Juvenile Discovery: A Developing Trend and a Word of Caution

Diane Geraghty
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The use of discovery is acknowledged as essential to the efficient administration of justice and to the fairness of the adversary system in both civil and criminal proceedings. However, the juvenile court system has been slow to implement various means of discovery, largely as a result of the doctrine of parens patriae and the unique nature of the juvenile process. Although a discernible trend indicates acceptance of pretrial discovery, there has been considerable experimentation at decisional and statutory levels to develop procedurally protective discovery mechanisms. Professor Geraghty traces the use of discovery in juvenile proceedings and devotes particular attention to whether civil or criminal techniques should serve as the basis for pretrial discovery. As a corollary to such an examination, this article isolates the use of depositions and comments on the appropriateness of their inclusion in a model for juvenile discovery.

I. INTRODUCTION

Judge Learned Hand once criticized the criminal procedure system as one giving "every advantage" to the accused.1 This remark points out a longstanding controversy regarding the appropriate scope of discovery in criminal cases.2 The Supreme Court's deci-

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sion in In re Gault,\textsuperscript{3} which established that juveniles are entitled to an adversarial-type hearing in the adjudicatory phase of a delinquency proceeding, added a new dimension to this already complex debate.

The initial attempts by the courts and by the legislators to more precisely define the parameters of discovery in the juvenile process were sporadic, and generally succeeded only in adding to the confusion. Frequently, for example, the type of discovery available was determined by whether or not a particular jurisdiction had traditionally attached a civil or criminal label of convenience to delinquency proceedings.\textsuperscript{4}

In recent years, however, a discernible trend has emerged from a small but growing body of statutory and case law. This trend is characterized by an acceptance of pretrial discovery as a useful tool in the delinquency factfinding process, and by a realization that criminal discovery rules are generally more appropriate than rules applicable in civil cases. The one exception to this development has been a willingness on the part of state rulemaking authorities\textsuperscript{5} to permit the use of depositions in juvenile cases, something which courts considering the issue have steadfastly refused to do.

This comment will first trace the evolution of the majority position regarding juvenile pretrial discovery at both decisional and statutory levels. Thereafter the discussion will focus on the use of depositions in the juvenile justice process.

II. CONSTITUTIONAL DIMENSIONS

After Gault, courts inevitably were called upon to address the question of what role, if any, the Constitution played in determining the appropriate scope of juvenile discovery. Since adult criminal defendants have no constitutional right to force wholesale pretrial disclosure of the prosecution's case,\textsuperscript{6} it logically follows that it cannot be a \textit{per se} denial of due process or equal protection to refuse discovery rights to juveniles which are constitutionally unavailable to adults. To date the Supreme Court has given no indication that special considerations affecting juvenile proceedings require the extension of a greater degree of constitutional

\textit{Method of Discovery Before Trial}, 42 \textit{Yale L. J.} 863 (1933); \textit{Developments In the Law—Discovery}, 74 \textit{Harv. L. Rev.} 940 (1960).


5. The term encompasses both legislatures and courts which have adopted state or local procedural rules.

protection than that received by an adult accused.\textsuperscript{7} A number of lower courts have expressly rejected such an extension.\textsuperscript{8}

While as a general proposition, neither adults nor juveniles have a constitutional right to pretrial discovery, there are a number of decisions which indicate that discovery may be available by right under certain circumstances. First, \textit{Brady v. Maryland}\textsuperscript{9} requires the prosecution to disclose evidence which is favorable to the accused and material to the issues of guilt or sentencing.\textsuperscript{10} Indeed, this decision has been further extended to proceedings where a court has otherwise refused to find any constitutional basis for a juvenile's right to pretrial discovery.\textsuperscript{11}

In \textit{Kent v. U.S.},\textsuperscript{12} the Supreme Court ordered disclosure of social records on which the juvenile court judge relied in making his decision to transfer a juvenile's case to the adult criminal division for trial. While it is not clear whether the decision in \textit{Kent} rested on constitutional rather than statutory grounds,\textsuperscript{13} courts have responded to it by concluding that counsel for a juvenile should be permitted to see anything in the court's own file as a matter of right. Thus, in \textit{Baldwin v. Lewis},\textsuperscript{14} the court reasoned that the constitutionally mandated right to counsel recognized in \textit{Gault} is hollow if a court in a delinquency proceeding rules on the basis of information which is never identified or made available for inspection.

Some courts have held that due process and equal protection require that juveniles be permitted to inspect, in advance of hearing, discovery items available to adult criminal defendants by statute or caselaw. Two different analyses have been used to sup-

\textsuperscript{7} On the contrary, see \textit{Fare v. Michael C.}, 99 S. Ct. 260 (1979), in which the Court refused to apply different standards for juveniles and adults in deciding whether or not the minor respondent waived his rights as delineated in \textit{Miranda v. Arizona}.

\textsuperscript{8} \textit{In re Hitzeman}, 161 N.W.2d 542, 545 (Minn. 1968); \textit{In re C.}, 322 N.Y.S. 2d 203, 66 Misc. 2d 761, (Fam. Ct. N.Y.C. 1971).

\textsuperscript{9} \textit{Brady v. Maryland}, 373 U.S. 83 (1963).

\textsuperscript{10} \textit{Cf. U.S. v. Agurs}, 427 U.S. 97 (1976), which substantially limits the scope of the \textit{Brady} decision.


\textsuperscript{13} While \textit{Kent} professes on its face to be a decision following exclusively from statutory and caselaw, the opinion contains the following language: "We believe that this result is required by the statute in the context of constitutional principles relating to due process and the assistance of counsel." \textit{Id.} at 557.

