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THE JUVENILE COURT SYSTEM IN EVOLUTION

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The first juvenile court law was enacted almost 70 years ago. It had as its purpose the removal of children from the criminal courts. By providing a special court it was thought that the children would be protected from being stigmatized as criminals and traumatized by a highly formal and public trial.[1]

The juvenile courts, like all other social institutions, are subject to evolutionary change. A history of changing administrative forms, judicial roles, and attitudes toward due process of law lies between the establishment of the first juvenile courts and the recent decisions by the Supreme Court of the United States in two cases involving juvenile court procedure, *Kent v. United States*,[2] and *In the Application of Gault*.[3] Some people are concerned that these decisions, when considered with other developments (including state supreme court decisions) may represent a culmination—perhaps it may go even further—in an evolution stressing the opposite of the original goal. The fear is that these developments are bringing the juvenile courts closer to the criminal court model.

There appear to be three primary views of the situation: 1) The

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1. The distinction between the juvenile court and the criminal court is sometimes put as the difference between punishment (criminal court) and treatment (juvenile court); or between informality (juvenile court) and constitutional procedure (criminal court). But these formulations are inaccurate. Both the juvenile and criminal courts treat (*e.g.*, use probation) and punish (commit to an institution). Although there is greater informality in the juvenile court than in the criminal court, this is hardly a basic characteristic. The true distinction between the juvenile and criminal court proceeding is that the former endeavors to achieve a *non-criminal* procedure and effect, in marked contrast to the criminal court procedure, which attempts to arrive at a *criminal conviction*.

The Supreme Court of the United States made this clear in Kent v. United States, 383 U.S. 541, 554 (1966). It said:

> Juvenile court proceedings are designated as civil rather than criminal. The Juvenile Court is theoretically engaged in determining the needs of the child and society rather than adjudicating criminal conduct. The objectives are to provide measures of guidance and rehabilitation for the child and protection for society, not to fix criminal responsibility, guilt and punishment.

2. 383 U.S. 541 (1966).
3. 387 U.S. 1 (1967).

approach of the Supreme Court (which one might call "legalistic"), to the effect that the juvenile courts are to be looked at realistically; if the procedures are found to be unfair, procedural requirements must be tightened. 2) The old school, represented by the Arizona Supreme Court in the *Gault* case, maintaining that the courts are informal, the judge (or the probation department) knows best and should not be restricted, since he is doing his best for the child. 3) The no-nonsense, "young hoodlum" school, which considers the juvenile court to be a menace to the community because it is too lenient with young hoodlums better dealt with in a criminal court.

I suggest that there is also a fourth school of thought, believing that the concept represented by the Arizona Supreme Court is wrong; that the "young-hoodlum" criticism of the juvenile court is wrong; and that the Supreme Court, and most other courts, are going in the right direction, but that changes other than those the courts can make are needed. I associate myself with this last school.

This article will deal first with the court cases concerning juvenile court procedure, (both the United States Supreme Court and the state supreme court cases); secondly with the punitive school; and finally with the changes that I suggest are needed but which are not reflected in any of the foregoing positions.

Evolution in the Courts—The Paternalistic and Legalistic Schools

From the beginning the state supreme courts have held that the juvenile court procedure is valid, though not affording a child the procedural rights of a defendant in a criminal trial, because the adjudication was non-criminal.[4] Each juvenile court statute declared that the adjudication was non-criminal and that it did not constitute a conviction, no matter how serious the underlying violation that brought a child into the court as a delinquent.[5] This view was generally deemed the desirable one from the point of view of social workers, including

4. *Ex parte* Daedler, 194 Cal. 320, 228 P. 467 (1924); Nicholl v. Koster, 157 Cal. 416, 108 P. 302 (1910); Cinque v. Boyd, 99 Conn. 70, 121 A. 678 (1923); *In re* Sharp, 15 Idaho 120, 96 P. 563 (1908); Lindsay v. Lindsay, 257 Ill. 328, 100 N.E. 892 (1913); Marlowe v. Commonwealth, 142 Ky. 106, 133 S.W. 1137 (1911); Robinson v. Wayne Circuit Judges, 151 Mich. 315, 115 N.W. 682 (1908); State v. Buckner, 300 Mo. 259, 254 S.W. 179 (1923); *Ex parte* Loving, 178 Mo. 194, 77 S.W. 508 (1903); State v. Burnett, 179 N.C. 735, 102 S.E. 711 (1920); *Ex parte* Powell, 6 Okla. Crim. 495, 120 P. 1022 (1912); Hills v. Pierce, 113 Ore. 386, 231 P. 187 (1924); Commonwealth v. Fischer, 213 Pa. 48, 62 A. 198(1905); Mill v. Brown, 31 Utah 473, 88 P. 609 (1907).

5. Of course, some of the statutes excluded the serious offenses. However, even in those jurisdictions in which the serious offenses are under the juvenile court's jurisdiction all juvenile proceedings are termed non-criminal without regard to the nature of the underlyng activity.

probation officers. The position of the social workers has been—and is—that the law should merely supply a framework in which casework may operate freely. After all, the juvenile court proceeding is "on behalf of the child," and not against him, as is the case in criminal prosecutions.

