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In Re Gault: Understanding the Attorney's New Role

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There is no probability, in the proper administration of the law, of the child's liberty being unduly invaded. Every statute which is designed to give protection, care, and training to children, as a needed substitute for parental authority and performance of parental duty, is but a recognition of the duty of the state, as the legitimate guardian and protector of children where other guardianship fails. No constitutional right is violated, but one of the most important duties which organized society owes to its helpless members is performed. . . .


While there can be no doubt of the original laudible purpose of juvenile courts, studies and critiques in recent years raise serious questions as to whether actual performance measures well enough against theoretical purpose to make tolerable the immunity of the process from the reach of constitutional guaranties applicable to adults. . . . There is evidence, in fact, that there may be grounds for concern that the child receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children.


I. INTRODUCTION

The above quotations illustrate the great changes in critical evaluation that have occurred in the nearly seven decades since the inauguration of the juvenile court as an instrumentality of individualized justice. The concern expressed by Mr. Justice Fortas in the Kent case,1 regarding the lack of constitutional protection for juveniles, has now become an indictment of the juvenile court system in the United States. Because of the treatment afforded a fifteen year old boy in Gila County, Arizona, Mr. Justice Fortas, in speaking of the lack of procedural safeguards maintained in the juvenile courts, stated that, “juvenile court history has again demonstrated that unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure.”2

2. In re Gault, 387 U.S. 1, 18 (1967).
On June 8, 1964, Gerald Francis Gault and Ronald Lewis were taken into custody. Gerald was then subject to a six months probation order as a result of his having been in the company of another boy who had stolen a wallet from a woman's purse. The action taken by the police on June 8 was the result of a verbal complaint by a neighbor of the boys, in regard to a telephone call made to her in which the caller or callers made lewd or indecent remarks. No notice was given to Gerald's parents when he was taken into custody, however, when Mrs. Gault went to the detention home that night she was orally informed of the reason for her son's detention and that there would be a hearing the next afternoon. At this hearing, Gerald and his parents were not advised of their right to counsel. The juvenile court judge found Gerald delinquent under the Arizona statute which defines a "delinquent child" as "one who is habitually involved in immoral matters," or "who habitually so departs himself as to injure or endanger the morals or health of himself or others." The judge based his findings on Gerald's admission of guilt at the adjudicative and dispositional hearings, and committed him to the state industrial school for the period of his minority, that is, until he reached the age of twenty-one. Gerald's parents filed a writ of habeas corpus with the Arizona Supreme Court who referred it to the superior court for hearing. The writ was dismissed and the Arizona Supreme Court affirmed the dismissal notwithstanding various arguments attacking the constitutionality of the Arizona Juvenile Code because of alleged denial of procedural due process to juveniles charged with delinquency.

Appeal was taken to the United States Supreme Court, petitioners alleging that the rights of notice of the charges, right to counsel, right to confrontation and cross-examination, the privilege against self-incrimination, the right to a transcript of the proceedings, and the right to appellate review were denied contrary to the due process clause of the fourteenth amendment. The Supreme Court reversed, holding that the due process clause of the fourteenth amendment requires that juveniles, in a proceeding to determine delinquency which may result in commitment to an institution in which the juvenile's freedom is curtailed, must be given sufficient notice to permit preparation of a defense to the charges; that the juvenile and the parents 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; that he be advised of his right to remain silent; and that absent a valid confession adequate to support the determination of the juvenile court, he be guaranteed the right of confrontation and cross-examination. In re Gault, 387 U.S. 1 (1967).

II. Parens Patriae and the Fourteenth Amendment

The parens patriae rationale which is the theoretical underpinning for rejection of the adversary system in the juvenile courts, was expressed by Chief Justice Stern of the Pennsylvania Supreme Court in Holmes' Appeal.7

The proceedings in such a court are not in the nature of a criminal trial but constitute merely a civil inquiry or action looking to the treatment, reformation and rehabilitation of the minor child. Their purpose is not penal but protective, — aimed to check juvenile delinquency and to throw around a child, just starting, perhaps, on an evil course and deprived of proper parental care, the strong arm of the State acting as parens patriae. The State is not seeking to punish an offender but to salvage a boy who may be in danger of becoming one, and to safeguard his adolescent life. Even though the child's delinquency may result from the commission of a criminal act the State extends to such a child the same care and training as to one merely neglected, destitute or physically handicapped. No suggestion or taint of criminality attaches to any finding of delinquency by a Juvenile Court.

During the past decade a number of state and federal courts have reasoned that the child is afforded protection from procedural abuse in the juvenile process by the "fundamental fairness" concept of due process.8 However, the recent deluge of criticism by jurists, attorneys, and sociologists that has been directed at the ineffectiveness of this vague protective concept expresses the general dissatisfaction with the operation of the juvenile courts and their related organizations.9 In fact, the caveat issued by Mr. Justice Fortas in Kent v. United States10 that "the admonition to function in a 'parental' relationship is not an invitation to procedural arbitrariness," may prove to be the deathknell for the parens patriae approach in the juvenile courts. As a requirement of the due process clause of the fourteenth amendment, a juvenile now must be afforded "fair treat-

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10. 383 U.S. 541, 555 (1966). The decision in Kent, as to the validity of waiver of jurisdiction in the juvenile court and the right to counsel at a hearing to determine waiver, turned on the language of the District of Columbia statute, rather than on constitutional grounds.
"fair treatment" in connection with a court adjudication of delinquency. It should be noted that this holding is merely the logical extension of Kent and a reiteration of past federal and state decisions. What the court considers "fair treatment" in Gault, however, cannot be reconciled with what state courts have deemed "fair treatment" to be in the past. The problem, of course, is to ascertain the precise requirements that the due process clause will now impose upon juvenile proceedings.

Under prior case law, two mutually exclusive views were adhered to in defining the procedural rights of juveniles. By far, the overwhelming number of decisions support the conclusion that juvenile proceedings are civil rather than penal in nature, and therefore, constitutional safeguards are insured by application of the requirement of "fair treatment," "and not by the direct application of the clauses of the Constitution which in terms apply to criminal cases." However, these cases define what is not, rather than what is included in the "fair treatment" concept. By applying the "noncriminal" rubric to juvenile proceedings, the rights of counsel, confrontation, bail, grand jury, public trial, and self-incrimination have been excluded from the concept. As the Court of Appeals for the District of Columbia Circuit remarked, "These strict safeguards, however, are wholly inappropriate for the flexible and informal procedures of the Juvenile Court which are essential to its parens patriae function."

A diametrically opposed view was taken by the District Court for the District of Columbia in In re Poff where it was reasoned that the only possible purpose for the Juvenile Court Act in the District of Columbia was to afford juveniles safeguards in addition to those they possessed before the Juvenile Court Acts were passed. However, the Circuit Court of Appeals for the District of Columbia, in Pee v. United States, in effect limited the Poff decision when it noted that the cases cited by appellants established that in certain circumstances the child is entitled to due process, "however, what constitutes due process depends on the circumstances of each individual case." Though limited by the circuit court, the essence of the Poff decision has not gone unnoticed. The District Court of Montana, in United States v. Morales, held that the requirements of due process and fundamental fairness "compel the same safe-

12. See cases cited supra note 8.
13. Before passage of the juvenile court acts, minors accused of crime were entitled to all of the constitutional safeguards possessed by adults exposed to criminal prosecutions. See State v. Ray, 63 N.H. 406 (1885); Commonwealth v. Horregan, 127 Mass. 450 (1879); People ex rel. O'Connell v. Turner, 55 Ill. 280 (1870).
14. Pee v. United States, 274 F.2d 556, 559 (D.C. Cir. 1959). The appendix to the Pee opinion lists similar holdings in 51 jurisdictions. Id. at 561.
15. Id. at 563.
18. Supra note 13.
20. Id. at 563.
guards for a juvenile as for an adult charged with the same offense. The court noted that a different result might be obtained where a case is disposed of on a “social rather than legal basis,” but where the proceeding is directed toward depriving the child of his liberty, constitutional safeguards apply. Finally, a recent decision of the New York Court of Appeals, dealing with the voluntariness of statements taken while the juvenile was in custody, ignored the civil label which had been attached to juvenile proceedings and attacked the substance of the proceeding as “at the very least quasi-criminal in nature.” As in Morales, the New York court asserted that the possible deprivation of personal liberty incident to an adjudication of delinquency compels greater protection.

The history of the application of due process concepts to juvenile rights has, at the least, been uncertain. Although In re Gault will help to establish needed guidelines in this area, the immediate effect seems to be that of elevating this uncertainty to a national level. The arguments resounding in the Supreme Court today closely resemble those of Pee, Morales, and In re W. Mr. Justice Black, concurring in the instant case, argues that when a person can be charged, convicted and sentenced to be confined for six years for violating a state criminal law, regardless of its being in a juvenile proceeding, “the Constitution requires that he be tried in accordance with all the guarantees of all the Bill of Rights made applicable to the States by the Fourteenth Amendment.” His argument is not based on concepts of “fair treatment” but is grounded solely on the rights conferred by the fifth and sixth amendments. Mr. Justice Harlan, however, rests his concurrence and dissent on the due process clause alone. He suggests three criteria by which the procedural requirements of due process can be measured in the juvenile courts. First, no more restrictions should be imposed than are necessary to assure the fundamental fairness of the proceedings. Secondly, the restrictions which are imposed should be those which preserve the essential elements of the state’s purpose. And finally, restrictions should be chosen which will later permit the orderly selection of any additional protections which may prove necessary. Applying these criteria, Mr. Justice Harlan would not apply

22. Id. at 165.
23. Ibid.
27. See generally Comment, 40 WASH. L. REV. 189 (1965).
29. Supra note 14.
30. Supra note 25.
31. In re Gault, supra note 2, at 61.
33. In re Gault, supra note 2, at 66.
34. Id. at 72.
the privilege against self-incrimination in what he believes to be a non-
criminal proceeding.35

Somewhere between these views rest Mr. Justice Fortas' majority
opinion and the future characteristics of this country's juvenile courts.
The aspect of the majority opinion which must be considered initially is
that the juvenile proceeding has not been labeled criminal. While the
opinion expressly states that "juvenile proceedings to determine 'delin-
quency,' which may lead to commitment to a state institution, must be
regarded as 'criminal' for purposes of the privilege against self-incrimina-
tion,"36 the conclusion that, as far as all other procedural safeguards are
concerned, the juvenile proceeding is to be considered civil in nature,
should be avoided. A more realistic approach would seem to be a recog-
nition of the distaste expressed for a categorical labeling of the juvenile
proceeding as either totally criminal or civil.

