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

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† This is the first part of a two part article. The second part will appear in the next issue.

I. Historical Background

Under the common law, no distinction was made between young people and adults so far as criminal offences were concerned. The fundamental aim in criminal jurisprudence was not reformation but punishment, punishment as retribution for the wrong, punishment as a warning and deterrent to others. In 1801 Andrew Brenning, aged 13, was publicly hanged for stealing a spoon. In 1808 a 7-year-old girl was hanged in Lynn. In 1831 a 9-year-old boy was given the death penalty for setting fire to a house. In 1833 a boy of the same age was hanged for stealing a printer's color valued at two pence.[1]

The protection of the offending child is not, however, entirely the creation of statute. For over two centuries the English Chancery courts have exercised jurisdiction in his protection. Nor is the jurisdiction of these courts limited to cases where the child had property. Thus North, J. in *Re McGrath*[2] stated:

> But then it is said that I have no jurisdiction in this case, and for this reason, because the infants are not wards of Court, and have no property — that the Court cannot interfere under such circumstances. I think that proposition is wholly unsupported by either principle or authority.[3]

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[1] Koestler, *Reflections on Hanging*, (London, 1956); Koestler and Rolph, *Hanged by the Neck*, (1961). Even today, in some countries, juvenile offenders are treated no differently than adults. According to the *Toronto Globe and Mail* (March 8, 1972), Timothy Davey, 14, was sentenced the previous week to 6 years and 3 months' imprisoument in an adult jail in Istanbul, Turkey for drug offences.

[2] [1892] 2 Ch. 496.

[3] *Ibid.*, at pp. 511-512. See also *In re Spence*, 2 Ph 247, at p. 252, where Lord Chancellor Cottenham said:

> I have no doubt about the jurisdiction. The cases in which this Court interferes on behalf of infants are not confined to those in which there is property... The Court interferes for the protection of infants, *qua* infants, by virtue of the prerogative which belongs to the Crown as parens patriae, and the exercise of which is delegated to the Great Seal.

The case of *In re Flynn*, [1848] 2 DeG & Sm 457, is another instance where the court exercised its jurisdiction to take children who had no property out of the custody of their father, upon the ground that it was not for their welfare that they should remain with him. Again, in *Brown* v. *Collins*, 25 Ch. D 56, at p. 60, Mr. Justice Key said:

> In one sense all British subjects who are infants are wards of court, because they are subject to that sort of parental jurisdiction which is entrusted to the court in this country, and which has been administered continually by the courts of the Chancery Division... The jurisdiction exists from the fact that the infant is a British subject, and the Chancery

Most of the cases in this early period of English law refer to protection of children from their parents where circumstances in the home are such that the State, as parens patriae, take over the duties and obligations of the natural parents. In the narrow sense, this would cover cases of neglected children or children beyond the control of their parents. Delinquent children, if limited to those who have committed acts which would be crimes in the adult sense, would not be included in this category, although it can be said that by such delinquency they have proved themselves to be beyond the control of their parents and must now be looked after by the State.

II. Development of the Parens Patriae Concept in the United States and the Establishment of Juvenile Courts

In the United States, the philosophy of special protection for juveniles was a gradual process. In 1869 a law was passed in Massachusetts providing for a "visiting agent" to sit in at hearings and advise judges regarding the disposition of youthful offenders under sixteen.[4] Houses of Refuge were established in New York City (1825) and in Pennsylvania (1826) to receive children who were incorrigible or were lawbreakers and to provide them with care, discipline and training. Although the record of these institutions was one of extreme harshness and ill treatment, the separation from adult criminals was a basic improvement.[5]

One of the earlier cases dealing with such houses of refuge applied the doctrine of parens patriae to delinquent children. In *ex parte Crouse*[6] it was held that:

> The House of Refuge is not a prison, but a school, where reformation, and not punishment, is the end... To this end may not the natural parents, when unequal to the task, or unworthy of it, be superceded by the parens

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Division has always exercised that parental jurisdiction over British subjects who are infants.

For other cases and an historical discussion of the Courts of Chancery, see Mack, *The Juvenile Court,* (1909), 23 Harv. L. Rev. 104; Nicholas, *History, Philosophy and Procedures of Juvenile Courts,* (1961), 1 Journal of Family Law 151.

[4] Winters, *Modern Court Services for Youths and Juveniles,* (1949), 33 Marq. L. Rev. 99.

[5] Nicholas, *op. cit.,* n. 3; see also note: *Misapplication of the Parens Patriae Power in Delinquency Proceedings,* (1954), 29 Indiana L. Rev. 475; Wilkin, *The Responsibility of Parenthood,* (1910), 36 Annals 64. See also: Fox, *Juvenile Justice Reform: An Historical Perspective,* (1970), 22 Stan. L. Rev. 1187.

[6] 4 Wharton 9 (Penn. Sup. Ct., 1839).

> patriae, or common guardian of the community? It is to be remembered that the public has a paramount interest in the virtue and knowledge of its members, and that of strict right, the business of education belongs to it. That parents are ordinarily entrusted with it is because it can seldom be put into better hands; but where they are incompetent or corrupt, what is there to prevent the public from withdrawing their facilities, held, as they obviously are, at its sufferance? The right of parental control is a natural, but not an inalienable one.[7]

The thinking public and the courts began to look at young people in this way — is the propensity for wrongdoing the fault of the children, or is it in reality the fault of the parent for not guiding and controlling the child (barring a small minority of children who simply cannot be controlled)? If the child is thus neglected by the parent, is it not the duty of the State to take charge, not to punish the child, but to restore him to the ways of good citizenship, to reform, to guide and to develop him? Within this concept, there is no distinction between delinquent children who have committed crimes and neglected or dependent children.

It was through this notion of parens patriae that the idea of a sheltering juvenile court for all young people who need help

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[7] In *Prescott* v. *State*, 19 O.S. 184 (1870), the Supreme Court of Ohio stated:

> The proceeding is purely statutory; and the commitment in cases like the present is not designed as a punishment for crime, but to place minors of the description and for the instances specified in the statutes under the guardianship of the public authorities named for proper care and discipline, until they are reformed or arrive at the age of majority. The institution to which they are committed (House of Refuge or reform farm in Ohio) is a school, not a prison; nor is the character of their detention affected by the fact that it is also a place where juvenile convicts may be sent who would otherwise be condemned to confinement in the common jail or the penitentiary.

In another Ohio case, *House of Refuge* v. *Ryan*, 37 O.S. 197 (1881), the defendant filed a petition of Habeas Corpus alleging that he was the father of 3 children, all under six years of age; that their mother had died and that they were taken away from his home without notice and committed by a justice of the peace to the House of Refuge. His plea failed. The Ohio Supreme Court stated:

> The commitment is not designed as a punishment for crime but to place destitute, neglected and homeless children and those who are in danger of growing up idle and vicious members of society under the guardianship of the public authorities for their proper care and to prevent crime and pauperism. As to such infants it is a home and a school, not a prison. The authority of the State as parens patriae to assume the guardianship and education of neglected, homeless children, as well as neglected orphans, is unquestioned.

was developed at the turn of the century.[8] Legislation for it was designed for humanitarian purposes. The court was intended to be civil, not criminal. It was to be helpful and rehabilitative to the offender, not designed to be punitive or aimed at retribution. The intent was to treat young people guilty of criminal acts in non-crimninal ways. The primary objective was to afford additional protection to the child.[9]

The establishment of the juvenile court was hailed by Dean Roscoe Pound of the Harvard Law School as "one of the most significant advances in the administration of justice since the Magna Carta".[10]

Another enthusiastic supporter of the juvenile court was Judge Ben Lindsay, well-known juvenile court judge in Colorado. He said that its aim:

> ...was to bring into the life of the child all of those aids and agencies that modern science and education have provided through the experts in human conduct and behaviour; in a word, to specialize in the causes of so-called bad things as doctors would in the cause of disease.[11]

Judge Lindsay wrote further:

> He, (the child), is taught, literally, to overcome evil with good. He is taught his duty to society, the meaning of law — why ordnances are passed, and *by a system of education* he is taught to know how to help himself, and to make himself honest and industrious... It will thus be seen that our institution (juvenile court) is a school-court.[12]

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[8] The first juvenile court in the United States was established in Cook Country, Illinois and officially opened in Chicago July 1, 1899.

