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CONSTITUTIONAL PROTECTIONS FOR THE JUVENILE

BY
TED RUBIN*
RICHARD S. SHAFFER**

Judge Rubin and Mr. Shaffer engage in an intriguing analysis of the juvenile court system today. Their discussion focuses on the challenge posed by the injection of constitutional safeguards into that system. The authors demonstrate by analysis the lack of due process in the present system and the resultant failure of the primary purposes of the juvenile court. To maintain the integrity of the juvenile court, it is necessary to consider methods of acquiring constitutional protections for the juvenile. The authors conclude that adoption of basic safeguards into the present juvenile system will realize great rewards for the system and the child. These rewards far outweigh the practical difficulties that would be encountered in the adoption of the recommended constitutional protections.

INTRODUCTION

THE revolutionary introduction in 1899 of the juvenile court into a previously two-pronged civil and criminal judicial system was accompanied by the magnificent hopes of its creators. One such hope was that individualized justice for the child would henceforth be a reality.

Today we are in the midst of a second transformation: procedural safeguards traditionally reserved for the criminal system are being injected into the juvenile system. The authors propose to examine the historical development of the juvenile court system, the current practices within the system, and the necessity for completing this transformation now in progress.

Beginning in the 1870's, the judicial system was severely criticized, in part, for its inability to adapt to new legal problems which accompanied urbanization.[1] The increased crime rate, domestic problems, small claims of individuals, and youthful offenders of the law[2] were of mounting concern to reformers. It was against this background that the juvenile court was born. Specialization of the courts was hopefully a panacea for the ills of the former system. Hence, in addition to the creation of small claims courts, municipal

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[1] See HURST, THE GROWTH OF AMERICAN LAW, ch. 8 (1950); Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 19 A.B.A. REP. 395 (1906).

[2] HURST, *op. cit. supra* note 1.

courts for traffic offenders, and domestic relations courts, the juvenile court arose.[3]

Noble intentions accompanied the development of the juvenile court. The court "avoids the stigma"[4] which attaches to criminal court charges. It "made the child visible"[5] in a proceeding conducive to individualized justice. The court would provide care which would "approximate as nearly as may be that which should be given by its parents."[6] "[T]he judge and all concerned were merely trying to find out what could be done on his behalf."[7] As one writer stated, "[E]mphasis is laid, not on the act done by the child, but on the social facts and circumstances that are really the inducing causes of the child's appearance in court. The particular offense which was the immediate and proximate cause of the proceedings is considered only as one of the many other factors surrounding the child. The purpose of the proceeding here is not punishment but correction of conditions, protection of the child, and care and prevention of a recurrence through the constructive work of the court. Conservation of the 'child' as a valuable asset of the community, is the dominant note."[8] Unfortunately not all of these goals have been attained.[9]

I. THE JUVENILE COURT TODAY

A. *Comparison with the Adult System*

To place the juvenile proceeding in perspective, a brief comparison between the juvenile system and the adult criminal system will be made. When contrasted with the juvenile system, the criminal system has two distinct characteristics: the proceeding is formal and punishment is a primary purpose. The criminal action is generally brought against the defendant by the district attorney representing the people. The defendant is usually represented by counsel — either of his own selection or by court appointment. The trial is an adversary proceeding. The *parens patriae* philosophy of the juvenile court[10] is absent in the criminal court. In the latter, the

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[3] Nicholas, *History, Philosophy, and Procedures of Juvenile Court*, 1 J. FAM. L. 151 (1961).

[4] Schramm, *Philosophy of the Juvenile Court*, 261 Annals 101 (1949).

[5] Lathrop, quoted in LUNDBERG, UNTO THE LEAST OF THESE, 119 (1947).

[6] ILL. ANN. STAT. § 701 (Supp. 1965).

[7] Addams, quoted in JUSTICE FOR THE CHILD 14 (Rosenheim ed. 1962).

[8] FLEXNER & BALDWIN, JUVENILE COURTS AND PROBATION, 6-7 (1916).

[9] See generally Sloane, *Juvenile Court: An Uneasy Partnership of Law and Social Work*, 5 J. FAM. L. 170 (1965), which suggests that the conflict between legal and social norms is at the root of the fundamental problems of the juvenile courts.

[10] A typical definition of the doctrine is:

> The term parens patriae is defined as the father or parent of his country; in England, the King; in America, the people; the government is thus spoken of in relation to its duty to protect and control minor children and guard their interests.

Helton v. Crawley, 241 Iowa 296, 305, 41 N.W.2d 60, 70 (1950).

prevailing attitude is that if the defendant has violated the law he should be punished.

Due process safeguards are more prominent in criminal proceedings; the requirement of these protections has been specifically set forth by appellate court decisions.[11] These decisions have expressly enunciated the application of the fifth, fourteenth and other amendments to the procedures related to the adult system of criminal justice. But the Supreme Court of the United States has ruled only once on a juvenile delinquency case,[12] and there have been comparatively few appellate court decisions regarding delinquency. Accordingly, there is no pervading constitutional application of due process to juvenile proceedings. In its absence the juvenile correctional system has inconsistently and on a piecemeal basis interpolated criminal due process safeguards to the juvenile.[13] As a result juvenile courts have applied *ad hoc* a procedural yardstick of fundamental fairness.[14]

The criminal system adheres more stringently to the common law requisites of a crime, *i.e., mens rea* and *actus reus*. The juvenile system on the other hand is premised on the principle that a child has only an incomplete ability to formulate the criminal intent necessary to violate a law. Less severe sanctions are therefore utilized in the juvenile system, partly because of the incomplete *mens rea*.[15]

Traditionally, the rehabilitation of the child was more important to the juvenile court than the adjudicative determination of a law violation, and probation counselors were employed to aid in this objective.

In many juvenile courts the probation staffs are still hired by the judge. This situation may diminish the working independence of the staff in that its work conforms to the views of the judge. This situation exists even when juvenile probation staffs are not hired directly by the judge. In the adult system there is less dialogue between judge and probation staff, and frequently even less between probation staff and probationers. Although case loads are higher than desirable in most juvenile courts, case loads are generally far

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[11] *In re* Contreras, 109 Cal. App. 2d 787, 241 P.2d 631 (1952); People v. Fitzgerald, 244 N.Y. 307, 155 N.E. 584 (1927); *In re* Holmes, 379 Pa. 599, 109 A.2d 523, *cert. denied*, 348 U.S. 973 (1954) (dissenting opinion).

