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CONSTITUTIONAL RIGHTS IN JUVENILE COURTS

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Under the prevailing judicial response today most of our traditional constitutional rights, accorded even to hardened criminals, are denied to children exposed to juvenile court proceedings. This should be a matter of serious concern if only a hundred youths a year were involved. The number of affected juveniles far surpasses popular impressions. For instance, in 1959 in the 1,789 cities of over 2,500 population alone, there were 519,685 children arrested.[1] In the same year, according to the best reports available, there were 483,000 juvenile delinquency cases (exclusive of traffic offenses) handled by the juvenile courts of the United States, and in that year an additional 290,000 traffic offenses were charged against youths.[2] The time has come to seriously inquire if there are persuasive reasons why these young persons are to be denied constitutional rights.

First, let us consider what can happen to a minor when he or she is apprehended by the police or juvenile authorities for alleged misbehavior. The record indicates that the child may linger weeks and even months in places of detention without even a hearing. To illustrate, a Washington, D. C., newspaper reported in 1951 that children were being detained there without a hearing for 41, 50, 53, 92 and 107 days.[3] Other reliable sources attest that youngsters have been held for six months while awaiting disposition of their cases.[4] In many parts of the country the child may be held in police lock-ups and county jails in association with all sorts of adult criminals.[5] Youngsters not at all delinquent when picked up may well be deviants after such "care" by the state before it

† See contributors' section, masthead p. 458, for biographical data.

1 U.S. Dep't of Justice, Crime in the United States 99 (1960).

2 U.S. Dep't of Health Education and Welfare, Juvenile Court Statistics, 1959, 1-2 (Children's Bureau Statistical Series #61, 1960).

3 Washington Post, June 7, 1961, p. 1, col. 2.

4 White v. Reid, 125 F. Supp. 647 (D. D.C. 1954) (six months); United States v. Dickerson, 271 F.2d 487 (D.C. Cir. 1959) (five to six weeks).

5 A hundred thousand children aged seven to seventeen are detained in county jails and police lock-ups, according to Fine, 1,000,000 Delinquents 285 (1955).

is ready to try them or return them to their homes and families. A reader who might imagine that these are all youthful monsters who might well be removed from free society should reflect upon the best available figures that indicate that 43 per cent of all the children detained overnight or longer are released without even being brought before a juvenile court judge.[6] A recognition of constitutional rights seems imperative if children are being picked up with such enthusiasm and kept for such periods without hearings.

Judicial refusal to acknowledge constitutional safeguards in juvenile court proceedings is customarily defended on the theory that the proceedings are "non-criminal," or on the alternative ground that the commitment or disposition meted out is not "punishment" but only "protection." Let us see if juvenile court proceedings can be truly labelled "non-criminal." At a time when the Michigan legislature was piously affirming that juvenile court proceedings "shall not be taken to be criminal proceedings in any sense" it was authorizing juvenile court judges to impose fines upon the children! Happily it can be reported that Michigan's Supreme Court ruled that such fines were clearly punishments and that children subjected to such punitive sanctions were entitled to constitutional rights.[7] In a number of states juvenile courts can still fine minors[8] and it should be obvious to all that proceedings so culminating are "criminal." Consider further the action of an Ohio court that insisted juvenile court proceedings were "non-criminal" while allowing a child to be sent to the state reformatory, an institution described by the appellate court as "a prison for persons who are convicted of felonies and committed thereto upon a sentence of the court following such conviction," but withal, in the mind of this court, a good place to reform juveniles.[9] It is surely impossible to apply the "non-criminal" label in all those states where children can be transferred to adult penal institutions by executive action.[10] In these jurisdictions the "non-criminality" of juvenile court proceedings is "more fiction than fact."[11] Professor Tappan, a learned sociologist who has long given careful attention to the problems of juvenile delinquency, has maintained "that at the child's level the experience of a delinquency adjudication in the

[6] Tappan, Juvenile Delinquency 187 (1949).

[7] Robison v. Wayne Circuit Judges, 151 Mich. 315, 115 N.W. 682 (1908).

[8] E.g., Colorado Rev. Stat. Ann. § 22-8-1(3) (1953) (up to fifty dollars if child is over fourteen). Tappan, Juvenile Delinquency 192 (1949).

[9] Leonard v. Licker, 3 Ohio App. 377, 381, (1914). The decision is criticized by Flexner & Oppenheimer, The Legal Aspects of the Juvenile Court 9 (United States Children's Bureau Publication No. 99 1922).

[10] Sheridan, "Double Jeopardy and Waiver in Juvenile Delinquency Proceedings," 23 Fed. Prob., Dec. 1959, p. 43.

[11] Rubin, Crime and Juvenile Delinquency 70 (1958).

juvenile court, its treatment consequences, and its effect upon his reputation and his self-esteem are as severe—very often more so—as criminal conviction is to an adult." He adds, "In spite of this, the insensitive perceptions of an adult world, what appears to be a self-deception induced by benign but misdirected motives, persists in viewing the court handling of the child as an innocuous or even a generally constructive experience." And he concludes that labelling juvenile court proceedings as "non-criminal" is "a convenient but highly misleading sophistry."[12]

Of a statement in the California juvenile court law that adjudication of minors to be wards of the court "shall not be deemed to be a conviction of crime," a California appellate court said "for all practical purposes, this is a legal fiction, presenting a challenge to credulity and doing violence to reason."[13] The New Jersey Juvenile Delinquency Commission, referring to the juvenile court, has admitted that "In the generally current impressions of the public at large and of the children with whom it deals, it *is* a court of criminal law."[14] Social workers who are constantly before juvenile courts seemingly understand and admit that "these special courts have operated under the name of juvenile courts but have actually functioned more like criminal courts."[15] Many of the social stigmas attendant upon criminal conviction customarily attach to children who have been adjudicated delinquent and sent away to reformatories: difficulties in securing employment, economic advancement, entrance to schools and colleges, and restricted professional opportunities.[16] Indeed, even the law itself has recognized the "criminal" consequences when it allows persons to be impeached as witnesses by questioning about their difficulties with juvenile authorities.[17] To the extent that labels are important to the judiciary it seems clear, in summation, that proceedings resulting in the deprivation of one's liberty by the state and his incarceration are assuredly "criminal."

How accurate and honest are the customary assertions of the judiciary that children are not "punished" by the juvenile courts? Let the reader himself characterize the action of a New Jersey juvenile court judge who had three boys aged 12, 14 and 15 whipped with a police sergeant's belt![18] Much more realistic is the conclusion of a Texas court "that the

12 Tappan, "Unofficial Delinquency," 29 Neb. L. Rev. 547, 548 (1950).
13 In re Contreras, 109 Cal. App. 2d 787, 789, 241 P.2d 631, 633 (1952).
14 "Justice and the Child in New Jersey," 1939 Report of the New Jersey Juvenile Delinquency Commission, 153.
15 Kvaracens, The Community and the Delinquent 445 (1954). And see Ellrod & Melaney, "Juvenile Justice: Treatment or Travesty?," 11 U. Pitt. L. Rev. 277, 279 (1950).
16 Sheridan, "Double Jeopardy and Waiver in Juvenile Delinquency Proceedings," 23 Federal Probation 43 (1959). Mr. Sheridan is Chief, Technical Aid Branch, Division of Juvenile Delinquency Service, U.S. Dep't of Health, Education and Welfare.
17 People v. Smallwood, 306 Mich. 49, 10 N.W.2d 303 (1943).
18 Thurston, Concerning Juvenile Delinquency 147 (1942).

'commitment' issued by the juvenile court fixes and determines punishment for crime whether it is so designated or not . . . ."[19] And a capable investigator of the New York City court has reported: "There are several judges who initiate use of temporary detention facilities in a punishing way . . . ."[20] When children are taken from their homes and families and deprived of their liberty by incarceration in an institution, they are being punished. Furthermore, the degree of difference in punishment between modern state penal farms or prisons and reformatories for juveniles is negligible. Judge Anderson of Mississippi has stated, "It cannot be said truthfully that the Industrial Training School in this state is not a penal institute. It is as much a penal institution as the modern, well-regulated, humanely managed penitentiary. Its inmates are restrained of their liberty of action, notwithstanding the purpose of the law is to reform and educate them."[21]

It should be recognized, too, that children are often incarcerated by juvenile courts for far longer periods than would be meted out to an adult criminal for the identical misdeed. To illustrate, when petit larceny was punishable in California by a maximum six-month jail sentence, a boy described as "under 18" was for such an act put away until he was twenty-one.[22] And, in Pennsylvania when petit larceny by an adult was punishable at the most by a two year sentence, a child was deprived of his liberty for such an act for seven years, that is, until he reached his majority.[23] Again, in South Carolina when the ordinary sentence for petit larceny was thirty days, the Supreme Court of that state upheld for such an act the commitment to the state industrial school of boys eight and ten until they reached the age of twenty-one.[24] Furthermore, the record by now is abundantly clear that children are being committed by juvenile courts on far less grounds than would justify a criminal court in depriving an adult of his liberty. For instance, a juvenile court judge removed a child from his parents and deprived him of his liberty because he had driven a car without a license.[25] In another reported case, a juvenile court judge took a boy from his home and sent him to the reformatory because he had *accidentally* discharged

19 Santillian v. State, 147 Tex. Crim. 554, 557, 182 S.W.2d 812, 814 (1944).
20 Kahn, A Court for Children 268-69 (1953).
21 Bryant v. Brown, 151 Miss. 398, 433, 118 So. 184, 194 (1928) (dissenting). See also, Rappeport, "Determination of Delinquency in the Juvenile Court: A Suggested Approach," 1958 Wash. U.L.Q. 123, 126; Tappan, Juvenile Delinquency 10 (1949); Lindsey, "The Legal Foundations of the Jurisdiction, Powers, Organization and Procedure of the Courts of Pennsylvania in Their Handling of Cases of Juvenile Offenders and of Dependent and Neglected Children," 1926 Annals of the American Academy of Political and Social Science 28.
22 Ex parte Nichols, 110 Cal. 651, 43 Pac. 9 (1896).
23 Commonwealth v. Fisher, 213 Pa. 48, 62 Atl. 198 (1905).
24 State v. Cagle, 111 S.C. 548, 96 S.E. 291 (1918).
25 In re Holmes, 379 Pa. 599, 109 A.2d 523 (1954).