\textsuperscript{14} \textit{Baldwin v. Lewis}, 300 F. Supp. 1220, 1232 (E.D. Wis. 1969), \textit{rev'd on other grounds}, 442 F.2d 29 (7th Cir. 1971).
port this position. First, some courts, particularly those in New York, have concluded that there is certain information intrinsically necessary to the adequate preparation of any case, and that due process therefore requires that such information be discoverable in juvenile as well as adult proceedings. Timely and adequate notice of charges is a prime example of this type of information. Thus, the court in *In re L.* required the state to respond to respondent's Bill of Particulars where the petition alleging delinquency was not sufficiently detailed to comply with minimum notice requirements.

In *In re Edwin,* a leading New York case in the area of pretrial discovery, the court held that whenever “fundamental rights are affected,” due process and fair treatment require that juveniles alleged to be delinquent be given the same procedural rights available to adult defendants under the state’s code of criminal procedure. The respondent in *Edwin,* therefore, was entitled to examine, in advance of trial, his own statements, an autopsy report, and other scientific and demonstrative evidence.

In another line of New York cases, fourteenth amendment concepts of fundamental fairness also served as the basis for supplying respondent with the grand jury testimony of two state witnesses in an adult co-defendant’s case where the state called the same witnesses in respondent’s case. Moreover, a recent California case relied on both constitutional and statutory grounds to strike down a court policy which called for automatic rejection in juvenile cases of a defense request for reimbursement for investigative services. In adult cases, such requests were considered on the merits.

Language in other opinions implies that irrespective of whether a specific item of discovery is necessary to meet minimum requirements for a fair trial, equal protection requires that if a state permits an adult to discover certain information in advance of trial, that information must also be made available to minors in delinquency proceedings. For example, in *In re Forrest,* an Illi-

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17. A bill of particulars is not required except where the delinquency petition is not sufficiently specific to meet due process requirements. *In re C.*, 322 N.Y.S. 2d 203, 66 Misc. 2d 761 (Fam. Ct. N.Y.C. 1971); *In re Hitzeman*, 161 N.W. 2d 542, 545 (Minn. 1968).
nois court concluded that where the state is required to furnish adult criminal defendants with verbatim statements of state witnesses, "a right sense of justice" demands that the same items be available to juveniles.\textsuperscript{22}

While some courts have found a constitutional basis for supplying juveniles with pretrial discovery, others have expressly rejected this view. In \textit{District of Columbia v. Jackson},\textsuperscript{23} three respondents charged with rape filed extensive pretrial discovery motions requesting information that adult criminal defendants would receive under local law. Refusing to accept respondents' argument that equal protection requires the same procedural treatment for juveniles and adults, the Court stated that "there is sufficient dissimilarity between juvenile proceedings and criminal proceedings, however, to deny application of the doctrine to this issue. Criminal trials are comparatively formalistic. But flexible and informal procedures are essential to the \textit{parens patriae} function of the Juvenile Court."\textsuperscript{24}

In \textit{In re R.L.},\textsuperscript{25} a California court also adopted the view that in the absence of legislation providing a system of discovery for use in juvenile court, no constitutional provision requires the creation of such a system.

\section*{III. The Evolving Caselaw}

The Supreme Court has recognized that, constitutional considerations aside, discovery in both civil and criminal proceedings is conducive to both the efficient administration of justice, and to the fairness of the adversary system.\textsuperscript{26} This sentiment is shared by a majority of courts, most of which conclude that some type of pretrial discovery process is appropriate for the juvenile court system.\textsuperscript{27} Difficulties arise, however, in the attempt to develop a reasoned model for discovery which must take into account the special needs and goals of a court system specifically structured

\textsuperscript{22} Id. at 253, 298 N.E. at 200.
\textsuperscript{24} Id. at 512.
to deal with problems of the young, especially those accused of serious criminal behavior.

The approaches taken by the courts fall into three categories. A small minority has permitted across the board civil discovery in delinquency proceedings. Conversely, some courts have limited pretrial disclosure to information obtainable under rules of criminal procedure. Finally, a third group of courts has adopted an intermediate position, sanctioning a combined use of civil and criminal discovery techniques.

Texas courts have concluded that because the state legislature considers delinquency proceedings to be civil in nature, rules of civil procedure, including discovery, apply.\textsuperscript{28} Thus, in \textit{Villareal v. State},\textsuperscript{29} the state was permitted to discover jurisdictional facts (name, age, address) by serving a Request for Admission on the minor respondent.

Perhaps significantly, no Texas opinion analyzed in detail the appropriateness of the application of a broad panoply of civil discovery techniques to the juvenile process. Courts which have directly considered the consequences of permitting wholesale civil discovery have rejected the idea for a number of reasons. Some courts have pointed out that one of the assumed benefits of a separate juvenile justice system is its ability to adjudicate factual issues expeditiously and informally, a benefit which they see as undercut by allowing extensive civil discovery.\textsuperscript{30} Other courts have concluded that if they were to permit civil discovery, they inevitably would be placed in the untenable position of encroaching on the fifth amendment right of juveniles to avoid self-incrimination, or of unfairly limiting the opportunity for pretrial discovery to one party, the respondent.\textsuperscript{31}

Other concerns about the negative effect of civil discovery on the fairness of the adjudication process have been voiced. In \textit{Hanrahan v. Felt},\textsuperscript{33} the Illinois Supreme Court concluded that while juvenile proceedings are essentially civil in nature, the potentially serious consequences faced by delinquents give rise to the same concerns which have led courts to reject broad discovery in adult criminal proceedings. Specifically, the Court in \textit{Hanrahan} expressed the concern that extensive discovery could lead to har-

\footnotesize{\textsuperscript{28} See, e.g., \textit{Carrillo v. State}, 480 S.W.2d 612 (Texas 1972).
\textsuperscript{29} 495 S.W.2d 28 (Tex. Civ. App. 1973).
\textsuperscript{33} 48 Ill. 2d 171, 269 N.E.2d 1 (1971).}
rassment and intimidation of witnesses, suppression of evidence and an increase in perjury.\textsuperscript{34}

In In re Edwin,\textsuperscript{35} a New York court refused a minor’s request to employ traditional civil discovery techniques, such as interrogatories and depositions. The decision was based upon the determination that most delinquency petitions in New York are filed by citizens, most of whom would be reluctant to complain about allegedly criminal behavior if required to answer time-consuming pretrial discovery requests. The court also noted that counsel appointed to represent juveniles would face additional burdens if they were obligated to prepare elaborate pre-adjudicatory discovery motions.

