North Dakota Law Review

Volume 45 | Number 2 Article 3

1968

Should Children Be as Equal as People

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SHOULD CHILDREN BE AS EQUAL AS PEOPLE?

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In the beginning it was written that "all men are created equal." The words carried a magic in their simplicity; even though those who declared them really meant only that all white, adult, propertied, Christian males are created equal. But the words as they were written have been a lodestone: the restrictive adjectives are being removed, each with its own struggle. The courts say that non-whites are equal, legislatures write laws commanding it. Property is only distantly remembered as a qualification for equality, lack of it is now an assurance that all the essentials of life will come free. The church is so well protected by its separation from the state that it has substantially lost its influence on public affairs. Males are struggling for equality. Now the last adjective is being assaulted. From Berkeley to Columbia, from Kent to Gault, from Hashbury to hair-do's from vodka to voting to Viet, the non-adults are demanding equality. But should children be as equal as people?

> . . . nor shall any state . . . deny to any person . . . the equal protection of its laws.

Should children go before children's courts, or, if they are equal should they go before "real" courts — with real prisons? Should children have extra laws, such as for drinking, smoking, curfew, disobeying teachers, or, if they are equal, should they only be charged for "grown-up" offenses? — and drink what they please. Should children who commit criminal offenses with dangerous weapons be treated as dangerous criminals? — even if they're only seven years old. If a woman is married to a drunkard, she can get a divorce; but can a child, if his mother is a drunkard?—and where does he go next. If a man's home provides him no satisfactions, he moves on; should a child? — can a child?

Should people be as equal as children? All children are provided a free education; are adults denied equal protection of the laws if they must pay? All children receive food, shelter, and cloth-

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ing with no strings attached; is it unconstitutional not to do the same for adults? All children are virtually guaranteed a woman's loving care; are all men entitled to the same guarantee? Should people be as equal as children?

I. EQUAL PROTECTION

A. Counsel?

> . . . no single action holds more potential for achieving procedural justice for the child in the juvenile court than the provision of counsel.[1]

> The juvenile needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it.[2]

The question is no longer whether counsel should be provided, but when, and in what depth. Consider: at the arraignment, the court offers to appoint a lawyer and to continue the case for a few days to allow consultation. Because it would mean an additional hearing, an additional half-day's pay lost, the family rejects the offer. Is the child denied counsel?

Consider: the child desires an attorney and the parents have adequate money but refuse to spend it for a lawyer's fee. Is counsel a necessity for which the parents must pay? Can the court order them to pay on pain of contempt or can the court charge the fees to the long-suffering taxpayers?

Consider: the Bar Association provides a list of lawyers who have volunteered to represent juveniles, but none of the lawyers have read *Gault*, the Juvenile Code, or "Standards for Juvenile and Family Courts."[3] Is the child proffered knowledgeable counsel? Can such counsel comprehend the various and delicate interrelationships of court, child, parent, probation officer, police, public, press, school, peers, or institutions? Can any non-metropolitan court afford to have specialized counsel always available?

Consider: should counsel advocate what the child, his client, wants — what the parents think best for the child — or what counsel thinks best for the child?

Consider: should counsel see only the clerk's file? Or should he also see the police file, the social history and the social worker's notes and sources? Further, should counsel be given access to

1. REPORT OF THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 86 (1967).
2. In re Gault, 387 U.S. 1, 36 (1967).
3. CHILDREN'S BUREAU, DEP'T OF HEALTH, EDUCATION, AND WELFARE, PUB. NO. 437, STANDARDS FOR JUVENILE AND FAMILY COURTS (1966).

school and psychological data? If all of these should be provided, how much time and how many lawyers will be needed?[4]

Counsel is a constitutional necessity, which should be chargeable to the parents. He should insist upon time to acquaint himself with the facts and the law, hear all that the court sees and hears, cross-examine those who purvey information or opinion to the court and advocate that which his client would seek if his client were mature of thought.

B. Care?

> . . . the evidence discloses that . . . [the parents] are caught in a vicious circle of physical incapacity, emotional strain, and financial distress beyond their capabilities to master. The net result has been a destruction of any reasonable hope for a home environment compatible with the welfare of the three young children.[5]

Children are entitled to parental care. Obviously, if parents can not, or will not, provide adequate care, society intervenes with expert social counselling. If this is not sufficient, the children are removed temporarily while the parents and the home are brought up to minimal standards. If, despite the best available efforts, there is no hope of achieving such standards, the children are removed permanently and placed for adoption or made wards of the state. It is neat and efficient — and frightening in its aspect of the social camel's nose prodding under the parental tent. Four words determine whether parents keep or lose their children: 'adequate care' and 'minimal standards.' The parents are charged with child neglect. They are told they may lose their children, which, among other reactions, they feel as a personal insult. They fight back, hard.[6] As in delinquency, the court becomes more involved in yesterday's muck than in tomorrow's help — and the help is made that much harder to accept.

