Washington University Law Review

Volume 1958 | Issue 2

1958

Determination of Delinquency in the Juvenile Court: A Suggested Approach

Jack J. Rappeport
Pittsburgh University School of Law

WASHINGTON UNIVERSITY
LAW QUARTERLY

Volume 1958 April, 1958 Number 2

DETERMINATION OF DELINQUENCY IN THE JUVENILE COURT: A SUGGESTED APPROACH*

JACK J. RAPPEPORT†

In the course of the statutory growth and development of a new field of law—particularly a revolutionary one like that of juvenile court law, beginning with the statute setting up the first juvenile court in Cook County, Illinois—certain legal problems in the categories of constitutional protections, jurisdiction, proof, and disposition, have been disclosed.

Not only in its early years, but more recently, the juvenile court movement has been subjected to criticism because some of its advocates assert that the efficient administration of juvenile court hearings demands both a denial of procedural safeguards, and a scrapping of the customary rules of evidence. For, was not the original purpose of the juvenile court laws to give minors additional protection, rather than to take away the rights they already had?

If the federal and state constitutions guarantee a privilege against self-incrimination, a right to employ counsel, to face one's accuser, to summon witnesses, a trial by jury and an indictment in the case of criminal offenses, upon what legal principle are these safeguards withheld from juvenile offenders in a purely social trial? Is there really a basic conflict between the social and the legal approaches to delinquency? Are the constitutional guarantees afforded to an accused to be taken from the child if he is in court for protection and therapy, rather than retributive punishment, merely because a legislature has decided that crimes committed by juveniles are not criminal?

Should the causes for which children are brought before juvenile courts be considered as separate and distinct, or should they, as the

* The helpful comments of Professors Sheldon Glueck and William Edward McCurdy of the Harvard Law School in the preparation of this article are gratefully acknowledged.

† Assistant Professor of Law, Pittsburgh University School of Law.

prevailing tendency seems to be, be lumped together? How specific should the law be in defining the types of anti-social behavior which constitute delinquency?

It is proposed in the following pages to confine the discussion to problems of proof in the juvenile court, and to attempt to answer some of these problems with greater precision than heretofore.

There are three separate categories of causes for which children are brought before juvenile courts. They are: (1) dependency and neglect, essentially involving parental fault, and an absence of fault on the part of the child; (2) incorrigibility and waywardness, essentially involving fault on the part of the child, who has as yet not done anything socially objectionable, together with an absence of parental fault; and (3) delinquency, involving the commission of an act which would be considered a crime if committed by an adult. This third category (delinquency) may result from either of the first two categories, or a combination of both of them, or neither.

The first two categories are properly determined under custody principles, because they involve the care and control of the child. It follows that in these two categories, the intervention of the court is sought principally because of the situation in which the child finds himself. This situation, it is feared, could contain the seeds of future anti-social behavior, although specific acts of the child may, but need not, be involved. Here, both historically and analytically, the doctrine of parens patriae could properly obtain. This doctrine would be applicable as an extension of custody principles, because the child's need arises from the parents' failure to provide proper care. However, it is anomalous to apply the notion of parens patriae to a specific anti-social act, such as robbery, arson, rape and murder, which does not necessarily result from parental neglect.[1]

Attempts to paternalize the trial of juveniles have at times been misguided or confused by legislative and judicial lumping together of vastly different concepts.[2] This manifests itself in a grouping to-

1. While acts comprising delinquency ordinarily are manifestations of parental neglect, the atypical cases cited in the Glueck research indicate that this is not necessarily the case. Glueck & Glueck, One Thousand Juvenile Delinquents (1939). Cf. Glueck & Glueck, Unravelling Juvenile Delinquency (1950).

2. "Children charged with being delinquent are supposed to come before the court because they have, in some way, actively offended; children charged with being neglected or dependent come before the court because their welfare is jeopardized by improper surroundings." Flexner & Oppenheimer, Legal Aspect of the Juvenile Court, 57 Am. L. Rev. 65, 79 (1923). See also In re Knowack, 158 N.Y. 482, 487, 53 N.E. 676, 677 (1899).

The tendency to abolish the legal distinction between delinquency and neglect cases has in some states gone so far that the petition need only allege that the child comes within the purview of the Juvenile Court Act. See, e.g., Va. Code §

gether of criminal and noncriminal offenses under a single statutory definition.[3] The real problems of proof arise when it is attempted to apply the same standards of procedure and evidence to both.

It is the prevailing tendency of juvenile courts to view their proceedings as more in the nature of a clinical process than a technical trial. This has led to a preoccupation, not with whether the juvenile should be treated at all, but rather with *how* the juvenile should be treated.[4] The desire to achieve informality in their proceedings has impelled many juvenile courts to deny one or more of the procedural safeguards constitutionally guaranteed in adult criminal trials. Yet, to maintain the semblance of judicial proceedings, they have insisted that findings be based on "competent evidence."[5] However, the competent evidence has not been precisely defined. As a matter of fact, in practice the customary evidentiary rules are often greatly relaxed or discarded.[6] This may result in an unreliable determination of factual questions upon which the right of the state to intervene is based.

Over-protectiveness at the fact-finding level has in many instances resulted in a denial of procedural guarantees given adult defendants either by constitutional provision or by statute.[7] This has now be-

---

16.1-165(6) (Supp. 1956): ". . . statement of the facts which allegedly bring the child within the purview of this law." Va. Code Ann. § 1907 (Michie 1942), which was repealed by [1950] Acts 690, stated, "[I]t shall be sufficient for that purpose [of the petition] to aver that the child mentioned therein is 'dependent,' 'neglected,' or 'delinquent' as the case may be, and in need of the care and protection of the State in that (here, stating concisely the facts which bring said child within said terms as herein defined), ..." See also Okla. Stat. Ann. tit. 10, § 105 (1941).

3. See Petition of Morin, 95 N.H. 518, 68 A.2d 668 (1949), where the statute classified as a juvenile delinquent an infant below certain age who is "wayward, disobedient, or uncontrolled by his parent" or who "deports himself as to injure or endanger the health or morals of himself or others" or who "violates any law of this state or any city or town ordinance."

4. See dissenting opinion of Musmanno, J., In re Holmes, 379 Pa. 599, 610, 109 A.2d 523, 528 (1954), cert. denied, 348 U.S. 973 (1955).

5. Id. at 606, 109 A.2d at 526.

6. Ibid., where hearsay testimony regarding a subsequently repudiated confession was admitted when both confessor and confession were readily available.

7. Cinque v. Boyd, 99 Conn. 70, 121 Atl. 678 (1923) (right of accused to be confronted by witnesses against him); Ex parte Januszewski, 196 Fed. 123 (S.D. Ohio 1911); Wissenburg v. Bradley, 209 Iowa 813, 229 N.W. 205 (1930); Marlowe v. Commonwealth, 142 Ky. 106, 133 S.W. 1137 (1911) (right to appeal); In re Daedler, 194 Cal. 320, 228 Pac. 467 (1924); Wissenburg v. Bradley, supra; Commonwealth v. Fisher, 213 Pa. 48, 62 Atl. 198 (1905) (trial by jury); Ex parte Espinosa, 144 Tex. 121, 188 S.W.2d 576 (1945) (right to bail); People v. Dotson, 46 Cal. 2d 891, 299 P.2d 875 (1956); People v. Fifield, 136 Cal. App. 2d 741, 289 P.2d 303 (1955) (appointment of counsel); Rule v. Geddes, 23 App. D.C. 31 (1904) (notice of hearing); Commonwealth v. Fisher, supra; Mill v. Brown, 31 Utah 473, 88 Pac. 609 (1907) (arraignment, plea or warrant of arrest); Peo-

come a matter of acute concern to the courts. The appearance and meaning of a reformatory to a child may not correspond with the judicial label of "protection." Most reform schools are no more than junior prisons, with the same restraint of action as is found in a large measure of adult penal institutions, both state and federal.[8] Moreover, it is well known that when the child returns to society after a period of "treatment" in a reformatory, his opportunities are defi-

---

ple v. Silverstein, 121 Cal. App. 2d 140, 262 P.2d 656 (1953); In re Santillanes, 47 N.M. 140, 138 P.2d 503 (1943) (protection against double jeopardy); In re Dargo, 81 Cal. App. 2d 205, 183 P.2d 282 (1947); In re Santillanes, supra; People v. Lewis, 260 N.Y. 171, 183 N.E. 353 (1932) (necessity to warn against self-incrimination); Ex parte Naccarat, 328 Mo. 722, 41 S.W.2d 176 (1931) (constitutional guarantee against cruel and unusual punishment inapplicable); Ex parte Nichols, 110 Cal. 651, 43 Pac. 9 (1896) (act not unconstitutional as providing unequal punishment for the same offense, where detention of minor guilty of criminal offenses until majority might exceed the term of imprisonment for an adult convicted of the same offense); cf. 62 Stat. 858 (1948), 18 U.S.C. § 5034 (1952), note 30 infra. See also In re Holmes, 379 Pa. 599, 109 A.2d 523 (1954), cert. denied, 348 U.S. 973 (1955); Mont Appeal, 175 Pa. Super. 150, 103 A.2d 460 (1954) (privilege against self-incrimination); Rose v. State, 137 Tex. Crim. 316, 129 S.W.2d 639 (1939); State ex rel. Roberts v. Johnson, 196 Iowa 300, 194 N.W. 202 (1923) (necessity that information conform to the requirements of an indictment); People v. Lewis, supra; People v. Pikunas, 260 N.Y. 72, 182 N.E. 675 (1932) (rules of criminal procedure do not apply).

8. MacCormick, The Essentials of a Training School Program, in Matching Scientific Advance with Human Progress, National Council of Juvenile Court Judges, Pittsburgh Conference 26-33 (1950): "There are things going on, methods of discipline used in the state training schools of this country, that would cause the warden of Alcatraz to lose his job if he used them on his prisoners. There are practices that are a daily occurrence in some of our state training schools that are not permitted in the prisons or penitentiaries of the same states. There are many states in which the discipline is more humane, more reasonable, in the prison than it is in the state training school."

"In practice, these institutions range from a small number of schools in which extraordinary insight into the problems of children is manifest both in program and personnel, to some which can only be called junior prisons. Some still stress repressive and disciplinary features to an extent that in correctional efforts puts them behind the early children's refuges." Glueck, Crime and Justice 50 (1936). [M]ost damaging is the very fact of institutional routine, which, though less marked in industrial schools than in jails or prisons, is just as likely to result in a mechanization not conducive to healthy self-management on release." Id. at 51.

Intensive follow-up investigation of the products of one of the oldest and best reformatories revealed only 22% of 500 graduates did not continue in crime during a five-year test period following their release on parole. Perhaps many so-called reformatories do not materially reduce recidivism because in structure, regime and personnel, they are little more than traditional prisons. Glueck & Glueck, 500 Criminal Careers 314-15 (1930).

Cf. Bryant v. Brown, 151 Miss. 398, 424, 118 So. 184, 191 (1928) (dissenting opinion); State v. Ray, 63 N.H. 406 (1885).

nitely jeopardized.[9] Therefore, the unjust commitment of a child is likely to create a resentment which might manifest itself in the future in serious anti-social behavior.

Is there really a conflict between the clinical, or sociological, viewpoint, which sees the anti-social act as *symptomatic* of deeper personal disharmony, and the legalistic concept, which emphasizes proof of a particular criminal act? To what extent, if any, is a subordination of one concept to another, or adjustment between them, required? Actually, each has its particular function in all cases, regardless of the age of the offender. The legal approach is applicable to problems of proof. The sociological approach is applicable to problems of disposition, after the finding of guilt. Clinical studies, which do not readily lend themselves to the type of definition and proof necessary in a legal proceeding, may be used to implement individualized treatment, but delinquency must be first established in a fair legal process.[10]

9. In re Contreras, 109 Cal. App. 2d 787, 789, 241 P.2d 631, 633 (1952): "While the juvenile court law provides that adjudication of a minor to be a ward of the court shall not be deemed to be a conviction of crime, nevertheless, for all practical purposes, this is a legal fiction, presenting a challenge to credulity and doing violence to reason. . . . It is common knowledge that such an adjudication when based upon a charge of committing an act that amounts to a felony, is a blight upon the character of and is a serious impediment to the future of such minor. . . ."

Jones v. Commonwealth, 185 Va. 335, 341-42, 38 S.E.2d 444, 447 (1946): "The judgment against a youth that he is delinquent is a serious reflection upon his character and habits. The stain against him is not removed merely because the statute says no judgment in this particular proceeding shall be deemed a conviction for crime or so considered. The stigma of conviction will reflect upon him for life. It hurts his self-respect. It may, at some inopportune, unfortunate moment, rear its ugly head to destroy his opportunity for advancement, and blast his ambition to build up a character and reputation entitling him to the esteem and respect of his fellowman."

Waite, How Far Can Court Procedure Be Socialized Without Impairing Individual Rights?, 12 J. Crim. L., C. & P. S. 339, 344, (1921): "When we have minimized the stigma of an adjudication of delinquency in every way that kindly ingenuity may devise, it remains true that in the mind of the child, his family and his acquaintances who know about it, it is practically equivalent to conviction of a criminal offense. In the face of this fact legal theory should give way, and no less evidence should be required than if the hearing were a criminal trial."

10. Holmes' Appeal, 379 Pa. 599, 611, 109 A.2d 523, 528 (1954), cert. denied, 348 U.S. 973 (1955) (dissenting opinion): "There are two phases to every Juvenile Court proceeding: (1) Determination as to whether the juvenile involved is delinquent or not; (2) Decision as to whether the juvenile is to be returned to his home, placed in a foster home, or committed to a reform institution. It is the first phase with which we are most concerned in this appeal."

The majority in Holmes' Appeal upheld a juvenile judge's refusal to disclose a probation officer's report, in reliance upon the United States Supreme Court decision in Williams v. New York, 337 U.S. 241 (1949). However, the Williams case distinguished between the fact-finding and dispositional phases of every

The object of this article is to show that there is no inherent inconsistency between the juvenile court philosophy of correction in lieu of punishment on the one hand, and on the other, the equally sound proposition that when a child commits what would constitute a crime if the same act were committed by an adult, fair play requires that the child be afforded equal procedural safeguards.

