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Delinquency Proceedings— Fundamental Fairness for the Accused in a Quasi-Criminal Forum

Informal procedures are consistent with the reformatory and rejuvenative objectives of the juvenile courts, but Mr. Welch argues that the pursuit of these objectives should not excuse the disregard of Constitutionally guaranteed procedural rights. While recognizing the desirability of reducing the criminal stigma attached to juvenile proceedings, the author argues for the retention of procedural rights commensurate with the potential punitive disposition of the hearings. Mr. Welch also discusses the role of the attorney in a juvenile delinquency hearing, laying particular emphasis on the problems arising from the conflicting interests the attorney is often called upon to simultaneously represent.

Thomas A. Welch*

The juvenile courts were originally conceived as a progressive social experiment for treating juvenile offenders in specially designed forums. As such the idea departed significantly from the traditions of criminal law. The objective was an institutionalized curative device whereby juveniles deviating from the norms of accepted social behavior could be brought under the paternal protection and instruction of the state. The state would then provide the proper influences and, if necessary, a more appropriate environment for the juvenile during his formative years. State power for implementing these notions was found in the state's role as *parens patriae*, providing for the protection of unfortunate children. Precedent for the law was found in the authority of English courts of equity to manage children's property in their behalf.¹ American courts thereby concluded that juvenile courts were "noncriminal" by their very nature. The proceedings were

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1. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 106 (1909); Nicholas, *History, Philosophy, and Procedures of Juvenile Courts*, 1 J. FAMILY L. 151, 152 (1961).

to be protective rather than punitive. A corollary of this conclusion was that protection from the state was unnecessary, for the state was pursuing the juvenile respondent's ultimate benefit.²

I. SOCIALIZING TREATMENT OF JUVENILE DELINQUENCY

To effectuate the above objectives, those elements of criminal prosecution generally recognized to give rise to the need for special procedural protections were eliminated. These elements were: (1) the public scorn which attaches to the convicted criminal, and (2) the punitive character of the disposition of the case.

A. ELIMINATION OF SOCIAL STIGMA

Legislation establishing special juvenile proceedings generally prescribes that a finding of delinquency shall not be deemed a conviction of crime or be civilly disabling.³ These statutes generally provide for a private hearing;⁴ the use of the evidence heard in juvenile court, the finding of delinquency, and the disposition made upon such a finding in any other court proceeding is prohibited.⁵ Records are generally kept confidential. The criterion used in evaluating these measures is their practical effectiveness in removing the stigma resulting from a juvenile court determination of antisocial behavior.⁶

Prior to the enactment of juvenile acts, criminal prosecutions against juveniles were the same as those against adults, including

2. *Cf. Cinque v. Boyd*, 99 Conn. 70, 121 Atl. 678 (1923); *People v. Lewis*, 260 N.Y. 171, 183 N.E. 353, *cert. denied*, 289 U.S. 709 (1932); *Holmes' Appeal*, 379 Pa. 599, 109 A.2d 523 (1954), *cert. denied*, 348 U.S. 973 (1955). See generally *Pee v. United States*, 274 F.2d 556, 561-62 (D.C. Cir. 1959); 41 CORNELL L.Q. 147, 151 n.24 (1955).

3. See, e.g., D.C. CODE ANN. § 16-2308 (Supp. IV, 1965); MASS. GEN. LAWS ch. 119, § 60 (1951); N.Y. FAMILY CT. ACT § 781-82; ORE. REV. STAT. § 419.543 (1963); PA. STAT. ANN. tit. 11, § 261 (1965); VA. CODE ANN. § 16.1-179 (Supp. 1960).

4. See D.C. CODE ANN. § 16-2307 (Supp. IV, 1965); N.Y. FAMILY CT. ACT § 741. Compare CAL. WELFARE & INST'NS CODE § 676 (accused may have a public trial on request); ORE. REV. STAT. § 419.498 (1963) (public trial allowed on request, but judge retains discretion to exclude persons).

5. See MCCORMICK, EVIDENCE § 43, at 91 (1954); 1 WIGMORE, EVIDENCE § 196, at 673 n.5 (3d ed. 1940 Supp. 1964); Antieau, *Constitutional Rights in Juvenile Court*, 46 CORNELL L.Q. 387, 407 (1961); Rapoport, *Some Legal Aspects of Juvenile Court Proceedings*, 46 VA. L. REV. 908, 914-15 (1960).

6. See Paulsen, *Fairness to the Juvenile Offender*, 41 MINN. L. REV. 547, 554 (1957).

the same procedural safeguards.⁷ The disposition of the case and the public's impression of the convicted were both oriented to the gravity of the violation. The philosophy and design of the juvenile courts is that neither a finding of delinquency nor the disposition of the matter is necessarily indicative of the gravity of the respondent's misconduct. Indeed, a juvenile who has not violated any criminal statute may be found delinquent and given a disposition identical to that given a juvenile for conduct amounting to a felony if committed by an adult.⁸ The public is left to speculate about the matter. Specific inquiry is bound to lead to stigmatizing the juvenile who must answer that his "delinquency" was an act of felony proportions. As a practical matter, however, the lesser offender may be condemned to the same stigma by the "delinquent" label without an opportunity to explain that his conduct was truly noncriminal.

Protective measures restrict official disclosure of delinquency findings, but they do not prevent future employers and others from asking the person affected about his previous record. The opportunity to respond to such an inquiry that by legislative decree any prior determination of delinquency should not be considered the same as a criminal conviction does little to erase the stigma. The realization that society does not regard a delinquency record in the manner prescribed by statute is reflected in a joint statement by the Los Angeles Bar Association, Los Angeles County Juvenile Court Judges, and the Chief Probation Officer of Los Angeles County:

b) Although disposition of a delinquency proceeding in the Juvenile Court does not give rise to a criminal record for the minor, a minor's Juvenile Court record frequently is inquired into by bonding companies, prospective employers, and the Armed Services.⁹

Similarly, there are instances where officials might use a record of juvenile delinquency despite statutory barriers.¹⁰ Perhaps no

7. *In re Poff*, 135 F. Supp. 224, 225 (D.D.C. 1955). See also Antieau, *supra* note 5, at 407.

8. See, e.g., ORE. REV. STAT. §§ 419.476, .509, .511 (1963); VA. CODE ANN. §§ 16.1-158, -180 (Supp. 1960).

9. Committee on Juvenile Courts, Los Angeles Bar Association, *The Attorney and the Juvenile Court*, 30 LOS ANGELES B. BULL. 333, 335-37 (1955); cf. *In re Contreras*, 109 Cal. App. 2d 787, 241 P.2d 631 (Dist. Ct. App. 1952); *Holmes' Appeal*, 379 Pa. 599, 610, 109 A.2d 523, 528 (1954) (Musmanno, J., dissenting), *cert. denied*, 348 U.S. 973 (1955); *Jones v. Commonwealth*, 185 Va. 335, 38 S.E.2d 444 (1946).

10. See *People v. Smallwood*, 306 Mich. 49, 10 N.W.2d 303 (1943), where the Michigan Supreme Court upheld impeachment of a juvenile witness in a criminal proceeding by reference to previous difficulty with juvenile authorities.

scheme can prevent criminal stigma attaching as long as individuals in society react to the idea of delinquency according to personal compunction and can identify the "delinquent." Acting on the assumption that stigma primarily is related to the label of "delinquency," at least two states have taken legislative steps to change the use of that term.

The 1961 California Juvenile Court Act¹¹ employs the term "ward of the court" to cover both cases involving the violation of criminal statutes,¹² and those involving less specific notions of juvenile waywardness.¹³ Portions of the act distinguish these two types of wards for determining the quality of evidence needed to support jurisdiction¹⁴ and in prescribing the court's powers on disposition.¹⁵

Whatever effectiveness this change in terminology has will cease when society equates the old concept of delinquency with the new label of ward of the court. While the change announces a new official attitude that juvenile offenses are not to be equated with adult crimes, a similar change in private attitudes is doubtful. To be more successful than prior statutory measures denominating delinquency as noncriminal, this scheme depends on society's unawareness that officially the term "delinquency" has been eliminated. When employers, for example, become aware of the elimination of the term "delinquency," it challenges credibility to believe a changed label will result in "wards" receiving equal consideration to that given nonward job applicants. It should be remembered that the word "delinquency" was itself employed to distinguish the errant juvenile from ingrained notions of criminality. It is apparent the California legislature did not feel a change in labels would totally eliminate the stigma of delinquency.¹⁶ This is shown by provisions which would allow the court, in its discretion, to treat a noncriminal ward of the court in a manner very similar to the treatment accorded a ward guilty of criminal conduct.¹⁷

11. CAL. WELFARE & INST'NS CODE § 500-914.

12. *Id.* § 602.

13. *Id.* § 601.

14. *Id.* § 701. A proceeding to determine a juvenile to be within the court's jurisdiction is paralleled to criminal procedure in the case of a "ward of the court" under § 602, and to civil procedure in the case of a "ward of the court" under § 601.

15. *Id.* §§ 730, 731. Commitment to the Youth Authority is authorized only in the case of juveniles found to be wards of the court under §§ 601, 602.

16. See *In re Mikkelsen*, 226 Cal. App. 2d 467, 38 Cal. Rptr. 106 (Dist. Ct. App. 1964).

17. See CAL. WELFARE & INST'NS CODE §§ 601, 634, 731.

Another recognition that stigma may attach to a ward of the court is the distinct label "dependent child of the court" given to cases coming under the court's dependency and neglect jurisdictions.¹⁸ These cases would traditionally be described as true instances of wardship. It must be concluded that the legislature deemed it desirable to differentiate such cases from those where the child's own conduct is the principal subject for determination and correction.¹⁹

The California act attempts to combat stigma by allowing a person under the court's jurisdiction to request all records of the proceeding to be sealed. This request may be made five years after the termination of the juvenile court's jurisdiction of the case. Once such records are sealed, the proceedings "will be deemed never to have occurred," and the petitioner "may properly reply accordingly to any inquiry."²⁰ The issuance of such an order is in the discretion of the juvenile court judge.²¹

Is this mechanism, coupled with safeguards against official disclosure in the interim, effective in removing criminal stigma?²² To a certain extent the answer is yes, but why should such proceedings be disclosed at all?²³ Since jurisdiction may continue until majority is reached,²⁴ this provision will often not be available until the age of twenty-six. It has little practical effect in removing the blot on reputation since most persons will seek employment before that age. Finally, there is no provision which requires notice to be given to the minor of his right to petition

18. *Id.* § 600.

19. At least one California appellate court recognizes that stigma has not been eliminated by the 1961 act. In *In re Mikkelsen*, 226 Cal. App. 2d 467, 38 Cal. Rptr. 106 (Dist. Ct. App. 1964), the court cited and quoted from *In re Contreras*, 109 Cal. App. 2d 787, 789, 241 P.2d 631, 633 (Dist. Ct. App. 1952), to the effect that being declared a ward of the court when based upon a felony charge "is a blight upon the character of and is a serious impediment to the future of such minor." 226 Cal. App. 2d at 471, 38 Cal. Rptr. at 108.

20. CAL. WELFARE & INST'NS CODE § 781.

21. *Ibid.*

22. *Id.* § 827 limits access to juvenile court records to the persons immediately involved "and such persons as may be designated by the judge of the juvenile court." See also 40 OPS. CAL. ATT'Y GEN. 50 (1962), wherein it is stated that any agency should respond to inquiries made after the entry of an order under § 781 that it has no record on the petitioner.

23. See 43 OPS. CAL. ATT'Y GEN. 288, 290-91 (1964), wherein it is stated that the minor must admit to inquiries about arrest and detention by juvenile authorities until an order is entered under § 781, and an employer has a right to make such inquiries.

24. CAL. WELFARE & INST'NS CODE § 607.

for sealing his record.²⁵ All in all, the California provision for sealing juvenile court records affords a shield against private inquiry and is a good scheme for defeating social stigma, but unfortunately it becomes operative too late to effectively accomplish its goal.

A somewhat different method of combatting social stigma is used by the New York Family Court Act of 1962. The term "delinquency" is retained only to describe juveniles who have violated a criminal statute.²⁶ Habitually disobedient juveniles or those beyond parental control are described as "person(s) in need of supervision."²⁷ The act narrowed the scope of the term "delinquency" to "accord with the common understanding that it refers to someone who commits a crime and requires official treatment."²⁸ The distinction between delinquent and person in need of supervision is reflected in the court's powers of disposition since only juveniles adjudged delinquent may be confined.²⁹

The purpose of the differentiation is to confine and focus the aura of criminality on the label delinquent. This approach, unlike the California effort, attempts to minimize social disapprobation of noncriminal juveniles within the juvenile court jurisdiction. On its face, this approach affords substantial relief to the juvenile who has committed no criminal act. But there is no longer any doubt that in New York a juvenile adjudged a delinquent is exposed to unambiguous criminal stigma. Although the court's determination of delinquency is not officially deemed a conviction, the act says, in essence, that delinquent means criminal.

