St. John's Law Review

Volume 41
Number 3 *Volume 41, January 1967, Number 3*

Article 4

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St. John's Law Review

policies. It is unlikely that all the issues in the area will be resolved within the foreseeable future. However, it seems inappropriate for state legislatures to permit these conflicts to find resolution at town planning board meetings where local interests are frequently given undue weight. The balancing of public interests and the settling of conflicts of such importance presumably deserve the close attention of the state legislatures.

THE JUVENILE OFFENDER'S PROCEDURAL RIGHTS IN THE NEW YORK FAMILY COURT

Should a child, when under the jurisdiction of a state juvenile court, be afforded the constitutional rights guaranteed an adult in ordinary criminal proceedings, *i.e.*, the right to counsel, the right against self-incrimination, the right to confront witnesses and the right to appeal? A recent Arizona case, *Application of Gault*,[1] now pending before the United States Supreme Court, which is in accord with numerous jurisdictions, has answered this question in the negative. Several months ago, the United States Supreme Court, in *Kent v. United States*,[2] declared that the District of Columbia's waiver proceeding, which determines whether jurisdiction will be entertained by either the criminal or juvenile court, was unconstitutional. Thus, it appears that the Court is, for the first time,[3] attempting to deal with the constitutional problems inherent in modern-day treatment of juvenile offenders. Whether the Court will declare many state procedures to be in violation of due process is a matter of great speculation.

In 1894, the New York legislature amended the Penal Code to provide that a child under the age of fourteen, charged with a felony which was not a capital offense, might, in the discretion of the court, be tried for a misdemeanor.[4] The charge was finally reduced to juvenile delinquency as a matter of right,[5] and, in 1922, the children's courts were established throughout the state.[6]

Since the child was not to be convicted of a crime but only adjudicated a juvenile delinquent, an entirely novel proceeding was created. The state's relation to the child was that of *parens*

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[1] 99 Ariz. 181, 407 P.2d 760 (1965), *prob. juris. noted*, 384 U.S. 997 (1966).

[2] 383 U.S. 541 (1966).

[3] No United States Supreme Court decision has been found in this area, nor does the *Kent* case refer to any Supreme Court case.

[4] N.Y. Sess. Laws 1894, ch. 726, § 1.

[5] N.Y. Sess. Laws 1909, ch. 478, § 1.

[6] N.Y. Sess. Laws 1922, ch. 547, § 3.

patriae,[7] *i.e.*, the state acted as the parent of the child who had been neglected and misguided during his early years. The child was to be rehabilitated and not punished, since a child was considered more receptive to treatment than an adult.[8] Many of the procedural safeguards were relaxed in view of the fact that an adjudication resulted in treatment rather than punishment. However, certain due process limitations were retained. For example, the child had to be charged with some form of juvenile delinquency, regardless of whether the offense was of a criminal nature,[9] and also a writ of habeas corpus was available if the court lacked jurisdiction.[10]

The New York Court of Appeals reached the constitutional issues and construed the provisions of two different children's court acts. In *People v. Fitzgerald*,[11] a child under sixteen was convicted under the prior Buffalo Children's Court Act on the uncorroborated testimony of an accomplice and on his own confession which had been induced under threats of violence. The Court of Appeals set aside the conviction, holding that the charge against the child must be proved in the same manner as if made against an adult, *i.e.*, by competent evidence.[12] The Court construed the particular act as consisting of two distinct procedures: (1) an inquiry into the circumstances relating to the proper guardianship and care of the child, and (2) a trial upon a specific charge with competent evidence resulting in a judgment of conviction and the imposition of a fine.

The *Fitzgerald* case would seem to have made mandatory, in a juvenile court proceeding, those constitutional safeguards afforded to the adult offender. However, this conclusion was not reached by the Court in *People v. Lewis*[13] which involved the construction of an entirely different statute. There the Court affirmed a conviction even though the child had not been warned of his right to remain silent, and the judgment rested solely on his confession. The Court distinguished *Fitzgerald* by stating that the statute involved therein was of a criminal nature since it imposed criminal sanctions and therefore required strict evidentiary rules. The Court

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[7] People *ex rel.* Converse v. Derrick, 146 Misc. 73, 77-78, 261 N.Y. Supp. 447, 452 (Sup. Ct. 1933).

[8] In the Matter of Robles, 193 Misc. 870, 84 N.Y.S.2d 827 (Dom. Rel. Ct. 1948).

[9] People v. Pikunas, 260 N.Y. 72, 74, 182 N.E. 675, 676 (1932).

