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Note

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In re Edwin L.: When process isn't due

"Herein lies the peculiar paradox of juvenile courts: designed to ensure a superior justice through protection of the child, they have to an excessive extent abandoned the fundamentals upon which the methods of promoting justice are based."[1]

"Neither man nor child can be allowed to stand condemned by methods which flout constitutional requirements of due process of law."[2]

I. Introduction

Almost three decades ago, in the landmark decision *In re Gault*,[3] the United States Supreme Court declared that "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone."[4] For the first time, our highest Court specifically held that in a proceeding in which a child is facing the "tremendous consequence" of being adjudged a "delinquent" and consequently may be deprived of his freedom,[5] the juvenile is entitled to many of the same procedural due process protections guaranteed to criminal defendants.[6] It is particularly significant to the issue addressed in this Note, however, that the scope of the Supreme Court's ruling is expressly limited to the adjudicatory phase of the juvenile justice process; that is, the phase in which it is determined whether a juvenile is a "delinquent" as a result of alleged misconduct on his part.[7] The Supreme Court in *Gault* was not confronted with the application of procedural due process during the pre-judicial or post-adjudicatory stages of the juvenile justice process.[8] Hence, under *Gault* the states remained substantially free to determine what, if any, procedural

1. Paul W. Tappan, Juvenile Delinquency 170 (Richard T. La Piere consulting ed., 1949).

2. Haley v. Ohio, 332 U.S. 596, 601 (1948) (plurality opinion).

3. 387 U.S. 1 (1967).

4. *See id.* at 13.

5. *See id.* at 56-57 (in part quoting Kent v. United States, 383 U.S. 541, 554 (1966)).

6. *See Gault*, 387 U.S. 1.

7. *See id.* at 13.

8. *See id.*

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due process guarantees must be afforded by Family Courts during non-adjudicatory juvenile delinquency proceedings.[9]

Accordingly, a deeply divided New York Court of Appeals recently held[10] that Family Court judges need afford a child accused of violating a condition of a non-adjudicatory adjournment in contemplation of dismissal (hereinafter "ACD")[11] only minimal procedural due process protections prior to revocation of the child's conditional freedom.[12]

Despite a fervent dissent,[13] the majority maintained that an ACD order is not a "dispositional" order, and thus, its revocation does not entitle the juvenile to the same procedural protections constitutionally required prior to dispositional revocations.[14] Noting that the juvenile has not yet been adjudged a "delinquent," the majority concluded that the juvenile possesses only an "attenuated," rather than a "vested," liberty interest in a court-ordered ACD.[15] Balancing this limited liberty interest against the significant state interests involved, the majority held that the concept of due process is satisfied as long as the Family Court conducts some sort of inquiry into, and af-

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9. *See id.*

10. *In re* Edwin L., 88 N.Y.2d 593, 671 N.E.2d 1247, 648 N.Y.S.2d 850 (1996).

11. N.Y. FAM. CT. ACT § 315.3(1) (McKinney 1983) states in pertinent part:

> An adjournment in contemplation of dismissal (hereinafter "ACD") is an adjournment of the proceeding, for a period not to exceed six months, with a view to ultimate dismissal of the petition in furtherance of justice. . . . If the proceeding is not restored, the petition is, at the expiration of the order, deemed to have been dismissed by the court in furtherance of justice.

A juvenile ACD allows, in the court's discretion, certain juvenile delinquency proceedings to be conditionally postponed pending final adjudication; upon fulfillment of court-specified conditions, the adjourned charges are effectively dismissed. *See id.* An ACD may be contingent upon "such terms and conditions as the court deems appropriate." *Id.* The juvenile ACD process is "non-adjudicatory" because it does not contribute to the determination of whether a child is in fact a "delinquent" as a result of alleged misconduct on his part. *See id.* On the contrary, the ACD process merely postpones that determination pending possible dismissal. *See id.*

12. *See Edwin L.*, 88 N.Y.2d at 597, 603, 671 N.E.2d at 1248, 1251, 648 N.Y.S.2d at 851, 854.

13. *See infra* text accompanying notes 210-228; *see Edwin L.*, 88 N.Y.2d at 617, 671 N.E.2d at 1260, 648 N.Y.S.2d at 856 (Levine, Titone, Ciparick, JJ., dissenting).

14. *See id.* at 600-01, 671 N.E.2d at 1250, 648 N.Y.S.2d at 853; *see generally supra* note 11 and accompanying text, *infra* notes 172-73.

15. *See Edwin L.*, 88 N.Y.2d at 601-03, 671 N.E.2d at 1250-51, 648 N.Y.S.2d at 853-54 (pointing out that vacatur of an ACD "merely brings the juvenile back to the same circumstances he would have faced after the conclusion of fact-finding").

fords the juvenile an opportunity to respond to the allegations against him.[16] In addition, the Family Court must find that there is a "legitimate basis" for revoking the ACD.[17]

The dissent, on the other hand, maintained that the conditional liberty interest implicated by an ACD is "essentially identical" to that afforded by the dispositions of parole and probation.[18] Characterizing this liberty interest as "significant," the dissent argued that the absence of a formal adjudication of guilt was constitutionally irrelevant.[19] Thus, the dissenters concluded that the majority's relaxed "legitimate basis" test was constitutionally insufficient to protect a juvenile's right not to have his ACD revoked without due process of law.[20]

The case that so divided the New York Court of Appeals is *In re Edwin L.*[21] Beneath the surface of the conflicting *Edwin L.* opinions are two interesting questions. First, what, if any, constitutionally protected interest does a juvenile have in a post-fact-finding ACD order?[22] Second, irrespective of a constitutionally protected interest, might the underlying goals of the Family Court justify diminished due process in juvenile ACD revocation proceedings?

To preface the discussion of these issues, Part II of this Note will begin with an outline of the historical treatment of juvenile crime. Part III of this Note will then address the applicable due process inquiry. Part IV will provide a summary of the significant elements of *Edwin L.*, while Part V will analyze

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16. *See id.*

17. *See id.* at 603-04, 671 N.E.2d at 1251-52, 648 N.Y.S.2d at 854-55.

18. *See id.* at 607, 613, 671 N.E.2d at 1253, 1257-58, 648 N.Y.S.2d at 856, 860-61 (Levine, J., dissenting).

19. *See id.* at 613-15, 671 N.E.2d at 1257-59, 648 N.Y.S.2d at 860-62.

20. *See Edwin L.,* 88 N.Y.2d at 613-15, 671 N.E.2d at 1257-59, 648 N.Y.S.2d at 860-62.

21. 88 N.Y.2d 593, 671 N.E.2d 1247, 648 N.Y.S.2d 850 (1996).

22. An ACD may be granted "at any time prior" to a formal determination of juvenile delinquency. *See* N.Y. FAM. CT. ACT §§ 315.3(1), 352.1 (McKinney 1983). Thus, a court may, in its discretion, decide to grant a conditional adjournment even before it conclusively ascertains the juvenile's guilt or innocence. *See* § 315.3. On the other hand, the court may find it advisable to conclude the fact-finding process before it decides to adjourn the proceedings in contemplation of dismissal. Accordingly, a "post-fact-finding ACD order" is one that is granted after a hearing has been held to adjudicate the factual question of guilt (but, as required by the statute, prior to the formal order of delinquency). *See* § 315.3(1); *see generally infra* notes 172-73.

the above questions and their implications with reference to Edwin's case. In Part VI, the author will ultimately conclude that the majority analysis is flawed, and the resultant procedural standards are constitutionally lacking.

II. Historical Treatment of Juvenile Crime

A. *Basic Pre-Gault Overview*

> The juvenile justice system is based on the concept of *parens patriae* or, by implication, the rehabilitative ideal. Because of this orientation, . . . the courts have traditionally developed procedures for handling juvenile law violations that differ from those used for adults. . . . However, these differences [in procedural standards] should be based on sound legal, social and constitutional principles, and the objective should be to protect juveniles from the harsher aspects of the criminal justice system.[23]

While history evidences society's apparent reluctance to treat juvenile offenders as harshly as adult offenders,[24] early America had no special facilities for the correction or rehabilitation of errant youth.[25] Thus, juvenile prosecutions, although relatively infrequent, took place in adult criminal courts.[26] A conviction subjected the juvenile to the full range of harsh criminal penalties, including possible confinement in an adult penitentiary, or even death.[27] This treatment was perceived as extreme, especially in light of the beliefs that children were "essentially good,"[28] and were particularly susceptible: to rehabilitation as well as to criminal influence. The foregoing perception contributed to a gradual reformulation of the early juvenile jus-

23. FRANCIS BARRY MCCARTHY AND JAMES G. CARR, JUVENILE LAW AND ITS PROCESSES 287 (2d ed. 1989) (excerpting a commentary from the National Advisory Committee's 1976 report on Juvenile Justice and Delinquency Prevention).

24. *See, e.g.*, MERRIL SOBIE, THE CREATION OF JUVENILE JUSTICE: A HISTORY OF NEW YORK'S CHILDREN'S LAWS 5-12 (1987) (discussing, *inter alia*, the historical common law "presumption of infancy," which firmly presumed that a child between the ages of seven and fourteen lacked the criminal capacity necessary to establish guilt; thereby reducing the likelihood of criminal conviction and severe criminal sanctioning of juveniles); *Gault*, 387 U.S. at 15.

25. *See* HARVARD UNIVERSITY PRESS, CHILDREN AND YOUTH IN AMERICA Vol. 1, 307 (Robert H. Bremner, ed. 1970).

26. *See* SOBIE, *supra* note 24, at 5, 25-26; *Gault*, 387 U.S. at 15-16.

27. *See* SOBIE, *supra* note 24, at 5, 25-26.

28. *See Gault*, 387 U.S. at 15.

tice process.[29] Thus, the turn of the Twentieth Century saw the establishment of autonomous juvenile courts, which were to exist and function independently of the criminal courts which had previously maintained jurisdiction over juvenile proceedings.[30] The primary goal of the specialized court was to afford the child an individualized application of justice, focusing on the care and rehabilitation of the child rather than his punishment.[31]

One notable development during this transitional period away from criminal courts was the "decriminalization" of juvenile misconduct.[32] Further observation of this period revealed the fact that children were often brought before the juvenile courts on relatively trivial charges or on matters in which fault was not attributable to the child.[33] Consequently, judges in juvenile courts adopted paternalistic inclinations, fashioning individual dispositions that focused on the child's environment and best interests, rather than on the actual crime committed as

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29. *See* Sobie, *supra* note 24, at 25-26; *Gault*, 387 U.S. at 15-16.

30. *See* Sobie, *supra* note 24, at 97-106. The Nation's first Juvenile Court was established in 1899 by the Illinois Legislature. *See id.* at 104 n.331. While some areas of New York had previously established separate children's court Parts, a juvenile court completely independent of the criminal court was not established in New York until 1922. *See id.* at 130; Children's Court Act 1922 N.Y. Laws 547.

31. *See Gault*, 387 U.S. at 15; Sobie, *supra* note 24, at 98-99, 105-06. Segregated juvenile proceedings enabled exclusively-assigned judges to become familiar with the appropriate child care agencies, develop specialized knowledge, and become more attuned to the unique dispositional alternatives available in juvenile cases; all with a view toward achieving individualized justice effectively tailored toward the child's particular needs. *See* Sobie, *supra* note 24, at 103.

32. *See* Sobie, *supra* note 24, at 112. *See e.g.,* 1909 N.Y. Laws 478 (providing that "[a] child of more than seven and less than sixteen years of age, who shall commit any act or omission which, if committed by an adult, would be a crime not punishable by death or life imprisonment, shall not be deemed guilty of any crime, but of juvenile delinquency only. . ."); Sobie, *supra* note 24, at 126; 1907 N.Y. Laws 417 (removing civil penalties, such as abrogation of future voting rights and disqualification from future service as a juror, which had traditionally attached upon an adjudication of delinquency); Sobie, *supra* note 24, at 114-15; 1910 N.Y. Laws 659, § 39 (stating that "so far as it is consistent with the interest of the child and of the state [the court shall] consider the child not upon trial for the commission of a crime, but as a child in need of the care and protection of the state."); Sobie, *supra* note 24, at 115 n.365.

33. *See* Sobie, *supra* note 24, at 119-20, 144. Many juvenile arrests were for minor offenses; such as petty larceny, breach of peace, and even ballplaying in the street. *See id.* Juvenile courts were also responsible for hearing charges of parental neglect and improper guardianship. *See id.*

was the practice in criminal courts.[34] Another major consequence of the separation of juvenile courts from criminal courts was the removal from New York's Penal Code of the substantive laws governing children.[35] This extraction generated confusion concerning which procedures would govern the newly-segregated juvenile proceedings.[36]

To cope with these transitions, the specialized juvenile courts resorted to experimentation.[37] The juvenile court would often dispense with traditional procedural protections in favor of an informal process, in the belief that informality would most effectively protect and rehabilitate the wayward child.[38] While procedural due process requirements were never officially eliminated, they were largely disregarded in the increasingly informal juvenile proceeding.[39] The primary focal points of such proceedings were protection and rehabilitation of the child, even if that meant committing the child to an institution without the benefit of basic procedural safeguards.[40] This abroga-

34. *See id.* at 120-22; *Gault,* 387 U.S. at 25-26. "The juvenile judge tended to view his role as patriarchal. He pictured himself as the benevolent judge who placed his arm around a youngster and prevented future criminality through sheer concern and persuasion." *See* SOBIE, *supra* note 24, at 122.

35. *See* SOBIE, *supra* note 24, at 117, 119-20, 144. These substantive laws were subsequently recodified as the Children's Court Act of 1922 (repealed 1962). *See id.*

36. *See id.* at 117-18, 140. The 1922 Act was portentously unclear on this issue. *See id.* at 139-40. Whereas the procedural protections applicable in criminal proceedings; such as the right to adequate notice, the right to confrontation, the right to cross-examination of witnesses, and the requirements of sworn testimony and proof beyond a reasonable doubt; were previously presumed applicable in juvenile cases heard under the unified system, the segregation of juvenile proceedings prompted the question of whether these procedures were still supposed to govern in the independent juvenile courts. *See id.* at 118.

37. *See* SOBIE, *supra* note 24, at 122-23, 140, 146; *Gault* 387 U.S. at 15-17 (citing protectionist theories to explain the retreat from the rigid adversarialness of the criminal procedure law).

38. *See* SOBIE, *supra* note 24, at 122-23, 140.

39. *See id.* at 122-23.

40. *See id.* at 123-24.

