North Dakota Law Review

Volume 44 | Number 2 Article 2

1968

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James P. White

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Recommended Citation

White, James P. (1968) "The Juvenile and the Court: A Continuing Dialogue," *North Dakota Law Review*: Vol. 44 : No. 2 , Article 2.
Available at: https://commons.und.edu/ndlr/vol44/iss2/2

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THE JUVENILE AND THE COURT: A CONTINUING DIALOGUE

JAMES P. WHITE*

> The juvenile court is conspicuously a response to the modern spirit of social justice. It is perhaps the first legal tribunal where laws and science — work side by side. It recognizes the fact that law unaided is incompetent to decide what is adequate treatment of delinquency and crime. It undertakes to define and readjust social situations without the sentiment of prejudice. Its approach to the problem which the child presents is scientific, objective and dispassionate. The methods which it uses are those of social case work, in which every child is studied and treated as an individual.[1]

A series of recent judicial decisions involving juveniles culminating in the case of *In re Gault*[2] and corresponding abundance of law review articles[3] has caused a new appraisal of the operation of juvenile courts in the United States. These cases and articles create the need for a current assessment of the basic operation of the Juvenile Court in North Dakota.

In the development of English law children over the age of fourteen were traditionally treated as adults with regard to the operation of the criminal laws. Children between the ages of seven and fourteen were treated as though they might be capable of a crime and subject to adult penalties, but children under the age of seven were considered to be legally incapable of forming the

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* Professor of Law, Indiana University. B. A. 1953, J. D. 1956, University of Iowa, L.L.M. 1959, George Washington University.

1. LOU, JUVENILE COURTS IN THE UNITED STATES 2 (1927).
2. 387 U.S. 1 (1967).
3. See: Evans, *Constitutional Rights of Juveniles—or Parens Patriae v. Due Process*, 4 WILLAMETTE L.J. 152 (1966); Paulson, *Juvenile Courts, Family Courts and the Poor Man*, 54 CALIF. L. REV. 694 (1966); Lefstein, *In re Gault, Juvenile Courts and Lawyers*, 53 A.B.A.J. 811 (1967); Whitlatch, *Juvenile Court—A Court of Law*, 18 W. RES. L. REV. 1239 (1967); Lemert, *Legislating Change in the Juvenile Court*, 1967 WISC. L. REV. 421 (1967); Robitscher, *The California Juvenile Court; A Bill of Rights for Youth*, 52 WOMEN L.J. 146 (1966).

See also Second Tentative Draft, Uniform Juvenile Court Act, National Conference of Commissioners on Uniform State Laws and KETCHAM AND PAULSEN, JUVENILE COURTS, CASES AND MATERIALS (1967).

necessary intent to commit a crime and hence could not be found guilty of a crime. Upon a finding of guilt, the punishment prescribed was the same as that for adult offenders. This English system was transplanted to the United States and existed in this form in all American jurisdictions until 1899.[4]

In 1899 the first in a new system of courts forthe treatment of juvenile offenders was established. The first juvenile court was established by the State of Illinois,[5] but was soon followed by like courts in other jurisdictions so that juvenile courts currently are operative in all of the fifty states. The intent of the new court was one of rehabilitation rather than one of punishment. The normal formal court proceedings were to a great degree eliminated and the concept began of an informal proceeding where the juvenile and the judge could discuss the problems of the juvenile and reach a solution with the intent of rehabilitating or saving the juvenile from future acts of delinquency. The basic conceptions which traditionally have distinguished juvenile courts from other courts can be briefly stated.

> Children are to be dealt with separately from adults. Their cases are to be heard at a different time and, preferably, in a different place; they are to be detained in separate buildings, and, if institutional guidance is necessary, they are to be committed to institutions for children. Through its probation officers the court can keep in constant touch with the children who have appeared before it. Taking children from their parents is, when possible, to be avoided; on the other hand, parental obligations are to be enforced. The procedure of the court must be as informal as possible. Its purpose is not to punish but to save. It is to deal with children not as criminals but as persons in whose guidance and welfare the State is peculiarly interested. Save in the cases of adults, its jurisdiction is equitable, not criminal, in nature . . . .[6]

Formal criminal court procedures including indictment, formal prosecution, guaranteed representation by legal counsel and trial by jury were not provided, but rather the proceeding became

4. *See* National Council on Crime and Delinquency, *Guides for Juvenile Court Judges* (1957). For a discussion of the historical background of juvenile courts see Mack, *The Juvenile Court*, 23 HARV. L. REV. 104 (1909).