[12] Kent v. United States, 383 U.S. 541 (1966).

[13] See, *e.g.*, Pee v. United States, 274 F.2d 556 (D.C. Cir. 1959); *In re* Williams, 49 Misc. 2d 154, 267 N.Y.S.2d 91 (1966).

[14] See Shioutakon v. District of Columbia, 236 F.2d 666 (D.C. Cir. 1956); *In re* Williams, 49 Misc. 2d 154, 267 N.Y.S.2d 91 (1966); Welch, *Delinquency Proceedings — Fundamental Fairness for the Accused in a Quasi — Criminal Forum*, 50 MINN. L. REV. 653, 664-694 (1966).

[15] See Westbrook, *Mens Rea in the Juvenile Court*, 5 J. FAM. L. 121 (1965), which emphasizes that the traditional concept of *mens rea* is not applicable to juvenile proceedings. It should be used only as an objective criteria which must be satisfied before a violation can be found.

heavier in the adult system. As a result probation counseling is far more standardized and less intensive than in the juvenile system.

Most adult probation workers seem to be less adequately trained than juvenile court staffs. Even so, untrained staff members in both systems have often performed effectively. The limited professionalism in the juvenile probation and parole system has been partially counteracted by the employment of psychological and psychiatric personnel affiliated with the courts and by rather close liaison with child guidance and mental health clinics. Mental health professionals are still primarily used in the juvenile system for diagnostic recommendations and occasional treatment, but are increasingly being used as staff trainers and consultants. The adult system has not utilized mental health personnel nearly as much, confining them primarily to diagnostic procedures in determining whether or not an adult offender is criminally insane.

Juvenile probation officers are involved with the child and his family very early in the process, obtaining a social history and beginning the rehabilitative relationship. Adult officers, on the other hand, because of a less flexible system, wait and approach their task more formally.

Juvenile courts utilize detention home care for children pending official disposition, although detention facilities are grossly inadequate throughout the country. Certain courts have developed this temporary detention into a constructive experience for the child, in contrast to the usually sterile experience in the city or county jail for the adult offender.

Attorneys who practice in criminal courts frequently have difficulty making the transition to a juvenile court case. They are not accustomed to a non-adversary proceeding, and their understanding of the juvenile system is hampered by a general lack of orientation to this court during law school training.[16] Despite this, they do tend to give more total consideration to the effect of this proceeding upon the child. For example, a lawyer in juvenile court may recommend that the youthful client admit responsibility to a petition in order to help the child develop an improved concept of responsibility and honesty. In the adult court, a lawyer more frequently sees his duty as providing an adequate defense rather than encouraging his client to admit to guilt in clear cases of guilt. One reason for this difference may be the more severe sanctions possible for the offender in the criminal court.

The right to be represented by counsel has not been clearly defined for juvenile courts, although it appears likely that counsel

[16] Skoler & Tenney, Jr., *Attorney Representation in Juvenile Court*, 4 J. FAM. L. 77 (1964).

will be provided in some situations to the youthful offender.[17] Juvenile court procedures are not as well-defined by statute or court decision as those in the adult system. Children far more frequently admit to the petition than do adults to the information or indictment. The adult receives greater notice of his rights and the procedures affecting him than does the child. Moreover, juvenile judges not infrequently lack legal training, whereas such training is a prerequisite to being a judge in the criminal system.

B. *Instituting the Juvenile Proceeding*

Turning specifically to the juvenile system, the juvenile court proceeding is characterized as civil in nature.[18] The action is commenced by the state through a delinquency petition, not against the juvenile offender, but rather on his behalf. Once the petition has been filed, the court must either sustain or dismiss the petition. While the quantum of proof requisite for conviction, "beyond a reasonable doubt," has never been in doubt for the adult system, no specific standard has yet been established to adjudicate delinquency in juvenile courts. The juvenile court has alternative standards of proof available to adjudicate delinquency. Since the proceeding is civil, the court may apply either a preponderance of the evidence[19] or a clear and convincing standard;[20] it may also elect to apply the higher criminal standard of "beyond a reasonable doubt."[21] Judges are not uniform in the application of any of these criterion. For example, at a meeting of judges in Colorado in 1966, three judges indicated that they each utilized a different quantum of proof. It is clear that inconsistencies and unequal justice may

[17] For legislation providing a right to assigned counsel for indigent juvenile offenders, see CAL. WELFARE & INST'NS CODE § 507 (1966); N.Y. FAMILY CT. ACT § 728 (1963). See Ketcham, *Legal Renaissance in the Juvenile Court,* 60 NW. U.L. REV. 585 (1965) (foresees assumption by legal profession of responsibility to represent children in juvenile court); Skoler & Tenney, Jr., *Attorney Representation in Juvenile Court,* 4 J. FAM. L. 77 (1964) (predicting other states will enact legislation providing right to counsel).

[18] Kent v. United States, 383 U.S. 541 (1966); United States v. Borders, 154 F. Supp. 214 (N.D. Ala. 1957); Bryant v. Brown, 151 Miss. 398, 118 So. 184 (1928); *Re* Santillanes, 47 N.M. 140, 138 P.2d 503 (1943); People v. Lewis, 260 N.Y. 171, 183 N.E. 353, *cert. denied,* 289 U.S. 709 (1932); State v. Thomasson, 275 S.W.2d 463 (Tex. 1955); State *ex rel.* Berry v. Superior Ct., 139 Wash. 1, 245 Pac. 409 (1926); McKesson, *Right to Counsel in Juvenile Proceedings,* 45 MINN L. REV. 843 (1961).

[19] See, *e.g.,* People v. Lewis, 260 N.Y. 171, 183 N.E. 353, *cert. denied,* 289 U.S. 709 (1932); State v. Ferrell, 209 S.W.2d 642 (Tex. Civ. App. 1948); Robinson v. State, 204 S.W.2d 981 (Tex. Civ. App. 1947); State *ex rel.* Berry v. Superior Ct., 139 Wash. 1, 245 Pac. 409 (1926).