But under the protection of the early state court decisions, and imbued with confidence evidently resulting from the early decisions that went all out to uphold the juvenile courts, some judges adopted high-handed practices. They accepted petitions that were vague and non-specific, held hearings that were not only informal but casual, and decided cases on evidence that was mainly or entirely hearsay. Children were being committed to training schools for substantial periods.

Further, the adjudication, though non-criminal, could nevertheless bar the child in adult years from a job, enlistment in the armed forces, or other privileges and opportunities.

> This reality of the consequences of disposition, as well as the closed hearing which little regarded the rights of the child or his parents, led to the charge that the courts were a "star chamber" the fifteenth and sixteenth-century English court typifying arbitrary and brutal proceedings. The charge was . . . that the rights of children and families were either ignored or treated cavalierly.[6]

The earliest Supreme Court decision dealing with the juvenile courts, *Gallegos v. Colorado*,[7] was handed down in 1962. The *Gallegos* case involved two juveniles who followed a man into a hotel, assaulted him, and stole $13. One of the juveniles—Gallegos—was picked up by the police. He admitted the robbery. When the victim died, an information charging first degree murder was returned against Gallegos, and he was found guilty. The crucial evidence was a formal confession signed by Gallegos "after he had been held for five days during which time he saw no lawyer, parent, or other friendly adult."[8] The boy's mother had tried to see him in the detention home the day after his arrest, but permission to visit was denied. That same day he was examined by the police and made a confession which was recorded in longhand. The formal confession came a few days later.

Reversing the conviction, the Supreme Court condemned confessions obtained by "secret inquisitorial processes" as suspect, being conducive to the use of physical and psychological pressures. The Court cited the length of the questioning, the use of fear to break a suspect,

6. Rubin, *Trends in Juvenile Court Philosophy*, SOCIAL WORK April, 1962.
7. Gallegos v. Colorado, 370 U.S. 49 (1962).
8. *Id.* at 50.

and the youth of the accused as illustrations of circumstances on which cases of this kind turn. It said:

> There was no evidence of prolonged questioning. But the five-day detention—during which the boy's mother unsuccessfully tried to see him and he was cut off from contact with any lawyer or adult adviser—gives the case an ominous cast. The prosecution says that the boy was advised of his right to counsel, but that he did not ask either for a lawyer or for his parents. But a 14-year-old boy, no matter how sophisticated, is unlikely to have any conception of what will confront him when he is made accessible only to the police.[9]

The prosecution had argued that the youth and immaturity of the petitioner and the five-day detention were irrelevant because the basic ingredients of the confession came tumbling out as soon as Gallegos was arrested. The Court rejected this position, stating that it would be in callous disregard of the boy's constitutional rights.

> A lawyer or an adult relative or friend could have given the petitioner the protection which his own immaturity could not. . . . The youth of the petitioner, the failure to send for his parents, the failure immediately to bring him before the judge of the Juvenile Court, the failure of these combine to make us conclude that the formal confession on which this conviction may have rested was obtained in violation of due process.[10]

The Supreme Court clearly is saying that the child in juvenile court—or in any court—needs more, not less protection than an adult. The child's immaturity makes him less able than an adult to protect himself while in the hand of the police or in court.

The police, who presumably do not approve a decision of this kind, can argue that it intrudes on the informality of the juvenile court concept. Some judges and social workers argue similarly, saying that the adult charged with crime is protected by the constitution because if convicted he is going to be punished. It is perhaps not surprising that such an argument is made not only by police but by people from the juvenile court field. It is precisely reminiscent of the concept of the court held by social workers and noted earlier—that the court is, and should be, a framework in which casework and treatment may operate freely.

The answer to that argument came in the next juvenile court

9. *Id.* at 54.
10. *Id.*

case decided by the Supreme Court, *Kent v. United States*,[11] decided in 1966. In brief, and perhaps a bit oversimplified, the Court's answer is that the so-called non-criminality of the juvenile court may be a fiction. The Court will examine the situation, and to the extent that it is a fiction, will ignore the fiction and deal with the reality. This cuts through the whole history of the juvenile court.

Kent, 16 years of age, was taken into custody in the District of Columbia on a charge of rape. After interrogation by the police and detention at the Receiving Home, the juvenile court judge entered an order reciting that after "full investigation" he waived the jurisdiction of the juvenile court.[12] The District of Columbia juvenile court law states no criteria or procedure on waiver, merely requiring "full investigation."[13] Complying with only the bare requirements of the statute, the juvenile court made no findings and recited no reason for waiver of jurisdiction over Kent. Kent was transferred for criminal trial, where he was convicted and sentenced to 30 to 90 years in prison.

The Supreme Court held that this bare minimum compliance was not enough, and reversed the conviction. In addition to the "investigation provision," there must be "procedural regularity sufficient in the particular circumstances to satisfy the basic requirements of due process and fairness."[14] The Court held the following to be required elements of due process and fairness: a hearing; effective assistance of counsel; and a statement of reasons. The Court implied that, in general, juvenile courts should provide greater protection for the child—certainly not less than that afforded adults in criminal trials:

> It is inconceivable that a court of justice dealing with adults, with respect to a similar issue, would proceed in this manner. It would be extraordinary if society's special concern for children, as reflected in the District of Columbia's Juvenile Court Act, permitted this procedure. We hold that it does not.[15]

In one specific aspect the Court afforded the child more protection than an adult. It held that the counsel for Kent was entitled to access to the social records and probation or similar reports considered by the court. This position has not yet been taken with respect to pre-sentence reports in adult cases.