It is evident, therefore, that while most courts have flatly rejected the notion of a blanket application of civil discovery rules in delinquency cases, they have not adopted a uniform position regarding what system of rules should apply. In Hanrahan v. Felt,\textsuperscript{36} the court held that while a general application of civil discovery rules was inappropriate, the unique nature of a delinquency proceeding seemed to indicate that such cases were nonetheless more like civil than criminal actions:

Delinquency hearings are not in the nature of a criminal trial but constitute merely a civil inquiry or action looking to the treatment, reformation and rehabilitation of the minor child. Their purpose is not penal but protective, aimed to check juvenile delinquency and to throw around the child, just starting, perhaps on an evil course and deprived of proper parental care, the strong arm of the state acting as parens patriae.\textsuperscript{37}

In an effort to reconcile the essentially civil nature of juvenile proceedings with the concern that the serious consequences of a delinquency finding might result in a subversion of justice, the Hanrahan court adopted the position that a juvenile court may, in its discretion, allow discovery on a case-by-case basis, including broader discovery than would be permitted in an adult criminal proceeding.\textsuperscript{38}

California courts also have vested their juvenile judges with discretionary powers to permit discovery proceedings in delinquency cases, but that discretion is limited to criminal discovery devices. In a case of first impression, Joe Z. v. Superior Court of

\textsuperscript{34} Id. at 172-73, 269 N.E.2d at 2-4.
\textsuperscript{35} 303 N.Y.S.2d 406, 60 Misc. 2d 355 (Fam. Ct. N.Y.S. 1969).
\textsuperscript{36} 48 Ill. 2d 171, 269 N.E.2d 1 (1971).
\textsuperscript{37} Id. at 173, 269 N.E.2d at 3 (quoting from In re Holmes, 379 Pa. 599, 603-04, 109 A.2d 523, 525 (1954)).
\textsuperscript{38} Id. at 173, 269 N.E.2d at 3.
Los Angeles County,\textsuperscript{39} the court reasoned that even in the absence of any constitutional right or statutory directive, the authority of a court to order discovery in a juvenile proceeding is inherent in the “power of every court to develop rules of procedure aimed at facilitating the administration of criminal justice and promoting the orderly ascertainment of truth.”\textsuperscript{40}

At issue in \textit{Joe Z.} was whether a minor charged with murder could discover his own statements and those of his co-defendants. The Court did not assume that procedural safeguards available to adult criminal defendants are automatically applicable in juvenile proceedings. Rather, the Court looked to cases dealing with discovery of statements in criminal proceedings to determine if the reasoning supporting the adult’s right to discovery was equally appropriate in juvenile cases. Citing the important role that statements play in the search for truth and the special caution to be used by courts when considering juvenile confessions,\textsuperscript{41} the Court concluded that it was an abuse of discretion to deny the minor access to the desired information.

Later California cases indicate that this careful weighing of needs has given way to a somewhat automatic transference to juvenile proceedings of any judicially-created right to discovery which an adult criminal defendant possesses. Thus, in \textit{Dell M. v. Superior Court},\textsuperscript{42} the court in a footnote cited \textit{Joe Z.} as standing for the proposition that “[t]he standards applicable to criminal discovery apply also to juvenile delinquency proceedings.”\textsuperscript{43} On this basis the court upheld the right of minors accused of resisting arrest to examine police personnel files to determine if the arresting officers had in the past been the objects of excessive force complaints.

Similarly, in \textit{In re Ricky B.},\textsuperscript{44} the juvenile court erred in denying a minor access to an accomplice’s juvenile record when the accomplice testified against respondent in a delinquency proceeding. The reviewing court again merely cited the availability of this type of information in an adult criminal case as the basis for its ruling.

\begin{itemize}
\item \textsuperscript{39} 3 Cal. 3d 797, 478 P.2d 26, 91 Cal. Rptr. 594 (1970).
\item \textsuperscript{40} \textit{Id.} at 802-03, 478 P.2d at 28, 91 Cal. Rptr. at 596.
\item \textsuperscript{41} See, e.g., \textit{In re Gault}, in which the Supreme Court, citing its own prior decisions and Dean Wigmore, concluded that a minor respondent has a right to be free of self-incrimination at a delinquency hearing in part because “[i]t has long been recognized that the eliciting and use of confessions or admissions requires careful scrutiny,” and “[t]his Court has emphasized that admissions and confessions of juveniles require special caution.” 383 U.S. at 44-45 (citations omitted).
\item \textsuperscript{42} 70 Cal. App. 3d 782, 144 Cal. Rptr. 418 (1977).
\item \textsuperscript{43} \textit{Id.} at 783 n. 1, 144 Cal. Rptr. at 419 n.1.
\item \textsuperscript{44} 82 Cal. App. 3d 106, 146 Cal. Rptr. 828 (1978).
\end{itemize}
Following the trend in California, courts in other jurisdictions have also decided juvenile pretrial discovery issues on the operating principle that criminal procedural rules are appropriately transferable to the adjudication of delinquency petitions. In In re Cowell, a Pennsylvania court assumed juveniles are entitled to invoke the statutory provisions governing adult criminal discovery, but ruled that the respondent had not met his burden of showing a need for discovery as required by those rules. In In re Pima County v. Superior Court, an Arizona court ordered a minor to furnish the State with the names and addresses of alibi witnesses, rejecting respondent’s argument that the special nature of a juvenile proceeding should protect the minor against that type of disclosure.