> To save a child from becoming a criminal, or from continuing in a career of crime, to end in maturer years in public punishment and disgrace, the Legislature surely may provide for the salvation of such a child . . . by bringing it into one of the courts of the state *without any process at all*, for the purpose of subjecting it to the state's guardianship and protection.

See id. at 123 n.394 (quoting Commonwealth v. Fisher, 62 A. 198, 200 (1905) (emphasis added)).

tion of procedure was generally justified by invocation of the common law doctrine of *parens patriae*.[41] The courts reasoned that procedural due process was unnecessary, since they were merely acting in their *parens patriae* capacity as "surrogate parents" in order to help the child, rather than to punish or subject him to stigmatism.[42] In accordance with the foregoing events, juvenile proceedings were classified as "civil" rather than "criminal," further justifying the departure from traditional criminal procedural protections.[43] Thus developed the informality that subsequently became the hallmark of the juvenile justice system, and ultimately prompted the United States Supreme Court decision *In re Gault*.[44]

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41. *See Gault*, 387 U.S. at 16-17 (explaining that the *parens patriae* doctrine presumed "that a child, unlike an adult, has a right 'not to liberty, but to custody,'" and that absent a right to liberty, the child suffered no deprivation —no matter how the state obtained custody over him— and thus was not entitled to any procedural protections); SOBIE, *supra* note 24, at 88, 122-23 (quoting the assertion of *In re* Donohue, 1 Abb. N. Cas. 1, 6-8 (Sup. Ct., 1st. Dep't 1876), that "the state as *parens patriae*, has the original right to the control and disposition of all minors. It confides a part of its right to a parent *as a trust.*").

42. *See* SOBIE, *supra* note 24, at 123.

> The natural parent needs no process to temporarily deprive his child of its liberty by confining it in his own home, to save it and to shield it from the consequences of persistence in a career of waywardness: nor is the state, when compelled, as *parens patriae*, to take the place of the father for the same purpose, required to adopt any process as a means of placing its hands upon the child to lead it into one of its courts. When the child gets there, and the court, with the power to save it, determines on its salvation, and not its punishment, it is immaterial how it got there.

See id. at 123 n.394 (quoting *Fisher*, 62 A. at 200); *see also Gault*, 387 U.S. at 16-17.

43. *See Gault*, 387 U.S. at 16-17.

> The juvenile court laws . . . are the result of plans promoted by humane and forward-looking people to provide a system of courts, procedures, and sanctions deemed to be less harmful and more lenient to children than adults. For this reason such state laws generally provide less formal and less public methods for the trial of children. In line with this policy, both courts and legislators have shrunk back from labeling these laws as 'criminal' and have preferred to call them 'civil.'

Id. at 59 (Black, J., concurring).

44. *See* SOBIE, *supra* note 24, at 124, 145; *Gault*, 387 U.S. at 17-18 ("[T]he highest motives and most enlightened impulses led to a peculiar system for juveniles, . . . [but] in practice, . . . the results have not been entirely satisfactory. . . . Departures from established principles of due process have frequently resulted not in enlightened procedure, but in arbitrariness.").

B. *The Contributions of In re Gault*

Despite the decriminalization of juvenile crime and the paternalistic, rehabilitative intent of the juvenile courts, a "delinquency" adjudication continued to invoke connotations and consequences comparable to those associated with a criminal conviction.[45] This reality, coupled with the juvenile courts' overall disregard of the procedural safeguards that had been developed to promote truth-finding and deter erroneous deprivations, presented itself to the United States Supreme Court in the case of *In re Gault*.[46]

In *Gault*, fifteen-year-old Gerald Gault was arrested after a neighbor alleged that Gerald and his friend made lewd comments to her over the telephone.[47] Although Gerald was taken into custody and temporarily detained in a children's detention center, no attempt was made to notify his parents of his arrest, nor were other traditional due process protections afforded during the delinquency proceedings against him.[48] Gerald was subsequently adjudged delinquent, and committed to the State Industrial School for the remainder of his minority "unless sooner discharged by due process of law."[49] After exhausting

45. *See Gault*, 387 U.S. at 23-24, 27. "A proceeding where the issue is whether the child will be found to be delinquent and subjected to the loss of his liberty for years is comparable in seriousness to a felony prosecution." *Id.* at 36. *See* SOBIE, *supra* note 24, at 127-28; *see also* People v. Pollack, 154 A.D. 716, 720, 139 N.Y.S. 831, 883 (2d Dep't 1913) (recognizing that "[the] new classification, . . . known as 'juvenile delinquency,' . . . though excluded expressly from the degree of statutory crime, was in its nature *quasi-criminal*, whatever words were used to characterize it."); *In re* Gregory W., 19 N.Y.2d 55, 62, 224 N.E.2d 102, 106, 277 N.Y.S.2d 675, 680 (1966) (holding that delinquency actions "are at the very least quasi-criminal in nature"); People v. Fitzgerald, 244 N.Y. 37, 155 N.E. 584 (1927) (holding that the mere substitution of words could not alter the proceeding's criminal nature).

46. 387 U.S. 1 (1967); *see id.* at 19-24; *see generally infra* note 185. The 1967 *Gault* decision was one of the first in the Supreme Court's history involving juvenile justice. *See* SOBIE, *supra* note 24, at 165 n.541.

47. *See Gault* 387 U.S. at 4.

48. *See id.* at 5-8.

49. *Id.* at 7-8. The age of majority being twenty-one, Gerald thus received a potential six-year sentence for his "adolescent variety" phone call. *See id.* at 4, 7-8, 29. Had Gerald been over eighteen when he committed this same act, he would have been tried as an adult, afforded the full range of procedural protections, and even then been subjected to a maximum penalty of not more than $50 or two months imprisonment. *See id.* at 29.

his state remedies to no avail, Gerald appealed his case to the United States Supreme Court.[50]

On review, the Supreme Court recounted the historical theories which originally sanctioned the relaxation of procedure in juvenile proceedings.[51] However, the Court declined to endorse those views blindly.[52] Instead, the Court scrutinized the claimed benefits afforded the juvenile by the informal system to determine whether those benefits actually existed, and if so, whether they outweighed the patent disadvantages associated with the absence of normal due process.[53] In so doing, the Court expressed doubt as to the validity of the belief that informality itself actually benefitted the child.[54] The Court further suggested that modern juvenile courts were not providing the individualized attention that the informal system was intended to promote.[55] Moreover, the Court observed that essentially, a delinquency adjudication is substantially akin to a criminal conviction.[56] While the Court conceded that some of the principles behind the informal system were valuable, it nevertheless reversed the lower court, ultimately concluding that the proposed

50. *See Gault*, 387 U.S. at 4. Having no right of appeal in juvenile cases under Arizona law, Gerald petitioned the appropriate state court for a writ of habeas corpus. *See id.* at 4, 8. Gerald alleged that the Arizona Juvenile Code was unconstitutional on its face and as applied because, *inter alia*, it did not provide for adequate notification of charges; did not provide for appellate review; denied the rights to counsel, confrontation, and the privilege against self-incrimination; allowed the use of hearsay testimony; and failed to require that the proceedings be recorded. *See id.* at 9-10. The Supreme Court of Arizona subsequently affirmed the dismissal of Gerald's petition, concluding that the proceedings against him did not offend the constitutional requirements of due process. *See id.* at 4.

51. *See id.* at 14-22; *see also supra* Part II.A.

52. *See Gault*, 387 U.S. at 14-22. "[I]t is important, we think, that the claimed benefits of the juvenile process should be candidly appraised." *Id.* at 21.

53. *See id.* at 21-22. For example, the Court conceded that processing the juvenile separately from the adult, declining to classify the juvenile as a "criminal," and affording him individualized attention were "commendable principles" of the juvenile system. *See id.* at 22-26. On the other hand, the Court indicated that an absence of traditional due process might endanger "the appearance as well as the actuality of fairness, impartiality and orderliness." *Id.* at 26.

54. *See Gault,* 387 U.S. at 26.

55. *See id.* at 17-19, 25-28.

56. *See id.* at 27, 36 ("A proceeding where the issue is whether the child will be found to be delinquent and subjected to the loss of his liberty for years is comparable in seriousness to a felony prosecution."); *id.* at 29 ("The essential difference between Gerald's case and a normal criminal case is that safeguards available to adults were discarded in Gerald's case.").

benefits neither necessitated, nor justified, a complete lack of procedural due process.[57]

The Court explained that "[d]epartures from established principles of due process have frequently resulted not in enlightened procedure, but in arbitrariness."[58] Stressing the solid relationship between adequate due process and the fundamental right of individual liberty,[59] the Court opined that "it would be extraordinary if our Constitution did not require the procedural regularity and the exercise of care implied in the phrase 'due process.'"[60] In essence, the Supreme Court ignored the traditional rhetoric which proclaimed that a retreat from rigid criminal due process was required to meet the "unique" needs of juveniles on trial, and instead examined the reality of the juvenile delinquency proceeding.[61] Consequently, the Supreme Court declared that in an adjudicatory proceeding which may result in a loss of freedom, the juvenile is entitled to many of the fundamental due process protections constitutionally guaranteed in adult criminal proceedings.[62] Specifically, the juvenile and his parents are entitled to timely notice of the charges against him,[63] and both must be apprised of his right to counsel.[64] The juvenile also must be advised of his privilege against self-incrimination,[65] and be afforded the opportunity to confront and cross-examine witnesses against him.[66]

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57. *See id.* at 22-27 (noting that the juvenile judge's *parens patriae* power is not unlimited, and is by no means an "invitation to procedural arbitrariness;" instead reasoning that the favorable practices of the juvenile system need not mutually exclude the fundamentals of due process); *see also* discussion *supra* note 53.

58. *Gault,* 387 U.S. at 18-19.

59. *See id.* at 20 ("Due process of law is the primary and indispensable foundation of individual freedom. It is the basic and essential term in the social compact which defines the rights of the individual and delimits the powers which the state may exercise.").

60. *Id.* at 27-28.

61. *See generally Gault,* 387 U.S. 1.

62. *See id.* at 4, 13, 22, 31-59.

63. *See id.* at 33.

64. *See id.* at 36-41.

65. *See id.* at 47-55.

66. *See Gault,* 387 U.S. at 56-57. While the Court indicated its preference for a right of appellate review, it found that due process did not obligate the states to provide this right. *See id.* at 58.

C. *New York and Juvenile Procedure After Gault*

The *Gault* decision triggered much litigation in the area of juvenile due process.[67] The self-proclaimed limits of the decision were tested, and its principles were occasionally extended to other procedural rights and areas of the juvenile proceeding.[68] Against this backdrop, the New York Court of Appeals had occasion to review New York's treatment of certain juvenile issues that had not been conclusively addressed by *Gault* or its progeny.[69] Particularly relevant to this Note is the New York Court of Appeals decision *People ex rel. Silbert v. Cohen*.[70]

In *Silbert*, two juveniles were adjudged delinquents and ultimately confined to a State Training School.[71] Subject to the requirement that they abide by court-specified conditions, both boys were subsequently released from the institution on parole.[72] Soon thereafter, it was alleged that the boys had violated a condition of their parole.[73] Without a hearing, parole was revoked and both boys were remanded back to the State Training School.[74] The Appellate Division held that "[r]evocation of parole, whether of a juvenile or an adult, is a deprivation of liberty," and granted the boys' habeas corpus petitions.[75] The

67. *See, e.g.*, Breed v. Jones, 421 U.S. 519 (1975); People *ex rel.* Silbert v. Cohen, 29 N.Y.2d 12, 271 N.E.2d 908, 323 N.Y.S.2d 422 (1971); McKeiver v. Pennsylvania, 403 U.S. 528 (1971); *In re* Winship, 397 U.S. 358 (1970).

68. *See, e.g.*, *Breed*, 421 U.S. at 519 (extending the privilege against double jeopardy to juveniles); *Silbert*, 29 N.Y.2d at 15, 271 N.E.2d at 910, 323 N.Y.S.2d at 424 (extending procedural protections to juveniles during post-adjudicatory parole revocation proceedings); *Winship*, 397 U.S. at 364, 368 (concluding that the due process clause protects an accused against conviction unless guilt is established by proof beyond a reasonable doubt, and then extending this protection to juvenile delinquency adjudications). *But compare McKeiver*, 403 U.S. at 545 (finding that due process does not require juvenile delinquency adjudications to be by jury trial).

69. *See, e.g.*, *Silbert*, 29 N.Y.2d 12, 271 N.E.2d 908, 323 N.Y.S.2d 422 (addressing the impact of due process on post-adjudicatory juvenile parole revocation proceedings); *In re* Daniel D., 27 N.Y.2d 90, 261 N.E.2d 627, 313 N.Y.S.2d 704, *cert. den.*, D. v. County of Onondaga, 403 U.S. 926 (1970) (addressing, prior to *McKeiver*, whether juveniles had a due process right to jury trials).

70. 29 N.Y.2d 12, 271 N.E.2d 908, 323 N.Y.S.2d 422 (1971).

71. *See id.* at 13-14, 271 N.E.2d at 909, 323 N.Y.S.2d at 423; *see generally infra* note 171.

72. *See Silbert*, 29 N.Y.2d at 13-14, 271 N.E.2d at 909, 323 N.Y.S.2d at 423.

73. *See id.*

74. *See id.*

75. People *ex rel.* Silbert v. Cohen, 36 A.D.2d 331, 332, 320 N.Y.S.2d 608, 609 (2d Dep't 1971), *aff'd*, 29 N.Y.2d 12, 271 N.E.2d 908, 323 N.Y.S.2d 422 (1971).

Court further concluded that "due process requires that a fair hearing precede such a deprivation."[76] The New York Court of Appeals affirmed.[77]

Analyzing the question of whether the juveniles were entitled to a hearing on the issue of parole revocation, the New York Court of Appeals applied the rationale behind its prior decision, *People ex rel. Menechino v. Warden.*[78] In *Menechino*, the Court reasoned that a parole revocation proceeding was "an accusatory proceeding in which the outcome—liberty or imprisonment—is dependent upon the board's factual determination as to the truth of specific allegations of misconduct."[79] In addition, *Menechino* emphasized that the purpose of the parole system is to engender rehabilitation of convicted wrongdoers to the benefit of society.[80] In order to effectively achieve that end, *Menechino* argued it was critical to instill in the parolee the feelings of fair and objective treatment associated with due process.[81]

Based on these actualities, the *Silbert* Court concluded that revocation proceedings subjected parolees to a potential deprivation of liberty, and the proceedings, therefore, "[fell] within the protective ambit of due process."[82] Holding that due process itself guarantees, *inter alia*, a hearing before an individual may be so deprived, *Silbert* essentially declared that it was irrelevant whether that individual was a child or an adult.[83] Thus, while *Silbert* conceded that it was not desirable to overly encumber the juvenile proceeding with formality, the Court nevertheless concluded that the *Menechino* principles and due

76. *Id.*

77. *See Silbert*, 29 N.Y.2d 12, 271 N.E.2d 908, 323 N.Y.S.2d 422.