Does the New York Family Court Act adequately insulate a person in need of supervision from the stigma undoubtedly attaching to the delinquent? It is essential that the noncriminal juvenile be called something other than delinquent, and that the label he is given represents a sharply defined category of noncriminal activity. It is also essential as a practical demonstration of this theoretical distinction that he is consistently *treated* differently from the delinquent. Seemingly the provisions empowering the juvenile court to confine the delinquent, but not a person in need of supervision, afford this different treatment.³⁰ Unfortunately,

25. See Comment, 51 CALIF. L. REV. 421, 446 (1963).

26. N.Y. FAMILY CT. ACT § 712 (a).

27. *Id.* § 712(b).

28. *Id.* § 712, committee comments. See also Oughterson, *Family Court Jurisdiction*, 12 BUFFALO L. REV. 467, 474 (1963).

29. N.Y. FAMILY CT. ACT § 731.

30. See *id.* §§ 731-32.

this distinction is blurred upon closer examination, for both a delinquent and a person in need of supervision may be "placed" in the custody of an "authorized agency" for up to eighteen months.³¹ Faced with the ambiguity of the term "authorized agency," a family court judge decided in 1962 that a person in need of supervision could be placed in a state training school for girls,³² which is the normal place for confinement of juveniles found delinquent.³³ The court stated:

[A] "person in need of supervision" must be interpreted to mean what it really is, a category of delinquency as to which the legislature directs the use of a different label, the substitution of the softer word "place" for "commit," and the review of these placements at the end of eighteen months . . .³⁴

The following year the New York legislature amended the Family Court Act provision for the placement of delinquents and persons in need of supervision. Unfortunately, this did not correct the court's interpretation but specifically authorized the placement of persons in need of supervision in state training schools.³⁵

Although the New York Court of Appeals has subsequently held that a person in need of supervision cannot be placed in a state reformatory designated as suitable for the confinement of delinquents,³⁶ the qualitative difference between confinement and placement in a state training school remains unexplained. If non-

31. See *id.* §§ 731-32, 756. Provision is made for extensions upon review of the case.

32. *In re Doe*, 232 N.Y.S.2d 715 (Family Ct. 1962).

33. N.Y. FAMILY CT. ACT § 758.

34. 232 N.Y.S.2d at 718.

35. N.Y. FAMILY CT. ACT § 756(d).

36. *Fish v. Horn*, 14 N.Y.2d 905, 200 N.E.2d 857, 252 N.Y.S.2d 313 (1964). N.Y. FAMILY CT. ACT § 758 designates Westfield Farm, run by the State Department of Correction, as a suitable place for the commitment of delinquent girls. The state training schools of New York are run by the Department of Social Welfare. In *Anonymous v. People*, 20 App. Div. 2d 395, 247 N.Y.S.2d 323 (1964), the appellate division originally held that the placement of a girl found to be a person in need of supervision at Westfield Farm could not be ordered under the Family Court Act § 756, since it was not an authorized agency within the meaning of that section. In doing so, the court shed considerable doubt on the nonpunitive nature of committing delinquents to that institution by stating:

The entire structure of the Act reflects a deliberate and calculated plan to place "persons in need of supervision" in authorized agencies for treatment and rehabilitation and not to commit them to penal institutions. Placement in a reformatory such as Westfield State Farm would frustrate the avowed purpose of the statute.

20 App. Div. 2d at 400, 247 N.Y.S.2d at 323.

criminal juveniles are continually placed in the same facilities as confined delinquents, it is quite clear that the person in need of supervision is merely a category of delinquency as to which the legislature directs the use of a different label. When a family court tersely negates the theory of differentiation designed to minimize criminal stigma and the legislature eliminates any meaningful statutory differentiation in treatment by immediately ratifying that action, can the public be far behind in equating the person in need of supervision with the delinquent?

The Family Court Act generates more criminal stigma for the delinquent than existed before. Insofar as the person in need of supervision becomes publicly equated with the delinquent, he too will reap an increased burden of criminal stigma. Attempts to divorce the aura of criminal stigma from juvenile transgressions are perhaps better not undertaken at all until the determination and resources of the state are marshalled to ensure sufficient practical adoption of theory to practice to reorient individual attitudes. Individuals become acclimated to the operation of a revolutionary idea, and they are usually skeptical at the outset. Continued inability to realize theoretical plans in practice at some point creates an insurmountable obstacle of public cynicism to social change.

Legislative efforts to reduce stigma are justified since the juvenile lacks a developed sense of responsibility and, therefore, his accountability for his conduct should be lessened. However, the notion that some price in terms of lesser procedural protection must be exacted for this special consideration seems wholly foreign to the aim of maximizing protection of his interests.³⁷ In light of the inherent flaws in attempts to reduce social stigma as discussed above, the price amounts to an uncompensated confiscation of his rights to protection from acts of the state.

B. PUNITIVE QUALITY OF THE DISPOSITION

In order to minimize the punitive nature of the proceeding, thus obviating the necessity of criminal procedural safeguards, juvenile acts provide that a finding of delinquency does not amount to a conviction and that incarceration or probation orders

37. Cf. *United States v. Dickerson*, 168 F. Supp. 899, 902 (D.D.C. 1958), *rev'd on other grounds*, 271 F.2d 487 (D.C. Cir. 1959); *Ex parte Tahbel*, 46 Cal. App. 755, 189 Pac. 804 (Dist. Ct. App. 1920).

are not punitive sentences.³⁸ Facilities for juveniles have been set up which are physically independent of adult correctional facilities,³⁹ and which emphasize the rehabilitary rather than the punitive aspect of detention.

Putting aside the feasibility of institutional character molding, implementing these provisions has still not been up to expectation. In many instances treatment facilities are little more than jails.⁴⁰ The facility in our nation's capital for temporary detention of juveniles *before* they have had a hearing was described as "solitary confinement." Recalcitrant juveniles were confined in cells without beds for periods of two to five days.⁴¹ Obviously these facilities are not what was envisioned by the early advocates of socializing the treatment of juveniles.⁴² Such treatment is patently inconsistent with the aims of juvenile courts and thus eliminates the rationale for informal, summary procedures.

A related practice which defeats the nonpunitive philosophy of juvenile courts is the transfer of committed juveniles to adult correctional institutions.⁴³ In *White v. Reid*,⁴⁴ the federal district court for the District of Columbia ordered the release or transfer of a juvenile held in a city jail upon an application for a writ of habeas corpus. Later that year the same court received another petition from the same defendant, who was confined this time in an adult correctional facility.⁴⁵ Due to the existence of a federal statute which allows the transfer of juveniles from the National Training School for Boys to adult correctional institutions,⁴⁶ the

38. See, e.g., MASS. GEN. LAWS ch. 119, § 53 (1951); PA. STAT. ANN. tit. 11, § 261 (1939); VA. CODE ANN. § 16.1-179 (Supp. 1960).

39. Compare Holmes' Appeal, 379 Pa. 599, 109 A.2d 523 (1954), *cert. denied*, 348 U.S. 973 (1955), where the court viewed intermingling criminals with juvenile delinquents as beneficial to the criminal rather than punitive to the juvenile.

40. See Fried, *Impromptu Remarks*, 76 HARV. L. REV. 1319 (1963); Rapport, *supra* note 5, at 911; Rubin, *Protecting the Child in Juvenile Court*, 43 J. CRIM. L., C. & P.S. 425 (1946).

41. Note, 49 GEO. L.J. 322, 337 (1960).

42. See Mack, *supra* note 1, at 114.

43. See Note, 49 GEO. L.J. 322, 353-56 (1960). The Federal Juvenile Delinquency Act, 18 U.S.C. § 5032 (1964), allows the accused to elect juvenile proceedings instead of criminal prosecution. This distinction from the D.C. Juvenile Court Act was held to justify transfers from juvenile detention facilities to adult correctional institutions. See *Sonnenberg v. Markley*, 289 F.2d 126 (7th Cir. 1961). There has been no comparable appellate decision concerning the validity of transfers under the Juvenile Court Act.

44. 125 F. Supp. 647 (D.D.C. 1954).

45. See *White v. Reid*, 126 F. Supp. 867 (D.D.C. 1954).

46. 18 U.S.C. § 4082 (1964).

same court approved a similar transfer five years later.⁴⁷ However, it disapproved the practice later that year⁴⁸ and again the following year.⁴⁹ Apparently the practice is now informally discouraged,⁵⁰ but the statute remains. Thus, the constitutionality of such transfers remains unresolved. It is unseemly for a court which earlier recognized the need for procedural safeguards in juvenile proceedings to subject the juvenile found delinquent without many of those safeguards to punitive incarceration through the devious route of transfers between juvenile and adult commitment facilities.⁵¹ It is equally hard to understand what motivated Congress to pass a statute which specifically defeats the stated purpose of the District of Columbia Juvenile Court Act by allowing such transfers. The protective motives of the Government are, at best, questionable so long as this condition exists.

The power and limits of juvenile courts under state and federal constitutions should not be determined by calling such proceedings noncriminal.⁵² The Supreme Court of the United States stated over twenty years ago: "[L]iberty of an individual is at stake. . . . Meticulous care must be exercised lest the procedure by which he is deprived of that liberty not meet the essential standards of fairness."⁵³ It is true that specific sections of the Bill of Rights address themselves to federal criminal proceedings. Nevertheless, as the quote above suggests, the due process clause of the fifth amendment dictates procedural safeguards for noncriminal federal hearings according to the degree of potential government interference with liberty. Similarly, the due process clause of the fourteenth amendment draws its content from "fundamental standards of fairness" rather than from specific sections of the Bill of Rights.⁵⁴

No matter how parental the state becomes, it is still engaging in state action subject to the restrictions of the fourteenth amend-

47. See *Clay v. Reid*, 173 F. Supp. 667 (D.D.C. 1959), *appeal dismissed*, 272 F.2d 527 (D.C. Cir. 1959).

48. See *Cogdell v. Reid*, 183 F. Supp. 102 (D.D.C. 1959).

49. See *Kauter v. Reid*, 183 F. Supp. 352 (D.D.C. 1960).

50. See Note, 49 GEO. L.J. 322, 356 (1960).

51. Compare *Clay v. Reid*, 173 F. Supp. 667 (D.D.C. 1959), with *In re Poff*, 135 F. Supp. 224 (D.D.C. 1955).

52. Cf. *United States v. Dickerson*, 168 F. Supp. 899, 901 (D.D.C. 1958) (dictum); *Holmes' Appeal*, 379 Pa. 599, 616, 109 A.2d 523, 530 (1954) (dissenting opinion), *cert. denied*, 348 U.S. 973 (1955).

53. *Bridges v. Nixon*, 326 U.S. 135, 154 (1945).

54. Compare *Adamson v. California*, 332 U.S. 46 (1947); *Palko v. Connecticut*, 302 U.S. 319 (1937).

ment when it commits a juvenile. The fourteenth amendment clearly restricts the state as *parens patriae* to acts short of those to which a stern and benevolent parent might resort.⁵⁵ Only a very strained reading of the fourteenth amendment allows a substantially different measure of fairness when the deprivation of liberty is motivated by good intentions. As Justice Brandeis warned us over a generation ago, "experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficent."⁵⁶

Labeling a proceeding noncriminal allows a withdrawal from the fundamental standards of fairness demanded in criminal cases without analyzing the reason for those standards. Reformation and rehabilitation as important objectives of criminal jurisprudence have been increasingly recognized by the Supreme Court,⁵⁷ but there is no suggestion that such objectives justify a reduction in the rights of the accused under fourteenth amendment due process.⁵⁸ However, there is a suggestion in the Court's opinions that the fundamental standards vary according to the severity of the possible sentence.⁵⁹ What is important in fourteenth amendment due process is the degree of interference by the state, *not* the motivation behind that interference.

The juvenile has every right under the fourteenth amendment to decline surrendering his liberty in return for "guidance," and to lead his life without official interference until such time as the state can prove in an orderly and reliable procedure that his conduct justifies state infringement of his liberty.⁶⁰ After such a

55. See TAPPAN, *JUVENILE DELINQUENCY* 191 (1st ed. 1949); Diana, *Rights of Juvenile Delinquents: An Appraisal of Juvenile Court Procedures*, 47 J. CRIM. L., C. & P.S. 561, 564 (1957); Waite, *How Far Can Court Procedure Be Socialized Without Impairing Individual Rights?*, 12 J. CRIM. L., C. & P.S. 339, 341 (1921).

56. *Olmstead v. United States*, 277 U.S. 438, 479 (1928) (dissenting opinion). Recently the Supreme Court in *Kent v. United States*, 86 Sup. Ct. 1045, 1055 (1966), specifically declined to consider the constitutional validity of the *parens patriae* rationale for reduced procedural safeguards.

57. *Cf. Williams v. New York*, 337 U.S. 241, 248 (1949) (dictum).

58. See *Pointer v. Texas*, 380 U.S. 400 (1965); *Malloy v. Hogan*, 378 U.S. 1 (1964); *Gideon v. Wainwright*, 372 U.S. 335 (1963).

