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Constitutional Rights in Juvenile Court

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ON JUNE 20, 1966, the United States Supreme Court noted that it had probable jurisdiction in the case of *In Re Gault*.[1] Ten months and three weeks later, the Supreme Court reached a landmark decision on judicial handling of juvenile delinquency matters.[2] During this interim, the probable outcome and effect of *In Re Gault* was the subject of much discussion among members of the bench and the bar. The decree has been both eagerly anticipated and reluctantly awaited. On May 15, 1967, the court handed down a ruling that many of the constitutional procedural protections previously observed only in adult trials are also applicable to children in juvenile court proceedings.[3] This decision portends a major change in the manner in which most of the nation's three thousand juvenile courts have been functioning. The significance of this Supreme Court decision can be appreciated only when one has an adequate understanding of the law prior to May 15, 1967. It is the purpose of this article to provide that understanding.

Historical Background

The earliest juvenile code known to man is found in the bible—(Deuteronomy 21:18-21):

> If a man have a stubborn and rebellious son, that will not hearken to the voice of his father, or the voice of his mother, and though they chasten him, will not hearken unto them; then shall his father and his mother lay hold on him, and bring him out unto the elders of his city, and unto the gate of his place; and they shall say unto the elders of his city: "This our son is stubborn and rebellious, he doth not hearken to our voice; he is a glutton and a drunkard." And all the men of his city shall stone him with stones, that he die; so shalt thou put away the evil from the midst of thee; and all Israel shall hear, and fear.[4]

The biblical law made no distinction between the acts of a man and the acts of a child. Children charged with offenses against society were subjected to the same punishments as adults and paid the full price for their misconduct.

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1 384 U.S. 997 (1966).

2 In Re Gault, 387 U. S. __, 35 U.S.L.W. 4399 (May 15, 1967).

3 A few jurisdictions had already passed legislation granting these procedural protections, New York and California in particular. N.Y. Civil Laws—Family Act 246; Cal. W. & I. C. 634.

4 The Holy Scriptures according to the Masoretic text, The Jewish Publication Society of America (5677-1917).

The first real attempt at specialized treatment for young offenders was a long time in coming. It had its beginnings in the chancery courts of fourteenth and fifteenth century England. An awareness gradually evolved that imbeciles and children of tender years were really not as responsible for their actions as they had previously been held to be. It was at this time that the English common law concept of "Parens Patriae" took root, and equity courts were set up for those accused who were in special need of aid. The Parens Patriae doctrine held that the king, as father of the country, had the right and duty to look after and care for those members of the kingdom who were incapable of taking care of themselves due to tender age or other disability. In effect, it gave the crown jurisdiction over the person and property of a minor.[5]

When the English colonists came to America, they brought with them the common law of the mother country, and the rights and duties of the king eventually became the rights and duties of the state governments. But despite the early assumption of state protective authority over those of tender years, the legal annals continued to be filled with cases of children suffering severe punishments for unacceptable behavior. In fact, prior to the nineteenth century, any child who had reached the age of criminal responsibility (usually seven, but seldom higher than ten or twelve) paid the same penalty for an offense as an adult. The criminal law concept that "like cases should be treated alike" applied. By the turn of the century the harshness of this law finally culminated in a revision of society's attitudes toward the treatment of minors.

In 1899, the first special court for children was established at Cook County, Illinois. The 1899 Illinois Juvenile Act was the model upon which all of the states were to pattern their development, and marked the beginning of an enlightened attitude toward wayward children. Juvenile delinquency was now to be treated as something less than criminal activity. The deterrent of punishment was discarded, and the more sophisticated techniques of correction and rehabilitation were to be employed. The statute provided for a special courtroom, friendly supervision by probation officers, placement outside of the home, and, in general, commitments to training schools rather than jails. Children under twelve were forbidden to be committed to jail, and it was unlawful to confine or bring a child into the same building, yard, or enclosure where adult convicts were placed. The act eliminated most of the features of a criminal proceeding and provided that a child's care, custody, and discipline should approximate that which should be given by the parents.[6]

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[5] 15A C.J.S., Common Law § 1; The *Parens Patriae* doctrine has since developed into one of the most fundamental concepts upon which our juvenile tribunals have relied. It is used today as an expression of the inherent power and authority of the state to provide protection of the person and property of a minor. 31 Words and Phrases, "Parens Patriae."