[10] Matter of Post, 199 Misc. 1075, 107 N.Y.S.2d 896 (Sup. Ct. 1951), *aff'd*, 280 App. Div. 268, 113 N.Y.S.2d 475 (3d Dep't 1952).

[11] 244 N.Y. 307, 155 N.E. 584 (1927).

[12] The Court was referring to N.Y. CODE CRIM. PROC. §§ 395, 399. Section 395 excludes from evidence a confession that has been coerced, and also requires proof in addition to a confession to warrant a conviction. Section 399 requires that testimony of an accomplice be corroborated.

[13] 260 N.Y. 171, 183 N.E. 353, *cert. denied*, 299 U.S. 709 (1932).

reasoned that the statute in *Lewis* was purely for the benefit of the child and in no way imposed criminal penalties. Therefore, there was neither a right to nor a necessity for the procedural safeguards prescribed by the constitution and by criminal statutes.

In 1962, with the enactment of the Family Court Act, all children's courts of the state of New York were abolished and replaced by one tribunal, the family court.[14] The *Lewis* case which did not impose any stringent constitutional requirements was regarded as allowing the legislature "wide discretion in prescribing the processes of law in this area." [15] The legislature, recognizing this fact, stated that the purpose of the new act was to provide the child with protection consistent with due process.[16] Hence, the *parens patriae* concept, in effect, became outmoded and was no longer a basis for the relaxation of procedural safeguards.

The act contains many safeguards and affords more protection than the Children's Court Act or statutes currently in force in many other jurisdictions. It is the purpose of this note to analyze many of the provisions of the Family Court Act and to determine whether they afford the juvenile the fullest protections without limiting the courts in fulfilling and applying the underlying philosophy of the juvenile court.

Apprehension, Detention, and Right to Counsel

Apprehension and Right to Counsel

The procedure under the act for apprehending and detaining a juvenile differs in accordance with the formal determination sought. A child may either be adjudicated a juvenile delinquent or a person in need of supervision (hereinafter referred to as a PINS).[17] The former applies when a child has committed an act which, if done by an adult, would be a crime.[18] The latter applies in a case in which a child has either been truant or has committed an anti-social act which is non-criminal in nature.[19] The major purpose in differentiating between the two was to avoid, in appropriate cases, the needless stigma of "juvenile delinquent."[20] "Juvenile delinquent" was considered a term of disapproval and

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[14] N.Y. Sess. Laws 1962, ch. 688, §§ 1, 2.

[15] N.Y. FAMILY CT. ACT § 711, Committee Comments (1962).

[16] N.Y. FAMILY CT. ACT § 711 (1962).

[17] N.Y. FAMILY CT. ACT § 712 (1962). This distinction is important throughout the entire act due to the fact that different rules will apply depending upon the type of adjudication.

[18] N.Y. FAMILY CT. ACT § 712(a) (1962).

[19] See N.Y. FAMILY CT. ACT § 712(b) (1962).

[20] N.Y.S. JOINT LEGISLATIVE COMMITTEE ON COURT REORGANIZATION—II THE FAMILY COURT ACT 7 (1962) (hereinafter cited as REPORT).

judges had been reluctant to make such an adjudication in the absence of conduct violating the Penal Law. In some instances, however, an adjudication of delinquency was rendered although no criminal-type acts had been committed because some kind of supervision was considered necessary for the proper development of the child.[21]

A juvenile may be apprehended without a court order only in those cases where an adult might similarly be arrested without a warrant.[22] Thus, a child who will be charged with being a PINS can never be apprehended without a court order. A police officer who does, in fact, seize a child charged with juvenile delinquency must notify his parents immediately and then release the child to his parents or bring the juvenile to the family court.[23] A violation of this provision may cause the invalidation of a minor's confession.

In *Matter of Addison,*[24] defendant, age thirteen, was charged with being a juvenile delinquent on a petition made by a police officer. She appeared at the police station of her own accord, without her parents, and voluntarily confessed to the offense. The court invalidated the confession, and indicated "that a confession may not be obtained prior to notifying parents or relatives and releasing the child either to them or to a Family Court." [25] However, a recent amendment provides that if it is necessary to question the child, the police officer, after making every reasonable effort to notify the parents, may do so for a reasonable period of time at a place designated by the appropriate appellate division.[26]

The amendment, however, fails to provide for a warning as to right to counsel. The Family Court Act only provides for this warning at the commencement of a hearing.[27] The act does not provide for a warning at any preliminary stage such as an interrogation by police officers. Although Section 735 of the Family Court Act does provide that statements made during a preliminary conference are inadmissible as evidence at a fact-finding hearing (thus apparently rendering unnecessary such a warning), it has been held that this does not apply to statements taken by the police.[28]

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[21] *Ibid.*

[22] N.Y. FAMILY CT. ACT § 721 (1962).