The Court dealt with the fictions involved in the juvenile court concept. The original laudable purpose of the juvenile courts was con-

11. 383 U.S. 541 (1966).
12. *Id.* at 546.
13. Juvenile Court Act, D.C. CODE ANN. § 11-914 (1951).
14. 383 U.S. at 561.
15. *Id.* at 554.

ceded. The Court, however, pointed out that recent studies and critiques "raise serious questions" as to whether actual performance measures up well enough to theoretical purpose to justify the immunity of the process from the constitutional guarantees applicable to adults:

> There is much evidence that some juvenile courts, including that of the District of Columbia, lack the personnel, facilities and techniques to perform adequately as representatives of the State in a *parens patriae* capacity, at least with respect to children charged with law violation. There is evidence, in fact, that there may be grounds for concern that the child receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children.[16]

Some juvenile court people are disturbed by this. Two principal grounds of concern are generally raised. One of these is the effect upon the fictions underlying the structure of the juvenile court. The second is that the procedural requirements intrude on the informality of the court. The best reflection of this latter point of view comes in the *Gault* case,[17] decided by the Supreme Court of the United States in 1967. The view of the Supreme Court of Arizona, which was there reversed, is a striking example of the old, paternalistic point of view.

The *Gault* case involved a delinquency charge against a 15-year-old boy. The boy and a friend were alleged to have made lewd telephone calls to a neighbor. Gault denied the charge, but was adjudicated delinquent and was committed to the training school. The complainant was not present at the hearing; the judge felt his presence was not necessary. The adjudication was based on the judge's statement that the boy had admitted making some of the obscene remarks. The parents never received a copy of the petition and they were not informed of the right to subpeona or cross-examine witnesses.[18]

The Supreme Court of Arizona upheld the adjudication and commitment, basing its argument on the ground that the juvenile court is non-criminal. Since the juvenile court is non-criminal, the Arizona Supreme Court reasoned, "Juvenile courts do not exist to punish children for their transgressions." Hence, "we do not think due process requires that an infant have a right to counsel."[19]

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16. *Id.* at 556. Compare, Ketcham, *The Unfulfilled Promise of the Juvenile Court,* CRIME AND DELINQUENCY April, 1961.
17. *In re* Gault, 387 U.S. 541 (1967).
18. *Id.* at 546.
19. 407 P.2d 760, 767 (Ariz. 1966).

One does not have to be a lawyer to see the awful *non sequiturs* involved. Of course the child was being punished—he was committed to a training school. It is hard to believe that a social worker or a probation officer thinks this is good practice from a social casework point of view. As a lawyer, it is ghastly to me that such use of the fiction of non-criminality can so mislead a state supreme court as to constitutional rights.

The Supreme Court of the United States properly reversed the adjudication. The reversal was on several grounds, including the failure to provide a detailed statement of the charge and the denial of the right to be represented by counsel. The Court also held that the defendant's rights to confront his accusers and his right not to be a witness against himself had been violated.[20]

The view of the Supreme Court was anticipated by some in the field. In 1962 the National Council on Crime and Delinquency (N.C.C.D.) published a book entitled *Procedure and Evidence in the Juvenile Court, A Guidebook for Judges.*[21] The Supreme Court of the United States had not at that time handed down any of its juvenile court decisions. There were, however, many decisions in state supreme courts, most of which were protective of the liberty of the child by requiring proper notice, sufficient evidence to establish jurisdiction, protection against hasty revocation of probation, and so on. N.C.C.D. supported this trend, saying:

> No judge need meet one demand of his court at the expense of another since each complements the other in furtherance of one objective—justice for children. If he fully understands both the legal and social nature of the court, if he carefully distinguishes between procedures of the adjudicative phase of the hearing and those peculiar to the dispositive phase, as he has so often been admonished to do, and if he observes the legal demands of due process, he will serve the court as its creators envisaged and as it deserves.[22]

In summary of the legalistic point of view, I would say that it is called forth by the reality, inherent in the trend of the decisions cited, that a paternalistic procedure, one that is informal and casual, has another face—it is also autocratic. The net result of the various decisions is that the law is developing precisely those procedures needed to prevent

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20. 387 U.S. at 548.

21. NATIONAL COUNCIL ON CRIME AND DELINQUENCY, PROCEDURE AND EVIDENCE IN THE JUVENILE COURT (1962).

22. *Id.* at 5. The N.C.C.D. supported this trend in other publications and in the Standard Juvenile Court Act and the Standard Family Court Act.

such autocratic handling. At the same time full play is allowed to all measures helpful to the child.

Some of the state legislatures are following the course of these decisions. Most juvenile court laws passed since 1959, the date of the latest edition of the Standard Juvenile Court Act, have drawn on the Standard Act to add substantially to procedural requirements, including the right to counsel and to assigned counsel. In 1959, the Standard Act called for a hearing on transfer of cases to a criminal court; the Supreme Court in the *Kent* case held this to be constitutionally required.[23]

This article has now dealt with two of the four schools of thought listed at the outset: the old paternalistic school, represented by the Arizona Supreme Court in the *Gault* case, and the newer legal school, represented by the Standard Juvenile Court Act as well as the recent decisions of the Supreme Court. I interpret these as placing needed restraints on the juvenile court and affording needed protections to prevent autocratic handling of the child.

