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BEYOND GAULT AND WHITTINGTON— THE BEST OF BOTH WORLDS?

THOMAS R. SPENCER, JR.*

Today we seek a way out of the difficulties of criminal law and criminal procedure by developing preventive justice and preventive methods of social control.¹

But the admonition to function in a 'parental' relationship is not an invitation to procedural arbitrariness.²

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I. INTRODUCTION

Mrs. Willard had been reported missing by some of her relatives on the afternoon of July 29, 1966, in the village of Baltimore in Fairfield County, Ohio.³ Buddy Whittington, an only child and fourteen years old, had joined the search. Mr. Willard, who had quarreled consistently with his wife during the past two years, last saw her at 6:00 a.m. Neighbors had seen her in her yard at about 7:30 a.m. Buddy said he had seen her at about 8:00 a.m. when she came to the rear door to return some hair curlers to his mother. As the search continued on into the evening, the villagers checked their own homes. Finally, at 8:00 p.m. Buddy and his father found Mrs. Willard's body in their home, under the bed in Buddy's bedroom. She had been strangled.⁴

Law enforcement officials and the probation officer of the juvenile

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1. Pound, *The Juvenile Court in the Service State* (1944), reprinted in 10 CRIME & DELINQUENCY 516, 520 (1964).

2. *Kent v. United States*, 383 U.S. 541, 555 (1966).

3. The statement of facts is summarized from the Brief for Petitioner at 3-22, *In re Whittington*, 88 S. Ct. 1507 (1968) and *In re Whittington*, 13 Ohio App. 2d 11, 233 N.E.2d 333 (1967).

4. *Id.* at 3.

court interrogated Buddy Lynn Whittington at his home, at which time he denied any knowledge of how Mrs. Willard's body got under his bed or the cause of her death.

On August 5, 1966, a complaint was filed in the juvenile court alleging that Buddy was a delinquent child by virtue of murdering Mrs. Willard. He was arrested, and since there was no juvenile detention facility in Fairfield County he was imprisoned in solitary confinement in a cell in the county jail. Buddy's lawyers attempted to have him released on bond pending the hearing or to have him transferred to a juvenile detention home in a nearby county. Although many witnesses testified that there would be no risk to the community if Buddy were released, this motion was denied.⁵

The hearing to adjudicate the delinquency charge was held September 2, 1966. Several motions challenging the proceeding under various provisions of the Federal Constitution were denied.⁶ In substance, the case against Buddy consisted of the fact that Mrs. Willard's body was found under his bed, together with circumstances, opinion testimony, and his statements under interrogation, by which the state sought to raise the inference that he was the last person to see her alive. At the close of the state's case, the defense moved to dismiss the complaint for failure to prove the charge. The motion was overruled:

The Court finds that there has been a crime committed here, that there has been a homicide committed on this alleged victim; and the Court finds that there is probable cause to believe that this young defendant may have done this act, which, if done by an adult, would be a felony.⁷

Buddy was adjudicated a delinquent child and ordered committed for examination. Thereafter, he was returned from the Juvenile Diagnostic Center and again imprisoned in the Fairfield County jail.

After seventy-eight days of solitary confinement, the district court of appeals held that the jail was an illegal place of confinement, but overruled the motion for bond or release to his parent. He was transferred to the detention facility of another county. On January 3, 1967, the district court of appeals affirmed the judgment of delinquency, holding that "the Fifth and Sixth Amendments to the United States Constitution, being applicable only to the rights of accused persons charged with criminal offenses, do not apply." With regard to the quantum of proof required, the court held that:

5. *Id.* at 6.

6. These motions included: (1) a motion for dismissal because of a denial of Buddy's right to pre-hearing release; (2) a motion to suppress all evidence derived by interrogation without warning as to his privilege against self-incrimination and right to counsel, and (3) a motion to dismiss because of the unconstitutionality of the Ohio Juvenile Code in authorizing the same judge to both investigate and try the case on the merits. *Id.* at 9.

7. *Id.* at 20. See *In re Whittington*, 13 Ohio App. 2d 11, —, 233 N.E.2d 333, 338 (1967).

The proceeding being civil in nature and not criminal, a preponderance of the evidence is sufficient to warrant a determination that a minor is a delinquent, even though such determination involves a finding that a criminal statute has been violated by such minor.⁸

The Supreme Court of Ohio dismissed the appeal for lack of any substantial constitutional question.⁹ Certiorari to the Supreme Court of the United States was granted.¹⁰ On May 20, 1968, the Supreme Court¹¹ vacated the judgment and remanded the case to the district court of appeals for consideration in light of *In re Gault*.¹²

Buddy Whittington's plight, the second sequel in the development of juvenile court due process, requires the legal community once more to re-examine the basic foundations of an ambitious, if unsuccessful, social experiment.

Two factions, entrenched in opposite legal corners, have again pitted humanitarianism against justice. While the juvenile court traditionalist bellows the need for discretion and flexibility, the due process zealot demands the equivalent of a criminal court. In the middle stands the child. Alleged beneficiary of this pugilism, he receives the worst of two possible worlds—the unfeeling monstrosity of criminal procedure and the overly solicitous juvenile court non-procedure. In a third corner, facing away from the contest, crouches the public. Neither knowledgeable nor financially sympathetic, the public is perhaps the cause of it all. Money makes ideas work. The converse is also true. Since the juvenile courts' alleged forte is effective care and rehabilitation in the place of the parent, the public's position is contradictory to the avowed purpose. Thus, under such conditions, and alert to the obvious prejudice of this writer, we enter round two.

It shall be the purpose of this Comment to examine the characteristics of juvenile crime, the fundamental basis of the juvenile court concept with special reference to the *Gault* and *Whittington* problems, and to conclude with the perhaps idealistic analysis that the two factions should shake hands and consolidate their respective ideas and energies.

II. CONTOURS OF THE SOCIAL PROBLEM

Juvenile crime presents one of the most challenging domestic problems presently facing this country. In the United States today, one boy

8. *Id.* at 21. 13 Ohio App. 2d 11, —, 233 N.E.2d 333 at 341.

9. Reply Brief for the Petitioner, *In re Whittington*, 88 S. Ct. 1507 (1968).

10. *In re Whittington*, 389 U.S. 819 (1967).

11. *In re Whittington*, 88 S. Ct. 1507 (1968). The Court evaded the decision of any of the crucial issues asserted by the Petitioner. Nevertheless, because the problems are so important the case will be used as a factual and legal springboard.

12. 387 U.S. 1 (1967).

in six is referred to the juvenile court. In 1965, 30 per cent of all those arrested for non-traffic offenses were under 21 years of age, and approximately 20 percent were under 18 years of age.¹³

The highest arrest rates were attributed to the 15 to 17 age group, with the next highest for those aged 18 through 20. The 11- to 17-year-old age group, representing 13.2 percent of the population, was attributed with 50 percent of the arrests for burglary, larceny and motor vehicle theft. That age group was also responsible for 8.4 percent of arrests for willful homicide, 19.8 percent of forcible rape, 28 percent of robbery, and 14.2 percent of the aggravated assault. Between 1960 and 1965, arrests for persons under 18 years of age rose 52 percent for willful homicide, rape, robbery, aggravated assault, larceny, burglary, and auto theft. However, the commission of "adult" crimes is but a portion of the juvenile problem. Misconduct is also prevalent in truancy, association with deviant personalities, ungovernable behavior, and the like. While the greatest delinquency problems appear to be concentrated in urban areas, suburbs and rural areas are, respectively, second and last in the crime quanta distribution.¹⁴

Moreover, delinquents are predominately male. Four times as many boys were referred to juvenile court than girls, and as might be expected, the type of conduct which brings the child to the attention of police authorities varies with the sex of the child. Boys were referred to court primarily for larceny, burglary and motor vehicle theft. Girls were taken into custody primarily for running away, ungovernable behavior, larceny and sex offenses.

The delinquent child often comes from a broken home. He does poorly in school and usually emerges from a background of social and economic deprivation. This is demonstrated by the relationship between the slums of large cities and the incidence of delinquency. Accordingly, negroes account for a disproportionate number of arrests.¹⁵

Numerous and sometimes conflicting theories have been advanced for the causes of delinquency. The proposition is generally accepted, however, that children learn to become delinquent by becoming members of groups in which delinquent behavior is accepted.¹⁶ Criminal behavior is learned in interaction with others, principally in intimate personal groups:

13. REPORT OF THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* 55 (1967).

14. *Id.* at 56.

15. *Id.* at 57.

16. See H. L. WILENSKY AND C. N. LEBEAUX, *INDUSTRIAL SOCIETY AND SOCIAL WELFARE* (1958); *MIDDLE-CLASS JUVENILE DELINQUENCY* (E.W. Vaz ed. 1967); See also the excellent papers presented in the PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, *TASK FORCE REPORT: JUVENILE DELINQUENCY AND YOUTH CRIME* (1967).

Whether a person's motives and drives are criminal or non-criminal is a function of whether the legal codes have been defined by those around him in a manner favorable to their observance or to their violation.¹⁷

Although additional biological causes contribute to a great amount of delinquency,¹⁸ research indicates that there is a clear relationship between failure in school and the factors which contribute to juvenile misconduct.¹⁹

In light of all this, it is obvious that the awesome social problems which produce delinquency must be identified and eliminated. The juvenile courts must be so well constructed that, while sanctioning misconduct, they somehow prevent further deviant behavior. Unfortunately, the past has demonstrated a greater ability of the courts to sanction than to prevent delinquency. The interest of society in the great numbers of children brought before the court and the current breakdown of the family unit forces the juvenile court to assume the posture of policeman, parent, and psychologist. Yet, it must also "perform functions essentially similar to those exercised by any court adjudicating cases of persons charged with dangerous and disturbing behavior."²⁰

It is the interest of society in the child and the interest of society in its own safety which hang in the balance. As juvenile crime increases, the indulgence of the society must naturally decrease proportionately, and the original concept of the juvenile court as a social force must necessarily change with contemporary needs. As society views the court's process more as a sanction essentially similar to that imposed on adult deviants, the original understanding of the court as a solely therapeutic device requires re-examination.