GROWTH AND DEVELOPMENT OF THE JUVENILE COURT MOVEMENT

Discrimination between the treatment of adult criminals and young offenders capable of reformation is nothing new. As far back as the tenth century, Athelstane promulgated certain laws concerning the probation of young offenders, and the abolition of the death penalty for children.[11] However, it is somewhat discouraging to note that for many centuries thereafter, the history of the criminal law of England is one of steady retrogression. In the time of the Plantagenets, judges would stay sentence upon youthful offenders so that royal clemency, which was available in most cases, might be invoked. However, the humanity of the early middle ages declined so that by the time of the seventeenth century, an eight-year-old boy was hanged for arson, and in 1833, the death sentence was pronounced upon a child who broke a pane of glass and stole two pennyworth of paint.[12] Examples are not wanting of children in the United States receiving the same kind of treatment.[13]

---

criminal case. The Court pointed out that while constitutional guarantees and strict rules of proof were relevant on the narrow issue of guilt, the sentencing judge is not so narrowly confined in determining the type and extent of punishment after an adjudication of status, because possession of the fullest information possible concerning the defendant is highly relevant to appropriate sentencing.

11. Athelstane (924-939 A.D.) initiated two main changes in the law: (1) any thief over the age of twelve was criminally liable for his actions, and should not be pardoned; (2) no youth under sixteen years of age would suffer capital punishment. See Garnett, Children and the Law 146 (1911); cf. Wilkins, Leges Anglo-Saxonical ecclesiastical et civiles 70 (1721).

Garnett points out that Athelstane "not only attempted this reformation of juvenile offenders, but enacted in the Tenth Century substantial portions of the Children's Act, the probation of young offenders, the requirement of security from parents, the abolition of the death penalty, even to the very age specified in the Children's Act."

12. Blackstone, Commentaries *23-24 (1770); Garnett, op. cit. supra note 11, at 137; Waddy, The Police Court and Its Work 104-07 (1925). See State v. Adams, 76 Mo. 355 (1882).

13. State v. Fischer, 245 Iowa 170, 60 N.W.2d 105 (1953); Thomas v. Commonwealth, 300 Ky. 480, 189 S.W.2d 686 (1945); State v. Guin, 212 La. 475, 32 So.2d 895 (1947); Lou, Juvenile Courts in the United States 14 n.3 (1927) (thirteen-year-old hanged in New Jersey in 1828 for an offense committed when he was twelve).

At common law, the age of twenty-one had no significance at all with respect to age distinctions and criminal responsibility. Since criminal law is based on culpability, it would seem that there must be some age below which a person is incapable of having specific intent deserving of punishment. Infants were therefore divided into three classes for the purpose of establishing criminal responsibility, namely: absolute immunity, full liability, and conditional liability. There were those under seven years of age who were conclusively presumed to be incapable of committing a criminal offense. This "presumption" was really a rule of law that such child could not be convicted. Over fourteen, a minor was presumed to have an adult's mentality, and was placed in the same category. Criminal acts committed by children within the age group of seven to fourteen were presumed not to have been done with a criminal intention. This presumption, however, was rebutted by showing that a particular child was sufficiently vicious to have the necessary mens rea; a child proved to be capable of malice would be punished therefor. Such rebuttal would depend on the mentality of the child in each specific case. If a child were shown to have sufficient mentality for criminal intent, he could be found guilty of a crime.[14] As a result, we find some extreme cases at common law of eleven-year-olds being hanged for relatively minor offenses. Public opinion, which might not be reflected by the jury in a specific case, looked askance at the infliction of capital punishment on children.

Moreover, children of very tender years were incarcerated in adult criminal prisons.[15] This led to a persuasive argument for affording a different sort of *treatment* to juvenile offenders. Since there are separate jails for men and women, it was argued, separate jails should be maintained for juvenile offenders.[16] It was further contended that

14. By 1302 the English common law had adopted the Roman law concept of absolute immunity for children under the age of seven. Y. B. Rolls. 30 Edw. 1, 510 (1302), 24 Seld. Soc. 109 (1909); see Angelo v. People, 96 Ill. 209 (1880); State v. Aaron, 4 N.J.L. *232, 238-39 (1818) (absolute immunity); Heilman v. Commonwealth, 84 Ky. 57, 1 S.W. 731 (1886) (conditional liability); Gilchrist v. State, 100 Ark. 330, 140 S.W. 260 (1911) (full liability). See also Ludwig, Youth and the Law 12-36 (1955); note 25 infra.

15. "Children under ten years of age were arrested, held in police stations, and tried in the police courts. If convicted, they were usually fined and, if the fine was not paid, sent to the City Prison." Lathrop, The Background of the Juvenile Court in Illinois, in The Child, The Clinic, and The Court 291 (1925).

16. The first implementation of this idea was the establishment of the House of Refuge in New York in 1825, which was the first reformatory for juvenile offenders in the United States. Later Pennsylvania in 1828 followed suit. Other states established similar institutions. For a penetrating contemporary account of such institutions and the motives leading to their establishment, see de Beau-

a failure so to provide would result in the juvenile offender coming out worse than when he went in. These arguments are understandable and are today generally recognized.

As a matter of fact, beginning with the early nineteenth century, statutes were passed directed toward improvement of the treatment of juvenile offenders.[17] Toward the close of that century, a general movement was under way to humanize justice, culminating in the creation of the juvenile court. The law establishing the first juvenile court in the United States officially recognized that the issues presented in juvenile court require understanding, guidance and protection, rather than the stricter technical concepts of "criminal responsibility" and "punishment."[18]

However, much of the subsequent development of the juvenile courts, instead of concentrating on the post-trial disposition, centered upon the treatment of juvenile offenders in the pre-conviction stage. The thought was, and to a great extent still is, that they ought not to be tried before tough jurymen in the regular courtroom, where criminals are being led back and forth. It was also argued that children ought not to be subjected to the traumatic experience of a criminal trial, because shocking them would make the rehabilitation process more difficult. What was needed, it was urged, was a relaxation of the stricter technical criminal procedures in favor of a more homelike atmosphere, to acquire supervisory rather than penal control over the child, and institute corrective measures as early in the formative stages of his development as possible.

As a matter of history, where the welfare or the property of the child was threatened as a result of parental deficiency, the state intervened to supply the necessary parental care and control.[19] How-

---

mont and de Tocqueville, Du Système Penitentiare aux Etats Unis, passim (1833). This has been translated into English and German.

17. Mass. Laws 1877, c. 210, § 5; Mass. Laws 1872, c. 358; Mass. Laws 1869, c. 453, § 7; Mo. Laws 1897, p. 71; Mo. Laws 1825, p. 784; N.Y. Laws 1892, c. 217, § 7; R.I. Acts and Resolves 1898, c. 581, §§ 2, 3, 5, 7.

18. The first tribunal created to deal specifically with the problems of juvenile delinquency was the Juvenile Court of Cook County, Illinois, established in 1899. Ill. Laws 1899, p. 131. Section 2 provided: "In all trials under this Act, any person interested therein may demand a jury of six, or the judge of his own motion may order a jury of the same number to try the case." Perhaps this vestige of traditional criminal procedure was included to meet possible constitutional objections.

19. See McCurdy, Persons and Domestic Relations 791-807 (4th ed. 1952); Ex parte Badger, 386 Mo. 139, 226 S.W. 936 (1920) (parental rights, particularly those of the father, loomed large at common law).

Nevertheless, some examples exist of courts of chancery taking over the care of children, where the parents were deemed unfit by virtue of their conduct. See Wellesley v. Wellesley, 2 Bligh N.S. 124, 4 Eng. Rep. 1078 (Ch. 1828), where the

ever, English courts of equity never presumed to exercise jurisdiction where the only basis was violation of the criminal law.[20] It follows, therefore, that historically and analytically parens patriae extends to dependent and neglected, but not to delinquent, children. Yet, there is frequent reliance on the equity origins of the juvenile court.[21] The intervention of the state as pater patriae in the juvenile crime situation is founded on a judicial presumption of parental deficiency. Such a presumption, which arises automatically upon the child's commission of an act of delinquency, denies the possibility that a child may enjoy the best parental care and still, on some particular occasion, commit an act to which politically organized society objects. That this presumption is unwarranted has been recognized by some courts, which distinguish between parental neglect cases, where notice to parents is required, and cases where children are accused of delinquency, where such notice is not required.[22]

---

father was deprived of the custody of his children because of his immoral conduct. See also Shelley v. Westbrooke, Jacob 266, 37 Eng. Rep. 850 (Ch. 1821), wherein Shelley, the poet, was denied the right to provide for the education of his children because of his atheistic views.

20. See Lou, Juvenile Courts in the United States 7 (1927): "The view that chancery jurisdiction is not a factor in creating the juvenile court is correct as to the delinquency jurisdiction."

In Pound, Interpretation of Legal History 134-35 (1923), it is said: "Judicial empiricism has done for the common law most of what was done for the Roman law by juristic science. Usually it proceeds cautiously from case to case with an occasional creative generalization. But there are many cases of creative judicial action which have made new chapters in the law or new legal institutions almost at a stroke. . . . American law may furnish an example in the institution known as the Juvenile Court. This institution, which is making its way everywhere, is due to the initiative of a few definitely known socially-minded judges, who had the large vision to see what was required and the good sense not to be hindered in doing it because there had never been such things before. Today we find a legal basis for it in the jurisdiction of chancery over infants. We reconcile it with legal-historical dogmas on this basis. But the jurisdiction of equity over infants was not a factor in creating it. It arose on the criminal side of the courts because of the revolt of those judges' conscience from legal rules that required trial of children over seven as criminals and sentences of children over fourteen to penalties provided for adult offenders." See also Lindsey, The Juvenile Court from a Lawyer's Standpoint, 52 Annals 143 (1914); Mack, The Juvenile Court, 23 Harv. L. Rev. 104 (1909).

21. See note 7 supra; McCurdy, Persons and Domestic Relations 807-10 (4th ed. 1952).

22. Statutes now require notice in most jurisdictions. However, the distinction was made in cases where the statute was silent with reference to notice or service of summons.

Sinquefield v. Valentine, 159 Miss. 144, 132 So. 81 (1931), and cases therein cited, held that notice was required in neglect cases by the due process clause of the state constitution and the fourteenth amendment to the Federal Constitution.

The distinction between parental neglect and specific unlawful conduct which interferes with the rights of others is one which requires the application of different policies and principles. One of the important differences is the role of the juvenile court judge in each case. In a case where a parent or guardian is felt to be deficient, or acting contrary to the child's best interests, the court's unique function is to shield the child.[23] However, this is not so when the court is dealing with a juvenile accused of specific unlawful conduct. In this case, the court no longer acts as a buffer between the minor and persons with adverse interests.[24]

Criminal law concepts have also participated in the development and rationalization of juvenile court practices. The common law presumption of absolute immunity below the age of seven was based upon the absence of criminal intent. The non-criminal procedures followed in the juvenile court are sometimes explained as grounded upon an extension of the common law age of inability to possess mens rea to all persons who qualify as juveniles under the age limits specified in the statutes. Such rationale seems to be unrealistic, particularly when dealing with infants nearing maturity. Moreover, the analogy fails entirely when it is realized that at common law *no action* whatever was taken against offenders under seven years of age;[25]

Cf. Comment, 3 Miss. L.J. 342 (1930-31); Comment, 5 So. Cal. L. Rev. 161 (1931-32).

In Ex parte Naccarat, 328 Mo. 722, 41 S.W.2d 176 (1931), the distinction is taken between neglected children and delinquent children, notice to parent not being necessary in the case of delinquent children. Cf. Estate of Hampton, 55 Cal. App. 2d 543, 131 P.2d 565 (1942), where an award of custody of a child to an institution for the ultimate purpose of adoption, made without notice to parent under Kansas statute not requiring notice, was held void as a denial of due process. But see In re Roth, 158 Neb. 789, 64 N.W.2d 799 (1954) (notice necessary under Neb. Rev. Stat. § 43-206 (1943)).

23. See Wellesley v. Wellesley, 2 Bligh N.S. 124, 4 Eng. Rep. 1078 (Ch. 1828).

24. "The reason for a different procedure in neglect cases and delinquency cases is obvious. In a neglect case, only the proper custody and support of the child are involved; but in a delinquency case, the reformation of the child is also involved, and *the proceeding is between the state and the child.*" Ex parte Naccarat, 328 Mo. 722, 724, 41 S.W.2d 176, 177 (1931). (Emphasis added.)

25. The common law ignored offenders below the upper age limit of absolute irresponsibility. In the Eyre of Kent case, 24 Seld. Soc. 109 (1909), it was said that "an infant under the age of seven years, though he be convicted of felony, shall go free of judgment because he knoweth not of good and evil." As early as 1302, Spigurnal, J., stated that a child indicted for homicide committed before he was seven should not suffer judgment (Y. B. Rolls, 30 Edw. 1, 510 (1302)) illustrating that what is commonly referred to as a conclusive presumption is really a positive rule of law that an infant under seven cannot be convicted. Cf. State v. Peterson, 153 Minn. 310, 190 N.W. 345 (1922); People v. Wunsch, 198 Ill. App. 437 (1916).

whereas under the juvenile court laws, it can be argued that the sole purpose of the rationalized extension of the age of immunity is to subject the child to "treatment." Thus, the net effect of *applying treatment* in all cases is to eliminate the area of absolute immunity, as it existed at common law.

In emphasizing the fact that the proceedings of the juvenile court were not criminal in nature, it was said by an early advocate of this system,

> The problem for determination by the judge is not, Has this boy or girl committed a specific wrong, but What is he, how has he become what he is, and what had best be done in his interest and in the interest of the State to save him from a downward career.[26]

It is felt that the author of this statement never intended the parens patriae power over dependent and neglected children to extend to cases where there was merely a difference of opinion about the best course to pursue in rearing the child.[27] Nor in delinquency cases, where issues of fact are involved, was it intended to impose control over those who have committed no offense. Nevertheless, an unwarranted extension of the implications of this statement, as interpreted by many of the courts, has resulted in a denial of constitutional and procedural safeguards, and the abandonment of many of the usual rules of evidence.[28] Other courts have asserted that no less evidence should be required in a juvenile proceeding than if the hearing were a criminal trial.[29]

---

26. Mack, The Juvenile Court, 23 Harv. L. Rev. 104 (1909).

27. In re Contreras, 109 Cal. App. 2d 787, 241 P.2d 631 (1952). "The court cannot regulate by its processes the internal affairs of the home. Dispute between parents when it does not involve anything immoral or harmful to the welfare of the child is beyond the reach of the law. The vast majority of matters concerning the upbringing of children must be left to the conscience, patience and self-restraint of father and mother. No end of difficulties would arise should judges try to tell parents how to bring up their children." People ex rel. Sisson v. Sisson, 271 N.Y. 285, 287, 2 N.E.2d 660, 661 (1936).

The juvenile court law certainly does not contemplate the taking of children from their parents and breaking up family ties merely because, in the estimation of probation officers and courts, the children can be better provided for and more wisely trained as wards of the state." People v. Gutierrez, 47 Cal. App. 128, 130, 190 Pac. 200, 202 (1920). See also Lindsay v. Lindsay, 257 Ill. 328, 100 N.E. 892 (1913); In re Rinker, 180 Pa. Super. 143, 117 A.2d 780 (1956).

