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Cover Page Footnote

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THE JUVENILE JUSTICE SYSTEM: IN SEARCH OF THE ROLE OF COUNSEL

ELYCE ZENOFF FERSTER, THOMAS F. COURTLESS,** AND EDITH NASH SNETHEN****

I. INTRODUCTION

SEVERAL important questions about a child's right to counsel in delinquency proceedings were left unanswered by the United States Supreme Court's opinion in the case of *In re Gault*.[1] The Court held that if the delinquency proceedings may result in commitment to an institution, the child and his parents must be notified of the child's right to be represented by retained counsel. They must also be told that counsel will be appointed for him if they are unable to afford counsel.[2] However, many important issues, including those listed below, were not touched on in the *Gault* opinion:

1. Who must notify the parents and child of this right? When should they be notified?
2. Can the right to counsel be waived? If so, by whom and under what conditions?
3. Is the function of counsel at the adjudicatory stage the same as or different from that of counsel in criminal cases?
4. What is the function of counsel at the dispositional stage?
5. Does the right to counsel extend to revocation of probation?[3]

Almost four years have passed since the *Gault* decision. During this time, the bar, the bench and the legislatures have been trying to answer these questions. This article, the fourth in a series reporting the findings of a three year study[4] on "The Juvenile Offender and the Law," describes some of the answers which have been found and suggests some solutions in those areas which remain troublesome.[5] It is based on an analysis of

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

2. Id. at 41.

3. See Ketcham, Guidelines From Gault: Revolutionary Requirements and Reappraisal, 53 Va. L. Rev. 1700, 1703, 1716-17 (1967).

4. The study is supported by Public Health Service Grant MH-14500 from the National Institute of Mental Health.

5. See also Ferster & Courtless, The Beginning of Juvenile Justice, Police Practices, and the Juvenile Offender, 22 Vand. L. Rev. 567 (1969); Ferster, Courtless & Snethen, Separating Official and Unofficial Delinquents: Juvenile Court Intake, 55 Iowa L. Rev. 864

statutes and cases, a review of the literature (including statistical and field reports), and a field study of "Affluent" County conducted by the study staff.[6]

II. Counsel at the Adjudicatory Stage

A. *Notice*

In the *Gault* case the Supreme Court merely stated that Mrs. Gault and her son "had a right expressly to be advised that they might retain counsel and to be confronted with the need for specific consideration of whether they did or did not choose to waive the right."[7]

Other than requiring express advice, the Supreme Court did not dictate elements of "adequate" notice. Should written notice be sent to the child or his parents before the hearing? If written notice is required, must the judge also determine that the minor and parents know of the right and understand its significance?

Under model procedures recommended by organizations such as the Commissioners on Uniform Laws and the Children's Bureau, the summons or notice sent to the child and his parents before the hearing is intended to communicate the child's right to counsel. In addition, they require that notice of the right to counsel be given at the hearing.[8] Some of the states which have amended their codes since *Gault* have similar provisions.[9]

Correspondence with courts[10] and reports of two field studies on the implementation of the *Gault* decision indicate that written notice is used extensively. In one study (hereinafter called The Lefstein Study),[11]

(1970); Ferster, Snethen & Courtless, Juvenile Detention: Protection, Prevention or Punishment?, 38 Fordham L. Rev. 161 (1969).

6. Affluent County has an estimated 1969 population of 500,000 and has the highest median family income of any county in the U.S. For example, 34,400 families earn between $10,000 and $15,000; 47,600 families fall in the $15,000 to $25,000 income range; and an additional 18,000 earn over $25,000. These three family groups represent 78% of the total families residing in the county. Department of Community Development, Affluent County, Population and Social Characteristics 2.

7. In re Gault, 387 U.S. 1, 42 (1967).

8. Uniform Juvenile Court Act §§ 22(d), 26 [hereinafter cited as Uniform Act]; National Council on Crime and Delinquency [hereinafter cited as NCCD], Model Rules for Juvenile Courts, R. 21 & 39 (1969) [hereinafter cited as Model Rules]; W. Sheridan, Legislative Guide for Drafting Family and Juvenile Court Acts § 15(b) (1969) [hereinafter cited as Legislative Guide]. Note that § 25 of the Legislative Guide requires appointment of counsel if counsel is not retained by the family.

9. See, e.g., Minn. Stat. Ann. ch. 260, R. 4-2 & 5-1 (1971); S.C. Code Ann. § 15-1095.14 (Supp. 1970); S.D. Compiled Laws Ann. §§ 26-8-13.1, -8.22.1 (Supp. 1970).

10. See Paulsen, Juvenile Courts and the Legacy of '67, 43 Ind. L.J. 527, 531-32 (1968).

11. Lefstein, Stapleton & Teitelbaum, In Search of Juvenile Justice: Gault and its Implementation, 3 Law & Soc'y Rev. 491 (1969) [hereinafter cited as Lefstein Study]. This

two of the three courts observed used written notices.[12] In one of these jurisdictions, Metro, the notice suggested contacting Legal Aid if the family wanted a lawyer and could not afford one, but did not mention the court's duty to appoint one in these circumstances.[13] In another, Gotham, the notice referred to the "right to retain and be represented by counsel," with no reference at all to the possibility of the family's inability to engage counsel.[14]

Written notice of the right to counsel is also used in Affluent County, the jurisdiction studied by the authors. The pertinent portions of the statement are set out below:

> If you desire to have your child represented by an attorney—and you cannot afford to employ one, you should notify the court and submit a sworn statement as to your income and expenses. If the court determines that you cannot afford to employ an attorney, it will appoint one to represent your child.

This statement is similar to Metro's in that it does not mention that the court has a *duty* to make the appointment. Moreover, it implies that the juvenile's right to counsel depends upon the parent's willingness to submit a written statement of his income and expenses.

Even if the notices used in these jurisdictions are sufficient on their face, it is doubtful that they fulfill the court's responsibility to notify the juvenile of his right to counsel. It has been suggested that in order to fulfill this responsibility

> a court has the inherent duty of satisfying itself by ascertaining from any person, adult or infant, whether or not he has funds with which to hire counsel . . . and . . . where indigency is found to exist, and after full advice, if the accused does not waive an offer of court-appointed counsel, the court has the further duty of appointing counsel to represent him before proceeding with trial.[15]

Also, it seems clear that juvenile courts should determine that the minor and his parents know of the right to counsel and understand its significance.[16]

This view that written notice alone is not sufficient seems to be shared to some extent by the jurisdictions studied, because at least in some cases they supplement written notice with oral notice at the first hearing.[17]

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study observed the implementation of Gault in three metropolitan juvenile courts in three different states.

12. Id. at 506.

13. Id.

14. Id.

15. Phillips v. Cole, 298 F. Supp. 1049, 1052 (N.D. Miss. 1968). See also In re Haas, 5 N.C. App. 461, 464, 168 S.E.2d 457, 459 (1969), where the Court of Appeals of North Carolina held that facts must be elicited to show financial ability to retain counsel before a waiver of counsel can be accepted.

16. Lefstein Study, supra note 11, at 507 & nn.32-35.

17. Approximately two-thirds of the juveniles in Metro and three-fourths of those in

The Affluent County judges were interviewed and asked why notice of counsel was given to some juveniles at the hearing but not to others. Judge A answered that he is not sure whether written notice is sufficient to meet the requirements of *Gault* in all cases.[18] Therefore, he tells older children of their right to counsel. He does not give this information to younger children because he believes they would not understand it.[19] One might argue that in a case where the judge believes the juvenile would not understand notice of counsel, appointment of counsel might be a more appropriate solution than omission of the counsel warning. Judge B also does not consider written notice sufficient to comply with *Gault*. Therefore, he said, the family is always asked if they wish an attorney, and if the alleged delinquent is an older juvenile he is also asked if he wishes counsel.[20] However, the field reports showed that counsel warnings were sometimes omitted by both judges.[21]

If the written notice is inadequate under *Gault*, a judge does not remedy the deficiency by telling the child and his parents that they have the right to retain counsel. He must also say that if they cannot afford counsel, one will be appointed for them.

Unfortunately, many juveniles receive notice which is either incomplete or prejudicial. For example, in one southern jurisdiction juveniles who were involved in civil rights protests were not told that an attorney would be appointed for them if they were unable to afford one.[22]

If the right to counsel is not to be prejudiced, the judge's counsel advice should be neutral as well as complete. This right will not be exercised freely if a judge makes it obvious that he regards the presence of counsel as unwise or unnecessary. The Affluent County study found several examples of such prejudicial advice. In fact, one of the judges in an interview recited the following statement as an example of a proper warning

Affluent County received some advice at the hearing. The rate of compliance with Gault was much lower, however, since in both communities the advice was incomplete or prejudicial in a large number of cases. See Table A at page 379 infra.

18. Interview with Judge A, Judge of the Affluent County Juvenile Court, in Affluent County, Aug. 5, 1970.

19. Nor does Judge A notify a juvenile of his right to counsel if the child admits the offense. Id.

20. Interview with Judge B, Judge of the Affluent County Juvenile Court, in Affluent County, Aug. 21, 1970.

21. The project's court observer, a lawyer, observed Affluent County delinquency proceedings three days a week for seven weeks. The total number and allocation of observed cases between Judges A and B were dictated by the court's own scheduling requirements. During our observation, Judge A heard significantly more cases than Judge B.

The observer took into the courtroom a checklist form listing all pertinent areas of inquiry. Insofar as possible, significant statements of judges and participants were taken down verbatim. Both judges were informed that the observer was in court to take notes on courtroom interaction, as part of an overall study of the Affluent County Juvenile Court.

22. See Phillips v. Cole, 298 F. Supp. 1049, 1050 (N.D. Miss. 1968).

under *Gault*: "I notice you are not here with an attorney and I assume that you do not wish an attorney. You may have one but it is not required."[23]

Some of the other prejudicial warnings which have been used in various communities are set out below:

[1] "Do you want a lawyer or do you want to speak for yourself?"[24]

[2] I certainly hope you don't want an attorney.[25]

[3] [Judge (very rapidly):] "At this time, I'd like to inform you that you have a right to have an attorney. If you cannot afford an attorney, I'll appoint an attorney for you. Or, on the other hand, if you'd like, we can have the case heard today."

The woman said something and the judge said, "I can't hear you."

Then the woman said that she would like to have it heard today.

[Judge:] "Let the record show that Mrs. G....., the mother of A....., waives the right to an attorney."[26]

[4] [Judge:] Do you know he has a right to have a lawyer? Do you know that it is your decision?

[Mother:] I didn't know. I don't know what to do.

[Judge:] Most people charged with a minor charge don't have a lawyer. We could go ahead. Then if you feel you need one you could ask for one.[27]

[The mother agreed to go ahead without counsel.]

The problems of incomplete and prejudicial notice of the right to counsel were extensive in the jurisdictions observed, and time alone will not solve them. Table A, which compares data from the Lefstein Study (carried out shortly after *Gault*) with the Affluent County study of 1969, shows that very few of the children involved received complete and unprejudiced advice of their right to counsel.

TABLE A
Comparison of Studies

	Affluent		Metro		Zenith		Gotham	
	No.	%	No.	%	No.	%	No.	%
Complete	11	30.6	1	1.6	8	44.0	0	0
Partial	11	30.6	15	21.1	6	33.0	7	12.0
Prejudicial	6	16.6	32	45.0	3	17.0	2	3.0
None	8	22.2	23	32.3	1	6.0	50	85.0
No. of Juveniles	36	100.0	71	100.0	18	100.0	59	100.0

Judges who make prejudicial statements are not necessarily hostile to the right to counsel. In fact, these same judges have appointed counsel in

23. Interview with Judge B, note 20 supra.

24. Hawes, Gault and the District of Columbia, 17 Am. U.L. Rev. 153, 158 (1968).

25. Affluent County courtroom observation, note 21 supra.

26. Lefstein Study, supra note 11, at 512.

27. Affluent County courtroom observation, note 21 supra.

other cases where the child and the parents seemed uninformed or indifferent to the right to counsel. The reason for the statements in some instances is simply an assumption that the written notice satisfied *Gault* and that the parents and child have read the notice, understand it, and are deliberately waiving their rights by appearing without counsel. In other instances, it is arguable that the judge is merely informing them of all their rights, including the right to proceed expeditiously.[28] Still other warnings are undoubtedly based on the judge's knowledge that he will dismiss the case, hold it open without a finding, or at most put the child on probation.[29] Observations, however, show that parents do not always understand the notice, and consequently have not thoroughly considered the matter.[30] Also, some children who have received inadequate or prejudicial counsel advice are committed to institutions.[31]

All these problems would disappear if the judge would tell the juvenile and his family, "If you want a lawyer, you are entitled to have one and I will assign counsel if you cannot afford to retain one," instead of assuming that the warning is not needed or that the family has decided to waive.

