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Fairness to the Juvenile Offender

Monrad G. Paulsen
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The procedure used in juvenile courts is the target of a steady fire of criticism particularly with respect to juvenile delinquency cases. "We Need Not Deny Justice to Our Children" is the title of a recent article in the Civil Liberties Record, published by the Greater Philadelphia Branch of the American Civil Liberties Union. A California judge has written that the juvenile court "is fast developing into a complete system of fascism, as dangerous to our institutions as communism." A writer discussing the Georgia Juvenile Court Act has said, "The flowery platitudes of this act cannot close the gateway to tyranny which it has opened."

It is surprising to find such intemperate expression employed with respect to legislation designed for humanitarian purposes. Men of good will created juvenile courts for the benefit and protection of children in the light of the appalling consequences visited upon

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2. Olney, Juvenile Courts—Abolish Them, 13 Cal. State B. J. 1, 2 (April-May 1938). In a like vein: "It has become settled law in this country that the constitutional guarantees applicable to criminal procedure accorded to known criminals, acknowledged Communists, and enemy aliens before our courts, need not be considered in the sentencing to reformatories of our young citizens adjudged to be juvenile delinquents." Note, Due Process in the Juvenile Courts, 2 Catholic U. L. Rev. 90, 91 (1952); "It is unfortunate that the mechanics of that system are so ridden with danger to the persons who are to be the object of that protection." 49 Geo. L. J. 138, 141 (1955). See also the dissent in In re Holmes, 279 Pa. 599, 610-30, 109 A.2d 523, 528-37 (1954).

Some of the criticism is more temperate. "In the search for proper judicial standards to govern juvenile court proceedings there remains a vital balance of interests yet to be struck between an informal approach emphasizing reformation and rehabilitation, on the one hand, and a more formal procedure designed to guard against punishment of the innocent, on the other." 41 Corn. L. Q. 147, 154 (1955). See also Note, Rights of Juveniles to Constitutional Guarantees in Delinquency Proceedings, 27 Colum. L. Rev. 908 (1927). Rubin, Protecting the Child in the Juvenile Court, 43 J. Crim. L. and Crim. 425 (1952), is a constructive piece by one close to the juvenile court movement.

3. Miller, Responsibility—In Criminal Law and in Treating Juvenile Offenders, 23 U. Kan. City L. Rev. 257 (1955), makes the criticism that juveniles should be held to a stricter responsibility for their choices.

youngsters by the criminal law. Under the system of an earlier day, a child of eight or nine could be marred for life by conviction of crime and subsequent imprisonment with hardened criminals. Execution of the very young was not unknown to the stern criminal law practices of the eighteenth century. Reform was accomplished by replacing notions of punishment with concepts of care and rehabilitation.

According to the philosophy of the Juvenile Court Acts, a child is not to be accused, but to be offered assistance and training by the state if there is some demonstrated need for it. The adjudication that state intervention in a child’s life is necessary is not supposed to carry the stigma of criminal guilt. Records are not generally available for inspection. Probationary supervision, not continued detention, is sufficient treatment in all but the most serious cases. In those relatively few instances which require institutionalization the child is supposed to be housed in such a way as to give him the rehabilitation and training he needs. The aim throughout is individualized treatment according to the needs of the youth, not punishment according to the seriousness of the act, redemption not retaliation. The care offered the child, in the words of the first Juvenile Court Act, “shall approximate as nearly as may be that which should be given by its parents.”

4. We can still be quite harsh today. State v. Fischer, 245 Iowa 170, 60 N.W.2d 105 (1953), tells of the second degree murder conviction of a boy fourteen and one-half years old at the time of the event. State v. Gunl, 212 La. 475, 32 So.2d 895 (1947), affirms the murder conviction of sixteen year old defendant. In 1945 a Kentucky trial court convicted an eleven year old boy of raping a five year old girl and sentenced him to 2 years in the state reformatory. The conviction was reversed for error in the instruction. Thomas v. Commonwealth, 300 Ky. 480, 189 S.W.2d 686 (1945).

5. The most widely consulted statement of the basic aims of the court is Mack, The Juvenile Court, 23 Harv. L. Rev. 104 (1909).

6. For example, a juvenile’s adjudication of delinquency cannot be used as the basis for impeaching his credibility as a defendant-witness in a criminal case. Woodley v. State, 227 Ind. 407, 86 N.E.2d 529 (1949), State v. Coffman, 360 Mo. 782, 250 S.W.2d 761 (1950). Compare the dissenting opinion of Judge Stevens in Thomas v. United States, 121 F.2d 903, 911 (D.C. Cir. 1941). It has been held that fingerprints and photographs taken of delinquents must be returned by the police. Campbell v. Adams, 206 Misc. 673, 133 N.Y.S. 2d 876 (1954).

7. Sussman, Juvenile Delinquency 31 (1950). Statements made in juvenile court may not be used in other proceedings according to the juvenile court acts. In an interesting Colorado case Judge Lindsey was ordered to testify as to what a child had told him before the juvenile court proceedings had formally begun by petition. The Judge argued that the proceedings had already begun in the “breast” of the judge as the child began to speak. Lindsey v. People, 66 Colo. 343, 181 Pac. 531 (1919).

The procedure in a juvenile case is much more informal than that in a criminal prosecution. Even though the court may take a child's liberty until his majority, all the protections of an accused are not extended to him. The courts have reasoned that juvenile proceedings are civil and not criminal in character, hence the specific criminal safeguards are not applicable. The Juvenile Court Acts have been upheld on the theory that the state is merely acting as parens patriae for the youngster's protection in the way as it does in a guardianship matter and not accusing the child with a view to punishment as it does in a prosecution for crime.

The beneficent purpose of the protective legislation led some to opinions as extravagant in their own way as the contrary views quoted in the opening paragraph. Thus, a 1904 case upholding the right of an official to commit a fifteen year old to a girls' reform school merely upon her parents' application, characterized the restraint as an opportunity for "moral and physical well being." The court went on to say, "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."

And again from an early Pennsylvania case upholding the constitu-

9. Cinque v. Boyd, 99 Conn. 70, 121 Atl. 678 (1923), is a key opinion. All of the important prior cases on the basic constitutional issues are cited there and all of the important issues were raised in that case.


11. Rule v. Geddes, 22 App. D.C. 31 (1904). State v. Worden, 162 Ohio St. 593, 124 N.E.2d 817 (1955), held the following old Ohio statute repealed by implication from the Juvenile Court Act: "If a crime is charged against a youth before a Grand Jury and the charge is supported by sufficient evidence to put him on trial, such youth may be committed by the Court to the Boys' Industrial School on the recommendation of the Grand Jury without presenting an indictment."

12. Rule v. Geddes, supra note 11 at 50.
tionality of the Pennsylvania Juvenile Court Act, "[H]e could not have been without due process of law, for the constitutional guaranty is that no one charged with a criminal offense shall be deprived of life, liberty or property without due process of law. [T]he state is not required to adopt any process as a means of placing its hands upon the child to lead it into one of its courts."18 "There is no probability, in the proper administration of the law, of the child's liberty being unduly invaded."14

These optimistic points of view come to trouble on at least three counts (1) any restraint by the state, even one springing from the kindest of motives, is a restraint which must have some justification, (2) children are, in fact, sometimes treated arbitrarily, (3) the institutions to which children are sent, however lofty in purpose, are often little better than prisons for the young.

This article is an attempt to discover what courts can do to protect the rights of the child more adequately without sacrificing the very real benefits of our courts for children. Clearly a child is entitled to due process of law whether the juvenile court administers civil or criminal justice. Whether a boy or girl should be afforded a protection given an accused adult is not necessarily determined by taking note of the fact that the judge is presiding over a civil trial. Nor can we jump to the conclusion (even as to that portion of the juvenile court's proceedings designed to adjudicate the fact of delinquency) that we should "grant the child all the safeguards of due process that protect the rights of an accused adult before his liberty can be taken away.15 Fairness is a relative standard. The proper inquiry is what does fairness require in a children's court case? What follows is an examination of many topics with this question in mind. All of the topics will require more extended consideration. The author's often too dogmatically stated conclusions are intended only to bring us to the threshold of discussion.