59. See *Gideon v. Wainwright*, *supra* note 58, at 347 (concurring opinion). In that case that the right to effective assistance of counsel was said to turn on a "capital-non-capital punishment" dichotomy, and then on a "serious crime-petty offense" dichotomy under fourteenth amendment due process.

60. See Pound, *Foreword* to YOUNG, *SOCIAL TREATMENT IN PROBATION AND DELINQUENCY* at xiv-xv (2d ed. 1952); TAPPAN, *JUVENILE DELINQUENCY* 191 (1st ed. 1949).

determination has been made, the commendable motives and objectives of reformation and rehabilitation do credit to our society. Before such a determination has been made, however, these objectives are merely expedient apologies for stripping proceedings of safeguards designed to ensure standards of reliability consistent with the degree of state power being exercised.

Paradoxically, on at least two occasions juvenile acts have been found unconstitutional because the court was empowered to fine delinquents without adhering to constitutionally ensured procedural rights.⁶¹ One such act authorized a maximum fine of twenty-five dollars,⁶² but it was felt that a fine could only have punitive effect. It is a highly theoretical distinction to say that a twenty-five dollar fine is more punitive than commitment to a state training school. This distinction is a result of analyzing fourteenth amendment procedural requirements in terms of legislative intent rather than in terms of the degree of state interference.

The critics who clamor for more procedural protection — or restoration of what was removed by the juvenile acts — argue that procedural requirements for juveniles should not be relaxed until the court's disposition is not regarded as punitive. If procedural aspects of the hearing must be responsive to the disposition, then procedural changes which reduce personal rights will conform to due process requirements when facilities, personnel, and public attitudes improve. Perhaps, when that day comes, a convincing argument can be made that a deprivation of liberty following a finding of delinquency has no punitive aspect, the prognosis of such treatment being predictable and the juvenile demonstrably benefiting from his commitment.

II. CONFUSIONS BROUGHT ON BY INFORMALITY

The development of procedural safeguards in the juvenile courts has been inhibited by widespread confusion in two areas. One of these is the multiple jurisdiction of the juvenile court over dependent, neglected, and delinquent children. Some courts have not distinguished these different types of hearings,⁶³ although

61. See *Robison v. Wayne Circuit Judges*, 151 Mich. 315, 115 N.W. 682 (1908); *Jones v. Commonwealth*, 185 Va. 335, 38 S.E.2d 444 (1946).

62. See *Robison v. Wayne Circuit Judges*, *supra* note 61, at 326, 115 N.W. at 686.

63. See, e.g., *Holmes' Appeal*, 379 Pa. 599, 604, 109 A.2d 523, 525 (1954), *cert. denied*, 348 U.S. 973 (1955), where Justice Stern supports his thesis that juvenile court is a civil inquiry by referring to examples of *neglected* and *abandoned* children, when the case before him was *delinquency* on allegation of armed robbery.

recent juvenile acts recognize the difference in the court's dispositive powers.⁶⁴

A dependency determination may be ascertained through a background investigation. The determination is only of the child's physical status which can easily be demonstrated. The same is true of a neglect determination, except where the alleged neglect is nonphysical or where the proceeding is to take the child from the custody of the parents. Educational and spiritual neglect involve subtle fact determinations. Thus, if the parent is being prosecuted for child neglect and may lose custody of his child, he is clearly entitled to procedural safeguards commensurate with the jeopardy to his interests.⁶⁵

In delinquency determinations the child is *exposed* to the label of delinquent and possible commitment regardless of the severity of his infraction.⁶⁶ (This is not to say that courts habitually exercise their full power in cases of minor infractions, but if a procedural rule is to check judicial discretion, the most logical test for its need is a comparison of court power with guarantees of reliability.) Juvenile courts may waive jurisdiction and transfer the child to regular criminal courts.⁶⁷ The availability of such transfer makes the juvenile hearing either a preliminary to criminal trial or dispositive on the merits within the discretion of the juvenile court judge. Statutes defining delinquency beyond the commission of a specific criminal offense are very vague.⁶⁸ Hence, there is real need for the juvenile court to carefully determine what the juvenile has done to attract the court's jurisdiction.

Over fifty years ago the emphasis of juvenile court was reported as shifting from adjudication to disposition.⁶⁹ The child, unlike the adult, was not to hang between freedom and punishment depending on the finding of the case. Rather he was to have help and cooperation even though the court found him delinquent.

64. See, e.g., CAL. WELFARE & INST'NS CODE §§ 727, 730, 731; N.Y. FAMILY CT. ACT §§ 352, 731-32; ORE. REV. STAT. §§ 419.476, .509 (1965). Compare VA. CODE ANN. §§ 16.1-158, -178 (Supp. 1960).

65. See *Evans v. Rives*, 126 F.2d 633 (D.C. Cir. 1942).

66. See, e.g., CAL. WELFARE & INST'NS CODE §§ 601-02, 730-31; ORE. REV. STAT. §§ 419.476, .509, .511 (1963); VA. CODE ANN. §§ 16.1-158, -178, -180 (Supp. 1960). Compare N.Y. FAMILY CT. ACT § 758.

67. See, e.g., CAL. WELFARE & INST'NS CODE § 606; D.C. CODE ANN. § 11-1553 (Supp. IV, 1965); MASS. GEN. LAWS ANN. ch. 119, § 61 (1965). Compare N.Y. FAMILY CT. ACT §§ 713-15.

68. See, e.g., D.C. CODE ANN. § 11-1551 (Supp. IV, 1965) ("Beyond control of his parent" and "deports himself as to injure or endanger himself or the morals or safety of himself or others").

69. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 106-07 (1909).

This laudable motive should be duly acclaimed once the youngster is found to be within the court's dispositive powers. For some reason, however, this shift in emphasis was taken as license to abandon the attention traditionally bestowed on the fact finding stage before determination in favor of greater effort to tailor a suitable remedy. The following statement is illustrative of this attitude: "[T]he problem for determination by the judge is not, 'Has this boy or girl committed a specific wrong?' but 'What is he, how has he become what he is, and what had best be done in his interest and in the interest of the state to save him from a downward career?'"⁷⁰ This attitude has received second looks from sociologists, courts, and legislators:

[A]lthough some of us feel we have some answers, actually there is far less agreement than there was 50 years ago . . . [T]he idea that [the judge] might be taking away the parents' right to their child, or his right to them, without any semblance of "due process" didn't occur to us too often. We were too sure we knew what was right.⁷¹

The net effect of these confusions has been that findings before disposition have gravitated toward the lowest level of reliability.⁷² Some recent statutes have delineated the jurisdictional facts and segregated the stages of the hearing,⁷³ but the confusions remain most troublesome where procedure is largely in the court's discretion.

Regarding juvenile proceedings as informal and noncriminal, the courts have been reluctant to examine the question of compliance with due process requirements. What is happening in juvenile courts is not generally disputed:

Children's cases are handled much like any other criminal cases except that they many times fail to provide the protections that prevail in criminal courts and are considered basic ingredients of justice. . . .

The rights to a definite charge, counsel, a fair hearing, reasonably relevant and convincing evidence, and appeal, which are ensured on even the most trivial issues to adults, were not being afforded to children.⁷⁴

70. Mack, *supra* note 69, at 119-20; cf. *People v. Lewis*, 260 N.Y. 171, 183 N.E. 353, *cert. denied*, 289 U.S. 709 (1932); *Holmes' Appeal*, 379 Pa. 599, 109 A.2d 523, *cert. denied*, 348 U.S. 973 (1954). See also Nicholas, *History, Philosophy, and Procedures of Juvenile Courts*, 1 J. FAMILY L. 151, 164-65 (1961).

71. Address by Alan Keith Lucas, *White House Conference on Children* (1950), in PROCEEDINGS: HEALTH PUBLICATIONS INSTITUTE, INC. 127 (1950).

72. See *People v. Lewis*, 260 N.Y. 171, 176, 183 N.E. 353, 355, *cert. denied*, 289 U.S. 709 (1932).

73. See, e.g., CAL. WELFARE & INST'NS CODE §§ 600-02, 701-06; N.Y. FAMILY CT. ACT §§ 712, 742-46.

74. S. REP. NO. 130, 85th Cong., 1st Sess. 175 (1957).

With the emphasis on disposition it is not hard to understand how procedural safeguards have been ignored. During hearing on disposition, the judge's discretion as to what he will hear and what weight to accord it has been extremely broad.⁷⁵ It is important to remember that every hearing has a due process standard commensurate with it.⁷⁶ The protection provided by the procedural standards of the fourteenth amendment pertains primarily to the preliminary decision of whether any disposition is justified. Therefore, these rights extend from the time the threat of deprivation arises until actual deprivation is justified.⁷⁷

III. COUNSEL IN JUVENILE COURTS

It has already been suggested that fundamental fairness is chameleon-like, taking on the complexion of the proceeding before the court. In a juvenile court neglect and dependency cases are intermingled with delinquency cases on a crowded calendar.⁷⁸ One can readily understand a judge seeking one expeditious procedure for all types of cases.

There is widespread belief that informal procedures foster a closer relationship between judge and juvenile.⁷⁹ In their quest for informality, some juvenile court judges have resisted the appearance of attorneys, fearing that attorneys will press for traditional criminal law procedures and will resist the court at every stage of the proceedings. These influences, they believe, will eventually transform juvenile courts into junior criminal courts in spite of efforts to keep them noncriminal.⁸⁰ The argument is often made that because the court's sole interest is the child's welfare, his interests are adequately protected by the judge and probation officer.⁸¹

75. Cf. *Williams v. New York*, 337 U.S. 241 (1949).

76. Cf. *In re Oliver*, 333 U.S. 257, 273 (1948).

77. See Committee on Juvenile Courts, Los Angeles Bar Association, *The Attorney and the Juvenile Court*, 30 LOS ANGELES BAR BULL. 333, 335-37 (1955), wherein a joint statement by the Bar, juvenile court judges, and probation officials noted, "Constitutional safeguards are as applicable in a juvenile court proceeding as in any other proceeding in which personal and property rights are involved."

78. See Note, 49 GEO. L.J. 322, 357 (1960).

79. See Alexander, *Constitutional Rights in Juvenile Court*, 46 A.B.A.J. 1206, 1207 (1960); Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 120 (1909).

80. Cf. Alexander, *supra* note 79, at 1209; McKesson, *Right to Counsel in Juvenile Proceedings*, 45 MINN. L. REV. 843, 851 (1961); Note, 10 STAN. L. REV. 471, 500-01 (1958).

81. See TAPPAN, *JUVENILE DELINQUENCY* 189 (1st ed. 1949); Tappan,

Only five jurisdictions require appointment of counsel after request and a finding of indigency,⁸² while another two will appoint counsel in certain classes of cases.⁸³ In seven jurisdictions the appointment of counsel is within the court's discretion.⁸⁴ Five other jurisdictions specifically permit counsel to appear, but do not provide for court appointment.⁸⁵ Five provide for the appointment of a guardian *ad litem* — not necessarily an attorney — to protect the juvenile's interests.⁸⁶ The remaining jurisdictions make no specific mention of the right to counsel.

A. FIFTH AND FOURTEENTH AMENDMENT REQUIREMENTS FOR COUNSEL IN JUVENILE COURT

To properly determine if counsel is essential to a fair hearing in juvenile court, one must look at the court as seen by those appearing before it. In delinquency proceedings the child's parents are often the complaining parties.⁸⁷ The social worker or probation officer, although specially trained in methods of treatment and rehabilitation, is viewed by the juvenile as agents of the court who are primarily concerned with the disposition stage of the hearing. This viewpoint is accentuated when the probation officer is cast in the role of the prosecutor.⁸⁸ This leaves only the judge and the child himself concerned with the child's interests during the trial. To the juvenile the judge is often identified as the opponent rather than as counsel, largely because of the court's

The Adolescent in Court, 37 J. CRIM. L., C. & P.S. 216, 226-27 (1946); Note, 10 STAN. L. REV. 471 (1958).

82. *Shioutakon v. District of Columbia*, 236 F.2d 666 (D.C. Cir. 1956); IDAHO CODE ANN. § 16-1631 (Supp. 1965); MINN. STAT. ANN. § 260.155(2) (Supp. 1965); N.Y. FAMILY CT. ACT §§ 241-49; ORE. REV. STAT. § 419.498 (1965).

83. CAL. WELFARE & INST'NS CODE § 634; MO. REV. STAT. § 211.211 (1959).

84. ALA. CODE, tit. 13, § 359 (1958); ARK. STAT. ANN. 45-227 (1947); IOWA CODE § 232.15 (1962); MICH. STAT. ANN. § 27.3178 (598.17) (1962); NEV. REV. STAT. § 62.085 (1961); W. VA. CODE ANN. § 4904 (60) (1961); WIS. STAT. § 48.25 (6) (1955).

85. *In re Pulin*, 100 N.H. 458, 129 A.2d 672 (1957); ME. REV. STAT. ANN. ch. 152-A, § 15 (Supp. 1963); MISS. CODE ANN. § 7185-08 (1942); MISS. CODE ANN. § 7187-08 (Supp. 1964); N.H. REV. STAT. ANN. § 9 (1955); OHIO REV. CODE § 2151.35 (Anderson Supp. 1964); R.I. GEN. LAWS ANN. § 14-1-30 (Supp. 1965).

