurisdiction is to empower the adult traffic court to hear and dispose of the majority of juvenile traffic offenses. Although some commentators have suggested that the resultant exposure to the mechanical and insensitive doling out of justice that typifies adult traffic courts compels retention of juvenile court jurisdiction, whatever innovative changes the juvenile court might inject into the processing of essentially mundane cases would be of doubtful merit in view of the administrative burden confronting most juvenile courts.

Subsection B. attempts to specify those traffic offenses that should be deemed "major" for purposes of retaining juvenile court jurisdiction. Subsection B. 2. is premised on the belief that where a juvenile traffic offense creates a serious risk of injury, such conduct warrants the special attention and treatment facilities available in juvenile court.

Subsection B. 1. retains juvenile court jurisdiction for any *driving* offense by a juvenile younger than thirteen years of age, both because such very young offenders would be wholly out of place in adult traffic court, and because operation of a motor vehicle by subteenagers is itself sufficiently contrary to the norm for that age group to justify recourse to the juvenile court's more adequate diagnostic and treatment facilities.

[55] Both the President's Commission Report 24, and the Uniform Juvenile Court Act § 2(b), support this position.

Subsection C. states the obvious proposition that to the extent that offenses or any violations are by this standard excluded from juvenile court jurisdiction, they should be tried in the appropriate adult court. The standard creates three categories of such offenses: (1) those not punishable by imprisonment; (2) those not codified in the criminal code and deemed not criminal in the particular jurisdiction; and (3) minor traffic offenses. Each such exclusion rests on the dual grounds that the excluded offense category is of too little criminologic significance to warrant the specialized attention and services of the juvenile court and that the sanctions imposable for such offenses in the adult courts will seldom exceed a modest fine.

2.3 Elimination of uniquely juvenile offenses.

Juvenile delinquency liability should include only such conduct as would be designated a crime if committed by an adult.

Commentary

This standard states a proposition fundamental to a noninterventionist theory of juvenile delinquency liability. Its numerous effects are best assessed against the background of existing juvenile law.

All jurisdictions presently incorporate (with various exceptions, described in the commentary to Standard 2.2) adult criminal standards as a basis for juvenile delinquency liability.[56] In addition, the juvenile laws of most jurisdictions authorize a finding of delinquency based on behavior or status conditions that do not constitute crimes for adults. These uniquely juvenile offenses are designed to serve a variety of paternal, therapeutic, or control purposes that are totally misplaced in a juvenile delinquency code. Moreover, these standards are frequently expressed in unacceptably broad and vague terms.

In many jurisdictions, for example, a juvenile may be adjudicated delinquent for habitually so deporting himself or herself as to injure or endanger his or her own or another's "health or morals."[57] In others, delinquency liability may be premised on a finding that a juvenile has engaged in "indecent or immoral conduct",[58] is "beyond the control" of parents, guardians, school, or other authori-

[56] *See, e.g., N.M. Stat. Ann.* § 13-14-3(N) (Supp. 1972); *cf. N.H. Rev. Stat. Ann.* § 169:2(II) (Supp. 1972).

[57] *See* n. 37, *supra.*

[58] *E.g., Conn. Gen. Stat. Ann.* § 17-53 (Supp. 1973).

ties,[59] or is leading an "idle, dissolute, lewd, or immoral life" or "associating with vicious or immoral persons."[60]

Such standards plainly cannot survive in a delinquency code that has among its purposes the safeguarding of "conduct that is without fault." That purpose is also served by constitutional principles and conventional criminal law doctrine forbidding vague and overbroad penal statutes.[61]

Other kinds of conduct commonly made offenses only for juveniles (although stated with legally sufficient precision) would also be excised from juvenile delinquency jurisdiction by adoption of the recommended standard. In many states, juveniles who violate curfew regulations,[62] run away from home,[63] or are truant from school[64] may be adjudicated delinquent. Curfew violation, of itself, is surely a defective measure of culpability. While keeping late hours or unauthorized absence from home or school may warrant juvenile court intervention on some other basis, the moral ambiguity of such conduct disqualifies it from use as a basis for the imposition of delinquency liability.

Failure to obey a lawful order of the juvenile court—designated a crime in eight states[65]—would seem better treated as a basis for revocation or reconsideration of the nature or terms of a violator's probationary program, as in adult criminal proceedings.

PART III: GENERAL PRINCIPLES OF LIABILITY

3.1 *Mens rea*—lack of *mens rea* an affirmative defense.

Where an applicable criminal statute or ordinance does not require proof of some culpable mental state, it should be an affirmative defense to delinquency liability that the juvenile:

A. was neither negligent nor reckless with respect to any material element of an offense penalizing the unintended consequences of risk-creating conduct; or

B. acted without knowledge or intention with respect to any mate-

[59] *See* nn. 35, 36, *supra.*

[60] *Ala. Code* tit. 13, § 350 (1958); *N.J. Rev. Stat.* § 2A:4-14(2h) (Supp. 1973); *Tex. Rev. Civ. Stat.* art. 2338-1, § 3(g) (Supp. 1973).

[61] *See, e.g.*, Papachristou v. Jacksonville, 405 U.S. 156, 92 Sup. Ct. 839, 31 L. Ed. 2d 110 (1972).

[62] *See* n. 39, *supra.*

[63] *See* n. 40, *supra.*

[64] *See* n. 41, *supra.*

[65] *See* n. 42, *supra.*

rial element of an offense penalizing conduct or the circumstances or consequences of such conduct.

Commentary

Criminal liability is commonly said to consist of (1) a behavioral element (the proscribed conduct) and (2) a mental element (the proscribed state of mind) with reference to that conduct. Thus, homicide consists of the killing of a human being intentionally or at least negligently. Unfortunately, the mental element necessary for conviction is often expressed in such vague and confusing terms as "malice," "willfulness," and "scienter."[66]

A major contribution of the Model Penal Code was its definition of four "kinds of culpability"—purpose (or intention), knowledge, recklessness, and negligence—as an exclusive list of mental states on which criminal liability might be based. This fundamental reform has been uniformly adopted, with inconsequential modifications, by those jurisdictions that have revised (or proposed revision of) their criminal laws since 1962.