B. *Waiver*

Determining what constitutes a valid waiver and who may exercise it seems to be more difficult than determining what constitutes incomplete or prejudicial counsel advice. *Gault* says merely that the right is not waived when there is no knowledge of the right to appointed counsel.

28. Lefstein Study, supra note 11, at 512.

29. Id. at 530. The Lefstein Study hypothesized what our Affluent County data confirmed. For example, in four Affluent County cases in which counsel notices were prejudicial, the disposition fell far short of institutionalization. One case was continued without finding, in two others the juveniles were placed on probation, and one case was held open without further action.

30. For example, in one observed case in Affluent County, the child's mother asked the judge if she could retain one of the lawyers representing a co-defendant. When told she would have to make private arrangements, she withdrew her request. The mother later told the judge that she did not realize that certain charges would be taken up that day. The judge asked if she had received a notice. She said she had and the matter was dropped. Clearly, the mother did not fully understand either the substance of the charges or the counsel advice contained in the mailed notice.

31. Three juveniles who did not receive notice of the right to counsel at the hearing were committed to institutions. Two were sent to state training schools and one to a semi-public institution, The George Junior Republic. One petition alleged violation of probation based on auto theft. In Affluent County, probation revocations based on law violations are handled in the same way (presentation of testimony, examination of witnesses, etc.) as adjudication hearings. See also Lefstein Study, supra note 11, at 532, which shows that 13 of the 35 juveniles committed to institutions received no counsel advice and 20 received incomplete or prejudicial advice.

Is waiver valid if it is based on the juvenile's desire to save his parents counsel fees? This question was the issue in a recent California case, *In re H.*[32] The juvenile, a seventeen year old boy charged with participating in a burglary, received proper counsel warnings and notice before the proceedings. However, he was also advised that since his father was employed, the county would be entitled to reimbursement for the cost of appointed counsel. The juvenile told a probation officer that he would waive his right to counsel rather than have his father obligated to pay for it, because his father was already indebted to the county for his prior detentions. Consequently, at the hearing he waived the right to counsel, was adjudicated delinquent, and was committed to the California Youth Authority.

The California Supreme Court said that a juvenile's waiver of counsel made to avoid or reduce parental pressure or displeasure is neither intelligent nor voluntary, and criticized the lower court for accepting the waiver without any attempt to determine his capacity to waive this right.[33]

Whether parents can waive the juvenile's right to counsel in order to save themselves payment of attorney's fees is not an issue in California, because the relevant statute requires the appointment of counsel whenever the juvenile does not execute a waiver. It also requires parents to pay for counsel if they can afford to do so.[34] However, the question of whether parents can waive the juvenile's right under these circumstances has been considered in at least two other states which do not have such statutes.[35]

Both cases involved situations in which the court did not appoint counsel, presumably because it determined that the parents could afford to retain counsel. In *Blaylock v. DeFoor*,[36] the Georgia Supreme Court held that the juvenile court's failure to provide counsel for the juvenile was not a denial of due process when his father was financially able to employ an attorney.[37] In a similar situation, a Florida case which con-

32. 2 Cal. 3d 513, 468 P.2d 204, 86 Cal. Rptr. 76 (1970); see Comment, Does Parental Liability for Legal Fees Infringe upon a Juvenile's Constitutional Rights?, 10 Santa Clara Law. 347 (1970).

33. 2 Cal. 3d at 525, 468 P.2d at 211, 86 Cal. Rptr. at 83.

34. Cal. Welf. & Inst'ns Code § 700 (West Supp. 1971).

35. Blaylock v. DeFoor, 225 Ga. 688, 171 S.E.2d 146 (1969); In re L.G.T., 216 So. 2d 54 (Fla. Dist. Ct. App. 1968).

36. 225 Ga. 688, 171 S.E.2d 146 (1969).

37. Id. at 689, 171 S.E.2d at 148. Although the court also held that the juvenile's mother received notice of his right to counsel and did not request counsel, the fact situation in the case is very confusing. The information about the juvenile court proceedings is sketchy. The only facts which emerge clearly are that the mother was present at the hearing and that the father was not. Nothing in the opinion indicates that the juvenile court judge had any information about the father's income. The facts which the supreme court opinion relies

sidered the parents' failure to provide counsel held that parental failure to fulfill their duties to provide counsel should not deprive the child of his constitutional rights.[38] This position seems to be consistent with the spirit of the *Gault* decision. The United States Supreme Court was requiring notice to parents and waiver of counsel by them, as well as the child, on the premise that the juvenile thereby received increased protection. Clearly, the child is not receiving additional protection if the parents' waiver is based on the desire to avoid payment of counsel fees.

The refusal of a parent to retain counsel when he is able to do so is one example of a conflict between the parent and child which can frustrate the implementation of the right to counsel. A case in which the charge is initiated by the parent is another example. Petitions alleging that the child is beyond parental control or a runaway fall into this latter category.[39]

The Model Rules[40] and the California Code[41] both allow the court to appoint separate counsel if the court thinks the interests of the child and his parents conflict; it is not clear whether the automatic appointment of counsel is required in every parental control or runaway case. The efficacy of appointing counsel in all of these cases will be discussed in section C on *The Role of Counsel, infra.*

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on were developed at a habeas corpus hearing based on a petition brought by the father, which was denied and appealed to the supreme court. It was at this hearing that the father testified that his take-home pay was $92.00 a week.

The only fact supporting the juvenile court's failure to appoint counsel was Mrs. Blaylock's alleged failure to request such appointment. However, her testimony at the habeas corpus hearing was summarized as follows: "When asked whether she had an attorney, she replied that she could not afford one. . . . She testified . . . that she owed Mr. Cobb for representing her son in a prior juvenile court hearing [and] that Mr. Cobb would not represent her son in this hearing unless his fee in the prior case was paid. . . . She did ask the court to provide her with an attorney." Id. at 689, 171 S.E.2d at 147.

38. In re L.G.T., 216 So. 2d 54, 56 (Fla. Dist. Ct. App. 1968). The juvenile court found that the parents of a 14 year old boy had a combined income of $140.00 per week plus family lodging, which was sufficient to provide legal services for their child's appeal of his adjudication of delinquency. The district court of appeals reversed, saying the parents' duty to furnish necessaries to minor children does not extend to furnishing legal services on appeal. "Even if such a duty did exist, however, a parent's failure to fulfill such duty should not work to deprive the minor of his constitutional rights . . . ." Id. at 56.

The position of the Advisory Council of Judges is significantly qualified. Only where the interests of parents and children conflict does the Council urge that the child's right to an attorney not be compromised by his parent's refusal or neglect to retain one. NCCD Council of Judges, Provision of Counsel in Juvenile Courts 26 (1970).

39. The Lefstein Study differentiated these cases from those where the parent was not the complaining witness, yet manifested hostility toward the child or expressed disapproval of his conduct. Lefstein Study, supra note 11, at 547-48.

40. Model Rules, supra note 8, R. 39 (1969).

41. Cal. Welf. & Inst'ns Code § 634 (West Supp. 1971).

Some authorities believe that counsel should be appointed as a matter of course without requiring any affirmative choice by the juvenile or his parents. This was the recommendation of the President's Crime Commission[42] and has been adopted as a practice in one of the family courts in New York City. It is the practice in this court to say to each child: " 'Is it acceptable that Mr. So and So act as your lawyer?' "[43]

Under the Crime Commission recommendation, the child or his family could say that they do not wish an attorney. The Children's Bureau model legislation goes further by requiring a non-waivable right to counsel.[44] Only one state, Kansas, has adopted this rule,[45] but some commentators predict that it will become nation-wide either as a result of legislative changes or court decisions.[46]

Recommendations of this type appear to be based on a series of interrelated premises which are set out below:

1. Juvenile proceedings are "criminal prosecutions."
2. Counsel should act as an advocate and force the state to prove its case.
3. Few adults or children can effectively invoke the right to present evidence, cross-examine witnesses, etc., without the assistance of counsel.
4. Most delinquents and their families are too economically and socially deprived to be aware of the advantages of having counsel.

If the first premise is accepted, the second and third flow quite logically from it. The fourth premise is merely an extension which says if counsel is so important for adult criminal defendants, children should be protected from losing it through ignorance.

However, the basic question of whether juvenile proceedings should be criminal prosecutions is not settled. Chief Justice Burger, in his dissent in *Winship*,[47] alleged that the Court's majority erroneously assumed that the proceedings were criminal and that their attitude "is really a protest against inadequate juvenile court staffs and facilities; we 'burn down the stable to get rid of the mice.' "[48]

The conflict is a result of disagreement concerning the rehabilitative

42. President's Commission on Law Enforcement and Administration of Justice, Report: The Challenge of Crime in a Free Society 87 (1967) [hereinafter cited as Commission Report].

43. Dyson & Dyson, Family Courts in the United States, 9 J. Family L. 1, 50 (1969).

44. Legislative Guide, supra note 8, § 25.

45. Kan. Stat. Ann. § 38-817 (Supp. 1970).

46. Lefstein Study, supra note 11, at 562. Ohio's recent statutory provision still allows a competent and intelligent waiver to defeat appointment of counsel. Ohio Rev. Code § 2151.352 (Supp. 1970). The provision is ambiguous about whether the parent's, child's, or both parent's and child's waiver is required.

47. In re Winship, 397 U.S. 358 (1970).

48. Id. at 376.

potential of the juvenile justice system. Although the disagreement is well-known and is easily stated, there is no simple resolution. "One argument is that the system has failed to fulfill its rehabilitative and preventive promise because of a grossly over-optimistic view of juvenile criminality and because of what even a fully equipped juvenile court can do about it."[49] The other side of the argument is that the juvenile justice concept has never been tried because some jurisdictions lack a non-punitive system of justice in law, and in most others, which theoretically have a non-punitive approach, it has not been accepted in fact.[50] The latter view is well expressed in a recent article by a well-known juvenile court judge:

> The adversaries of the juvenile court are still trying to return children to the criminal law process, under the guise of protecting their constitutional rights and by endlessly repeating the charge that the juvenile court has not fulfilled its promise. . . . The court has not failed; rather, the communities of our country have failed to provide the facilities and tools to complete the work of the court. One does not discard a new car because it doesn't have gas in the tank, and we ought not discard the juvenile court concept because county commissions, city councils, state legislatures, and the federal Congress do not provide the facilities to give each child known to our courts the care and treatment he needs.[51]

At issue is the question: "Should the juvenile justice system be abandoned or implemented?" There is no doubt that if juvenile proceedings are criminal, children are entitled to all the protections given to criminal defendants and perhaps to additional ones as well. Nevertheless, it is also important to remember that:

> While the progress made in protecting the constitutional rights of the child in the adjudicatory process is to be welcomed, it will in no way compensate for the lack of dispositional remedies. *Gault* may protect some children from unfair hearings and wrongful findings, but it will not provide one dollar's worth of professional mental health services or one hour of care for any troubled child.[52]

What counsel accomplishes in court or as a result of court intervention is as important as the child's right to counsel. Whether the actions of counsel ameliorate the child's life is the question which will determine the future of the juvenile justice system.

C. *The Role of Counsel*

The role of counsel at the fact-finding stage is still being debated. Some commentators believe that counsel's obligations toward his juvenile

49. Ferster & Courtless, The Beginning of Juvenile Justice, Police Practices, and the Juvenile Offender, 22 Vand. L. Rev. 567, 568 (1969).