28. Mont Appeal, 175 Pa. Super. 150, 103 A.2d 460 (1954); Campbell v. Siegler, 10 N.J. Misc. 987, 162 Atl. 154 (1932); In re Holmes, 379 Pa. 599, 109 A.2d 523 (1954), cert. denied, 348 U.S. 973 (1955).

29. In re Lewis, 11 N.J. 217, 94 A.2d 328 (1953); In re Sippy, Mun. Ct. App. D.C., 97 A.2d 455 (1953); In re Contreras, 109 Cal. App. 2d 787, 241 P.2d 631 (1952); In re Green, 123 Ind. App. 81, 108 N.E.2d 647 (1952); In re Madik, 233 App. Div. 12, 251 N.Y.S. 765 (1931).

"Our activities in behalf of the child may have been awakened, but the funda-

The federal and state statutes[30] creating the juvenile courts in some measure deny certain state or federal constitutional safeguards guaranteed to a defendant in criminal proceedings. This position is justified by declarations that the proceedings are equitable, looking to the rehabilitation of the child, rather than criminal.[31] They provide in most instances for treatment in a reformatory or school rather than imprisonment.[32] And the civil disabilities which attach to adult criminals are inapplicable to juvenile offenders.

The more advanced type of juvenile court statute provides that neither the fact that the child has been before the court for hearing, nor any evidence given in the hearing, nor the record of conviction or disposition, shall be admissible against the child in any other proceeding for any purpose whatever, except in subsequent proceedings in the same court against the same juvenile under the act.[33] Never-

---

mental ideas of criminal procedure have not changed. These require a definite charge, a hearing, competent proof, and a judgment. Anything less is arbitrary power." People v. Fitzgerald, 244 N.Y. 307, 316, 155 N.E. 584, 588 (1927).

30. "A juvenile alleged to have committed one or more acts in violation of the law of the United States not punishable by death or life imprisonment, and not surrendered to the authorities of a state, shall be proceeded against as a juvenile delinquent if he consents to such procedure, unless the Attorney-General, in his discretion, has expressly directed otherwise. In such event, the juvenile shall be proceeded against by information and no criminal presentation shall be instituted for the alleged violation." 62 Stat. 857, 18 U.S.C. § 5032 (Supp. 1954). See also 62 Stat. 857, 18 U.S.C. § 5033 (1952): "Such consent shall be deemed a waiver of a trial by jury." Cf. 62 Stat. 858, 18 U.S.C. § 5034 (1952): "No juvenile can be confined for a period greater than would be possible for an adult convicted of the same offense."; Ga. Code § 24-2419 (1951).

31. See note 7 supra.

32. "Unless the institution is one whose primary concern is the individual's moral and physical well-being, unless its facilities are intended for and adapted to guidance, care, education and training, rather than punishment, unless its supervision is that of a guardian, not that of a prison guard or jailer, it seems clear a commitment to such an institution is by reason of conviction of crime, and cannot withstand an assault for violation of fundamental Constitutional safeguards." White v. Reid, 125 F. Supp. 647 (D.D.C. 1944).

33. "No adjudication under the provisions of this chapter shall operate as a disqualification of any child subsequently to hold office, or as a forfeiture of any right or privilege to receive any license, granted by public authority. No child shall be denominated a criminal by reason of such adjudication, nor shall such adjudication be denominated a conviction. . . . Neither the fact that a child has been before the Children's Court for hearing, nor any confession for hearing, admission or statement made by him to the court or to any officer thereof while he is under the age of sixteen years, if the court be a Domestic Relations Court or eighteen years, if the court be a Juvenile Domestic Relations Court, shall ever be admissible as evidence against him or his interest in any other court." S. C. Code § 15-1202 (1952). See also New York Children's Court Act § 45, which is practically identical.

But see In re Sengillo's Estate, 206 Misc. 751, 134 N.Y.S.2d 800 (1954) where

theless, school and military authorities are frequently given access to the record, and it has been held that a present defendant formerly involved in juvenile court proceedings may be questioned about the nature of the accusation, but not about the outcome.[34] Probation officers' reports as well as other records can be examined to determine present guilt.[35] The hearsay reports of social workers and officers of

---

a fifteen-year-old boy shot his father and was indicted by the grand jury on a charge of murder in the first degree. The indictment was dismissed after the criminal court directed that action be removed to children's court. The boy was subsequently adjudicated a juvenile delinquent. Later, the children's court held that the equitable maxim that no man shall be permitted to profit by his own wrong would bar the juvenile from taking a distributive share in his father's estate.

Moreover, when a juvenile court decision is appealed, the record is not only printed in the briefs, but later becomes a part of the appellate court decision. In view of this, it is submitted the frequent statement by these same appellate courts that the proceedings of the juvenile court are not a matter of public record becomes anomalous. See Dendy v. Wilson, 142 Tex. 460, 179 S.W.2d 269 (1944) (provisions do not afford sufficient immunity to avoid the constitutional prohibitions).

34. The Michigan statute, unlike the South Carolina statute (see note 33 supra), did not contain the phase "neither the fact that the child had been before the Children's Court . . . shall be admissible as evidence" but declared that "a disposition of any child under this chapter, or any evidence given in such case, shall not in any civil, criminal or any other cause or proceeding whatever in any court, be lawful or proper evidence against such child for any purpose whatever, except in subsequent cases against the same child under this chapter. . . ." Mich. Stat. Ann. § 27.3178 (584) (1943).

The court conceded that the juvenile court records were inadmissible and that the statutory aim was "to hide youthful errors from the full gaze of the public and bury them in the graveyard of the forgotten past"; nevertheless, a question to a fifteen-year-old prosecutrix in a rape prosecution whether or not she had been in trouble with juvenile authorities before was admissible, since it did not refer to disposition of child or any evidence given in any juvenile case and was competent on question of credibility. People v. Smallwood, 306 Mich. 49, 10 N.W.2d 303 (1943). To the same effect is State v. Guerrero, 58 Ariz. 421, 429, 120 P.2d 798, 802 (1942), interpreting Ariz. Code § 46-106 (1939).

The real reason for the decision in the Smallwood case was not the difference in the statutory language noted, but the desirability of inquiring into the unchaste tendencies of a young complainant in a rape case, which may affect her credibility. The court cited 1 Wigmore, Evidence § 196 (3d ed. 1940) which criticizes statutes that forbid subsequent use of the juvenile court proceedings in this type of case. Wigmore also favors using juvenile court records in sentencing of prisoners under "habitual offenders" statutes. See Mass. Ann. Laws § 119:60 (1957), precluding use of juvenile proceedings "except in subsequent proceedings for waywardness or delinquency against the same child, and *except in imposing sentence* in any criminal proceeding against the same person." (Emphasis added.)

35. The social workers' reports, like those of probation officers, are not necessarily objective, being a reflection of the background of the officer making them.

the court can be used, and most often without subjecting the reporter to examination under oath.[36] It should be noted that even when they are so subjected, the evidence is still hearsay.[37] Publicity is deemed injurious, and hearings may be closed, and the publication of the child's name without written permission of the court may be prohibited.[38] The infant may, even against his will, be subjected to physical and mental examination, and may be compelled to answer questions concerning his past and present crimes.[39] The court may commit the juvenile to long imprisonment for relatively minor things.[40] In the most extreme type of statute, the juvenile court may hear the evidence in the absence of the child.[41]

In addition, it must be borne in mind that because of the heavy workload, social investigations often tend to be superficial.

Utah Code Ann. § 55-10-26 (1953), provides that the "court . . . shall inquire into the home environment, history, associations, and general condition of such children, may order physical and mental examinations to be made by competent physicians, psychologists and psychiatrists, and may receive in evidence the verified reports of probation officers, physicians, psychologists or psychiatrists concerning such matters."

36. See, however, S.C. Code § 15-1137 (1953): "The probation officer, unless the court otherwise directs, shall make a prompt and thorough investigation before, during or after hearing concerning the history, character and circumstances of any case assigned to him. His reports shall be submitted to the court, and they shall include such facts as may aid the court in correcting conditions responsible for the appearance of the case in court and in planning for the future welfare of the parties involved." See also § 15-1134, providing that "The judge may take testimony under oath with regard to any matter concerning the court." It would thus appear that the parties are no longer entitled as a matter of right to examine the probation officer.

La. Acts § 13 (1924), empowered the judge to admit "any other character of evidence which the court in its discretion may deem proper," including testimony of the probation officers. See State in the Interest of McDonald, 207 La. 117, 20 So. 2d 556 (1944).

Recently trial courts have been reversed on appeal when probation officers' reports have been the sole evidentiary basis of an adjudication of delinquency. Ford v. State, 122 Ind. App. 315, 104 N.E.2d 406 (1952); In re Mantell, 157 Neb. 900, 62 N.W.2d 308 (1954).

37. S.C. Code § 256-159 (Supp. 1944) states: "Hearings shall be conducted in accordance with such rules as the Court may adopt, and the Court may consider and receive as evidence the result of any investigation had or made by the probation officer; provided, that either party shall be entitled to examine the probation officer under oath thereon."

38. See Ark. Stat. Ann. § 45-205 (1947).

39. ". . . and may compel children to testify concerning the facts alleged in the petition." Utah Code Ann. § 55-10-26 (1953).

40. Ex parte Nichols, 110 Cal. 651, 43 Pac. 9 (1896). Compare 18 U.S.C. § 5034, supra note 30.

41. Utah Code Ann. § 55-10-26 (1953): "The court may hear evidence in the absence of such children." On the necessity for the presence of the delinquent,

Where the statute provides either for the optional[42] or mandatory prosecution of the juvenile in criminal court for certain offenses,[43] it necessarily follows that the child is entitled to constitutional guarantees, when regular criminal procedures are invoked.[44] However, in all other cases, a clear distinction must be made between two types of constitutional challenges to the validity of the juvenile court statutes. On the one hand, there is the outright denial of constitutional safeguards protecting human liberties;[45] on the other, there are the frequent attempts to alter, through legislative action, the jurisdiction of constitutionally created courts. Additional jurisdiction may be conferred upon a constitutional court,[46] which may or may not affect civil liberties, or jurisdiction over juveniles may be transferred from a constitutional court where civil liberties are guaranteed to a legislative or constitutional court where they are not. This latter procedure involves the same infringement of constitutional guarantees as does an outright denial.[47]

---

the Utah court had said that while this section gives the court power to hear evidence in the absence of the delinquent, and, no doubt, in many instances it may be necessary to do so, yet it is better, at least in case of children over ten years of age, to permit them to be present and to be heard in their own defense respecting their custody, conduct and control. Stoker v. Gowans, 45 Utah 556, 563, 147 Pac. 911, 913 (1915). Cf. Weiss v. Ussery, 92 So. 2d 916 (Ala. 1957) (holding no authority to adjudicate delinquency when accused not present at hearing).

42. Mosely v. State, 1 Ala. App. 108, 56 So. 35 (1911); Hicks v. State, 146 Ga. 706, 92 S.E. 216 (1917); Childress v. State, 133 Tenn. 121, 179 S.W. 643 (1915).

43. In re Sanders, 53 Kan. 191, 36 Pac. 348 (1894); Ex parte Parsons, 232 S.W. 740 (Mo. 1921); Ex parte Cain, 86 Tex. Crim. 509, 217 S.W. 386 (1920).

44. Robison v. Wayne Circuit Judges, 151 Mich. 315, 115 N.W. 682 (1908); State v. Tincher, 258 Mo. 1, 166 S.W. 1028 (1914).

45. Tappan points out that protection of child from the unlawful acts of government officials is an essential duty of the courts under the parens patriae doctrine. "The presumption is commonly adopted that since the state has determined to protect and save its wards, it will not do injury to them through its diverse officials, so that these children need no due process protections against injury. Several exposures to court; a jail remand of days, weeks or even months; a long period in a correctional school with young thieves, muggers and murderers—these can do no conceivable harm if the state's purpose be beneficent and the procedures be 'chancery'! Children are adjudicated in this way every day without visible manifestations of due process. They are incarcerated. They become adult criminals, too, in thankless disregard of the state's good intentions as 'parens patriae.'" Tappan, Juvenile Delinquency 205 (1949).

46. Commonwealth v. Fisher, 213 Pa. 48, 62 Atl. 198 (1905). In this case, the Pennsylvania statute purported to confer jurisdiction on the constitutional court to sit as a juvenile court. One question involved was whether it was within the power of the Pennsylvania legislature to confer jurisdiction upon a constitutional court.

47. In re Mei, 122 N.J. Eq. 125, 192 Atl. 80 (1937) (illustrating an attempt to

The constitutionality of a deprivation of civil liberties may be justified in two ways. In all instances where the juvenile court jurisdiction is concurrent[48] or qualified,[49] and in some where it is exclusive,[50] the statutes are not considered as changing the substantive nature of the offense committed, but merely changing the procedures for trying infants accused of committing these crimes. The theory is that, notwithstanding the fact that the offense is still a crime, the defendants are susceptible to reformation because they are mentally and emotionally immature. Therefore, different procedures aimed toward anticipatory preventive treatment, rather than punishment, should be employed. Under this construction, when a juvenile offender is not apprehended or tried until he is beyond the age of juvenile court jurisdiction, criminal courts are held to be competent. In many instances where the juvenile court is given original and exclusive jurisdiction over juvenile offenses,[51] however, the statute purports to effect a substantive change in the nature of the offense itself. Al-

transfer jurisdiction from a constitutional court to a legislative court, which was held inapplicable to murder and other heinous crimes).

W. Va. Const. art. VIII, § 12 provides that the circuit courts "shall, except in cases confined exclusively by this constitution to some other tribunal, have original and general jurisdiction . . . [over] all crimes and misdemeanors." There is thus raised the same constitutional question presented in the Mei case, supra, and the Fisher case, supra note 46.

W. Va. Sess. Laws 1936, c. 105, as amended, W. Va. Code Ann. § 4904(50) (1955), relating to criminal jurisdiction of the juvenile courts, provides: "[E]xcept as to a violation of law which if committed by an adult would be a capital offense, the juvenile court shall have exclusive jurisdiction to hear and determine criminal charges . . . against a person who is under eighteen years of age at the time of the alleged offense." However, the Attorney-General of West Virginia has recently taken the position that the child welfare provisions of this statute do not preclude criminal prosecution of juveniles in the circuit courts or other courts having criminal jurisdiction. Thus construed, the statute does not interfere with the constitutional jurisdiction of the circuit courts. Op. Att'y-Gen. W. Va., Feb. 22, 1957.