In a previous draft, it was proposed that juvenile delinquency liability should always require proof of a culpable mental state—intention, knowledge, recklessness, or negligence—with respect to each material element of an incorporated criminal offense, even though such proof was not required for adult criminal liability. That recommendation proved to be problematic for several reasons. With respect to jurisdictions that have followed the Model Penal Code by requiring proof of *mens rea* for all criminal offenses, the previously recommended standard was, of course, redundant. Applied to unrevised criminal codes, the former recommendation was awkward and confusing because it appeared to contradict the fundamental decision to continue to define juvenile delinquency liability by incorporation of the criminal statutes and ordinances applicable to adults.

The revised standard achieves the same results as the previous one, but in a manner both more conceptually sound and more practically feasible. Both were premised on the judgment that these standards should adopt the American Law Institute's rejection of "absolute or strict liability in penal law. . . ."[67] As Professor Weinreb commented in reference to a similar provision recommended by the National

[66] Model Penal Code, Tent. Draft 4, at 124.
[67] Model Penal Code, Tent. Draft 4, at 140.

Commission on Reform of Federal Criminal Laws:

> Rejection of strict liability is based on the conclusion that the purposes of Federal criminal law do not require that criminal penalties be threatened or imposed for conduct which is without fault. In the absence of an overriding policy objective which requires the use of criminal sanctions where moral blame does not attach, it is surely preferable to make criminal law conform to moral judgment.[68]

The revised standard bars strict delinquency liability (i.e., liability without fault) by making proof of the absence of an appropriate mental state with respect to a material element of an offense an affirmative defense to delinquency liability. Because such a defense is unnecessary when the incorporated offense requires proof of *mens rea*, the defense would apply only where the incorporated statute or ordinance does not require proof of some culpable mental state for conviction. Such strict liability offenses are distinguished, for drafting purposes, in subsections A. and B. according to whether the offense involves intended conduct or results (for which intention and knowledge are appropriate mental states) or the unintended consequences of conduct (for which recklessness and negligence are appropriate mental states).

The effect of the standard is to require and allow the juvenile court judge to consider evidence tending to show that a juvenile alleged to have violated a strict liability statute did so innocently because he or she lacked the intention, knowledge, recklessness, or negligence appropriate to the offense. Its impact will be predictably modest, since nearly all of the traditional offenses require proof of some *mens rea*. Moreover, because strict liability is most commonly used in a regulatory context, juveniles are unlikely to be charged with such offenses.

Despite its limited practical effect, however, the standard expresses an important judgment forbidding the imposition of juvenile delinquency liability without fault, without which the stated purposes of these standards[69] would be seriously compromised. Although these standards cannot and should not undertake to rewrite state and local criminal laws, they can and should state the conditions under which those laws ought to be used in determining the delinquency liability of juveniles.

[68] National Commission on Reform of Federal Criminal Laws, I Working Papers 105, 130 (1970).

[69] *See* Standard 1.1 B. and D., *supra*.

3.2 *Mens rea*—reasonableness defense.

Where an applicable criminal statute or ordinance penalizes risk-creating conduct, it should be a defense to juvenile delinquency liability that the juvenile's conduct conformed to the standard of care that a reasonable person of the juvenile's age, maturity, and mental capacity would observe in the juvenile's situation.

Commentary

Although most criminal offenses require that the prohibited conduct be committed intentionally or knowingly, many offenses require only that the conduct be accompanied by a reckless or negligent state of mind. The Model Penal Code provides that allegedly reckless or negligent behavior be judged against "the standard of care that a reasonable person would observe in the actor's situation."[70] The recommended standard would modify this standard in juvenile proceedings by requiring consideration of the juvenile's "age, maturity, and mental capacity."

Arguably, the end sought could be achieved without the proposed modification by construing "the actor's situation" to include age, maturity, and mental capacity. As the Model Penal Code commentary notes, however, "there is an inevitable ambiguity in 'situation.' . . . The heredity, intelligence, or temperament of the actor would not now be held material in judging negligence [or recklessness] . . . ."[71]

The recommended standard eliminates only so much of the ambiguity as seems plainly necessary to justly assess the culpability of juveniles, not, as the drafters of the Model Penal Code feared, by "depriving the criterion of all its objectivity,"[72] but by assuring that a juvenile's liability for risk-creating conduct will be judged against that of the reasonable young person in the juvenile's situation. Explicit reference to youthful capacities may, moreover, serve partially to offset the absence of a jury's "community judgment" in juvenile proceedings.

The recommended standard is intended to be broadly applicable to all situations in which a juvenile's delinquency liability depends upon the "reasonableness" of his or her behavior. Thus it would apply, for example, to the defense of duress, which excuses offenses coerced

[70] Model Penal Code, Proposed Official Draft § 2.02(2)(d), at 26.
[71] Model Penal Code, Tent. Draft 4, at 126.
[72] *Id.*

by another if "a person of reasonable firmness in [the actor's] situation would have been unable to resist,"[73] as well as to offenses such as homicide and assault where proof of recklessness or negligence may be a primary ingredient of the crime.

As originally proposed, this standard would have required that the standard of care in delinquency adjudications based on risk-creating conduct always be modified by reference to the juvenile's "age, maturity, and mental capacity." It has been redrafted as a defense on the recommendation of the Commission. The effect of this change is to allow an adjudication of delinquency based on the usual standard of care unless the juvenile introduces some evidence that his or her conduct was reasonable when judged against the conduct of a reasonable person of the juvenile's age, maturity, and mental capacity. Thus, the benefits of the more precise standard are made available in appropriate cases without more drastically altering the incorporated adult standard.

3.3 Consent.

A. Where delinquency liability is defeated or diminished by consent to the conduct charged to constitute the offense, such consent should not be deemed ineffective solely on the ground that it was given by a person who, by reason of youth, was legally incompetent to authorize the conduct.

B. Effective consent by a juvenile should be a defense to juvenile delinquency liability based on conduct that causes or threatens bodily harm where:

1. the bodily harm caused or threatened by the conduct consented to is not serious; or

2. the conduct and the harm are reasonably foreseeable hazards of participation in a contest, sport, game, or play.

C. Consent by the person whose interest was infringed by conduct charged to constitute an offense should be implied in juvenile delinquency proceedings when such conduct was, within a customary license or tolerance, neither expressly forbidden by such person nor inconsistent with the purpose of the law defining the offense.

Commentary

Subsection A. of the recommended standard is not intended to modify existing criminal law doctrine governing the situations in

[73] Model Penal Code, Proposed Official Draft § 2.09, at 40.

which consent is relevant to the determination of criminal liability. Rather, it proposes that, in such cases, consent by a juvenile, unless otherwise invalid, be legally sufficient in juvenile delinquency proceedings.

