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Juvenile Delinquency Proceedings in Ohio: Due Process and the Hearsay Dilemma

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Juvenile Delinquency Proceedings in Ohio: Due Process and the Hearsay Dilemma

THE SUPREME COURT HAS LONG SINCE HELD that a necessary result of due process requirements is the firm separation of the adjudicatory and dispositional phases of delinquency proceedings.[1] As a corollary to this, the juvenile is theoretically entitled to fundamental due process safeguards in the adjudicatory stage, including the right to exclude hearsay evidence.

The discrepancy between that which is theoretically available and that which is actually extant is a function of the rules of procedure of each jurisdiction as well as the attitudes of its appellate courts. This comment will explore the extent to which the exclusion of hearsay evidence in a delinquency proceeding is a practical reality in the Ohio system. In so doing, the possibilities for abuse will be highlighted and suggestions for their elimination will be made, all in the spirit of the Supreme Court's mandate to provide fundamental due process safeguards to this procedure.

Background

Within the past several years the fundamental concepts underlying the juvenile court process have been closely examined, and the doctrine of *parens patriae*,[2] standing alone, has been found inadequate.[3] Its application has shown that the unbridled discretion of a juvenile judge, however benevolent its motivation, is frequently a poor substitute for principle and procedure.[4] To remedy the abuses of the traditional juvenile procedures the Supreme Court has held that they must adhere to the essentials of due process and fair treatment.[5] This should not be taken to mean, however, that the full panoply of criminal

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[1] *In re* Gault, 387 U.S. 1 (1967); Kent v. United States, 383 U.S. 541 (1966).

[2] The social theory that underlies the juvenile justice system is grounded in the doctrine of *parens patriae*. This theory assumes a parental relationship between the state and the child which would dispense with the need for certain procedural protections.

Bayh, *Juveniles and the Law: An Introduction,* 12 AM. CRIM. L. REV. 1, 3 n.8 (1974).

[3] PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 85 (1967). An inherent weakness of the doctrine of *parens patriae* is its failure to recognize that the juvenile courts serve to punish offenders and protect society as well as the admitted purposes of protecting and rehabilitating children. It has failed in both these stated goals. Children are not protected because the informality engendered by the *parens patriae* doctrine creates the potential for arbitrariness and unfettered discretion on the part of the juvenile court judge and does not, in many cases, result in an accurate determination of the facts. As a corollary to this "there is increasing evidence that the . . . seemingly all-powerful and challengeless exercise of authority by judges and probation officers" is an obstacle to rehabilitation. *Id.*

[4] *In re* Gault, 387 U.S. 1, 18 (1967).

[5] Kent v. United States, 383 U.S. 541, 562 (1966).

rights will be afforded to the juvenile.[6] Rather, the courts have sought to effectuate a compromise between the two, avoiding both the harshness of an adversary proceeding and the granting of "unbridled discretion" to the juvenile judge.

An essential element of the attempt to treat fairly those juveniles alleged to be delinquent is the bifurcated juvenile court system. An adjudicatory hearing is held to determine the truth of the allegations in the complaint.[7] If these allegations are found to be true, the court acquires jurisdiction over the child. A dispositional hearing is then held at which time the judge decides upon the most remedial treatment for the child.[8]

The Supreme Court of the United States has taken the lead in separating the adjudicatory and dispositional stages of juvenile delinquency proceedings. The Court found, in 1966, 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."[9] Thus, in 1967, the stage was set for the landmark case in juvenile law, *In re Gault*.[10] Limiting its holdings to adjudicatory hearings,[11] the Court found that neither the fourteenth amendment nor the Bill of Rights is limited to adults.[12] In extending such rights to juveniles, the Court emphasized that the substantive benefits of the juvenile process should be neither abandoned nor displaced by the states.[13]

The Court feared that if it held juvenile proceedings to be criminal in nature the flexibility of the process might be destroyed. However, it could not ignore procedural irregularities in hearings from which a loss of liberty might result[14] and to which a stigma was and is attached.[15] Also considered by the Court in their application of con-

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[6] *Id.*

[7] OHIO R. JUV. P. 2(1).

[8] OHIO R. JUV. P. 2(8) and 34(A).

[9] Kent v. United States, 383 U.S. 541, 556 (1966).

[10] 387 U.S. 1 (1967).

[11] *Id.* at 27.

[12] *Id.* at 13.

[13] *Id.* at 21.

[14] *Id.* at 27. *Accord, In re* Sippy, 97 A.2d 455 (D.C. App. 1953); *In re* Green, 123 Ind. App. 81, 108 N.E.2d 647 (1952); *In re* Simmons, 299 So. 2d 906 (La. App. 1974); *In re* Barkus, 168 Neb. 257, 95 N.W.2d 674 (1959); *In re* H.C., 106 N.J. Super. 583, 256 A.2d 322 (Juv. Ct. 1969); *In re* B., 30 App. Div. 2d 442, 293 N.Y.S.2d 946 (1968); *In re* Smith, 326 P.2d 835 (Olka. App. 1958).