[20] See, *e.g.,* Holley Coal Co. v. Globe Ind. Co., 186 F.2d 291 (4th Cir. 1950); Jensen v. Housley, 297 Ark. 742, 182 S.W.2d 758 (1944); Lynch v. Lichtenthaler, 85 Cal. App. 2d 437, 193 P.2d 77 (1948); *In re* Mazanec's Estate, 204 Minn. 406, 283 N.W. 745 (1939); Coddington v. Jenner, 57 N.J. Eq. 528, 41 Atl. 874 (1898); First Nat'l Bank v. Ford, 30 Wyo. 110, 216 Pac. 691 (1923).

[21] *In re* Madik, 233 App. Div. 12, 251 N.Y. Supp. 765 (1931) (juvenile court case). *But see In re* Bigesby, 202 A.2d 785 (D.C. Cir. 1964) (juvenile court case).

occur when judges within the same state apply a different standard of proof. A case now pending before the United States Supreme Court[22] hopefully will determine the appropriate measure.

Following the adjudication of delinquency, the court must make its finding and order. The court customarily hears a report from the probation counselor before making its final order. This report is usually oral and concerns the environmental factors surrounding the child. The court will then enter its order, which is read in open court to the child and his parents.

C. *Sentencing the Juvenile*

Numerous alternatives for disposition are available to the judge, ranging from institutionalization of the juvenile to placing him on probation. Currently in some states the court may maintain jurisdiction over a child for as long as eleven years.[23] Juvenile courts frequently impose indeterminate sentences on the child.[24] In this manner the juvenile proceedings often result in longer periods of restriction or incarceration for juveniles than the courts are allowed to impose on an adult found guilty of a similar crime.[25]

Since there is a reluctance on the part of a juvenile court judge to take the child away from his parents and his home, the child is frequently placed on probation. In the federal system, for example,

> During the year ending June 30, 1960, 10,391 (38.9 percent) adult offenders of a total of 26,728 sentenced and convicted in federal courts were placed on probation, and 690 (48.3 percent) of a total of 1,428 convicted and sentenced juvenile offenders were granted the same privilege.[26]

Probation is granted even more frequently in state juvenile courts.

Probation has long been employed to keep the family together and to facilitate the child's adjustment in his familial environment. While the juvenile is on probation legal authorities maintain careful watch and control over the individual to assist the probationer in his new start in life. Probation also serves as a control imposed upon the wrongdoer to protect society from the recurrence of his wrongful conduct. The court continues jurisdiction over the child

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[22] Application of Gault, 99 Ariz. 181, 407 P.2d 760 (1965); *appeal docketed*, 34 U.S.L. WEEK 3409 (U.S. May 31, 1966) (No. 1273); *prob. juris. noted*, 34 U.S.L. WEEK 3428 (U.S. June 21, 1966) (No. 1273) (No. 1273, 1966 Term; renumbered No. 116, 1967 Term).

[23] See, *e.g.*, COLO. REV. STAT. § 22-8-11 (1963).

[24] *Ibid.*

[25] Siler, Jr., *The Need for Defense Counsel in the Juvenile Court*, in 11 CRIME AND DELINQUENCY 45, 56 (1965).

[26] Hink, *The Application of Constitutional Standards of Protection to Probation*, 29 U. CHI. L. REV. 483, 487 (1962), citing The 1960 Ann. Rep. Administrative Office of the United States Courts 304-09 (1961).

during the probation period. Thus the court is enabled to supervise the program of rehabilitation and reintegration of the juvenile.

Two major problems arise when considering probation in juvenile cases. The first is the nature of the rules and conditions imposed on the probationer; the second concerns the procedure adopted for the revocation of probation.

In juvenile as well as criminal cases, probation has traditionally been treated as a matter of judicial "grace" and not a matter of right.[27] Hence, certain conditions of probation have withstood challenges[28] of being cruel and unusual punishment under the eighth amendment. They have also been held not violative of the due process clauses of the fifth and fourteenth amendments.[29] However, a condition requiring the probationer to attend Sunday School was declared unconstitutional under the first amendment.[30] The court stated, "no civil authority has the right to require anyone to accept or reject any religious belief or to contribute any support thereto."[31]

One condition which is utilized is the suspension of the juvenile's drivers license. Despite the fact that many juvenile courts do not have jurisdiction over traffic offenses, this condition may be imposed.[32] Moreover, this condition may be applied even when offenses are not related to automobiles. The probation counselor may feel that it is easier to control the individual if he does not have extensive mobility.

Other conditions commonly applied include requiring school attendance, restricting the probationer's associations, prohibiting the frequenting of taverns,[33] and ordering the probationer to obey his parents. The requirement of attending school is a condition probably beneficial in most cases. However, if the probationer is above the compulsory attendance age, the condition may be a method of keeping him off the streets and under constant surveillance. Such use may be of dubious value; the compulsory attendance statute is designed to assist a child in attaining an education. If the child's presence in court is caused by a problematic situation at school, such a condition may not aid him in achieving an education, but may only aggravate his problem. The condition should not be used when this result seems likely.

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[27] *Cf.* Rubin, Sol, *Probation and Due Process of Law,* in 11 CRIME AND DELINQUENCY 30 (1965).

[28] Springer v. United States, 148 F.2d 411, 415 (9th Cir. 1945).

[29] People v. Becker, 349 Mich. 476, 84 N.W.2d 833 (1957).

[30] Jones v. Commonwealth, 185 Va. 335, 38 S.E.2d 444 (1946).

[31] *Id.* at 344-345, 38 S.E.2d at 448.

[32] Sheridan, *Standards for Juvenile and Family Courts,* U.S. DEP'T OF HEALTH, EDUCATION, AND WELFARE 37 (1966).

[33] Some states permit the sale of beverages with 3.2% alcohol content to minors after they reach age eighteen.

Utah has adopted a statutory provision enabling the juvenile court judge to place the child on probation, but conditional upon the child's parents undergoing medical, psychological, or psychiatric treatment.[34] This provision is not typical and would seem to infringe upon the rights of the parents — especially since they are before the court as guardians and not as violators of the law. On the other hand, a condition requiring parental cooperation in a mental health study of the child would not be subject to the foregoing objection.