Absent such a standard, conduct wholly blameless because consented to by a peer might nonetheless be found delinquent on the ground that consent is ineffective when "given by a person who is legally incompetent to authorize the conduct."[74]

Subsection B. 2. is based on Model Penal Code § 2.11(2)[75] and is designed to bar juvenile delinquency liability for conduct that risks or causes minor injury or reasonably foreseeable injury sustained in sports and play activity to which the injured person actually and effectively consented.

The standard is necessary because consent is ordinarily a defense "only when it negatives an element of the offense or precludes infliction of the harm to be prevented by the law defining the offense."[76] This conventional rule will, of course, be applicable by incorporation to juvenile offenses, but because absence of consent is not commonly an element of offenses prohibiting bodily injury, the recommended standard is needed to assure that schoolyard scuffles are not transmuted by law into unlawful assaults or batteries.

Whether consent is "effective" is an issue that can safely be left for determination according to standards incorporated from conventional criminal law. Those standards would deny effectiveness to consent gained by force, threat, or fraud, or where the assenting person is patently incapable of making a reasoned judgment as to the nature or harmfulness of the conduct.[77]

Subsection C. is drawn from Model Penal Code § 2.12(1),[78] and complements earlier standards requiring express consent. It allows a juvenile to defeat delinquency liability where it can be shown that the conduct charged against him or her was customarily tolerated in his or her community, so long as the injured party has not expressly negated such toleration and no violence to the spirit of the prohibition is caused thereby. Juveniles, to a greater extent than adults, acquire their norms for behavior from their immediate community. Conduct within those limits ought not be a basis for delinquency liability

[74] Model Penal Code Proposed Official Draft § 2.12(3)(a), at 42.

[75] Model Penal Code Proposed Official Draft 41-42.

[76] *W. LaFave & A. Scott, Criminal Law* 408.

[77] Model Penal Code Proposed Official Draft § 2.11(3), at 41; *LaFave & Scott, supra.*

[78] Where it comprises one of four situations calling for dismissal on de minimis grounds. The circumstances described seem more properly treated as a species of consent than of insignificance.

under the conditions described because it evidences neither culpability nor deviance.

Special mention should be made of the scope of the recommended affirmative defense in the case of intrafamily offenses. The "customary tolerance or license" that exists in family living situations is highly variable, and behavior that is within or only slightly oversteps those understood tolerances is most appropriately dealt with by parental authority rather than by the criminal law. The nature of the conduct charged to constitute delinquency, the relation to the accused of the person whose rights have been infringed, and the situation in which the conduct occurred (*e.g.*, at home or elsewhere) should be considered in determining whether the defense is available.

3.4 Parental authority.

A. A juvenile should not be adjudicated delinquent for complicity in an offense committed by another if he or she terminated his or her involvement in such offense prior to its commission and

1. gave timely warning to law enforcement authorities or to a parent, legal guardian, or custodian, or to an adult otherwise entrusted with the care or supervision of the juvenile; or

2. otherwise made a reasonable effort to prevent the commission of the offense.

B. It should be a defense to delinquency liability that a juvenile engaged in conduct charged to constitute an offense because a parent, legal guardian, or custodian, or an adult otherwise entrusted with the care or supervision of the juvenile, used or threatened to use force or disciplinary measures against him or her or another which a person of reasonable firmness in the juvenile's situation would have been unable to resist.

Commentary

This standard is designed to recognize the unique role that persons in positions of authority occupy in a juvenile's life. For each of the sections of the standard, such a person is defined as a "parent, legal guardian, or custodian, or . . . an adult otherwise entrusted with the care or supervision of the juvenile." This definition is intended to include all those adults who, because of their special relation to the juvenile, exercise great influence over him or her and upon whom, therefore, the juvenile should be permitted to rely. The term "custodian" refers to those persons, other than parents or legal guardians,

who stand *in loco parentis* to the juvenile or who have obtained legal custody by order of a court.[79]

Subsection A. is patterned after Model Penal Code § 2.06(6),[80] to which has been added a provision allowing a juvenile to terminate his or her complicity in an offense (for which he or she would otherwise be liable according to conventional rules of accessorial liability). by notifying a parent or parent figure. If incorporated law allows termination of liability by notification to officials, it seems appropriate that juveniles should be able to effect that end by the means provided.

Moreover, the recommended standard may serve to encourage both withdrawal from criminal associations (by vitiating liability) and recourse to parents in such situations. Whether a parent would be legally obliged to notify the authorities or take other steps to prevent the commission of the offense will depend on local law governing such duties generally.

The effect of Subsection B. is to recognize the special authority that a parent (or other adult occupying an analogous status) may exercise over a young person's behavior. The recommendation supplements conventional duress provisions by providing a special ground of exculpation where that authority has been abused by coercing a juvenile to commit an offense.

To the extent that a juvenile's offense is a reasonable (as defined by these standards) response to such authority, its commission evidences no need for correction or punishment, although the coercing adult would of course be criminally liable under conventional principles of accessorial liability.

3.5 Responsibility.

Juvenile delinquency liability should not be imposed if, at the time of the conduct charged to constitute the offense, as a result of mental disease or defect, the juvenile lacked substantial capacity to appreciate the criminality of his or her conduct or to conform his or her conduct to the requirements of the law.

Commentary

The recommended standard incorporates the reformed version of the "insanity" defense proposed by the Model Penal Code and adopted by many state and federal jurisdictions.

Any attempt to state the conditions under which mental incapacity should defeat criminal liability must address two kinds of limiting issues:

[79] Uniform Act § 2(h).
[80] Model Penal Code 33-34 (Proposed Official Draft).

A. How must the incapacity have been caused?

B. How must the incapacity have affected the individual's mental functioning?

As to the first issue, Anglo-American law has always required that the incapacity derive from some mental disease or defect, thus excluding, for example, incapacities based on the individual's social background.