One other point requires underscoring at the beginning. There is a relationship between the rights of a child and the treatment given him by the juvenile court. If the result of an adjudication of delinquency is substantially the same as a verdict of guilty, the youngster has been cheated of his constitutional rights by false labeling. We cannot take away precious legal protection simply by changing names from "criminal prosecution" to "delinquency proceedings." The propriety of a change in procedure turns upon a

14. Id. at 56, 62 Atl. at 201.
change in theory and the substantial realization of the theory in practice.

**Fair Treatment Before Trial**

Standards of fair treatment of any alleged law violator ought to be applied before the time of trial. The child who may be delinquent ought to be handled by the police with even more circumspection and understanding than the adult accused of crime. Lifelong attitude towards law enforcement and the police are formed in these first contacts with law enforcement officials. Police are in need of special instruction respecting the handling of children's cases so that the process of rehabilitation can begin at the earliest possible time.16

The protection of children requires that police have broader powers to take juveniles into custody than to arrest adults. A policeman should be able to detain a child if he has reasonable grounds to believe that the child is delinquent. This proposal would extend a policeman's authority beyond the provisions of the Standard Juvenile Court Act which provides "any child found violating any law or ordinance, or whose surroundings are such as to endanger his welfare"17 may be taken into custody. If a policeman without a warrant is powerless unless he finds the child violating a law, the restriction is unrealistic.18 He may possess information short of personal knowledge of a law violation (indeed the knowledge may be an act not illegal according to the criminal law at all) which strongly supports a belief that a child is delinquent. In such cases, for the benefit of the child, an officer should be able to act. If the youngster, after being taken into custody, is treated in accordance with the provisions of the Juvenile Court Acts, his rights are adequately protected.

Juvenile court statutes typically provide that parents are to be informed as soon as children are arrested, and the youngsters are to be released to the custody of their parents if that is at all feasible.19

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17. The quoted language is from Art. IV, § 15, of the Standard Juvenile Court Act published by the Nat'l Probation & Parole Ass'n (1949). The Standard Act (and many others) state that taking a child into custody shall not be termed an arrest. Whatever value may come from the change of label, it should not operate to shield the exercise of force, inevitably involved, from the necessity of some justification in fact.


Obviously, bail ought not be a matter of right in a juvenile case, not because the proceedings are civil rather than criminal in character but, more importantly, because a child in trouble may need care immediately and that care is not provided by a simple release from custody. Discharge to parents will not be wise in every case because the parents may be the source of a child's difficulty. Of course, some review of the decision to keep a child in detention pending a juvenile court adjudication ought to be available in the courts. The writ of habeas corpus can accomplish the release of a boy or girl arbitrarily kept in custody before adjudication.

Temporary detention in the regular jail is deplorable, but in many parts of the country no other facilities are available. In this, as in so many other respects, the fair treatment of the juvenile is not simply a matter of restricting public officials, but of affirmatively providing adequate facilities.

The flippancy and impertinence of some young people can be an irritant to policemen from whom the greatest forebearance is required. Myers v. Collett, from Utah, is a striking example of how badly a children's case can be handled. Three boys were questioned by police officers who were investigating a “prowler complaint.” The youngsters became impertinent and evasive whereupon they were arrested for “violation of curfew and investigation of activities.” They were taken to a detention home from which they were not released until the next day. After the arrest an officer called one of the parents who asked if the boys might be released were he to drive to the station and bring them home. The officer

20. Louisiana has held that a juvenile has a right to bail pending a determination of delinquency. State v. Franklin, 202 La. 439, 12 So.2d 211 (1943). However, an appeal does not operate to suspend a judgment of commitment in Louisiana juvenile cases. State v. McDonald, 206 La. 732, 20 So.2d 6 (1944). The cases are discussed in Jackson, The Right to Bail and Suspensive Appeal in the Louisiana Juvenile Courts, 20 Tul. L. Rev. 363 (1946).

Because of the speed with which the juvenile courts normally operate, the right to be free on bail is much more important after the adjudication pending an appeal than before. Admission to bail, as a matter of right in such circumstances has been denied. In re Magnuson, 110 Cal. App. 2d 73, 242 P.2d 362 (1952), State v. Fullmer, 76 Ohio App. 335, 62 N.E.2d 268 (1945), Ex parte Espinosa v. Price, 144 Tex. 121, 188 S.W. 576 (1945).

21. See, for example, In re Tillotson, 225 La. 573, 73 So.2d 466 (1954) which tells of a young girl who had sexual relations with a man in “her mother's bed at her home in New Orleans, with her mother's apparent consent and approval,” and Application of Jones, 206 Misc. 90 (1954), which tells of a fifteen year old who had been abused by her stepfather.


replied that they would have to wait until morning. Apparently the policeman’s attitude was the result of antagonism aroused by the conduct of one of the youngsters. Under the Utah statute the officer, “unless it is impracticable,” must release a child to his parents. When one of the boys sued for false imprisonment, he was denied recovery on the grounds that the policeman had no duty to notify parents of the child’s right to release, and that the plaintiff’s parent had not been the one who had inquired about the possibility of taking the boys home. Perhaps the decision can be defended on narrow technical grounds. Yet the conduct of the officers, motivated by a spirit of vengeance, can only be deplored. It is difficult to think that these boys have an increased respect for law enforcement after their first brush with the police and that their parents will not reinforce any hostile feelings which the boys may have.

The aim of the plaintiff in Collett is sound. Civil liability ought to be imposed on the police for violation of statutory provisions concerning the handling of a juvenile between the time of arrest and trial. The deterrent effect of such suits should be increased by provisions for statutory minima in respect to damages. Recognizing liability here would not impair the efficiency of the police by making them hesitant to act when quick action is wanted—a point sometimes made against proposals for more adequate civil recovery in false arrest and illegal search cases. The officer can protect himself by simply following the direction of the statute.

In the ordinary administration of the criminal law, every case of a known violation of law is not brought to trial. A vast discretionary power is lodged in the prosecutor. The power is almost without check save for an appeal to the ballot box, but almost everyone agrees that it is a necessary power. The same need exists to pick and choose the juvenile cases appropriate for official action. A great many juvenile cases are disposed of informally. In practice this means that discretion is lodged in a policeman or a caseworker in the intake service of a juvenile court, either (1) to institute proceedings in the court, (2) to merely give a warning, (3) to offer advice, (4) to dismiss a satisfactory conference adjusting matters between the complainant and the child or his family, (5) or to refer the case to a social agency. Sometimes informal adjustments can give rise to great abuses. It should be remembered that without the

25. Louisvile & N.R. Co. v. Offutt, 204 Ky. 51, 263 S.W. 665 (1924), permitted a recovery of $500 damages by a twelve year old arrested by railroad police who failed to take him to the juvenile authorities.

filing of a petition the juvenile court is without power to act. Informal action taken by the police or members of the court’s staff without an adjudication by the court can be a kind of informal and unofficial probation which interferes very much with the life of the child and for which there is no sanction save the fear of being brought to court.\footnote{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. The practical enforcement of this principle probably depends upon controls other than litigation before the juvenile court or elsewhere. Juvenile courts should become sufficiently sensitive to the rights of children and parents to restrain their staffs from the use of state power without a reason demonstrated to others.}

As we have said, what is fair to a youngster in the juvenile court depends, in part, upon how far the philosophy of that court is realized in fact. A youth’s rights are not those of a person accused of crime because he is to be protected from the stigma of crime. The state does not accuse him but proceeds in his interest. How short performance can fall is shown by \textit{Harris v. Souder},\footnote{The dangers of informal but directive handling of juvenile cases is described in Tappen, \textit{Unofficial Delinquency}, 29 Neb. L. Rev. 547 (1950) Professor Tappen asserts that the trend toward the imposition of controls without court adjudication stems from a recognition of the harm which comes to a child from an adjudication of delinquency and of the injustice of attributing the status to youngsters who have done no real injury to the community, but because of the embrasive definitions of the statutes are brought within the power of the court.} a 1954 case from Indiana, in which the form of the proceeding given Harris was nearly identical with that given to an accused. The record of the case before the Johnson Circuit Court was entered in “Criminal Order Book Number 4,” and the cause was styled “\textit{State of Indiana v. Axel Harris.}” The record tells that Harris was “duly arraigned” and “for his plea says guilty as charged.” The order of the court adjudged him “guilty as charged.” Even the Supreme Court of Indiana, in discussing the case referred to “the charge is then for a juvenile offense, to-wit delinquency”\footnote{Id. at 293, 119 N.E.2d at 11. A boy, charged with being delinquent in that he committed burglary and larceny, was found a “delinquent and guilty as charged.” Relief from the form of the adjudication was denied on the ground that the juvenile was not prejudiced thereby. \textit{State v. Harold}, 281 S.W.2d 605 (Mo. App. 1955)}
A juvenile court judge may not make disposition of a child just because it seems like a good thing to do. The trial judge in *In re Coyle* 29 defended his adjudication by saying that "the court was simply making a determination as to whether or not the appellant's future training, and the best interests of the State would be best served by taking him from his home and placing him where proper training was available." 31 The appellate court did not agree. "Juvenile court procedure has not been so far socialized and individual rights so far diminished that a child may be taken from its parents and placed in a state institution simply because some court might think that to be in the best interests of the state. Some specific act or conduct must be charged as constituting the delinquency and the truth of such charge must be determined in an adversary proceeding." 32