[15] *In re* Gault, 387 U.S. 1, 24 (1967):

> While the juvenile court law provides that an adjudication . . . shall not be deemed to be conviction of crime, nevertheless, . . .This is a legal fiction. . . .
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> . . . .

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stitutional safeguards was the fact that the incarceration of a juvenile is, in many instances, for a much greater length of time than that of an adult for the same criminal act.[16] Perhaps the most persuasive argument by the Court, however, was that to achieve the ideal of rehabilitation, "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."[17] And, of course, the rationale of *Pointer v. Texas*,[18] still holds true — the instruments of due process enhance the possibility that the confrontation of opposing versions and conflicting data will produce the truth.[19]

This concern for flexibility deserves greater consideration. To what do the courts refer when they speak of the danger of sacrificing flexibility? Is it merely a euphemism for judicial discretion, paternalism or arbitrariness? A continual thread underlying the arguments of the courts seems to be their desire to ensure that the juvenile court takes jurisdiction only when a delinquent act has been committed.[20] The bifurcated process outlined by the Supreme Court closely parallels the procedures involved in a criminal proceeding. The trial is analogous to a delinquency adjudication, and sentencing is similar to the dispositional hearing.[21] Indeed some recent decisions have termed

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> It is common knowledge that such an adjudication when based upon a charge of committing an act that amounts to a felony, is a blight upon the character of and is a serious impediment to the future of such minor.

In re Contreras, 109 Cal. App. 2d 787, 789-90, 241 P.2d 631, 633 (1952). A "Juvenile Court record is a lengthening chain that its riveted possessor will drag after him through" life. Holmes Appeal, 379 Pa. 599, 612, 109 A.2d 523, 529 (1954), *cert. denied*, 348 U.S. 973 (1955). *See* Mahoney, *The Effect of Labeling Upon Youths in the Juvenile Justice System: A Review of the Evidence*, 8 LAW & SOC'Y REV. 583 (1974); Comment, *Alternative Preadjudicatory Handling of Juveniles in South Dakota: Time for Reform*, 19 S.D. L. REV. 207 (1974). These articles point out that not only does a stigma attach to those adjudicated delinquent with regard to obtaining jobs, etc., but such an adjudication may become a self-fulfilling prophecy, encouraging future delinquent behavior.

[16] 387 U.S. at 29.

[17] *Id.* at 26.

[18] 380 U.S. 400, 404 (1965).

[19] *In re* Gault, 387 U.S. 1, 21 (1967):

> [T]o the extent that the rules of evidence are not merely technical or historical, but like the hearsay rule have a sound basis in human experience, they should not be rejected in any judicial inquiry.

Note, *Juvenile Delinquents: The Police, State Courts, and Individualized Justice*, 79 HARV. L. REV. 775, 795 (1966). Cross-examination "is beyond a doubt the greatest legal engine ever invented for the discovery of truth." 5 J. WIGMORE, EVIDENCE § 1367 (3d ed. 1940). C. MCCORMICK, EVIDENCE § 19 (2d ed. 1972).

[20] Stamm, *The Need for Juvenile Code Revision*, 25 JUVENILE JUSTICE 14, 17 (August, 1974):

> I read the recent Supreme Court cases broadly as standing for the principle that when the juvenile court seeks to officially intervene in a child's life, it will do so through the medium of due process.

[21] Holmes Appeal, 379 Pa. 599, 602, 109 A.2d 523, 526 (1954), *cert. denied*, 348 U.S. 973 (1955).

delinquency proceedings quasi-criminal in nature.[22] If the procedural safeguards developed in the criminal law are those best designed to serve justice, both by facilitating the search for truth and protecting the rights of the accused, the clear similarities between criminal and juvenile adjudication dictate that, lacking substantial reasons to the contrary, procedural safeguards applied to the former should be applied to the latter. Sincere concern for the well being of the juvenile, however, has resulted in a rather informal procedure, which in turn has lead to a fragmentary application of what should be the juvenile's constitutionally guaranteed protections.[23] The inevitable difficulties are manifiest in the evidentiary problems presented by hearsay and social reports.

The Ohio Rules of Juvenile Procedure

The Ohio Rules of Juvenile Procedure, promulgated by the Supreme Court and approved by the State legislature, which took effect on July 1, 1972, reflect the changes which have taken place in the courts' attitudes towards juvenile offenders. They provide for a liberal interpretation in order to promote justice, streamline procedure, and protect the welfare both of children subject to the court's jurisdiction and of the public.[24] The child's rights are tempered by a strong emphasis on the paternal aspect of juvenile court proceedings. This is consistent with the procedures required by *Gault*, recognizing the juvenile's rights at the adjudicatory hearing. The dispositional phase of the proceedings, however, places great discretion in the juvenile court judge.

Since the Supreme Court provided for the exclusion of hearsay evidence in juvenile adjudicatory proceedings well before the adoption of the Ohio Rules of Juvenile Procedure, the Rules fail to deal directly with this issue. Rule 34(B)(2), concerning dispositional hearings,

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[22] *In re* Gregory W., 19 N.Y.2d 55, 62, 224 N.E.2d 102, 106, 277 N.Y.S.2d 675, 680 (1966).

