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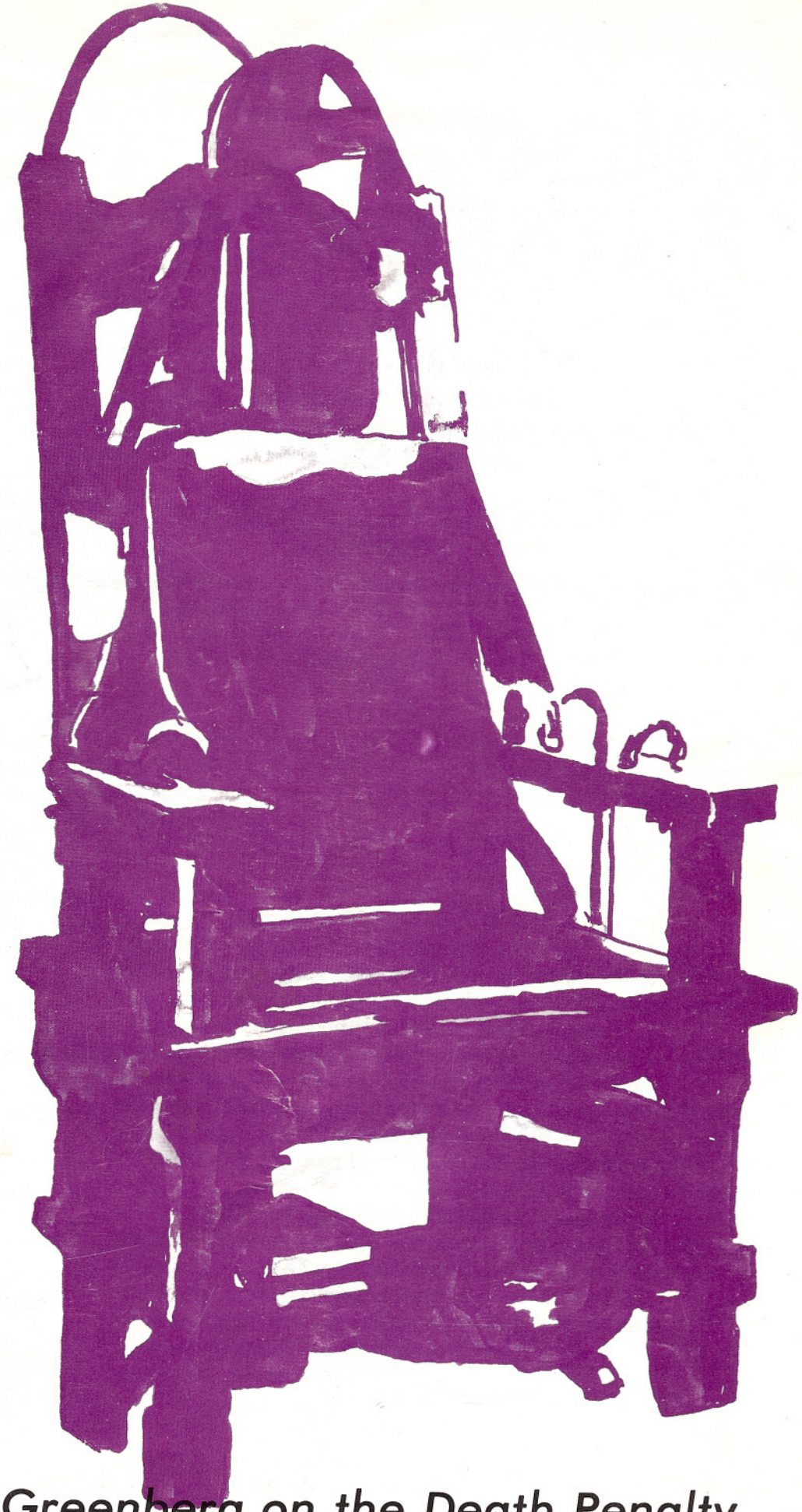