Historically a mental health evaluation of the child has been a common practice. Since the 1909 inauguration of the Chicago Juvenile Court — related Juvenile Psychopathic Institute and the Judge Baker Foundation in Boston in 1917, juvenile courts have directly provided clinical evaluation of children or have arranged for the examination at nearby child guidance or mental health clinics. Even though the psychiatrists and psychologists could make a greater overall contribution to a larger number of court-acquainted children as staff trainers and consultants, their diagnostic and treatment plan recommendations in an advisory capacity can be extremely valuable to judge and staff.

If the court decides to place the child on probation, but away from his parents, restrictions may be placed upon parental visitation rights. In such a case the child may be placed in a foster home, through public or private child placing agencies, or in public or private group care facilities, or in the juvenile detention home. There is considerable reluctance to assign a child to the juvenile hall for any extended period of time; usually it is a receiving center pending hearing. Because of the lack of other facilities, the detention hall has also become the setting for enforced school attendance programs, headquarters for work programs, and a temporary placement facility for children who have violated probation or who are awaiting placement away from home.

The court may decide to place the child on probation, but in the home of a friend or relative. This condition enables the juvenile to be in familiar surroundings, associating with people he knows. Under these circumstances, conflicts may arise between the parents and the persons caring for the child. With proper counseling, placement review, and work with the parents, however, these animosities can be minimized.

Courts are increasingly developing work camps or day or weekend work programs as rehabilitation devices and as alternatives to the delinquency institution. These are generally well accepted by the public and offer ample opportunities for creative change in the

[34] UTAH CODE ANN. § 55-10-84 (1953). See Winters, *The Utah Juvenile Court Act of 1965*, 9 UTAH L. REV. 509 (1965).

child. But if poorly administered and arbitrarily used, these programs could pose difficulties in attaining the rehabilitative goal. They may interfere with the normal schooling of the child, require excessive or dangerous work, be programmed without corresponding counseling, continue for unreasonable periods of time, or be essentially punitive in nature. Serious problems of due process would arise with an ill-executed work program.

When juvenile courts exhaust available local sources and resort to state facilities for institutionalization the preferable method is for centralized commitment to the Youth Authority or to the appropriate state department administering the different state delinquency programs. The state department should then determine which of its facilities is most appropriate for the rehabilitation of the particular child. Transfers between state institutions — as from basic delinquency institution to the forestry camp — can thus be facilitated.

Although a judge may know particular juveniles and all state facilities well enough to determine which facility will best meet the individual's needs, the state department is in a better overall position to finally decide which facility should be utilized. Currently, statutes vary on the method of commitment. As more states fulfill their obligation to provide an array of alternatives, however, it is hoped that more statutes will provide for this centralized commitment.

The correctional institutions in some states are stratified on the basis of age. It is possible in a number of jurisdictions for both criminal and juvenile courts to sentence offenders to the same reformatory. Since the criminal offender may be convicted under a higher standard of proof, *i.e.,* beyond a reasonable doubt, than that which was applied in the juvenile court, the juvenile offender may be denied equal protection under the fourteenth amendment. Further, no juvenile should be committed to a state penitentiary from the juvenile court since the state penitentiary is clearly intended for adjudicated criminals and a child cannot be adjudicated a criminal in juvenile court.

D. *Appeal by the Juvenile*

Once the court has passed sentence on the offender, the juvenile has the right to appeal the court's decision. Presently this right is rarely exercised. Reasons for failure to appeal may be the lack of counsel in juvenile proceedings, inadequacy of notice of the right to appeal, or inadequacy of notice of the right to appointive counsel on appeal if indigent. Moreover, some juvenile courts fail to keep or maintain adequate records which are insufficient transcripts on which to base an appeal. Regardless of why there are few appeals,

when they do occur, the record is protected to maintain the confidentiality of the name of the child.

If the juvenile has been placed on probation and violates the conditions thereof, probation may be revoked by court. Notice and hearing on the revocation of probation are not consistently required for juveniles.[35]

E. *Waiver*

At the onset of the juvenile proceeding or when an adjudicated delinquent commits another offense, a serious problem of jurisdiction arises. In many states, the juvenile court and adult criminal courts have concurrent jurisdiction over felonies committed by sixteen and seventeen year old juveniles; hence, the juvenile court may waive jurisdiction to the adult court. Such a determination may depend upon the court in which the district attorney has brought the action[36] or it may be made by the juvenile judge.[37] The procedure followed in such cases may raise constitutional questions of due process.[38]

Juvenile court judges today may hesitate to apply the constitutional protection of the fourteenth amendment due to an incomplete understanding of "due process." Portions of the fifth and sixth amendments specifically refer to criminal proceedings.[39] However, neither the fourth nor the fourteenth amendment is limited to the criminal context. Because the juvenile proceeding is "civil" in nature, the court may feel the protections afforded by these amendments do not apply to juvenile hearings. But "due process of law" is a broader concept which applies to civil as well as criminal hearings. Especially when the juvenile court is confronted with a violator who may be subjected to punitive penalties, the distinction between "civil" and "criminal" actions seems unrealistic. Hopefully the courts are not basing their non-application of certain elements of due process, such as the right to counsel, which have been delineated in a criminal context, on this fictitious distinction.

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[35] Sheridan, *supra* note 32 at 90. See also MODEL PENAL CODE § 301.4, comment (Tent. Draft No. 2, 1954 and Tent. Draft No. 4, 1955).

[36] People *ex rel.* Marks v. District Court of Adams County, 420 P.2d 236 (Colo. 1966).

[37] Kent v. United States, 383 U.S. 541 (1966).

[38] *Ibid.*

[39] "no person . . . shall be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V. "In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense." U.S. CONST. amend. VI.

II. CRITIQUE OF PRESENT SYSTEM

Re-evaluation of the juvenile court has been stimulated by certain developments in the area of criminal law. Procedural safeguards guaranteed by the United States Constitution have been delineated more precisely than in the past. For example, protection against unreasonable search and seizure,[40] against prolonged detention,[41] against involuntary confessions,[42] from arbitrary police practices,[43] and of right to counsel[44] have recently been litigated in the Supreme Court of the United States. By its decisions, the Court has strengthened these protections and once again drawn attention to the due process rights of criminal defendants.