78. 27 N.Y.2d 376, 267 N.E.2d 238, 318 N.Y.S.2d 449 (1971). In *Menechino*, the particular issue before the Court was whether an adult parolee had a constitutional right to the assistance of counsel at a parole revocation hearing. *See id.* However, the rationale for concluding that the assistance of counsel was constitutionally required constituted the foundation for the Court's decision in *Silbert*. *See Silbert*, 29 N.Y.2d at 14-15, 271 N.E.2d at 909-10, 323 N.Y.S.2d at 423-24.

79. *Menechino*, 27 N.Y.2d at 382, 267 N.E.2d at 238, 318 N.Y.S.2d at 449.

80. *See id.* at 385-86, 318 N.E.2d at 456, 267 N.Y.S.2d at 243.

81. *See id.* at 386 ("[H]ardly anything could more seriously impede that important [rehabilitative] goal than a belief . . . that the law's machinery is arbitrary, too busy, or impervious to the facts.").

82. *Silbert*, 29 N.Y.2d at 14, 271 N.E.2d at 910, 323 N.Y.S.2d at 423.

83. *See id.* at 15, 271 N.E.2d at 910, 323 N.Y.S.2d at 424.

process procedures were equally applicable to juvenile parolees.[84]

III. The Due Process Inquiry

The Fourteenth Amendment to the Constitution prohibits state action that "deprive[s] any person of life, liberty, or property, without due process of law."[85] This clause is intended to shield against arbitrary and capricious government actions that infringe upon protected individual rights.[86] Fourteenth Amendment protections extend to all "individuals," regardless of age.[87] Based on these principles, the Supreme Court has explicitly confirmed that "[t]here is no doubt that the Due Process Clause is applicable in juvenile proceedings."[88] Due process, however, is not a fixed and immutable rule.[89] It is flexible and only requires "such procedural protections as the particular situation demands."[90] The dilemma arises, then, in determining the nature and extent of the process due in a particular proceeding.[91]

In order to determine whether a particular procedure comports with the Fourteenth Amendment's due process concept of fundamental fairness, *Mathews v. Eldridge*[92] directs that a multi-step inquiry be undertaken.[93] Foremost, it must be determined that a constitutionally protected interest exists, and that such interest has been interfered with by state action.[94] If such an interference has occurred, the procedures afforded prior to the deprivation must be examined to ascertain whether they were constitutionally sufficient.[95] Determining whether a pro-

84. *See id.* at 16-17, 271 N.E.2d at 911, 323 N.Y.S.2d at 425-26 (noting that the *Menechino* rehabilitation-rationale "takes on added importance when children are involved").

85. U.S. CONST. amend. XIV, § 1.

86. *See* Kentucky Dep't of Corrections v. Thompson, 490 U.S. 454, 459-60 (1989).

87. *See* U.S. CONST. amend. XIV, § 1; *Gault* 387 U.S. at 13 (noting that "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone").

88. Schall v. Martin, 467 U.S. 253, 263 (1984).

89. *See* Mathews v. Eldridge, 424 U.S. 319, 334 (1976).

90. Morrissey v. Brewer, 408 U.S. 471, 481 (1972).

91. *See id.*; *Schall*, 467 U.S. at 263; *Gault*, 387 U.S. at 13-14.

92. 424 U.S. 319.

93. *See id.* at 332-35; *Kentucky Dep't of Corrections*, 490 U.S. at 460.

94. *See Kentucky Dep't of Corrections*, 490 U.S. at 460.

95. *See id.*

cedure is constitutionally sufficient requires consideration of three distinct factors: (1) the individual interest affected by the state action; (2) the state interest embodied in the challenged action; and (3) the risk of erroneous deprivation of the individual interest under the existing procedural scheme and the probable value, if any, of additional or substitute procedural safeguards.[96] These potentially competing interests must then be balanced to assess whether the state has afforded the individual adequate procedural protections in a particular case.[97]

A. *The Determination of a Protected Interest*

The Fourteenth Amendment's procedural due process requirement imposes constraints upon state actions which deprive individuals of protected "property" or "liberty" interests.[98] However, not every claimed interest falls within the ambit of the Fourteenth Amendment.[99] Preliminarily, it must be determined whether the particular interest affected is indeed constitutionally protected.[100] To warrant constitutional protection, the interest at stake must amount to more than an obscure need, desire, or hope; the claimed interest must have a legitimate foundation.[101] Legitimately protected property and liberty interests are either derived from the due process clause itself, or are conferred by state law.[102] Fourteenth Amendment principles of procedural due process are implicated whenever a state seeks to significantly restrict an individual's enjoyment of a protected interest.[103] Following are three cases which exemplify the United States Supreme Court's view of the type of interests constitutionally protected under the Fourteenth Amendment.

In the first case, *Morrissey v. Brewer*,[104] the Supreme Court addressed the question of whether due process required a hear-

96. *See Mathews*, 424 U.S. at 334-35.
97. *See id.* at 334-35, 348.
98. *See id.* at 332.
99. *See Kentucky Dep't of Corrections*, 490 U.S. at 460.
100. *See id.*; *Mathews*, 424 U.S. at 332.
101. *See Kentucky Dep't of Corrections*, 490 U.S. at 460.
102. *See id.*
103. *See* Paul v. Davis, 424 U.S. 693, 711 (1976).
104. 408 U.S. 471 (1972).

ing prior to the revocation of a convict's parole.[105] In evaluating this question, the Court recognized that "whether any procedural protections are due depends on the extent to which an individual will be 'condemned to suffer grievous loss.'"[106] In other words, a constitutionally protected liberty interest will be found where the nature of the claimed interest is such that its abridgement would impose a "grievous loss" upon the individual claiming protection.[107] Reviewing the historical function and administration of parole, the Court noted that the concept of parole is based on the understanding that a parolee is entitled to retain his liberty as long as he substantially abides by the parole conditions imposed upon him.[108] The Court further observed that parole affords the parolee the liberty to do many of the same things available to people who have never been convicted of a crime, and clearly allows the parolee a less restrictive lifestyle than confinement in prison.[109] Moreover, the Court observed that revocation of parole often subjects the parolee to a lengthy term of incarceration.[110] Thus, even though the liberty afforded by parole is conditional, the Court concluded that its termination would indeed inflict a "grievous loss"

105. *See id.* at 472. *Morrissey* consolidated two appeals from dismissed habeas corpus petitions. *See id.* at 474. Both petitioners had pled guilty to felony charges and had been paroled after a brief period of incarceration. *See id.* at 472-73. Subsequently, both paroles were revoked based on the written reports of their parole officers, which alleged violations of the parole conditions. *See id.* The petitioners contended that revocation of parole without a hearing to determine whether cause existed for such revocation was a deprivation of due process. *See id.* at 474.

106. *Morrissey,* 408 U.S. at 481 (citations omitted).

107. *See id.*

108. *See id.* at 477-80. The Court explained that the primary purpose of parole is to facilitate reintegration so that the convict may become a productive member of society as soon as he is able. *See id.* at 477. This end is promoted by placing restrictive conditions upon the parolee's freedom, which generally encourage the parolee to stay out of trouble, and enable the parole officer to maintain continued contact and supervision over the parolee's behavior. *See id.* at 478-79. As a means to discourage detrimental behavior, the parole officer is afforded broad discretion to recommend revocation of parole and return to prison if a condition is breached. *See Morrissey,* 408 U.S. at 478-79. Thus, the goals of parole will be effected only if the parolee is ensured that his continued respect for the imposed conditions guarantees his continued liberty. *See id.*

109. *See id.* at 482.

110. *See id.*

upon the parolee.[111] Therefore, the liberty interest affected upon termination of parole falls under the protection of the Fourteenth Amendment.[112]

In the second case, *Bell v. Burson,*[113] the Supreme Court was required to determine whether procedural due process was required prior to suspending an uninsured motorist's state issued driver's license.[114] The Court noted that the state, in its discretion, could have declined to issue drivers' licenses to uninsured motorists without implicating the Fourteenth Amendment.[115] However, once a driver's license was granted, the Court held that an "important interest" had inured to its holder, as contemplated by the Fourteenth Amendment.[116] Thus, the Court found that the nature of a state issued driver's license was such that its suspension inflicted a loss serious enough to warrant a finding of a constitutionally protected interest.[117]

Finally, in *Goss v. Lopez,*[118] the issue was whether a publicly maintained school was required to afford its students a hearing prior to, or within a reasonable time after, suspen-

111. *See id.* In *Gagnon v. Scarpelli*, the Supreme Court was presented with the similar question of whether due process required a hearing prior to the revocation of a convict's probation. *See* 411 U.S. 778, 779 (1973). Citing its recent *Morrissey* decision, the Court found parole and probation "constitutionally indistinguishable," and thus concluded that the revocation of probation, like the revocation of parole, also imposed a serious deprivation of liberty upon the probationer as contemplated by the Fourthteenth Amendment. *See id.* at 781-82.

112. *See id.*

113. 402 U.S. 535 (1971).

114. *See id.* at 535-36. Petitioner, a licensed but uninsured motorist in Georgia, was involved in a car accident resulting in $5,000 damage. *See id.* at 537. Under the circumstances, Georgia law required that his license be suspended, regardless of fault, unless he posted a bond to cover the potential damage liability against him. *See id.* at 535-36. Petitioner contended that without a hearing to determine fault, deprivation of his license violated his right to due process. *See id.* at 536.

115. *See Bell*, 402 U.S. at 539.

116. *See id.* The Court noted that once issued, the continued possession of the driver's license "may become essential in the pursuit of a livelihood." *Id.*

117. *See id.* Indeed, in Kelley v. Johnson, 425 U.S. 238 (1976), a majority of the Supreme Court conceded, for the sake of the opinion, that a police officer even had a constitutionally protected liberty interest in maintaining his choice of hairstyle. *See id.* at 244-45. A separate dissent was written to propose that the Fourteenth Amendment's due process clause "clearly" contemplated a liberty interest in personal appearance. *See id.* at 244 (Marshall, J., dissenting).

118. 419 U.S. 565 (1975).

sion.[119] There, the Supreme Court confirmed that protected property and liberty interests are frequently created by the state through statutes or rules which grant certain benefits to the individual.[120] Upon choosing to extend a particular right, the state thereby creates a "legitimate claim of entitlement."[121] In statutorily providing that public school students would be suspended only for "misconduct," the Supreme Court found that Ohio had created a legitimate entitlement to a public education amounting to a protected property interest.[122] Moreover, the Court found that the Ohio students also possessed a constitutionally protected liberty interest in their reputation and good name, since the disparagement of such reputation through allegations of misconduct could lead to other injuries.[123] The Supreme Court dismissed the argument that infringement of these interests would not inflict "grievous loss" upon the student.[124] Instead, the Court held that the interests were substantial and could not be encroached upon "in complete disregard of the Due Process Clause."[125] Thus, the Supreme Court concluded that state created property interests and constitutionally conferred liberty interests were implicated.[126]

119. *See id.* In *Goss*, an Ohio statute provided for free public education to all children between the ages of five and twenty-one years of age. *See id.* at 573. The statute also granted authority to the school principal to suspend a student in the event of "misconduct." *Id.* at 567. Students suspended under the statute alleged that it unconstitutionally violated their rights to due process, however, because it permitted the school to abridge their rights to an education without affording them a hearing prior to, or within a reasonable time after, suspension. *See id.* at 567-69.

120. *See Goss*, 419 U.S. at 572-73.

121. *Id.* at 573. The states are not constitutionally obligated to provide their citizens public education. *See id.*

122. *See id.*

123. *See id.* at 574-75. The Court recognized that if the charges of misconduct were noted in the students' school records, "those charges could seriously damage the students' standing with their fellow pupils and their teachers as well as interfere with later opportunities for higher education and employment." *Goss,* 419 U.S. at 575. *Compare* Paul v. Davis, 424 U.S. 693 (1976) (holding that an interest in reputation, without more, did not amount to a constitutionally protected liberty interest; acknowledging however, that damage to reputation coupled with some other injury would warrant constitutional protection).

124. *See Goss*, 419 U.S. at 575-76.

125. *Id.*

126. *See id.* at 576.

B. *Assessing the Constitutional Sufficiency of the Accorded Procedures*

1. *The Individual Interest*

As discussed above, an individual may have a constitutionally protected liberty or property interest at stake in a given state proceeding.[127] Under the first prong of the *Mathews* test, the extent to which that interest may be deprived by the challenged state action is a relevant factor to consider in determining whether such actions are constitutionally infirm.[128] Commensurate with the gravity of the protected interest at stake, the individual also possesses an interest in obtaining an accurate factual resolution of issues which, if erroneously decided, might result in a wrongful deprivation.[129] Consequently, the personal interest in accuracy should be given due regard in evaluating the constitutional sufficiency of the attendant procedures.[130] The likely duration of any wrongful deprivation is also relevant to the evaluation.[131] Consideration of this element should include the availability of timely appellate review.[132] Finally, an individual may have a legitimate interest in procedures which limit the degree of discretion afforded to an official decision-maker.[133]

127. *See supra* notes 92-126 and accompanying text.

128. *See* Mathews v. Eldridge, 424 U.S. 319, 341, 347 (1976); *see also supra* notes 92-97 and accompanying text.

129. *See* Santosky v. Kramer, 455 U.S. 745, 758-59, 765 (1982) (noting that an individual has a "commanding" interest in a fair and accurate determination in a proceeding in which a fundamental liberty interest may be deprived, and a coexistent interest in avoiding erroneous deprivations); Ake v. Oklahoma, 470 U.S. 68, 78 (1985) (describing the individual interest in accurate factual determinations in a criminal proceeding as "uniquely compelling," given the fact that the fundamental interests of life and liberty are at stake, and citing the panoply of required procedural safeguards—specifically designed to promote accuracy—as evidence of the gravity of these interests).

130. *See Santosky*, 455 U.S. at 758-59; *Ake*, 70 U.S. at 78.

131. *See Mathews*, 424 U.S. at 341-42.

132. *See Santosky*, 455 U.S. at 758-59.

