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A LOOK BACK: DEVELOPING INDIANA LAW POST-BENCH REFLECTIONS OF AN INDIANA SUPREME COURT JUSTICE

SELECTED DEVELOPMENTS IN INDIANA JUVENILE JUSTICE LAW (1993-2012)

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As a Justice of the Indiana Supreme Court ("the Court") for almost nineteen years (from late-1993 until mid-2012), I participated in the adjudication of many cases involving troubled children and children in trouble.[1] During this period of time, the Court, under the leadership of Chief Justice Randall T. Shepard, also devoted considerable effort to improving the administration of juvenile justice in Indiana and I worked on many of those projects. In this Article, I will describe some selected developments in both the adjudication and administration of juvenile justice in Indiana during this timeframe. I will not attempt to try to cover everything, but instead will identify and detail several major tensions that

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** This Article is dedicated to Cheryl G. Sullivan who, as Secretary of the Indiana Family and Social Services Administration from mid-1993 through 1996 and again from late-2003 through 2004, devoted herself and the agency she headed to improving the lives of troubled children and children in trouble. She is now CEO of the American Academy of Nursing, Washington, D.C.

This Article is adapted from versions of remarks delivered on many occasions over the last two decades, notably to attorneys employed by the Indiana Department of Child Services, Indianapolis, Indiana, March 30, 2012; at the Annual Meeting for Indiana Juvenile Court Judges, Nashville, Indiana, June 19, 2003; at Dartmouth College's Senior Symposium, Hanover, New Hampshire, April 7, 2000; and Lectures on multiple occasions for Professor Michael's Seminar on Children and the Law in Modern America, Indiana University Maurer School of Law, Bloomington, Indiana. I deeply appreciate both the hospitality and constructive feedback I received on all of these occasions.

1. I have used the expression "troubled children and children in trouble" to refer collectively to abused, neglected, and delinquent children for many years—at least since a speech on January 26, 1999. In the Winter 2008 volume of the Juvenile & Family Court Journal, Ann Reyes Robbins published an article with that expression as its title. At the outset, she thanks Judge Charles Pratt, a leading Indiana juvenile court judge, "for providing the inspiration for the title." Perhaps Judge Pratt heard the expression from me and passed it on to her. Or perhaps I first heard it from him.

exist within the juvenile justice system as a result of many conflicting political, substantive, and fiscal philosophies about the way in which our society should deal with troubled children, children in trouble, and their families.

I ask the reader to appreciate that this Article contains some highly personal reflections. It is not an argument but neither is it entirely objective.

I. INTRODUCTION

A. The Role and Jurisdiction of the Juvenile Justice System

How should society as a whole deal with child abuse or neglect or with juvenile delinquency? What should society do, for example, when a father punishes his nine-year-old child by holding the child's hand over a burning flame? When children are found dirty and suffering from rat and insect bites in a filthy home? When a child is born addicted to cocaine or with fetal alcohol syndrome? Or when a young child commits an act that would be a serious felony if committed by an adult?

Society could deal with these situations in several ways. Society could react by leaving these matters to the child's extended family—or perhaps the family's neighbors, or church, or a local charity. Society could also react by turning these matters over to government administrators. Instead, American society has reacted by turning these matters over to the courts. In America, children thought to be abused, and neglected, or delinquent are brought to court for protection, care, treatment—or punishment.[2] We call this the "juvenile justice system" and these courts "juvenile courts."[3]

In order to discuss the juvenile justice system, it is important from the outset to sketch the contours of juvenile court jurisdiction: (1) child abuse and neglect cases (called "CHINs" cases); (3) delinquency cases; and (3) termination of parental rights cases.

1. Abuse and Neglect Cases.—In Indiana, a juvenile court acquires jurisdiction over a child abuse or neglect case when the Indiana Department of Child Services ("DCS") alleges that a child is "a child in need of services"—a CHINs.[4] A child is a CHINs if (1) it is before the child becomes eighteen years old; and (2) the child needs care, treatment, or rehabilitation that the child "(a) is not receiving and (b) is unlikely to be provided or accepted without the coercive intervention of the court"; and (3) one or more of specified incidents of neglect or abuse, summarized at the margin, have occurred.[5] Unless the

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2. *See* IND. CODE § 31-30 (2014).

3. *Id.*

4. *Id.*

5. Indiana Code sections 31-34-1-1 to -14 provide that a child is a child in need of services (CHINs) "if (1) before the child becomes 18-years-old; and (2) the child needs care, treatment, or rehabilitation that the child (a) is not receiving and (b) is unlikely to be provided or accepted without the coercive intervention of the court"; and (3) one or more of the following conditions are met: (a) the child's physical or mental condition is seriously impaired or seriously endangered as a result of the inability, refusal, or neglect of the child's parent, guardian, or custodian to supply

allegation is admitted, the juvenile court holds a "fact-finding" hearing.[6] A finding by a juvenile court that a child is a CHINs must be based upon a preponderance of the evidence.[7] If the court finds that a child is a CHINs, the court holds a "dispositional" hearing to consider alternatives for the care, treatment, rehabilitation, or placement of the child.[8]

2. Delinquency Cases.—A juvenile court acquires jurisdiction over a delinquency case when a County prosecuting attorney alleges that a child has committed a "delinquent act," that is, to have committed, before becoming eighteen years of age, an act that would be a crime if committed by an adult.[9] Unless the allegation is admitted, the juvenile court holds a "fact-finding" hearing.[10] A finding by a juvenile court that a child committed a delinquent act

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the child with necessary food, clothing, shelter, medical care, education, or supervision; (b) the child's physical or mental health is seriously endangered due to injury by the act or omission of the child's parent, guardian, or custodian; (c) the child is the victim of a sex offense under law specified in Indiana Code section 31-34-1-3; (d) the child's parent, guardian, or custodian allows the child to participate in an obscene performance (as defined by law specified in Indiana Code section 31-34-1-4); (e) the child's parent, guardian, or custodian allows the child to commit a sex offense prohibited by law specified in Indiana Code section 31-34-1-5; (f) the child substantially endangers the child's own health or the health of another- individual; (g) the child's parent, guardian, or custodian fails to participate in a disciplinary proceeding in connection with the student's improper behavior, as provided for by law specified in Indiana Code section 31-34-1-7, if the behavior of the student has been repeatedly disruptive in the school; (h) the child is a missing child (as defined by law specified in Indiana Code section 31-34-1-8); or (i) subject to certain exceptions specified in Indiana Code sections 31-34-1-12 and 13, either the child is born with fetal alcohol syndrome or any amount, including a trace amount, of a controlled substance or a legend drug in the child's body or the child has an injury, has abnormal physical or psychological development, or is at a substantial risk of a life threatening condition that arises or is substantially aggravated because the child's mother used alcohol, a controlled substance, or a legend drug during pregnancy. A child with a disability is also a CHINS if the child is deprived either of nutrition that is necessary to sustain life or of medical or surgical intervention that is necessary to remedy or ameliorate a life threatening medical condition if the nutrition or medical or surgical intervention is generally provided to similarly situated children with or without disabilities. If a parent, guardian, or custodian fails to provide specific medical treatment for a child because of the legitimate and genuine practice of the religious beliefs of the parent, guardian, or custodian, a rebuttable presumption arises that the child is not a CHINS because of the failure. However, this presumption does not prevent a juvenile court from ordering, when the health of a child requires, medical services from a physician licensed to practice medicine in Indiana, or apply to situations in which the life or health of a child is in serious danger. IND. CODE §§ 31-34-1-1 to -14 (2014).

6. IND. CODE § 31-34-11-1 (2014).

7. IND. CODE § 31-34-12-3 (2014).

8. IND. CODE § 31-34-10-9 (2014).

9. IND. CODE §§ 31-37-1-1 & 2 (2014). IND. CODE §§ 31-37-2-1 to -7 set forth additional circumstances under which a child may be deemed delinquent and, therefore, within the jurisdiction of the court upon a proper filing.

10. IND. CODE § 31-37-13-1 (2014).

must be based upon proof beyond a reasonable doubt.[11] If the court finds that a child has committed a delinquent act, the juvenile court holds a "dispositional" hearing to consider alternatives for the care, treatment, rehabilitation, or placement of the child.[12]

3. Termination of Parental Rights Cases.—The DCS may petition the juvenile court to terminate the parent-child relationship involving a CHINs or a delinquent child under the following conditions.[13] First, one of three conditions exist: (1) the child has been removed from the parent for at least six months under a dispositional decree; (2) a court has entered a finding that reasonable efforts for family preservation or reunification are not required; or (3) the child has been removed from the parent and has been under the supervision of the DCS for at least fifteen months of the most recent twenty-two months.[14] Second, either the child has on two separate occasions been adjudicated a CHINs or there is a reasonable possibility that either the conditions that resulted in the child's removal or the reasons for placement outside the parents' home will not be remedied; or the continuation of the parent-child relationship poses a threat to the well-being of the child.[15] Third, termination is in the best interests of the child.[16] The fourth and final condition is that there is a satisfactory plan for the care and treatment of the child.[17] If the court finds that these conditions are met, the court terminates the parent-child relationship.[18] A finding in a proceeding to terminate parental rights must be based upon clear and convincing evidence.[19]

B. The Similarity Between CHINS and Delinquents

The foregoing description of the jurisdiction of the juvenile courts—specifically, the highly similar terminology and procedure for adjudicating both CHINs and delinquency cases—suggests an important realization about the juvenile justice system: the high degree of similarity between CHINs and delinquents.[20] There is, in other words, a very high degree of overlap between the type of children whom prosecutors bring into the juvenile justice system and the type of children brought there by child protection caseworkers.[21] Children arrested and charged with being delinquent often turn out to be children who were abused or neglected when they were younger but were never identified by the child protection system. Before the changes to

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11. IND. CODE § 31-34-12-5 (2014).

12. IND. CODE § 31-37-18-1 (2014).

13. IND. CODE § 31-35-2-4(a)(1) (2014). A petition may also be filed by a child's court appointed special advocate or a child's guardian ad litem. *Id.* § 31-35-2-4(a)(2) and (3).

14. *Id.* § 31-35-2-4(b)(2)(A).

15. *Id.* § 31-35-2-4(b)(2)(B).

16. *Id.* § 31-35-2-4(b)(2)(C).

17. *Id.* § 31-35-2-4(b)(2)(D).

18. IND. CODE § 31-35-2-8(a) (2014).

19. IND. CODE § 31-34-12-2 (2014).

20. *See generally* IND. CODE § 31-34 (2014); IND. CODE § 31-37 (2014).

21. *See generally* IND. CODE § 31-34 (2014); IND. CODE § 31-37 (2014).

Indiana juvenile law in 2008, the court was integrally involved in both, but the DCS (and its predecessor agencies) only in the one. The 2008 statutory changes were designed in part to address the need for coordination between our criminal law enforcement system and our social services system.[22]

In 2015, the legislature took another significant step in recognizing the similarity between CHINs and delinquents with the enactment of Public Law 66-2015.[23] The new statute recognizes for the first time a category of child defined as a "dual status child."[24] A dual status child, generally speaking, is one who meets or could meet the laws definition of both a CHINs and delinquent child.[25] Under the new law, upon a determination by a juvenile court that a child is a dual status child, a panoply of actions are triggered to assess the child's "best interest and well-being,"[26] and make recommendations to the court with respect thereto.[27]

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22. *See infra* Part II.C.3.
23. H. 1196, 119th Gen. Assemb., 1st Reg. Sess. (Ind. 2015).
24. IND. CODE § 31-41-1-2 (2015).
25. IND. CODE § 31-41-1-2 (2015), provides in full:

"Dual status child" means:

(1) a child who is alleged to be or is presently adjudicated to be a child in need of services under IC 31-34-10 or IC 31-34-11 and is alleged to be or is presently adjudicated to be a delinquent child under IC 31-37-12 or IC 31-37-13;

(2) a child who is presently named in an informal adjustment under IC 31-34-8 and who is adjudicated a delinquent child under IC 31-37-12 or IC 31-37-13;

(3) a child who is presently named in an informal adjustment under IC 31-34-8 and who is adjudicated to be a child in need of services under IC 31-34-10 or IC 31-34-11;

(4) a child who:

(A) has been previously adjudicated to be a child in need of services under IC 31-34-10 or IC 31-34-11; or

(B) was a participant in a program of informal adjustment under IC 31-34-8;

and who was under a wardship that had been terminated or was in a program of informal adjustment that had concluded before the current delinquency petition;

(5) a child who was:

(A) previously adjudicated to be a delinquent child under IC 31-37-12 or IC 31-37-13 that was closed; and

(B) a participant in a program of informal adjustment under IC 31-37-9 which was conducted prior to a child in need of services proceeding; and

(6) a child:

(A) who is eligible for release from commitment of the department of correction;

(B) whose parent, guardian, or custodian:

(i) cannot be located; or

(ii) is unwilling to take custody of the child; and

(C) for whom the department of correction is requesting a modification of the dispositional decree under IC 31-30-2-4.