What is "care" becomes important. Physical care: food, shelter, housing, these are easy to measure. Supervisory care: awareness and control of the child's conduct and teaching self-discipline,

4. "In [disposition] hearings . . . all evidence helpful in determining the questions presented, including oral and written reports, may be received by the court . . . [T]he parties or their counsel shall be afforded an opportunity to examine and controvert written reports so received and to cross-examine individuals making the reports. Sources of confidential information need not be released." UNIFORM JUVENILE COURT ACT § 29-d (promulgated July 30, 1968, by the National Conference of Commissioners on Uniform State Laws). This position was endorsed by the National Council of Juvenile Court Judges at their annual convention in Chicago, June 25, 1968, but with a vigorous and almost unanimous dissent to the last phrase.

5. Kennedy v. State, 277 Ala. 5, 166 So.2d 736, 737 (1964).

6. "When existing parent-child relationships fail to meet—or allegedly fail to meet—commonly accepted community standards, an intense human drama almost inevitably develops." Todd v. Superior Court, 68 Wash.2d 587, 414 Pac.2d 605, 606 (1966).

these can also be measured, though far too often they are measured in a delinquency proceeding rather than a neglect proceeding. "Parental neglect, excessive weakness, categorial leniency destroy respect for the law and for those charged with its enforcement."[7] Emotional care: giving the child love, an identity and a sense of security are difficult to measure and yet they are possibly the most important elements for a stable society. "When I did something good, I should have gotten some gratitude or something; and when I did something wrong, I wasn't punished enough. (My parents) just didn't care very much about me."[8]

Society, and its courts, should be concerned with what children need, not with muck-raking and labelling what they and their parents have done. The focus should be forward: to provide for future needs, not backward: to correct for past misdeeds.

II. EQUAL PRIVACY

A. Silence?

> The privilege can be claimed in any proceeding, be it criminal or civil, administrative or judicial, investigatory or adjudicatory.[9]

If the police are questioning a boy about rape, as in *Kent*; or threatening phone calls, as in *Gault*, it is obvious and easy to say that the accused is entitled to silence, and to be told of his right to it. "He needs someone on whom to lean lest the overpowering presence of the law, as he knows it, . . . crush him."[10] "[T]he statements of adolescents under 18 years of age who are arrested and charged with violations of law are frequently untrustworthy and often distort the truth."[11]

> [I]t seems probable that where children are induced to confess by 'paternal' urgings on the part of officials and the confession is then 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.[12]

Silence is golden and the right to it can be precious. But there are problems. Confessing to a policeman is rather obviously a prelude to unpleasant consequences; but what of confessing to a school

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7. J. Edgar Hoover, Remarks to Masons, Oct. 1965.
8. Comment by an anonymous parolee from Minnesota State Training School for Girls on "Open Mike for Teens", WCCO Radio, Minneapolis, March 5, 1967.
9. In re Gault, *supra* note 2, at 47, *quoting from* Murphy v. Waterfront Commission, 378 U.S. 52, 94 (1964) (concurring opinion).
10. Haley v. Ohio, 332 U.S. 596, 600 (1948).
11. In the Matter of Four Youths, 89 Wash. L. Reporter 639 (1961), *as quoted in* In re Gault, *supra* note 2, at 55.
12. In re Gault, *supra* note 2, at 51-52.

principal or a coach who passes it on to the police? Should school principals or coaches be required to give the *Miranda* warning? Testifying at a court trial is at the very vortex of unpleasant consequences; but what of testifying at a parent inquiry which results in loss of driving privileges, an early curfew, or a spanking? May children take the Fifth Amendment with all authority? And if not all, then should the child have the protection of privileged communication as to those with whom he has no right of silence?

A child should have the right of silence in all matters with the police, and in investigations by the schools and other public agencies of conduct criminal for adults; and his communications on child offenses to the schools and on all matters with his parents should be privileged.