The cogency of this approach is evident when it is recalled that the
Court made use of both the "fair treatment" aspect of the due process
clause and the strict application of the fifth amendment. The right to
counsel and adequate notice are mandated by the due process clause of
the fourteenth amendment, whereas the fourteenth amendment's only
role in regard to the privilege against self-incrimination is that it makes
the fifth amendment applicable to the states and thus, applicable to
juvenile proceedings.

The Court's refusal to affirm the parens patriae rationale stems from
the abuse of this concept in denying juveniles fundamental due process
rights,37 particularly its use in justifying the extended detention of
juveniles.38 Confinement for the purpose of treatment in an institution
must be regarded as a deprivation of liberty, regardless of the label attached
to the institution. In fact, Mr. Justice Fortas saw fit to note Pennsylvania
Supreme Court Justice Mussmano's dissent in Holmes' Appeal,40 which
pointed out the penal nature of juvenile proceedings in Pennsylvania and
which scoffed at the euphemistic labeling of a bleak, lonely reformatory
as an "industrial school." The Court, in the instant case, went as far as
to infer that the continuance of the original change in procedure — the
handling of juveniles in civil proceedings rather than in adult criminal
courts, as they were during the nineteenth century — must be based both
upon a change in theory and the substantial realization of that theory in
practice.41 That is, a civil commitment for special treatment must provide
that special treatment if the statute is to be sustained.42

35. Id. at 74-76.
36. Id. at 49. (Emphasis added.) The right to adequate notice and counsel
were grounded solely on the due process clause of the fourteenth amendment. Id.
at 31 and 34.
37. Id. at 21-24.
38. Id. at 29.
39. Ibid.
41. In re Gault, supra note 2, at 22 n.30. See Paulsen, Fairness To The Juvenile
Offender, 41 MINN. L. REV. 547 (1957).
42. See Sas v. Maryland, 334 F.2d 506 (4th Cir. 1964); Director of Patuxent
Institution v. Daniels, ___ Md. ___, 221 A.2d 397 (1966). The character of juvenile
Reading *Gault* narrowly, a definition of due process as it relates to juveniles would include: the right to adequate notice, the right to be advised of the assistance of counsel (including court appointment), the right to remain silent at the hearing, and finally, absent a valid confession, the right to confrontation and cross-examination. This much of the adversary process has invaded the realm of the *parens patriae* approach to juvenile court proceedings. The Court makes it quite clear, however, that the opinion does not apply to the pre-judicial stages or dispositional processes of the juvenile courts, and infers that the considerations brought to bear on the adjudicatory stage may not be applicable to the other stages of the juvenile process. The Court points out that the observance of due process standards “will not compel the States to abandon or displace any of the substantive benefits of the juvenile process,” nor does the hearing have to “conform with all of the requirements of a criminal trial. . . .” Nevertheless, the Court mentions only two procedures which are to be necessarily retained from past operations of the juvenile courts, the processing and treatment of juveniles separately from adults and the classification of juvenile offenders as delinquent rather than criminal. In the context of these considerations, the ensuing discussion will examine the specific effects *Gault* will have on the various stages of the juvenile process, for *Gault* can justifiably be viewed as the germinal seed of a movement from the *parens patriae* approach to an adversary process in the juvenile courts.

### III. Notice and Definition

The Supreme Court has emphasized that in order for the proceeding in question to comply with due process, adequate and timely notice of the alleged misconduct must be given to the child and his parents. Not only is notice a fundamental of due process, but it is an essential element in an effective adversary system. The type of notice mandated by a court necessarily sets the tone for the adjudicative hearing to follow. Notice of a general allegation of delinquency, if deemed adequate, would not effectively afford parents and counsel a reasonable opportunity to prepare, thus leaving the processes of presenting the facts, adjudicating delinquency,
and arriving at a disposition solely in the hands of the court. Particularized notice would tend to shift at least some part of the fact finding process to the accused, thereby introducing the adversary system into juvenile courts.

The Indiana Court of Appeals has held that a child brought before a juvenile court is entitled to a clear statement of the nature of the proceedings against him so that he can prepare his defense.50 However, some states have interpreted the juvenile court acts as not requiring the same degree of particularity in the informations as is provided for adults.51 In the instant case, the Arizona Supreme Court rejected appellant's claim that he was denied due process by the inadequate notice that had been given, by stating, inter alia, that it was "the policy of the juvenile law to hide youthful errors from the full gaze of the public and bury them in the graveyard of the forgotten past."52 Thus advance notice of the specific charges or grounds for taking the juvenile into custody and for the hearing is not necessary.53 In the classic Pennsylvania decision, Holmes' Appeal, Chief Justice Stern noted that it has been held to be an abuse of discretion for a juvenile court to begin a hearing on the merits without providing notice to the parents or persons having custody of the child.54 However, he considered such notice unnecessary where the parents portrayed a total lack of interest, were indifferent towards the child, or were unable to control him.55

These interpretations have seemingly been put to rest by Gault. Citing both criminal and civil decisions which define adequate notice requirements under the due process clause,56 the Court couched its decision in classic criminal terms, holding that, "notice, to comply with due process requirements, must be given sufficiently in advance of scheduled court proceedings so that reasonable opportunity to prepare will be afforded, and it must set forth the alleged misconduct with particularity."57 The Court requires that notice be given to the child as well as to the parents,58 thereby overruling cases and practices which have considered notice to the child unnecessary.59 As one commentator has pointed out, "If anything, the immature minor should be informed of these purported wrongs with greater particularity so that no magnified fears be engendered in the mind

52. The court also stated that Mrs. Gault knew the exact nature of the charge on the day Gerald was taken to the detention home, and that the Gaults appeared at the two hearings without objection. Application of Gault, 99 Ariz. 181, 190, 407 P.2d 760, 767 (1965).
53. Id. at 190, 407 P.2d at 767.
56. In re Gault, supra note 2, at 33 n.53.
57. Id. at 33.
58. Ibid.
of the child."\(^{60}\) The creation of this fear, coupled with the fact that parents often are indifferent to the problems of their children, demonstrates the need for dual notice.

One of the purposes of mandating adequate notice is to clarify the issues that are to be adjudicated at the juvenile court hearing,\(^{61}\) thereby allowing counsel sufficient time to prepare a defense to these charges. The implication that follows from the requirement of such notice is that the juvenile will be tried for specific acts. However, the juvenile court statutes define delinquency in terms of a continuous mode of conduct as well as specific antisocial acts. For example, the Pennsylvania Juvenile Court Act defines a delinquent as a child who has violated any state or municipal law or ordinance, has been habitually disobedient so as to be uncontrollable by his parents or other legal custodian, has been habitually truant from school or home, or has habitually behaved in a way injurious to the morals or health of himself or others.\(^{62}\) Arizona's statute, as noted before, makes provision for children who are habitually involved in immoral matters,\(^{63}\) and Iowa concludes the definitional section with the catchall, a child "living under such other unfit surroundings as to bring such child, in the opinion of the court, within the spirit of this chapter."\(^{64}\)

The language used in such delinquency statutes is so broad that it has prompted commentators to remark that the language would be unconstitutionally vague if used as the basis for a criminal prosecution,\(^{65}\) and that it would be hard to imagine most active adolescents not capable of falling within some part of the definition.\(^{66}\) Indeed, one irate writer stated:

In my opinion this is not a piece of legislation; it is a harangue. It lacks the cold logic and precision of the law and it is full of moral overtones, perhaps because it was meant to represent principles of social reform rather than the embodiment of criminal jurisprudence.\(^{67}\)

To alleviate the problems engendered by these broad statutes as well as the stigma attached to a juvenile who is labeled a delinquent, some states have separated those noncriminal actions — neglect, truancy, and incorrigible cases — and placed them in a new category, thereby avoiding the delinquent label.\(^{68}\) But, this is not the general rule. Most have not, and references to "incorrigibility," "run-away," "uncontrollable," and "involved in immoral matters," remain in the definitions of delinquency.\(^{69}\)

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\(^{60}\) Antieau, \textit{supra} note 49, at 410.

\(^{61}\) \textit{In re Gault}, \textit{supra} note 2, at 34 n.54.

\(^{62}\) PA. STAT. ANN. tit. 11, § 243(4) (a)-(d) (1964).

\(^{63}\) ARIZ. REV. STAT. ANN. § 201-6(d) (1956).

\(^{64}\) IOWA CODE § 232.2(7) (1946).


\(^{66}\) Handler, \textit{supra note 42}, at 14.


\(^{68}\) See, e.g., CAL. WELFARE AND INST'NS CODE §§ 600-02 (1966).

In these states, the broad standards are defended on the basis of *parens patriae*-type reasoning — official intervention is thought necessary to restrain and help an adolescent who is capable of harmful action.\(^{70}\) The *Gault* decision does not appear to affect the future validity of these definitions. However, while the statute has been deemed not to be penal, thus rendering the void-for-vagueness doctrine inapplicable,\(^{71}\) the Court, in the instant case, has for the purposes of the fifth amendment, applied the criminal label to juvenile proceedings.\(^{72}\) Therefore, it is not unrealistic to suppose that the court may employ this same rationale in future considerations of these definitions, thus reviving the possibility of the application of the void-for-vagueness doctrine. As the definitions now stand, they are not "sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties. . . ."\(^{73}\)

IV. RIGHT TO COUNSEL

The *parens patriae* philosophy which gave birth to the juvenile court movement at the beginning of the century, emphasizing treatment and rehabilitation, is reflected today in the informality of juvenile court proceedings.

The juvenile court hearing, to be really meaningful, must be much more than a formal or perfunctory adjudication of the case. Its conduct should reflect the principles that originally prompted the establishment of juvenile courts. It should, therefore, be free from the legalistic and often antiquated forms and technicalities which are the attributes of criminal trials of adult offenders.\(^{74}\)

The proceeding is often characterized as an integral part of the therapy,\(^{75}\) and in order to alleviate any association of the juvenile with criminality, formality is avoided wherever possible,\(^{76}\) and the informality of these proceedings has generally been afforded constitutional sanction by appellate courts on the ground that juvenile courts are noncriminal in nature.\(^{77}\) Similarly, the employment of counsel in these proceedings is thought to be unnecessary,\(^{78}\) and courts have refused to reverse decisions

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\(^{70}\) Handler, *supra* note 42, at 15.