The reasons for which a court may interfere in the life of a child are set forth in the juvenile court act of each state. 33 The reasons with which this article is principally concerned have to do with the misconduct of the child and embrace a great range of behavior. However, under the most frequently used provisions of juvenile court acts, a child comes within the power of the court if he violates any state law, federal law or municipal ordinance, if he is acting beyond the control of his parents, or if he is associating with persons probably leading him to a life of crime.

It can be seen that the statutes are very far ranging indeed. By these definitions, almost every child could be adjudicated a delinquent. 34 What youngster grows up without violating a federal or state law, or a municipal ordinance? What child has not stolen

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31. *Id.* at 219, 101 N.E.2d at 193.
32. *Id.* at 219-20, 101 N.E.2d at 193.
33. The provisions of the many state statutes are tabulated in Sussman, *Juvenile Delinquency* 20-21 (1950).
34. Appellate courts have sometimes reversed a finding of delinquency if based only on narrow technical grounds. Although the language quoted below states only one of several reasons for reversal in a Virginia opinion, it is of great interest on this point:

> There is nothing in the record to suggest that the accused were inherently vicious or incorrigible. To classify an infant as delinquent because of a youthful prank, or for a mere single violation of a misdemeanor statute or a municipal ordinance, not immoral per se, in this day of numberless laws and ordinances is offensive to our sense of justice and to the intendment of the law. We cannot reconcile ourselves to the thought that the incautious violation of a motor vehicle traffic law, a single act of truancy or a departure of an established rule of similar slight gravity, is sufficient to justify the classification of the offender as a “delinquent,” and require the supervision of a probation officer. We can but reflect that if this were so, there would be an inclusion of so
an apple or filched a penny or played a harmful Halloween prank? Yet the youngster is probably not more completely blanketed by the delinquency law than an adult by the criminal law. To some extent we are all law violators. Adults must rely on the good sense of law enforcement officers, prosecutors and judges. The prosecutor does not normally play the same sifting role in children's cases as he does in those concerning adults, so the young must depend upon good sense of intake services, and on the discretion of juvenile judges themselves, for protection from the tyranny of "over enforcement" of the law.

Some of the statutory language in juvenile court acts would be unconstitutionally vague if it were used as the basis for criminal prosecution. What does it mean to be "incorrigible," to "grow up in idleness or crime," to "so deport himself as to injure or endanger self or others," or "to engage in immoral or indecent conduct?"

Without defending the specific formulations above against constitutional attack even in a juvenile case, we must admit that some juvenile cases do call for a standard rather than a single, specific law violation to measure the appropriateness of court intervention. There must be some way to deal with a boy of sixteen who spends a lot of his time visiting a home that has been turned into a school

many in the classification that the word would lose its accepted meaning. Jones v. Commonwealth, 185 Va. 335, 343, 38 S.E.2d 444, 447-48 (1946). See also State v. Breon, 244 Iowa 49, 55 N.W.2d 565 (1952) (a single act of assault with intent to commit rape does not establish delinquency under the Iowa law). In Iowa a child is a delinquent only if he "habitually" violates the law. Kahm v. People, 83 Colo. 300, 264 Pac. 718 (1928), holds that a single act of taking an automobile is neither "incorrigibility" nor "growing up in idleness or crime."

A Note, Misapplication of the Prens Patræ Power, 29 Ind. L. J. 475 (1954), argues that the employment of the prens patræ doctrine requires that a finding of parental unfitness be made before a delinquent can be committed to a public institution. The contention has been made and rejected in a Texas case, Dudley v. State, 219 S.W.2d 574 (Tex. Civ. App. 1949). See also State v. Christensen, 119 Utah 361, 227 P.2d 760 (1951). The California Welfare and Institutions Code § 739 (Supp. 1956), requires in some circumstances an express finding that the child's welfare demands that custody be taken from parents or that the parents are unfit to train and educate the child. In re Barajas, 114 Cal. App. 2d 22, 249 P.2d 350 (1952), reverses a trial court for failure to make the finding.

In re Jacobson, 283 App. Div. 719, 127 N.Y.S. 2d 356 (1954) is an example of a delinquency adjudication founded on a not-very-serious violation of the law. The boy, sixteen, was driving an auto without a license. Without more evidence, it is not clear that the boy needed "treatment" to improve his character.

35. "It is indeed a definite indication of a highly unsocial legal order when our most gifted and astute observers suggest a 'selective law-breaking' as the only path to the liberty that free men must have." Harper, The Forces Behind and Beyond Juristic Pragmatism in America, printed in II Recueil d'Etudes sur Les Sources Du Droit en L'Honneur de François Gény 261 (1932).

for sexual delinquency even though he himself did not participate.\textsuperscript{37} If the treatment process is, in fact, rehabilitative and redemptive, it ought to be applied to cases in which the youngster's commission of an actual criminal act is just a matter of time. Fundamentally, any standard employed should suggest an inquiry into parental supervision and control.\textsuperscript{38} If that control is permitting criminality to develop or is seriously defective in other ways, the rest of us must take a hand. Unhappily, the standard cannot state with precision the circumstances under which the courts will act. Nevertheless, the only alternative would be to refrain from action which might salvage an obviously deteriorating life.

THE PETITION INITIATING PROCEEDINGS

The jurisdiction of the juvenile court is begun by a petition which must be written and must set forth the facts which brings the child within the power of the court.\textsuperscript{39} The petition is a much less formal document than a criminal indictment or information, and need only stand the test whether the child is adequately informed of the reasons for his being in court. In most courts, inexpertly drawn petitions are sufficient if the youngster is not prejudiced thereby.\textsuperscript{40} The petition may allege several law violations, even though such a pleading might be subject to a motion to quash in a criminal case.\textsuperscript{41} Petitions ought to be freely amendable in the light of the proof with the safeguard that the boy or girl be given plenty of time to rebut evidence developed at the trial but not alleged in the petition.\textsuperscript{42} Sometimes the courts are overly legalistic. An Indiana case was reversed because the petition alleged the setting of a fire at a certain time and place, while the boy confessed to setting an-

\textsuperscript{37} State v. Myers, 74 N.D. 297, 22 N.W.2d 199 (1946).
\textsuperscript{38} See argument developed in a Note, Misapplication of the Parens Patrua Power, 29 Ind. L. J. 475 (1954).
\textsuperscript{39} E.g., Standard Juvenile Court Act (1941) § 11.
\textsuperscript{40} "It is not necessary that the petition be drawn by one learned in the law. But it should show in plain and clear language the facts or situation which reveal dependency, neglect or delinquency. An intelligent layman should be able to do that." State in the interest of Graham, 110 Utah 159, 168, 170 P.2d 172, 177 (1946). See also State v. Johnson, 131 La. 8, 58 So. 1015 (1912), State v. Heath, 352 Mo. 1147, 181 S.W.2d 517 (1944) (criminal pleading rules do not apply in juvenile court). Harry v. State, 246 Wis. 69, 16 N.W.2d 390 (1944) (allegation in the words of the juvenile court statute without more detail is sufficient).
\textsuperscript{41} The prayer of the petition does not control the disposition of the case. Ex parte Norris, 268 P.2d 303 (Okla. Crm. 1954).
\textsuperscript{42} Note the large number of criminal acts alleged to make the "delinquency" in Hewitt v. Probate Court, 66 Idaho 690, 168 P.2d 77 (1946). See also In re Hartman, 93 Cal. App. 2d 801, 210 P.2d 53 (1949).
\textsuperscript{43} The petition in In re Tillotson, 225 La. 573, 73 So.2d 466 (1954), merely stated that the child was in need of the protection of the court. Objection on appeal was dismissed "[S]ince evidence was adduced at that trial
other fire in another place. In Cantu v. State, to take another example, the allegations stated that Cantu had (1) seduced a sixteen year old girl under a promise of marriage, (2) had threatened her with serious bodily harm if she did not sign a suicide note, and (3) had kept his father’s car overnight without his father’s permission. Allegations (2) and (3) were held too vague and indefinite to charge violation of any penal statute or to constitute Jose Cantu, Jr., a “delinquent child.” The proof, which indicated that sexual relations had taken place lacked detail as to the circumstances and these failed to bear out the particulars of the first allegation. However, the facts actually shown clearly pointed to a need for treatment. The petition should have been amended to reflect the pattern of sexual behavior and violence revealed at the trial. Little is gained by requiring a new petition to be filed except delay in the treatment process. One of the reasons the accusation is so important in a criminal case is that a certain punishment is related to a certain crime, therefore it becomes vital that A has been alleged and proved rather than B. In a juvenile case, once a justification for action is shown, the treatment is to be individualized without regard to the delinquent act. Whether a child steals a tire or burglarizes a house should make little difference. His treatment should depend upon his needs.