B. Hearsay?

. . . the court conferred privately with the daughter. . . .[13]

When should children testify? Tests for determining their competency are well settled: respect for the oath and capacity to relate observed facts.[14] But when should they *have* to testify? It is common in custody fights for one party to demand that the child be brought forth and ordered to state her preferences publicly with both parents watching, and then the other side demands to cross-examine. How cruel must courts be? Some courts clear the courtroom of all except counsel and the reporter and all questions are put by the judge. But the child knows, and is afraid and confused — and the child's susceptibility has been propagandized by the person who brought her to court. Hence, this procedure is almost as cruel and almost as meaningless. Some judges interview the child alone, without record or counsel. But this is a denial of confrontation, and any appeal taken is at least partially without transcript. Moreover, this procedure only slightly lessens the fear, propaganda — and the trauma. Children talk best in their native habitat. What they say when pressures of emotion and strangeness are absent is more apt to be true, somewhat analogous to *res gestae*. Obviating the need for children to come into court will prevent trauma to the children, trauma which accomplishes little since court testimony of children is not very reliable.

Under reliable circumstances, out of court statements made by children pertaining to their relationship with their immediate family should be admissible as an exception to the hearsay rule.

13. Aske v. Aske, 233 Minn. 540, 543, 47 N.W.2d 417, 419 (1951).
14. State v. Triblett, ————Minn.————, 162 N.W.2d 121 (1968).

C. Search?

> We can agree that the father's "house" may also be that of the child, but if a man's house is still his castle in which his rights are superior to the state, those rights should also be superior to the rights of the children who live in his house. We cannot agree that a child . . . has the same constitutional rights of privacy in the family home which he might have in a rented hotel room.[15]

The watchword in recent appellate decisions is that children are entitled to "fairness." Unreasonable search and seizure is as certainly barred by "fairness" for juveniles as it is by "civil rights" for adults. So far the answer is simple, but with children there are the problems that come from dependence. Can school officials search a child's locker for marijuana — or .38's? Can a probation officer search a child for switchblades — or zips? Can a YMCA director search a child's tote basket for LSD — or yellow jackets? Can a parent search a child's dresser for stolen records — or hub caps? Somewhere there is a line. Parents cannot be reduced to search warrants nor school principals to Miranda warnings — or can thay? If equality is the principle, if children are as equal as people, then children have the same rights to privacy and mothers should not read mail, or diaries, or insist on meeting dates. But, repeat *but,* if parents have a right to invade the privacy of their children, where does inequality stop: at home, church, school, psychologist's office, or the police station? Should inequality stop at age fourteen, seventeen, nineteen, or at emancipation? A cruel rule may be necessary but one which lets parents be parents and schools be schools and doctors be doctors, and lets them inquire into the needs and problems of children and act according to their best judgement.

Those legally responsible for providing children with necessities should be entitled to make, or authorize, reasonable — or unreasonable — searches and seizures.

D. Arrest?

> . . . the law of arrest does not apply to the taking into custody of minors.[16]
>
> Such action shall not be deemed an arrest but shall be deemed a measure to protect the health, morals, and well-being of the juvenile.[17]

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15. State v. Kinderman, 271 Minn. 405, 409, 136 N.W.2d 577, 580 (1965).
16. In re James L. ————Jr., 25 Ohio Op.2d 369, 194 N.E.2d 797, 798 (1963).
17. State v. Smith, 32 N.J. 501, 161 A.2d 520, 534 (1960).

A child may be taken into custody without the safeguards of observation or reasonable suspicion that protect an adult. But what does the child receive in return: a separate place of detention—in some metropolitan areas; friendly and interested counsellors—sometimes; no bars on the windows, no echoing corridors, no clanking locks—just psychiatric screen, shiny tiled walls, and electronic listening. It doesn't seem an even shake! Liberty is at least as precious to children, maybe more so, since time curiously means so much more to children who have so much more of it. Everyone arrested is allowed one phone call. Everyone knows this axiom to be true, even though finding it in any lawbook makes an interesting search. How effective is one phone call to an absent or drunken parent, or to a friend whose mother says he's in bed, or doing his homework, or to a lawyer—and how many children know a lawyer?

Arrest for children is at least as serious as arrest for adults. It should have the same rules whatever name is given it and a call should be completed to a supportive, competent adult advising him of the arrest within a reasonable time.