a gun.[26] How can we possibly justify the juvenile court judge who sent away a girl because she had been raped and later seen "painted and powdered up"?[27] Consider further the justice of detaining a little boy age *seven* in a city jail for several weeks (including the Christmas holidays) for having put his hand under the skirt of a companion.[28] The reader might endeavor to project himself into the place of the parent whose child was the innocent victim of an adult homosexual, for which the youngster was put into a juvenile detention home and then sent away to the reformatory.[29] In still another instance we find an eight-year-old child being removed from his family by the authorities and held in detention simply so that he would be a handy witness for the police in a criminal case.[30]

In the situations where it is necessary to separate a child from his father or mother for the youth's protection, it is suggested that justice would be far more effectively accomplished by incarcerating not the child but the parent. What can be said of the "protection" theory when a state permits girls under twenty-one to marry and thereafter continues to expose them to the jurisdiction of juvenile courts?[31] Again, how defensible is the "protection" theory when used by juvenile courts to justify their usurpation of jurisdiction over adults because they committed some misdeed when they were minors.[32]

Before the passage of the juvenile court acts it was everywhere well established that minors accused of crime were entitled to all the constitutional safeguards possessed by adults exposed to criminal prosecution.[33] Even today when a minor can have his charges heard in the usual adult criminal court, he is entitled to all the customary constitutional rights.[34] And when the person before the juvenile court is fortunate enough to be an adult rather than a juvenile being "protected," he is entitled to all constitutional protections. For instance, the United States Supreme Court has held that an adult defendant before a juvenile court

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26 State v. Butcher, 74 Utah 275, 279 Pac. 497 (1929).

27 People v. Fowler, 148 N.Y. Supp. 741 (Sup. Ct. Bronx County 1914), reversed on other grounds, 166 App. Div. 605, 152 N.Y. Supp. 261 (1st Dept. 1915).

28 Reported by Fine, 1,000,000 Delinquents 285 (1955).

29 Reported by Diana, "The Rights of Juvenile Delinquents: An Appraisal of Juvenile Court Procedures," 47 J. Crim. L. C. & P. S. 561, 566 (1957).

30 In re Singer, 134 Cal. App. 2d 547, 285 P.2d 955 (1955).

31 Stoker v. Gowans, 45 Utah 556, 147 Pac. 911 (1915); State v. Cronin, 220 La. 233, 56 So. 2d 242 (1951). And cf. In re Lundy, 82 Wash. 148, 143 Pac. 885 (1914).

32 Johnson v. State, 18 N.J. 422, 114 A.2d 1 (1955).

33 Commonwealth v. Horregan, 127 Mass. 450 (1879) (right to presentment by a grand jury); State ex rel. Cunningham v. Ray 63 N.H. 406 (1885) (due process of law; right to trial by jury); People ex rel. O'Connell v. Turner 55 Ill. 280 (1870) (due process of law).

34 Pee v. United States, 274 F.2d 556 (D.C. Cir. 1959); Ex parte Rider, 50 Cal. App. 797, 195 Pac. 965 (1920).

in the District of Columbia, charged with willfully neglecting or refusing to support his children, which was punishable by fine or imprisonment for not more than twelve months, was entitled to the preliminary of a grand jury indictment before being brought to trial.[35] Similarly, it has been held that an adult accused of refusing to provide for his child is entitled in a District of Columbia juvenile court to his constitutional right to counsel under the sixth amendment.[36] The state courts also regularly acknowledge that adults tried before juvenile courts for child-related offenses are entitled to all their constitutional rights.[37] It is only the child before the juvenile court who has suffered the bad bargain of having traded precious constitutional rights for "protection."

If ever words have obscured issues of legal and constitutional right, it is the unfortunate language of "non-criminal," "non-punishment" and "protective" indulged in by the legislatures and the courts. It is understandable that a capable sociologist is aghast at "their free recourse to ecstatic and unwarranted assumptions."[38] The record of juvenile court judges and authorities is not such that we can safely go on theorizing that constitutional rights are unnecessary. It may be that the alarming recidivism of children exposed to the juvenile courts is due in part at least to the kind of justice administered in these institutions. In brief, this paper will urge that children accused of acts that would be crimes if committed by adults are entitled as of constitutional right in the juvenile courts to all constitutional safeguards recognized in that jurisdiction to those charged with crimes in the usual criminal courts. The proposition is already accepted by the better jurists. For instance, Judge Curran has indicated, "in the District of Columbia, where the charge in the Juvenile Court is one of crime which, because of charitable considerations for the welfare of the child, is called 'juvenile delinquency,' then it must be surrounded by the guarantees and limitations of the Federal Constitution."[39] Additionally, it will be urged that even if a court should refuse to recognize the punitive and criminal nature of the proceedings, it must acknowledge that a child is being deprived of his liberty and hence entitled as of constitutional right to due process of law under the fifth and fourteenth amendments, and under the comparable due

[35] United States v. Moreland, 258 U.S. 433 (1922).

[36] Evans v. Rives, 126 F.2d 633 (D.C. Cir. 1942).

[37] State v. Marsh, 126 Wash. 142, 217 Pac. 705 (1923), holding unconstitutional an attempt by a juvenile court judge to hear in chambers evidence that the adult had contributed to the delinquency of a minor. See further People v. Budd, 24 Cal. App. 176, 140 Pac. 714 (1914); Pease v. State, 74 Ind. App. 572, 129 N.E. 337 (1921); State v. Eisen, 53 Ore. 297, 99 Pac. 282 (1909).

[38] Geis, "Publicity and Juvenile Court Proceedings," 30 Rocky Mt. L. Rev. 101, 110, n.39 (1957).

[39] In re Poff, 135 F. Supp. 224, 227 (D.D.C. 1955).

process clauses in the state constitutions which, of course, apply to "non-criminal" proceedings.

The Right to a Grand Jury Indictment as a Preliminary to Trial

Not all states provide for a constitutional right to indictment or presentment by a grand jury as a necessary preface to prosecution for crime, and states that do not provide grand juries as a preliminary to prosecution for crimes can not be expected to do this as a prelude to proceedings in juvenile court. In the states having constitutional grand jury indictment clauses, the cases are few and they are not agreed on whether children can be brought before juvenile courts for what would be indictable offenses without grand jury action. The Missouri Supreme Court once held that a statute giving a probate court jurisdiction to deal with juvenile offenders under seventeen was void when applied to such a youth charged with petit larceny, since the act did not provide for either the indictment or information required by the state constitution.[40] The Tennessee Supreme Court, however, has ruled that the constitutional right to a grand jury indictment as a preliminary to prosecution is inapplicable to juvenile court proceedings involving children charged with misdeeds.[41] Nevertheless, even in a state where the courts do not consider the right applicable to juvenile court proceedings, it has been ruled that a minor must be freed whenever the evidence against him is insufficient to show reasonable or probable cause where on the same facts an adult would be discharged on motion to quash the indictment or information.[42] Since the United States Constitution does not require any state to preface its criminal prosecutions by grand jury indictments or presentments,[43] that document will not be interpreted to make such a demand as a preliminary to juvenile court proceedings.[44]

It cannot yet be said that the grand jury indictment clause of the fifth amendment requires such a preliminary to juvenile proceedings in the federal courts. If juveniles charged with what would be indictable offenses are entitled to the right in federal courts, the right can be waived in proceedings under the Federal Juvenile Delinquency Act by consenting to the procedures of the Act.[45]

The Right to Bail

It would be unthinkable to urge that a legislature could circumvent the constitutional right to bail where it exists by the simple expedient

40 State ex rel. Cave v. Tincher, 258 Mo. 1, 166 S.W. 1028 (1914).
41 Childress v. State, 133 Tenn. 121, 179 S.W. 643 (1915).
42 In re Contreras, 109 Cal. App. 2d 787, 241 P.2d 631 (1952).
43 Hurtado v. California, 110 U.S. 516 (1884).
44 Ex parte Januszewski, 196 Fed. 123 (S.D. Ohio 1911).
45 52 State 765 (1938), 18. U.S.C. § 5032 (1958).

of labelling the proceedings "non-criminal," and yet this is, in effect, what the courts are permitting in denying the applicability of the constitutional bail clauses to children incarcerated by juvenile authorities in advance of their hearings. In a large city hundreds of children are typically being detained pending their ultimate hearing and disposition.[46] According to the United States Children's Bureau, twenty-five per cent of the children picked up are detained in jails.[47] And, as noted earlier, the period of detention prior to their hearing can extend into months.[48] Where a child is accused of crime in the usual courts he is, except for a few of the most serious offenses, regularly accorded the constitutional right to bail. He should have the same constitutional right when accused of comparable misdeeds in juvenile courts. Illustratively, holding that a statute creating juvenile courts could not take away a child's constitutional right to bail, the Louisiana Supreme Court appropriately observed, "Tribunals of this nature were established with the view of showing more consideration to the juvenile and were not designed to deprive him of any of his constitutional rights."[49] Judge Holtzoff of the District Court for the District of Columbia has strongly stated that the constitutional right to bail under the eighth amendment is applicable to all who are deprived of their liberty and detained previous to trial, including children picked up by juvenile authorities in the District.[50] In England bail is acknowledged as of right to children pending their hearings.[51] Of course, some parents have been to blame for their children's deviant behavior and they may not be the best custodians in the world for the children,[52] but, until the hearing is held and the juvenile court makes its disposition, it is urged that the child belongs in his home and not in a police lock-up, a county jail, or even a "detention center."

After a child has been adjudicated a delinquent in a proper proceeding there is not, according to the weight of authority, any constitutional right to bail pending disposition.[53] However, should the child be trans-

[46] Cf. In re Prieto, 49 N.Y.S.2d 800, 802 (Dom. Rel. Ct., Bronx County, 1944) (three hundred and eight boys).

[47] U.S. Dep't of Health Education and Welfare, Juvenile Court Statistics, 1946-49 (Children's Bureau Statistical Series #8, 1951).

[48] Notes 3 & 4 supra.

[49] State v. Franklin, 202 La. 439, 444, 12 So. 2d 211, 213 (1943).