III. THE ORIGINAL UNDERSTANDING OF THE JUVENILE COURT

The theory that the state has the power to care for children within its geographical jurisdiction is of ancient origin. In feudal times in England the Crown supervised the estates of minors through the *inquisitio post mortem*, in order to benefit from the fruits of tenure and livery to the overlord. This was replaced in the time of Henry VIII²¹ by the Court of Wards and Liveries which continued to exercise jurisdiction until 1660. At that time, when the feudal system had become outdated, the jurisdiction of the court was transferred to the Court of Chancery. Through this court, the King, as *parens patriae*, assumed the general protection not

17. Glaser, *The Sociological Approach to Crime and Correction*, 23 LAW & CONTEMP. PROB. 683, 689 (1958).

18. See Fox, *Delinquency and Biology*, 16 U. MIAMI L. REV. 65 (1961).

19. REPORT OF THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 71 (1967).

20. *Id.* at 81, quoting from ALLEN, *THE BORDERLAND OF CRIMINAL JUSTICE* 53 (1964).

21. 33 Hen. VIII, c. 22 (1541).

only of infant tenants but of all infants in the realm, through the chancellor.²²

The doctrine that the state was *parens patriae* of the people who compose it, for the purpose of the care, protection, discipline and reform of its citizenship, became an integral part of the British government and jurisprudence in the courts of equity and thus passed to this country upon the establishment of courts of law and equity in the various states.²³

Motivated by disgust with a history in which the juvenile was treated as any common criminal, the enlightened American reformers recognized the need to make a distinction. Psychologists had learned that the effectiveness of rehabilitation decreased proportionately with the age of the individual.²⁴ This premise, along with the adverse reaction to the treatment of children as criminals, impelled the formulation of the juvenile court system. Proceedings involving juveniles were henceforth to be non-criminal in nature in order to save the child from the brand of criminality, to take him in hand and, rather than first stigmatizing and then reforming him, to protect him from stigma. Proceedings were to be brought to have a guardian or the state look after the child, with the state intervening between the natural parent and the child because the child needed it, as evidenced by some of his acts, and because the parent was either unwilling or unable to train the child properly.²⁵ The essential question before the court was not what the child did, but what he was, how he got that way, and what would be the best course of action in his interest and in the interest of the state to save him from a downward career.

At first, separate systems were provided for juveniles.²⁶ Then, in 1899, the first juvenile court was created in Chicago, combining basic equity jurisdiction with the following concept:

The fundamental idea of the [juvenile court] law is that the state must step in and exercise guardianship over a child under such adverse social or individual conditions as develop crime. . . . It proposes a plan whereby he may be treated, not as a criminal, or legally charged with crime, but as a ward of the state, to receive practically the same custody and discipline that

22. *Eyre v. Shaftsbury*, 2 Peere Williams 103, Eng. Rep. 659 (Ch. 1722).

23. *Ex parte Daedler*, 194 Cal. 320, 228 P. 467 (1924); *In re Turner*, 94 Kan. 115, 145 P. 871 (1915).

24. See *Ex parte Crouse*, 4 Whart. 9, 11 (Pa. 1939) wherein the Supreme Court of Pennsylvania stated of the State House of Refuge:

The object . . . is reformation, by training the inmates to industry; by imbuing their minds with principles of morality and religion; by furnishing them with a means to earn a living; and above all, by separating them from the corrupting influence of improper associates.

25. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 119-20 (1909).

26. In 1841, Massachusetts established a probation system for juveniles, using rehabilitation instead of punishment. Thereafter, that state provided separate hearings and transportation for juveniles. In 1892, New York established separate trials, dockets, and records for children under the age of sixteen. P. TAPPAN, *JUVENILE OFFENDERS* 555 (1949).

are accorded the neglected and dependent child, which, as the act states, "shall approximate as nearly as may be, that which should be given by its parents."²⁷

With its basic equity jurisdiction, the juvenile court was to have five characteristics: (1) it was to be procedurally informal; (2) it was to be remedial and not punitive; (3) it was to act preventively in advance of the commission of any specific wrongdoing; (4) it was to employ administrative rather than adversary methods, and (5) it was to adapt to the circumstances of individualization.²⁸

Whenever arguments questioning the constitutionality of the juvenile court system were advanced, the answer was, in one form or another, the same. The juvenile court was not a criminal court, and therefore criminal due process did not apply.²⁹ A juvenile court hearing was not considered a criminal trial.³⁰ The juvenile delinquent was not a criminal.³¹ Juvenile delinquency was not a crime.³² A finding of a condition of juvenile delinquency was not a conviction,³³ nor was a commitment to a juvenile correctional institution a sentence to punishment.³⁴ So the syllogism went, ad infinitum.

It soon became more than apparent, however, that the ambitions of the juvenile court exceeded its realizations.³⁵ Through no fault of the advocates of the system nor the majority of its administrators, major foundations of the structure disintegrated. For example, the advocates could not control the fact that the American public regards juvenile delinquents as no more than young criminals.³⁶ The stigma which the court sought to obliterate was inescapable. Neither could the juvenile court judges be blamed for the fact that the public refused to foot the bill for workable child care centers.³⁷ Hence, the value of the system became questionable.

27. Pound, *The Juvenile Court and the Law* (1944), reprinted in *CRIME & DELINQUENCY* 490, 498 (1964).

28. *Id.* at 499.

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

30. *In re Santillanes*, 47 N.M. 140, 138 P.2d 503 (1943); *Childress v. State*, 133 Tenn. 121, 179 S.W. 643 (1915).

31. *Thomas v. United States*, 121 F.2d 905 (1941).

32. *Wade v. Warden*, 145 Me. 120, 73 A.2d 128 (1950).

33. *In re Turner*, 94 Kan. 115, 145 P. 871 (1915).

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

35. See, e.g., Antieau, *Constitutional Rights in the Juvenile Courts*, 46 CORNELL L.Q. 387 (1961); Ketcham, *The Unfulfilled Promise of the Juvenile Court*, 7 CRIME & DELINQUENCY 97 (1961); Paulsen, *Fairness to the Juvenile Offender*, 41 MINN. L. REV. 547 (1957); Comment, *Criminal Offenders in the Juvenile Court: More Brickbats and Another Proposal*, 114 U. PA. L. REV. 1171 (1966).

36. *In re Mikkelsen*, 226 Cal. App. 2d 467, 38 Cal. Rptr. 106 (1964); *In re Contreras*, 241 P.2d 631 (Dist. Ct. App. 1952).

37. NATIONAL CRIME COMMISSION, TASK FORCE REPORT: JUVENILE DELINQUENCY AND YOUTH CRIME 13, 36-37 (1967), PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 80-81 (1967).

Gradually, other contradictions began to emerge. While refusing to label the adjudication of the juvenile a criminal conviction, the result seemed to be the same. The public's economic apathy turned the dream into a nightmare, and juvenile facilities became no more than jails, and no less the festering places for the psychological sores of children.³⁸ Further, it was clear that the majority of alleged juvenile delinquents brought before the court were charged with violations of law. The fact-finding process in the criminal court was relatively sophisticated, but what was supposedly its parallel in the juvenile court was incredible. Using the preponderance of the evidence test,³⁹ some courts allowed hearsay testimony,⁴⁰ disallowed confrontation and cross-examination,⁴¹ and in many instances did not require formal notice of the charges.⁴² Thus, a child charged with a felony was adjudicated a delinquent with the same informality as a child charged with truancy.

Spurred by rumors and concrete examples of abuses,⁴³ lawyers began clamoring for much more law and much less equity in the juvenile courts.⁴⁴ Finally, the inevitable argument against the juvenile court was waged. If

38. FREED AND WALD, *BAIL IN THE UNITED STATES: REPORT TO THE NATIONAL CONFERENCE ON BAIL AND CRIMINAL JUSTICE* 105 (1964): "With few notable exceptions, juvenile detention facilities have been characterized as a 'national disgrace.'"

39. *Bryant v. Brown*, 151 Miss. 398, 118 So. 184 (1928); *People v. Lewis*, 260 N.Y. 171, 183 N.E. 353 (1932), *cert. denied*, 289 U.S. 709 (1932).

40. *See In re Holmes*, 379 Pa. 599, 606, 109 A.2d 523, 526 (1954):

... from the very nature of the hearings in the Juvenile Court it cannot be required that strict rules of evidence should be applied as they properly would be in the trial of cases in the criminal court. Although, of course, a finding of delinquency must be based upon sufficient competent evidence . . . hearsay evidence, if it is admitted without objection and is relevant and material to the issue, is to be given its natural probative effect and may be received as direct evidence. . . .

But see the dissenting opinion of Musmanno, J.:

In justification of this incredible procedure, the Majority . . . says that it is proper to receive hearsay when it is admitted without objection. What did Joseph Holmes know about objections? He is a minor. He had no lawyer to represent him. No one informed him as to his rights. He was not told he could object. A child in a courtroom amid a throng of police officers, probation officers, court attendants, and other officials, with a judge officiating from a podium, is not apt to summon the brashness, even if he possessed the knowledge, to lift his voice and cry out that what a police officer testified to was hearsay, even if he knew what hearsay meant.

Id. at 619, 109 A.2d at 532. *See also In re Mantell*, 157 Neb 900, 62 N.W.2d 308 (1954) (finding may not rest upon hearsay); *Williams v. Rhay*, 73 Wash. Dec.2d 775, 440 P.2d 427 (1968) (Hearsay evidence in the form of juvenile and police reports admissible for the purposes of a transfer hearing); *State v. Piche*, 442 P.2d 632 (Wash. 1968).

41. *See*, for example, the procedure used in *Gault*, note 48 *infra* and accompanying text.

42. *See, e.g., Freestone v. State*, 98 Ind. App. 523, 176 N.E. 877 (1931).

43. *See* for example, the biting charge made by Starrs, *A Sense of Irony in Southern Juvenile Courts*, 1 PORTIA L. J. 107 (1966):

[T]he civil rights movement has taught us that the juvenile court, like other legal processes in the South, may be no more than another strong arm of segregation. It can, when it wishes, intimidate civil rights demonstrators and their parents by long periods of inhuman confinement without recourse to bail. It can, at its whim, force them to sell their constitutional birthright in return for their release . . . And it can, in ominous tones, threaten to invoke its continuing jurisdiction to recall and redetermine the case of any juvenile upon his breach of elaborate and obscure probationary conditions.

44. *See* note 35 *supra*.

the juvenile court was not supplying the positive benefits it claimed to possess, the rationale for its continued existence disappeared.⁴⁵

It had been argued that the state could withhold traditional due process from the child in return for providing care instead of punishment, a sort of quid pro quo. But it became obvious that the child's part of the bargain saw a definite failure of consideration:

There is evidence . . . that there may be grounds for concern that the child receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children.⁴⁶

In addition, the possibility of resultant confinement supplied an underlying rationale to afford a child due process of law.⁴⁷ Short of total obliteration, fundamental rights had to be injected into the juvenile court process. This order was finally expressed, if not fully delineated, in the decision of *In re Gault*.⁴⁸

IV. IN RE GAULT AND ITS PROGENY OF PROBLEMS

The *Gault* decision, like the *Whittington* case, arose out of an incredible factual situation. Gerald Gault was taken into custody by the sheriff of Gila County, Arizona, on June 8, 1964, and was charged with uttering indecent language over the telephone. At the time of his arrest, his parents were not notified of his arrest or detention. A probation officer filed a petition merely alleging in general language, without supportive factual allegations, that Gerald was delinquent. No copy of the petition was served on the parents.