III. EQUAL INNOCENCE

A. Bail?

> The right to release without excessive bail, guaranteed by constitutions and statutes in criminal cases, is neither historically nor logically a part of civil or equitable proceedings such as occur in juvenile court . . . .[18]

Bail is money deposited to guarantee return of an arrested person at his next hearing. Does a twelve year old child appreciate the difference between five hundred dollars and five thousand? Can he comprehend how many hours of sweat go into five hundred dollars, or how many shoes, hamburgers, aspirins or blankets it will buy? Does he care that his father has mortgaged his home, or his mother her engagement ring? Can children understand money—someone else's money—well enough to be bound by it? A child should not be detained in the first place unless he is dangerous or a runner.[19] If he is dangerous, money on bail will not make him less so, especially the money of someone intimate enough to ante it up for the child and thus probably so intimate as to be, to the child, responsible for the confinement in the first place. And if the child

18. REPORT OF THE COMMITTEE ON JUVENILE DELINQUENCY (CRIMINAL LAW SECTION) OF THE AMERICAN BAR ASSOCIATION, CONSTITUTIONAL RIGHTS IN JUVENILE COURT PROCEEDINGS (1966).

19. *Supra* note 3, at 60.

is a runner, isn't he most apt to be running from precisely the people who will be offering the bail?

Bail should not be available for children unless it is clearly demonstrated that the money or the bond or the property will in fact be compelling upon the child to return for the subsequent hearing.

B. Grand Jury?

> . . . [T]he constitutional right to a grand jury indictment as a preliminary to prosecution is inapplicable to juvenile court proceedings involving children charged with misdeeds.[20]

A grand jury protects a citizen from the expense and stigma of a criminal charge. In juvenile court, counsel is guaranteed and the lack of a public trial guarantees that no stigma or inference will be attached to the mere fact of a charge.

The reasoning for the Grand Jury does not exist for children. Cessante ratione legis, cessat ipsa lex.

C. Notice?

> 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."[21]

The immediate tendency of many juvenile courts was to shift to the jargon of indictments, making the notice satisfactory to appellate courts—and considerably less intelligible to the family. The essential is *plain* language,[22] with sufficient detail as to time, place, names and actions to advise of the claims which will be presented to the court. Amassing of synonyms and adjectives actually works towards a denial of due process by obfuscation. But the right to notice raises other problems: is the *child* entitled to notice and are *both* parents, if separated? What of the offense which comes to light in the pre-disposition investigation? Can the court consider it without further notice and arraignment? Must the notice specify the particular subdivision of the particular statute allegedly violated and be held to this and no other? What facts must be pleaded and proven to demonstrate "incorrigibility," "waywardness," or "habitual misconduct"? If a child steals a car to escape a drunken father, must the pleader be forced to choose either delinquency or neglect, or is "fact pleading" permissible? The public is concerned

20. Antieau, *Constitutional Rights in Juvenile Courts,* 46 CORNELL L. Q. 387, 393, (1961).
21. In re Gault, *supra* note 2, at 33.
22. In re Hitzemann, ————Minn.————, 161 N.W.2d 542 (1968).

that courts intervene into the lives or individuals when necessary, but only when necessary. The family is concerned with knowing what it is that has called down authority upon them. And the court is concerned with what, if anything, the child needs which the court can provide.

The notice must allege sufficient facts to show the child's need and the court's authority, in language a layman can understand.

D. Proof?

We live in a sea of semantic disorder. . . .[23]

"Beyond a reasonable doubt," "fair preponderance of the evidence," "clear and convincing" and "persuasive to reasonable men" are standards that have been advanced. At the risk of being sacrilegious, it is suggested that however much the standard mouthings are defined, the test that will in fact be applied is simply whether the trier of the fact is "pretty sure," or not. It matters little when what formula is ordered, only that he who applies it realizes that American liberty is a precious thing.

> After all, what we are striving for is not merely "equal" justice for juveniles. They deserve much more than being afforded only the privileges and protections that are applied to their elders. A niggardly and indiscriminate granting of concepts of justice applied to adults will stunt the growth of the juvenile court and handicap the progress of future generations.[24]

IV. EQUAL TRIAL

A. Speedy Trial?

> All the powerful reasons that have long justified the draftsmen of our constitutions in enshrining the right to a speedy trial apply in cases where juveniles are accused of misconduct.[25]

The argument is made that speedy trial is a criminal right and therefore not available in juvenile proceedings which are by nature non-criminal.[26] That the consequences of juvenile court dispositions may be at least as unwanted by the child as criminal sentencing is unwanted by adults was pointed out in *Gault*, with the comment that:

> . . . it would be extraordinary if our Constitution did not

23. Pres. Dwight D. Eisenhower, State of the Union Message, Jan. 1960.
24. Chief Justice Earl Warren, Address to the National Council of Juvenile Court Judges, Vol. 15, No. 3 JUV. CT. JUDGES J. 14 (1964).
25. Antleau, *supra* note 20, at 398.
26. Harling v. United States, 295 F.2d 161 (D.C. Cir. 1961).

require the procedural regularity and the exercise of care implied in the phrase "due process."[27]

B. Local Trial?

> In all criminal prosecutions, the accused shall enjoy the right to a . . . trial [in] the State and district wherein the crime shall have been committed. . . .[28]

Most juvenile codes provide for trial, at least optionally, not at the county where the offense was allegedly committed but at the child's county of residence upon the theory that the child is better protected in his home county by his parents, better known in his home county to those who must devise a treatment for him, and better supervised in his treatment in his home county by the court where he will be living. The theory is sound in all respects, but it seems to run counter to the Constitution unless:

> Where it is to the child's own interest, the criminal analogy can be disregarded and the jurisprudence can revert to the child's welfare, and to the pre-Gault concept of the juvenile court as a derivation of equity, interested in best using society's power to help children.[29]

C. Subpoena?

What can be in doubt? What can be said in opposition?

D. Public Trial?

> Anyone who enjoys seeing his name in print as a lawbreaker is a potential criminal, and the sooner he's put away the better.
>
> * * *
>
> Publicity is painful but necessary. Most people have good youngsters they want to keep away from the hoodlums. How can they do it if they don't know who the hoodlums are?
>
> * * *
>
> Giving publicity to a delinquent doesn't destroy him. In all cases I have seen it has improved his behavior.
>
> Judge Lester Loble[30]
>
> In one short year . . . in the court presided over by (Judge Lester Loble) there has been a 58 per cent increase . . . in juvenile felony cases. . . .[31]

Publicizing a juvenile delinquent brands him—and his brothers

27. In re Gault, *supra* note 2, at 27-28.
28. U.S. CONST. Amend. VI.
29. *See* State ex rel Knutson v. Jackson, 249 Minn. 246, 82 N.W.2d 234 (1957).
30. *Montana's Experiment with Juvenile Crime,* Vol. 75, No. 6 AMERICAN LEGION MAGAZINE 50 (1963).
31. *Open Hearings in Juvenile Courts in Montana,* Statement by the National Council on Crime and Delinquency (Nov. 1964).

and sisters—and isolates him into the company of other delinquents, with little preventative effect. But, not publicizing delinquency proceedings threatens both the child and the public that their proper interests will be arbitrarily handled—or ignored. Traditionally the adult courts have accepted the public's "right to know" as a needed protection both to the accused and the victim, and upon an unproven belief that punishment is a deterrent to others. In their brief history of only some seven decades, the juvenile courts have accepted the child's "right to privacy" as a more needed protection from public retribution. There are five principal influences attributed to public trial. First, it protects the accused from an arbitrary court. But a lawyer, a court reporter, and an appellate court can provide better protection. Second, it assures the victim that an eye has been given for his eye. But the *lex talionis* has been repealed.[32] Third, it deters others from criminal conduct by fear of known punishment. But there is better authority to the effect that the real deterrent is the fear of getting caught.[33] Fourth, it drives the guilty into further crime by isolating them into a criminal environment, publicity's real fault.[34] Fifth, it protects the public from judicial disregard of dangerous conduct, publicity's real value. A simple rule which protects the public without needless harm to the accused, and without duly restricting freedom of the press requires that: *news media should be accorded full access to juvenile court proceedings, but should be forbidden to identify any participating juvenile.*

E. Jury Trial?

> A jury trial would inevitably bring a good deal more formality to the juvenile court without giving a youngster a demonstrably better fact-finding process than trial before a judge.[35]

A jury of peers is a protection to both the public and the individual from authority and judicial whim. Peers have a degree of sympathy, they can relate to the accused and understand in some measure his idiom and his world. But children are children's peers, and children can't be tried by a jury of children. Yet adults can't understand long hair, and teeny-bop talk, and the driving fear of being left out, and the perplexing problem of identity for a changing body with a changing mind in a changing world. Adults can be taken in by giving a hoodlum a suit, a tie, and a crew cut, and