[9] See Comment, *Dependent-Neglect Proceedings, A Case for Procedural Due Process,* (1970), 9 Duquesne L. Rev. 651, at p. 654, where it is stated that the juvenile courts "are purely statutory courts without foundation in common law, and are, therefore, strictly limited within the confines of the creating statute". This same view was expressed in *Prescott* v. *State, op. cit.*, n. 7, where the Supreme Court of Ohio, referring to the Houses of Refuge, stated "The proceeding is purely statutory..." For a contrary view, see *Commonwealth* v. *Fisher,* 62 A. 198 (Penn. Sup. Ct., 1905), where the Supreme Court of Pennsylvania stated that no new court was created by the Pennsylvania Statute establishing Houses of Refuge. It was simply an Act to define the powers of an already existing and ancient court, the Court of Quarter Sessions.

[10] Quoted in *National Probation & Parole Association,* Guides for Juvenile Court Judges 127 (1957).

[11] Lindsay-Borough, *The Dangerous Life,* (1931), at p. 103.

[12] Lindsay, *The Juvenile Laws of Colorado,* (1906), 18 Green Bay 126, at p. 127. In a chapter headed *The Human Artist Succeeded the Executioner*

III. Relaxation of Formal Safeguards in Juvenile Courts

The theory that in juvenile cases the court acts as parens patriae has led juvenile courts to relax or altogether omit many formal safeguards found in adult criminal courts. The humanitarian purpose of such courts is given as justification.

In *Commonwealth* v. *Fisher*[13] Fisher was committed to a House of Refuge. His appeal to the Supreme Court of Pennsylvania failed. The constitutionality of the Pennsylvania *Juvenile Act* was challenged on the grounds that,

1) the juvenile was not taken into court under due process of law,
2) he was denied trial by jury and,
3) the *Act* provides different punishment for the same offence by a classification of offenders according to age.

Brown, J. stated:

> ...it is important that the powers of the court, in respect to the care, treatment and control of dependent, neglected, delinquent and incorrigible children, should be clearly distinguished from those exercised by it in the administration of criminal law... it (the Act) is not for the punishment of offenders but for the salvation of children, and points out the way by which the state undertakes to save, not particular children of a special class, but all children under a certain age, whose salvation may become the duty of the state, in the absence of proper parental care or disregard of it by wayward children... Its protecting arm is for all who have not gained that age (16) and who may need it for protection.[14]

In the above passage, Brown, J. made it clear that *all* children are covered by the Pennsylvania *Juvenile Act*, be they dependent, neglected, incorrigible or delinquant children who have committed crimes. He said:

> To save a child from becoming a criminal, or from continuing in a career of crime, to end in maturer years in public punishment and disgrace, the Legislature surely may provide for the salvation of such a child, if its parents or guardians be unable or unwilling to do so, by bringing it into one of the courts of the state without any process

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(Lindsay-Borough, *op. cit.*, n. 11, at p. 140). Judge Lindsay was ecstatic in praise of the Juvenile Court.

> The point I am making is the basic importance of the natural aptitude for this human artistry, through the capacity for the same love and joy in playing upon a human instrument that another type of artist finds in playing upon his musical instrument. I sometimes think that real human artists called to institutions such as ours (mistakenly called a 'court') are born, not made.

[13] 62 A. 198 (Peun. Sup. Ct., 1905).

[14] *Ibid.*, at p. 199.

> at all, for the purpose of subjecting it to the state's guardianship and protection. The natural parent needs no process to temporarily deprive his child of its liberty by 'confining' it in his own home to save it and to shield it from the consequences of persistence in a career of waywardness. Nor is the state, when compelled as parens patriae, to take the place of the father for the same purpose, required to adopt any process as a means of placing its hands upon the child to lead it into one of its courts.[15]

The juvenile court is not a criminal court. Brown, J. held that:

> The design is not punishment, or the restraint imprisonment, any more than is the wholesome restraint which a parent exercises over his child... Every statute which is designed to give protection, care and training to children, as a needed substitute for parental authority and performance of parental duty, is but a recognition of the duty of the state as the legitimate gnardian and protector of children where other guardianship fails. No constitutional right is violated...[16]

In *Mill* v. *Brown*,[17] a minor of 13 was charged with petit larceny for taking a box of cigars, found guilty and committed to the Utah industrial school until he reached 21. The minor was successful on appeal and was returned to his parents.

Finch, J. delivered the unanimous opinion of the court. He stated that :

> Such laws (against juvenile offenders) are most salutory and are in no sense criminal and not intended as a punishment, but are calculated to save the child from becoming a criminal. The whole and only object of such laws is to provide the child with an environment such as will save him to the state and society as a useful and law-abiding citizen,

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[15] *Ibid.*, at p. 200. See also the case of *Rule* v. *Geddes*, 23 App. D.C. (1904) where the court upheld the right of an official to commit a 15-year-old girl to a reform school solely upon her mother's application. The restraint was considered an opportunity for "moral and physical well-being". It was stated, at p. 50:

> The child herself, having no right to control her own action or to select her own course of life, had no legal right to be heard in these proceedings. Hence the law which does not require her to be brought in person before the committing officer or extend her the privilege of a hearing on her own behalf cannot be said to deprive her of the benefit of due process of law.

[16] *Commonwealth* v. *Fisher, op. cit.*, n. 9, at p. 201. Eight years later, in *Black* v. *Graham et al.* 86 A. 266 (Penn. Sup. Ct., 1913), Brown, J., at p. 267, changed his mind about the nature of the juvenile court.

> On the other hand, the relation established by the order of the juvenile court and the contract made thereunder is really penal in its nature... such of these children as are 'incorrigible' are quasi-criminals. They have been apprehended for wrongs committed by them. All of these children are, in effect, prisoners.

[17] 88 P. 609 (Utah Sup. Ct., 1907).

> and to give him the educational requirements necessary to attain that end... As we have already pointed out, the proceedings of the juvenile court do not fall, nor are they intended to come within what is termed criminal procedure, nor are the acts therein mentioned, as applied to children, crimes.[18]

The jurisdiction of the juvenile court, however, is limited to cases where the parent has been proven to have failed in his duty to supervise or control the child. This duty "to educate and save the child from a criminal career" rests upon the parent first. Finch, J. held that:

> As the duty is imposed by the moral as well as the laws of society upon the father first, so it must likewise logically follow that he must be given the first right to discharge that duty... Before the state can be substituted to the right of the parent, it must affirmatively be made to appear that the parent has forfeited his natural and legal right to the custody and control of the child by reason of his failure, inability, neglect or incompetence to discharge the duty and thus to enjoy the right...[19]

The court emphasized that following a complaint, the qualifications of the parent must be carefully considered before his natural right to custody and control can be surrended; otherwise "the court might as well enter upon a judgment without any complaint or investigation whatever".[20]

This line of reasoning appears sound enough but cases dealing with children charged with criminal offences ("delinquency" in the narrow sense) often do not show any serious inquiry by the court, if in fact any inquiry is made at all, into the competence and performance record of parents.[21]

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[18] *Ibid.*, at p. 613. At p. 612, Frick, J. cited 16 cases where due process requirements were discussed but held inapplicable in juvenile courts.