In an earlier draft, it was proposed that a juvenile's mental incapacity or disorder resulting from "immaturity" should have the same exculpating effect as incapacities resulting from "mental disease or defect." That recommendation was based on the assumption that impairment of a juvenile's cognitive or volitional control might as easily, and, more to the point, as innocently, be the result of mental immaturity as of mental pathology. By vote of the commission at its December 1974 meeting, the reference to "immaturity" was stricken. It was the view of the commission that to excuse juveniles from delinquency liability based solely on the ground of "immaturity" would subject juveniles so excused to civil commitment on that same ground. The specter of involuntary, indeterminate commitment of juveniles based on a concept as vague and shifting as "immaturity" (with release from confinement presumably based on an equally imprecise concept of "maturity") was judged too high a price to pay for the proposed change in the standards for delinquency liability. As presently proposed, therefore, this standard follows all existing Anglo-American law in restricting the "insanity" defense to incapacities found to be the result of mental disease or defect.

The second issue—the nature of the impairment—has elicited a more variable response from the law. The traditional *M'Naghten* standard[81] recognized the defense only where, by reason of mental disease or defect, the individual did not know what he or she was doing or that it was wrong. The *Durham* standard,[82] recently rejected in its home jurisdiction, the District of Columbia, abandoned the requirement that mental disorder impair some particular aspect of mental functioning and instead granted exculpation whenever the offense was the "product" of mental disorder. Despite its simplicity, the *Durham* standard proved exceedingly difficult to administer, primarily because (contrary to Judge Bazelon's expectations) it allowed the psychiatric expert to usurp the law's function of determining responsibility.

The proposed standard follows the Model Penal Code and the proposed Federal Criminal Code[83] by requiring that a juvenile's mental

[81] M'Naghten's Case, 10 Clark & Fin. 200 (1843).

[82] Durham v. U.S. 214 F.2d 862 (D.C. Cert. 1954).

[83] National Commission on Reform of Federal Criminal Laws, Study Draft § 503 (1970).

irresponsibility be manifested by substantial impairment of the capacity to control his or her conduct or to appreciate its wrongful character. While such a standard is vulnerable to the criticism that it artificializes mental processes, the job of the criminal law is not to provide scientifically precise descriptions of psychic processes but to provide workable bases for the determination of guilt or innocence.

The standard departs in one respect from the Model Penal Code formulation, which specifically bars application of the insanity defense to "an abnormality manifested only by repeated criminal or otherwise anti-social conduct."[84] This attempt to exclude the so-called "sociopath" from the scope of the insanity defense is rejected for the same reasons that led to its rejection by the drafters of the proposed Federal Criminal Code: "Such a provision may be of questionable utility in view of the near certainty that some additional symptom will be found by any psychiatrist inclined to the ultimate conclusion that the accused was mentally ill."[85]

PART IV: SANCTIONS

Introduction. Juvenile courts have traditionally been granted exceedingly broad dispositional authority in delinquency cases.[86] A juvenile adjudicated delinquent for the violation of even a minor local criminal ordinance is commonly subject to incarceration in a state institution. The violation of any state, federal, or local law by a juvenile is, in this traditional scheme, seen as a symptom of present or incipient social deviance that if so diagnosed by a juvenile court judge, might require the imposition of serious and lengthy sanctions "in the best interests of the child."

As to the duration of confinement that may be imposed pursuant to an adjudication of delinquency, the large majority of states provide that such sentences shall be of an indeterminate length, subject to release either by order of the juvenile court following a hearing on the motion of an interested party, or by order of the director of the facility in which the child is confined.[87] A small number of states

[84] Model Penal Code § 401(2) (1962).

[85] National Commission, Study Draft 37 (1970).

[86] *See* the *Dispositional Procedures* volume 6-10.

[87] *Ariz. Rev. Stat. Ann.* § 8-246 (Supp. 1972); *Fla. Stat. Ann.* § 39.11(4) (Supp. 1973); *Ill. Ann. Stat.* ch. 37, § 705-7(5) (1972); *Ind. Ann. Stat.* § 9-3207 (1956); *Ky. Rev. Stat. Ann.* § 208.200(1,c) (1972); *La. Rev. Stat. Ann.* § 13:1580 (Supp. 1973); *Me. Rev. Stat. Ann.* tit. 15, § 2611 (1964); *Mass Gen. Laws Ann.* ch. 119, § 58 (Supp. 1972); *Mich. Stat. Ann.* § 27.3178 (Supp. 1973); *Minn. Stat. Ann.* § 260.181(4) (1971); *Mo. Ann. Stat.* § 211.231(1)

and the District of Columbia, however, limit the effect of dispositional orders.[88] In Connecticut, for example, commitment of delinquent children is for an indeterminate period not to exceed two years, subject to recommitment for an additional two years upon a finding that such extension would be in the best interest of the child.[89] Pennsylvania law limits confinement to a period no longer than three years, or a period no longer than the maximum sentence for an adult convicted of the same offense, whichever is less.[90] Juvenile court laws provide for periodic review of dispositional orders.[91]

Whether confinement is specified as limited or indeterminate, juvenile court dispositional orders commonly terminate when the juvenile reaches twenty-one,[92] or some earlier specified age.[93]

A few rather limited conditions precedent to confinement are applied by some states. Minimum age requirements are often im-

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(1959); *Mont. Rev. Codes Ann.* § 10-612 (Supp. 1971); *Neb. Rev. Stat.* § 43-210.02 (1969); *N.M. Stat. Ann.* § 13-14-35 (Supp. 1972); *N.C. Gen. Stat.* § 7A-286 (Supp. 1971); *Ohio Rev. Code Ann.* § 2151.38 (Supp. 1972); *Okla. Stat. Ann.* tit. 10, § 1139 (Supp. 1972); *S.D. Compiled Laws Ann.* § 26-8-48 (Supp. 1972); *Tenn. Code Ann.* § 37-237 (Supp. 1972); *Tex. Rev. Civ. Stat.* art. 2338-1, § 13(c2) (1971); *Utah Code Ann.* § 55-10-103 (Supp. 1971); *Vt. Stat. Ann.* tit. 33, § 658 (Supp. 1972); *Va. Code Ann.* § 16.1-180 (1960); *Wash. Rev. Code Ann.* §13.04.095 (Supp. 1972); *Wis. Stat. Ann.* § 48.34(3) (1957); *Wyo. Stat. Ann.* § 14-115.32 (Supp. 1971).

[88] *Conn. Gen. Stat. Ann.* § 17-69 (Supp. 1973); *D.C. Code Ann.* § 16-2322 (Supp. V, 1972); *Ga. Code Ann.* § 24A-2701 (Supp. 1972); *Md. Ann. Code* art. 26, § 70-20 (1973); *Pa. Stat. Ann.* tit. 11, § 50-323 (Supp. 1973).