86. ILL. REV. STAT. ch. 23, § 2007 (1963); KAN. GEN. STAT. ANN. § 38-821 (1963); N.C. GEN. STAT. § 110-29 (1960); N.D. CENT. CODE § 27-16-25 (1960); S.C. CODE ANN. § 15-1193 (1962); VA. CODE ANN. § 16.1-173 (Supp. 1960).

87. See TAPPAN, *DELINQUENT GIRLS IN COURT* 98-99 (1947).

88. See TAPPAN, *JUVENILE DELINQUENCY* 189 (1st ed. 1949).

dispositive power. The feeling of aloneness in an adult world is inevitable. The presence of his own counsel could greatly alleviate this feeling.

In addition to the desirability of counsel from the juvenile's point of view, there are important substantive reasons as well. His ability to persuade witnesses to appear in his behalf is far less than that of an attorney, especially if the juvenile is detained prior to the hearing.⁸⁹ Assuming the child could obtain his witnesses, he usually lacks an attorney's ability to bring out the entirety of their testimony. Admittedly the judge may question witnesses at length, but the scope of this interrogation does not usually approach that of an attorney. The juvenile is also at a great disadvantage regarding rules of evidence.

The right to remain silent is of little value without an understanding of waiver and scope of the privilege; for these reasons also an attorney is essential.⁹⁰ Even where the child admits the allegations, commitment should not be ordered without a consideration of all factors.⁹¹ This consideration may well have due process connotations although a delinquency determination was previously made, for the validity of juvenile court procedures depends largely on nonpunitive dispositions. Juveniles as a class lack any political power, and where the parents are complaining parties, there is not even any derivative political posture.⁹² This makes it doubly important that the juvenile be given the full protection of available procedural rights. The attorney is good insurance of that result.

All in all, the picture is one of the minor's peculiar ineptitude to fend for himself. The Supreme Court recognized long ago that youth and immaturity are specially disabling factors necessitating counsel to insure a fair hearing.⁹³

Youth and inexperience often preclude awareness of procedural rights as well as those arising under the state and federal constitutions.⁹⁴ Little is done to assure a fair hearing if a defendant has

89. See GELLHORN, *CHILDREN AND FAMILIES IN THE COURTS OF NEW YORK* 78 (1954) (juvenile respondent denied compulsory process in many jurisdictions); Antieau, *Constitutional Rights in Juvenile Courts*, 46 *CORNELL L.Q.* 387, 405 (1961).

90. See Note, 10 *STAN. L. REV.* 471, 497-98 (1958).

91. Cf. Kamisar & Choper, *The Right to Counsel in Minnesota: Some Field Findings and Legal-Policy Observations*, 48 *MINN. L. REV.* 1, 100-01 (1963).

92. See TAPPAN, *DELINQUENT GIRLS IN COURT* 98-99 (1947).

93. See *Uveges v. Pennsylvania*, 335 U.S. 437 (1948); *Wade v. Mayo*, 334 U.S. 672 (1948); cf. *Powell v. Alabama*, 287 U.S. 45 (1932).

94. Cf. TAPPAN, *JUVENILE DELINQUENCY* 184 (1st ed. 1949); Antieau, *supra* note 89, at 395.

certain rights but is not made aware of them. Counsel is essential to ensure that rights are waived only after conscious consideration.⁹⁵ Mr. Justice Sutherland said in *Powell v. Alabama*⁹⁶ over 30 years ago:

Even the intelligent and educated layman has small and sometimes no skill in the science of law. . . . He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he has a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him.⁹⁷

Viewed in terms of the greater need of the immature, and in terms of deprivation of liberty and the stigmatizing label of delinquent, fundamental fairness requires counsel in juvenile delinquency proceedings.⁹⁸ Parity suggests a right to counsel arises under the fourteenth amendment when the juvenile is accused of delinquency for conduct amounting to a serious crime if committed by an adult.⁹⁹ However, in juvenile delinquency cases the defendant is often exposed to commitments in excess of those his adult counterpart would receive.¹⁰⁰ There is no predictable relation between the seriousness of the crime and the maximum length of commitment; rather the maximum term of commitment is a function of the defendant's age at the time of the hearing — the younger he is, the longer an indefinite commitment until majority could be.¹⁰¹

There is another reason why older juvenile defendants have a right to counsel. For youngsters over fourteen,¹⁰² or in some cases sixteen,¹⁰³ the juvenile court may be only a preliminary hearing

95. See generally Note, 49 MINN. L. REV. 1133 (1965).

96. 237 U.S. 45 (1932).

97. *Id.* at 69.

98. *Cf.* *Shioutakon v. District of Columbia*, 236 F.2d 666, 669 (D.C. Cir. 1956).

99. See *Gideon v. Wainwright*, 372 U.S. 335, 351 (1961) (Harlan, J., concurring).

100. TAPPAN, JUVENILE DELINQUENCY 192 (1st ed. 1949); *cf.* Antieau, *supra* note 89, at 390.

101. See Dembitz, *Ferment and Experiment in New York: Juvenile Cases in the New Family Court*, 48 CORNELL L.Q. 499, 512 (1962). Compare N.Y. FAMILY CT. ACT § 758, which limits confinement to a maximum of three years.

102. See, e.g., MASS. GEN. LAWS ch. 119, § 61 (1965); VA. CODE ANN. § 16.1-176 (Supp. 1960).

103. See, e.g., ORE. REV. STAT. § 419.533 (1963).

before waiver of juvenile court jurisdiction and certification for trial in criminal court. In these instances the hearing record may not be used against him in criminal court.¹⁰⁴ Nevertheless, without the advice of counsel, the juvenile defendant may be potentially prejudiced in at least three ways in a preliminary hearing. First, he is not protected from the consideration of anything he may have said in the hearing as a matter in aggravation on disposition in the criminal court.¹⁰⁵ Second, police officers are often in attendance at such hearings, and the defendant is not protected from the "fruits" of statements made at the hearing being used against him in criminal court.¹⁰⁶ Finally, at least one court has held that a witness in criminal court can be impeached by statements made in juvenile court.¹⁰⁷ It might be added that an admission of guilt in juvenile court, followed by its exclusion and the right to remain silent in criminal court, smacks of trying to "stuff the cat back into the bag." The defendant is psychologically disadvantaged and more amenable to a negotiated plea of guilty in criminal court.¹⁰⁸ Only under the federal Juvenile Delinquency Act can the juvenile defendant avoid this preliminary hearing and proceed immediately under the umbrella of criminal constitutional safeguards.¹⁰⁹ Thus considering the above factors, everywhere — except in the federal jurisdiction — juvenile delinquency hearings for specific misconduct should be considered merely an extension of criminal procedure.

The Supreme Court has held that the right to counsel under the fourteenth amendment extends to any critical court room stage of a criminal proceeding.¹¹⁰ In *Escobedo v. Illinois*,¹¹¹ the Court suggests that when the defendant first becomes accused he has reached a critical stage if prevailed upon to make a statement. The *Escobedo* court cites *Hamilton v. Alabama*¹¹² and *White v. Maryland*¹¹³ as support for the right to counsel at such a stage,

104. See authorities collected in note 5 *supra*.

105. See *Commonwealth v. Myers*, 393 Pa. 224, 144 A.2d 367 (1958); 1 WIGMORE, EVIDENCE § 196, at 673-76 (3d ed. 1940).

106. Cf. *Gallegos v. People*, 145 Colo. 53, 61-63, 358 P.2d 1028, 1032-33 (1961), *rev'd on other grounds*, 370 U.S. 49 (1962). But cf. *Kozler v. New York Tel. Co.*, 93 N.J.L. 279, 108 Atl. 375 (Sup. Ct. 1919).

107. *State v. Searle*, 125 Mont. 467, 239 P.2d 995 (1952).

108. See *United States v. Bayer*, 331 U.S. 532, 540 (1947).

109. See 18 U.S.C. § 5032 (1964).

110. *White v. Maryland*, 373 U.S. 59 (1963); *Hamilton v. Alabama*, 368 U.S. 52 (1961).

111. 378 U.S. 478 (1964).

112. 368 U.S. 52 (1961).

113. 373 U.S. 59 (1963).

but it does not recognize the distinction that in those cases the critical stage was a court proceeding, whereas in *Escobedo* the stage was police interrogation. The juvenile hearing is a court proceeding where the defendant's inclination is naturally to resist certification for trial as a criminal. Such an environment is conducive to encouraging defendant's active entry into the proceedings. In fact, the environment in juvenile court is designed to encourage the juvenile defendant to be candid about his prior conduct. This is especially true where resistance might lead to certification for trial in criminal court.¹¹⁴ Thus, in a very real sense the juvenile stands at the crossroad of two judicial systems.

The fourteenth amendment right to counsel in juvenile court hearings does not depend on it being a junior criminal court. It exists because of the threat of criminal treatment by certification to criminal court. Theory makes a child exempt from the criminal law,¹¹⁵ yet practice holds him subject to criminal court proceedings unless the court finds him suitable for treatment as a juvenile. The system incorporates a pretrial interrogation step which is no less critical because it is conducted before a judge rather than in the station house.

The argument that counsel is not essential to a fair hearing in juvenile court is largely fallacious. It boils down to propositions that the juvenile is protected by the court, traditional criminal safeguards are not applicable in juvenile court, and, therefore, an attorney is not necessary to protect the juvenile's interests. This amounts to an assertion that having stripped the proceedings of most procedural protections very little is lost by making the denial of procedural protection complete.

To the extent procedural devices designed to ensure a reliable proceeding are abandoned, those remaining become more crucial to the defendant.¹¹⁶ Due process clearly allows a defendant to present matters tending to negate the validity of the allegations.¹¹⁷ If this is the defendant's only protection against an unjust determination of delinquency, the skill with which it is managed becomes critical. One leading authority on the juvenile courts has put it as follows:

There should be an attorney for the defense in the court at all times to

114. See McKesson, *supra* note 80, at 846; Note, 10 STAN. L. REV. 471, 475-76 (1958).

115. See *Pee v. United States*, 274 F.2d 556 (D.C. Cir. 1959).

116. See Dembitz, *supra* note 101, at 510.

117. See *In re Oliver*, 333 U.S. 257, 273 (1948).

give legal guidance and advice to the [defendant]. This is the minimal requirement for fair adjudication. If . . . the defendant is to be deprived of a large section of her traditional right of due process by permitting . . . gossip . . . community opinion . . . there 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 is of inferior credibility little weight will be attached to it.¹¹⁸

Additionally, the mere presence of an attorney in court restrains the court's discretion. An attorney can ensure that determinations will be grounded on competent evidence. He may also take and perfect a timely appeal if necessary.¹¹⁹ Finally, the attorney is essential to effectively present the defendant's view of the facts supporting the allegations.

Fifth and fourteenth amendment due process embody a right to have retained counsel appear in any proceeding which may deprive a person of his liberty.¹²⁰ If the right to retain counsel is of due process proportions, it logically follows that counsel, whether retained or not, is essential to the fairness of the hearing.¹²¹ *Douglas v. California*¹²² largely eliminated the relative disadvantage a poor man had in his defense, by requiring the appointment of counsel for an indigent under the equal protection clause of the fourteenth amendment where the right to retain counsel exists. Thus it would seem that equal protection and due process require the appointment of counsel for the indigent juvenile whose liberty is threatened in a delinquency proceeding.

B. WAIVER AND EQUAL PROTECTION

In jurisdictions where counsel is allowed, or will be appointed on request, rarely is there any provision for informing the juvenile of the right.¹²³ However, in California the child and his parents

118. TAPPAN, *DELINQUENT GIRLS IN COURT* 107-08 (1947).

119. *Cf. Shioutakon v. District of Columbia*, 236 F.2d 666 (D.C. Cir. 1956). See also Kadish, *The Advocate and the Expert—Counsel in the Penitentiary Process*, 45 MINN. L. REV. 803, 833 (1961); Kamisar & Choper, *supra* note 91, at 94-101; Paulsen, *Fairness to the Juvenile Offender*, 41 MINN. L. REV. 547, 571 (1957); Waite, *How Far Can Court Procedure Be Socialized Without Impairing Individual Rights?*, 12 J. CRIM. L., C. & P.S. 339, 341 (1921).

120. *Chandler v. Fretag*, 348 U.S. 310 (1954); *Powell v. Alabama*, 287 U.S. 45, 69 (1932); *Ex parte Chin Loy You*, 223 Fed. 833, 838 (D. Mass. 1915).

121. See Kamisar, *Betts v. Brady Twenty Years Later: The Right to Counsel and Due Process Values*, 61 MICH. L. REV. 219, 227-28 (1962).

122. 372 U.S. 353, 357 (1963).