[23] McKeiver v. Pennsylvania, 403 U.S. 528 (1971). Trial by jury is the main constitutional right which has been denied to those accused of juvenile delinquency in adjudicatory hearings.

[24] OHIO R. JUV. P. 1. More specifically the Rules provide:

> (B) Construction.
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> These rules shall be liberally interpreted and construed so as to effectuate the following purposes:
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> (1) to effect the just determination of every juvenile court proceeding by ensuring the parties a fair hearing and the recognition and enforcement of their constitutional and other legal rights;
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> (2) to secure simplicity and uniformity in procedure, fairness in administration, and the elimination of unjustifiable expense and delay;
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> (3) to provide for the care, protection, and mental and physical development of children subject to the jurisdiction of the juvenile court, and to protect the welfare of the community; and
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> (4) to protect the public interest by treating children as persons in need of supervision, care and rehabilitation.

states that hearsay evidence may be admitted, whereas Rule 29(E)(3), provides that in the adjudicatory hearing the court shall "[t]ake all testimony under oath or affirmation in either question-answer or narrative form . . . ." It may be argued that the latter rule prohibits the use of hearsay, but the evidentiary trustworthiness that the rule against hearsay is designed to guarantee exists not only when the witness or declarant is under oath but also when he is present in the courtroom and available for cross-examination.[25] If Rule 29(E)(3) is properly interpreted to exclude hearsay in the adjudicatory hearings, one aspect of the differences between the dispositional and adjudicatory phases becomes apparent. The skeleton of constitutional safeguards necessary in the adjudicatory proceeding are, on the whole, not present (nor desirable) in the dispositional phase. Regrettably, the procedural distinctions between the two phases are often relaxed due to burdensome case loads and the ensuing quest for expediency.[26]

One particular form of hearsay, the social history, is excluded from consideration in the adjudicatory stage by Rule 32.[27] Social histories (also referred to as social studies or probation reports) are prepared by the probation officer for the benefit of the court in the dispositional phase of the proceedings. They include the personal and family history of the child and any prior record he might have.[28] The reports contain information obtained from the child's parents, school, and any social agencies with which he or his family has been involved.[29] Rule 32 delineates specific instances in which the social histories may be considered by the juvenile court judge in delinquency adjudications. They are: (1) when the juvenile so requests,[30] and (2) when the legal responsibility for the juvenile's acts is an issue.[31] Further-

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[25] 5 J. WIGMORE, EVIDENCE § 1362 (3d ed. 1940); C. MCCORMICK, EVIDENCE § 245 (2d ed. 1972).

[26] While informality is the theme of a juvenile court hearing,

> informality should not, however, mean that the court ceases to be a court or becomes merely a conference in the judge's chambers. Still less should it mean that the court ignores rules of evidence or fails to establish procedures for its actions. Rather, informality means an absence of those technicalities which are not essential to justice and which tend to confuse or intimidate a child.

U.S. DEPT. OF HEALTH, EDUCATION AND WELFARE, STANDARDS FOR SPECIALIZED COURTS DEALING WITH CHILDREN 54 (1954).

[27] OHIO R. JUV. P. 32.

[28] OHIO R. JUV. P. 2(21).

[29] Interviews with three probation officers, Cuyahoga County Juvenile Court, between December, 1974, and March, 1975. (Two of the officers are no longer employed by the court, but all have requested to remain anonymous).

[30] OHIO R. JUV. P. 32(A)(1).

[31] OHIO R. JUV. P. 32(A)(4). Prior to *Gault*, juvenile courts often received social histories in lieu of or in addition to actual witnesses at the hearing. The informality of the procedure as it then existed coupled with a loosely conceived business records-official documents exception to the hearsay rule seems to have provided the propelling force behind

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more, when, under the exceptions of Rule 32(A), a social history is being used by the judge, Rule 32(B) requires that its use be confined to the purposes of the exception.[32]

Case Law

Among the rights afforded juveniles by *Gault* is the sixth amendment right of confrontation and cross-examination.[33] The sixth amendment had previously been held applicable to the states through the fourteenth amendment in *Pointer v. Texas*,[34] where the Court recognized the importance of cross-examination in exposing falsehood and eliciting the truth.[35] Ohio case law has followed the *Gault* decision,[36] and the rule prohibiting hearsay has been recognized in other jurisdictions both prior to and as a result of *Gault*.[37] No Ohio cases have been found regarding the admission of social histories at the adjudicatory stage, although some do exist in other jurisdictions.[38] One Ohio case, involving the use of similar reports in the dispositional phase,

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admission. *See* Note, *The California Juvenile Court*, 10 STAN. L. REV. 471, 493 n. 145 (1958). Since *Gault* had constitutionally eliminated some of the prior informality, and in the absence of rules such as Ohio's Rule 32 generally prohibiting the use of social histories in adjudications, social histories would not seem admissible into evidence as a business record exception to the hearsay rule due to the lack of a duty to record on the informants. *See* Yates v. Bair Transport, Inc., 249 F. Supp. 681 (S.D.N.Y. 1965); Kelly v. Wasserman, 5 N.Y.2d 425, 158 N.E.2d 241, 185 N.Y.S.2d 538 (1959); Johnson v. Lutz, 253 N.Y. 124, 170 N.E. 517 (1930). *See also* RULES OF EVIDENCE FOR UNITED STATES COURTS AND MAGISTRATES 803(6) (effective July 1, 1975) and the accompanying Advisory Committee's Note thereto.