[89] *Conn. Gen. Stat. Ann.* § 17-69 (Supp. 1973).

[90] *Pa. Stat. Ann.* tit. 11, § 50-323 (Supp. 1973).

[91] *See, e.g., Iowa Code Ann.* § 232.36 (1969); *Tenn. Code Ann.* § 37-237 (Supp. 1972).

[92] *Ariz. Rev. Stat. Ann.* § 8-246(B) (Supp. 1972); *Colo. Rev. Stat.* § 22-3-19 (1963); *Fla. Stat. Ann.* § 39.11(4) (Supp. 1973); *Idaho Code* § 16-1814(3) (Supp. 1973); *Ill. Ann. Stat.* ch. 37, § 705-11 (1972); *Ky. Rev. Stat. Ann.* § 208.200(1c) (1972); *La. Rev. Stat. Ann.* § 13:1580 (Supp. 1973); *Me. Rev. Stat. Ann.* tit. 15, § 2611 (Supp. 1972); *Md. Ann. Code* art. 26, § 70-20 (1973); *Mass. Gen. Laws Ann.* ch. 119, § 58 (Supp. 1972); *Minn. Stat. Ann.* § 260.181 (1971); *Mo. Ann. Stat.* § 211.231 (Supp. 1973); *Neb. Rev. Stat.* § 43-210.02 (1969); *N.M. Stat. Ann.* § 13-14-35(H) (Supp. 1972); *Ohio Rev. Code Ann.* § 2151.38 (Supp. 1972); *Okla. Stat. Ann.* tit. 10, § 1139 (Supp. 1972); *S.D. Compiled Laws Ann.* § 26-8-48 (Supp. 1972); *Tex. Rev. Civ. Stat.* art. 2338-1, § 13(c2) (1971); *Utah Code Ann.* § 55-10-103 (Supp. 1971); *Vt. Stat. Ann.* tit. 33, § 658 (Supp. 1972); *Va. Code Ann.* § 16.1-180 (1960); *Wash. Rev. Code Ann.* § 13.04.095 (Supp. 1972); *Wis. Stat. Ann.* § 48.34 (1957); *Wyo. Stat. Ann.* § 14-115.32 (Supp. 1971).

[93] *Iowa Code Ann.* § 232.36 (1969) specifies age for termination of orders; *Miss. Code Ann.* § 43-21-19 (1972) allows state training schools to retain child until twentieth birthday; *Mich. Stat. Ann.* § 27.3178 (Supp. 1973) and *N.C. Gen. Stat.* § 7A-286(5) (Supp. 1971) both provide that orders terminate at age of eighteen.

posed, ranging from eight to thirteen years of age.[94] Need for treatment requirements also exist in several jurisdictions.[95]

All of the model acts limit the effective length of commitment orders. The Uniform Act limits the duration of any order committing a delinquent child to confinement in an institution for delinquent children to two years, but allows a two-year extension of the order upon a hearing and finding that extension is necessary for the treatment or rehabilitation of the child.[96] The Children's Bureau Standards recommend that an order committing a juvenile to confinement be limited to three years duration,[97] as does the Standard Act,[98] although both provide for extensions similar to the Uniform Act provision. Under all the acts, such orders terminate when the juvenile attains majority.[99]

Only the Children's Bureau Standards require a specific finding of a need for institutional treatment as a condition precedent to a commitment. Those standards provide that " . . . [t]he court should be required to find either that the child cannot receive in his own home the care, supervision or guidance needed, or that his removal is necessary for the protection of the community."[100]

That the juvenile court's customarily broad discretionary power to commit juveniles to confinement is more than theoretical is demonstrated by the case of Gerald Gault, a fifteen-year-old found to have violated an Arizona statute prohibiting the use of "vulgar, abusive or obscene language . . . in the presence or hearing of any woman or child. . . ."[101] Although an adult convicted of this same offense could be imprisoned for no more than sixty days, Gerald was committed by the juvenile court to the State Industrial School "for the period of his minority [that is, until twenty-one], unless sooner discharged. . . ."[102]

[94] *Ariz. Rev. Stat. Ann.* § 8-244 (Supp. 1972); *Cal. Welf. & Inst'ns Code* § 733 (West 1972); *Ill. Ann. Stat.* ch. 37, § 705-2(5) (1972); *Kan. Stat. Ann.* § 38-826(a6) (Supp. 1972); *Me. Rev. Stat. Ann.* tit. 15, § 2611 (Supp. 1972); *Miss. Code Ann.* § 43-21-19(2) (1972); *Mo. Ann. Stat.* § 219.160 (1959); *Okla. Stat. Ann.* tit. 10, § 1139(c) (Supp. 1972).

[95] *Conn. Gen. Stat. Ann.* § 17-68(a) (Supp. 1973); *Ga. Code Ann.* § 24A-2304 (Supp. 1972); *Ill. Ann. Stat.* ch. 37, § 705-2(5) (1972); *Md. Ann. Code* art. 26, § 70-19 (1973); *N.Y. Family Ct. Act.* § 743 (McKinney 1963); *N.C. Gen. Stat.* § 7A-286(3) (Supp. 1971); *Ore. Rev. Stat.* § 419.509 (1972).

[96] Uniform Act § 36(b).

[97] Children's Bureau Standards 82.

[98] Standard Act § 24(3).

[99] *See, e.g.*, Standard Act § 24(3).

[100] Children's Bureau Standards 86, § 1(d).

[101] *Ariz. Rev. Stat. Ann.* § 13-377.

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

Because the process by which Gerald's "delinquency" was determined failed to conform to due process standards, the United States Supreme Court reversed the Arizona judgment.[103] The *Gault* decision, however, does not purport to limit the sanctioning authority of the juvenile court; on the contrary, the Court's holding is expressly limited to "the proceedings by which a determination is made as to whether a juvenile is a 'delinquent'. . . ."[104]

The standards set forth in Parts IV and V recommend that the juvenile court's dispositional authority in delinquency cases be rigorously limited in *type* and *duration* according to the age and prior record of the juvenile and the seriousness of his or her offense.