26. *Id.* § 31-41-1-2-5.
27. *Id.* § 31-41-1-2-6(2).

The court is authorized to determine, in respect of any such dual status child, whether the Indiana Department of Child Services or the probation department of the court will be the "lead agency" in supervising the child's care, treatment, or rehabilitation.[28]

This new statutory regime is a most impressive development in addressing the need for coordination between our criminal law enforcement system and our social services system. All involved in its passage should take great pride in this achievement.[29]

C. Separation of Powers and Juvenile Court

Our judicial system was established by our Constitution as a separate but equal branch of government to adjudicate legal disputes.[30] This principle of separation of powers is very important to judges because it allocates to the other two branches of government—and not to the courts—the responsibilities of making and administering our laws.[31] Judges resolve disputes, they don't make or administer laws.[32]

However, the powers and duties of the juvenile court differ from the traditional concept of separation of powers. The juvenile judge's responsibilities are to enforce the legal obligations of children and their parents and to assure due process. But, juvenile judges also provide children within the juvenile justice system with care, treatment, rehabilitation, and protection. In both delinquency and CHINS cases, judges order specific forms of treatment and care and monitor the progress of both children and parents in treatment.[33] These responsibilities are ones we ordinarily ascribe to the executive or administrative branches of government, not the judiciary.[34]

A rationale for separation of powers is avoiding consolidation of too much governmental authority in any one branch.[35] A secondary rationale is recognizing respective spheres of expertise.[36] Are these principles that animate separation of powers undermined when juvenile judges are given, in addition to their traditional adjudicatory responsibilities, such administrative duties as ensuring care and treatment, utilizing diversionary programs, running detention centers, and strengthening families? This Article does not purport to answer that question

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28. IND. CODE § 31-41-3-1 (2015).

29. I thank Judge Charles Pratt for calling this legislation to my attention.

30. See generally U.S. CONST. art. III, which vests all judicial powers with the courts.

31. *Id.*

32. See generally U.S. CONST. art. I, which vests all legislative powers with Congress.

33. *See generally* IND. CODE § 31-34 (2014); IND. CODE § 31-37 (2014).

34. See generally U.S. CONST. art. II, which vests executive powers in the president.

35. T.J. Halstead, *The Separation of Powers Doctrine: An Overview of Its Rationale and Application*, CRS REPORT FOR CONGRESS (1999), *available at* http://congressionalresearch.com/RL30249/document.php?study=THE+SEPARATION+OF+POWERS+DOCTRINE+AN+OVERVIEW+OF+ITS+RATIONALE+AND+APPLICATION, *archived at* http://perma.cc/8N6R-LKMK.

36. *Id.*

but it is an important one to keep in mind as I explore the tensions facing the juvenile justice system today.

II. TENSIONS IN JUVENILE JUSTICE

The human tragedies reflected in CHINs and delinquency cases make juvenile justice work enormously challenging. In addition to the human tragedies that are so emotionally rending, there are other challenges—challenges more substantive and less apparent. Indeed, the very operation of the juvenile justice system is poised amidst tension: amidst conflicting political, substantive, and fiscal philosophies about the way in which our society should deal with troubled children, children in trouble, and their families. This is indeterminacy at its apex: in none of these areas of tension is any option clearly the superior of its opposite.

I am going to focus on the following five areas of tension facing the juvenile justice system today that contribute to juvenile justice work being so difficult:

- The tension between the authority of the court—primarily its power and discretion to manage and dispose of delinquency cases—and the constitutional and statutory rights enjoyed by the child.[37]
- The tension between the responsibility of the state to protect children and the rights of parents to raise their children without state interference.[38]
- The tension between the need for child services and their cost.[39]
- The tension between rehabilitating and punishing youthful offenders.[40]
- The tension between the goals of reunification and permanency—between the goal of reunifying the victim of child abuse or neglect who has been removed from the home of the child's biological family and the goal of finding a permanent loving home for that child.[41]

A. The Tension Between the Authority of the Court and the Rights of the Child

The first tension facing the juvenile justice system today is between the authority of the court—principally its power and discretion to manage and dispose of delinquency cases—and the constitutional and statutory rights enjoyed by the child.

1. Parens patriae and the Juvenile Court Movement.—Jurisdiction over children alleged to be delinquent, abused, or neglected is an integral part of the policy established by our legislature in the Indiana Juvenile Code for dealing

37. *See infra* Part II.A.
38. *See infra* Part II.B.
39. *See infra* Part II.C.
40. *See infra* Part II.D.
41. *See infra* Part II.E.

with the problems of troubled children.[42] It is a policy grounded in the Progressive Movement of the late nineteenth and early twentieth centuries, when American society rejected treating juvenile law violators no differently from adult criminals in favor of individualized diagnosis and treatment.[43]

At the end of the nineteenth century, this country treated children accused of committing crimes in the same way as adults.[44] "They were tried in courts of general criminal jurisdiction with all the formalities of the criminal law and constitutional safeguards. If convicted, they were incarcerated in adult jails and prisons."[45] There was no distinction between the adult and the child, no special provision for their separation in confinement pending trial, in the hearing of their cases, or in their final disposition.[46] If guilty, children might share incarceration with men and women in jail or workhouse.[47]

> This system brought scrutiny from reformers, most notably in Chicago, who believed that children should not be held as accountable as adult offenders.[48] Rather than subject children to the punitive, adversarial, and formalized trappings of the adult criminal process, the reformers envisioned a system that would treat and rehabilitate the child based on an analysis of the youth's special circumstances.[49]

The reformers did not have to look far to identify both a philosophy and a structure for providing a more humane system for dealing with juvenile crime.[50] Children accused of crimes were treated as adults in the late nineteenth century, and the doctrine of parens patriae[51] was employed to provide both the theoretical justification and structural mechanism for vigorous state intervention on behalf of dependent children and neglected children.[52]

Indiana provides a particularly good example. In 1889 and 1891, the Legislature passed the "Board of Children's Guardians Act," establishing county

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42. *See* IND. CODE § 31-30-1-1 (2014).

43. *See generally* Frank Sullivan, Jr., *Indiana as a Forerunner in the Juvenile Court Movement*, 30 IND. L. REV. 279 (1997).

44. *Id.* at 279.

45. *Id.*

46. *See generally id.*

47. *See generally id.*

48. *Id.* at 279.

49. *Id.* at 279-80.

50. *Id.* at 280.

51. Parens patriae literally means "parent of the country" and refers to the traditional role of the state as sovereign and guardian of persons under legal disability. BLACK'S LAW DICTIONARY 1114 (6th ed. 1990). Parens patriae originates from the English common law where the King had a royal prerogative to act as guardian for persons under a legal disability such as infants and those mentally ill. In the United States, the parens patriae function belongs with the states. *Id.*

52. David S. Tanenhaus, *The Evolution of Juvenile Courts in the Early Twentieth Century: Beyond the Myth of Immaculate Construction*, A CENTURY OF JUVENILE JUSTICE 42 (Margaret K. Rosenheim et al. eds., 2002).

boards charged with "the care and supervision of neglected and dependent children under fifteen years of age."[53] Under the act, the board could petition a court for the custody of any child abandoned, neglected, or cruelly treated by his or her parents.[54] Shortly thereafter, a woman and her husband appealed an Indianapolis court's award of the custody of her three children to the local board.[55] Was it constitutional for the government to take children away from their parents? In saying that it was under these circumstances, the Indiana Supreme Court invoked the doctrine of parens patriae:

> [O]ur constitutions, and our laws enacted under it, sanction and confirm the great principle of the sovereign's guardianship of the children within the dominions of the sovereign. . . . [T]he equally great principle that natural rights vest in parents the custody and control of their children is confirmed and enforced. This high and strong natural right yields only when the welfare of society or the children comes into conflict with it; but where there is such conflict the supreme right of guardianship asserts itself for the protection of society and the promotion of the welfare of the wards of the commonwealth.[56]

Employing the parens patriae philosophy to deal with both juvenile offender as well as the dependent and neglected child, the Illinois Legislature passed the first juvenile court act in 1899.[57] The first judge of the Chicago juvenile court, Richard S. Tuthill, described the "sole purpose" of his new court in terms of parens patriae: "[T]o give children what all children need, parental care."[58]

"Under the Illinois statute, which would become a model for the nation—a model widely used even today—the juvenile court judge was authorized to hear any case concerning a dependent child or a neglected child"[59] and, upon finding that the best interest of the child would be served by making the child a public ward, the court was authorized to employ a variety of dispositional alternatives, including placements in foster homes and institutions.[60] Similarly, the juvenile court was authorized to hear any case involving a child alleged to have

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53. Board of Children's Guardians Act, ch. 125, § 2, 1889 Ind. Acts 261, 261-62 (superseded).

54. *Id.* at 262.

55. *See* Van Walters v. Bd. of Children's Guardians of Marion Cnty., 32 N.E. 568 (Ind. 1892).

56. *Id.* at 569; *see also* Addison M. Beavers, *The Philosophy of Children's Court Proceedings*, FIRST ANNUAL INSTITUTE OF THE JUVENILE AND CRIMINAL COURT JUDGES OF INDIANA 1 (1960).

57. Illinois Juvenile Court Act, 1899 Ill. Laws 131 (repealed 1965).

58. Richard S. Tuthill, *The Juvenile Court*, INDIANA BULLETIN OF CHARITIES AND CORRECTION 48, 52 (1904); *see also* Julian W. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 106 (1909); Tanenhaus, *supra* note 52, at 42.

59. Sullivan, *supra* note 43, at 281 (citing Illinois Juvenile Court Act § 7, 1899 Ill. Laws 131, 133 (repealed 1965) (current version at 705 ILL. COMP. STAT. 405/3-9 (1992)).

60. Illinois Juvenile Court Act § 8, 1899 Ill. Laws 131, 133 (repealed 1965).

committed a crime[61] and, upon finding that the child was guilty of the offense, the court was authorized to pursue various alternatives, "including returning the child to his or her parents, placing the child on probation, or placing the child in foster care or an institution."[62]

Note two things: the segregation of cases of children alleged to be delinquent, abused, or neglected into a specialized court; and the enormous degree of discretion and flexibility of the judge in handling the cases and fashioning the remedies. "*Parens patriae* philosophy mandated that the juvenile court provide children with care, custody, and discipline approximating as nearly as possible, that which should be given by their parents"; and "that juvenile offenders should not be treated as criminals, but rather as children in need of aid, encouragement, and guidance."[63] As such, it became fundamental legal doctrine that juvenile courts were not criminal but civil in their nature, precisely because their purpose was not to punish but to treat and rehabilitate the child.[64] As one Indiana juvenile court judge would say some years later:

> We are a Court for children, and children need no constitutional guarantees to protect them in the Courts for children. The Courts are given a great deal of power under the Juvenile Court law, which should always be used for the children and never against them.[65]

2. In re Gault *and the Criminal Procedure Revolution*.—Thus, juvenile courts took hold in virtually every American jurisdiction, dealing with children in this highly paternalistic way.[66] But is it true, as the Indiana judge I just quoted said, that "children need no constitutional guarantees to protect them"[67] in juvenile court?

Juvenile courts were challenged throughout the country during the first quarter of the twentieth century as depriving children of liberty without due process of law, including specifically as violating the right to trial by jury and denying the right to appeal.[68] But these challenges were unsuccessful.[69]

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61. Illinois Juvenile Court Act § 9, 1899 Ill. Laws 131, 133 (repealed 1965) (current version at 705 ILL. COMP. STAT. 405/2-1 (1992 & Supp. 1996)).

