The Continuing Turbulence Surrounding the Parens Patriae Concept in American Juvenile Courts (Part 2)

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a. *Right to Counsel and Waiver of Counsel*

There is a distinction between certain rights of persons to make various choices and rights of persons to be protected from the choices made by others. In the first category are voting rights, right to freedom of worship, right to free expression. In the second category are the right not to be imprisoned without due process, right not to be molested, right to protection from invasion of privacy. The second type of rights requires no rationality of the person who can claim them and would include the right to counsel. Since the right to counsel is founded on the incompetency or inability of the man in the street to defend himself in court, it follows there is an even greater right to counsel when applied to juveniles in trouble with the law because of their greater incompetence and

ignorance. A lawyer's function in court is not only to present the facts in a favourable light, but also to create rights through knowledge where before they remain undiscovered.[84]

Even before *Gault*, the right to counsel of a juvenile was not denied. In *In re Poff*,[85] Curran, D. J., stated:

> ... the only possible reason for the *Juvenile Court Act* was to afford the juvenile safeguards *in addition* to those he already possessed. The legislative intent was to enlarge, *not to diminish*, these protections... Where the child commits an act, which act if committed by an adult would constitute a crime, then due process in the juvenile court requires that the child be advised that he is entitled to the effective assistance of counsel.[86]

In *Shioutakon* v. *District of Columbia*,[87] a 15-year-old was charged with using an automobile without the owner's consent. On appeal before the Court of Appeals, D. C. Circuit, Bazelon, Circuit Judge, stated:

> Our concern for the fair administration of justice impels us to hold that, in this and in similar cases in the future, the juvenile must be advised that he has a right to engage counsel or have counsel named on his behalf. And where that right exists, the court must be assured that any waiver of it is intelligent and competent.[88]

He then continued:

> We are in full accord with the objectives of the act to enable the court to deal with children in an informal manner and to encourage disposition on the basis of all relevant social data, looking toward treatment rather than punishment. Requiring the court to inform an alleged delinquent like appellant, against whom a petition has been filed, that he has a right to counsel is not, we think, incompatible with these objectives.[89]

Perhaps the leading case for the opposing view is the *Dotson* case decided before the California Supreme Court in 1956.[90] Here the juvenile was convicted of murder, burglary and robbery in the criminal court. He was then referred to the Superior Court for criminal proceedings by the juvenile court where a hearing was had without counsel, and the juvenile court found he was not "a good subjet" for rehabilitation.

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[84] A. Kleinfeld, *The Balance of Power among Infants, their Parents and the State*, (1970), 4 Family Law Quarterly 320.

[85] 135 F. Supp. 224 (U.S.D.C. District of Columbia, 1955).

[86] *Ibid.*, at pp. 225, 227.

[87] 236 F. 2d 666 (D.C.C.A., 1956).

[88] *Ibid.*, at p. 670.

[89] *Id.* For support of this right and comprehensive review of cases see Riederer, *The Role of Counsel in the Juvenile Court*, (1962), 2 Journal of Family Law 16.

[90] *People* v. *Dotson*, 299 P. 2d 875 (California Sup. Ct., 1956).

Shenu, J. stated:

> But proceedings before the Juvenile Court, even in cases where a criminal charge is pending in the Superior Court, are not criminal in nature. They are in the nature of guardianship proceedings in which the state as parens patriae seeks to relieve the minor of the stigma of a criminal conviction and to give him corrective care, supervision and training... While such minors are as much entitled to constitutional guarantees as when subjected to criminal proceedings, ...nevertheless, because of the nature of the proceedings, the denial of those requirements which have been recognized as elements of a fair trial does not necessarily deprive one of the due process of law in Juvenile Court proceedings. The fact that a minor is not represented by counsel need not be a denial of due process in the Juvenile Court... It is only when by such lack of representation of the minor undue advantage is taken of him or he is otherwise accorded unfair treatment resulting in a deprivation of his rights that it can be said he has been denied due process of law. There is nothing in the present case to suggest such deprivation or unfair treatment.[91]

In 1959 the Standard Juvenile Court Act, promulgated by the National Council on Crime and Delinquency, in cooperation with the U.S. Children's Bureau and the National Council of Juvenile Court Judges, recommended the following statutory language to assure legal representation for juveniles:

> As soon as practicable after the filing of a petition, and prior to the start of a hearing, the court shall inform the parents, guardian or custodian, and the child when it is appropriate to do so that they have a right to be represented by counsel at every stage of the proceeding. If any of them requests it but is found by the court to be financially unable to employ counsel, counsel shall be appointed by the court...[92]

Judge Eastman, founder of the U.S. National Council of Juvenile Court Judges in 1937, said:

> The judge should insist that persons appearing in the juvenile court are entitled to advice of counsel. He should see to it that children and their parents know their rights in this matter. He does not discharge his responsibility merely by not denying the right to counsel. He must point it out to those who are confused or too ignorant to know of it.[93]

In 1962, the American Advisory Council of Judges to the National Council of Crime and Delinquency asserted not only that a child has a right to counsel, but that there is such a positive benefit to be gained by having an attorney represent a juvenile that a judge should often assign counsel where the juvenile has none.[94]

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[91] *Ibid.*, at p. 877, *per* Sheny, J.

[92] *Standard Juvenile Court Act*, art. V, s. 19 (6th ed., 1959).

[93] Eastman, *The Juvenile Court Judge's Job*, (1959), 5 N.P.P.A.J. 414.

[94] *Procedure and Evidence in Juvenile Courts*, N.C.C.D. (New York, 1962).

Prior to *Gault*, while counsel may have a right to appear and represent both parent and juvenile under the due process clause of the Fourteenth Amendment, no state juvenile court law contained provisions requiring that any of the parties be advised of the right to counsel.[95] The presence of an attorney in juvenile court was a rarety.

Changes have since occurred. In St. Louis,[96] the figures were: 1965 - 314 attorneys, 1966 - 529 attorneys, 1967 - 764 attorneys, 1968 - 586 attorneys, 1969 - 799 attorneys.

In Philadelphia, only about 5% of the children appearing in juvenile court had been represented by counsel in the period immediately preceding 1967. Eight months later, in October, 1967 close to 40% were represented.[97]

In a recent survey[98] consisting of over 500 questionnaires sent to delinquent juveniles in state institutions of Pensylvania, one of the questions asked was — why did the juvenile not get a lawyer? The answers were:

i) probation officer advised against it 24%
ii) parents advised against it 17%
iii) juvenile did not think he needed one 31%
iv) other reasons 28%

Another question asked was — who obtained the lawyer? The answers were: parents 35%, friend, guardian 4%, probation officer 23%, juvenile court 38%.

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[95] Reiderer, *op. cit.*, n. 89; Ketcham, *Legal Renaissance in the Juvenile Court*, (1965), 60 Nw. U. L. Rev. 585. Two of the most advanced jurisdictions were New York and California. Under the New York law guardian system, established by the *Family Court Act* (1962), on request of the minor or his parents or guardian the court must appoint counsel if the minor is not independently able to retain a lawyer.

The *Act* requires informing the minor or parent of the right to counsel and permits the court on its own motion to make an appointment without request. In California, if the minor or parent desired counsel and is indigent, the court must make an appointment if the juvenile is charged with a criminal act which if committed by an adult would be considered a felony, and in all other cases the court may appoint counsel if requested. Where there appears to be a conflict of interest between parent and child, the court can make additional appointments. Comment, *Criminal Offenders in the Juvenile Court: More Brickbats and another Proposal*, (1966), 114 U. Pa. L. Rev. 1171.

[96] McMillan & McMurtry, *The Role of Defence Lawyer in the Juvenile Court — Advocate or Social Worker?*, (1970), 14 St-Louis U. L.J. 561.

[97] Coxe, *Lawyers in Juvenile Court*, (1967), 13 Crime and Delinquency 488.

[98] Walker, *The Lawyer — Child Relationship: A Statistical Analysis*, (1971), 9 Duquesne L. Rev. 627.

The survey found that 71% of the juveniles questioned confirmed that they were advised of their right to have a lawyer. Sixty-two per cent of these with lawyers thought the lawyers should have done more for them. Twenty-five per cent felt the lawyer had done his best.[99]

Does the juvenile have a right to waive counsel?

In the *Gault* case, there is evidence that the parent may waive this right in behalf of the child.[100] This does not seem reasonable in every instance. Sometimes the parents manifest hostility in varying degrees toward the child, or disapproval of his conduct, express or implied. In delinquency proceedings alleging "incorrigibility" or "truancy" or "running away from home", it is often

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[99] Nor should the juvenile's right to counsel depend upon the parent's willingness to engage one. Thus, in *Phillips* v. *Cole*, 298 F. Supp. 1049 (U.S.D.C., 1968), it is stated at p. 1052 per Keady, C.J., that:

> A court has the inherent duty of satisfying itself by ascertaining from any person, adult or infant, whether or not he has funds with which to hire counsel... where indigency is found to exist, and after full advice, if the accused does not waive an offer of court-appointed counsel, the court has the further duty of appointing counsel to represent him before proceeding with trial.

In *In re Haas*, 168 S.E. 2d 457 (1969), the North Corolina Court of Appeals held that facts must be elicited to show financial ability to retain counsel before a waiver of counsel can be accepted.

[100] *In re Gault*, 387 U.S. 1 (1966), at pp. 41-42.

At the habeas corpus proceeding Mrs. Gault testified that she knew that she could have appeared with counsel at the juvenile hearing. This knowledge is not a waiver of the right to counsel which she and her juvenile son had, as we have defined it. They had a right expressly to be advised that they might retain counsel and to be confronted with the need for specific consideration of whether they did or did not choose to waive the right. If they were unable to afford to employ counsel, they were entitled in view of the seriousness of the charge and the potential commitment, to appoint counsel, unless they chose waiver. Mrs. Gault's knowledge that she could employ counsel was not an 'intentional relinquishment or abandonment' of a fully known right.

The above reference to Mrs. Gault only of her knowledge of waiver and not that of the son, taken in the context of waiver for both, appears to imply that waiver by parent is a good waiver for both parent and child.

the parent who brings the charge and is the complaining witness.[101] At other times the parent is so worn out by the child's behavior that his attitude is "just get him out of here". Can such a parent be said to be acting in the best interest of the child?

Gault says that the right to counsel is not waived if there is no knowledge of this right. It is therefore the responsibility of the court to notify the juvenile of his right to counsel.

Is waiver valid if based on the juvenile's desire to save his parents' counsel fees? In a recent California decision,[102] the California Supreme Court reversed a judgment of the lower court, and held that a juvenile's waiver of counsel made to avoid or reduce parental pressure or displeasure is neither intelligent nor voluntary. The relevant California statute requires the appointment of counsel whenever the juvenile does not execute a waiver and payment thereof by parents if they can afford to do so. Whether parents can waive the juvenile's right to counsel to save themselves counsel fees is not an issue.[103]

It has also been questioned whether waiver of counsel can be supported without the presence of counsel since the juvenile may not fully appreciate the consequences in so doing. It may be questioned whether a juvenile can, by himself, knowingly and understandingly waive a constitutional right.[104]

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[101] In a study prepared by Lepstein, Stapleton & Teitelbaum, *op. cit.*, n. 56, the amount of conflict between parent and child is approportioned as follows:

	Gotham (fictional name or city just under 1 million population)	Metro (fictional name of city between 1 and 2 million population)	Zenith (fictional name of city with 5 million population)
No apparent conflict	68%	76%	89%
Implicit conflict	15%	13%	—
Explicit conflict	17%	11%	11%

[102] *In re H.*, 468 P. 2d 204 (California Sup. Ct., 1970).

[102] But *cf. Blaylock* v. *De Foor*, 171 S.E. 2d 146 (1969), where the Georgia Supreme Court held that failure of the juvenile court to provide counsel was not a denial of due process when the parent was able to engage one. In *In re L.G.T.*, 216 S. 2d 54 (Fla. Dist. C.A.) it was held that parental failure to provide counsel must not deprive the child of his constitutional rights.

[104] In *People* v. *Lara*, 432 P. 2d 202 (1967), Mosk, J. stated in the Supreme Court of California, at pp. 217-218:

> It is settled that 'the determination of whether there has been an intelligent waiver of the right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience and conduct of the accused... This rule

So much for the right to waiver. The next questions are — when does the right to counsel arise and for how long does it continue? Is the right limited to cases in which the juvenile may be institutionalized and his freedom curtailed?