Another factor contributing to this investigation of the juvenile system has been the increasing incidence of juvenile crime. Congress, recognizing this rapid increase, responded by passing the U.S. Juvenile Delinquency Control Act in 1961.[45] As a result, comprehensive community counterattacks on the causes of delinquency were launched and were subsequently merged with anti-poverty programs, and training centers for delinquency personnel were initiated. Manpower needs in this field were critical.

The critique which accompanied judicial attention to due process in criminal cases and legislative enactments to control delinquency was basically centered on two issues: the juvenile proceeding itself and the staff and facilities of the juvenile system.

The juvenile proceeding poses numerous procedural problems of due process. The juvenile court when created was not intended to deny fundamental fairness to its participants. One purpose of the system was to provide a fair hearing in an informal and flexible atmosphere. But under the doctrine of *parens patriae* the system has substituted a paternalistic standard for fairness which may not always equal the due process standard.[46]

In the system today many juveniles confess to offenses. These offenders are interrogated by the police before being charged. Under the philosophy of the court, the rehabilitation of the child is more easily ascertained when all the facts, no matter how discovered, are before the court. But due process may require more; *Miranda v.*

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[40] Mapp v. Ohio, 367 U.S. 643 (1961).

[41] Mallory v. United States, 354 U.S. 449 (1957).

[42] Powell v. Alabama, 287 U.S. 45 (1932).

[43] Miranda v. Arizona, 384 U.S. 436 (1966); Escobedo v. Illinois, 378 U.S. 478 (1964).

[44] Gideon v. Wainwright, 372 U.S. 335 (1963).

[45] Juvenile Delinquency and Youth Offenses Control Act, 75 Stat. 572 (1961), 42 U.S.C. §§ 2541-48 (1961).

[46] See note 10 *supra* for a definition of the *parens patriae* doctrine. See *The Parens Patriae Theory and Its Effect on the Constitutional Limits of Juvenile Court Powers*, 27 U. PITT. L. REV. 894 (1966).

Arizona[47] and *Gideon v. Wainwright*[48] may require that such interrogation only be in the presence of counsel or parent and that the court appoint counsel to assist the indigent. Because of these decisions the parents and child may have to have notice of the hearings and of their legal rights — including the right to remain silent. Other constitutional problems are present. Must the juvenile be granted a hearing at which he is represented by counsel for revocation of probation or parole, or when the juvenile court seeks to waive jurisdiction?[49] Must he be provided with counsel at the initial proceeding and on appeal? What type notice must he have of his legal rights? Are confessions, statements, and the evidence discovered from the information given in a confession or statement admissible into evidence at the hearing? Must the juvenile be granted a hearing when he is transferred from the delinquency institution to a reformatory — especially in light of the fact that the latter usually requires a higher standard of proof for conviction and commitment than the former would? Finally, the problem remains of whether the indeterminate sentence is valid and the continuing jurisdiction of the court constitutional — must these sentences be reviewed periodically?

Numerous other problems, in addition to the lack of constitutional safeguards, exist. Despite state statutes prohibiting the jailing of children,[50] numerous juveniles are incarcerated in jails annually. Children may be punished or their freedom restricted when they have not committed a crime, *e.g.,* for truancy or incorrigibility.[51] "Arithmetical justice" is frequently meted out to juveniles; for the first offense, probation; for the second offense, suspended sentence to a delinquency institution; for the third offense, institutionalization. Overly restrictive conditions of probation are frequently imposed.

The present system frequently fails to adequately achieve reintegration of the child into society or to attain his rehabilitation. In some cases non-court social or rehabilitative services would better meet the needs of the child than the court proceeding. A mentally retarded child, for example, generally needs specialized services, not a court. The neglected or dependent child may be advantageously helped by social services rather than probation. Currently, diverting such cases into these services is difficult prior to official court consideration. New York is one state which adopted an intake practice in juvenile courts to enable the court to authorize such

[47] 384 U.S. 436 (1966).

[48] 372 U.S. 335 (1963).

[49] Kent v. United States, 383 U.S. 541 (1966).

[50] See, *e.g.,* COLO. REV. STAT. § 22-8-6 (1963); CAL. WELFARE & INST'NS CODE § 507 (1966).

[51] See *e.g.,* N.Y. FAMILY CT. ACT, §§ 711, 712, 754, 756 (1963).

outside remedial measures before a petition is filed. That state also allows court surveillance of a case without filing a petition.[52] Such a practice enables the number of delinquency petitions to be decreased and yet achieves rehabilitation of the child. Moreover the court can focus attention on the more serious offenses.

In seeking rehabilitation of a child the present system does not enable the child to fully appreciate the correctional process. An indeterminate sentence may cause the juvenile to question the system and consider it as harrassing him — he may not understand its rehabilitative goals. The purpose of the continuing jurisdiction of the court during probation, of the parole authority, or of the correctional institution should be fully and carefully explained to the child. The jurisdiction should be subject to review at a given time to see if it is still necessary. The necessity for periodic review becomes more evident in light of the fact that a sequence of probation, institutionalization, and parole may extend over many years.

Probation poses other dilemmas such as the reasonableness of the conditions. It would seem that overly strict conditions which are unrelated to the offense charged would be so arbitrary and unreasonable as to violate due process. The present system fails either to recognize this problem or resolve it.

Moreover, if probation is revoked for violation of condition, several due process questions arise. Must the juvenile have a hearing on his probation revocation? Does he have a right to counsel? To appeal? Also, an equal protection problem may be present. Are the probationers being treated equally when probation is revoked summarily for violation of a probation condition, when the conditions imposed are neither uniform nor in conformity with any rational policy?