[50] Trimble v. Stone, 187 F. Supp. 483 (D.D.C. 1960). However, note Cinque v. Boyd. 99 Conn. 70, 121 Atl. 678 (1923) for the suggestion that the constitutional right to bail does not apply in juvenile court cases.

[51] Henriques, "Children's Courts in England," 37 J. Crim. L.C. & P.S. 295, 296 (1946).

[52] Cf. Paulsen, "Fairness to the Juvenile Offender," 41 Minn. L. Rev. 547, 552 (1957).

[53] Ex parte Espinosa v. Price, 144 Tex. 121, 188 S.W.2d 576 (1945); with which compare Ex parte Osborne, 127 Tex. Crim. 136, 75 S.W.2d 265 (1934); In re Magnuson, 110 Cal. App. 2d 73, 242 P.2d 362 (1952); State v. Fullmer, 76 Ohio App. 335, 62 N.E.2d 268 (1945). Rubin, "Protecting the Child in the Juvenile Court," 43 J. Crim. L.C. & P.S. 425, 443 (1952).

ferred to a penitentiary for adult criminals, or any comparable institution, habeas corpus should be granted unless within a very brief period the child is transferred to a more suitable institution.[54]

The Right to Know the Nature and the Cause of the Accusation

Most state constitutions contain clauses comparable to the sixth amendment of the United States Constitution, to the effect that all persons accused of crime shall have the right to be informed of the nature and cause of the accusation against them.[55] A court has occasionally indicated that a minor brought before a juvenile court for some misdeed is not entitled to this constitutional right, on its usual theory that the youth was not charged with a "crime."[56] However, the better view supported by the weight of authority is that a child brought before a juvenile court for alleged misbehavior is entitled to a charge that is reasonably definite.[57] Writing of children before the juvenile courts, an outstanding sociologist has said: "An almost universal handicap of the child is his ignorance of the meaning of the charge and of his rights in court; rarely is he appraised fully and intelligibly so as to remove his childish misunderstanding and fears."[58]

The first essential of judicial fairness is that the person brought into court be given a clear understanding of the claims of society against him. Without this it is impossible to defend oneself. As of constitutional right, either under specific "right-to-know" or general due process clauses, a child brought before a juvenile court is entitled to a clear statement of the nature and cause of the proceedings against him so that he can prepare his defense.[59] Since many children will be unable to comprehend the accusation, this right must, of necessity, belong also to the child's parents or guardians.

The Ban upon Double Jeopardy

The fifth amendment ban upon double jeopardy, binding upon the federal government, should prevent subsequent criminal prosecution of a minor after he has been exposed to a juvenile delinquency proceeding by the federal government. Jeopardy has commenced when a person is brought before any tribunal that can deprive him of his liberty: Judge

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54 United States ex rel. Stinnett v. Hegstrom, 178 F. Supp. 17 (D. Conn. 1959); In re Prieto, 49 N.Y.S.2d 800 (Dom. Rel. Ct., Bronx County, 1944).

55 E.g., Pa. Const., Art. I, § 9.

56 Cinque v. Boyd, 99 Conn. 70, 121 Atl. 678 (1923).

57 People v. Lewis, 260 N.Y. 171, 178, 183 N.E. 353, 355 (1932); Ex parte Mei, 122, N.J. Eq. 125, 192 Atl. 80 (1937).

58 Tappan, Juvenile Delinquency 184 (1949).

59 In re Green, 123 Ind. App. 81, 108 N.E.2d 647 (1952); Tappan, Juvenile Delinquency 215 (1949).

Holtzoff of the District Court for the District of Columbia has ably remarked:

> Ineluctable logic leads to the conclusion that the constitutional protection against double jeopardy, as is the case with the right of counsel and the privilege against self-incrimination, is applicable to all proceedings, irrespective of whether they are denominated criminal or civil, if the outcome may be deprivation of liberty of the person. Necessarily, therefore, this is true of proceedings in the Juvenile Court. Precious constitutional rights cannot be diminished or whittled away by the device of changing names of tribunals or modifying the nomenclature of legal proceedings. The test must be the nature and the essence of the proceeding rather than its title. If the result may be a loss of personal liberty, the constitutional safeguards apply.[60]

Even though courts-martial are not considered "criminal" in the usual sense of the word, the United States Supreme Court long ago ruled that the same sovereign could not expose a person to both court-martial punishment and criminal prosecution for the same act.[61] Analogously, once the federal government has in a juvenile proceeding alleged particular misdeeds against a youth, it cannot fairly thereafter re-expose him to prosecution in the usual criminal courts for the same misbehavior.

Under the fourteenth amendment the United States Supreme Court has held that certain practices of the states were not the kind of double jeopardy that is forbidden under the amendment's due process clause.[62] It must then be accepted as still an open question whether the federal constitution allows a state juvenile court to commit a youth and to follow this with criminal court prosecution and sentencing for the one misdeed.

Most state courts presently hold that the state constitutional bans upon double jeopardy do not prevent later criminal prosecution for the same misconduct after a minor has been exposed to juvenile court proceedings and disposition.[63] The customary explanation is that the ban upon double jeopardy applies only to "criminal" cases, and juvenile court proceedings are deemed to be something else. This position is

[60] United States v. Dickerson, 168 F. Supp. 899, 901 (D.D.C. 1958), rev'd, 271 F.2d 487 (D.C. Cir. 1959), 45 Va. L. Rev. 436 (1959). Without resolving the constitutional question, the Court of Appeals reversed, concluding that jeopardy had not yet attached at the preliminary hearing stage. 271 F.2d 487 (D.C. Cir. 1959).

[61] Grafton v. United States, 206 U.S. 333 (1907).

[62] Brock v. North Carolina, 344 U.S. 424 (1953); Palko v. Connecticut, 302 U.S. 319 (1937).

[63] People v. Silverstein, 121 Cal. App. 2d 140, 262 P.2d 656 (1953); In re Santillanes, 47 N.M. 140, 138 P.2d 503 (1943); Dearing v. State, 151 Tex. Crim. 6, 204 S.W.2d 983 (1947); State v. Smith, 75 N.D. 29, 25 N.W.2d 270 (1946); In re Smith, 114 N.Y.S.2d 673 (Dom. Rel. Court Kings County 1952). And cf. Matter of McDonald, 153 A.2d 651 (Mun. App. D.C. 1959). A few states have no express constitutional ban upon double jeopardy and in these jurisdictions exposing a minor to juvenile court proceedings and later criminal prosecution is deemed constitutional. Moquin v. State, 216 Md. 524, 140 A.2d 914 (1958).

applied by these courts even when the youth is charged in juvenile court with misconduct that would be criminal if committed by an adult.[64] Under this approach youngsters have been incarcerated in "training schools" and comparable institutions for as long as fifteen months and then exposed to prosecution in the adult criminal court for the identical offense that put them in the juvenile detention institution.[65]

The contrary and better view holds that once a child has been tried and either acquitted or found to be a juvenile delinquent by a juvenile court and given a commitment or "disposition," he cannot thereafter be tried in the usual criminal courts for the same offense. In so holding, a Texas court has said "In neither case can the party be convicted twice for the same criminal act whether the result of the conviction be to denounce him as a delinquent or as a felon."[66] The Pennsylvania courts have also recognized the impropriety of turning over to the criminal courts for prosecution a child who has earlier been committed for the same conduct by a juvenile court. The Pennsylvania Superior Court held that a juvenile court could not commit a youth to the state industrial school and at the same time order him held for the grand jury for the same act.[67] More recently, the court has added "Furthermore, ordinarily, when the juvenile court assumes jurisdiction, makes an adjudication of delinquency and commits a child, it could not certify the case to the court of quarter sessions for criminal prosecution based on the same violations of law."[68] This was affirmed by the Supreme Court of Pennsylvania which ruled that a certification by a juvenile court for trial in an adult court "could not be made after the Juvenile Court had made an adjudication of delinquency nor, perhaps, after any self-incriminatory examination of the child."[69] The Standard Family Court Act provides that "When a petition has been filed a child shall not thereafter be subject to a criminal prosecution based on the facts giving rise to the petition . . . ."[70] The draftsman of the Act has made it clear that it was not the intention to permit a juvenile court to try a child for alleged delinquency and then at a later date waive the case to an adult court for criminal prosecution for the same act.[71]

It is shocking to contemplate that, under the response of the majority

64 In re Santillanes, 47 N.M. 140, 138 P.2d 503 (1943).
65 People v. Silverstein, 121 Cal. App. 2d 140, 262 P.2d 656 (1953); Sheridan, "Double Jeopardy and Waiver in Juvenile Delinquency Proceedings, 23 Fed. Prob. 43 (1959).
66 Van Hatten v. State, 97 Tex. Crim. 123, 125, 260 S.W. 581, 582 (1924).
67 Matter of Trignani, 150 Pa. Super. 491, 28 A.2d 702 (1942).
68 Matter of Holmes, 175 Pa. Super. 137, 144, 103 A.2d 454, 458 (1953).
69 Matter of Holmes, 379 Pa. 599, 605, 109 A.2d 523, 526 (1954).
70 § 13.
71 Sheridan, "Double Jeopardy and Waiver in Juvenile Delinquency Proceedings," 23 Fed. Prob. 43-44 (1959).

rule, a minor can be committed for many years by a juvenile court judge, then prosecuted and sentenced by a state criminal court for the identical misdeed, and later, for the original misconduct, exposed to further "protection" by the juvenile court! These courts should be urged to re-examine their position. Once a youth is exposed to a judicial proceeding wherein his liberty can be lost he is in jeopardy, regardless of how the proceeding is locally labelled. A minor is in jeopardy the moment a juvenile court begins hearing his case.

The Right to a Speedy and Public Trial

It has not yet been made clear by the United States Supreme Court that the right to a speedy trial is binding in the state courts and, consequently, it cannot be said with assurance that the right under the federal constitution prevails in state juvenile court proceedings. In federal juvenile courts the right to a speedy trial should prevail, either under the specific clause of the sixth amendment or under the due process clause of the fifth amendment.