123. *Cf. Riederer, Role of Counsel in Juvenile Court*, 2 FAMILY L.J. 16, 19 (1962).

must be informed at a detention hearing and in the notice of hearing on a petition of the right to appear with counsel. The child or parent may then request appointed counsel if unable to retain counsel.¹²⁴ This notice may not be waived.¹²⁵ At the hearing the judge must satisfy himself that notice has been given before he may proceed in the absence of counsel.¹²⁶ The California Supreme Court has decided, however, that the judge may satisfy himself from the record that notice has been given. He is not required to ascertain by inquiry at the petition hearing that the right to counsel has been waived.¹²⁷

This overt circumvention of the purpose of the statute can only be explained as a perpetuation of the attitude that juvenile proceedings are more effective in the absence of counsel.¹²⁸ The statute leaves the method of ensuring proper notice of right to counsel to the judge's discretion; it seems a clear violation of that discretion to prefer a less reliable means over a more certain and expeditious means. The juvenile judge should, in open court, obtain the parties' verbal acknowledgment of notice and waiver of counsel.¹²⁹

Where counsel is provided when requested, the right is only as good as the awareness of that right. One cannot be held to have made an intelligent choice between requesting counsel and proceeding *pro se* when he is unaware of an alternative. The affluent will hire an attorney, perhaps totally unaware of the right to appointed counsel. His ignorance of that alternative does not prejudice his rights under the statute. The indigent who knows of his right to request counsel will get procedural protection equivalent to the affluent defendant. However, the accused who is both indigent and ignorant of his right to appointed counsel must depend on the court to so advise him if he is to receive equivalent protection.¹³⁰

124. CAL. WELFARE & INST'NS CODE §§ 633-59. See also N.Y. FAMILY CT. ACT §§ 728, 741.

125. Cf. 36 OPS. CAL. ATT'Y GEN. 85, 89 (1960).

126. CAL. WELFARE & INST'NS CODE § 700.

127. *In re Patterson*, 58 Cal. 2d 848, 377 P.2d 74 (1962), *cert. denied*, 374 U.S. 838 (1963).

128. See McKesson, *supra* note 80, at 847; Note, 10 STAN. L. REV. 471, 500 (1958).

129. Cf. *Shioutakon v. District of Columbia*, 236 F.2d 666 (D.C. Cir. 1956); *In re Patterson*, 58 Cal. 2d 848, 377 P.2d 74, 79 (1962), *cert. denied*, 374 U.S. 838 (1963).

130. Cf. *McBride v. Jacobs*, 247 F.2d 595 (D.C. Cir. 1957); *People v. Dorado*, 40 Cal. Rptr. 264, 268, 394 P.2d 952, 956 (Sup. Ct. 1964).

In *Douglas v. California*,¹³¹ the Supreme Court held that the equal protection clause of the fourteenth amendment requires the indigent be afforded counsel on appeal. The Court said an unconstitutional line was drawn between rich and poor if retained counsel was allowed full argument as of right while indigent's right to argument by counsel was conditioned.¹³² Similarly, where appointment of counsel is afforded in juvenile courts upon request the court cannot allow ignorance of that right to foreclose access to appointed counsel.

C. COUNSEL AS ESSENTIAL TO DUE PROCESS FAIR HEARING — RECENT TRENDS

There has been intrajurisdictional disagreement among courts and legislatures about the essentials of a fair hearing in juvenile proceedings. Courts which have looked beyond the noncriminal label have clashed sharply with those bent on holding the line. California and District of Columbia decisions provide representative illustrations.

In California the picture is forty years of indecision. In 1920 a district court of appeals held all criminal procedural safeguards to be applicable in juvenile proceedings based on violations of law.¹³³ In 1924 the California Supreme Court held there was no right to a jury trial in juvenile court.¹³⁴ In 1952 a district court of appeals ordered a new trial for a boy found delinquent on incompetent evidence, "thereby enabling said minor, *with the aid of counsel*, to properly prepare and present a defense to the charges . . ."¹³⁵ Three years later a district court of appeals found that since so many other traditional rights of criminal procedure were inapplicable, "by a parity of reasoning the guaranty of the right to counsel in criminal cases is likewise not applicable."¹³⁶ The court distinguished the 1952 case by confining its holding to the sufficiency of competent evidence to support the finding, the only matter on appeal.

In 1956 a convicted murderer alleged the absence of counsel in juvenile court before being certified for trial in criminal court vio-

131. 372 U.S. 353 (1963).

132. *Id.* at 357.

133. *Ex parte Tahbel*, 46 Cal. App. 755, 189 Pac. 804 (Dist. Ct. App. 1920).

134. *Ex parte Daedler*, 194 Cal. 320, 228 Pac. 467 (1924).

135. *In re Contreras*, 109 Cal. App. 2d 787, 790, 241 P.2d 631, 634 (Dist. Ct. App. 1952). (Emphasis added.)

136. *People v. Fifield*, 136 Cal. App. 2d 741, 743, 289 P.2d 303, 304 (Dist. Ct. App. 1955).

lated due process since his ability to prove himself a proper subject for juvenile treatment was impaired. In *People v. Dotson*,¹³⁷ the California Supreme Court found no denial of due process. In 1961 California enacted statutes supplying counsel in delinquencies of felony proportions and leaving appointment in other cases to the discretion of the court.¹³⁸

Dotson is instructive as an insight into juvenile court due process. The intermediate hearing, in which the juvenile court decided young Dotson was not a proper subject for juvenile treatment, was in no sense a proceeding against him. The court relied on this fact to preclude any possible due process violation. Dotson was never in jeopardy in *juvenile* court. A significant point is that he did not claim the absence of counsel in juvenile court prejudiced his case in *criminal* court.

The District of Columbia has experienced perhaps the most checkered development of the right to counsel in juvenile court. The municipal appellate court indicated in 1953 that a juvenile has the right to have retained counsel appear in juvenile court.¹³⁹ Two years later the federal district court held the juvenile's right to counsel is derived directly from the sixth amendment.¹⁴⁰ In a very strong opinion the court emphasized that juvenile delinquency rests on a determination of guilt where specific criminal acts are alleged. Therefore, any juvenile proceeding alleging an act which would be a crime if committed by an adult is imbued with constitutional safeguards.¹⁴¹ The court reasoned the legislative intent was to give the juvenile greater protection and also expressed grave doubt whether the legislature had the power to disallow any constitutional right by merely legislating certain conduct to be noncriminal.¹⁴²

The following year *Shioutakon v. District of Columbia*,¹⁴³ a case of delinquency based on a law violation confirmed, the non-criminal nature of juvenile proceedings. However, it did not consider due process requirements as to counsel. Rather, the court interpreted the Juvenile Court Act as implicitly providing for notice of the right to counsel and providing counsel in the case of

137. 46 Cal. 2d 891, 299 P.2d 875 (1956). But see *Kent v. United States*, 86 Sup. Ct. 1045, 1053 (1966), where it is said that a valid transfer hearing may not be held without assistance of counsel.

138. See CAL. WELFARE & INST'NS CODE § 634.

139. *In re Sippy*, 97 A.2d 455 (D.C. Munic. App. 1953).

140. *In re Poff*, 135 F. Supp. 224 (D.D.C. 1955).

141. *Id.* at 227.

142. *Id.* at 225-26.

143. 236 F.2d 666 (D.C. Cir. 1956).

indigency.¹⁴⁴ The court stressed that perfecting an appeal and drafting written motions required the assistance of counsel. The court stated, "the right to be heard when personal liberty is at stake requires the effective assistance of counsel in a juvenile court quite as much as it does in a criminal court."¹⁴⁵ While the Juvenile Court Act did not specifically mention the use of counsel in juvenile court,¹⁴⁶ by liberal construction the court neatly avoided applying any part of the Bill of Rights to the juvenile court.

In 1958 the district court picked up the line it had started three years earlier — before *Shioutakon*. The defendant pleaded guilty in juvenile court before being certified for trial in criminal court. The court held the juvenile could not be placed in double jeopardy.¹⁴⁷ The court stated:

Ineluctable logic leads to the conclusion that the constitutional protection against double jeopardy, *as is the case with the right to counsel* and the privilege against self-incrimination, is applicable to all proceedings, irrespective of whether they are denominated criminal or civil, if the outcome may be deprivation of liberty of the person¹⁴⁸

The court of appeals reversed on the sole ground that jeopardy had not yet attached in juvenile court.¹⁴⁹ It is not clear from the district court opinion whether it considered these constitutional safeguards directly provided in the Bill of Rights or through fifth amendment due process. At any rate, the court of appeals again avoided making a firm precedent about due process requirements in juvenile court.

Two court of appeals cases after *Shioutakon* make it clear that the label of delinquency, along with potential deprivation of liberty, determine the right to counsel. In a neglect case, *In re Custody of a Minor*,¹⁵⁰ the child, represented by a social director rather than an attorney, was committed to the care of public welfare. The court held there was no right to counsel since the proceeding was not against the child, emphasizing that there was no punishment involved.¹⁵¹ On the other hand, in 1960 it held

144. *Id.* at 670.

145. *Id.* at 669.

146. See 52 Stat. 596-99 (1938) (now D.C. CODE ANN. §§ 16-2301 through 16-2315 (Supp. IV, 1965)).

147. See *United States v. Dickerson*, 168 F. Supp. 899 (D.D.C. 1958), *rev'd*, 271 F.2d 487 (D.C. Cir. 1959).

148. *Id.* at 901. (Emphasis added.)

149. See *United States v. Dickerson*, 271 F.2d 487 (D.C. Cir. 1959).

150. 250 F.2d 419 (D.C. Cir. 1957).

151. *Id.* at 420-21.

that counsel should have been supplied in a case where a teenage girl was found delinquent because she was "destitute of a suitable guardian."¹⁵² The court spoke of deprivation of liberty as one of the intended consequences of the hearing. It stated that the child was in jeopardy, and concluded, "with her liberty in the balance, the assistance of counsel might well have furthered the best interests both of the child and of the authorities responsible in this delicate area of social welfare."¹⁵³ In 1963 Congress revised the Juvenile Court Act, but again made no specific provision for appointed counsel.¹⁵⁴

These two jurisdictions represent the recent trends: concern for procedural fairness; disregard of the noncriminal label; the use of criminal procedure by analogy; and an appraisal of the elements of juvenile court powers and abilities on their own merits. In California, the legislature provided the right to counsel apparently to avoid compelling a judicial determination that juvenile proceedings were criminal. On the other hand, Congress left a great deal unspecified in its revision of the District of Columbia Juvenile Court Act. It was apparently satisfied to let the District of Columbia Court of Appeals continue to define the procedural essentials in juvenile proceedings. Since that court of appeals considers fifth amendment due process to be the guidepost for juvenile rights, further development should be instructive to the states concerned under fourteenth amendment due process.

In both jurisdictions there has been an attitude that juveniles need not submit themselves to the mercy of the governmental parent. Whether this has been done in the name of constitutional rights or of legislative policy makes little difference since the foundation for both may be described as essential to a scheme of ordered liberty.¹⁵⁵ The focus of these efforts to give standing to the juvenile respondent has been to provide him with a competent spokesman and partisan in the form of counsel.¹⁵⁶

Providing counsel is the first fundamental step essential to give meaning to other rights which are appropriate to juvenile proceedings. With more frequent appeals and informative debate

152. *McDaniel v. Shea*, 278 F.2d 460 (D.C. Cir. 1960).

153. *Id.* at 462.

154. See D.C. CODE ANN. §§ 16-2301 through 16-2315 (Supp. IV, 1965). But see D.C. CODE ANN. § 2-2202 (1961) (authorizes use of public defenders in juvenile court proceedings); cf. *Blue v. United States*, 342 F.2d 895 (D.C. Cir. 1964), cert. denied, 380 U.S. 944 (1965).

155. See *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

156. See *Dembitz, Ferment and Experiment in New York: Juvenile Cases in the New Family Court*, 48 CORNELL L.Q. 499, 509 (1963).

of juvenile procedures, the juvenile courts should gain strength from meeting the test of social and constitutional validity. Where the juvenile courts are unable to meet these tests, the particular practices will be weeded out by the scrutiny of judicial review and public opinion.

D. ROLE OF THE ATTORNEY IN A JUVENILE DELINQUENCY HEARING

A further word about the attorney's role in a delinquency hearing seems warranted. Initially he is faced with some difficult ethical and practical problems. Usually he is retained by the child's parents to represent both the child and themselves.¹⁵⁷ This situation has potential difficulties because the interests are separable and possibly conflicting.¹⁵⁸ For example, in the ordinary delinquency case the parents have a legitimate interest in resisting jurisdiction which might result in the court preempting their right of custody. If the child wishes to admit to a petition alleging delinquency, and his attorney has no personal doubts that the allegations are correct, there would be such a conflict. Conflict could also arise where the parents want to retain custody and the child's best interests would be served by placing him in the custody of more responsible adults. An even more extreme case arises when the delinquency alleged is "waywardness," and the attorney becomes convinced that it is really a case of parental neglect. A motion for substitution of a neglect petition against the parents may be the child's only legitimate defense.¹⁵⁹

In each of these examples shared confidences with either the child or his parents could have occurred before the conflict became apparent. Total withdrawal from the case is the attorney's only way out of this dilemma.