133. *See* Schall v. Martin, 467 U.S. 253, 306-08 (1984) (Marshall, J., dissenting) (noting that excessive judicial discretion may lead to unequal application of the law, and may mask reliance on inappropriate criteria and arbitrary decision-making; specifically, Justice Marshall suggested that the absence of sufficient guidelines in detaining juveniles alleged to be delinquent may invite judges to detain for the sole (and impermissible under our Constitution) purpose of teaching a troublesome child a lesson).

2. *The State Interest*

After assessing the individual interest at stake, the *Mathews* test requires that the state interest embodied in the challenged procedure be examined.[134] In *Santosky v. Kramer*,[135] the United States Supreme Court expressly noted that a state has a significant *parens patriae* interest in preserving and promoting the welfare of its children.[136] Correspondingly, the New York State Legislature has articulated its particular interest in determining and pursuing the "needs and best interests" of children brought before it on delinquency petitions.[137] However, in the same breath, New York cautioned that its desire to protect the best interest of the child may be tempered by its commitment to the protection of the community.[138] The United States Supreme Court has asserted that the state's interest in protecting the public from crime is both "legitimate and compelling."[139] Thus, in evaluating the sufficiency of procedures accorded in a juvenile delinquency proceeding, New York's obvious interest in furthering the established goals of its Family Courts must be considered; such as the effective rehabilitation of the wayward child in accordance with the child's best interests, and the potentially conflicting interest in protecting the safety and welfare of the public.[140]

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134. *See Mathews*, 424 U.S. at 347; *supra* notes 92-97 and accompanying text.

135. 455 U.S. 745 (1982).

136. *See id.* at 766. *See Santosky*, 455 U.S. at 790 (Rehnquist, J., dissenting), quoting Prince v. Massachusetts, 321 U.S. 158, 168 (1944) ("A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies."). *Santosky* involved a child-protection action in which the New York Family Court had terminated the Santosky's right to custody of their natural children based on a finding, by a fair preponderance of the evidence, of permanent neglect. *See Santosky*, 455 U.S. at 751-52. Balancing the significant interests at stake, the Court held that adopting such a neutral standard of proof violated principles of due process. *See id.* at 747-48, 758, 765. *See also Schall*, 467 U.S. at 265-66.

137. *See* N.Y. FAM. CT. ACT § 301.1 (McKinney 1983) (enumerating the purpose of Article Three of the Family Court Act); *see also infra* note 138.

138. *See* N.Y. FAM. CT. ACT § 301 ("In any proceeding under [the Juvenile Delinquency] Article, the court shall consider the needs and best interests of the respondent as well as the need for protection of the community."); N.Y. FAM. CT. ACT § 301.1 commentary at 261 (McKinney 1983).

139. *Schall*, 467 U.S. at 264-65 (in part quoting De Veau v. Braisted, 363 U.S. 144, 155 (1960)).

140. *See* N.Y. FAM. CT. ACT § 301.1; N.Y. FAM. CT. ACT § 301.1 commentary at 266.

Also relevant in the assessment of the constitutional sufficiency of the process afforded is the state's additional interest, analogous to that of the individual, in achieving fair and accurate factual determinations.[141] The interest in accuracy is particularly weighty, given the state's *parens patriae* concerns, where the factual determination involves the welfare of a child.[142] Another consideration in the test for constitutional sufficiency is the state's interest in avoiding any undue administrative and financial burdens that might result if heightened procedural safeguards were constitutionally mandated.[143] Also relevant at this stage are the potential costs to society of such a mandate, such as the effects of restricted resources and the potential effect on the ultimate safety of the public.[144] Finally, it is relevant to note that the imposition of a constitutionally mandated procedural scheme may implicate the state's interest in avoiding increased federal court intrusion into matters traditionally left to the state.[145] In matters involving juveniles, the Supreme Court itself has specifically acknowledged "the desirability of flexibility and experimentation by the States."[146] In contrast, it may be argued that in proceedings affecting juveniles the state itself has an interest in greater formality, since increased procedural safeguards may instill in the child the sense that he is being treated with fairness in a virtuous system deserving of his respect and cooperation.[147]

3. *The Risk of Erroneous Deprivation*

"[P]rocedural due process rules are shaped by the risk of error inherent in the truthfinding process . . . ."[148] Thus, the fairness and reliability of the existing procedures must be considered in assessing their constitutional sufficiency, as must the probable value of affording added procedural safeguards.[149] A

141. *See Santosky*, 455 U.S. at 766.
142. *See id.* at 766-67.
143. *See Mathews*, 424 U.S. at 347-48.
144. *See id.*; *see also supra* text accompanying note 143.
145. *See Santosky*, 455 U.S. at 770-73 (Rehnquist, J., dissenting).
146. *Schall,* 467 U.S. at 275 (quoting Gerstein v. Pugh, 420 U.S. at 114 (1971)).
147. *See Schall,* 467 U.S. at 308-09 (Marshall, J., dissenting); Parham v. J.R., 442 U.S. 584, 636 n.22 (1979).
148. *See Mathews*, 424 U.S. at 344.
149. *See id.* at 343.

primary purpose in imposing procedural constraints prior to a final deprivation of a protected interest is to promote accuracy in factual determinations.[150] Theoretically, a hearing before an impartial tribunal, attendant with all of the traditional procedural safeguards, increases the likelihood that accurate and truthful conclusions will emerge from the mass of disputed information presented.[151] Thus, due process is designed to reduce the risk of error.[152] The degree of procedural safeguards provided will influence the likelihood of reaching an erroneous factual determination in favor of or against a number of competing interests.[153] Consequently, in assessing the constitutional sufficiency of the accorded procedures, the goal is to fairly allocate the risk of erroneous fact-finding, relative to those interests which are deemed of greater significance.[154]

Assuming that the existing procedures consist of some sort of factual hearing or inquiry, it is relevant to examine the extent to which issues of witness credibility and veracity factor into the decision-making process.[155] The degree of subjectivity and discretion called for in the factual determination may proportionally affect the risk of error, and therefore is also relevant to the evaluation.[156] The resources available to the state in assembling its case, as compared to those available to the individual in preparing its defense, similarly relate to the assessment of inherent risk.[157] It is also pertinent to consider whether the

150. *See* STONE, SEIDMAN, ET. AL., CONSTITUTIONAL LAW 992 (2d ed. 1991); *Schall*, 467 U.S. at 303-04 (Marshall, J., dissenting) ("One of the purposes of imposing procedural constraints on decisions affecting life, liberty, or property is to reduce the incidence of error."); *In re* Gault, 387 U.S. 1, 19-21 (1967) (noting that procedural safeguards are the "best instruments" for ascertaining facts and uncovering truth).

151. *See* STONE, *supra* note 150, at 992.

152. *See id.*; *Santosky*, 455 U.S. at 786 (Rehnquist, J., dissenting) (analyzing the effects of applying a heightened standard of proof).

153. *See Santosky,* 455 U.S. at 761, 786.

154. *See id.*

155. *See Mathews*, 424 U.S. at 343-44.

156. *See Santosky,* 455 U.S. 745, 762-63 (voicing concerns about the potential role of cultural or class bias in proceedings which frequently affect the indigent, the uneducated, or members of minority groups).

157. *See id.* at 763-64 (contemplating, *inter alia*, the individual's right to court-appointed counsel, the presumptive expertise of the state on the issues involved, and situations in which state employees are both investigators and primary witnesses).

existing process affords the individual an opportunity to challenge the accuracy of the facts relied upon and the correctness of the conclusions reached against him.[158]

Where the official action involves a deprivation based on the result of a factual determination, there is a broad range of procedural safeguards additionally or alternatively available.[159] In fact, the alternatives may extend as far as a comprehensive evidentiary hearing complete with the "full panoply" of adversarial protections guaranteed in criminal trials; such as the right to counsel,[160] the exclusion of hearsay testimony coupled with the right to confront and cross-examine adverse witnesses,[161] and the right to compulsory process.[162]

As noted above, insufficient procedures increase the risk of erroneous deprivations.[163] Since error has no theoretical social value, it is likely that, where the interests of the individual and the state are essentially equivalent, this third factor (the risk of error and the feasibility of imposing additional safeguards), may be the determinative and swaying factor in ascertaining the constitutional sufficiency of the attendant procedures.[164]

C. *Balancing the Criteria*

Even if it is concluded that a constitutionally protected liberty interest is at stake, and that some procedural due process protections are thus warranted, the question still remains of the standard of process that is due in the particular case.[165] As noted above, Fourteenth Amendment principles of due process are satisfied as long as the state provides the quantum of procedural safeguards that "the particular situation demands."[166]

158. *See Mathews*, 424 U.S. at 345-46.

159. *See Schall,* 467 U.S. at 274-75; *Mathews*, 424 U.S. at 344-45.

160. *See Schall*, 467 U.S. at 274-75; *see also* Gideon v. Wainwright, 372 U.S. 335 (1963); Powell v. Alabama, 287 U.S. 45 (1932); U.S. CONST. amend. VI, amend. XIV, § 1.

161. *See Schall*, 467 U.S. 274-75; Pointer v. Texas, 380 U.S. 400 (1965); U.S. CONST. amend. VI, amend. XIV, § 1.

162. *See Schall*, 467 U.S. 274-75; Washington v. Texas, 388 U.S. 14 (1967); U.S. CONST. amend. VI, amend. XIV, § 1; *Mathews,* 424 U.S. at 344-45.

163. *See supra* notes 148-54 and accompanying text.

164. *See* Valmonte v. Bane, 18 F.3d 992, 1004 (2d Cir. 1994).

165. *See Morrissey*, 408 U.S. at 481; Smith v. Organization of Foster Families, 431 U.S. 816 (1977).

166. *Morrissey*, 408 U.S. at 481; *see supra* notes 85-90 and accompanying text.

The test for evaluating whether the accorded procedural safeguards are constitutionally sufficient is set forth in *Mathews v. Eldridge*.[167] *Mathews* requires a balancing of the criteria discussed above: (1) the personal interest affected by the state action, (2) the state interest embodied in the challenged action, and (3) the risk of erroneous deprivation of the individual interest under the existing procedural scheme and the probable value, if any, of additional or substitute procedural safeguards.[168] Thus, an official action will pass constitutional muster if it furthers state interests which sufficiently outweigh the individual interests affected, and if it provides procedural safeguards which sufficiently prevent undue abridgements of constitutionally protected interests.[169]

IV. The Case of *In re Edwin L.*

A. *Facts*

In re Edwin L.[170] originated in Family Court following allegations that thirteen-year-old Edwin had committed acts which would have constituted crimes if committed by an adult.[171] Subsequently, a fact-finding hearing was held at which the Family Court concluded, based upon admissions made by Edwin, that Edwin's conduct, if committed by an adult, would indeed have

167. 424 U.S. 319, 335 (1976).

168. *See id.* at 334-35, 348; *see supra* text accompanying notes 92-97.

169. *See Schall,* 467 U.S. at 283 (Marshall, J., dissenting); *see supra* text accompanying notes 92-103, 168.

170. 88 N.Y.2d 593, 671 N.E.2d 1247, 648 N.Y.S.2d 850 (1996).

171. *See id.* at 597, 671 N.E.2d at 1248, 648 N.Y.S.2d at 851. In New York, a child below the age of sixteen is not considered criminally responsible for his conduct. *See Schall,* 467 U.S. 253, 257 n.4; N.Y. FAM. CT. ACT § 301.2(1) (McKinney 1983) (defining a "juvenile delinquent" as "a person over seven and less than sixteen years of age, who, having committed an act that would constitute a crime if committed by an adult, (a) is not criminally responsible for such conduct by reason of infancy . . . "). If the child commits an act that would constitute a crime if committed by an adult, the child comes under the jurisdiction of the Family Court. *See Schall,* 467 U.S. at 257 n.4; § 302.1(1) ("The Family Court has exclusive original jurisdiction over any proceeding to determine whether a person is a juvenile delinquent."). Edwin was charged with conduct which, if committed by an adult, would have constituted the crimes of criminal mischief in the fourth degree and possession of burglar's tools. *See Edwin L.*, 88 N.Y.2d at 597, 671 N.E.2d at 1248, 648 N.Y.S.2d at 851.

constituted the crimes alleged.[172] A dispositional hearing was then scheduled,[173] at which Edwin sought and was granted an adjournment in contemplation of dismissal ("ACD").[174] Pursuant to the terms of the ACD order, Edwin was required to continue living at the residential facility where he had been placed a few years earlier as a result of a child neglect proceeding,[175]

172. *See Edwin L.*, 88 N.Y.2d at 597, 671 N.E.2d at 1248, 648 N.Y.S.2d at 851. A "fact-finding hearing" is the juvenile equivalent of a trial. *See Schall*, 467 U.S. at 258 n.8. Thus, it is an adjudicatory proceeding, held to ascertain whether the respondent in fact committed (is guilty of) the acts alleged. *See* N.Y. FAM. CT. ACT § 301.2(6).

173. If "guilt" is established at the fact-finding hearing, the Family Court is then required to schedule a "dispositional hearing." N.Y. FAM. CT. ACT § 345.1(1); *see Schall*, 467 U.S. at 258 n.8. The dispositional hearing is akin to a criminal sentencing hearing, *see Edwin L.*, 88 N.Y.2d at 614, 671 N.E.2d at 1258, 648 N.Y.S.2d at 861; MCCARTHY AND CARR, *supra* note 23, at 453, and is held to determine whether the respondent requires "supervision, treatment or confinement." § 301.2(7). A formal adjudication of juvenile delinquency cannot be entered unless both determinations are in the affirmative: that is, that a crime has in fact been committed, and that the juvenile requires supervision, treatment or confinement. *See* § 352.1; N.Y. FAM. CT. ACT § 301.2 commentary at 266 (McKinney 1983). If guilt is *not* established at the fact-finding hearing, the charges must be dismissed. *See* § 345.1(2).

174. *See Edwin L.*, 88 N.Y.2d at 597, 671 N.E.2d at 1248, 648 N.Y.S.2d at 851; *see generally supra* note 11. The juvenile probation department had submitted a report noting that Edwin had no prior legal history, that he was doing well in school, that he "does not appear to be a danger to the community or himself," and that he was generally "a likable young man who has had some unfortunate incidents in his life." *See* Brief for Appellant at 7-8, *In re* Edwin L., 88 N.Y.2d 593, 671 N.E.2d 1247, 648 N.Y.S.2d 850 (N.Y. Ct. App. 1996) (No. 662-91 and 665-91 (consolidated by court)) (in part quoting the Probation Department's Investigation and Report). The probation department recommended that Edwin be conditionally discharged (paroled). *See id.* at 8. However, with the state's agreement, the court ultimately agreed to grant the ACD instead. *See id.* No errors were assigned to these initial proceedings. *See Edwin L.*, 88 N.Y.2d at 597-99, 671 N.E.2d at 1248-49, 648 N.Y.S.2d at 851-52; Appellant's Brief at 2-5, *Edwin L.*, (No. 662-91 and 665-91 (consolidated by court)) (summarizing issues and arguments presented on appeal).