5. Illinois Laws 1899, at 131.

6. FLEXNER AND OPPENHEIMER, THE LEGAL ASPECT OF THE JUVENILE COURT, at 9 (Children's Bureau Pub. No. 99, 1922). *See also* Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 119, 120 (1909) wherein the author states: "The problem for determination by the judge is not, has this boy or girl committed a specific wrong, but what is he, how has he become what he is, and what had best be done in his interest and in the interest of the state to save him from a downward career."

one in the nature of a dialogue between the judge and the child.[7] The courts were considered civil rather than criminal[8] and the child appearing before the court became a ward of the state rather than a prisoner of the state.[9]

> No doubt the procedures by which law is 'enforced' in juvenile court must condition the law itself, particularly if law is viewed as but a reflection of what officials in fact do. The officials of the juvenile court are free to use law in ways unavailable to other tribunals. For them, law is not merely a code of conduct that children must be made to obey; it is a code whose violation is taken as symptomatic of an interior disorder and used to identify those children to be taken into custody and 'helped'. The discovery of a violation represents an opportunity to teach new lessons.

Thus the underlying philosophy of the juvenile court system since its establishment in the United States has been that of the court's operating in a *parens patriae* relationship to the juvenile offender.[11] The prime purpose or intent of the juvenile court has been that of rehabilitation. Under this philosophy and purpose, the "non-criminal" nature of juvenile proceedings has been considered adequate to render normal safeguards of due process inapplicable to those cases coming before the juvenile court. Thus traditionally the operation of the juvenile court process has been characterized by an ignoring of the safeguards usually considered fundamental in a criminal court proceeding.[12]

For many years, and particularly in recent years there have been questions of re-examination raised regarding the operation of juvenile courts under the *parens patriae* concept.[13] The inherent

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7. *See* Note, *Juvenile Delinquents: The Police, State Courts, and Individualized Justice*, 79 HARV. L. REV. 775 (1966) and Caldwell, *The Juvenile Court: Its Development and Some Major Problems*, 51 J. CRIM. L.C. & P.S. 493 (1961). *See also* Ketcham, *The Unfulfilled Promise of the Juvenile Court*, 7 CRIME AND DELINQUENCY 97 (1961).

8. In re Holmes, 379 Pa. 599, 603, 109 A.2d 523, 525 (1954) in which the court stated: "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. There purpose is not penal, but protective. . . . "

9. People v. Lewis, 260 N.Y. 171, 183 N.E. 353 (1932). The court, however, has been considered as being "not a social agency, but a court of law." McCabe, *A Big Brother in Family Court*, 16 JUV. CT. JUDGES JR. 116 (1966).

10. Note, *Juvenile Delinquents: The Police, State Courts and Individualized Justice*, 79 HARV. L. REV. 775, 804 (1966).

11. *See* Ketcham, *The Unfulfilled Promise of the American Juvenile Court*, JUSTICE FOR THE CHILD at 23 (1962). *See also* BLOCK AND FLYNN, DELINQUENCY: THE JUVENILE OFFENDER IN AMERICA TODAY (1956) at 305-37.

12. In re Holmes, 379 Pa. 599, 109 A.2d 523 (1954) (no right to confront witnesses); People v. Silverstein, 121 Cal. App.2d 140, 262 P.2d 656 (1953) (no double jeopardy defense available); In re Magnuson, 110 Cal. App.2d 73, 242 P.2d 362 (1952) (no right to release on bail); Christensen v. Christensen, 119 Utah 361, 227 P.2d 760 (1951) (no right to sworn testimony).

13. "The prerogative of the state, arising out of its power and duty, as parens patriae, to protect the interest of infants, has always been exercised by courts of chancery." Lindsay v. Lindsay, 257 Ill. 326, 100 N.E. 892, 894 (1918).

supposition that juvenile courts were non-criminal has been attacked on the ground that if juveniles are deprived of their liberty, the proceedings are essentially criminal.[14] The juvenile court system has also been attacked for its assumption that juvenile justice adequately performs its rehabilitation function.[15] A number of states have begun certain reforms in juvenile court procedure, regarding procedural rights of juveniles appearing before it. These reform swithin the individual states have not applied all elements of criminal due process to juvenile court proceedings, but have provided some new protections for the juvenile which presage recent judicial rulings.[16]