No Mollycoddling—The Punitive School

The third school of thought is what has been called the treat-em-rough school, the back to the woodshed, no mollycoddling school. This school emphasizes punishment as a deterrent and a preventive for delinquency. The punitive school in general is represented by the police,[24] who usually support measures that would diminish the jurisdiction of the juvenile court.[25]

However, the punitive school is also reflected in the operations within the juvenile courts. A Montana judge received quite a bit of fame in recent years through the publicity given to his statements that he was reducing delinquency in his community by measures typifying this school.[26] For example, he favored release and publication of the names of juveniles, whereas most juvenile court laws and judges protect against

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23. Standard Juvenile Court Act § 13.

24. In a letter to all "enforcement officials" dated October 1, 1959, FBI Director J. Edgar Hoover suggested that the spotlight of public opinion be turned on those judges who "persist in endangering the public by unleashing young terrorists apprehended at great risk by law enforcement officers."

25. Typically, the proposals have included a reduction of the age jurisdiction of the juvenile court and a reduction of the range of the court's exclusive jurisdiction.

26. For example, an editorial from the Oklahoma City Oklahoman, June 23, 1964:

> Juvenile delinquency in the United States has risen 370 percent since 1940. But it isn't rising in Montana, and the rest of the country ought to be interested in examining a possible reason why. Montana dispensed with its juvenile courts two years ago and now deals in open court with all offenders regardless of their ages. . . . Juvenile felony cases in Montana are 49 percent below what they were under the former system. . . .

As quoted in the Statement by the N.C.C.D. on Open Hearings in Juvenile Courts in Montana 4 (1964) [hereinafter cited as Statement].

disclosure. He stressed punishment, rather than probation—in his publicity. This publicity had some effect upon legislation, particularly in several states that enacted statutes calling for release of information about individual delinquents.[27]

While the usual juvenile court law provides that juvenile court hearings shall not be open to the public, the Montana juvenile court law was changed in 1961 to authorize open hearings where the juvenile was charged with an act that would be a felony when committed by an adult.[28] A few years later it was claimed that in the judge's district juvenile felonies were down 49 percent, non-felony cases down 68 percent. The National Council on Crime and Delinquency examined the situation in that community and found the claimed reduction of delinquency was not established. Surprisingly, the claim of being punitive was not established either. The judge refused to give the facts to a staff consultant, but from another source it was found the adjudications had increased, not decreased.[29] The figures, however, were so small as to be insignificant altogether—less than fifty per year. And despite the judge's condemnation of "coddling," he had actually increased his percentage use of probation. Statewide, serious crimes by those under 18 had *increased,* not decreased. The same was true of three other states with new provisions for publicity in delinquency cases.[30]

It would be foolish to infer that the change in the law resulted in an increase in juvenile crime. It did not result in either an increase or a decrease—it simply did not touch the causes of delinquency. As the statement by the National Council on Crime and Delinquency said:

> [No court] can overcome the collective force of the myriad factors contributing to delinquency in its community—modern

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27. The three states referred to are Arizona, Florida and Georgia.

28. MONT. CODE §§ 10-611, -633 (1961). The amendments read as follows:
10-611 . . . Whenever the hearing in the juvenile court is had on a written petition charging the commission of any felony, persons having a legitimate interest in the proceeding, including responsible representatives of the public information media, shall not be excluded from such hearing.
10-633. Publicity forbidden. No publicity shall be given to the identity of an arrested juvenile or to any matter or proceeding in the juvenile court involving children proceeded against as, or found to be, delinquent children, except where a hearing or proceeding is had in the juvenile court on a written petition charging the commission of any felony.

29. The judge refused to give the figures. The local police department had no statistics upon which a drop in juvenile crime could be measured. However, figures were obtained from an "informed source" in the police department. The N.C.C.D. does not vouch for the accuracy of the figures. STATEMENT, *supra* note 26, at 7.

30. The serious crime rate in each of the states mentioned is taken from the FBI's Uniform Crime Reports. These reports make no attempt to segregate the offenses by juveniles. However, experience indicated that the juvenile crime rate will include 50 percent of the FBI's figure. STATEMENT, *supra* note 26, at 11.

> mobility, broken homes, bad housing, unequal employment opportunities, inadequate parents . . . the destructive example of corruption and sharp practice by leaders in government and business, deficiencies in the schools, etc., etc., ad infinitum.[31]

This Montana judge is not unique except in the publicity given to his claims. In practice, there are many judges, in both juvenile and criminal courts, who believe that it is useful to sentence at least in part for the deterrent effect on others. This is an illusion. Juvenile courts cannot solve the delinquency problem by their dispositions, whether oriented toward punishment or treatment. Delinquency is produced by the totality of onerous conditions in society, affecting different families and individuals in differing ways. Even theoretically, we are only groping for an explanation of the origins of crime and delinquency—but at least we do know the origins are all-pervasive. The problems thus are not to be resolved by any one program or agency and not by the dispositions of the juvenile court.

Does this mean that the juvenile court can make no contribution to the wider community, or that the juvenile court should shun publicity? No. The court *can* make a broad and significant contribution to the community, and even affect the attitudes of children. It can do this by contributing to a spirit in the community. If the image of the juvenile court is that of a vengeful policeman, a punitive substitute for the family, or an agency to supersede the family, that image will be felt in the community. It is such an image that is negative and destructive for the spirit of the community and for the spirit of the youngsters.