175. According to the probation report, Edwin's mother had been an I.V. drug abuser and had died of AIDS in 1992. *See* Appellant's Brief at 7 n.4, *Edwin L,* (No. 662-91 and 665-91 (consolidated by court)). Edwin's father was reportedly in a Puerto Rico prison. *See id.* In approximately 1989, child neglect proceedings had revealed that Edwin was a neglected child. *See id.* at 7. Consequently, Edwin had been placed in a residential facility for children, which is where he was residing at the time of the scheduled dispositional hearing. *See id.* However, according to the probation report, someone was in the process of adopting Edwin at the time of these proceedings. *See id.* Thus, the residency requirement was subject to Edwin's expected adoption. *See Edwin L.*, 88 N.Y.2d at 597, 671 N.E.2d at 1248, 648 N.Y.S.2d at 851.

attend school, and avoid further contact with the courts for a period of six months.[176]

Less than two weeks before the ACD was to have matured into a dismissal, the presentment agency[177] sought its vacatur, alleging that Edwin had breached its conditions.[178] At Edwin's behest, a hearing was held to determine whether any conditions of the ACD order had in fact been violated.[179] In support of its vacatur petition, the presentment agency offered the testimony of only one witness, a residential facility caseworker.[180] Rather than providing non-hearsay testimony based upon her own personal knowledge, the caseworker's testimony consisted primarily of information which she had learned from reading police reports and from other sources.[181] Nevertheless, the Family Court denied Edwin's motion to strike the caseworker's testi-

176. *See Edwin L.*, 88 N.Y.2d at 597-98, 671 N.E.2d at 1248, 648 N.Y.S.2d at 851.

177. In New York, the "presentment agency" is the party assigned to represent the state's interests in a juvenile delinquency action. *See* N.Y. FAM. CT. ACT §§ 301.2(12), 254(a). Thus, the presentment agency's role is analogous to that of the prosecutor in a criminal action.

178. *See Edwin L.*, 88 N.Y.2d at 598, 671 N.E.2d at 1248, 648 N.Y.S.2d at 851. Based on the supporting deposition of the residential facility security manager, (which concluded that Edwin was beyond the facility's control and was in need of a more structured environment, *see* Brief for Respondent at 5, *In re* Edwin L., 88 N.Y.2d 593, 671 N.E.2d 1247, 648 N.Y.S.2d 850 (N.Y. Ct. App. 1996) (No. 662-91 and 665-91 (consolidated by court)), the presentment agency alleged, *inter alia*, that Edwin had been absent from the residential facility without permission on two separate dates during the six month period, that he had been arrested on both of those dates, and that his behavior at school had deteriorated. *See Edwin L.*, 88 N.Y.2d at 598, 671 N.E.2d at 1248, 648 N.Y.S.2d at 851.

179. *See Edwin L.*, 88 N.Y.2d at 598-99, 671 N.E.2d at 1248-49, 648 N.Y.S.2d at 851-52. The Family Court Act does not expressly entitle the juvenile to a hearing prior to revocation of an ACD. *See* N.Y. FAM. CT. ACT § 315.3(1). Instead, after discussing the court's discretion to set the conditions of the ACD, the Act simply states that "[u]pon *ex parte* motion by the presentment agency, or upon the court's own motion, made . . . at any time during [the ACD's] duration, the court may restore the matter to the calendar." *See id.*

180. *See Edwin L.*, 88 N.Y.2d at 598-99, 671 N.E.2d at 1248-49, 648 N.Y.S.2d at 851-52; *see also id.* at 607-08, 671 N.E.2d at 1254, 648 N.Y.S.2d at 857 (Levine, J., dissenting).

181. *See id.* According to the dissent, it was "clear that the witness in fact had no personal knowledge of the arrests and AWOL incidents, which were the more serious violations, and the most relevant to any decision to terminate Edwin L.'s ACD." *Id.* at 607-08, 671 N.E.2d at 1254, 648 N.Y.S.2d at 857. The presentment agency neither called the deponent who claimed first-hand knowledge of the alleged violations, nor sought to introduce as business records any documentation of the arrests or other violations alleged. *See id.*

mony on the ground that it was based on hearsay, and subsequently relied on the challenged evidence to conclude that Edwin had indeed violated the conditions of his ACD order.[182] The Family Court thus vacated the ACD order and restored the matter to the calendar for further dispositional proceedings against Edwin.[183]

Edwin ultimately appealed his case to the New York Court of Appeals.[184] Edwin argued that before a Family Court may consider whether a juvenile has violated a condition of an ACD order, principles of procedural due process guarantee the juvenile a hearing at which hearsay evidence will be excluded, unless the court first finds good cause to dispense with the

182. *See Edwin L.*, 88 N.Y.2d at 598-99, 607-08, 671 N.E.2d at 1248-49, 1254, 648 N.Y.S.2d at 851-52, 857; Respondents' Brief at 7-8, *Edwin L.*, (No. 662-91 and 665-91 (consolidated by court)).

183. *See Edwin L.*, 88 N.Y.2d at 599, 671 N.E.2d at 1249, 648 N.Y.S.2d at 852; Respondents' Brief at 6, *Edwin L.*, (No. 662-91 and 665-91 (consolidated by court)). Since an ACD only postpones the original action pending possible dismissal, the Family Court was still required to hold a dispositional hearing before Edwin could be adjudged delinquent on the original charges. *See Edwin L.*, 88 N.Y.2d at 599, 671 N.E.2d at 1249, 648 N.Y.S.2d at 852; N.Y. FAM. CT. ACT §§ 315.3, 352.1; *supra* notes 11, 173. However, Edwin waived his right to this dispositional hearing and consented to placement with the Division of Youth for one year. *See Edwin L.*, 88 N.Y.2d at 599, 671 N.E.2d at 1249, 648 N.Y.S.2d at 852. It is possible that Edwin forewent the dispositional hearing in order to expedite the appellate process. *See generally* N.Y. FAM. CT. ACT § 365.1. Since the Family Court had already determined that Edwin was in fact guilty of the underlying crimes, and that he had in fact violated the conditions of his ACD, Edwin could reasonably have anticipated that a formal adjudication of delinquency was inevitable. *See supra* notes 172-73, 182 and accompanying text. Pursuant to New York's Family Court Act, a juvenile is entitled to appeal an order of disposition as of right. *See* § 365.1(1). However, appeals from "any other orders," (such as ACD revocation orders), require permission of the appellate court. *See* § 365.2. Given the interlocutory nature of an ACD revocation order, a petition for its appeal likely would have been an exercise in futility. *Cf.* MCCARTHY AND CARR, *supra* note 23, at 375.

184. *See Edwin L.*, 88 N.Y.2d at 599, 671 N.E.2d at 1249, 648 N.Y.S.2d at 852. On the intermediate appeal, the Appellate Division had affirmed the Family Court's dispositional orders, summarily holding that the evidence presented at the revocation hearing was sufficient to justify a finding that Edwin had violated the conditions of the ACD order, and further holding that the hearing satisfied procedural due process requirements. *See In re* Edwin L., 215 A.D.2d 760, 627 N.Y.S.2d 963 (2d Dep't 1995), *aff'd*, 88 N.Y.2d 593, 671 N.E.2d 1247, 648 N.Y.S.2d 850 (1996). Thereafter, Edwin took his appeal to the New York Court of Appeals as of right. *See In re* Edwin L., 86 N.Y.2d 867, 659 N.E.2d 763, 635 N.Y.S.2d 940 (1995) (mem.); N.Y. FAM. CT. ACT § 365.1(1).

confrontation of witnesses.[185] Edwin reasoned that ACD orders that are granted post-fact-finding are functionally equivalent to dispositional orders,[186] and are substantially analogous to the dispositions of parole and probation in particular.[187] Thus, Edwin contended that his ACD revocation hearing should have accorded him the same procedural protections guaranteed to both juvenile respondents and adult defendants in parole revocation and probation violation hearings.[188] Specifically, Edwin argued

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185. *See Edwin L.*, 88 N.Y.2d at 597, 599, 671 N.E.2d at 1248-49, 648 N.Y.S.2d at 851-52. The fundamental importance in our judicial system of the right to confront and cross-examine adverse witnesses has been repeatedly emphasized. *See e.g.*, Pointer v. Texas, 380 U.S. 400, 403 (1965) (holding that the Sixth Amendment right of an accused to confront the witnesses against him is a "fundamental" right, and is thus binding on the states through the Fourteenth Amendment's Due Process Clause).

> The right of cross-examination is more than a desirable rule of trial procedure. It is implicit in the constitutional right of confrontation, and helps assure the 'accuracy of the truth-determining process.' It is, indeed, 'an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal.'

Chambers v. Mississippi, 410 U.S. 284, 295 (1973) (citations omitted). *Chambers* further explained the import of the hearsay rule and the basis for its development in relation to the right of confrontation and cross-examination:

> The hearsay rule, which has long been recognized and respected by virtually every State, is based on experience and grounded in the notion that untrustworthy evidence should not be presented to the triers of fact. Out-of-court statements are traditionally excluded because they lack the conventional indicia of reliability: they are usually not made under oath or other circumstances that impress the speaker with the solemnity of his statements; the declarant's word is not subject to cross-examination; and he is not available in order that his demeanor and credibility may be assessed by the [fact-finder].

Chambers, 410 U.S. at 298 (citation omitted). *Chambers* did note that hearsay statements were not objectionable where the circumstances indicated that they were likely reliable and truthful. *See id.* at 298-99, 302.

186. *See generally supra* notes 22, 173; *infra* note 191.

187. *See Edwin L.*, 88 N.Y.2d at 599, 671 N.E.2d at 1249, 648 N.Y.S.2d at 852.

188. *See id.*; *see generally* N.Y. FAM. CT. ACT §§ 360.3(1) (guaranteeing the juvenile the right to a hearing to determine whether he has violated a condition of his parole or probation), 360.3(3) (indicating that only "relevant, competent and material" evidence should be considered at such a hearing; and further guaranteeing the juvenile the right to cross-examine the witnesses against him); *Morrissey*, 408 U.S. at 487-89 (holding that before an individual's parole may be revoked, due process guarantees the parolee the right to a hearing, the opportunity to be heard, and the right to confront and cross-examine witness, unless the court specifically finds good cause to dispense with such confrontation); *Gagnon*, 411 U.S. 778, 782 (holding that probationers are entitled to the same procedural protections guaranteed to parolees in *Morrissey*).

that absent a finding of good cause, his right to confront the witnesses, who were the actual source of the information used against him in the ACD revocation proceeding, was unconstitutionally deprived.[189]

B. *Majority Holding*

A majority of the New York Court of Appeals rejected Edwin's claim.[190] The majority distinguished the ACD from the dispositions of parole and probation, stressing the fact that an ACD is not a "dispositional" order.[191] The majority detailed both procedural differences in availability, and substantive differences in repercussions, between ACD orders and dispositional orders.[192] Specifically, the majority pointed out that an ACD may be granted only *prior* to the conclusion of a dispositional hearing and formal adjudication of juvenile delinquency, while dispositional orders may be issued only *after* the conclusion of the dispositional hearing and formal adjudication of delinquency.[193] The majority further explained that the ACD's pre-adjudicatory nature was significant in that if the ACD were revoked, the child would not immediately be subject to a loss of freedom as he would upon revocation of parole or probation.[194] Instead, the child would still be entitled to a dispositional hearing on the issue of whether he was in fact in need of supervision, treatment, or confinement.[195]

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189. *See Edwin L.*, 88 N.Y.2d at 599, 671 N.E.2d at 1249, 648 N.Y.S.2d at 852; *supra* note 186.

190. *See Edwin L.*, 88 N.Y.2d at 597, 671 N.E.2d at 1248, 648 N.Y.S.2d at 851.

191. *See id.* at 600-02, 671 N.E.2d at 1250-01, 648 N.Y.S.2d at 853-54. New York's Family Court Act enumerates five types of dispositional orders which become available to the court upon an adjudication of delinquency. *See* N.Y. FAM. CT. ACT §§ 352.2(1) (listing the five orders of disposition), 352.1 (requiring a delinquency adjudication before the court may impose a § 352.2 disposition). The ACD is not one of those dispositional options. *See* §§ 352.2(1), 315.3(1) (noting that "[a]n adjournment in contemplation of dismissal is an adjournment of the proceeding . . ." (as opposed to an order of disposition)).

192. *See Edwin L.*, 88 N.Y.2d at 600-02, 671 N.E.2d at 1250-51, 648 N.Y.S.2d at 853-54.

193. *See id.* at 600, 671 N.E.2d at 1250, 648 N.Y.S.2d at 853; N.Y. FAM. CT. ACT §§ 315.3(1), 352.1(1).

194. *See Edwin L.*, 88 N.Y.2d at 600-01, 671 N.E.2d at 1250-51, 648 N.Y.S.2d at 853-54.

195. *See id.*; *compare* N.Y. FAM. CT. ACT § 360.3(6) (authorizing revocation of probation, and thus loss of freedom, immediately following the probation violation hearing), *with* § 315.3(1) *and* § 352.1(1) (together providing that, upon revocation

The majority did concede, however, that some similarities do exist between an ACD and the dispositional orders of conditional discharge and probation.[196] For example, with each, "the juvenile's continued freedom is contingent upon the satisfaction of the [court-ordered] conditions."[197] Moreover, each order may constrain the juvenile's liberty only minimally.[198] However, the majority pointed out that the pre-adjudicatory ACD entitles the juvenile to a "clean record" upon satisfaction of its conditions; since the case is deemed dismissed, the juvenile's records will be sealed.[199] In contrast, the records in a case in which a formal adjudication of delinquency has been entered will rarely be sealed, even upon the successful completion of probation or parole conditions.[200] Thus, the successful expiration of an ACD, unlike a delinquency finding, ensures that the child will not be burdened with a potential predicate offense.[201]

Weighing the significance of the noted distinctions, the majority concluded that a juvenile's liberty interest in a pre-adjudicatory ACD, as opposed to the liberty interest implicated by a dispositional order, is limited.[202] In essence, the majority concluded that ACD revocation proceedings do not warrant the

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of an ACD, the matter must be restored to the calendar for a dispositional hearing before one of the more restrictive § 352.2(1) dispositions may be imposed).