Jack Greenberg on the Death Penalty

The Defense Attorney at the Dispositional

the need for social worker

One of the most perplexing dilemmas for the defense attorney appearing in juvenile court is presented within the context of the dispositional hearing.[1] On the one hand, this is the most important hearing in the minor's path through the juvenile justice system. On the other hand, the defender has very little statutory or case law with which to defend his client. Some commentators would resolve the dilemma by relegating the attorney to a minor role at the disposition, arguing that this is essentially a non-legal hearing.[2] Others contend there is much to be accomplished by the defender at the dispositional stage.[3]

I subscribe to the latter view. In this paper I will attempt to show why the dispositional hearing deserves the defense attorney's best efforts in spite of the lack of legal guidelines for its operation, what the defender should try to do at the hearing, why the assistance of some social worker[4] input is essential for meaningful participation by the defender and, finally, why the addition of social worker staff to a defender office would be beneficial to the goals of the juvenile law.

The Dispositional Hearing

The form of the hearing is not complicated. The judge sits before the minor and other interested parties. He usually has available to him a report on the minor prepared by the probation staff. The report includes the nature and circumstances of the conduct that brought the minor before the court, the minor's previous record, the family history, school records, any special entries, a summary and a recommendation. The minor and his attorney may have access to the report and recommendation.[5] They will be given an opportunity to suggest to the court their views as to the best program for the minor, and then the judge will decide the matter.

While some crucial decisions are made at the detention, waiver and jurisdictional stages of the juvenile process, in the great majority of cases the most important hearing is the dispositional.[6] It certainly is the most important hearing in the eyes of the minor. "What's going to happen to me?" he asks. The answer is that the juvenile court judge may do many things from dismissing the case or suspending sentence to removing the minor from his home for an indefinite period of time. In our entire legal system, few decisions are as momentous as that made by the juvenile court judge at the dispositional hearing.

Most cases filed in the juvenile court reach the dispositional stage. Generally

Hearing:

assistance

Leonard Edwards

What follows is a paper presented to the second annual Juvenile Court Conference in Reno, Nevada, August 15-18, 1976. The conference was a joint project of NLADA and the National Council of Juvenile Court Judges, and was designed for legal aid and defender lawyers who provide representation in juvenile courts.

Efforts are underway to set up a Juvenile Section within NLADA. Discussions and planning took place at the conference in Philadelphia with the formation of an organizing committee, and the delineation of a series of issues and concerns for study and action.

In light of these efforts, we present this first in a series of juvenile law articles, to open a "multilogue" and direct your attention to this matter, and to the steps NLADA can, and shortly will, take to support the segment of its membership that struggles with it daily. Your comments are welcome; for information on the projected Juvenile Section, contact the NLADA Chicago office.

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the sufficiency of the evidence has been reviewed by a prosecutor and the weak cases have not been filed. If several separate counts have been filed, the chances are high that one will be sustained (found true) by the juvenile court thus taking the case to the dispositional hearing. Often the evidence includes a confession by the minor. Our experience in Santa Clara County, California is that better than 9 out of 10 cases are uncontested at the jurisdictional stage. In the contested cases, at least half have one count sustained.

In spite of the importance of the dispositional decision, there is very little law defining what rights the minor has at the hearing and what a defense attorney can do on behalf of his client. The United States Supreme Court decisions in *Kent,*[7] *Gault,*[8] *Winship,*[9] *McKeiver,*[10] and *Breed v. Jones*[11] set out the minor's constitutional rights at the jurisdictional and waiver hearings. State courts have added substantially to the minor's rights at these and other hearings,[12] but the courts have been reluctant to intrude into the dispositional hearing, thus entrusting the decision making to the sound discretion of the juvenile court judge.[13]