[6] Laws of Ill. (1899).

Today, the Federal Government[7] and every one of our fifty states have legislation dealing with special courts for children. The modern juvenile code provides for a sociological setting whereby investigative reports on the child and his family are used, in conjunction with possible clinical evaluations, to help in determining just what the child's problems are and the best way to help him overcome them. All of the statutes are written so as to provide for a relaxation of the procedural rules applicable to criminal matters and a consequent atmosphere of informality in the juvenile courtroom. It is hoped that in this way the delinquent child will more freely discuss his misdeeds and two results will have been accomplished: (1) the court will more easily be able to ascertain the facts in the case, and (2) the child in freely discussing his involvement will now be on the road toward a more healthy rehabilitation.

> To help the child change his attitude, a clean breast, a confession, is a primary prerequisite, a sine qua non. Otherwise the court would be aiding the child to build his future on a foundation of falsehood and deceit, to build his house on sand instead of the rock of truth and honesty.[8]

The "Means"

The laudable ends of juvenile court legislation have had few critics. Who can argue against lending a helping hand to a youngster in need? The means used by our courts to reach the lofty ideals of correction and rehabilitation have, however, been the subject of serious debate over the past fifty years. The means employed have entailed an almost wholesale renunciation of the Fourth, Fifth, and Sixth amendments to the United States Constitution. An extreme example is evident in the following opinion:

> The child, herself, having no right to control her own action or to select her own course of life, had no legal right to be heard in these proceedings. Hence, the law which does not require her to be brought in person before the committing officer or extend to her the privilege of a hearing on her own behalf cannot be said to deprive her of the benefit of due process of law.[9]

The principal justification for the renunciation of Constitutional guarantees has been that juvenile proceedings are considered civil and not criminal in nature.

> . . . Juvenile Courts *are not criminal courts,* the constitutional rights granted to persons accused of *crime* are not applicable to children brought before them. . . .[10]

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[7] Juvenile Court Act of the District of Columbia, Act of Mar. 1906, 34 Stat. 73, as amended by Act of June 1, 1938, Dist. of Columbia Code § 11-902, 1961 edition, vol. 1, p. 589.

[8] Alexander, Constitutional Rights in Juvenile Court, 46 A.B.A.J. 1206-1209 (1960).

[9] Rule v. Geddes, 23 App. D. C. 31, 50 (1904).

[10] In Re Holmes, 379 Pa. 599, 109 A.2d 523, 525 (1954).

> Such claims [of unconstitutionality], however, entirely overlook, in our opinion, the basic concept of a Juvenile Court. 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. . . . No suggestion or taint of criminality attaches to any finding of delinquency by a Juvenile Court.[11]

This type of reasoning has not been universally followed. In fact, it has been severely criticized by some courts.

> While the juvenile court law provides that adjudication of a minor to be a ward of the court shall not be deemed to be a conviction of crime, nevertheless, for all practical purposes, this is a legal fiction, presenting a challenge to credulity and doing violence to reason. . . . Surely a minor charged in the juvenile court with acts denounced by law as a felony does not have lesser constitutional statutory rights or guaranties than are afforded an adult under similar circumstances in the superior court.[12]

> Ineluctable logic leads to the conclusion that the constitutional protection against double jeopardy, as in the case with the right of counsel and the privilege against self incrimination, is applicable to all proceedings, irrespective of whether they are denominated criminal or civil, if the outcome may be deprivation of liberty of the person. Necessarily, therefore, this is true of proceedings in the Juvenile Court. Precious constitutional rights cannot be diminished or whittled away by the device of changing names of tribunals or modifying the nomenclature of legal proceedings. The test must be the nature and the essence of the proceeding rather than its title. If the result may be a loss of personal liberty, the constitutional safeguards apply.[13]

But these opinions have been few and far between. The majority of opinions have continued to rely on the "non criminal" status of the proceedings in overriding cries of unconstitutionality.