62. *Id.* (citing Illinois Juvenile Court Act § 9, 1899 Ill. Laws 131, 133 (repealed 1965) (current version at 705 ILL. COMP. STAT. 405/2-1 (1992 & Supp. 1996))).

63. Sullivan, *supra* note 43, at 282; *see* Illinois Juvenile Court Act § 21, 1899 Ill. Laws 131, 137 (repealed 1965) (codified as amended in 705 ILL. COMP. STAT. 405/2-1 (1992)) ("This act shall be liberally construed, to the end that its purpose may be carried out, to-wit: That the care, custody and discipline of a child shall approximate as nearly as may be that which should be given by its parents . . . .").

64. *See In re* Gault, 387 U.S. 1, 14-18 (1967).

65. Beavers, *supra* note 56.

66. *Id*.

67. *Id*.

68. CHRISTOPHER P. MANFREDI, THE SUPREME COURT AND JUVENILE JUSTICE 32 (1998) (citing Solon L. Perrin, *The Future of the Children's Court*, J. A.B.A. 768 (1922)).

69. *In re Gault*, 387 U.S. at 14-15; HERBERT H. LOU, JUVENILE COURTS IN THE UNITED

However, by the middle of the twentieth century, the proposition that constitutional rights were unnecessary in juvenile proceedings was being given careful scrutiny.[70] In 1966, the United States Supreme Court rendered the first of a series of landmark decisions holding that however noble the philosophy of juvenile courts might be, children facing charges still enjoyed the constitutional rights of adults accused of crime.[71]

The most sweeping of these cases came from Arizona and involved a fifteen-year-old boy named Gerald Gault who had been committed as a juvenile delinquent to a "state industrial school" for making what would be referred to today as a sexually harassing telephone call to a female neighbor; Gerald was also on probation for stealing a wallet from a woman's purse at the time.[72] The Supreme Court found that the Arizona juvenile court system unconstitutionally denied Gerald the following rights: notice of the charges; right to counsel; right to confrontation and cross-examination; privilege against self-examination; right to a transcript of the proceedings; and right to appellate review.[73]

The Supreme Court discussed at some length the philosophy of the juvenile court, including parens patriae, and expressed considerable skepticism about it:

> [T]he highest motives and most enlightened impulses lead to a peculiar system for juveniles . . . . The constitutional and theoretical basis for this peculiar system is—to say the least—debatable. And in practice, . . . the results have not been entirely satisfactory. Juvenile court history has again demonstrated that unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure.[74]

STATES 19 (1927); Julian W. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 106 (1909). Juvenile courts were unsuccessfully challenged in other states during this era as depriving children of liberty without due process of law: *Ex parte* Sharp, 96 P. 563, 564 (Idaho 1908); Marlow v. Commonwealth, 133 S.W. 1137, 1141 (Ky. 1911); State *ex rel.* Matacia v. Buckner, 254 S.W. 179, 180 (Mo. 1923); violating the right to trial by jury: *Ex parte* Januszewski, 196 F. 123, 129-30 (C.C.S.D. Ohio 1911); *Ex parte* Daedler, 228 P. 467, 469-71 (Cal. 1924); *Marlow*, 133 S.W. at 1141; *Matacia*, 254 S.W. at 180; Commonwealth v. Fisher, 62 A. 198, 200 (Pa. 1905); Mill v. Brown, 88 P. 609, 612 (Utah 1907); and denying the right of appeal: *Januszewski*, 196 F. at 131; *Marlow*, 133 S.W. at 1141. The enactment of juvenile court statutes have also survived attacks against them as impermissibly creating a new court: Lindsay v. Lindsay, 100 N.E. 892, 894 (Ill. 1913); *Marlow*, 133 S.W. at 1138-39; *Ex parte* Powell, 120 P. 1022, 1023-26 (Okla. Crim. App. 1912); *Fisher*, 62 A. at 199; constituting class legislation: Robison v. Wayne Circuit Judges, 115 N.W. 682, 685 (Mich. 1908) (but striking the act for failure to provide a twelve-person jury); *Fisher*, 62 A. at 199; constituting local or special laws: Cinque v. Boyd, 121 A. 678, 685 (Conn. 1923); *Ex parte* Loving, 77 S.W. 508, 511-14 (Mo. 1903); *Mill*, 88 P. at 611; embracing more than one subject: *Robison*, 115 N.W. at 684; *Fisher*, 62 A. at 198; and conferring executive powers on judicial officers: Nicholl v. Koster, 108 P. 302, 305 (Cal. 1910).

70. *See In re* Gault, 387 U.S. 1 (1967), Kent v. United States, 383 U.S. 541 (1966).

71. *Kent*, 383 U.S. at 541.

72. *In re Gault*, 387 U.S. at 1.

73. *Id*.

74. *Id*. at 17-18.

> It is claimed that juveniles obtain benefits from the special procedures applicable to them which more than offset the disadvantages of denial of the substance of normal due process . . . . [T]he observance of due process standards, intelligently and not ruthlessly administered, will not compel the States to abandon or displace any of the substantive benefits of the juvenile process.[75]

Gault was decided in the midst of, and was indeed an integral part of, the Warren Court's criminal procedure revolution: the Supreme Court's application to the states of due process protections theretofore applicable only to the federal government, if recognized at all.[76] Amid uncertainty over the precise extent to which the new constitutional order would be applied in the juvenile setting, the Supreme Court proceeded case-by-case.[77] On the one hand, the Supreme Court held that when juveniles are charged with an act that would constitute a crime if committed by an adult, the charges must meet the adult standard of proof—"beyond a reasonable doubt"—and not the less protective civil standard of "preponderance of the evidence."[78] On the other hand, the Supreme Court held that the right to a trial by jury does not apply to juvenile delinquency proceedings.[79]

In the end, the Supreme Court's prediction in *Gault* that requiring constitutional due process would not disrupt the benefits of juvenile courts proved to be correct. Despite the mandate of constitutional protections for accused juveniles, the juvenile court survives to this day. Now a blend of paternalism and due process, the juvenile court still enjoys a substantial degree of discretion in fashioning remedies for children found to be delinquent, abused, or neglected, though that discretion is guided by the precepts of due process.

3. Indiana Developments: Lewis *et seq*.—Closely following the Warren Court's expansion of the rights of accused juveniles and adults was the Indiana Supreme Court's remarkable decision, *Lewis v. State*,[80] in 1972. In it, the Court went beyond protections afforded by the Warren Court to promulgate an "interested adult rule" pursuant to which an adult interested in the juvenile's welfare, generally a parent, must be informed of the child's rights, have an opportunity to consult privately with the child, and be present during any

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75. *Id*. at 21.

76. Sara S. Beale, *You've Come a Long Way, Baby: Two Waves of Juvenile Justice Reforms as Seen From Jena, Louisiana*, 44 HARV. C.R.-C.L. L. REV. 511, 516-17 (2009).

77. *Id.* at 517-18.

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

79. McKeiver v. Pennsylvania, 403 U.S. 528 (1971). Of historical note, when the Indiana Legislature first passed a bill creating a juvenile court in Indianapolis on February 25, 1903, the bill was vetoed by Governor Winfield T. Durbin on the advice of Attorney General Charles W. Miller that the bill was unconstitutional, because it did not provide sufficient legal protection for the children who would be brought into juvenile court, including the right to trial by jury. The Legislature promptly rectified these deficiencies and Governor Durbin signed a revised bill into law on March 10. Sullivan, *supra* note 43, at 293-95.

80. 288 N.E.2d 138 (Ind. 1972).

interrogation.[81]

Lewis was an appeal from a conviction for a murder in Fort Wayne.[82] Police officers asked Douglas Timothy Lewis, a seventeen-year-old high school sophomore, to accompany them to the station because his name had come up "in certain investigations" they were conducting.[83] During the ride, the officers asked Lewis where his mother was, and he said he did not know where she worked or how to reach her.[84]

One of the police officers later testified that "we told [Lewis] that we would like to talk to him in reference to several investigations, but before we did this, we had to, we had a formality that we had to go through as to his rights."[85] The police officer had Lewis read the police department's standard *Miranda* rights and waiver form.[86] He said he could read and that he understood it; the police officer also read it over again out loud.[87] Lewis signed beneath the statement of rights and again beneath the statement of waiver; his confession was completed within an hour.[88]

Lewis's appeal of his subsequent conviction challenged the admissibility of the confession.[89] The Indiana Supreme Court's opinion was written by Justice Roger O. DeBruler, one of the longest-serving and most distinguished justices in the Court's history.[90] Justice DeBruler's jurisprudence reflects a dual purpose assigned to criminal procedure: protection of the rights of the accused and guidance to law enforcement. He believed that the police value criminal procedure rules just as much as do those accused, because criminal procedure rules give the police clear guidance on how to discharge their sworn duties; that criminal procedure rules do not constrain the work of law enforcement, they define it. In this regard, the *Lewis* opinion is pure DeBruler:

> The authorities seeking to question a juvenile enter into an area of doubt and confusion when the child appears to waive his rights to counsel and against self-incrimination. They are faced with the possibility of taking

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81. The Indiana Supreme Court appears to have led the nation in adopting an interested adult rule. Other courts that have done so include: *State in Interest of Dino*, 359 So. 2d 586, 594 (La. 1978); Commonwealth v. A Juvenile (No. 1), 449 N.E.2d 654, 657 (1983) (applies absolutely for children under fourteen; for those fourteen or over State has very heavy burden if no consultation permitted); *In re* E.T.C., 449 A.2d 937, 940 (1982). *Contra* McIntyre v. State, 526 A.2d 30, 37 (1987) (rejecting the interested adult rule in favor of a totality of circumstances test after extended discussion of the approach taken in various jurisdictions).

82. *Lewis*, 288 N.E.2d at 139.

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. The juvenile was tried in adult criminal court, not juvenile court. *See infra* Part II.D.

90. *See* Linda C. Gugin & James E. St. Clair, *Justices of the Indiana Supreme Court* 379 (2010).

> a statement from him only to have a court later find that his age and the surrounding circumstances precluded the child from making a valid waiver.
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> . . . .
>
> If the police are placed in a quandary when confronting a juvenile accused, the juvenile is perhaps in the most serious predicament of his short life.[91]

In addition to the rather evident irony of expanded protections for the accused being in the best interests of law enforcement, DeBruler's opinion contained a subtle irony as well. Remember that just a few years before in *Gault*, the United States Supreme Court had found the results of a system of special rules for juveniles "not entirely satisfactory."[92] But DeBruler grounds the legitimacy of the interested adult rule in the very history of special rules for juveniles: "The concept of establishing different standards for a juvenile is an accepted legal principle since minors generally hold a subordinate and protected status in our legal system."[93]

The Indiana Supreme Court reversed Lewis's conviction, holding that a juvenile's statement or confession cannot be used against the juvenile at a subsequent trial or hearing unless both the juvenile and the juvenile's parents or guardian were informed of the juvenile's rights to an attorney, and to remain silent.[94] In addition, the Court said, the juvenile must be given an opportunity to consult with the juvenile's parents, guardian, or an attorney representing the juvenile as to whether or not the juvenile wishes to waive those rights.[95] The juvenile may waive those rights after such consultation the juvenile so chooses, the Court concluded, "provided of course that there are no elements of coercion, force or inducement present."[96]

The General Assembly reacted by not only codifying *Lewis*, but providing additional protections to juveniles beyond those in *Lewis* by requiring that a qualifying adult—specifically, a "custodial parent, guardian, custodian, or guardian ad litem"—join in the juvenile's waiver.[97] The current statute provides, in relevant part, that any of a juvenile's rights under the federal or state constitutions, or under any other law, may be waived only:

> [B]y the child's custodial parent, guardian, custodian, or guardian ad

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91. *Lewis*, 288 N.E.2d at 141.

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

93. *Lewis*, 288 N.E.2d at 142. This was too much for Chief Justice Norman Arterburn and Justice Richard Givan who argued for the pre-*Gault* world. *Id*. (Arterburn, C.J., dissenting).

94. *Id*.