The reluctance to interfere in the dispositional hearing stems partly from the belief that the juvenile court judge, equipped with unbridled discretion, will be in the best position to devise a rehabilitative program for the minor before the court. Indeed the dispositional hearing was at the heart of the original juvenile court ideal first expressed in statute in Illinois in 1899 and now found in every jurisdiction in the United States. The law places the juvenile judge in a position to make important decisions about the minors who appear before him unhindered by legal and constitutional strictures.[14] Using experts in the social sciences for assistance, the judge is thought to be ideally situated to guide minors through the difficult years of youth. Those familiar with the wide discretion permitted the sentencing judge in criminal courts may be surprised to learn that the juvenile court's dispositional power is broader and more discretionary than the sentencing power of the criminal court.[15]

The Role of the Attorney

The traditional response by the attorney at the dispositional hearing has been to make the impassioned plea for mercy or "one more chance" that is often voiced in the criminal courts. This has been true even after the legal community heard that the attorney should present alter-

natives to the probation department's recommendations.

> The outcome is critical for the life of the child, and justice requires that he have the assistance of counsel in advancing his own interest before the court -- by offering alternative plans, for example, or by calling attention to the factual and theoretical assumptions, the speculations, the degree of thoughtfulness and thoroughness of the probation officer's report.[16]

Generally, the attorney neglects to develop an alternative plan. Instead he determines whether his client agrees with the probation department's recommendation and then verbalizes the client's position to the court.

This format, I suspect, is used extensively across the country by defenders in juvenile court and understandably so. The defender is faced with large caseloads which demand a great deal of time. Priorities are directed towards the detention, waiver and jurisdictional hearings where the attorney knows he has some law to turn to. He focuses on the legal as opposed to the social problems, and the effort for the dispositional hearing comes last.

Unfortunately for the defense attorney and his client, this is a losing strategy. It puts the probation officer and his social study against the attorney and his last desperate plea for leniency. As one commentator put it,

> . . .it was the rare attorney who had the resources and training to challenge competently a given dispositional recommendation.[17]

I suggest a substantially different approach to the dispositional hearing and to the juvenile case in general. The attorney should be thinking about disposition from the outset of the case.[18] The first time the attorney has contact with his client, the dispositional aspects of the case must be considered. Along with the detention, waiver, jurisdictional and other problems, the case must be viewed in its entirety including what the court will do if everything else fails. Of course, if the case results in a transfer of jurisdiction to the criminal courts or if the case is dismissed or found not to be true at the jurisdictional hearing, there will be no disposition, but, as was noted above, most cases proceed to the dispositional hearing.[19]

The attorney should be able to pick out those cases which will present dispositional problems from those that will not. Where probation seems assured, the attorney will be able to get by with less preparation. He can add to the probation report his suggestions and assist the court in the implementation of the recommendations (consistent with his client's wishes), but little else is necessary concerning disposition. In those cases in which an out-of-home placement or other recommendation opposed by the minor seems likely, the task becomes much more difficult.[20] The defender must attempt to construct an alternative program which is at once acceptable to his client and will also satisfy the rehabilitative and public protection goals to be considered by the court.[21]

Certain skills are important. (1) The attorney must be able to predict the probable recommendation at the dispositional hearing. Often this is easily determined by contacting the probation officer. (2) The attorney must have the ability to select an appropriate program for his client, one acceptable to the client and which the court will look upon favorably. For this, the attorney must have a working knowledge of the available community resources, probation services and placement possibilities.[22] (3) The attorney must start the program as soon as possible. One commentator has pointed out that the chances of success are highest at the pre-adjudication stage.

