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TWO MANY RIGHTS OR NOT ENOUGH? A STUDY OF THE JUVENILE RELATED DECISIONS OF THE WEST VIRGINIA SUPREME COURT OF APPEALS

PAUL MONES*

I. INTRODUCTION**

On January 12, 1983, in his State of the State address, Governor John D. Rockefeller IV announced the closing of the West Virginia Industrial School for Boys at Pruntytown. The institution was closed as part of an overall statewide effort to cut costs. The decision to close the West Virginia Industrial School for Boys was rationalized in economic terms, but the ultimate benefit to the State was humanitarian in nature. That is, though the closing would save hundreds of thousands of dollars, it would, more importantly, prevent the destruction of numerous young people who would otherwise have been incarcerated in the facility.

Constructed during the heyday of the turn-of-the-century social reform movement, Pruntytown was the epitome of the juvenile justice system in West Virginia. The stated purpose of both the system and the facility was the reform and the rehabilitation of delinquent juveniles. Unfortunately for the youth, there was an immense gulf between theory and practice present from the system’s inception. Tragically, the well-intentioned child reformers created a system which did more harm than good.

For the seven years prior to its demise, the West Virginia Industrial School for Boys was the subject of numerous lawsuits, governmental investigations and newspaper exposés. While the institution was the subject of much scathing criticism, the court systems responsible for the commitments

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** This article is dedicated to the memory of Jeffrey Flanigan, a teenager who was murdered while he was incarcerated in the Wood County Correctional Center in Parkersburg, West Virginia. Jeff had originally been adjudicated delinquent as a status offender. He violated his probation by committing another status offence. As a result of this probation violation he was placed in the jail in September of 1982 and on November 5, 1982, Jeff was beaten to death by an adult inmate. Consistent with the thesis of this article, it is the author's opinion that Jeffrey Flanigan's death was the direct result of the failure of the juvenile justice system to protect his constitutional and statutory rights.

1 The West Virginia Industrial School for Boys, or Pruntytown as it is commonly known in the State, was built in 1891. At the time of its closing, it was one of three youth correctional facilities in the state, the other two being the West Virginia Industrial Home for Youth and the Davis Center. During most of its lifetime, the facility housed over 400 boys; at the time of its closing only 52 resided at the facility. For a further description, see 6 INSTITUTIONS ETC. 1-4 (March 1983).

2 This time period is chosen because in 1976, the West Virginia Supreme Court of Appeals was presented with its first case against the institution. State ex rel. Harris v. Calendine, 233 S.E.2d 318 (W. Va. 1977).
to the facility escaped the public's outcry. The entire juvenile justice system was, however, culpable for the injuries inflicted on the residents of the West Virginia Industrial School for Boys. The problems at the Industrial School were a byproduct of an entire system which was, for the most part, unjust. Though they never made banner headlines, the abuses in the courtrooms and police stations have been of equal magnitude to those occurring at the Industrial School.

The focus on the treatment of juvenile delinquents is a relatively recent phenomenon in West Virginia, yet it is clearly one of the most controversial subjects among lawyers, judges, law enforcement personnel and legislators alike. This controversy dates from 1977, the year in which the West Virginia Supreme Court of Appeals decided State ex rel. Harris v. Calendine. Harris set forth two important positions which have had an irreversible effect on the courts and juvenile institutions. Firstly, Harris held that an adjudicated delinquent was constitutionally entitled to receive the least restrictive alternative treatment consistent with his or her rehabilitative needs. Secondly, Harris explicitly and emphatically prohibited the commingling of adjudicated status offenders (those children considered to be beyond the control of their parents and who are engaging in harmful but noncriminal activity) and adjudicated criminal offenders in secure prison-like facilities such as Pruntytown. The court stated that "no status offender in any event, regardless of incorrigibility, may be incarcerated in a secure, prison-like facility which is not devoted exclusively to the custody and rehabilitation of status offenders." The immediate effect of Harris was a dramatic drop in the population at the various correctional facilities in the State, and a total revision of the juvenile code.