On their usual theory that this is a "non-criminal" proceeding, two state courts have ruled that the right to a speedy trial under the state constitutional safeguards does not apply in juvenile court proceedings.[72] It is urged that the cases are wrongly decided. All the powerful reasons that have long justified the draftsmen of our constitutions in enshrining the right to a speedy trial apply in cases where juveniles are accused of misconduct. The threat of loss of their liberty should not indefinitely hang over their heads. Furthermore, the possibility of losing witnesses who might aid in their defense is fully as real and harmful here as in the usual criminal prosecution. Clearly, it would seem that this constitutional right would be violated if a juvenile court were to commit a youth to a place of reform and then, months or even years later, turn him over to the adult criminal court for prosecution for the original wrong.[73]

Again, on the basis of the customary "non-criminal" label, a number of courts have held that the constitutional right to a public trial is not applicable in juvenile court proceedings.[74] To the extent that these decisions take from the youngster or his parents and counsel the decision whether there should be a public trial, these are wrongly decided.

[72] Prescott v. State, 19 Ohio St. 184, 2 Am. Rep. 388 (1870); Matter of Mont, 175 Pa. Super. 150, 103 A.2d 460 (1954).

[73] Sheridan, "Double Jeopardy and Waiver in Juvenile Delinquency Proceedings," 23 Fed. Prob. 43, 45 (1959).

[74] White v. Reid, 125 F. Supp. 647 (D.D.C. 1954); Cinque v. Boyd, 99 Conn. 70, 121 Atl. 678 (1923); Matter of Sharp, 15 Idaho 120, 96 Pac. 563 (1908); State v. Cronin, 220 La. 233, 56 So. 2d 242 (1951); Matter of Mont, 175 Pa. Super. 150, 103 A.2d 460 (1954); Dendy v. Wilson, 142 Tex. 460, 179 S.W.2d 269 (1944).

Even if the proceedings should be locally labelled "non-criminal" the fair trial concept inherent in due process of law demands that a youngster should not be tried in camera over his opposition. The reasons are persuasive. For instance, when a youth is charged with assault, a member of the public may well step forward in the court and testify that the minor was simply defending himself. Or other members of the courtroom audience may volunteer that the complaining witnesses are prevaricating. Indeed, this right is necessary to keep a healthy check upon the juvenile court judges. Of such judges in New York City a capable scholar has written: "Each of these men and women is the monarch of the court while sitting on its bench. The proceedings of the court are only rarely observed by critical eyes. The public is not admitted. Lawyers infrequently appear . . . . Decisions are seldom appealed to higher courts that might admonish or correct."[75] Truly this is not just a "legalistic" ritual magnified by the legal profession.

No minor before a juvenile court should be exposed to the gaze of the community and the press if he does not so desire. It follows that once the constitutional right to a public trial is acknowledged, it can be waived by any youth who desires to be heard in private. Since the purpose of the right is not to guarantee the community entertainment or the press copy, but to protect the person charged with an offense against the state, it is up to the person charged, and not the state, to determine if the right to a public trial is to be dispensed with in the particular case. In England, although the general public is ordinarily not permitted to be present, the press is given the opportunity to attend juvenile court proceedings, but prohibited from mentioning the name of the minor or describing the youngster in such a way that identification is possible.[76]

The Right to Trial by Jury

At the moment there is no federal constitutional right to trial by jury in state courts and this, of course, embraces the juvenile courts.[77] The sixth amendment guarantee of trial by jury in criminal prosecutions does not, according to a federal district court, assure a jury trial to a minor before a federal juvenile court.[78]

On the prevailing theory that juvenile court proceedings are "non-criminal," most of the state courts that have ruled upon the question have held that the state constitutional bills of rights guaranteeing trial

[75] Gellhorn, Children and Families in the Courts of New York City 81 (1954). And see Geis, "Publicity and Juvenile Court Proceedings," 30 Rocky Mt. L. Rev. 101 (1957).
[76] Henriques, "Children's Courts in England," 37 J. Crim. L., C. & P.S. 295 (1946).
[77] Brown v. New Jersey, 175 U.S. 172 (1899).
[78] White v. Reid, 125 F. Supp. 647 (D.D.C. 1954).

by jury in criminal cases are inapplicable to youngsters charged with offenses before the juvenile courts.[79] The prevailing view additionally permits denial of a jury under the state constitutional clauses guaranteeing a right of trial by jury in civil proceedings.[80] Some of these courts have come to this conclusion by deciding that a juvenile court proceeding does not amount to a "trial."[81] Additionally, a majority of the courts that have passed upon the problem have concluded that a child before a juvenile court is not entitled to this right under due process of law.[82]

Notwithstanding the above authority, it is urged that when children are brought before juvenile courts for misdeeds that would require a jury trial if the accused were an adult, such minors are entitled as of right to trial by jury. There are well-reasoned state supreme court cases recognizing the constitutional right of trial by jury when a youth is charged with a specific wrong before a juvenile court. This is the holding, for example, of the Iowa Supreme Court.[83] Further, at a time when the Michigan juvenile court law allowed the judge to fine minors up to twenty-five dollars for their peccadilloes, the Supreme Court of that state properly concluded that the proceedings were "criminal" to which the constitutional safeguard of jury trial applied.[84] The early decisions in Illinois, New Hampshire, New Jersey and Pennsylvania held that children before juvenile court judges were entitled to the constitutional right of trial by jury[85] but, unfortunately, the later cases have taken a contrary view.[86] That the right to jury trial is considered both necessary and important is attested by the acts of the legislatures in almost half the states giving the right in juvenile court pro-

[79] Matter of Daedler, 194 Cal. 320, 228 Pac. 467 (1924); People v. Fifield, 136 Cal. App. 2d 741, 289 P.2d 303 (1955); Cinque v. Boyd, 99 Conn. 70, 121 Atl. 678 (1923); Hampton v. Stevenson, 210 Ga. 87, 78 S.E.2d 32 (1953); Lindsay v. Lindsay, 257 Ill. 328, 100 N.E. 892 (1913); Marlowe v. Commonwealth, 142 Ky. 106, 133 S.W. 1137 (1911); Bryant v. Brown, 151 Miss. 398, 118 So. 184 (1928); Laurie v. State, 108 Neb. 239, 188 N.W. 110 (1922); In re Santillanes, 47 N.M. 140, 138 P.2d 503 (1943); Prescott v. State, 19 Ohio St. 184, 2 Am. Rep. 388 (1870); Commonwealth v. Fisher, 213 Pa. 48, 62 Atl. 198 (1905); Commonwealth v. Carnes, 82 Pa. Super. 335 (1923); Mill v. Brown, 31 Utah 473, 88 Pac. 609 (1907); In re Gomez, 113 Vt. 224, 32 A.2d 138 (1943).

[80] Ex parte Januszewski, 196 Fed. 123 (Ohio Cir. 1911); State v. Heath, 352 Mo. 1147, 181 S.W.2d 517 (1944); Prescott v. State, 19 Ohio St. 184, 2 Am. Rep. 388 (1870); Commonwealth v. Fisher, 213 Pa. 48, 62 Atl. 198 (1905).

[81] Commonwealth v. Fisher, 213 Pa. 48, 62 Atl. 198 (1905).

[82] In re Santillanes, 47 N.M. 140, 138 P.2d 503 (1943); Wissenburg v. Bradley, 209 Iowa 813, 229 N.W. 205 (1930); but compare with this State v. Breon, 244 Iowa 49, 55 N.W.2d 565 (1952).

[83] State v. Breon, 244 Iowa 49, 55 N.W.2d 565 (1952).

[84] Robinson v. Wayne Circuit Judge, 151 Mich. 315, 115 N.W. 682 (1908).

[85] People v. Turner, 55 Ill. 280, 8 Am. Rep. 645 (1870); State v. Ray, 63 N.H. 406, 56 Am. Rep. 529 (1885); Matter of Daniecki, 117 N.J. Eq. 527, 177 Atl. 91 (1935), aff'd 119 N.J. Eq. 359, 183 Atl. 298 (1935); Matter of Mansfield, 22 Pa. Super. 224 (1903).

[86] Lindsay v. Lindsay, supra note 79; Commonwealth v. Fisher, supra note 79; Petition of Morin, 95 N.H. 518, 68 A.2d 668 (1949); State v. Monahan, 15 N.J. 34, 104 A.2d 21 (1954).

ceedings.[87] And in England all children over the age of fourteen charged in the juvenile courts with what would be indictable offenses are accorded the right of trial by jury.[88]

Before the juvenile court acts in this country, children charged with offenses before the regular courts were without question entitled to their constitutional right to trial by jury, and, since it was hardly the intent of the legislature to diminish the protections of the children by the acts, the juvenile court statutes should be interpreted wherever possible to admit this right. Any attempt by the legislature to take away constitutional rights in this area should be invalidated.[89] Once this right is acknowledged, the doctrine of waiver can be applied so long as the child has knowingly and intelligently effectuated the waiver.[90]

The Right of Confrontation

The sixth amendment right of confrontation is not applicable, according to a federal district court, in federal juvenile delinquency proceedings.[91] And the United States Supreme Court has not yet held that one accused in the state courts is entitled to this right as part of due process under the fourteenth amendment.[92]

Some state courts have ruled that the right of confrontation guaranteed in the state constitutions does not apply in juvenile court proceedings on their usual rationale that these are "non-criminal."[93] In these jurisdictions there is no constitutional objection to the use of hearsay against a minor,[94] and the courts have sometimes permitted adjudications of delinquency to be based upon hearsay.

The better and majority of cases, on the other hand, have held hearsay inadmissible in juvenile court proceedings and have rejected findings of delinquency when supported only by hearsay.[95] For example, a Texas

87 Reckless & Smith, Juvenile Delinquency 227 (1st ed. 1932). E.g., Colo. Rev. Stat. Ann. § 22-8-2 (1953); Kahm v. People, 83 Colo. 300, 264 Pac. 718 (1928); D.C. Code Ann. § 11-915 (1951); Okla. Stat. tit. 10, § 102 (1941); Ex parte Lewis, 85 Okla. Crim. 322, 188 P.2d 367 (1947); Tex. Rev. Civ. Stat. art. 2334 (Supp. 1950).

88 Henriques, "Children's Courts in England," 37 J. Crim. L., C. & P.S. 295, 296 (1946); Tappan, Juvenile Delinquency 205 (1949).