[23] N.Y. FAMILY CT. ACT § 724(b) (Supp. 1965).

[24] 20 App. Div. 2d 90, 245 N.Y.S.2d 243 (4th Dep't 1963). For an excellent discussion as to when a violation of § 724 will invalidate a minor's confession, see 40 ST. JOHN'S L. REV. 286 (1966).

[25] Matter of Addison, 20 App. Div. 2d 90, 92, 245 N.Y.S.2d 243, 246 (4th Dep't 1963).

[26] N.Y. FAMILY CT. ACT § 724(b)(ii) (Supp. 1965).

[27] N.Y. FAMILY CT. ACT § 741 (1962).

[28] *Supra* note 25.

With the advent of *Miranda v. Arizona*,[29] law enforcement authorities, before questioning a criminal suspect in custody, must warn him of his right to counsel, and when a request is made, provide counsel. If the individual refuses counsel, an effective waiver must be obtained before questioning may proceed. The same dangers which existed in *Miranda* and which compelled the promulgation of the rule set forth therein exist in the questioning of children. The act as presently construed will prevent the use of confessions obtained prior to the required statutory notification of the child's parents. In keeping in line with the obvious intent of the legislature to protect the child at this sensitive stage, it should be additionally required that either the child or his parents be advised of the infant's right to counsel. In the alternative, Section 735 may be extended to apply to statements made to the police, thereby excluding these statements from the fact-finding hearing.

Detention

In several states a child may be detained for an unlimited amount of time pending a hearing.[30] Such detention has been excused on the grounds that (1) a child may need immediate care and (2) releasing him to his parents may be detrimental if they have been a source of his difficulty.[31] This type of detention has resulted in much abuse. In one year, twenty-five per cent of the children who were "picked up" in the United States were detained in jails.[32] In several cases the period of detention was extended for one month or more.[33]

Detention of a child is rarely desirable before an adjudication and usually is not needed either to protect the child or to protect the community from further harmful activity.

The New York legislature adopted a strong policy against temporary detention pending the initiation of a family court proceeding.[34] Detention of a minor will depend upon the type of determination involved. In New York, a child charged as a PINS must be released to a parent or other person legally responsible for his care.[35] When the petition seeks a determination

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[29] 384 U.S. 436 (1966).

[30] Elson, *Juvenile Courts & Due Process*, in JUSTICE FOR THE CHILD 95, 101 (Rosenheim ed. 1962).

[31] *Ibid.*

[32] SUSSMAN, JUVENILE DELINQUENCY 41 (2d ed. 1959).

[33] *E.g.*, United States v. Dickerson, 271 F.2d 487, 489 (D.C. Cir. 1959) (5-6 weeks); White v. Reid, 125 F. Supp. 647, 651 (D.D.C. 1954) (6 months).

[34] See REPORT 11.

[35] N.Y. FAMILY CT. ACT § 728(b)(ii) (1962).

as to juvenile delinquency, the child must be released "unless there is a substantial probability that he will not appear in court" or may "do an act which if committed by an adult would be a crime." [36] At first glance, this rule would appear to be unfair to the child since it gives the court broad discretion. However, similar discretion is used by the courts in the determination of bail for adult offenders. It has been held that the eighth amendment does not provide for the right to bail but is merely a safeguard to prevent excessive bail in the instances where it is properly granted.[37] Therefore, by a parity of reasoning, the act's detention procedure is consistent with constitutional requirements.

Petition to Initiate Family Court Proceedings

In order for the family court to obtain jurisdiction, a petition must be issued setting forth the facts which bring the child within its jurisdiction.[38] The petition is a less formal document than the criminal indictment, and has been held to be adequate if it sufficiently informs the child of the reasons for his appearance in court.[39] Although in criminal cases punishment is related to the specific crime committed, treatment administered to the child will primarily relate to the needs of the minor and not to the act he committed. Therefore, requiring a petition to be as sufficient as an indictment would seem to be unnecessary and wasteful. On the other hand, carelessly and inexpertly drafted petitions could result in abusive treatment of juveniles and hinder their attorneys in the preparation of an adequate explanation of the child's behavior.