Another reason advanced for the renunciation of constitutional guarantees is that strict adherence to the Constitution would increase formality and detract from the social atmosphere of the court. Formalizing procedures would prevent the court from learning "important facts as to the child's character and condition which could only lead to the child's detriment." [14] It has been suggested that not only would the child suffer,

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[11] *Ibid.*

[12] In Re Contreras, 109 Cal.App.2d 787, 241 P.2d 631, 633 (1952).

[13] United States v. Dickerson, 168 F.Supp. 899, 901-902 (D.D.C. 1958); reversed on other grounds, 271 F.2d 487 (D.C. Cir. 1959).

[14] Whitlatch, The Lawyer in the Juvenile Court, Cleve. Bar Ass'n. J. 2 (April 1950).

but the community as well, because of the tremendous practical problems (for example, lengthy jury trials) which would be incurred.[15]

It has also been urged by one eminent jurist that, since the juvenile courts have adopted the solicitous, non-adversary approach, there is really little occasion to observe the Bill of Rights. The overwhelming number of youngsters brought before the juvenile bench admit their misdeeds and there is consequently little need for constitutional safeguards in the fact finding process.[16] Another authority has contended that there should be really no question as to the constitutionality of juvenile court laws. It is reasoned that since the Parens Patriae theory antedates all constitutions, the constitutions must be and are, in fact, construed in light of Parens Patriae.[17]

Due Process

The prevailing philosophy among juvenile tribunals has been that a minor's rights are determined not from the application of clauses in the Constitution having to do with criminal cases, but rather from the requirements of fair treatment and due process.[18] The determination as to what is fair treatment has generally depended upon the facts in the individual case. Due process, on the other hand, has been more of a problem. Although some courts have seemed to imply that a minor is not entitled to due process,[19] the overwhelming majority have at least gone so far as to hold that a juvenile is entitled to due process. The real problem has been to determine what is meant by due process. A New Mexico court came close to a definition of due process by stating what it did not include. According to the Supreme Court of that state, due process of law in juvenile cases did not necessarily incorporate the protection against double jeopardy or self incrimination, the right to a jury trial or appeal, or the right to require a record to be made of the evidence.[20] Due process has also been held in other courts to not necessarily include the right to counsel.[21] Bail, grand jury indictment, speedy and public

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[15] Senator Hennings, Effectiveness of the Juvenile Court System, in, Federal Probation, 7 (June 1959).

[16] Young, The Constitution and the Juvenile Court—Letter or Spirit, 44 J. Amer. Jud. Soc. 93, 95 (1960).

[17] Brown, Constitutional Problems of Juvenile Court Law, 50 Women Lawyers J. 89 (Summer 1964).

[18] Shioutakon v. District of Columbia, 236 F.2d 666 (D. C. Cir. 1956); Pee v. United States, 274 F.2d 556 (D. C. Cir. 1959). The latter case also cites other authorities in Appendix B, p. 563.

[19] Rule v. Geddes, *supra* n. 9.

[20] In Re Santillanes, 47 N.M. 140, 138 P.2d 503 (1943).

[21] White v. Reid, 125 F.Supp. 647 (D. D. C. 1954); In Re Holmes, *supra* n. 10; People v. Fifield, 289 P.2d 303 (Cal.App. 1955); In Re Shaeffer, 126 A.2d 870 (Mun. Ct. App. D.C. 1956).

trial, and confrontation of accusers have also been excluded.[22] By and large, the courts have been very reluctant to lay down specific constitutional guarantees which are applicable in all juvenile cases.