One of the amazing paradoxisms of the American judicial system is that prior to *In re Gault*,[17] the United States Supreme Court in the past several decades had heard only three cases involving offenses committed by juveniles.[18] The most recent case prior to *In re Gault* was *Kent* v. *United States*[19] in which the main issue was the question of waiver by the juvenile court in the District of Columbia of its exclusive jurisdiction in the case of a sixteen year old accused of rape. In this case the court discussed at length a number of issues relevant to the operation of juvenile court concepts. The court stated: "There is no place in our system of law for reaching a result of such tremendous consequences without ceremony . . . without hearing, without effective assistance of counsel, without a statement of reasons."[20] In *Kent*, it was held that before a case could be transferred by a

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14. *See* Antieau, *Constitutional Rights in Juvenile Courts*, 46 CORNELL L.Q. 387 (1961). *See also* Quick, *Constitutional Rights in the Juvenile Court*, 12 HARV. L.J. 76 (1966).

15. "There is so much evidence that some juvenile courts . . . lack the personnel, facilities and techniques to perform adequately as representatives of the State in a *parens patriae* capacity, at least with respect to children charged with law violation. There is evidence, in fact, that there may be grounds for concern that the child receives the worst of both worlds; he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children." Kent v. United States, 383 U.S. 541, 555 (1966).

"Studies conducted by the Commission, legislative inquiries in various States, and reports by informed observers compel the conclusion that the great hopes originally held for the juvenile court have not been fulfilled. It had not succeeded significantly in rehabilitating delinquent youth, in reducing or even stemming the tide of delinquency, or in bringing justice and compassion to the child offender." PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 80 (1967). A juvenile court judge has observed:

"For the unhappy judge who can expect virtually no help in determining the basic pattern of the child's behavior because of his court's lack of a trained staff, for the unfortunate jurist who knows that his state training school represents naked detention and nothing better, even perhaps something worse, there can be but one governing principle: to resolve every uncertainty in favor of the child and his home; to commit solely on the basis of unmistakable need for community protection." Dill, *When Should a Child be Committed?*, 4 NAT. PROBATION AND PAROL A. JR. 1, 5-6 (1958).

16. *See* Reiderer, *The Role of Counsel in the Juvenile Court*, 2 J. FAM. L. 16 (1962); Comment, *Juvenile Justice in Transition*, U.C.L.A. L. REV. 1144 (1967).

17. 387 U.S. 1 (1967).

18. Kent v. United States, 383 U.S. 541 (1966); Gallegos v. United States, 370 U.S. 49 (1962); Haley v. Ohio, 332 U.S. 596 (1948).

19. 383 U.S. 541 (1966).

20. Kent, *supra*, note 18 at 554.

juvenile court to another court for criminal prosecution, a hearing must be held and counsel for the child must be given the right to examine, and an opportunity to refute, any information given to the judge. It was also held that the judge must render a statement of the reasons for the transfer so that his decision might be subject to review. This was held to be required in view of the "critically important" decision that transfer entails, the court stating that " . . . there is no place in our system of law for for reaching a result of such tremendous consequences without ceremony, without hearing, without a statement of reasons." The court held that the assistance of counsel in the "critically important determination of waiver of jurisdiction by a juvenile court is essential to the proper administration of justice."

The prime case of *In the Matter of Gault* has caused great attention to juvenile courts and their proceedings in each of the states. The Arizona Supreme Court affirmed the dismissal of a writ of *habeus corpus* by an Arizona Superior Court finding that Gault had been accorded treatment consistent with constitutional due process.

The "due process" Gault had been accorded was the following:

(1) he was taken into custody as the result of a verbal complaint by a woman neighbor about a lewd telephone call;

(2) without notice to his parents he was taken to a detention home;

(3) after learning from neighbors where he was, his mother went there, and was orally informed why he was there and that a juvenile court hearing would be held the next day;

(4) the hearing was based upon a petition filed by a probation officer, which merely alleged that Gault was a delinquent under 18 and prayed for an order regarding his care and custody;

(5) no attorney was present at the hearing, the complaintant was absent, no one was sworn and no transcript or record of the hearing was made;

(6) at the hearing Gault made an admission or confession of some kind;

(7) at a subsequent hearing, again without an attorney present, Gault made admissions or a confession of some kind;

(8) at this hearing a "referral report" was made and filed with the court, but its contents were not disclosed to Gault or his parents; and

(9) Gault was committed as a juvenile delinquent to the State Industrial School for 6 years for an act which if committed by an adult would have carried a maximum sentence of 2 months. This is not the "due process" that normally comes to the mind of a lawyer or a judge.