[19] *Ibid.*, at p. 613.

[20] *Ibid.*, at p. 614.

[21] See Note, *Misapplication of the Parens Patriae power in Delinquency Proceedings, op. cit.*, n. 5. It is argued that while jurisdiction over dependent and neglected children has strong historical basis under the concept of parens patriae, extension of this authority to delinquency where the child has committed a crime is a result of legislative policy rather than judicial precedent. If the concept is to be thus widened, there should be some proof of parental neglect or inability for discipline. Yet in delinquency proceedings it is necessary only to prove the child delinquent, insufficient parental control or supervision is either presumed or overlooked. It is suggested as a remedy that no child, even if shown to be delinquent, should be committed to state institutions unless the inability of parents for discipline is proved. Where there is no lack of care or supervision, and the parents are not at fault, but delinquency occurs due to emotional instability or other psychological or psychiatric deficiencies, the courts should not interfere and

At this early stage in juvenile court history, there was strong support for the parens patriae concept in its widest sense. Trials were not criminal in nature and procedures were to be flexible.

In *In re Lundy*[22] the offence committed by a juvenile (female) was that of singing for wages in a restaurant where wine and beer were sold. This was not a "crime" as such, but was a delinquent act under the juvenile court law of Washington.

In the Washington Supreme Court, Ellis, J., delivering an unanimous opinion, stated:

> The Act, in its application to the delinquent, is not punitive in its nature or purpose. The policy under this law is protection, not punishment. Its purpose is not to restrict criminals, to the end that society may be protected and the criminal perchance reformed; it is to prevent the making of criminals. Its operation is intended to check the criminal tendency in its inception, and protect the unformed character in the facile period from improper environment and influences. In short, its motive is to give to the weak and immature a fair fighting chance for the development of the elements of honesty, sobriety and virtue essential to good citizenship.[23]

Due process procedures must be followed, but should be liberally construed. Ellis, J. continued:

> While no person, whether minor or adult, should ever be restrained of liberty without due process, and in that respect the statute must be construed with all the strictness of a criminal law... in other respects it should be liberally construed, to the end that its manifest beneficent purpose may be effectuated to the fullest extent compatible with its terms.[24]

A comprhensive review of all prior cases dealing with juvenile offences is found in *Cinque* v. *Boyd*[25] before the Supreme Court of Errors of Connecticut. A minor, 14-year-old, was charged with aiding and abetting other boys of taking from a drunken person the sum of two dollars and fifty cents. He was found delinquent and committed to the Connecticut School for Boys.

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commit the child to a state institution. "Parents should not be deprived of the custody of their children unless it is conclusively proved in the juvenile court that by reason of their incompetency the best interest of the child require state intervention." (at p. 484).

This writer would suggest, however, that it is precisely these cases where the child need special care that the juvenile court, with all its facilities, should participate in the effective treatment process. The question of a parent's incompetence should not be the determining factor.

[22] 143 P. 885 (Washington Sup. Ct., 1914).

[23] *Ibid.*, at p. 886.

[24] *Id.*

[25] 121 A. 678 (1923).

On appeal, it was contended that the *Juvenile Court Act* was unconstitutional for the following reasons: denial of right to bail, no confrontation of witnesses, denial of trial by jury and definition of "delinquent" too broad and inclusive.

These arguments were rejected. Keeler, J. quoted with approval the concept of the juvenile court as non-criminal as characterized by Flexner and Oppenheimer in a monogram prepared for the Children's Bureau of the U.S. Department of Labor.[26]

Keeler, J. then went on to say:

> ...the Act was intended to constitute a court which should conduct a civil inquiry, to determine whether, in a greater or less degree some child should be taken under the direct care of the state and its officials to safeguard and foster his or her adolescent life, and not to conduct a criminal prosecution, nor to attach to the enforcement of the provisions of the Act any sanction of a criminal nature... Of course an act does not become one solely of a civil nature simply because it is called so, but its true nature is to be determined by the scope and nature of the provisions. If such courts are not of a criminal nature, then they are not unconstitutional because of the nature of their procedure depriving persons brought before them of certain constitutional guarantees in favor of persons accused of crime.[27]

After citing a great number of cases, Keeler, J. concluded that "the fundamental principle of decision running through them all is that the inquiries conducted by juvenile courts are not criminal trials".[28]

Pee v. *United States*,[29] a decision of the Court of Appeals, District of Columbia Circuit, is a strong case for the proposition that a juvenile court is not a criminal court. This was a charge

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[26] The basic conceptions which distinguish juvenile courts from other courts can be briefly summarized. Children are to be dealt with separately from adults. Their cases are to be heard at a different time, and preferably in a different place; they are to be detained in separate buildings, and, if institutional guidance is necessary, they are to be committed to institutions for children. Through probation officers the court can keep in constant touch with the children who have appeared before it. Taking children from their parents is, when possible, to be avoided; on the other hand parental obligations are to be enforced. The procedure of the court must be as informal as possible. Its purpose is not to punish but to save. It is to deal with children not as criminals but as persons in whose guidance and welfare the state is peculiarly interested. Save in the case of adults its jurisdiction is equitable not criminal, in nature. (Reprinted in American Law Review, p. 65.)

[27] *Cinque* v. *Boyd, op. cit.*, n. 25, at p. 683.

[28] *Id.*

[29] 274 F. 2d 556 (Dist. of Columbia, C.A. 1959).

of robbery and assault with intent to commit rape laid against 3 juveniles and 1 other. Prettyman, Chief Judge, stated:

> In the event a child commits an offence against the law, the state assumes a position as parens patriae and cares for the child. Such a one is not accused of a crime, not tried for a crime, not convicted of a crime, not deemed to be a criminal, not punished as a criminal and no public record is made of his alleged offence. In effect he is exempt from the criminal law... The foregoing proceedings are not criminal cases. The constitutional safeguards vouchsafed a juvenile in such proceedings are determined from the requirements of due process and fair treatment, and not by direct application of the clauses of the Constitution which in terms apply to criminal cases.[30]

As recently as 1964, the Supreme Court of Ohio[31] held that the proceedings in the juvenile courts were civil and not criminal. In that case, a 17-year-old boy was found guilty of an act of malicious entry which would have been a felony if committed by an adult. The evidence showed he had a record of delinquency and derelictions. He was sent, not to the Boys Industrial School, but to the Ohio State Reformatory.

In the unanimous judgment of the court, delivered by Griffiths, J., it was not disputed that the juvenile court did not provide the accused with counsel, did not advise him of his constitutional rights prior to the hearing and did not inform him that he could have counsel to represent him if he so wished.

> Proceedings in a juvenile court are civil in nature and not criminal. The appellant was not prosecuted for a criminal offence. The appellant was never indicted, never convicted and never sentenced... The hearing in the juvenile court is upon the status of a minor child, in the nature of a guardianship, and this is so even though the minor child is over 16 years of age and commits an act which, if committed by an adult, would constitute a felony. The Legislature by this Act clearly is not inclined to brand the appellant with a mark of infamy or to set a mark of disgrace upon him. It is for the purpose of correction and rehabilitation and not for punishment.[32]

It can be seen from the cases above cited that after the establishment of the juvenile courts in the United States most of the decisions upheld the principle of parens patriae, considered the proceedings

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[30] *Ibid.*, at pp. 558-59. In Appendix A of the judgment a list of authorities is given supporting the proposition that proceedings in juvenile courts are not criminal cases and in Appendix B a list of authorities is given supporting the proposition that the provisions of the Constitution which specifically apply to criminal cases are not applicable to juvenile court proceedings by reason of such specific provisions.

[31] *Cope* v. *Campbell*, 196 N.E. 2d 457 (Ohio Sup. Ct., 1964).