\(^{72}\) *In re Gault*, *supra* note 2, at 49.


\(^{78}\) TEEETERS & REINEMANN, *supra* note 74, at 326.
which have been appealed on the basis of failure to appoint, or notify of the right to counsel. 79

The Court, in the instant case, noted that there has been a developing trend, both by statute and case law, to recognize the juvenile offender's right to counsel. 80 Some state statutes require the court to appoint counsel for children in need, 81 but, the burden of requesting counsel may be on the accused juvenile. 82 Other states, like Pennsylvania, make no provision for the right to, or appointment of, counsel. As evidence of the former, the Court cited recent District of Columbia cases which interpreted its juvenile court act to mean that advice of the right to counsel, and the right to have counsel appointed, must be given. 83 By and large, the statutes and decisions evidence a conflict in this area, some courts not informing of the right, if present at all, others advising freely, and still others only advising in serious cases. 84

In the instant decision, Mr. Justice Fortas first attacked the presumption of the *parens patriae* rationale that the juvenile benefits from informal proceedings in the juvenile court hearing by stating:

> But recent studies have, with surprising unanimity, entered sharp dissent as to the validity of this gentle conception [the juvenile court judge as the fatherly protector of the young offender]. They suggest that the appearance as well as the actuality of fairness, impartiality and orderliness — in short, the essentials of due process may be a more impressive and more therapeutic attitude so far as the juvenile is concerned. 85

Noting the recent findings of sociologists Wheeler and Cottrell, the Court observed that when stern discipline follows the procedural laxness of the *parens patriae* attitude, the contrast may have an adverse effect upon the juvenile who may feel that he has been deceived or enticed. 86 Wheeler and Cottrell conclude, "Unless appropriate due process of law is followed, even the juvenile who has violated the law may not feel that he is being fairly treated and may therefore resist the rehabilitative efforts of court personnel." 87 Acknowledging the similarity between the consequences of being adjudged a delinquent (six year sentence) and a criminal, the Court reasoned that the juvenile "needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon

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80. *In re Gault*, *supra* note 2, at 37, 38.
81. See, *e.g.*, MINN. STAT. ANN. § 260.155(2) (Supp. 1966); N.Y. FAMILY CT. ACT §§ 241, 249; ORE. REV. STAT. § 419.498(2) (1965). The California statute provides for mandatory appointment of counsel only where the offense would be a felony under the criminal law. CAL. WELFARE AND INST'NS CODE § 634 (1966).
83. *In re Gault*, *supra* note 2, at 35 n.55.
86. *In re Gault*, *supra* note 2, at 26 & n.37.
87. *Id.* at 26, quoting WHEELER & COTTRELL, JUVENILE DELINQUENCY — ITS PREVENTION AND CONTROL 33 (1966).
regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it,"88 no less than the adult offender.89 It is significant that, in requiring that the parent and child be advised of the child's right to be represented by counsel retained by them (or appointed if they are not able) in proceedings to determine delinquency, the Court has implanted the heart of the adversary system in the juvenile courts.

Aside from formalizing the hearings, it is thought that the introduction of the adversary system will precipitate additional problems. A survey of juvenile court judges expressed the feeling that most attorneys are not at their best when involved with the juvenile process,90 it being primarily felt that he lacks the necessary understanding of the juvenile court philosophy; that is, trained as an adversary, he is not trained to "treat" or to compliment the socially oriented ramifications of the court action. He is lacking in special skills and training beyond normal defense counsel skills.91 He may fail to disassociate the interests of the child from the parent, especially when he is retained by the parents,92 notwithstanding the fact that in many instances the delinquency itself stems from neglectful and inadequate parents.93 In response to a survey of Pennsylvania's juvenile court judges conducted in conjunction with this note, all of the judges responding (pre-Gault) felt that the attorney did have some role in present juvenile court proceedings, however, only a small percentage depicted him in his traditional adversarial role. The majority of judges viewed him as an aid in presenting all the facts to the court.94

The Supreme Court seems to imply a middle ground position as to the exact role counsel will take in the juvenile courts. The Court notes that the section of the National Crime Commission's report pertinent to this problem states:

Fears have been expressed that lawyers would make juvenile court proceedings adversary. No doubt this is partly true, but it is partly desirable. Informality is often abused. The juvenile courts deal with cases in which facts are disputed and in which, therefore, rules of evidence, confrontation of witnesses, and other adversary procedures are called for.95

At the same time, the Court has indicated that the hearing need not conform with all of the requirements of a criminal trial,96 nor will the "con-
ception of the kindly juvenile judge" be replaced, even though some elements of the adversary system will be introduced in contested cases.97

Perhaps the best solution to the problem of the role of the attorney is voiced in the New York Family Court Act, to which the Court makes repeated reference. The "law guardian" concept of the Family Court Act indicates a different concept of proper legal representation.98 The attorney is portrayed not only as an advocate, but as a guardian and an officer of the court.99 As an advocate, he is responsible for the protection of the juvenile's constitutional rights; however, one writer notes, this does not include "purposeless obstructionism."100 Another commentator points out that there is little evidence that counsel become overzealous in asserting the juvenile's right, but that they frequently stipulate to the facts and seek a particular type of disposition.101 As a guardian, he is expected to consider the child's welfare as well as his legal rights,102 and it is in this phase of counsel's duties that the major qualification of the adversary system can be visualized. Counsel may well be put in a position which necessitates a decision on his part concerning the proper treatment to be afforded to the offender. That is, he may believe that the juvenile is technically innocent of the specific charges brought against him, but at the same time, based on the past history of the juvenile, his environment, and the nature of his parental supervision, believe it is in the best interests of the child for him to be removed from his family, whether it be foster placement or institutional care.103 As a consequence of this type of representation, the role of wise parent (parens patriae) has, in effect been transferred to the law guardian from the court.104 At first blush, the law guardian concept seems to strike the proper tone of counsel's attitude before the juvenile court, but as in the initial philosophy of the juvenile courts, this too may not be a realistic substitute for the adversary system.105

[The role of counsel in the juvenile courts] will have to be forged in the crucible of actual experience and in a long range process of adaptation and accommodation which must inevitably occur between the lawyer, the social and diagnostic services which are attached to or utilized by the court and the court itself.106

Closely associated with the right to counsel is the problem of effective waiver of counsel. In the instant case, Mrs. Gault knew that she could

97. Id. at 27.
100. Id. at 506. This caveat to the juvenile court lawyer may not be necessary.
102. N.Y. FAMILY CT. ACT § 241.
103. The Family Court Act draws a distinction between juvenile delinquency and persons in need of supervision, truancy, ungovernability, etc. N.Y. FAMILY CT. ACT § 712(a) & (b). Counsel should be aware of the different problems presented as far as procedure and judicial power are concerned when statutes provide for this distinction.
104. Issacs, supra note 99, at 507.
105. For a similar proposal, see Handler, supra note 76, at 36.
have appeared with counsel at the juvenile hearing. By applying the classic definition of waiver, "an intentional relinquishment or abandonment of a known right or privilege," the Supreme Court concluded that her knowledge was not sufficient to bring her within this standard, reasoning that both child and parent had the right to be expressly advised of the right to counsel and of the right to court appointed counsel if necessary, or the specific choice of waiver.

Inherent in this decision is the need to have both the parent and child waive counsel. As far as the juvenile is concerned, such a waiver may be impossible as a matter of law. Considering that an infant is legally incompetent to act in a number of legal relationships, it would seem to follow that such rationale could be applied to his actions in juvenile court proceedings. The lack of sophistication of young offenders, which may cause them to waive procedural rights without understanding the consequences, has induced the Supreme Court to remark that "formulas of respect for constitutional safeguards [advising the child only] cannot prevail over the facts of life which contradict them." In fact, the Court in the instant case, and a number of commentators, have noted the desirability of making representation of the juvenile by counsel mandatory. Whatever ramifications this type of requirement may have, the Court seems to have made it quite plain that, to be effective, the parents as well as the child must participate in the waiver action.

V. PRIVILEGE AGAINST SELF-INCRIMINATION

One of the distinctive features of the juvenile courts is the high number of confessions and admissions. Over a two year period, a survey revealed that of 3,000 consecutive cases in one court, only five accused juveniles wholly denied involvement in the offense. Most confessions occur at the police intake stage and many are repeated in the form of admissions, the juvenile equivalent of a guilty plea, at the adjudicative hearing. This prevalence of confessions and admissions has been justified and explained by the "treatment" rationale or the parens patriae approach, rather than being attributed to coercive police practices. Confession is

107. In re Gault, supra note 2, at 41, 42.
112. In re Gault, supra note 2, at 38 n.65; Handler, supra note 76, at 33-34.
113. The juvenile may feel it is in his best interests to waive counsel. A purposeful trial tactic is considered an aspect of waiver. See Fay v. Noia, 372 U.S. 391, 438 (1963); Note, 12 VILL. L. REV. 655, 659-60 (1967).
felt to be good for the child,"\textsuperscript{118} and cooperation with the authorities a civic
duty which should be learned at the earliest age. Furthermore, it has been
asserted that the parents and child should not be advised of the juveniles
right to remain silent at the hearing, in order that he be encouraged to
assume an attitude of trust and confidence in the officials.\textsuperscript{119}

By attaching the noncriminal rubric to juvenile proceedings, courts
have held that there is no constitutional right to protection against self-
incrimination in the juvenile courts.\textsuperscript{120} In fact, Pennsylvania's Supreme
Court has held that not only is there no duty to advise the juvenile of the
privilege against self-incrimination, but that the court may require the
juvenile to answer when he does object.\textsuperscript{121} Chief Justice Stern stated that
the juvenile was not being "compelled to testify, he was questioned in the
same manner and in the same spirit as a parent might have acted, for
whom, under the theory of the juvenile court legislation, the State was
substituting."\textsuperscript{122} Decisions of other courts have granted juveniles protec-
tion against self-incrimination,\textsuperscript{123} and the recent New York Family Court
Act provides that the parents and the juvenile be advised at the start of
the hearing of the juvenile's right to remain silent,\textsuperscript{124} however, these
examples represent a very small minority.