32. The gospel according to St. Matthew (circa 110) Ch. 5, v. 38-44.
33. "It is accepted in the police world that it is not fear of punishment that deters the criminal, but fear of being found out." Kurt Lindroth, Deputy Director of State Police for Sweden, *quoted from* THE ROTARIAN 32 (Aug. 1968).
34. *See* "Comment" to UNIFORM JUVENILE COURT ACT, § 24, *supra* note 4.
35. Paulsen, *Fairness to the Juvenile Offender*, 41 MINN. L. REV. 547, 559 (1957).

adults can be put out by the normal rebellion of children striving for independence. Possibly judges who are in constant touch with juveniles come closest to being their peers—if empathy is peerage. And in a court of equity, from which the juvenile courts have evolved, it was thought that: *where remedies were needed beyond law's rigidities, justice can better come from judges than from juries.*

F. Confrontation?

> . . . the right to confront witnesses . . . essentially includes the right of effective cross-examination by defendant's counsel of witnesses against the defendant.[36]

If the right belongs to the child to see and hear everything the judge sees and hears, it's a little thing; if it belongs to the parents it's a little more; if to counsel, certainly quite a deal more. Children may not be mature enough to absorb adverse testimony and react with intelligent counter-attack. Parents become emotional about criticism of their children—and far more emotional at suggestions it may be parental fault. Counsel can protect the rights involved, and can better comprehend and be unemotional about the domestic can-of-worms that appears in so many delinquency and neglect cases.

Confrontation without a lawyer is nearly meaningless. Counsel is the essence of the right, he knows the questions to ask—and not to ask.

V. EQUAL GUILT

A. Double Jeopardy?

> The doctrine of double jeopardy is one of ancient origin and is designed to prevent the prosecution of a person a second time when he has already been subjected to the risk of "life and limb" in a prior trial. The concept clearly contemplates that the action which bars a second prosecution must be instituted in a court which has the power to . . . punish . . . [but] . . . the juvenile act does not contemplate the punishment of the children. . . .[37]

Children are not punished by the courts; but then neither are adults. They are both reformed and rehabilitated, they are made penitent. "The fact of the matter is that, however euphemistic the title, a 'receiving home' or an 'industrial school' for juveniles is an institution of confinement . . . ."[38] If a child is threatened denial of his liberty, however high the motive of him who denies it, is the

36. 32 J. OF AM. TRIAL LAWYERS 570 (1968).
37. Moquin v. State, 216 Md. 524, 140 A.2d 914, 916 (1958).
38. In re Gault, *supra* note 2, at 27.

liberty any less important than that of an adult?

If a child's freedom of movement has been put at stake, for whatever noble purpose, he has been in jeopardy.

B. Punishment?

> In making dispositions some judges will use some device that will "shock" the child . . . fines can be used constructively, if they are not too heavy. . . .[39]

Are "shock" dispositions "cruel and unusual"? Watch a seventeen year old suburban boy when his license is suspended for drinking beer! Are fines or restitution, which to a child amounts to the same thing, "excessive"? If a child wraps a stolen car around a telephone pole, is $2,000.00 restitution, ordered as part of delinquency rehabilitation, an excessive fine? Is it "cruel" to require delinquents to clean soft drink cans from the side of a highway — or is it involuntary servitude? Curiously, the Constitution does not prohibit cruel punishments nor does it prevent unusual punishments; it only prohibits cruel *and* unusual punishments. Flogging is cruel, but apparently may be used if it always has been. Taking care of senile patients is unusual, but may apparently be used if it is not traumatic. What is prohibited is "considerations of expediency, the satisfaction of public indignation, or example . . . [as] . . . contrary to the whole spirit of the juvenile act."[40] Fines and restitution may be used, if not excessive for the *particular* child.

The great advancement of the juvenile courts is that they can be imaginative and flexible: that they can design a package of dispositions to fit the needs of a particular child.