[32] *Ibid.*, at pp. 458-59.

in such courts civil rather than criminal, did not insist on due process and emphasized the informality and flexibility of court proceedings with a view towards rehabilitation and care of the juvenile rather than punishment and retribution.[33] Only a few courts and commentators questioned the withholding of constitutional rights through denial of due process from youthful offenders.[34]

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[33] Professor Ketcham has succinctly summarized juvenile court philosophy under five premises:

1) that the consequences of a finding of delinquency will, in fact, be non-criminal and that the stigma of a criminal record will not obtain.
2) that the hearing itself will be promptly held, easily understood, fair and compatible with, if not a part of the treatment process.
3) that family ties will be strengthened and the child removed from his home only when his welfare or the interests of the community demand such action.
4) that the child's treatment subsequent to a finding of delinquency will approximate as closely as possible that which he should have received from his parents.
5) that the deleterious effects of imprisonment upon habits, attitudes and aspirations will be minimized and by therapeutically rather than punitively oriented restrictions. See: Ketcham, *The Unfulfilled Promise of the Juvenile Court*, (1961), 7 Crime and Delinquency 97, at p. 101.

[34] In *People* v. *Fitzgerald*, 155 N.E. 584 (N.Y.C.A., 1927), at p. 587, Crane, J. in the New York Court of Appeals stated:

> Where, therefore, a child is arrested and charged with being a delinquent child because it has committed an offense which would be a crime in an adult, that offense must be proved, and proved by competent evidence... In the interests of the child such a proceeding is not called a criminal trial or a criminal proceeding; it is called a hearing on a charge of delinquency, but the change is in name only, for the act requires competent evidence, and adjudication, and permits a commitment to a state institution or a fine following an adjudication of guilt. The proceeding, at least, is one of a criminal nature... The evidence taken in this case was not competent or sufficient to convict an adult: therefore it was insufficient to convict this boy.

In the same year, a commentator expressed the same thought:

> It seems that despite the attempts 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 offense, and placed under restraint pending the hearing, which restraint 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

The benevolent nature of the juvenile court and the concept of parens patriae did not always produce shorter terms of confinement.[35] In a recent case,[36] the Pennsylvania Supreme Court held that a juvenile may be sentenced to a longer term than that of an adult when convicted of the same offence provided the following conditions are met:

(i) notification at the outset of all factors upon which the state proposes to base its adjudication,

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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 Colum. L. Rev., at pp. 970-72.

[35] In 1911 a North Carolina court sent a juvenile to detention for six years on a charge of vagrancy which could hold an adult no more than 30 days. *Ex parte Watson* 72 S.E. 1049 (N. Carolina Sup. Ct., 1911). In South Carolina a sentence with a potential of holding two minors 8 and 10 years old to their respective majorities was upheld on appeal when the same offense (petit larceny) would impose a maximum of 10 days for adults. *State* v. *Cagle,* 96 S.E. 291 (S. Carolina Sup. Ct., 1918). In California, where the maximum sentence (petit larceny) for adults was 6 months in jail, a boy under 18 was put away until he became 21. *Ex parte Nichols* 43 P. 9 (California Sup. Ct., 1896). In Pennsylvania, where the maximum sentence for this offence was 2 years in jail, a child was deprived of his liberty for 7 years until he reached his majority. (*Commonwealth* v. *Fisher, op. cit.,* n. 9). In *In re Holmes* a minor was removed from his family because he had driven a car without a licence. (109 A. 2d 523 (Penn, Sup. Ct., 1954). In *State* v. *Butcher et al.,* 279 P. 497 (Utah Sup. Ct., 1929) a boy was sent to the reformatory because he had *accidentally* discharged a gun. In *People* v. *Fowler,* 148 N.Y. Supp. 741 (1914) reversed on other grounds (152 N.Y. Supp. 261 (1915)) a girl was sent away because she had been raped and later seen "painted and powdered up". In another case reported by Deane, *The Rights of Juvenile Delinquents: An Appraisal of Juvenile Court Procedures,* (1957), 47 Journal of Crim L.C. & P.S. 561, at p. 567, a juvenile was placed in a detention home and later sent to a reformatory because he was the innocent victim of a homosexual. In *In re Singer,* 285 P. 2d 955 (Cal. Dist. C.A., 1955) an 8-year-old was removed from his family and held in detention so that he would be a handy witness for the police in a criminal case. In *In re Gault,* 387 U.S. 1 (1966), if the juvenile had been an adult the maximum punishment would have been a fine of 50 dollars or imprisonment for not more than 2 months. Instead, Gerald Gault was committed to custody for 6 years.

[36] *In re Wilson,* 264 A. 2d 614 (Penn. Sup. Ct., 1970). Here Wilson, a juvenile, was involved in a racial street fight. No one was seriously injured and Wilson's participation consisted in throwing a few punches. He was sent to the State Correctional Institution. Since he was 16, the maximum detention period was 5 years, until he reached 21. If he had been tried as an adult for the same offence of assault and battery, the maximum sentence would have been 4 years and he would have probably been sent to the same institution.

(ii) facts must be clearly found and supported, and
(iii) during the longer commitment the juvenile will receive appropriate rehabilitative care.

There is no doubt that the juvenile court ought to maintain some balance between the child's act and the treatment imposed. The law for juvenile courts, like other branches of jurisprudence, should try to reconcile the individual needs of the child with the goal of equality. Thus Dean Pound, speaking about the law in general, stated:

> It was long assumed that the whole task of the law was to be done by means of rules or else that it was to be done by discretion. Reaction from a regime of substantially unchecked discretion led to return to mechanical application of rules or logical application of authoritative starting points for reasoning. Attempts have been made to define law wholly in terms of the imperative element or wholly in terms of the traditional element. Very generally in the nineteenth century jurists sought to eliminate discretion from the idea of law. There are some today who would eliminate rule. Here as in the definition of justice we have to take account of ideas, either of which carried to its logical extreme negates the other, which nevertheless are equally necessary for achievement of our practical task and must be kept in balance.[37]

IV. The Pendulum Swings the Other Way

Some fifty years after the turn of the century, the courts began to move away from the parens patriae concept in all its implications (including the flexibility of juvenile court procedures). Most of the cases, however, dealt with charges against juveniles which, if committed by adults, would be crimes and prosecuted in the criminal courts. Strict application of due process procedures here should not mean automatic application to all situations, which woud include truancy from school, runaways, children "beyond the control of their parents", neglected children, incorrigibles.

In *Haley* v. *Ohio*,[38] a 15-year-old boy was arrested at his home on a charge of murder, taken to police headquarters and questioned for five hours, without counsel, until he signed a confession typed by police. He was then put in jail and held incommunicado for three days. The lawyer, retained by the child's mother, tried to see him twice, but was refused. The boy's mother was not allowed to see him until five days later.

On appeal to the U.S. Supreme Court, the signed confession was disallowed and the judgment of the lower court reversed.

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[37] Pound, *Jurisprudence,* (Part 3, The Nature of Law, St. Paul, 1959).
[38] 332 U.S. 596 (Cert. to Ohio Sup. Ct., 1948).

The methods used in obtaining the confession cannot be squared with due process of law requirements.

Justice Douglas delivered the majority opinion. He stated:

> Neither man nor child can be allowed to stand condemned by methods which flout constitutional requirements of due process of law.
>
> But we are told that this boy was advised of his constitutional rights before he signed the confession and that, knowing them, he nevertheless confessed. That assumed, however, that a boy of fifteen, without aid of counsel, would have a full appreciation of that advice and that on the facts of this record he had a freedom of choice. We cannot indulge those assumptions. Moreover, we cannot give weight to recitals which merely formalize constitutional requirements. Formulas of respect for constitutional safeguards cannot prevail over the facts of life which contradict them. They may not become a cloak for inquisitorial practices and make an empty form of the due process of law for which free men fought and died to obtain.[39]

In *In re Contreras*,[40] the Superior Court of Los Angeles County, sitting in separate session as a juvenile court, convicted a juvenile for assault and committed him to the Youth Authority of California. On appeal, the conviction was set aside on grounds that the juvenile was not represented by counsel and that there was insufficient legal evidence to establish even a reasonable or probable cause of guilt. It was held that where a juvenile is charged with a felony, due process procedures must be followed.