95. *Id.*

96. *Id.*

97. Act of 1978, Pub. L. No. 136–1978, § 1, 1978 Ind. Acts 1196, 1232 (codified as amended at IND. CODE § 31-32-5-1 (2014)).

litem if:

(A) that person knowingly and voluntarily waives the right;

(B) that person has no interest adverse to the child;

(C) meaningful consultation has occurred between that person and the child; and

(D) the child knowingly and voluntarily joins with the waiver.[98]

Taking both federal and state protections into account, there are thus four requirements that must be satisfied in Indiana before a juvenile's statements made during a custodial interrogation can be used in the State's case-in-chief.[99] First, *Miranda* and *Lewis* require that both the juvenile and his or her parent must be adequately advised of the juvenile's rights.[100] Second, Indiana statute and *Lewis* require that the juvenile must be given an opportunity for meaningful consultation with his or her custodial parent, guardian, custodian, or guardian ad litem.[101] Third, *Miranda* and Indiana statute require that both the juvenile and his or her parent must knowingly, intelligently, and voluntarily waive the juvenile's rights.[102] Finally, federal constitutional law requires that the juvenile's statements must be voluntary and not the result of coercive police activity.[103]

During my tenure on the Court, we were faced with an interesting question of who qualifies as a "parent" for purposes of the *Lewis* rule and statute. In *Stewart v. State*,[104] the police took seventeen-year-old Alfred Stewart to the station in connection with a murder investigation.[105] There, the police unsuccessfully attempted to contact Stewart's mother before locating his father.[106] The father, upon arriving at the station, told police that he was Stewart's biological father, but that Stewart did not live with him.[107] Father and son then had all of the consultation and provided all of the waivers required by the *Lewis* rule and statute before Stewart signed a confession.[108] But, as noted above, the statute requires consultation with and waiver by a "custodial parent."[109] Did the father qualify?

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98. IND. CODE § 31-32-5-1 (2014). The statute permits such rights to be waived (1) "by counsel retained or appointed to represent the child if the child knowingly and voluntarily joins with the waiver," and (2) "by the child, without the presence of a custodial parent, guardian, or guardian ad litem, if: (A) the child knowingly and voluntarily consents to the waiver; and (B) the child has been emancipated under IC 31-34-20-6 or IC 31-37-19-27, by virtue of having married, or in accordance with the laws of another state or jurisdiction."

99. D.M. v. State, 949 N.E.2d 327, 333 (Ind. 2011).

100. *Id.*

101. *Id.*; IND. CODE § 31-32-5-1(2) (2014).

102. *D.M.*, 949 N.E.2d at 333.

103. *Id.*

104. 754 N.E.2d 492, 493 (Ind. 2001).

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. IND. CODE § 31-32-5-1 (2014).

In an opinion authored by Justice Theodore R. Boehm, the Court answered "no."[110] Although the statute itself did not define "custodial parent," the Court was satisfied from definitions used in other statutes that "custodial parent" should be understood "to mean either a person who has been adjudicated by a court to have legal custody of the child, or a parent who actually resides with the unemancipated juvenile."[111]

Stewart is particularly interesting for how hard-nosed the Court is about enforcing the *Lewis* rule and statute. First, it categorically dismisses the State's claim that the father's biological relationship to Stewart is enough to satisfy the statute.[112] "This contention plainly reads 'custodial' out of the statute,"[113] the opinion practically sneers. "It seems clear that the statute contemplates consultation and waiver by a person in the close relationship afforded by either formal custody or actual residence, in addition to a biological or adoptive relationship. Stewart's father meets neither test."[114]

Even more to the point, the Court rejected the State's "harmless error" claim.[115] Stewart had been convicted after the trial court admitted his confession.[116] The State had quite a bit of circumstantial evidence linking Stewart to the crime.[117] But, the Court said, "the State presented no evidence directly placing Stewart at the scene."[118] Only the "confession definitively established Stewart's role in the commission" of the crime.[119] Stewart's conviction was reversed.[120]

Today, the parens patriae philosophy still animates the juvenile court process in Indiana. The juvenile court enjoys substantial power and discretion in the management and disposition of delinquency cases. But the child before the juvenile court enjoys a panoply of constitutional and statutory rights of which the juvenile court—and the lawyers who practice before it—must always be mindful.

B. The Tension Between Child Protection and Parental Rights

A second tension facing the juvenile justice system today is between the responsibility of the state to protect children—principally from abuse and neglect in their homes—and the rights of parents to raise their children without state interference.

1. The Responsibility to Protect.—Indiana law declares it to be the policy of our state to ensure that children within the juvenile justice system are treated as

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110. *Stewart*, 754 N.E.2d at 495.
111. *Id.*
112. *Id.* at 496.
113. *Id.*
114. *Id.*
115. *Id*.
116. *Id.*
117. *Id.*
118. *Id.*
119. *Id.*
120. *Id.* at 497.

persons in need of care, protection, treatment, and rehabilitation.[121] In our state, this authority is vested in the Indiana Department of Child Services with an office in each county.[122] The child welfare caseworkers (formally called "family case managers")[123] in these county offices comprise the front line of the state's child protection duties. They identify when a child has been abused or neglected, make the initial determination whether the abuse or neglect warrants the child's removal from the home, and recommend to the court whether the home has become safe enough for the child to return.[124] When a child is badly injured or even killed in the face of case manager inaction, all hell can break loose in the form of recriminations against the child protection system and the appointed and elected officials who head it.[125] The moral as well as political consequences of such incidents encourage aggressive child protection efforts.

During my time on the Court, there was a particularly vivid illustration of this point in the tenure of former New York City Mayor Rudolph Giuliani.[126] Alarming cases came to light of child abuse and even death where victims had been returned to their homes by child welfare authorities following prior abuse or where the authorities had failed to respond to reports of abuse.[127] Mayor Giuliani then adopted a policy that "society should put the welfare of children first, and remove them from their homes"[128] "as soon as possible if there are signs of neglect or abuse."[129] About a decade ago, there were two incidents in Indiana that prompted reactions like Mayor Giuliani's.

In January 2003, an eight-year-old child with cerebral palsy was found dead in a wheelchair after a home fire in Madison County.[130] An autopsy showed the child had died from pneumonia one day before the fire, was malnourished, and had bedsores.[131] The child's mother pled guilty to felony neglect charges.[132] But what made headlines was that a state child welfare caseworker had received reports that the child was in trouble but had failed to act on them.[133] The local prosecutor went so far as to file felony neglect charges against the caseworker in

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121. IND. CODE § 31-10-2-1(5) (2014).

122. IND. CODE § 31-25-2-7 (2014).

123. *Id.* § 31-25-2-5.

124. *See generally id.* § 31-34-2.

125. *See, e.g.*, Moore v. State, 845 N.E.2d 225 (Ind. Ct. App. 2006).

126. Joyce Purnick, *Ex-Prosecutor Builds Case for Children*, N.Y. TIMES (Feb. 12, 1996), http://www.nytimes.com/1996/02/12/nyregion/metro-matters-ex-prosecutor-builds-case-for-children.html, *archived at* http://perma.cc/536X-8USV#_blank; Martin Guggenheim, *Sometimes, Foster Care Is the Easy Way Out*, N.Y. TIMES, July 8, 1998, at A21.

127. Guggenheim, *supra* note 126; Purnick, *supra* note 126.

128. Purnick, *supra* note 126.

129. Guggenheim, *supra* note 126.

130. Kevin O'Neal, *Caseworker Makes Deal in Neglect Case*, INDIANAPOLIS STAR, Nov. 9, 2004, at B1.

131. *Id.*

132. *Id.*

133. *Id.*

May 2003, although the prosecutor later dropped the charges in November 2004.[134]

During the same time period that this Madison County case was in the news, an even more dramatic story was unfolding in Marion County.[135] Several years earlier—in March 1997—twins who had tested positive for cocaine at birth had been immediately placed in foster care by Marion County child welfare authorities.[136] Although the children had developmental problems, they thrived in the foster home and their foster parent asked to adopt them.[137] As the child welfare caseworker assigned to the case was preparing for the foster parent adoption, a woman claiming to be a relative of the twins contacted the caseworker and asked to adopt the twins as well.[138] State policy prefers placement of children for adoption with relatives, and that is what ultimately occurred.[139] In January 2002, about two years after the adoption, the twins were taken to Riley Hospital.[140] One of the twins died later that day from dehydration; the other was diagnosed with severe failure to thrive, malnutrition, and demonstrated evidence of physical abuse and neglect.[141] The adoptive mother and her husband were ultimately convicted of child neglect.[142]

What made headlines in this case was that the caseworker had failed to conduct the required investigation of the adoptive parents.[143] Had she done so, she would have discovered that their family relationship to the twins was extremely tenuous, they had criminal convictions (though relatively minor ones), and that child abuse had previously been substantiated in their household.[144] In February 2004, a grand jury indicted the caseworker with charges of felony neglect of a dependent and misdemeanor obstruction of justice.[145] Early the next year, a jury found the caseworker guilty of obstruction of justice although it acquitted her of the more serious neglect charges.[146] In the end, the Indiana Court of Appeals vacated the obstruction conviction.[147] In analyzing the issue and

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134. *Id.* (The case was resolved by the caseworker pleading guilty to misdemeanor charges of tampering with computer records. "The message social workers, [the prosecutor] said, was to be accountable because you could be prosecuted—but don't be intimidated from doing your job. The prosecutor thought conviction on the felony charge would have had the wrong impact.")

135. *See* Moore v. State, 845 N.E.2d 225 (Ind. Ct. App.), *trans. denied*, 860 N.E.2d 583 (Ind. 2006) (Sullivan, J., not participating).

136. *Id.* at 226.

137. *Id.*

138. *Id.* at 226-27.

139. *Id.* at 227.

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.* 228-29.

144. *Id.* at 227.

145. *Id.*

146. *Id.*

147. *Id.* at 229.

coming to its conclusion, the court stated:

> In order to convict [the caseworker] of obstruction of justice, the State was required to prove that [the caseworker] made, presented, or used a false record, document, or thing with intent that the record, document, or thing, material to the point in question, appear in evidence in an official proceeding or investigation to mislead a public servant. . . .
>
> It is entirely within the realm of possibility that [the caseworker] never requested information about prior OFC contact. This is certainly negligent conduct, and it may even be grossly negligent. But negligence in the State of Indiana is not a criminal act. . . . Regardless, there is not a shred of evidence that [the caseworker] actually intended to mislead a public official because there is no evidence that she knew the information to be false.
>
> This case represents a tragic failure in the system that ought to have protected [the twins] from being placed in an abusive home. And while [the caseworker] was undoubtedly negligent in her handling of their case, that negligence does not amount to an obstruction of justice. Accordingly, we find that . . . the evidence was insufficient to convict [the caseworker] of obstruction of justice.[148]

2. Parental Rights and Willis.—Notwithstanding the child protection imperative illustrated by the stories in the preceding section, there is also a considerable body of public opinion that child protection caseworkers interfere with parental decisions concerning discipline, elective medical procedures, religious practices, and the allocation of family financial resources.[149] This body of opinion itself enjoys significant political support and the Indiana Code is regularly the target—sometimes successfully—of legislative efforts to circumscribe the state's child protection authority in deference to parental rights.

During the time I was on the Court, my attention was sometimes drawn to "parental rights advocates" who would argue in the press and online that in many cases children are removed from their homes with no evidence of abuse or neglect. One vocal proponent of this view is a Colorado resident named Suzanne Shell, who opposes the agencies that "take the children first and ask questions later."[150] Shell is also the author of a monologue called "Profane Justice: A Comprehensive Guide to Asserting Your Parental Rights."[151]

Some of these advocates strike me as being on the ideological fringe. But certainly, as the United States Supreme Court itself has declared, a parent's

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148. *Id.* at 228-29.

149. *See, e.g.*, AMERICAN FAMILY ADVOCACY CENTER BLOG, http://profanejustice.blogspot.com/ (last visited Jan. 31, 2015), *archived at* http://perma.cc/U9ML-PUR3.

150. AMERICAN FAMILY ADVOCACY CENTER, http://profane-justice.org/profane-justice.org (last visited Mar. 18, 2015), *archived at* http://perma.cc/L3ZD-B6F8.