In \textit{Gault}, the Court disposed of the argument that confessions by
juveniles aid in individualized treatment by pointing to studies that indi-
cate that when children are persuaded by officials to confess, and the
confession is followed by disciplinary action, "the child's reaction is likely
to be hostile and adverse — the child may well feel that he has been
led or tricked into confession, and that despite his confession, he is
being punished."\textsuperscript{125} Although the Court limited its holding to the adjudi-
cative hearing,\textsuperscript{126} Mr. Justice Fortas concluded that the constitutional
privilege against self-incrimination is as applicable to juveniles as it is to
adults. Henceforth, a juvenile court judge must advise the parent and
the child of the juvenile's right to remain silent.\textsuperscript{127} The problem of waiver
in this context is similar to that concerning the right to counsel,\textsuperscript{128} and the
Court indicated that the child alone will not be able to waive the privilege.\textsuperscript{129}

Although the application of the privilege against self-incrimination is
limited to the adjudicative hearing, it is significant that the language used

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{118} Supra note 111, at 780-81.
\item \textsuperscript{119} See \textit{In re Gault}, supra note 2, at 51; \textit{In re Dargo}, 81 Cal. App. 2d 205,
183 P.2d 282 (1947).
\item \textsuperscript{120} \textit{In re Dargo}, supra note 119; \textit{In re Santillanes}, supra note 117; \textit{People v.
\item \textsuperscript{121} \textit{Holmes' Appeal}, supra note 117, at 604, 109 A.2d at 525.
\item \textsuperscript{122} \textit{Id.} at 605, 109 A.2d at 526.
\item \textsuperscript{123} See \textit{Dendy v. Wilson}, 142 Tex. 460, 179 S.W.2d 269 (1944); \textit{In re Tahbel},
\item \textsuperscript{124} \textit{N.Y. FAMILY CT. ACT} § 741.
\item \textsuperscript{125} \textit{In re Gault}, supra note 2, at 51, 52.
\item \textsuperscript{126} \textit{Id.} at 44.
\item \textsuperscript{127} \textit{Id.} at 51-54.
\item \textsuperscript{128} See text accompanying note 113 supra.
\item \textsuperscript{129} Supra note 127.
\end{enumerate}
\end{footnotesize}
in implanting it in the juvenile courts is that of *Miranda v. Arizona.*\(^{130}\) Both Mr. Justice White and Mr. Justice Stewart note that Gerald's admission was not compelled by the juvenile court judge, hence, no issue of compulsory self-incrimination as stated by the fifth amendment is presented in this case.\(^{131}\) The Court's opinion, however, uses the fifth amendment as a device to insure the voluntariness of confessions and admissions. The gap between the fourteenth amendment's ban of coerced confessions and the privilege against self-incrimination in the fifth amendment was breached in *Miranda.*\(^{132}\) That Court, after reviewing the methods of police interrogation\(^{133}\) found that no statement from a defendant could be considered the product of free choice without adequate protective devices.\(^{134}\) The Court concluded that the privilege against self-incrimination is fulfilled only when an individual is guaranteed the right to "remain silent unless he chooses to speak in the unfettered exercise of his own will."\(^{135}\) Mr. Justice Goldberg, in *Escobedo v. Illinois,*\(^{136}\) found that police interrogation is a "critical stage," hence the right to counsel is applicable, but the limited holding of that case led to conflicting opinions concerning the necessary procedure mandated by the Court.\(^{137}\) The *Miranda* Court clarified *Escobedo,* and the right to be advised of counsel and to remain silent when an individual is subject to interrogation\(^{138}\) are now constitutional guidelines for law enforcement agencies. Since the privilege against self-incrimination is as applicable to juveniles as it is to adults,\(^{139}\) can *In re Gault* then be interpreted as the initial step in applying the *Miranda* guarantees in the pre-judicial as well as the adjudicative phases of the juvenile court process?

It should be noted that Gerald Gault had been questioned by the probation officer after being taken into custody, but any admissions made at that time did not appear in the record, therefore, the court did not have to consider this precise question.\(^{140}\) As previously noted, most juveniles confess and most of these confessions occur at the pre-judicial stages.\(^{141}\) The first of these stages is the police intake stage where the

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131. In re Gault, supra note 2, at 64, 81. The pertinent part of the fifth amendment reads, "No person . . . shall be compelled in any criminal case to be a witness against himself. . . ." U.S. CONST. amend. V.


134. Id. at 448.

135. Id. at 460, quoting Malloy v. Hogan, 378 U.S. 1, 8 (1964).


138. The majority in *Miranda* declared that these principles apply when an individual is first subjected to interrogation, whether in custody at the police station or otherwise deprived of his freedom of action in anyway. 384 U.S. at 444, 477, 478.

139. Supra note 127.

140. In re Gault, supra note 2, at 43 & n.74.

141. Supra notes 114, 115 and accompanying text.
role of the police is considerably greater than the mere discretion to
arrest. 142 In fact, police operate ad hoc juvenile courts with the result
that large numbers of juveniles arrested for minor offenses are never
brought before the juvenile court. 143 At the same time, this encounter
may result in the creation of an official record with the police or the
court. 144 A denial of guilt at the police hearing "indicates that the juvenile
is not amenable to these 'non-compulsory approaches' and requires court
referral." 145 Actually, the police hearing is a very real form of coercion
and probably accounts for a great number of confessions. 146 A second
pre-judicial stage may be instituted by the juvenile court itself. This in-
volves a screening process different from the police process in that the
personnel are usually trained and experienced in social investigation and
are generally under the supervision of the juvenile court. 147 Again, the
practice is to dispense with the formal hearing only when the child admits
his guilt; contested cases are automatically referred to the judge. 148 As
one note points out, the juvenile usually cooperates with the probation officer
or court intake officer at this stage, because he knows that the probation
officer will make recommendations to the court regarding treatment.
149

New York's progressive Family Court Act provides that statements
made during the intake hearing are inadmissible in any subsequent judicial
proceeding, however, most states do not provide this protection. 150 Need-
less to say, where confessions at the intake level are admissible at the
adjudicative stage, the role of counsel will be severely limited if he is
barred from the intake hearing.

The effect of informal intake procedures can be disastrous for the
juvenile as is evidenced by the instant case. Here the juvenile court judge
based his finding of delinquency in part on the Arizona definition of delin-
quency which includes, one who, as the judge phrased it, is "habitually
involved in immoral matters." 151 The basis for this finding of habitual
involvement was a "referral" made two years earlier "where the boy had
stolen a baseball glove from another boy and lied to the Police Department
about it." 152 No formal action by the juvenile court was ever taken, but
the creation of an official record with the court proved to be consequential.
From this it may be argued that the interrogation by the police had reached

142. See Goldstein, Police Discretion Not To Invoke the Criminal Process:
Low-Visibility Decisions in the Administration of Justice, 69 YALE L.J. 543 (1960);


145. Id. at 781.

146. See generally Goldman, The Differential Selection of Juvenile
Offenders for Court Appearance 131 (1963); Wilson, Police Planning 134
(2d ed. 1957); Tappan, Unofficial Delinquency, 29 Neb. L. REV. 547 (1950).

147. Supra note 144, at 787.

148. Ibid.


150. N.Y. FAMILY CT. ACT § 735.


152. Ibid.
a "critical stage" in the proceedings in exactly the same manner as it had in the proceedings against Danny Escobedo. The Court, in Gault, cited numerous authorities which have suppressed the involuntary confessions of juveniles as violative of the fourteenth amendment.\footnote{E.g., Haley v. Ohio, 332 U.S. 586 (1948) ; United States v. Morales, 233 F. Supp. 160 (D. M. D. 1944) ; In re Carlo, 48 N.J. 224, 225 A.2d 110 (1966) ; In re W., 19 N.Y.2d 55, 277 N.Y.S.2d 675, 224 N.E.2d 102 (1966).} These decisions point out the necessity for applying the Miranda guarantees in the juvenile courts. In In re Carlo,\footnote{48 N.J. 224, 225 A.2d 110 (1966).} the New Jersey Supreme Court suppressed the confessions of the juveniles involved, noting that even though they were advised of their rights before they made their statements this fact should not be given significant weight in the determination of voluntariness.\footnote{Id. at 241-42, 225 A.2d at 120.} That court cited Haley v. Ohio\footnote{332 U.S. 586, 601 (1948).} where the Supreme Court rejected the proposition that a fifteen year old boy without the aid of counsel would have a full appreciation of the advice given him concerning his constitutional rights. It may logically be concluded from these cases that if Miranda is applied to the juvenile courts, the juvenile will not be allowed to waive these rights by himself.\footnote{See Gallegos v. Colorado, 370 U.S. 49, 52 (1962). See Gallegos v. Colorado, 370 U.S. 49, 52 (1962). But see Commonwealth v. Washington, (Docket No. 402) Philadelphia Quarter Sessions Ct., June 29, 1967, where it was held that In re Gault does not require the presence of counsel or parents during interrogation and that age is only one factor to be considered in the determination of the efficacy of the juvenile's waiver of counsel. This case can be distinguished from Gault by the fact that the seventeen year old defendant was not tried in juvenile court but in a criminal court. See In re Gault, supra note 2, at 55. However, the Court also stated that juvenile proceedings to determine delinquency would be considered "criminal" for purposes of the fifth amendment. Pre-judicial stages conceivably may not be considered "criminal" for the privilege. Id. at 49.}