196. *See Edwin L.*, 88 N.Y.2d at 600-01, 671 N.E.2d at 1250, 648 N.Y.S.2d at 853.

197. *Id.*

198. *See id.*

199. *See id.*; N.Y. FAM. CT. ACT § 375.1(1). Although the terminology appears counter-intuitive, an ACD may be both "post-fact-finding" and "pre-adjudicatory." As previously discussed, the ACD is "post- fact-finding" if it is granted after the court has held a hearing to determine guilt. *See supra* notes 22, 172. However, since a formal adjudication of delinquency cannot be entered until after the court has also held a dispositional hearing and determined that the juvenile is in need of supervision, treatment or confinement, the ACD is also considered "pre-adjudicatory." *See supra* notes 172-73. *Compare supra* note 191.

200. *See Edwin L.*, 88 N.Y.2d at 600-01, 671 N.E.2d at 1250, 648 N.Y.S.2d at 853; N.Y. FAM. CT. ACT § 375.2 (designating the limited circumstances under which records may be sealed after a delinquency finding).

201. *See Edwin L.*, 88 N.Y.2d at 600-01, 671 N.E.2d at 1250, 648 N.Y.S.2d at 853.

202. *See id.* at 600-01, 671 N.E.2d at 1250-51, 648 N.Y.S.2d at 853-54 (commenting that "a juvenile does not possess a vested liberty interest in an ACD," since the "vacatur of the ACD order merely brings the juvenile back to the same circumstances he would have faced after the conclusion of fact finding"; thus concluding that a juvenile merely possesses "an attenuated liberty interest in [obtaining] the least restrictive dispositional order under the Family Court Act").

more stringent procedural safeguards afforded in dispositional vacatur proceedings because even after an ACD has been revoked, the juvenile has yet to be adjudged a delinquent, and thus is not yet subject to the formidable consequences that attach when delinquency is established.[203] Finding the issue presented in the instant case more analogous to the plea agreement violation hearings challenged in *People v. Outley*,[204] the *Edwin* majority held that

> the requirements of procedural due process are satisfied when a Family Court determines, after conducting an inquiry into the allegations of the violation petition, and providing the juvenile with the opportunity to respond to those allegations, that there is a legitimate basis for concluding that a juvenile has violated a condition of an ACD order . . . .[205]

Thus, the majority applied a "legitimate basis" test, which merely requires that the court afford the juvenile some opportunity to respond to allegations that he has breached his ACD

203. *See id.* at 602, 671 N.E.2d at 1251-52, 648 N.Y.S.2d at 853-54.

204. 80 N.Y.2d 702, 610 N.E.2d 356, 594 N.Y.S.2d 683 (1993). The *Outley* case consolidated the appeals of three separate defendants. *See id.* at 702, 610 N.E.2d at 356, 594 N.Y.S.2d at 684. There, the defendants had agreed to enter guilty pleas in exchange for reduced sentences. *See id.* The lower courts agreed to impose the reduced sentences, but only on the condition that the defendants not be re-arrested pending the actual sentencing. *See id.* at 707, 610 N.E.2d at 356, 594 N.Y.S.2d at 685. In violation of their agreements, each of the defendants was re-arrested during the interim, and the lower courts refused to issue the reduced sentences as conditionally agreed. *See id.* On appeal, the defendants did not deny that they had breached the no-arrest conditions, but instead argued that due process entitled them to an evidentiary hearing to determine whether they had in fact committed the acts which led to their re-arrests. *See Outley*, 80 N.Y.2d 702, 610 N.E.2d 356, 594 N.Y.S.2d 683. The Court of Appeals disagreed. *See id.* at 712-13, 610 N.E.2d at 356, 594 N.Y.S.2d at 688. The Court held that requiring an evidentiary hearing on the issue of guilt would change the "not being arrested for a crime" condition into a "not actually committing a crime" condition. *See id.* While the Court found that the express language of the condition refuted the need for such an in-depth inquiry, it did agree that due process required some sort of inquiry to ensure that the re-arrests were not malicious or baseless. *See id.* Leaving the general nature and extent of the inquiry to the discretion of the trial court, the *Outley* Court held that the inquiry must at least be sufficient to establish whether there was a "legitimate basis" for the arrest. *See id.* at 713, 610 N.E.2d at 356, 594 N.Y.S.2d at 688. Where the defendants were given the opportunity to explain the circumstances of their arrests, the Court found that sufficient process had been afforded. *See Outley*, 80 N.Y.2d at 713-14, 610 N.E.2d at 356, 594 N.Y.S.2d at 688-89.

205. *Edwin L.*, 88 N.Y.2d at 602-03, 671 N.E.2d at 1251, 648 N.Y.S.2d at 854.

conditions, but otherwise leaves the form and extent of the inquiry to the wide discretion of the Family Court.[206] Justifications offered for the use of the legitimate basis test included, *inter alia*, preservation of the Family Court's broad discretion to fashion appropriate remedies in juvenile delinquency proceedings and the desirability of avoiding "unnecessary complexity" in the ACD process.[207] Balancing these state interests against the "limited" nature of the juvenile's liberty interest in an ACD order and the allegedly "low" risk that such liberty interest would be erroneously deprived,[208] the majority concluded that its application of the legitimate basis test satisfied the standards for determining whether a state has provided adequate

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206. *See id.* at 603, 671 N.E.2d at 1251, 648 N.Y.S.2d at 854. The majority expressly rejected the suggestion that due process requires an ACD revocation hearing in every case, and moreover, explicitly permitted the Family Court to consider hearsay evidence in determining whether a condition of an ACD has been violated. *See id.* at 603-06, 671 N.E.2d at 1252-53, 648 N.Y.S.2d at 855-56. However, acknowledging the fact that the defendants in *Outley* had conceded breach of their "no-arrest" conditions, the majority explained that due process will require "a more detailed inquiry" in the event a juvenile denies the predicate facts alleged in a violation petition. *See id.* at 602-03, 671 N.E.2d at 1251, 648 N.Y.S.2d at 854. Thereafter, the majority interpreted Edwin's failure to affirmatively deny the violation allegations against him as an *Outley*-type admission, and consequently declined to find his situation worthy of the aforementioned "more detailed inquiry." *Id.*

On this issue, the dissenters found it material that the defendants in *Outley* had conceded the facts, (their re-arrests), that constituted violations of their conditional releases, and challenged only the process required in determining whether they had in fact committed the underlying crimes which led to their arrests. *See Edwin L.*, at 609, 671 N.E.2d at 1255, 648 N.Y.S.2d at 858. On the other hand, Edwin did not admit (or expressly deny) that he had violated any of the conditions of his ACD, but was challenging the process afforded him in determining that precise issue. *See id.* Noting that Edwin was neither legally obligated to testify on his own behalf nor carried the burden of affirmatively disproving the alleged violations, the dissent found it inappropriate to construe Edwin's silence as an admission. *See id.* at 608-09, 671 N.E.2d at 1254-55, 648 N.Y.S.2d at 857-58. Thus distinguishing the facts and issue presented in *Outley,* the dissent deemed the ignoble "legitimate basis" test inapplicable to Edwin's situation. *See id* at 602-03, 608-09, 671 N.E.2d at 1251, 1254-55, 648 N.Y.S.2d at 854, 857-58.

207. *See Edwin L.*, 88 N.Y.2d at 603-04, 671 N.E.2d at 1251-52, 648 N.Y.S.2d at 854-55.

208. The majority found that the risk of an erroneous deprivation of liberty was "low" because the presentment agency would have to meet the "legitimate basis" burden, the juvenile had an opportunity to be heard in his own defense, and there was still an opportunity to defend the liberty interest at a subsequent dispositional hearing, the outcome of which was subject to judicial review. *See id.*

due process protections as articulated by the United States Supreme Court in *Mathews v. Eldridge*.[209]

C. *Dissenting Opinion*

Three justices disagreed with the aforementioned conclusions in a comprehensive dissent authored by Justice Levine.[210] The dissent maintained that insofar as due process is concerned, the conditional liberty interest afforded a juvenile by a post-fact-finding ACD is "essentially identical" to that enjoyed by probationers and parolees, and that its revocation therefore requires comparable procedural protections.[211] Focusing on the substantive similarities between ACD orders and dispositional orders rather than the academic differences, the dissenters concluded, in the spirit of *Morrissey v. Brewer*[212] and *Gagnon v. Scarpelli*,[213] that a post-fact-finding ACD does indeed embody a significant "liberty interest," however indeterminate, as contemplated by the Fourteenth Amendment to the Constitution.[214]

Furthermore, the dissenters explained that notwithstanding the formal adjudication of guilt, a post-fact-finding ACD is substantially similar to the dispositions of parole and probation in that all are based on a determination that confinement is not currently necessary.[215] Moreover, each is designed to promote rehabilitation by granting the individual the opportunity to re-

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209. 424 U.S. 319. *See Edwin L.*, 88 N.Y.2d at 600, 603, 671 N.E.2d at 1249-50, 1251-52, 648 N.Y.S.2d at 852-53, 854-55. As previously discussed, *Mathews v. Eldridge* requires the court to balance the private interest at stake and the risk of an erroneous deprivation of that interest, or the value, if any, of additional or substitute procedural safeguards against the state interest embodied in the challenged action to determine whether such action has afforded the individual sufficient due process. *See Mathews*, 424 U.S. at 335; *supra* Part III.

210. *See Edwin L.*, 88 N.Y.2d 593, 671 N.E.2d 1247, 648 N.Y.S.2d 850 (Levine, J., dissenting). Before his appointment to the New York Court of Appeals, Justice Levine previously served nine years as a New York State Family Court Judge. *See* JUDICIAL YELLOW BOOK, STATE COURTS OF THE UNITED STATES, FALL 1996.

211. *See Edwin L.*, 88 N.Y.2d at 607, 613, 671 N.E.2d at 1253, 1257, 648 N.Y.S.2d at 856, 860 (Levine, J., dissenting).

212. 408 U.S. 471 (1972); *see supra* notes 104-12 and accompanying text.

213. 411 U.S. 778 (1973); *see supra* note 111.

214. *See Edwin L.*, 88 N.Y.2d at 611-15, 671 N.E.2d at 1256-59, 648 N.Y.S.2d at 859-62; U.S. CONST. amend. XIV, § 1.

215. *See Edwin L.*, 88 N.Y.2d at 613, 671 N.E.2d at 1257, 648 N.Y.S.2d at 860.

tain his liberty and to participate as a constructive member of society, subject to possible revocation if he fails to substantially abide by the court ordered conditions imposed upon him.[216] Finally, in each case the individual justifiably relies on the promise that his conditional freedom will not be revoked unless he fails to satisfy those conditions.[217]

The dissent found unpersuasive the distinction that upon revocation of an ACD, a formal adjudication of guilt would not be entered, nor sanctions imposed, until the court has held a dispositional hearing and found the juvenile in need of supervision, treatment or confinement.[218] Instead, the dissent observed that the ACD revocation process involves precisely the same two step inquiry as that enunciated by the United States Supreme Court in *Morrissey* regarding parole and probation revocation.[219] Specifically, the Family Court must first make a factual determination as to whether an ACD condition has in fact been violated.[220] If a violation has been found, the court must then schedule a dispositional hearing to determine whether the juvenile requires supervision, treatment, or confinement.[221] Recognizing that the second prong of the revocation inquiry is primarily contingent upon the conclusion reached in the first prong of the inquiry, the dissent stressed

216. *See id.*

217. *See id.*

218. *See id.* at 614-15, 671 N.E.2d at 1258-59, 648 N.Y.S.2d at 861-62; *see supra* Part IV.B; *see generally supra* note 173.

219. *See Edwin L.*, 88 N.Y.2d at 614, 671 N.E.2d at 1258, 648 N.Y.S.2d at 861. The Supreme Court in *Morrissey* recognized that revocation of the liberty interest implicated by parole inflicts upon the parolee a "grievous loss." *See Morrissey,* 408 U.S. at 482. The Court explained that such a deprivation demands that a court first determine the factual question of whether a condition of release has in fact been violated, and if so, the court must then determine whether revocation is warranted under the circumstances. *See id.* at 479-80. The factual determination as to the number and nature of the violations, reached in response to the first inquiry, is one of the circumstances to be considered in evaluating the second inquiry (that of the propriety of revocation). *See id.* at 480. A similar inquiry is required prior to probation revocation. *See Gagnon*, 411 U.S. at 782, 784-85; *Edwin L.*, 88 N.Y.2d at 609-13, 671 N.E.2d at 1255-57, 648 N.Y.S.2d at 858-60.

220. *See Edwin L.*, 88 N.Y.2d at 614, 671 N.E.2d at 1258, 648 N.Y.S.2d at 861; *supra* note 219 and accompanying text.

221. *See supra* note 219.

the importance of reaching an accurate conclusion to the determinative preliminary question.[222]

Based on the analogy between the dispositional hearing and the second prong of the *Morrissey* inquiry, the dissent argued that any protection offered by the dispositional hearing was at most superficial, since the factual bases for its conclusion had already been determined at the ACD revocation proceeding.[223] Thus, contrary to the majority's suggestion, the dispositional hearing could not make up for the lack of procedural protections at the prior ACD revocation hearing.[224]

In order to promote accurate dispositional determinations, the dissent concluded that due process demands, at a minimum, an "informal but effective" ACD revocation hearing.[225] Particularly, due process was found to require that the juvenile be afforded the right to confront and cross-examine adverse witnesses against him, unless the Family Court specifically finds good cause to dispense with such confrontation.[226] In support of its conclusion, the dissent cited the "significant" interest of the juvenile in his conditional freedom.[227] The dissent also cited the interests of the state in encouraging the juvenile to lead a productive and law abiding life and in non-revocation of an ACD based on "erroneous information or because of an erroneous evaluation of the need to [revoke]."[228]

V. Analysis: The Due Process Inquiry Applied to *Edwin L.*

In the instant case, Edwin complained that he had been unfairly treated when the Family Court revoked his conditional freedom based on information which could not be tested for the traditionally indispensable indicia of truthfulness, accuracy,

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222. *See Edwin L.*, 88 N.Y.2d at 609-13, 671 N.E.2d at 1255-57, 648 N.Y.S.2d at 858-60.

223. *See id.* at 614-15, 671 N.E.2d at 1258-59, 648 N.Y.S.2d at 861-62; *see supra* notes 219-20 and accompanying text.