The holding in *Gault* is limited to the adjudication stage. Since in adult cases before the criminal courts this right becomes applicable as soon as one is taken into custody and before questioning,[105] it seems that this right should be extended to juveniles at the earliest possible moment.

The first problem the lawyer should be facing is to consider the validity of the juvenile's arrest or his being taken into custody. Other matters which he should consider are in-custody interrogations, search and seizure procedures, identifications.[106] The role

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applies to minors as well as adults, and the age of the defendant is simply a factor, although an important one, to be weighed with many others in determining in any given case whether there has been a knowing and intelligent waiver of counsel.

See also: McMillan & McMurtry, *op. cit.*, n. 96. In Lepstein, Stapleton & Teitelbaum, *op. cit.*, n. 56, the authors questioned whether minors can "knowingly and intelligently" waive the rights guaranteed by Gault.

In a study made in California, 86 out of 90 juveniles questioned freely and voluntarily waived their constitutional rights, including the right to counsel. Of the 86, only 5 achieved an understanding score. In other words 81 out of the 86 did not fully and consciously understand their rights. The right to silence seems fairly well understood. But the right to have counsel was understood by about ¼ of the juveniles. The conclusion was that the great majority should be advised and counselled carefully if they are to understand their rights completely. Ferguson & Douglas, *A Study of Juvenile Waiver*, (1970), 7 San Diego L. Rev. 39.

It is the recommendation of the President's Crime Commission (President's Commission on Law Enforcement and Administration of Justice, Report: The Challenge of Crime in a Free Society (1967)) that counsel should be appointed as a matter of course without requiring any affirmative choice by the juvenile or his parents. Following this recommendation, one of the Family Courts in New York City has adopted the practice of saying to each child "is it acceptable that Mr. X. act as your lawyer?" (Dyson & Dyson, *Family Courts in the United States*, (1969), 9 Journal of Family Law 1.

[105] See: *Gideon* v. *Wainwright*, 372 U.S. 335 (1963); *Escobedo* v. *Illinois*, 378 U.S. 478 (1964) and the celebrated case of *Miranda* v. *Arizona*, 384 U.S. 436 (1966).

[106] The case of *Leach* v. *State*, 428 S.W. 2d 817 (Texas Ct. of Civil Appeal, 1968), points out the dangerous consequences to a child without counsel at the pre-adjudication phase. Debra Leach, aged 12, was alleged to be a delinquent child on the basis that she "habitually deports herself so as to injure

of counsel should continue through the dispositional stage as well.[107]

Gault involved an adjudication of delinquency based on a violation of law that would have been a crime if committed by an adult. The decision had nothing to do with parent-neglect cases, truancy, incorrigibility or other offences peculiar to juveniles, which may collectively be called PINS (persons in need of supervision).

It has been argued, however, that the right to counsel should not be limited to *Gault* cases.

> The label of 'delinquency' attaches regardless of the offence and the life-long stigma which all too often follows does not differentiate between institutionalization and a different disposition. Therefore, it follows that the necessity for counsel does not vary with the nature of the offence

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or endanger the morals or health of herself or others" (pp. 818-819). She was placed in detention for 2 months during which time she was questioned on numerous occasions by a probation officer concerning two runaway incidents, "her social needs and her general background" (p. 819). Whether the purpose of these interrogations was to gather incriminating evidence to write up a "social study" or to work out an informal adjustment of the case is not specified. At the hearing, the probation officier testified that after numerous conversations with the child she had formed the opinion that the child was endangering health and morals by the runaways and what took place during the runaways. The Texas Court of Civil Appeals reversed on the grounds that inculpatory statements made prior to a waiver of the privilege against self-incrimination are inadmissible.

Had this case not been appealed, the child would have been incarcerated on self-incriminating statements given prior to trial and without the benefit of counsel. See also: Ferster, Courtless & Snethen, *Separating Official and Unofficial Delinquents: Juvenile Court Intake,* (1970), 55 Iowa L. Rev. 864; McMillan & McMurtry, *op. cit.,* n. 96.

[107] Once the juvenile is found delinquent, the attorney's obligation does not end. The lawyer can also serve an important role at the dispositional stage. He can disclose factors related to the matter of treatment and suggest possible alternatives. If the attorney is aware of any programs, agencies or other sources of assistance to the juvenile, he can help to provide the child with a treatment plan which best meets his needs. Furthermore, by adequately defending his client, the attorney will gain the confidence which will make him the one best suited for explaining the court's decision to the child. Comment, *In re Gault and the persisting questions of procedural due process and legal ethics in juvenile courts,* (1968), 47 Neb. L. Rev. 558.

The defence lawyer should also perform at the dispositional stage to question the probation officer's reports, his conclusions and recommendations. See: Handler, *The Juvenile Court and the Adversary System: Problems of Function and Form,* (1965), Wisc. L. Rev. 7.

and the right ought to extend to all cases which may result in an adjudication of delinquency.[108]

Assuming that the arguments for wider use of counsel is valid, the next question is what are his functions?

The great fear is that lawyers, trained in adversary proceedings and skilled in technical procedures characteristic of other tribunals — especially the criminal courts — will convert the juvenile court into a legal arena for a battle of wits and technicalities that will lose sight of the main purpose of these courts — that of doing what is best for the child. To be truly effective, the lawyer might assume his usually accepted role of advocate at the intake and adjudicatory stages, but not at the dispositional stage when he should assist the court in deciding what is best for rehabilitation of the juvenile.

The function of a lawyer then in juvenile courts is different in kind and degree from that of the trial lawyer.[109] Recognizing these differences, the National Council of Juvenile Court Judges convened a nation-wide conference in 1964 on "the role of the

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[108] (1968), 47 Neb. L. Rev. 558, at p. 568. Paulsen, *op. cit.*, n. 79, at p. 569 had this to say:

> Is a child entitled to counsel if the court does not deprive him of liberty in the sense of committing him to an institution, but merely places him on probation? Does he have the same right if the alleged delinquency is conduct short of criminality, e.g., 'associating with immoral persons' or 'incorrigibility' and 'acting beyond the control of his parents'?
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> Both questions, in the author's view, require an affirmative answer...
>
> In spite of the theory to the contrary, an adjudication of delinquency, in itself, is harmful and should not be capriciously imposed.

[109] There are divergent views. Levin, in *The Role of the Lawyer in Juvenile Proceedings*, (1968), 39 Pa. B. A. Q., at p. 427 stated:

> My role now is not to be a probation officer, a psychiatrist or a social worker, for which professions I am certainly not qualified. My task is to be a lawyer. My obligation is to obtain as nearly as possible for my client, my concept of justice.

Some writers believe that counsel "ought to play the part of pure advocate at all stages of the proceedings". Dyson and Dyson, *op. cit.*, n. 104, at p. 58; Paulsen, *Juvenile Courts and the Legacy of '67*, (1968), 43 Indiana L. J. 527, at pp. 538-39. Others believe that the adversary role is applicable only at the fact-finding or adjudicatory stage and at disposition he should act as a member of the Court. Dyson and Dyson, *ibid.*, at p. 60. A third view is that the lawyer's role should be modified throughout as the concept of guardianship requires consideration of the child's welfare as well as his legal rights. "The role of the 'wise parent' has, in effect, been transferred from the court itself to the law guardian." Isaacs, *The Role of the Lawyer in Representing Minors in the New Family Court*, (1963), 12 Buffalo L. Rev. 501, at p. 507.

lawyer in juvenile court". By consensus, it was decided that the lawyer in juvenile court had three distinct functions:[110]

1) to advocate and defend his client's proper legal rights,
2) to be his client's legal guardian with special concern of his welfare and best interest and,
3) as an officer of the court, to be concerned with the administration of justice.

It is submitted that the lawyer can and should contribute to the rehabilitation scheme of the juvenile. To do this, he must know the child and become his "confident". He is a big brother, counsellor and friend — all in one. He must be sensitive to the child's needs. At the disposition hearing, he should cross-examine social reports, psychiatric evaluation and psychological assessments for inconsistencies, errors and omissions. Even after disposition, if the child is sent to a training school or some other institution outside his home, the lawyer should follow the progress of the child and assess the result, if any, of any rehabilitation program. He should be available at hearings for revocation of probation and revocation of after-care status (equivalent to adult parole).[111] His extended activities thus include enforcement of the child's rights after disposition. He will have the positive responsibility of seeing that the court order is carried out.

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[110] Ketcham, *op. cit.*, n. 95. In the summer of 1967, 32 juvenile probation officers throughout Missouri took part in a one-week institute to study changes in the juvenile courts as a result of the latest Supreme Court decisions. A questionnaire was submitted to assess the role of the lawyer in juvenile court. According to this assessment, the lawyer was expected not only to assume the traditional legal role, but also to be involved in welfare functions when necessary, e.g., presentation of alternative treatment programs at the dispositional phase. It was the majority opinion that the presence of a lawyer resulted in fairer treatment of the child, a more thorough job by the probation officer, and a rise in status of the court. Brennan, *The Probation Officer's Perception of the Attorney's Role in Juvenile Court*, (1970), 16 Crime & Delinquency 172.

[111] See: Johnston, *Function of Counsel in Juvenile Court*, (1970), 7 Osgoode Hall L.J. 199; Note, *Rights and Rehabilitation in Juvenile Courts*, (1967), 67 Colum. L. Rev. 281. Ferster, Courtless and Snethen, *The Juvenile Justice System: In Search of the Role of Counsel*, (1971), 39 Fordham L. Rev. 375.

In 1970, the Council of Judges of the National Council on Crime and Delinquency considered counsel at disposition so important that it recommended assignment of counsel on request, even if the juvenile waived the right at adjudication. N.C.C.D. Council of Judges, Provision of Counsel in Juvenile Courts 17 (1970).

The role of the lawyer has been well stated:

> The lawyer must remember that he is not really *defending* his client in the criminal or civil sense, but *advising* both the child and the court of the best course of action consistent with society's needs and the rights of the client. More important, since the youth is so impressionable... the conduct of both the attorney and the court may forever mark the child with either respect or hatred of the law, and thus determine his future conduct as a member of society. Admittedly the dual role of the attorney seems to be conflicting when viewed in light of his adversary function in criminal proceedings. He has a duty to zealously advocate the parents' wishes, while, at the same time, he is an officer of a court whose function goes beyond the mere adjudication of 'guilty' or 'innocent'. Although it is difficult to rationalize along traditional lines a view of the attorney's role in conjunction with *parens patriae* will resolve the conflict by seeing that the parents' desires are concurrent with the court's in deciding what is best for the child.[112]

Judge Ketcham, President of the National Council of Juvenile Court Judges, foresaw new social responsibilities for lawyers:

> The original founders of the juvenile court movement intended a balance between law and social work in the court. After more than four decades of imbalance, the original design will soon be restored. This will provide daily interchange and communication between lawyers and social workers in search of the common goal of individualized justice for each juvenile. The result should be greater understanding of the tenets and merits of each other's profession and a new respect for one another... They (juvenile courts) will become more accepted vehicles of co-ordinated legal research looking toward effective social control through law.[113]

There has been no clear guidance from the courts or legislatures as to what the role of counsel ought to be. One judicial opinion which even mentions the issue is *In re Bacon* [114] where the juveniles claimed they were deprived of effective counsel when their lawyer allowed substantive parts of the offence to be elicited from their testimony rather than from independent evidence. The California Court of Appeals rejected this argument, stating that juvenile proceedings are not criminal. As a second argument, the Court also pointed out that counsel's activities were proper under the statute which provides that "except where there is a contested issue of fact or law, the proceedings shall be conducted in an informal non-adversary atmosphere with a view to obtaining the maximum co-operation of the minor..." [115]

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[112] Walker, *op. cit.*, n. 98, at p. 647.
[113] Ketcham, *op. cit.*, n. 95, at pp. 596 and 597.
[114] 240 Cal. App. 2d 34 (1966).
[115] *Ibid.*, at p. 45.

In view of the growing importance of lawyers in juvenile courts and the special responsibilities they face, it is evident that much specialized training is required. This need, however, is far from fulfilled.[116]

b. *Trial by Jury*

Gault did not specifically state whether or not a juvenile is entitled to jury trial although the majority opinion discouraged such a practice.[117] In *Duncan* v. *Louisiana*[118] and *Bloom* v. *Illinois*[119] the U.S. Supreme Court held that for serious offences trial by jury was fundamental to the American scheme of justice.