50. Id. at 568.

51. Noyes, Has Gault Changed the Juvenile Court Concept?, 16 Crime & Delinq. 158, 162 (1970).

52. J. Polier, The Rule of Law and the Role of Psychiatry 100 (1968).

clients do not differ from his responsibilities to adult criminal defendants and that, consequently, he "ought to play the part of pure advocate" at all stages of the proceedings.[53] Others believe that this adversary role should be followed only during the fact-finding phase, and that the attorney should act as a member of the court team at disposition.[54] Still others believe that the concept of guardianship requires consideration of the child's general welfare as well as his legal rights, and hence should modify the advocate's role. Under this view "[t]he role of the 'wise parent' has, in effect, been transferred from the court itself to the law guardian."[55]

To date, juvenile court attorneys have received no clear guidance from the courts or legislatures[56] to help them decide which role to choose.[57] Only one judicial opinion has been found which even mentions the issue, and it was decided before *Gault*. In this case, *In re Bacon*,[58] the juveniles claimed that they were deprived of effective counsel because their attorney allowed the substantive elements of the offense to be elicited from their testimony rather than from independent evidence. The California Court of Appeals rejected this argument, saying that a juvenile proceeding is not criminal. It also pointed out that counsel's activities were proper under the applicable statute, which provides that "[e]xcept where there is a contested issue of fact or law, the proceedings shall be conducted in an informal nonadversary atmosphere with a view to obtaining the maximum co-operation of the minor . . . ."[59]

Nor has the Supreme Court settled the issue. The Court did not char-

53. Dyson & Dyson, supra note 43, at 58; Paulsen, supra note 10, at 538-39.

54. See, e.g., Dyson & Dyson, supra note 43, at 60, quoting Makover, Mental Health Services in New York City Family Court 122-23 (1966) (footnote to Appendix A); Treadwell, The Lawyer in Juvenile Court Dispositional Proceedings: Advocate, Social Worker or Otherwise, in Children in the Courts—The Question of Representation 411, 421-23 (Newman ed. 1900).

55. See Isaacs, The Role of the Lawyer in Representing Minors in the New Family Court, 12 Buffalo L. Rev. 501, 507 (1963).

56. See, e.g., Handler, The Juvenile Court and the Adversary System: Problems of Function and Form, 1965 Wis. L. Rev. 7, 36-39, 43-44, which describes the conflicting definitions of the role of law guardian in the legislative history of the New York Family Court Act.

57. See, e.g., Comment, Wisconsin Juvenile Rights after Gault, 1968 Wis. L. Rev. 1219, 1231, which states that the attorney is often faced by uncertainty and inexperience as to what role to play.

58. 240 Cal. App. 2d 34, 49 Cal. Rptr. 322 (Dist. Ct. App. 1966).

A 1965 Vermont case held that its statutory scheme required the appointment of a guardian ad litem as well as counsel for a juvenile accused of a felony, since the role of the guardian to weigh alternatives is incompatible with the advocate role of the attorney. In re Dobson, 212 A.2d 620 (Vt. 1965). However, the provision on which the court relied has since been repealed. See Vt. Stat. Ann. tit. 33, § 678 (Supp. 1970).

59. 240 Cal. App. 2d at 45, 49 Cal. Rptr. at 328, quoting Cal. Welf. & Inst'ns Code § 680 (West 1966).

acterize juvenile proceedings as criminal in either *Gault*[60] or *Winship*.[61] Therefore, decisions about the proper role of counsel must be made by each individual attorney or agency.

The law guardians in New York City have adopted the role of advocate. From the beginning of the program it has been office policy to insist strictly on all rights and privileges of the client at each stage of the case.[62] However, a study of a public defender office in another community shows that the advocate's role has been modified by adding the role of "guardian" or "social worker" in some cases.[63]

Unfortunately, so little data is available on the activities of counsel in the juvenile court that it is impossible to determine the extent to which attorneys are adopting any particular role.[64] In fact, even information concerning the number of alleged delinquents who are represented by counsel is lacking.[65]

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60. In re Gault, 387 U.S. 1 (1967); see Lefstein, In re Gault, Juvenile Courts and Lawyers, 53 A.B.A.J. 811, 812 (1967).

61. In re Winship, 397 U.S. 358 (1970).

62. Dyson & Dyson, supra note 43, at 58.

63. "The public defender in Metro's juvenile court maintains two seemingly conflicting roles. As an 'officer of the court,' . . . the public defender sees himself as a social worker. At the same time, however, he is a defense attorney who takes pride in the craft of advocacy." He distinguishes his role from appearances "'in criminal court [where] I would just do everything I could to get my client off. But here I won't.'" Platt, Schechter & Tiffany, In Defense of Youth: A Case of the Public Defender in Juvenile Court, 43 Ind. L.J. 619, 624 (1968).

64. Only two recent studies have explored this question. See Platt, Schechter & Tiffany, supra note 63, and Steinfeldt, Kerper & Friel, The Impact of the Gault Decision in Texas, 20 Juv. Ct. Judges J. 154 (1969).

65. Our Affluent County data shows that attorneys were present in 24% of the cases observed.

A recent study of selected communities in the twelve states which allow jury trials in juvenile cases showed the following results:

In nine counties, 100% of the cases had lawyers representing juveniles. These were Topeka and Wichita, Kansas; Tulsa, Oklahoma; and Amarillo, Austin, Corpus Christi, Fort Worth, Houston, and San Antonio, Texas.

In the other fifteen counties, the following percentage of cases had lawyers representing juveniles: (1) In more than 50% of the cases, juveniles were represented by lawyers in El Paso, Texas; Denver, Colorado; and the District of Columbia. (2) Lawyers represented juveniles in 50% of the cases in Oklahoma City, Oklahoma and Pierre, South Dakota. (3) They were represented by counsel in less than 25% of the cases in Dallas, Texas; Colorado Springs, Colorado; Flint, Michigan; Lansing, Michigan; Pueblo, Colorado; and Sioux Falls, South Dakota. (4) Counsel represented juveniles in less than 10% of the cases in Billings and Butte, Montana; and in Grand Rapids, Michigan. In Detroit, the court appoints counsel in 70 to 80 cases per month, in addition to which there are some privately retained attorneys. Brief for Public Defenders Service for the District of Columbia and the Neighborhood Legal Services Program of Washington, D.C. as Amicus Curiae at 129, In re Burrus, cert. granted, 397 U.S. 1036 (1970).

The differences in viewpoint about the role of counsel can be explored best by considering a specific fact situation. There is little question that when a child strongly protests the alleged act, an attorney should zealously defend the charge in juvenile court. This view was not disputed even before *Gault*.[66]

Suppose, however, that the child admits the offense to the attorney. This is the situation in about one-half of the case load of the Metro public defender's office mentioned earlier[67] and in "most" cases which come to the Affluent County public defender.[68]

Presumably, the attorney who believes his obligations to his adult and juvenile client are the same will advise his client to invoke the privilege against self-incrimination.[69] In contrast, the attorney who modifies his adversary role in the juvenile court will probably not routinely advise all his juvenile clients to claim the privilege.

A study of one public defender's office showed that the action taken depends on whether (1) the juvenile claims to be innocent; (2) the alleged offense is of a "serious" nature; (3) the juvenile has a prior juvenile court record; and (4) the defender believes that the juvenile is a "good kid" or a "bad kid."[70]

> If the public defender considers his client a "good kid" with little or no criminal record, he will plead him guilty on the grounds that he will receive only a lecture, or supervision, or probation. The public defender believes that a minimal sanction is often what a client needs; the idea is that "these kids need a good scare. . . ."
>
> . . . [W]here his client is a "good kid" but has a more substantial record, the public defender . . . will plead the youth not guilty, force the state to prove its case, and attempt to secure a dismissal or a lenient sentence. He follows the same procedure when the youth involved is a "good kid" who is charged with a "serious" offense. In both instances he knows that a finding of guilty may well mean automatic commitment to a reformatory. The public defender does not subscribe to the notion that the reformatories are rehabilitative institutions capable of remedying his clients' problems. . . .

66. Lefstein, supra note 60, at 812.

67. Platt, Schechter & Tiffany, supra note 63, at 625-26.

68. Interview with Public Defender for Affluent County, in Affluent County, July 14, 1969.

69. See note 53 and accompanying text supra. A noted New York lawyer advises that "decisions as to whether or not to invoke the privilege against self-incrimination must be made in a broader and different perspective than that normally employed in adult criminal matters. . . . [However,] a child's legal rights should be waived on the ground of social desirability only with great care. . . . [S]hould not counsel consider such factors as the lifetime stigma which may be the irrevocable by-product of a finding of delinquency; . . . that rehabilitative services might be provided through other community resources[;] . . . that ultimate disposition of the case may involve commitment to so-called 'treatment' institutions which, in fact, have 'therapeutic' facilities of no, or at least questionable, value." Isaacs, The Lawyer in the Juvenile Court, 10 Crim. L.Q. 222, 234 (1968).

70. Platt, Schechter & Tiffany, supra note 63, at 625.

"Bad kids" invite an attitude of despair. The public defender assumes, along with all juvenile court functionaries, that little can be done to "help" these clients. He pleads them guilty and cooperates in processing them into reformatories. They have long records, they admit the offense, no "responsible" adults are willing to be their spokesmen, and they are likely to antagonize judges with their poor school record. The public defender does not waste his time on "bad kids." A serious effort on behalf of these clients would only jeopardize his chances with more "worthy" defendants.[71]

Some attorneys would report any admission by juveniles to the court, even if their action involves breaching a confidential communication.[72] At least this is the implication in the report of a survey of Texas attorneys associated with juvenile courts in the state.[73] The report says that seventy-six percent of the respondents believe "it is their duty to present to the juvenile court judge all facts that come to their attention including those that may lead to an adjudication of delinquency."[74] It should be noted, however, that two-thirds of the respondents were associated with prosecutors' offices.[75]

Even if this view accurately reflects the opinion of Texas attorneys on the role of counsel, it certainly does not conform to that of the United States Supreme Court. The *Gault* opinion refers only to the juvenile's right to and need for the advice of counsel. Nowhere does it contain any explicit or implicit indication that such counsel has the duty to act as a witness for the juvenile court.

Use of the privilege against self-incrimination is only one of the issues about which "advocates" and "modified advocates" might take different positions. Should the attorney move to suppress illegally obtained evidence if suppression would release a guilty youth?[76] Should he challenge the use of a confession taken in violation of law if the statement is, in fact, true?[77] These questions raise substantially the same problems that

71. Id. at 626 (footnotes omitted).

72. Lefstein cites the NCCD's 1962 statement (in NCCD Council of Judges, Procedure and Evidence in the Juvenile Court 43 (1962)) as advancing this view. Lefstein, supra note 60, at 813 n.9.

A fairer reading of the 1962 NCCD position does not support disclosing acts establishing the allegations of the complaint, since only "facts pointing to the need for treatment" are singled out for disclosure. NCCD, supra at 43.

73. Steinfeldt, Kerper & Friel, supra note 64, at 154.

74. Id. at 157.

75. Id. The practice of the Texas attorneys does not seem to have been at issue in In re Bacon, 240 Cal. App. 2d 34, 49 Cal. Rptr. 322 (1966). The plaintiffs apparently alleged that their attorney had a duty to invoke their privilege against self-incrimination. They did not allege that he ignored their requests to plead "not involved" or to invoke the privilege.

76. Paulsen, supra note 10, at 537.

77. Id. See also Haviland, Daddy Will Take Care of You: The Dichotomy of the Juvenile Court, 17 Kan. L. Rev. 317, 318 (1969).

confront counsel when considering the privilege against self-incrimination.