In the appellants brief in the *Gault* case, counsel differentiated between criminal law process prior to trial and the process at the trial stage.

> *White, Hamilton* and *Miranda* related not to the trial stage, but to stages in the criminal process prior to trial. By contrast, the issue in the case at bar is whether due process requires the assistance of counsel at the trial itself, a stage of the juvenile process, needless to say, which is not merely "critical", but its very essence. It is the central fact-finding inquiry where the determination is made whether the accused juvenile committed the acts charged. The resolution of this inquiry determines whether the juvenile will be denominated a juvenile delinquent and possibly deprived of his liberty.[21]

In reversing this decision the United States Supreme Court set forth these due process requirements for juvenile proceedings:

(1) The child and his parents must be notified in writing of the specific charge or factual allegations to be considered at the delinquency hearing and the specific issues they will be called upon to meet.

(2) The child and his parents must be notified of the child's right to counsel, whether retained by them or appointed by the court.

(3) The constitutional privilege against self-incrimination is applicable to juveniles as well as to adults.

(4) In the absence of a valid confession (one not a product of ignorance of rights, fright, despair or fantasy), confrontation and sworn testimony by witnesses available for cross-examination is required.

In addition the Court expressly did not rule on Arizona's failure to provide a transcript of record of the proceedings nor its failure to allow for review of such procedures, reversing instead in light of the requirements for counsel and due process.

In light of the flurry of publicity regarding juvenile courts and their operation and the resulting plethora of law review articles

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21. In re Gault, Appellants brief at 15.

examining problems facing juvenile courts it is useful to look at the North Dakota Juvenile Court and its operation.

The Juvenile Court was established in North Dakota in 1911[22] and is the District Court acting as the juvenile court.[23] North Dakota is particularly fortunate that the juvenile court is part of the general integrated court system of the state and that it is a division of the highest court of trial jurisdiction, the district court. This is in accordance with the United States Children's Bureau standards for juvenile courts.[24] Thus the juvenile court is an integral part of the court system of the state. The judges sitting on juvenile cases are experienced and highly qualified full-time state judges and not part-time judges of special courts assigned to deal with juvenile problems. It cannot be emphasized too strongly that part of the key to success of a juvenile court is to have the highest level trial court of the state operate as the juvenile court.

In North Dakota the juvenile court is given fairly typical juvenile court jurisdictional authority. It has original jurisdiction in all proceedings:

1. Concerning any child residing in or who is temporarily within the county:
   a. Who has violated any city or village ordinance or law of this state or of the United States;
   b. Who has deserted his home without sufficient cause or who is habitually disobedient to the reasonable and lawful commands of his parents, guardians, or other custodians;
   c. Who habitually associates with dissolute, vicious, or immoral persons, or who is leading an immoral or vicious life;
   d. Who, being required by law to attend school, willfully and habitually absents himself therefrom, or who habitually violates the rules and regulations thereof;
   e. Whose parent or other person legally responsible for the care and maintenance of such child, neglects or refuses, when able to do so, to provide proper or necessary support, education as required by law, medical, surgical, or other care necessary for his health, morals, or well-being, or who is abandoned by his parents, guardian, or other cus-

22. N.D. SESS. LAWS 1911, Chap. 177.
23. N.D. CENT. CODE § 27-16-01 (1960).
24. STANDARDS FOR JUVENILE AND FAMILY COURTS (Children's Bureau Pub. No. 437, 1966).

todian, or who is otherwise without proper custody or guardianship;

f. Whose home, by reason of neglect, cruelty, drunkenness, or depravity on the part of the parent or person having the custody or control of such child, is an unfit place for such child to live;

g. Who engages in an occupation or who is in a situation dangerous or injurious to the health, safety, or morals of himself or others;

2. Concerning any person who is twenty-one years of age residing within the county charged with having violated any city or village ordinance or law of this state or of the United States prior to having become eighteen years of age;

3. Concurrent jurisdiction with the district court, county court with increased jurisdiction, and justice or police magistrate court, over any person between the ages of eighteen and twenty-one years residing within the county charged with having violated any city or village ordinance or any law of this state or of the United States;

4. Concurrent jurisdiction for the care or commitment to the state school at Grafton or other public facility for the mentally deficient or mentally disordered child as provided by section 25-04-06.[25]

One of the jurisdictional problems now facing juvenile courts is that of the optimum maximum age for a youthful offender over whom it assumes jurisdiction.[26]