In the former case, Justice White stated:

> Because we believe that trial by jury in criminal cases is fundamental to the American scheme of justice, we hold that the Fourteenth Amendment guarantees a right of jury trial in all criminal cases which — were they to be tried in a federal court — would come within the Sixth Amendment's guarantee.[120]
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> ...Our conclusion is that in the American states, as in the federal judicial system, a general grant of jury trial for serious offences is a fundamental right, essential for preventing miscarriages of justice and for assuring that fair trials are provided for all defendants. We would not assert, however, that every criminal trial — or any particular trial — held before a judge alone is unfair or that a defendant may never be as fairly treated by a judge as he would be by a jury.[121]

In *Bloom* v. *Illinois* Justice Fortas stated:

> I believe, as my brother White's opinion for the Court in *Duncan* v. *Louisiana* persuasively argues, that the right to jury trial in major prosecutions, state as well as federal, is so fundamental to the protection of justice and liberty that 'due process of law' cannot be accorded without it.[122]

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[116] In 1965, only 12 out of 136 accredited law schools in the United States have a course devoted exclusively or primarily to juvenile courts. One third of these schools had no coverage at all and the remainder include juvenile court law in either the criminal law or domestic relations course. Ketcham, *op. cit.*, n. 95, at pp. 591-92. In a study of lawyers for juveniles in Chicago made in 1968 it was found that these were merely "small-fee" lawyers and general practitioners. Only 2.5% of all lawyers listed in 1966 as practising in Cook County had filed appearances in juvenile court. Platt & Freedman, *The Limits of Advocacy: Occupational Hazards in Juvenile Court,* (1968), 116 U. of Pa. L. Rev. 1156.

[117] 387 U.S. 1 (1966), at p. 36.

[118] 391 U.S. 145 (1968).

[119] 391 U.S. 194 (1968).

[120] 391 U.S. 149 (1968).

[121] *Ibid.*, at pp. 157-158.

[122] 391 U.S. (1968),, at p. 212.

Despite the general wording of both judgments, it is an unsettled question as to whether or not juveniles are entitled to jury trials at all, be the acts charged of a criminal nature or not.[123]

In New York, in the *Matter of Ronny*,[124] a case prior to *Gault*, it was held that minors before the juvenile court have the same constitutional rights as adults except for the right of trial by jury, "which is balanced by our circumscribed power and the confidentiality here maintained in an effort to keep the record of a child unblemished".[125]

Commonwealth v. *Johnson*,[126] a case before the Supreme Court of Pennsylvania, was decided after *Gault* but prior to *Duncan*. Hoffman, J. delivered the judgment of the court.

> ...the right to a jury trial has never been held by the Supreme Court as an essential element of due process in State proceedings, nor does its absence deny the juvenile the opportunity to ferret out the truth. If jury trials are inserted into juvenile court proceedings, however, the juvenile court judge will be sorely limited in carrying out the special tasks which the legislature has assigned to him. The juvenile court judge, while maintaining order, must, nonetheless, be free to utilize those procedures which we have mentioned. He must be free to relieve the hearing of its austerity. He must be active in seeking the co-operation of child, parents and counsel in discovering the truth. He must be prepared to inject or vary his personality as the situation requires.

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[123] The great majority of state statutes do not make provision for juries in juvenile courts. New Jersey law specifically provides for hearings in juvenile court without juries. (N.J. Rev. Stat. § 2A 4-35, 1952). The law in Pennsylvania is similar. (Penn. Stat. Ann. Title II, § 247, 1965) California also makes no provision for trial by jury. The District of Columbia is a notable exception. "The court shall hear and determine all cases of children without a jury unless a jury is demanded by the child, his parent, guardian or the court". (D.C. Code Ann. § 16 at 2307, Supp. V 1966) The Texas Statute, Texas Laws 1943 Chapter 204 § 13, 316-17, gives juveniles the right to trial by jury. The function of the jury is to state whether or not a child is delinquent. Disposition is up to the judge alone. The court need not advise the juvenile of this right. Where a jury trial is granted on request, it is indicated that the right is seldom exercised. "In Denver (Colorado) where jury trial is allowed, there has been two requests for it in 25 years, and both requests were withdrawn before trial". Note, Kittrie, *Juvenile Delinquents: the Police, State Courts, and Individualized Justice*, (1966), 79 Harv. L. Rev. 775, at pp. 793-94. In Washington, D.C., where trial by jury is provided for juveniles by statute, there were only 2 jury trials between 1964 and 1966. Comment, *Juveniles and their Right to a Jury Trial*, (1970), 15 Vill. L. Rev. 972.

[124] 242 N.Y.S. 2d 844 (Family Court 1963).

[125] *Ibid.*, at p. 860.

[126] 234 A. 2d 9 (Penn. Superior Ct., 1967).

> The National Crime Commission Report... to which the Supreme Court frequently referred in *Gault,* contains the following significant statement: "Most states do not provide jury trial for juveniles... trial by jury is not crucial to a system of juvenile justice. As this report has suggested, the standard should be what elements of procedural protection are essential for achieving justice for the child without unduly impairing the juvenile court's distinctive values...
>
> In summary, we are in full agreement witht the holding of the Supreme Court that the constitutional safeguards of the Fourteenth Amendment guaranteed to adults must similarly be accorded juveniles. It is inconceivable to us, however, that our highest court attempted, through *Gault,* to undermine the basic philosophy, idealism and purposes of the juvenile court... Rather, we find that the Supreme Court recognized juvenile courts, while acting within the constitutional guarantees of due process, must, nonetheless, retain their flexible procedures and techniques. The institution of jury trial in juvenile court, while not materially contributing to the fact-finding function of the court, would seriously limit the court's ability to function in this unique manner, and would result in a sterile procedure which could not vary to meet the needs of delinquent childen.[127]

Three courts have applied the right to a jury trial to delinquency proceedings.

In *Nieves* v. *United States,*[128] several months before *Duncan* was decided and after *Commonwealth* v. *Johnson* and in the *Matter of Ronny* (both of which cases were referred to in the judgment) the U.S. District Court, sitting with three Circuit Judges, held that the Federal *Juvenile Delinquency Act* was unconstittutional to the extent that it required a juvenile defendant to waive his right to a jury trial in order to be proceeded against under the *Act.*

Tyler, District Judge, delivered the opinion of the Court as follows:

> The right to a jury trial is available in all non-petty federal criminal prosecutions. Notwithstanding the fact that the Federal *Juvenile Delinquency Act* seems to indicate that federal juvenile court proceedings are not to be considered criminal, we read *Gault* to require the availability of that right in any federal juvenile proceeding in which a youth is faced with incarceration for the commission of an act alleged to be violative of federal law. It is clear to us that proceeding which may lead to a juvenile's loss of liberty by incarceration, for purposes of the Sixth Amendment right to trial by jury, is in nature a criminal prosecution, and the constitutionally guaranteed right of a trial by jury

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[127] *Id.* Other cases support this view that jury trials are not essential in juvenile courts since the proceedings were civil and not criminal. *In re Johnson,* 255 A. 2d 419 (Maryland C.A., 1969); *In re Ager,* 249 N.E. 2d 808 (Ohio Sup. Ct., 1969); *In re Turner,* 453 P. 2d 910 (Oregon Sup. Ct., 1969).

[128] 280 F. Supp. 994 (N.Y. Dist. Ct., 1968).

in all federal criminal prosecutions must, therefore, accompany such a proceeding.

Referring to *Gault*, he continued:

> The privilege can only be raised to protect an individual from being forced to make disclosures which could be used against him in a criminal prosecution... In finding the privilege applicable to youths faced with juvenile court proceedings, the Court found those proceedings to be criminal prosecutions.
>
> When forced to decide whether juvenile court proceedings were civil or criminal in order to determine the applicability of a federal right which turns on the distinction, the Court did not hesitate in choosing the latter. We are convinced that this classification applies equally to the right of trial by jury in a juvenile court proceeding.[129]

A second case applying the right to a jury trial to juvenile proceedings is *Peyton* v. *Nord*.[130] There the Supreme Court of New Mexico limited the scope of its analysis of the jury issue to the state constitution. The court found that the petitioner, who allegedly violated a criminal statute, had a right to a jury trial under the New Mexico Constitution, regardless of "whether or not the Fourteenth Amendment of the United States Constitution would also require it".[131] Although the court did not rely on *Gault*, it was held that:

> If the reasoning of *In re Gault*... is applied in this case it would be difficult, in our view, to escape the conclusion that the jury trial guarantees of Article II, 14, New Mexico Constitution, as well as those of the Sixth Amendment of the United States Constitution are likewise applicable.[132]

Finally, a Rhode Island family court has stated:

> The court is... convinced that a juvenile is entitled to a trial by jury under the provisions of the Sixth Amendment to the U.S. Constitution, via the Fourteenth Amendment, and which in light of the *Gault* decision... will undoubtedly, in this court's opinion, be extended to the states.[133]

There is, however, a preponderance of support for the view that juveniles should not have the right to a jury trial.

The National Council on Crime and Delinquency states that juvenile hearings should be separate and heard without a jury.[134]

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[129] *Ibid.*, at p. 1004.

[130] 437 P. 2d 716 (1968).

[131] *Ibid.*, at p. 722.

[132] *Ibid.*, at p. 723.

[133] *In re Rindell*, 36 U.S.L.W. 2468 (Rhode Island Family Court 1968).

[134] The Standard Juvenile Court Act, art. V, § 19 (6th ed.) provides: "Cases of children... shall be dealt with by the court at hearings separate from those for adults and without a jury. The hearings shall be conducted in an informal manner and may be adjourned from time to time".

> Formal procedure is incompatible with the informal conference atmosphere required by the court to gain the confidence of child and parents, to elicit the pertinent facts of the parties, their emotional states, and the causes of the difficulty — all of which is of the utmost importance to a wise disposition of the case.[135]

It is implied here that a jury trial would increase the formality of juvenile hearings and thus impede the dispositional phase of the juvenile process. The Standard Juvenile Court Act however did not provide for separate adjudicatory and dispositional hearings as was the case in *Gault*. It is therefore possible that the statement is referring only to the dispositional phase and does not conflict with the *Gault* decision declaring that adjudicatory hearings must " ... measure up to the essentials of due process and fair treatment ... The problems of pre-adjudication treatment of juveniles, and of post-adjudication disposition, are unique to the juvenile process; hence what we hold in this opinion with regard to the procedural requirements at the adjudicatory stage has no necessary application to other steps of the juvenile process".[136]

The Children's Bureau of the Department of Health, Education and Welfare, in its Standards for Juvenile and Family Courts, does not recommend jury trials in delinquency proceedings. They contend that such proceedings are not criminal and that juries are incompatible with the informal setting of the court hearing.[137] As these recommendations were published before the *Gault* decision was announced,[138] the reasoning for denying the right to a jury trial may be questionable since *Gault* noted that certain delinquency proceedings resemble criminal adjudications and that informality will not take priority over the requirements of due process and fair treatment.[139]

The President's Commission on Law Enforcement and Administration of Justice also recommended that juveniles not be granted jury trials.[140] Because the Report was prepared prior to the *Gault*

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[135] Comment to Standard Juvenile Court Act, *ibid.*, at p. 48.

[136] *In re Gault*, 387 U.S. 1 (1966), at p. 31. See also Note, *A Due Process Dilemma — Juries for Juveniles*, (1968-69), 45 N. Dakota L. Rev. 251, at pp. 261-263.

[137] U.S. Dept. of Health, Education & Welfare, Children's Bureau, Standards for Juvenile and Family Courts 73 (1966).

[138] *Ibid.*, Supplement (March 29, 1968), at p. 1.

[139] "Procedure is to law what 'scientific method' is to science". *In re Gault*, 387 U.S. 1 (1966), at p. 21.

[140] The President's Commission on Law Enforcement and Administration of Justice Task Force Report: Juvenile Delinquency and Youth Crime 7-8 (1967). Also cited in Carpenter, *A Due Process Dilemma — Juries for Juveniles*, (1968-69), 45 N. Dakota L. Rev. 251.

decision, the Commission conceded that a portion of its report, without naming what portion, might have to be revised.[141] The Commission also relied on certain statements of Dean Paulsen.[142]

The Uniform Juvenile Court Act drafted by the National Conference of Commissioners on Uniform State Laws and approved by the American Bar Association on August 7, 1968 specifically denied jury trials without giving reasons for this view.[143]

Let us now examine the case law.