224. *See Edwin L.*, 88 N.Y.2d at 614-15, 671 N.E.2d at 1258-59, 648 N.Y.S.2d at 861-62; *see supra* notes 203, 208 and accompanying text.

225. *See Edwin L.*, 88 N.Y.2d at 614-15, 671 N.E.2d at 1258-59, 648 N.Y.S.2d at 861-62 (in part restating *Morrissey*, 408 U.S. 471, 484-85).

226. *See id.* at 615, 671 N.E.2d at 1259, 648 N.Y.S.2d at 862.

227. *See id.* at 613-15, 671 N.E.2d at 1257-58, 648 N.Y.S.2d at 860-61.

228. *Id.* (in part quoting *Morrissey*, 408 U.S. 471, 484).

and reliability.[229] While Edwin's primary concern was likely for his personal self preservation, the fundamentals of his case are far reaching and will impact upon all similarly situated juveniles. Thus, the remainder of this Note will focus on evaluating the constitutional validity of the "legitimate basis" test, as well as the merits of the arguments proffered for and against it.

In order to evaluate the constitutional validity of the procedures established by *Edwin L.*, the due process inquiry must be applied to the post-fact-finding ACD revocation proceeding.[230] As outlined in Part III, the first step in this evaluation is to determine whether a juvenile possesses a constitutionally protected interest in a post-fact-finding ACD.[231] If so, the next step is to assess the extent of that individual interest.[232] The third step in the process is to determine the scope of New York State's interest in the existing ACD revocation proceeding.[233] The fourth step is to consider the likelihood that interests associated with the ACD will be erroneously deprived under the existing procedural scheme, and the likelihood that erroneous deprivations would be avoided if additional or substitute procedural safeguards were afforded.[234] The final step in the evaluation is to balance the above factors against each other.[235]

A. *A Protected Interest in a Post-Fact-Finding ACD*

As previously noted, an ACD is an order by the Family Court which conditionally adjourns, for a specified period of time, the delinquency proceedings pending against a juvenile.[236] If the juvenile successfully abides by the court-imposed conditions, the delinquency proceedings against him will be conclusively dismissed.[237] Thus, the juvenile who successfully fulfills his ACD, although accused of committing a criminal act, will never have to face the risk that a court will determine that he has in fact committed the criminal act and is in need of supervi-

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229. *See supra* notes 185, 189 and accompanying text.
230. *See supra* text accompanying notes 92-97.
231. *See supra* notes 92-94, 98-126 and accompanying text.
232. *See supra* notes 96, 127-33 and accompanying text.
233. *See supra* notes 96, 134-47 and accompanying text.
234. *See supra* notes 96, 148-64 and accompanying text.
235. *See supra* text accompanying notes 97, 165-69.
236. *See supra* note 11.
237. *See supra* note 11.

sion, treatment, or confinement.[238] The ACD, therefore, provides the accused juvenile with the opportunity to ensure his continued freedom, and to safeguard himself from a disposition more restrictive than the conditions by which he is currently bound.[239] It also provides the juvenile with the opportunity to ensure that his record remains "clean" in respect to the alleged offense; in other words, that he remains free from the burdens associated with a potential predicate offense.[240]

Essentially, the post-fact-finding ACD affords the juvenile the power to maintain absolute control over his destiny. By tailoring his behavior to conform with the stipulated conditions, the juvenile can completely avoid the uncertainty of a dispositional hearing.

As discussed in Part III-A, the United States Supreme Court has held that an individual's interest is constitutionally protected whenever its abridgment would impose a "grievous loss."[241] Such interests are either derived from the Fourteenth Amendment's due process clause, or conferred by state law.[242] In this case, the broadly defined interest at stake is that of a juvenile in a post-fact-finding ACD granted by a New York Family Court. Pertinent to this analysis, however, are the particular interests subject to infringement if the ACD is revoked. As suggested above, these interests include the juvenile's state conferred right to control his destiny.[243] Specifically, the juvenile has an interest in guaranteeing his future freedom under the least restrictive conditions possible.[244] Similar freedom concerns are also reflected in the "clean record" offered by an ACD; in that instance, revocation may affect the restrictiveness of the dispositions available in the event of future misconduct.[245] Finally, given the quasi-criminal nature of a juvenile delinquency adjudication,[246] the juvenile also has an interest in avoiding the

238. *See supra* notes 11, 171-73.

239. *See supra* notes 11, 171-73, 191, 202.

240. *See supra* notes 11, 199-201 and accompanying text.

241. *See supra* text accompanying notes 106-07; *see generally supra* text accompanying notes 98-103.

242. *See supra* text accompanying notes 98-103.

243. *See supra* notes 237-40 and accompanying text.

244. *See supra* notes 237-40, 244 and accompanying text.

245. *See supra* note 241 and accompanying text.

246. *See supra* note 45 and accompanying text.

disfavorable reputation associated with him by those who learn of his "delinquency" classification, since lost social, educational, and employment opportunities could result.[247]

In *Morrissey v. Brewer*, it was held that revocation of the conditional liberty offered by parole inflicted a "grievous loss" upon the parolee, who justifiably relied on the promise that he would be able to maintain control over his destiny if he upheld his part of the bargain.[248] In *Goss v. Lopez*, it was held that high school students had a state created constitutionally protected interest, not only in obtaining an education, but in avoiding disparagement of their reputation, since documentation of their misconduct, if discovered, could have an adverse affect on their future opportunities.[249] In this case, revocation of a post-fact-finding ACD strips the child of the right to control his destiny. It subjects him to the uncertainty of a dispositional hearing and increases the likelihood of a loss of freedom and a blackened reputation. These losses are substantially analogous to the losses suffered in the above examples. Thus, it is concluded that the revocation of a court ordered ACD does inflict a "grievous loss" upon the juvenile as contemplated by the Fourteenth Amendment to the Constitution. Therefore, the interests implicated by the revocation of an ACD are constitutionally protected.[250] Since the juvenile's interest in a post-fact-finding ACD is constitutionally protected, adequate procedural protections must be afforded before an ACD may be revoked.[251]

In the case of *Edwin L.*, neither the majority nor the dissent seriously disputed the fact that a juvenile has a constitutionally protected interest in retaining his court-ordered

247. *See supra* note 123 and accompanying text.
248. *See supra* text accompanying notes 104-12.
249. *See supra* text accompanying notes 118-26.
250. *See supra* text accompanying notes 98-103.
251. *See supra* notes 98-103 and accompanying text.

ACD.[252] The debate became more heated, however, when the sides began to explore the nature and extent of that interest.[253]

B. *Consideration of the Mathews Factors*

1. *The Nature of the Juvenile's Interests*

As illustrated above, if two juveniles are charged with committing criminal acts and one juvenile obtains an adjournment of the delinquency proceedings in contemplation of dismissal, that juvenile possesses a number of constitutionally protected interests that the other juvenile does not.[254] According to the majority's analysis, those interests are "limited."[255] According to the dissent's analysis, those interests are "significant."[256] Despite the contingent nature of the ACD, it appears to this author that the individual interests associated with it are indeed substantial.

Clearly, if the juvenile's ACD is revoked, all contingent expectations are immediately lost. Likewise, the juvenile has one less opportunity to safeguard his current record, reputation, and degree of freedom.[257] Most acute, however, is the unmitigated forfeiture of control.[258] The pre-adjudicatory nature of the ACD, unlike the dispositional orders of parole and probation, ensures that a deprivation of freedom will not occur automatically.[259] However, deprivation of the juvenile's opportunity to safeguard his record, reputation, and degree of freedom is im-

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252. *See supra* Part IV.B-C. It is noted that the majority states in its opinion that a juvenile who suffers an ACD revocation "does not suffer a 'grievous loss.'" *Edwin L.*, 88 N.Y.2d at 602, 671 N.E.2d at 1251, 648 N.Y.S.2d at 851. However, the author suggests that the majority was referring to its evaluation of the proper weight to accord the juvenile's interest under the first of the *Mathews* factors, rather than arguing that there was no constitutionally protected interest at all. *See generally supra* Part III. This is concluded because the majority proceeded to apply the *Mathews* test in assessing that a certain quantum of process was in fact due. Had the majority's position been that no constitutionally protected interest existed, no further analysis would have been necessary.

253. *See supra* Part IV.B-C.

254. *See supra* Part V.A.

255. *See supra* notes 208-09 and accompanying text.

256. *See supra* text accompanying notes 214, 228.

257. *See generally supra* notes 172-73, Part IV.B-C.

258. *See supra* Part V.A.

259. *See supra* note 195 and accompanying text.

mediate and complete. The juvenile arguably has a material interest in avoiding such complete deprivations.

Moreover, because the granting of an ACD is discretionary,[260] and because courts likely would not find an unrestrictive ACD sufficient to rehabilitate a "hardened" delinquent, it is probable that the juvenile granted an ACD is not a persistent offender. On the contrary, he may even be before the Family Court for the first time. Thus, his interest in maintaining his current status is even more heightened than it might at first appear.

Furthermore, where the ACD has been issued after the conclusion of the fact-finding hearing (as in Edwin's case), it is likely that the juvenile has an even greater interest in its continued existence,[261] because essentially, the juvenile is already "half-way" to a delinquency adjudication.[262] In other words, if a post-fact-finding ACD is revoked, the juvenile is not entitled to another hearing on the issue of guilt or innocence of the underlying offense. His guilt has already been determined, and the only thing standing between him and a delinquency adjudication is the dispositional hearing.[263] Given the fact that his guilt has already been established, it is less likely that the delinquency proceedings will be dismissed; and more likely that the juvenile will be found delinquent and subjected to a liberty restraining dispositional order, than if the juvenile still had the opportunity to maintain and prove his innocence.[264]

Additionally, due to the interlocutory nature of the ACD revocation order, a successful appeal at this stage in the proceedings is unlikely.[265] Thus, the deprivations discussed will continue at least until termination of the dispositional hearing, if not indefinitely. Given the gravity of the ultimate freedoms at stake and the improbability of immediate appellate review, the juvenile has a substantial interest in having the Family Court reach an accurate conclusion on the issue of whether an ACD violation has in fact occurred.[266] The circumstances of Edwin's

260. *See supra* notes 11, 22.
261. *See generally supra* notes 22, 172-73.
262. *See generally supra* notes 172-73, 202.
263. *See generally supra* notes 172-73, 202.
264. *See generally supra* notes 172-73, 202.
265. *See supra* note 183.
266. *See supra* notes 129-30 and accompanying text.

case also illustrate the significant juvenile interest in limiting the discretion afforded to the Family Court.[267] There, both the conditions of Edwin's ACD and the allegations supporting the violation were somewhat ambiguous (for example, "avoid further contact with the court" apparently meant "avoid being arrested").[268] Moreover, the evidence offered in support of the allegations was primarily hearsay, and thus arguably unreliable.[269] However, the broad discretion of the fact-finding judge enabled him to conclude that sufficient proof of violations existed, and that Edwin's ACD should be revoked just two weeks before its maturity.[270]

As will be discussed below,[271] the gravity of an ACD revocation may be mitigated if an unadulterated dispositional hearing is subsequently afforded.[272] Nevertheless, it is concluded that the individual interests associated with a post-fact-finding ACD are indeed significant.

2. *New York's Interest in Unencumbered ACD Revocation Proceedings*

Comparable in significance to the juvenile interests at stake are the state interests embodied in the ACD process. Foremost are New York's interests in effectively fulfilling its *parens patriae* role.[273] As surrogate parent, New York has a strong interest in protecting the needs and best interests of the accused child.[274] However, New York also has a significant interest in protecting its citizens from the criminal acts of an unrestrained juvenile.[275] Fortunately, the successful rehabilita-

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267. *See supra* notes 133, 172-83 and accompanying text.

268. *See supra* notes 177-78 and accompanying text; *see also* Evan A. Davis, *New York Court of Appeals Roundup: Juvenile Justice; Lead Paint; Peremptory Challenges*, 216 N.Y.L.J. 3 (1996).

269. *See supra* notes 172-83 and accompanying text; *see also* Davis, *supra* note 268.

270. *See supra* notes 172-83 and accompanying text.

271. *See infra* Part V.C.

272. *See supra* note 131 and accompanying text; *see generally supra* notes 173, 194-95 and accompanying text; *cf. Mathews*, 424 U.S. at 338-40.

273. *See supra* notes 136-37 and accompanying text; *see generally supra* notes 37-42 and accompanying text.

274. *See supra* notes 136-37 and accompanying text; *see generally supra* notes 37-42 and accompanying text.

275. *See supra* notes 138-39 and accompanying text.

tion of a child who has ventured into a career of lawlessness serves the best interests of both the child and the community.[276] Ideally, the ACD can further that rehabilitative goal. For example, the ACD provides the state with continuing supervisory jurisdiction over the child who does not appear to need a very restrictive environment, but has instead demonstrated that only minimal guidance is necessary to steer him away from an antisocial lifestyle.[277] Given the potential value of the ACD system,[278] New York's interest in preserving its practicability is strong.

If, however, it appears that the juvenile's rehabilitation is not being advanced by the permissive ACD, the state also has an interest in an unfettered revocation process. Where the ACD process has proven ineffective, it will further the state's interests to quickly restore the delinquency proceeding and issue a disposition more conducive to rehabilitation.[279] Accordingly, based on history and experience, New York has determined that broad Family Court discretion and procedural informality best enable the state to realize its rehabilitative goal.[280] By ensuring that ineffective ACD's are easily revoked, New York may also minimize the Family Court's hesitancy to issue them.[281] Since the "legitimate basis" standard preserves the informality and discretion of the Family Court system,[282] New York's interest in it is arguably strong.

However, efforts to rehabilitate will not be successful unless the juvenile's needs are accurately diagnosed.[283] In other words, it will not serve the state's interests to revoke a child's ACD if that child has not committed a violation warranting revocation. On the contrary, an erroneous revocation will likely defeat the rehabilitation process, as the juvenile will feel that he has been cheated, or at least treated unfairly, and may therefore be less inclined to cooperate with the system in the fu-

276. *Cf. supra* notes 136-38.

277. *See generally supra* notes 11, 42, 179.

278. *See, e.g.*, text accompanying *supra* notes 274-277.

279. *See generally supra* notes 11, 179.

280. *See generally supra* Part II; N.Y. FAM. CT. ACT Art. Three.

281. *See generally supra* notes 205-07 and accompanying text.

282. *See generally supra* notes 205-07 and accompanying text.