While the present delinquency sanctioning system is not properly termed "indeterminate" (because all jurisdictions terminate juvenile sanctions at majority—commonly age twenty-one), and although the standards here proposed are not strictly "determinate" (because only maxima are prescribed), it is no great distortion loosely to characterize the proposed standards that follow as recommending substitution of determinate for indeterminate sanctions in delinquency proceedings.

This move toward determinacy is consistent with the direction of recent statutory changes and with model legislation recently proposed. Determinacy of delinquency sanctions, moreover, is demanded by the logic of the principle of limited intervention. It would make little sense to restrict the occasions for government intervention in the lives of juveniles if any such occasion, however minor, might yield relatively unlimited sanctioning authority.

The following standards seek to accomplish substantial determinacy in delinquency sanctions by:

1. Describing three types of sanctions:
   a. custodial;
   b. conditional freedom; and
   c. nominal.
2. Ranking juvenile offense categories according to the maximum penalties authorized for adult offenders.
3. Limiting the type and duration of sanction that may be imposed according to:
   a. the category of offense;
   b. the prior record of the juvenile; and
   c. the severity of the sanction to be imposed.

[103] *Id.*
[104] *Id.*

4.1 Types of sanctions.

The sanctions that a juvenile court may impose upon a juvenile adjudged to have committed a juvenile offense should be of three types, from most to least severe, as follows.

A. Custodial, where the juvenile is ordered

1. to be confined in a secure facility as defined in these standards; or

2. to be placed in a nonsecure facility including a foster home or residence as defined in these standards.

B. Conditional, where the juvenile is ordered

1. periodically to report to probation or other authorities; or

2. to perform or refrain from performing certain acts; or

3. to make restitution to persons harmed by his or her offense or to pay a fine; or

4. to undergo any similar sanction not involving a change in the juvenile's residence or legal custody.

C. Nominal, where the juvenile is reprimanded, warned, or otherwise reproved and unconditionally released.

D. For purposes of this standard

1. the following institutions or designated portions thereof are secure facilities:

. . . . [to be designated by the enacting jurisdiction]

2. the following types of facilities or designated portions thereof are nonsecure facilities:

. . . . [to be designated by the enacting jurisdiction]

Commentary

This standard defines a hierarchy of three types of sanctions that may be imposed in delinquency proceedings. These definitions, together with the juvenile offense categories described in Standard 4.2, *infra*, provide the vocabulary for imposing determinate limits on the type and duration of sanctions available to the court in delinquency dispositional proceedings. (See Standard 5.2, *infra.*)

The three types of sanctions are ranked according to the degree of deprivation of freedom that each entails.

The most severe custodial sanction contemplated by the standard is confinement in a secure facility, as that term is defined in the *Corrections Administration* volume.

A distinction is drawn between such confinement and placement in a nonsecure facility. The distinction is designed to differentiate secure, total, often remote institutions (places of confinement) from open, community facilities (including foster care) in which a juvenile

may be ordered to reside while maintaining a relationship with his or her community, family, school, or place of employment. Because this distinction is necessarily imprecise, bracketed sections are provided in subsection D. of the standard for legislative (or administrative) specification in each jurisdiction of the institutions (or types or portions thereof) that fall within each category.

A juvenile's freedom is vastly less infringed upon by the two remaining types of sanctions—conditional freedom and nominal sanctions.

Conditional freedom is a compendious sanction designed to include probation, restitution, community service, and similar compulsory regimes that do not entail "a change in the juvenile's residence or legal custody." Nominal sanctions are distinguished by the unconditional release of the juvenile from any further jeopardy, contingent or otherwise, arising from the adjudicated offense.

It should be noted that this standard is not intended to distinguish among types of sanctions according to the level or effectiveness of treatment provided to juveniles subject to such sanctions. Nor does it differentiate according to whether the official motive for imposing a sanction is to treat, correct, incapacitate, or punish the juvenile. Instead, the standard is designed to assure that juvenile court delinquency sanctions that abridge freedom be proportional to the offense committed and determinate in the type and duration of sanction imposed. That any authorized sanction be as humanely and effectively administered as possible is the province of the *Dispositions* and *Dispositional Procedures* volumes of these standards.

4.2 Classes of juvenile offenses.

A. Offenses within the criminal jurisdiction of the juvenile court should be classified as class one through class five juvenile offenses.

B. Where, under a criminal statute or ordinance made applicable to juveniles pursuant to Standard 2.2, the maximum sentence authorized upon conviction for such offense is

1. death or imprisonment for life or for a term in excess of [twenty] years, it is a class one juvenile offense;

2. imprisonment for a term in excess of [five] but not more than [twenty] years, it is a class two juvenile offense;

3. imprisonment for a term in excess of [one] year but not more than [five] years, it is a class three juvenile offense;

4. imprisonment for a term in excess of [six] months but not more than [one] year, it is a class four juvenile offense;

5. imprisonment for a term of [six] months or less, it is a class five juvenile offense;

6. not prescribed, it is a class five juvenile offense.

Commentary

This standard parallels Standard 2.2 (making adult criminal statutes and ordinances applicable, with enumerated modifications, to juveniles) by deriving the maximum sanctions authorized for juvenile offenders from the maximum sanctions to which an adult offender would be subject for the same offense. Modification of these maxima for application to juveniles is, however, accomplished with very broad strokes under this recommended standard.

Adult felony offenses are classified as class one, two, or three juvenile offenses, according to the maximum term prescribed by law for adult offenders. Misdemeanors are ranked as class four or five juvenile offenses by reference to the statutory maxima prescribed by an incorporated criminal prohibition. Whether more or fewer offense categories are needed justly to differentiate among juvenile offenders, or whether a greater degree of sentence variation common to adult sanction systems ought to be more precisely reflected by, *e.g.*, prescribing a ratio (constant or variable) for computing juvenile from adult maxima, are obviously debatable issues. The five offense categories recommended seem sufficient to assure substantial proportionality and to reflect the usual level of actual variation in adult sanctions.

The standard may also be challenged for its failure to confront possible inequities in the relative severity of sanctions applicable to adults, which (as was recommended with respect to the substantive law) could be discreetly modified for application to juvenile offenders. The effect of such inequities in juvenile proceedings, however, is substantially diminished if not eliminated by the recommendation that all adult offenses be collapsed within five juvenile offense categories, subject to an overall limitation of two years' confinement.