Attorneys who modify their adversary role when the juvenile is guilty still believe in the *parens patriae* function of the juvenile court. The purpose of the court, in their opinion, differs from that of the criminal courts, which exist to convict and dispose of guilty adults.[78] The juvenile courts are supposed to determine the best way to correct the child's unlawful behaviour—a goal which cannot be achieved if the child is encouraged to escape the consequences of his wrongful act.[79]

Full utilization of all available rights for guilty juveniles means that some will escape adjudication as delinquents, thus losing the opportunity to receive treatment.[80] Moreover, this escape may encourage further misconduct.[81]

There is also concern that the increased use of such defenses will be followed by the introduction of prosecutors and an increased emphasis on guilt and punishment.[82] The real fear, however, involves the apocryphal story of a judge who, hearing of *Gault*, said that "the Supreme Court has ended the juvenile court." It is feared that this will soon be a fact instead of a story.

78. Reasons, Gault: Procedural Change and Substantive Effect, 16 Crime & Delinq. 163 (1970). See also Handler, supra note 56, at 30.

79. Snyder & Mangano, Effect of Law Guardian Representation on the Treatment of Delinquent Children, 13 Social Work, July, 1968, at 103.

80. Id.

81. Haviland, supra note 77, at 318.

82. See, e.g., Lefstein, supra note 60, at 812. The need for counsel to bring out evidence in support of the petition has been noted by the NCCD, which suggests that the judge decide whether he needs the aid of counsel and, if so, notify and request the "appropriate legal officer"—the attorney general, the city or corporation counsel, or the county attorney—to appear at the hearing. NCCD Council of Judges, Provision of Counsel in Juvenile Courts 18 (1970).

The necessity of providing legal counsel for the petitioner was cited by one New York family court judge in a 1965 case. In re Lang, 44 Misc. 2d 900, 906, 255 N.Y.S.2d 987, 993 (Family Ct. 1965). "[The] basic lack of staff to present cases properly in what has become an adversary proceeding is aggravated not only by the heavy calendars, but by the fact that the Judges of the Family Court have no law secretaries or legal assistants. . . .

"Unless legislation is enacted to correct the present imbalance in legal services and to provide for adequate legal assistance and judicial manpower, there is grave danger that cases will be dismissed for lack of proper presentation, that citizens will be discouraged from seeking redress in the court, and that legal questions will not be given adequate consideration. The present situation inevitably results in injury to citizens, to delinquent children, and to the entire community."

All three models provide for counsel for petitioner. The Model Rules require a civil officer to represent the petitioner in contested cases. Model Rules, supra note 8, R. 24, Comment. The Legislative Guide, supra note 8, designates an "appropriate prosecuting official." Id. § 15(c) & Comment. The Uniform Act allows the judge to request the aid of a prosecutor. Uniform Act, supra note 8, § 24(b).

Attorneys who are partisan advocates of the child in the traditional legal posture also believe that they are acting in the best interests of the children.[83] Some of them discount the harmful effect of "getting away" with the offense on the child's attitudes or future conduct. They point out that there is no empirical evidence that escape from adjudication leads to further delinquencies.[84] Others say that, although for some children such an escape may be an unfortunate occurrence in ultimate terms, one cannot have both alternatives if the juvenile court is to function as part of the general legal system.[85]

The most important reason for insisting on the role of advocate, however, is the belief that facilities for treatment and rehabilitation are so inadequate that the consequences of a finding of delinquency are more likely to be harmful to the child than to help him.[86] If the attorney believes that the juvenile court cannot play the role of the loving parent, it is reasonable for him to do the one thing which is within his ability, *i.e.*, use every legal means to keep his client from being adjudicated delinquent. Under these circumstances, it would be unreasonable to expect him to shed tears about the court's demise.

Another problem for an attorney in the juvenile court is what to do when the parent and child have divergent interests.[87] At the fact-finding stage, this conflict is likely to arise when the parents allege that the child is "beyond control," or a "runaway." Is the child "beyond control" or is he without adequate parental care? In the running away situation, it may be questionable whether he is disobedient to his parents' reasonable wishes or escaping from an intolerable situation. The same question of responsibility can arise when a complaint against a child is made by someone outside the family. Who is at fault if a child has been absent from school for twenty-five days with his parents' knowledge? If a feud between neighbors leads a child to harass the neighbors, assault their children etc., is the child "guilty" of being beyond parental control? Counsel cannot adequately represent both the child and the parents in cases where these questions arise, and he should not attempt to do so. Because it is so difficult to prove that a child is neglected or without adequate parental care, this problem should be considered and explored by counsel.

Information about parent-child relationships may be vital in the dis-

83. Dyson & Dyson, supra note 43, at 52.

84. Lefstein, supra note 60, at 813.

85. Paulsen, supra note 10, at 539.

86. Dyson & Dyson, supra note 43, at 59.

87. Skoler, The Right to Counsel and the Role of Counsel in Juvenile Court Proceedings, 43 Ind. L.J. 558, 580-81 (1968).

position stage of a delinquency case, even if it was not considered significant at the fact-finding stage.

III. Counsel at Disposition and Beyond

A. *The Right to Counsel*

1. Disposition Hearings

Although the Supreme Court limited its decision in *Gault* to the adjudicatory stage of delinquency cases,[88] the right to counsel is routinely extended to dispositions by model laws[89] and state statutes.[90] In fact, attorneys are representing delinquents even in jurisdictions which lack such statutes.[91] The dearth of cases on the issue[92] may be partially

88. In re Gault, 387 U.S. 1, 41 (1967).

89. See, e.g., Legislative Guide, supra note 8, § 25(a); Model Rules, supra note 8, R. 39; and Uniform Act, supra note 8, § 26(a).

90. See, e.g., Colo. Rev. Stat. Ann. § 22-1-6 (Supp. 1969); D.C. Code § 16-2307 (Supp. 1970); Ga. Code Ann. § 24-2418.1 (Supp. 1970); Md. Ann. Code art. 26 § 70-18(d) (Supp. 1970); Minn. Juv. Ct. R. 2-1.1; Neb. Rev. Stat. § 43-205.06 (1968); N.Y. Family Ct. Act § 741 (McKinney 1963); N.D. Cent. Code § 27-20-26 (Supp. 1969); Ohio Rev. Code § 2151.352 (Supp. 1970); Okla. Stat. Ann. tit. 10 § 1109(a) (Supp. 1970); S.D. Compiled Laws Ann. §§ 26-8-22.1, -8-22.2 (Supp. 1970); Tex. Rev. Civ. Stat. Ann. art. 2338-1, § 7-B (Supp. 1970); Utah Code Ann. § 55-10-96 (Supp. 1969).

91. For example, our observations in Affluent County confirmed that whenever counsel appeared at adjudication, he remained through disposition. Observations in the District of Columbia also found counsel present at disposition. One reason for the presence of counsel at disposition is that fact-finding and disposition hearings are held consecutively in many jurisdictions. For example, in 1969, in the District of Columbia Juvenile Court, only 20% of the cases were continued for separate dispositional hearings. Kandell, A Study of the Juvenile Court of the District of Columbia 91 (1970). Therefore, if counsel has been present at the fact-finding hearing, he is present also at the disposition.

The weight of authority, however, favors separate dispositional hearings. See Legislative Guide, supra note 8, § 32(d); Model Rules, supra note 8, R. 39; Uniform Act, supra note 8, § 29(b). The President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Juvenile Delinquency and Youth Crime 35 (1967), also urges separate hearings. However, there is no information currently available showing whether separate hearings affect the frequency of appearance at disposition.

92. Only one case was found. In re Robert F., 30 App. Div. 2d 933, 293 N.Y.S.2d 873, (4th Dep't 1968). The appellate court reversed a family court judge's finding that the juvenile had waived counsel at his dispositional hearing. The relevant facts are as follows: In spite of statutory provision for counsel at disposition, the New York Law Guardian's office, which had represented the juvenile at adjudication, was not notified of the disposition hearing. When the boy and his mother appeared alone in the family court, the judge induced a clearly involuntary waiver of counsel: "Do you want to speak for yourself," followed by "Robert, it's up to you," at which point Robert said "Yes." Robert was committed by the judge, in the face of a caseworker's recommendation of probation. The appellate court ordered that a new disposition hearing be held, at which the Law Guardian who represented Robert on the appeal would be assigned to protect Robert's rights.

explained by the fact that counsel's participation is generally accepted.[93]

At the disposition hearing, the court will decide what should be done about the delinquent child. Since removal of the child from home and community is one possible outcome of the hearing, many commentators feel that disposition is the most critical phase of the juvenile justice process, and the one in which protection of the juvenile's rights is most important.[94] In this respect, the juvenile proceeding is analogous to adult sentencing proceedings. Therefore, it is believed by some that due process requires representation by counsel—especially where disposition may be affected by inaccurate assumptions concerning such factors as the juvenile's rehabilitative potential.[95]

The Council of Judges of the National Council on Crime and Delinquency considers counsel at disposition so important that it recommends assignment of counsel on request, even if the juvenile waived the right at adjudication.[96] If, however, counsel at disposition is as vital as the Council of Judges claims, appointment of counsel only on demand seems to be inadequate protection of that right. The same reasoning which the Supreme Court applied to the adjudicatory stage of the proceedings seems to apply to disposition.

2. Revocation of Probation

Proceedings for revocation of probation and aftercare also involve both an adjudicatory and a dispositional phase. To date, however, there has been little interest in the problem of the right to counsel in such post-dispositional proceedings. Juvenile courts use probation as a disposition which allows the child to live in his own home or in the custody of a suitable person, under supervision of an agent of the court, upon conditions which the court determines.[97] General conditions of probation include, *inter alia,* obedience to parents, regular school attendance, keeping early hours, and staying away from undesirable companions.[98] A probation order can be revoked if the juvenile violates a condition of

93. See Greenspun, Role of the Attorney in Juvenile Court, 18 Clev.-Mar. L. Rev. 599 (1969); Isaacs, The Lawyer in the Juvenile Court, 10 Crim. L.Q. 222, 235 (1968).

94. "I would go so far as to suggest that, consonant with the philosophy of the juvenile court, the dispositional phase of the proceeding is the most crucial aspect of the process and that it is in this phase that adequate protection of the juvenile's rights is most important." Isaacs, supra note 93, at 235; accord, Dorsen & Rezneck, In re Gault and the Future of Juvenile Law, 1 Family L.Q., Dec., 1967, at 42-43.

95. The President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Juvenile Delinquency and Youth Crime 33 (1967).

96. NCCD Council of Judges, Provision of Counsel in Juvenile Courts 17 (1970).

97. Reinemann, Probation and the Juvenile Delinquent, in S. Glueck, The Problem of Delinquency 610 (1959).

98. Id. at 615.

probation. Probation may also be revoked if the child is "having trouble adjusting on probation."[99] This phrase usually means that the child is having significant school problems or that family problems have become so severe that it may be unwise for the child to remain in the home.[100]

Prior to 1967, probation was generally revoked without a hearing.[101] Nevertheless, a few statutes required that a hearing be held,[102] and several courts decided that such hearings must conform with the requirements of due process.[103]

The *Gault* decision, including the right to counsel, and the Supreme Court's decision in *Mempa v. Rhay*,[104] establishing adults' right to counsel at probation revocation hearings, do not seem to have had a substantial effect on juvenile probation proceedings. Although all the model laws now require a court hearing with a right to appointed counsel before probation can be revoked,[105] only a few post-*Gault* statutes require a court hearing,[106] and the number which unambiguously extend the right to counsel is even smaller.[107]

Not one post-*Gault* judicial decision has been found which holds that

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99. Interview with Probation Supervisor, Affluent County Juvenile Court, in Affluent County, July 28, 1969.

100. One probation review case illustrating such a situation was observed in the Affluent County Study. The probation worker's reasons for initiating the proceeding were varied. Emotional deprivation characterizes the home situation, and the step-father does not get along with the youth or any of the other children in the family. They have moved very frequently, which has made it impossible for the boy to establish peer relationships. He has school problems, some of which result from his having obtained master keys to doors and drawers.

At the hearing the probation officer said that the Pennsylvania Junior Republic would accept the youth, and both the boy and his mother indicated it was worth a try.

101. Kean, Due Process Applied to Hearings for the Revocation of Juvenile Probation, 16 Juv. Ct. Judges J. 178 (1966).

102. Id. at 181 & n.36.

103. Id. at 181 & n.37.

104. 389 U.S. 128 (1967). See Skoler, supra note 87, at 570.