The current practice of providing a waiver proceeding allows the more severe juvenile crimes to be treated more strictly in the criminal courts and with the possibility of very severe penalty. Presently, the procedures surrounding the waiver hearing have come under criticism as being a denial of due process. The legislature or court, in allowing such a practice, seems to be protecting itself from public criticism in the more severe cases. "The community, in general not yet convinced of the value of the experiments [juvenile courts], is unwilling or unable to give up totally the satisfaction of punishing wrongdoers in exchange for the dubious advantage of rehabilitating them."[53] Increased substantive protections are needed before waiver should be allowed. And doesn't the waiver provision

[52] N. Y. FAMILY CT. ACT, §§ 713, 727, 759 (1963).

[53] Gordon & Sargent, *Waiver of Jurisdiction*, in 9 CRIME AND DELINQUENCY 121, 126 (1963).

represent our society's failure to provide adequate and effective juvenile rehabilitative facilities? If we programmed sufficiently for youth, we might eliminate the waiver procedure entirely.

The final criticism of the present system focuses on the transfer of the adjudicated delinquent from one institution to another. If he is transferred from a delinquency institution to the reformatory, he is being penalized in the same manner as the criminal offender. But the latter has been committed to the reformatory by a higher standard of proof than would occur in the usual juvenile hearing. Serious constitutional questions may arise. Typically a transfer is without a hearing or representation by counsel. It is an administrative act based on various considerations. Nonetheless, it would seem that the child should be allowed to have counsel, express himself and understand what is happening to him.

III. Recommendations

In order to rectify and adjust the juvenile system to the legal standards which it avoids, many alterations are necessary. Probably a more significant one is to grant the juvenile court exclusive jurisdiction over cases involving minors. This change is needed to carry out the rehabilitative purpose of the juvenile court, and to avoid the arbitrariness of the current standard for waiver, *i.e.,* waiving jurisdiction depending on the age of the juvenile and severity of the offense charged. Concomitant with this alteration, the juvenile system will need better staffed institutions and more and better trained personnel. Then the staff could strive to rehabilitate the child and reintegrate him into society.

At the time of the delinquency petition, the child must be informed of his constitutional rights. These should include his right to counsel, to remain silent, and to a full hearing. Once counsel has been employed or appointed, interrogation and investigation of the child could go on within a fairer context.

Because the court may institutionalize the offender or may otherwise restrict his freedom, the authors feel that a uniform criterion for delinquency adjudication should be applied. This standard should be higher than that required in civil cases. A consistent standard would avoid certain inequalities which may now occur in juvenile courts.

After the adjudication of delinquency, the child and his parents should be notified in writing of the right to appeal and to counsel on appeal. If counsel has been provided throughout the proceeding, the parents and child will have the court's order and finding explained to them; they will understand its impact and ramifications.

Before sentence is rendered, the child, his parents, or counsel should have the right to examine a copy of the probation counselor's report prior to the disposition hearing. He can thus be in a position to contest it or question its accuracy. This would enable the court to know the facts more precisely. Moreover, the child should be allowed to challenge the conditions for probation if they are arbitrary or unreasonable. He has a right to have them given to him in writing and to have them explained to him. In this manner he can begin to "know himself" if he understands the purpose of the condition and why it was imposed.

The foregoing remarks apply with equal force to conditions of parole. There should be written conditions for the continuation of parole. Upon breach of a condition, parole or probation should be revoked only after a hearing at which the child is represented by counsel. Arbitrary revocation must be discontinued; the revocation hearing serves as a control on such activity. In addition to the above, the child should have been given written notice of the revocation hearing and its cause, and of his right to counsel. In short, the juvenile must have due process safeguards at any revocation proceeding.

The need for continuing jurisdiction of the court by use of probation must be reviewed by the court at periodic intervals. The probationer should be brought before the court and the parolee before the parole authority and if the need for probation or parole no longer exists, it should be removed. By the suggested review, the juveniles will be treated fairly, but the jurisdiction of the court or parole authority will last only as long as necessary — it will not be a means of harassment or of arbitrary punishment at the whim of an administrative official.

The principles underlying rules of probation or parole should be reasonableness, relatedness to the offense, and expectation of successful compliance. The child should be encouraged to comply with and benefit from the terms of probation or parole. He should not be confronted with conditions so unrelated as to be unreasonable or so harsh as to be impossible of compliance.

Changes must be implemented in the staff, facilities, and services of the juvenile court and the entire juvenile correctional system. As the constitutional standards are provided juveniles, and as evaluative research reflects the inadequacies of the services provided, more personnel will be required. These persons will require better training and orientation to the juvenile system.

An increased staff of social workers, skilled both in one-to-one and group counseling, as well as better intake practices will be required. Rather than coming before the court under a delinquency

petition, more juveniles should be channeled into the mental health clinic or other agency service which he may need more than the services of a court. The court, itself, as these other services become more available, may focus attention on the more serious offenders who come before it. In the interim, courts should experiment with shorter term probation for low risk cases.

Before a juvenile is transferred from a delinquency institution to a reformatory, a hearing before the Youth Authority should be held. Only in cases where the act committed by the youth, if done by an adult would be a crime or where the youth has committed a second offense which would be a crime, should transfer occur. Review by the court of the administrative determination should be afforded the juvenile.

Before the youth is transferred to a mental hospital or institution for the mentally retarded, a hearing must be held to ascertain whether the evidence warrants such action. Once the statutory mandates are met, the transfer would be proper. However, the child must be allowed to present evidence and litigate the transfer. The alleged facts must be subject to challenges of inaccuracy and of propriety of the action as to the individual being transferred. In such cases a qualified guardian *ad litem* may appear for the child to further clarify and represent the child's position, and to interpret the proceeding, the reasons for, and hopefully the merits of transfer to the child.

A. *Youth Authority*

Legislative policy determines whether the juvenile parole decision vests in the superintendent of the institution, a juvenile parole board, or a division of a Youth Authority. Despite problems inherent in each method, the authors recommend the Youth Authority model as offering the greatest opportunity for program and administrative efficiency and for consistency in the treatment of the delinquent throughout the institutional and parole phases.[54] Due process and good rehabilitative practice both require that the parole authority systematically review the eligibility of each institutionalized child for parole within a reasonable period of time following commitment. Such a system interposes a check on both the open-endedness of the indeterminate sentence and on the institutional personnel who would need to explain why the program has not successfully prepared a child for return to society.