151. SUZANNE SHELL, PROFANE JUSTICE: A COMPREHENSIVE GUIDE TO ASSERTING YOUR PARENTAL Rights (2nd ed. 2001).

interest in the care, custody, and control of their children is "perhaps the oldest of the fundamental liberty interests."[152] This is the import of the older cases of *Meyer v. Nebraska*[153] and *Pierce v. Society of Sisters*,[154] holding that prohibiting the teaching of foreign languages in public schools and requiring children between the ages of eight and sixteen years to attend the public schools, respectively, unconstitutionally "interfere[d] with the liberty of parents and guardians to direct the upbringing and education of children under their control."[155] Perhaps similar is *Wisconsin v. Yoder*,[156] holding that applying Wisconsin's compulsory school attendance law to children of members of the Conservation Amish Mennonite Church violated the parents' Free Exercise Clause rights.[157] And it was in its 2000 "grandparent visitation" case that the United States Supreme Court explicitly recognized a parent's substantive due process rights in the care, custody, and control of their children.[158] The facts of *Meyer*, *Pierce*, and *Yoder* illustrate some of the many places in which the tension between the state's responsibility to protect children and parental rights are manifest.[159]

In my mind, the most striking example to reach our Court during my tenure was *Willis v. State*.[160] In that case, Sophia Willis appealed her conviction of felony battery on a child, imposed for having inflicted corporal punishment on her eleven-year-old son for having stolen some clothing from her and, when confronted, lying to her about it.[161] The incident was part of the child's "history of untruthfulness and taking property belonging to others" and consisted of her "strik[ing] him five to seven times with either a belt or an extension cord" across his bared buttocks.[162] "[H]is attempt to avoid the swats resulted in some of them landing on his arm and thigh leaving bruises."[163] A school nurse reported the injuries to child protection authorities, ultimately leading to the mother's conviction.[164]

Willis's appeal contended that her use of physical force as a form of

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152. Troxel v. Granville, 530 U.S. 57, 65 (2000).

153. 262 U.S. 390 (1923).

154. 268 U.S. 510 (1925).

155. *Id.* at 534-35.

156. 406 U.S. 205 (1972).

157. *Id.* at 219.

158. Troxel v. Granville, 530 U.S. 57, 65 (2000).

159. *Yoder*, 406 U.S. at 205; *Pierce*, 268 U.S. at 510; Meyer v. Nebraska, 262 U.S. 390 (1923).

160. 888 N.E.2d 177 (Ind. 2008). As will be discussed below, I dissented in *Willis*. For a good survey of the tension between child abuse and parental discipline (though one admittedly friendly to my *Willis* dissent), see Kyli L. Willis, Willis v. State: *Condoning Child Abuse As Discipline*, 14 U.C. DAVIS J. JUV. L. & POL'Y 59, 72-73 (2010).

161. *Willis*, 888 N.E.2d at 179.

162. *Id.*

163. *Id.*

164. *Id.*

discipline did not cross the line into criminal conduct.[165] Finding "'precious little Indiana caselaw providing guidance as to what constitutes proper and reasonable parental discipline of children, and [that] there are no bright-line rules,'"[166] Justice Robert D. Rucker's opinion for the Court examined two possible sources for establishing a parental discipline privilege.[167] First, the Court looked at a Model Penal Code provision setting the parameters for when a parent's use of force is justifiable[168] but rejected it as not having support in Indiana's common law.[169] Next, the Court turned to the American Law Institute's Restatement (Second) of Torts which provides, "A parent is privileged to apply such reasonable force or to impose such reasonable confinement upon his [or her] child as he [or she] reasonably believes to be necessary for its proper control, training, or education."[170] Adopting this view, the Court found it entirely consistent with Indiana common law and also helpful in identifying a non-exclusive list of factors to consider in "determining the reasonableness of punishment."[171]

The Court then applied this test to the facts for the case, concluded that the State had not disproved beyond a reasonable doubt the defense of parental discipline privilege, and reversed Willis's conviction.[172] The opinion is an incredibly fact-specific opinion for an appellate court.[173] My dissent (I was by myself in dissent; all the other justices concurred in the majority opinion) took the position that this was an improper appellate re-weighing of the evidence.[174] But I think any fair observer of both the majority opinion and my dissent would say that this case was not so much about whether Sophia Willis was guilty of battery on a child as it was about the basic tension between the authority of the

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165. *Id.* at 180.

166. *Id.* at 181 (quoting Mitchell v. State, 813 N.E.2d 422, 427 (Ind. Ct. App. 2004)).

167. *Id.* at 181-82.

168. MODEL PENAL CODE § 3.08(1) (1985) (providing that "a parent's use of force is justifiable if: (a) the force is used for the purpose of safeguarding or promoting the welfare of the minor, including the prevention or punishment of his misconduct; and (b) the force used is not designed to cause or known to create a substantial risk of causing death, serious bodily injury, disfigurement, extreme pain or mental distress or gross degradation.").

169. *Willis*, 888 N.E.2d at 181-82.

170. RESTATEMENT (SECOND) OF TORTS § 147(1) (1965).

171. *Willis*, 888 N.E.2d at 182; RESTATEMENT (SECOND) OF TORTS § 150 (1965) ("In determining whether force or confinement is reasonable for the control, training, or education of a child, the following factors are to be considered: (a) whether the actor is a parent; (b) the age, sex, and physical and mental condition of the child; (c) the nature of his offense and his apparent motive; (d) the influence of his example upon other children of the same family or group; (e) whether the force or confinement is reasonably necessary and appropriate to compel obedience to a proper command; (f) whether it is disproportionate to the offense, unnecessarily degrading, or likely to cause serious or permanent harm.").

172. *Willis*, 888 N.E.2d at 183-84.

173. *Id.*

174. *Id.* at 184.

state and parental rights in the context of parental discipline.[175]

C. The Tension Between the Need for Child Services and Their Cost

A third tension facing the juvenile justice system today is between the responsibility of the juvenile court judge to order services for children and the fact that someone must pay for those services. First and foremost in this regard is the dilemma that so much money is required for the treatment of abuse, neglect, and delinquency that little is ever available for prevention. Every juvenile court judge, DCS official, and child welfare advocate bemoans the emphasis that must be given to coping with and treating the problems of abuse and neglect, compared to preventing it. Indeed, it is likely that because we concentrate our resources on treating the results of abuse and neglect, rather than on preventing it in the first place, we simply have more and more of it to treat.

1. Background.—From 1936 to 1986, the child welfare system in Indiana operated on a county by county basis under the auspices of what were called "County Welfare Departments."[176] Even to this day, some people refer to today's Department of Child Services as "the Welfare Department."

In 1986, the county welfare departments were taken over by the state.[177] The county child welfare caseworkers became employees of the "State Department of Public Welfare" and their work was directed from Indianapolis.[178] But they continued to bring abuse and neglect and termination of parental rights cases in the county juvenile courts.[179] While the caseworkers were paid from Indianapolis, the costs of foster care and other social services ordered by the juvenile court in CHINS dispositional hearings continued to be the responsibility of county government.[180] These services were paid from county property taxes deposited in each respective county's "Child Welfare Fund."[181]

In 1991, during the administration of Governor Evan Bayh, the State Welfare Department was merged with several other state social services agencies to create

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175. In fall 2014, national sports news was focused in part on child abuse case of professional football star Adrian Peterson. An op-ed piece written by a columnist for the Miami Herald named Leonard Pitts, Jr. tracks the majority opinion in *Willis* and states: "My mother was a child abuser. I was, too. In fact, growing up, pretty much every parent I knew abused their kids. Or so many of Adrian Peterson's critics would have you believe." Mr. Pitts goes on to conclude that "[a] parent must be loving, accessible, involved, but also an authority figure, the one who sets limits and imposes real and painful consequences for kids who flout them." Leonard Pitts, Jr., *Sometimes, Spanking Is Not Abuse*, MIAMI HERALD (Sept. 20, 2014, 7:00 PM), http://www.miamiherald.com/opinion/opn-columns-blogs/leonard-pitts-jr/article2171907.html, *archived at* http://perma.cc/Y887-PGZF.

176. J.A.W. v. State, Marion Cnty. Dep't of Pub. Welfare, 687 N.E.2d 1202, 1208 (Ind. 1997).

177. *Id.* at 1211.

178. *Id.* at 1212.

179. *See* IND. CODE § 31-30-1-1 (2014) (granting exclusive original jurisdiction of juvenile matters to juvenile courts).

180. *J.A.W.*, 687 N.E.2d at 1213-14.

181. *Id.*

the Indiana Family and Social Services Administration ("FSSA").[182] Now operating as FSSA's Division of Families and Children, the child welfare caseworkers continued to appear in juvenile courts in the same way as before and the costs of foster care and other social services continued to be paid at the county level.[183]

At the beginning of the administration of Governor Mitch Daniels, the Division of Families and Children was taken out of FSSA and a stand-alone Department of Child Services was established.[184] The number of child welfare caseworkers was increased substantially, but their work remained the same: appearing in juvenile courts where the costs of meeting dispositional decrees continued to be paid at the county level.[185] Later in the Daniels Administration, these costs were shifted to the state level in what I refer to below as the "Daniels Property Tax Revolution of 2008."[186]

2. Governor Bayh's Special Committee on Welfare Property Tax Controls.—In the late 1980s and early 1990s, shortfalls in the County Welfare Fund in a number of counties resulted in Governor Bayh establishing a "Special Committee on Welfare Property Tax Controls" ("the Committee") in 1993 to investigate the causes of these shortfalls.[187] Eighteen state and local government officials accepted Governor Bayh's request to serve on the Committee, including Indiana Chief Justice Randall T. Shepard. I was Governor Bayh's Executive Assistant for Fiscal policy and chaired the Committee.[188]

As noted in the preceding section, even though the state took over management of the State Welfare Department in 1986, it was each county's "County Welfare Fund" that continued to pay for the respective county's foster care and other social service costs, using property taxes levied each year on a county-by-county basis for that purpose.[189] One of the first things our Committee discovered was that seventy-eight percent of the expenditures from County Welfare Funds were for services for CHINS, the most expensive of which were

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182. Health and Human Services, Pub. L. No. 9-1991, 1991 Ind. Legis. Serv. P.L. 9-1991 (West).

183. *See id.* (focusing on the form rather than function of the State's health and human services functions).

184. Department of Child Services—Children and Minors—Destitution, Pub. L. No. 145-2006, 2006 Ind. Legis. Serv. P.L. 145-2006 (West).

185. THE INDIANA YOUTH INSTITUTE, CHILD MALTREATMENT IN INDIANA: A STATUS REPORT 3 (2005), *available at* http://www.iyi.org/resources/doc/Issue-Update-CHILD-MALTREATMENT-Winter-05.pdf, *archived at* http://perma.cc/YY97-YDR8.

186. *See infra* Part II.C.3.

187. *See generally* GOVERNOR'S SPECIAL COMMITTEE ON WELFARE PROPERTY TAX CONTROLS, FINAL REPORT 7-8 (1993), *available at* http://bl-libg-doghill.ads.iu.edu/gpd-web/historical/gscwptc1993.pdf, *archived at* http://perma.cc/KKP3-DFJ5 (describing the process by which counties borrowed to cover shortfalls).

188. *Id.* at 20.

189. *See supra* Part II.C.2.

out-of-home placements, primarily in institutions.[190] The Committee's final report set forth a series of recommendations for financing services in the short run and beginning to address underlying societal causes of abuse and neglect in the longer-term.[191]

In 1994, the Legislature adopted the most important of the Committee's recommendations, including establishing a new "Family and Children's Fund" in each county from which to pay for services for both delinquent children and CHINs and promulgating new budgeting requirements.[192] By 1996, Chief Justice Shepard could report a "dramatic" reduction in the budget shortfalls that had plagued counties only a few years earlier.[193] These shortfalls had almost entirely disappeared.[194] The results of the Committee's work were gratifying, but my appointment by Governor Bayh as chair of the Committee was of personal significance to me in a greater way. It marked my first experience working closely with Chief Justice Shepard and a number of leading juvenile court judges from throughout the state, an experience that would continue for the next twenty years and be the proximate cause of my learning about many of the topics described in this Article.

3. The Daniels Property Tax Revolution of 2008.—Going back to the administration of Governor Frank O'Bannon, who served between Governor Bayh and Governor Daniels, considerable interest was expressed in moving the costs of child welfare services—that this, the costs of foster care and other social services incurred on behalf of CHINs—from county government to state government.[195] However, the politics of this were complicated. To be blunt, the counties with the biggest expenditures in this area tend to be counties with Democratic majorities. There was little incentive for the Republican-controlled Indiana Senate to shift the tax burden from these counties to the entire state.