In *In re Burrus*,[144] the Supreme Court of North Carolina held that, notwithstanding *Gault* and *Duncan*, the juvenile can claim no right to trial by jury.[145]

> Absent a statute providing for a jury trial, it is almost universally held that in juvenile court delinquency proceedings the alleged delinquent has no right under the pertinent State or Federal Constitution to demand that the issue of his delinquency be determined by a jury... These cases (after citing *Gault* and *Duncan* among others) enumerate the basic requirements of due process that must be satisfied in juvenile proceedings; however, the right to jury trial is not listed among them. We have not found and counsel has not cited any case supporting the right to jury trials in juvenile proceedings. We therefore adhere to our former decisions and hold that a juvenile is not entitled to a jury trial in a juvenile court proceeding on the issue of delinquency.[146]

In 1969, the U.S. Supreme Court in *DeBacker* v. *Brainard*[147] was given an opportunity to make a clear ruling on this question.

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[141] "The Supreme Court's decision in *In re Gault*, which deals with many of the issues considered in chapter 1, was handed down while the chapter was in press, and it has not been revised to reflect that opinion..." *Ibid.*, at xi, 1.

[142] A jury trial would inevitably bring a good deal more formality to the juvenile court without giving a youngster a demonstrably better fact-finding process than trial before a judge. Paulsen, *op. cit.*, n. 79, at p. 549.

[143] Hearings under this Act shall be conducted by the court without a jury, in an informal but orderly manner, and separate from other proceedings not included in section 3. *Juvenile Court Act* § 24(a) (1968).

[144] 169 S.E. 2d 879 (1969). See also *People* v. *"Y.O. 2404"*, 291 N.Y.S. 2d 510 (1968) presently on appeal before the U.S. Supreme Court.

[145] See also *Estes* v. *Hopp*, 438 P. 2d 205 (1968). The Washington court was presented with the contention that *Gault* had eliminated the distinction between juvenile and criminal proceedings so that a juvenile was entitled to a jury trial and bail pending appeal. The court was asked to declare unconstitutional part of the Juvenile Code, Washington Rev. Code s. 13.04.030 (1939) providing that juveniles "shall be tried without a jury" when under the jurisdiction of the juvenile courts. This argument was dismissed by the court. See review of this case in (1969), 44 Washington L. Rev. 481.

[146] 169 S.E. 2d, at p. 886.

[147] 396 U.S. 28 (1969).

The majority of the judges did not do so on a technicality[148] although at least two of the dissenting justices felt strongly about a juvenile's right to trial by jury.[149]

In *In re Terry*[150] the Supreme Court of Pennsylvania, after considering *Gault*, *Kent* and *Duncan*, decided that the Constitution of the United States does not give juveniles the right to insist on a jury trial provided the due process rights in *Gault* are observed[151] together with three others, namely,[152]

1) the right to have a transcript of the hearing,
2) the right of appellate review and
3) the right to be declared delinquent only upon evidence demonstrating that the facts on which the delinquency is based are true beyond a reasonable doubt.

Roberts, J., delivering the opinion of the court, felt that in the light of all the constitutional safeguards above-mentioned, the juvenile is sufficiently protected. To add a further requirement,

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[148] 'Because appellant's juvenile court hearing was held on March 28, 1968 — prior to the date of the decisions in *Duncan* and *Bloom* — appellant would have had no constitutional right to a trial by jury if he had been tried as an adult in a criminal proceeding. It thus seems manifest that this case is not an appropriate one for considering whether the Nebraska Statute which provides that juvenile hearings be 'without a jury'... is constitutionally invalid in light of *Duncan* and *Bloom*'. *Ibid.*, at p. 30.

[149] Justice Black stated: 'I can see no basis whatsoever in the language of the Constitution for allowing persons like appellant the benefit of those rights (granted in *Gault*) and yet denying them a jury trial, a right which is surely one of the fundamental aspects of criminal justice in the English-speaking world... Depriving defendants of jury trials prior to *Duncan* violated the Constitution just as much as would similar deprivations after that decision...' *Ibid.*, at pp. 33-5. Justice Douglas also dissented. 'Given the fundamental nature of the right to jury trial as expressed in *Duncan* and *Bloom*, there is, as I see it, no constitutionally sufficient reason to deprive the juvenile of this right. The balancing of the rehabilitative purpose of the juvenile proceeding with the due process requirement of a jury trial is a matter for a future Constitutional Convention.' *Ibid.*, at p. 38. Justice Douglas speaks of the "rehabilitative purpose" of the juvenile court. Since such purpose is not the primary concern of the court at the adjudication stage, his support of jury trials could be restricted to that stage without detracting from the intent and purpose of his argument.

[150] 265 A. 2d 350 (1970). At the time of writing, this case is on appeal to the U.S. Supreme Court.

[151] These are: 1) right to adequate and timely notice of charges; 2) right to counsel; 3) right to confrontation and cross-examination; 4) privilege against self-incrimination.

[152] 265 A. 2d, at p. 354.

that of trial by jury, might well destroy "the traditional character of juvenile proceedings".

> ...the right to trial by jury is the one which would most likely be disruptive of the unique nature of the juvenile process. Utilization of the other due process rights in the juvenile courts will not require the judge to abandon traditional practices; the hearing can still be conducted with some flexibility and with patience and understanding. A jury trial,... would probably require substantial alteration of the traditional practices... the juvenile court judge would of necessity have to concern himself much more with the technicalities of proper procedure, and would have a vastly reduced capacity to guide and mold the hearings. It is our view that the procedural rights which we have held applicable in the juvenile process will give the juveniles sufficient protection, and there is no need to add an element, the right to a trial by jury, which might well destroy the traditional character of juvenile proceedings.[153]

In a dissenting opinion, Cohen, J. argued against all four elements referred to in the majority opinion distinguishing the juvenile system and the criminal court. He felt that *Duncan* should apply in both courts and that at the adjudicatory stage trial by jury should not be refused to juveniles.[154]

In re D.,[155] a judgment of the New York Court of Appeals supported *In re Terry*. Scileppi, J., in a bare majority judgment of four judges to three, stated:

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[153] *Ibid.*, at p. 355.

[154] Courts today appear to be of two minds with respect to the rights of juveniles. The United States Supreme Court decisions in *Gault* and *Winship* make clear that the essentials of due process and fair treatment must be applied to the adjudicatory stage of delinquency proceedings, but in *Winship* the Court was careful to point out that its holding would not destroy the beneficial aspects of the juvenile process. Thus due process and *parens patriae* have come into direct conflict... The trend of the United States Supreme Court decisions, however, appears to be away from *parens patriae* in the adjudicatory stage, and the right to trial by jury is an essential part of the adjudicatory process. I do not see valid reasons why *Duncan* should not apply to the juvenile court system. *Ibid.*, at p. 358.

Under California Statute, juvenile offenders are grouped under three different sections. Section 600 covers dependent children, the destitute, objects of cruelty or neglect. Section 601 cases are juveniles with delinquent tendencies, those that show non-criminal anti-social behavior, e.g., persistently or habitually refusing to obey their parents, beyond the control of their parents, habitually, truant. Section 602 deals with children who violate laws defined as crimes for adults. Because of procedural problems and practical problems of overcrowding the court calendar, these sections may soon be repealed or consolidated. See Comment, *Juvenile Law — a Potential for California Change*, (1971), 2 Pacific L. J. 737.

[155] 261 N.E. 2d 627 (1970).

> ...trial by jury, in cases involving juvenile delinquents, is neither constitutionally required nor desirable. To require a jury trial in such proceedings 'would inevitably bring a good deal more formality to the juvenile court without giving the youngster a demonstrably better fact-finding process than trial before a judge' (President's Commission on Law Enforcement and the Administration of Justice: Task Force Report on Juvenile Delinquency and Youth Crime, pp. 38-40 (1967)); ... Moreover, it would make delinquency adjudications unwieldy and disruptive since the Family Court is not structured to handle jury trials. This view is consonant with the majority of most State courts which have passed upon the issue since *Gault* was decided...
>
> Therefore, we see no compelling reason why we should burden the court with a procedural requirement which would make such adjudications significantly time consuming, cumbersome, and result in a loss of secrecy which has always been deemed most desirable, since a jury trial would not necessarily afford the youngster a better fact-finding process.[156]

A commentator has recently sharply criticized this judgment.[157] The reasons for judgment "express an overriding desire by the Court to maintain an efficient and effective system of juvenile court administration, but they do not express any principles of law. Indeed, this Court has, in the denial of a right to trial by jury, stemmed the evolving due process concepts of *Gault* and *Winship* for the sake of what appears to be administrative convenience".

It was further suggested that at the fact-finding or adjudicative phase, the court could have allowed trial by jury without destroying the raison d'être of the juvenile court system. The traditionally important question "what can we do for the child?" should be left to the dispositional phase. "The heart of the actual fact-finding hearing should be the question: 'Did the child commit the act?' Allowing a trial by jury at the option of the child will certainly not hinder the settling of this question... Indeed, the formality of a jury trial and its proceedings may help settle the question, perhaps more justly".[158]

The President's Commission has observed:

> There is increasing evidence that the informal procedures, contrary to the original expectation, may themselves constitute a further obstacle to effective treatment of the delinquent to the extent that they engender

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[156] *Ibid.*, at p. 630.

[157] Comment, *Juvenile Offenders — Right to Jury Trial not Constitutionally Required*, (1971), 35 Albany L. Rev. 849.

[158] *Ibid.*, at pp. 854-855.

> in the child a sense of injustice provoked by seemingly all-powerful and challengeless exercice of authority by judges and probation officers.[159]

It has been argued that the purpose of an adjudicatory hearing is to make an accurate determination of the facts and not to begin rehabilitation of the minor based on the preconceived notion that he has committed the alleged act. To accurately determine the facts, well established rules and procedures should be followed. "Trial by jury is not a matter of form — like a judge's robe or gavel — but of substance, the product of long historical experience and expressing a profound judgment by our legal system about the means of adjudicating criminal behavior".[160]

A jury trial at the adjudicatory stage of delinquency proceedings would not affect the flexibility of the dispositional phase and would not interfere with the judge's relationship to the minor in making a *parens patriae* type of disposition.

In *In re Winship*, Justice Harlan stated:

> There is always in litigation a margin of error, representing error in fact finding, which both parties must take into account.[161]

It has been argued that trial by jury provides for this margin of error and increases the probability that one juror may not be convinced "beyond a reasonable doubt". It has therefore been asked that if this likelihood of doubt is provided by the U.S. Constitution for adults in the criminal courts, why should it be denied to youthful offenders? [162]

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[159] "In theory the court's operations could justifiably be informal, its findings and decisions made without observing ordinary procedural safeguards, because it would act only in the best interest of the child. In fact it frequently does nothing more or less than deprive a child of liberty without due process of law..." The President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society 81 (1967) cited in Carpenter, *op. cit.*, n. 140, at p. 270.

[160] Dorsen & Rezneck, *In re Gault and the Future of Juvenile Law*, (1967), 1 Family Law Quaterly 1, at p. 23.

[161] 397 U.S. at p. 358 (1969) quoting Mr. Justice Brennan in *Speiser* v. *Randall*, 357 U.S. 513 (1958), at p. 525.

[162] Cohen, J. dissenting in *In re Terry*, 265 A. 2d 350 (1970), at p. 357:

> Informality and flexibility are not ends in themselves: the purpose of the adjudicatory stage is to determine whether the defendant is a delinquent, and as some loss of informality and flexibility will not have a great effect on whatever rehabilitation the juvenile system can accomplish, I do not see an alteration of the "traditional character of juvenile proceedings" as so weighty a factor as to render the right to a jury

c. *Right to Treatment*

The *parens patriae* philosophy of the juvenile court is well summarized by the Michigan Statute which states that the law for juveniles is to be liberally construed to advance "the child's welfare and the best interest of the States".[163] Thus, implicit in this thesis lies the responsibility of the State, through its court, to see to it that the children are receiving proper treatment towards rehabilitation.

The right to treatment was first dramatized in the United States in 1960. Conceived as a right for the protection of mental patients, the right to treatment was advanced by Dr. Morton Birnbaum, who urged that judicial safeguards against improper institutionalization should extend to the post-commitment stage. He argued that the process is not limited to determination of mental illness and compliance with admittance procedures, but extends to a determination of whether the individual "actually does receive adequate medical treatment so that he may regain his health, and therefore his liberty, as soon as possible".[164]

In 1967, the Pennsylvania General Assembly introduced "The Right to Treatment Law of 1968". It called for a Mental Treatment Standards Committee charged with preparing minimum standards of treatment applicable in the State's mental institutions. A Patient Treatment Review Board was to be set up "to receive, hear and investigate petitions filed on behalf of patients who allege they are not receiving maximum standards of treatment".[165]

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trial less fundamental in the juvenile system than in the ordinary criminal process.