The parole authority, which would be a division of the Youth Authority, should establish standards for the granting of parole. These standards for parole should be held out as a goal to each

[54] See, *e.g.*, CAL. WELFARE & INST'NS CODE §§ 1700-1803 (1966).

institutionalized child. It should be clear that parole after a defined institutional period is not a matter of right, but is a goal which can be attained by each child. Broad discretionary powers should remain with the parole authority, but standards would be beneficial to the child and to the authority in the exercise of its discretion.

If the child has retained counsel, the parole authority should grant the attorney the opportunity to participate fully in the parole hearing. Such a practice will permit a thorough discussion of all possible legal and sociological factors and enable the juvenile's case to be accurately presented. In the absence of private counsel, an attorney or guardian might be appointed. In either case the proceedings should be recorded. The opportunity to appeal to a court should be granted in instances of an alleged abuse of discretion by the parole authority or a contested fact issue.

B. *Waiver Procedures*

We should move to abolish waiver proceedings. A juvenile court should serve all delinquent children and not just those who are in their early teens or who have committed less serious offenses. The key to the elimination of this proceeding is the accelerated development of more extensive alternatives available to the court or provided by state juvenile authorities. Improved services to the sixteen and seventeen year old on both local and state levels would eliminate the need for waiver and carry out the duty of the juvenile court to provide rehabilitative care to all juveniles who commit delinquent acts.

If waiver is not repealed, its consideration should be limited to the sixteen and seventeen year old who commits a felony and for whom no suitable program is available through juvenile services.

IV. IMPACT OF THE PROPOSAL ON THE PRESENT SYSTEM

The ramifications of incorporating the foregoing suggestions into the present system would be numerous. A major need would be massive educational efforts with specialists having contact with juveniles and with the public at large. To achieve full value from the proposed changes, the court, its staff, and the staff of related services, *e.g.*, the parole authority, must understand the aims underlying due process in the juvenile system.

High on the list of priorities would be the expanded training of judges holding juvenile jurisdiction. These judges require additional education in the legal and constitutional aspects of their specialized function, but legal training by itself is insufficient background. Graduate training and experience in social work, psychology, or sociology will be necessary for the most effective function-

ing by the juvenile judge. Since such combined formal training is rarely held by these judges, workshops and seminars to provide clinical orientation and sensitivity training are crucial. The National Council of Juvenile Court Judges has made an impressive start in this direction with its institute series which has reached more than 1,000 judges in recent years. Such workshops and seminars also place heavy emphasis on the legal aspects of juvenile court proceedings. State councils of juvenile judges are aiding the educational movement to secure justice for the child.

Police officers, especially those with specialized juvenile functions, will require related training in the legal issues connected with juveniles, particularly as it relates to their handling of a child. Similar training is crucial for juvenile probation and parole officers, and for those individuals who constitute the juvenile parole authorities in each state.

Law schools must expand their curriculum to include courses dealing with children and to include materials on the youthful offender and the law. Law students also need the practical experience of representing children who are respondents in juvenile court cases. Local, state, and the American Bar Associations should encourage participation by their members in juvenile proceedings and should sponsor seminars on the practice and philosophy of juvenile courts.

Legislative revisions are critical as part of the educational strategies to achieve justice for the child. Legislators and citizen groups concerned with children must take cognizance of these problems surrounding the delinquent child and seek statutory reforms to overcome them.

The state-wide juvenile correctional systems should be integrated into a single state-wide juvenile authority which can implement consistent administrative methods and checks to provide due process throughout the experience of the child in a state institution. Well trained professionals, knowledgeable in the legal as well as rehabilitation aspects of juvenile delinquency, must supervise the state institutions, youth camps, parole programs, and the transfer procedures between these state facilities.

Private attorneys will need to be appointed and paid from tax funds to facilitate legal protection to juvenile offenders in some communities. Increasingly, publicly employed legal counsel will be necessary to provide legal representation to the growing numbers of juveniles coming before the courts. Substantial amounts of time will be required from law guardians, juvenile defenders, and public and private agencies rendering legal services to the poor. Such counsel should be available daily in juvenile courts and should be

knowledgeable in law, legal procedures related to juveniles, and the goals of rehabilitation.

A state-wide public defender may be necessary on the state level to implement constitutional norms in appeals to higher courts. This official may also be the easiest means to incorporate those protections into parole granting and revocation hearings.

With more lawyers present in the pre-trial and adjudicative stages of the juvenile court proceeding, more appeals from these hearings can be expected. The appeals should be directed toward clarification of delinquency statutes or delinquency procedures. By the appeal, deficiencies in the rehabilitation practice and procedure may also be challenged.

Judicial reorganization in many states is essential to the proposal. Juvenile judges should be attorneys to be qualified to serve as judges. By this provision, the caliber of the bench will be improved commensurate with the improvement of attorneys appearing before it.

To achieve the desired reintegration of the child into society, considerable legislation and administrative changes will be necessary. The radical differences between institutionalized life and community life must be reduced. The institutionalized youth should relate to the communtiy through recreational and cultural activities, school and social activities, vocational training, and employment. Parental relationships should concurrently be improved through professional counseling and maintained by furlough visits.

CONCLUSION

The juvenile court experiment, when it began in 1899, was never envisaged as being an instrument which would deny to the child the basic principles of fairness. A major purpose of the juvenile court was to provide a fair hearing with all of the protections due a child. Due process is one purpose of the juvenile court. This purpose has not been met.[55]

The juvenile court cannot continue in its present form and achieve its primary purpose.[56] Individualized justice for the child encompasses rehabilitation of the child and reintegration of the child into society. The present system, which shuns the adversary system and prefers flexible and informal deliberations, denies consistent legal protections to the child. As a result, the child does not under-

[55] See generally Quick, *Constitutional Rights in the Juvenile Court*, 12 How. L.J. 76 (1966).

[56] See Moylan, Sr., *Comments on the Juvenile Court*, 25 MD. L. REV. 310 (1965), which asserts that the early goals can be reached through a juvenile statute requiring procedural safeguards and due process for the child.

stand himself or the system. By incorporating constitutional safeguards into this system, individualized justice can become a reality.