In holding that the same rule applicable in adult cases is also appropriate in juvenile proceedings, the court reasoned:

While in a game of chess one may slyly fianchetto his bishop and later uncover it for a surprise attack, the trial of a cause in our courts is not “un grand jeu” (a big game) to be won by the litigant most successful in the act of surprise . . . . The juvenile court here was exercising its inherent power predicated on the requirements for the due administration of justice. (citations omitted).

New York courts have produced the largest body of juvenile delinquency pretrial discovery opinions and, in New York cases the trend toward routine application of criminal discovery rules to delinquency proceedings is most apparent.

Since 1962, New York’s Family Court Act has included a provision that civil practice law and rules “shall apply to the extent that they are appropriate to the proceedings involved.” Thus, the task faced by New York courts in ruling on delinquency discovery issues has been to decide whether the specific discovery device sought to be used is “suitable” to the juvenile adjudicatory process.

The first New York case to address that issue, In re Edwin, concluded that the standard civil discovery devices of written interrogatories, oral deposition and requests to admit are not appropriate for use in delinquency proceedings. The court stressed, however, that the statutory language of section 165 indicated a

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47. Id. at 401, 561 P.2d at 322.
legislative intent that certain procedural rights, including discovery, should be available to minors accused of crimes. The court therefore permitted respondent to discover the contents of written witness statements, although that same information clearly was unavailable to adult criminal defendants.50

For several years following *Edwin*, courts either wholly rejected the idea that civil discovery methods are ever “suitable” in delinquency proceedings,51 or reasoned that the way to decide if a provision of the civil practice code is applicable in juvenile cases is to look for an equivalent provision in the Code of Criminal Procedure. In *In re L.*,52 for example, the court allowed a minor to file a Bill of Particulars in part because adult criminal defendants were permitted to do so by statute.

In a 1977 case, *In re Archer*,53 the New York Supreme Court noted an increasing trend by New York courts to apply criminal rather than civil procedure rules in delinquency cases. In *In re Terry T.*,54 the court formally adopted a position that, despite the language of section 165, criminal discovery rules are to be followed whenever minors are accused of acts which constitute crimes if committed by adults. In so holding, the court explained:

> We have been granting discovery under the CPLR (Civil Practice Laws and Rules) in an effort not to prejudice the Respondent by denying him his right to disclosure. However, this court is of the opinion that the proper form in these proceedings for pre-trial discovery is to proceed pursuant to the Criminal Procedure Law (CPL), and it is the direction of the Court that pre-trial discovery in delinquency proceedings shall follow the rules set forth in the CPL.55

As the basis for this decision, the court noted the quasi-criminal nature of delinquency proceedings and its belief that civil discovery procedures are simply too cumbersome and time-consuming for use in juvenile cases.

**IV. STATUTES AND COURT RULES**

As the prior discussion indicates, in the decade following the *Kent* and *Gault* decisions courts hesitatingly took the initiative in delineating pretrial discovery procedures for use in juvenile court proceedings. The development of statutory law in the area has proceeded at an even slower pace. Until recently, few jurisdictions made any effort to systematize the rights and responsibili-

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50. *Id.* at 409, 60 Misc. 2d at 359, (citing, e.g., People v. Graziano, 261 N.Y.S.2d 546, 46 Misc. 2d 936 (1965)).
52. 320 N.Y.S.2d 570, 66 Misc. 2d 142 (Fam. Ct. N.Y.C. 1971).
55. *Id.* at 549, 90 Misc. 2d at 1015.
ties of juveniles seeking discovery. Those that did enact statutes concentrated on a codification of the principle established in *Kent* that a juvenile is denied fundamental fairness if a judge makes a critical decision based on information unavailable to the juvenile and his attorney. Thus, several states have enacted legislation which permits juvenile respondents access to records possessed by the court, law enforcement, or other social agencies. Even these narrow provisions vary with respect to the procedures to be followed in securing access. Some make inspection a matter of right, while others permit disclosure only in the court's discretion.

Recently, however, there has been a modest increase in the number of statutes and court rules focusing on juvenile preadjudication discovery procedures. These legislative guidelines range in specificity from conclusory statements that rules of criminal discovery apply, to extensive provisions paralleling


59. See, e.g., IND. CODE ANN. § 31-6-7-9(a) (Supp. 1978); KY. REV. STAT. § 208.060(2)(b) (Supp. 1978); LA. CODE JUV. PROC. ANN. art. 59 (1979); but see ALA. R. JUV. PROC. 1 (ALA. R. CIV. PROC. applies to all matters in the juvenile court), and DEL. FAM. CT. R. 150 (1978) (where all parties to a proceeding are repre-
those adopted for use in adult criminal proceedings.60

Following the trend noted in judicial opinions on the subject, the majority of legislative provisions rest on the assumption that regardless of whether a juvenile proceeding is dubbed civil, criminal or quasi-criminal, discovery needs in a delinquency case are more closely akin to those in adult criminal rather than civil cases. As a consequence, a core of information obtainable by respondents in recently-enacted legislation usually includes the names and addresses of prosecution witnesses,61 together with their statements,62 the statements or admissions of respondent63 and his/her corespondents,64 and documentary65 and scientific66 evidence. Additionally, more detailed statutory schemes cite the availability of grand jury minutes,67 Brady information,68 and police records of prosecution witnesses.69

Most jurisdictions with detailed pretrial discovery rules permit


some form of reciprocal discovery. Characteristically, respondents are placed under an affirmative duty to disclose to the prosecution physical evidence, notice of defenses, and a list of defense witnesses and their statements.

Finally, many statutes or rules cloak courts with discretionary authority to grant discovery in addition to information which may be obtained as a matter of right.

These discovery provisions closely track provisions specifically designed and adopted to serve the needs of the defense and prosecution in adult criminal trials. The one exception to this pattern, however, has been an unprecedented willingness on the part of rulemakers to permit the use of oral depositions in the juvenile adjudicatory process. This development is decidedly contrary to the majority position adopted in connection with adult criminal proceedings. In addition, it is at variance with the view taken by courts faced squarely with the issue of whether to allow depositions in delinquency cases.