In Miranda it was stated that the fifth amendment applies to all situations where the individual's freedom of action is curtailed by the use of compulsion to testify against himself.\footnote{Comment, 7 SANTA CLARA LAWYER 114, 127 (1966). See Gallegos v. Colorado, 370 U.S. 49, 52 (1962). But see Commonwealth v. Washington, (Docket No. 402) Philadelphia Quarter Sessions Ct., June 29, 1967, where it was held that In re Gault does not require the presence of counsel or parents during interrogation and that age is only one factor to be considered in the determination of the efficacy of the juvenile's waiver of counsel. This case can be distinguished from Gault by the fact that the seventeen year old defendant was not tried in juvenile court but in a criminal court. See In re Gault, supra note 2, at 55. However, the Court also stated that juvenile proceedings to determine delinquency would be considered "criminal" for purposes of the fifth amendment. Pre-judicial stages conceivably may not be considered "criminal" for the privilege. Id. at 49.} A recent California decision, however, has rejected the Miranda guarantees in that state's juvenile courts.\footnote{In re Castro, 243 Cal. App. 2d 402, 52 Cal. Rptr. 469 (1966).} The California Court of Appeals based its decision on the civil label-of-convenience attached to juvenile proceedings. The court reasoned that since the proceedings in juvenile court do not constitute a criminal trial, Miranda does not apply. This type of reasoning has been overruled by Gault, in that it specifically states that the privilege against self-incrimination is as applicable to juveniles as it is to adults.\footnote{In re Gault, supra note 2, at 30 n.87, and accompanying text for a favorable comment concerning Miranda.} However, caution must be exercised in extending the applicability of the privilege\footnote{For a discussion of the right to bail in the juvenile courts see Antieau, Constitutional Rights in Juvenile Courts, 46 CORNELL L.Q. 387 (1961) ; Paulsen, Fairness To The Juvenile Offender, 41 MINN. L. REV. 547, 552 (1957) ; Note, 29} in light of the Court's reluctance to consider any issues relevant to the other-than-adjudicatory phases of the juvenile court process.\footnote{For a discussion of the right to bail in the juvenile courts see Antieau, Constitutional Rights in Juvenile Courts, 46 CORNELL L.Q. 387 (1961) ; Paulsen, Fairness To The Juvenile Offender, 41 MINN. L. REV. 547, 552 (1957) ; Note, 29}
If Miranda is not employed in the juvenile courts, statutes similar to those of New York's Family Court Act and the *Standards for Juvenile and Family Courts* may have to be enacted as devices to insure the voluntariness of confessions. The New York statute provides that the police must attempt to communicate with the juvenile's parents before questioning him and that a confession may not be obtained before such notification. As the Supreme Court notes, the *Standards for Juvenile and Family Courts* mandate that before being interviewed by the police, the child and his parents should be informed of his right to have legal counsel present and to refuse to answer questions or to be fingerprinted. Therefore, the Court's argument — that the appearance and actuality of fairness, may be more therapeutic to the juvenile than the prior informality — may have even greater validity when applied to the pre-judicial stages. It is here that the juvenile has his first contact with the instrumentalities of the state, and it is here that his attitude will first be formed. Fairness at the pre-judicial stage may help develop the respect and confidence that the juvenile courts wish to instill at the adjudicatory level.

VI. CONFRONTATION, CROSS-EXAMINATION, AND SWORN TESTIMONY

The Constitutional right of confrontation, which includes the right of cross-examination and the procedural requirement of sworn testimony, has been denied by both federal and state courts in juvenile court proceedings. Justification for this practice has been the *parens patriae* rationale which has been used to deny the juvenile a host of other rights. In addition to the belief that the juvenile court would be more efficient if it were not inhibited by needless formalities, other reasons have been advanced for the deletion of the right to confrontation and its progeny. Persons appearing in juvenile court as witnesses often bear unique relationships to the child, which are deemed reason in themselves for denying the child these rights. Parental authority has been acknowledged to have a greater scope than that of any governmental agency, and to subject parents to cross-examination by the child could obviously impair

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163. N.Y. Family Ct. Act § 724.

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this authority. Probation officers charged with the responsibility of re-
habilitating the child have suggested that being subjected to a rigorous
cross-examination would severely curtail their effectiveness, destroy sources
of information, and force disclosures which might result in psychological
harm to the child.\footnote{172} This latter reason is also the justification offered
for receiving testimony in the absence of the child, whether from the pro-
bation officer or others.\footnote{173}

The underlying rationale for the denial of these rights has been subject
to widespread criticism by legal writers\footnote{174} and courts, although the latter
have been reluctant to base such criticism on constitutional grounds.
Instead, they have based their decisions on an interpretation of the local
juvenile court act and the belief that cross-examination is necessary to
determine the true facts.\footnote{175} In In re Sippy, a mother petitioned the court
to have her daughter institutionalized as "uncontrollable." The court
ruled that testimony must be given under oath and that the failure of the
mother to exercise the right of cross-examination was not sufficient to deny
the child such right, since their interests obviously conflicted.\footnote{176} This
analysis has also been applied to the testimony of the probation officer.\footnote{177}

Although few courts have specifically articulated a position on the
right of confrontation, they have addressed themselves to the closely
related problem of the admissibility of hearsay evidence in juvenile court
proceedings. However, no general statement can be made in this area
since the solutions of the courts which have faced the problem have run
the gamut from employment of the standards applicable to a criminal trial,
to the free admission of all testimony.\footnote{178} The Supreme Court of Penn-
sylvania\footnote{179} has held that since the child was only charged with delinquency,
"the juvenile court may, in order to accomplish the purposes for which
juvenile court legislation is designed, avoid many of the legalistic features
of the rules of evidence customarily applicable to other judicial hearings."\footnote{180}
The court acknowledged the rules of hearsay, specifying that it should be
barred if objections were properly raised,\footnote{181} but, since counsel has either
been denied or not obtained in most cases, this decision’s practical effect

\footnote{172. Id. at 609. See also Krasnow, Social Investigation Report in Juvenile Court;
Their Uses and Abuses, 12 Crime and Delinquency 157 (1966); Rosenheim,
174. Id. at 566. See Antieau, Constitutional Rights in Juvenile Court, 46 Cornell
900, 62 N.W.2d 308 (1954); In re Green, 123 Ind. App. 81, 108 N.E.2d 647 (1952);
In re Hill, 78 Cal. App. 23, 27, 247 Pac. 591, 592 (1926). But see In re Poff, supra
note 17 and accompanying text.
178. In re Rich, 125 Vt. 373, 375, 216 A.2d 266, 268 (1966). See also Note, 67
Colum. L. Rev. 281, 335-39 (1967); Note, 39 Notre Dame Law. 341 (1964); Note,
973 (1955).
180. Id. at 526.
181. Ibid.
has been very limited. Other courts, which have not been persuaded by the change in nomenclature of the charge, or the prophesied results of a juvenile court hearing, require that evidence be tested by rules applicable in criminal or civil trials.

The social investigation report, prepared by probation officers in the period between the filing of a petition and the hearing, is the most frequent source of hearsay evidence which is admitted in the adjudicative proceeding. In Pennsylvania, of the juvenile court judges surveyed, sixty-eight per cent reported that they review this report prior to the hearing and fifty-six per cent use it in adjudication, though it is replete with hearsay. Furthermore, in sixty per cent of the cases the probation officer who prepared the report is not present at the hearing. This practice has been justified on the grounds that since the majority of juvenile cases are held without a jury, it can be presumed that the judge has ignored all incompetent evidence and that the ruling that results should be sustained wherever sufficient admissible evidence has been introduced. Since the social investigation report is admissible at disposition, its introduction during adjudication has not been considered error. One court has held that, "the report of the probation officer became a judicial record when it was filed with the juvenile court and that court not only had the right but the duty to consider it in deciding the case." However, in other jurisdictions, such decisions have not gone unchallenged. For example, it has been held to be reversible error for the trial court to consider ex parte investigations made by the probation office on a disputed issue of fact.

Two recent legislative enactments have taken different tacks in establishing rules of evidence for juvenile court proceedings. The California act permits the admission of all "relevant and material evidence," but a finding of custody can be based only on evidence admissible at a criminal trial. The New York act restricts evidence to that which is "competent, without counsel.

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182. See Shioutakon v. D.C., 236 F.2d 666, 670 (D.C. Cir. 1956), where the court points out that the child would have to be a legal genius to exercise legal rights without counsel.
185. See infra, note 254 and accompanying text.
186. See Appendix.
187. Ibid.
188. Note, supra note 178, at 285.
189. Mont Appeal, 175 Pa. Super. 150, 156-57, 103 A.2d 460, 463 (1954); In re Gonzalez, 328 S.W.2d 475, 479 (Tex. Civ. App. 1959); In re Bently, 246 Wis. 69, 16 N.W.2d 390 (1944).
194. Ibid.
material and relevant," a standard which also appears in the Children's
Bureau’s Standards for Juvenile and Family Courts. 196

The foregoing reveals that neither courts nor legislatures, in attempt-
ing to arrive at a juvenile court system which is fundamentally fair to
the child have been in accord as to the necessity of incorporating the rights
of confrontation and cross-examination.

The Arizona Supreme Court, in the Application of Gault, 197 was
cognizant of the problems posed in this area, and after analyzing the
decisions reached by courts in other jurisdictions, determined that con-
frontation was only required when the child denied the charges. 198 Hearsay
would be admissible, but “must be of a kind on which reasonable men are
accustomed to rely in serious affairs,” 199 and sworn testimony only would
be necessary from those witnesses who maintain some official relationship
to the court. 200 While the Arizona court was convinced that with these
modifications the child’s rights would not be impaired, the United States
Supreme Court felt otherwise, and held that the child cannot be denied
the constitutional right of confrontation and the opportunity to test the
evidence by cross-examination where the possibility of incarceration in
a state institution exists. 201 However, where the child has made a valid
confession, these protections are unnecessary, since the hearing is only
held to arrive at a proper disposition. 202 It should be noted that if this
decision is read narrowly, it does not determine whether a child who is
placed on probation, and is therefore subject to the discipline of the court,
is entitled to these protections.

In imposing these standards, the Court relied on the recommenda-
tions of the Children’s Bureau 203 which characterize the proceedings in
juvenile court as civil 204 in nature. This reliance makes it clear that the

195. N.Y. FAMILY CT. ACT § 744(a). (Emphasis added.) For judicial interp-}
tation see In re Anonymous, 37 Misc. 2d 827, 831, 238 N.Y.S.2d 792, 797 (1962).
198. Id. at 191, 407 P.2d at 768.
199. Id. at 192, 407 P.2d at 768.
200. Ibid.
201. In re Gault, supra note 2, at __________.
202. Ibid. This holding implies that the Court will adhere to the position it took

A sentencing judge, however, is not confined to the narrow issue of guilt. His
task within fixed statutory or constitutional limits is to determine the type and
extent of punishment after the issue of guilt has been determined. Highly
relevant — if not essential — to his selection of an appropriate sentence is the
possession of the fullest information possible concerning the defendant’s life and
characteristics. And modern concepts individualizing punishment have made it all
the more necessary that a sentencing judge not be denied an opportunity to obtain
pertinent information by a requirement of rigid adherence to restrictive rules of
evidence properly applicable to the trial.