Instead, the spirit of the court ought to be one of fairness, concern for juveniles and their families, and an interest in helping them avoid delinquent patterns. Such a court needs not only a certain kind of judge, but also a certain level and quality in its staff, in its procedure, and in its related agencies—police, detention, shelter, and commitment or placement institutions.

One final word about the punitive point of view. The police are opposed to decisions of the courts placing any restraints upon them. There is hardly a police spokesman who in recent years has defended the decisions of the United States Supreme Court in the *Escobedo* and *Miranda* cases. Those police representatives who have spoken, and as any newspaper reader knows, they have been vociferous, have uniformly condemned the decisions as gravely hampering police work.

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31. STATEMENT, *supra* note 26, at 4. For an in-depth appraisal of the effect of publicity and the problems involved in the relationship between the juvenile courts and the press, see ADVISORY COUNCIL OF JUDGES, GUIDES FOR JUVENILE COURT JUDGES ON NEWS MEDIA RELATIONS (1965).

The police make a special argument against the application of those decisions to juvenile cases. They argue that the spirit of the juvenile court is informal, and that importation of criminal court ideas and procedure is harmful to the child. This beneficial informality, they say, should be carried over to the interrogation room.

How sharply that emphasizes the two sides of the old idea of the juvenile court—one side paternalistic, the other side autocratic! Like the Arizona Supreme Court in the *Gault* case, the argument is that as long as there is no law to violate, the confessions of juveniles and adults can be deemed to be voluntary. Hence, the proponents of this view do not wish to be saddled with procedural rules. Neither the Supreme Court of the United States nor most state supreme courts will buy that argument. I believe the adult interrogation cases will be applied to juveniles.

Peculiarly, although the paternalistic and punitive schools sound quite different, and in some things do differ—for example, how much jurisdiction the juvenile court should have—they are, paradoxically, much alike in practical application. The paternalistic school is much more punitive than it pretends, and the treat-em-rough school in practice is not much worse than the paternalistic judges, among whom one counts the judges who feel that a week or two in a detention home is a good lesson for the boy, even before he has been adjudicated a delinquent.

Other Changes Are Needed—The Fourth School of Thought

I have said that there is a fourth school of thought. The Supreme Court said in the *Kent* and *Gault* cases that we must see through the fictions and protect the child with necessary legal procedures. But the concept of the juvenile court is much more than legal procedures. It is a social concept proclaiming that the young offender should be protected against being treated as a criminal—*actually,* not in a fiction; that he should be treated, not punished—*actually,* not by a fiction that calls punishment "treatment." This is the point of view upon which I will elaborate, by means of the following incidents of juvenile court operations: 1) the definition of delinquency, and 2) disposition. Between jurisdiction and disposition, wherein lies the whole realm of procedure, constructive things can be done that, again, cannot be achieved by Supreme Court decisions. There is not, however, sufficient space to go into these areas in this paper.

The definition of delinquency

Most of the older juvenile court laws had a long list of activities which constituted delinquency.[32] The list included not only violations

32. S. Rubin, Crime and Juvenile Delinquency 49 (1961), listing twenty-five different definitions of delinquency found in the various statutes.

of law, but truancy, bad companions, willful disobedience of parents, being in pool rooms and other bad places, swearing, smoking, etc. Some juvenile court laws are still constructed along these lines. The Standard Juvenile Court Act would limit the concept of delinquency to violations of law.[33] Under the Standard Juvenile Court Act, and a number of state laws, especially the newer ones, only a child who violates a provision of the criminal code may be committed to a training school. The older laws are clearly more paternalistic. They do not distinguish among children. Their approach is that a child is a child and the court will do what is right in each individual case. On the other hand, the Standard Act refuses to put neglected children, or children whose misbehavior does not violate the law, in the same institution as children who are serious law violators.

This objective of separating the two types of children is not attainable by court decisions. It is attainable only by statutes. I believe that the separation approach is more protective of children than the old laws, and affords the kind of protection that no procedure can furnish. When the definition of delinquency includes a variety of conditions and behavior that are not violations of law, the definition does not serve to remove children from the criminal court to the juvenile court, but rather brings children into juvenile court who would not be answerable in the criminal court, or any court, for their behavior.

The insistence that delinquency be limited to violations of law is usually joined with the insistence that there be no exceptions to the violations over which the juvenile court has jurisdiction.[34] Those who favor defining many childish patterns as delinquency usually also favor excluding the serious offenses. Some exclude felonies carrying a certain penalty (for example, offenses punishable by imprisonment for ten years or more). In a few jurisdictions, any violation may be tried in a criminal court. In brief, do not bring naughty children into the juvenile court, since it is, after all, a court with many threatening and destructive aspects. On the other hand, do not exclude any serious offenders from the juvenile court, because as between the criminal and the juvenile court, the advantages of informality and lesser sentences are with the juvenile court.

I would like to see the juvenile courts be even more restrictive in this direction than the Standard Juvenile Court Act. Although under

33. The Standard Act does not use the term "delinquency." It achieves this result by providing that only children who are within the jurisdiction of the court because of a violation of law may be committed to a training school. *See* STANDARD JUVENILE COURT ACT § 24 [hereinafter cited as STANDARD ACT].