White, J., the presiding judge of the District Court of Appeal, said:

> While the juvenile court law provides that adjudication of a minor to be a ward of the court shall not be deemed to be a conviction of crime, nevertheless, for all practical purposes, this is a legal fiction, presenting a challenge to credulity and doing violence to reason.
>
> It is common knowledge that such an adjudication when based upon a charge of committing an act that amounts to a felony, is a blight upon the character of and is a serious impediment to the future of such minor... True, the design of the Juvenile Court Act is intended to be salutary, and every effort should be made to further its legitimate purpose, but never should it be made an instrument for the denial to a minor of a constitutional right or of a guarantee afforded by law to an adult. Regardless of the provisions of section 736 of the Welfare and Institutions Code,[41] the fact remains that the minor herein was

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[39] *Ibid.*, at p. 601. (*per* Frankfurter, J.).

[40] 241 P. 2d 631 (Calif. Dist. C.A., 1952).

[41] Section 736 of the Code of California provided that "An order adjudging a person to be a ward of the juvenile court shall not be deemed to be a conviction of crime".

> taken from the custody of his parents, deprived of his liberty and ordered confined in a state institution...[42]

White, J. concludes:

> Even though, as held in some cases, the quantum of proof necessary to sustain an order declaring a minor a ward of the juvenile court is not the same as in a criminal proceeding affecting an adult... it cannot be seriously contended that the constitutional guarantee of due process of law does not extend to minors as well as to adults.[43]

Although these words are couched in general terms, the decision itself was limited to cases where the offence, if committed by an adult, would have been a felony and therefore a crime. No reference was made anywhere in the judgment covering other juvenile offences which were not "crimes" in the narrow sense.

In re Holmes[44] was a case where the Supreme Court of Pennsylvania returned to the concept of parens patriae in its widest sense. The case dealt with a juvenile with a long record of highway robbery, burglary, truancy from school, assault and battery, and armed robbery of a church. His conviction for the last charge was appealed by counsel on the grounds that the juvenile was improperly compelled to answer a question which was self-incriminatory, that the court received hearsay evidence, that counsel was denied the right to inspect the court records, including offences, that notice of hearing was not given to the parents and that the juvenile should not be committed to the Pennsylvania Industrial School as that institution is not restricted to delinquent juveniles, but may include persons convicted of crime in a criminal court (up to 21 years of age).

Horace Sterne, Chief Justice, grouped all types of offences together so far as juveniles were concerned and applied the same criteria of "treatment, reformation and rehabilitation". He stated that:

> Appellant's able counsel have urged upon us as upon the Superior Court, many claims of illegality and deprivation of constitutional rights in connection with the proceedings before the Municipal Court. Such claims, however entirely overlook, in our opinion, the basic concept of a Juvenile Court. The proceedings in such a court are not in the nature of a criminal trial but constitute merely a civil inquiry or action looking to the treatment, reformation and rehabilitation of the minor child. Their purpose is not penal but protective, — aimed to check juvenile delinquency and to throw around a child, just starting, perhaps, on an evil course and deprived of proper parental care, the strong arm of the State acting

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[42] 241 P. 2d, at p. 633 (*per* White, J.).
[43] *Ibid.*, at p. 634.
[44] 109 A. 2d 523 (Penn. Sup. Ct., 1954).

> as parens patriae. The State is not seeking to punish an offender but to salvage a boy who may be in danger of becoming one, and to safeguard his adolescent life. Even though the child's delinquency may result from the commission of a criminal act the State extends to such a child the same care and training as to one merely neglected, destitute or physically handicapped. No suggestion or taint of criminality attaches to any finding of delinquency by a Juvenile Court.[45]

Justice Musmanno, in a celebrated dissenting opinion, used strong language against the concept of parens patriae as a reason for denying due process and asked for a re-hearing on all alleged offences not constitutionally and legally proved. He stated:

> But fairness and justice certainly recognize that a child has the right *not* to be a ward of the State, *not* to be committed to a reformatory, *not* to be deprived of his liberty, if he is innocent. The procedure for ascertaining the guilt or innocence of a minor may be designated a hearing or a civil inquiry, as the Majority says, but in substance and form it is a trial — a momentous trial which means even more than one which confronts an adult, because in the Juvenile Court trial the defendant's whole mature life still lies before him. And no matter how trained and experienced a Juvenile Court judge may be, he cannot by any magical fishing rod draw forth the truth out of a confused sea of speculation, rumor, suspicion and hearsay. He must follow certain procedures which the wisdom of centuries have established.[46]

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[45] *Ibid.*, at p. 525.

[46] *Ibid.*, at p. 535. See also p. 529 on court records; p. 530 on punishment; p. 535 on criminal offences by juveniles. Musmanno, J. was strongly supported in *In re Urbasek*, 232 N.E. 2d 716 (1968) where a juvenile, 12-year-old, was charged with punching an 11-year-old girl. In the Supreme Court of Illinois, Underwood, J. stated:

> A minor found guilty of the requisite misconduct to be adjudged a delinquent is committed to an institution where he may be restrained of liberty for years. It is of no constitutional consequence — and of limited practical meaning — that the institution to which he is committed is called an Industrial School. The fact of the matter is that, however euphemistic the title, a 'receiving home' or an 'industrial school' for juveniles is an institution of confinement in which the child is incarcerated for a greater or lesser time. His world becomes 'a building with white-washed walls, regimented routine and institutional laws... Instead of mother and father and sisters and brothers and friends and classmates, his world is peopled by guards, custodians (and) state employees. (*In re Gault*, 87 Sup. Ct., 1428, at p. 1443).

The judgment continues:

> When we eschew legal fictions and adopt a realistic view of the consequences that attach to a determination of delinquency and a commitment to a juvenile detention home, 'juvenile quarters' in a jail or a State institution as described above, we can neither truthfully nor fairly say that such an institution is devoid of penal characteristics. Though the purpose of industrial training schools for boys, such as that at St. Charles

Commenting on the civil or criminal nature of juvenile court proceedings, Professor Tappan [47] observed:

> At the child's level the experience of a delinquency adjudication in the juvenile court, its treatment consequences, and its effect on his reputation and self esteem are as severe — very often more so — as criminal conviction is to an adult. In spite of this, the insensitive perceptions of an adult world, what appears to be a self-deception induced by benign but misdirected motives, persists in viewing the court handling of the the child as an innocuous or even a generally constructive experience.[48]

Labelling juvenile court proceedings as "non-criminal" is "a convenient, but highly misleading sophistry".[49]

V. Evolution of the Law Under Kent, Gault and Winship

Under these three cases, the concept of parens patriae as originally conceived was breached in the Supreme Court of the United States. The aims and purposes of the juvenile court were challenged to the breaking point and its *raison d'être* severely shaken.