Id. at 247.
203. STANDARDS FOR JUVENILE AND FAMILY COURTS, supra note 196, at 73.
204. Ibid.
court chose to avoid the rigid standards of *Pointer v. Texas*, a criminal case. However, the Court's citation to *Willner v. Committee on Character*, a quasi-judicial hearing, may be instructive in ascertaining the proper application of the confrontation clause in the juvenile courts.

The circumstances will determine the necessary limits and incidents implicit in the concept of a "fair" hearing. Thus, for example, when the derogatory matter appears from information supplied or confirmed by the applicant himself, or is of an undisputed documentary character disclosed to the applicant, and it is plain and uncontradicted that the committee's recommendation against admission is predicated thereon and reasonably supported thereby, then neither the committee's informal procedures, its ultimate recommendations, nor a court ruling sustaining the committee's conclusion may be properly challenged on due process grounds, provided the applicant has been informed of the factual basis of the conclusion and has been afforded an adequate opportunity to reply or explain. Of course, if the denial depends upon information supplied by a particular person whose reliability or veracity is brought into question by the applicant, confrontation and the right of cross-examination should be afforded.

If indeed this statement is applicable to the instant case, it is clear that the juvenile court is still left with broad discretion in this area. *Gault* does not require strict formality, nor does it require the preclusion of all hearsay in attaining fairness for the child at the hearing. It necessarily follows therefore, that the liberalization of the admission of hearsay in other judicial proceedings may also be applicable to juvenile hearings. The use of the social investigation report prior to and in adjudication will come under close scrutiny, but if the child and his attorney are made aware of its use, are given an opportunity to refute its contents, and call witnesses where necessary, its admission should not be prohibited.

The effect of *Gault* in the area of testimony seems to be that the juvenile court judge can no longer rely on the protective cloak of the *parens patriae* doctrine in arbitrarily determining what evidence is to be considered, but must adhere to certain rules of evidence and procedure. Persons who are witnesses to the acts in question will no longer be able to relate their observations to a probation officer and remain anonymous, but, where the youth is subject to possible incarceration, they must appear and sustain their position under oath and subject to cross-examination.

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205. 380 U.S. 400 (1965); see Confrontation and the Hearsay Rule, 75 Yale L. Rev. 1434 (1966).


207. Id. at 107-08 (Goldberg, J., concurring).

208. Paulsen, supra note 173, at 565.

209. See Report of the President's Commission on Law Enforcement and Administration of Justice, "The Challenge of Crime in a Free Society" 87 (1967), cited at 387 U.S. 57 n.98, which recommends the social investigation report not be made available to the judge at adjudication.
Since the inception of the juvenile court procedure, state courts have consistently taken the position that the right to appellate review exists only where provided for by statute.\textsuperscript{210} The Supreme Court in \textit{Griffin v. Illinois},\textsuperscript{211} a criminal case, reaffirmed the view\textsuperscript{212} that the right to an appeal is not guaranteed by the Constitution since it is not a part of the common law, nor "a necessary element of due process of law."\textsuperscript{213} Rather, appellate court review is a discretionary matter for the state legislatures to determine.\textsuperscript{214} While this conclusion has been widely followed it has not gone without criticism, and it has been appropriately suggested that the question of whether the child has received fair treatment at the hearing is difficult to answer absent appellate review, since lack of appeal renders the proceedings largely free of supervision.\textsuperscript{215}

Closely akin to the problem of appellate review is the question of the type of record, if any, which must be kept of the juvenile proceedings. Records of the proceedings are required in many states by statute,\textsuperscript{216} but what constitutes an adequate record apparently differs in various jurisdictions.\textsuperscript{217} If the record is incomplete or nonexistent, the possibility of obtaining adequate review is severely limited\textsuperscript{218} and this factor may be a reason for the small number of appeals in juvenile court. In the case at bar, the Arizona Supreme Court\textsuperscript{218} held that there is no right to a transcript for two reasons. Since there is no right of appeal, it logically follows that there is little need for a transcript;\textsuperscript{220} and secondly, the Arizona statute requires that the hearing be confidential and all records destroyed after a prescribed time.\textsuperscript{221} It concluded that in view of these two considerations, whether a transcript is made is a matter for the discretion of the juvenile court.\textsuperscript{222}

The Supreme Court did not rule on the questions of appellate review or provision for transcript for it had already decided that the Arizona
decision demanded reversal. However, the Court intimated that the absence of such rights might precipitate severe problems in subsequent habeas corpus proceedings where the juvenile court judge may be required to testify under cross-examination concerning the events that occurred in his courtroom, in order that it may be determined whether the juvenile was afforded due process of law as required by the instant case. This prediction of the Court concerning the increased burden on the habeas corpus procedure is almost guaranteed to be realized by the portions of the opinion that require counsel, confrontation, and cross-examination. As the number of attorneys involved in juvenile matters has increased in recent years, the number of appeals has also risen, and it can be safely concluded that Gault will but accelerate this trend.

VIII. THE DISPOSITIONAL PROCESS

In re Gault requires that certain constitutional requisites be met in the adjudicative phase of the juvenile court process, and although recognizing that the treatment promised is often not received, the Court chose not to call for these same safeguards in the unique dispositional phase of that process. This choice indicates recognition by the Court that this phase offers the greatest possibility of implementing the original goals of the juvenile court system and, if properly conducted, need not be governed by the more formalized adjudication procedures. Personalized justice leading to individualized treatment and rehabilitation, without the stigma of criminality, was the innovation which led to the juvenile court’s rapid acceptance in the United States. However, in order for this concept to have continued vitality, it must prove to be practical, that is, it must be molded in such a way as to strike the proper balance between the protection of the community and rehabilitation of the child.

When the adjudication process has been concluded with a finding of delinquency, the attorney is faced with what may prove to be an entirely unfamiliar task, that of adequately representing his juvenile client in the dispositional phase of the proceeding. His situation is further complicated by the fact that Gault does not make the appearance of the attorney in the dispositional phase mandatory. In order to be an attribute in this

223. In re Gault, supra note 2, at 58.
224. Ibid. The Court cites with approval the standards recommended in the Standards for Juvenile and Family Courts, supra note 196, at 8, which suggests “written findings of fact,” some form of record of the hearing “and the right to appeal.”
226. In re Gault, supra note 2, at 22-23 n.30.
227. Id. at 13.
230. But see In re Gault, supra note 2, at 38-40 n.65. Recent decisions of Pennsylvania courts have found in criminal cases that the sentencing hearing is a "critical
process, counsel must compliment his legal expertise with a familiarization with the behavioral sciences that play such a large role in the final outcome. The attorney can no longer limit his preparation to the adjudicatory phase of the proceeding, since the dispositional phase often proves to be the most crucial for his client. Therefore, the following discussion will attempt to acquaint the attorney with the factors that must be considered and the tools that must be employed in effectively representing his juvenile client. With this objective in mind, the juvenile courts of the Philadelphia metropolitan area, operating under the Pennsylvania Juvenile Court Act, were examined.

A. The Participants — Child, Parents, Probation Officer, Judge

Children who are brought before the juvenile court on delinquency charges cannot be stereotyped. Although youths from lower socio-economic groups appear more frequently before the court, for a variety of reasons, delinquency touches all classes of our society. Within the encompassing standards of delinquency, both the youthful prankster and the sophisticated young criminal may face the authority of the same court. The juvenile court judge, having broad discretionary powers in determining proper disposition, may merely caution the child or confine the youth in an institution until the age of twenty-one. If the child, even though recognizing that his acts justify the exercise of authority by the court, believes that the disposition is unfair, it may only serve to re-enforce his anti-social conduct and the latitude of possible dispositions and the responses they may evoke in the child, demonstrate that the dispositional phase is as important as the adjudicatory phase in the juvenile court.

The parents' relationship with the child has a strong bearing on the disposition arrived at by the juvenile court. Recommendations of the probation department and the election by the judge between probation and institutionalization may depend, in large measure, on the parents' ability and desire to effectively supervise and assist their child. In fact, the disposition of the child often leads to a disposition of the parents. That is, if the child is removed from their custody, the court can order the parents


to pay support, and whether the child remains within the home or is placed elsewhere, traditional concepts of parental rights and authority will be modified.

The Pennsylvania Juvenile Court Act has created a probation department, under judicial supervision, which functions as an administrative arm of the court, and the importance of the individual probation officer who plays a significant role in all phases of the juvenile court process should not be underestimated. It is his responsibility to prepare the social investigation report which is a vital factor in determining the initial disposition of the child, and whether a final order of the juvenile court will be later modified, thereby imposing more severe restrictions on, or removing all court supervision from, the child, will often turn on the opinions expressed by the probation officer. It is therefore evident that he must be well trained and have the ability to establish a rapport with the child in order to fulfill his role adequately.

The probation officer should attend all proceedings held in juvenile court pertaining to a child under his supervision. In Delaware County, Pennsylvania, the probation officer who prepared the report and who will later be assigned to the child is required to attend the hearing, whereas, Philadelphia County merely has a representative of the probation office present, while the probation officer who prepared the social investigation report attends only at the request of the judge or voluntarily.