Particular Rights

DOUBLE JEOPARDY: A great number of our courts have held that a minor may be adjudged delinquent, committed under the juvenile court laws, and later prosecuted in the criminal courts for the same act.[23] This has been justified on the expedient civil status of juvenile cases, and consequent non-applicability of the constitutional safeguard against double jeopardy. The obvious impropriety of such action has induced many states to incorporate, by statute, bans against such practice.[24]

SPEEDY AND PUBLIC TRIAL: It seems apparent that a juvenile is under no less a burden than an adult in awaiting trial. The anxiety involved in a lengthy wait, plus the possible loss of important witnesses, should compel a speedy trial in both juvenile and adult cases. But the few cases which have decided on a juvenile's right to a speedy trial have generally held that the constitutional guarantees are not applicable.[25]

There has been much more debate on the subject of the juvenile's right to a public trial. It has been urged that an open public trial would serve as a deterrent for overzealous judges who in their haste to "protect" the child, might overlook the fundamental fairness which every hearing requires. Conversely, it has been argued that to open the juvenile court to the eyes of the public would put a stigma on the minor and retard the process of rehabilitation. Most jurisdictions have sided with the latter and have denied the juvenile's right to a public trial.[26]

TRIAL BY JURY: Since a juvenile hearing is not a "trial," the majority of courts have held that a jury trial is not part of due process of law as that phrase is understood in juvenile proceedings.[27] In fact, in the absence of a state statute so providing, almost all courts have held that a juvenile cannot demand a jury trial.[28]

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[22] Pee v. United States, *supra* n. 18 at 563. For an extensive treatment see Paulsen, Fairness to the Juvenile Offender, 41 Minn. L. Rev. 547 (1957).

[23] In Re Santillanes, *supra* n. 20 (1943); People v. Silverstein, 121 Cal.App.2d 140, 262 P.2d 656 (1953); Matter of McDonald, 153 A.2d 651 (Mun. Ct. App. D.C. 1959); In Re Smith, 114 N.Y.S.2d 673 (Dom. Rel. Ct. N.Y. City 1952).

[24] A typical example is Ohio Rev. Code § 2151.35 ". . . any evidence given in the court shall not be admissible as evidence against the child in any other case or proceeding in any other court. . . ."

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

[26] White v. Reid, *supra* n. 21; State v. Cronin, 220 La. 233, 56 So.2d 242 (1951); Dendy v. Wilson, 142 Tex. 460, 179 S.W.2d 269 (1944). The exclusion of the public is discretionary in New York and New Jersey.

[27] Commonwealth v. Fisher, 213 Pa. 48, 62 A. 198 (1905); In Re Santillanes, *supra* n. 20; Wissenburg v. Bradley, 209 Iowa, 813, 229 N.W. 205 (1930).

[28] See 100 A.L.R.2d 1408, for a listing of cases state by state.

In addition one writer has suggested that

> Practical considerations also, including long, crowded calendars, usual absence of attorneys, customary informality and the non-adversary character of proceedings, have made trial by jury in juvenile court cases incompatible and inappropriate, if not impossible.[29]

RULES OF EVIDENCE: In a criminal case, the court is required to find proof "beyond a reasonable doubt" before it can convict an accused person. A much less weighty measure—preponderance of the evidence—is used in juvenile cases. Although a juvenile court may be termed civil, it nevertheless has the power to commit a minor to a confining institution. It seems that due process of law should demand equal degrees of proof before taking away the liberty of an individual, whether in a criminal proceeding or in a juvenile hearing. The courts, however, have felt otherwise, and reasoned that they must be less restrained on procedural matters in order to ascertain the truth and better provide for the protection of the child. The legal justification has again been the civil nature of the inquiry.[30]

CONFRONTATION OF WITNESSES AND HEARSAY EVIDENCE: Fair play and due process of law require that an accused must have the right to face his accusers and question them about their testimony. Most state courts have agreed with this philosophy and have extended it into juvenile hearings. They have not allowed minors to be adjudged delinquent on hearsay evidence alone.[31]