89 "The rights of the individual guaranteed by the constitution cannot he determined by the criterion of whether we think them useful or otherwise." Brickley, J., dissenting in In re Santillanes, 47 N.M. 140, 169, 138 P.2d 503, 521 (1943).

90 Ex parte Baeza, 185 P.2d 242 (Okla. Crim. 1947). In proceedings under the Federal Juvenile Delinquency Act, 62 Stat. 857 (1948), 18 U.S.C. § 5032 (1951), juveniles can waive their right to trial hy jury by consenting to procedures under the Act.

91 White v. Reid, 125 F. Supp. 647 (D.D.C. 1954).

92 Cf. Stein v. New York, 346 U.S. 156 (1953); West v. Louisiana, 194 U.S. 258 (1904).

93 Cinque v. Boyd, 99 Conn. 70, 121 Atl. 678 (1923).

94 Matter of Holmes, 379 Pa. 599, 109 A.2d 523 (1954).

95 In re Sippy, 97 A.2d 455 (Mun. App. D.C. 1953); In re Contreras, 109 Cal. App. 2d 787, 241 P.2d 631 (1952); Krell v. Mantell, 157 Neb. 900, 62 N.W.2d 308 (1954); People v. Fitzgerald, 244 N.Y. 307, 155 N.E. 584 (1927); Miller v. State, 82 Tex. Crim. 495, 200 S.W. 389 (1917).

court has concluded, "The accused in such cases should be faced by the witnesses who give evidence against him and should be permitted to hear such evidence and have an opportunity to cross-examine the witnesses."[96] The statement by a California appellate court is equally appropriate: "[D]etails whispered privately to a judge in chambers cannot be the basis of a final order. The more serious the accusation the greater the need that it be carefully tested, and to that end that no one be denied the right of cross-examination."[97] According to the New York Court of Appeals, "Hearsay, opinion, gossip, bias, prejudice, trends of hostile neighborhood feeling, the hopes and fears of social workers, are all sources of error and have no more place in Children's Court than in any other court."[98] To this the Nebraska Supreme Court adds,

> Reports of an ex parte investigation made by investigators from the police department and the Child Welfare Department are not competent evidence and may not be considered by the court in the hearing and decision of a disputed issue of fact.[99]

Recently, the same court ruled that a juvenile court judge cannot consider statements made out of court, nor can he hear testimony or conduct part of the hearing out of the presence of the juvenile. This court pointed out in unmistakable terms that the language, "to hear and dispose of the case in a summary manner," typical of the juvenile court statutes, "did not mean that trials could be had in any court in such manner as to destroy the traditional and constitutional safeguards of a trial. The Legislature did not intend that trials should be had without the benefit of testimony of witnesses given nnder the sanction of oath or affirmation. It did not mean to say that the liberty of a child has less sanctity than that of an adult."[100]

Capable commentators have made the point that confrontation is an imperative in juvenile court proceedings if justice is to be done. The late Dean Wigmore wrote: "But that the judge shall have the *power* to commit to long detention any person without giving the person *any opportunity to hear the substance of the testimony against him* is fundamentally unsound and practically dangerous."[101] A distinguished jurist

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96 Ballard v. State, 192 S.W.2d 329, 332 (Tex. Civ. App. 1946). And see State v. Tincher, 258 Mo. 1, 166 S.W. 1028, 1033 (1914); Green v. State, 123 Ind. App. 81, 108 N.E.2d 647 (1952).

97 In re Hill, 247 Pac. 591, 592-93 (Cal. App. 1926).

98 People v. Lewis, 260 N.Y. 171, 183 N.E. 353, 355 (1932). North Dakota courts have used similar language. See State v. Schelin, 59 N.D. 386, 230 N.W. 9 (1930); followed in Matter of Rixen, 74 N.D. 80, 19 N.W.2d 863 (1945).

99 Ripley v. Godden, 158 Neb. 246, 247, 63 N.W.2d 151, 153 (1954).

100 Nebraska v. Bartkus, 168 Neb. 257, 263, 95 N.W.2d 674, 677 (1959).

101 5 Wigmore, Evidence, § 1400, at 145 (3d ed., 1940).

comments in similar vein: "If hearsay, for example, has not been found justly admissible in civil disputes and criminal trials, it is no better in juvenile court proceedings."[102] And Sheldon Glueck, who has ably studied the approaches of the law to juvenile misbehavior, has recently observed: "Loftiness of the motives of a juvenile court can be an insufficient exchange for hearsay or neighborhood gossip or the inability of the child to examine the witnesses from whom the social investigator obtained his information."[103] In a society that long ago deliberately rejected the inquisitorial method and freely chose the alternative of confrontation and cross-examination by adversary counsel in its search for the truth, there is neither justification nor excuse for the deprivation of liberty to a single child when supported only by the utterances not under oath of persons never subjected to court-room confrontation and cross-examination. Either under the specific bill-of-rights safeguards, or under due process of law in the federal and state constitutions, a youth must be given the right to confront and cross-examine those who would prove him a delinquent. Because parents or guardians are therewith being deprived of the care and companionship of the child, they, too, should perforce be recognized as possessing these rights.

The Right to Have Compulsory Process to Compel the Attendance of Witnesses

The sixth amendment guarantees that every accused shall enjoy the right "to have compulsory process for obtaining witnesses in his favor," and most state constitutions have comparable provisions. On two occasions courts have suggested that the right does not prevail in juvenile court proceedings on the predictable theory that these are "non-criminal."[104] The courts should repudiate these views and, admitting the criminal nature of the proceedings rule that this right spelled out in the bills of right applies here. But even if a court should refuse to acknowledge the criminal nature of the court proceedings, it should understand that even parties in civil litigation require compulsory process to present their positions and should hold that due process, clearly applicable to civil proceedings, demands a fair opportunity to present one's defense. It is impossible to have one's day in court without the opportunity to produce favorable witnesses. The right to have compulsory process to compel the attendance of witnesses is acknowl-

102 Waite, "How Can Court Procedures Be Socialized Without Impairing Individual Rights:," 12 J. Am. Inst. Crim L. & C. 339, 343 (1922).

103 Glueck, The Problem of Delinquency 327 (1959).

104 White v. Reid, 125 F. Supp. 647 (D.D.C. 1954); Cinque v. Boyd, 99 Conn. 70, 121 Atl. 678 (1923).

edged in the better juvenile courts[105] and it should be recognized everywhere.

The Right to Counsel

Once incarceration of children for their misdeeds is recognized as a criminal proceeding though conducted by juvenile courts, juveniles will be accorded their right to counsel under the criminal safeguard sections of the federal and state constitutions. The sixth amendment will then guarantee the right to counsel in federal juvenile courts. The fourteenth amendment will guarantee children before state juvenile courts the right to counsel when to deny them counsel would in effect deny them a fair trial.[106] Already a federal court, in a well-reasoned opinion, has held by way of statutory interpretation that a youth charged in a federal juvenile court with an offense that would be a crime if committed by an adult is entitled to be advised that he has a right to counsel. Furthermore, the court indicated that the legislature could not have deprived the youth of his pre-existing constitutional rights, including the right to counsel when tried in a federal court. Referring to the juvenile court act, the court stated:

> It follows logically that in the absence of such legislation, the juvenile would be entitled to the same constitutional guarantees and safeguards as an adult. If this be true then the only possible reason for the Juvenile Court Act was to afford the juvenile safeguards *in addition to those* he already possessed. The legislative intent was to enlarge, *not to diminish* these protections.[107]

When a child was confined to a "juvenile hall" under commitment issued out of a juvenile court and accused of doing an act that was a felony under state law, a California appellate court held that he had a right to counsel under that State's constitutional clause giving right to counsel "in criminal prosecutions."[108] The contrary holdings to the effect that the right to counsel is inapplicable in juvenile courts are based again on the theory that these proceedings are "non-criminal."[109]

Even the courts that label juvenile court proceedings as "non-criminal" must face the demands of federal and state due process. It is incontrovertible that a child is a "person" and hence entitled to due process

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105 Gellhorn, Children and Families in the Courts of New York City, 78 (1954).

106 Cf. Betts v. Brady, 316 U.S. 455 (1942).

107 In re Poff, 135 F. Supp. 224, 225 (D.D.C. 1955).

108 Matter of Rider, 50 Cal. App. 797, 195 Pac. 965 (1920). And see Matter of Hill, 78 Cal. App. 23, 247 Pac. 591 (1926); In re Contreras, 109 Cal. App. 2d 787, 241 P.2d 631 (1952).

109 White v. Reid, 125 F. Supp. 647 (D.D.C. 1954); In re Shaeffer, 126 A.2d 870 (Mun. App. D.C. 1956); People v. Fifield, 136 Cal. App. 2d 741, 289 P.2d 303 (1955); Matter of McDermott, 77 Cal. App. 109, 246 Pac. 89 (1927); Cinque v. Boyd, 99 Conn. 70, 121 Atl. 678 (1923); In re Holmes, 379 Pa. 599, 109 A.2d 523 (1954) (dissent by Musmanno, J.).

under the fifth amendment and the state constitutions in state juvenile courts. A fair trial in juvenile court proceedings requires that a child have counsel by his side. Indeed, the right of a prosperous youth to hire such counsel is everywhere acknowledged.[110] The right must include the right of an indigent juvenile to have counsel appointed for him by the state that alleges he is delinquent. Judge Curran of the District Court for the District of Columbia has held "that where the child commits an act, which act if committed by an adult would constitute a crime, then due process in the Juvenile Court requires that the child be advised that he is entitled to the effective assistance of counsel, and this is so even though the juvenile court in making dispositions of delinquent children is not a criminal court."[111] And the Court of Appeals for the District of Columbia stated:

> Since an intelligent exercise of the juvenile's rights under the Act and the Rules clearly requires skills not possessed by the ordinary child under 18, it is plain that, as appellee, the District of Columbia, concedes, a juvenile is entitled to be represented by counsel if he or his parents or guardian choose to furnish one. Appellee contends, however, that the court is not required to advise a juvenile of that right, or to assure itself that the right has been intelligently waived. It also contends that the court is not required to appoint counsel where there is no such waiver or where the juvenile's family is indigent. We think these contentions are unsound.[112]

The court preferred to avoid the constitutional issue by basing its decision upon statutory interpretation, but the language is equally persuasive in determining the need for recognition of this constitutional right when a juvenile court statute cannot be so interpreted. For "Even in purely civil proceedings the constitutional right of counsel applies if the result may be a deprivation of freedom of the individual."[113] There is no doubt that the right to counsel includes the right of the minor to be advised by the court of such right.[114]

The better reasoned state court opinions similarly acknowledge the youth's right to counsel. Often the courts avoid the constitutional issues and reach this result by "interpreting" the juvenile court acts. In so doing, for example, the New Hampshire Supreme Court has recently noted that "a concomitant of an opportunity to be heard in support of or in defense of a claim is the right to the assistance of counsel."[115] Both

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110 People v. Fifield, 136 Cal. App. 2d 741, 289 P.2d 303 (1955); Shioutakon v. District of Columbia, 236 F.2d 666 (D.C. Cir. 1956).