PART V: LIMITS ON TYPE AND DURATION OF DELINQUENCY SANCTIONS

5.1 Orders imposing sanctions.

Juvenile court orders imposing sanctions should specify:

A. the nature of the sanction; and

B. the duration of such sanction; and,

C. where such order affects the residence or legal custody of the juvenile, the place of residence or confinement ordered and the person or agency in whom custody is vested*; and

***Commission member Wald would not require that the disposition order specify the "place of residence" but only the level of secure or nonsecure confinement and would leave the precise placement to the discretion of corrections officials.**

D. The juvenile court judge's reasons for the sanction imposed, pursuant to *Dispositions* Standard 2.1.

Commentary

This standard specifies the minimal requirements for an order imposing sanctions.

5.2 Limitations on type and duration of sanctions.

A. The juvenile court should not impose a sanction more severe than,

1. where the juvenile is found to have committed a class one juvenile offense,

a. confinement in a secure facility or placement in a nonsecure facility or residence for a period of [thirty-six] months, or

b. conditional freedom for a period of [thirty-six] months;

2. where the juvenile is found to have committed a class two juvenile offense,

a. confinement in a secure facility or placement in a nonsecure facility or residence for a period of [eighteen] months, or

b. conditional freedom for a period of [twenty-four] months;

3. where the juvenile is found to have committed a class three juvenile offense,

a. confinement in a secure facility or placement in a nonsecure facility or residence for a period of [six] months, or

b. conditional freedom for a period of [eighteen] months;

4. where the juvenile is found to have committed a class four juvenile offense,

a. confinement in a secure facility for a period of [three] months if the juvenile has a prior record, or

b. placement in a nonsecure facility or residence for a period of [three] months, or

c. conditional freedom for a period of [twelve] months;

5. where the juvenile is found to have committed a class five juvenile offense,

a. placement in a nonsecure facility or residence for a period of [two] months if the juvenile has a prior record, or

b. conditional freedom for a period of [six] months.

B. For purposes of this standard, a juvenile has a "prior record" only when he or she has been formally adjudged previously to have committed:

1. an offense that would amount to a class one, two, or three juvenile offense, as defined in Standard 4.2, within the twenty-

four months preceding the commission of the offense subject to sanctioning; or

2. three offenses that would amount to class four or five juvenile offenses, as defined in Standard 4.2, at least one of which was committed within the twelve months preceding the commission of the offense subject to sanctioning.

C. The juvenile court may impose a sanction consisting of confinement or placement for a specified period of time followed by conditional freedom for a specified period of time, provided that the total duration does not exceed the maximum term permissible as a custodial sanction for the offense.

Commentary

The provisions of this standard are graphically summarized in Chart 1.

This standard utilizes the vocabulary established in previous standards to impose determinate maxima on the type and duration of juvenile court sanctions. It sets an upper limit of thirty-six months on custodial commitments and restricts nonincarcerative sanctions to a maximum duration of thirty-six months.

Whether the particular maxima proposed adequately accommodate the conflicting demands of justice (proportionality and determinacy), treatment (flexibility and individualization), and social defense (authority and security) is of course a matter for discussion. That some such limits ought to be prescribed is a fundamental assumption of these standards.

The limits proposed are derived from (1) the kind and duration of sanctions actually imposed in delinquency cases; (2) regard for the developmental situation of the juvenile offender; (3) the demonstrated adverse effects of long-term confinement or institutionalization; and (4) skepticism regarding both the accuracy of predictions of delinquent behavior and the ability of custodial treatment durably to prevent such behavior.

Because noncustodial sanctions involve a lesser deprivation of freedom and fewer risks of harmful consequences, the standard authorizes periods of conditional freedom of relatively longer duration than custodial commitments.

The standard also permits a sanction combining specified successive custodial and noncustodial terms, provided the total term does not exceed the maximum custodial sanction authorized for the offense. This provision is in accord with *Dispositions* Standard 3.3 C.

Class four and five juvenile offenses correspond to the misde-

CHART 1

MAXIMUM DURATION OF SANCTIONS (IN MONTHS)

*TYPE OF SANCTION**

CLASS OF JUVENILE OFFENSE	Conditional Freedom		Placement in a Nonsecure Facility		Confinement in a Secure Facility
One	36	OR	36	OR	36
Two	24	OR	18	OR	18
Three	18	OR	6	OR	6
Four	12	OR	3	OR	3
Five	6	OR	2	OR	××× ×××

Key:

∴ = Sanction authorized only if prior record.

××× / ××× = Sanction not authorized.

meanor category under most adult criminal codes. More serious misdemeanors (class four) may result in confinement (if the juvenile has a prior record as defined in subsection B. of the standard) or placement in a nonsecure facility for a period of three months. Petty misdemeanors (class five juvenile offenses) may not be sanctioned by confinement in a secure facility, but placement in a nonsecure facility for two months is authorized when the juvenile has a prior record.

*Because nominal sanctions require no durational limits, that category is excluded from the chart.

These provisions are premised on the judgment that most petty offenses pose no threat to others and that, absent such threat, only minimal custodial sanctions should be allowed.

Standard 5.2 makes no provision for "enhanced sentencing" of juveniles beyond the maxima there prescribed. Because current law commonly allows the juvenile court judge absolute discretion to impose sanctions, including incarceration, until the juvenile attains majority, substantial authority to "enhance" sentences has been inherent in the conventional juvenile justice system. The adoption of a standard limiting the juvenile court judge's sentencing authority by the prescription of determinate maxima requires confronting whether such limits ought to be supplemented by a special provision authorizing lengthier sentences for egregious offenses by juveniles. Because any other solution would compromise the determinacy of the sanctions recommended by these standards, the question of enhanced sentencing ought to be addressed in a proceeding to determine whether juvenile court jurisdiction should be declined. As such, it is treated in the *Transfer Between Courts* volume.

5.3 Multiple juvenile offenses.

A. When a juvenile is found to have committed two or more juvenile offenses during the same transaction or episode, the juvenile court should not impose a sanction more severe than the maximum sanction authorized by Standard 5.2 for the most serious such offense.

B. When, in the same proceeding, a juvenile is found to have committed two or more offenses during separate transactions or episodes, the juvenile court should not impose a sanction

1. more severe in nature than the sanction authorized by Standard 5.2 for the most serious such offense; or

2. longer in duration than a period equal to one and a half times the period authorized by Standard 5.2 for the most serious such offense.