48. Miss. Code Ann. §§ 7185-15 to -16 (1953); Ore. Comp. Laws Ann. §§ 93-603, 93-613, 93-614, 93-618 (1940).

49. Okla. Stat. Ann. tit. 10, §§ 102, 107 (1952) (providing for investigation by juvenile court judge of facts in case where child under sixteen is charged with crime, and remission to common law criminal court if judge finds child knew of the wrongfulness of the act).

50. Davis v. State, 21 Ala. App. 649, 111 So. 645 (1927); Lane v. State, 20 Ala. App. 192, 101 So. 521 (1924); State v. Adams, 316 Mo. 157, 289 S.W. 948 (1926); Strachner v. State, 86 Tex. Crim. 89, 215 S.W. 305 (1919); McClaren v. State, 85 Tex. Crim. 31, 209 S.W. 669 (1919).

51. State v. Dubray, 121 Kan. 886, 250 Pac. 316 (1926); White v. Commonwealth, 242 Ky. 736, 47 S.W.2d 548 (1932); Mattingly v. Commonwealth, 171 Ky. 222, 188 S.W. 370 (1916); State v. Malone, 156 La. 617, 100 So. 788 (1924); State v. Coble, 181 N.C. 554, 107 S.E. 132 (1921); Johnson v. State, 31 N.J. Super. 382, 106 A.2d 560, aff'd, 18 N.J. 422, 114 A.2d 1 (1955).

though the anti-social act would normally be denominated a crime, when the offender is within the juvenile age group it is no longer a criminal act but something called juvenile delinquency. Under the substantive construction, the criminal court never acquires jurisdiction, even though the defendant is no longer an infant when he is arrested.

The juvenile court statutes are generally silent on whether the jurisdiction of the court vests at the time the act is committed or at the time proceedings are instituted. Those jurisdictions which regard their statute as procedural would take the date when the proceeding is instituted as the basis for the juvenile court's jurisdiction.[52] On the other hand, jurisdictions regarding their statute as changing the substantive nature of the offense would have jurisdiction vest on the date of the alleged commission of the act of delinquency.[53]

Whether the juvenile statutes are regarded as procedural or substantive in nature, certain anomalies may arise when an accused is apprehended while still within the statutory age limits for juveniles, but is not finally tried until after reaching the upper juvenile age limit. In the first set of circumstances, the accused, while still a juvenile within the exclusive jurisdiction of the juvenile court, might have been erroneously tried for a felony in the regular criminal court. That court's judgment rendered without jurisdiction is wholly void, and subject to reversal and remand by the appellate court. At the time of the remand, the accused is above the upper statutory age limit for juveniles.[54] The second situation involves a delay in bringing the offender before the court for some reason, so that the hearing takes place after the upper age limit is reached.[55] In the third situation, although the offender is tried in the juvenile court, the decision on appeal is remanded for further proceedings after the offender is past the age limit.[56]

If the statute is regarded as merely procedural, the case could normally be heard in the criminal court. However, the court in the third situation may be required to release the offender under certain circumstances. This would occur if the particular jurisdiction is one that

52. Davis v. State, 21 Ala. App. 649, 111 So. 645 (1927); Burrows v. State, 38 Ariz. 99, 297 Pac. 1029 (1931); People v. Ross, 235 Mich. 433, 209 N.W. 663 (1926); Scopillitti v. State, 41 Ohio App. 221, 180 N.E. 740 (1932); Ex parte Albiniano, 62 R.I. 429, 6 A.2d 554 (1939); Dendy v. Wilson, 142 Tex. 460, 179 S.W.2d 269 (1944); State v. Melvin, 144 Wash. 687, 258 Pac. 859 (1927).

53. See note 51 supra.

54. This situation was presented in McClaren v. State, 85 Tex. Crim. 31, 209 S.W. 669 (1919).

55. Mattingly v. Commonwealth, 171 Ky. 222, 188 S.W. 370 (1916).

56. This possibility discussed in Dendy v. Wilson, 142 Tex. 460, 179 S.W.2d 269 (1944).

abridges or completely denies the constitutional privilege against self-incrimination, basing the denial on the fact that testimony taken in the juvenile court cannot be used elsewhere.[57] The resulting anomaly is that though the offense is so serious that it would be punishable by death or life imprisonment had it been committed by an adult, not only does the juvenile offender go unpunished, but he is not even subject to state control under a clinical approach.[58]

Where the juvenile statute is considered to be substantive, and the court's jurisdiction is continuing as to persons who no longer qualify as juveniles at the time of the hearing, the problem presented by the offender's remand to the juvenile court shortly after reaching adulthood is normally of little moment. In the first and second cases, the offender would be a statutory adult at the time of his first hearing before the juvenile court, as opposed to the third case where the court has affirmatively taken jurisdiction while the offender is still a juvenile. However, the courts in the substantive states make no distinction between "competence" and "jurisdiction," but hold that jurisdiction vests exclusively in the juvenile court upon commission of the offense.[59] Jurisdiction once having attached under the express provisions of many statutes, it may continue during the minority of the defendant.[60] Under these circumstances, the offender is still presum-

57. This anomaly was recognized in Dendy v. Wilson, supra note 56, which held that the rule declaring that evidence given in the juvenile court shall be inadmissible in another proceeding was not sufficient immunity upon which to deny the privilege against self-incrimination, unless the court under these circumstances was prepared to release the offender.

58. In McClaren v. State, 85 Tex. Crim. 31, 209 S.W. 669 (1919) the court said, "[I]t could hardly be seriously contended that one who had committed a heinous crime, as, for instance, murder, while 15 or 16 years of age, and who was not apprehended or indicted until past 21, would, by reason of such lapse, go absolutely unwhipped of justice, unless the language of the law were such that it was reasonably susceptible of no other construction than one which produced such results."

59. In Johnson v. State, 31 N.J. Super. 382, 106 A.2d 560, aff'd, 18 N.J. 422, 114 A.2d 1 (1955), contrary to the usual rule that—with the exception of contempt in facie curiae—jurisdiction is acquired by the filing of a pleading, the court held that not only are persons below a certain age subject to the exclusive jurisdiction of the juvenile court, but by the doing of the prescribed act, the juvenile court acquires jurisdiction. Cf. State v. Coble, 181 N.C. 554, 107 S.E. 132 (1921).

But see Ford v. State, 122 Ind. App. 315, 104 N.E.2d 406 (1952) to the effect that a juvenile court cannot acquire jurisdiction of an action to have a child made a ward of the court unless a summons is issued. See also State v. Ferrell, 140 W. Va. 202, 83 S.E.2d 648 (1944), reversing a summary commitment to the state school for girls based on an admission made during a hearing in which the party committed was merely a witness.

60. State v. Coble, 181 N.C. 554, 107 S.E. 132 (1921). Fla. Stat. Ann. § 39.02(5) (1957).

ably amenable to the special rehabilitative treatment of the juvenile court system. However, there are two situations in these substantive jurisdictions where the remand might prove troublesome. The first of these results from the fact that in some substantive states where minority and juvenility are not coextensive, the juvenile court's jurisdiction continues only as long as the offender qualifies as a juvenile.[61] Certainly, where the delay in bringing the offender before the court is attributable to the prosecuting officials, and perhaps in all of the three above mentioned hypotheses, the offender's discharge would be mandatory, no matter how serious the offense.[62] The second situation arises where the statute expressly giving the juvenile court exclusive jurisdiction has been construed as not applying to murder or other heinous crimes.[63] Therefore, a juvenile offender is tried, convicted, and sentenced by a regular criminal court. In a subsequent case,[64] former authorities are overruled and the criminal court is held to be without jurisdiction. The grounds for the reversal are that the exclusive jurisdiction conferred by the statute on the juvenile court was without constitutional limitation, regardless of the nature of the misconduct. Since judicial decisions are retroactive in their operation, the accused is remanded to the custody of the juvenile court, on the theory of a continuing jurisdiction.[65] The real difficulty would occur where the remand comes about when the offender is an older person, as explained below.[66] The alternative to a remand would be the unconditional release of the offender.[67]

There may also be a case where a juvenile offender is not appre-

61. Mattingly v. Commonwealth, 171 Ky. 222, 188 S.W. 370 (1916). Under some statutes, the upper age limit of juvenile delinquency is co-extensive with minority. Ark. Stat. Ann. § 45-221 (1947).

62. Mattingly v. Commonwealth, supra note 61. See also Williams v. Huff, 142 F.2d 91 (D.C. Cir. 1944) where arraignment of appellant was delayed nearly two years without explanation while he was confined to the reformatory. The court noted that proceedings against a child should not be delayed in order to try him as adults are tried, but that it would not assume that the delay in this case was for this purpose.

63. In re Mei, 122 N.J. Eq. 125, 192 Atl. 80 (1937).

64. State v. Monahan, 15 N.J. 34, 104 A.2d 21 (1954).

65. Johnson v. State, 31 N.J. Super. 382, 106 A.2d 560, aff'd, 18 N.J. 422, 114 A.2d 1 (1955). In State v. Smigelski, 137 N.J.L. 149, 58 A.2d 780 (1948), appeal dismissed, 1 N.J. 31, 61 A.2d 583 (1948), it was held, following the ruling in Mei, that the juvenile court had no jurisdiction in cases involving a child under sixteen years of age when the indictment was for murder. However, following the Monahan decision, the court set aside the conviction of Smigelski and turned him over to juvenile authorities. See In re Smigelski, Docket No. 147-52, N.J. Super. (L), April 9, 1954.

66. See text supported by note 71 infra.

67. State v. Spruell, Docket No. 147-52, N.J. Super. (L), April 9, 1954 (1952 manslaughter conviction set aside on the basis of State v. Monahan).

hended until long after the commission of the offense, and the offense is one to which a statute of limitations applies in the case of adult offenders.[68] However, the criminal statute of limitations is not applicable where the act is not a crime, and none of the juvenile court statutes have limitation periods. Under the procedural approach, there is no problem. Under the substantive approach, where jurisdiction to adjudicate delinquency does not extend beyond minority, this jurisdictional limitation will in itself operate in lieu of a statute of limitations. On the other hand, where jurisdiction is not thus limited, the anomaly becomes serious. While an adult criminal would not be subject to any action for an offense against which the statute of limitations had run, a man sixty-five years of age who was arrested for an offense committed as a juvenile, even though his conduct as an adult had been exemplary, would be subject to the jurisdiction of the juvenile court. It follows, therefore, that under these circumstances, if the same act were committed by an adult, and by a juvenile, not only does the juvenile court act not afford greater protection to the juvenile, but it would appear to discriminate against him.[69] It is conceded that this particular anomaly would not arise as to those

68. At common law, the expiration of time does not operate to bar the prosecution of a defendant for the commission of a crime. The matter is now usually covered by statute. Generally, an indictment for the acceptance of a bribe by a public official must be found and the information filed within six years. The period is usually three years in the case of other felonies, and one year for any misdemeanor. While in the majority of jurisdictions the statute of limitations is available as a defense only and is waived if not properly raised by the defendant, in some states the running of the statute is jurisdictional.

69. Another form of discrimination is imprisonment of a child until majority for a relatively minor offense, which if committed by an adult might result in a shorter period of incarceration. In Commonwealth v. Fisher, 213 Pa. 48, 62 Atl. 198 (1905), the offense was petit larceny for which adults were subject to a maximum jail sentence of two years. Under the "parens patriae" notion adopted in that case, if the offender was "treated" until majority, the period of incarceration would be seven years. See also Ex parte Nichols, 110 Cal. 651, 43 Pac. 9 (1896), where an adult could be punished for petit larceny by imprisonment for only six months, whereas the term of detention in reform schools for the same offense could be made greater by the judgment of the court, e.g., petitioner under 18 was committed to reform school "until he should be twenty-one or unless sooner and legally discharged." Held constitutional. Commitment to reform school is not imprisonment, object of statute was not punishment but reformation, discipline and education. It should be noted that in some jurisdictions the period of incarceration extends beyond majority. But see, 18 U.S.C. § 5034 (1952), which eliminates this form of discrimination. See also, Mill v. Brown, 31 Utah 473, 88 Pac. 609 (1907), setting aside a juvenile court judgment committing a thirteen-year-old boy who had pilfered a box of cigars (petit larceny) as a delinquent child to the State Industrial School "until he shall attain age of twenty-one years unless sooner released by board of control . . ." Id. at 475, 88 Pac. at 610.

types of criminal offenses to which the statute of limitations does not apply.[70]

However, other serious problems are presented in any attempt by a juvenile court to adjudge an older person a juvenile delinquent. Either the adult would have led a law-abiding life, or he would not. If he had led an exemplary life, there would be no purpose in reforming him. If, on the other hand, he had become a hardened criminal in the meantime, it would be impossible to reform him, for his recidivistic tendencies would have crystallized into chronic criminality. The only remaining reason for his being in juvenile court at all would be the sociological fear of a criminal trial acting as a traumatic experience which might have serious repercussions in later life. Such an argument, in the case of an older person, is patently absurd. Thus, the reasons underlying the paternalism of the juvenile court no longer being applicable, there would not seem to be any excuse for depriving the offender of his constitutional rights. In addition, there looms large the impotence of the juvenile court to implement appropriately an adjudication of juvenile delinquency on the part of an older person, except for a few jurisdictions.[71] Yet, if the acquisition of jurisdiction in the juvenile court is automatic and under the substantive approach continues indefinitely beyond majority, it is certainly logical to conclude that a person's age at the time of the proceeding is wholly immaterial to the question of jurisdiction. And if the jurisdiction of the juvenile court is retained beyond a certain age, it could well be the means of depriving persons of constitutional guarantees long after the justification for doing so had passed.[72]

---

70. There is no limitation in the case of some felonies, such as murder, the embezzlement of public funds, and the falsification of public records.

71. Colo. Stat. Ann. 22-8-1(3) (1953), provides that a child over sixteen whose delinquency is chronic or repeated, or would otherwise amount to commission of a felony, may be committed to any state institution as if convicted in criminal court for felony. In most cases, New York statutes do not deal with persons over twenty-one, but N.Y. Penal Laws § 2185 in some instances allows for the "care" of offenders from the ages of sixteen through thirty. Mass. Ann. Laws c. 279, § 33 (1957), provides as follows: "if committed to said reformatory as a delinquent child, he may be held therein for not more than two years . . . ."