Many problems arise in conjunction with these suggestions. Police officers will dislike consistently involving an alleged delinquent's parents in notice of arrest, presence during questioning, and clearer notification of legal rights, including the right to say nothing. Probation officers will complain that the child and his parents will not understand the legal rights explanation; they believe that the child simply wants to admit to the complaint and not be confused or delayed by interpretations of legal rights. Court clerks would prefer to sabotage the production and service of new forms. County commissioners would rather not spend greater public funds to provide for counsel for the indigent child. An overburdened juvenile court judge will not be happy with any substantial increase in the number of time-consuming contested matters.

By providing more lawyers in juvenile court, there will be more cases where the lawyer asserts his expertise developed in criminal courts. In some cases the lawyers may fail to consider that the child may prefer to admit to a wrongful act rather than undergo the anxiety of heavily argued and frequently continued motions and trials. A successful dismissal on a procedural technicality may accelerate a child's belief than he can continue a delinquent pattern and keep asking for a lawyer to beat future "raps."[57] Marginal income families may expend badly needed money for private legal services which bring the same result for their child as would have been obtained without counsel. This situation could cause deteriorations of the familial relationship and further rejection of the child.

Admittedly all of these problems may arise. However, they can be minimized through expanded law school course offerings on juvenile courts and delinquency. Practicing lawyers can be educated through orientation and seminars. More important, if the court and its staff as well as the state and community programs for juveniles improve and are successful in the context of newly offered legal protections, the result should be the maturation of the juvenile court and the juvenile correction system.

Benefits from expanded legal services to children brought before the court would be numerous.[58] More lawyers will become more interested in the goals and problems of the court and in court and community service needs. More legislative reforms affecting

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[57] McLaughlin & McGee, *Juvenile Court Procedure*, 17 ALA. L. REV. 226 (1965).

[58] See Skoler & Tenney, Jr., *Attorney Representation in Juvenile Court*, 4 J. FAM. L. 77 (1954), for an analysis of the roles of counsel in juvenile court as reflected in the 1963 survey of juvenile court judges by the National Council of Juvenile Court Judges.

children's laws will be achieved; out-moded laws may be removed from the books and clarification of existing laws would be possible.

Appeals to higher courts will be facilitated. In this way current juvenile laws and procedures will be clarified, validated, or invalidated. Procedural fairness will be guaranteed the child at every stage of the proceeding from pre-trial to post-trial phases.

Juvenile court proceedings should be conducted to achieve the highest degree of child and parent participation in the process. Although formal courtroom hearings emphasizing the court's authority and control may be most effective with certain children selectively chosen for this type handling, usually greater success in the majority of the cases will be achieved in the informal chamber setting. The active involvement of the child and family in dialogue with judge and staff should facilitate rehabilitative goals. The less formal hearing seems more effective, in general, to the child's greater comprehension of himself and his decision to achieve rehabilitation.

Police handling and questioning of juveniles will need to be tailored to a new cloth. The *Miranda* precedent[59] would void many juvenile court cases if the issues determined by that case were raised in a typical juvenile delinquency matter. It is doubtful that the average policeman on the street makes a clear statement to the child as to his legal and constitutional rights before interrogating him. It is even more dubious whether a child has the legal status to waive his right to counsel and other rights without his parents being present at the time of the alleged waiver.

Police and the courts have relied upon the child's admission to the offense, especially with the numerous delinquencies which are unwitnessed. Defense attorneys, whetted by *Miranda,* will obtain suppressions of admissions and ultimate freedom for their child-client, even though the child may in fact have committed the delinquent act. To this degree due process may impede the purpose of the court to bring a child to accountability and to rehabilitate him. However, due process in this context can serve the heightened purpose of helping police officers and others who interrogate a child to effectuate higher standards of fair handling.[60]

Due process will mean more lawyers; more lawyers will mean more trials and more delays in dealing with the court docket; more lawyers will mean more private and public costs; more lawyers will mean more appeals; more lawyers will also mean more children

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[59] Miranda v. Arizona, 384 U.S. 436 (1966).

[60] See Handler, *The Juvenile Court and the Adversary System: Problems of Function and Form,* 1965 WIS. L. REV. 7 (1965), for a recommendation that adversary procedures be introduced at the administrative level (screening by police and probation officers) with judicial supervision.

removed from detention to their homes pending trial; more lawyers will mean more "guilty" children found innocent because of insufficient evidence produced at a trial; more lawyers will mean an insistence on fair procedures at each step of the correctional system. Again, although inconvenience and an occasional "injustice" may occur because of this change, the gains should far outweigh the disadvantages, and the goals for the juvenile court should come closer toward achievement.

Due process as it is utilized more completely in revocation of probation proceedings will slow down and sometimes prevent a court's desire to banish a child to a state institution as quickly as it can. But here, as elsewhere, the child's growing recognition of his rights should help many children toward greater self assertion in their daily lives, and, in generalized form, toward more successful lives. This is one of the major purposes of the juvenile court system.

An increased number of hearings would also take place in the juvenile parole granting and revocation sequences. In many states this procedure is incompletely defined by statute, and personal hearings with the child have been discouraged or denied.[61] Due process, introduced to parole, would mean evidentiary consideration for granting or non-granting of parole and its suspension or revocation. Again, this will cause certain inconvenience and require more personnel, but the presence of due process should not impede, but in fact should strengthen the system of juvenile parole.

Transfers between state institutions would be slowed and more management problems could well be created if courts were required to approve transfers instead of the common present procedure of transfer by administrative decision. But sharply improved correctional institutions should reduce the need to transfer children between institutions when a child cannot now be handled in the original setting. For example, more disturbed children could be effectively handled in delinquency institutions without their transfer to a mental hospital.[62]

In summary, consistent due process in juvenile proceedings will cause inconvenience, will cost considerable money and will, in isolated cases, hamper the most effective consideration of the needs of a child. But the massive gains inherent in the application of this concept can only result in the greater fulfillment of the purpose of the juvenile court and its related agencies. A new model for the juvenile court should develop and with it the heightened implementation of all goals in behalf of children.

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[61] The chairman of Colorado's Juvenile Parole Board, Mr. Goodrich Walton, told the writers in August, 1966, that no child has appeared directly before the Board during his six years as a member.

[62] See GLASER, REALITY THERAPY (1965).