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75. See FLA. R. Juv. P. 8.070(a)(6)(i), (ii) (1979); but cf. N.M. R. P. FOR CHILDREN'S COURT 31(c)(2)(1978) (statements made by witnesses to respondent, his agents or attorneys, not subject to disclosure).


80. In re Giangrosso, 367 So. 2d 376 (La. 1979); Joe Z. v. Superior Court of Los Angeles County, 3 Cal. 3d 797, 478 P.2d 26, 91 Cal. Rptr. 594 (1970); In re R. L., 31
Two questions arise as a result of this deviation from the general trend toward the use of criminal discovery techniques. First, how does one explain the divergence of opinion evident in statutory and caselaw regarding the appropriateness of deposition use in juvenile proceedings? Secondly, which of the two positions is to be preferred on the merits?

The readiness of rulemakers to permit depositions in delinquency cases is probably grounded in the traditional belief that a separate court system for juveniles requires that cases involving minors be regarded as more than “mini-criminal trials.”81 Furthermore, rulemakers recently confronted with the task of drafting juvenile pretrial discovery rules have had the benefit of scholarly comment and model code legislation calling for use of depositions in delinquency proceedings.

Specifically, the Institute of Judicial Administration-American Bar Association Joint Commission on Juvenile Justice Standards (1977)82 recommended that states adopt juvenile discovery rules essentially identical to the extensive standards adopted by the ABA for use in connection with adult criminal prosecutions, but with an additional provision permitting discovery by deposition.83 Significantly, the commentary accompanying this recommendation focuses on the committee's disagreement with the majority position which prohibits the use of depositions in adult criminal cases rather than concentrating on the pros and cons of deposition use in the juvenile justice system.84

Rulemakers might also have been influenced by commentary sanctioning the use of civil discovery techniques in delinquency proceedings. In one particularly compelling article85 the author's central theme was that the reasons advanced in the caselaw for rejecting civil discovery are unconvincing and can be met by slightly modifying standard rules currently used in adult civil cases. Thus, worries expressed by courts over delays caused by extensive civil discovery can be alleviated merely by imposing strict time limits on the information-gathering phase of the adjudicatory process. Likewise, fear of perjury, intimidation and the

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82. INSTITUTE OF JUDICIAL ADMINISTRATION AND AMERICAN BAR ASSOCIATION, JUVENILE JUSTICE STANDARDS PROJECT, STANDARDS RELATING TO PRETRIAL COURT PROCEEDINGS § 3 (1977).
83. Id. at §§ 3.3 to 3.12 (depositions).
84. Id. (commentary accompanying § 3.3(B)).
suppression of evidence can be dealt with through the use of protective orders.

As persuasive as this reasoning is, it fails to include an analysis of the needs of the respective interests represented in a delinquency proceeding and a discussion of the discovery model best suited to serve those needs. Rather, it, like the ABA model code legislation discussed above, is bottomed on an assumption that any position which curbs an adult's pretrial access to information is incorrect and, therefore, anything short of full civil discovery in juvenile cases must also be wrong.

It is the position taken by this comment that courts and rulemaking bodies which have permitted extensive criminal-type discovery, but have prohibited the automatic use of depositions and other civil discovery techniques, have taken the most functional and therefore most desirable stance on the issue of the appropriate scope of juvenile pretrial discovery.

V. THE USE OF DEPOSITIONS IN DELINQUENCY CASES

Any discussion of the appropriate model for pre-adjudication discovery in delinquency proceedings must begin with a review of the benefits advanced in support of a separate system of justice for children accused of criminal conduct. A compendium of these advantages can be compiled from a collective reading of the recent line of Supreme Court cases focusing on the constitutional contours of the juvenile justice system. Thus, in *In re Gault*, the Court noted approvingly the system's dual objectives of avoiding classification of juveniles as criminals and preventing their adjudication as delinquents from operating to their disadvantage in adulthood. In *In re Winship*, the Court stressed the importance of "informality, flexibility, or speed" in the fact finding process, while in *McKeiver v. Pennsylvania*, the Court cited among the system's primary benefits its "discretionary intake procedure permitting disposition short of adjudication, and its flexible sentencing permitting emphasis on rehabilitation." The desirability of these objectives has remained constant since

86. 387 U.S. 1 (1967).
87. Id. at 24-25.
89. Id. at 366.
90. 403 U.S. 528 (1971).
91. Id. at 542.
the beginning of the juvenile court system. Views on how best to achieve these goals, however, have fluctuated. In what has been referred to as the era of the "socialized juvenile court," it was felt that any concentration on legal rights or procedures inevitably would act as a hinderance to the solicitous remolding of wayward children.

Throughout the period from 1899 to 1967, critics of the socialized model of juvenile justice increasingly expressed concern that juveniles accused of criminal conduct and subject to lengthy periods of involuntary confinement were being asked to relinquish procedural protections in exchange for benefits that existed more in theory than in fact. Finally, after decades of silence on the fundamental questions of the validity of a separate judicial system for minors and procedures used in such a system, the Supreme Court in 1967 took up the banner of those who had long argued that some degree of procedural regularity in juvenile proceedings is required by the Federal Constitution. In the space of eight years, the Supreme Court changed the operating complexion of the adjudicatory phase of delinquency proceedings by recognizing a constitutional right to notice of charges, counsel, confrontation and cross-examination, the right to invoke the privilege against self-incrimination, to have the state prove its case beyond a reasonable doubt and to be free of double jeopardy concerns.

But while the Supreme Court has recognized that certain fundamental procedural rights possessed by adult criminal defendants are required in the fact finding phase of a delinquency proceeding, it has refused to sanction the wholesale transfer of criminal procedures for fear that "if the formalities of the criminal adjudicative process are to be superimposed upon the juvenile court system, there is little need for its separate existence."