It should be noted that Rule 32(A) enumerates 6 instances where social histories may be used by the court, however, only 32(A)(1) and (4) are applicable to delinquency adjudications. 32(A)(3) relates to neglect and dependency proceedings; 32(A)(2) relates to bindover proceedings; and 32(A)(5) and (6) concern reports of mental and physical examinations.

[32] OHIO R. JUV. P. 32(B).

[33] 387 U.S. at 57:

> We now hold that, absent a valid confession, a determination of delinquency and an order of commitment to a state institution cannot be sustained in the absence of sworn testimony subjected to the opportunity for cross-examination in accordance with our law and constitutional requirements.

[34] 380 U.S. 400 (1965).

[35] *Id.* at 404. It should be noted that the sixth amendment right of confrontation and the rule against hearsay have not been held to be the same thing. *See* C. MCCORMICK § 252 (2d ed. 1972), and cases cited therein for a discussion of this distinction.

[36] *In re* Tsesmilles, 24 Ohio App. 2d 153, 265 N.E.2d 308 (1970).

[37] *E.g., In re* Gladys R., 1 Cal.3d 855, 464 P.2d 127, 83 Cal. Rptr. 671 (1970); *In re* B.L.M., 30 Colo. App. 106, 500 P.2d 146 (1972); *In re* Sippy, 97 A.2d 455 (D.C. App. 1953); *In re* Green, 123 Ind. App. 81, 108 N.E.2d 647 (1952); *In re* Simon, 295 So. 2d 473 (La. App. 1974); *In re* Cromwell, 232 Md. 409, 194 A.2d 88 (1963); *In re* Gressett, ... Miss. ....., 272 So. 2d 921 (1973); *In re* Barkus, 168 Neb. 257, 95 N.W.2d 674 (1959); *In re* D.C., 114 N.J. Super. 499, 277 A.2d 402 (App. Div. 1971); *In re* Farms, 216 Pa. Super. 445, 268 A.2d 170 (1970); Ballard v. State, 192 S.W.2d 329 (Tex. Civ. App. 1946); Rusecki v. State, 56 Wis. 2d 299, 201 N.W.2d 832 (1972); Gilbert v. Commonwealth, 214 Va. 142, 198 S.E.2d 633 (1973).

[38] *E.g., In re* Corey, 266 Cal. App. 2d 295, 72 Cal. Rptr. 115 (1968); *In re* Simmons, 299 So. 2d 906 (La. Ct. App. 1974); *In re* A.H., 115 N.J. Super. 268, 279 A.2d 133 (App. Div. 1971).

stated that "[u]nlike in the adjudicatory hearing, in the dispositional hearing the clinical reports are not only admissible but are frequently indispensible."[39]

Concern has been expressed by the Ohio Supreme Court that an infusion of all the rights or features provided in criminal cases, other than those essential to due process generally would destroy the individualized, remedial nature of adjudication.[40] In spite of this evident desire to maintain flexibility in the juvenile system, the court, prior to *Gault* and the Rules of Juvenile Procedure, has refused to allow the introduction of hearsay which would benefit the child on the ground that the declarant was available.[41]

The Possibilities for Abuse Under Present Law

The scarcity of decisions dealing with the use of hearsay evidence in juvenile delinquency adjudications results not from the rarity of its admision in these proceedings, but rather from the difficulties involved in perfecting appeals of juvenile court decisions. There are several practical reasons for the lack of effective appellate review: the typical juvenile commitment is for only six to nine months, and appeals are difficult to prosecute within such a short period of time; generally children are more passive than adults about asserting their legal rights; appellate courts are often unwilling to overturn juvenile decisions because they think that juvenile judges possess special expertise; and records of juvenile court proceedings are not always prepared.[42] These obstacles eliminate the normal checks on a juvenile judge's power and thus give him great latitude regarding the admission of hearsay evidence.

Social study reports present a more complex problem than does hearsay evidence. There are no ambuiguities in the rules regarding their preparation and use. Rule 32(B) clearly prohibits the court from ordering a social history until there has been either an admission or an adjudication of delinquency. Surveys conducted both prior to and after *Gault* have revealed a widespread use of social histories by juvenile court judges before the child had been adjudged delin-

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[39] *In re* J.F., 17 Ohio Misc. 40, 43, 242 N.E.2d 604, 606 (Juv. Ct. 1968). Note that this decision was rendered four years before the Ohio Rules of Juvenile Procedure took effect.

[40] *In re* Agler, 19 Ohio St. 2d 70, 79, 249 N.E.2d 808, 813 (1969).

[41] *In re* Tsesmilles, 24 Ohio App. 2d 153, 265 N.E.2d 308 (1970).