Although the petition does not have to enumerate in detail the acts committed, any exercise of power over an infant should not turn upon a single judge's estimate of the need for treatment. Rather, it should depend on the occurrence of acts or circumstances which have been legislatively determined as sufficient reason for judicial action. The act provides that if the proceeding is to adjudicate one a juvenile delinquent, the petition must allege that the infant committed an act which, if committed by an adult, would constitute a crime.[40] In order to adjudicate one a PINS, the

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[36] N.Y. FAMILY CT. ACT § 728(b)(iii) (1962).

[37] Carlson v. Landow, 342 U.S. 524 (1952); see Note, *Judicial Discretion in Granting Bail*, 27 ST. JOHN'S L. REV. 56 (1952).

[38] N.Y. FAMILY CT. ACT § 731 (1962).

[39] Paulsen, *Fairness to the Juvenile Offender*, 41 MINN. L. REV. 547, 557 (1957).

[40] N.Y. FAMILY CT. ACT § 731(a) (1962). In addition, the petition must allege that the respondent was under sixteen when the act was committed and that he requires supervision, treatment, or confinement. N.Y. FAMILY CT. ACT § 731 (1962).

petition must include allegations that the minor is a habitual truant, "is incorrigible, ungovernable or habitually disobedient and beyond the lawful control of parent or other lawful authority." [41] In addition, it must be shown that the juvenile has a condition which requires the attention of the court.[42]

In order to insure that the court will exercise its jurisdiction only when certain prescribed acts have been committed, two separate proceedings are provided: a fact-finding hearing,[43] and a dispositional hearing.[44] In the fact-finding hearing the statute bars reference to the reports prepared by the probation service, which contain evidence as to the general character and background of the respondent.[45] Such matters are reserved for the dispositional hearing which determines the type of treatment to be provided.[46] Hence, differentiating between the issues to be decided at each hearing and separating the evidence to be introduced provides the juvenile with the added protection that an adjudication will not result unless certain prescribed acts have been alleged and substantiated.

Role of the Attorney

Since the family court proceeding is informal and non-adversary, the role of the attorney is a unique one. The early view was that the judge protects the child, thereby reducing the significance of the attorney's participation.[47] Although this initial premise of judicial protection has since been shown to be impractical, several noteworthy arguments have been made on its behalf. It is said that the lawyer will have a confused role, since the traditional role of the attorney is essentially a partisan one.[48] Since the juvenile court proceeding is for the benefit of the child, the attorney must assume a different role and in certain circumstances disclose adverse evidence. More important, however, is the possibility that the judge may be thrown into a prosecutor's state of mind by the presence of an advocate for the child, but none against him. A recent New York case [49] criticized the untenable position

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[41] N.Y. FAMILY CT. ACT § 732(a) (1962). The statute requires that the petition also contain allegations that a male is under 16 and a female under 18, and that supervision or treatment is required. N.Y. FAMILY CT. ACT § 732 (1962).

[42] In the Matter of Ronny, 40 Misc. 2d 194, 242 N.Y.S.2d 844 (Fam. Ct. 1963).

[43] N.Y. FAMILY CT. ACT § 742 (Supp. 1965).

[44] N.Y. FAMILY CT. ACT § 743 (1962).

[45] N.Y. FAMILY CT. ACT § 746 (Supp. 1965).

[46] N.Y. FAMILY CT. ACT § 746 (Supp. 1965).

[47] Dembitz, *Ferment and Experiment in New York: Juvenile Cases in the New Family Court*, 48 CORNELL L.Q. 499, 510 (1963).

[48] See Elson, *supra* note 30, at 103.

[49] In the Matter of Lang, 44 Misc. 2d 900, 255 N.Y.S.2d 987 (Fam. Ct. 1965).

which a judge must assume. The court noted that not only must the judge seek the facts and bear the defense, but he must also pass upon the evidence impartially. In such circumstances,

there is no one to interview the petitioner or complaining witnesses prior to the trial, no one to conduct the direct examination other than the Judge, no one to cross-examine the respondent and his witnesses other than the Judge, and no one to prepare a brief on questions of law. . . . The present situation inevitably results in injury to citizens, to delinquent children, and to the entire community.[50]

The proper solution to such a problem would not be the banishment of all lawyers from the family court. However, since most lawyers are totally unfamiliar with the philosophy, policy and procedure used in the family court, the best answer would be to educate lawyers to understand the basic aims of the court. After such tutelage most lawyers, cognizant of their professional obligations to assist in the supervision, rehabilitation, and treatment of the infant,[51] would refrain from insisting that their client be afforded the same rights as an adult-offender or that the evidentiary rules applicable in criminal courts be strictly followed.[52]