In *Kent* v. *United States*,[50] it was held that the juvenile court judge "held no hearing. He did not confer with petitioner, his parents or counsel. He made no findings. He merely entered an order reciting that 'after full investigation I do hereby waive' jurisdiction and directed the juvenile be 'held for trial for (the alleged offences) under the regular procedure of the U.S. District Court

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> in Illinois, is to rehabilitate and train youths whose misconduct has brought them to these institutions, the incarcerated juveniles' liberty of action is restrained just as effectively as that of the adult inmates serving terms in State and Federal prisons. The modern concepts of penology which guide the administrators of today's prisons also place a great emphasis on training, education and rehabilitation which were once the unique characteristics of the juvenile system that, in theory at least, justified the application of lesser procedural safeguards for delinquency hearings. Now, however, while improbable, a minor may conceivably be confined for a longer period of time then the period of imprisonment imposed upon an adult who is found guilty of the same criminal conduct. (At p. 719).

[47] Professor Tappan, Professor of Sociology and Lecturer in Law, New York University.

[48] Tappan, *Unofficial Delinquency*, (1950), 29 Neb. L. Rev. 547, at p. 548.

[49] *Id.* See also Antieau, *Constitutional Rights in Juvenile Courts*, (1961), 46 Cornell L. Quart. 387. (Cert. to U.S.C.A. Dist. Colnmbia).

[50] 383 U.S. 541 (1966). For a Canadian view of this case, see Parker, *The Appellate Court View of the Juvenile Court*, (1970), 7 Osgoode Hall L.J., No. 2, 155.

for the District of Columbia'".[51] Thus the Supreme Court dealt only with waiver proceedings from a juvenile court to the regular court.

Speaking for the majority, Mr. Justice Fortas said:

> The theory of the District's Juvenile Court Act, like that of other jurisdictions, is rooted in social welfare philosophy rather than in the *corpus juris*. Its proceedings are designated as civil rather than criminal. The juvenile court is theoretically engaged in determining the needs of the child and of society rather than adjudicating criminal conduct. The objectives are to provide measures of guidance and rehabilitation for the child and protection for society, not to fix criminal responsibility, guilt and punishment. The state is parens patriae rather than prosecuting attorney and judge.[52]

Justice Fortas added however that, "... the admonition to function in a 'parental' relationship is not an invitation to procedural arbitrariness".[53]

The Court then concluded that as a condition for a valid waiver order the juvenile is entitled to a hearing (albeit an informal one), to the assistance of counsel, to access to social records and probation and similar reports, and to a statement of reasons for the juvenile court's decision.

Four of the nine Supreme Court Justices dissented on the sole ground that the case involved the construction of a statute applicable only to the District of Columbia. Their recommendation was to remand the case to the Court of Appeals for reconsideration in the light of two of its subsequent decisions.

Kent is the first juvenile case before the Supreme Court. While the decision itself is limited to procedure for waiver cases, the majority judgment, while accepting the concept of parens patriae in juvenile delinquency legislation, seems to limit its application and

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[51] The Court noted the following arguments of counsel: Firstly, the police failed to notify parents of child and the juvenile court itself. Secondly, the juvenile was deprived of his liberty for a week without determination of probable cause which would have been required in the case of an adult. Thirdly, the juvenile was interrogated by police in absence of counsel or parent. Fourthly, he was not warned of his right to remain silent or advised of his right to counsel. Fifthly, he was fingerprinted contrary to the intent of the Juvenile Court Act and the fingerprints were unlawfully used in the District Court proceeding. The Court then stated "However, because we remand the case on account of the procedural error with respect to waiver of jurisdiction, we do not pass upon these questions." *Ibid., per* Fortas, J., at p. 552.

[52] *Ibid.*, at pp. 554-55.

[53] *Ibid.*, at p. 555.

casts doubt on the flexibility of juvenile court procedures which have heretofore distinguished that court as a civil and not a criminal court.[54]

In re Gault[55] is recognized as a landmark decision.[56] At the outset, it should be remembered that the decision is limited to the

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[54] See Comment, *Criminal Offenders in the Juvenile Court: More Brickbats and Another Proposal*, (1966), 114 U. of Pa. L. Rev. 1171; Paulsen, *Kent* v. *United States: The Constitutional Context of Juvenile Cases*, (1966), Supreme Court Review 167, at p. 168 where Paulsen, in speaking of *Kent* observed regretfully:

> Thus great numbers of Americans have had their most vital interests in freedom and in the right to the custody and control of their children adjudicated by courts employing procedures of debatable constitutional validity. Today no one can state with authority whether a respondent to a juvenile court delinquency petition is entitled to the right to counsel; if so, in what cases and at what stage of the proceedings; whether such youngsters may invoke the privilege against self-incrimination; whether a juvenile's lawyer has the right to inspect the social services record compiled by the court staff to assist the judge in making disposition of the case; whether a child in juvenile court has the right to a jury trial; whether the full reach of the 4th Amendment applies to children in the same manner as to adults; whether the limitations on police interrogation which must be observed in criminal cases after *Miranda* v. *Arizona* (384 U.S. 436, 1966) are also to be observed in cases of youths headed for children's court. This list offers only a few of the multitude of questions that a parade of juvenile court cases would put to the Justices.

[55] 387 U.S. 1 (1966).

[56] *Gault* has been the subject of much legal commentary. See, *e.g.*, Ketcham, *Guidelines from Gault: Revolutionary Requirements and Re-appraisal*, (1967), 53 Virg. L. Rev. 1700; Polier, *Gault: Its Practical Impact on the Philosophy and Objectives of the Juvenile Court*, (1967), 1 Family Law Quarterly 47; *In re Gault*, (1967), 12 Vill. L. Rev. 803; Lepstein, *In re Gault: Understanding the Attorney's New Role, Juvenile Courts and Lawyers*, (1967), 53 A.B.A.J. 812; George, *Gault and the Juvenile Court Revolution*, Institute of Continuing Legal Education, Ann Arbor, Michigan (1968); *In re Gault*, (1968), 47 Neb. L. Rev. 558; *The Children's Court, Will It Survive Gault?*, (1969), 34 Albany L. Rev. 46; Steinfield, Kerper & Friel, *The Impact of Gault in Texas*, (1969), 20 Juvenile Court Judges Journal 154; Lepstein, Stapleton & Teitelbaum, *In Search of Juvenile Justice, Gault and its implications*, (1969), 3 Law & Society Rev. 491; Noyes, *Has Gault Changed the Juvenile Court Concept?*, (1970), 16 Crime & Delinquency 158; Cohen, *Standard of Proof in Juvenile Proceedings: Gault Beyond a Reasonable Doubt*, (1970), 68 Michigan L. Rev. 567; Lenon, *On Re-examining Gault — Again and Again*, (1970), 4 Family Law Quarterly 387; Parker, *Instant Maturation of the Post Gault "Hood"*, (1970), 4 Family Law Quarterly 113; Cannon & Kolson, *Rural Compliance with Gault: Kentucky, a Case Study*, (1970), 10 Journal of Family Law 300; Zehler, *Post Gault — One Judge's View of the Juvenile Court*, (Winter, 1971), 21 Juvenile Court Journal 112.

adjudication phase of a juvenile court hearing where the alleged misconduct of the juvenile may result in his committment to a state institution.[57]

In the majority opinion, delivered by Justice Fortas, it was contended that juvenile court proceedings must be regarded as "criminal" only in reference to the privilege against self-incrimination. It was held that:

> The juvenile offender is now classed as a 'delinquent'... It is disconcerting, however, that this term has come to involve only slightly less stigma than the term 'criminal' applied to adults.[58] ...Juvenile proceedings to determine 'delinquency' which may lead to committment to a state institution, must be regarded as 'criminal' for purposes of the privilege against self-incrimination.[59]

Justice Fortas reviewed the history of the juvenile court. While agreeing that "the highest motives and most enlightened impulses led to a peculiar system for juveniles... the results have not been satisfactory. Juvenile court history has again demonstrated that unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure... Departures from established principles of due process have frequently resulted not in enlightened procedure but in arbitrariness." [60]

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[57] We do not in this opinion consider the impact of these constitutional provisions upon the totality of the relationship of the juvenile and the state. We do not even consider the entire process relating to 'juvenile delinquents'. For example, we are not here concerned with the procedures or constitutional rights applicable to the pre-judicial stages of the juvenile process, nor do we direct our attention to the post-adjudicative or dispositional process... We consider only the problems presented to us by this case. These relate to the proceedings by which a determination is made as to whether a juvenile is a 'delinquent' as a result of alleged misconduct on his part, with the consequence that he may be committed to a state institution. 387 U.S. 1, at p. 13.