34. *See, e.g.*, the STANDARD ACT.

the Standard Act only a child law violator can be committed to a training school, the neglect subdivision includes jurisdiction over a child "who is beyond the control of his parent or other custodian."[35] Such jurisdiction is generally found in juvenile court laws, but is usually contained in the delinquency definition, and such children may be committed to training schools. The term "incorrigible" appears in some acts. The Standard Act position is that a child "beyond the control of his parent" should not be committable to a training school, but should be treated as are other neglected children.

The Standard Act Committee did a very wholesome thing in dealing with the child "who is beyond the control of his parent or other custodian" as a neglected child. The child has not committed a lawless or anti-social act. Unfortunately, the structure of the section separating law violators and neglected children is quite subtle. In fact, the import of separating the two groups into separate subdivisions does not become clear until the decree section, and even in that section the importance of the separation is not made explicit. Inasmuch as legislatures use the Standard Act as a guide in drafting their laws, it is too easy for "beyond the control of his parent or other custodian" to become a part of the delinquency rather than the neglect definition.

Why should it not be? As the comment points out, these are children "who are more at war with themselves than with the community."[36] But as we reflect on this, it is clear that these children are not as much at war with themselves as with their parents. It is equally valid, legally and behaviorally, to say that their parents (or other custodians) are at war with them. The Standard Act properly lays no blame in a situation where a child is "beyond the control of his parent." There are many instances in which the child beyond control is sound and healthy, and the lack of control is due either to attempts at excessive control, to highly disciplinary or authoritarian attitudes in control, or to some ignorance or neurotic need on the part of his parent that a normal child may naturally resist.[37]

We realize, then, that in some of these instances there is no occasion for court intervention, even though there is conflict between child and parent. At what point should the court intervene? I suggest that the wisdom evidenced by putting these situations in the neglect subdivision should be pursued a bit further. In fact, "beyond control," a very loose

35. STANDARD ACT § 8 (2) (c).
36. STANDARD ACT § 8, Comment 1.
37. *See, e.g.,* a case in which commitment of a girl on the petition of her mother was reversed, *In re* Sippy, 97 A.2d 455 (D.C. Mun. App. 1953). *See also* State *ex rel* Marcum v. Ferrell, 83 S.E.2d 648 (W. Va. 1954).

term, should not stand alone as a jurisdictional statement. A court should not take jurisdiction in such a case *unless a condition of neglect actually exists*. That is, if the child, despite the conflict and despite being beyond control of his parent, is attending school, has his needs taken care of, and is not becoming emotionally ill as a result of the conflict—why should the juvenile court take jurisdiction? Referral to voluntary services is as far as we should go. I would say the same for the provision giving courts jurisdiction over a child "whose environment is injurious to his welfare, or whose behavior is injurious to his own or other's welfare."[38]

Using voluntary services rather than compulsory court services will, I suggest, protect many children against needless court procedures and adjudication. At the same time, the authority of the court will not be inhibited where the situation is serious enough to warrant its intervention.

One state adopted something like the recommendation just outlined and which I had presented in another law review article several years ago.[39] The New York family court law, passed in 1962, provided that incorrigible or wayward children (it called them "persons in need of supervision"—"PINS") could not be committed to training schools.[40] The new law had some important results, one of which, seemingly directly attributable to this provision, was a marked reduction in training school commitments and in the training school population. Most people would have thought this was a good thing; but there was opposition at the outset and the opposition continued. It would have been fine if there had not been a change in the law until this natural experiment had been studied. Were the results good or bad? Unfortunately, no such study was made, the law was changed back, commitments rose again, and presumably, training school superintendents and some judges were happy again.

Dispositions

Although I have spoken of the close examination by the Supreme Court of the "fiction" of the non-criminality of the juvenile court, the fact is that the non-criminality concept is the single basic idea upon which the entire juvenile court procedure depends, not only for its informal procedure, but for its constitutionality. As indicated at the outset, the courts upheld the juvenile court procedure without requring the constitutional safeguards applicable to adults charged with crime, precisely because the statutes said that the procedure was not criminal. If the statute failed to so state, the laws would be invalid.

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38. STANDARD ACT § 8 (2) (b).
39. Rubin, *Legal Definitions of Offenses by Children and Youths*, 1960 U. ILL. L.F. 512.
40. Family Court Law, 1962, ch. 686, §§ 754, 756 (1962).

A good illustration of the stautory language used is the provision in the Standard Juvenile Court Act, the general equivalent of which is found in all juvenile court laws:

> No adjudication by the court of the status of any child shall be deemed a conviction; no child shall be found guilty or deemed a criminal by reason of adjudication. . . . The disposition made of a child shall not operate to disqualify the child in any civil service or military application or appointment.[41]

In order to support this provision, the juvenile court laws contain another provision to prevent information about the adjudication getting into the hands of those who would disregard the foregoing provisions. In the Standard Act this provision reads, in part: "All information obtained and social records prepared in the discharge of official duty by an employee of the court shall not be disclosed directly or indirectly . . . unless and until otherwise ordered by the judge."[42]

Is the fiction of non-criminality belied in practice? Are the directives not to deny privileges or rights to the child because of his adjudication obeyed? The answer is that they are widely disobeyed. Is the confidentiality of the record protected? The answer is that if the judge of the court refuses to give the information, the person with the juvenile court record, whether he is still a juvenile or now an adult, will be rejected out of hand or will have to overcome the assumptions against him by full disclosure. The effect is clearly the very opposite of what the juvenile court laws try to accomplish.