At the hearing on June 9, 1964, the prosecuting witness was absent. No transcription of the proceedings was made, nor were Gerald or his parents told that he had a right to counsel or a right to remain silent.

45. A typical statement is found in *State v. Owens*, 197 Kan. 212, 223, 416 P.2d 259, 269 (1966):

The validity of the whole juvenile system is dependent upon its adherence to its protective, rather than its penal, aspects. *Dispensing with formal constitutional safeguards can be justified only so long as the proceedings are not, in any sense, criminal.* We hold confinement in a penal institution will convert the proceedings from juvenile to criminal and require the observance of constitutional safeguards. . . . If after a juvenile proceeding, the juvenile can be committed to a place of penal servitude, the entire claim of *parens patriae* becomes a hypocritical mockery.

See also *In re Poff*, 135 F. Supp. 224 (D.D.C. 1955).

46. *Kent v. United States*, 383 U.S. 541, 556 (1966).

47. In *United States v. Dickerson*, 168 F. Supp. 899, 902 (D.D.C. 1958), *rev'd on other grounds*, 271 F.2d 487 (D.C. Cir. 1959), the Court stated:

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.

See also *Shioutakon v. District of Columbia*, 236 F.2d 666 (D.C. Cir. 1956).

48. 387 U.S. 1 (1967).

A further hearing was held on June 15th at which the complaining witness was again absent. After consulting the probation officer's "referral report," a document which was not disclosed to Gerald or his parents, the judge adjudicated Gerald a juvenile delinquent and committed him to the State Industrial School for the period of his minority (a possible period of six years). If Gerald had been an adult, he would have been subject to the possibility of a fine of five to fifty dollars or imprisonment for not more than two months.

Because under Arizona law no appeal was permitted, a writ of habeas corpus was filed in the Supreme Court of Arizona. That court referred the matter for hearing to a lower court which dismissed the writ. The dismissal was affirmed by the Supreme Court of Arizona.

On appeal the Supreme Court of the United States addressed itself to six problems: (1) notice of the charges; (2) right to counsel; (3) right to confrontation and cross-examination; (4) privilege against self-incrimination; (5) right to a transcript of the proceedings, and (6) the right to appellate review. The Court, however, declined to rule on the last two issues.

Throughout the opinion runs the thread of the Court's discontent with the present achievement of juvenile court objectives, and three main points seemed paramount. First, even though the child was merely adjudicated delinquent, he was charged with misconduct, the result of which might be incarceration. A majority of the Court saw no difference between incarceration in an "industrial school" and in an adult prison.⁴⁹ Second, high crime rates and a great deal of recidivism highlighted the failure of the system to correct the anti-social conduct of juveniles.⁵⁰ Finally, the Court refused to accept the argument that informality was a positive characteristic to be retained. Studies indicated "that the appearance as well as . . . the essentials of due process . . . may be a more impressive and more therapeutic attitude so far as the juvenile is concerned."⁵¹

The Court, in short, reached the conclusion that many of the alleged benefits of the system existed in theory not in fact and, therefore, failed to supply a sufficient basis for the denial of fundamental rights. The Court did not, however, refuse to recognize some of the positive aspects which actually exist:

For example, the commendable principles relating to the processing and treatment of juveniles separately from adults are in no way involved or affected by the procedural issues under the discussion.⁵²

49. *Id.* at 27.

50. *Id.* at 22.

51. *Id.* at 26.

52. *Id.* at 22.

In fact, the opinion stresses repeatedly: "... the features of the juvenile system . . . will not be impaired by constitutional domestication."⁵³

Nevertheless, certain basic procedural guarantees were demanded of the juvenile court adjudicatory process when a child is charged with being a delinquent and faces possible confinement. Henceforth, to comply with due process requirements of juvenile court proceedings, notice must be given sufficiently in advance of the scheduled court proceedings so that the child *and* his parents will have an opportunity to prepare a defense. Furthermore, the petition or other notice must "set forth the alleged misconduct with particularity."⁵⁴

With regard to the presence of counsel, the Court noted that the juvenile court could not adequately or constitutionally represent both the child and the state. The juvenile needs the assistance of counsel to cope with the problems of law:

We conclude that the Due Process Clause of the Fourteenth Amendment requires that in respect of proceedings to determine delinquency . . . in which the juvenile's freedom is curtailed, the child and his parents must be notified of the child's right to be represented by counsel retained by them, or if they are unable to afford counsel, that counsel will be appointed to represent the child.⁵⁵

Reiterating the position taken in *Kent v. United States*,⁵⁶ the Court also held that absent a valid confession, a determination of delinquency and an order of commitment to a state institution could not be sustained in the absence of sworn testimony subjected to the opportunity for cross-examination.⁵⁷ Lastly, the Court concluded that "the constitutional privilege against self-incrimination is applicable in the case of juveniles as it is with respect to adults."⁵⁸

The effect of *Gault* was far greater in its implications than in the four fundamental rights it deemed absolutely necessary.⁵⁹ The revolutionary policy which the opinion evidenced has produced a jurisprudential battle which will be resolved only through clear future statements by

53. *Id.*

54. *Id.* at 33. See also *Ex Parte DeGrace*, — Mo.—, 425 S.W.2d 228, 234 (Kan. City Ct. App. 1968).

55. *Id.* at 41.

56. 383 U.S. 541 (1966).

57. 387 U.S. at 57.

58. *Id.* at 55.

59. For other recent articles dealing with the effect of the *Gault* decision, see Frey, *The Effect of the Gault Decision on the Iowa Juvenile Justice System*, 17 DRAKE L. REV. 53 (1967); Lefstein, *In re Gault, Juvenile Courts and Lawyers*, 53 A.B.A.J. 811 (1967); Comment, *Juvenile Justice in Transition*, 14 U.C.L.A. L. REV. 1144 (1967); Comment, *In re Gault: Children Are People*, 55 CALIF. L. REV. 1204 (1967). For an excellent empirical study on the application of the *Gault* decision on Florida juvenile courts, see Note, *Delinquency and Denied Rights in Florida's Juvenile Court System*, 20 U. FLA. L. REV. 369 (1968).

the Court. Since the Court refused to characterize the proceedings as either civil or criminal, the juvenile court remains in definitional limbo. Consequently, a number of problems arise simply because of the failure to label the process. The purpose of this Comment is to present and examine a few of those problems.

A. *Gault*—Retrospective or Prospective

A central issue being judicially debated today in a number of jurisdictions is whether the rights guaranteed by the *Gault* decision should be given retroactive effect. The Court's ability to apply a decision retrospectively is well-settled:

[W]e are neither required to apply nor prohibited from applying a decision retrospectively. We must then weigh the merits and [diversity] in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation.⁶⁰

The decision of *Gideon v. Wainwright*⁶¹ was impliedly held retroactive in *Doughty v. Maxwell*,⁶² where the Court reversed a conviction entered prior to the pronouncement in *Gideon* because the indigent accused had not been provided with counsel. Later, *Jackson v. Denno*⁶³ was applied retroactively in *McNerlin v. Denno*.⁶⁴

Yet, in recent years, retroactive application of decisions has been conspicuously absent. For example, in *Linkletter v. Walker*,⁶⁵ the Court denied retroactive application to the exclusionary rule announced in *Mapp v. Ohio*.⁶⁶ Subsequently, in *Tehan v. United States ex rel. Shott*,⁶⁷ the Court declined to retrospectively apply the right of a defendant to have the prosecution refrain from commenting on his failure to testify.⁶⁸

In *Johnson v. New Jersey*⁶⁹ the Court noted that the choice between retroactivity and non-retroactivity in no way turns upon the "value of the constitutional guarantee involved."⁷⁰ The reliance on existing law and the impact on the administration of justice were announced as controlling

60. *Linkletter v. Walker*, 381 U.S. 618, 629 (1965). See Bender, *The Retroactive Effect of an Overruling Constitutional Decision: Mapp v. Ohio*, 110 U. PA. L. REV. 650 (1962), Note, *Prospective Overruling and Retroactive Application in the Federal Courts*, 71 YALE L. J. 907 (1962).

61. 372 U.S. 335 (1963).

62. 376 U.S. 202 (1963).

63. 378 U.S. 368 (1964).

64. 378 U.S. 575 (1963).

65. 381 U.S. 618 (1965).

66. 367 U.S. 643 (1961).

67. 382 U.S. 406 (1966).

68. Announced in *Griffin v. California*, 380 U.S. 609 (1965).

69. 384 U.S. 719 (1966).

70. "We also stress that the retroactivity or non-retroactivity of a rule is not automatically determined by the provision of the Constitution on which the dictate is based." 384 U.S. at 728.

factors in determining retroactivity or non-retroactivity. The Court realized that retroactive application of *Escobedo* and *Miranda* would seriously disrupt the administration of criminal laws. "It would require the retrial or release of numerous prisoners found guilty by trustworthy evidence in conformity with previously announced constitutional standards."⁷¹

Finally, the Court summarized the rules of *Johnson*, *Tehan* and *Linkletter* by setting forth in *Stovall v. Denno*⁷² the following criteria for determining whether a decision should be given retroactive or only prospective effect: (a) the purpose to be served by the new standards; (b) the extent of the reliance by law enforcement authorities on the old standards; and (c) the effect on the administration of justice of a retroactive application of the new standards.⁷³ When these criteria are applied to the *Gault* decision, it appears that it should not be given retroactive application.

With regard to the first criterion, the purpose served by the *Gault* decision is demonstrated by the Court's concern for clear procedural guidelines to determine a juvenile's status. The second criterion is, however, a more important consideration. The majority of states assumed before *Gault* that juvenile court laws, reflecting the *parens patriae* concept of juvenile justice, were constitutionally adequate. The practical effect of the *Gault* decision was to drastically change the juvenile court structure, with a resultant burden on the judicial process.

The last factor, however, provides the most important basis for not applying the decision retroactively. In *Stovall v. Denno*⁷⁴ the court noted the basis upon which *Griffin v. California*⁷⁵ had not been applied retroactively:⁷⁶

To require all of those states now to void the conviction of every person who did not testify at his trial would have an impact upon the administration of their criminal law so devastating as to need no elaboration.