The juvenile courts generally have jurisdiction in 3 categories. 1. Children with delinquent tendencies, non-criminal but anti-social behavior, such as persistently or habitually refusing to obey their parents, acting beyond the control of parents, habitual truaunts from school. 2. Dependent or destitute children, children neglected by their parents or object of cruelty. 3. Children who have violated laws defined as crimes if committed by adults. Presumably the *Gault* decision is restricted to the third category.

[58] 387 U.S. 1, at pp. 23-24.

[59] *Ibid.*, at p. 49.

[60] *Ibid.*, at pp. 17-19.

What, then, are the due process requirements? For *Gault* they appear to be 1) right to notice,[61] 2) right to counsel,[62] (knowledge of this right is not a waiver of it) [63] and 3) privilege against self-incrimination, right to confrontation and cross-examination.[64] The Court left open the requirement of appellate review and transcript of proceedings.[65]

Concurring opinions did not entirely agree with all that was said by Justice Fortas.

Justice Black based his concurring opinion solely on the grounds that violation of the three rights are violations against the provisions of the Fifth and Sixth Amendments to the Constitution which the Fourteenth Amendment made applicable to the states. Justice White concurred but did not find an "adequate basis in the

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[61] Notice, to comply with due process requirements, must be given sufficiently in advance of scheduled court proceedings so that reasonable opportunity to prepare will be afforded, and it must 'set forth the alleged misconduct with particularity'. *Ibid.*, at p. 33.

[62] ...it (the assistance of counsel) is equally essential for the determination of delinquency, carrying with it the awesome prospect of incarceration in a state institution until the juvenile reaches the age of 21. *Ibid.*, at pp. 36-37.

We conclude that the Due Process Clause of the Fourteenth Amendment requires that in respect of proceedings to determine delinquency which may result in commitment to an institution in which the juvenile's freedom is curtailed, the child and his parents must be notified of the child's right to be represented by counsel retained by them, or if they are unable to afford counsel, that counsel will be appointed to represent the child. *Ibid.*, at p. 41.

[63] Mrs. Gault's knowledge that she could employ counsel was not an 'intentional relinquishment or abandonment' of a fully known right. *Ibid.*, at p. 42.

The Court is speaking of the parent's right to counsel and right to waiver. But quaere whether the parent could waive on behalf of the child whose rights and interests may be conflicting with those of the parent.

[64] We now hold that, absent a valid confession, a determination of delinquency and an order of commitment to a state institution cannot be sustained in the absence of sworn testimony subjected to the opportunity for cross-examination in accordance with our law and constitutional requirements. *Ibid.*, at p. 57.

[65] This Court has not held that a state is required by the Federal Constitution to provide appellate courts or a right to appellate review at all... We need not rule on this question in the present case or upon the failure to provide a transcript or recording of the hearings — or, indeed, the failure of the Juvenile Court Judge to state the grounds for his conclusion. *Ibid.*, at p. 58.

record for determining whether that provilege (against self-incrimination) was violated".[66] Justice Harlan concurred in part and dissented in part. He preferred to rest his decision on due process requirements only and criticized the Court for "failure to provide any discernable standard for the measurement of due process in relation to juvenile proceedings".[67] With respect to self-incrimination, confrontation and cross-examination, Justice Harlan felt that their consideration should be deferred.

Justice Stewart dissented on the grounds that a juvenile court is not a criminal court.[68] He did agree that "a state in all its dealings must, of course, accord every person due process of law".[69] For example, there must not be brutally coerced confession and there must be timely notice of the purpose and scope of the proceedings.

In re Winship[70] is the latest Supreme Court case in this trilogy. As stated in the majority opinion delivered by Justice Brennan,

> This case presents the single, narrow question whether proof beyond

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[66] *Ibid.*, at p. 64.

[67] *Ibid.*, at p. 72. Justice Harlan suggested 3 criteria by which the procedural requirements of due process should be measured: Firstly, no more restrictions should be imposed than are imperative to assure fundamental fairness. Secondly, the restrictions imposed should be those which preserve, so far as possible, the essential elements of the State's purpose. Thirdly, the restrictions should be chosen which will later permit the orderly selection of any additional protections which may prove necessary. Measured by these criteria, only 3 procedural requirements are necessary to satisfy the Due Process Clause of the Fourteenth Amendment: Firstly, timely notice must be provided to parents and children of the nature and terms of the juvenile proceeding. Secondly, unequivocal and timely notice must be given that counsel may appear in behalf of child and parents and where child may be confined to an institution, counsel may, in case of indigency, be appointed for them. Thirdly, the Court must maintain a written record, adequate to provide effective review on appeal or in collateral proceedings. (See: 387 U.S. 1, at p. 72.)

[68] Juvenile proceedings are not criminal trials. They are not civil trials. They are simply not adversary proceedings. Whether treating with a delinquent child, a neglected child, a defective child, or a dependent child, a juvenile court proceedings' whole purpose and mission is the very opposite of the mission and purpose of a prosecution in a criminal court... I am certain that the answer (in dealing with the serious problems of juvenile delinquency) does not lie in the Court's opinion in this case, which serves to convert a juvenile proceeding into a criminal prosecution. *Ibid.*, at pp. 78-79.

[69] *Ibid.*, at p. 80.

[70] 397 U.S. 358 (1969).

a reasonable doubt[71] is among the 'essentials of due process and fair treatment' required during the adjudicatory stage when a juvenile is charged with an act which would constitute a crime if committed by an adult.[72]

While juvenile courts are not criminal courts, "juveniles, like adults, are constitutionally entitled to proof beyond a reasonable doubt when they are charged with violation of a criminal law".[73] Justice Brennan continued:

Use of the reasonable doubt standard during the adjudicatory hearing will not disturb New York's policies that a finding that a child has violated a criminal law does not constitute a criminal conviction, that such a finding does not deprive a child of his civil rights, and that juvenile proceedings are confidential. Nor will there be any effect on the informality, flexibility or speed of the hearing at which the fact finding takes place. And the opportunity during the post-adjudicatory or dispositional hearing for a wide-ranging review of the child's social history and for his individualized treatment will remain unimpaired. Similarly, there will be no effect on the procedures distinctive to juvenile proceedings that are employed prior to the adjudicatory hearing.[74]

Justice Harlan, concurring, stated:

...due process, as an expression of fundamental procedural fairness, requires a more stringent standard for criminal trials than for ordinary civil litigation.

When one assesses the consequences of an erroneous factual determination in a juvenile delinquency proceeding in which a youth is accused of a crime, I think it must be concluded that, while the consequences are not identical to those in a criminal case, the differences will not support a distinction in the standard of proof.[75]

Chief Justice Burger, joined by Justice Stewart, dissented. They protested strongly that juvenile courts are not criminal courts and the procedures should not be the same.

The Court's opinion today rests entirely on the assumption that all juvenile proceedings are 'criminal prosecutions', hence subject to constitutional limitations...

Much of the judicial attitude manifested by the Court's opinion today and earlier holdings in this field is really a protest against inadequate

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[71] The reasonable doubt test has been succinctly expressed by Chief Justice Shaw of the Massachusetts Supreme Court:

The burden of proof is upon the prosecutor. All the presumptions of law independent of evidence are in favour of innocence, and every person is presumed to be innocent until he is proved guilty. If upon such proof there is a reasonable doubt remaining, the accused is entitled to the benefit of it by an acquittal. *Commonwealth* v. *Webster*, 59 Mass 295 (1850), at p. 350.