Before a hearing on the petition, the child’s parents or guardian are entitled to notice so they may be able to represent his interests and to cooperate with the process of treatment. Generally the requirement of notification is thought so important that the juvenile court does not have the power to act unless notice has been given. Without any objection, such evidence effected an enlargement of the pleadings and supplied any deficiencies therein.” Id. at 579, 73 So.2d at 468. The opinion asserts that no claim of surprise was made nor was the truthfulness of the evidence challenged. Full amendment was also supported by the opinion in Harry v. State, 246 Wis. 69, 16 N.W.2d 390 (1944). The court felt that a contrary view would defeat the purpose of the juvenile court law.

43. In re Coyle, 122 Ind. App. 217, 101 N.E.2d 192 (1951). See also In re Green, 123 Ind. App. 81, 108 N.E.2d 647 (1952), in which a boy was charged with “immoral conduct” and the judge told the boy’s father that he was going to send the youngster to “Boys’ School and straighten him up.”

44. 207 S.W.2d 901 (Tex. Civ. App. 1948). Robison v. State, 204 S.W.2d 981 (Tex. Civ. App. 1947), is another Texas case which sets technical pleading requirements for a delinquency petition. See also Ex parte Gusti, 51 Nev. 105, 269 Pac. 600 (1928).

In re Fisher, 184 S.W.2d 519 (Tex. Civ. App. 1944), reverses a juvenile court which heard evidence of other misdeeds than the one alleged in the petition. If plenty of opportunity is given to answer, it would seem proper to hear all the evidence and amend the petition rather than to reverse as in a criminal case.

or the requirement has been waived through actual appearance by parent or guardian or in some other way.46

THE HEARING IN THE JUVENILE COURT

Under most juvenile statutes, a youngster is not entitled to trial by jury even if the petition alleges acts which would be criminal if done by an adult.47 The courts have uniformly held that the constitutional guarantees of trial by jury in a criminal case have no application to juvenile proceedings. 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. The jury provides the accused with a weapon against political crimes repressive of civil liberties, a weapon juveniles do not generally need. Furthermore, the jury affords the accused some protection against punishment which is greater than the community, speaking through the jury, thinks warranted in a given case. The juvenile court is not concerned with punishment as such, but, first, with establishing that a basis exists for the use of state power to care for a child, and, then, prescribing a treatment cut to the special needs of the individual. The judge and his staff would be better able to make this determination than an inexperienced and unskilled jury. If the practice of the court does not stray from the theory, children have lost no important right when judges find the facts.

A child is, of course, entitled to an unbiased judge if we understand that the disqualification for bias operates only to excuse judges having a personal dislike of the youngster or a personal interest in the outcome. The judge can be prejudiced in favor of law enforcement or of the juvenile court system without destroying his usefulness. The bar will will have to become accustomed to the role of the juvenile court judge which requires him to take a much more active part in the courtroom proceedings than judges ordinarily do.48 The judge ought to be motivated by a deep interest in children which


47. The cases are collected in 67 A.L.R. 1082 (1930). In some states a jury trial may be demanded in juvenile court, for example in Oklahoma. Ex parte Hollowell, 84 Okla. Crim. 355, 182 P.2d 771 (1947).

48. Even so, one may doubt whether a juvenile court judge ought to have authority to make personal investigations of his own to supplement the evidence at the trial. Kessler v. Williston, 117 Ind. App. 600, 75 N.E.2d 676 (1947). Nor is it the best practice for a trial judge to read a prepared typewritten statement of his decision immediately after the conclusion of the testimony. In re Church, 204 S.W.2d 126 (Mo. App. 1947).
will guide his actions. Juvenile court judges ought to have some specialized skill and therefore rules which permit an automatic change of judge in juvenile cases are very unfortunate if the effect is to disqualify the juvenile court judges and to take the case before a magistrate without experience in juvenile matters. 49

A juvenile is not entitled to a public trial, open to the gaze of the community and the press. 50 An open trial would operate as a check on arbitrary action by the court, but the advantage would be purchased at the expense of punishing the juvenile by publicity. The goals of protecting a young person from the misconduct of his youth, and of informing the community how its courts operate in every case, cannot be pursued simultaneously.

The ideal of informality in the juvenile court has led some courts to question witnesses without administering an oath. 51 Surely a child is entitled to the protection of the laws against perjury and (even in these secular days) to the added incentive for truth-telling on the part of the few who respect the oath itself. Perhaps an exception might be made in the case of questioning young children. There the fear which formalism can breed may outweigh the benefit of testimony under oath. 52

An authoritative source has said "A fair hearing does not mean that the child, in particular, or that both parents need to be present while all the evidence is being presented. The court may exclude the child (but not his counsel) from the hearing at any time that it thinks proper, and should do so, especially when the evidence is considered not fit for him to hear or when it may damage his confidence in his parents." 53 We can admit that the knowledge of some

49. See State ex rel. Jones v. Geckler, 214 Ind. 574, 16 N.E.2d 875 (1938). This case is doubly unfortunate because in Indiana a special judge appointed from the bar for one case only will frequently preside at the trial when the regular judge is challenged. 50. State v. Cronin, 220 La. 233, 56 So.2d 242 (1951).


53. U.S. Department of Health, Education and Welfare, Children's Bureau, Standards for Specialized Courts 58 (1954). Cinque v. Boyd, 99 Conn. 70, 121 Atl. 678 (1923), upholds the constitutionality of a hearing without confrontation. In re Green, 123 Ind. App. 81, 108 N.E.2d 647 (1952) reversed an adjudication made without (1) notice, (2) the presence of the child, (3) confrontation, (4) opportunity for cross-examination, or (5) a chance to meet the information contained in an ex parte report. State v. Ferrell, 83 S.E.2d 648 (W Va. Sup. Ct. of App. 1954), reversed a summary commitment to the state school for girls upon an admission of sexual relations with a soldier made during a hearing in which the girl was a witness. No petition was filed nor any hearing held. State v. Reister, 80 N.W.2d 114 (N.D. 1956), suggests a private hearing of witness in the judge's
testimony may make the child's treatment more difficult. A court hearing is probably an enormous emotional disturbance to a child. Yet how can he make a truly effective reply to evidence unless he knows what it is and who said it. The presence of an attorney (and there may be none) is not a sufficient check. The child must know about all the adverse evidence and the sources. Furthermore, a record ought to be kept in every case, either in the form of stenographic notes or of a mechanical recording, so the opportunity for an effective appeal can be provided.

A rule which requires alleged delinquents to be told that they need not testify at the hearing would be most unfortunate. The hearing ought to be a part of the treatment process, a function which it certainly cannot perform if the child is told that he need not talk to the judge or to anyone else about the situation in which he finds himself. If the juvenile proceeding is truly protective and non-accusatory in character, there can be little need for a privilege against testifying similar to the privilege against self-incrimination. The latter privilege is tied to the accusatorial scheme of the criminal law. It is an expression of the dignity of the accused although the collective power of the state is ranged against him. Further, per-chambers might be a "serious irregularity," but in the North Dakota case the interview had taken place after the decision had been made.