Application of *Gault* retroactively would have the same devastating impact on the states. All adjudications of delinquency, where the child was not advised of his right to court appointed counsel, would be void. Rehearings would be demanded in state judicial systems which are already choked with litigation. Such hearings would be rendered ineffective by

71. *Johnson v. New Jersey*, 348 U.S. at 731. See Mishkin, *The Supreme Court 1964 Term—Foreword: The High Court, The Great Writ and Due Process of Time and Law*, 79 HARV. L. REV. 56 (1965); Comment, *Linkletter, Shott, and the Retroactivity Problem in Escobedo*, 64 MICH. L. REV. 832 (1966).

72. 388 U.S. 293 (1967).

73. *Id.* at 297.

74. *Id.* at 293.

75. 380 U.S. 609 (1965).

76. Quoting from *Tehan v. United States ex rel. Shott*, 382 U.S. 406, 419 (1966).

"the unavailability of witnesses, by dim memories, and by the inadequacy or unavailability of juvenile court records."⁷⁷

Courts which have analyzed the decisions culminating in *Stovall* have denied retroactive application.⁷⁸ Other courts have simply held the decision retroactive,⁷⁹ while others have compared the right to counsel in *Gault* with the same right, applied retroactively in *Gideon v. Wainwright*,⁸⁰ and have reached the same result of retroactive application.⁸¹ However, the situations in *Gault* and *Gideon* are distinguishable. When *Gideon* was decided, the states were forewarned of the outcome and many states had actually advocated the Court's decision. The mere fact that both concerned the right to counsel is not the controlling factor, as the Court carefully explained in *Johnson v. New Jersey*.⁸² In fact, as previously noted, not even the particular amendment involved in the decision is controlling. Rather, the impact on the administration of justice seems to be the controlling consideration. It is clear that the *Gault* case will affect many more than the six states affected by the *Tehan*⁸³ decision and the majority of the states affected by the *Johnson* decision. Indeed, the *Gault* decision is comparable in effect to the *Stovall* decision and therefore compels the same standard of non-retroactivity.

B. A Right to Counsel in Non-Delinquency Proceedings

Although the Court in *Gault* was clear in requiring counsel in delinquency hearings, no statement was made as to the other half of the juvenile court business—"neglect," "dependency," and "child in need of supervision" proceedings. The premise of the Court's application of the right to counsel turned on the fact that the delinquency proceeding carries with it "the awesome prospect of incarceration in a state institu-

77. *Cradle v. Peyton*, 208 Va. 243, 156 S.E.2d 874 (1967) (holding *Gault* not retroactive).

78. *In re Wylie*, 231 A.2d 81 (D.C. Ct. App. 1967); *Cradle v. Peyton*, 208 Va. 243, 156 S.E.2d 874 (1967); *Rieck v. Hershman*, 35 U.S.L.W. 2754 (Wis. Waukesha Cty. Ct., June 1, 1967). See also the excellent analysis of this problem by Barns, J. in *Sult v. Weber*, 210 So.2d 739 (Fla. 4th Dist. 1968):

Gault clearly recognized that the standards therein stated were not merely newly discovered constitutional rights, but were newly extended applications of new constitutional standards to a system of courts unknown to the common law which are *sui generis* in nature.

Id. at 746.

79. *Marsden v. Commonwealth*, 352 Mass. 564, 227 N.E.2d 1, 3 (1967); *LaFollette v. Circuit Court*, 37 Wis. 2d 329, 155 N.W.2d 141 (1967). See also *Gogley v. Peyton*, 160 S.E.2d 746 (Va. 1968).

80. 372 U.S. 335 (1963).

81. *State ex rel. Milton v. Richardson*, 28 Fla. Supp. 189 (Cir. Ct. Dade County 1967).

82. 384 U.S. 719, 728 (1966).

83. In *Stovall v. Denno*, the court remarked:

In *Tehan v. United States ex rel. Shott*, supra, we thought it persuasive against retroactive application of the no-comment rule of *Griffin v. State of California* . . . that such application would have a serious impact on the six states that allowed comment on an accused's failure to take the stand. 382 U.S. at 419 (1966).

tion until the juvenile reaches the age of 21.⁸⁴ Yet in a state such as Florida, a child may be committed to an institution as a *dependent* for the term of his minority.⁸⁵ If the rationale of the Court is at all consistent, the same right to counsel should apply, since the same incarceration may result. Other courts have followed this logic in other similar proceedings. In *People v. Potter*,⁸⁶ for example, a court held that in a proceeding to determine whether or not a person is insane, the right to counsel should be afforded. Federal courts have similarly demanded that in a proceeding which may result in the commitment of a person thought to be insane, the defendant has a constitutional right to counsel.⁸⁷ Some state courts have applied the safeguard to proceedings solely aimed at determining dependency.⁸⁸

One could, however, argue that the Court in *Gault*, aside from the deprivation of liberty, was also impressed with the resultant stigma which attached to a child adjudicated a delinquent.⁸⁹ This is distinguishable from the attitude society has for children in some manner dependent on its care.⁹⁰ The lack of a negative stigma might induce hesitation to apply the right to counsel. This view was recently expressed in *In re Urbasek*:

Dependency and neglect cases are ordinarily instituted primarily because of the unwillingness or inability of parents or relatives

84. 387 U.S. at 36.

85. FLA. STAT. § 39.11(2)(c) (1967). As a practical matter, this occurs rarely.

86. 85 Ill. App. 2d 151, 228 N.E.2d 238 (Dist. Ct. App. 1967). The Court relied upon *Gault* for the proposition that whether the proceeding is called civil or criminal the end result is incarceration and the right to counsel must be applied. See also *Baxstrom v. Harold*, 383 U.S. 107 (1966); *Specht v. Patterson*, 386 U.S. 605 (1967) wherein the Court, referring to a sex offender statute, noted at 608:

The commitment proceedings whether denominated civil or criminal are subject both to the Equal Protection Clause of the Fourteenth Amendment . . . and to the Due Process Clause.

Florida, by statute applies a privilege to counsel to insanity hearings. FLA. STAT. § 394.22(4) (1967).

87. *Dooling v. Overholser*, 243 F.2d 825 (D.C. Cir. 1957).

88. See *in re McCoy*, 184 Kan. 1, 334 P.2d 820 (1959) (KAN. GEN. STAT. 38-80 (1954)); *In re Palmer*, 212 A.2d 61 (R.I. 1965) (R.I. GEN. LAWS § 14-1-30 (1956)).

89. "It is disconcerting . . . that this term has come to involve only slightly less stigma than the term 'criminal' applied to adults." 387 U.S. at 24. See also *Winburn v. State*, 32 Wis. 2d 152, 162, 145 N.W.2d 178, 182 (1966) wherein the court stated:

Despite all protestations to the contrary, the adjudication of delinquency carries with it a social stigma. This court can take judicial notice that in common parlance, 'juvenile delinquent' is a term of opprobrium and is not society's accolade bestowed on the successfully rehabilitated.

See also *People v. Welch*, 255 A.C.A. 550, 63 Cal. Rptr. 258 (1967).

90. One experienced author, Judge Orman Ketcham of the Juvenile Court of the District of Columbia, has stated:

Repeatedly, the Court stated two basic limitations to its mandate: the specific rights guaranteed by *Gault* must be afforded only when (1) the proceedings entails the determination of delinquency as a result of alleged misconduct, and (2) the result of the proceedings may be commitment to an institution in which the juvenile's freedom may be curtailed. Thus, neglect and dependency proceedings are clearly not within the ambit of the decision.

Ketcham, *Guidelines from Gault*, 53 U. VA. L. REV. 1700, 1706-7 (1968).

to discharge their parental duties rather than because of the child's misconduct.⁹¹

On the other hand, severing the child from its parents might be of sufficient seriousness to compel the same right to counsel guaranteed in *Gault*. Furthermore, the child who is presumed incompetent for many other purposes might be in the same practical situation as the insane individual. Consistency of both logic and public policy seem to compel the same procedural safeguard in the case of the dependent infant when faced with the possibility of incarceration in a state school.

C. *Equality of Appellate Review*

It has been thought well-settled that an appeal is not a matter of right but a matter of grace, and the failure of a state legislature to provide for an appeal from a juvenile court is not unconstitutional.⁹² The Supreme Court of the United States has recognized that when an appeal is provided, it may be accorded by the state upon such terms and conditions as in its wisdom it deems proper.⁹³

However, if a state does grant a right of appeal to persons accused of crimes, it must make that right equally available to indigents.⁹⁴ Must the state also make that right equally available to juveniles charged with delinquency based upon a violation of law? Is it a denial of the equal protection and due process clauses of the fourteenth amendment to deny a juvenile a "first" appeal when criminal defendants are afforded such by a state? Moreover, when an appeal is provided for juveniles but the time to perfect the appeal is less than that afforded to criminal defendants, does this amount to an "invidious discrimination?"

The guaranty of the fourteenth amendment is that all persons similarly situated must be dealt with and treated on an equal basis. A state may classify persons according to their peculiar circumstances as long as the classification is reasonable and not arbitrary.⁹⁵ An argument could be made that juveniles charged in juvenile court with a violation of law are "similarly situated" with criminal defendants. When charged with a violation of law, the determination in the fact finding process, or adjudicative stage, is whether or not the child did the act which resulted

91. 38 Ill. 2d 535, 232 N.E.2d 716, 720 (1967). However, it should be noted that in Illinois the dependent child cannot be committed to an institution designed solely for the care of delinquent children. ILL. REV. STAT., ch. 37, par. 705-7(1)(e) (1965).

92. *In re Santillanes*, 47 N.M. 140, 138 P.2d 503 (1943); *Wissnburg v. Bradley*, 209 Iowa 813, 227 N.W. 136 (1929). It should be noted that the Supreme Court declined to rule on this issue in *Gault*, 387 U.S. at 58.

93. *McKane v. Durston*, 153 U.S. 684 (1894); *Mooneyham v. Kansas*, 339 F.2d 209 (10th Cir. 1964).

94. *Draper v. Washington*, 372 U.S. 487 (1963); *Griffin v. Illinois*, 351 U.S. 12 (1956).