[72] 397 U.S. 358, at p. 359.

[73] *Ibid.*, at p. 365.

[74] *Ibid.*, at pp. 366-67.

[75] *Ibid.*, at pp. 373-74.

> juvenile court staffs and facilities. We burn down the stable to 'get rid of the mice'...
>
> My hope is that today's decision will not spell the end of a generously conceived program of compassionate treatment intended to mitigate the rigors and trauma of exposing youthful offenders to a traditional criminal court; each step we take turns the clock back to the pre-juvenile court era. I cannot regard it as a manifestation of progress to transform juvenile courts into criminal courts, which is what we are well on the way to accomplishing.[76]

Justice Black, dissenting, argued that it has never been clearly held that proof beyond a reasonable doubt is either expressly or implicitely required under any provisions of the Constitution. Due process of law does not include such proof as a fundamental requirement.

VI. Trends

Of the three Supreme Court decisions, *Gault* was the most important as it dealt with general principles and set general guidelines.[77] In the following pages, the writer will discuss some of the steps taken by state legislatures, judges and legal commentators to extend the limited confines of *Gault* to other areas which were either not dealt with in *Gault* or specifically excluded by that decision.

Before specifically embarking on a discussion of these trends,

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[76] *Ibid.*, at pp. 375-76.

[77] In an analysis made by Charles Reasons, *Gault: Procedural Change and Substantive Effect*, (1970), 16 Crime & Delinquency 161, it was found that after *Gault* out of 3,225 juvenile cases in Franklin County (Columbus, Ohio), appearances with counsel in auto theft cases increased from 11 to 33%; prosecutions were reduced from 18 to 7%, possibly due to stricter requirements for determining guilt. Appearances with counsel in burglary cases increased from 18 to 47%. Incorrigibility cases fell from 17 to 11%, probably due to more stringent screening in the pre-adjudication stage. The number of cases dismissed rose from 8% to 16%. Total prosecutions for burglary fell from 119 to 66.

The writer concludes, at p. 171:

> An increase in the presence of counsel and the number of dismissals and a reduction in the number of cases reaching adjudication and disposition indicate a shift toward legal fact-finding.

See also: Glen, *Developments in Juvenile and Family Court Law*, (1970), 16 Crime & Delinquency 198:

> The decision of the U.S. Supreme Court in the *Gault* case has been accorded a virtually unique acceptance in the courts and legislatures. The appellate tribunals have been busy testing extensions of this decision into procedural areas not dealt with by the Supreme Court, and into aspects of the juvenile court process specifically excluded in *Gault*. The legislatures continue to update their juvenile court statutes to implement *Gault*, especially in regard to the right to counsel.

it will be useful to clarify the different stages of a delinquency hearing.

Briefly stated, there are three stages. *Intake,* where the authorities decide whether or not to take further action; presentation before the judge for *adjudication; disposition,* where the judge decides what to do with a child found delinquent. Between intake and adjudication there may be a further step of waiver proceedings, to decide whether or not the juvenile court should waive jurisdiction to an adult criminal court for trial.[78]

At the intake or "screening" stage, the handling by police of a child who may be delinquent should be with extreme circumspection and patience. If protection of children requires policemen to have broader powers to take them into custody than adults,

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[78] Procedures are not identical in all states, but in general they are as follows:

The screening process. This is usually broken down into 2 stages, police screening and screening by the juvenile court's "intake" department. The policeman on the beat usually makes the first contact either from a complaint received or from apprehension at the time of the alleged offence. He can then i) release the juvenile, with or without a warning, but without making a record or taking further action; ii) release the juvenile but make a brief "field report" for the juvenile bureau or file a more formal report for possible further action; iii) turn the youth to the juvenile bureau; or iv) refer the case to the juvenile court. In the last instance, the police must decide whether to return the child to his parents or to detain him. The policeman is guided by considerations of whether or not the offence is serious, whether the child is on probation (if he has this knowledge) or if he has had previous contacts with the police.

In some cities, the minor is brought immediately before a juvenile officer who decides, usually after a police hearing, whether to take the case to court or terminate it at this stage, perhaps with a stern reprimand. Notice of the hearing is given to the parents. If the minor denies his guilt, the case can be taken to court or dropped, usually also with a reprimand. If the minor confesses, the officer can release him to his parents with a reprimand, direct him and perhaps his parents to a community social agency or refer the case to court. Police records are maintained and release of information is at the discretion of the police.

"Screening" by intake department. As in the police hearing, the issue of whether to proceed is based on an assessment of whether future delinquent behaviour can be otherwise averted, and the seriousness of the alleged offence. At the intake hearing, the minor, his parents and on rare occasions, counsel, are present. The screening personnel has the power to impose "informal probation" where an attempt is made to work out remedial measures without court referal, refer the case to court or dismiss the charge. See: Note, *Juvenile Delinquents, the Police, State Courts and Individualized Justice,* (1965-66), 79 Harv. L. Rev. 775; Weiss, *The Poor Kid,* (1971), 9 Duquesne L. Rev. 590; Dobson, *The Juvenile Court and Parental Rights,* (1970), 4 Family Law Quarterly 393.

then they require special instruction and training in handling juveniles. One of the first requirements must be that they be relased to their parents as soon as possible following custody unless there is evidence that a child is neglected or in need of protection from his parent.[79] The flippancy and impertinence of young people can be an irritant to police who should not allow that to influence their judgment whether or not to make an arrest.[80]

With respect to informal action taken by the police of the "intake department", Professor Paulsen of Columbia University writes that such action "can be a kind of informal and unofficial probation which interferes very much with the life of a child". He suggests that "in principle, however difficult the principle may be to apply, no coercive measures should be taken without a formal court decision reached after a hearing".[81]

Some writers support the principle of screening. Careful work done here, especially by the intake department with competent staff, will help to recognize the more "casual" acts and spare these from court consideration. It is felt that a fair amount of juvenile activity is not so much an indication of basic criminal impulse, but may be an expression of an inherent drive "to experiment, to dare, to revolt". "These are not really criminal offences, they deal with children who are in trouble, not with the law but with their homes and school environment... They should be handled by social agencies, not the courts." [82]

Adjudication is the fact finding phase of the court hearing. Here the judge must decide whether or not the juvenile has committed the alleged offence, is in fact a dependent child or a neglected child. The disposition or judgment phase may or may not occur on the same day as the adjudication. Dispositional alternatives include leaving the juvenile with his parents, with or without the supervision of a probation officer, removal to a foster home, placement in a training school.[83]

End of Part 1

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[79] See: Paulsen, *Fairness to the Juvenile Offender,* (1957), 41 Minnesota L. Rev. 547.

[80] See: *Myers* v. *Collett,* 268 P. 2d 432 (Utah Supreme Court, 1954).

[81] Paulsen, *Fairness to the Juvenile Offender, op. cit.,* n. 79, at p. 554.

[82] See, *e.g.,* Alper, *The Children's Court at Three Score and Ten: Will It Survive Gault?,* (1969), 34 Albany L. Rev. 46, citing at p. 52 the chief counsel for the defenders of an 18-year-old girl convicted under a "stubborn child" section of a Massachusetts Statute. In 1967, 53% or 428,000 of all cases referred to juvenile courts were handled without a judicial decision. (U.S. Children's Bureau, (Juvenile Court Statistics 1967), at p. 11.)

[83] See, *e.g.,* the California procedure. Boches, *Juvenile Justice in California: a Re-evaluation,* (1967), 19 Hastings L. J. 47.