72. To show how the deprivation of liberties in juvenile court could lead to depriving a large segment of our population of its constitutionally guaranteed liberties, see art. 3(a), Uniform Code of Military Justice, 64 Stat. 109 (1950), 50 U.S.C. 553 (1952), which authorized courts-martial of former servicemen for certain crimes committed during service and for which the accused could not be tried in any federal court. In United States ex rel. Toth v. Quarles, 305 U.S. 11 (1955), this act was declared unconstitutional, because it would deny a federal guarantee of trial by jury to the accused. Minton, J., dissenting, conceded that a civilian not under the jurisdiction of the Military Code has a right to be tried in a civil court for an alleged crime as a civilian, but argued that the defendant had a

However, the instances of adults coming before the juvenile courts are not confined solely to those who are, correctly or otherwise, thought to be in the jurisdiction of these courts because of offenses committed as juveniles.[73] Express provisions are to be found in the juvenile court statutes relating to adults who contribute to juvenile delinquency or dependency.[74] Adults may also appear before the juvenile court as witnesses. As has been noted by an advocate of the juvenile court,

> Logically and practically, it is not bound in law to observe the jury trial rules of Evidence. Nevertheless, it deals with adults in their relation to dependent and delinquent children . . . . For this reason, . . . it becomes a question how far the judge should consider himself morally bound to observe at least the fundamental framework of the jury-trial rules. There is contant pressure from lay-advisers to eliminate "technicalities." On the other hand, since the juvenile-court methods are due to be extended

---

conditional discharge only, and that the United States clearly reserved the right to charge and try him by court-martial for a crime committed which was committed while the defendant was in the status of soldier. Id. at 44 (dissenting opinion). This is analogous to the juvenile court's indefinite extension of jurisdiction. The majority rejected Minton's argument because it felt that through the instrument of "conditional" discharges, the military could extend its jurisdiction indefinitely, and deprive any veteran later accused of crime while in the services of a right to trial by jury.

In this connection it should be noted that the uncontrolled extension of juvenile court jurisdiction could be more flagrant than the extension of military jurisdiction, because not all segments of the population serve in the military and thus come under its jurisdiction, while, in addition to adults who come within the jurisdiction of the juvenile courts (see note 74 infra), everybody is at one time a juvenile, and might be later accused of offenses while occupying that status. Moreover, juvenility being a status, the legislature could constitutionally extend the juvenile court's jurisdiction, with its accompanying deprivation of liberty, simply by further raising the upper age limits for juveniles. To do so would contradict the principle that a legislature can only depart from a constitution by constitutional amendments. See Crane, J., dissenting in People v. Lewis, 260 N.Y. 171, 180, 183 N.E. 353, 356 (1932): "Can a child be deprived of his liberty, taken from his home and parents, and incarcerated in an institution for a term of years, by changing the name of the offense from 'burglary' or 'larceny' to 'juvenile delinquency'? If the Legislature can thus wipe out constitutional protection by changing a name, the substance and reality remaining the same, at what age of an accused does this power begin and end?".

73. "Acts or omissions of adults in regard to children come under legal cognizance in three classes of cases—first, those in which an adult is accused of a crime against a minor; second, those in which the adult has failed to fulfill a duty toward a minor; and third, those in which the adult is accused of causing, or tending to cause, juvenile delinquency or dependency." Flexner & Oppenheimer, The Legal Aspect of the Juvenile Court, 57 Am. L. Rev. 65, 82 (1923).

74. Ariz. Rev. Stat. Ann. § 13-822A (1956).

gradually to adult offenders in some fields, it is needful to build up a system that will not depart too radically from accepted traditions of criminal procedure.[75]

In some jurisdictions, however, the danger of the possible deprivation of civil liberties presented by the extension of the juvenile court system to adults has to some extent been alleviated. This has been accomplished by decisions[76] holding, in the absence of statutes, that the informality applied to the disposition of juvenile offenders is not applicable in the case of adults who contribute to juvenile delinquency. There are also express statutory provisions to the same effect.[77] Nevertheless, there are decisions which indiscriminately deny the applicability of the usual procedural safeguards to *anyone* appearing before a juvenile court.[78]

The Present State of the Law

Apart from litigation concerning protections ordinarily guaranteed by the state and federal constitutions, there is a paucity of statutes and decisions on the applicability of the rules of evidence in the juvenile court.

Statutory attempts have been made to delineate the boundary between traditional criminal court procedures and the informal hearing concept of the juvenile court. However, even these relatively bold statutes have been watered down by vagueness, and have varied greatly from jurisdiction to jurisdiction.[79] Consequently, broad pow-

---

75. 1 Wigmore, Evidence § 4d(4) (3d ed. 1940).

76. State v. Campbell, 177 La. 559, 148 So. 708 (1933); Mill v. Brown, 31 Utah 473, 88 Pac. 609 (1907).

77. La. Rev. Stat. Ann. § 13:1573 (1950), gives the procedure in cases of adults. "In the trial of adults coming within the jurisdiction of the juvenile court, the proceeding shall be in the same manner and subject to the same rules of procedure, evidence, etc., as the trial of an adult on a misdemeanor charge in any other court of criminal jurisdiction, except that an adult may waive his right to a public trial. Furthermore, whenever the judge, in his discretion, shall decide that the accused should be represented by counsel and that he is unable to procure or employ counsel, the court before whom he shall be tried shall assign counsel consisting of one or more members of the Louisiana Bar." See also Ariz. Rev. Stat. Ann. § 13-822B (1956).

78. Evans v. Rives, 126 F.2d 633 (D.C. Cir. 1942), where a juvenile court of Washington, D.C., handled an adult for failing to support his minor child in the same informal manner as it did for juvenile delinquency adjudications. See also Department of Pub. Welfare v. Barlow, 80 Ariz. 249, 296 P.2d 298 (1956).

79. Fla. Stat. Ann. § 39.09(2) (1957) ("Hearings shall be conducted by the judge without a jury, applying the rules of evidence in use in equity cases in the circuit courts . . . ."); Md. Ann. Code art. 26, § 59 (1951) ("Hearings shall be conducted in an informal manner . . . ."); Mo. Rev. Stat. § 211.020 (1949) ([City of St. Louis and counties with population over 50,000] "The practice and procedure prescribed by law for the conduct of criminal cases shall govern in all

ers of discretion have been vested in juvenile court judges to decide upon their own rules of procedure[80] with the inevitable "capricious results" of basing decisions concerning fundamental constitutional protections upon "day to day opinions."[81]

There are cases in which a court denies a particular right outright without affirming any other rights; however, the surrounding circumstances may be such that these decisions ought to be binding in future juvenile court cases only where the fact situations are similar. In *Commonwealth v. Fisher*,[82] for example, it appeared that a boy fourteen years of age was indicted for larceny and pleaded not guilty. After the indictment, the district attorney certified that a prosecution was not required, and the juvenile court committed the defendant to the House of Refuge. This case has been widely cited[83] for the proposition that by changing the nomenclature of the proceeding from a "criminal trial" to a "civil inquiry," the state may deprive a child of his liberty without a trial by jury, notwithstanding the fact that the constitutions of the United States[84] and of the state[85] provide for trial by jury in all cases except impeachment. However, the courts citing this case most often overlook the fact that the youth had counsel. Moreover, it is indicated in the opinion of the intermediate appellate court[86] that the defendant, through his attorney, waived his opportunity for a trial on the criminal side of the court.[87] There was an-

---

proceedings . . . in which the child stands charged with the violation of the criminal statutes of the state, and in such proceedings, the child, his parent, or any person standing in *loco parentis* to him may on his behalf demand a trial by jury. In all other cases the trial shall be before the court without a jury, and the practice and procedure customary in proceedings in equity shall govern, except where otherwise provided herein."); Mo. Rev. Stat. § 211.340 (1949) ([In counties with population under 50,000] "The court shall have power to devise and publish rules and regulate the procedure.").

Classification by counties does not render the act unconstitutional as a local or special act. The reasonableness of the classification is based on the theory that different conditions in the cities and rural communities call for different treatment. On the question of reasonable classification, see Ex parte Loving, 178 Mo. 194, 77 S.W. 508 (1903).

80. Utah Code Ann. § 55-10-26 (1953) provides, "The court may conduct the hearing in an informal manner, and may adopt any form of procedure in such cases which it deems best suited to ascertain the facts."

81. The language quoted is from Foster v. Illinois, 332 U.S. 134, 141 (1947) and Gryger v. Burke, 334 U.S. 728, 732 (1948) (dissenting opinions).

82. 213 Pa. 48, 62 Atl. 198 (1905).

83. In re Daedler, 194 Cal. 320, 228 Pac. 467 (1924).

84. U.S. Const. art. III, § 2.

85. Pa. Const. art. I, § 9.

86. Commonwealth v. Fisher, 27 Pa. Super. 175 (1903).

87. "If demand for a trial by jury was made in the court below, it does not appear upon the record. . . . In view of the provisions of the act, we can see no

other circumstance which contradicts the court's avowed intention, viz., not to punish the child, but merely to act in the manner of a kindly parent. This was a subsequent opinion written by Mr. Justice Brown, eight years later on the relation of the state to delinquent children, in which he stated,

> [T]he relation established by the order of the Juvenile Court . . . is really penal in its nature. . . . Such of these children as are "incorrigible" are quasi-criminals. They have been apprehended for wrongs committed by them. All of these children are, in effect, prisoners.[88]

There are cases where the courts deny one right but affirm other rights,[89] or merely qualify one right while affirming other rights.[90] Might not a decision that there is no necessity for warning as to self-incrimination be merely a qualification of the right, rather than a denial of the right itself? The *Lewis* case, which held that this warning was not necessary, is often cited[91] as authority for an outright denial of the privilege against self-incrimination. However, the California court, while holding that the warning is not necessary, has upheld the privilege where it was claimed.[92] In Texas, compelling juveniles charged with delinquency to testify against themselves was held error;[93] a subsequent holding, however, permitted a minor to testify against himself without being warned of his rights, while at the same time making a clear distinction between the failure to warn, and forcing the child to testify against himself.[94] If it is thought that a constitutional right should not be entirely denied, then it is felt that any qualification of the particular right is a dangerous judicial half-step.

There are also cases which deny or qualify a procedural rule only

---

difficulty whatever in a defendant, or anyone for him who may be interested in securing his constitutional right of trial by jury, having such a trial. Whenever evidence of the denial of such a right is brought to the attention of an appellate court, it will probably not be necessary to declare this act unconstitutional, in order to remedy the evil, but simply to return the case for a regular trial by jury, if it should appear that such a trial was denied." Id. at 182-83.

88. Black v. Graham, 238 Pa. 381, 385-86, 86 Atl. 266 (1913).

89. Holmes' Appeal, 379 Pa. 599, 109 A.2d 523 (1954), cert. denied, 348 U.S. 973 (1955); In re Contreras, 109 Cal. App. 2d 787, 241 P.2d 631 (1952); Dendy v. Wilson, 142 Tex. 460, 179 S.W.2d 269 (1944); Mill v. Brown, 31 Utah 473, 88 Pac. 609 (1907).

90. People v. Lewis, 260 N.Y. 171, 183 N.E. 353 (1932); Ballard v. State, 192 S.W.2d 329 (Tex. Civ. App. 1946).

91. Cf. Holmes' Appeal, 379 Pa. 599, 109 A.2d 523 (1954); Mont Appeal, 175 Pa. Super. 150, 103 A.2d 460 (1954).

92. In re Tahbel, 46 Cal. App. 755, 189 Pac. 804 (1920).

93. Dendy v. Wilson, 142 Tex. 460, 176 S.W.2d 269 (1944).

94. Ballard v. State, 192 S.W.2d 329 (Tex. Civ. App. 1946).

as it applied to a particular group within the purview of the juvenile court. Such treatment, although unequal, is not constitutionally objectionable if based upon reasonable classification. An example is the requirement of sworn testimony for an adjudication of juvenile delinquency. It would seem that many courts require that testimony in juvenile court given by adults be sworn, but excuse juveniles from the solemnity of being sworn because it is felt that the child does not appreciate the nature of the oath. A failure to perceive this distinction may give the impression of apparent inconsistencies regarding the swearing of witnesses as between the several jurisdictions and even within a particular jurisdiction. In *Mill v. Brown*,[95] for example, involving the question of parental rights, the statute in force[96] provided that a parent responsible for or contributing to the child's delinquency should be guilty of a misdemeanor, guilt to be determined by the juvenile court in a summary manner. That portion of the statute was held unconstitutional as denying a parent the right of a criminal trial. The court also indicated that witnesses should be examined under oath. This suggestion has matured into a definite requirement for sworn testimony in the decisions of other jurisdictions which have nevertheless recognized that there might be certain circumstances where the oath could properly be dispensed with.[97] However, in a subsequent Utah case[98] the appellate court held it was unnecessary to place children under oath where the juvenile court

95. Mill v. Brown, 31 Utah 473, 88 Pac. 609 (1907).

96. Utah Laws c. 117, § 7 (1905).

97. In re Ross, 45 Wash. 2d 654, 277 P.2d 335 (1954), where the lower court was reversed because of a failure of the juvenile court judge to comply with the request that all witnesses be sworn. The court says: "This statement is not to be tortured into a holding that all witnesses must be sworn in all juvenile court proceedings. It has long been recognized that informality and friendly discussion can, under many circumstances, attain the best results with juveniles and their parents." The court went on to say that at the hearing proper witnesses must be sworn and "at such hearings, the usual rules relative to the admissibility of evidence should be applied." Id. at 655, 277 P.2d at 336. To the same effect is In re Sippy, 97 A.2d 455 (Munic. Ct. App., D.C. 1953) (decision based on unsworn statements by the daughter alleged to be beyond the control of the mother, by the mother, the mother's attorney, and the social worker employed by the juvenile court).

98. State v. Christensen, 119 Utah 361, 227 P.2d 760 (1951), where the testimony concerned indecent advances made by a fourteen-year-old boy to girls in the lower grades of an elementary school. The juvenile court had apparently felt that the administration of an oath would merely serve to increase the children's anxiety without a corresponding increased impression on them of the duty to speak the truth. It is, nevertheless, felt that the girls' evidence, particularly inasmuch as it described acts of violence against themselves, was likely to be acute and reliable. The unsworn testimony of the fourteen-year-old accused was also admitted, but the court offered to swear him in, if counsel desired it.

deemed it advisable to allow children to testify without being sworn. This holding was made on the theory that although children did not understand the meaning of an oath because of their age, they were nevertheless likely to state the truth. On the other hand, some courts dispense with the necessity of an oath for everyone in their zeal to convince the world that the juvenile court judge and probation officer are friends of the offender, and not "the avengers of offended law."[99]

The judicial decisions[100] and express statutory provisions[101] which purport to require less rigorous rules of proof in a delinquency case than in a criminal trial for the same offense have, in the main, not only been vague, but have failed to distinguish between the probative force of the evidence on the one hand, and the degree of persuasion (which has no effect on the rules of admissibility) on the other. Some courts are fond of reciting from the celebrated *Lewis* case[102] that

> The customary rules of evidence shown by long experience as essential to getting at the truth with reasonable certainty in civil trials must be adhered to. The finding of fact must rest on the preponderance of evidence adduced under those rules . . . .