But as concerns over property taxes intensified in 2006, the (Republican) Daniels Administration threw its weight behind a shift of child welfare expenses off the county property tax rolls and on to the state budget.[196]

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190. GOVERNOR'S SPECIAL COMMITTEE ON WELFARE PROPERTY TAX CONTROLS, *supra* note 187, at 2 (Only twenty-two percent was paid for public assistance to needy families and other expenses more traditionally thought of as welfare.)

191. *Id.* at 5-11.

192. IND. CODE § 12-19-7-3 (1994), *repealed by* 2008 Ind. Acts 146.

193. Randall T. Shepard, Chief Justice, Ind. Supreme Court, State of the Judiciary Address: The Challenge of a Challenged Profession (Jan. 17, 1996) (transcript available at http://www.in.gov/judiciary/supreme/2347.htm, *archived at* http://perma.cc/82ZT-N47J).

194. *Id.*

195. Kevin Corcoran, *Child Welfare's Crushing Cost*, NWITIMES.COM (Mar. 15, 1997, 12:00 AM), http://www.nwitimes.com/uncategorized/child-welfare-s-crushing-cost/article_b76060a4-12b9-5a50-989f-40c52b5bf2c0.html, *archived at* http://perma.cc/SZ2M-L6R4.

196. *Senate Leaders Hear Plan to Have State Pay for Child Welfare*, THEHERALDBULLETIN.COM (Dec. 6, 2007, 8:41 PM), http://www.heraldbulletin.com/news/state_news/senate-leaders-hear-plan-to-have-state-pay-for-child/article_cd9035ef-49a5-5ff8-b82b-2183f65877f1.html, *archived at* http://perma.cc/V9SJ-RQCQ.

One very constructive thing that happened in 2006 was a recognition on the part of both the Daniels Administration and the Legislature of a key insight discussed in Part I of this Article: that there is little difference when it comes to foster care and other social services between children adjudicated to be delinquent and children adjudicated to be CHINs.[197] The idea of the 2006 legislation would be that the state would take over responsibility for paying for foster care and other social services for *both* delinquency and CHINs cases.[198]

Unfortunately, the legislation did not pass when a major policy disagreement emerged between the state's juvenile judges, the administration, and key lawmakers.[199] The administration and legislators were fearful that if the fiscal responsibility for foster care and other social services were shifted from the local to the state level, local judges would be less restrained fiscally in their dispositional decrees.

I remember one leading legislator saying it this way: it is not fair for the state to bear the added cost of decisions by judges who send children where they don't need to be over the recommendation of DCS caseworkers. The administration's solution was to provide that if a juvenile court judge did not abide by the recommendation of the state's caseworker, the judge's home county would be responsible for any difference in the cost.[200]

You will not be surprised that many juvenile court judges felt this to be an infringement upon their independence. "Fiscal intimidation," said one.[201]

This disagreement from 2006 remained through the 2007 session of the General Assembly and no changes were made. But in the summer of 2007, all hell broke loose when property tax bills in Indianapolis and, to a somewhat lesser extent, many other areas of the state, were released and imposed mammoth increases.[202] The property tax catastrophe contributed to the November 2007 defeat of Indianapolis Mayor Bart Peterson, initially thought to be a shoo-in for reelection.[203]

In response to the property tax catastrophe, in 2008 the Indiana General

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197. *See supra* Part I.B.

198. H. R. 1001, 114th Gen. Assemb., 2nd Reg. Sess. (Ind. 2006) (Section 193 of the January 17 amendment would have established the state child welfare fund).

199. *See Letter to the Editor*, KOKOMO TRIBUNE (Feb. 6, 2006), http://www.kokomotribune.com/letter-to-the-editor---tuesday-feb/article_90113fe9-ff67-5936-9181-e7412763c988.html, *archived at* http://perma.cc/MDL4-4WFM.

200. H. R. 1001, 114th Gen. Assemb., 2nd Reg. Sess. (Ind. 2006) (Section 210 of the January 17 amendment).

201. Marcia Oddi, *Judges Concerned about Bill Language Limiting Decision-Making Power in Child Abuse and Neglect Cases*, IND. L. BLOG (Feb. 8, 2006), http://indianalawblog.com/archives/2006/02/ind_courts_judg_11.html, *archived at* http://perma.cc/8GMY-HD9Q.

202. *Black Sunday in Indianapolis, Indiana Due to Huge Tax Increases*, CNN IREPORT (Feb. 11, 2008), http://ireport.cnn.com/docs/DOC-1230, *archived at* http://perma.cc/ZA8Q-VT3J.

203. *Comeback Kid: Ballard Upsets Peterson to Win Indy Mayor's Race*, WTHR.COM (Nov. 6, 2007), http://www.wthr.com/story/7322072/comeback-kid-ballard-upsets-peterson-to-win-indy-mayors-race, *archived at* http://perma.cc/338L-BTWZ.

Assembly enacted House Enrolled Act 1001, a comprehensive property tax relief plan that shifted the principal fiscal responsibility for child welfare services from individual counties to the state budget.[204] The new law, which took effect on January 1, 2009, also gave DCS more oversight authority over delinquency and CHINs cases.[205]

In writing this legislation, the Legislature specified a procedure for situations in which the DCS believed that a juvenile court judge had ordered more expensive services for a child than the circumstances warranted.[206] This procedure involved an expedited appeal to the Indiana Court of Appeals and, ultimately, the Indiana Supreme Court.[207] As just noted, the new law took effect on January 1, 2009.[208] The reader of this Article can get a sense of how seriously our appellate courts took the legislative mandate for expedited appeals from the fact that the first such appeal was decided by the Indiana Supreme Court only three-and-a-half months later on April 17, 2009, after having stopped first at the Court of Appeals![209] In that case, Justice Dickson, writing for a unanimous court, held that a juvenile court must accept DCS's recommendations unless the court finds by a preponderance of the evidence that the recommendation is "unreasonable" or "contrary to the welfare and best interests of the child."[210]

4. Out-of-state Placements and A.B.—The 2008 legislation had a special provision for out-of-state placements.[211] DCS was not to be responsible for the cost of out-of-state placements unless the juvenile court found that there was not a "comparable facility with adequate services" in Indiana or that the placement was within fifty miles of the child's residence.[212] Such a determination was subject to the same expedited appellate review that I just described.[213] But only six months after the new law took effect, on July 1, 2009, without any legislative hearings or consultation between DCS and juvenile judges, the Legislature surprisingly changed this specification to provide that DCS would not be responsible for the cost of out-of-state placements made without the approval of the DCS Director or the Director's designee.[214]

In February 2010, a juvenile court judge ordered a placement outside Indiana, but it was not approved by the DCS Director.[215] In response, the judge declared the 2009 amendment to be unconstitutional on several grounds.[216] Our Court was

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204. 2008 Ind. Acts 146, H. R. 1001, 115th Gen. Assemb., 2nd Reg. Sess. (Ind. 2008).
205. *Id.*
206. *Id.*
207. *Id.*
208. *Id.*
209. *In re* T.S., 906 N.E.2d 801 (Ind. 2009).
210. *Id.* at 804.
211. 2008 Ind. Acts 146, H. R. 1001, 115th Gen. Assemb., 2nd Reg. Sess. (Ind. 2008).
212. *Id.*
213. *Id.*
214. H. R. 1001, 116th Gen. Assemb., 1st Special Sess. (Ind. 2009).
215. A.B. v. State, 949 N.E.2d 1204, 1219 (Ind. 2011).
216. *Id.* at 1210-11.

called upon to resolve the conflict in the case *A.B. v. State of Indiana*.[217]

DCS argued that the 2009 amendment gave it absolute "control over when the State will pay for out-of-state placements."[218] That is, DCS took the position that its Director's decisions are not subject to the expedited appellate review procedures.[219]

In a decision written by Justice Steven H. David, we unanimously agreed with DCS that "the effect of the 2009 amendment was to remove from the expedited appellate review procedures adopted in 2008 those out-of-state placements and services that the DCS Director does not recommend or approve."[220] We also unanimously agreed that "a disapproving decision by the DCS Director cannot be overruled by the juvenile court at which it is directed."[221]

However, our Court stopped short of agreeing that the new provision was immune from any appellate review whatsoever.[222] And the standard of appellate review that we unanimously applied instead was that of the Indiana Administrative Orders and Procedures Act ("AOPA"), our state's basic code of administrative law.[223] AOPA gives great deference to administrative agency decisions and only authorizes agency action to be overturned if the agency action is:

> (1) [a]rbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) [c]ontrary to constitutional right, power, privilege, or immunity; (3) [i]n excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) [w]ithout observance of procedure required by law; or (5) [u]nsupported by substantial evidence.[224]

This is the state of the law today.[225]

Applying this standard, the Court disapproved the Director's action as arbitrary and capricious for reasons that included the out-of-state facility being less expensive than any of the in-state alternatives; the cost of the out-of-state facility including transition and aftercare services while none of the in-state alternatives either provided or guaranteed those same services; and the child, the child's family, the child's attorney, and the juvenile probation officer all favored the out-of-state facility.[226]

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217. *Id.* at 1211.
218. *Id.* at 1215.
219. *Id.*
220. *Id.*
221. *Id.*
222. *Id.*
223. IND. CODE § 4-21.5 (2014).
224. *Id.* § 4-21.5-5-14(d).
225. *Id.*
226. A.B. v. State, 949 N.E.2d 1204, 1220 (Ind. 2011).

D. The Tension Between Rehabilitation and Punishment

A fourth tension facing the juvenile justice system today can be formulated in theoretical or operational terms. Phrased as theory, it is the dilemma between whether society's primary focus should be on rehabilitating or on punishing youthful offenders. Phrased in operational terms, it is the dilemma between trying and sentencing youthful offenders as children or as adults.

1. The Indiana Constitution and Juvenile Incarceration.—It is worthy of note that section 18 of the Indiana Bill of Rights provides that "[t]he penal code shall be founded on the principles of reformation, and not vindictive justice."[227] The Indiana Constitution goes on to provide, "The General Assembly shall provide institutions for the correction and reformation of juvenile offenders."[228] Two decisions from the 1990s rejected claims under these two provisions made by youthful offenders incarcerated as adults.[229]

In the first, Lewis David Hunter, was convicted of committing a home-invasion robbery in which he had bludgeoned an older woman to death.[230] He was sixteen years old at the time of his crime.[231] Convicted in adult criminal court, rather than juvenile court, he was incarcerated with adult offenders.[232]

His appeal argued that his imprisonment with "older, hardened criminals" violated his rights under Article 1, Section 18.[233] In doing so, he specifically referenced the delegates' debate during the 1850 Constitutional Convention in which there was discussion of the difficulty of reforming youthful offenders when they are incarcerated with adults.[234]

In an opinion I authored for the Court, the state's general practice of segregating incarcerated youthful offenders from adult offenders was reviewed prior to concluding that it was not unconstitutional for the state to have a scheme where the only youths not subject to this general practice are those who have "committed the most serious and violent crimes."[235] We went so far as to conclude that it was "well within the legislature's purview to conclude that this system better accommodates the purposes behind Article 1, § 18 and Article 9, § 2, because it segregates younger and less violent offenders from the most violent offenders, regardless of age."[236]

Receiving much greater public attention and addressing the issues in much greater detail, but in the end reaching a similar result, was *Ratliff v. Cohn*.[237]

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227. IND. CONST. art. I, § 18.

228. IND. CONST. art. IX, § 2.

229. *See* Ratliff v. Cohn, 693 N.E.2d 530 (Ind. 1998); Hunter v. State, 676 N.E.2d 14 (Ind. 1996).

230. *Hunter*, 676 N.E.2d at 15.

231. *Id.*

232. *Id.*

233. *Id.*

234. *Id.*

235. *Id.* at 17.

236. *Id.*

237. 693 N.E.2d 530 (Ind. 1998).