The Court's opinion in *McKeiver* makes it clear that, henceforth, the question of whether a certain procedural protection should be afforded, at least as a matter of constitutional right, must be decided on an issue-by-issue basis. In so deciding, the appropriate analytical approach is to balance the need for the particular procedural device against its power to disrupt the unique nature of the juvenile court system.

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98. *Id* at 545, 590.
It is interesting to speculate on the possible outcome of such a balancing with regard to the issue of pretrial discovery in juvenile cases. What function does discovery serve and how essential is this function to resolution of the issue of whether or not a minor committed an act which would constitute a crime if done by an adult?

Pretrial discovery is a tool fashioned to aid in the ascertainment of truth, a quest which serves the basic purpose of any system of justice—the orderly and rapid resolution of disputes. Discovery accomplishes this goal by promoting the complete exposure of all relevant facts, which in turn narrows and sharpens issues for litigation, which in turn eliminates both surplusage and surprise, expediting ultimate resolution of the core dispute.

In both the civil and criminal areas, the development of pretrial discovery mechanisms has followed as a corollary to a relaxation of procedural rules regarding the specificity of complaints initiating the legal process. This development came first and remains most pronounced in the civil sphere. The discrepancy in growth can be explained by an examination of the most fundamental dissimilarities in the civil and criminal justice systems. As a general matter, a civil dispute involves a conflict between two private parties; a criminal prosecution, however, finds the state pitted against an individual accused. This distinction plays a significant role in deciding the appropriateness of a complete exchange of all information possessed by the litigants before trial.

First, because the awesome power of the state is involved, the accused has, under our constitutional system, a series of rights designed to ensure as high a degree of procedural fairness as possible. As part of this procedural armour, a criminal defendant has a right not to incriminate himself and a right to the speediest possible adjudication on the issue of his guilt or innocence. The existence of these constitutional rights has been used to support the argument that liberal pretrial discovery is less suitable in criminal than in civil cases. Experience has shown that extensive discovery can be a time-consuming process, something which inherently conflicts with the defendant's sixth amendment right to a speedy trial. Additionally, the privilege against self-incrimination means that the prosecution will not be entitled to full discov-

ery of the defendant’s case. That fact has in the past led courts to conclude that since unilateral discovery is unfair to the prosecution, its use by either side should be prohibited.101

Although significant inroads have been made into the argument that criminal discovery is a “one-way street,”102 the fact remains that the state cannot force a criminal defendant to testify against himself. This necessarily means that the complete exchange of information before trial is of significantly more value, in terms of efficient resolution, in civil cases. For example, discovery in civil cases affirmatively contributes to the settlement of cases before trial. It exposes groundless or fraudulent claims which can be dealt with by means of summary judgment rather than full-blown proceedings. It reveals weaknesses in a litigant’s case, thus promoting the desirability of an early resolution. It provides a clearer factual basis for determining the amount of settlement. The criminal defendant’s right to remain silent mitigates against the availability of this type of resolution-inducing information.

In addition to the distinction between the identities of the litigants in civil and criminal cases, the relative difference in stakes faced by those litigants has also contributed to the differing growth rate regarding the use of discovery. Loss of liberty, even life, is faced by a criminal accused. This in turn has led to a fear that, if the state were forced to disclose information to the defendant, it could lead to intimidation of potential prosecution witnesses and to fabrication of evidence in order to defeat the state’s case.103 That possibility has meant that where discovery has been allowed in criminal cases, it has been allowed only under strict court supervision. This is in sharp contrast to the efficient self-operating discovery procedures adopted for use in civil matters.104

While these are factors which contributed to the restrictive role of pretrial discovery in criminal proceedings in the past, it is now clear that the pendulum has swung in favor of those advocating

102. See, e.g., Williams v. Florida, 399 U.S. 78 (1970), in which the Supreme Court upheld the constitutionality of a state statute requiring a criminal defendant to disclose the name and address of an intended alibi witness.
103. “In criminal proceedings long experience has taught the courts that often discovery will lead not to honest factfinding, but on the contrary to perjury and the suppression of evidence.” State v. Tune, 13 N.J. 203, 210-11, 98 A.2d 881, 884 (1953).
104. Compare, e.g., FED. R. CRIM. P. 16 requiring the defense and prosecution to move the court to discover ascertainable information but FED. R. CIV. P. 30 permits the parties, as a general rule, to arrange for the deposition of any person, including a party, without leave of court.
permissive criminal discovery.\textsuperscript{105} This is so because of an increasing conviction that discovery is a significant aid in securing just and efficient fact finding in criminal cases, and because of the experience of states which experimented with broad discovery. Those states demonstrated that the problems feared from liberalized discovery were in large measure illusory.\textsuperscript{106}

Much of the history of juvenile law has been an adoption of trends already established in adult criminal proceedings.\textsuperscript{107} It is therefore neither surprising nor inappropriate that the movement in juvenile law has been to permit increasingly expansive criminal-type discovery in the adjudicatory phase of the delinquency process. As a body, the Supreme Court’s opinions from \textit{Gault} through \textit{Fare v. Michael C.},\textsuperscript{108} recognize the de facto criminal nature of delinquency proceedings. The fact that children were being accused of criminal conduct, when combined with the not insignificant loss of liberty in jail-like settings, led the Court to conclude that due process required that procedural protections designed to assure accurate fact finding on the issue of an adult’s guilt or innocence be similarly available to minors accused of crimes.\textsuperscript{109}