Many statements saying that the essentials of a fair hearing must be observed in a juvenile case are found in the cases. E.g.,

The judge of any court, and especially a judge of a juvenile court, should therefore, be willing at all times, not only to respect, but to maintain and preserve, the legal and natural rights of men and children alike. Respondent, as this record discloses, either has no regard for, or is uninformed in respect to, the rules that the experience of past generations has evolved for the purpose of safeguarding the rights of all. Like most laymen, but seemingly without their good judgment, respondent seems to regard these rules as mere technicalities to be brushed aside as obstructions in the pathway of what is usually termed 'common-sense justice.' He seems to be a willing convert to the theory that he is better, if not wiser, than both law and rules of procedure, and that he may thus disregard either or both at pleasure. While juvenile courts cannot, and are not expected to, be conducted as criminal or other courts usually are, the judge should still not wholly disregard all wholesome rules in an attempt to establish guilt which he suspects, or, worse yet, merely imagines. Most of the rules of evidence and procedure were established, and their observance is necessary, to curb the propensities of the inquisitor, and it would, no doubt, better subserve the best interests of all if the most important of these rules were observed by respondent in his investigations. The fact that the American system of government is controlled and directed by laws, not men, cannot be too often nor too strongly impressed upon those who administer any branch or part of the government. Where a proper spirit and good judgment are followed as a guide, oppression can and will be avoided.


haps its greatest usefulness lies in making it difficult to convict a man for his opinions or politics, matters not often the basis for a delinquency petition. No overriding reason can be seen why a child should not be compelled to testify although the element of compulsion would itself impair close relations between the court and the youngster. One matter should be made clear the propriety of freely receiving a child's testimony in a delinquency case assumes that he may not be criminally prosecuted for offenses revealed by his statements. If the youth can be turned over to the criminal courts for punishment, or if he can be punished after his treatment by the juvenile authorities, his privilege against self-incrimination must be carefully guarded. The common statutory provisions forbidding the use of a juvenile's testimony in another proceeding is not a sufficient guarantee. The youngster must be protected against prosecution for any offense revealed by his testimony before it is fair to strip him of the right given the worst criminals. If he has need of the privilege against self-incrimination, the judge must decide the difficult but little discussed problem of how the privilege can be waived. Surely a fourteen year old without counsel ought to be incapable of waiving.

Evidence in the Juvenile Court

Some cases have discussed the question whether the criminal law's "beyond a reasonable doubt" properly describes the rule of proof required in a delinquency case, or whether a simple "preponderance" of evidence will suffice. It is difficult to guess exactly


56. In re Tahbel, 46 Cal. App. 755, 189 Pac. 805 (1920) (juvenile court law held not to justify commitment to juvenile detention home solely because minor refused to answer incriminating questions).

57. In Jones v. Commonwealth, 185 Va. 335, 342, 38 S.E.2d 444, 447 (1946) the Court said, "Guilt should be proven by evidence which leaves no reasonable doubt." For a time it seemed that proof beyond a reasonable doubt was required under the Children's Court Act of New York. In re Madik, 233 App. Div. 12, 251 N.Y.S. 765 (1931), cf. People v. Fitzgerald, 244 N.Y. 307, 155 N.E. 584 (1927). The preponderance rule was established by People v. Lewis, 260 N.Y. 171, 183 N.E. 353 (1932). See also Garner v. Wood, 188 Ga. 463, 4 S.E.2d 137 (1939) and the cases collected in 43 A.L.R. 2d 1128, 1138-41 (1955).

It should be clear that direct testimony should be given greater weight than hearsay as to the same matters. In re Contreras, 109 Cal. App. 2d 787, 241 P.2d 631 (1952). The civil rule that in the absence of proof to the contrary the law of a sister state is presumed to be the same as that of the forum has been applied in a juvenile case. See State v. Thomasson, 154 Tex. 151, 275 S.W.2d 463 (1955).

Carmean v. People, 110 Colo. 399, 134 P.2d 1056 (1943), is an example of a reversal for failure to make sufficient proof.
what effect such words have on the mind of a judge. However, on
the assumption that the problem is a real one, the criminal law test
should be confined to criminal prosecutions. "Beyond a reasonable
doubt" is a device to prevent punishment in the wrong cases. In a
juvenile case the aim is not punishment but rehabilitation; the risk
of failing to act may be greater than the risk of acting too quickly.
This is not to say that evidence is not needed, but merely that the
consequences of error are not quite so serious in a juvenile case
and therefore we need not be quite so cautious.

In the rush to classify a delinquency case as a civil case and
hence not subject to the evidence rules of the criminal court, some
troublesome evidence problems have been brushed aside. It may be
reasonable to make an adjudication of delinquency on the basis
of a confession alone, but risky business to do the same on an
uncorroborated account of seduction. Even when concerning a
child, stories of sexual activity are easier to tell than to refute. The
tale of a collaborator at wrongdoing would seem as untrustworthy
in a juvenile as in a criminal case.

The willingness of juvenile court judges to receive hearsay
evidence has been the source of a great deal of lawyers' criticism.
That the criticism is not without persuasive force can be seen by
considering an example. In the now famous Holmes case, the
juvenile court judge permitted a detective to testify that Holmes
had participated in a church robbery according to the signed con-
fession of another young man. The court demanded to see neither
the confession nor the confessor. Although at a subsequent hearing
the person who had made the confession repudiated it, Holmes was
adjudicated a delinquent. The Supreme Court of Pennsylvania
brushed aside objections to these proceedings with, "[T]he hear-
ing 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."

Concerning the repudiation of the confession the court said,
"[T]he judge was not obliged to believe his retraction." The

58. In re Tillotson, 225 La. 573, 73 So.2d 466 (1954), People v. Lewis,
260 N.Y. 171, 183 N.E. 353 (1932), Ballard v. State, 192 S.W.2d 329 (Tex.
59. People v. Fitzgerald, 244 N.Y. 307, 155 N.E. 584 (1927). In State
v. David, 226 La. 208, 76 So.2d 1 (1954), a trial judge's failure in a criminal
case to caution the jury on the use of an accomplice's testimony was not
error because the alleged accomplice, a young girl, could not be punished of
crime for her participation. She could only be adjudicated a juvenile de-
linquent.
61. Id. at 606, 109 A.2d at 526.
62. Ibid.
court did add that nothing in the record indicated that the lower
court judge acted on the basis of Holmes’ participation in the church
robbery, although Judge Mussmano, in a strident dissent, insisted
to the contrary. However, other technical grounds for the disposi-
tion of the case apparently were present.

Upon the assumption that the trial court in Holmes was moved
to a finding of delinquency by the detective’s statement, most
lawyers will condemn the judge’s action. What is the proper basis
of the condemnation? It would seem clear that, in a juvenile case
tried by a judge alone (as most of them are), the mere reception
of hearsay would not vitiate a finding if there were, besides that,
sufficient evidence in the record. Is an adjudication necessarily im-
proper because it is based only on hearsay? Suppose a disinterested
eyewitness to an act of deliquency dictates and signs an affidavit
immediately thereafter. If that witness becomes unavailable through
death, might not a juvenile court adjudicate the status of the child
involved though the court relied solely on the document? Some
hearsay is persuasive, and men of prudence ordinarily rely upon it
in their most important concerns. Even in jury trials the rule
against hearsay is riddled with exceptions. Should not the real
questions be whether the evidence is probative and whether we can
get better information, rather than whether the offer of proof is
hearsay or not? The Holmes case (upon the assumption made
above) is shocking because the statement is so untrustworthy and
direct examination of the confessor himself so easily done.

In a well known dictum, the New York Court of Appeals ad-
dressed itself to the question of a fair trial in the juvenile court and
said, “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, preju-
dice, 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 any other court.” The statement com-
mands general agreement but surely goes awry in lumping “hear-
say” with “bias,” “gossip” and “prejudice.” Some unsworn out-of-

63. In re Holmes, supra note 62, In re Mont, 175 Pa. Super. 150, 103
Harry v. State, 246 Wis. 69, 16 N.W.2d 390 (1944). But see Garner v. Wood,
188 Ga. 463, 4 S.E.2d 137 (1939) (case tried before a jury), In re Ross, 45
Wash. 2d 654, 277 P.2d 335 (1954) (admitting hearsay was reversible error
where hearsay was clearly the sole basis for a portion of the court’s findings).