> Ordinarily offenders awaiting disposition and feeling the pressure of the court appear more motivated and are more likely to cooperate and accept service.[23]

Release of the minor at the detention stage on the condition he engage in a specific program can be a successful tactic while the presentation at disposition of an on-going rehabilitative scheme can be very persuasive to the judge. (4) The attorney must be able to work with the minor, his family, and other interested parties so that the program has a chance to succeed. (5) Finally, the attorney must be able to present the program persuasively at the dispositional hearing. The attorney should demonstrate how the program is consistent both with rehabilitation of the minor and with public protection. It is helpful to show that the program is working and all those concerned are satisfied with its progress. The attorney should not hesitate to use experts (psychiatrists, sociologists, etc.) to show the benefits of the pro-

posed program.

With this kind of preparation, the defense attorney comes into the dispositional hearing with the opportunity to have a substantial impact upon the decision making process. He has a meaningful alternative for the court's decision.

I do not mean to neglect the other important functions the defense attorney can perform at the dispositional hearing, such as checking all reports and documents for accuracy or bias and ensuring that no improper prior records or reports are before the court.[24] These, however, are familiar tasks for the attorney, and in this paper I am focusing on the unfamiliar.

Social Worker Staff

In order to effectively represent minors at the dispositional hearing, the defender needs the assistance of social worker personnel.[25] First, the attorney does not have the time to do many of the tasks I have outlined. He is tied down by court appearances and must have field support. Second, the attorney is not trained to do these tasks, and a social worker is.

The assistance a social worker can render to a defense attorney can be significant.[26]

(1) The social worker will enable the attorney to have much more information about the minor. Specifically, the attorney will better understand the social and psychological needs of the minor.

(2) The social worker can educate the attorney on available community resources and placements.

(3) The social worker will be able to talk to the minor in complete confidence both about the underlying conduct and about possible rehabilitative programs. Unlike the probation officer, who often must assume a position contrary to that of the minor, the social worker would, in every case, be attempting to find the least restrictive program consistent with the needs of the minor. It is this unique position shared by the attorney and the social worker that may give the alternative program a greater chance for success.[27]

(4) The social worker can assist the attorney in the preparation of an alternative social report which can be presented to the court at the time of disposition.

Why should defender offices be provided with social workers when probation officers perform substantially the same tasks for the court? Is this not a duplication of services and a drain on limited public monies? This position has been taken by some opponents to the creation of social worker staffs in defender offices.[28] In the remainder of this paper, I will discuss how such an innovation will aid both the juvenile court judge and the purposes of the juvenile law, how social workers have been a successful addition to several defender offices around the country and how cost can be kept to a minimum.

The juvenile court judge faces an extremely difficult task at the dispositional hearing. He is asked to decide the future of a minor based on little more than a probation report and a hearing at which the interested parties are present. Often untrained in the social sciences, the judge is nevertheless asked to strike a balance between the legal considerations and the social scientific findings so that the most productive rehabilitative program possible can be fashioned for the minor. The understandable temptation is to follow the probation report's findings and recommendations even when the judge knows the likelihood of success is small. As one Judge put it:

> The value of diagnostic studies and recommendations is too often reduced to a paper recommendation. In shopping for placement, probation officers are forced to lower their sights from what they know a child needs to what they can secure. Their sense of professional responsibility is steadily eroded. The judge, in turn, becomes the ceremonial official who in many cases approves a disposition which he knows is only a dead end for the child.[29]

The participation of social workers for the defense means the judge will, in difficult cases, be given a meaningful opportunity to choose between alternative programs. Perhaps the judge will decide on one recommendation, perhaps the other or a combination of the two or something entirely different. In any case, the decision will be more informed, the process more open and the judge less of a rubber stamp for the probation department.[30]

Society may well benefit from the participation of these social workers. The juvenile justice system is struggling to maintain its credibility with the community. While *Gault* may have given the minor more rights, it has neither stopped the rising juvenile crime rates nor had an impact on rehabilitative programs. The defender social worker is the kind of innovation that may result in the

creation of better programs for minors appearing before the juvenile court.