As with adults, the effective exercise of a juvenile’s constitutional rights to counsel, confrontation, and cross-examination, is dependent on an adequate opportunity to prepare for confrontation of adverse witnesses. This includes obtaining information as to their identity, what they have said about the alleged crime, what documentary evidence will be used to support their testimony, the results of physical, mental and scientific tests to be tes-

\begin{itemize}
  \item \textsuperscript{105}Fletcher, \textit{Pretrial Discovery in State Criminal Cases}, 12 STANFORD L. REV. 293 (1960).
  \item \textsuperscript{106}Commentary, ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, § 1.2 (Draft, 1969).
  \item \textsuperscript{107}For example, the Supreme Court’s recognition in \textit{Gault} that a state delinquency respondent has a privilege against self-incrimination followed the Court’s 1964 ruling in \textit{Malloy v. Hogan}, 378 U.S. 1 (1964), that the fifth amendment privilege extends to state criminal defendants by virtue of the fourteenth amendment.
  \item \textsuperscript{109}\textit{McKeiver} is the only case to date in which the Supreme Court expressly refused to find that a juvenile is entitled to a procedural right given to an accused adult by the Constitution. In \textit{McKeiver}, the Court concluded that a minor respondent is not entitled to a trial by jury because a jury trial is not an integral part of the fact finding process. 403 U.S. at 543.
\end{itemize}
tified to by witnesses and what the respondent and his accomplices have told others about their alleged participation in the crime. This is the same type of information which a respondent is entitled to discover in jurisdictions where broad criminal rules have been adopted for use in delinquency proceedings.\textsuperscript{110}

Permitting discovery of this nature is consistent with the test enunciated in \textit{McKeiver v. Pennsylvania} for deciding whether or not procedural devices used in adult criminal cases should be employed in delinquency proceedings. Liberal bilateral discovery of the type originally proposed by the American Bar Association Project on Standards for Criminal Justice,\textsuperscript{111} and now adopted for use in a majority of jurisdictions,\textsuperscript{112} "insures that the juvenile court will operate in an atmosphere which is orderly enough to impress the juvenile with the gravity of the situation and the impartiality of the tribunal and at the same time informal enough to permit the benefits of the juvenile system to operate."\textsuperscript{113}

Specifically, criminal-type discovery contributes to orderly and principled decision-making in juvenile cases by providing adequate information for informed intake screening, diversion, and pleas, by expediting trials, minimizing surprise, and affording an opportunity for effective cross-examination.\textsuperscript{114} In addition, allowing indigent respondents to discover information in the possession of the state would correct the imbalance of investigative resources available to the respective sides.

On the other hand, permitting discovery of the type of information catalogued would not significantly undercut the benefits of a separate juvenile justice system. Adoption of a substantially self-operating discovery system which basically involves only the exchange of already-acquired information would not unduly lengthen the period between the time a minor is taken into custody and the adjudicatory hearing.\textsuperscript{115} The dispositional phase of

\textsuperscript{110} See notes 66-80 supra.
\textsuperscript{111} ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, DISCOVERY AND PROEDURE BEFORE TRIAL (Approved Draft 1970).
\textsuperscript{112} Id. at ch. 11.
\textsuperscript{113} McKeiver v. Pennsylvania, 403 U.S. 529, 539 (1971) (quoting the lower court opinion).
\textsuperscript{114} These are the articulated purposes for discovery as incorporated in IJA-ABA JUVENILE JUSTICE STANDARDS PROJECT, STANDARDS RELATING TO PRETRIAL COURT PROCEEDINGS § 3.1 (Draft, 1977).
\textsuperscript{115} Most states have a statutory provision requiring the speedy adjudication of delinquency petitions. In Illinois, for example, in the case of a respondent not in detention, an adjudicatory hearing must be set within 30 days. If detained, the minor has a statutory right to an adjudicatory hearing within 10 days of the order of the court directing detention. ILL. REV. STAT. ch. 37, § 704-2 (1976). Any viable system of discovery must take into account these statutory time limitations.
the process, the touchstone of the juvenile justice system,116 would be unaffected. Fears of misuse of discovered information can be dealt with by protective orders and by the contempt powers of the court.

These are the types of considerations which have led an increasing number of courts and legislatures to sanction the use of criminal discovery techniques in delinquency proceedings. As previously noted, however, there has been a greater tendency to permit the use of discovery depositions in juvenile cases than in adult criminal cases. Such a trend carries with it the danger of upsetting the balance sought to be struck between the desirability of procedural regularity and the efficient functioning of the juvenile court system.

Oral depositions undoubtedly serve as useful tools for eliciting facts and legal theories from opponents. In addition, they provide tactical advantages for those who employ them. An adverse witness's testimony is frozen, thereby permitting impeachment if the witness changes his or her story at trial. Questioning of a witness before trial can uncover relevant information which might not have otherwise been revealed. Discovery of facts on which one's opponent relies is helpful in framing one's own response to the issues. Of course, the availability of depositions also has negative tactical aspects. For example, in a civil case, one's own witnesses, including the principal party, can be impeached if their deposition testimony varies from their trial testimony. Or, taking an adverse witness's deposition can backfire by effectively educating the witness in testimonial techniques.

These uses of the advantages and disadvantages of deposition use in civil cases admittedly have equal application in both criminal and juvenile proceedings. There are, however, drawbacks to permitting depositions in juvenile cases which are not present in civil matters. These drawbacks relate to 1) the time-consuming nature of depositions; 2) their cost; and 3) the increased likelihood that witnesses will not voluntarily come forward in juvenile cases.

While the Supreme Court has never directly addressed the issue, state courts have held that juveniles, like adult criminal defendants, have a constitutional right to a speedy trial.117

Legislative enactments also have stressed the need for a rapid determination of the question of whether or not a respondent is, in fact, delinquent. The time factor has been a crucial element which courts have considered in deciding whether or not to permit any pre-adjudication procedures. This concern with prompt determination is based on an accepted notion that children do not react to the passage of time in the same way that adults do.

In *Beyond The Best Interests of The Child*, authors Goldstein, Freud, and Solnit detail the concept that "unlike adults, who have learned to anticipate the future and thus to manage delay, children have a built-in time sense based on the urgency of their instinctual and emotional needs." As a consequence, delay in adjudication proceedings can create anxiety beyond that experienced by an adult charged with the commission of an offense. Additionally, the psychological impact of a swift reaction by an authority figure immediately following a child's unacceptable behavior is lost by undue postponement.