In addition, some statutes prescribe the rules of evidence used in equity cases,[103] others declare hearsay and opinion evidence to be admissible,[104] and still others are not confined to or bound by technical rules of procedure.[105]

Historically, there were two distinct systems of evidence, one at

---

99. State v. Scholl, 167 Wis. 504, 510-11, 167 N.W. 830, 832 (1918): "[W]e regard the proceedings taken as entirely sufficient, although no witness was sworn. The investigations of the probation officer and the facts brought out by the kindly questioning of the judge upon the hearing substantiate the fact of delinquency fully as well as sworn testimony." Even in this case the court stressed the fact that the only action taken was to place the delinquents on probation, and not to incarcerate them in an institution. In the latter case, sworn testimony would be proper before a final disposition.

100. People v. Lewis, 260 N.Y. 171, 183 N.E. 353 (1932); other cases in Annot., 43 A.L.R.2d 1128, 1138.

101. Fla. Stat. Ann. § 39.02(2) (1957); La. Rev. Stat. 13:1579(1) (1950); R.I. Stat. 14-1-30 (1956).

102. People v. Lewis, 260 N.Y. 171, 178, 183 N.E. 353, 355 (1932). See also Carmean v. People, 110 Colo. 399, 134 P.2d 1056 (1943) (rev'd for insufficiency of proof); Garner v. Wood, 188 Ga. 463, 4 S.E.2d 137 (1939).

103. Fla. Stat. Ann. § 39.02(2) (1957).

104. La. Rev. Stat. 13:1579(1) (1950). See McCormick, Evidence 458 (1954): "[T]he main justification for the exclusion of hearsay . . . . is the lack of opportunity for the adversary to cross-examine the absent declarant whose out-of-court statement is reported by the witness." The nature of the safeguard which hearsay lacks is indicated by Chancellor Kent in Coleman v. Southwick, 9 Com. L. R. 44 (N.Y. 1812).

105. R.I. Stat. 14-1-30 (1956): "The court may dispense with the strict rules of evidence."

common law, and one in chancery.[106] Nevertheless, the rules as to admissibility of evidence, which developed at common law, were always accepted in chancery.[107] Although within the common law courts themselves the general rules and tests as to admissibility and relevancy of evidence are the same in civil and criminal cases,[108] there may be a difference in their application.[109] In the quantitative evaluation of proof, as opposed to rules of admissibility, there are actual

---

106. 1 Wigmore, Evidence § 4 (3d ed. 1940).

107. "But it seems to have been conceded (or professed) from the first by the Court of Chancery (according to its maxim that Equity follows the Law) that it accepted the rules of the common law as to the admissibility of evidence. [Citing Henley v. Philips, 2 Ark. 48, 26 Eng. Rep. 426 (Ch. 1740).] Its own methods of taking evidence continued, as of course; but it recognized the bindingness of the common law rules, and professed to apply them except so far as the method of written deposition made a modification necessary. There was in truth comparatively little field for controversy . . . partly because criminal cases and many civil issues which might raise common questions of evidence were wholly withdrawn from the cognizance of chancery.

"The orthodox and broad proposition, then, always was and has continued to be that the rules of Evidence at common law trials obtained also in chancery." Ibid.

Wigmore points out, however, that there were actually two systems of rules, distinct in history and method. The four main differences may be summarized as follows: (1) In chancery, testimony was taken in writing, instead of orally. Cross-interrogatories had to be framed even before the interrogatories were known. Thus, cross-examination, which was axiomatic at common law, was effectively "emasculated" in equity. (2) Chancery courts enforced the tradition of the canon law, requiring two witnesses to every material allegation. This was rejected by the common law. See 7 id. § 2032. (3) Equity granted discovery before and during trial, whereas at common law, a party opponent could refuse to disclose any of his evidence at any time. (4) There were a few variant rules, which were really rules of procedure or of substantive law.

108. "[T]he occasional appearance . . . of the title 'Criminal Evidence' has tended to foster the fallacy that there is some separate group of rules or some large number of modifications. . . . The fallacy . . . has had repeatedly to be repudiated." 1 id. § 4.

109. A few rules of admissibility are modified or created for criminal issues due to the special considerations which may arise. For example, admissible but uncorroborated evidence may not be sufficient for a criminal conviction. According to the general rule, a defendant cannot be convicted on the uncorroborated testimony of an accomplice (one who can be charged and convicted of the same offense as that charged to the principal offender). Testimony given by an accomplice may be of questionable reliability because of selfish motives. Merely changing the nomenclature of the offense, and adjudging it juvenile delinquency rather than a crime, would scarcely serve to increase the reliability of the accomplice's testimony. But some courts have held otherwise. See State v. David, 226 La. 268, 76 So. 2d 1 (1954). Other rules of admissibility are applicable solely to criminal cases because they are the only cases where certain issues arise, for example, presumption of innocence, dying declarations, the rule of corroboration in perjury.

differences, both between the equity and common law courts and between civil and criminal trials within the common law courts. While the rule of proof in criminal cases is "beyond a reasonable doubt,"[110] a mere "preponderancy of the evidence" suffices for civil cases.[111] In equity, where the chancellor reviewed the vice-chancellor's finding of fact as well as of law, there developed a sort of intermediate standard of proof, in the form of a requirement that the evidence be "clear and convincing." It is argued that the various standards for burden or proof and measure of persuasion are helpful as a guide for instructing juries, but that in the many jurisdictions which deny a trial by jury to accused juveniles, a competent judge does not require any such distinction.[112] However, in many jurisdictions juvenile court judges are laymen, and even where they are legally-trained, there are some courts which have felt that each of the several standards will convey a distinct meaning to the mind of a judge sitting without a jury in a juvenile case.[113]

If this is correct, then it is ironical to say that "beyond a reasonable doubt" is a device to prevent punishment in the wrong cases, or that the courts need not be so cautious in a juvenile case since the aim is not punishment but rehabiiltation, and the consequences of error are not quite so serious. The theory behind this argument is that the risk of acting too quickly is not so great as the risk of failing to act altogether. This stand, which superficially might seem sound, simply reflects another aspect of legalistic blurring together of the fact-finding and dispositional phases found in every delinquency case.[114] In addition, the advocates of such a theory fail to perceive that on net balance, society gains more and loses less by delaying treatment even where required, than by indiscriminately administering such treatment prematurely in a case where it is not required at all. This argument further presupposes that the commendable aims and purposes of

110. The state must prove the essential elements of criminal liability beyond a reasonable doubt. This doubt must be of a type that would cause one to hesitate when confronted with the "graver transactions of life" or the "important affairs of life." See State v. Taylor, 76 Idaho 358, 283 P.2d 582 (1955).

111. To sustain the burden of proof, the evidence based on something more than pure speculation must show that the existence of the fact claimed is more probable than its non-existence. See Sargent v. Massachusetts Accident Co., 307 Mass. 246, 29 N.E.2d 825 (1940).

112. This argument has no factual basis in history, since there were no juries in chancery.

113. In a minority of jurisdictions, a child has an absolute right to elect a jury trial. D.C. Code Ann. § 11-915 (1951); Okla. Stat. Ann. tit. 10, § 102 (1951); Ex parte Hollowell, 84 Okla. Crim. 355, 182 P.2d 771 (1947); Tex. Stat., Rev. Civ. art. 2334 (1950); Colo. Rev. Stat. c. 101, art. 1, § 105-1-7 (1953).

114. See note 10 supra.

juvenile court treatment are actually translated into practice, which, unfortunately, is not the case in most jurisdictions.[115]

Similarly, a failure to distinguish between rules of admissibility (which should not and do not substantially vary between civil and criminal proceedings) and the degree of proof necessary to sustain the burden of persuasion (which does vary) may result in the admission of hearsay (or unsworn testimony, which is only another form of hearsay) evidence.[116] However, the impulse to "paternalize" the rules of admissibility may be so great that even in some jurisdictions recognizing this distinction, hearsay testimony may be admissible.[117] As has previously been noted,[117a] special rules of evidence have been devised for use in criminal trials, because of the specialized situations which might arise therein, having no counterpart in civil trials. Yet, many cases and statutes requiring the same kind of proof for an adjudication of delinquency as would be required in an ordinary civil action leave the juvenile court with no adequate fact-finding machinery to cope with facts unique in criminal proceedings. Recognizing this apparent dilemma, some decisions have required proof beyond a reasonable doubt where the alleged act of delinquency is criminal in nature.[118]

In discussing the procedural safeguards connected with problems of proof in the juvenile court, emphasis is often given the right to trial by jury.[119] It has been argued that where a jurisdiction, either by statute or decision, denies the right to trial by jury, assuming that it is a basic right, then by a parity of reasoning the right to counsel

115. See note 8 supra.

116. See In re Holmes, 379 Pa. 599, 109 A.2d 523 (1954), cert. denied, 348 U.S. 975 (1955); Mont Appeal, 175 Pa. Super. 150, 103 A.2d 460 (1954); State v. Christensen, 119 Utah 361, 227 P.2d 760 (1951); In re Bentley, 246 Wis. 69, 16 N.W.2d 390 (1944).

117. In the matter of Lewis, 11 N.J. 217, 221, 94 A.2d 328, 330 (1953), the court said, "[T]he real question . . . is whether the evidence, viewed in its entirety, was such that the trial judge could properly find therefrom, beyond reasonable doubt, that the deaths were the result of the appellant's careless and heedless operation of the car," thus indicating that in New Jersey criminal law standards are applied to burden of proof. However, the admission of hearsay evidence in juvenile delinquency proceedings is not error in New Jersey. Campbell v. Siegler, 10 N.J. Misc. 987, 162 Atl. 154 (1932).

117a. See note 109 supra.

118. In the matter of Lewis, 11 N.J. 217, 94 A.2d 328 (1953); People v. Fitzgerald, 244 N.Y. 307, 155 N.E. 584 (1927); In re Rich, 86 N.Y.S.2d 308 (1949); In re Madik, 233 App. Div. 12, 251 N.Y. Supp. 765 (1931); Jones v. Commonwealth, 185 Va. 335, 38 S.E.2d 444 (1946).

See Waite, How Far Can Court Procedure be Socialized Without Impairing Individual Rights?, 12 J.Crim. L., C. & P.S. 339, 344 (1921), advocating the "beyond a reasonable doubt" standard when the offense is criminal in nature.

119. See Ludwig, Youth and Law 40 (1955).

should also be denied.[120] It is submitted that the right to counsel, as guaranteed by the federal and various state constitutions, is not only applicable to the juvenile court, but that the court is obliged to implement this basic guarantee by advising the juvenile of his rights to counsel, and appointing counsel for him where he has none of his own.

The sixth amendment to the United States Constitution grants a right to counsel in all criminal prosecutions.[121] A trial court must advise the accused of this right, and if he is financially unable to hire a lawyer, the court must assign one to him.[122] Representation by counsel must be effective and timely. The accused is entitled to the aid of an attorney at every stage of the proceedings. If the counsel represents anyone besides the accused, there must be no possibility of an inconsistency between the interests of these other persons and those of the accused.[123] When the accused waives his right to counsel, it is the court's duty to determine whether he has done so intelligently and competently[124] and it must consider every reasonable presumption against such a waiver.[125] Since a failure to comply with the constitutional guarantee of a right to counsel is a jurisdictional defect, subsequent proceedings are rendered wholly void.[126]

Although the sixth amendment is not directed to proceedings in the

---

120. People v. Dotsen, 46 Cal. 2d 891, 299 P.2d 875 (1956); People v. Fifield, 136 Cal. App. 2d 741, 289 P.2d 303 (1955). But see Ex parte Echols, 245 Ala. 353, 17 So. 2d 449 (1944).

121. U.S. Const. amend. VI, provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."

122. Johnson v. Zerbst, 304 U.S. 458 (1938). "If the defendant appears in court without counsel, the court shall advise him of his right to counsel, and assign counsel to represent him at every stage of the proceeding, unless he elects to proceed without counsel or is able to obtain counsel. Fed. R. Crim. P. 44. See also Fed. R. Crim. P. 5(b), 15(c), 40(b)(2).

123. Von Moltke v. Gillies, 332 U.S. 708, 725 (1948); In re Sippy, 97 A.2d 455 (D.C. Munic. Ct. App. 1953).

While a preliminary hearing does not finally decide guilt or innocence, yet temporary restraint of the accused's personal liberty is involved, and therefore it would seem that all procedural safeguards ought to be applicable. Moreover, effective aid of counsel in preparing a case may be precluded if the case is decided in a preliminary hearing. However, due process under the fourteenth amendment does not demand that a defendant have counsel at the arraignment, so long as the accused has ample time to take advantage of every defense which would have been available originally. Canizio v. New York, 327 U.S. 82 (1946). Cf. Shioutakon v. District of Columbia, 236 F.2d 666, 670 n.25 (D.C. Cir. 1956): "We do not hold that counsel is essential in the preliminary stages before a petition is filed."

124. Von Moltke v. Gillies, supra note 123.

125. Johnson v. Zerbst, 304 U.S. 458 (1938).

126. Id. at 467; Evans v. Rives, 126 F.2d 633 (D.C. Cir. 1942).

state courts,[127] nevertheless, all of the states have some express or implied constitutional guarantee of the right to counsel.[128] Moreover, a denial of the right to counsel may constitute a violation of the due process clause of the fourteenth amendment[129] because the right is regarded as essential to the substance of a hearing. The measure of the right is determined by what the court considers to be "of the very essence of a scheme of ordered liberty," rather than the sixth amendment, which is directed to proceedings and rules which prevail in the federal courts only.[130] This is true not only in state prosecutions of capital offenses,[131] but also in non-capital cases where exceptional circumstances are involved.[132] Among the "exceptional circumstances" cases are those involving young and immature defendants who in many jurisdictions would come within either the exclusive or concurrent purview of a juvenile court.

In *De Meerleer v. Michigan*,[133] a seventeen-year-old was not advised of the right to counsel or of the serious nature of the plea of guilty to a first degree murder charge. It was held that the youth's unfamiliarity with legal proceedings resulted in a serious impairment of his constitutional rights *at the arraignment.*

In *Marino v. Ragen*,[134] the accused was convicted of murder in 1925 on a plea of guilty, and sentenced to life imprisonment. At that time he was eighteen years old and had migrated to the United States from Italy only two years previously. Not only was the accused unfamiliar with American trial court procedure, but he did not even understand English. One of his two interpreters at the arraignment was the arresting officer. No attorney was appointed to represent the accused.