If one applies for a professional license—in law, medicine, or whatever—he will be asked about any juvenile court record, and required to make full disclosure. If the licensing agency considers the juvenile charge serious, the license may be denied. This is exactly the approach used in the case of a criminal court conviction. In an application for a job in private industry, the experience is the same—the juvenile court record must be disclosed in the same fashion as if it were a criminal court record.

Does government itself respect the juvenile court statute? The answer is, in the vast majority of instances, no. An applicant for a civil service job is asked, almost everywhere, about his juvenile court record. Is this a practical necessity? No—as demonstrated by the fact that the United States Civil Service Commission, in quite a radical breakthrough, revised its regulations in August of 1966 to benefit not only applicants

41. STANDARD ACT § 25.
42. STANDARD ACT § 33.

with an arrest record as adults, but also those with juvenile court records.[43] Previously, applicants were questioned about arrests as well as convictions. They were not, however, required to answer questions as to events that occurred prior to the age of 16. Now an applicant may not be asked about arrests, but only convictions; and as to juvenile court records, one may omit "any offense committed before the 21st birthday which was finally adjudicated in a juvenile court or under a youthful offender law."[44]

On the other hand, the Job Corps, established precisely for the assistance and retraining of underpriviledged children, will not admit a person until it has examined the juvenile court record. If access to the record is denied, the application will be denied.[45] The National Council on Crime and Delinquency, in 1966, made strenuous representations to the Job Corps to revise its policy so that it would not violate the requirements of the juvenile court laws. We said that in exceptional cases, if the youth would otherwise be rejected on the basis of the usual criteria, excluding the question of adjudication, and where the court's record might shed some light, application for information could be made to the court. We felt that courts would cooperate in such circumstances. But this was not acceptable and nothing was changed. The same situation exists with respect to military service when the enlistee has a juvenile court delinquency record.

The basic dispositions by juvenile courts are probation or commitment. What are the realities here? The facts are, in general, that in probation practice and institutional treatment, the facilities for juvenile courts are not particularily better than those for criminal courts. Sometimes juvenile court probation service and training school are superior to probation and correctional institutions for those convicted in criminal courts, and sometimes the juvenile facilities are inferior. By and large, they are comparable in training resources and the quality of personality treatment.

Still, this does not damage the *concept* of non-criminality. But that concept is decidedly damaged when a juvenile is committed to a correctional institution for adults, such as the reformatories. This happens frequently. In a few states the statutes actually authorize commitment to reformatories; but in even more states, a juvenile in training school who misbehaves may be transferred to a reformatory without any court hav-

43. Federal Personnel Manual System letter, August 15, 1966.
44. *Id.* Instruction regarding question 31.
45. Question 64 of the Job Corps Data Sheet requires a categorization of the applicant's behavior in terms of statutory types of criminal offenses, such as breaking and entering, armed robbery, grand larceny or battery. If this information is not provided by the Juvenile Court, the application is incomplete.

ing committed him there. Sometimes, in fact, the child who misbehaves in a training school and is transferred to the reformatory did not even break a law; he was originally committed to the training school not as a delinquent, but as a neglected child. Unfortunately, this procedure is quite possible under many juvenile court laws.

The United States Children's Bureau recommends that a juvenile court be authorized to waive these cases to criminal court as a partial "solution" to the incorrigible child in the training school.[46] It recommends authorizing waiver when:

> . . . the minor is under commitment to an institution or facility designed for the care and treatment of children for an offense which would be a crime if committed by an adult, and (b) the minor is alleged to have committed an act which if committed by an adult would be a crime.[47]

That is, the waiver would be authorized as to misdemeanors in the training school, whereas the Standard Juvenile Court Act, in pursuance of the policy narrowing exceptions to juvenile court jurisdiction, would limit transfers to felonies.[48] The N.C.C.D. disapproves this proposed loosening of waiver provisions. The problem is to improve training schools and enable them to handle difficult youngsters, not to avoid the problem by transferring them to penal institutions.

In a recent book, Dr. Seymour Halleck of Wisconsin writes:

> An especially frightening aspect of the juvenile court system is that a child confined to a juvenile institution can be transferred to an adult institution even if he has never committed a criminal act. Some children who are committed for treatment purposes become serious disciplinary problems within juvenile institutions. If they are felt to be unmanageable, they are likely to be transferred to state prisons and reformatories. As our juvenile institutions become overcrowded, the number of "unmanageable" delinquents transferred to reformatories or prisons is rapidly increasing. In a small state such as Wisconsin, for example, there are almost two hundred juveniles at the reformatory. Under the current system it is possible for a boy to be committed for truancy, spend many years in adult institu-

46. U.S. CHILDREN'S BUREAU, DELINQUENT CHILDREN IN PENAL INSTITUTIONS (1964).
47. *Id.* at 27.
48. STANDARD ACT § 13.

tions, come out a confirmed criminal and perhaps spend the major part of his life behind bars.[49]

I believe that when the Supreme Court decides the issue, it will condemn commitment of children to reformatories. But why do judges and administrators wait for the Supreme Court? We need these decisions of the Court precisely because, depressing as it is to acknowledge it, we do not usually move away from bureaucratic practices until someone tells us that we must.