3 W. Va. § 49-1-4 (1980) provides:
"Delinquent child" means a child:
(1) Who commits an act which would be a crime under state law or a municipal ordinance if committed by an adult, punishable by confinement in jail or imprisonment;
(2) Who commits an act designated a crime under a municipal ordinance or state law not punishable by confinement in a jail or imprisonment;
(3) Who, without just cause, habitually and continually refuses to respond to the lawful supervision by such child's parents, guardian or custodian;
(4) Who is habitually absent from school without good cause; or
(5) Who willfully violates a condition of a probation order or a contempt order of any court.
5 Id. at 329.
6 Id. at 331.
7 Id.
8 At the West Virginia Industrial Home for Girls 61 of the 70 girls were released. Approximately thirty-five percent of the boys were released from the male institutions.
9 On April 5, 1977, Senate Bill 200 was passed. The bill dramatically increased the rights of juveniles. One of its most notable changes was the extension of procedural and evidentiary protections such as requiring judges of the dispositional hearing to give precedence to the least restric-
The juvenile rights issue was catapulted into public awareness when, on October 12, 1979, Justice Darrell McGraw attempted to personally investigate the circumstances surrounding the death of a seventeen-year-old boy who was illegally incarcerated in the Kanawha County Jail in Charleston, West Virginia. As the newspapers across the state and the nation reported, in attempting to gain access to the facility, Justice McGraw was physically assaulted and arrested by several sheriff's deputies. Following this incident, youth advocates substantially increased their efforts in reviewing juvenile detention practices and procedures.10

Of the three branches of government, it is clear that the West Virginia Supreme Court of Appeals has generated the most heated debate about juvenile rights. Though the Legislature has totally revamped the juvenile code, the amendments can in large part be explained as attempts to bring the West Virginia Code into compliance with court pronouncements regarding juvenile rights. Additionally, a number of Code changes can be attributed to the Legislature's attempts to limit the effect of certain court decisions.11

In 1980, Justice Neely described the state of affairs with respect to juvenile law by writing that "it is important to recognize that the juvenile law in West Virginia has been in substantial turmoil since this Court's decision in State ex rel. Harris v. Calendine. . ."12 It is the purpose of this article to explain the nature and causes of this "turmoil" by analyzing the court's major delinquency-related decisions. The analysis reveals that the court has with fair consistency applied the principles espoused in Harris13 to the juvenile cases it has decided since 1977. The article demonstrates that the decisions themselves are not in "turmoil." Rather, the turmoil is in large part due to the failure of those who work with children—judges, lawyers, and institutional personnel—to abide by the law. The West Virginia Supreme Court of Appeals14 has articulated a philosophy of juvenile rights that is both beneficial to the progressive social development of our children and society.

10 As a result of this incident Justice McGraw swore out warrants against the deputies and vice versa. Ultimately, both complaints were dropped. It is a rare jurist who expresses such concern for justice. After this incident, the Juvenile Justice Committee (which was established pursuant to W. Va. Code § 49-5-16b (1980 & Supp. 1983)) substantially increased their efforts in inspecting jails and other facilities which housed juveniles.
11 See generally Withers, supra note 9, at 249-50.
13 233 S.E.2d 318.
14 In 1977 the court was comprised of Justice Richard Neely, Justice Sam Harshbarger, Justice Thomas Miller, Justice Darrell McGraw and Justice Fred Caplan. In 1982 Justice Caplan retired and he was replaced by Justice Thomas McHugh.
The juvenile rights philosophy of the West Virginia Supreme Court of Appeals has its roots in the landmark United States Supreme Court decision of In re Gault. The basic legal theories espoused in Gault are prominent in Harris, and they can be seen throughout the major juvenile-related decisions of the West Virginia Supreme Court. The first part of the article explores the dominant themes of Gault and creates a foundation for analyzing the West Virginia cases. The second part presents a detailed analysis of Harris and the later decisions of the West Virginia Supreme Court of Appeals which have had a substantial impact on juvenile rights.

II. THE UNITED STATES SUPREME COURT JUVENILE CASE LAW: IN RE GAULT

The holding of the United States Supreme Court in In re Gault was limited in that it addressed the rights of juveniles at only the adjudicatory hearing, and not at the detention or dispositional hearing. The decision held that accused juveniles had the following rights: adequate notice of hearing; assistance of counsel; the privilege against self-incrimination and cross-examination; and confrontation of witnesses. The opinion was, however, far-reaching in two ways. Firstly, it was a scathing indictment of the entire juvenile justice system. Indeed, the Court noted, "Under our Constitution, the condition of being a [juvenile] does not justify a kangaroo court."