What has been said so far about conflicting interests is premised on the assumption that the child is *entitled* to a status independent of his parents for purposes of the delinquency proceedings. This problem does not exist in criminal prosecutions because resistance is considered the common interest of both parent and juvenile. Nor is there a problem in delinquency cases where parents have originated the petition against their own child. By so

157. Skoler & Tenney, *Attorney Representation in Juvenile Court*, 4 J. FAMILY L. 77, 83 (1964).

158. See McMullan, *The Lawyer's Role in the Juvenile Court*, 8 PRAC. LAW. 49, 53 (No. 4 1962).

159. See Isaacs, *The Role of the Lawyer in Representing Minors in the New Family Court*, 12 BUFFALO L. REV. 501, 511 (1963).

doing the parents have waived their parental prerogative of control over the child.

In situations of potential conflict, the parents lose some of their prerogatives to determine the child's best interests while defending against the state's challenge to that prerogative. Parental rights are never so pervasive as to eliminate the child's independent identity in the eyes of the law. Under the fifth and fourteenth amendments the child is entitled to a hearing on the question of delinquency. However, the juvenile does not have those rights if his parents can waive his right to a *prima facie* showing of delinquency by admitting to the allegations in the petition. Thus the child, or his attorney as guardian ad litem, must make the final decision on matters affecting his constitutional rights to ensure their exercise in the juvenile's best interests.

It is apparent in certain situations an attorney should not represent both the child and his parents.¹⁶⁰ If the parents desire independent representation, the attorney should insist that separate counsel be retained for the child.¹⁶¹ If he is hired to represent the child, it should be understood that the child's interests alone will guide the course of his representation.

The attorney as guardian ad litem, must decide the scope of his responsibility to make the final decision on matters which affect the child's fundamental rights. When he is convinced that the allegations of delinquency are well-founded and the child needs treatment, should he admit the allegations in the child's behalf even if the juvenile wants to resist?¹⁶² The answer is decidedly "no." In the first place neither the question of delinquency nor the need for treatment is a matter for him to decide. If the allegation is "waywardness," even the juvenile may not know whether he has been delinquent within the statutory definition; this question is for the court. By thus dispensing with the delinquency hearing over his client's objection, the attorney sets himself up as another *parens patriae* — without statutory control.

Secondly, it is quite likely the attorney has become convinced of his client's delinquency partly as a result of confidences which his client has shared with him. The need for a jealously protected attorney-client privilege is as strong in juvenile court as in any

160. Cf. McMullan, *supra* note 158, at 53; Oughterson, *Family Court Jurisdiction*, 12 BUFFALO L. REV. 467, 471 (1963).

161. See Isaacs, *supra* note 159, at 511.

162. See generally Handler, *The Juvenile Court and the Adversary System: Problems of Function and Form*, 1965 WIS. L. REV. 7, 43-44; Isaacs, *supra* note 159, at 512-15.

other instance.¹⁶³ In juvenile court it is especially important that the defendant have complete confidence that his case has been fully presented and that the state's case has been fully tested before any treatment or correction is undertaken.

Finally, the juvenile has a personal right to not lose his freedom on less than a *prima facie* case. This is the most fundamental element of due process. This right embodies notions of fair play, a guarantee of reliability, and a recognition of the individual's status before the law.

Although the attorney should follow the juvenile's wishes to resist the petition, he should make him aware that this does not necessitate a posture of uncompromising resistance.¹⁶⁴ Having shown his willingness and duty to represent the child's legitimate interests and protect his rights, the attorney is better situated than anyone to explain the nature and objectives of the juvenile courts.¹⁶⁵ He should explain that the juvenile is not being tried as a criminal, the court is not going to punish him, and criminal court tactics of resistance are not appropriate in juvenile court. Such an explanation will remove the prospect of a dramatic trial from the juvenile's mind. It will make him aware that his attorney's objective and purpose is to require an orderly presentation of the true facts by complainant's witnesses — and no more. When the juvenile is aware that the sensationalist aspects of unyielding obstruction will not be present in the hearing, he may take a more down-to-earth view of the entire proceedings.

Before the hearing, the attorney should investigate the possibility of informal or voluntary probation, if the juvenile is willing to admit to the allegations. This device often affords necessary supervision without the consequence of a delinquency record.¹⁶⁶

At the hearing the attorney must ensure an orderly presentation of legally dependable evidence going solely to the issue of delinquency. He must see to it that the court renders a decision on delinquency before any evidence related to disposition is heard.¹⁶⁷ Above all, the attorney in a delinquency hearing should discard any personal interest in winning cases. Where punishment

163. Cf. *id.* at 507.

164. See *id.* at 507; McMullan, *supra* note 158, at 52.

165. Cf. Handler, *supra* note 162, at 21.

166. Cf. Isaacs, *supra* note 159, at 509.

167. See Committee on Juvenile Courts, Los Angeles Bar Association, *The Attorney and the Juvenile Court*, 30 LOS ANGELES B. BULL. 333, 343 (1955); Hall, *Judicial Ethics for the Juvenile Court Judge*, 3 J. FAMILY L. 248, 261 (1963); Isaacs, *supra* note 159, at 512-15; McMullan, *supra* note 158, at 54.

has truly been eliminated, real "victory" is realized when a delinquent child has been rehabilitated. The real "defeat" lies in obstructing the legitimate operation of the rehabilitation mechanism.

It is during the disposition stage that an attorney probably feels least at home. His efforts should be directed at obtaining an effective program of treatment which imposes the minimum necessary restrictions on the juvenile's freedom. This, however, is not to say that the attorney should press for minimum restrictions regardless of his client's needs for supervision. He should also realize that the child is likely to view his own best interests as maximum resistance to official interference.¹⁶⁸ An attorney can assist the court in making a thoroughly informed disposition by volunteering information on the child's personality, homelife, associates, and other matters in mitigation.¹⁶⁹ He can also make suggestions about the method of treatment, including a program of probation on terms designed to isolate the juvenile from the circumstances which have led him into trouble. There are, of course, limits to the information an attorney can volunteer. For instance, revealing prior delinquent activity, although useful to the court, probably falls within the attorney-client privilege. If the attorney has no positive contributions, his negative arguments will most likely be ignored. Even when the attorney plans an appeal, although he should be cautious about what information he volunteers to the court, he should not forego contributing to a plan for treatment suited to the child's needs in the event he should not prevail upon appeal.

After disposition, the attorney should fully explain the terms, duration, and objectives to the juvenile, and his parents or guardian. He should explain that the degree of acceptance and cooperation will largely determine its effectiveness and duration in meeting those objectives. He should also inform all parties of the consequences attending a violation of its terms or of maintaining an attitude of resistance and defiance, and should try to impart his confidence that the plan is a fair one designed for correction rather

168. Cf. *ibid.*; Skoler & Tenney, *supra* note 157, at 83. Of the judges surveyed only 15% reported that the government appeared by an attorney regularly in juvenile delinquency proceedings.

169. Cf. Handler, *supra* note 162, at 34; Isaacs, *supra* note 159, at 507, 516; Treadwell, *The Lawyer in Juvenile Court Dispositional Proceedings: Advocate, Social Worker, or Otherwise*, 16 JUVENILE CT. JUDGES J. 109, 113 (1965).

than punishment. His chances of succeeding in these regards are much better than are those of a government official.¹⁷⁰

To a great extent the attorney's effectiveness in a juvenile delinquency proceeding will depend upon his relations with the judge and probation officer.¹⁷¹ If they feel his primary objective is to resist the court, they will probably not be disposed to discuss the matter informally before the hearing. To the extent that the judge feels the attorney appreciates the ideals and objectives of the juvenile court system, he will be receptive to argument at the hearing and more sensitive to any resistance.

IV. OTHER DUE PROCESS REQUIREMENTS OF A DELINQUENCY DETERMINATION

A. RULES OF EVIDENCE

The juvenile court must have a reliable method of determining who is subject to its jurisdiction. Whether these factual findings must be supported by a preponderance of evidence or beyond a reasonable doubt, the evidence itself must be sufficient to enable the judge to make a finding of fact rather than merely take the word of a police officer, probation officer, or parent.¹⁷² Basic as this proposition sounds it is not always followed.¹⁷³

Of course it is difficult for the rules of evidence to be meaningful in the absence of counsel since they are certainly beyond the knowledge of the vast majority of youngsters facing the court. It can be argued that the judge can distinguish the valid from untrustworthy evidence.¹⁷⁴ However, even a judge may have difficulty determining the motivations and observations under-

170. Cf. Handler, *supra* note 162, at 20-21. See also Isaacs, *supra* note 159, at 507; McMullan, *supra* note 158, at 54-55; Treadwell, *supra* note 169, at 112. Apparently this is the *primary* role envisioned for the attorney in juvenile court by some. See ADVISORY COUNCIL OF JUDGES OF THE NATIONAL PROBATION & PAROLE ASSOCIATION & NATIONAL COUNCIL OF JUVENILE COURT JUDGES, GUIDES FOR JUVENILE COURT JUDGES 66 (1957), where the judge is urged to welcome the attorney "for very often he may help the family in understanding and accepting the court's plan." Nowhere is special mention made of the attorney's role or value in the delinquency determination hearing.

171. See Paulsen, *Fairness to the Juvenile Offender*, 41 MINN. L. REV. 547, 567 (1957).

172. Cf. *In re Allamaras*, 139 Mont. 130, 361 P.2d 340 (1961).

173. See cases collected in Annot., 43 A.L.R.2d 1128, 1143-44 (1955).

174. See *Williams v. State*, 219 S.W.2d 509 (Tex. Civ. App. 1949); *In re Brown*, 201 S.W.2d 844 (Tex. Civ. App. 1947).

lying a hearsay statement, even though he is suspicious of its credibility.¹⁷⁵ He may need the gentle reminder of the exclusionary rules to avoid relying on less trustworthy but more convenient sources of information, such as written *ex parte* reports by social workers.

Some courts allow hearsay statements but require the delinquency determination to be supported by a preponderance of nonhearsay evidence.¹⁷⁶ But if incompetent evidence may not contribute to the finding, why is it allowed at all? The practice is an example of mixing evidence relevant to a delinquency determination with that relevant for disposition. The majority of jurisdictions, however, hold the rules of evidence applicable to juvenile court.¹⁷⁷

Statutory prohibitions against using evidence presented in juvenile hearings in any other court proceeding¹⁷⁸ do not justify abandoning the rules of evidence in juvenile hearings. Such statutes are designed to reduce the stigma of delinquency determinations, to provide immunity against self-incrimination, and afford some semblance of protection against double jeopardy. These objectives are extrinsic to the delinquency determining process. Insofar as relaxed rules of evidence may lead to questionable delinquency determinations they tend to allow juvenile courts to exceed their jurisdiction by prescribing guidance for nondelinquents.

Appeal from a delinquency finding is generally available. Where the judge sits as the sole determiner of fact and law the rules of evidence are an essential aid to the reviewing court. Without rules on admissibility the appellate court must either independently evaluate the evidence and substitute its discretion for that of the trial court or completely defer to the discretion of the trial court as to every item presented.

Informality in juvenile proceedings conserves time and lessens the psychological impression that the court is proceeding against the juvenile. Nevertheless, our legal system is replete with checks and restraints. While all these "technicalities" are time consuming,

175. *Cf.* *Holmes' Appeal*, 379 Pa. 599, 614, 109 A.2d 523, 529 (1954) (dissenting opinion), *cert. denied*, 348 U.S. 973 (1955).

176. See *id.* at 606, 109 A.2d at 526; CAL. WELFARE & INST'NS CODE § 701.

177. *Cf. In re Hill*, 78 Cal. App. 23, 247 Pac. 591 (Dist. Ct. App. 1926); *In re Mantell*, 157 Neb. 900, 62 N.W.2d 308 (1954); *People v. Lewis*, 260 N.Y. 171, 178, 183 N.E. 353, 355 (1932); Antieau, *Constitutional Rights in Juvenile Courts*, 46 CORNELL L.Q. 387, 401 (1961).

178. See authorities cited note 5 *supra*.

hasty, unilateral, subjective decisions are regarded as ill considered and tend to reduce public confidence in the courts. Hence the technicalities are retained. Whatever the court gains by a less oppressive atmosphere, more will be lost when a child is unjustly found delinquent.¹⁷⁹ The juvenile court as an institution must be accepted and respected, especially by the parents and children who appear before it, if it is to obtain the cooperation necessary for effective guidance and rehabilitation. The cost of complete informality, to the system and to the individual, is too high to be counterbalanced by a veneer of paternalism. This is especially true to the extent that formalities can be reduced without a corresponding reduction in the dependability of its factual findings.

B. PRIVILEGE AGAINST SELF-INCRIMINATION

The fifth and fourteenth amendments allow silence if speaking will tend to incriminate the witness.¹⁸⁰ When a juvenile is compelled to answer in juvenile court, is he incriminating himself? Where the juvenile hearing can be preliminary to a criminal trial, or where the child is subject to a criminal trial in addition to the juvenile proceeding,¹⁸¹ the answer is clearly yes. To deny protection when the juvenile is exposed to prosecution in criminal court violates due process.¹⁸² It would also seem to be an invidious discrimination in criminal procedure favoring adult over youthful defendants.