But the general practice of commitment to training schools is an even larger problem. In recent years, some very important and almost inspiring things have been happening in the correctional field. One is the remarkable reduction in the use of the death penalty. Not many years ago, a hundred or more people a year were being executed. In 1965 it was seven; in 1966 it was one.[50] Another instance: at the end of 1961 there were 220,000 prisoners in the state and federal correctional institutions for adult criminals in this country. Every year since that figure has gone down, despite the increase in the general population, until at the end of 1965 it was 211,000.[51] For a number of states the downward trend began even before 1961.

Has the same downward trend occurred with respect to the population of the juvenile training schools? No. The population of juvenile training schools goes steadily upward. According to statistics published by the United States Children's Bureau, there were 44,100 children in public training schools for delinquent children on June 30, 1964.[52] This was an increase of over four percent from 1963. This particular increase was explained by inclusion of reception and diagnostic centers and some additional local schools. In 1963, the number of children in the institutions had decreased about one percent from the previous year. This was the first decrease in the eleven year history of the reporting plan. But evidently the decrease resulted from the increase in diagnostic and reception centers, which were holding substantial numbers of children who would otherwise be in the training schools. Hence the change in 1964 to include the populations of reception and diagnostic centers, and, of course, the population figure went up again. The figures in brief are: 1958, 36,000 children; 1962, 39,000 children; 1964, 44,000.[53]

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49. S. HALLECK, PSYCHIATRY AND THE DILEMMAS OF CRIME (1967).
50. Dep't of Justice News Release, March 15, 1967. *See also* DEP'T OF JUSTICE, NATIONAL PRISONERS STATISTICS BULL. No. 41, EXECUTIONS, 1930-1966 (1967).
51. DEP'T OF JUSTICE, BULL. No. 40, NATIONAL STATISTICS 12 (1965).
52. U.S. CHILDREN'S BUREAU, STATISTICS ON PUBLIC INSTITUTIONS FOR DELINQUENT CHILDREN 1964 (1965).
53. *Id. See also* the 1958, 1962, and 1964 reports.

Presumptively, the trend is a bad one. As I have said, I do not see how the United States Supreme Court or state court decisions will help regarding this problem. Conceivably, however, they may help in reducing the number of juveniles in reformatories, who are not even included in the above statistics.[54] The trend can be reversed. The State of New York stumbled on an important factor, cited earlier, and was so frightened, or at least some judges and training school superintendents were, that it pleaded for and obtained the restoration of the old style legislation.

This then, is the concept of the juvenile court that I believe should be the aim: very simply, a court that strives to achieve in reality the concept of non-criminality that is the foundation of the juvenile court system. I have used as illustrations first, the definition of delinquency, and second, aspects of the decree, or disposition. Between these are the many procedural aspects of the court which, if examined in similar detail, would show rich fields for the concept, and a great challenge in our work, including the police handling of juveniles and detention.

Does this strike one as leading away from the essential values of the juvenile court? I hope not. I think it is leading *toward* a concept of a juvenile court that we could not fully visualize without living through some misconceptions. I believe I can underscore the point by going back to just a little more history—to the state of things before there was a juvenile court.

Before juvenile courts were established, other courts were often dealing with children on a basis not too different from the juvenile courts today. Prior to disposition by juvenile courts, judges were committing children to industrial schools. They were doing so for behavior which later became the definition of delinquency; that is, not merely for violations of law but for waywardness of the kind found in most juvenile court laws today.[55] "PINS"—the New York term—is not an innovation at all; it harks back to the law before the earliest juvenile court law. As for procedure, juveniles were being dealt with informally (that is, without a jury) also before this century; and the procedures were upheld under the same principle that today supports the juvenile court idea—that the state, as *parens patriae,* stands *in loco parentis* to the child, in default of proper parental care.

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54. In 1960 there were over 28,000 youths under 21 years of age in reformatories and prisons. Over 5,000 of these were under 18 years of age and almost 150 were 14 and under. At least 500 and possibly 1,000 youths are in penal institutions today who have neither been charged with nor convicted of a crime.
U.S. CHILDREN'S BUREAU, DELINQUENT CHILDREN IN PENAL INSTITUTIONS (1964).
55. F. SUSMAN, LAW OF JUVENILE DELINQUENCY 21-22 (1959).

Before the Chicago juvenile court law—the first in this country—was ever conceived, a California court upheld a juvenile proceeding under an 1858 statute with the following words:

> The action of the police judge here in question did not amount to a criminal prosecution, nor to proceedings against the minor according to the course of the common law in which the right of trial by jury is guaranteed. The purpose in view is not punishment for offense done, but reformation and training of the children to habits of industry with a view to his future usefulness when he shall have been reclaimed to society, or shall have attained his majority.[56]

If in the 19th Century we were living with a fiction which the juvenile court movement sought to correct, I fear that for a long time the juvenile courts themselves were living much the same fiction. I have tried to suggest the direction in which we must go—I believe we have taken some steps in that direction—if we are to make the juvenile court fiction a worthwhile reality.

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56. *Ex parte* Ah Peen, 51 Cal. 280, 281 (1876).