Secondly, in developing its holdings, the Court developed an expansive due

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16 387 U.S. 1 (1967).
17 Id.
18 233 S.E.2d 318.
19 387 U.S. 1.
20 233 S.E.2d 318.
21 387 U.S. 1. The United States Supreme Court has decided five other delinquency related cases of significant merit, but for the purpose of this analysis only Gault will be discussed. The other cases are: Fare v. Michael C., 442 U.S. 707 (1979) (a juvenile's request during a custodial interrogation to speak to his probation officer did not represent an invocation of the child's Miranda rights); Breed v. Jones, 421 U.S. 519 (1975) (subjecting a child to a criminal trial as an adult after he has been adjudicated delinquent on the same charge violates the double jeopardy clause of the fifth amendment); McKeiver v. Pennsylvania, 403 U.S. 528 (1971) (a juvenile does not have a constitutional right to trial by jury); In re Winship, 397 U.S. 358 (1970) (the standard of proof to determine delinquency is proof beyond a reasonable doubt); Kent v. United States, 383 U.S. 541 (1966) (a juvenile must be given a formal hearing on the issue of whether he or she should be transferred to adult jurisdiction).
23 The opinion appears to limit these rights to those juveniles charged with a criminal type offence. Id. at 29, 36. However, the case can also be more broadly interpreted to apply the rights in any case where a child's liberty is denied, as is the situation with status offenders who are securely confined. Id. at 13, 27.
24 Id. at 28.
process constitutional analysis that is applicable to the evaluation of any segment of the juvenile process. It is within this constitutional framework that the decisions of the West Virginia Supreme Court of Appeals will be reviewed.

The primary departure point for the constitutional analysis in Gault was that "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone." The Court steadfastly rejected the historic rationale of the juvenile court system that accused juveniles did not possess a liberty interest and thus were not entitled to be accorded due process of laws. While the development of the due process analysis formed the basis for the Court’s holding, it also was the basis for the Court’s caustic criticism of the overall juvenile court system. The majority’s analysis is, on one level, an exposé of the history of juvenile law. In its exposé, the Court presents a detailed refutation of the argument that the benefits obtained by juveniles from the traditional system "more than offset the disadvantages of the denial of the substance of normal due process." In its refutation the Court exposed the myths that for so long propped up the juvenile court system. The Court specifically repudiated the system’s incorporation and reliance upon the doctrine of parens patriae.

Parens patriae has its roots in the old English Court of Equity doctrine whereby the sovereign assumed the protection of all children who were orphaned, dependent or abandoned. The doctrine presently refers to the states’ power to act in place of the parents for the purpose of assuming the custody of children. However, parens patriae has evolved to provide the fundamental basis for incarcerating juveniles who commit acts that are socially unacceptable.

The child reformers of the late nineteenth century sought to promote individualized evaluation, treatment and rehabilitation. Incarceration was not considered to be punishment. Indeed, the "child savers" stressed treatment

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24 Id. at 13.
25 Id. at 16-28.
26 For a detailed discussion of the history of juvenile law, see Fox, Juvenile Justice Reform, An Historical Perspective, 22 STAN. L. REV. 1187 (1970).
27 387 U.S. at 21.
28 Id. at 19-31.
31 Id.
and separation from adults. Unfortunately, the good intentions and honorable motives of the early reformers led to a peculiar, informal, discretionary and often arbitrary system of justice in which loss of liberty often resulted. Because it was assumed by the reformers that a child was not being punished by the state it naturally followed that there existed no need to provide the child with the protections normally afforded adults. No trial was required because there was no determination of guilt made by the judge. No attorney was needed because it was assumed that the judge would act in the child's best interest. Finally, it was assumed that the child would undoubtedly receive the best regenerative and rehabilitative care the state had to offer in the residential facilities of the state. The hopes for these facilities were expressed in their names: industrial school, reform school and forestry camp.