105. Legislative Guide, supra note 8, § 39; Model Rules, supra note 8, R. 33 & 39; Uniform Act, supra note 8, §§ 26, 37. See also NCCD Council of Judges, Provision of Counsel in Juvenile Courts 12 (1970).

106. See, e.g., Colo. Rev. Stat. Ann. § 22-3-18 (Supp. 1969); D.C. Code § 16-2309 (1967); N.C. Gen. Stat. § 110-22 (Supp. 1969); N.D. Cent. Code § 27-20-37 (Supp. 1969); S.D. Compiled Laws Ann. § 26-8-61 (Supp. 1970); Vt. Stat. Ann. tit. 33 § 659 (Supp. 1970).

107. Colo. Rev. Stat. Ann. § 22-3-6(c) (Supp. 1969); N.D. Cent. Code § 27-20-26 (Supp. 1969). Although others, e.g., S.D. Compiled Laws § 26-8-22.1 (Supp. 1970), extend the right to appointed counsel to "every stage of the proceedings," it is arguable if post-disposition proceedings are intended to be included, since the proceedings usually are thought to terminate at disposition. An unambiguous provision is the Uniform Act, supra note 8, § 26 ("at all stages of any proceedings under this Act").

probation revocation proceedings require *Gault* protections in the absence of statute.[108] In some cases, however, where the revocation proceedings occurred before *Gault*, the courts intimated that the right to counsel would be extended upon presentation of a proper case.[109] In a few jurisdictions, hearings are held even though the statute is silent.[110] Unfortunately, it is almost impossible to discover how extensive the practice is, or whether the right to counsel is extended to revocation of probation,[111] because court statistics do not identify probation revocation cases.[112]

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108. NCCD Council of Judges, Provision of Counsel in Juvenile Courts 12 (1970), cited White v. State, 457 P.2d 650 (Alas. 1969), as holding that a probation revocation proceeding comes within the Gault counsel requirement. The court's language indeed supports such an extension: "[T]he ruling in Gault . . . requires as a matter of due process that counsel be provided to a juvenile in any proceeding which may result in commitment to an institution . . . ." 457 P.2d at 653. The precise question at issue, however, was the adequacy of counsel at the adjudication hearing; no probation revocation was involved.

One case termed a probation revocation proceeding by the Utah Supreme Court appears to say that notice of the right to appointed counsel and an inquiry as to whether sufficient resources are available is not required in such proceedings. Velasquez v. Pratt, 21 Utah 2d 229, 231, 443 P.2d 1020, 1021 (1968). However, the case is confusing for two reasons. The first reason is that the court's designation of the proceedings as probation revocation is erroneous. Facts show that the appellant juvenile had been committed to an institution and released to the custody of his mother; therefore, his "probation" was actually "parole," or "aftercare" as it is called in juvenile courts. Secondly, it is unclear whether the court's holding that the juvenile was not deprived of counsel because he had been advised of his right to representation indicates that the court was of the opinion that notice of the right to appointed counsel is not required in post-adjudication cases, or whether it thinks such notice is not required in any juvenile case (which would, of course, violate Gault). The dissent makes it clear that notice of the right to appointed counsel is absent from the transcript, as is any inquiry about financial ability to afford counsel. Id. at 233, 443 P.2d at 1022-23.

109. Sult v. Weber, 210 So. 2d 739 (Fla. Dist. Ct. App. 1968). Another Florida case denied Gault's applicability on the grounds that the time of the probation revocation petition, which preceded the Gault opinion by two weeks, determined whether Gault must be applied retroactively, even though the actual hearing was held the day after the Gault opinion issued. See Richardson v. Milton, 219 So. 2d 77 (Fla. Dist. Ct. App. 1969).

110. Prior to the revision of the 1970 District of Columbia juvenile code, probation revocation proceedings were not required by statute but hearings nevertheless were held. "No formal petition is brought; nor is formal notice of the charge furnished to the child in advance of the hearing. He is simply notified to report at a specified time." Kandell, A Study of the Juvenile Court of the District of Columbia 93 (1970). Our observations in Affluent County showed that probation revocation hearings are held in that jurisdiction.

111. The juvenile was informed of his right to counsel at probation revocation hearings in the District of Columbia when there was a possibility of commitment. Id.

112. Statistics were examined in juvenile courts located in twelve different states. Seven reports made no mention of probation revocation. These were from Kentucky, Maryland, Missouri, New York, North Dakota, Vermont, and Wisconsin. In two of the remaining five reports, the expression "violation of court order," which may include violation of probation,

The lack of interest in probation revocation proceedings may be explained by the possibility that most probation revocation cases have been handled as ordinary delinquency adjudications.[113] Prior to *Gault* and *Winship*, there was little reason to have different procedures for new offenders and those who were on probation. Because of the protections established by these cases, however, it may become more difficult to obtain adjudications of delinquency. For example, it may be hard to prove that a fifteen year old boy on probation, found at midnight in a stolen car with friends who were also on probation, participated in the stealing of this car. It may, however, be relatively easy to show that he violated probation conditions concerning hours and associates. The use of probation revocation proceedings therefore may increase, with the issue of the right to counsel at these proceedings becoming much more significant.

3. Revocation of Aftercare Status

Aftercare status[114] is the juvenile equivalent of adult parole. Revocation of the status is similar to probation revocation, because it is applied when a new offense is committed or when an aftercare condition is violated.[115] Traditionally, the institution in which the juvenile is confined

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is the only referral reason specified. These states were Colorado and Illinois. In Georgia, Oregon and Virginia, court reports combined violations of probation and parole for statistical purposes.

113. The court reports in Colorado and Illinois list respectively a total of 40 and 203 "violations of court orders," representing 2.0% of the total volume of business of each court. The range of percentages in the three states combining probation and parole violations were as follows: Georgia, 0.7%; Oregon, 0.5%; and Virginia, 1.2%. From the very small number of cases reported, it would appear likely that violations of probation handled by these courts are violations of conditions of probation rather than law violations of juveniles on probation, which are reported under the appropriate delinquency category (e.g., auto theft, burglary, etc.).

114. Some experts in the juvenile justice area define "aftercare" as any action which occurs after disposition. Thus, commitment under this definition is part of aftercare. The more common definition of aftercare, and the one used in this article, describes the status of a juvenile who has been released from an institution but is still subject to the jurisdiction of the court.

115. For example, the District of Columbia's "Expectations of Aftercare" form lists the following "expectations" or conditions:

"A. General Expectations:

"1. Obey all laws, ordinances, and regulations of the District of Columbia.

"2. Obey your parents or guardian.

"3. Keep your appointments with your caseworker and follow the worker's advice and instructions.

"4. Report any change of address to your caseworker within 48 hours.

"5. Adhere to an acceptable daily plan of activity:

or the state agency which administers these institutions[116] is responsible for establishing aftercare conditions and deciding to revoke the status. Neither the model acts nor the post-*Gault* statutes provide for judicial hearings on aftercare revocation,[117] indicating that aftercare is outside the juvenile court process. By rule, however, at least one state requires a judicial hearing before aftercare status is revoked, and includes the right to appointed counsel.[118]

Courts also seem to be of the opinion that neither a right to counsel nor a judicial hearing are required in revocation proceedings. Two state courts have recently upheld the validity of administrative proceedings, in spite of the juvenile's claims that due process safeguards—including the right to counsel—should apply.

In one case, *In re Loyd*,[119] a proceeding to revoke aftercare was initiated because the juvenile "was allegedly involved in an incident" at his high school.[120] An administrative hearing was held before the state Youth Conservation Commission, which is permitted by statute to revoke aftercare whenever it believes that this action is desirable.[121] The juvenile was allowed to testify at the hearing, but neither his parent nor his attorney was allowed to be present.[122] The hearing resulted in the revocation of his "parole" and recommitment to the institution.

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a. If you are enrolled in school, attend regularly unless you have been excused for a valid reason.

b. If you are in the employment market, you must work, or demonstrate to your caseworker that you are exerting reasonable effort in seeking regular employment.

"6. Do not leave the metropolitan area of Washington, D. C. without permission of your caseworker.

"7. Adhere to curfew hours agreed upon by your caseworker and your parents or guardian.

a. Your curfew hours are _____.

"B. Special Expectations:

The above expectations of aftercare have been explained to me by my caseworker and I agree to conduct myself in accordance with the expectations that have been set up to guide me.

Agreement to be signed by juvenile, parents and caseworker."

See also the aftercare agreement in Bernier v. State, 265 A.2d 604, 605 n.2 (Me. 1970), appeal docketed, 39 U.S.L.W. 3181 (U.S. Oct. 19, 1970) (No. 877).

116. Many statutes grant administrators authority to revoke aftercare at their discretion. E.g., Ariz. Rev. Stat. Ann. § 41-1608 (Supp. 1970); Me. Rev. Stat. Ann. tit. 15 § 2716 (Supp. 1970); W. Va. Code Ann. § 28-1-6 (1966).

117. However, a few pre-Gault statutes provide for judicial hearings at aftercare revocation. See, e.g., Ala. Code tit. 13 § 361 (1958); Va. Code Ann. § 16.1-210 (Supp. 1970).

118. Md. Rules of Procedure 915, 918 (Supp. 1970).

119. 177 N.W.2d 555 (Minn. 1970).

120. Id. at 556.

121. Minn. Stat. Ann. § 242.19 (Supp. 1970). The commission may "order reconfinement . . . as often as [the] commission believes . . . desirable."

122. 177 N.W.2d at 556. However, the parent and a retained attorney were allowed

On appeal, the juvenile claimed that, under *Gault* and *Mempa v. Rhay*, he was entitled to court appointed counsel at a revocation hearing.[123] The Minnesota Supreme Court rejected this argument, stating that neither decision applied to aftercare revocation proceedings. The principal reason for denying the request, however, seemed to be fear that officials might not grant early parole if all due process protections are required whenever parole violation is suspected.[124]

The Supreme Judicial Court of Maine also handed down an aftercare revocation opinion in 1970. In *Bernier v. State*,[125] the court went even further than Minnesota in its approval of administrative discretion, holding that revocation decisions were within the sole discretion of the institution superintendent. In *Bernier*, a youth was returned to an institution sixteen months after his release, solely because he had been questioned by the police about the theft of some green stamps from a local store. No formal charges were brought against him, and no hearing of any kind was held about either the missing stamps or any possible violation of aftercare rules.[126] The juvenile contended that revocation without a hearing was a denial of equal protection and due process. The court rejected this argument on the basis that the Superintendent may return a child to the institution at his discretion, because he has by statute "all the power of a guardian to his ward, and of parents over their child."[127] Having noted that the Superintendent has plenary authority to return the child when he is " 'satisfied at any time that the welfare of the child will be promoted by return to the center,' "[128] the court asked: "What does it matter whether the child was or was not guilty of a particular offense?"[129]

One need not believe that all *Gault* protections should apply to aftercare revocations to be appalled by these decisions. They uphold deprivation of liberty under a proceeding which completely lacks fundamental fairness.

to consult with an official of the Youth Conservation Commission for one half hour prior to the hearing.

123. The other rights asserted were: (1) "Notice of any alleged violation of law;" (2) "A fact hearing on the allegations;" (3) "Confrontation and cross-examination of witnesses;" (4) "Presentation of evidence in his own behalf;" (5) "Minimal demands of due process, including presumption of innocence, burden of proof beyond a reasonable doubt, and bail." Id. at 556.

124. Id. at 558. See also Velasquez v. Pratt, 21 Utah 2d 229, 443 P.2d 1020, 1021 (1968) (discussed in note 108 supra), where the court also expressed concern that requiring all due process safeguards would discourage authorities from granting release.

125. 265 A.2d 604 (Me. 1970), appeal docketed, 39 U.S.L.W. 3181 (U.S. Oct. 19, 1970) (No. 877).