It has been suggested that the jurisdiction of juvenile courts should be enlarged and extended beyond minority to 22 or 23 years of age.[27] Social and emotional maturity are not achieved at any given chronological age. There will be some youngsters who, because of their personality maladjustment, cannot profit from programs designed for adolescents. On the other hand, there will be adolescents who need placement in a program for juveniles rather than in a youthful-offender program.[28]

Consideration should be given whether the juvenile courts should have its jurisdiction (concerning the age of the youthful offender) enlarged. In making this ultimate determination consideration must be given to the availability of specialists and specialized

25. N.D. CENT. CODE § 27-16-08 (Supp. 5, 1967).

26. The usual age for juvenile court jurisdiction is 18 years of age with an extension to 21 years of age for a minor who has committed acts of delinquency or is unmanageable prior to reaching 21 years of age. Many states, however, limit the age to under 16 although there appears to be a trend in recent years to increase it to 21.

27. Sheridan, *New Directions for the Juvenile Court*, 31 FED. PROB. 15 (June 1967).

28. *Id.* at 19.

services which will assist the judge in determining the social and emotional maturity of the youthful offender.

In North Dakota the District Court Judges are entitled to appoint not more than two suitable and discreet persons of good moral character as juvenile commissioners for each county of the district.[29] These Commissioners may:

1. Administer oaths;
2. Take acknowledgments of instruments, for the purposes of this chapter;
3. Receive complaints and have warrants issued within the the provisions of this chapter;
5. Issue summonses and subpoenas for hearings within the provisions of this chapter. Such hearings may be held at any place within the county where the proceeding is commenced;
6. Compel the attendance of witnesses before him and report any witness or witnesses to one of the judges of the judicial district for nonattendance or refusal to be sworn or to testify as provided by section 27-10-23; and
7. Make such temporary order for the custody and control of a child as he may deem proper.[30]

Under the North Dakota statute it is apparent that the actual authority of the juvenile commissioner depends in part on that authority given him by the District Court Judge. If indeed the juvenile commissioner initiates the intake process he operates the screening process regarding the jurisdiction of the juvenile court in juvenile matters. It is a type of review or assessment of information regarding the alleged acts or activities of juveniles.[31] The juvenile commissioner collects information for use by the court.

The North Dakota Courts over thirty years ago specified some of the constitutional safeguards which must be afforded to an individual. In *Ex Parte Solberg*,[32] the court stated that "[t]he statute clearly contemplates notice to the parents and a reasonable opportunity to be heard before the court may make an order depriving them, perhaps permanently, of their children."[33] In light of *Gault*, the right to notice clearly applies to any hearing at any time within the juvenile court procedure and applies whether

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29. N.D. CENT. CODE § 27-16-02 (1960).
30. *Id.*
31. For an excellent discussion of the intake process, *see* Sheridan, *Juvenile Court Intake*, 2 J. FAM. L. 139 (1962).
32. Ex Parte Solberg, 52 N.D. 518, 203 N.W. 898 (1925).
33. *Id.* at 524, 203 N.W. at 900.

the hearing is conducted by the juvenile court commissioner or the district judge.

The North Dakota Century Code contains two principal sections regarding the juvenile hearing itself.[34] Section 27-16-14[35] provides that notice be given of any hearing involving a child. North Dakota statutory law expresses rights of notice like those rights of notice deemed necessary by the court in the *Gault* decision. This section provides for notice in writing "citing briefly the substance of the petition" and requiring that this notice be served upon both the child and the parents. The North Dakota case of *Ex Parte Solberg*[36] requires that this notice of hearing be served on both parents of the child. The North Dakota courts have stated that if the proceeding is a hearing to permanently terminate parental rights, there must be proper notice served upon the child and the parents.[37]

The *Gault* decision indicates that a general allegation of delinquency is no longer sufficient. The court indicates that the notice must "set forth the alleged misconduct with particularity." North Dakota statutes seem to embody this thought in their expression that the substance of the petition must be cited. However, the question might be raised whether in the past there has been substantial compliance with this provision or whether there has simply been a notice containing a general allegation of de-