64. If the hearsay is completely contradicted by non-hearsay evidence
at the hearing, is an adjudication of delinquency improper? Compare In re
Contreras, 109 Cal. App. 2d 787, 241 P.2d 631 (1952), with State v. Reister,
80 N.W.2d 114 (N.D. 1958).

65. People v. Lewis, 260 N.Y. 171, 178, 183 N.E. 353, 355 (1932)
court statements are utterly convincing and we would be foolish not to act on the basis of them. The problem is one of discriminating between those statements which are dangerous to use and those which are not. The great truth of the New York court’s dictum lies in the insistence that the juvenile practice may not fall below the standards employed in the civil courts generally. But should those courts, encouraged by the American Law Institute Model Code of Evidence,66 move in the direction of the more liberal use of hearsay, it is proper for the juvenile courts to follow.

A juvenile, brought before a court with proper facilities, will be the subject of a social casework investigation. Ideally, the caseworker will seek to learn all that is humanly possible about the child, his motivation, and the circumstances surrounding the alleged delinquency. If the case study is made before an adjudication of delinquency, there is a great temptation to use the case report in the proceedings determining that issue. The caseworker is likely to know more about the child and his needs than anyone else. It is much easier to hear the caseworker only than to arrange for the appearance and examination of a number of witnesses particularly if (as is true in the overwhelming number of cases) the facts are not in dispute.

In In re Mantell,67 the petition alleged that Mantell, a fifteen year old, had been associating with vicious and immoral people and had been guilty of immoral conduct. Mr. Lawrence Krell, apparently a social worker, made a detailed unsworn statement with regard to the defendant’s conduct. It is a fair guess that the trial court, in permitting the use of this hearsay, relied upon a portion of the Nebraska Juvenile Court Act. “The court shall proceed to hear and dispose of the case in a summary manner.”

Mantell squarely presents the issue whether we can use the casework report as a short cut in a delinquency proceeding. What are the dangers to the child in such a report? He and those who stand with him are unable to cross-examine the witnesses whose evidence is summarized. People may be much more willing to whisper a damaging false statement to a caseworker than to testify in front of the child. The caseworker himself may have a serious prejudice against the youngster and his family, or, perhaps more importantly, the case investigation may have been badly bungled through meagerness rather than viciousness. There is a special diffi-

cully attached to the exclusive use of case report evidence in Mantell because of the vagueness of the charges. Testimony respecting the morality of companions and conduct must contain a large measure of subjectivity. Where such reports, without more evidence, have been the basis of the adjudication of delinquency, the trial courts have been reversed on appeal. Yet we pay a price for our doubts about social investigation as evidence. A solid job of inquiry can gain much understanding relevant to a child's need for help which will not readily crystallize into testimony about what a child had actually done. The necessity of producing all the witnesses in court uses their time, gives greater publicity to the child's troubles, and introduces a formal element in the adjudication which makes it more difficult to begin the healthy process of rehabilitation inside the courtroom. On the balance the price ought to be paid. The danger of mistake or prejudice in this important matter is too great. But we should be aware that we do not save our children from hopeless tyranny by insisting on the right to cross-examination.

In a great many places the point has been made as a point of high principle that while juvenile courts should not use the case-work report in adjudicating delinquency, it may be used in determining the disposition of the child once delinquency has been established. The distinction does not seem an easy one to defend except by the argument that an adjudication of delinquency will usually turn on a narrow question of fact, i.e., did the youngster perform the act of delinquency and, therefore, it will be feasible to bring


State v. Campbell, 177 La. 559, 48 So. 708 (1933), and State in the Interest of McDonald, 207 La. 117, 20 So.2d 556 (1944), are cases arising under a Louisiana statute which makes the testimony of a probation officer admissible as to the result of his investigation.

The goal of informality may be pursued with such singlenessmindedness that the child and the parents not know what is going on. Kahm v. People, 83 Colo. 300, 264 Pac. 718 (1928) (mother assumed that some sort of "preliminary examination or conversation" was taking place). See also In re Green, 123 Ind. App. 108, 108 N.E.2d 647 (1952), Petition of O'Leary, 325 Mass. 179, 89 N.E.2d 769 (1950), State ex rel. Palagi v. Freeman, 81 Mont. 132, 262 Pac. 168 (1927), In re Sippy, 97 A.2d 455 (Munc. Ct. App. D.C. 1953).

in the few witnesses necessary while the question of disposition may turn one a great range of factors, many of which are deeply imbedded in subjective judgment. Yet in either case, use of a report puts a great reliance on the professional judgment and integrity of the caseworker in a matter of highest importance to the child. We must emphasize that the disposition can be as vital to the child as the adjudication of delinquency. The disposition can range from an admonition followed by a reunion with parents, to commitment in an institution not greatly different from a prison. Surely the information on which such a decision is taken ought to be carefully gathered and dispassionately evaluated. The process of disposition in the juvenile court must meet a standard of fairness, and that standard requires as a minimum that casework reports be made available to the child’s lawyer upon request. It will be objected that revealing all of a report may be shocking to a child or his parents and may make the treatment process more difficult. The social worker will fear the disappearance of his sources of information because witnesses, reluctant to testify in court or to become embroiled in controversy with a neighbor, will speak less freely. It will be urged that the opportunity to meet the findings of casework reports is impractical and would open too many collateral issues. Yet how can we insure fairness in disposition without some way of testing the basis for decision, and how can we test without knowing what ought to be tested? Can we be content by trusting the professional discipline of the social worker alone?

In Holness, a juvenile judge’s refusal to disclose a probation officer’s report was upheld in reliance upon the United States Supreme Court in Williams v. New York. There the Court approved, over due process objections, the use of presentence casework reports in the imposition of a death sentence. But the Court was careful to point out that “the accuracy of the statements made by the judge was not challenged by appellant or his counsel nor was the judge asked to disregard any of them or to afford appellant a chance to refute or discredit any of them by cross-examination or otherwise.” We may hope that if the accuracy of the report had

70. 337 U.S. 241 (1949). An inspection of prehearing investigation reports was also denied to the boy’s counsel in In re Mont, 175 Pa. Super. 150, 103 A.2d 460 (1954). It may be that the receipt of hearsay is not a ground for reversal especially if the finding of delinquency is supported by other competent evidence but surely the child’s lawyer must be permitted to know what the judge has had presented to him before an adjudication is made.

71. 337 U.S. 241, 244 (1949). The refusal to permit a contesting mother to inspect a welfare agency report used in an adoption proceeding has been held a denial of a fair trial. Attlasson v. Usrey, 224 Ind. 155, 65 N.E.2d 488 (1946).
been challenged the Court would have given the defendant an opportunity to meet the derogatory information.

**The Right to Counsel**

There has been a great deal of recent interest in whether a juvenile must be advised of a right to counsel and be furnished counsel by the state if he is unable to provide one. In the *Poff* case, District Judge Curran of the District of Columbia held that a child's right to counsel was grounded in due process. The judge agreed that juvenile proceedings were aimed at providing the care and guidance normally furnished by natural parents. Yet the juvenile court act was intended to enlarge rather than to diminish the protection of a youngster. The holding was influenced by the fact that the alleged act of delinquency was a crime and that legal protections were not to be torn away simply by changing the name of a proceeding. The Judge wrote, "I hold only that 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, and this is so even though the Juvenile Court in making dispositions of delinquent children, is not a criminal court."  

*Shoutaken v. District of Columbia,* a Court of Appeals case reaching the same result as *Poff,* rests on an interpretation of the juvenile court act applicable to the District rather than on due process. The court supported its reading of the statute in several ways. The legislative history reflected a congressional understanding that alleged delinquents would be represented by counsel. The statute provided for a "hearing" which "requires the effective assistance of counsel in a juvenile court quite as much as it does in a criminal court."  

The child, under the District's Juvenile Court Act, has a right to ask for a trial by jury, a request which cannot be made wisely without the assistance of a lawyer. The procedural rights of an alleged delinquent under the juvenile court rules cannot

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73. Id. at 227
74. 236 F.2d 666 (D.C. Cir. 1956).
75. Id. at 669.