> There must be a trial; the charge against the child cannot be sustained on hearsay or surmise; the child must first have committed the act of burglary or of larceny before it can be convicted of being a delinquent child. The act remains and the proof of the act is equally necessary whether we call it burglary, larceny, or delinquency. The name may change the result; it cannot change the facts.[32]

Some juvenile courts, however, have gone beyond these confines and allowed evidence that was clearly hearsay.[33] They have justified such action on the basis that confrontation takes up the time of both witnesses and the court, introduces an atmosphere of formality into the courtroom and gives more publicity to the child's problems.[34]

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[29] Bretenbach, Due Process of Law for Juveniles Revisited 37 J. of State Bar of Cal. 32 (1962).

[30] People v. Lewis, 260 N.Y. 171, 183 N.E. 353 (1932); Garner v. Wood, 188 Ga. 463, 4 S.E.2d 137 (1939); Robinson v. State, 204 S.W.2d 981 (Tex. Civ. App. 1947); State v. Shardell, 79 Ohio L. Abs. 534 (1958).

[31] In Re Contreras, *supra* n. 12; In Re Sippy, 97 A.2d 455 (Mun. Ct. App. D.C. 1953); Krell v. Mantell, 157 Neb. 900, 62 N.W.2d 308 (1954).

[32] People v. Fitzgerald, 244 N.Y. 307, 155 N.E. 584, 587 (1927); Also discussed in People v. Lewis, *supra* n. 30.

[33] In Re Holmes, *supra* n. 10.

[34] Shears, Legal Problems Peculiar to Children's Courts. 48 A.B.A.J., 719, 721 (1962).

SELF INCRIMINATION: The privilege against self incrimination supposedly exists in all proceedings: criminal, civil, and administrative. Indeed, a state appellate court, in 1920, released a minor on a writ of habeas corpus when it was shown that the reason for his incarceration was his refusal (on advice of his counsel) to answer certain questions.[35] The usual rule in juvenile cases has been otherwise, however, with the oft-repeated "non-Criminal" nature of the proceedings generally being used to justify making the minor answer incriminating questions. This has been done even though the privilege applies to civil as well as criminal proceedings. Proponents have asserted that the best results can often be obtained by encouraging the child to speak freely.[36] One authority has asserted that the hearing should be part of the treatment process, and that it cannot perform this function if the child is told that he can remain silent and need not talk about the situation in which he finds himself.[37] These sociological aspects have seemed to take precedence over the Fifth Amendment.

RIGHT TO COUNSEL: There are only a few cases holding that the right of counsel in juvenile court is absolute under the fifth amendment due process of law clause. Some courts have circumvented the problem of constitutional interpretation by holding that the right to counsel in juvenile courts stems from the state statutes.[38] An interesting decision reached by one court has held that only when the lack of representation of the minor results in an undue advantage being taken from him, is he denied due process.[39] The general trend in most jurisdictions has been to hold that state statutes, dealing with juvenile courts, were enacted with a view toward enlarging the protections of the Constitution, not restricting them.[40]

The right to be represented by counsel is unquestionably the most important right in any proceeding. Without it, all of the other rights lose their value.

> The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He

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35 In Re Tahbel, 46 Cal.App. 755, 189 P. 804 (1920).

36 Procedures and Evidence in the Juvenile Court. Advisory Council of Judges of the National Council on Crime and Delinquency (1962).

37 Paulsen, *supra* n. 22, at 561.

38 Shioutakon v. District of Columbia, *supra* n. 18; McBride v. Jacobs, 247 F.2d 595 (D.C. Cir. 1957); In Re Poulin, 100 N.H. 458, 129 A.2d 672 (1957). For a list of states that have enacted such legislation and the relevant texts see Lawyers in Juvenile Court 4-14 (January 1964).