Another argument put forward against the admission of the attorney to the family court is that factual issues generally are not in dispute, since most juveniles admit their delinquency.[53] However, a child's admission that he participated in certain activity might create a need for a lawyer to show that the conduct admitted was not included within the definition of juvenile delinquent or PINS. Although the basic facts may not be in dispute, the attorney may still play an important role in the ultimate disposition, *i.e.*, whether treatment, supervision or confinement is necessary. The precise development of the evidence will bear on the disposition and can mean the difference between commitment and probation. Also, with the attorney's assistance, probative and social reports can be closely scrutinized to determine omissions and errors. Additional investigation by the attorney, with suggestions for treatment, would also greatly aid the court in its determination.[54]

The Family Court Act recognizes the important role of the attorney and explicitly declares "that counsel is often indispensable

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[50] *Id.* at 905-06, 255 N.Y.S.2d at 992-93.

[51] McKesson, *Right to Counsel in Juvenile Proceedings,* 45 MINN. L. REV. 843, 846 (1961).

[52] *Ibid.*

[53] *Supra* note 47.

[54] "The 'right to be heard' when personal liberty is at stake requires the effective assistance of counsel in a juvenile court quite as much as it does in a criminal court." Shioutakon v. District of Columbia, 236 F.2d 666, 669 (D.C. Cir. 1956).

to a practical realization of due process of law and may be helpful in making reasoned determinations of fact and proper orders of disposition." [55] In addition, at the commencement of any hearing the child and his parent must be advised of his right to be represented by counsel, and legal aid is made available to the indigent.[56] The lawyer assigned by the court is designated a "law guardian" rather than "counsel," "attorney" or "lawyer." Such labeling indicates the intent of the legislature that the role of the lawyer be unique. The attorney may be said to perform at least three separate functions—that of advocate, guardian and officer of the court.[57] Hence, the attorney cannot act merely as an advocate, but must play a responsible part in order to aid the court in its attempt to protect and rehabilitate the child.

The Privilege Against Self-Incrimination

There have been some state court decisions which have refused to recognize the privilege against self-incrimination in juvenile proceedings.[58] Justification for this denial is supported not merely on the ground that the proceeding is non-criminal, but also because the hearing is part of the treatment process which could not function if the child were advised that he need not talk to anyone.[59] Due to the fact that the hearing is non-accusatory and is protective in nature, one may also argue that the need for this privilege is unwarranted.

However, the better rule should permit the child to invoke the privilege. The fact is that a child incriminates himself when his responses expose him to incarceration and loss of liberty through an adjudication of juvenile delinquency. In a California case [60] a child was committed to a detention home for refusing to answer questions. The court directed that he be released under a writ of habeas corpus, stating:

> it would have been strange indeed if the Legislature had sought to visit a minor with the loss of his natural parents' society, guidance, and governance merely because . . . he had the temerity to invoke the protection of a constitutional guaranty. . . .[61]

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[55] N.Y. FAMILY CT. ACT § 241 (1962).
[56] N.Y. FAMILY CT. ACT § 741 (1962).
[57] See Isaacs, *The Role of the Lawyer in Representing Minors In The New Family Court*, 12 BUFFALO L. REV. 501, 506-08 (1963).
[58] *E.g., In re* Dargo, 81 Cal. App. 2d 1205, 183 P.2d 282 (1947); *In re* Santillanes, 47 N.M. 140, 138 P.2d 503 (1943).
[59] *Supra* note 39, at 560-61.
[60] *Ex parte* Tahbel, 46 Cal. App. 755, 189 Pac. 804 (Dist. Ct. App. 1920).
[61] *Id.* at 761, 189 Pac. at 807.

The Family Court Act recognizes the privilege against self-incrimination, and before any hearing the court is obligated to advise the child of his right to remain silent.[62]

The Right to a Speedy and Public Trial

Generally, the juvenile has not been entitled to a public trial.[63] Although such a trial would operate as a check against possible abuses on the part of the family court, publicity would only serve to damage the child's reputation. It is felt that the goals of informing the community and protecting the youth cannot be simultaneously pursued, since any disclosures regarding the identity of a child, the nature of his behavior, and the like would be nullifying the potential benefits the child may receive from the family court proceedings.