The respondent is not the only interested party harmed by delay in delinquency proceedings. Increasingly, legislatures and courts have pointed out that one of the aims of the juvenile justice system is to protect the best interests of the community. The public, as well as the minor, has a stake in speedy adjudication of delinquency cases.

While there is no doubt that permitting even criminal type discovery before trial works a delay in resolution of the fact issues in a delinquency proceeding, this delay is minimal. Criminal discovery primarily involves the voluntary exchange of information already in the possession of the state and respondent. For

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118. *E.g.*, 501 FAM. CT. R. 150. "Recognizing the unique nature of the Court's jurisdiction and the need for a speedy determination thereof, the prompt exchange of information and documents by parties prior to trial is encouraged."

119. See note 31, *supra*. See also Boches, *Juvenile Justice in California: A Reevaluation*, 19 Hastings L.J. 47 (1967), in which the author advocates the adoption of criminal rather than civil rules of pretrial discovery on the theory that "the very limited period of time available in the processing of a juvenile court case and the quasi-criminal nature of juvenile court proceedings make it of dubious wisdom to make the full range of discovery of civil cases available." *Id.* at 87.


121. *Id.* at 40.

122. *Id.* at 40-42.

123. Thus, the Illinois Juvenile Court Act provides that it is the purpose of the Act "to secure for each minor subject hereto such care and guidance, preferably in his own home, as will serve the moral, emotional, mental and physical welfare of the minor and the best interests of the community." (Emphasis added). *II. Rev. Stat.* ch. 37, § 701-2 (1973).
example, in all likelihood the statements of respondent, co-respondents, and witnesses, were secured during the police investigatory phase, which preceded the filing of the delinquency petition. The same holds true for other discoverable material, such as documentary and scientific evidence. Thus, the filing of a routine motion or request for this type of information can be done almost immediately and without the need for court intervention or excessive turnover time.

This situation differs markedly from the time considerations involved when depositions are permitted. While the time for deposition taking can be statutorily restricted, it is well recognized that whenever a discovery procedure requires that several persons, such as opposing lawyers, third-party witnesses, and clients be physically gathered together, delays due to scheduling conflicts, illness, and unavailability are inevitable. Indeed, continuances become the rule rather than the exception. Such delays have a negative effect on one of the primary objectives of the juvenile court system—the speedy adjudication of delinquency issues.

In addition to time considerations, the costly nature of depositions raises separate problems in the juvenile court context. First, in civil cases the mutual availability of the deposition means generally that both litigants feel the impact of the expense to a relatively equal degree. In criminal and juvenile cases, however, there is almost always a significant imbalance in the resource capabilities of the state and the individual accused. Thus, the state would always be in a better position to depose extensively than would a minor.

On the other side of the coin, a significant number of children accused of criminal conduct fall within the indigency category. Assuming that principles of fundamental fairness would require the state to pay an indigent respondent's deposition costs, those costs, excluding consideration of any abuse of deposition use by dilatory respondents, could impact negatively on the juvenile

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124. The ABA Standards for Criminal Justice rejected the idea that a criminal defendant should have the right to take depositions in part because "in many cases the cost of the defense must be borne by the state; and it would be manifestly unfair to grant the right only to defendants who are able to finance their own defense." ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, DISCOVERY AND PROCEEDURE BEFORE TRIAL 87 (Draft, 1969).
justice system. Resources otherwise available for carrying out fundamental juvenile court aims, including the establishment of diversionary and rehabilitative programs, logically would have to be at least partially rechanneled to underwrite the high-priced deposition process. It is questionable whether this strain on the court system can be justified where relatively inexpensive criminal-type discovery is available as a viable alternative.

It seems reasonable that a further consequence of permitting third-party depositions in juvenile delinquency cases would be an increased reluctance on the part of potential witnesses to become involved in the prosecution of criminal cases. Proponents of deposition use in criminal and delinquency proceedings suggest that witness hesitation can be overcome by the use of protective orders to guard against harassment. Unfortunately, this stance fails to take into account the fact that involuntary participation in pretrial discovery is inhibiting even in the absence of wilful misuse of the process. Prosecutors already have a difficult time convincing witnesses to interrupt their daily lives and subject themselves to the generally unpleasant experience of appearing in court and being questioned and cross-examined under oath. Yet the effectiveness of an adversarial criminal justice system is heavily dependent on the willingness of citizens to become involved in state prosecutions for allegedly criminal conduct. Requiring these same citizens to participate in a pre-adjudication process which is as personally disruptive as the trial itself, will most certainly discourage civilian witnesses from coming forward.

Finally, opponents of oral depositions in criminal cases have worried that “if stated as a right, the need to take depositions might be construed as part of the adequacy of representation required by the constitutional right to counsel.” This potential problem obviously is of equal concern in delinquency cases.

In sum, the potential for harm to the basic objectives of the juvenile justice system created by the nondiscretionary use of depositions, outweighs the incremental benefit to the fact finding

125. Id. at 823-24.
126. Id. at 87.
127. Gault established that minors have a constitutional right to representation by counsel during the adjudicatory phase of a delinquency proceeding. In re Gault, 387 U.S. 1 Language in Gault and Kent, 383 U.S. 541 (1966), while not giving an express right to counsel to juveniles beyond the adjudicatory phase, lends strong support to the argument that a minor is entitled to counsel at every significant step in the proceeding. The right to counsel, furthermore, implies the right to effective representation by counsel; hence, the concern that counsel's failure to take depositions could lead to charges of ineffective assistance of counsel.
process which depositions would allow. Courts and legislatures, therefore, should concentrate on fully implementing broad criminal-type discovery before experimenting with the wholesale use of civil discovery techniques in delinquency proceedings.