126. Id. at 604-05.

127. Id. at 606.

128. Id.

129. Id. at 607.

It is unconvincing to argue that, because of the rehabilitative purpose of institutionalization, notice of the reasons for revocation and an opportunity to contest them are unnecessary. Is it rehabilitative for a child to be told that he is given his liberty on the condition that he abide by certain rules, but that he may lose it even if he keeps them? Is it rehabilitative to tell a child that he is being institutionalized to help rather than to punish him, when an unproved charge of improper conduct is the cause of his return to the institution? Such practices suggest punishment rather than treatment and rehabilitation. These court opinions make it clear that juvenile delinquents who are committed to an institution lose, for an unspecified number of years, the protections of the average citizen against deprivation of liberty.

B. The Role of Counsel: In General

Views concerning the proper role of counsel vary even more at disposition than at adjudication. Some attorneys think that their duty has ended at adjudication.[130] Others see their role as advocates and the probation officer as an adversary, and contest every assertion made in the social study in an effort to discredit its writer and recommendations.[131]

A less combative role is envisioned by those who see the attorney as "validating" the work of the experts. A lawyer—familiar with the family, trained to analyze, and experienced in cross-examination—can ensure that the disposition will be based on reliable facts and valid conclusions.[132]

Others believe that the attorney should actively participate in the formulation of a proper treatment plan[133] by presenting the strengths of the child and family in the most favorable light, or by suggesting potential dispositions that may not have come to the attention of the judge or the probation department.[134] Still others are of the opinion that

130. Greenspun, Role of the Attorney in Juvenile Court, 18 Clev.-Mar. L. Rev. 599, 606 (1969); Comment, The Role of the Attorney in the Treatment Phase of the Juvenile Court Process, 12 St. Louis U.L.J. 659 (1968). Those who espouse no counsel role justify their position "by saying that the attorney is not a social worker and cannot add anything to the proceeding which depends heavily on the social report." Comment, The Attorney and the Dispositional Process, 12 St. Louis U.L.J. 644, 646 (1968).

131. Dyson & Dyson, supra note 43, at 59, describing the position of New York City's Law Guardians, whose principal purpose at disposition is to prevent placement away from the home. See also Comment, The Attorney and the Dispositional Process, supra note 130, at 651.

132. L. Arthur, Counsel for the Child 28, 29 (1966); Task Force Report, supra note 91, at 33; Johnston, The Function of Counsel in Juvenile Court, 7 Osgoode Hall L.J. 199, 207 (1970); Comment, The Attorney and the Dispositional Process, supra note 130, at 648-49.

133. Task Force Report, supra note 91, at 33. See also J. Irving, On Going into Juvenile Court 5 (1967); Johnston, supra note 132, at 205; Comment, In Re Gault and the Persisting Questions of Procedural Due Process and Legal Ethics in Juvenile Courts, 47 Neb. L. Rev. 558, 591 (1968).

134. NCCD Council of Judges, Provision of Counsel in Juvenile Courts 16 (1970). A

counsel should be replaced by professionally trained non-lawyers operating in an adversary juvenile justice system.[135]

To a large extent, these different views reflect the attorney's judgment about many aspects of the juvenile justice system, although his opinion about the rehabilitative potential of the system is usually considered the principal variable in determining his role.

For example, the New York Law Guardians do not believe that there is any value in the dispositional alternatives available to most courts. In fact, they often exhibit a fixed determination to avoid any placement for their clients.[136] It is their view, therefore, that the juvenile court is not an agency for salvation, but rather the instrument of corruption. "It is no longer a gateway to needed services but a court for dealing with 'offenders for whom vigorous measures seem necessary.' "[137] It has been observed that the Law Guardians tend to resist almost any juvenile court disposition.[138]

Those attorneys who believe that the court has facilities[139] to help the child obtain his rights "to live in a decent home, to be in the custody of someone who understands and cares for him, to be supervised and disciplined, to have a chance for an education and a job, and to live in a community that will give him the opportunity to develop into a self-respecting, productive, and law-abiding citizen,"[140] are apt to cooperate

survey of probation officers showed that 78% of those responding believe that the attorney's role at disposition should include presenting alternative treatment plans. Brennan & Ware, The Probation Officer's Perception of the Attorney's Role in Juvenile Court, 16 Crime & Delinq. 172, 174 (1970).

135. Handler, The Juvenile Court and the Adversary System: Problems of Function and Form, 1965 Wis. L. Rev. 7, 39-44.

136. H. Makover, Mental Health Services in the Family Court of the State of New York in the City of New York 122-23 (1966) (footnote to Appendix A). The author reports that Law Guardians "also urge psychiatric examinations to delay or to avoid placement in the State Training Schools. The law guardians reason that since a BMHS study takes six to eight weeks to complete, the judge may parole a child to his home rather than remand him to Youth House for such a period of time." Id.

137. Paulsen, The Constitutional Domestication of the Juvenile Court, 1967 Sup. Ct. Rev. 233, 246.

138. "The law guardian's actions at the disposition hearing appear to be aimed at preventing disposition—any disposition within the jurisdiction of the court . . . ." Snyder & Mangano, Effect of Law Guardian Representation on the Treatment of Delinquent Children, 13 Soc. Work, July, 1968, at 102, 105.

139. "In the State of Minnesota the conclusion [of the Crime Commission that there are no facilities] is utterly false, and Minnesota is not unique." Arthur, A Revised Philosophy of the Juvenile Court, 18 Juv. Ct. Judges J. 31 (1967). See also Greenspun, Role of the Attorney in Juvenile Court, 18 Clev.-Mar. L. Rev. 599, 607-08 nn.47 & 48 (1969), for a description of resources in Cuyahoga County, Ohio.

140. Noyes, Has Gault Changed the Juvenile Court Concept?, 16 Crime & Delinq. 158, 160 (1970).

in the formulation of a treatment plan once its validity has been established.

Many factors other than the assessment of the rehabilitative potential of the court probably influence the position adopted by the attorney at disposition. For example, it might be important that the average adjudicated delinquent is given merely a warning, or at most is put on probation, rather than being sent to an institution for the remainder of his minority. Although the fact situation in the *Gault* case may give the contrary impression, the vast majority of juveniles are not committed to institutions,[141] and children sent to institutions are usually released in six to ten months.[142]

It might also be important that the attorney sees the child as a "good kid" with little or no criminal record, or a troubled child who needs help, rather than a dangerous offender who commits crimes which drive people off the street, or one who has already shown himself resistant to non-coercive rehabilitative efforts.[143]

The attorney's belief in his capability to make the "social" decisions required at disposition, together with his interest in making them, may

141. The Children's Bureau reports that of the 811,000 cases disposed of by juvenile courts in the United States in 1967, 382,100 of these cases (47%) were handled judicially, while 428,900 (53%) were handled non-judicially. Children's Bureau, Juvenile Court Statistics 9 (1967). 74,000 children were admitted to public training schools that year, but only 4,000 of them were being committed for the first time. Ten thousand additional children were committed to forestry camps, 6,000 of whom were first commitments.

See also Probation Dep't, County of Los Angeles, Biennial Report 33 (1965-1967), which reports that in the fiscal year 1967 approximately 30% of juvenile court cases were placed outside the home. However, 12% of those placed were listed as "undetermined at the initial hearing," raising the possibility that some of these children remained at home. Only 2% of the total cases were committed to the California Youth Authority (the state juvenile correctional facility). Platt, Schechter & Tiffany, In Defense of Youth: A Case of the Public Defender in Juvenile Court, 43 Ind. L.J. 619, 638 (1968), tabulated the dispositions in "Metro's" Juvenile Court for 1960-1967, showing that about 15% of those children for whom petitions are filed are ordered institutionalized.

142. "In 1967, 50% of the public institutions for delinquent children had average lengths of stay of 8 months or less, 26% of 9 months to 1 year, and 24% of 1 year or more. For training schools alone, the average length of stay in 1967 was approximately 10 months. Forestry camps and reception centers had average lengths of stay of 6 months and 3 months, respectively." Children's Bureau, Statistics on Public Institutions for Delinquent Children 2 (1967).

A survey undertaken by the NCCD in 1966, at the request of the President's Commission on Law Enforcement and Administration of Justice, found that the nationwide average length of stay in state training schools is nine months. NCCD, Juvenile Institutions, 13 Crime & Delinq. 80 (1967).

In Affluent County, the average length of time spent in training schools is much lower, ranging from 5 to 6 months. Interview with Mr. C., Probation Officer of Affluent County, July 22, 1969.

143. Commission Report, supra note 42, at 88. See Paulsen, supra note 10, at 554-55.

also be important. Some attorneys do not want to feel that they are social workers or psychiatrists,[144] while others believe that they can educate themselves or receive special training to examine expert witnesses and otherwise perform the social functions required in the juvenile court.[145]

The attorney's view of the relationship between the parent and the child may also influence his position at disposition. In this respect, it is important whether he regards their interests as identical,[146] or regards them as parties with separate and perhaps conflicting interests.[147]

Finally, the attorney's role will be greatly affected if he believes that status offenders should not be subject to the jurisdiction of the juvenile court because the acts are not offenses against society,[148] or if he feels that status offenses are forerunners of delinquency which indicate that the child needs assistance.[149]

Unfortunately, there is no empirical data available on the number of attorneys at disposition, their role at disposition, or the reasons which led them to adopt a particular role.[150] Also lacking is information concerning the validity of the assumptions which may have influenced the attorney's choice of role.

An effort was made to obtain this information by examining the activities of counsel in Affluent County. Court records were also analyzed, in an attempt to acquire information about children and their families in both counsel and non-counsel cases.

144. Levin, The Role of the Lawyer in Juvenile Proceedings, 39 Pa. Bar Ass'n Q. 427, 436 (1968). One observer has noted that "it was the rare attorney who had the resources and training to challenge competently a given dispositional recommendation." Cayton, Relationship of the Probation Officer and the Defense Attorney After Gault, 37 Fed. Probation 8, 11 (March 1970). See also Skoler, The Right to Counsel and the Role of Counsel in Juvenile Court Proceedings, 43 Ind. L.J. 558, 581 (1968).

145. Johnston, The Function of Counsel in Juvenile Court, 7 Osgoode Hall L.J. 199, 207 (1970).

146. A 1963 Survey of juvenile court judges probed who was represented most often in court. 52% of the responding judges indicated the "child and parents jointly," demonstrating a belief in their unity of interests. Skoler & Tenney, Attorney Representation in Juvenile Court, 4 J. Family Law 77, 82-83 (1964).

147. Levin, supra note 144, at 431-32; Virginia Lawyers, Judges, Discuss Juvenile Court Practice Since Gault, 6 Crim. L. Rep. 2128, 2129 (Nov. 12, 1969); Comment, The Attorney-Parent Relationship in the Juvenile Court, 12 St. Louis U.L.J. 603, 619-22 (1968).

148. See Commission Report, supra note 42, at 85; Comment, Statutory Vagueness in Juvenile Law: The Supreme Court and Mattiello v. Connecticut, 118 U. Pa. L. Rev. 143, 150 (1969).

149. See Fox, Juvenile Justice Reform: An Historical Perspective, 22 Stan. L. Rev. 1187, 1190-91 (1970); Reasons, Gault: Procedural Change and Substantive Effect, 16 Crime & Delinq. 163 (1970). "Part of the rationale for the establishment of the juvenile court was the belief that delinquency can be prevented through state action. Certain types of behavior—smoking, truancy, drinking, etc.—were believed to initiate a criminal career." Id. at 164.

150. For data on the presence of counsel, see note 65 supra.

C. *The Role of Counsel in Affluent County*

Initially, court records were surveyed to determine how many children were represented by counsel at disposition. They showed that counsel was present in 31 (27%) of the 113 cases examined.[151] As the following percentages illustrate, there were fewer commitments to institutions and more findings of "not involved" when the child was represented by counsel.