The juvenile court judge is charged with the responsibility of balancing all of the complex factors which determine the disposition of the child. He must be capable of evaluating the problems and needs of the individual child and of determining appropriate action if the child's conduct poses a threat to the community. Furthermore, this must be accom-

239. PA. STAT. ANN. tit. 11, § 251 (1965).
242. Infra note 250 and accompanying text.
243. See JUVENILE COURT JUDGES' COMM'N, DEPT. OF JUSTICE, COMMONWEALTH OF PENNSYLVANIA, JUVENILE COURT HANDBOOK AND DIRECTORY 35 (1965) (hereinafter cited as PA. JUV. CT. HANDBOOK) which sets forth as the minimum standards that the probation officer candidate must have a Bachelor's degree from an accredited college or university, and minimum scores in attitude, aptitude, and special tests on the subject of juvenile probation as determined by the individual juvenile courts in the state. (Delaware County's staff is composed of college graduates with degrees in sociology who either have, or are working toward, a masters degree in this field. Philadelphia County has a staff of college graduates, not necessarily in sociology.) See NATIONAL PROBATION AND PAROLE ASS'N, STANDARDS FOR SELECTION OF PROBATION AND PAROLE PERSONNEL, in DRESSLER, PRACTICE AND THEORY OF PROBATION AND PAROLE 221 (2d ed. 1962).
244. Although attending the hearings is listed as a function of the probation officer, it apparently is open to interpretation whether this requires the probation officer who prepared the report to attend. See PA. STAT. ANN. tit. 11, § 259 (1965); PA. JUV. CT. HANDBOOK, supra note 243, at 35, where it states that the probation officer assigned to a child is required to attend the child's hearing. In evaluating the Delaware County and Philadelphia County practices it should be noted that the average case load per month for a probation officer is eighty-five in Philadelphia County and fifty in Delaware County.
plished under the scrutiny of the public, which either criticizes the decisions reached as being too lenient or too harsh.\textsuperscript{246} It has been suggested that although the judge may be best equipped to make an adjudication of delinquency, he may not be an expert on disposition, and that an agency which employs trained personnel will be in a more advantageous position to assimilate the continually more sophisticated data supplied by the psychiatrist, sociologist, psychologist, and caseworker, and apply it properly.\textsuperscript{247} However, to remove the judge from the process of disposition fails to recognize that there must be an adjudication of delinquency, the result of which may remove the child from society or regulate his activities within the community, and limit the parents' custody of the child. A decision of this magnitude should be the responsibility of the judiciary.\textsuperscript{248}

\textbf{B. The Social Investigation Report}

Rehabilitation of the child requires a determination of the factors leading to the child's delinquent behavior. This is a complicated process, for "to explain juvenile misconduct one must analyze the condition of the individual involved, the influence of the social world in which he lives and the sequence of occurrences that precede the deviation from societal norms and laws."\textsuperscript{249} It is the function of the social investigation report to gather and synthesize the data for this analysis and to balance the child's needs against those of the community, so that the juvenile court judge can render an appropriate decision.\textsuperscript{250} A recommended format for the report in Pennsylvania\textsuperscript{251} which lists major headings as: Complaint, Previous Court or Institutional History, Family Background, Child's History, Information from Social Agencies and Others, Analysis, Interpretation and Recommendations, demonstrates the complexity of the report.

The survey\textsuperscript{252} conducted in conjunction with this note indicates that this report is used without exception by those judges who responded in arriving at disposition. The importance of the dispositional recommendation of the report is also manifested by the fact that the jurists' dispositional orders coincide with the recommendations contained in the report on an average of eighty-three per cent, varying from a high in Delaware County of ninety-three per cent, to a low of seventy-three per cent in

\begin{itemize}
  \item \textsuperscript{246} Address by Hon. W. Clarence Sheely, Judge of the fifty-first Judicial District, at the Eleventh Judicial Conference of Pennsylvania, May 6, 1960.
  \item \textsuperscript{247} Kahn, \textit{Court and Community}, in \textit{Justice for the Child} 217, 228 (Rosenheim ed. 1962).
  \item \textsuperscript{248} \textit{Supra} note 245.
  \item \textsuperscript{249} \textit{Neumeyer}, \textit{supra} note 234, at 73.
  \item \textsuperscript{250} The social study is a written report to the judge by the probation officer. It contains a narrative account of the child's life history with special emphasis on those factors which have resulted in the child's present problems and delinquent behavior. An evaluation of the child's potential social adjustment is included in this report. Its purpose is to help the court understand and individualize the child so that a disposition can be made that will both meet the child's rehabilitative need and protect the community. \textit{Pa. Juv. Ct. Handbook} 38.
  \item \textsuperscript{251} \textit{Id.} at 611.
  \item \textsuperscript{252} See Appendix.
\end{itemize}
Philadelphia County.\textsuperscript{253} This variance is probably due to the fact that the probation officer in Delaware County always attends the hearings, and therefore, plays a more active role in the dispositional proceedings. He is able to answer questions posed by the judge in regard to the recommendations in the report and undoubtedly adds to their persuasiveness.\textsuperscript{254}

\textit{C. Evaluation of, and Access to, the Social Investigation Report}

Without access to the report, it is doubtful that the attorney can effectively represent his juvenile client at disposition. However, the reasons asserted for nondisclosure of the report at adjudication are equally applicable at disposition — protection of the probation officer’s sources of information, confidential nature of the communications, preservation of the relationship established between the child and his probation officer, and the possibility that some information, if disclosed, could harm the child psychologically. Proponents of disclosure\textsuperscript{255} suggest that recognition of the importance of the report in respect to the child’s future requires that it be subject to evaluation by the child’s attorney, with the judge having discretion to determine what information is to be available to the child.\textsuperscript{256}

Those who feel that nondisclosure is the better view may find some support in the Supreme Court’s decision in \textit{Williams v. New York}\textsuperscript{257} where it was held that in a criminal presentencing hearing, due process was not denied when the convicted criminal was not afforded the right to confront and cross-examine persons whose statements were contained in a pre-sentence report, even where the judge admittedly relied on the report in determining the sentence.\textsuperscript{258} In the judicial search for a proper sentence, it was felt that the judge should be given broad discretion, however, the Court did not determine that the defendant is without an opportunity to challenge the accuracy of the statements relied on by the judge.\textsuperscript{259} Therefore, this decision may be of limited significance in regard to the attorney’s right of access to the social investigation report.

In Pennsylvania, the Juvenile Court Act provides that the records of the proceedings\textsuperscript{260} in the juvenile court be made available to the parents, or representative of the child or all persons with a legitimate interest. In regard to this provision, the Supreme Court of Pennsylvania in \textit{Holmes’}
Appeal\textsuperscript{261} held that the social investigation report was not part of the juvenile court record of the proceedings, and therefore, not governed by the statute. Relying on Williams, it decided that disclosure should be left to judicial discretion.\textsuperscript{262}

The juvenile probation office of Delaware County has asserted that they would be quite willing to have attorneys review their reports, but so few attorneys demonstrate an understanding of the philosophy and purpose of the juvenile court that the report would be of little value to them.\textsuperscript{263} Judge Clifford Scott Green\textsuperscript{264} of the County Court of Philadelphia stated that he permits attorneys to see the reports and in fact has suggested to attorneys appearing before him the necessity of reading the reports. He added, however, that not all of his colleagues are in agreement with his position. In an interview with the Juvenile Division of the Community Legal Services Office of Philadelphia,\textsuperscript{265} the accuracy of Judge Green's statement was borne out. It was related that some judges have refused attorneys' requests for access to the reports, and in other cases the apparent criteria is how well known the individual attorney is to the probation office. On many occasions access to the report is limited to the probation officer's selected readings from the report, a procedure which is wholly unsatisfactory to the child's attorney.

The future availability of the social investigation report to the attorney and his role in the dispositional phase of the juvenile court process may be inferred from this statement of the Supreme Court in Kent v. United States:

\begin{quote}
We do not agree with the Court of Appeals' statement, attempting to justify denial of access to these records, that counsel's role is limited to presenting "to the court anything on behalf of the child which might help the court in arriving at a decision; it is not to denigrate the staff's submissions and recommendations." On the contrary, if the staff's submissions include materials which are susceptible to challenge or impeachment, it is precisely the role of counsel to "denigrate" such matter. There is no irrebuttable presumption of the accuracy attached to staff reports.\textsuperscript{266}
\end{quote}

Access to the social investigation report will not, by itself, provide the attorney with sufficient information to protect his client's interests. The evaluation of the report requires not only a knowledge of what it contains, but an understanding of what it should contain. He must be capable of challenging the accuracy of the report by pointing out factual errors, and if necessary, by bringing to the attention of the court the inadequate preparation of, or imperfect technique employed by, the probation officer. Equally important is the addition of information which has been garnered

\begin{footnotes}
\item[262] Id. at 608, 109 A.2d at 527.
\item[263] Interview with Paul E. Gresregan, supra note 254.
\item[264] Interview with Judge Clifford Scott Green, Nov. 1966.
\item[265] Interview with Director, Juvenile Division, Community Legal Services, Philadelphia, Pennsylvania, Nov. 1966.
\item[266] 383 U.S. 541, 563 (1966).
\end{footnotes}
through the attorney-client relationship, and the highlighting of those aspects of the report which are favorable to the child.\textsuperscript{267} The attorney who recognizes the importance of the social investigation report and how it can be effectively employed on behalf of his client will be able to make a substantial contribution to the dispositional process.

**D. The Attorney as a Proponent of Possible Dispositions**

Unlike the criminal court, which considers deterrence, retribution, and rehabilitation in the sentencing process, the juvenile court is required to limit sentencing considerations to the rehabilitation of the individual child and the protection of the community.\textsuperscript{268} It is the responsibility of the juvenile court judge to consider the needs of the individual child and make a determination as to whether rehabilitation can be achieved by probation, or if institutionalization is required.\textsuperscript{269}

In choosing the latter course, it must be recognized that the problems of rehabilitating the child within an institution are manifold. For large institutions to operate efficiently the daily routines must be regimented in much the same way as a factory operates its assembly lines. However, such regimentation is not in accord with the theory and practice of individualized treatment and it has been found that children in such institutions receive less of the needed treatment than is prescribed.\textsuperscript{270} The desirability of removing children from contacts with adult criminals can be accomplished by institutions for juveniles, but it cannot overcome contacts with other delinquents and the corresponding influence of peer groups.\textsuperscript{271} Also, lack of trained personnel and adequate facilities may make the institution unsuitable for rehabilitation,\textsuperscript{272} not to mention the increased cost of institutional care.\textsuperscript{273}

Irrespective of the desires of the court, the stigma of delinquency does exist and will be a greater burden on the child who has been institutionalized. Furthermore, removal from the community has a psychological impact on the child which may retard the rehabilitation process. Recent decisions have recognized these problems and have indicated that in selecting an institution, the juvenile court is required to find a place which, in fact, affords the promised treatment and is apart from an adult prison.\textsuperscript{274}

\textsuperscript{267} Allison, \textit{supra} note 255, at 28; Krasnow, \textit{supra} note 172.
\textsuperscript{268} Ketcham, \textit{supra} note 228, at 35.
\textsuperscript{271} It has been suggested that institutional living reinforces deviant behavior and in fact creates pressures on the child to seek more deviant conduct. See Grygier, \textit{The Concept of the "State of Delinquency" and Its Consequences for the Treatment of Young Offenders}, 11 \textit{Wayne L. Rev.} 627, 646 (1965).
\textsuperscript{272} See Neumeyer, \textit{supra} note 234, at 352-54.
\textsuperscript{273} \textsc{Standards for Juvenile and Family Courts, supra} note 196, at 82, states that a national survey revealed that the average cost per year of probation is $200 to $250 per child, whereas the cost of institutional care ranges from $2,760 to over $4,000.
Pennsylvania has twenty-nine institutions available for the housing of juvenile delinquents.\textsuperscript{275} Included in this number are sixteen which are privately operated, although in many instances they receive state or county support, and three which provide for commitment by both the juvenile and criminal court. The juvenile court can obviously order that the child be placed in a state institution, however when placement in a private institution is deemed best, the child must meet the standards established by the institution in question, such as the attainment of a minimum score in intelligence testing. A survey\textsuperscript{276} conducted in 1954 reported that juvenile facilities varied from medium security prisons, with minimal educational programs, to cottage type facilities with slight custodial functions, and a variety of academic, industrial arts, and vocational training programs. The report criticized the institutions in Pennsylvania because in many cases, the physical plant was old and in poor condition and because there was a lack of sufficient teachers, social workers, trained psychiatrists, and psychologists. In addition, it was found that there was very little, if any, in service training of the staff, and that even though the available staff strived to rehabilitate the children, the lack of financial support made it difficult to maintain adequate personnel and facilities. It is obvious from the foregoing survey that the judge has a difficult task in deciding where to send the child, and that a well informed attorney could be of great assistance.