95. *McLaughlin v. Florida*, 379 U.S. 184 (1964); *Norvell v. Illinois*, 373 U.S. 420 (1963); *McGowan v. Maryland*, 366 U.S. 420 (1961); *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61 (1911).

in the violation of law which would make him delinquent. The possible result of a determination that he did commit the act is identical with that of the criminal defendant—incarceration. The fact that the child is committed to an industrial school instead of a prison was viewed as a distinction without a difference by the Court in *Gault*:

The fact of the matter is that, however euphemistic the title, a "receiving home" or an "industrial school" for juveniles is an institution of confinement in which the child is incarcerated for a greater or lesser time.⁹⁶

Therefore, since the child is similarly situated with criminal defendants in both the substance and goal of the proceedings, the child should have the same right to appeal and, if an appeal is granted, the same time to perfect an appeal as criminal defendants. To grant anything less would be discriminatory. The rationale of *Griffin v. Illinois*⁹⁷ and *Douglas v. California*,⁹⁸ the advocate could argue, obtains with no less force with respect to juveniles. The purpose there was to avoid an invidious discrimination based on economic status. Here, the object is to avoid a discrimination based on age.

On the other hand, one who analyzed the situation from the opposite point of view would no doubt place great emphasis on the reluctance of the *Gault* decision to characterize the juvenile court proceedings. In the absence of a criminal label, the advocate could revert to the old *parens patriae* concept, evidencing an entirely different approach to the juvenile. The child, the arguer could advance, is in no manner "similarly situated" with the criminal defendant. He is the object of the state's solicitude, not its approbation. He is not charged with a violation of law. Rather, it is his status which is being investigated. The result is not incarceration. On the contrary, an industrial school is designed for rehabilitation, not retribution. Admitting all this, the state has the absolute right to classify juveniles as distinct from criminals. In fact, the Supreme Court recognized this when it applauded the practice of treating juveniles separately from criminals. Many courts have upheld statutes distinguishing juveniles and rejected attacks based on the equal protection clause.⁹⁹

96. 387 U.S. at 27.

97. 351 U.S. 12 (1956).

98. 372 U.S. 353 (1963).

99. See *Cunningham v. United States*, 256 F.2d 467 (5th Cir. 1958); *In re Herrera*, 23 Cal. 2d 206, 143 P.2d 345 (1943); *People v. Schering*, 93 Cal. App. 2d 736, 209 P.2d 796 (1949). See also the statement of the court in *Fisher v. Commonwealth*, 213 Pa. 48, 51, 62 A. 198, 199 (1905):

That minors may be classified for their best interests and the public welfare has never been questioned in the legislation relating to them. Under the Act of 1887, the classification of females under 16 years of age means felonious rape, with its severe penalties for what may be done in one day, though on the next it remains simple fornication, to be expiated by a mere fine . . . The genus homo is a subject within the meaning of the Constitution. Will it be countered that as to this there can be no classification? No laws affecting the personal and property rights of minors as distinguished from adults? Or of males as distinguished from females?

Furthermore, if the appeal time is less than that afforded the criminal, the legislature may have had a distinct purpose. In Florida, for example, the time within which a juvenile may perfect an appeal is ten days,¹⁰⁰ while the convicted criminal has ninety days.¹⁰¹ The legislature's purpose, however, was to settle quickly the status of the child in order to expedite rehabilitation.¹⁰² In view of this reasonable purpose, there is no "invidious discrimination."

The resolution of this problem will depend upon the resolution of the essential premise. If the child undergoes a "criminal" prosecution and it is recognized as such, the child should be afforded equal treatment. Absent this label, one cannot definitely say to what appellate procedure the child is entitled.

D. *Amendment of Petition*

Assume, hypothetically, that the juvenile court judge is faced with a runaway who is, thereby, a dependent child. A petition alleging dependency is filed, and during the hearing, the child voluntarily admits to a violation of law, *i.e.*, that he is delinquent. Must the court now issue a new petition? If it does not, would this be a denial of procedural due process?

The fundamental requirement set down in *Gault* appears to compel an affirmative answer to both queries,¹⁰³ but the absence of a characterizing label confuses the issue. *Gault* requires that the child receive notice of the charges stated with particularity so that he and his parents may prepare a defense. This would seemingly require the juvenile court, under the hypothetical given above, to issue a new petition, to wait the required time, and to hold a new hearing on the delinquency charge. In fact, to do otherwise would be tantamount to adjudicating a person guilty of a crime without charging him with the crime, a procedure which has been denounced in criminal law.¹⁰⁴ But what of civil law?

It may be possible for the court to amend the petition to conform to the evidence produced at the hearing and to adjudicate the juvenile based on the amended petition. In fact, a few older cases have condoned this. One case, *In re Bentley*,¹⁰⁵ approved such a practice when the peti-

100. FLA. STAT. § 39.14(2) (1967).

101. FLA. STAT. § 924.09 (1967).

102. *In re Evans*, 116 So.2d 783 (Fla. 3d Dist. 1960).

103.

Notice to comply with due process requirements, must be given sufficiently in advance of scheduled court proceedings so that a reasonable opportunity to prepare will be afforded, and it must 'set forth the alleged misconduct with particularity.' 387 U.S. at 33.

104. See *Cole v. Arkansas*, 333 U.S. 196 (1948); *DeJonge v. Oregon*, 299 U.S. 353 (1937).

105. 246 Wis. 69, 16 N.W.2d 390 (1944). See also *State ex rel. Raddue v. Superior Court*, 106 Wash. 619, 180 P. 875 (1919).

tion alleged delinquency and the child was adjudicated dependent. The court held:

When the child is once brought before the court and the facts are presented, the court may order the petition to be amended and adjudge the child to be a "neglected", "dependent", or "delinquent" child, as the facts warrant. To hold otherwise would defeat the purpose of the law.¹⁰⁶

On the other hand, a more recent Mississippi case, *In re Slay*,¹⁰⁷ reached the opposite result. There the child was alleged to be a dependent, and without amending the petition or issuing a new one, the juvenile court had entered an order adjudicating the child a delinquent. Concluding that the child was denied due process of law, the court held that "[i]n short, the child was never charged with being a delinquent."¹⁰⁸

It is submitted that any reading of the intent of the *Gault* decision compels a conclusion identical to that reached in *Slay*. The purpose of the notice is to allow the child and his parents every opportunity to prepare a defense. Juvenile court judges faced with such a situation would do well to issue a new petition, give notice of the new charge and hold a new hearing.

However, were there a clear statement that an adjudication of delinquency based on a violation of law is equivalent to a criminal trial, no discussion would appear necessary. The criminal law in this respect is clear. Juvenile law is not.

E. *Waiver of Rights*

May a child waive the rights guaranteed by the *Gault* decision? That the Court felt that this was a possibility is clear from its consideration of whether the Gaults "did or did not choose to waive the right."¹⁰⁹ In another part of the opinion, the Court observed that:

[S]pecial problems may arise with respect to waiver of the privilege by or on behalf of children, and there may be some differences in technique—but not in principle—depending upon the age of the child and the presence and competence of parents.¹¹⁰

Historically this question has been a factual one; that is, whether or not the right was waived depends upon the facts and circumstances

106. *In re Bentley*, 246 Wis. 69, 80, 16 N.W.2d 390, 395 (1944).

107. 245 Miss. 294, 147 So.2d 299 (1962).

108. 245 Miss. 294, 300, 147 So.2d 299, 301 (1962). See also *Kearney v. Blue*, 134 Colo. 217, 301 P.2d 515 (1956) wherein the court held that where the petition alleged dependency, that was the sole determination to be made on that petition. New facts required the filing of a new petition.

109. 387 U.S. at 42.

110. *Id.* at 55. See also *Ex parte DeGrace*, —Mo.— 425 S.W.2d 228 (Kan. City Ct. App. 1968).

analyzed in their totality. The federal courts have directed the trial judge to consider the totality of circumstances in each case, including age, education, experience and ability to comprehend the meaning and possible result of a waiver.¹¹¹ A California Supreme Court case, decided after *Gault*, allowed waiver of the right to counsel, based upon the foregoing factual considerations.¹¹²

On the other hand, in many legal situations the law presumes that an infant is unable to intelligently protect his rights. For example, a child is presumed as a matter of law incompetent in contractual affairs.¹¹³ In 1962, in the decision of *Gallegos v. Colorado*,¹¹⁴ the Supreme Court reversed a conviction based upon a confession made by a juvenile notwithstanding the fact that he had been advised of his right to counsel. The majority stated that a fourteen year old, no matter how sophisticated, is unlikely to have any conception as to what he will be confronted with. He is unable to know how to protect his own interests or how to gain the benefits of his constitutional rights. A California court in *In re Butterfield*¹¹⁵ held a waiver by a fifteen-year-old juvenile ineffective, even though the juvenile and her mother were advised of the right to counsel. The appellate court thought the waiver ineffective because it was not made with an intelligent understanding of the consequences, a long-term confinement.

However, the general proposition still is that a juvenile can waive rights which are tendered to him.¹¹⁶ The question should remain a factual one, depending upon the total circumstances. Such an approach allows for needed flexibility. However, in the absence of a showing in the record that the juvenile was afforded competent, friendly adult advice, a rebuttable presumption of the lack of an intelligent waiver should be raised. Such a rule would provide the safeguards needed when dealing with statements made by juveniles who, on the whole, are easily coerced either

111. *McBride v. Jacobs*, 247 F.2d 595 (D.C. Cir. 1957). This is consistent with the statement in *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) that a waiver is "an intentional relinquishment or abandonment of a known right or privilege." See also *In re Estrada*, 1 Ariz. App. 348, 403 P.2d 1 (1965).

112. *People v. Lara*, 432 P.2d 202, 62 Cal. Rptr. 586 (1967). But see *Shioutakon v. District of Columbia*, 236 F.2d 666 (D.C. Cir. 1956); *In re Poff*, 135 F. Supp. 224 (D.D.C. 1955); *People v. Cocroft*, 37 Ill. 2d 19, 225 N.E.2d 16 (1967).

113. See, e.g., *Dixon v. United States*, 197 F. Supp. 798 (D.S.C. 1961); *Mossler Acceptance Co. v. Perlman*, 47 So.2d 296 (Fla. 1950). He is also incapable to act as either an executor or administrator. *T. ATKINSON, WILLS*, § 110 (1953).

114. 370 U.S. 49 (1962). The court drew upon its decision in *Haley v. Ohio*, 332 U.S. 596 (1948), where a fifteen year old was held incapable of being judged on a level with adults with regard to waiver.

115. 253 A.C.A. 888, 61 Cal. Rptr. 874 (1967). In *People v. Cummings*, 255 A.C.A. 378, 62 Cal. Rptr. 859 (1967), the court imposed the requirement that the minor have an understanding of the nature of the charge, elements of the offense, defenses available, or the punishment that might be exacted as a condition precedent to waiver. See also *State v. Herbert*, 106 N.H. 401, 235 A.2d 524 (1967); *Ex Parte DeGrace*, —Mo.—, 425 S.W.2d 228 (Kan. City Ct. App. 1968); *Hopkins v. State*, —Miss.—, 209 So.2d 841 (1968).