See also Comment, *Criminal Offenders in the Juvenile Court: more Brickbats and Another Proposal,* (1966), 114 U. of Pa. L. Rev. 1171; *Recent Decisions — Right to Trial by Jury,* (1971), 9 Duquesne L. Rev. 681; Boches, *Juvenile Justice in California: A Re-evaluation,* (1967), 19 Hastings L.J. 47.

If jury trials are reasonable in juvenile courts, should not their composition be restricted to the same age group as the minor on trial following the principle of "a jury of his peers"? In Fairbanks, Alaska, a 12-man jury was selected for the trial of a juvenile, where its members were from 16 to 18 years old. After the trial, the Attorney-General directed that henceforth the age of jurors shall be not less than 19. "We've decided that this case shall remain unique, and do not intend to stipulate to trial by juveniles in this manner again. The Toronto Star, November 26, 1971, p. 64.

[163] Mich. Stat. Ann. § 27 — 3178 (598.1) (1962).

[164] Birnbaum, *The Right to Treatment,* (1960), 46 A.B.A.J. 499.

[165] According to Kittrie, *Can the Right to Treatment Remedy the Ills of the Juvenile Process?,* (1968), 57 Georgetown L. J. 848 ten states and the District of Columbia have recognized a statutory right to treatment. Other jurisdic-

There are a number of cases in which the facilities for rehabilitation of juveniles in detention institutions were examined.

In 1954 [166] the U.S. District Court, D.C. Circuit, was faced with the challenge of a juvenile delinquent of his committal to an institution for the rehabilitation of "youthful offenders" who were regularly convicted of crime but thought to be amenable to rehabilitation. The Court examined these facilities and compared them, not unfavourably, with those assigned to juveniles. It did not believe, however, that a juvenile should be placed there. Laws, Chief Judge, delivered the opinion of the Court:

> It is true that in both juvenile court and criminal proceedings a person may be deprived of his liberty. It is likewise true in the modern administration of penal institutions increasing emphasis has wisely been placed upon the rehabilitation and training of prisoners as essential elements in a program for crime prevention and correction. Therefore some of the features of penal institutions resemble those of educational, industrial and training schools for juvenile delinquents. The basic function and purpose of penal institutions, however, is punishment as a deterrent to crime. However broad the different methods of discipline, care and treatment that are appropriate for individual prisoners according to age, character, mental condition and the like, there is a

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tions have given tacit recognition of this right.

The right to treatment has been noted by the courts. In *Miller* v. *Overholser*, 206 F. 2d 415 (1953), at pp. 419-420, the U.S. Court of Appeals, D.C. Circuit, stated:

> We think it has been settled since the decision of the Supreme Court in *In re Bonner*, 151 U.S. 242 (1894), that the writ (of habeas corpus) is available to test the validity not only of the fact of confinement but also of the place of confinement... If the appellant's allegations and evidence in respect to the conditions of his confinement be true... he is illegally confined where he is confined.

In *Commonwealth* v. *Page*, 159 N.E. 2d 82 (1959), the Massachusetts Supreme Court examined the facilities for treatment of sexual offenders. The defendant pleaded that while such a center was required by statute, it did not in fact exist. The court ruled that the remedial aspect of such confinements must have a foundation in fact. It was stated at p. 85:

> ...confinement in a prison which is undifferentiated from the incarceration of convicted criminals is not remedial so as to escape the constitutional requirements of due process.

In *Sas* v. *Maryland*, 334 F. 2d 506 (1964), the Court of Appeals, 4th Circuit, extended the judicial inquiry from the existence of a separate facility to the availability of actual treatment. The appeal was remanded to the District Court to determine whether the state institution for defective delinquents "does in fact furnish treatment for treatable defective delinquents as distinguished from other lawbreakers which would support the Act under the equal protection clause of the Fourteenth Amendment". (At p. 509).

[166] *White* v. *Reid*, 125 F. Supp. 647 (1954).

> fundamental legal and practical difference in purpose and technique. Unless the institution is one whose primary concern is the individual's moral and physical well-being, unless its facilities are intended for and adapted to guidance, care, education and training rather than punishment, unless its supervision is that of a guardian, not that of a prison guard or jailor, it seems clear a commitment to such institution is by reason of conviction of crime and cannot withstand an assault for violation of fundamental Constitutional safeguards...
>
> In this jurisdiction, this Court and not the Juvenile Court is the Court of competent jurisdiction designated for trial of a felony. A Juvenile Court hearing in respect of a juvenile is not a criminal trial, and a commitment is not a conviction and punishment for a felony.[167]

In *Creek* v. *Stone*[168] the juvenile brought a *habeas corpus* petition alleging that while detained in the receiving home for children there were no facilities for psychiatric care. Though the issue became moot as he was later transferred to the National Training School, the Court noted that:

> ...in general, *habeas corpus* is available not only to an applicant who claims he is entitled to be freed of all restraints, but also to an applicant who protests his confinement in a certain place, and under certain conditions, for confinement.[169]

The Court continued:

> But the purpose stated in 16 D.C. Code Section 2.316(3) — to give the juvenile the care 'as nearly as possible' equivalent to that which should have been given by his parents — establishes not ouly an important policy objective, but, in an appropriate case, a legal right to a custody that is not inconsistent with the parens patriae premise of the law... But where, as here, a claim is presented to that court by a juvenile alleging a need for treatment which is not being furnished, the fact that the custody is 'interim' as opposed to 'final' does not end the matter. The Juvenile Court, when presented with a substantive complaint, should make an appropriate inquiry to insure that the statutory criteria, as applied to that particular juvenile, are being met.[170]

In re Elmore[171] was a decision in the same court a few days later. It was stated that:

> In *Creek* we carefully consider the *Juvenile Court Act,* noting a clear legislative purpose to establish a professionally equipped, specialized court to deal with the myriad of situations coming before it. We pointed out that the Juvenile Court is armed with broad statutory powers to the end that the community's resources may be marshaled to provide individualized care and treatment... Recognizing that full and imaginative use of these powers enables the Juvenile Court to fashion a dispositional

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167 *Ibid.,* at p. 650.
168 379 F. 2d 106 (1967).
169 *Ibid.,* at p. 109.
170 *Ibid.,* at p. 111.
171 382 F. 2d 125 (1967).

> decree tailored to meet the peculiar needs of a particular child, we deemed that court obligated to conduct an 'appropriate inquiry' when presented with a 'substantial complaint' concerning commitment.
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> In this case, we have on the one hand an explicit finding by the Juvenile Court that petitioner needs 'psychological and/or psychiatric care to meet his particular needs' while, on the other, a claim that petitioner is receiving no treatment whatever. We think this presents, within the meaning of *Creek*, a 'substantial complaint' calling for appropriate inquiry.[172]

It is unfortunate that there has been growing dissatisfaction with the existing treatment facilities in the American juvenile system. However, a commentator [173] concedes that "the ability of the behavioral sciences, now or in the future, to attain the goal of rehabilitation is a moot question if society is unwilling or unable to commit the economic resources that the project requires".

In 1958, a Juvenile Court Judge made the following observations with respect to staff:

> For the unhappy judge who can expect virtually no help in determining the basic pattern of the child's behavior because of his court's lack of a trained staff, for the unfortunate jurist who knows that his state training school represents naked detention and nothing better, even perhaps something worse, there can be but one governing principle: to resolve every uncertainty in favor of the child and his home; to commit solely on the basis of unmistakable need for community protection. Lacking on the one hand the facts essential to accurate diagnosis and denied on the other a good training program for delinquents, the judge dares not assume that any beneficial results can accrue from his action save the protection of the community which enforced segregation guarantees. This does not minimize the importance which should be attached to this primary court responsibility, but makes certain that the inherent reasons underlying the decision to commit are understood by all, including the judge.
>
> How long such a judge and the community he serves must deny themselves the hope of truly helping children would depend on how long it takes to demonstrate to the citizens concerned that there is no magic, per se, in the *Juvenile Court Act*. Indeed, in some respects, it is far more dangerous than no act at all, inducing as it easily may a sense of complacency concerning a program which, in fact, has never emerged from the statute books.[174]

Ruben,[175] writing in 1970, reports a case in California where a judge closed a juvenile institution because he was disgusted with

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[172] *Ibid.*, at pp.126-127.

[173] Kittrie, *op. cit.*, n. 165.

[174] Dill (Juvenile Court Judge), *When Should a Child be Committed?*, (1958), 4 National Probation & Parole A.J., pp. 5-6.

[175] Sol Ruben in Crime & Delinquency (3rd ed., 1970), at p. 40. Also quoted by Cooley, *Court Control over Treatment of Juvenile Offenders*, (1971), 9 Duquesne L. Rev., at p. 629.

the absence of sound treatment. The children had been neglected and abused in the institution. Most were simply sent home by the judge, others placed in foster homes. The police predicted a crime wave. It never came. Six months later, out of the 140 children taken out of the institution, only 10 were in trouble again.

It has been pointed out that the right to treatment could find a basis in the U.S. Constitution's Eighth Amendment prohibition of cruel and unusual punishment.[176] As was noted by Chief Judge Bazelon in *Rouse* v. *Cameron*, "indefinite confinement without treatment of one who has been found not criminally responsible may be so inhumane as to be 'cruel and unusual' ".[177]

It has been further suggested that such a right, if firmly established, must be contained within certain criteria which should be carefully formulated through legislative, judicial and executive interaction. Sufficiency of treatment might be measured by a number of criteria to be determined by existing community resources, by examining the most advanced programs elsewhere, or by deciding what the natural parent would have selected for his child if he were financially able to do so. The treatment criteria should not be the function of the judiciary alone, but must be worked out from the bottom up and would include the considered judgments and research of psychologists, psychiatrists and experts in the social sciences.

Nor should the courts remain the exclusive enforcement machinery of the right to treatment. While juvenile court judges might assume some responsibility for the effectiveness of the treatment by making judicial visits and inspections of treatment facilities, preferably unannounced and at irregular intervals, at which times they might conduct informal conversations with the juveniles without the presence of supervisors,[178] boards of visitors might be established to supervise treatment programs, ombudsmen might be appointed to hear complaints.[179]

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[176] U.S. Constitutional Amendment VIII.

[177] 373 F. 2d 451 (1966). Judge Ketcham, President of the American Juvenile Court Judges Association, has described the right to treatment as the price tag without which the powers of *parens patriae* may not be exercised. Ketcham, *op. cit.*, n. 33, at p. 100.

[178] He also reports that the District of Columbia Courts inquire into absence of facilities for needed psychiatric care in the local juvenile detention quarters. New York releases juveniles where institutionalizing them promises no rehabilitation.

[179] Kittrie, *op. cit.*, n. 123.

d. *Right to Bail*

The Constitution of the United States does not expressly grant the right to bail. The Eighth Amendment provides that "excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted".[180] Federal law has long maintained that in all but capital cases (where bail is discretionary) a person accused of crime has an absolute right to be admitted to bail.[181] Prior to the enactment of juvenile court statutes, this same right existed for minors accused of crime.

Juvenile court statutes have treated the subject of bail with everything from affirmative approval through silence and neglect of any provisions for bail to express disapproval.[182] But where express provisions exist, it is usually provided that the parents of the minor be immediately informed after apprehension and the minor released to their custody if at all feasible.[183]

Section 10 of the *Louisiana Act 169* (1944) provides:

> Whenever any officer takes a child into custody, he shall, unless it is impractical or has been otherwise ordered by the court, accept the written promise of the parent, tutor or person having custody of the child to bring the child to the court at the time affixed. Thereupon such child may be released to a parent, tutor or other person having care of the child. The court may require a bond from such person for the appearance of the child; and upon failure of such person to produce said child when directed to do so, the court may, in addition to declaring the bond forfeited, punish said person as in case of contempt.[184]

The provisions for release are not mandatory. The use of the word "may" gives the judge some discretion in deciding whether to return the child to his home or keep him in care of the court pending the hearing.

In *State* v. *Franklin*,[185] a juvenile, 16 years old was charged in the juvenile court for the parish of Orleans for stabbing a 15-year-old

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[180] U.S. Constitutional Amendment VIII.