C. Transcript?

> . . . an indigent parent who is . . . aggrieved is entitled to a free transcript, the cost of which shall be assumed by the county out of appropriate welfare funds.[41]

Appeal without a transcript is like reviewing a book without reading it. Yet how much should the transcript contain—just formal testimony and exhibits, or the social report with its hearsay and conclusions? When it is free, what controls should be used to prevent over-ordering? Should it contain everything the judge hears and sees, including a probation officer's casual corridor comment, or a newspaper story? And how does one include the personal knowledge that a judge in a smaller community has of the people in his district? The need for a transcript of the arraignment and the ad-

39. ADVISORY COUNCIL OF JUDGES OF THE NATIONAL PROBATION AND PAROLE ASSOCIATION, GUIDES FOR JUVENILE COURT JUDGES, 79-80 (1957).
40. State v. Myers, 74 N.D. 297, 22 N.W.2d 199, 201 (1946).
41. In re Munklewitz, ———Minn.———, ———N.W.2d———(1968).

judicatory hearing are obvious. The dispositional hearing is more difficult: it is far less formal—or should be; it includes more discussion than evidentiary presentation; it may be based on opinions, phone calls with counsel, hearsay and much consideration of facial expression, chosen attire, tone of voice, gait, gum, glare, slouch—all the ingredients important in the decision, but impossible for inclusion in a transcript. But the disposition is almost entirely for the trial judge.[42]

A transcript of that which is transcriptive and necessary to the appealled issue is sufficient—if appellate courts continue to recognize the impact of un-transcriptive matter.

D. Appeal?

> This court has not held that a State is required by the Federal Constitution "to provide appellate courts or a right to appellate review at all."[43]

Appeal, next to the right of counsel, is the great protection against an arbitrary, ignorant or uncaring trial court. "The powers of the Star Chamber were a trifle in comparison with those of our juvenile courts . . . ."[44] Appeal *should* be as of right. It *should* be readily available and financially feasible. It *should* be expeditious, particularly for children for whom treatment should be temporally close to misconduct. Morris Kent was in his twenties when his case was remanded to the court for children. Appeal *should* be anonymous, consistent with the juvenile doctrine of confidentiality: the Gault boy, the Kent boy, the Whittington boy have either too much stigma or too much status. Other children, who should appeal, are often loath to follow them—or their parents shun the publicity.

Appeal is the only real protection against an improper trial court. It should be easily and readily available.

VI. EQUAL EXPRESSION

A. Religion?

> . . . the educated Chinese conscience . . . does not insult God by believing that he is a merciless Legalist, a stick-and-carrot deity who rules through a system of unimaginable rewards and awful punishments. . . .[45]

May children choose their religion—or lack of it? If they are old enough to drive, to die, to procreate, to marry, to drop out of school—are they old enough to drop out of church, to move to an

42. In re Lewis, 11 N.J. 217, 94 A.2d 328 (1953).
43. In re Gault, *supra* note 2, at 58.
44. Roscoe Pound, Foreword to YOUNG, SOCIAL TREATMENT IN PROBATION AND DELINQUENCY xxvii (1937), *quoted from* In re Gault, *supra* note 2, at 18.
45. BLOODWORTH, THE CHINESE LOOKING GLASS (1967).

"activist" church, or to follow Malcolm X? When can children decide that they are fed-up with Sunday School, except the dancing, hay-riding, boy-meet-girl part? If they enjoy the right to counsel, regardless of their parents, do they also enjoy the right to freedom of religion regardless of their parents—or does religion matter that much any more or is religion too important to trust to the young?

> A child old enough to die is old enough to affirm, "O unbelievers! I will not worship that which ye worship; nor will ye worship that which I worship . . . Ye have your religion, and I my religion."[46]

B. Statement?

> When a nation silences criticism and dissent, it deprives itself of the power to correct its errors.[47]

Do children have the right of free speech—in four-letter words? Do they have the right of free press—in scurrilous, underground rags? Can children criticize their teachers or their parents? May parents censor? May parents listen in on their children's phone calls? May they read their children's mail, both incoming and outgoing? If children have the right of silence, do they also have the right of expression? If children are entitled to cross-examine witnesses who accuse them, do they also have the right to cross-examine parents who accuse them? How far do we go with equality? If children are to be as adults, must they not then lose their childhood? If children are too immature to speak, to print, to assemble, to petition, to worship, are they not also too immature to resist search, to waive counsel, to confront witnesses, to read notice? If children are incapable of exercising some rights, how can they be capable of exercising others?

Children should be allowed to speak their dreams and their accusations privately or in public when they are mature enough to listen to the accusations of others and accord them their dreams and their frustrations.