The experience of several defender offices who have had social worker staff assisting attorneys confirms much of what has been written in this paper. In Santa Clara County from May, 1969 until October, 1970, social workers were utilized to provide dispositional plans for a selected number of Public Defender clients in the criminal courts. The report which summarized the results of the project, found that the alternative programs presented by the defender social workers "were an important addition to the sentencing process."[31] Further, "most of the judges were favorably disposed to the Project,"[32] while the defense attorneys discovered they could do more at the sentencing stage than they had previously thought possible.[33]

Perhaps the first such program was started at the Public Defender Service for the District of Columbia in the 1960's. Called the Offender Rehabilitation Division, it became a permanent part of the agency in December of 1969. It provides to the agency's clients

> a myriad of services such as arrangements for psychiatric counseling, narcotics treatment, vocational training, and job development.[34]

At the Metropolitan Public Defender Office in Portland, Oregon, the Alternatives Program has been providing social work assistance to the defenders there since 1971.[35]

In the Seattle King County Public Defender Association, a Pre-Sentence Counseling Unit was started in 1972 to provide attorneys in criminal and juvenile court with treatment alternatives. The counseling units continue today. Several reports have commented on it, noting the favorable reaction of both judges and attorneys.[36] Most judges found the pre-sentence reports prepared by the counseling unit valuable and effective. Other programs have had similarly favorable reports.[37]

Creating and maintaining a social worker staff can be kept to a reasonable cost if several factors are noted. Since only a small percentage of the cases handled by the office will need such services, the number of social workers relative to attorneys will be small. In small offices, part-time assistance can be arranged. Students in social work, community volunteers and ex-offenders are ideal sources for the manpower needed to run such programs. Working arrangements with psychiatric staffs at local hospitals or universities should also be considered. Private attorneys might be given access to the social worker staff as is presently the practice in Seattle.[38]

In summary, the addition of social worker staffing at defender offices should benefit the attorney, the juveniles before the court, the juvenile court judge and the community. The test of the juvenile court is its ability to create rehabilitative programs that have good results. The programs created by social workers for the defense have impressed those who have had contact with them. Such programs may assist individual minors to rejoin the mainstream of society and also provide new directions for programs elsewhere in the criminal justice system.

I urge defender offices across the country to consider this type of innovation for their offices, both for the quality of services provided to their clients and for the quality of the alternatives available to the courts. I further urge the courts to support such innovations.

I wish to thank Sheldon Portman, The Public Defender of Santa Clara County for his helpful suggestions concerning the subject matter. I also wish to thank Ms. Lynne Anderson, M.S.W. presently employed by the Public Defender Office in Santa Clara County as a social worker in juvenile court for her comments on the function of the social worker in the juvenile court setting.

1Although many of the comments below may have relevance to cases involving neglected and abused children, the paper specifically addresses only dispositions involving cases of delinquency and persons in need of supervision.

2Isaacs, "The Role of the Lawyer in Representing Minors in the New Family Court", 12 *Buffalo Law Review* 501 (1968) at 507.

3Besharov, Douglas J., *Juvenile Justice Advocacy: Practice in a Unique Court,* Practising Law Institute, N.Y. (1974) pp. 412-436; *Law and Tactics in Juvenile Cases*, The National Juvenile Law Center, St. Louis University School of Law, 2nd Edition, 1974, at pp. 309-424; Paulson, "The Constitutional Domestication of the Juvenile Court", *The Supreme Court Review* 1967 233 at 256; Paulson, "Juvenile Courts and the Legacy of 1967", 43 *Indiana Law Journal* 527 (1968) at 538-539; Walsh, "The Attorney and the Dispos-

itional Process", 12 *Saint Louis University Law Journal* 644 (1968). For similar positions concerning the role of the attorney at the sentencing stage of criminal cases see Portman, "The Defense Lawyer's New Role in the Sentencing Process", *Federal Probation* March, 1970, pp. 3-8.

4The name social worker carries unfavorable connotations for many. Other descriptive titles might be considered such as counsellor or community resource person.