Donna Ratliff was only fourteen years old when she set fire to her family home, killing her mother and sixteen-year-old sister.[238] Charged as an adult, she pled guilty to arson and reckless homicide.[239] She was incarcerated in Indiana's adult women's prison but separated from the general prison population.[240]

As had Hunter, Ratliff raised the debates at the 1850 Constitutional Convention in support of her claim that Article 9, Section 2 required to State to place all juvenile offenders—irrespective of their crimes or background—in institutions separate from adult prisons.[241] Justice Brent E. Dickson, writing for the Court, gave the claim far more extended treatment than I had done in *Hunter*.[242] "Clearly," the Court said, "there was strong support at the convention for significant change from the then-existing state of affairs regarding juvenile incarceration."[243] The Court agreed with Ratliff that "Article 9, Section 2 'is unambiguous in requiring the legislature to provide institutions for the correction and reformation of juvenile offenders.'"[244] But the Court found no evidence that the Framers intended that youthful offenders should be exclusively incarcerated in separate facilities, regardless of the nature of the crime or their own backgrounds.[245] In fact, the Court drew the contrary conclusion from the fact that, only shortly after the Constitution was adopted, the Legislature established a facility for juvenile offenders but did not require that all youthful offenders be excluded from adult facilities.[246]

On the basis that Article 9, Section 2 does not require the placement of all juveniles in a separate juvenile facility, the Court dismissed Ratliff's claim that her incarceration in the women's prison violated this provision.[247]

Ratliff also specifically challenged the Court's Article 1, Section 18, analysis in *Hunter*.[248] She argued that *Hunter* should be overruled, either because it had "no limiting principle," or because her case was distinguishable—a sixteen-year-old violent male with a criminal record compared to a fourteen-year-old female first offender.[249] The Court quickly rejected these claims, concluding that "such particularized, individual applications are not reviewable under Article 1, Section 18 because Section 18 applies to the penal code *as a whole* and does not protect

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238. *Id.* at 533.

239. *Id.*

240. *Id.*

241. *Id.* at 534.

242. *Ratliff* is one of many important decisions on Indiana constitutional law written by Justice Dickson that I have discussed elsewhere. *See* Frank Sullivan, Jr., *Selected Developments in the Indiana Constitutional Law (1993-2012)*, 47 IND. L. REV. 1217, 1243 (2014).

243. *Ratliff*, 693 N.E.2d at 535.

244. *Id.* (quoting Ratliff's brief).

245. *Id.* at 535-36.

246. *Id.* at 537.

247. *Id.* at 540-41.

248. *Id.* at 542.

249. *Id.*

fact-specific challenges."[250]

2. Waiver of Youthful Offenders from Juvenile Court to Adult Criminal Court.—If the Indiana Constitution permits youthful offenders to be incarcerated with adults, as *Hunter* and *Ratliff* hold, then the determination as to whether such an alleged offender will be tried in juvenile court or in adult criminal court becomes paramount. That determination is a mix of statutory mandate and prosecutorial and judicial discretion, best thought of as having five categories:

- The general rule: the juvenile court has exclusive jurisdiction over a child who, before becoming eighteen years old, is alleged to have committed a delinquent act.[251]
- The principal exception to the general rule: the juvenile court does not have any jurisdiction over a child who, at least sixteen years old, is charged with murder, kidnapping, rape, and certain other serious offenses listed in the margin.[252]
- "Presumptive waiver" situations: the juvenile court *must* "waive"[253] jurisdiction of a delinquency case to adult criminal court upon the request of the prosecutor in two situations: (1) the child is charged with an act that would be a felony if committed by an adult and has previously been convicted of a felony or a non-traffic misdemeanor;[254] and (2) a child who, at least sixteen years old when the alleged act was committed, is alleged to have committed an offense specified in the statute unless the court finds that "it would be in the best interests of the child and of the safety and welfare of the community for the child to remain within the juvenile justice system."[255]
- "Discretionary waiver" situations: the juvenile court *may* waive jurisdiction of a juvenile case to adult criminal court where a child who, at least sixteen years old when the alleged act was committed, is alleged to have committed an offense specified in the statute and the court finds that "it is in the best interests of the safety and welfare of the community for the child to stand trial as an adult."[256]

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250. *Id.* (emphasis in original) (citing Lowery v. State, 478 N.E.2d 1214, 1220 (Ind. 1985), "Article 1, Section 18 'applies to the penal laws as a system to insure that these laws are framed upon the theory of reformation as well as the protection of society.'").

251. IND. CODE § 31-30-1-1(1) (2014).

252. *Id.* § 31-30-1-4 (providing that juvenile court does not have jurisdiction over a child who, while at least sixteen-years-old, is alleged to have committed attempted murder; murder; kidnapping; rape; robbery if the robbery either was committed while armed with a deadly weapon or results in bodily injury or serious bodily injury; carrying a handgun without a license, if charged as a felony; and certain other offenses).

253. *Id.* § 31-30-3-1. "Waiver of jurisdiction refers to an order of the juvenile court that waives the case to a court that would have jurisdiction had the act been committed by an adult. Waiver is for the offense charged and all included offenses." *Id.*

254. *Id.* § 31-30-3-6.

255. *Id.* § 31-30-3-5.

256. *Id.* §§ 31-30-3-2 & 3.

- A special "presumptive waiver" situation for murder: the juvenile court must waive jurisdiction to adult criminal court the case of any child who, at least ten years old, is charged with murder, unless the court finds that "it would be in the best interests of the child and of the safety and welfare of the community for the child to remain within the juvenile justice system."[257]

The apparent complexity of the foregoing waiver scheme can obscure some rather straightforward principles. First, although the general rule is that children under eighteen are answerable for their criminal acts in juvenile court, there are a great many situations in which an accused child over sixteen will, presumably will, or can be tried in adult criminal court.[258] That will also be the case for recidivists and, in the case of murder, for children all the way down to the age of ten.[259]

One requirement of the statute not discussed in the foregoing is that a "full investigation and hearing" is required before a judge makes a waiver decision, whether presumptive or discretionary.[260] The centrality of this requirement was emphasized in *Vance v. State*,[261] where John Vance appealed his conviction for the murder of his mother, which was committed when he was fifteen years old.[262] Because Vance was under sixteen years old, the case was filed in juvenile court, but the special presumptive waiver provision for murder described above[263] was immediately invoked.[264] In fact, Vance's lawyer had been appointed on a Saturday, and the State filed its waiver request on the Monday two days later.[265] Defense counsel requested a continuance to prepare for the waiver hearing but the court denied the request, conducted the hearing that day, and waived jurisdiction to adult criminal court.[266]

I was assigned to write the opinion of the Indiana Supreme Court, and began by emphasizing that even though the presumption of the applicable statute operated in favor of waiver, waiver was not mandatory.[267] The juvenile court was permitted to retain jurisdiction if "it would be in the best interests of the child and of the safety and welfare of the community for the child to remain within the juvenile justice system."[268] Thus, it was possible that had Vance been granted a continuance, he might have gathered evidence to overcome the

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257. *Id.* § 31-30-3-4.

258. *Id.* § 31-30-3-1.

259. *Id.*

260. *Id.* §§ 31-30-3-2, 3, 4 & 5. *But see id.* § 30-31-3-6 (child is charged with an act that would be a felony if committed by an adult and has previously been convicted of a felony or a non-traffic misdemeanor), where the statute does not provide for investigation or hearing.

261. Vance v. State, 640 N.E.2d 51 (Ind. 1994).

262. *Id.* at 54.

263. IND. CODE § 31-6-2-4(d) (1997) (current version at IND. CODE § 31-30-3-4 (2014)).

264. *Vance*, 640 N.E.2d at 54.

265. *Id.*

266. *Id.* at 55.

267. *Id.*

268. *Id.* (quoting IND. CODE § 31-6-2-4(d) (2014)).

presumption of waiver.[269]

Furthermore, the Court emphasized that the "waiver statute specifically provides that the juvenile court may not waive jurisdiction until 'after full investigation and hearing.'"[270] And, precedent dictated that the record

> 'should be sufficient to demonstrate unequivocally that the strict statutory requirement of a full investigation and hearing has been met and that a conscientious determination of the question of waiver has been made.' In short, the investigation and hearing is not to be a perfunctory proceeding, but is one intended to protect the full panoply of rights provided by our state and federal constitutions.[271]

Under the circumstances, the Court held

> where a mere two days elapsed between the time counsel was appointed for Vance on Saturday and the waiver hearing on Monday, and where Vance requested a continuance, one was required in order that the statutory full investigation could take place and Vance could marshal evidence as to why he should remain in the juvenile justice system.[272]

3. Michigan's "Blended" Sentencing Scheme.—Other states have statutes that are not restricted to our binary options of either juvenile or adult criminal procedures, but permit a blend of the two.[273] One case that came to my attention some years ago from Michigan arose out of a 1997 fatal shooting of an eighteen year old boy in Pontiac by an eleven year old boy, Nathaniel Abraham.[274] The trial court's sentencing order in *People v. Abraham*[275] describes how, under Michigan's sentencing statute, an eleven year old could be tried as an adult for first-degree murder but, if convicted, sentenced in one of the following three ways at the discretion of the judge: (1) as a juvenile, with release at the latest at

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269. *Id.* at 55.

270. *Id.* (quoting IND. CODE § 31-6-2-4(d) (2014)).

271. *Id.* at 55 (quoting Summers v. State, 230 N.E.2d 320, 325 (Ind. 1967), which followed Kent v. United States, 383 U.S. 541 (1966)).

272. *Id.* The Court did not reverse Vance's conviction, however, because Vance was later granted a full waiver hearing on other charges and because he failed to convince the court that waiver was inappropriate on the other charges, the Court was persuaded that he was not prejudiced by his lack of time to prepare for the hearing on the murder charge and, therefore, that the denial of the continuance was harmless error. *Id.* at 56. In 2012, *Vance* served as the precedent when the Indiana Court of Appeals vacated the conviction of Paul Henry Gingerich for conspiracy to commit murder when he was twelve years old. Gingerich v. State, 979 N.E.2d 694 (Ind. Ct. App. 2012). In this highly publicized case, the court held that the juvenile court had abused its discretion when it denied Gingerich's request for a continuance of the waiver hearing. *Id.*

273. Andrea Knox, Note, Blakely *and Blended Sentencing, A Constitutional Challenge to Sentencing Child "Criminals*,*"* 70:5 OHIO ST. L.J. 1275 (2009).

274. People v. Abraham, 51 Juv. & Fam. Ct. J., Spring 2000, at 3, 10 (Mich. Cir. Ct. (Oakland Co.) Jan. 13, 2000), *aff'd*, 662 N.W.2d 836 (Mich. Ct. App. 2003).

275. *Id.*

age twenty-one; (2) as an adult subject solely to adult penalties and punishment; or (3) with a blended sentence.[276] Under the blended sentence option, a child is initially sentenced as an adult but placed in the juvenile system until age twenty-one.[277] If, at age twenty-one, the child is not rehabilitated, the adult sentence is carried out.[278] The initial determination is subject to annual review.[279] In *Abraham*, the judge opted for a blended sentence.[280]

The judge's sentencing order in *Abraham* also aptly summarized the tension between rehabilitation and punishment:

> [T]he pendulum has swung back so that much of the public wants us to get tougher with juveniles. For some it is worked, for others it has not . . . . If we don't want to throw out the baby with the bathwater, treat all youngsters more harshly, and perhaps even abolish the juvenile court and return to the days of the Industrial Revolution where we had one criminal court for both children and adults, we must do better with the thousands of juveniles we see every day in our juvenile courts.[281]

V. THE TENSION BETWEEN REUNIFICATION AND PERMANENCY

A fifth tension facing the juvenile justice system is between the goals of reunification and permanency—between the goal of reunifying the victim of child abuse or neglect who has been removed from home with the child's biological family and the goal of finding a permanent loving home for that child.

A. Background

Where reunification with the child's biological family results in a permanent loving home for the child, it seems this tension does not arise. However, deciding when a child removed from the home should be permitted to return home is no small matter. After all, something happened in that home which resulted in the drastic step of removal. Is the molesting boyfriend really gone? Has the child's mother really stopped drinking or using drugs? Will a reasonable level of hygiene really be maintained? The inability to answer questions like these in the affirmative often results in what is called "foster care drift."[282] Neither the caseworker nor the judge is willing to say that it will never be possible for the child to return to his or her biological family, so no steps are taken toward adoption.[283] On the other hand, neither are they willing to say the

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276. *Id.*

277. *Id.*

278. *Id.*

279. *Id.*

280. *Id.*

281. *Id.*

282. Leslie J. Harris, *Rethinking the Relationship Between Juvenile Courts and Treatment Agencies—an Administrative Law Approach,* 28 J. FAM. L. 217, 237-38 (1989/1990).