---

127. Barron v. Baltimore, 32 U.S. (7 Pet.) 243 (1833).

128. In Virginia, the only state that does not have an express constitutional provision comparable to the Federal Constitution's sixth amendment, the court has ruled that the right to counsel is included in the Virginia constitutional provisions forbidding deprivation of life or liberty "except by the law of the land." Cottrell v. Commonwealth, 187 Va. 351, 46 S.E.2d 413 (1948). Statutory provisions require court appointment of counsel in all felony cases. Va. Code §§ 19-167, 19-214.1 (1950). In cities of 100,000 to 160,000, the courts are authorized to appoint public defenders. Va. Code § 19-7 (1950).

Moreover, nine state constitutions expressly extend the right to civil cases, as do the federal courts. The nine states are: Alabama, Georgia, Maine, Michigan, Mississippi, Nevada, New York, Utah and Wisconsin. The federal case that extends it is In re Mandell, 69 F.2d 830 (2d Cir. 1934).

129. Powell v. Alabama, 287 U.S. 45 (1932); Palko v. Connecticut, 302 U.S. 319, 327 (1937) (dictum).

130. Ibid.

131. Powell v. Alabama, 287 U.S. 45 (1932).

132. Bute v. Illinois, 333 U.S. 640 (1948).

133. 329 U.S. 663 (1947).

134. 332 U.S. 561 (1947).

In view of the foregoing, the United States Supreme Court held that habeas corpus should have been granted.

In *Haley v. Ohio*,[135] a fifteen-year-old Negro boy's conviction of murder in the first degree and sentence to life imprisonment was based on his coerced confession. One circumstance which influenced the Court to set aside the conviction was that during and after the investigation, the boy was held incommunicado and denied the services of a lawyer.

Wade v. Mayo[136] presented the case of an eighteen-year-old charged with breaking and entering. Claiming that he had no funds with which to employ counsel himself, he requested that the trial judge appoint counsel to represent him. This request was refused. In setting aside the conviction, the Court said, "There are some individuals who, by reason of age, ignorance or mental incapacity are incapable of representing themselves adequately in a prosecution of a relatively simple nature. . . ." Where such incapacity is present, the refusal to appoint counsel is a denial of due process of law under the fourteenth amendment.

In *Uveges v. Pennsylvania*[137] a seventeen-year-old who had pleaded guilty to a charge of burglary was entitled to habeas corpus because he had not been advised of his right to counsel. Nor had any attempt been made by the court to make the accused understand the consequences of his plea.

The United States Supreme Court has thus far declined to concern itself with the question of the right to counsel in the juvenile court. But a few statutes, and a substantial number of federal and state decisions, do.[138] Unlike the privilege against self-incrimination, which is sometimes denied outright and sometimes qualified,[139] there are few, if any, decisions absolutely denying the right to counsel. The qualification of the right to counsel, however, is somewhat analogous

---

135. 332 U.S. 596 (1948).

136. 334 U.S. 672 (1948).

137. 335 U.S. 437 (1948).

138. Ark. Stat. Ann. § 45-217 (1947); Utah Code Ann. § 17-18-1(4) (1953); Shioutakon v. District of Columbia, 236 F.2d 666 (D.C. Cir. 1956). The Federal Rules of Criminal Procedure do not apply to proceedings of the Juvenile Court of the District of Columbia (United States v. White, 153 F. Supp, 809 (D.D.C. 1957). However, in Shioutakon v. District of Columbia, the court based its holding on a "right to be heard" provision (D.C. Code § 11-915 (1940)) requiring the effective assistance of counsel in the juvenile court, as at any criminal court. In re Poulin, 129 A.2d 672 (N.H. 1957), interpreted the provisions of a statute authorizing presence at juvenile court hearing of persons "necessary in the interests of justice" as satisfying requirements of due process when it entitled either the juvenile or his parents to have counsel present.

139. In re Daedler, 194 Cal. 320, 228 Pac. 467 (1924); see note 91 supra.

to the qualification of the privilege against self-incrimination. The common reason assigned to justify qualification is that the hearing is an integral part of the treatment process. This emphasizes the rehabilitative, non-criminal, nature of the proceedings, and fails to distinguish the fact-finding from the dispositional phase of the hearing. With reference to the principle against self-incrimination, it is feared that if a child is warned that he need not testify the resultant delay in the treatment outweighs the value of the privilege.[140] Similarly, the qualifiers of the right to counsel, although conceding that this privilege cannot be denied altogether, feel that the very presence of counsel is contrary to the spirit of a non-adversary proceeding.[141] Therefore, they argue, the court should not be compelled to advise a juvenile of that right, or to secure counsel for him when he is unable to do so for himself. In *People v. Fifield*,[142] the court, in holding that the constitutional and statutory rights afforded to persons charged with a crime are not extended to juveniles, distinguished between previous California cases,[143] in which juvenile judges refused to permit minors who had engaged counsel to consult with their attorneys, and the present case, where "the court did not expressly advise the minor that she was entitled to be represented by counsel." The court was careful to point out that, "Of course, no person can be deprived of the right to be represented by an attorney in any court proceeding if he (already) has an attorney whom he wishes to represent him." Thus, it is clear that the juvenile court's procedure in this case does not constitute an outright denial, but rather a mere qualification of a constitutional privilege.

Yet, in holding that a court is under no duty to appoint counsel without a request to do so, many juvenile court judges frequently overlook the fact that a layman, especially a young layman without the assistance of counsel, may not be aware of the legal defenses he might have to answer a charge. For example, because of the court's

140. It would seem unsound to grant the privilege to adults but withdraw it from young children who are more easily frightened. People v. Fitzgerald, 244 N.Y. 307, 155 N.E. 584 (1927). See also Williams v. Huff, 146 F.2d 867, 868 (D.C. Cir. 1944) where appellant testified that he entered a plea of guilty on the advice of other prisoners, who informed him that such a plea would give him a better chance for probation.

141. White v. Reid, 125 F. Supp. 647 (D.D.C. 1944); Virtue, Survey of Metropolitan Courts, Detroit Area 116 (1950). See In re Hill, 78 Cal. App. 23, 247 Pac. 591 (1926), where a lower court, which removed counsel from the courtroom on the ground that a juvenile court proceeding is one in which no attorney may appear as a matter of right, was reversed.

142. 136 Cal. App. 2d 741, 289 P.2d 303 (1955).

143. In re McDermott, 77 Cal. App. 109, 246 Pac. 89 (1926); In re Rider, 50 Cal. App. 797, 195 Pac. 965 (1920).

failure to advise the juvenile of his right to counsel, or to appoint counsel, the juvenile might easily be deceived into believing that an act which he committed is a crime and pleading guilty without having committed the technical elements of the offense at all.[144] Specifically, counsel can, before a decision as to the nature of his plea is made, advise the accused of such things as the sufficiency of the indictment; the possible existence of a defense or bar under facts known to the accused, but the legal import of which he may not know; the nature of the penalty provided for the offense charged; and the probable extent to which it would be imposed under the facts involved, in the event of a plea of guilty. Therefore, the argument that if counsel had been employed for the defendant his plea would have been the same does not follow.

In many courts, when it appears that the defendant fully understands the nature of the charges against him, the absence of a request for counsel coupled with a plea of guilty raises an implied waiver.[145] Other courts reason that a guilty plea not only indicates that the defendant knows with what he is charged, but is in itself tantamount to an express waiver of the right to counsel.[146] From here the reasoning proceeds as follows: that if the defendant knows with what he is charged and pleads guilty, such a plea would indicate that the accused has no defense at all. Hence, he has no need of counsel to defend him, and the constitutional right to the assistance of counsel in this case would be wholly extraneous. However, this attitude indicates a lack of understanding of the basic principle that a plea of guilty on arraignment does not create evidence of the defendant's guilt, any more than a plea of not guilty goes to prove his innocence. This argument is reminiscent of the reasoning of the English courts at the time of the American Revolution. In England, while a defendant always had the right to address the jury in his defense and was entitled to counsel when charged with a misdemeanor, he had no right to be represented by an attorney in cases of treason or felony.[147] Lord Coke's explanation, derived from continental legal procedure, was that in cases of serious crime, the state's testimony and proof ought to be so clear that there could be no defense to it.[148] The modern counter-

144. See Moore v. Commonwealth, 298 Ky. 14, 181 S.W.2d 413 (1944).

145. Atkins v. Sanford, 120 F.2d 471 (5th Cir. 1941); Odom v. Aderhold, 115 F.2d 202 (10th Cir. 1940), cert. denied, 312 U.S. 683 (1941).

146. Yankwich, J., in Cooke v. Swope, 28 F. Supp. 492, 494 (W.D. Wash. 1939).

147. 1 Archbold, Criminal Procedure, Pleading and Evidence 548-50 (8th ed. 1877).

148. 5 Holdsworth, History of English Law 192 (1924). But by statute of 6 & 7 Will. 4, c. 114, § 1 (1836), the right to make a full answer and defense was extended to all felony cases.

part of this explanation is the statement of a juvenile court to the effect that the child need not employ defense counsel because there are no legal pitfalls against which to guard.[149] In the juvenile courts, where the great percentage of juveniles readily admit to committing the act of which they are accused, this somewhat fallacious reasoning is particularly favored.

The better view[150] is that if the defendant did not know of the right to counsel and was not advised by the judge of the possibility of a court appointment, a plea of guilty does not constitute an intelligent and competent waiver of that right. An adult may be competent to decide between assistance of counsel and presenting his own defense, but even he generally will not fully understand the nature of the defenses available or the scope of the ultimate issues involved. A fortiori, an immature juvenile cannot be assumed capable, in the absence of legal advice, to make such an appraisal. The mere act of a juvenile telling the judge that he is informed of his right to counsel and desires to waive it does not terminate the judge's responsibility; the judge must ascertain it for himself.

In *Williams v. Huff*,[151] a federal decision not tried under a juvenile court statute, the youth and inexperience of the defendant led to the conclusion that there had not been a competent waiver of the right to counsel. It appeared that appellant was first arrested when he was fifteen years old and, without benefit of counsel at his hearing, was committed to the reformatory. Several months later he escaped. While he was being rearrested he struck at the arresting officer with a penknife. Arraignment for this assault was delayed nearly two years without explanation while appellant was confined in the reformatory. Thereafter he waived counsel and pleaded guilty to an indictment of assault with a dangerous weapon. At the time of his application for a writ of habeas corpus on the grounds of denial of counsel, appellant had been in prison for a total of nearly seven years. Appellant testified that he entered a plea of guilty on the advice of other prisoners, who informed him that such a plea would give him a better chance for probation.[152] The majority of the court took the position that appellant's competence was a question of fact in the determination of which his youth was entitled to serious consideration, but was

149. See Virtue, op. cit. supra note 141, at 115.

150. Walker v. Johnson, 312 U.S. 275 (1941); Evans v. Rives, 126 F.2d 633 (D.C. Cir. 1942).

151. 142 F.2d 91 (D.C. Cir. 1944); 146 F.2d 867 (D.C. Cir. 1944) (second appeal).

152. The appellant testified that he was fifteen at the time of the alleged original offense and contended that the juvenile court could not waive jurisdiction until he was sixteen under D.C. Code § 11-1914 (1940). See note 62 supra.

not necessarily conclusive. The case was therefore remanded to the lower court on the theory that, on the one hand, a defendant has the burden of proving his want of competence or intelligence, and, on the other, that the lower court must take evidence to determine whether, in the light of his age, education, information, and all other pertinent facts, the accused had sustained this burden. Chief Judge Edgerton, who wrote the opinion, speaking for himself, asserted that as a matter of law a boy of seventeen cannot competently waive his right to counsel in a criminal case. Upon remand, the trial court held that he had not sustained the burden, which finding was again appealed. The appellate court took the position that, while in the ordinary habeas corpus proceeding a court would be justified in disbelieving the uncontradicted evidence of a biased witness, here the fact that appellant was seventeen years old at the time of his plea created an inference of fact that his waiver was not intelligent; this inference was not rebutted by anything in the record showing that, at the time of his plea, he was examined as to his capacity to waive intelligently his constitutional right to counsel.

To permit a waiver by a juvenile would be tantamount to saying that the juvenile understands the nature of the charges,[153] the range of allowable "treatment," and possible legal defenses to or mitigating circumstances surrounding the charge or charges. It is submitted, therefore, that age should not be merely an important but inconclusive consideration on the question of competence to waive the right to counsel. Such competence should not be viewed as a rebuttable inference of fact either. Rather, it is submitted, it should be a conclusion of law that a juvenile in juvenile court is incompetent to waive the right to counsel unless he secures the advice and approval of the court. Before approving a waiver, however, the court must affirmatively assure itself, on the basis of age, education and all other pertinent factors, that the minor is capable of making an intelligent waiver, and does in fact desire to do so. Where the court finds for any reason that the alleged juvenile offender is not capable of waiving his right to counsel, the parent or guardian, with the advice of counsel,[154] may so waive, provided the court also finds that the parent is capable of an intelligent waiver and that there is no conflict of interests between

153. See State v. Cronin, 220 La. 233, 241, 56 So. 2d 242, 245 (1951), where the court reached the conclusion that a fourteen-year-old could make a competent and intelligent waiver on the dubious grounds of (1) an inference that the girl had sufficient judgment and knew what she was doing because she had just been married, and (2) because she informed the judge: "Judge, I don't want no lawyers or anyone representing me."

154. See Ex parte Echols, 245 Ala. 353, 17 So. 2d 449 (1944).

the juvenile and his parent.[155] Moreover, as said in *McBride v. Jacobs*,

> interested parties should be advised of their rights to counsel at preliminary conferences, which are an important part of the juvenile court process. But any preliminary waiver of counsel either by parent or minor should be confirmed by the judge in open court and on the record.[156]

Shioutakon v. District of Columbia[157] involved a delinquency proceeding against a fifteen-year-old charged with having used an automobile without the owner's consent. The charge was readily admitted, and, following a hearing in which he was not represented, the youth was committed to a training school. The denial of a motion to vacate the juvenile court's judgment on the ground that appellant had been deprived of his constitutional right to counsel was affirmed by the intermediate appellate court. This decision was reversed by the United States Court of Appeals for the District of Columbia, which held that advising an alleged delinquent of his right to counsel is compatible with the objectives of the juvenile court and an integral part of the right itself. The court, in rejecting the argument that a juvenile is entitled to be represented by counsel only if he or his parents or guardian choose to furnish one, emphasized that the stated purpose of the right to counsel is to protect an accused from a conviction resulting from his own ignorance. This important constitutional right would thus be watered down if made to depend on the child's intelligence and the economic position of his family.