39 People v. Dotson, 46 Cal. 2nd 891, 299 P.2d 875 (1956).

40 In Re Poff, 135 F.Supp. 224 (D.D.C. 1955); Application of Johnson, 178 F.Supp. 155 (D.C.N.J. 1957).

> is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect.[41]

The need for counsel in juvenile court was ably pointed out in a recent article.

> To say that the children's court judge, dedicated or otherwise, can represent both petitioner and respondent in a disputed issue is unrealistic. The principal function of a presiding judge during the course of a trial is to conduct it in a fair and impartial manner.
>
> If compelled to take on the roles of prosecutor and defense attorney in addition, there may be the human tendency at times for him to overzealously associate himself with one of the added roles to the detriment of his impartiality.[42]

The moral justifications advanced for the denial of the right to counsel appear very weak. Such arguments have emphasized the inability of attorneys to function in a social, non-adversary setting and have again asserted that the informality of the court might be dangerously jeopardized. They have maintained that the juvenile judge has the best interests of the child at heart, and, therefore, an attorney could provide little benefit in such proceedings. In fact, the attorney may do harm in the juvenile court by attempting to get his client "off" instead of trying to work with the court in finding the solution to the child's problems.

The unrestricted right to counsel, even in civil matters has been stated in no uncertain terms.

> If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such refusal would be a denial of a hearing and therefore, of due process in the constitutional sense.[43]

And yet many courts have felt that in a juvenile case the minor does not have a right to counsel as a matter of due process.[44] The reasoning again

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[41] Powell v. Alabama, 287 U.S. 45, 68-69 (1932). Although this is a criminal case, the arguments are just as forceful, if not more so, in a juvenile hearing.

[42] Schinitsky, The Role of the Lawyer in Children's Court, 17 The Record (Assoc. of the Bar of the City of New York) 10 (1962).

[43] Powell v. Alabama, *supra* n. 41, at 69.

[44] Akers v. State, 114 Ind.App. 195, 51 N.E.2d 91 (1943); White v. Reid, *supra* n. 21; In Re Schaeffer *supra* n. 21; People v. Fifield, *supra* n. 21; People v. Dotson, *supra* n. 39.

has been that the juvenile court is not criminal in nature and, therefore, the constitutional safeguards do not apply. In the face of the above quotation, such logic defies comprehension.

Conclusion

In a recent article dealing with juvenile court procedures, it is stated that constitutional guarantees are not what are needed because in juvenile courts which function as they should, no child's rights are impaired.[45] This reasoning appears to be begging the question. How are we to be assured that no child's rights are impaired unless we follow the Constitution? It may be that certain rules can bear relaxing in the interest of the correction and rehabilitation of the child, but the blanket dismissal of important constitutional guarantees, such as many of our courts have sanctioned in the past, cannot be morally justified. "The father may rightfully demand that the tie of blood shall be cut only by the sword of constitutional justice.[46]

The Supreme Court, in its recent 8-1 decision, has now made it mandatory upon juvenile courts to observe constitutional guarantees of due process and fair treatment in four major areas:[47]

1. The particular alleged misconduct must be set forth in the written notice, and the notice must be timely, so as to permit preparation in advance of the hearing.
2. The parents and their child must be notified of their right to counsel and, if indigent, to court appointed counsel.
3. The child must have adequate warning of the privilege against self-incrimination and his right to remain silent.
4. The child must be afforded the right to confront and cross-examine the complaining party and any other witnesses.

Many critics of the *In Re Gault* decision have implied that the court has taken an unnecessary step in that most juvenile courts have not been exceeding constitutional bounds. If this be true, then the decree can cause little concern. If not, then it is long overdue. In the interest of justice and the child, it is hoped that it will be swiftly implemented.

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[45] Young, *supra* n. 16, at 98.

[46] Waite, How Far Can Court Procedure Be Socialized Without Impairing Individual Rights, 12 J. Crim. L. & Crim. 344 (1921-1922).

[47] In Re Gault, *supra* n. 2.