116. See cases collected in Annot., 71 A.L.R.2d 1160 (1961).

directly or indirectly by the situation in which they find themselves. This would also force the states to provide a guardian *ad litem* immediately, a procedure which seems essential to the protection of the juvenile's rights and the integrity of the proceedings.

F. *Proof of Corpus Delecti*

If a child during a juvenile court hearing admits to a violation of law which could result in an adjudication of delinquency, is the state required to prove up the elements of the violation as in a criminal court?

Two problems immediately arise: (1) whether or not the criminal rules of evidence apply so that proof of corpus delecti is essential; and (2) whether or not a judicial confession, as distinct from an extra-judicial confession, must be substantiated by proof of the elements.

With respect to the first problem, the lack of a clear label attached to the juvenile proceeding again creates the issue. *Gault* did not examine or discuss the rules of criminal evidence. Further, many of the states apply the equity rules of evidence to the juvenile court proceedings.¹¹⁷ Nevertheless, the argument could still be made that since the determination is whether or not the juvenile did the act which resulted in the violation of law, which in turn makes him delinquent, the essential elements should be proved up as in a criminal prosecution. The purpose of requiring proof of corpus delecti in criminal proceedings is to substantiate a confession which might be unreliable or even coerced.¹¹⁸ Certainly this reasoning would apply with as much, if not greater, persuasion in the juvenile court.¹¹⁹

On the other hand, a major premise of the juvenile court philosophy is that the adjudication is one of a status, not of an act. Therefore, the rules of criminal evidence should not apply. The juvenile is presumably in friendly surroundings and would not be prone to confess to an act he has not committed.

Although there is a dearth of juvenile cases on this point, the majority rule in criminal law is that extra-judicial confessions must be corroborated.¹²⁰ One recent juvenile case followed this approach. In the case of *In re Houseworth*¹²¹ the court, although construing the New York Family Court Act,¹²² required that a confession made by juveniles be corroborated before it can be admitted by the court. The purpose of the

117. See, e.g., FLA. STAT. § 39.09(2) (1967):

Hearings shall be conducted by the judge without a jury, applying the rules of evidence in use in equity cases in the circuit courts

See also *In re W.O.*, 100 N.J. Super. 358, 242 A.2d 17 (1968).

118. C. MCCORMICK, EVIDENCE § 110, at p. 230 (1954).

119. See *In re Gault*, 387 U.S. 1, at 45, 51-2 (1967).

120. See note 118 *supra*.

121. 53 Misc. 2d 375, 278 N.Y.S.2d 715 (1967).

122. New York Family Court Act § 744(b).

requirement, the court indicated, is to avoid the danger that one may confess to a crime when no crime has been committed.

A further problem, however, results from the majority rule that while an extra-judicial confession must be corroborated, a judicial confession need not be substantiated.¹²³ Yet, it is clear that some psychological coercion must result from the conditions and trappings of the juvenile court. The child finds himself surrounded by strangers, placed in unusual quarters and faced with possible punishment. Under those conditions, is not a young person likely to agree to be easily coerced? The same fear of an unsubstantiated confession is present whether the confession is made in court or out of court. A more reasonable approach would be that regardless of where made, confessions by juveniles should be corroborated by at least some evidence. However, in the absence of a Supreme Court statement that the proceeding is criminal in nature, one can only suggest, rather than report, the correct approach.

G. *Unreasonable Search and Seizure*

Is a juvenile protected by the fourth amendment against unreasonable search and seizure? At least two jurisdictions have held that he is.

In *State v. Lowry*¹²⁴ the Superior Court of New Jersey asked:

Can a court countenance a system where, as here, an adult may suppress evidence with the usual effect of having the charges dropped for lack of proof, and, on the other hand, a juvenile can be institutionalized . . . for "rehabilitative" purposes because the Fourth Amendment right is unavailable to him?¹²⁵

The court noted that the historical development of the concepts of illegal search and seizure, from *Weeks v. United States*¹²⁶ to *Mapp v. Ohio*,¹²⁷ indicates that the rule applies to all persons, whether accused of a crime or not. Therefore, the constitutional right of privacy should be applicable to children and adults alike. Furthermore, the doctrine of *parens patriae* should require that in order to properly rehabilitate the child, official misbehavior must not go undeterred. Respect for law and order, the goal of the juvenile court, will be best realized if the police are required to deal fairly and legally with juveniles.¹²⁸

123. 23 C.J.S. *Criminal Law* § 839c (1961). This rule has been applied in juvenile proceedings. See *In re Patterson*, 58 Cal. 2d 848, 377 P.2d 74, 27 Cal. Rptr. 10 (1962), *cert. denied*, 374 U.S. 838 (1962). The courts seem to feel that while suspicion of protracted police interrogation compels independent proof of an extra-judicial confession, the psychological impact of the court, the oath of truth, etc., compel an opposite result. J. WIGMORE, *EVIDENCE*, § 842a (3d ed. 1940).

124. 95 N.J. Super. 307, 230 A.2d 907 (1967).

125. *Id.* at 316, 230 A.2d at 911. See also *In re Marsh*, —Ill.2d—, 237 N.E.2d 529 (1968); *In re L.B.*, 99 N.J. Super. 589, 240 A.2d 709 (1968).

126. 232 U.S. 383 (1914).

127. 367 U.S. 643 (1961).

128. See *In re Ronny*, 40 Misc. 2d 194, 210, 242 N.Y.S.2d 844, 860 (Family Ct. 1963):

It is interesting to note that while the court in *In re Williams*¹²⁹ recognized that proceedings in the New York Family Court are civil and not criminal, it nevertheless held that the constitutional guarantee against unreasonable searches and seizures should be extended to children charged with the doing of an act which if done by an adult would be a crime.

V. WHITTINGTON—FOUR MORE PROBLEMS

The rumblings of the legal community following the *Gault* decision had hardly subsided when *Whittington* appeared on the judicial horizon. Again, as in *Gault*, the summary adjudication seemed based on the flimsiest of evidence.¹³⁰ Again, four fundamental questions were involved: (1) whether due process and equal protection were denied by the application of the standard of proof by the lower courts; (2) whether a fair and impartial trial by an impartial trier of fact—trial by jury—was denied; (3) whether statements admitted into evidence violated the privilege against self-incrimination and the right to counsel; and (4) whether the right to pre-hearing release applies in a juvenile court proceeding.

Yet apart from these superficial similarities, the *Whittington* case is distinguishable in one great aspect. The inequity in *Gault* was the six year commitment facing a child for an offense normally punishable by a small fine or short jail term.¹³¹ In situations such as *Whittington*, commitment to a juvenile facility seems far less a punishment than that afforded an adult for the same criminal act.¹³² Yet, *any* commitment is unjust when based upon an illegal adjudication. The Court was thus faced with, but unfortunately did not decide, the question it avoided in *Gault*: Is the adjudicatory phase of a juvenile delinquency hearing, when based upon a criminal offense, a criminal trial?

A. *Beyond a Reasonable Doubt*

As noted above,¹³³ the proposition had long been accepted by the courts that a juvenile delinquency hearing was not a criminal trial.

I can think of few worse examples to set for our children than to visit upon children what would be, if they were older, unreasonable and unconstitutional invasions of their all-too-limited privacy and rights merely because they are young.

See also *In re Boykin*, —Ill. 2d—, 237 N.E.2d 460 (1968).

129. 49 Misc. 2d 154, 169, 267 N.Y.S.2d 91, 109 (Family Ct. 1966).

130. See note 7 *supra* and accompanying text.

131. 387 U.S. at 9, 29.

132. The distinction is underlined by the dissenting voice of Justice Stewart in *Gault* when, in defending the juvenile court system, he said:

So it was that a 12 year old boy named James Guild was tried in New Jersey for killing Catharine Beakes. A jury found him guilty of murder, and he was sentenced to death by hanging. The sentence was executed. It was all very constitutional.

387 U.S. at 80, citing *State v. Guild*, 5 Halst. 163, 18 Am. Dec. 404 (N.J. Sup. Ct. 1828).

133. See note 29 *supra* and accompanying text.

Therefore, the courts concluded, the quantum of evidence necessary for an adjudication was a preponderance of the evidence.¹³⁴

The petitioner in *Whittington* asserted a threshold argument that the lower court applied an impermissible standard of proof in basing the adjudication on what appeared to be a "probable cause" test.¹³⁵ However, counsel further argued that even the preponderance of evidence test was unconstitutional when applied to a violation of law. The result of the adjudication was commitment to a security institution. This result impelled the same evidentiary safeguards of criminal law.¹³⁶ Anything less would be a denial of both equal protection and due process of law.¹³⁷

Although the majority of jurisdictions have held otherwise,¹³⁸ the recent case of *In re Urbasek*¹³⁹ may be the vanguard of a trend toward the reasonable doubt standard. In that case, an eleven-year-old boy was charged with a violation of state law, the murder of an eleven-year-old girl with whom he had been playing a few hours prior to the discovery of her body. Reversing the lower court's opinion which affirmed an adjudication based on a preponderance of the evidence, the court held:

[I]t would not be consonant with due process or equal protection to grant allegedly delinquent juveniles the same procedural rights that protect adults charged with crimes, while depriving these rights or their full efficacy by allowing a find-

134. *United States v. Borders*, 154 F. Supp. 214 (N.D. Ala. 1957); *In re Wylie*, 231 A.2d 81 (D.C. Ct. App. 1967); *In re Bigesby*, 202 A.2d 785 (D.C. Ct. App. 1964); *Bryant v. Brown*, 151 Miss. 398, 118 So. 184 (1928); *In re Santillanes*, 47 N.M. 140, 138 P.2d 503 (1943); *In re Ronny*, 40 Misc. 2d 194, 242 N.Y.S.2d 844 (Sup. Ct. 1963); *People v. Lewis*, 260 N.Y. 171, 183 N.E. 353 (1932), *cert. denied*, 289 U.S. 709 (1932); *State v. Thomasson*, 154 Tex. 151, 275 S.W.2d 463 (1955); *State ex rel. Berry v. Superior Court*, 139 Wash. 1, 245 P. 409 (1926). *Contra*, *In re Madick*, 233 App. Div. 12, 251 N.Y.S. 765 (1931); *Jones v. Commonwealth*, 185 Va. 335, 38 S.E.2d 444 (1946). The reasons for applying this standard are referred to in *State v. Shardell*, 107 Ohio App. 338, 340, 153 N.E.2d 510, 512 (1958):

It is an informal hearing through the medium of Juvenile Court to determine whether the child needs the intervention of the state as guardian and protector of his person. This is obviously to do away with the usual and customary ceremony and procedure of a court trial in order to surround the child with an atmosphere of friendliness and goodwill rather than one of hostility and fault-finding.