[42] Nejelski and LaPook, *Monitoring the Juvenile Justice System: How Can You Tell Where You're Going, If You Don't Know Where You Are?*, 12 AM. CRIM. L. REV. 9, 19-20 (1974). It should be noted that although the Cuyahoga County Juvenile Court has made provisions for recording juvenile proceedings, the recording equipment often does not work properly, and the transcribing department is overworked. Rule 37 of the Ohio Rules of Juvenile Procedure provides that a court reporter may be requested, but the request must be made in advance and, of course, paid for by the requesting party. Thus, a transcript is a luxury not seen in many delinquency adjudications.

quent.[43] The mandates of *Gault* and passage of the Ohio Rules of Juvenile Procedure do not appear to have supplied the expected panacea. The injunction on the use of social histories is often overlooked in Ohio; indeed, it is obvious that, in view of the time required to prepare the history, the prohibition must be ignored wherever the dispositional hearing is conducted immediately after the delinquency adjudication.

The current procedures regarding social histories in the Cuyahoga County Juvenile Court illustrate the problem. They have been explained by officers of that court to be as follows:[44] Approximately one week after the filing of a complaint with the juvenile court, the probation department is notified that a social history must be prepared. The probation officers normally allow two weeks to complete these reports. This means that they are usually ready approximately one week before the adjudicatory hearing, as the hearings are scheduled to take place one month after the filing of the complaint.[45] The reports are sent by the probation department's records room to the bailiff of the judge hearing the case at around three-thirty or four o'clock p.m. on the day before the adjudicatory hearing. The bailiff then places the report in the alleged delinquent's file. The file is given to the judge before the child is brought into the courtroom. The probation officer appears at the hearing. At the close of the adjudicatory stage, the dispositional phase begins immediately. At that point the probation officer makes a verbal summary of his findings and recommendations while the judge is glancing over the social study report, supposedly for the first time.

The Cuyahoga County procedure undermines the spirit of Rule 32. Placing the report in the custody of the bailiff before the adjudicatory hearing makes it available to the judge. Even if the judge refrains from actually reading the report, prejudice to the juvenile may result because the judge cannot help noticing both the summary sheet attached to the front of the folder containing the report and the thickness of the report itself.[46] In order to maintain the integrity of the bifurcated juvenile court system, the adjudicatory stage must be completely separated from the dispositional phase. If the juvenile judge has the opportunity to review the report before the adjudicatory

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[43] *See generally* Rose, *Adjudication,* 16 ARIZ. L. REV. 325 (1974); Note, *Employment Of Social Investigation Reports in Juvenile Proceedings,* 58 COLUM. L. REV. 702 (1958); Note, *The California Juvenile Court,* 10 STAN. L. REV. 471 (1958); 5 SYRACUSE L. REV. 67 (1954).

[44] Interviews with probation officers and bailiff, Cuyahoga County Juvenile Court, between December, 1974 and March, 1975.

[45] OHIO R. JUV. P. 29(A) provides an exception where a child is in the detention home. In that situation the adjudicatory hearing may not be held more than ten days after the filing of the complaint unless good cause is shown.

[46] As a matter of practice, the report is usually accompanied by a summary sheet attached to the face of the report. The reports may vary as much as one inch in thickness depending upon the juvenile's past record.

hearing this separation is destroyed. The courts will not countenance any intermingling of the two,[47] because "[t]his procedure affords a necessary protection against the premature resolution of the jurisdictional issue on the basis of legally incompetent material in the social report."[48] Moreover, it does not matter whether the juvenile judge actually reads the report or not. What is important is that he has the opportunity to do so. Even the appearance of impropriety should be avoided.[49]

The Inadequacy of Appellate Review

It has been shown that problems exist not only with respect to the admission of witnesses' testimony including hearsay at the adjudicatory hearing,[50] but also regarding the social histories prepared ostensibly for the dispositional phase. How have the appellate courts dealt with these issues? Is any meaningful review possible? By what standards have appellate courts reviewed juvenile court proceedings when the admission of hearsay is the only error alleged?

In juvenile court proceedings the judge is the trier of fact.[51] Three basic approaches may be taken with regard to hearsay evidence in non-jury trials. The reviewing court may presume that the lower court disregarded improper evidence.[52] The reviewing court may require some assurance from the lower court that it did not consider improper evidence, such as a statement to that effect.[53] The remaining jurisdictions take a stricter view applying the same exclusionary rules to both jury and non-jury trials.[54] Ohio falls into the first category, and will not reverse a decision unless it is shown to be prejudicial to the defendant or that the improper evidence was relied upon in reaching the conclusion that the triers of fact did reach.[55]

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[47] *See In re* Gladys R., 1 Cal. 3d 855, 464 P.2d 127, 83 Cal. Rptr. 671 (1970); *In re* Corey, 266 Cal. App. 2d 295, 72 Cal. Rptr. 115 (1968); *In re* Simon, 295 So. 2d 473 (La. App. 1974); *In re* Simmons, 299 So. 2d 906 (La. App. 1974); *In re* Arnold, 12 Md. App. 384, 278 A.2d 658 (1971).