34. N.D. CENT. CODE § 27-16-14 (1960): "After a petition shall have been filed and after such further investigation as the court may direct, unless the parties hereafter named shall appear voluntarily, the court or juvenile commissioner shall issue a summons reciting briefly the substance of the petition and requiring the person or persons who have custody or control of the child to appear personally and bring the child before the court at a time and place stated. If the person so summoned shall be other than the parent or guardian of the child, then the parent or guardian, or both, also shall be notified of the pendency of the case and of the time and place appointed, by personal service before the hearing, except as otherwise provided in this chapter. A summons may be issued requiring the appearance of any other person whose presence, in the opinion of the judge, is necessary. If it appears that it is for the best interests and the welfare of the child, the judge or the juvenile commissioner may endorse an order upon said summons directing the officer serving the same to take the child from his parents, guardian, or custodian and to place him as directed in such order to await the return time of the summons. Or if the judge or juvenile commissioner, upon showing made, is convinced that such summons will be ineffectual to procure the attendance of a child, he may require the petitioner or other interested person to make and file an affidavit setting forth the reasons therefor. Upon filing such affidavit with the clerk of the court, such clerk shall issue a warrant directing the sheriff or other peace officer to arrest the child and bring him before the court forthwith or to hold him in such place as the warrant may direct to await time of hearing." N.D. CENT. CODE § 27-16-18 (Supp. 5, 1967): "On any hearing within the provisions of this chapter, the court may receive the report of the juvenile commissioner, made orally or in writing, of testimony taken before him. Such report may be received in evidence and be considered by the court with such other evidence as may be presented at the hearing. If the testimony taken by the juvenile commissioner has been taken under oath by a competent reporter it shall be unnecessary to have such testimony given by the same witness at such hearing. The court may conduct the hearing in an informal manner. Such hearing shall be reported as in a civil case. The general public shall be excluded . . . and only such persons admitted as have a direct interest in the case. The court shall hear and determine all cases without a jury."

35. N.D. CENT. CODE § 27-16-14 (1960).

36. 52 N.D. 518, 203 N.W. 898 (1925).

37. In re Kennedy, 110 N.W.2d (N.D. 1961).

linquency. Whatever the past practice has been, the future practice has been suggested and in any judicial proceeding (but not prejudicial) regarding a child appearing before a juvenile court, proper notice must be given to all parties stating in substance the alleged misconduct.

The hearing itself and its procedures has in North Dakota embodied the *parens patriae* concept. The concept of the court has been expressed in a 1960 study of juvenile delinquency in North Dakota which states:

> Juvenile courts are in a position to be aware of the many problems of youth who come into conflict with standards set down by our society through its laws. It has been a part of the juvenile court movement that determination in behalf of the child should be the result of an appraisal of the circumstances which are related to child behavior as well as to the act. The child may, of course, have legal counsel and he and his parents should know this. Such representation, however, is not ordinarily considered essential as the court itself represent the child and his welfare in taking action deemed to be in the child's best interest. The hearing should be informal and conducted in private. He should be placed preferably in the custody of his own home or when necessary in a shelter or foster home.[38]

The Juvenile Court hearing regarding an alleged act by a minor child must in light of the *Gault* decision additionally provide that:

1) Notice of right to counsel must be given the child and his parents. If they are unable to afford counsel, the court must be willing to appoint counsel. However, if the parent and the child wish to waive their right to counsel, they may so waive counsel.
2) The privilege against self-incrimination exists and the child must be informed of his right to remain silent.
3) That any confession must be validly made and freely given and if such confession is not in existence then the juvenile is entitled to confront all witnesses and to hear their sworn testimony and to cross-examine them or their testimony.[39]

38. Hoadly and Gardebring, IMPERILED YOUTH: A STUDY OF JUVENILE DELINQUENCY IN 15 RURAL COUNTIES IN NORTH DAKOTA (Public Welfare Board of North Dakota (1960).

39. *See* Driscoll, *The Privilege Against Self-Incrimination in Juvenile Court Proceedings*. 15 JUV. CT. JUDGES J. 17 (Fall 1964). A new look at juvenile courts and constitutional guarantees afforded in them came after the decision in 1966 of the case of Miranda v. Arizona, 384 U.S. 436 1966. In this case the United States Supreme Court held that it would not admit as evidence a confession given by a person suspected of a crime unless it was affirmatively shown that the suspect freely gave his confession after being appraised of certain constitutional guarantees by the law enforcement officials. The court stressed that when the nature of the investigation changes from investigatory to accusatory that the suspect must be made fully aware of his constitutional rights; that he has the right to remain silent; that he has the right to request that adequate

The North Dakota Juvenile Courts possess the necessary mechanisms to comply with these requirements of the *Gault* case. While various questions, implications and extensions exist as a result of the Supreme Court's decision in the *Gault* case,[40] the basic requirements seem quite clear.