135. See note 7 *supra*. The petitioner argued that the "probable cause" standard has nothing to do with guilt; that it describes the quantum of evidence necessary to justify arrest, search, or detention for trial; and that it does not even amount to the "preponderance of evidence" necessary for proof of a fact in a civil case. Brief for Petitioner, *In re Whittington*, 88 S. Ct. 1507 (1968).

136. The consequences to the life, liberty and good name of the accused from a conviction of crime may be much more serious than the effects of a judgment in a civil case. Accordingly, it is just and reasonable to require a greater degree of confidence by the trier in the truth of the charge in a criminal than in a civil case. This demand for a higher degree of persuasion in criminal cases was recurrently expressed from ancient times . . . C. McCORMICK, EVIDENCE, § 321, p. 681 (1954).

137. Brief for Petitioner 42-54, *In re Whittington*, 88 S. Ct. 1507 (1968).

138. See note 134 *supra*.

139. 38 Ill. 2d 535, 232 N.E.2d 716 (1967). See also *United States v. Costanzo*, —F.2d— (4th Cir. 1968).

ing of delinquency upon a lesser standard of proof than that required to sustain a criminal conviction.¹⁴⁰

One would probably be inclined to pass over the statement as renegade were it not for the fact that *Urbasek* was decided in the state that gave birth to the juvenile court concept. But the decision should not be construed as tolling a death knell for the juvenile court system. The Illinois court properly emphasized that the unique benefits that are derived from the special dispositional processes under the system will not be diluted by the changes made at the adjudicatory stage. The proposition is simply that when the same or even greater curtailment of freedom may attach to a finding of delinquency as to a criminal conviction, the minor should not be deprived of a standard of proof "distilled by centuries of experience as a safeguard for adults."¹⁴¹

B. Trial by Jury

Whittington argued that he had been denied a fair trial by an impartial trier of fact,¹⁴² and further, that he was entitled to a trial by jury if he so desired.¹⁴³ He asserted that trial by jury historically is the safest method of determining whether or not the person accused has, in fact, committed the act charged.¹⁴⁴ The arbitrariness denounced in *Kent* and *Gault* would be further prevented by the presence of an unprejudiced cross-section of the community.

In the absence of a statute specifically providing for a jury trial in a juvenile delinquency hearing,¹⁴⁵ the proposition has been well-

140. *Id.* at —, 232 N.E.2d at 719. See also the statement of the Supreme Court of Virginia in *Jones v. Commonwealth*, 185 Va. 335, 341-342, 38 S.E.2d 444, 447 (1946):

The judgment against a youth that he is delinquent is a serious reflection upon his character and habits. The stain is not removed merely because the statute says no judgment in this particular proceeding shall be deemed a conviction for crime or so considered. The stigma of conviction will reflect upon him for life. It hurts his self-respect. It may, at some inopportune, unfortunate moment, rear its ugly head to destroy his opportunity for advancement, and blast his ambition to build up a character and reputation entitling him to the esteem and respect of his fellow man . . . Guilt should be proven by evidence which leaves no reasonable doubt.

141. *In re Urbasek*, 38 Ill. 2d at —, 232 N.E.2d at 720 (1967). See also *United States v. Costanzo*, —F.2d— (4th Cir. 1968) ("No verbal manipulation or use of a benign label can convert a four-year commitment following conviction into a civil proceeding.").

142. The petitioner asserted that the juvenile court judge participated—personally and through his official arm, the probation officer—in the investigative and accusatory process and had ex parte access to the facts prior to the adjudicative stage. Brief for Petitioner at 57, *In re Whittington*, 88 S. Ct. 1507 (1968).

143. Brief for Petitioner at 64, *In re Whittington*, 88 S. Ct. 1507 (1968).

144. *Id.* at 66:

The law has established this tribunal because it believed that, from its numbers, made of their selection, and the fact that the jurors came from all classes of society, they are better calculated to judge motives (and) weigh possibilities . . . than any single man, however pure, wise and eminent he may be.

People v. Garbutt, 17 Mich. 9, 27 (1868).

145. See *Ex parte Norris*, 268 P.2d 302 (Okla. Crim. 1954) (child could waive right to jury trial); *Dendy v. Wilson*, 142 Tex. 460, 179 S.W.2d 269 (1944).

settled that there is no constitutional right to a jury trial.¹⁴⁶ The courts have reasoned that since the juvenile hearing is civil in nature and since the child is charged with delinquency and not a crime, a jury is not required. However, some courts have held that when a juvenile is charged with a specific crime, as a basis for a delinquency adjudication, he may demand that his guilt or innocence be determined by a jury.¹⁴⁷ While some recent cases have reiterated the nonexistence of a right to jury trial in the aftermath of *Gault*,¹⁴⁸ a few jurisdictions have broken away from the previous position, using *Gault* as their banner.¹⁴⁹

Interestingly, the trend toward recognizing jury trial in juvenile proceedings is growing despite authoritative recommendations against the formality it would necessarily bring to the juvenile court.¹⁵⁰ In *Nieves v. United States*,¹⁵¹ for example, a federal district court held that the Federal Juvenile Delinquency Act¹⁵² is unconstitutional insofar as it denies a jury trial to an accused juvenile delinquent charged with violating a federal criminal statute:

[W]e read *Gault* to require the availability of that right [to jury trial] in any federal juvenile proceeding in which a youth is faced with incarceration for the commission of an act alleged to be a violation of federal law.¹⁵³

The latest statement of the Supreme Court on the right to jury trial lends some support to the application of that right to juvenile proceedings. In *Duncan v. Louisiana*¹⁵⁴ the Court held that the fourteenth amendment guarantees a right of jury trial in all criminal cases which, were they to be tried in a federal court, would come within the sixth amendment's guarantee.¹⁵⁵ This right, the Court noted, must be recog-

146. See cases collected in Annot. 100 A.L.R.2d 1242 (1965). See also *Wilson v. Coughlin*, 147 N.W.2d 175 (Iowa 1966); *In re Elmore*, 222 A.2d 255 (D.C. Ct. App. 1966). But see *United States ex rel. Stinnett v. Hegstrom*, 178 F. Supp. 17 (D. Conn. 1959).

147. *State ex rel. Shaw v. Breon*, 244 Iowa 49, 55 N.W.2d 565 (1952); See also cases cited in Annot., 100 A.L.R.2d 1242, 1245 (1965).

148. *Commonwealth v. Johnson*, 211 Pa. Super. 62, 70, 234 A.2d 9, 17 (1967):

The institution of the jury trial in juvenile court, while not materially contributing to the fact-finding function, would seriously limit the court's ability to function in this unique manner, and would result in a sterile procedure which could not vary to meet the needs of delinquent children.

149. *Peyton v. Nord*, 78 N.M. 717, 437 P.2d 716 (1967) (construing state statute as not prohibitive of trial by jury); *In re Rindell*, 36 U.S.L.W. 2468 (R.I. Fam. Ct. Jan. 10, 1968). See *Yzaguirre v. State*, 427 S.W.2d 687 (Ct. Civ. App. Tex. 1968) (trial by jury afforded by statute).

150. The TASK FORCE REPORT ON JUVENILE DELINQUENCY AND YOUTH CRIME which augmented the 1967 report of the President's Commission on Law Enforcement and Administration of Justice noted at p. 38: "There is much to support the implicit judgment by these states that trial by jury is not crucial to a system of juvenile justice." See also Paulsen, *Fairness to the Juvenile Offender*, 41 MINN. L. REV. 547, 559 (1957).

151. 280 F. Supp. 994 (S.D.N.Y. 1968).

152. 18 U.S.C. § 5033 (1964).

153. *Nieves v. United States*, 280 F. Supp. 994 (S.D.N.Y. 1968).

154. 88 S. Ct. 1444 (1968).

155. *Id.* at 1447. See also *Bloom v. Illinois*, 88 S. Ct. 1477 (1968), where the Court applied a right to jury trial for a contempt punished by a two year prison term.

nized by the states as part of their obligation to extend due process to all persons within their jurisdiction.¹⁵⁶ The Court recognized benefits of the jury system and the evils which it is designed to lessen, if not eliminate:

Providing an accused with the right to be tried by a jury of his peers gives him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge.¹⁵⁷

Trial by jury would no doubt bring substantial difficulties to the juvenile court.¹⁵⁸ No longer would the informal atmosphere prevail. No longer would the child be judicially coddled. Formal, rigid procedures would ultimately be necessary. There would undoubtedly be a prosecutor who would present a case *against* and not entirely in the *interest* of the child.

However, these obvious drawbacks may be outweighed by the benefits to be derived from the integrity of the court proceedings when based on a violation of law. Perhaps a trial by jury and the necessary procedures incident thereto would impress upon the juvenile community the seriousness of deviant behavior.¹⁵⁹ Furthermore, the child would not be forced to accept a trial by jury. Rather, the form of the proceedings would depend upon his choice. Ignoring all this, however, the overriding benefit obtainable is the option of having the same fact-finding process applied to the commission of the same violation of law, regardless of whether the individual is a child or an adult.

C. *Miranda and the Juvenile*

Drawing upon the spirit of the *Gault* decision, counsel in *Whittington* argued that the admission of statements to law enforcement officials on the night of the discovery of Mrs. Willard's body,¹⁶⁰ contravened the principles laid down in *Miranda v. Arizona*.¹⁶¹

Although the Court in *Gault* clearly limited its holdings to the adjudicative stage, counsel sought to extend the policy considerations to

156. The Court applied this to *serious* criminal cases. While not attempting to define what a serious offense is, the Court did say:

It is sufficient for our purposes to hold that a crime punishable by two years in prison is, based on past standards in this country, a serious crime and not a petty offense. *Duncan v. Louisiana*, 88 S. Ct. 1444, 1454 (1968).

A juvenile in a case such as *Gault* or *Whittington* might well argue that commitment to an institution for minority when based upon a violation of law is a "serious criminal offense."

157. 88 Sp. Ct. 1444, 1451 (1968).

158. For a report on an interesting facet of trial by jury see REPORT OF THE NATIONAL COUNCIL ON CRIME AND DELINQUENCY, *Teen-Age Juries*, 12 CRIME AND DELINQUENCY 305 (1966).