TABLE B
Examination of Court Records

Disposition	Counsel Present		Counsel Absent	
	No. of Cases	Percent	No. of Cases	Percent
Dismissed—Not Involved	4	12.25	6	7.31
Dismissed	0	0	3	3.65
Held Open—Later Dismissed	3	9.67	8	9.75
Probation	20	64.51	48	58.53
Committed—Institution	3	9.67	15	18.29
Committed—Agency	1	3.22	2	2.43
TOTALS	31	99.32	82	99.96

Since no other data about the role of counsel could be found in the court records, sixty-four court hearings were observed in order to obtain such data.[152] Twenty-four (37.5%) of the sixty-four children in the observed sample had counsel[153] at the adjudicatory phase, and two additional children had counsel at disposition. Most of the children represented by counsel denied the offense, while the opposite was true in the other cases. These figures seem to indicate that Affluent County attorneys are adopting the role of advocates. Neither advocacy nor the presence of counsel seems to be related to court action at adjudication, however, since of the thirteen children who were represented by counsel and denied the charge, only two (15.4%) were dismissed as not involved, while four (30.7%) of the children without counsel obtained dismissal.[154]

151. The sample of formal cases represented 15% (126 cases) of all cases petitioned during 1968 for which dispositions had been made by May 8, 1969—the date the sample was drawn. The cases were drawn for the sample by using a table of random numbers.

152. See note 21 supra.

153. The observed cases were heard more than a year after the formal cases. The higher percentage of children represented by counsel is perhaps explained by the fact that counsel representation is increasing.

154. In fact, the percentage of children without counsel who were dismissed might be higher than has been indicated. Three children who made no plea were counted as not involved.

A few other studies have explored the relationship between the presence of counsel and

Therefore, if counsel plays a significant role in delinquency hearings in this county, it is at the dispositional stage of the proceedings.

The dispositions of the observed cases, as illustrated in the following table, were not severe.

TABLE C

Observation of Court Hearings: Counsel Present

Disposition	No. of Cases	Percent
Dismissed—Not Involved	2	8.33
Dismissed—With Restitution	2	8.33
Held Open—Later Dismissed	1	4.16
Probation	17	70.83
Committed—Institution	1	4.16
Committed—Agency	1	4.16
TOTAL	24	99.97

What did counsel do to achieve this result? The answer in sixteen (66⅔%) of the cases is that he did absolutely nothing. In other words, counsel was present but did not participate by asking questions or making any statement in these cases.

This lack of participation is not due to the use of appointed counsel. Many of the juveniles were represented by retained counsel, and there was no difference in the amount of participation. Only two attorneys represented more than one child, and in each case they represented two siblings. Thus the findings are not attributable to the conduct of only one or two attorneys.

The actions of counsel in the remaining eight cases can be divided into three groups. The first consists of five cases in which the information offered by counsel was almost wholly limited to either the juvenile's behaviour or attitudes with regard to the offense (*e.g.*, willingness to make restitution;[155] cooperation with the police), or to the socio-economic status of his family.[156] In none of these cases was information con-

dismissal. See, e.g., Reasons, Gault: Procedural Change and Substantive Effect, 16 Crime & Delinq. 163, 170 (1970), which indicates that over 25% of the post-Gault counsel cases in one Ohio county were dismissed, as opposed to about 10% of the non-counsel cases. See also Zeite & Medalie, Judicial Conference Committee on Law Pertaining to Mental Disorders; Dispositions of Mentally Disordered Juvenile Delinquents in the District of Columbia—The Problems of Diagnosis and Treatment 20 (1968).

155. Restitution was not, in fact, made in any of these cases until the court ordered it, and in one case the father protested the amount of $90.00 for replacement of an antique gun which the boy had sold.

156. One family was described as "prominent," another as "providing a most suitable environment," and in another case the father was described as an unemployed corporation executive.

tributed by counsel, the parents, or the youth concerning the child's school record, his relationship with family or friends, or his mental condition.[157]

Presumably, counsel was either of the opinion that no treatment was needed or that it was not his place to suggest it. The judge, however, thought that treatment was needed in at least three[158] of the cases, since he placed the boys on probation.[159] In the other two cases, the boys were dismissed but restitution was ordered[160]—ninety dollars for the theft of a gun, and a forty dollar hospital bill in an assault case. The boy involved in the assault case was returned to court a few months later on another charge of assaulting the same girl.[161]

In two cases, counsel and the family gave information about the boy which could be helpful to the judge in forming a treatment plan. The plan recommended by counsel for a seventeen year old boy who sold LSD was that he be allowed to join his family, which was moving out of the state, and that he continue therapy in the new community. Although the family had reportedly started therapy in Affluent County, no diagnostic or progress report was offered, nor was it clear how long treatment had been in progress. No other information about the boy or his family relationship was mentioned, except that the father felt that the many moves required by his work had caused the boy difficulty.[162] Counsel said that the boy had voluntarily cooperated with the police by pointing out locations where drugs were being sold. Our follow-up investigation, however, revealed that the boy had given the police false information.

In the other case, counsel had arranged for a psychological evaluation of a fifteen year old first offender, who was charged with burglary and

157. The court did not have this information from other sources because this was the first disposition hearing for all five of these children. The usual procedure in such cases is to put the child on temporary probation or to hold the case open until the social study is completed unless the case is dismissed.

158. In one of these cases restitution was also required.

159. In one of these cases probation would have been impractical, because the boy had entered the army between the offense and the hearing. Also, he was almost 18—the age at which the court usually closes cases.

160. This was a confusing disposition, since the offense was clearly admitted and restitution was in effect "the penalty." The advantage for the child, of course, is the fact that he has no record, since there is no adjudication of delinquency. From the view of obtaining the most favorable disposition, counsel's action was successful.

161. The follow-up study conducted a year later also showed that two boys did not have another petition filed. The other two boys, including the "dismissed with restitution" case, were no longer of juvenile court age.

162. Although the attorney asked for probation without verdict, the judge said the offense was too serious for this disposition. The boy was given a suspended commitment to the training school. (The judge said he would have committed him if the family had not been leaving the state.)

destroying a mailbox with explosives. Other information about the boy included the following facts: The parents had not had prior difficulties with him; he cooperated with the police; and he almost lost his arm from the mailbox explosion. The attorney suggested probation on condition of psychotherapy as a result of the evaluation.[163]

Three attorneys who represented youngsters in court also participated in the formation of a disposition plan. In each case, however, their only contribution was to disagree with the plan proposed by the diagnostic facility. None of the attorneys had examined the diagnostic report, nor did they request an opportunity to do so. In fact, one of them said the child should have a psychiatric evaluation, although the disposition hearing took place the very day he returned from a 30-day stay at a diagnostic facility, where he had not only had a psychiatric evaluation, but psychological, medical, and school evaluations as well.

Removal from the home to a residential treatment facility was recommended for two of these three boys and was ordered by the court despite the attorneys' objections.[164] The recommendation for the third boy was that he be placed in a group home for adolescent boys to receive psychotherapy. The court was unable to carry out the placement recommendation because the home accepts boys only if parents will participate in group meetings and the parents in this case were unwilling to do so.[165] The court did, however, make psychotherapy a condition of probation.[166]

163. The court adopted counsel's recommendation, but the follow-up study conducted three months later showed that the family had not made the arrangements for therapy. The probation officer assumed that the judge requested therapy with the therapist who had made the diagnosis. The father said he would pick his own therapist but did not, nor did he sign the forms necessary to allow the boy to participate in group therapy sessions at a public agency. The social file also showed that the boy's sister was on probation, and that her probation officer had found the family uncooperative.

164. In both of these cases the parents had voluntarily placed the children outside of the home for a period of years when they were less than nine years of age. The remarks below summarize the history of one of these boys.

R, at age 8, was brought to court by his parents as beyond parental control for repeated runaways. He had lived with his grandmother from his infancy until shortly before the court action. (The parents had given up another child for adoption at six months of age.) He was sent to the diagnostic center because the parents did not want to pay for an evaluation. The center's recommendation was for placement in a residential treatment center. The court substituted probation with psychotherapy. Psychotherapy was never provided, and the case was closed after a few months because there was no further difficulty and the parents were uncooperative. The present court appearance was three years later and involved a series of thefts by R, his 10 year old brother and another child, amounting to several thousand dollars. The new evaluation at the diagnostic center found him more disturbed than before and the parents still uncooperative.

165. Note that both probation officer and diagnostic center agreed that the parents were uncooperative and the root of the difficulty. In fact, the diagnostic facility believed the boy should not even be returned to the home to await placement.

166. The follow-up study showed that the youth and his family were in therapy.

The majority of attorneys who represented delinquents in the observed cases seemed to operate on the assumption that they had no role at disposition. Even when the attorney did participate, information about the child's problem and its possible solution was given to the court in only a few instances. From this study, it appears that counsel in Affluent County—with rare exceptions—regard themselves as advocates, whose primary allegiance is to the parent rather than to the child.

It was not possible to determine the reasons for each attorney's choice of role.[167] Data was, however, available concerning delinquents and their treatment in the county, and this data casts doubt on the validity of the assumptions underlying many of the attorney's role decisions. The data was derived from a study of 126 court cases. Information was obtained about the typical delinquent's socio-economic background, family relationships, court treatment, and rate of recidivism.

The average delinquent in Affluent County is a fifteen year old white male[168] who lives with both of his parents in a house purchased by them. Family income is usually in excess of ten thousand dollars a year,[169] and more than half of the delinquents live in homes whose value exceeds twenty-eight thousand dollars.[170] There was no "typical offense." Property crimes were committed by 42% of the children, 30% were status offenders, and 28% were involved in crimes against the person.

The court received diagnostic information about the child's mental condition in almost half of the cases,[171] in contrast to most juvenile courts, which have such data available on only ten percent of their children.[172] Only six percent of these children were diagnosed as mentally

167. The public defender's office reported that there are few "bum raps" in the court, and this belief may be one of the reasons for the passivity of counsel. It was also said that frequently he was called to court on a few hours notice. However, our observations showed that whenever a child requested counsel at the hearing, the case was continued to a later date. Interview with Affluent County Public Defender, in Affluent County, July 14, 1969.

168. The formal rather than the informal cases were used for this purpose. They comprised a larger group, and we were able to follow them for a longer period of time.

169. Unfortunately, the court does not keep any systematic economic data on the children. Their stated reason is that family income is almost always over $10,000 a year. However, we found a number of cases in which the family was on welfare, and others where it was doubtful from the information on parents' occupations that the income was that high. Therefore, we estimated family income on the basis of housing.

170. Housing information was obtained by examining county records compiled by the tax assessor to obtain assessed values of houses. These values are approximately 55% of the "real" value of houses in the county.

171. Thirty-one of the children were sent to the state diagnostic facility for 30-day observations, and 21 were examined in the community. Both judges said that more children could be examined in the community instead of the state facility if sufficient resources were available.

172. Task Force Report, supra note 95, at 81.

The President's Crime Commission reported that less than one-half of the juvenile courts

ill or retarded.[173] Although the number of children in the sample who were seriously disturbed is quite small, the rate of parent pathology is much higher. Twenty-seven percent of the parents were described as mentally ill or alcoholic and there were additional cases in which there was no data on a parent because the parent refused to be interviewed, had no contact with the child, etc.

The average juvenile in the sample was referred to court at least twice and forty-five percent of them were referred three or more times.[174] More than one-third of the recidivists began their court careers as status offenders, usually for running away or truancy. The fact that these children's violations changed from status to delinquency cannot be attributed to the detrimental effects of institutionalization because these children were not removed from their homes. In fact, the first disposition was often only a warning, or "held open without finding," which means that the case is dismissed a few months later if there are no additional referrals.

No one can determine with certainty the exact reason for the repeated referral of these children to court, but parental failure to carry out treatment recommendations was found in a fairly high percentage of cases. In our formal sample, the court made recommendations for treatment of the parent and/or the child in eighty-three cases. In twenty-six (31%) of these cases, the parents did not carry out these recommendations.[175] The children whose parents did not carry out the recommendations invariably turned out to be the same children who were eventually referred to court three or more times. Frequently, as might be expected, these children were also the ones whose parents were described as mentally ill or alcoholic.

Their progress towards rehabilitation after disposition does not seem to be retarded so much by a dearth of dispositional alternatives as it is by the failure to use them. When first referred to court, these children are quite young, averaging only 12.3 years of age, and do not have set delinquency patterns. Probation, supplemented in some instances with

responding to a survey received psychological examination data for more than 10% of their formal cases. Only 27% of the courts received such data for more than one-fifth of their cases. Psychiatric data was even less frequently received by the courts—only 13% reported receiving such information for more than 20% of their formal cases.