C. Conduct?

> . . . a nation bent on turning out robots might insist that every male have a crew cut and every female wear pigtails. But the ideas of 'life, liberty, and the pursuit of happiness,' expressed in the Declaration of Independence, later found specific definition in the Constitution itself, including of course, freedom of expression and a wide zone of privacy. I had supposed those guarantees permitted idiosyncracies to

46. The Koran (circa 652) Ch. 109.
47. Henry Steele Commager, Historian.

> flourish, especially when they concern the image of one's personality and his philosophy toward government and his fellow men.[48]

Can children do as they please? Obviously not. They can't hurt others; but can they hurt themselves? They can't hurt the sensibilities of others but can they wear their skirts short, or their hair long? Must they wash, and shave, and use curlers, and brassieres? Must they come home when ordered by law or custodian? But if society, or churches, or schools, or policemen, or parents can limit attire, or appearance, can they also limit speech, and press, and assembly? Are children to be deprived of all right of decision the day before their twenty-first birthday—and have full right of decision the next day? Shouldn't maturity and judgement be the test, rather than the calendar? But then, of course, many adults might lose *their* rights.

Let children have their fads and their foibles; so long as the sensibilities of too many others are not invaded too much, it is the safety valve of youthful effervescence, and the re-germination of our culture.

VII. EQUAL WAIVER

> We appreciate that special problems may arise with respect to waiver of the privilege by or on behalf of children, and that there may well be some differences in technique — but not in principle — depending on the age of the child and the presence and competence of parents.[49]

If children are equal, or even a little bit equal, they have rights. Rights can be the bane of existence for Authority. Rights can't be just presumed to be known, they must be made known. Rights have to be observed, or Authority will be humiliated by the courts' suppression of evidence. Rights get in the way of Authority's proper investigation. But they *can* be waived, and for adults this is Authority's out, because Authority can easily persuade adults to waive—sometimes Authority can hardly finish intoning the *Miranda* Formula before admissions come bubbling out. An adult can waive for himself his own right to silence, to counsel, to notice, to confrontation, or to jury—but can a child? He's too young to drink, to vote, to marry, to contract, or to soldier. Is he too young to waive? Can anyone waive for him? If there is no waiver possible without a lawyer, how can the police investigate a car theft or a "gang shag"? How can a department store investigate a shoplifting or ob-

48. 37 U.S.L.W. 3023 (1968).
49. In re Gault, *supra* note 2, at 55.

scene shouting? How can a school investigate truancy or nickel-and-dime extortion? How can a physician investigate battering or incest? How can a welfare worker investigate incorrigibility due to immorality by night or abandonment by day? Pragmatism demands waiver; fairness refines the demand. A method for juvenile waiver is a fundamental necessity, a method which will protect the child and not hamstring the public. It cannot be founded upon age because some hoodlums are constitutionally sophisticated at thirteen and some Boy Scouts ignorant at eighteen of their protections from Authority, and some people are not endowed with the brains ever to learn. So waiver cannot be a factor of age. Neither can it be founded upon the presence of an adult because some parents are uncaring or afraid, and some school people uninterested except in peace and order, and some probation officers are almost Authority themselves. There will never be enough lawyers to be available whenever a child has a right to exercise. It must be a method usable by the police in the turmoil of tempers and by the judiciary in the calmness of courtrooms.

Waiver should be permitted by a child of whatever age, or in his behalf by a concerned adult of whatever relationship, if the child or the friend understands the right to be waived, the consequences of waiving it, and believes waiver not to be harmful to the child.

CONCLUSION

A child at birth has no ability to choose between optional courses of conduct. Gradually he learns to recognize increasingly complicated facts. Gradually he learns to forecast the consequences of increasingly complicated acts. Gradually he learns to compare the advantages and disadvantages of increasingly complicated available alternatives. He should be given the freedom to choose between alternatives only when he can recognize each alternative, forecast its consequences, and compare the advantages and disadvantages. Without such maturity, his choice between available alternatives may be needlessly harmful to himself, or to others. But for every choice which he is too immature to make, as for every need he is unable to provide, he is entitled to the protection of a mature person who will make the choice and provide the need in his best interest.

Some day a person's identification card will show his Maturity Quotient which will change from time to time, but not much more often than his height and weight and face. It will be very useful for determining when a person may drink or drive or vote or read pornography or choose his church or authorize search or un-

derstand notice or, most important, waive counsel. Until then we must devise more complicated and more rigid restrictions and grants of juvenile freedom and juvenile equality.

Should children be as equal as people? Certainly not. They should not have equal liberty: they should have less. Neither should they have equal protection—they should have more. How much less and how much more will depend on the maturity of the particular child at the particular time.[50]

50. For a careful and exhaustive casebook treatment of juvenile court law by two leading experts in the field, *see* M. PAULSEN AND O. KETCHAM, JUVENILE COURTS (1967).