111 In re Poff, 135 F. Supp. 224, 227 (D.D.C. 1955).

112 Shioutakon v. District of Columbia, 236 F.2d 666, 670 (D.C. Cir. 1956).

113 United States v. Dickerson, 168 F. Supp. 899, 901 (D.D.C. 1958), reversed on other grounds, 271 F.2d 487 (D.C. Cir. 1959).

114 McBride v. Jacobs, 247 F.2d 595, 596 (D.C. Cir. 1957).

115 In re Poulin 100 N.H. 458, 459, 129 A.2d 672, 673 (1957).

New York and California cases indicate that there is a constitutional right of a child to counsel in the juvenile courts when to deny counsel is in effect to deny a fair trial.[116]

Capable observers are almost unanimously agreed that the child must be entitled to counsel. "In the absence of counsel," writes Tappan, "there is no assurance that the child will be heard at all fully."[117] And on another occasion he has written of girls brought before the juvenile courts:

> There should be an attorney for the defense in the Court at all times to give legal guidance and advice to the girl. This is the minimal requirement for fair adjudication. If . . . the defendant is to be deprived of a large section of her traditional right of due process by permitting communication to the judge of the information and misinformation gleaned from gossip, of community opinion, unthoughtful and often unfriendly neighbors and relatives, there must be an opportunity for an attorney representing the defendant to bring into the open the source and nature of the evidence so that where the source is of inferior credibility little weight will be attached to it.[118]

Other authorities are in substantial agreement.[119] While the aid of counsel may prevent unwise commitment of a child, there is in the record of the bar not the slightest basis for the fear of some lay judges and social workers that the purpose of the juvenile court acts will be thwarted by the presence of these officers of the court. "The worthwhile objectives of the juvenile courts can be accomplished without prohibiting the child or the parent from obtaining the assistance of counsel."[120]

Although it acknowledges "the child's right to counsel . . . in all juvenile court proceedings, including preliminary conferences," the United States District Court for the District of Columbia recently ruled that the right did not apply at a time when the juvenile court judge was deciding whether to waive the case over to the usual criminal courts.[121] The right to counsel can be waived by parties possessing the right. However, only intelligent and competent waivers can be accepted by the courts. Most minors brought before juvenile courts may well lack the competence and intelligence to give effective waivers of the right to counsel. "It seems to me to follow as a matter of law," says one court, "that a boy of seventeen cannot competently waive his right to counsel in a criminal case."[122] There is no reason to believe that the same boy

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116 People v. Dotson, 46 Cal. 2d 891, 299 P.2d 875 (1956); People v. James, — N.Y.2d —, — N.E.2d —, — N.Y.S.2d — (1961).

117 Tappan, Juvenile Delinquency 216 (1949).

118 Tappan, Delinquent Girls in Court 107-08 (1947).

119 Paulsen, "Fairness to the Juvenile Offender," 41 Minn. L. Rev. 547, 570 (1957); Fine, 1,000,000 Delinquents 287 (1955).

120 In re Poulin, 100 N.H. 458, 129 A.2d 672, 673 (1957).

121 United States v. Stevenson, 170 F. Supp. 315 (D.D.C. 1959).

122 Williams v. Huff, 142 F.2d 91, 92 (D.C. Cir. 1944). See also McBride v. Jacobs, 247 F.2d 595 (D.C. Cir. 1957); In re Sippy, 97 A.2d 455 (Mun. App. D.C. 1953).

or his more youthful companions can any more competently waive the right in juvenile court proceedings, and courts should not lightly conclude that they have.

The Privilege Against Self Incrimination

It is fully established in all American jurisdictions that, notwithstanding the limitative language of the constitutional provisions providing a privilege against self incrimination, it is available of right not only in the criminal courts but in any proceeding of that jurisdiction where the effect of the utterance is to expose the speaker to later punishment in the courts of that jurisdiction. Where a juvenile court judge can compel incriminating statements from a youth and then turn him over to the adult criminal court for prosecution, it is clear that he has been denied this constitutional privilege.[123] Any other rule would be unthinkable, permitting juvenile authorities to grill children in ways the police cannot. The Texas Court has ruled further that it is not enough that the juvenile court statute provide by way of immunity that evidence given in a juvenile court proceeding is inadmissible in any other court; to be constitutional the statute must give an absolute immunity if the child is to be forced to incriminate himself by the juvenile authorities.[124] Legislatures have understood the impropriety of using elsewhere such statements forced from the child. Today statutes in some thirty-eight jurisdictions prohibit the use of evidence given by a youth in juvenile court in any other tribunal.[125] An occasional court has deemed constitutional an interpretation of such statutes which would allow the child to be charged in another court for the identical misdeed but permit the charge to be proved only by evidence other than that given by the youth before the juvenile court.[126] The better rule prevents transfer of the child over to the adult courts for trial once incriminating statements of the child have been heard in juvenile court unless there has been an intelligent and competent waiver of the privilege against self incrimination by the youth.[127]

The privilege against self incrimination should permit a child to remain silent when being exposed to a finding of delinquency by juvenile authorities, and it should require that he be informed of his right by the juvenile court before being questioned by the judge or any officer of such court. There are well-reasoned decisions to the effect that a child is

123 Dendy v. Wilson, 142 Tex. 460, 179 S.W.2d 269 (1944); In re Sadlier, 97 Utah 291, 85 P.2d 810, aff'd on rehearing, 97 Utah 313, 94 P.2d 161 (1939).

124 Dendy v. Wilson, 142 Tex. 460, 179 S.W.2d 269 (1944).

125 E.g., Col. Rev. Stat. Ann. § 22-8-1 (1953). Sheridan, "Double Jeopardy and Waiver in Juvenile Delinquency Proceedings," 23 Fed. Prob. 43, 44 (1959).

126 Kozler v. New York Tel. Co., 93 N.J.L. 279, 108 Atl. 375 (1919). Annot. 147 A.L.R. 443 (1943).

127 Holmes' Appeal, 379 Pa. 599, 601, 104 A.2d 523, 526 (1954).

"incriminating" himself when his responses expose him to incarceration and loss of liberty through an adjudication of delinquency. A California appellate court has freed on habeas corpus a boy committed for refusing as a witness in juvenile court to answer certain questions upon the advice of his counsel. Said this court:

> It would have been strange, indeed, if the Legislature had sought to visit a minor with the loss of his natural parent's society, guidance and governance merely because, forsooth, he had the temerity to invoke the protection of a constitutional guaranty included in the state's organic law for the very purpose of safeguarding his personal liberty against the methods that obtained when confessions were extorted by inquisitorial abuses. . . . [T]he liberty of a ward of the juvenile court . . . cannot be further restrained, as, for example, by confinement in a public institution, solely and simply because the ward chooses to stand steadfastly by a right guaranteed him by the fundamental law of the state.[128]

Again, the Utah Supreme Court has ruled that a girl under eighteen could refuse to testify to her relations with an adult male when her answers might expose her to an adjudication of delinquency by a juvenile court: "If the concept of criminality arises only because of an arbitrary age limit fixed by statute, then it is all the more important that the juvenile should be entitled to and be protected in the right to the privilege of silence where his statement, if made, might be self-incriminating."[129] Furthermore, in those jurisdictions where juries are used in juvenile court proceedings, it has been held that youths are entitled to instructions from the court that the jury is to draw no unfavorable inference from the child's reluctance to take the witness stand.[130]

There have been some state court decisions to the effect that the instant constitutional right does not belong to children in juvenile court on the usual "non-criminality" theory with the consequence that children can be forced to acknowledge their wrongs.[131] Not only is the labelling unrealistic and unreasonable but, as pointed out above, the privilege is not restricted to "criminal" prosecutions but is regularly available in other inquiries by the state. No child taken before juvenile authorities should be compelled to say that he has committed misdeeds that would justify a juvenile court in removing him from his parents and society.

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128 In re Tahbel, 46 Cal. App. 755, 761, 189 Pac. 804, 807 (1920).

129 In re Sadleir, 97 Utah 291, 302, 85 P.2d 810, 815, aff'd on rehearing, 97 Utah 313, 94 P.2d 161 (1939).

130 In re Davis, 83 A.2d 590 (Mun. App. D.C. 1951).

131 People v. Lewis, 260 N.Y. 171, 183 N.E. 353 (1932) (dissent by Crane, J.: "The accused having been forced to be a witness against himself, was sent away to be locked up on his own testimony. This was in direct violation of the Constitution of this state. . . ." 260 N.Y. at 184, 183 N.E. at 358); In re Dargo, 81 Cal. App. 2d 205, 183 P.2d 282 (1947); Re Santillanes, 47 N.M. 140, 138 P.2d 503 (1943); Holmes' Appeal, 379 Pa. 599, 109 A.2d 523 (1954) (dissent by Musmanno, J.); Mont Appeal, 175 Pa. Super. 150, 103 A.2d 460 (1954). And cf. Cinque v. Boyd, 99 Conn. 70. 121 Atl. 678 (1923); Annot. 151 A.L.R. 1229 (1944).