283. *See supra* text accompanying notes 79-84, 141-42.

ture.[284] Thus, the state has an interest, analogous to that of the child, in reaching accurate factual determinations prior to revoking an ACD.[285]

Finally, it is unquestionable that the state has a legitimate interest in avoiding any increased administrative and financial burdens that might be encountered if the Family Courts were required to engage in a more formal and detailed revocation inquiry.[286] Since money and manpower are limited, an increase in the resources allotted for ACD revocation hearings would invariably result in a decrease in resources available for other public services.[287] Accordingly, it is concluded that New York's interest in an unencumbered ACD revocation process, comparable to that of the juvenile in maintaining his ACD, is significant.

3. *The Likelihood that an ACD will be Erroneously Revoked Under the Existing Procedural Scheme, and the Capacity to Avoid Any Erroneous Revocations*

Under the newly established *Edwin L.* rule, when a juvenile is accused of violating a condition of his post-fact-finding ACD order, the Family Court is required to "conduct an inquiry" into the alleged violation.[288] The Family Court must also provide the juvenile with an "opportunity to respond" to the allegations against him.[289] However, the New York Court of Appeals majority expressly held that an actual revocation hearing "is not required in every case."[290] On the contrary, the majority held that "[t]he form and extent of the inquiry necessary . . . will vary according to the particular circumstances of each case, and ultimately lie within the discretion of the Family Court."[291] In fact, reliance on hearsay evidence in making the revocation

284. *See supra* text accompanying notes 81, 141-42.

285. *See supra* text accompanying notes 79-84, 141-42.

286. *See supra* notes 143-44 and accompanying text.

287. *See supra* notes 143-44 and accompanying text.

288. *See supra* text accompanying notes 17, 205.

289. *See supra* text accompanying notes 17, 205.

290. *See supra* note 205; *Edwin L.*, 88 N.Y.2d at 605, 671 N.E.2d at 1253, 648 N.Y.S.2d at 856.

291. *Edwin L.*, 88 N.Y.2d at 603, 671 N.E.2d at 1251, 648 N.Y.S.2d at 854; *see supra* note 206 and accompanying text.

decision is expressly permitted.[292] According to *Edwin L.*, an ACD revocation inquiry satisfies Fourteenth Amendment principles of due process as long as the Family Court asserts a "legitimate basis" for concluding that a violation has actually occurred.[293]

As previously discussed, the degree of procedural safeguards provided will influence the accuracy and error inherent in the truthfinding process.[294] Relevant to this case, such safeguards include a heightened standard of proof and the right to confront and cross-examine witnesses.[295] The United States Supreme Court has confirmed that a heightened standard of proof is particularly effective in reducing the risk that a constitutionally protected interest will be erroneously deprived.[296] To illustrate: the higher the standard of proof, the greater the evidence needed to support a conclusion, and the less likely it is that the fact-finder will erroneously deprive the individual of a protected right. On the other hand, the lower the evidentiary standard, the more likely that an innocent individual will be wrongfully deprived. While the lower burden is clearly a cause for individual concern, the higher burden, in contrast, arguably promotes both state and individual interests. Both interests are advanced because the state and the juvenile have similarly strong interests in accuracy, and neither would benefit if resources are spent on juveniles who do not actually need rehabilitation.[297]

The right to confront and cross-examine witnesses has proven similarly valuable in reducing the risk of erroneous deprivation inherent in a particular factual determination.[298] When a fact-finder is called upon to determine the truth of allegations charged by one person against another, the credibility of the accuser is generally a critical issue. However, hearsay evidence denies the accused the opportunity to test the declarant's

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292. *See supra* note 206.

293. *See supra* text accompanying notes 17, 205.

294. *See supra* note 185; Part III.B(3).

295. *See, e.g., supra* note 185; Santosky v. Kramer, 455 U.S. 745, 764-65 (1982).

296. *See, e.g., Santosky*, 455 U.S. at 764-65.

297. *See supra* Part V.B(1-2).

298. *See supra* note 185.

capacity as a witness, and to observe his revealing demeanor.[299] Moreover, the damning statements are generally not made under circumstances which impress the speaker with the gravity of his statements.[300] For this reason, consideration of hearsay evidence during fact-finding proceedings has generally been disfavored.[301] Correspondingly, the opportunity of the accused to confront and cross-examine his accuser has long been recognized as an invaluable tool in ascertaining the truth.[302]

In this case, the majority has concluded that a "legitimate basis" standard sufficiently protects the juvenile from an erroneous ACD revocation.[303] However, the "legitimate basis" standard is one of the most deferential known to our judicial system.[304] Furthermore, the lower courts have been explicitly authorized to consider hearsay evidence in determining whether a child's ACD should be revoked.[305] As noted above, hearsay evidence is inherently unreliable.[306] Moreover, the broad discretion afforded the Family Courts increases the likelihood that revocation decisions will be arbitrary or based on improper criteria, such as the judge's subjective belief that the juvenile is a "troublemaker."[307] This risk is further intensified due to the pervasive lack of appellate review.[308]

Finally, the resource allocation under the existing scheme may increase the risk of an unwarranted ACD revocation. The juvenile probation department is often responsible for investigating the juvenile's behavior and reporting its recommendations to the Family Court.[309] Both the probation department and the presentment agency are agents of the state, and pre-

299. *See supra* note 185.

300. *See supra* note 185.

301. *See supra* note 185.

302. *See supra* note 185.

303. *See supra* text accompanying notes 205-07.

304. The legitimate basis standard is clearly less imposing than the familiar standards of preponderance of the evidence, clear and convincing evidence, and proof beyond a reasonable doubt; possibly only posing a greater obstacle than the "some credible evidence" standard. *Cf.* Addington v. Texas, 441 U.S. 418, 423-25 (1979); Valmonte v. Bane, 18 F.3d 992, 1003-004 (2d Cir. 1994).

305. *See supra* note 206.

306. *See supra* notes 185, 298-302 and accompanying text.

307. *See supra* notes 133, 156 and accompanying text.

308. *See supra* notes 131-32, 183, 265-66 and accompanying text.

309. *See supra* note 157 and accompanying text; *see generally supra* note 174.

sumably have vast pools of resources and expertise at their disposal. The juvenile, on the other hand, is often represented, if it all, by a court-appointed attorney functioning as a law guardian. Thus, despite the juvenile's guaranteed "opportunity to be heard," the juvenile suffers a great handicap in defending against allegations that a "legitimate basis" exists for revocation of an ACD.

On the other hand, the risk that an ACD will be erroneously revoked can easily be abated. Our judicial system provides a wealth of procedures designed to protect against the risk of error inherent in the fact-finding process.[310] Since the Family Court is already required to "conduct an inquiry" prior to revoking an ACD, it is already considering evidence on the facts alleged in the violation petitions.[311] It would impose minimal, if any, additional burden to bar the presentation of hearsay testimony unless good cause is shown as to why the accusing witness can not be present. The effects of subjecting the evidence adduced to a more stringent standard of proof would be similarly negligible.[312] Moreover, none of the aforementioned state interests would suffer if heightened procedural requirements were imposed, and in fact, the mutual interest in accuracy would be promoted.[313]

Based on the above assertions, it is concluded that the procedures endorsed by the *Edwin L.* majority produce an extremely high risk of error, which is unnecessarily shouldered almost entirely by the juvenile. The majority suggested that the risk of error produced by the relatively procedure-free ACD revocation proceeding was mitigated by the fact that a subsequent dispositional hearing would be held before the juvenile would be deprived of his freedom.[314] As illustrated below,[315] this argument is unsound.

310. *See, e.g., supra* notes 159-62, 185 and accompanying text; Part III.B(3).

311. *See supra* notes 17, 205, 289 and accompanying text.

312. *See* Stanley v. Illinois, 405 U.S. 645 (1972).

313. *See supra* Part V.B(2); Parham v. J.R., 442 U.S. 584, 636 n.22 (1979).

314. *See supra* notes 191-94, 202, 208 and accompanying text.

315. *See infra* Part V.C.

C. *Balancing the Mathews Factors: The Process Required*

The final inquiry addresses whether the procedural safeguards afforded are adequate under the circumstances.[316] Before an individual may be subjected to a final deprivation of a protected interest, some form of inquiry must be afforded.[317] In fact, the Supreme Court has recognized that it is "a principle basic to our society" that due process be accorded before an individual may be "condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction."[318] This fundamental requirement is satisfied by affording the individual an opportunity to be heard "at a meaningful time and in a meaningful manner."[319] As noted above, the nature and extent of the requisite procedural hearing is determined by balancing the various interests at stake.[320] Given the juvenile's constitutionally protected interest in a post-fact-finding ACD,[321] the question presented at this point is whether, in light of the interests discussed above,[322] an ACD revocation proceeding which includes the consideration of hearsay testimony (without first finding good cause to dispense with the confrontation of witnesses) provides the juvenile with a "meaningful" opportunity to respond to the violation allegations against him.[323]

With regard to the ACD process, the interests of the juvenile and the state are comparable in significance.[324] However, a balance must be struck which respects the weighty concerns of the juvenile and the significant interest of the state in informality, while at the same time comporting with the dictates of constitutional due process.[325] Thus, in balancing the *Mathews* factors, the risk inherent in the procedures endorsed by the *Ed-*

316. *See supra* notes 85-97; Part III.C.

317. *See supra* text accompanying notes 17, 205, 288; Mathews v. Eldridge, 424 U.S. 319, 333 (1976).

318. *Mathews*, 424 U.S. at 333 (quoting Joint Anti-Fascist Comm. v. McGrath, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring)).

319. *Id.* (quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1965)).

320. *See supra* notes 85-97; Parts III.C, V.B(1-2).

321. *See supra* Part V.A.

322. *See supra* Part V.B(1-3).

323. *See supra* notes 189, 288-93, 318 and accompanying text; *see supra* text accompanying notes 205-06.

324. *See supra* Part V.B(1-2).

325. *See supra* notes 85-97; Parts III.C, V.B(1-2).

win L. majority becomes the determinative factor in assessing their constitutional sufficiency.[326]

As previously noted, the existing procedures produce an extremely high risk of an erroneous deprivation.[327] Furthermore, that risk is unnecessary, since instituting additional procedural safeguards would be both feasible and effective.[328] Moreover, the risk is cast almost entirely upon the juvenile, arguably the party who has the most to lose and the least resources with which to defend himself. Additionally, despite the majority contention, in practice the dispositional hearing does not effectively safeguard against the risk of erroneous deprivations.[329] On the contrary, by the time of the dispositional hearing, the juvenile has already lost all contingent interests in the ACD, and even more critically, the juvenile has lost his right to control his destiny.[330]

Even if the scope of juvenile interests implicated by the revocation of a post-fact-finding ACD was limited to that of physical freedom, the value of the dispositional hearing in safeguarding the juvenile from an unwarranted loss of freedom would still not be what the majority purports it to be. In fact, after guilt has been established at the fact-finding hearing, and violations have been established at the ACD revocation inquiry, the dispositional hearing is really quite an illusory shield. In determining whether the juvenile requires "supervision, treatment or confinement," the Family Court inevitably considers the facts that the child has previously been found guilty of an underlying criminal act, and that he has been found in direct violation of the court's ACD order.[331] Thus, the juvenile who has suffered an ACD revocation does not come to the dispositional hearing with a clean slate. Instead, he is already marked, (by his "established" failure to abide by the conditions of his ACD), as an unwilling or incapable candidate for the more lenient rehabilitative methods. If the conclusions reached at the ACD revocation hearing are inaccurate and unreliable, it

326. *See supra* note 164 and accompanying text; Part V.B(3).

327. *See supra* Part V.B(3).

328. *See supra* notes 310-12 and accompanying text.

329. *See generally supra* text accompanying notes 191-95, 202, 208, 272, 313; Part V.B(3).

330. *See supra* Parts V.A, V.B(1).

331. *See supra* text accompanying notes 219-22.

logically follows that the conclusions reached at the dispositional hearing will also be inaccurate and unreliable. Clearly, the subsequent dispositional hearing cannot make up for the lack of procedural protections during the ACD revocation process. For this reason, it is imperative that the reliability of the ACD decision be insured through the use of additional procedural protections, which are specifically designed to reduce the risk of error in the truthfinding process.

In addition, the purported benefits of informality in the Family Court system do not cure the constitutional deficiencies in the *Edwin L.* rule. As previously recognized, informality promotes inaccuracy.[332] It can hardly be claimed that an unwarranted decision to revoke a child's constitutionally protected interest in an ACD is socially desirable. On the contrary, it serves no legitimate interests. Instead, an erroneous revocation wastes valuable public resources, offends the integrity of the judicial system, and defeats the rehabilitative goal.

The majority analysis relies on the contingent characterization of the juvenile interests and the purported safeguard of the dispositional hearing to conclude that only minimal procedural protections are required prior to an ACD revocation.[333] As illustrated above, however, this reasoning is misguided. As a result, the majority has dictated a rule that creates an undue risk of erroneous deprivations. This risk is unjustifiable and unconstitutional. To comport with Fourteenth Amendment principles of procedural due process, it is concluded that, if only a "legitimate basis" for a revocation is required, the juvenile is at least entitled to a hearing at which hearsay evidence will be excluded, unless the court first finds good cause to dispense with the confrontation of witnesses.

VI. Conclusion

In *Edwin L.*, an individual complained that he had been unfairly treated by an agent of the State of New York. Recalling that his forefathers had drafted the Fourteenth Amendment to the Constitution to shield against such transgressions, the individual sought to invoke its protections. He petitioned

332. *See supra* Parts II.A, III.B(3), V.B(3).

333. *See supra* note 293 and accompanying text.

the highest court of his state, challenging the constitutionality of the manner in which he had been treated. However, because he had not yet reached the age of majority, he was apparently treated with "kid" gloves. Despite the fervent dissent of a veteran Family Court judge, the child's appeal received only lofty rationalizations, reminiscent of the pre-*Gault* days, and an advisement to seek comfort in an illusory dispositional hearing. He was not the only one dismayed to discover that a majority of the New York Court of Appeals felt that the transgression he had suffered was not serious enough to warrant protections greater than the most deferential "legitimate basis" standard.

This author finds solace, however, in the realization that the *Edwin L.* rule, as with other constitutional guarantees, is just a starting point. It is the bare minimum that must be afforded, and in no way replaces the seasoned wisdom and insight of the Family Court judges who have the opportunity to observe first-hand the realities of the ACD process. Given the particularly vulnerable nature of the juvenile granted a conditional ACD, this author feels that it is especially important to ensure that deprivations are based only on fair and accurate factual conclusions. Thus, it is hoped that the Family Courts will elect, in their confirmed discretion, to afford the heightened procedural protections which history has proven to be indispensable in avoiding erroneous deprivations of constitutionally protected interests.

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