The hearing itself is a closed proceeding, open only to all proper parties. The intent of the closed hearing is one of protecting the juvenile from publicity which would result in punishment for the juvenile regardless of the court's final determination.[41] There has been discussion in recent years concerning the closed proceeding. A few juvenile judges have adopted policies of publishing the name of the youthful offender and that of his parents and hearing the case in open court with press and public freely admitted.[42] The intent of such publicity seems to be one of punishment rather than rehabilitation. Indeed some delinquent youngsters revel in the publicity and it inspires them to new acts of delinquency. North Dakota is fortunate in adhering to the closed juvenile concept.

The hearing itself must extend to the child the privilege against self-incrimination and he must be afforded the right to confront all witnesses and to hear their sworn testimony and to cross-examine them on their testimony. In the past the willingness of juvenile courts to receive hearsay evidence has resulted in much criticism from members of the bar. The requirement of the

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counsel be present; that he is informed that the state will provide counsel if he is unable to afford proper counsel; and that if he does make any statements, they may be used in court against him. If the accused wishes to waive his rights, such waiver must be made freely and knowingly and the burden is on the law enforcement officials to see that such a proper waiver is made. *See also* Handler, *The Juvenile Court and the Adversary System: Problems of Function and Form,* 1965 WISC. L. REV. 7.

40. *See* Lefstein, *In re Gault, Juvenile Courts and Lawyers,* 53 A.B.A.J. 811, 813, 814 (1967): "Besides important questions pertaining to the nature of adjudication hearings and the function of counsel, a myriad of other issues must be contemplated in the wake of Gault. For example, will the exclusionary rule prohibiting the admission of evidence illegally seized be extended to juvenile courts? Prior to Gault, in the few cases in which the issue had been raised, the exclusionary rule was applied. In the post-Gault era, these rulings are likely to become more common, particularly in view of the conceptual link between the Fourth and Fifth Amendments.

Also significant is whether requirements of Miranda v. Arizona should apply—or already do apply—to police interrogations of juveniles. Technically, the Gault decision appears not to apply Miranda restrictions, although the opinion's language is not free from doubt and reasonable men may differ. As stated earlier, at one point the court decares that it is not concerned with procedures or constitutional rights applicable to the prejudicial stages of the juvenile process. Elsewhere the Court refers to the police as if they are now charged with responsibility for advising children of their privilege against self-incrimination.

The right to appellate review and transcript of proceedings were two issues presented to the Court in Gault on which it did not rule. But these questions, especially how they affect juveniles from indigent families, are likely to be raised again. Already the indigent child's right to a transcript without cost in delinquency proceedings is pending before at least two state appellate courts."

41. *See* Geis, *Publicity and Juvenile Court Proceedings,* 30 ROCKY MT. L. REV. 101 (1957). *See also* State v. Cronin, 220 La. 233, 56 So.2d 242 (1951).

42. *See* Heyns, *The 'Treat-Em-Rough' Boys are Here Again,* 31 FED. PROB. 6 (June 1967).

Gault decision is in accord with dictum in the New York case of *People v. Lewis*[43] in which the court states:

> The customary rules of evidence shown by long experience as essential to getting at truth with reasonable certainty in civil trials must be adhered to. . . . Hearsay, opinion, gossip, bias, prejudice, trends of hostile neighborhood feelings, the hopes and fears of social workers, are all sources of error and have no more place in children's courts than in any other court.[44]

A complete determination of the particular facts at issue is at least as important to juveniles as it is to adults.

The United States Supreme Court speaking through Justice Fortas stated:

> We conclude that the constitutional privilege against self-incrimination is applicable in the case of juveniles as it is with respect to adults. 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 difference in technique — but not in principle — depending upon the age of the child and the presence and competence of parents. The participation of counsel will, of course, assist the police, juvenile courts and appellate tribunals in administering the privilege. If counsel was not present for some permissable reason when an admission was obtained, the greatest care must be taken to assure that the admission was voluntary, in the sense not only that it was not coerced or suggested, but also that it was not the product of ignorance of rights or of adolescent fantasy, fright or despair.[45]

The right to counsel in juvenile court proceedings has been a subject of discussion in recent years. A court has stated:

> [W]here the child commits an act, which act if committed by an adult would constitute a crime, then due process in the Juvenile Court requires that the child be advised that he is entitled to the effective assistance of counsel, and this is so even though the Juvenile Court in making dispositions of delinquent children is not a criminal court.[46]

Other judges have denied counsel stating the proceedings do not determine guilt or innocence, but rather are for the benefit of the welfare of the child.[47]

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43. 260 N.Y. 171, 183 N.E. 353 (1932).
44. *Id.* at 178, 183 N.E. at 355.
45. In re Gault, 387 U.S. 1, 55 (1967).
46. In re Poff, 135 F. Supp. 224, 227 (D.D.C. 1955).
47. *See* People v. Fifield, 136 Cal. App.2d 741, 289 P.2d 303 (1955).