159. In fact, there is authority for the psychological proposition that formalism may be of positive benefit for the child. See note 51 *supra* and accompanying text.

160. Brief for Petitioner at 76, *In re Whittington*, 88 S. Ct. 1507 (1968).

161. 384 U.S. 436 (1966).

the pre-hearing interrogation as well. The Court had emphasized repeatedly that admissions and confessions of juveniles require great caution. Furthermore, the same fears which cast doubt upon the reliability of confessions by children *in court*¹⁶² arise with greater intensity in a pre-hearing interview conducted without the presence of counsel.¹⁶³

Substantial authority supports the position taken by Whittington. For example, the Children's Bureau of the United States Department of Health, Education, and Welfare has recommended that before the child is interviewed, he and his parents should be informed of his right to have legal counsel present and to refuse to answer questions. This procedure, the Bureau emphasizes, is even more important when prosecution in an adult criminal court is a possibility. At the time of the interview it usually is not known whether or not the juvenile court will waive its jurisdiction. Therefore, all the procedural safeguards in the criminal law should be followed.¹⁶⁴

Of course, the argument against this position is that the child should not be encouraged to hide his mistakes, but rather to purge his conscience. This was, in fact, a major tenet of the previous juvenile court philosophy—the first step in the rehabilitative process.¹⁶⁵ However, when balanced against the possibilities of coercion, the noble aim of purgation shrinks in importance:

An individual swept from familiar surroundings into police custody, surrounded by antagonistic forces, and subjected to the techniques of persuasion cannot be otherwise than under compulsion to speak.¹⁶⁶

At least one enlightened juvenile court provides against the transgression of the *Miranda* guarantees. When the child is interviewed, the violation of law with which he is charged is clearly stated. He is advised of the seriousness of the matter, his right to have counsel present and his privilege against self-incrimination. After making any statement, both

162. 387 U.S. at 45, 51-52. See also *The Effect of the Miranda Case on Confessions in the Juvenile Court*, 5 AM. CRIM. L.Q. 79 (1967). See also *In re Rust*, 53 Misc. 2d 51, 278 N.Y.S.2d 333 (Family Ct. 1967); *In re James*, 54 Misc. 2d 514, 283 N.Y.S.2d 126 (Sup. Ct. 1967); *Choate v. State*, 425 S.W.2d 706 (Ct. Civ. App. Tex. 1968), for cases applying *Miranda* to juvenile proceedings.

163. The petitioner relied upon the following statement in *Gallegos v. Colorado*, 370 U.S. 49, 54 (1962):

[A] 14-year old boy, no matter how sophisticated, is unlikely to have any conception of what will confront him when he is made accessible only to the police. That is to say, we deal with a person who is not equal to the police in knowledge and understanding of the consequences of the question and answers being recorded and who is unable to know how to protect his own interests or how to get the benefits of his constitutional rights.

164. CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH, EDUCATION, & WELFARE, STANDARDS FOR JUVENILE AND FAMILY COURTS 49 (1966).

165. See statement of the Court in *In re Gault*, 387 U.S. at 51.

166. *Miranda v. Arizona*, 384 U.S. 436, 461 (1965). See *State v. Piche*, 442 P.2d 632 (Wash. 1968).

the child *and* the parent or guardian are required to sign the statement, in the presence of a witness.¹⁶⁷

Clearly such a procedure does not hamper the orderly machinery of the court process. Rather, it eliminates any claim of arbitrariness and, at the same time, impresses the child with the significance of his act.

D. *Right to Bail*

The final major legal argument presented by *Whittington* was that the denial of pre-hearing release to juveniles charged with a violation of law was contrary to due process and equal protection.¹⁶⁸

Perhaps the decision in the leading case of *Trimble v. Stone*¹⁶⁹ best explains the position of those authorities recognizing a constitutional right to bail for juveniles. The United States District Court for the District of Columbia, while accepting that a juvenile proceeding is not criminal, refused to recognize a distinction in the possible result of the proceeding. Even though a child committed to the National Training School for Boys is the object of the Government's paternalistic spirit, the court reasoned, the commitment is nevertheless punishment and a deprivation of liberty. Thus, the constitutional right to bail must be applied to a juvenile court proceeding based on a violation of law.

167. The court referred to is the Juvenile and Domestic Relations Court of Dade County, Florida. The substance of the form is reproduced in part, below:

ADVICE OF RIGHTS

It has been reported to the Juvenile Court that you have been involved in (*state clearly the law violation*).

This is a serious matter and I must advise you of certain rights you have in this Court. You have a **RIGHT TO BE REPRESENTED BY AN ATTORNEY** that you employ. If you and your parents are unable to pay for an attorney, the **COURT WILL APPOINT AN ATTORNEY TO REPRESENT YOU WITHOUT COST**. Do you understand?

You have a **PRIVILEGE AGAINST SELF-INCRIMINATION**. This means that you do not have to make any statement or admission by speaking or in writing that would in any way involve or incriminate you in this case or in any other law violation. Do you understand?

You have a **RIGHT TO REMAIN SILENT** and not make any statement, and if you choose to remain silent this will not be held against you at this time or at any court case. Do you understand?

If you choose to make a statement, anything you say, or any admission you make in writing can, and will, be used against you in court. Do you understand?

You have a **RIGHT TO HAVE AN ATTORNEY PRESENT AT THIS TIME** and to consult with an attorney prior to making any statement or admission in writing, and to assist you in making any decision concerning your rights in this case. Do you understand?

.....

Is there any portion of this statement that you would like for me to read again?

Having been advised of your rights, do you wish to proceed at this time without consulting an attorney, or without having an attorney present?

168. Brief for Petitioner at 86, *In re Whittington*, 88 S. Ct. 1507 (1968).

169. 187 F. Supp. 483 (D.D.C. 1960). See also *State v. Franklin*, 202 La. 439, 12 So.2d 211 (1943); *Smith v. McCrary*, 1 Crim. L. Rep. 2153 (Ky. Cir. Ct. May 26, 1967) and *Ex parte Osborne*, 127 Tex. Crim. 136, 75 S.W.2d 265 (1934), holding that a child in juvenile court has a right to bail.

Those who argue against applying bail to the juvenile court assert that a child who is in trouble may need care immediately. Care is not provided by a release from custody. Indeed, discharge to parents may not be appropriate or wise in certain situations since the parents may be the source of or contribute to the child's problem.¹⁷⁰

One need only reflect upon the empirical data compiled¹⁷¹ to appreciate that release may be extremely detrimental in certain instances.¹⁷² When such circumstances are recognized, it would appear to be consistent with the juvenile court concept to issue not only a petition of delinquency but also a petition of *dependency*, alleging the home conditions. If the allegations are true, then the child, dependent upon the state for proper care, should not be subject to pre-hearing release.¹⁷³

Absent the above-mentioned situation, however, it seems patently unfair to deny a juvenile the same right to bail that is afforded an adult, when both may be charged with the same criminal act. Bail is based upon the presumption of innocence and the desire to give an individual the opportunity to prepare a defense unhampered. It also serves to prevent the infliction of punishment prior to an adjudication in a court of law consistent with due process. Unless the presumption of innocence begins only at a certain age limit, unless it is not important that a child prepare a defense, and unless it is fair that a child be punished prior to a finding of guilt, bail should be applicable to juvenile delinquency proceedings.¹⁷⁴

VI. CONCLUSION

*What's in a name? That which we call a rose by any other name would smell as sweet.*¹⁷⁵

This philosophical observation eloquently crystallizes what is, in this author's opinion, the ultimate issue facing the courts. Labels are only meaningless when rights are not dependent on them. Yet, for the want of a name, a label, or a category within which to define the rights of juveniles and the correlative duties of the courts, the system now

170. Paulsen, *Fairness to the Juvenile Offender*, 41 MINN. L. REV. 547, 552 (1967). See also *Ex parte Cromwell*, 232 Md. 305, 192 A.2d 775 (1963); and *State ex rel. Peaks v. Allamon*, 66 Ohio L. Abs. 403, 115 N.E.2d 849 (Ohio App. 1952), holding that there is no constitutional right to bail in a juvenile court proceeding.

171. See note 15 *supra* and accompanying text.

172. Indeed, release of *adult* offenders before trial may be extremely detrimental, both to society and to the individual. Yet this has never been a sufficient rationale to overcome the presumption of innocence. See *Trimble v. Stone*, 187 F. Supp. 483 (D.D.C. 1960).

173. See *In re Magnuson*, 110 Cal. App. 2d 73, 242 P.2d 362 (1952) (proceeding to declare minor ward of juvenile court is not criminal, and is not subject to bail provisions of state constitution).

174. See also Antieau, *Constitutional Rights in Juvenile Courts*, 46 CORNELL L.Q. 387 (1961); Paulsen, *Fairness to the Juvenile Offender*, 41 MINN. L. REV. 547 (1957); Note, 29 GEO. WASH. L. REV. 583 (1961).

175. Shakespeare, *Romeo and Juliet*, Act II, scene ii.

hangs in limbo. What is ignored is that criminal law is one thing, civil law is quite another. "Let us not deal with a criminal matter in a civil way, with the result that we have a 'hodge podge' of nothingness."¹⁷⁶

When a child is charged with a violation of law, when the goal of the fact-finding process is to determine whether or not he committed the act, and when the result may be confinement, how can it be denied that the process is criminal in nature?

Recognition of this self-evident proposition will not destroy the real value of the juvenile court concept. It will not deter benevolence or repel understanding. Once it is decided that the child has violated some law, then, in the *dispositional* stage, armed with all the experience of that office, the judge can determine what can best be done "to save him from a downward career."¹⁷⁷ It is at this point, that the state has an opportunity to contribute substantially as *parens patriae* in the best interests of the child.

This system cannot work, however, unless the alternatives of treatment are substantial. The taxpayer must be made to appreciate the tremendous amounts of human talent and manpower which fall irretrievably into the institutional crevices known as "Boy's Schools." The alarming rise in youth crime and the disappointing recidivism dramatically point up the need for workable youth centers, filled with psychologists and social workers, and devoid of the atmosphere which propels delinquents toward death row.

The juvenile courts, staffed for the most part by dedicated and qualified individuals, must now be bolstered by both consistent law and substantial monies. If they are, the juvenile court traditionalist and the due process zealot can both achieve noble ends.

What's in a name? It can mean that, in the interest of society, we provide the best of both worlds for our troubled young.

176. *In re Rindell*, 36 U.S.L.W. 2468 (R.I. Family Ct. Jan. 10, 1968).

177. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 119-120 (1909).