5They certainly should have access to the report and in sufficient time prior to the hearing to prepare adequately. See *Law and Tactics in Juvenile Cases, op.cit.* footnote 3 at pp. 369-373; Besharov, *op.cit.* footnote 3 at pp. 418-422; *Juvenile Law and Procedure* by Paulsen and Whitebread, National Council of Juvenile Court Judges, Reno, 1974, at pp. 172-174.

6The authors of *Law and Tactics in Juvenile Cases* (*op.cit.* footnote 3) refer to the dispositional hearing as the "heart of the juvenile court process." See pp. 309-311. Also see Edwards, "The Rights of Children", *Federal Probation* June, 1973, 34-41 at p. 38.

7*Kent v. United States* 383 U.S. 541 (1966)

8*In re Gault* 387 U.S. 1 (1967)

9*In re Winship* 397 U.S. 358 (1970)

10*McKeiver v. Pennsylvania* 403 U.S. 528 (1971)

11*Breed v. Jones* 95 S.Ct. 1779 (1975)

12For an excellent legal overview of the entire juvenile justice system, see *Law and Tactics in Juvenile Cases*, supra, footnote 3. Also see Weinstein, Noah, *Legal Rights of Children*, National Council of Juvenile Court Judges, Reno, 1974, p. 31; Paulsen and Whitebread, *op.cit.* footnote 5 at pp. 174-182.

13The Court in *Gault* specifically disavowed any consideration of the minor's rights at the dispositional stage.

> We do not, in this opinion, consider the impact of these constitutional provisions upon the totality of the relationship of the juvenile and the state. We do not even consider the entire process relating to juvenile "delinquents." For example, we are not here concerned with the procedures or constitutional rights applicable to the prejudicial stages of the juvenile process, nor do we direct our attention to the post-adjudicative or dispositional process.
>
> 387 U.S. at 13 (emphasis added)

14On the breadth of discretion afforded the juvenile court judge at the dispositional hearing see Thompson, *California Juvenile Court Deskbook*, California College of Trial Judges at 113.

15See Besharov, *op.cit.* footnote 3 at p. 373.

16*The President's Commission of Law Enforcement and Administration of Justice, Task Force Report: Juvenile Delinquency and Youth Crime* at p. 33. Accord see Walsh, *op.cit.* footnote 3 at pp. 646, 650; Kay and Segal, "The Role of the Attorney in Juvenile Court Proceedings; A Non-Polar Approach", *The Georgetown Law Journal* 61:1401 at 1417; Edwards, *op.cit.* footnote 5 at 38-39; Besharov, *op.cit.* footnote 3 at 412-422.

17Cayton, "Relationship of the Probation Officer and the Defense Attorney after *Gault*", *Federal Probation*, March 1970, at pp. 8-13, 11. Accord Besharov, *op.cit.* footnote 3 at p. 412.

18Dash, Medalie and Rhoden, Jr., "Demonstrating Rehabilitative Planning as a Defense Strategy", 54 *Cornell Law Review* 408 (1969) at 410.

19The defender must guard against being over-confident of victory at the jurisdicational stage and thus being "embarrassed" by being unprepared for the dispositional hearing after the petition is sustained.

20Some defenders assert they get along very well with their local probation officers and are fearful of upsetting a good relationship by presenting opposition to the probation recommendations. I suggest that to do a lawyerlike job for *all* of their clients, defenders must be prepared to present alternative programs at disposition in those cases where the probation recommendation is opposed by the minor even if this means rocking the boat.