283. *Id.* (explaining that "foster care drift" is the result of children never returning to their

biological family is safe for the child now.[284] So, the child remains in foster care for months, and sometimes years, until a decision is made regarding whether reunification is possible.[285]

That is the way things were when I joined the Indiana Supreme Court back in 1993. But in November 1997, the Congress passed, and President Clinton signed into law, the Adoption and Safe Families Act ("ASFA").[286] The new law mandated tough time deadlines within which child protection systems and juvenile courts must decide whether it is safe to reunify or if a permanent placement should be made elsewhere (presumably through adoption).[287] However, the ASFA timelines are so short that juvenile judges face difficult reunification-permanency choices with great frequency.[288]

B. "Foster Care Drift" and Phelps

One of the provisions of ASFA designed to prevent "foster care drift" specifies that where a child has been in foster care for fifteen of the preceding twenty-two months, child welfare authorities must file a petition with the juvenile court to terminate the parents' parental rights and the court must hold a hearing on the petition within ninety days of its filing.[289] Can, consistent with parents' constitutional rights under cases like *Meyer* and *Pierce*, ASFA mandate termination of parental rights on such an extremely short timetable? This was the issue faced by the Indiana Court of Appeals in *Phelps v. Sybinsky*.[290]

Bobby Phelps, an autistic child with behavioral problems, was removed from his parents' home in November 1993, and placed in foster care.[291] The predecessor agency to DCS notified the Phelpses that under the state statute implementing ASFA, it would be filing a motion to terminate parental rights because Bobby had been placed out of their home for at least fifteen of the past twenty-two months.[292] The Phelpses maintained that ASFA violated their substantive due process and equal protection rights under the Fourteenth Amendment.[293] More specifically, they maintained that the statute violated their fundamental right to "family integrity."[294] Because a fundamental right was involved, they continued, the AFSA needed to be subjected to strict scrutiny.[295] Given the possibility that the parents would prove themselves to be fit to have

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biological families and also never being place in other permanent living situations).

284. *Id.*

285. *Id.*

286. Adoption and Safe Families Act, Pub. L. No. 105-89, 111 Stat. 2115 (1997).

287. 42 U.S.C. § 675(5)(E) (Supp. III 1997).

288. *Id.*

289. *Id.*

290. Phelps v. Sybinsky, 736 N.E.2d 809 (Ind. Ct. App. 2000).

291. *Id.* at 812.

292. *Id.*

293. *Id.* at 817.

294. *Id.*

295. *Id.*

Bobby return home if only the time period would be a little shorter, they argued that the statute should fall.[296]

Here is the approach taken by the Indiana Court of Appeals in an opinion authored by Judge Paul D. Mathias:

> The threshold question for a Fourteenth Amendment challenge concerns the level of scrutiny . . . . The [Phelpses] contend[ ] that the [ ] statute should be subjected to a "strict scrutiny" standard of review because actions to terminate the parent-child relationship implicate the fundamental right of family association. However, those governmental actions that merely touch on the family relationship in a slight or tangential manner do not require a strict scrutiny standard of review. . . . Here, the so-called "interference" is the requirement that parents, after their child has been placed out of the home for at least 15 months during which they have appeared at a number of hearings on the issue, appear in court one more time within ninety days of the filing of the petition to terminate for a hearing to determine the best interests of the child. The [ ] statute merely sets a benchmark for additional involvement of the judicial process; termination can only occur after the statutory requirements are proven by clear and convincing evidence. . . .
>
> The legislation must merely bear a rational relation to a legitimate governmental purpose. The [ ] statute seeks to facilitate adoptions, instead of endless foster care placements, for children placed outside their parental homes for an extended period of time. Accordingly, it sets a 15-month benchmark after which the judicial system becomes involved by automatic filing of a petition to terminate parental rights. Although the filing of such a petition is certainly not a matter to be taken lightly, it does bear a rational relation to the State's very legitimate interest in promoting adoptions of children who have been removed from their parental home for extended periods of time. The [ ] statute, with the protections outlined above, does not violate the Due Process Clause . . . [or] the Equal Protection Clause.[297]

C. Permanency, Reunification, and the Incarcerated Parent

If the AFSA time deadlines pass constitutional muster in terms of due

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296. *Id.*

297. *Id.* For interesting and succinct discussions of the substantive due process right to protection of family privacy and family relationships in another context, see the opinions of the Circuit and District Courts in *United States v. Hollingsworth*, 495 F.3d 795, 803 (7th Cir. 2007), *rev'g United States v. McCotry*, No. IP 06-CR-25-01-H/F, 2006 WL 2460757, at *10 (S.D. Ind. July 13, 2006). At issue was "whether the police may interrogate a young elementary school child at a public school (using a school personnel member as the interrogator) for the sole purpose of a criminal investigation of the child's parent and not for any purpose relating to child protection." *Id.* The district court found the parent's substantive due process right violated; the circuit court reversed. *Id.*

process and equal protection, they nevertheless can cause heart-wrenching stress to parents and the most difficult of challenges to courts at the reunification-permanency divide. One such scenario is the incarcerated parent. Think about it for a minute. A child's parent is (or parents are) sent to prison and the child is placed in foster care. The prison sentence is longer than fifteen months. As such, DCS is *required* to initiate termination proceedings under ASFA.[298]

Should the juvenile court grant DCS's petition in all such cases? That is, does parental incarceration, standing alone, always constitute clear and convincing evidence that it is in a child's best interests that parental rights be terminated? While most such petitions are granted and affirmed on appeal, our Court held termination was not appropriate in two cases decided in 2009.[299]

In the first,[300] an incarcerated mother had taken positive steps toward becoming a better parent in prison, demonstrated commitment and interest in maintaining a parental relationship with her five year old son, and showed a willingness to continue to participate in personal improvement programs after her release from prison.[301] In the second,[302] a situation where both parents were incarcerated, (1) both parents' release dates from prison were to occur soon; (2) both had fully cooperated with the services required of them while incarcerated; (3) both had a relationship with the child before their incarceration and attempted to keep the child in the care of relatives prior to their convictions; and (4) the child's need for permanency would not be severely prejudiced because the parents' ability to establish a stable and appropriate life upon their release from prison could be observed and determined within a relatively quick period of time.[303]

As I say, in both cases, our Court concluded that on these records, there was insufficient evidence that it was in the respective child's best interests that parental rights be terminated.[304] This is not to say that there is any presumption in favor of, or even any special rule concerning, incarcerated parents. Rather, cases of incarcerated parents well illustrate the tension between permanency and reunification.

VI. CONCLUSION: A REQUEST TO THE READER

The five areas of tension facing the juvenile justice system today that I have described in this Article illustrate the challenging work that face the men and women who labor in our juvenile justice system. The judges,[305] their staffs,

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298. 42 U.S.C. § 675(5)(E) (Supp. III 1997).

299. Pappas v. A.S., 908 N.E.2d 191 (Ind. 2009); R.Y. v. Ind. Dep't of Child Servs., 904 N.E.2d 1257 (Ind. 2009).

300. *R.Y.*, 904 N.E.2d at 1257.

301. *Id.* at 1262.

302. *Pappas*, 908 N.E.2d at 191.

303. *Id.*

304. *Id.*; *R.Y.*, 904 N.E.2d at 1257.

305. A listing of the many juvenile court judicial officers—judges, magistrates, master commissioners, and referees—who have made significant contributions to the quality of juvenile

juvenile probation officers, and child protection case managers all deserve our profound thanks and appreciation, as do those who support their work in so many other ancillary occupations in the fields of correction, mental health, education, and more.

As a member of the Indiana Supreme Court from 1993 until the middle of 2012, I tried to support the work of these men and women and am proud of the many initiatives that the Court took in that regard: conducting educational programs under the auspices of the Indiana Judicial Center;[306] supervising one of the nation's most extensive programs providing volunteer court-appointed special advocates to serve as the "child's voice in court";[307] establishing "family court" pilot projects;[308] supporting award-winning projects by documentary film-maker Karen Grau;[309] undertaking to equip every Indiana court with a twenty-first century case management system and connect each court's case management system with each other and with those who need and use court information;[310] establishing a "Court Improvement Program" that makes grants for particular projects that improve the juvenile justice system;[311] and more.

At the helm of all these initiatives was Chief Justice Randall T. Shepard, who reflected on, worried over, and did something about the great challenges and policy choices that our juvenile justice system faced. Supporting and improving Indiana's juvenile justice system was one of his top priorities in the twenty-five years that he served as our Chief Justice. Now the helm has passed to a new generation of justices, two of whom, Chief Justice Loretta Rush and Justice Steven David, were juvenile judges of distinction before their appointment to the

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justice in our state must await another time and place. But tribute must be paid here to the universally recognized leader of Indiana's juvenile judiciary, former Monroe Circuit Court Judge Viola J. Taliaferro, whose powerful intellect, steely purpose, and gentle kindness have inspired and motivated me and countless others—and benefitted thousands of Hoosier children.

306. Judicial Branch of Indiana, *Education & Outreach*, COURTS.IN.GOV, http://www.in.gov/judiciary/2727.htm (last visited May 13, 2015), *archived at* http://perma.cc/6944-BKVE.

307. Indiana Child Advocates Court Appointed Special Advocates Network, *Learn About Us, History*, http://www.childadvocatesnetwork.org/learn-about-us/history/ (last visited May 13, 2015), *archived at* http://perma.cc/6X98-K6GC (explaining the program is administered through the Indiana Supreme Court).

308. Division of State Court Administration, *About the Family Court Project,* COURTS.IN.GOV, http://www.in.gov/judiciary/family-court/2396.htm (last visited May 13, 2015), *archived at* http://perma.cc/566Y-Y3WR.

309. Karen Grau, *No Place for a Child*, NBC NEWS (Dec. 20, 2006), http://www.nbcnews.com/id/16174201/ns/msnbc-documentaries/t/no-place-child/#.VQ1zMhaKzwy (last visited May 13, 2015), *archived at* http://perma.cc/WG6P-H6MW.

310. Division of State Court Administration, *Indiana Court Information Technology Extranet (INcite)*, COURTS.IN.GOV, http://www.in.gov/judiciary/admin/2665.htm (last visited May 13, 2015), *archived at* http://perma.cc/H7SC-UC39.

311. Indiana Judicial Center, *Court Improvement Program*, Courts.IN.gov, http://www.in.gov/judiciary/cip/ (last visited May 13, 2015), *archived at* http://perma.cc/UQU9-L4C9.

Indiana Supreme Court by Governor Daniels.[312]

I end this Article with a request to the reader. Evan Bayh, who, when governor of Indiana, did me the high honor of appointing me to the Indiana Supreme Court, has said, "Our children are our greatest treasure and our greatest resource."[313] If we are to safeguard that treasure and utilize that resource to the fullest, we will all have to help the children who are troubled and who are in trouble. I hope some readers of this Article become child protection case managers and juvenile probation officers. I hope some who are or will become practicing lawyers conduct at least some of their practice in juvenile court. I hope many will explore the possibility of helping juvenile court as volunteer court appointed special advocates and guardians ad litem.

Most of all, I hope the reader will join every juvenile court judge I know, and many, many others involved with abused and neglected children, in seeking to prevent child abuse and neglect. As I mentioned earlier, we concentrate many more of our resources on treating the results of abuse and neglect than on preventing the abuse and neglect in the first place.

For those who work in a court, church, recreational, or educational setting with children who have been abused or neglected, have as one goal preparing them to be parents who do not repeat the cycle by abusing or neglecting their own children—and be on the lookout for younger siblings and take creative steps to keep them from being victimized as well. In the great debate about the allocation of public resources, speak up for funding of prevention programs. And when engaged in discussion and debate over the direction of our country, make the prevention of delinquency and child abuse and neglect one of your causes.

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312. Tom LoBianco, *Indiana Chooses First Female Chief Justice*, CHRISTIAN SCIENCE MONITOR (Aug. 6, 2014), http://www.csmonitor.com/USA/Latest-News-Wires/2014/0806/Indiana-chooses-first-female-chief-justice, *archived at* http://perma.cc/6HF4-AXZB; Courts in the Classroom, *Justice Steven H. David*, COURTS.IN.GOV, http://www.in.gov/judiciary/citc/3290.htm (last visited May 13, 2015), *archived at* http://perma.cc/M4LQ-BRDZ.

313. Governor Evan Bayh, 1992 State of the State Address 5 (Jan. 9, 1992).