The statutes preventing the use of evidence introduced in juvenile court in any other proceeding¹⁸³ protect the juvenile as to the evidence presented, but they do not protect him from evidence uncovered as a result of the excluded evidence.¹⁸⁴ Since any link in the chain of evidence falls under the privilege,¹⁸⁵ the juvenile respondent should have full immunity from criminal prose-

179. Cf. TAPPAN, *JUVENILE DELINQUENCY* 208-09 (1st ed. 1949); Waite, *How Far Can Court Procedure Be Socialized Without Impairing Individual Rights?*, 12 J. CRIM. L., C. & P.S. 339, 343-44 (1921).

180. See *Malloy v. Hogan*, 378 U.S. 1 (1964).

181. See *People v. Silverstein*, 121 Cal. App. 2d 140, 262 P.2d 656 (Dist. Ct. App. 1953); *Moquin v. State*, 216 Md. 524, 140 A.2d 914 (1958).

182. Cf. *Ex parte Tahbel*, 46 Cal. App. 755, 189 Pac. 804 (Dist. Ct. App. 1920).

183. See authorities cited in note 5 *supra*.

184. Cf. *Gallegos v. People*, 145 Colo. 53, 358 P.2d 1023, 1032-33 (1960), *rev'd on other grounds*, 370 U.S. 49 (1962). But see *Wong Sun v. United States*, 371 U.S. 471, 484-88 (1963); *Nardone v. United States*, 308 U.S. 338, 341 (1939), which held that an effective exclusion also includes the fruits of the condemned activity. See also Paulsen, *supra* note 171, at 562.

185. *Hoffman v. United States*, 341 U.S. 479, 486-87 (1951).

cution before he is compelled to answer.¹⁸⁶ This constitutional protection is necessitated by the threat of criminal prosecution, not by the character of the juvenile proceedings.

Where a specific crime is alleged, delinquency draws its content from the criminal law. In such a situation the stigma of criminal conduct and exposure to commitment for a significant period suggest the procedure has criminal repercussions. The juvenile defendant should not have to choose between perjuring himself or stigmatizing himself and possibly losing his liberty.¹⁸⁷ This is fundamental fairness, even if not within the wording of the fifth amendment privilege.¹⁸⁸

Arguably, the existing practice of affording immunity from criminal prosecution and then compelling the witness to testify on pain of contempt meets the argument that self-imposed stigma tends to self-incrimination. It is important to recognize, however, that these immunity provisions apply to witnesses in proceedings to which they are not a party.¹⁸⁹ The stigma is thereby confined to a record not easily identified with such witnesses. In the case of the juvenile who is a party to the proceedings, the delinquency finding becomes a part of the court record. Even though these records are generally confidential, a finding of delinquency may be considered in determining disposition of any subsequent criminal conviction.¹⁹⁰ Furthermore, as earlier indicated,¹⁹¹ future employers and others may inquire about prior delinquency findings, whereas the likelihood of their inquiring about any prior admission of criminal conduct while a witness is extremely remote. Additionally the accused in a criminal case has traditionally enjoyed the privilege to refuse to testify at all, whereas the witness may only decline to answer specific questions that tend to incrimi-

186. Cf. *Holmes' Appeal*, 379 Pa. 599, 605, 109 A.2d 523, 526 (1954), *cert. denied*, 348 U.S. 973 (1955).

187. Compare Paulsen, *supra* note 171, at 561. Professor Paulsen bases his rejection of the privilege on the premise that the proceedings are "truly protective and non-accusatory."

188. Cf. *Malloy v. Hogan*, 378 U.S. 1 (1964); *Palko v. Connecticut*, 302 U.S. 319 (1937). Only under the view of "incorporation" of the Bill of Rights into due process would the express wording of the amendment be compelling. For example, in *Palko* due process was held to be grounded in notions of fundamental fairness.

189. See 8 WIGMORE, EVIDENCE § 2281 (McNaughton rev. 1961).

190. See *Commonwealth ex rel. Hendrickson v. Myers*, 393 Pa. 224, 144 A.2d 367 (1958); 1 WIGMORE, EVIDENCE § 196, 673-76 (3d ed. 1940, Supp. 1964); Rapoport, *Some Legal Aspects of Juvenile Court Proceedings*, 46 VA. L. REV. 908, 914-15 (1960).

191. See note 9 *supra* and accompanying text.

nate.¹⁹² This differing breadth of the privilege is partially attributable to the fact that a witness does not suffer from the prejudice generated against him in the eyes of the trier of fact by his refusal to answer questions, whereas an accused might.

A survey several years ago revealed several counties in California regularly certified juvenile cases to the criminal courts when the respondent refused to testify in juvenile court.¹⁹³ Under this practice it made little difference if there was a privilege in juvenile court. Judge Alexander considers a confession by the juvenile a *sine qua non* of the juvenile court's reformatory mission. Since the child must assent to the court's rehabilitative efforts for them to be effective, the normal acts of a lawyer schooled in the adversary system may minimize the likelihood of the child cooperating. This quest for confessions is likened to a doctor's concern in treating a sick child.¹⁹⁴ The analogy may be a fair one, but it fails to prove what is intended; no doctor would ever insist that a child diagnose his own case upon peril of being deemed unsuitable for treatment merely because he refuses to cooperate.

The claim that cooperation by the juvenile is essential to the successful operation of the juvenile courts cannot be advanced to support eliminating the privilege. If the juvenile is willing to confess, fully realizing the court's powers over his future freedom, the privilege is deemed to be waived. If he is not willing to do so, it is hard to see how compulsion by the court will contribute to a spirit of cooperation. Failure to warn the juvenile of his right to remain silent seems hypocritical in the face of the professed concern for his best interests. If the privilege is recognized, the juvenile should be informed of his right to remain silent.¹⁹⁵

A related issue is the use of out-of-court confessions. The very practice of obtaining a confession away from judicial protection belies the notion that the juvenile is not being prosecuted.

The dangers of the juvenile's rights being abused by an out-of-

192. See McCORMICK, EVIDENCE § 122, at 257-59 (1954), 8 WIGMORE, EVIDENCE § 2251, at 296 (McNaughton rev. 1961).

193. See Note, 10 STAN. L. REV. 471, 475, 476 n.29 (1958). *Kent v. United States*, 86 Sup. Ct. 1045 (1966), held that the District of Columbia Juvenile Court must afford the juvenile a full hearing prior to certifying him for criminal trial and must state its reasons for doing so. *Id.* at 1057.

194. See Alexander, *Constitutional Rights in Juvenile Court*, 46 A.B.A.J. 1206, 1208 (1960).

195. See Note, 10 STAN. L. REV. 471, 497-98 (1958). In California the juvenile respondent is accorded the privilege but not warned of its existence. There is no statute in California precluding evidence in juvenile hearings from use in other courts. Compare N.Y. FAMILY CT. ACT § 728.

court confession are considerably greater than when such confessions are taken from adults.¹⁹⁶ Furthermore, if the juvenile, after having been properly advised of his best interests, is truly willing to confess, there seems little reason to rely on a confession taken before the court hearing. Thus, this practice seems inherently inconsistent with the desired spirit of cooperation among the court, the juvenile, and his parents.

The California Welfare and Institutions Code allows the use of out-of-court confessions unless the juvenile repudiates it at the hearing.¹⁹⁷ There are two difficulties with this procedure: (1) the court, sitting as trier of fact, knows of the existence of a prior confession; (2) if a confession is repudiated, a continuance is often required to allow collection of other evidence.

Both of these defects could be corrected by: (1) disallowing any confession taken before the juvenile has conferred with counsel; (2) making a confession signed by both the juvenile and his counsel binding in court. This amounts to no more than the preparation of a written stipulation of facts.

The same mechanism can be used for admissions, thus eliminating undisputed elements of the petition and concentrating the court's time and attention on disputed elements. It also affords a partial waiver of the privilege against self-incrimination with less prejudice in the eyes of the trier of fact by the juvenile's reluctance to answer questions. He may remain off the stand and yet divulge so much as he desires without committing himself to a complete confession.

These stipulations of fact must not be used in criminal court should the juvenile court certify the case for trial there. Existing statutes for excluding evidence presented in juvenile court are insufficient.¹⁹⁸ For example, the juvenile court could waive jurisdiction before receiving the confession. In any event there could be a dispute as to whether the juvenile court has received a confession within the meaning of the exclusion statutes when it certified the case for trial elsewhere. Safeguards are required whereby such confessions and stipulated admissions, whether previously presented or not, are completely excluded from use in any other court.

A problem thus far peculiar to the District of Columbia ju-

196. *Cf. Gallegos v. Colorado*, 370 U.S. 49 (1962); *Haley v. Ohio*, 332 U.S. 596 (1948).

197. See CAL. WELFARE & INST'NS CODE § 701.

198. See 1 WIGMORE, EVIDENCE § 196 n.5 (3d ed. 1940).

venile court is the interrelationship of the *McNabb-Mallory*¹⁹⁹ rule and the intermediate jurisdiction of the juvenile court when it certifies a case for trial in criminal court.²⁰⁰ The juvenile is only protected by *McNabb-Mallory* after waiver of jurisdiction by the juvenile court.²⁰¹ Federal officers comply with the rule by taking the juvenile directly from juvenile court to the United States Commissioner. However, the juvenile may have been detained for five days²⁰² prior to his juvenile hearing. In terms of detention before arraignment the juvenile does not get protection equal to that given an adult.

Excluding any confession given before certification by the juvenile court would not alone meet the problem, which is one of exposure to interrogation. The juvenile may be intermittently questioned over a period which would clearly violate *McNabb-Mallory* if he were arrested as an adult. Even though the particular confession introduced was taken after waiver of juvenile jurisdiction, if the respondent is subsequently treated as an adult, the period of availability for police interrogation must be measured from the time of original apprehension as a juvenile.

One approach to solving this dilemma is to extend the *McNabb-Mallory* rule into juvenile apprehensions. This means any apprehended child of appropriate age accused of an offense for which he could be tried criminally would have to be brought before a United States Commissioner before he could be placed in detention. This would cover the possibility that the juvenile court might certify the case for trial in a criminal court. In the vast majority of cases, however, this would be wasted effort. Also, a criminal procedure would be introduced which has no place or purpose in the juvenile system.²⁰³ Further, it would set the child in a criminal defense posture before he even got into juvenile

199. *Mallory v. United States*, 354 U.S. 449 (1957); *McNabb v. United States*, 318 U.S. 332 (1943).

200. See D.C. CODE ANN. § 11-914 (Supp. IV, 1965).

201. See *Harling v. United States*, 295 F.2d 161 (D.C. Cir. 1961). Compare Federal Juvenile Delinquency Act, 18 U.S.C. § 5035 (1964) which provides prompt arraignment before a United States Commissioner. This problem is closely related to that of evidence obtained in contravention of *McNabb-Mallory* by state officers before federal arrest. See *Pee v. United States*, 274 F.2d 556 (D.C. Cir. 1959); *Kamisar, Wolf and Lustig Ten Years Later: Illegal State Evidence in State and Federal Courts*, 43 MINN. L. REV. 1083, 1183-85 (1959).

202. See D.C. CODE ANN. § 11-1553 (Supp. IV, 1965).

203. Cf. *Harling v. United States*, 295 F.2d 161 (D.C. Cir. 1961), holding the rule inapplicable to juvenile proceedings.

court, and would minimize the chances of obtaining the desired cooperation.

The root of the problem is detention of the juvenile for a significant period of time before a decision is made as to which jurisdiction will hear the case. Releasing children to their parents after apprehension is the favored policy of the District of Columbia Juvenile Court Act. A child should be detained only if the safety of the child or of others requires it. Where detention is ordered, the child should be isolated from adults and policemen. Any information obtained by a case worker or probation officer should be for juvenile court use only. If these steps are followed, and if a child is brought before the Commissioner immediately upon waiver of jurisdiction by the juvenile court, police access for interrogation would be minimized without the undesirable side effects of strict compliance with *McNabb-Mallory*.

Confessions elicited from juveniles must be treated more cautiously than those taken from an adult for the additional reason that a juvenile may often be apprehended without probable cause.²⁰⁴ If *Wong Sun v. United States*²⁰⁵ requires suppressing any confession or admission preceded by an illegal arrest, any confession or admission made after apprehension of a juvenile on less than probable cause would be inadmissible in criminal court.

C. JURY TRIAL

According to the famous opinion of Mr. Justice Cardozo in *Palko v. Connecticut*,²⁰⁶ the fourteenth amendment does not guarantee a trial by jury in state criminal courts. Several Supreme Court cases have repeated that view and have not found the sixth amendment right to jury trial to be overriding.²⁰⁷ In the federal jurisdictions, the sixth amendment is directly applicable to criminal proceedings. The Federal Juvenile Delinquency Act²⁰⁸ requires the juvenile to waive a jury trial before the juvenile court acquires jurisdiction. If such waiver is not made, the juvenile is tried in criminal court where he has a jury as of right. The District of

204. See, e.g., Rubin, *Protecting the Child in Juvenile Court*, 43 J. CRIM. L., C. & P.S. 425, 433-34 (1952); Note, 49 GEO. L.J. 322, 325 (1960). But see CAL. WELFARE & INST'NS CODE § 625; N.Y. FAMILY CT. ACT § 721; ORE. REV. STAT. §§ 419.486, .569 (1963).