21In most states, both goals are mentioned in the juvenile law. In California, for example, the statute reads as follows:

> 502. Purpose of Chapter. The purpose of this chapter is to secure for each minor under the jurisdiction of the juvenile court such care and guidance, preferably in his own home, as will serve the spiritual, emotional, mental, and physical welfare of the minor and the best interests of the State; to preserve and strengthen the minor's family ties whenever possible, removing him from the custody of his parents only when his welfare or safety and protection of the public cannot be adequately safeguarded without removal; and, when the minor is

removed from his own family, to secure for him custody, care, and discipline as nearly as possible equivalent to that which should have been given by his parents. This chapter shall be liberally construed to carry out these purposes:

California Welfare and Institutions Code, Section 502

22See Besharov, *op.cit.* footnote 3 at p. 374

23Senna, "Social Workers in Public Defender Programs", *Social Work*, July, 1975, 271 at 274.

24See *People v. Calloway* 37 Cal.App.3d 905, 112 Cal.Rptr. 745 (1974).

25This is not a new idea as the test below will reveal. One of the first recognitions of the need was in *The President's Commission of Law Enforcement and Administration of Justice, Challenge of Crime in a Free Society,*

Defense counsel needs ready access to a number of auxiliar services resembling those available to a modern and well-equipped probation office. . .Social investigation, diagnosis and planning call for the efforts of persons from many disciplines, of which the law is but one.

Washington, D.C.: U.S. Government Printing Office, 1967, p. 151.

26Moreover by the use of social work assistance the attorney is in no way abrogating his responsibility to make the important decisions concerning the defense of his client. He is adding another resource to assist him in his case preparation.

27See Lockwood, "The Role of the Attorney in the Treatment Phase of the Juvenile Court Process", *Saint Louis University Law Journal* 12:659 at 662. He notes another commentator who states

As a consequence, the ward is likely to be more responsive to the lawyer's recommendations as to a proper course of conduct than he would be to the directions given by the probation officer.

McKesson, "Right to Counsel in Juvenile Proceedings" 45 *Minnesota Law Review* 843, 851 (1961)

28See the probation officer's comments in Wald, *The Use of Social Workers in a Public Defender Office: An Evaluation of the Offender Rehabilitation Project of the Public Defender Office for Santa Clara County, California*, Law Enforcement Administration, U.S. Dept. of Justice (Washington, D.C.: U.S. Government Printing Office, 1972). pp. 59-62. *Contra*: see Brennan and Ware, "The Probation Officer's Perception of the Attorney's Role in Juvenile Court", *Crime and Delinquency* Vol. 16, No. 2, 172 at 175.

29Polier, *A View From the Bench* (1962) at p. 30.

30One Juvenile Court Judge suggested at the Reno conference that the defense attorney must help protect the judge from making mistakes in court by providing him with better information about the case.

31Wald, *op.cit.* footnote 25 at p. 6.

32*ibid* p. 7

33*ibid* p. 8

34Public Defender Service for the District of Columbia, *Fifth Annual Report*, Washington, D.C., 1975, at p. 11.

35For more information about the Alternatives Program in Portland, contact the Metropolitan Public Defender, 620 Southwest 5th, Suite 408, Portland, Oregon 97204.

36Arthur Young & Company, *Seattle King County Public Defender Association Evaluation Project Final Report*, Sacramento (March 1975) at page 41; See also Ginsberg, "Pre-Trial Diversion and Deferral Programs", *Washington State Bar News*, January 1974, pp. 6-9, 33.

37Dash etal, *op.cit.* footnote 17, notes the judge's attitude towards defense reports at page 426; Boroch, "Offender Rehabilitation Services and the Defense of Criminal Cases: The Philadelphia Experience", *Criminal Law Bulletin* Volume 7, Number 3, pp. 215-224; Public Defender Service for the District of Columbia, "First Annual Report of Board of Trustees" (Washington, D.C., 1971), p. 12;

For an overview of the numbers of defender offices using social workers in some capacity see Senna, *op.cit.* footnote 21.

38While most of this article has addressed the use of social workers in defender offices, there is no reason why states or counties not serviced by such offices could not make available to court appointed counsel some type of social work assistance just as is done with investigative resource.