Due Process of Law—Notice and Hearing

When the liberty of a child is being abridged by juvenile courts he is entitled to constitutional due process.[132] Such liberty is clearly taken away by the state when children are removed from their families and homes, deprived of freedom of movement, and incarcerated by the state.[133] "It is true," admits a federal court, "that in both juvenile court and criminal proceedings a person may be deprived of his liberty."[134] Comparably the Washington Supreme Court has ruled that when the police took a minor into custody for alleged misbehavior they were depriving the youth of his liberty, and when they failed to follow applicable local procedures they were taking his liberty without due process, making them liable in damages for false imprisonment.[135] Not only does due process extend to children before juvenile courts but to their parents and guardians as well where the state is endeavoring to deprive them of the custody and companionship of their child.[136] The right of a child before a juvenile court to fair treatment was emphasized by the late Chief Justice Vanderbilt:

> In their zeal to care for children neither juvenile judges nor welfare workers can be permitted to violate the Constitution, especially the Constitutional provisions as to due process that are involved in moving a child from its home. The indispensable elements of due process are: first, a tribunal with jurisdiction; second, notice of a hearing to the proper parties; and finally, a fair hearing. All three must be present if we are to treat the child as an individual human being and not to revert, in spite of good intentions, to the more primitive days when he was treated as a chattel.[137]

The first demand of due process in a juvenile court proceeding requires that the minor and his parents or guardians be given clear notice of the alleged misbehavior with adequate specificity and ample time to prepare their defense to the state's allegations.[138] In requiring that parents and guardians be given timely notice of the charge against the child and a reasonable opportunity to defend, the Nebraska Court has explained,

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132 Pee v. United States, 274 F.2d 556 (D.C. Cir. 1959); In re Alexander, 152 Cal. App. 2d 458, 313 P.2d 182 (1957). Capello, "Due Process in the Juvenile Courts," 2 Cath. U.L. Rev. 90 (1952).

133 In re Mantell, 157 Neb. 900, 907, 62 N.W.2d 308, 311 (1954). See notes, 45 Ky L.J. 532, 535 (1957); 35 Va. L. Rev. 1097 (1949).

134 White v. Reid, 125 F. Supp. 647, 650 (D.D.C. 1954).

135 Weber v. Doust, 81 Wash. 668, 143 Pac. 148 (1914).

136 In re Moilanen, 104 Cal. App. 2d 835, 233 P.2d 91 (1951); Pettit v. Engelking, 260 S.W.2d 613, 616 (Tex. Civ. App. 1953).

137 Virtue, Basic Structure of Children's Services in Michigan p. x. (1953).

138 In re Florence, 47 Cal. 2d 25, 300 P.2d 825 (1956); In re Creely, 70 Cal. App. 2d 186, 190, 160 P.2d 870, 872 (1945); In re Coyle, 122 Ind. App. 217, 101 N.E.2d 192, 193 (1951); O'Leary, petitioner, 325 Mass. 179, 182, 89 N.E.2d 769, 771 (1950); State ex rel. Cave v. Tincher, 258 Mo. 1, 166 S.W. 1028 (1914); State v. Andersen, 159 Neb. 601, 68 N.W.2d 146 (1955); In re Roth, 158 Neb. 789, 64 N.W.2d 799 (1954); In re Poulin, 100 N.H. 458, 459, 129 A.2d 672, 673 (1957); Matter of Solberg, 52 N.D. 518, 203 N.W. 898 (1925); Pettit v. Engelking, 260 S.W.2d 613 (Tex. Civ. App. 1953).

"Without that protection a child of tender years could well become the victim of the merciless and be deprived of the constitutional and traditional safeguards which are guaranteed to even society's most depraved adult. Such a situation would be intolerable."[139]

At times juvenile court acts have been interpreted as not requiring that informations used against juveniles charge the offense with the same particularity as for adults charged with crimes.[140] These interpretations are unsound. If anything, the immature minor should be informed of his purported wrongs with greater particularity so that no magnified fears be engendered in the mind of the child.

The second due process right of the child and the parent in a juvenile court is the right to a fair and adequate hearing. Every person, even in "non-criminal" litigation, is entitled to his day in court. So, where a probate judge with juvenile court jurisdiction had a boy brought in, then told him to leave the judge's chambers while the judge told the father he was sending away the boy and actually sent off the boy without a hearing in open court of any kind, an Indiana court readily found due process of law had been denied:

> The petition reveals a star chamber proceeding . . . without a semblance of due process. . . . [T]he (Juvenile Court) act does not, nor could it, within constitutional limitations, sanction the action of a court in finding a juvenile guilty of a wrong against the state in disregard of his rights to a hearing in which he is apprised of the charges against him, the evidence in support thereof and afforded an opportunity to defend himself.[141]

The right to a fair hearing embraces the right of the child and its parents to be in court when the evidence is introduced against them, and the further right of a reasonable opportunity to rebut such evidence.[142] To avoid passing on the constitutional issues, courts typically construe the juvenile court acts to give the child the indicated rights.[143]

The right to due process of law in its particular demand for a fair hearing requires that the evidence against the youth be introduced in open court and that it consist only of evidence found over the years to

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139 In re Roth, 158 Neb. 789, 794, 64 N.W.2d 799, 802 (1954). And see In re Santillanes, 47 N.M. 140, 138 P.2d 503 (1943); In re Smith, 92 N.Y.S.2d 529 (Children's Ct. Erie County 1949) (notice to the parent is necessary before his child can be sent from an agency home to a state training school).

140 State v. Johnson, 196 Iowa 300, 194 N.W. 202 (1923); Rose v. State, 137 Tex. Crim. 316, 129 S.W.2d 639 (1939). A few cases have mistakenly suggested that because the proceedings were "non-criminal" notice to the parents was unnecessary. Mill v. Brown, 31 Utah 473, 88 Pac. 609 (1907). Professor Clark has written: "[I]t would seem that serious constitutional questions are raised [by lack of notice] at least where the decree affects the parents' custody of their child, perhaps in all cases." "Juvenile Delinquency in Colorado: The Law's Response to Society's Need," 31 Rocky Mt. L. Rev. 1, 10 (1958).

141 Matter of Green, 123 Ind. App. 81, 86-87, 108 N.E.2d 647, 649-50 (1952).

142 State v. Reister, 80 N.W.2d 114 (N.D. 1956); State v. Schelin, 59 N.D. 386, 391, 230 N.W. 9, 11 (1930); followed in Matter of Rixen, 74 N.D. 80, 19 N.W.2d 863 (1945).

143 Weiss v. Ussery, 265 Ala. 510, 92 So.2d 916 (1957).

be reliable. Hearsay, rumors, gossip, ex parte reports by persons not sworn in court, etc., have no more place in juvenile court proceedings than in any other judicial hearing. The important constitutional right to have evidence against one introduced under oath in open court when the minor and his parents are there to watch the witness and to rebut the testimony is not to be taken away even by well-meaning juvenile court judges in the name of "protecting" the child.[144] Visits in chambers where neighbors, police and others impart information and misinformation to the juvenile court judge without oath or the presence of the child are too fraught with peril to condone. An attorney with an extensive experience in juvenile court matters and sympathetic to the place of these courts has candidly admitted that "The danger that an informal hearing might degenerate into a 'star chamber inquisition,' where orders are made without proper evidence, is all too real, and must definitely be guarded against."[145]

There are some decisions allowing juvenile courts to brand children as delinquents on the basis of hearsay. Thus, a Pennsylvania juvenile court judge permitted a detective to testify that a boy had participated in a robbery on the basis of the signed "confession" of another boy. The confessor was not in court and the "confession" was not even introduced. Indeed, the youngster who allegedly gave the "confession" repudiated it at a later hearing. What was referred to naively as "the legalistic features of the rules of evidence" could be avoided in holding the child a delinquent according to the Pennsylvania court.[146] It is shocking to find a court negating constitutional rights to confrontation and due process of law "to accomplish the purposes for which juvenile court legislation is designed."[147] Fortunately, the better-reasoned and majority of cases are contra.[148] And capable sociologists have seen the need for the traditional tests for truth and urged that juveniles be given a fair hearing from which prejudicial, immaterial and hearsay evidence is excluded.[149] In England the rules of evidence in the juvenile courts are the same as in the traditional adult tribunals[150] and there is no persuasive reason why American courts should permit a distinction.

144 In re Sippy, 97 A.2d 455 (Mun. App. D.C. 1953).

145 Waybright, A Proposed Juvenile Court Act for Florida, Juvenile Court Program of Florida A. & M. University 1, 29 (1957). And see Ford v. State, 122 Ind. App. 315, 104 N.E.2d 406 (1952); Ripley v. Godden, 158 Neb. 246, 63 N.W.2d 151, 153 (1954).

146 Holmes' Appeal, 379 Pa. 599, 606, 109 A.2d 523, 526 (1954).

147 Ibid.

148 In re Mantell, 157 Neb. 900, 62 N.W.2d 308 (1954); People v. Lewis, 260 N.Y. 171, 177, 183 N.E. 353, 355 (1932); 5 Wigmore, Evidence § 1400 (3d ed. 1940); Waite, "How Far Can Court Procedures Be Socialized Without Impairing Individual Rights?," 12 J. Am. Inst. Crim. L. & C. 339, 343 (1922).

149 Tappan, Juvenile Delinquency 215 (1949).

150 Henriques, Children's Courts in England, 37 J. Crim. L., C. & P.S. 295, 296 (1946).

Due process of law demands that the particular misbehavior alleged to constitute juvenile delinquency be proved beyond a reasonable doubt.[151] Some courts have settled for the quantum of proof used in civil litigation, that is, proof by a preponderance of the evidence.[152] Not only must the offense be clearly proved, but it must be proved, according to the weight of authority, by good and competent evidence with true probative value.[153] The prevailing rule has been well-expressed by the New York Court of Appeals:

> [T]he charge against the child cannot be sustained upon mere hearsay or surmise; the child must first have committed the act of burglary or of larceny before it can be convicted of being a delinquent child . . . . When, therefore, a child is arrested and charged with being a delinquent child because it has committed an offense which would be a crime in an adult, that offense must be proved, and proved by competent evidence.[154]

Due process of law is clearly violated when a juvenile court adjudicates a child a delinquent solely on the basis of an involuntary confession extracted from the youth by force or coercion.[155]

A child before a juvenile court, alleged to have committed particular wrongs, is entitled to the presumption of innocence accorded by the law to inveterate adult wrongdoers.[156] In England juveniles before the children's courts are entitled to the full normal trial rights of the criminal law, specifically including the presumption of innocence and the requirement that the charge be proved beyond a reasonable doubt.[157] In this country these should be accepted as constitutional rights.