The act provides that the general public may be excluded from any hearing. Only those persons who have a direct interest in the case and representatives of authorized agencies have a right to be present.[64] However, it is suggested that the judge should, in his discretion, allow certain members of the public to be present. Perhaps selected members of the press should be admitted. In England, the press is given the opportunity to attend a proceeding but prohibited from mentioning the name of the minor or any other identifying information.[65]

The right to a speedy trial has been denied on the ground that the hearing is non-criminal.[66] Nevertheless, the reasons for a speedy trial in a criminal action should apply similarly to a juvenile proceeding. The threat of loss of liberty should not indefinitely hang over the child's head. Also the possibility of losing witnesses who might aid in the child's defense is as real in juvenile proceedings as in criminal actions. Although the act provides that a fact-finding hearing must be commenced within three days after the filing of a petition in the case of a child detained by the authorities,[67] no such provision is made for a child released in his parents' custody. It would seem that similar treatment should be afforded to these juveniles as well.

Rights to Appeal and to a Statement of Findings

That the right to appeal and the right to a statement of findings are very much dependent upon each other is demonstrated by

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[62] N.Y. FAMILY CT. ACT § 741(a) (1962).
[63] SUSSMAN, JUVENILE DELINQUENCY 32 (2d ed. 1959).
[64] N.Y. FAMILY CT. ACT § 741(b) (1962).
[65] Henriques, *Children's Courts in England,* 37 J. CRIM. L., C. & P. S. 295 (1946-47).
[66] *In re* Mont, 175 Pa. Super. 150, 103 A.2d 460 (1954).
[67] N.Y. FAMILY CT. ACT § 747 (Supp. 1965).

Application of Gault,[68] now pending before the United States Supreme Court. There, the child's parents are seeking a writ of habeas corpus to secure the release of their minor son who had been committed to the state industrial school. The parents allege that the state's juvenile procedure is unconstitutional because the statute failed to provide for a transcript of the hearing or a statement of findings. The Arizona court held that there was no right to appeal from a juvenile court order. Countering the contention that due process was denied because there was no record kept of the findings of fact upon which the conclusion of delinquency was based, the court stated that:

> the purpose of a transcript, in some instances, is to support an appeal. But there is no right to an appeal. Furthermore, the evidence adduced at a juvenile hearing is of a confidential nature because it is inadmissible in other courts. . . .[69]

Here, the only means of "appeal" afforded to the respondent was through a writ of habeas corpus. This writ is an extraordinary one and the scope of review it offers cannot be compared with that available under normal appellate procedures.[70] Surely the petitioner, in danger of being adjudicated a juvenile delinquent, is entitled to some of the protection against errors of law and fact accorded his adult equivalent. Without the existence of a court record, appellate review, even if granted, could not be exercised properly.

Under the Family Court Act, the New York court is required, when the allegations of a petition are established, to state the grounds for the finding.[71] In addition, an appeal may be taken as of right from any order of disposition and, in the discretion of the appellate division, from any other order.[72] In conformity with the informal procedures of the family court, however, no printed case or brief is required on appeal.[73] Also, where appropriate, the provisions of the New York Civil Practice Law and Rules apply to this appellate procedure.[74] Thus, under the act, the minor is afforded an adequate form of appellate review.

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[68] 99 Ariz. 180, 407 P.2d 760 (1965), *prob. juris. noted*, 384 U.S. 997 (1966).

[69] *Id.* at 192, 407 P.2d at 768.

[70] See generally 25 AM. JUR. *Habeas Corpus* § 26 (1940).

[71] N.Y. FAMILY CT. ACT § 752 (1962).

[72] N.Y. FAMILY CT. ACT §§ 1011, 1012 (1962).

[73] N.Y. FAMILY CT. ACT § 1016 (1962).

[74] N.Y. FAMILY CT. ACT § 1018 (1962).

Evidence

The type of evidence that is to be presented is an important factor in determining the constitutional validity of a juvenile proceeding. According to *People v. Lewis*,[75]

> hearsay, opinion, gossip, bias, prejudice, trends of hostile neighborhood feeling, 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.[76]

However, in other jurisdictions the hearsay evidence rule has not been as carefully transposed to juvenile courts. For example, in *In re Holmes* [77] the court admitted certain testimony substantiating a charge that a child was implicated in the armed robbery of a church. A detective testified as to the substance of a confession, subsequently repudiated, made by an accomplice. Although the findings of delinquency were not based solely on this testimony, the danger in permitting the introduction of this type of evidence became apparent. The court stated that while a finding must be based on sufficient competent evidence, the court may avoid many of the legalistic features of the rules of evidence customarily applicable to other judicial hearings.

The Family Court Act provides that in a fact-finding hearing only evidence that is competent, material and relevant may be admitted.[78] However, in a dispositional hearing, evidence to be admissable need only be material and relevant.[79] The legislature probably intended to make clear that the hearsay rule, although not applicable to exclude certain evidence in a dispositional hearing, would exclude similar evidence in a fact-finding hearing.[80] This distinction is made in recognition of the importance of sociological reports in the ultimate determination of what controls need to be placed on the child. The use of medical, psychiatric, psychological and background facts is the essence of the juvenile court therapy.[81] These reports cannot be used in other than the dispositional hearing. A fact-finding hearing, on the other hand, is only concerned with whether certain acts have been committed and the judge should not be influenced, at this point, with reports noting the respondent's character.