C. When, at the time a juvenile is charged with an offense, the charging authority or its agents have evidence sufficient to warrant charging such juvenile with another juvenile offense, committed within the court's jurisdiction, the failure jointly to charge such offense should thereafter bar the initiation of juvenile court delinquency proceedings based on such offense.

Commentary

Because of the proliferation of criminal statutes and ordinances at all government levels, a single course of conduct may often yield

plural criminal charges based on a multiplicity of acts, victims, or laws. This standard is intended to deal with the effect of such multiple charges on the sanction limitations imposed by the previous standards.

When multiple charges arise out of a single transaction, subsection A. limits the juvenile court to the sanction authorized for the most serious offense charged.

Multiple offenses that arise from separate transactions increase by one-half the authorized duration for the most serious such offense, but do not allow the imposition of a more severe type sanction.

Subsection C. of the proposed standard seeks to promote the filing of all charges known to the charging authority in a single proceeding by barring charges not so joined. This section is designed to complement subsection B., and to encourage the consolidation of charges, the pendency of which might otherwise hamper the success of treatment and services intended to give the juvenile a fresh start.

5.4 Termination of orders imposing sanctions.

A juvenile court order imposing sanctions should terminate no later than the [twenty-first] birthday of the juvenile subject to such order.

Commentary

See *Transfer Between Courts*, Standards 1.2 and 1.3, and accompanying commentary.

Dissenting Views

Statement of Commissioner Wilfred W. Nuernberger

I dissent to the volume on *Juvenile Delinquency and Sanctions.*

This volume gives the juvenile court jurisdiction over those offenses that would be punishable by imprisonment. The effect of this change would be that children who commit criminal offenses for which the penalty was a fine would be handled in regular adult court. In my opinion, this change destroys the juvenile court. Many states and localities have in recent years been told that they do not need to have a jail sentence for every law violation, and there has been a move to provide that only fines can be imposed. Such a position in my opinion is an "enlightened" approach to punishment for adults. The result of this standard is that eleven-, twelve-, and thirteen-year-old children who have violated some law punishable by a fine would appear in adult court. It may be argued that a prosecuting attorney would use common sense and not prosecute those children, but it seems to me that a standard should not depend upon the common sense of prosecuting attorneys in thousands of jurisdictions to correct a policy that should be handled in the standard itself. But more important, if a child is to appear in any court, it is my belief that the child should appear in juvenile court.

Standard 1.2 requires the prosecution to disprove an affirmative defense beyond a reasonable doubt. Such a standard is inconsistent with the idea of an affirmative defense. The defense need not prove an affirmative defense beyond a reasonable doubt. It is now clear that the state must prove a charge of juvenile delinquency by proof beyond a reasonable doubt. This standard has worked very well in the adult criminal law and therefore there is no reason to change it for juveniles. This standard when applied to Standard 3.1 will guarantee endless litigation with no beneficial purpose.

I disagree with Standard 2.4,* which I consider to be harmful for children and also unconstitutional. Under the standard, it would not be illegal for a child to gamble or to be involved in other specific acts that would be illegal for adults. I believe that it is constitutional to have laws that are different for different classes of persons, but there must be a rational basis for the classification. For example, it is possible for a state to have a law that it is illegal for a child under sixteen years of age to drive a car and yet allow a person over sixteen to drive a car. The classification is reasonable because it depends upon the maturity and ability of the person to operate a motor vehicle. Such classifications do not offend the equal protection clause of the Constitution because there is a rational basis for the difference. However, in Standard 2.4, there is no rational basis for the distinction that an act is legal for a youth and illegal for an adult. In addition, the standard itself does not serve the best interest of children.

On the use of illegal substances, the argument is made that the answer to the problem is to prosecute the distributor. The attempts of this country at locating and prosecuting the distributors of illegal products have been one of the real failures of the justice system. I submit that there are many cases where prosecution of distributors has been successful only because a lead was obtained from a person charged with possession. I think it is obvious that the standard is included because some groups have suggested eliminating victimless crimes from the statutes. If such crimes are to be eliminated from the statutes they should be eliminated on their merits. Even if eliminated, it is doubtful that the country would eliminate them for children and thereby permit children to gamble, possess pornographic literature, and use alcohol and marijuana.

Finally, I object to the standard establishing a "grid" system of punishment for children. The standard proposed in effect states that if an adult can receive life imprisonment for an offense, a juvenile can receive a maximum of two years or if an adult can receive five years, a juvenile can receive no more than six months. The standard is supported by those who say that it will protect society, but I believe it will neither protect society nor provide the juvenile with the treatment he or she needs. It would be fair to have a standard that provided that a juvenile could not be subject to restrictive custody for a longer period than could an adult for the same law violation and also have the present limit which exists in all states that jurisdiction terminates at twenty-one years or a specified age.

*Standard 2.4 in the tentative draft, which provided for the elimination of private offenses, was deleted by the executive committee of the joint commission.

Statement of Commissioner Justine Wise Polier

This volume sees the primary task for reform of juvenile delinquency jurisdiction as revision of substantive criminal laws applicable to juveniles. It would repeal all special offense jurisdiction for juveniles and end state enforcement of authority of families, schools, or government over juveniles, not exercised in regard to adults. The only recognition of a difference between the treatment of juveniles and adults who violate laws that impose criminal sanctions is by reducing sentences in a "sensible" way under the rubric of proportional punishment. The proposals are drawn substantially from the Model Penal Code.

The criticism of many procedures in the family courts is justified and gives ground for increasing skepticism that this country is ready to improve services for delinquent juveniles. However, it does not seem rational or sound to ignore the vast differences between juveniles and adults, the unique capacity for change by juveniles, the need for careful assessment of the needs of individual juveniles, and governmental responsibility to provide services for juveniles on an individualized basis. The responses are regressive in that they lower goals and lessen responsibilities of government.

It is my hope that this noninterventionist theory will be seen as an honorable effort to confront governmental abdication of responsibility that has characterized the past decade, and not as a blueprint for the future.

The juvenile justice system, with all its imperfections, offers at least fertile ground for developing more effective responses to deviant behavior. It should not be abandoned or forced to follow in the lock-steps of the failed criminal justice system.

I concur in the proposals for increased protections of due process and in the standards that would limit dispositional authority and require determinate maximum periods of commitment. However, commitments that involve restrictions of the personal liberty of juveniles should not be based only on the offense. They should always be subject to judicial review so that when a child's condition or responses warrant greater freedom, such freedom will be assured.