The Sentence and Punishment

Since the federal constitution is not violated if a state judge considers for the purpose of fixing sentence materials not introduced into evidence at the trial,[158] it is seemingly constitutional for juvenile court judges to use, solely for the determination of a proper disposition and after a

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151 In re Lewis, 11 N.J. 217, 94 A.2d 328 (1953); People v. Pikunas, 260 N.Y. 72, 182 N.E. 675 (1932); In re Madik, 233 App. Div. 12, 251 N.Y. Supp. 765 (3d Dep't 1931); Jones v. Commonwealth, 185 Va. 335, 38 S.E.2d 444 (1946); Note, 35 Va. L. Rev. 1097 (1949).

152 United States v. Borders, 154 F. Supp. 214 (N.D. Ala. 1957); State v. Superior Court, 139 Wash. 1, 245 Pac. 409 (1926).

153 In re Davis, 83 A.2d 590 (Mun. App. D.C. 1951); Holden v. Smith, 135 Miss. 322, 100 So. 27 (1924); In re Mantell, 157 Neb. 900, 62 N.W.2d 308 (1954); People v. Pikunas, 260 N.Y. 72, 182 N.E. 675 (1932); In re Gonzalez, 328 S.W.2d 475 (Tex. Civ. App. 1959); State v. Butcher, 74 Utah 275, 279 Pac. 497 (1929). Contra, Campbell v. Siegler, 10 N.J. Misc. 987, 162 Atl. 154 (1932).

154 People v. Fitzgerald, 244 N.Y. 307, 313, 155 N.E. 584, 587 (1927).

155 People v. Fitzgerald, 244 N.Y. 307, 155 N.E. 584 (1927); In re Davis, 83 A.2d 590 (Mun. App. D.C. 1951). Compare People v. Lewis, 260 N.Y. 171, 183 N.E. 353 (1932), sustaining a commitment where the finding of delinquency was based solely on a youth's confession in children's court without any warning of his privilege against self incrimination.

156 People v. Fowler, 148 N.Y. Supp. 741, 746 (Bronx County Ct. 1914).

157 Tappan, Juvenile Delinquency 205 (1949).

158 Williams v. New York, 337 U.S. 241 (1949).

finding of delinquency at a fair trial, such matters as probation reports, conclusions of psychiatrists, etc.[159]

An occasional state court has refused to protect children committed by juvenile courts under the constitutional bans on cruel and unusual punishment, on a theory that the children were not being "punished."[160] More reasonably, when a juvenile court imposed a sentence upon a youth for a definite span of years, the Arkansas Supreme Court readily found "punishment." "The evident purpose of the order here under review was to punish the delinquent. He was sentenced to the institution to which juvenile felons may be sent, and for the definite period of three years, which is a sentence that might have been imposed upon a conviction before a jury for the crime of arson."[161]

Even where courts have not yet specifically held the constitutional ban upon cruel and unusual punishment is binding upon the juvenile courts in their "dispositions," a comparable end is frequently attained by appellate courts setting aside or reducing the commitments imposed by the juvenile courts.[162] Orders and commitments of juvenile courts have also been restricted by the state constitutional freedom and establishment of religion clauses. For instance, when a juvenile court dealt with two boys who had thrown rocks at a dwelling by placing them on probation for a year and ordering them to attend Sunday school and church every Sunday for the year, the Virginia court voided that part of the judgment as contrary to the minors' constitutional rights.[163]

Juvenile courts have been allowed to commit children for far longer terms than either they or adults could be sentenced for in the customary adult criminal court for that act.[164] Furthermore, state constitutional bans upon involuntary servitude have been deemed not violated by juvenile court orders committing children to various institutions.[165] The argument seems to be that "The provisions of the Constitution with reference to involuntary servitude, do not have reference to legitimate authority for the control and education of children."[166] Whatever commitment is

159 In re Gonzalez, 328 S.W.2d 475 (Tex. Civ. App. 1959). Note, "Correct Use of Background Reports in Juvenile Delinquency Cases," 5 Syracuse L. Rev. 67 (1953).

160 Ex parte Naccarat, 328 Mo. 722, 41 S.W.2d 176 (1931).

161 Underwood v. Farrell, 175 Ark. 217, 219, 299 S.W. 5, 6 (1927). A fortiori, the courts will find "punishment" when the juvenile is sent to a jail or prison. White v. Reid, 125 F. Supp. 647, 650-51 (D.D.C. 1954). Note too People ex rel. O'Connell v. Turner, 55 Ill. 280 (1870).

162 E.g., In re Kroll, 43 A.2d 706 (Mun. App. D.C. 1945); Underwood v. Farrell, 175 Ark. 217, 299 S.W. 5 (1927).

163 Jones v. Commonwealth, 184 Va. 679, 36 S.E.2d 571 (1946).

164 Ex parte Nichols, 110 Cal. 651, 43 Pac. 9 (1896); People v. Scherbing, 93 Cal. App. 736, 209 P.2d 796 (1949); State v. Cagle, 111 S.C. 548, 96 S.E. 291 (1918); Commonwealth v. Fisher, 213 Pa. 48, 62 Atl. 198 (1905).

165 In re Santillanes, 47 N.M. 140, 138 P.2d 503 (1943).

166 Bryant v. Brown, 151 Miss. 398, 423, 118 So. 184, 191 (1928).

made to "reform" the child clearly must be terminated when the prisoner is no longer a child, that is, when he attains his majority.[167]

Some courts have allowed juvenile court judges to revoke the probation of children without further notice or hearing and send them off to institutions.[168] The better cases are contra. Thus, in North Dakota the court has ruled that where, after a juvenile court hearing, the child was put in the custody of his father, the judge could not thereafter take away the child and dispatch him to a training school without further notice and hearing.[169] And it has been judicially suggested that the decision to revoke probation is not to be made without weighty reasons. So, the Utah Court states, "once a child is allowed to leave the institution for rehabilitation or because he appears already to have been rehabilitated, the authorities must have good reason for returning him to the institution."[170]

CONCLUSION

The constitutional issues herein indicated will probably be avoided in the future as they have been in the past by judicial interpretation of the juvenile court acts so as to recognize the fundamental rights enumerated. Previous to these statutes juveniles brought to trial were accorded all the constitutional safeguards incident to criminal prosecutions and it seems reasonable to suppose that "The legislative intent was to enlarge, *not to diminish,* these protections."[171]

It should be apparent by now that the judicial negation of the constitutional rights indicated herein on theories that the proceedings are somehow "non-criminal" and the children are not really being "punished," illustrates the jurisprudence of appellation at its most superficial. For example, what can be said in defense of a court that piously professes children are not being punished by juvenile courts in the state, when these same courts find their authority in a legislative act "Defining Juvenile Delinquents, Providing for their Punishment"?[172] Capable courts and judges have continuously exposed the unreason of this labelling process:

> 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, representing a

[167] Ex parte Naccarat, 328 Mo. 722, 41 S.W.2d 176 (1931).
[168] Ex parte Hollowell, 84 Okla. Crim. 355, 182 P.2d 771 (1947).
[169] In re Rixen, 74 N.D. 80, 19 N.W.2d 863 (1945).
[170] Ex parte S.H., 1 Utah 2d 186, 187, 264 P.2d 850, 851 (1953).
[171] In re Poff, 135 F. Supp. 224, 225 (D.D.C. 1955). See also In re Mantell, 157 Neb. 900, 62 N.W.2d 308 (1954).
[172] In re Santillanes, 47 N.M. 140, 138 P.2d 503 (1943); New Mexico Stat. Ann., Art. I, Ch. 44 (1941).

> 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. Let him attempt to enter the armed service of his country or obtain a position of honor and trust and he is immediately confronted with his juvenile court record. And, further, as in this case, the minor is taken from his family, deprived of his liberty and confined in a state institution. . . . Never should [a juvenile court act] be made an instrument for the denial to a minor of a constitutional right or of a guarantee afforded by law to an adult.[173]

The right of the parent to the care and company of his child and the right of the child to his liberty—in the language of a federal court, "the natural rights of parents to rear and educate their own children in the parental home and the natural right of the child to be so reared"[174]—represent high values in our hierarchy of rights. These are not to be abridged or denied by the convenient semantics of legislative bodies.

The applicability of the constitutional rights indicated hinges not on labels used but on the effect of the proceedings conducted by the state. If a child is in danger of being fined, of being deprived of his liberty, removed from his parents and his home and incarcerated in any institution of the state, then the minor is entitled to the customary constitutional safeguards locally given to adults accused of crime. It is no longer even respectable to deny that the child's "liberty" is taken. A number of years ago Lindsey wrote, "Many of the provisions of the Juvenile Court Acts are clearly in conflict with constitutional provisions and this conclusion can only be escaped by evasion. In the case of commitment to an institution there is often a very real deprivation of liberty, nor is this fact changed by refusing to call it punishment or because the good of the child is stated to be the object."[175] And recently Judge Holtzoff added, "Precious constitutional rights cannot be diminished or whittled away by the device of changing names of tribunals or modifying the nomenclature of legal proceedings. The test must be the nature and the essence of the proceedings rather than its title. If the result may be a loss of personal liberty, the constitutional safeguards apply."[176] The time has come to recognize not only the protections inherent in due process of law, but to insist that the safeguards surrounding criminal prosecutions in the bills of right apply to children who stand before juvenile court judges.

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173 In re Contreras, 109 Cal. App. 2d 787, 789, 241 P.2d 631, 633 (1952).

174 In re Custody of a Minor, 250 F.2d 419, 420 (D.C. Cir. 1957) (Burger, J.).

175 1926 Annals of American Academy of Political and Social Science, 28.

176 United States v. Dickerson, 168 F. Supp. 899, 902 (D.D.C. 1958), reversed on other grounds, 271 F.2d 487 (D.C. Cir. 1959). Note too the dissent of Justice Musmanno in In re Holmes, 379 Pa. 599, 109 A.2d 523 (1954), and the dissent of Justice Crane in People v. Lewis, 260 N.Y. 171, 183 N.E. 353 (1932).