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[75] 260 N.Y. 171, 183 N.E. 353, *cert. denied*, 289 U.S. 709 (1932).
[76] *Id.* at 178, 183 N.E. at 355.
[77] 379 Pa. 599, 109 A.2d 523 (1954).
[78] N.Y. FAMILY CT. ACT § 744(a) (Supp. 1965).
[79] N.Y. FAMILY CT. ACT § 745(a) (1962).
[80] Paulsen, *The New York Family Court*, 12 BUFFALO L. REV. 420, 432 (1963).
[81] *Ibid.*

The act provides that such "therapeutic" reports shall be deemed confidential information which the court, in a proper case, may withhold from counsel and other interested parties.[82] Two arguments support the treatment of these reports as confidential: (1) the rule of total confidentiality is necessary to protect sources of information, and (2) the reports contain data that may damage the family relationship if disclosed to the parties.[83] Disclosure of these reports to a family, without further information, might create hostilities between the child and his parents or between the parents themselves, and hinder any chance for improved relations in the future. The legislature, concerned with the possible effect of disclosure on family relationships, gave the judge authority to withhold medical data and psychiatric diagnoses when he believes that disclosure would be harmful.[84] However, this provision should not allow the judge to prevent counsel from inspecting these reports. The policy for non-disclosure would appear not to be applicable to the attorney when he is admonished that certain information should not be disclosed to his client.

Waiver of Family Court's Jurisdiction

In most jurisdictions there are provisions which deal with the waiver of juvenile court jurisdiction. Waiver will usually depend upon the age of the respondent and the nature of the offense committed.[85] In *Kent v. United States*,[86] the Court determined the constitutionality of the District of Columbia's waiver proceeding. The provision read:

> If a child sixteen years of age or older is charged with an offense which would amount to a felony in the case of an adult, or any child charged with an offense which if committed by an adult is punishable by death or life imprisonment, the judge may, after full investigation, waive jurisdiction and order such child held for trial under the regular procedure of the court which would have jurisdiction of such offense if committed by an adult. . . .[87]

Defendant requested a hearing on the question of waiver, and access to the Social Service file. No hearing was had and the judge, without conferring with defendant or his counsel, waived jurisdiction. He made no findings nor did he recite any reasons for the waiver. Defendant was then indicted, stood trial and

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[82] N.Y. FAMILY CT. ACT § 746(b) (Supp. 1965).
[83] REPORT 10.
[84] *Ibid.*
[85] SUSSMAN, *op. cit. supra* note 63, at 26.
[86] 383 U.S. 541 (1966).
[87] D.C. CODE § 11-914 (1961).

was found guilty. Defendant urged that the waiver proceeding was a violation of due process and also urged that the procedures concerning his prior detention and interrogation were unlawful and unconstitutional.

The Supreme Court refused to examine the question of the District of Columbia Act as a whole. However, it did declare the waiver proceeding defective on statutory and constitutional grounds. The Court, through Mr. Justice Fortas, stated:

> [W]e conclude that, as a condition to a valid waiver order, petitioner was entitled to a hearing, including access by his counsel to the social records . . . and to a statement of reasons for the Juvenile Court's decision. We believe that this result is required by the statute read in the context of constitutional principles relating to due process and the assistance of counsel.[88]

The present New York Code of Criminal Procedure provides that in cases in which a child who is fifteen commits an act which, if done by an adult, would be a crime punishable by death or life imprisonment, jurisdiction may be waived by the criminal courts and vested in the family court.[89] The provision does not encompass all felonious acts as did the statute involved in *Kent*, and the determination of waiver is not to be decided by the family court but in the regular criminal courts. The procedure involves an indictment against the juvenile and, thereafter, upon recommendation to the court by the grand jury, the district attorney, or upon the court's own motion, an investigation is granted to determine whether the proceedings should be removed to the family court. Should the court determine, after examination, investigation and questioning, that the ends of justice, the best interests of the state, and the welfare of the child would be served by removal, the indictment is dismissed, no further action is taken on the indictment, and the case is transferred to the family court.[90] It should be emphasized that the defendant has no *right* to an investigation absent a specific recommendation by the parties indicated above.[91] Note that the statute neither requires a hearing nor a statement of findings.[92]

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[88] *Supra* note 86, at 557.