The Court rejected the notion that the doctrine of parens patriae allowed the state to deprive an individual of due process under the guise of treatment. In fact, the failure of the early reformists to incorporate fundamental due process into the system doomed it to failure. Without incorporating procedural safeguards, the system was guaranteed to produce arbitrariness and abuse. It was the Court's position that children were entitled to be treated and rehabilitated, but the state could not intervene in the child's life for any purpose without first according him or her due process of law. The Court refused to accept the traditional notion that the juvenile judge was a fair and compassionate arbiter. In fact, it likened the typical juvenile court more to the Star Chamber than to a contemporary court. The juvenile judge was moreover, ill-prepared to competently deal with the complex adjustment problems presented by many youth. The Court also rejected the assertion that the reform schools actually provided any meaningful treatment to the youth. The Gault Court refused to be blinded by euphemistic titles which engendered images of care and solicitude. The Court was of the opinion that the state facilities created delinquency as opposed to preventing it.


34 See supra Curtis, note 30.
35 See, e.g., 387 U.S. at 17-20 where the Court stated that: Juvenile Court history has ... demonstrated that unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure ... Failure to observe the fundamental requirements of due process has resulted in instances, which might have been avoided, of unfairness to individuals and inadequate or inaccurate findings of fact and unfortunate prescriptions of remedy.
36 Id. at 21. "As we shall discuss, the observance of due process standards, intelligently and not ruthlessly administered, will not compel the States to abandon or displace any of the substantive benefits of the juvenile process." Id.
37 In 1937 Dean Pound wrote: "The powers of the Star Chamber were a trifle in comparison with those of our juvenile courts." Id. at 18.
38 Id. at 18-19.
39 Id. at 27.
Not only has "the rhetoric of the juvenile court movement developed without any necessarily close correspondence to the realities of court and institutional routines;" but, in addition it has developed without a clear understanding of the nature of a child's competency and maturity. A review of the Court's right to counsel analysis reveals a great concern for a child's inherent inability to advocate for him or herself. In its analysis the majority relied on the due process clause rather than the sixth amendment. Reliance upon the due process clause permitted the Court to explain the unique importance of defense counsel in a juvenile proceeding. The opinion states that the attorney insures a degree of fairness in the proceeding that would not otherwise be present if the child were to defend him or herself. Moreover, the Court clearly implied that counsel should be appointed regardless of the child's desire to have an attorney present.

An examination of the development of the self-incrimination holding reveals an analysis similar to that used in the right to counsel section. The Court acknowledged that "[w]ith respect to juveniles, both common observation and expert opinion emphasize distrust of confessions made in certain situations. . . ." Compelling children to testify against themselves was judged to be antithetical to the child's progressive treatment.

The majority opinion ostensibly relies upon the assertion that the adjudicatory "hearing must measure up to the essentials of due process and fair treatment [found in] . . . the Due Process Clause of the Fourteenth Amendment of our Constitution." I use the word "ostensibly" in describing the Court's reliance on the due process clause, because the majority opinion makes unequivocal reference to the Bill of Rights in the various holdings.

The majority opinion can be understood as a compromise between the two concurring opinions. Justice Black conditioned the holdings based upon the belief that the fifth amendment and the sixth amendment accorded juve-
eniles certain basic rights. Justice Harlan, on the other hand, relied on the fundamental fairness component of the due process clause. Justice Black's position led to his full support of the holding, but Justice Harlan fell short of a total endorsement. Justice Harlan believed that the fundamental fairness component of the due process clause required that a child be afforded appropriate notice and counsel; however, he did not believe that fundamental fairness encompassed the right to cross-examination and confrontation of witnesses or the right to the privilege against self-incrimination.

Justice Fortas, writing for the majority, adopted a middle ground in that he found both the fairness component of the due process clause and the Bill of Rights required the holdings. It is Fortas' eclectic approach to defining the rights of juveniles which forms the basis for Gault's application to other areas of the juvenile court system. Crucial to a comprehension of Gault's criticism of the juvenile court system, is the opinion's explicit support for the overall goals of the system. The Court maintained its support for the basic proposition that juveniles are entitled to solicitous care and treatment. It was the Court's opinion, however, that such treatment could only occur within the confines of the Constitution.