[48] *In re* Gladys R., 1 Cal. 3d 855, 859-60, 464 P.2d 127, 130-31, 83 Cal. Rptr. 671, 674-75 (1970).

[49] *In re* A.H., 115 N.J. Super. 268, 279 A.2d 133 (App. Div. 1971); ABA CANONS OF JUDICIAL ETHICS NOS. 4 and 34 (1971).

[50] Members of the Arizona Law Review conducted a study on Arizona juvenile courts which substantiated charges that juvenile court judges in Pima County "would allow almost any sort of hearsay to be admitted." Rose, *Adjudication,* 16 ARIZ. L. REV. 325, 357 (1974).

[51] OHIO R. JUV. P. 29(E)(4).

[52] Note, *Improper Evidence in Nonjury Trials: Basis for Reversal?,* 79 HARV. L. REV. 407 (1965).

[53] *Id.* at 408.

[54] *Id.*

[55] *See* State v. Ostrowski, 30 Ohio St. 2d 34, 282 N.E.2d 359, *cert. denied,* 409 U.S. 890 (1972); State v. Bolan, 27 Ohio St. 2d 15, 271 N.E.2d 839 (1971); *In re* Agler, 19 Ohio St. 2d 70, 249 N.E.2d 808 (1969); State v. Shardell, 107 Ohio App. 338, 153 N.E.2d 510 (1958); *In re* Baker, 18 Ohio App. 2d 276, 283, 248 N.E.2d 620, 625 (1969); State v. Blanton, 111 Ohio App. 111, 170 N.E.2d 754 (1960).

Cases protesting the use of hearsay evidence in juvenile delinquency adjudications in Ohio are few, but it is clear that Ohio courts take the most liberal view with regard to its introduction. The Supreme Court and courts of appeals are disinclined to interfere with the decisions of trial judges when they admit or refuse to admit hearsay. It should be noted, however, that in the case where introduction was prohibited, such introduction was sought by the child.[56]

It seems obvious that an adjudication of delinquency based entirely on hearsay will not be upheld. Most reviewing courts have held that since the hearsay was inadmissible in the first instance, they will consider the sufficiency of the evidence disregarding that which was improperly admitted. Thus, many cases are reversed for lack of competent legal evidence.[57] The converse is also true; where the burden of proof is met without resort to the hearsay evidence, its admission will be held harmless error.[58] This application of the "bald presumption" theory,[59] whereby the appellate court assumes that the trial court disregarded any improper evidence, has an inherent weakness. It is unrealistic to assume that a juvenile court judge can simply put out of his mind any hearsay evidence which is presented in the course of a juvenile delinquency adjudication.[60]

Other jurisdictions will overlook the admission of hearsay evidence when the trial judge has made a statement in the record which indicates that it has been disregarded.[61] It logically follows that when the judge reveals that he has not cast the hearsay out of his

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[56] *In re* Tsesmilles, 24 Ohio App. 2d 153, 265 N.E.2d 308 (1970).

[57] *See In re* V., 10 Cal. App. 3d 676, 517 P.2d 1145, 111 Cal. Rptr. 681 (1974); *In re* D.J.B., 18 Cal. App. 3d 782, 96 Cal. Rptr. 146 (1971); *In re* Contreras, 109 Cal. App. 2d 787, 241 P.2d 631 (1952); People v. Pitt, 133 Ill. App. 2d 859, 272 N.E.2d 250 (1971); *In re* Gressett, ... Miss. ....., 272 So. 2d 921 (1973); *In re* Sanders, 168 Neb. 458, 96 N.W.2d 218 (1959); *In re* D.C., 114 N.J. Super. 499, 277 A.2d 402 (App. Div. 1971); Sorrels v. Steele, 506 P.2d 942 (Okla. Crim. App. 1973). *Cf. In re* J.D., 513 P.2d 654 (Alas. 1973).

[58] *In re* Dunston, 12 N.C. App. 33, 182 S.E.2d 9 (1971); Rusecki v. State, 56 Wis. 2d 299, 201 N.W.2d 832 (1972); *In re* Bentley, 246 Wis. 69, 16 N.W.2d 390 (1944).

[59] Note, *Improper Evidence in Nonjury Trials: Basis for Reversal?*, 79 HARV. L. REV. 407, 409 (1965).

[60] On crucial presupposition of the juvenile court philosophy — a mature and sophisticated judge, wise and well versed in law and the science of human behavior — has proved in fact to often unattainable.

PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 80 (1967). If the reader has any doubts on this subject, he is urged to consult D. JACKSON, JUDGES (1974).

> [N]o matter how trained and experienced a Juvenile Court judge may be, he cannot by any magical fishing rod draw forth the truth out of a confused sea of speculation, rumor, suspicion and hearsay.

Holmes Appeal, 379 Pa. 599, 614, 109 A.2d 523, 529 (1954) (dissenting opinion), *cert. denied*, 348 U.S. 973 (1955).