See also *In re Poulin,* 129 A.2d 672 (N.H. 1957) which holds that under a statute authorizing the presence of persons "necessary in the interest of justice" it was reversible error to deny a motion that counsel appear at the hearing in juvenile court. The Court said at p. 673, "a concomitant of an opportunity to be heard in support of or in defense of a claim is the right to the assistance of counsel." Further, "The worthwhile objectives of the juvenile courts can be accomplished without prohibiting the child or the parent from obtaining the assistance of counsel."
be protected adequately without legal help, to say nothing of the legal problems connected with an appeal. Finally, the statute was considered, after the fashion of McNabb, in the light of the court's "concern for the fair administration of justice." 76

Shwutaken, just as Poff, rests, in part, on the conviction that important rights cannot be brushed aside merely by a change of label. A child, charged with an act which would be a crime if committed by an adult, may not be deprived of his liberty without an adjudication based on evidence adduced in a fair hearing. Such an approach raises two questions. 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?"

Both questions, in the author's view, require an affirmative answer. As to the first, it is impossible to foretell whether commitment will result from the trial, and the need for counsel exists, if it exists at all, from the moment the petition is filed. In any event, "treatment," though short of detention, is performed under the compulsion of the state. The need for any intervention by the government into the life of a child ought to be clearly demonstrated in a fair proceeding wherein the legal rights of the child are protected. In spite of the theory to the contrary, an adjudication of delinquency, in itself, is harmful and should not be capriciously imposed. 77

The same considerations support an affirmative answer to the second question. Indeed, the need for legal assistance may even be greater in those cases in which the allegations of the petition are vague. Especially careful attention should be given, from the child's point of view, to the proof which will be offered in support of such petitions.

Those judges who have denied a juvenile the right to counsel have relied on the purpose and aim of a juvenile court. 78 The objec-

76. Id. at 670. McNabb v. United States, 318 U.S. 332 (1943).
77. The judgment against a youth that he is delinquent is a serious reflection upon his character and habits. The stain against him is not removed merely because the statute says no judgment in this particular proceeding shall be deemed a conviction for crime or so considered. The stigma of conviction will reflect upon him for life. It hurts his self-respect. It may, at some inopportune, unfortunate moment, rear its ugly head to destroy his opportunity for advancement and blast his ambition to build up a character and reputation entitling him to the esteem and respect of his fellow man.
tive is rehabilitation, not punishment. The proceedings do not determine guilt or innocence, but rather promote the welfare of the child by strengthening the family or by removing the child from the custody of his parents should that be necessary. Drawing an analogy from the fact that a jury is not required in delinquency proceedings, these judges have argued that neither statutory construction nor the Constitution demand that a child be given a lawyer.

In addition to this sort of argument, some experts in the juvenile field doubt whether lawyers have much to contribute. It is probably true that few members of the bar operate easily in a non-adversary kind of proceeding, particularly in juvenile cases which seem much like ordinary criminal trials. Professor Kahn reports a case situation in which a lawyer, by careful questioning, succeeded in proving that his client had not forced a complaining witness to submit to intercourse, an act which the petition had charged. The client, however, had had voluntary sexual relations with the fourteen year old complainant. His act was an act of delinquency in either event. Presumably, the client would not have been punished in proportion to the seriousness of the deed, but would be given treatment to improve his character. The sharp cross-examination of a disturbed girl provided the basis for the lawyer's plea for "leniency"—a concept appropriate to the criminal law but hardly a useful idea in the juvenile court. My own reading of a large number of juvenile court records makes plain the unhappy role that many lawyers play in juvenile cases. Often the attorneys are merely uninformed pettifoggers.

That lawyers are not ordinarily trained to be helpful does not argue against assigning them a role in delinquency cases, but rather in favor of giving lawyers an understanding of the aims and methods of the juvenile courts. The failure of the bar is a great responsibility of the law schools and bar associations.

With adequate understanding of the task, lawyers can contribute a great deal. Every child faced with an adjudication of delinquency should have access to legal help. A lawyer's skill in

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79. Judge Alexander, of the Toledo Juvenile Court has said, "We seldom see a lawyer in juvenile court—and when we do, we have to tell him what to do and how to do it." See Virtue, Survey of Metropolitan Courts Detroit Area 116 (1950).
80. Kahn, A Court for Children 100-01 (1953).
81. Speaking of an adjudication that a child is a "wayward minor," a status similar to delinquency, Professor Tappan has written, "[T]here must be an opportunity for an attorney representing the defendant to bring into the open the source and nature of the evidence so that where the source of the
developing the facts in detail can, if done without harsh grilling of young witnesses, result in a fuller understanding of a total situation. In the Shoutaken case, Judge Bazelon reminded us that juveniles have legal rights and the exercise of them requires informed judgment. Counsel is important for another reason. Juvenile proceedings are conducted behind closed doors. Only the judge, the child, the witnesses, the parents, the social workers, and an occasional interested person (by permission of the judge) are present. This may seem like a large group, but one factor is lacking—competent impartial observation not dependent on the judge. It would not be a hasty guess to suppose that a judge’s performance (and that of his staff) will be much more alert and careful under the gaze of a lawyer than otherwise. The greatest value of the attorney may be his very presence, rather than his ability to give affirmative help.

If a juvenile ought to have counsel, at what stage should the right commence? The Shoutaken opinion clearly limited its holding to cases in which petitions have been filed. Although impressive criticism has been made of the informal handling of cases without bringing them to court, it is probably impractical to require counsel before the petition is filed.

A recent California case, People v. Dotsen, presents a difficult question. A youngster (with others) allegedly ransacked a house, but was interrupted by the return of the owner. The intruders bound and gagged the owner in such a way as to cause his death by suffocation. The boy was arraigned upon an indictment in criminal court, but when it was learned he was a minor of eighteen years, proceedings were suspended, and he was taken to juvenile court. After a hearing, the judge decided that, in the light of the indictment testimony is of inferior credibility little weight will be attached to it." Tappan, Delinquent Girls in Court 108 (1947). He would provide counsel through the Legal Aid Society. Id. at 192.

The need for legal assistance is certainly not satisfied by the appointment as counsel for the child the lawyer of a hostile mother, the moving spirit behind commitment proceedings. In re Sippy, 97 A.2d 455 (Mun. Ct. App. D.C. 1953). A juvenile court’s refusal to permit parents’ lawyers “active participation” in the juvenile court proceedings has been held a denial of due process in a dependency and neglect case. Arizona State Dept. of Pub. Welfare v. Barlow, 296 P.2d 298 (Ariz. 1956).

82. Compare the following from an undated mimeographed statement prepared by the Wayne County Juvenile Court, Detroit, Michigan, cited in Virtue, Survey of Metropolitan Courts Detroit Area 115 (1950) “The child need not employ defense counsel, as there are no legal pitfalls to guard against or judicial technicalities or devices to employ.” According to Mrs. Virtue, defense counsel are rarely used in the Wayne County Juvenile Court.

83. “We do not hold that counsel is essential in the preliminary stages before a petition is filed.” 296 P.2d 666, 670 n. 23 (D.C. Cir. 1956).

84. 299 P.2d 875 (Cal. 1956).
ment, "the report of the Probation Officer, the prior record of the minor, the minor's character, the type of his offense, his actual age, and other relevant factors" the boy was not a "fit subject" for consideration under the juvenile court law, and remanded the youth to the criminal court. The boy had no lawyer in the juvenile court, nor apparently had he been offered one. The Supreme Court of California held that no constitutional right had been violated by the failure to provide counsel in this proceeding, judged either by the standards applicable to children's tribunals or according to the rules applicable to the regular criminal courts. The court did not see the juvenile court determination as a stage in the criminal proceedings, but rather emphasized the judge's great discretion in deciding whether a child is a "fit subject" for consideration in the juvenile court.

What could a lawyer have done for Dotsen? He could have developed facts for the court. He could have seen to it that those considerations upon which the judge relied were probable truths. He could have tried to persuade the court. These services could be very useful. Although the indictment charged murder under the felony-murder doctrine, the youth alleged that he made no effort to have the matter retained in juvenile court. He thought he had a defense to the murder charge because he intended no harm to the deceased. A lawyer could have enlightened the boy on the fine points of the felony-murder doctrine and thus encouraged efforts to remain in juvenile court. Yet it is hard to find a legal basis for insisting upon the right to counsel here. No adjudication of delinquency was made, no treatment prescribed. The action of the court was simply to let the criminal law take its course. A full criminal trial with all the protections will follow. The children's court plays a role in this instance not unlike that of a prosecutor in the exercise of his discretion. It makes a decision that a given case should go forward to trial. Although that decision is made after a hearing, the whole procedure seems too close to the ordinary processes of bringing an accusation to require that the youngster be represented by counsel at that stage.