Is there any more basis for presuming a defendant to be cognizant of his constitutional right to the assistance of counsel than to presume that he is cognizant of a privilege against self-incrimination and other guarantees? Or for presuming that a defendant understands the rules governing the sufficiency of an indictment, the admissibility of evidence, or the burden of proof? Moreover, how can a child without the aid of counsel competently decide whether or not he should exercise such other rights as may be afforded him by the juvenile court acts and federal and state constitutions? It would seem clear that a child within the age limits of juvenility does not generally possess the legal skill required to exercise such rights intelligently. Is it not, therefore, meaningless for a court to say that hearsay admitted without objection may be given its natural probative force?[158] How can a child without counsel be in a position to object? Or, if a trial by jury is

155. McBride v. Jacobs, 247 F.2d 595 (D.C. Cir. 1957).

156. Ibid.

157. 236 F.2d 666 (D.C. Cir. 1956).

158. In re Holmes, 379 Pa. 599, 109 A.2d 523 (1954), cert. denied, 348 U.S. 973 (1955).

demanded, how can a child be expected to exercise peremptory challenges, prepare written requests for instructions, or make written motions for new trial or in arrest of judgment?

This is true even in jurisdictions affording a bare minimum of rights. A legislative attempt to deprive a person of his constitutional rights merely by changing the name of an offense would contradict the principle that a legislature can only depart from a constitutional mandate by constitutional amendment. It is submitted that the right to counsel is not satisfied by the judge who conducts the entire case on behalf of the state.[159] Nor is it satisfied by a statute providing for the state prosecutor to act as defense attorney in juvenile court and insisting that the proceedings should in no sense be adversary.[160] For adversary proceedings are essential not only to guard against tyranny but to insure accuracy in the fact-finding process.[161] Implementing the right to counsel would also make meaningful the juvenile's other constitutional guarantees, such as trial by jury, where that is provided for, or the privilege against self-incrimination.

An infant's contracts, except for necessaries, are voidable at common law, not because of an inherent want of capacity, but because the law desires to protect the infant from the consequences of his own immaturity. Moreover, when the property rights of an infant are the subject of litigation, the law requires the court to appoint a guardian ad litem for him and, if in the court's opinion his interests also require that he have counsel, the court must assign him counsel, regardless of the child's wishes in the matter. If the law is so solicitous of the child's property rights, should it not, for the same or stronger reasons, aid the child in fighting for his liberty?[162]

A Suggested Approach

The development of the juvenile court movement in the United States has stressed the harm done to the child during the process of trying him. There has been much concern with the detrimental aspects of what is assumed to be a "traumatic experience." As a matter

159. In re Coyle, 122 Ind. App. 217, 101 N.E.2d 192 (1951).

160. Ark. Stat. Ann. § 45-217 (1947); Utah Code Ann. § 17-18-1(4) (1953).

161. Even if an adjudication of delinquency might not be prevented by the presence of counsel, it might serve to insure that treatment is not predicated on misinformation. Assistance of counsel could have prevented the situation which arose in In re Green, 123 Ind. App. 81, 86, 108 N.E.2d 647, 649 (1952), where the court said: "The petition reveals a star chamber proceeding whereby a boy was torn from the custody of his parents and deprived of his liberty without a semblance of due process . . . ."

162. See argument of Chief Judge Edgerton in Williams v. Huff, 142 F.2d 91 (D.C. Cir. 1944).

of fact, a more formal, orderly, hearing, far from being "traumatic," may actually be a constructive factor in anticipatory preventive technique.[163] That is, the very formality of the hearing may well have a sobering, educative effect on the child as well as his parents, acting as an effective deterrent to future delinquency.

However, assuming that some of the more rigid rules of criminal procedure may properly be eliminated from juvenile court proceedings, how may this be done while still affording basic protection? It has been asserted that constitutional safeguards ought to be provided only where necessary to assure fair treatment.[164] Under this approach, relevant factors are to be established, and the scope of judicial discretion regarding the necessity of a particular safeguard is to be delineated, by appellate decisions on a case-by-case basis. In addition to the obvious dangers that decisions which were intended to be limited to a particular fact situation may be regarded as binding in future cases, and that appellate courts have little control in these matters because so much depends upon the fact situation, there is a much more serious objection. The process could well be an empirical one because matters within the competence of the juvenile court are, by their very nature, certain to evoke conflicting emotions. Every judge has an ineradicable socio-cultural background in these matters, which, subconsciously at least, might tend to color a decision left to his general discretion. In addition, since family matters are commonly experienced, and individual expertise is assumed to follow, there is likely to be a wide variance in the decisions. If so, the familiar remark concerning undisciplined discretion in equity cases, to the effect that equity was only as long as the chancellor's foot, is relevant.[165] Equally germane is the more recent opinion of a Massachusetts court in denying the discretion of trial judges to consider conduct short of recrimination as a bar to divorce:

> In respect to divorce, wide cleavages of opinion exist. . . . The divorce law has to be administered by judges whose personal opinions vary as widely as do those of other people. . . . If every judge . . . . were entitled to exercise discretion according to his

163. A detrimental aspect pointing up the need for counsel is that an infant untrained in the law and overawed by the presence of the court might be unable to conduct an intelligent and effective fight for his freedom without proper advice. See In re Poff, 135 F. Supp. 224 (D.D.C. 1955).

164. People v. Dotsen, 46 Cal. 2d 891, 895, 299 P.2d 875, 877 (1956).

165. Selden, Table Talk 54 (1696): "Equity is according to the conscience of him that is Chancellor, and as that is larger or narrower, so is Equity. 'Tis all one as if they should make the standard for the Measure, we call a Chancellor's Foot, what an uncertain measure this would be? One Chancellor has a long Foot, another a short Foot, a third an indifferent foot; 'tis the same thing in the Chancellor's Conscience."

> own ideas of propriety or of public policy, the judicial branch of government . . . would become a government of men and not of laws.[166]

To avoid delegating undefined discretion to the courts, and to afford more clearly defined rights to the juvenile offender, consideration should be given to specific legislation which would define, regularize, and record, the governing policy for all to know that it exists. Such legislation would clearly differentiate between the categories of causes which bring children before the juvenile court. By a separation rather than a consolidation of these causes, the term "delinquency" would be applied exclusively in cases where a serious antisocial act was alleged.[167] In cases of neglect and incorrigibility, the constitutional safeguards and the probative force of the evidence should be those required in non-criminal proceedings.[168] To guard against the abuse of power, even when exercised with the loftiest of motives, and to ensure a proper finding of guilt in delinquency cases, the same constitutional safeguards and rules of procedure and evidence should be afforded the child as are mandatory in the criminal trials of adults. While the objectives of "individualized justice" are recognized and approved, one must always bear in mind that the child's status and rights, as well as the rights of the parents, are involved. Where an alleged violation of law might empower the court

---

166. Reddington v. Reddington, 317 Mass. 760, 765, 59 N.E.2d 775, 778 (1945); cf. note 81 supra.

167. The tendency to consolidate was noted in note 2 supra. Contrast a recent case reasoning that child dependency or neglect arising not out of any conduct or misconduct of the child, but from parental deficiency in providing the child with proper care, maintenance and support, is based on parental delinquency. Hence, the same evidence which establishes parental lack of fitness determines the child's status of dependency. However, "incorrigibility" may arise from extrinsic sources, and the evidence establishing such conditions may be wholly unrelated to the fitness of the parent to perform his legal duties as a parent. In re Welfare of Three Minors, 314 P.2d 423, 426 (Wash. 1957).

168. In Evans v. Rives, 126 F.2d 633, 641 (D.C. Cir. 1942), the court reminded the juvenile court that the social considerations underlying the Juvenile Court Act and the informal procedures permitted under it are not incompatible with the rights guaranteed by the Constitution to one accused of crime. In In re Poulin, 129 A.2d 672, 673 (N.H. 1957), the court said: "The worthwhile objectives of the juvenile courts can be accomplished without prohibiting the child or the parent from obtaining the assistance of counsel."

We should keep complete and accurate records of the proceedings in juvenile court, just as are kept in criminal court and for use on appeal. Moreover, with the granting of all procedural safeguards, the record could be used for other desirable purposes, such as inquiring into the unchaste tendencies of complainants in rape cases, and in imposing sentence under an "habitual offense" statute in any subsequent criminal proceeding. See Mass. Ann. Laws c. 119, § 60 (1957); cf. note 34 supra.

to deprive the child of liberty and the parents of custody, the court must first determine from competent evidence in a fair hearing whether or not the child has, in fact, committed an unlawful act. If a preponderance of the evidence is thought to be more desirable in delinquency proceedings than proof beyond a reasonable doubt, then the authority of the appellate courts in reviewing the evidence should be substantially broadened.[169]

What is needed is a framework of formalism designed solely for the protection of the juvenile, within which there would be limited flexibility. This flexibility would take the form of modified courtroom formalities and an absence of those technicalities not essential to justice which tend to confuse and intimidate the child. In establishing proceedings which are readily interpreted to a child and his parents,[170] it may also be desirable to eliminate criminal law terminology.[171] The petition initiating the delinquency proceeding should be clear and specific.[172] The court should explain the substance of the charge in simple language suitable to the child's age and understanding. Social investigation reports, psychological and psychiatric data should be prohibited as a source of information on which to determine the issue of delinquency.[173] Unless directed by the court, children should not be permitted in the courtroom, except when the proceedings are in

---

169. In re Hill, 78 Cal. App. 23, 247 Pac. 591 (1926) (similar to the broader powers of the chancellor in equity to review findings of fact as well as of law). See text following note 111 supra.

170. See In re Sippy, 97 A.2d 455 (D.C. Munic. Ct. App. 1953); In re Green, 123 Ind. App. 81, 108 N.E.2d 647 (1952); In re Coyle, 122 Ind. App. 217, 101 N.E.2d 192 (1951); Petition of O'Leary, 325 Mass. 179, 89 N.E.2d 769 (1950); Kahm v. People, 83 Colo. 300, 264 Pac. 718 (1928); State ex rel. Palagi v. Freeman, 81 Mont. 132, 262 Pac. 168 (1927).

171. E.g., summons, instead of warrant; petition on behalf of the child, as opposed to indictment or information; hearing to establish state's right to intervene on behalf of the child, as opposed to trial. Cf. Block & Flynn, Delinquency—The Juvenile Offender in America Today 340-41 (1956).

172. In re Fisher, 184 S.W.2d 519 (Tex. Civ. App. 1944).

173. This data would be proper if presented under oath and included first hand observations on parent-child relationships on issues of dependency and neglect. Even so, they are highly subjective interpretations of behavior, relevant only on questions of parental supervision, and should not be relied on without corroboration. Such reports should be offered for inspection by the child, his parent, and their counsel, when proceedings begin. In re Godden, 158 Neb. 246, 63 N.W.2d 151 (1954); In re Mantell, 157 Neb. 900, 62 N.W.2d 308 (1954); In re Contreras, 109 Cal. App. 2d 787, 241 P.2d 631 (1952).

On the extent of use of background reports before hearing, see note 36 supra, and Note, Correct Use of Background Reports in Juvenile Delinquency Cases, 5 Syracuse L. Rev. 67 (1953).

relation to the child.[174] Even when so related, if the testimony being given relates to immoral conduct on the part of the child's parents, the child should be excluded. Where the juvenile is giving testimony relating to indecent conduct, the judge should have the power to clear the court of parties not directly concerned in the case.[175] If the child is called as a witness and does not understand the nature of an oath, then his unsworn testimony may be received if he understands the duty of speaking the truth.[176] The judge should ascertain a child's capacity as a witness by questioning the child and other necessary persons in the courtroom.[177] However, the unsworn testimony of a child should not be used as the basis for a conviction unless it is corroborated. In this connection it should be specified that the unsworn statement of one child is not corroborated by the unsworn statement of another. Even if the child is testifying under oath, such natural drawbacks as an overactive imagination and undue nervousness when in court should be borne in mind and the judge should be required to instruct the jury of the risks involved in acting on the uncorroborated evidence of a child, even when given under oath.[178] If the child's attendance in court would seriously endanger his health, there should be a provision for taking his statement out of court. This might be accomplished by extending the present system of discovery depositions. However, if such a deposition is used as evidence, the same statute should provide for giving interested parties an opportunity to be present at the deposition and to cross-examine the child who is making it.[179] The trial should be open. However, if it is felt that publicity about the proceedings would harm the child, then the court in its discretion could restrict the revelation of any particulars which would lead to the identification of the child, as well as pictures of the child.[180]

An alternative solution would be to refer serious juvenile cases to criminal courts for jury trial, with referral back to the juvenile court for sentencing after a finding of guilt. The advantages of this type of handling are: (1) juvenile courts often have superior clinical facilities for the individualized disposition of each case; (2) there is less

174. Mass. Ann. Laws c. 119, § 65 (1957) ("No minor shall be allowed to be present at any such hearing unless his presence is necessary either as a party or a witness."); S.C. Code § 15-1155 (1952).

175. Children and Young Persons Act, 23 Geo. 5, c. 12, § 37(1) (1933).

176. Id. at § 38.

177. Rex v. Reynolds [1950] 1 K.B. 606.

178. If any child whose unsworn evidence is received wilfully gives false evidence, he should be liable to penalties, provided he would have been guilty of perjury had his evidence been given under oath.

179. Children and Young Persons Act, 23 Geo. 5, c. 12, § 43 (1933).

180. Id. at § 39.

tendency to use a social background investigation, including reports on school and general behavior, home and neighborhood surroundings, before an adjudication of status; (3) it would lessen the reluctance on the part of the court to dismiss the child when, even though the child may be adjudicated innocent, the court feels that treatment is necessary.

Implicit in the right to counsel to be guaranteed in all cases would be an offer of counsel and an implementation of that offer.[181] The argument that attorneys in juvenile proceedings are uninformed pettifoggers is often well-founded. It is recognized that a universal right to counsel will produce the desired result only after we have trained specialists in this field. However, pettifogging is a matter for control of the courts and adequate understanding of the aims and procedure of the juvenile courts is the responsibility of legal education.

Persons drafting such legislation must assume that standards will be implemented by competent personnel, and public efforts must be made to educate appointive agencies to the absolute necessity of appointing as juvenile judges people who are specially fitted for the position.

The possibilities suggested above certainly merit serious consideration in accommodating the various interests involved and striking a realistic and rational balance between the clinical and legalistic objectives of the juvenile court.[182]

---

181. Assignment of counsel with adequate compensation, possibly through the Legal Aid Society. See Tappan, Delinquent Girls in Court 192 (1947); Ferguson v. Pottawattamie County, 224 Iowa 518, 278 N.W. 223 (1938).

182. Glueck, Crime and Justice 49-53 (1936). "But unbridled sentimentalism is also bad. Deep though our pity be, we cannot indulge in futile sentimentality while dangerous persons stalk the land. We must discipline our humane impulses with science and good sense. A head without a heart may lead to tyranny; a heart without a head may mean annihilation. . . . These two principles, then, the ethical and the scientific, must both be reckoned with." Id. at 6.