[61] *In re* Joseph G., 7 Cal. App. 3d 695, 87 Cal. Rptr. 25 (1970); *In re* A.H., 115 N.J. Super. 268, 279 A.2d 133 (App. Div. 1971).

mind, his decision will be reversed.[62] The rationale of the decisions[63] taking this position are much the same as those behind *Gault*, but, unfortunately, the results are not as encouraging.

The basic conflict between a judge's discretion and procedural regularity is thus presented. Flexibility is desired, but so is fair treatment. What compromise may be reached? How can the juvenile's right to fundamental due process and fair treatment and the interests of the state be balanced?

Recommendations

As always, it is difficult to ascertain which procedures will best ensure the administration of justice. However, the Supreme Court has mandated the separation of the adjudicatory and the dispositional phases of juvenile delinquency proceedings. The following recommendations endeavor to bring current practices in Ohio closer to the intent of the Supreme Court by helping to eliminate the potential for abuse inherent in the present Rules and to make effective appellate review possible.

Appellate Review

It is not within the scope of this comment to examine in depth the various methods for improving appellate review, however, one recommendation will be made in this respect. Rule 29(F)(3) of the Rules of Juvenile Procedure provides that the court shall "make written findings of fact and conclusions of law" upon request. This should be a mandatory procedure. Where this is done, the reviewing court would not have to resort to assumptions and presumptions which amount to mere speculation and conjecture to determine upon what facts the juvenile court judge based his findings. Balancing the benefits of this requirement to the juvenile against the time and effort which the juvenile judge would be required to expend, there seems to be no doubt that the interests of the juvenile must prevail.[64]

Simply relying on a general statement by the juvenile court judge that improper evidence was not considered will not be enough. Such a statement would become a standard part of every juvenile delinquency adjudication. The judge must state specifically what evidence his decision is based on and which evidence he excluded from consideration. With this type of requirement, the judge would be forced to weigh the facts carefully and objectively.

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[62] *In re* Gladys R., 1 Cal. 3d 855, 464 P.2d 127, 83 Cal. Rptr. 671 (1970); *In re* Steven F., 270 Cal. App. 2d 603, 75 Cal. Rptr. 887 (1969).

[63] *In re* Sippy, 97 A.2d 455 (D.C. App. 1953); *In re* Simmons, 299 So. 2d 906 (La. App. 1974); *In re* Sanders, 168 Neb. 458, 96 N.W.2d 218 (1959); *In re* Steven B., 30 App. Div. 2d 442, 293 N.Y.S.2d 946 (1968); *In re* H.C., 106 N.J. Super. 583, 256 A.2d 322 (Juv. Ct. 1969).

[64] OHIO R. JUV. P. 1. Note that the constitutional rights purpose precedes the expediency purpose.

Social Study Reports

The problem presented by the fact that the social histories are available to the juvenile court judge before the child has been adjudicated delinquent is capable of a simple solution. One recommendation for the elimination of this danger is that a rule should be promulgated which would require a representative of the probation department to verify that the probation report was not given to the judge before the child had been adjudged delinquent.[65] The judge should be able to order the probation report whenever he wants,[66] but it should not be available to him until delinquency has been established (except as already provided in Rules 32 (A) (1) and (4)). Under this procedure the records office of the probation department could hold the social studies until the day of the hearing, and the probation officer could pick up the reports on his way to the hearing. He could then hand the social history to the judge before he summarized its contents. The juvenile judges might object to this procedure because they would not be sure that the reports were ready until the probation officer handed them to the judges. This objection could easily be satisfied by a daily written list from the probation department employee in the records office to the bailiff, naming those persons upon whom reports have been completed for use at the following day's hearings. In the event this procedure was adopted an additional provision would be required for the destruction of these reports if the child was not found to be delinquent.

The weaknesses inherent in such a procedure are obvious. Its enforcement would be extremely difficult and would be complicated by the facts that juvenile court employees are anxious to please the judges, and many judges see nothing wrong with perusing the social history prior to or during the adjudicatory hearing. Therefore, it is proposed that the premature use of social histories be prevented by strict enforcement of Rule 32(B) prohibiting their preparation or use prior to an adjudication of delinquency. If this procedure were followed there would be no need to destroy reports on juveniles found not to

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[65] Such a rule was proposed in Boches, *Juvenile Justice in California: A Re-evaluation,* 19 HASTINGS L. J. 47, 94 (1967) (emphasis added):

> The probation officer should be expressly prohibited from furnishing, and the judge from *receiving or reading,* the probation report until such time as an adjudication has been made.

At least one judge has informally adopted such a policy:

> This writer not only avoids looking at the record, but has instructed the court personnel not to even place the record on the bench so that its thickness or thinness can be observed.

Klein, *A Practical Look at the New Juvenile Act,* 12 DUQUESNE L. REV. 186, 210 (1973).