In insisting that a juvenile has a right to counsel, we create a serious problem of making it a real right. While a parent may be able to waive counsel, it would seem clear that a youth may not do so on his own behalf. If a child's parents are hostile or absent, the

85. Id. at 876.
86. See the discussion in In re Poff, 135 F. Supp. 224, 227-28 (D.D.C. 1955). In State v. Cronin, 220 La. 233, 56 So.2d 242 (1951), the court reached the doubtful conclusion that a fourteen year old's statement, "Judge,
alleged offender must have a guardian ad litem appointed, and the guardian, as well, may waive the right to a lawyer. This is not the place to discuss the sources from which legal assistance may be had. A system of assigned counsel (with adequate compensation), legal aid provided by the organized bar, or a kind of public defender for juveniles, are all possible methods of achieving the goal.

**FAIRNESS IN THE TREATMENT PROCESS**

Fair treatment of a child should not end with an adjudication of delinquency. If he is placed on probation or parole, the terms of the conditional release should be made reasonably clear. There is danger in the approach of an Oklahoma court. “[T]his court will take judicial notice of the fact that one of the conditions . . . [of her parole] was that the petitioner would shun evil associates and refrain from law violations.” What a court will assume to be a condition of release may not be so clear to the youngster.

Revocation of parole after an *ex parte* hearing without notice to the child has been permitted because the statutes do not provide for notice to the juvenile on a parole violation. Certainly statutes ought to provide for notice and hearing. To be put back into an institution with all the attendant unpleasantness is a serious matter which ought to occur only for clearly demonstrated reasons. Probation officers are, like all men, capable of arbitrary action. In *Ex parte Karnes*, a field counselor “gave petitioner the option to go back to her husband in Defiance [Ohio] or be taken back to School, even though the house the husband had selected was not fit for human habita-

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87. In Iowa the juvenile court’s power to appoint counsel to represent a juvenile gives rise to an obligation on the part of the county to pay a reasonable fee. Ferguson v. Pottawattamie County, 224 Iowa 516, 278 N.W. 223 (1938).
89. “[I]t is not necessary that notice be served upon the parents, or that a jury trial be had before entering an order, where there has been a violation of the parole order formerly made. . . .” *Ex parte Hollowell*, 84 Okla. Crim. 355, 363, 182 P.2d 771, 774 (1947). The Utah Supreme Court has but the authorities must have “good reason” for doing so. The reason can be tested on habeas corpus with the burden of proving “lack of good reason” resting upon the child. *Ex parte S. H.*, 1 Utah 2d 186, 264 P.2d 850 (1953). The North Dakota court has held that a hearing is necessary without making explicit what makes it necessary. *In re Rixon*, 74 N.D. 80, 19 N.W.2d 863 (1945).
90. 121 N.E.2d 156 (Ohio App. 1953).
The counselor may have been cooperating with the husband who had threatened the girl with a return to the industrial school if she refused to share his dilapidated home. Happily, the Ohio Court of Appeals held that the action taken was beyond the counselor's authority.

Denying a child the protections of the criminally accused has an important corollary in respect to treatment. The juvenile does not have the rights he would have in a criminal case, it is said, because the object of the juvenile court proceedings is to protect his welfare under the parent-like care of the state. The act seeks to secure him the custody and protection that he would receive at the hands of parents. The treatment prescribed must in fact approximate this goal or he is wrongfully deprived of his constitutional rights. Surely, the North Dakota Supreme Court was correct in reversing a juvenile court judge who ordered a boy to the state training school because of "the deterrent effect which the commitment would have upon other juveniles." The goal of deterrence may properly be pursued by the criminal law, but not by the Juvenile Court Acts through the use of non-criminal procedure. As Judge Burke of the North Dakota Supreme Court wrote, "considerations of expediency, the satisfaction of public indignation, or example are contrary to the whole spirit of the juvenile act."

In an exceedingly interesting opinion, Judge Laws of the District of Columbia held that if a child is placed in a punitive institution following juvenile proceedings, the writ of habeas corpus should be available to secure his release. In White v. Reid he wrote, "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

92. Id. at 302, 22 N.W.2d at 201.

The trial judge in In re Curdy, 204 S.W.2d 126 (Mo. App. 1947) erred in "sentencing" a delinquent to five years instead of an indefinite term until majority. One wonders whether a spirit of vengeance or perhaps the use of the deterrence principle did not lie behind the disposition in In re Lewis, 11 N.J. 217, 94 A.2d 328 (1953). Lewis, a boy of 17, killed two persons in an auto mishap occurring because the boy had fallen asleep at the wheel. He had driven a long way and knew he lacked adequate rest but decided to press on in order to get back to a summer job in the Catskills. The boy was committed to the Annandale Reformatory. His act may have deserved such punishment but there was no showing that his needs required such treatment.

withstand an assault for violation of fundamental Constitutional safeguards."\textsuperscript{94} Using this test, the court held that the Attorney General could not place a boy in the District of Columbia jail for continued detention. At a later stage of the same controversy,\textsuperscript{95} Judge Laws held that the Attorney General could not designate the Federal Correctional Institution at Ashland, Kentucky, as the place of confining a juvenile delinquent. Ashland is an institution designed to rehabilitate youths regularly convicted in the criminal courts. The Attorney General was ordered to designate "the National Training School for Boys or a similar institution not designed as a place of confinement for those convicted of crime and where petitioner may not have contact or communication with those convicted of crime."\textsuperscript{96}

According to the first quotation, Judge Laws would release a boy, or not, depending on the purpose and facilities of the institution. This position was largely abandoned in the second stage of the case and the mingling of criminals with juveniles becomes the pivotal point. The first path, as the Judge found, is a difficult one to follow. Nor will we want to hold the second position with unyielding tenacity. Should there be a proper classification of convicted personnel and a civilized penal philosophy directing an institution, the mingling of some convicted young people with delinquents will not strike us as unfair.

\textsuperscript{94} Id. at 650. In Underwood v. Farrell, 175 Ark. 217, 299 S.W. 5 (1927), the court held that juvenile court proceedings were unconstitutional in the light of (a) the evident punitive purpose of the order entered, (b) the commitment to an institution housing young felons, (c) a definite sentence of three years. The Farrell case was seriously undercut in Martin v. State, 213 Ark. 507, 211 S.W.2d 116 (1948). See also the action of a New York City judge in paroling a fifteen year old because to keep him in the city prison for temporary detention would not be "in keeping with the purpose of the entire Act." In re Prieto, 49 N.Y.S.2d 800 (N.Y. Dom. Rel Ct. 1944).

In In re Lewis, 11 N.J. 217, 94 A.2d 328 (1953), a boy of seventeen was committed to New Jersey's Ammandale Reformatory after juvenile court proceedings. The Supreme Court of New Jersey, speaking through Mr. Justice William Brennan, refused to interfere with the judge's discretion regarding the disposition. No constitutional argument was made.

Under an Iowa statute the commitment of a delinquent child to an institution for neglected or dependent children was held erroneous. Murphy v. Lacey, 237 Iowa 318, 21 N.W.2d 897 (1946).


\textsuperscript{96} Id. at 871. See also Benton v. Reid, 231 F.2d 780 (D.C. Cir. 1956) in which a chronic sufferer from communicable tuberculosis secured his release from the hospital section of the District of Columbia jail where he had been placed because of his unwillingness to remain in other hospitals. "(T)he unwillingness to suffer the social stigma and bad associations resulting therefrom" without criminal conviction would raise grave constitutional questions. Release was ordered as a matter of statutory interpretation.
Yet Judge Laws gives us a useful tool to employ in clear cases. The implications of his opinions are exceedingly important. In adopting the approach of these essays, judges could provide themselves with an effective weapon not only against a misguided custodial officer who makes illegal confinement designations, but also against a community in default of its obligations to the young. If we do not provide reasonably good rehabilitation and care-taking facilities for juveniles, the youngsters ought to go free unless we can convict them of crime. When we do not give children in trouble adequate institutions, we do not merely fail them, we deprive them of constitutional rights. Parental care rather than punishment has been offered in exchange for some constitutional safeguards. The price must not be paid in counterfeit coin.