The policy in the North Dakota Juvenile Courts seems to be one of permitting counsel for the juvenile, but not always one of informing the juvenile of his right to counsel. This duty now becomes incumbent upon each juvenile court.[48]

Fairness in the treatment process is itself the goal of the juvenile and the juvenile court system. This has been a continuing goal since the inception of the juvenile court in the United States. This goal of fairness in the treatment process has characterized the reported juvenile court cases in North Dakota. The late Chief Justice Burke of the North Dakota Supreme Court in the case of *State* v. *Myers*[49] wrote that, "considerations of expediency, the satisfaction of public indignation, or example are contrary to the whole spirit of the juvenile act."[50]

The Juvenile Judges Association have set forth their feelings regarding the *Gault* decision and the operation of the Juvenile Court in the following statement:

> The decision of the United States Supreme Court in the case of *in the Matter of Gault* affirms the standards for juvenile and family courts developed over many years by the National Council on Crime and Delinquency and its Council of Judges, the National Council of Juvenile Court Judges, and the United States Children's Bureau. Basically, *Gault* reiterates that juvenile and family courts are courts of law, and not social welfare agencies.
>
> Due process and fair treatment are as necessary in the juvenile courts as they are in any judicial setting, whether civil or criminal.
>
> The juvenile court hearing, however, remains a unique type of judicial proceeding characterized by its treatment-oriented philosophy and its focus on the individual child. We do not read the *Gault* decision as undermining the non-criminal character of juvenile and family courts, or as abrogating their judicial concepts, whose intrinsic soundness was affirmed by the justices even though they were compelled to view them through the unsympathetic and atypical lens shaped from the facts of the *Gault* case. It is the obligation of all juvenile court judges to incorporate the mandates of Gault into the juvenile court hearings while

48. *See* McBride v. Jacobs, 247 F.2d 595, 597 (D.C. Cir. 1957), wherein the court stated, "The juvenile must be advised that he has a right to engage counsel or to have counsel named on his behalf, and second, where that right exists, the court must be assured that any waiver of it is intelligent and competent. The latter implies that where a waiver is relied on, the Juvenile Court must affirmatively find as a fact that by reason of 'age, education, and information, and all other pertinent facts' the minor is able to and did make an intelligent waiver."

49. 74 N.D. 297, 22 N.W.2d 199 (1946). In this case the North Dakota Supreme Court reversed the decision of a juvenile judge who ordered a boy to the state training school because of the "deterrent effect which the commitment would have upon juveniles." The court held that deterrence may well be an objective of criminal court proceedings but is contrary to the entire rehabilitative spirit of the juvenile court.

50. *Id.* at 302, 22 N.W.2d at 201.

> retaining the many basic values of the juvenile court process.
>
> Implicit in this decision must be a recognition that juvenile courts are completely dependent on public support, which too often in the past has not been forthcoming. New legislation may be needed in many states, not only to correlate existing statutes with the *Gault ruling*, but to provide the budgetary support that can make the words "individualized justice" a reality.
>
> We urge judges, the courts, the organized bar, legislatures, and society to join in efforts to meet the requirements of the decision. We also urge that every community endeavor to provide juveniles and the juvenile courts with more than the bare minimum support and services that have been provided to date, so that the juvenile courts can give children the specialized attention they have been promised.[51]

The ultimate effect of the *Gault* decision on the operation of the Juvenile Court system in North Dakota is not one which does violence to the operation of the juvenile court within its North Dakota framework. It is one of a number of decisions in both federal and state courts which have forecast changes in the operation of the juvenile court. The court has not ceased to exist nor have its functions been drastically changed or diminished. Rather *Gault*, like others involving the operation of juvenile courts, is one of achieving both the due process concept of fundamental fairness and continuing the traditional *parens patriae* concept of serving the best interest of the juvenile. This then must continue to be the goal and aspiration of the juvenile court.

51. Statement of Council of Judges of the National Council on Crime and Delinquency on the Case of In the Matter of Gault (as adopted on May 27, 1967), 18 JUV. CT. JUDGES J. 43 (1967).