173. The diagnoses were taken from the court reports of the diagnostic facility and were independently reviewed by this project's consulting psychiatrist, Donald Hayes Russell, M.D.

174. When these cases were followed up one year later, twenty-five percent of the three-or-more time recidivists had been returned to court again.

175. For examples of failures to carry out treatment, see notes 163 and 164 supra. For a detailed description of two other cases where the parents obstructed and refused to cooperate with the court's treatment plans, and where the boys' delinquencies multiplied, see Webb, A Probation Officer Speaks Out: Treatment Referrals of Delinquent Children, 20 Juv. Ct. Judges J. 138 (1969).

family counseling and in others with individual or family therapy, would be sufficient for many of them. When such treatment was used, few subsequent referrals to court were found.

However, where the families failed to follow through or were actively resistent to treatment for themselves or for the child, frequently the case was soon closed because the parents were "uncooperative." The court has the authority to order therapy and require the parents to pay for it to the extent of their ability to do so, and court orders were found making psychotherapy a condition of probation. The records, however, showed no indication of action by the probation officer or a judge when the parent did not follow the order.

The judges said that they have the authority to remove the child from the home when parents are indifferent and uncooperative, and that they not only threaten such parents, but also sometimes remove the children. The records showed, however, that even when the child was removed, the action had been recommended much earlier by the diagnostic center or probation authorities. Removal itself took place only when the child was referred to court for additional delinquencies, and it was the safety of the community rather than the rights of the child which seemed to be the stimulus for the removal.

When children are removed from home at a fairly late stage of delinquency, there are substantial dispositional problems. Less facilities are available for older children. Moreover, those that exist are geared more to the needs of the child who has just started to have trouble and who needs guidance in a relatively free atmosphere.[176]

The case of Buddy illustrates some of the problems found in many of the recidivists' cases. Between the ages of eight and fourteen, Buddy was referred to the court eight times for at least twenty offenses, including more than a dozen burglaries. He was warned, put on probation, kept on probation, committed to a state institution for delinquents, released, warned, committed again, and released again. One might say that those who felt Buddy could be helped had an "overoptimistic view of . . . juvenile criminality and of what even a fully equipped juvenile court could do about it."[177]

176. One complaint of the director of Affluent County's boys home, a group residential home with community orientation, is that by the time the probation officer decides the home situation is unsuitable for the child, a short term group facility such as a boy's home is inappropriate. Interview with Director of Group Home, in Affluent County, July 16, 1970.

An indication of the extent of the use of residential facilities other than state training schools may be seen from a summary of a recent Affluent Court Probation Department report. As of August, 1970, a total of 33 juveniles were placed in 14 different facilities, 7 of which were located out of state.

177. Commission Report, supra note 42, at 80.

A look at Buddy's social record shows a somewhat different picture. He was sent to the state diagnostic center for a thirty-day evaluation at age ten, when he was referred to court for the second time. The center described him as an anxious, possibly frightened child, showing rather mild neurotic trends, who functioned in the bright-normal range but with his potential in the "very superior range."

The center described the home as follows:

> Father punishes child by tying him up with chains by neck or feet and whipping him with wires and belts. He once chained him in his room for six days. The paternal grandfather approves of these punishments and calls Buddy "dog" when he is tied up. The mother on these occasions does nothing. Parents presumably don't get along but won't discuss it. Without radical changes in the whole constellation of emotional and other forces in this family, the boy's problems and his acting out will increase.

Placement in a group home was recommended because of the father's sadistic inclinations and unwillingness to accept outside help. Home placement, if used at all, was recommended only on a trial basis and only if the father embarked on intensive psychotherapy.

Buddy was sent home to be supervised unofficially by a probation officer. During the next four years Buddy was referred to court repeatedly, usually for stealing. At eleven, he was sent to a state training school; at twelve, he was sent there again; and at thirteen, he went to live with relatives at the suggestion of his father. They returned him after he became involved in stealing after a vacation with his parents.

Throughout these four years, periodic efforts were made by probation officers and aftercare workers to interest the parents in therapy, though they said that the father didn't want Buddy at home. At one point the father tried therapy briefly, but stopped because it was too expensive. However, he refused referrals to clinics which would have been less costly. Efforts were also made to place Buddy in public mental hospitals, which were unsuccessful because he was not psychotic.

Finally, after probation, reformatories, aftercare, etc., Buddy was sent to the diagnostic center again at age fourteen. It repeated its recommendation that he be removed from his home, saying: "There has been little change in the home situation since 1964 and there probably won't be any in the future." The center's report also said that Buddy was more disturbed than he was during his first stay there, although he was functioning closer to his superior intellectual ability. Several months later, after two more court referrals, the court arranged for his admission to a residential school where, according to the probation officer, "it [was] felt he [would] receive the best of care and understanding." Buddy's father was ordered to contribute seventy dollars a month for his support.

A follow-up check eighteen months after placement indicated that Buddy was still at the school and was doing well there.

IV. Conclusion: A New Role for Counsel

Only the relatively happy ending to Buddy's story makes his experience unusual among the three-or-more time recidivist group. The fault lies not in society's assumption that most parents are interested in and capable of helping their delinquent children, but in its refusal to recognize and take action in those situations where the parents are incompetent or unconcerned.

This myopia exists not only in delinquency cases but in other legal actions concerning children as well. Society finds it difficult to believe that parents will light matches and stick them in their children's body openings. Nor does it believe that parents will leave young children unattended for days. Equally unacceptable is the view that custody battles frequently reflect parental hatred for each other, rather than their concern for the child's well being. The actions of attorneys and judges frequently reflect this disbelief that parents can be indifferent or hostile to their children. Thus custody decisions continue to leave small children with uncaring, alcoholic, or mentally ill mothers; children continue to be uncared for and unfed; and battered children become psychotic, physically maimed, and frequently die from their injuries.

Counsel, of course, cannot alone change society's perceptions of children's needs, but he is uniquely qualified to play a major role in this battle by ensuring that court orders made for a child's benefit are carried out. An attorney can and should inform the court that his client is not receiving the psychotherapy the court ordered, or that the parents have failed to apply for a recommended vocational training program, or that the child is not being brought to his probation appointments and cannot get there by himself.

This type of activity does not force the attorney into the role of either a social worker or a psychiatrist. Attorneys frequently file actions for adult clients who are not receiving the benefits awarded them by the court. Actions to enforce alimony awards or to restrain violations of an injunction are only two of many reasons an attorney may return to court on his client's behalf.

Extending his activities to include enforcement of his client's rights at and after disposition, instead of limiting his activities solely to defending the charges against him, requires counsel to look at the juvenile court process more broadly than he has in the past.

The court decision that the child has committed an act prohibited by law is the prerequisite to any court action affecting him. If it is determined that he did not commit the act, the attorney's job is over—as it would be if there were a similar finding in a civil or criminal case involving an adult.

The attorney, however, cannot limit his interest solely to guilt or in-

nocence in those cases where the court finds that the child did commit the act. In such cases, the court is supposed to protect the child from conditions in his life which lead to crime, and to provide him with whatever he needs in the way of care and treatment. Unless the goal of a nonpunitive system of justice has been abandoned for a juvenile criminal court, the adjudicated delinquent is entitled to protection and care.

If the attorney limits his activities at disposition solely to securing what he considers the least serious disposition, he is denying that help is needed. This is a proper position for counsel to take in those cases where the act was clearly an isolated one in the child's life. In such cases, the attorney can and should argue that the child will reimburse the injured party for the damage he has caused, or that he has learned his lesson and does not require court services.

For a large number of children, this is not the situation. They may have had several contacts with the police or with the intake division of the court. Frequently, as has been pointed out before, they have been adjudicated delinquent in the past. An attorney's contention that a child does not need services should be based on his knowledge of the facts, not merely on the family's or child's wish to be left alone.

Where the delinquent's acts are repeated or stem from school, home, or emotional problems, it is counsel's duty to assist him in getting the services he needs. The existence of a right to such services is the only justification for their existence. If children do not have this right, they may as well be returned to criminal courts—with perhaps less severe penalties for youthful law breakers.

Counsel's duty to assist a child in receiving needed protection and care does not end with the court's disposition of the case. Most adults will notify their attorney if they do not receive the benefits awarded them by a court. This probably is not true in the case of children. Therefore, counsel's role in the juvenile court will be new in the sense that he will have the affirmative responsibility of seeing that the court order has been carried out. It will not, however, be a burdensome task. Usually, only a phone call to the probation officer every few months will be necessary to determine that the requirements established by the court are being fulfilled. If it is the state rather than the family which is making it impossible to carry out the court's order, counsel must still assert that the child is being deprived of its services. If the decision of society is that children should be punished rather than helped, conscientious counsel can at least make it clear that it is society, and not the child, who has failed. Attorneys should not passively participate in the game of allowing countless Buddys to be deprived of protection and services until they "graduate" to adult criminal status by virtue of age, or by virtue of their alleged failure to benefit from a juvenile system of justice.

The extent and means by which the court can require parents to carry out its orders pertaining to delinquent children will not be explored here. New legislation may be required in some states, but at least one-third of the states have statutes which allow orders to be issued against parents or other adults, requiring them to provide services, to cooperate with the court, or to refrain from certain behavior damaging to the child.[178] Such laws often decree that the court may provide necessary treatment when the parents refuse to do so. Such an order was used in a case where a judge believed that a juvenile on probation needed periodic counseling by a social work agency. The child's mother, a Jehovah's Witness, felt that the Bible was the only assistance her child needed. The judge issued a protective order,[179] "and the mother complied without contention."[180]

The *Gault* decision established that children are entitled to the essentials of due process in juvenile court adjudications of delinquency. Although statutory and case law established the same rights for persons accused of being mentally ill in the late 1860's, it took another one hundred years before the law began even to talk in terms of a "right to treatment."[181] It should be obvious by now that neither children nor society can wait another one hundred years for the establishment of a right to treatment[182] for juvenile delinquents.

178. Colo. Rev. Stat. Ann. § 22-3-10 (Supp. 1967); Ga. Code Ann. § 24-2421(d) (1959); Hawaii Rev. Laws § 571-48(7) (1968); Idaho Code Ann. § 16-1814(5) (Supp. 1969); Iowa Code Ann. § 232.34.6 (1969); Mich. Stat. Ann. § 27.3178(598.18)(i) (1962); Minn. Stat. Ann. § 260.185(f) (1959); Nev. Rev. Stat. § 62.200(d) (1967); N.H. Rev. Stat. Ann. § 169:17-a (1964); Ohio Rev. Code Ann. § 2151.359 (Page 1968); Okla. Stat. Ann. tit. 10, § 1116(a)(1) (Supp. 1970); Ore. Rev. Stat. § 419.507(1) (1969); S.C. Code Ann. § 15-1095.20(d) (Supp. 1968); S.D. Code § 43.0328 (Supp. 1960); Utah Code Ann. § 55-10-100(13) (Supp. 1967); Wis. Stat. Ann. § 48.34 (1957), as amended, (Supp. 1970); Wyo. Stat. Ann. § 14-109 (1965).

179. A protective order may set forth "reasonable conditions of behavior to be observed for a specified time by a person who is before the court and is a parent or other person legally responsible for the child's care . . . or respondent or both." N.Y. Family Ct. Act § 759 (McKinney 1963).

180. Dyson & Dyson, supra note 43, at 81.

181. The first legislation mentioning a "right to treatment" for the mentally ill was the Ervin Act in the District of Columbia. D.C. Code §§ 21-501 to 509 (Supp. III 1970). Section 9(b) provides that "any person hospitalized in a public hospital for mental illness shall, during his hospitalization, be entitled to medical and psychiatric care and treatment."

182. For articles discussing a right to treatment for juvenile delinquents, see Dorsen & Rezneck, supra note 94; Irving, Juvenile Justice—One Year Later, 8 J. Family Law 1 (1968); Kittrie, Can the Right to Treatment Remedy the Ills of the Juvenile Process?, 57 Geo. L.J. 848 (1969).