[181] *Stack* v. *Boyle*, 342 U.S. 1 (1951). The same right is guaranteed in all but 7 states. See: Wald & Freed, *Bail in the United States*, (Z.N. 8, 1964).

[182] 9 states expressly endorse the bail provisions found in criminal courts, 3 states imply there is right to bail, 3 states expressly state that bail provisions do not apply, 8 states imply the same, the remaining 27 states and the District of Columbia have no provisions dealing with the question. See: *Legislation: The Right to Bail and the Pre-Trial Detention of Juveniles Accused of "crime"*, (1965), 18 Vand. L. Rev. 2096.

[183] In Massachusetts, bail is available in juvenile cases. Mass. Gen. Laws Ann. Ch. 119 § 67 (1958).

[184] See: Jackson, *The Right to Bail & Suspensive Appeal in the Louisiana Juvenile Courts*, (1966), 20 Tul. L. Rev. 363.

[185] 173 So. 137 (1937).

boy with a knife. He was arrested and placed in the municipal colored boys home pending trial. The boy's lawyer sought bail pending proceedings and was refused. On appeal, writs were granted by the Louisiana Supreme Court which declared that "the *Act* would be unconstitutional if interpreted as denying juveniles the right to bail pending trial". The court reasoned that the juvenile courts were established to show more consideration to the juvenile and not to deprive him of any of his constitutional rights. It was stated that a finding of delinquency will usually mean the necessity of a change of custody of the child, but prior to such finding, he is entitled to his constitutional right to bail.

Other states which have created juvenile courts have not followed any uniform rule with respect to bail. Alabama[186] has essentially the same provisions as Louisiana. The Delaware *Juvenile Court Act* provides:

> Any child proceeded against, as in said sections provided, shall have the right, given to any person, to give bond or other security for its appearance at trial.[187]

Most commentators are of the opinion that bail should not be a matter of right in a juvenile case.[188] Irregardless of whether the proceedings are civil or criminal, a child in trouble may be in need of care immediately and that care may not be forthcoming by a simple release to its parents. If the parents are the source of the difficulty, discharge to them will not be wise in every case. The decision not to grant bail, however, should be subject to review.[189]

It has been suggested that if the judge must determine whether the juvenile is to be detained or released then he should be given the tools to help him in arriving at a just and fair decision in serving the best interests of the child. One of these tools is a screening center supplied with trained and adequate personnel who will gather information about the juvenile, his parents, his background, his individual needs for treatment and supervision. Supplied

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[186] Title 13 Alabama Code 1940.

[187] Delaware Rev. Code s. 4336 (1935).

[188] A telling argument against conditioning a child's release upon bail is the fact that the basic policy of the juvenile court "which is to provide detention only for those in need of detention" would be exchanged "for a policy which would provide detention only for those in need of money". Katz, *A Reappraisal of Juvenile Delinquency Proceedings in New York,* (1969), 34 Albany L. Rev. 122.

[189] Paulsen, *op. cit.*, n. 79. In a letter to the Harvard Law Review January 4, 1966, Judge Howard G. Brown wrote that while a review of the detention decision before a judge is available, it is seldom requested.

with this expert data, the judge can then make a calculated and wise decision. The second tool is the availability of detention centers, well supplied with equipment and trained personnel to make the child comfortable and feel at home. Since he is usually still at school, continuation of his studies while in detention must be assured.[190]

e. *Hearsay Evidence*

Opinion is divided as to whether or not hearsay evidence should be allowed in juvenile courts. In *People* v. *Lewis*,[191] it was held that:

> The customary rules of evidence shown by long experience as essential to getting at the truth with reasonable certainty in civil trials must be adhered to... Hearsay, opinion, gossip, bias, prejudice, trends of hostile neighborhood feelings, the hopes and fears of social workers, are all sources of error and have no more place in children's courts than in this court.[192]

In *In re Sippy*,[193] the Municipal Court of Appeals for the District of Columbia reversed a judgment of the juvenile court finding the child to be habitually beyond the control of the parent and committing the child to a school for an indefinite period. The only evidence was two reports, the first made by a lawyer reporting a conversation he had with the child's physician, and the second a report of a social worker containing statements allegedly made to the worker by the same doctor.

Clayton, Chief Judge, stated that while the juvenile court may conduct the hearing in an informal manner, "in a case like this where liberty is involved, we think a respondent is entitled to insist that the facts be presented by witnesses who are under the solemnity of an oath".[194]

Hearsay evidence alone is not sufficient to charge a juvenile. "Certain it is that without the incompetent hearsay evidence above-

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[190] See *Legislation: The Right to Bail and the Pre-Trial Detention of Juveniles Accused of "crime"*, (1965), 18 Vand. L. Rev. 2096; Comment, *In re Gault & the Persisting Questions of Procedural Due Process & Legal Ethics in Juvenile Courts*, (1968), 47 Neb. L. Rev. 558; Katz, *op. cit.*, n. 188; *Recent Developments: Criminal Procedure — Juvenile Delinquents: No Right in Delinquency Proceedings to Trial by Jury or Bail on Appeal — Estes* v. *Hopp*, 438 P. 2d 205, (1969), 4 Washington L. Rev. 481.

[191] 183 N.E. 353 (1932).

[192] *Ibid.*, at p. 355, *per* Crouch, J.

[193] 97 A. 2d 455 (1953).

[194] *Ibid.*, at p. 458 *per* Cayton, C.J.

recited, there was not enough left to support the charge and nothing to justify the order..." [195]

In *In re Mont*,[196] Rhodes, J. stated:

> It is argued on behalf of appellant that he was adjudicated delinquent and committed on hearsay testimony in violation of the fundamental rules of evidence. Appellant freely admitted facts showing his violation of law and his delinquency, and the court's finding of delinquency is therefore supported by competent evidence of record. It was not necessary to rely upon hearsay testimony to support the basic finding of delinquency, and it does not appear that hearsay testimony or ex parte reports were used by the court in making its determination and adjudication. As the basic finding of delinquency was supported by competent evidence, the admission of hearsay testimony would not constitute reversible error.[197]

In *Ballard* v. *State* [198] the Texas Court of Civil Appeals reversed a county court decision (sitting as a juvenile court) sending a juvenile to the state's school for boys for causing damage to a sewer pipe belonging to the city. The judgment erred in admitting hearsay evidence "of a material nature".

> The accused in such cases should be faced by the witnesses who give evidence against him and should be permitted to hear such evidence and have an opportunity to cross-examine the witnesses. The evidence given in such cases should also be confined to the charges alleged in the petition filed in the case. We are of the opinion, therefore, that the trial court erred in considering statements of a material nature made to him out of the presence and hearing of appellants. It was likewise error for the trial court to hear and consider hearsay evidence of a material nature and to hear and consider evidence about extraneous matters and misconduct of the child with which it was not charged in the petition presented in the case...
>
> The *Act* gives the trial court many discretionary powers, but its powers are not unlimited and they should be cautiously exercised.[199]

Whitlatch, J. said in 1967: [200]

> It is the writer's practice in juvenile proceedings to state that everything in the reports given by policemen and social workers which is not competent will be considered as would the opening statement of counsel, that is, not as evidence but rather as being what the witness expects the competent evidence to show, and that it is later supported by competent, sworn testimony. Unquestionably, hearsay has no place in

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[195] *Ibid.*, at p. 459.
[196] 103 A. 2d 460 (1954).
[197] *Ibid.*, at p. 463.
[198] 192 S.W. 2d 329 (1946).
[199] *Ibid.*, at p. 332.
[200] Whitlatch, *The Juvenile Court — a Court of Law*, (1967), 18 Western Reserve L. Rev. 1239.

> any juvenile court proceeding and there is no reason to believe that juvenile court judges do not share the legal profession's traditional attitude toward hearsay.[201]

In *In re Mantell*,[202] the Supreme Court of Nebraska held that hearsay evidence cannot alone decide the guilt of a juvenile. Mr. Krell (the social worker) then proceeded to make a detailed statement with regard to the defendant not under oath all of which was clearly and admittedly hearsay. Others were allowed to make statements not under oath and which likewise were hearsay.

It was stated that:

> No witness was sworn and nothing except hearsay information was adduced at the hearing... The effect of the adjudication in this case was to deprive the defendant of his liberty... Can it be said that it (the Legislature) intended that trials should be held without the benefit of testimony of witnesses given under the sanction of oath or affirmation?... We think not.[203]

Some courts have allowed hearsay evidence. In *re Holmes*[204] a juvenile was charged with operating a vehicle without a permit and taking part in a church robbery. On the latter charge, the juvenile court judge permitted a detective to testify that Holmes had taken part according to the signed confession of another. The court did not find it necessary to see the confession or question the confessor.

On appeal to the Supreme Court of Pennsylvania, Horace Stern, C. J., stated:

> Appellant complains that the court received certain hearsay testimony in regard to the charge that he was implicated in the armed robbery of the church... from the very nature of the hearings in the Juvenile Court it cannot be required that strict rules of evidence should be applied as they properly would be in the trial of cases in the criminal court. Although, of course, a finding of delinquency must be based on sufficient competent evidence, the hearing in the Juvenile Court may, in order to accomplish the purposes for which juvenile court legislation is designed, avoid many of the legalistic features of the rules of evidence customarily applicable to other judicial hearings.[205]

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[201] *Ibid.*, at p. 1248.

[202] 62 N.W. 2d 308 (1954), *per* Yeager, J.

[203] *Ibid.*, at p. 311. In this case the question raised was whether or not the child's casework report can be used in adjudication. The dangers to a child are that he has no means of cross-examination. People may be more willing to whisper damaging statements to a caseworker than to testify in court.

[204] 109 A. 2d 523 (1954).

[205] *Ibid.*, at p. 526.

Hearsay evidence, though not conclusive, "if it is admitted without objection and is relevant and material to the issue, is to be given its natural probative effect and may be received as direct evidence".[206]

This judgment is not a strong case supporting hearsay evidence in court since the Juvenile Court judge did not decide that the juvenile had in fact participated in the robbery. "Moreover, there is nothing in the record to indicate that the judge who presided in the Juvenile Court acted in the final disposition of appellant's case on the basis of any conclusion that appellant had in fact participated in the armed robbery of the church".[207]

Where hearsay evidence has been admitted, and there is sufficient other evidence to support the same conclusion, the presumption seems to be that the court disregarded the hearsay evidence. The unfortunate flaw here is that the court might have actually considered the hearsay evidence in reaching a conclusion. Where there is a lack of findings of fact or conclusions of law, it becomes especially difficult to ascertain whether the Juvenile Court judge had in fact disregarded hearsay evidence.

In *Campbell* v. *Siegler*,[208] the Supreme Court of New Jersey ruled that while the Juvenile Court may have erred in admitting certain hearsay evidence, the testimony was in no way prejudicial to the prosecution so the appeal failed on that ground.

In *In re Brown*,[209] the Texas Court of Civil Appeals ruled that while hearsay evidence was introduced in the lower court, "there is sufficient evidence to support the court's judgment without the aid of such inadmissible testimony. Unless the contrary is shown, it will be presumed that the court disregarded the same in rendering its judgment".[210]

While there were no findings of fact or conclusions of law filed by the court, from the remarks of the judge the appeal court ruled that: ... the court, in effect, said that he did not consider any hearsay evidence in reaching his decision".[211]

In *State* v. *Christensen*,[212] the Supreme Court of Utah likewise

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206 *Id.*
207 *Id.*
208 162 A. 154 (1932).
209 201 S.W. 2d 844 (1947).
210 *Ibid.*, at p. 847 *per* Lester, C.J.
211 *Id.*
212 227 P. 2d 760 (1951).

did not reverse the lower court on the grounds of hearsay evidence when there was other evidence available.[213]

In *In re Gonzales*,[214] the Court of Civil Appeals of Texas held that "evidence of probative value" is admissible in juvenile court, thus allowing a great deal of latitude in admitting uncorroborated evidence.[215]

The position of the Superior Court of Pennsylvania with respect to hearsay evidence in Juvenile Court proceedings has been further clarified in the recent case of *In re Farms*.[216] The question for the court to decide was — is it erroneous to preclude an inquiry into statements made by a principal witness to the police when such statements may be contradictory of that witness' testimony?

The court ruled that in adult court an error would have been committed by excluding the prior statement and that therefore it was erroneous to do so in Juvenile Court. In this particular instance such admission was helpful to the juvenile as it showed the inconsistency of the witness who testified against him.