Interviews with judges, attorneys, and probation officers\textsuperscript{277} indicate that although the same conditions exist today, the institutions are doing the best they can under the circumstances. It was recommended that the attorney not only be aware of the variations in the institutions but make personal visitations to form his own impression, establish contact with the staff of the institution, and become familiar with the special facilities each offers. Personal contact with the institutional staff will enhance the possibility of gaining admission for the client to the private institutions, and permit the attorney to discover, not only the type of services offered, but also, whether they are in fact provided.

Probation as an alternative to institutionalization, is not problem free for a number of reasons. The deprived environmental conditions in which the child lives, coupled with the fact that peer group influence can be as strong within the society as within an institution, operates in many instances to make rehabilitation difficult. In addition, the parents may be incapable of providing the home life required and no substitute may be available within the community. Furthermore, the probation officer, overburdened with a high case load, may be unavailable to provide the direction and counseling that the child requires.

\begin{itemize}
  \item \textsuperscript{276} Government Consulting Service, Institute of Local and State Government, University of Pennsylvania, Survey of Pennsylvania Training Schools (1954).
  \item \textsuperscript{277} Interview with Juvenile Authorities in Philadelphia, Nov. 1966.
\end{itemize}
As in the decision to commit, probation does not end the responsibility of the court. A program must be designed which will provide for the youth's supervision and guidance within the community under the direction of the court. Normally this program provides that the child report to the probation officer on a regular schedule, that the probation officer visit the child's home periodically, and that the child attend school regularly. Again it can be seen that an experienced, well informed attorney can be a valuable aid to the court in formulating this program. Similarly, as a broader spectrum of possible programs within the community develops, probation may become even more attractive to the juvenile court judge, and an attorney who is prepared to assist in identifying, and proposing methods of taking advantage of, these new community resources would be of invaluable service to his client and the court.

In addition, the following list, although not exhaustive, demonstrates approaches which have been used by the juvenile courts and which the attorney may wish to propose as alternative rehabilitative tools.

1. **Foster Home Care:** It has long been felt that every child should have a home or the best possible substitute. The difficulty in foster home care is locating a family which is willing to accept a child who has been adjudicated delinquent.\(^{278}\)

2. **Fines:** Fines have been used in England, Canada and Colorado as an alternative to probation. This approach is criticized because it may prove to be unfair or impractical for the lower socio-economic groups.\(^{279}\)

3. **Restitution:** Although many states allow the use of restitution as a rehabilitative tool,\(^{280}\) Pennsylvania does not permit its juvenile court to impose restitution.\(^{281}\) However, this method has been recommended by the Pennsylvania Juvenile Court Judges' Commission\(^{282}\) as a way to instill responsibility in the child and is employed where the youth voluntarily assumes the obligation.

4. **Work Projects:** These projects which may involve such chores as cleaning up park areas and recreational centers have been employed by several jurisdictions.\(^{283}\)

5. **Community Organizations:** Religious groups, Boy Scouts of America, and similar organizations may provide individuals and facilities which can be used in the rehabilitative process.\(^{284}\)

6. **Employment Training Organizations:** If the child has an interest in a particular type of work, it may be possible to find schools or organiza-

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\(^{278}\) See *Neumeyer*, *supra* note 234, at 357.
\(^{280}\) *Id.* at 128-29.
\(^{283}\) See Fradkin, *supra* note 279, at 129.
\(^{284}\) *Neumeyer*, *supra* note 234, at 383-87.
tions which will be willing to assume the responsibility of supervising the child. 285

IX. POST DISPOSITIONAL CONSIDERATIONS

A method of insuring fairness in juvenile court proceedings is the right to appeal final orders. In Pennsylvania, if the child, parents, or next friend 286 believe that there has been an error of law or fact in the adjudication or disposition, they may, within twenty-one days, petition for a rehearing, and appeal any final order to the superior court. 287 Due to the broad discretionary powers which the juvenile court judge exercises in arriving at and imposing disposition, it is difficult to successfully appeal a dispositional decision unless an abuse of discretion is clear. 288 There also exists the right of the child, parents, or next friend to request either modification or revocation 289 of the disposition on the belief that a change of circumstances has necessitated a change in the court's order. 290 If this request is denied, an appeal can still be taken to the superior court.

The problem with the modification and revocation procedures lies in the requirement that there be a change in circumstances. In the case of a child who has been committed to an institution, information must be obtained concerning his progress, and this is entirely within the domain of the superintendent and board of managers of the institution. 291 As a matter of practice, state institutions and many private institutions submit progress reports to the committing court every six months, or more frequently upon request by the court, but this, unfortunately, is not always the case. 292 Similarly, the superintendent and board of managers of the various institutions determine when a child is ready to be released, and, subject to the approval of the committing judge, 293 set the terms of such release. When the child has been paroled, or is on probation, the probation officer is required to report the child's conduct and progress to the court on a periodic basis, and observations of the dispositional proceedings indicate that such reports are generally requested by the judge every six months.

A change in circumstances will not depend solely on the child's progress. It must be remembered that the parent's attitude and ability to

285. This method was suggested by Judge Clifford Scott Green of the Philadelphia County Court in an interview, Nov. 1966.

286. Ninety-two per cent of the judges responding to the survey conducted by the authors felt that the attorney could play a prominent role in proposing possible dispositions.


290. This right is another reason for the small number of appeals taken from the juvenile court. In re Weintraub, supra note 288.


293. PA. STAT. ANN. tit. 11, § 377 (1965).
provide the proper environment will also have to be known, thereby re-
quiring the institutional authorities and probation officers to determine
the attitudes of the family before the child is released or his probation
terminated. The judges interviewed\textsuperscript{294} stated that if progress in the child's
rehabilitation or the capabilities of the parents to provide for and super-
vise the child can be demonstrated, they would be quite willing to modify
or revoke their orders, and the Juvenile Division of the Community Legal
Services Office of Philadelphia\textsuperscript{295} felt that this approach served two
beneficial ends, for it softens the impact of the disposition by presenting
the possibility of alteration of the order, and serves as an immediate in-
centive for the child and parents to exhibit the necessary progress required
for modification or revocation of the final order.

The right to have a final order of the juvenile court modified or
revoked is extremely important, and the reporting of information reflect-
ing the child's progress should not be left to the discretion of the super-
intendent or board of managers where the child has been institutionalized.
The duty to supply periodic reports should be made mandatory by the
Juvenile Court Act to insure the availability of current information on
the child's progress. Recognizing the heavy burden of the juvenile court,
it is felt that the reports should be submitted to the parents or other
persons having a legitimate interest in the child, including the child's attor-
ney, so that those parties may petition for modification or revocation, and
thereby better protect the future well being of the child.

X. Conclusion

The Supreme Court's decision in \textit{Gault} makes it clear that it is no
longer satisfied with the doctrine of \textit{parens patriae} as sufficient assurance
that the child will receive fair treatment in the adjudicatory hearing in
the juvenile court. However, the Court recognizes that the juvenile court
hearing is neither a criminal nor civil trial and that the application of
constitutional safeguards will not depend on its characterization as one
or the other. This recognition is evidenced by the fact that while the
Court has required strict application of the fifth amendment privilege
against self-incrimination, it has employed the fundamental fairness con-
cept of the fourteenth amendment in requiring counsel and adequate
notice of the charges — both of which are applied unequivocally in criminal
trials by virtue of the sixth amendment. Furthermore, the requirement
of counsel in the adjudicatory phase of the juvenile court process will
insure that the child will be able to exercise his rights effectively and
thereby receive the fair treatment so often alluded to by the courts.

The Supreme Court's recognition of the value of the unique disposi-
tional phase of the juvenile court process is made apparent by its refusal

\textsuperscript{294}. Interview with Judges of the Juvenile Courts of Philadelphia and Delaware

\textsuperscript{295}. Interview, \textit{supra} note 265.
to introduce these same safeguards into this stage of the proceedings, however, it is evident that the court will not hesitate to re-examine this area if it is determined that the child is not receiving the treatment promised. The attorney, properly educated in the complexities of the dispositional hearing and the tools which are employed in this phase, can insure that the child will receive the protections afforded to adults \textit{and} the solicitous care and regenerative treatment postulated for children — the best of both worlds.

\textit{Glenn C. Equi}

\textit{James D. Hutchinson}

\textit{Barney B. Welsh}

\textbf{APPENDIX}

\textbf{SURVEY OF JUVENILE COURT JUDGES OF PENNSYLVANIA*}

\textbf{QUESTIONNAIRE}

1. Do you review the social investigation report prior to the hearing? .......................................... 68\% 32\%
2. Do you use the social investigation report in adjudication? ......................................................... 56\% 44\%
3. Do you use the social investigation report in disposition? .............................................................. 100\%
4. Is the probation officer who prepares the report present at the hearing? ...................................... 60\% 40\%
5. How frequently does final disposition coincide with the recommendations of the social investigation report? .............................................................. 83\%
6. Does an attorney have any function in juvenile court proceedings? ................................................ 100\%

\* Eighty-nine Judges responded to the above questionnaire which was distributed and answered prior to the \textit{Gault} decision.