[89] N.Y. CODE CRIM. PROC. § 312-c(c) (1948).

[90] See *ibid.*

[91] Two cases have held that a denial of defendant's own motion for removal to the family court is not appealable. People v. Jolls, 17 App. Div. 2d 1031, 235 N.Y.S.2d 456 (4th Dep't 1962) (memorandum opinion); People v. Lubchuk, 218 N.Y.S.2d 348 (Queens County Ct. 1961).

[92] N.Y. CODE CRIM. PROC. § 312-c(a) (1948) provides that "the defendant be investigated for the purpose of determining whether the court shall order the action removed."

Any discussion as to the constitutionality of New York's present "removal" procedure would only be academic due to the enactment of the Revised Penal Law.[93] Section 30 states unequivocally that "a person less than sixteen years old is not criminally responsible for conduct." The legislature felt that retention of existing law was illogical since "if a child of fifteen is not deemed sufficiently mature to be responsible for robbery, burglary or assault, he can hardly be deemed mature enough to be responsible for murder or kidnapping." [94]

Conclusion

On the basis of the above analysis of the principal provisions of New York State's Family Court Act, one may justifiably conclude that the juvenile is generally afforded the protections of due process of law. This note has emphasized those provisions which protect the minor in various circumstances. For example, a child cannot be taken into custody without a court order unless under similar circumstances the arrest of an adult would be legal. The child is provided with two hearings, one to determine whether the child is a juvenile delinquent or a PINS, and the other to determine his treatment. Most significantly, a child must be advised of his right to remain silent and of his right to be represented by counsel at a hearing.

The *Gault* case, if decided for the defendant, will have little effect on New York's legislation. The errors alleged therein which include (1) a denial of the right to counsel, (2) a denial of the right to appeal, (3) the failure to give proper notice of the charge, and (4) the reliance upon unsworn hearsay testimony could not arise under the Family Court Act.

Although New York's statute affords a more liberal approach than that of many other jurisdictions, its provisions may be deficient in certain respects. For example, the principles of recent Supreme Court decisions on right to counsel may someday affect the section providing for right to counsel before a hearing. The question is whether the child must be informed of his right to counsel at the moment he is taken into custody. In addition, do the police have a right to question the child, or is his immediate release into the custody of his parents required by due process?

The act places the release of sociological reports in the court's discretion. Should the child have a right to inspect these documents? As was stated before, these reports are essential for the final disposition. Counsel should at least be provided with this

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[93] N.Y. REV. PEN. LAW (effective 9-1-67).

[94] Commission Staff Comments, N.Y. REV. PEN. LAW art. 30 (1965).

evidence as a matter of right in order to correct any omissions or misstatements.

Another question which presents itself is whether the child should have a right to choose a public hearing. A statute could be drafted to admit members of the press, if the child so chooses, as long as his name is not reported.

These and other questions as to the validity of the Family Court Act must await the United States Supreme Court's determination concerning due process in the realm of juvenile law. It is recommended, during the interim, that the provisions of the Family Court Act be closely scrutinized by the courts to determine whether they provide not only for the rehabilitation of the juvenile offender, but also protect his rights in accordance with the basic requirements of due process of law.

MANUFACTURER'S STRICT TORT LIABILITY TO CONSUMERS FOR ECONOMIC LOSS

As American courts become increasingly aware of the need for protecting consumers from defective goods, the law of products liability correspondingly develops at a rapid and fascinating pace. Privity of contract, fault as the basis of liability, and other classical common-law concepts as prerequisites for liability are becoming antiquated or radically modified. Virtually every state holds the manufacturer liable to the consumer for negligence in the production of products when it ultimately results in physical injury.[1] Indeed, a few courts have held manufacturers liable for property damage where no risk of personal injury was present, basing recovery on express representations made directly to the consumer by the manufacturer.[2] However, absent the risk of personal injury or express representations, attempts to expand the law of products liability to encompass the economic loss of subpurchasers have met great resistance.

Plaintiffs seeking to recover in negligence actions by invoking traditional products liability theories have generally been denied recovery when the product has not threatened or caused physical

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[1] PROSSER, TORTS § 96 (3d ed. 1964). Various theories, including warranty and strict liability in tort, have been used to hold manufacturers liable when a defect in a product causes personal injuries. See generally Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099 (1960).

[2] *E.g.*, Randy Knitwear, Inc. v. American Cyanamid Co., 11 N.Y.2d 5, 181 N.E.2d 399, 226 N.Y.S.2d 363 (1962).