The court first affirmed that *Gault* and *Winship* only decided that certain but not all essentials of due process were required. "The Court was clear, however, that due process did not require abandonment of 'the informality, flexibility (and) speed' of the juvenile procedure if the juvenile's interest in a fair adjudication was not overcome thereby".[217]

Hoffman, J., stated:

> In juvenile cases, where the judge sits alone as the trier of fact and where it is his duty to become as knowledgeable and inquisitive as reasonably possible, it is better for him to admit hearsay 'for what

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[213] The letter from Superintendent Anderson was verified but the letter from Dr. Ramsey contained no verification. While technically the court erred in admitting in evidence the letter from Dr. Ramsey because it did not comply with the above statute with regard to verification,... the letter reported nothing that was not contained in the letter from Superintendent Anderson which was clearly admissible. *Ibid.*, at p. 762, *per* Wolfe, J.

[214] 328 S.W. 2d 475 (1959).

[215] Appellant's sixth point accuses the court of error in adjudging appellant a delinquent juvenile on uncorroborated evidence or testimony of Juan Guevara, whom appellant describes as an accomplice. This point must be overruled, because it has been clearly set forth many times that the evidence necessary to so adjudicate need not be that sufficient to establish the delinquency beyond a reasonable doubt, as in a criminal case, but must be on some evidence of probative value; in other words, in accordance with the Rules of Civil Procedure. *Ibid.*, at p. 478, *per* Fraser, J.

[216] 268 A. 2d 170 (1970).

[217] *Ibid.*, at p. 175.

> it's worth'. He can make the determination whether responsible people would rely upon it in serious affairs when he makes his findings. He, by his experience in dealing with thousands of juveniles, being exposed to their statements, both forthright and delusive, will not be swayed, as a jury would, by hearsay which is not to be relied upon...
>
> Of course, we would not allow an adjudication of delinquency based on hearsay. Such a result would be in violation of a juvenile's right of confrontation. *In re Gault*... But, when a matter as important as the prior statement of a witness is brought to the court's attention, it should be permitted to consider it, whether or not it technically is an exception to the hearsay rule.[218]

In some state jurisdictions, attempts have been made to clarify the status of hearsay evidence by dividing the hearing into two parts — the adjudication where a finding is made as to guilt or innocence and the dispositional where a judge is to decide what to do with the child if found guilty. In New York, California and Illinois such a division is made.[219] Under the California statute, however, there is no explicit provision removing hearsay evidence from the adjudicatory hearing.

f. *Should there be Two Separate Hearings — Adjudication and Disposition?*

It has been pointed out that whether or not there should be a separation, the purpose of the juvenile court, that of rehabilitation, should be constantly in evidence. Thus even though the youth has admitted guilt or the evidence unmistakeably points to his involvement, the court may feel that a finding of delinquency will impede his return to proper behavior patterns in society. In such circumstances, the juvenile court judge may dismiss the case outright or postpone final judgment to provide for a period of informal supervision.

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[218] *Id.* See *Recent Decisions: Criminal Law — Juvenile Court Proceedings, Evidence,* (1971) 9 Duquesne L. Rev. 573-696 (1971). This writer does not agree with the conclusion reached in the above note that *In re Farms* makes a distinction between what is and what is not admissible hearsay evidence in juvenile courts and that admissibility depends on whether such evidence is or is not helpful to the juvenile's case. The court merely states that hearsay evidence is admissible "for what it's worth", relying on the good judgment of the juvenile court judge.

[219] *New York Family Court Act,* § 344-345 (1963); California Welfare and Institutions Code, § 701-02 (1966); *Illinois Juvenile Court Act* of 1965. Under the California Statute, however, there is no explicit provision removing hearsay evidence from the adjudicatory hearing.

In a study[220] prepared for the Columbia Law Review after interviews with juvenile court judges, probation officers, attorneys, and after observing juvenile hearings in some 18 cities, it was found that "exposure to the court, and to a judge who can choose between dealing sternly or being gentle with the alleged offender, has been accepted as a useful rehabilitative tool".[221] According to the report, it was common practice in some jurisdictions for the intake department to send minors to the court, recommending that they be reprimanded and dismissed, merely for the purpose of assuring beneficial exposure to the tribunal.

> The notion of the court appearance as a rehabilitative device is reinforced by two instances observed. In one case, a youth was brought before the court though he was only a runaway, a matter which in that jurisdiction was usually handled by the intake staff; his parents had suggested, and the probation officer had agreed, that a court appearance might reform the child. In another locale, the intake staff was instructed to bring all shoplifting cases before the court, no matter how trivial. Experience there indicated that recidivism in that category became negligible after a court appearance.[222]

It has been argued that the separation into two hearings has certain advantages:

1. The lawyer can take a strong adversary position at the adjudicatory stage.
2. At the dispositional hearing, he can leave the adversary tactics and act for the best interest of the child.
3. The separate hearings will give the lawyer a better opportunity to examine the social reports and prepare an alternate disposition, if any.[223]

Bearing in mind the primary purpose of the juvenile court to correct and rehabilitate the child, it is suggested that the lawyer should always act in the best interest of the child, whether in

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[220] Comment *Rights & Rehabilitation in the Juvenile Courts,* (1967), 67 Colum. L. Rev. 281.

[221] *Ibid.,* at p. 283.

[222] *Ibid.,* at p. 284.

[223] See Comment, *The Attorney and the Dispositional Process,* (1968), 12 St. Louis U. L. J. 644; McMillan & McMurtry, *op. cit.,* n. 96; Parker, *op. cit.,* n. 50. The President's Commission on Law Enforcement and Administration of Justice also recommends a separate dispositional hearing. "Juvenile court hearings should be divided into an adjudicatory hearing and a dispositional one, and the evidence admissible at the adjudicatory hearing should be so limited that findings are not dependent upon or unduly influenced by hearsay, gossip, rumor and other unreliable types of evidence". Report of the President's Commission on Law Enforcement and Administration of Justice: The Challenge of Crime in a Free Society, at p. 87 (1967).

the adjudicatory or dispositional stage. The juvenile court should not be an adversary court. If the child has committed an offence or shows unlawful or harmful tendencies, the lawyer should assist the child and the court to help correct them. By using technicalities of the rules of practice to get the child "off the hook" may not, in the long run, be helpful to the child. It will simply increase his disdain for the law and may encourage him to further wrongdoing.

Besides any advantages a divided hearing may have for the lawyer, it has been argued that there are advantages for the judge as well.

> It is in the exercise of this dispositive function that the expertise of the juvenile judge is most useful. His main concern during the sentencing process should be rehabilitation of the juvenile rather than punishment and protection of the public. During this stage it becomes essential that the judge familiarize himself with the juvenile's entire record including social and psychological reports which would be inadmissible in the fact-finding hearing... In order to assure the proper use of the youth's social report during the dispositional phase without violating the juvenile's right to confrontation guaranteed to him during the adjudicative stage, a divided hearing that totally separates the two functions should be provided.[224]

Judge McFadden of the California Supreme Court and formerly presiding judge, Los Angeles Juvenile Court, suggests that the disposition phase should be separate to allow the time required for lawyer, judge and parents to discuss in detail the social and other reports of the juvenile so that a considered rehabilitation plan can be worked out. Judge McFadden also believes that the role of the probation officer is very important at the dispositional hearing. His report should be clear, concise and contain specific recommendations. He must be prepared to defend them in a convincing and thorough manner.[225]

The importance of the dispositional phase is also stressed by Judge Lindsay Arthur, Juvenile Division Judge for the District of Minnesota:

> The whole, wonderful challenge of the Juvenile Court is to discover a child's needs, and to provide for them. And for this each Judge needs all of his own best energy and analytical thinking and imagination and concentration — and compassion. And he needs to have and to use the best social diagnosis and casework and group work that professional social workers can give. And he needs the help of lawyers to test the

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[224] Comment, *Juveniles and their Right to a Jury Trial*, (1970), 15 Vill. L. Rev. 972, at p. 991.

[225] MacFaden, *Changing Concepts of Juvenile Justice*, (April, 1971), 17 Crime & Delinquency, 131.

> diagnoses and the proposals for treatment, and he needs them to bring out the family's ideas of what happened, and why, and what needs to be done.[226]

Because of these special requirements, Judge Arthur believes there is a need for Juvenile Court Judges to be specially trained.[227] Judge Arthur suggests that to fulfill this need:

> The National Council should take as its first objective the development of the dispositional process. It should train Judges and, possibly, social workers and others affiliated with the Judges. It should investigate resources and facilities and propound methods to assist Judges in obtaining the best of them. It should provide current lists of facilities throughout the country which Judges might use.[228]

g. *Should there be Different Kinds of Juvenile Courts?*

Some commentators have suggested that child offenders should not be grouped together and tried in the same court with similar rules, procedures and dispositions. It is not true to say that there is no such thing as a bad boy. Hopefully the court, by treating him as one, will not find it necessary to treat him as a bad adult later.[229]

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[226] Arthur, *Disposition — The Forgotten Focus*, (Fall, 1970), 23 Juvenile Court Judges Journal, at p. 71.

[227] The great crying need is for training Juvenile Court Judges in the dispositional process. Gaultism we learn at law school and in the legal literature, and it doesn't really matter all that much since most of its application is as easy as a check-off list and little of its application impinges on the prime function of the Court. But dispositions aren't easy, nor can they be done with a check-off list. They require an understanding of each child's needs and strengths and of available resources to meet those needs and use those strengths. They require an understanding of how to communicate with a child during the hearing, and with his parents. They require an appropriate setting for the hearing, which may be different, for different cases. They require social investigations and usable reports and communication with social workers, and with schools, and the police, and the public... THERE IS NEED, great need, for training in dispositions... *Ibid.*, at p. 72.

[228] *Id.* In 1958 a far-reaching proposal for the dispositional stage in a juvenile proceeding was made. A separate court would be set up consisting of the chief judge and two special judges. One of the lay judges would be an expert in clinical psychology and the other an expert in sociology, psychology or social work. Nunberg, *Problems in the Structure of the Juvenile Court*, (1958), 48, J. Crim. L.C. & P.S. It would seem, however, that the same result might be achieved by requiring individualized reports and the presence of experts in court to answer questions or explain their recommendations.

[229] Parker, *Instant Maturation for the Post-Gault "Hood"*, (1970), 4 Family Law Quarterly 113, at p. 129. See also: Handler, *The Juvenile Court and the Adversary System: Problems of Function and Form*, (1965), Wisconsin

The role of the Juvenile Court is rehabilitation, but the procedures and methods for treatment ought not to be same for all minors charged as delinquents. The thesis is that true crime committed by true criminals should be treated by the courts as just that, regardless of defendant's age. Conversely, if the action is not truly criminal, such as truancy, loitering, stubbornness, beyond control of parents, or if the offender is not truly responsible for his actions, for such reasons as age, mental retardation, emotional disturbance, then the criminal court process should not be actuated. Parents, school authorities, psychiatrists, clergymen, counselling services — all are more adapted to dealing with incipient delinquency than a court burdened with a full complement of legal procedures.

The criticism of the present system is that the juvenile court judge is called on to be an arbiter and social worker at the same time. Strict segregation of mentally disturbed cases from the truly criminally motivated juvenile cases should be considered. The Juvenile Court judge should not be forced to be an amateur psychiatrist.[230]

Jurisdiction of the Juvenile Court should include children who have committed acts which, if committed by an adult, would be crimes. These are *Gault* cases and all due process procedures of a criminal court should be observed.[231]

L. Rev. 7; Ketcham, *op. cit.*, n. 95; Noyes, *Has Gault Changed the Juvenile Court Concept?*, (1970), 16 Crime and Delinquency 158; Paulsen, *op. cit.*, n. 79; Sheridan, *Juveniles Who Commit Non-criminal Acts: Why Treat in a Correctional System?*, (1967), 31 Fed. Probation 26.

230 (1970), 4 Family Law Quarterly 113, at p. 121.