205. 371 U.S. 471 (1963).

206. 302 U.S. 319 (1937).

207. See, e.g., *Irvin v. Dowd*, 366 U.S. 717, 721 (1961); *Fay v. New York*, 332 U.S. 261, 288 (1947).

208. 18 U.S.C. § 5033 (1964).

Columbia Juvenile Court Act provides for a jury trial upon request.²⁰⁹

Much courtroom formality is designed to impress upon the jury the solemnity of their duties as well as to simplify the receipt of evidence. Such formality is, therefore, unnecessary where the trier of fact is a judge. Counsel's approach to a single trier of fact is likely to be more straightforward—the courtroom is more businesslike and less a stage. These aspects of nonjury trial are consistent with the objectives of the juvenile court acts. Nonjury trial is also consistent with the notion of a private hearing, attracting as little publicity as possible.

The jury must answer the same questions when a delinquent is charged with specific criminal acts as it must in an adult criminal case. Thus, tradition favors a jury trial in this situation. Other types of delinquency involve rather ill-defined notions of waywardness and unmanageability,²¹⁰ and the maintenance of some semblance of uniform standards among them dictates trial before a judge. For either category of delinquency, the juvenile may be committed to an institution.²¹¹ If a jury trial is applicable to one category, it should be to the others as well, at least insofar as rights are responsive to potential state impingement on the respondent's freedom. Insofar as fairness requires a common standard of conduct upon which all are to be judged, the respondent facing a less specific charge should not have a jury, unless it is a permanent body which tries all such cases. Viewed in this respect, it would seem that the absence of a jury is fairer to the juvenile respondent than is its use.

A jury trial may be in the juvenile's best interests insofar as some courts are either careless or unwilling to consider the determination of delinquency before considering an appropriate disposition. The jury may provide the necessary external mechanism to segment the proceedings. However, the jury seems a rather clumsy and expensive tool for this purpose where specific statutes would be adequate.²¹² It is the jury's capabilities as a factfinder which should recommend it—not a collateral benefit from its presence.

In light of these considerations, the fourteenth amendment does not require a jury trial in state juvenile proceedings. Failure to

209. In the District of Columbia a jury trial may be had upon request in juvenile court. See D.C. CODE ANN. § 16-2307 (Supp. IV, 1965).

210. See, *e.g.*, D.C. CODE ANN. § 11-1551 (Supp. IV, 1965).

211. See, *e.g.*, ORE. REV. STAT. §§ 419.476, .509, .511 (1963).

212. See, *e.g.*, CAL. WELFARE & INST'NS CODE §§ 701-06; N.Y. FAMILY CT. ACT §§ 742-46.

provide a jury does not seem to deny due process nor does it unfairly discriminate against juveniles.²¹³

D. RIGHT TO BAIL

The juvenile acts generally favor releasing a child to his parents pending hearing.²¹⁴ Any detention before hearing not ordered by the court may violate the fourteenth amendment in view of the fact that: (1) a juvenile may be apprehended on less than probable cause;²¹⁵ (2) the policy of the juvenile acts is against punitive incarceration; (3) detention deprives the parents of their right to care and control of the child as well as depriving the child of his liberty. If the processing machinery is essentially the same as that used to process criminals, a veneer of noncriminal treatment in juvenile court would not offset the unconstitutionality of an arrest without probable cause or of punitive incarceration pending hearing. If the system adheres to its professed objectives, the instances of interim detention should be low.

Where interim detention is ordered, it should be based on safety to the community or safety of the child. Such a determination should be made by the court at the earliest practicable time with opportunity for the juvenile to confer with counsel. This will assure that the child is being detained for a well-considered reason.²¹⁶ There is no reason why the child could not be ordered into detention pending hearing on the merits after a detention hearing. Unfortunately, detention hearings put an extra load on the court which may lead to longer detentions pending the delinquency hearing.

If detention is intended to guarantee attendance at the delinquency hearing, bail would seem to follow as of right. This consideration seems to be fundamental in setting bail in criminal cases.²¹⁷ If the bond system is in effect and no collateral is required of the defendant, there is no forfeiture for not appearing. The defendant either appears or not because of other considerations —

213. See *Douglas v. California*, 372 U.S. 353, 356 (1963): "[A] state can, consistently with the Fourteenth Amendment, provide for differences so long as the result does not amount to a denial of due process or an 'invidious discrimination.'"

214. See, e.g., D.C. CODE ANN. § 16-2306 (Supp. IV, 1965); N.Y. FAMILY CT. ACT § 724; ORE. REV. STAT. § 419.573 (1963).

215. See authorities cited in note 204 *supra*.

216. Compare CAL. WELFARE & INST'NS CODE §§ 625-36; D.C. CODE ANN. § 16-2306 (Supp. IV, 1965). See also Note, 49 GEO. L. J. 322, 331-35 (1960).

217. Cf. *Stack v. Boyle*, 342 U.S. 1, 4-5 (1951); *State v. Konigsberg*, 33 N.J. 367, 373, 164 A.2d 740, 742 (1960).

bail is merely a fee for getting released from jail.²¹⁸ A system which places a higher premium on attendance at a noncriminal, non-punitive hearing than at a criminal proceeding raises serious equal protection problems under the fourteenth amendment. This treatment also raises questions about the credibility of labeling delinquency commitments nonpunitive. If the child is to be helped rather than punished, it is inconsistent to assume he is less likely to appear in juvenile court than in criminal court.

Again the problem is the overlapping jurisdiction of criminal and juvenile court. While being considered for treatment as a juvenile the defendant may not be released on bail. But should his case be certified for trial in criminal court he then may be released. Arguably, were the child slated solely for juvenile court handling, the denial of bail could be justified in terms of his lack of responsibility before the law. His immunity from the criminal law would then be complete. But noncriminal treatment does not turn on level of responsibility, it turns on suitability for rehabilitation. This must be determined on a case by case basis. As long as the child is potentially exposed to trial as a criminal, it must be assumed that he is held accountable before the law as an adult. His right to bail should not be based on a subsequent determination of whether he is to be tried as a child or an adult.²¹⁹

Some courts have suggested that the juvenile's right to bail exists when the applicable statute is silent on the subject.²²⁰ Inherent in this analysis is the idea that a statutory deprivation is sufficient to eliminate any constitutional right to bail which otherwise would exist. Perhaps this analysis goes no further than suggesting that noncriminal proceedings are those so labeled by the legislature, and the label forecloses discussion of rights traditionally afforded in criminal proceedings. The fallacy in this theory has already been discussed.

Some courts recognize the right to bail when there is incarceration before a final determination.²²¹ So viewed, it does not matter whether detention can fairly be called treatment. Such treatment is premature. This is sound analysis.

218. *Cf. Pannell v. United States*, 320 F.2d 698, 699 (D.C. Cir. 1963) (Wright, J. concurring).

219. See ORE. REV. STAT. §§ 419.533, .583 (1963).

220. See *Trimble v. Stone*, 187 F. Supp. 483 (D.D.C. 1960); *Cinque v. Boyd*, 99 Conn. 70, 94, 121 Atl. 678, 686 (1923).

221. *Cf. Trimble v. Stone*, *supra* note 220; *State v. Franklin*, 202 La. 439, 12 So. 2d 211 (1943). *Contra, In re Magnuson*, 110 Cal. App. 2d 73, 242 P.2d 362 (Dist. Ct. App. 1952); *Espinos v. Price*, 144 Tex. 121, 188 S.W.2d 576 (1945).

If the relevant statute is silent on the subject, it should be read as assuming the right to bail exists when a child is placed in detention. If release on bail is denied by statute, it must be denied only after a judicial determination that considerations of safety require detention. Any other justification for detention without bail discriminates against the child. At least in the situation where the child may be certified for criminal trial, there seems little doubt that this discrimination violates the equal protection clause of the fourteenth amendment.

V. CONCLUSION

A new view of the procedural due process requirements for the juvenile courts is needed. Procedural minimums should be specially tailored just as they have been for criminal procedure. The noncriminal label is not a sufficient justification for the summary proceedings paired with the extensive judicial power which now prevails. Resistance to procedural safeguards results largely from fears of a comparison to the criminal court system and a wholesale importation of its procedures. It is fear of what attorneys might do and of what the public might think. There is probably very little objection to procedural safeguards aimed at ensuring the reliability of the delinquency determination procedure.

The juvenile court system is only half-bold and invites unwanted analogy to the criminal system, including direct applications of some procedures. It will continue to do so as long as jurisdiction over juveniles remains divided between criminal and juvenile courts. A complete separation of criminal and juvenile proceedings is essential for the maintenance of different procedures. Divorcing juvenile from criminal proceedings would entail giving content to the criteria of "suitability for treatment as a juvenile" in statutory form.²²² Once a juvenile is found suitable for treatment he should not be exposed to a criminal trial for the same offense.

The child's need for counsel is much greater than that of the adult criminal defendant. Not only is his age and experience a disadvantage, but he is afforded fewer tools to resist the loss of his liberty. His need of a spokesman and confidant is further increased if the finder of fact concentrates attention on reformation rather than on the existence of delinquency. The need of counsel in ju-

²²² See *Kent v. United States*, 86 Sup. Ct. 1045 (1966), where not only were such criteria deemed essential, but a hearing to collect information and a deliberate application of them to the facts was held to be a jurisdictional prerequisite to subsequent prosecution as an adult. *Id.* at 1057.

venile court does not vary with the seriousness of the alleged conduct since usually neither the label of delinquency nor the power to deprive the child of his liberty relates to the seriousness of the offense. Where the child is exposed to overlapping criminal and juvenile jurisdiction, the skillful exercise of his rights and appreciation of their changing complexion becomes much more complicated. Here an attorney is essential to navigate a prudent course and conserve the child's posture for criminal trial.

The need for counsel has become the focal point of critics of the summary procedures employed by juvenile courts. Few of the procedural safeguards afforded are meaningful to the child who is unaware of them or unskilled in their use. Therefore, it is central to the effective utilization of all safeguards that the child be informed of his right to the assistance of counsel. Both notions of due process and equal protection dictate that every alleged delinquent child should be afforded a meaningful opportunity to have the assistance of counsel as soon as official steps are taken which might lead to deprivation of his liberty.

The attorney who participates in juvenile proceedings must leave his criminal court strategy behind. He must contribute his own efforts toward implementing the philosophy of the juvenile court. If the procedures used are questionable within the context of juvenile court, he should seek to revise them on appeal and elsewhere. However, he must critically appraise his own approach to the juvenile forum to avoid dogmatisms borrowed wholesale from criminal law. Maximum resistance is not always in his client's best interests. His client is one who is presumed by all of society to be incapable of deciding his ultimate best interests. His role must include that of confidant and spokesman, yet he must temper his resistance to the court by recognizing that the child may be headed for greater difficulty in the future. Counsel may invite future trouble if his actions indicate to the child that the court is a state institution which will only impose on the individual. Further, he must maintain and defend his client's rightful standing in the proceedings, and yet leave room for the state's legitimate interests once it has justified its right to act.

Applying the rules of evidence is essential to assure that a child is not subjected to treatment until a reliable determination of delinquency has been made. The rules are also essential to establish uniform standards for appellate review. Both of these needs are heightened in juvenile proceedings where the elements of delinquency are often vague and left to the subjective discretion of the juvenile judge.

Due process draws on the substance of the policy underlying the privilege against self-incrimination through the fifth and fourteenth amendments. Therefore, it is unsatisfactory to deny the privilege in juvenile proceedings solely because they are not denominated as criminal proceedings. The consequences of "criminality" must be the measuring rod for procedural fairness under the test of due process. Insofar as such consequences may be imposed on the juvenile directly as a result of a delinquency finding, or by eventual criminal conviction, the reason for the existence of the privilege remains.

Juveniles should be detained prior to hearing only when detention is necessary for the safety of the child or the community. Where the state constitution provides for bail prior to trial, juveniles as a class are discriminated against in an arbitrary fashion — the noncriminal label is used to justify arrest without probable cause and detention before the state has demonstrated its right to exercise coercive power. Allowing nonjudicial officers to decide if temporary detention is necessary invites treatment before either the child or his parents have been heard on the merits.

The juvenile court system is a bold scheme which assaults some rather deeply entrenched notions about what courts can and should do. If successful in all it professes to do, there would be little objection to its informal factfinding approach. The failure of treatment in practice, and the fact that many courts act in the same manner as adult criminal courts, initiated comparison with the criminal system. In many parts of the nation, legislative action has brought procedures of the juvenile courts more in line with the ideals of the system. These actions have temporarily retarded grave constitutional objections in the state supreme courts. Continuing legislative response to the system's practical limitations should stave off wholesale analogies to the criminal courts in appellate review of the constitutionality of juvenile proceedings.