[66] In this way, there would be no unnecessary delay between the adjudication of delinquency and the dispositional hearing. The attitude of juvenile court judges to the prohibition against ordering social studies prior to an adjudication of delinquency is illustrated by Klein, *A Practical Look at the New Juvenile Act,* 12 DUQUESNE L. REV. 186, 209 (1973), where a judge characterizes such a rule as impractical, inane, and counterproductive."

be delinquent because there would be no such reports prepared in the first place. More importantly, in the vast majority of cases where the juvenile is not confined to the detention home, the child would gain substantial benefits. Generally counsel for a juvenile in a contested delinquency proceeding has little time to prepare for the hearing, and naturally preparation relating to the adjudicatory stage takes precedence over that relating to the disposition. Thus, a delay between the two stages would create an advantage for the child because his attorney would be able to adequately prepare for the dispositional hearing. The delay involved would not be too great because, as indicated previously, it takes approximately two weeks to prepare a social study report. Balancing the child's right to a dispositional hearing immediately following adjudication[67] against the assurance that the judge could not consider the report when determining the issue of delinquency and the greater probability of adequate representation at the dispositional hearing, it would seem that a strict enforcement of Rule 32(B) is preferable.

The arguments for implementation of one of the above recommendations are overwhelming. Under the present system in Cuyahoga County, for example, a juvenile judge may read the report before the adjudicatory hearing. The child may be prejudiced by the judge's perusal of the hearsay and irrelevant comments contained therein. In all likelihood there is no remedy available since, unless it is apparent from the record that the judge read the report, the court of appeals will not interfere. Not many children accused of delinquency have the funds to pay a court reporter, and would be unable to catch the judge's "slip" even if he made one. A child's constitutional rights should not be made to depend upon the whim of a juvenile court judge.

Hearsay During the Adjudicatory Hearing

Rule 29 of the Rules of Juvenile Procedure should be amended to expressly prohibit the use of hearsay evidence except at the request of the child. There are times when the juvenile may wish to introduce hearsay evidence which might benefit him. Two recent cases, one in Ohio and one in Pennsylvania have dealt with this situation. The Pennsylvania case,[68] decided in 1970, involved an attempt by the child to question a police officer regarding any prior inconsistent statements that the state's principal witness might have made to him. The juvenile court judge sustained an objection, but the decision was overturned. The Ohio case,[69] also decided in 1970, involved an attempt by the child to enter as an exhibit a medical examination

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[67] OHIO R. JUV. P. 34(A).

[68] *In re* Farms, 216 Pa. Super. 445, 268 A.2d 170 (1970).

[69] *In re* Tessandilas, 24 Ohio App.2d 153, 265 N.E.2d 308 (1970).

requested by the state and made before the trial. The child was denied the right to enter the report because the examiner was available and this holding was sustained.

The result reached by the Pennsylvania court is the more desirable. The court concluded that "strict adherence to the technicalities of the rules of hearsay does not necessarily lead to the most just finding."[70] Commentary on this decision[71] has advocated the adoption of the position whereby the juvenile could benefit from the hearsay rule both by excluding those things detrimental to him and by introducing favorable evidence.[72] By allowing the child to exclude hearsay testimony, he is able to exercise his constitutional rights as guaranteed by *Gault*. It must be remembered that even though the juvenile proceedings are adversary in nature, it is not always true that when one side receives a benefit the other suffers a detriment. In this situation the main interest of the state is seeing justice done. A rule such as the one proposed seems to be the type of informality that was contemplated in the desire to retain flexibility in juvenile procedures.

Until Rule 29 is so amended, it should be remembered that Rule 32(A)(1) provides a method by which the child can introduce one form of hearsay, his social history, at the adjudicatory hearing. It is a tool worth consideration. Of course the juvenile cannot control what goes into the report nor what subjects it covers, but in most cases the probation officer who prepares the report will investigate matters favorable to the juvenile if he is so requested.

Conclusion

Among the rights granted to juveniles by *Gault* was the right not to have hearsay evidence considered by the trier of fact when determining delinquency. Ohio practice is still (eight years later) unable to guarantee juveniles this right. The Ohio Rules of Juvenile Procedure do not clearly prohibit the use of hearsay evidence in delinquency adjudications, and judicial review of these decisions has not been effective in discouraging its use. A particular problem is presented by the premature use of social histories. Although the rules prohibit their preparation prior to an adjudication of delinquency, this provision is generally ignored for reasons of expediency. This

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[70] *In re* Farms, 216 Pa. Super. 445, 450, 268 A.2d 170,175 (1970).

[71] 9 DUQUESNE L. REV. 696 (1971).

[72] Such a rule has been advocated with regard to criminal proceedings. "A miscarriage of justice should not be risked by shutting out any evidence for the defense, even though it may be hearsay." D. LOUISELL, J. KAPLAN & J. WALTZ, CASES AND MATERIALS ON EVIDENCE 39 (2d ed. 1972).

practice allows the judge access to the social histories consisting mostly of hearsay and irrelevant material prior to his decision regarding delinquency.

These problems illustrate the subversion of the Supreme Court's intent to create a bifurcated system. The modifications to Rules 29 and 32 of the Ohio Rules of Juvenile Procedure would leave no doubt as to the impropriety of considering hearsay evidence when determining delinquency, and requiring written findings of fact and conclusions of law would greatly facilitate the task of reviewing courts. The solutions presented will not revolutionize the field of juvenile law, but they are an important step toward complying with the *Gault* decision and should thus be adopted.

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