231 In 1927, a commentator observed: It seems that despite the attempt of the statutes to socialize the trial of an infant for an act of delinquency which if committed by an adult would be a crime, and the attempt to make such a trial civil by calling it civil, the trial, as a practical matter, still retains the flavor of a criminal proceeding insofar as the child must be formally brought into court, charged with a specific offence, and placed under restraint pending the hearing, which restrait may be continued upon conviction... It seems then, as a practical matter, that the juvenile court is really quasi-criminal, and as such, the Bill of Rights is a factor to be considered in the attempt to make the work of the juvenile court more effective by giving it greater administrative power. Note, *Rights of Juveniles to Constitutional Guarantees in Delinquency Proceedings*, (1927), 27 Columb. L. Rev., at pp. 970-72. In 1968, another commentator wrote: When a child is charged with a violation of law, when the goal of the fact-finding process is to determine whether or not he committed the act, and when the result may be confinement, how can it be denied that the process is criminal in nature? Thomas R. Spencer, Jr., *Beyond Gault and Whittington — The Best of Both Worlds?*, (1968), 22 U. of Miami L. Rev. 906, at p. 936. In the New

Its jurisdiction should also extend to dependent-neglect cases where emotionally or physically deprived children are brought to the attention of the Juvenile Court. It has been argued that since the purpose of such a hearing is to determine whether the state should assume guardianship of the child, with the possibility of removal from the parents' custody, adjudication involves rights of parent and child and questions the very existence of the family as an institution. As one author has stated:

> The functioning of the family, the basic unit of our society, is under direct scrutiny when a court seeks to determine if a child is being neglected. For this reason, when the State uses its judicial machinery to disrupt the family relationship by separating a child from his parents, all the safeguards of procedural due process should be observed.[232]

It is argued that since the Fourteenth Amendment of the American Constitution forbids a State to deprive any person of life or liberty without due process of law, any action by the State interfering with the family relationship is interference with Fourteenth Amendment rights and requires the protection of due process.

York Court of Appeal, *People* v. *Fitzgerald,* 155 N.E. 584 (1927), a distinction was made between cases of neglected, incorrigible or ungovernable children and those where they are charged with specific offences which would be criminal if committed by an adult. Crane, J. said, at pp. 586-87: ...there are many occasions for disposing of children under the so-called neglect and delinquency provisions which do not involve any crime or acts of a criminal nature... In such cases the formal proceeding of proof according to a trial cannot always be followed. For instance, a neglected child is one under 16 years of age without proper guardianship, or who has been abandoned, or deserted by both parents, or who is in such a condition of want or suffering as to injure his health. Such a child can be sent by the judge to a private home or public institution to be cared for. So, too, an incorrigible and ungovernable child, one habitually disobedient and beyond the control of his parents can be properly disciplined, or one who is habitually a truant from school, or who, without the consent of his parents deserts his home may be brought before the judge and submitted to proper control. None of these charges against the child involve a crime or are of a criminal nature, and the proceedings must be and always have been more or less informal. While proper records must be kept... yet we cannot expect from the very nature of such cases that the strict rules of evidence shall be applied as they would and should be in cases dependent entirely upon a charge involving an act of a criminal nature...

Where, therefore, a child is arrested and charged with being a delinquent child because he has committed an offense which would be a crime in an adult, that offense must be proved, and proved by competent evidence...

...The evidence taken in this case was not competent or sufficient to convict an adult; therefore it was insufficient to convict this boy.

[232] Faber, Comment, *Dependent-Neglect Proceedings: A Case for Procedural Due Process,* (1971), 9 Duquesne L. Rev. 651, at p. 652.

The right of parents to custody of their children is of long standing. To invade these rights is a serious undertaking and deserves full constitutional protections. Although the determination of the Juvenile Court is for the "welfare and best interest of the child", the result would be a loss of the child's liberty "without procedural due process" unless he is removed from his home and family only after full inquiry before the court acting in a quasi-criminal capacity.[233]

For all remaining types of juvenile activity other than *Gault* cases, such as "unruly" children, truants from school, incorrigibles, runaways, waywards, children found in a disreputable place or in the company of vagrant or immoral persons and in general children whose behavior has not been so serious as to present a threat to themselves or to society, but who manifest conduct indicative of the need for assistance, it has been suggested that such children should be referred to a Youth Services Bureau in the community rather than to the Juvenile Court.[234]

This concept reverses the referral approach. Police, school, parents or private complainants should direct such activity or behavior of juveniles not to the Juvenile Court but to this Youth Services Bureau where qualified professionals begin the task of evaluation and treatment. Neither child nor parent would be under an obligation to accept the services offered. If no mutually accepted plan can be arrived at within a reasonable period, e.g. from 30 to 60 days, the case can then be proceeded with in the Juvenile Court.

Judge Ralph Zehler, Jr., a Judge of the eighth Regional Juvenile and Domestic Relations Court for Virginia, supports the division of Juvenile Court cases. "It appears that many of the problems courts are encountering in implementing *Gault* are due to the fact that all too frequently courts and state laws fail to make a distinction between the juvenile delinquent and the so-called incorrigible child".[235]

He agrees that *Gault* cases should strictly follow due process procedures.

> I submit there is clearly good reason for different safeguards in those cases where children are accused of criminal violations and in those

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[233] *Ibid.*, at pp. 662-63.

[234] Shering, Note: *A Proposal for the More Effective Treatment of the "unruly" Child in Ohio: The Youth Services Bureau,* (1970), 39 U. Cin. L. Rev. 275.

[235] Zehler, *Post Gault: One Judge's View of the Juvenile Court,* (Winter, 1971), 21 Juvenile Court Judges Journal, at p. 113.

> cases where youngsters won't go to school regularly, or are otherwise beyond the control of their parents. Courts should jealously guard all constitutional rights and strictly adhere to the rules of evidence and procedure in the first category. Proof beyond a reasonable doubt must be brought to light by the prosecuting attorney. Defence counsel must be involved, and this has quite properly become an adversary proceding.[236]

Judge Zehler suggestes that two kinds of juvenile court be established, a court for criminal violations and an equity court.[237]

For the equity court, disposition should not include confinement to state schools or similar institutions.

> The juvenile who is brought before the proposed equity court should not be liable to commitment or confinement in any of the institutions available for delinquents...
>
> In the equity court, disposition should be limited to local treatment facilities such as mental health, foster care, detention homes, probation etc.[238]

VII. Conclusion

There can be no doubt that the Juvenile Court has a special duty to perform. It is also true that it has not fulfilled the high expectations of its founders and those who supported its creation. But an examination of its performance through the case law and court records show that most of its failures are due not to the Juvenile Court and its procedures, but are the result of untrained

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[236] *Id.*

[237] In those cases where a child is charged with a criminal violation (acts which would be criminal if committed by an adult) and quite possibly in those cases where a specific act constitutes an offence applicable only to children, such as curfew violation, etc., the court will sit and be known as a junior criminal court. Through the adjudicatory hearing, all rules of criminal evidence and procedure will be strictly followed. "Trials" for criminal violations will be separate and apart from the other functions of the court. Following an adjudication and finding of "true" or "not innocent", based on proof beyond a reasonable doubt, the case will be set for disposition, whereupon the court will re-assume the traditional role of the juvenile court. Rules of fair treatment will supplant the strict rules of due process. All the protections and shields afforded juveniles under the present system will be preserved... The other side of the court would be known as an equity court with limited jurisdiction, where all matters other than "criminal" would be disposed of. Rules of evidence, procedures and quantum of proof would be governed by civil rules of equity, liberally administered so as to allow for a full and fair presentation of all matters bearing on the case. *Ibid.*, at pp. 115-6.

[238] *Ibid.*, at p 116.

and understaffed personnel as well as inadequacies in those institutions provided by the State for the rehabilitation process.[239]

Due process procedures should be tightened up, constitutional safeguards, especially in cases where crimes are committed, should be granted to the youthful offender. But the main concern of these Courts is rehabilitation and the mechanical methods of procedure in a criminal court should not be allowed to stultify the progressive development of the Juvenile Court, acting as *parens patriae,* towards achieving what is best for the child based on a thorough and understanding knowledge of his individual needs and

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[239] Reform schools have come under heavy criticism. "Warehousing kids in concrete and steel" is the way some youth officials have described such schools. Beginning January 1, 1972, the Massachusetts Department of Youth Services started to phase out its three state-operated reform schools, housing about three hundred juveniles. Almost all of the 1,200 juveniles committed to the Department for short term treatment are to be sent to twenty community-based residential treatment centers, each housing up to a dozen young people. It is expected that by June of this year all juvenile offenders who would have been sent to reform school will be placed in home-like facilities, perharps back in their own neighborhoods. Only the few convicted of serious or violent crimes will continue to be kept under tight security, but will receive specialized counselling and, if necessary, psychiatric care.

The State of California has also turned away from large state institutions for rehabilitation purposes. The number of juveniles in state reform schools have been reduced from 8,000 five years ago to 4,500 in January 1972. Another 2,000 are in county-operated schools, ranches and camps. Youth officials have been successful in convincing the authorities that "a young offender's best chance for rehabilitation is often through expert counselling in a home-like environment back in the kind of neighborhood that he came from".

Dr. Jerome Miller, Massachusetts Commissioner of Youth Services says: "There is simply no longer any need for institutions that incarcerate yougsters behind locked doors. It is clear that the more a juvenile offender is treated in institutions, the sicker he gets. They just don't help".

See: Kelly, *A State Decides to Stop 'Warehousing Kids'*, The National Observer, January 1, 1972.

The reform school system has been further criticized by Lester Velie, *The Child Trappers,* Reader's Digest (Feb., 1972), at p. 96. Quoting the National Council on Crime and Delinquency, "The quickest route to a criminal career is via the juvenile court". According to the NCCD, the odds that a juvenile graduate from a training school or reformatory will go straight is less than 50-50. According to an official at the reform school at Sheridan, Illinois, who used to inspect state prisons: "Over the years, I saw hundreds of inmates at Pontiac (an adult prison) whom I had first met as Sheridan boys".

deficiencies. As Chief Justice Earl Warren stated in his address to the National Council of Juvenile Court Judges:

> After all, what we are striving for is not merely 'equal' justice for juveniles. They deserve much more than being afforded only the privileges and protections that are applied to their elders. A niggardly and indiscriminate granting of concepts of justice applied to adults will stunt the growth of the Juvenile Court and handicap the progress of future generations.[240]

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[240] In a similar vein, the Hon. Lindsay G. Arthur, District Judge, State of Minnesota, Juvenile Division, and Vice-President of the National Council of Juvenile Judges, wrote: Should children be as equal as people? Certainly not. They should not have equal liberty: they should have less. Neither should they have equal protection — they should have more. How much less and how much more will depend on the maturity of the particular child at the particular time. Arthur, *Should Children Be As Equal As People?*, (1968-69), 45 N. Dakota L. Rev. 204.

THURSDAY, FEBRUARY 24, 1972 at 7:30 p.m.

THE McGILL 3rd YEAR FINAL MOOT COURT COMPETITION

CASE CONCERNING CERTAIN ASPECTS OF PRIVATE INTERNATIONAL LAW AND THE CIVIL LAW OF SALE

JUDGES OF THE MOOT COURT:

The Honourable Mr. Justice GEORGE H. MONTGOMERY, Montreal, Court of Appeal

BERNARD DESCHÊNES, c.r., Member of the Quebec Bar

DAVID CAYNE, Assistant Professor, Faculty of Law, McGill University, Member of the Quebec Bar

FINALISTS

ANDRÉ GODBOUT	vs.	STUART CORBETT
JEAN L'HEUREUX		THOMAS DAVIS

THE DECISION WAS AWARDED TO MESSRS. GODBOUT AND L'HEUREUX FOR BEST ORAL PRESENTATION AND FACTUM

SPECIAL THANKS TO MR. GEORGE DESSAULES AND MISS ELIZABETH TRUEMAN FOR THE PREPARATION OF THE PROBLEM AND MR. MAX HABERKORN FOR HIS HELP THROUGHOUT THE TERM

SIDNEY H. ABED,
Chairman,
Moot Court Board.

THE WHEELS OF JUSTICE

Ordonnance de la Commission
des relations de travail —

Bref de prohibition
sans ordre de surseoir —

Ordre subséquent de surseoir —

Bref d'assignation non signifié —

Mis en demeure de signifié —

Défaut —

Jugement ordonnant l'émission du bref
et ordre de surseoir —

Demande d'annulation du jugement —

Nullité.

(The above 'found poem' copies verbatim the headnote to *L'Association internationale des commis du détail local 486 R.C.I.A.* v. *The J. Pascal Hardware Co. Ltd.*, (1970) C.A. 163. Only the title has been added.)

F. R. Scott *

* Former Dean of Law, currently of the Faculty of Law, McGill, and a noted Canadian poet.