III. WEST VIRGINIA JUVENILE CASE LAW

The juvenile court system in West Virginia dates back to 1936 when the Legislature enacted chapter 49, section 5 of the West Virginia Code. Between 1936 and 1977 (the date of State ex rel. Harris v. Calendine), the West Virginia Supreme Court of Appeals addressed very few cases concerning the rights of juveniles. The vast majority of cases that were granted review involved juveniles who had been convicted of a major felony and sentenced to an adult correctional center. Perhaps the two most significant cases decided during the pre-Harris period were State ex rel. Slatton v. Boles and State

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4 Id. at 59-64, (Black, J., concurring).
4 Id. at 65-78, (Harlan, J., concurring and dissenting).
4 Id.
4 Though the juvenile court system was created in 1936, legislation pertaining to dependent, neglected and delinquent children was first passed in 1915. See, State ex rel. Slatton v. Boles, 147 W. Va. 674, 679-80, 130 S.E.2d 192, 195-97 (1963).
4 233 S.E.2d 318.
4 See, e.g., State ex rel. Campbell v. Wood, 151 W. Va. 807, 155 S.E.2d 893 (1967); State ex rel. Taylor v. Boles, 147 W. Va. 701, 130 S.E.2d 693 (1963); but see State ex rel. Marcum v. Ferrell, 140 W. Va. 202, 83 S.E.2d 648 (1954), a case that provides an excellent illustration of the "star chamber" atmosphere in the traditional juvenile court. Here, the petitioner, was summarily adjudged delinquent and committed to the West Virginia Industrial Home for Girls, based upon her testimony as a witness. No petition was filed against her, she was declared a delinquent immediately after testifying and sentenced in the absence of petition, indictment or certification from another court. "The discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure." Gault, 387 U.S. at 18.
ex rel. Wilson v. Bambrick. Boles, decided in 1963, held that a circuit court could not sentence a juvenile to the state penitentiary if the offense was committed prior to the child's sixteenth birthday. The importance of the case lies in the court's detailed exposition on the need to maintain a separate system of justice for juveniles. Wilson, decided in 1973, basically affirmed the constitutional principles enunciated in Gault, of the right to a fair hearing and the right to counsel.

The decision of State ex rel. Harris v. Calendar opened the flood gates for challenges to the treatment of juvenile delinquents. From March 1977 to September 1983, the West Virginia Supreme Court of Appeals issued forty-four juvenile-related opinions. This analysis will focus upon the twelve cases which have had the most profound impact on the rights of juveniles.

A. Less Restrictive Forms of Treatment: State ex rel. Harris v. Calendar

In analyzing the significance of Harris, it is eminently fair to state that Gilbert Harris, a teenager from Calhoun County, is the "Gerald Gault" of West Virginia. Harris singularly revolutionized the treatment of juveniles both in the courtrooms and in the institutions of West Virginia.

Gilbert Harris' release from the Davis Center was conditioned on two distinct yet related grounds. Firstly, he was released because the court found that no child adjudged delinquent of a status offense may be incarcerated in a secure facility without there first being a thorough examination of lesser restrictive forms of treatment. The standard for evaluating the alternatives is not what is available in the state, but rather one that "looks to what facilities could reasonably be made available in an enlightened and humane state sol-

53 233 S.E.2d 318.
54 This number does not include the number of petitions or appeals which were dismissed on mootness grounds or those opinions that were unreported.
55 In deciding which cases would be the subject of analysis, I specifically did not include the transfer cases. Though the issue of transfer is a very important one as evidenced by the fact that 17 of the 44 cases were transfer related a discussion of the issue is beyond the scope of this paper. For a treatment of the issue see, NATIONAL JUVENILE LAW CENTER, INC. & JUVENILE ADVOCATES, INC., MANUAL FOR DEFENSE OF JUVENILE CASES IN WEST VIRGINIA, 218-43, 263 (1981). For the most recent court pronouncements on the issue, see State of West Virginia v. Helms, 292 S.E.2d 610 (W. Va. 1981) and In re Moss, 295 S.E.2d 33 (W. Va. 1982).
56 233 S.E.2d 318. An interesting note anecdote on this case was reported to this author by Harris' attorney, Charles "Skip" Garten. According to Garten, the Harris petition was presented to the court two times. The first time, the petition was rejected four to one with only Justice Neely dissenting. Two weeks later, after Justices McGraw, Miller and Harshbarger joined the court, the petition was refiled and unanimously accepted. All of which demonstrates the elusive nature of justice.
57 Id. at 329.
licitous of the welfare of its children."\textsuperscript{32} The second ground for release was related to the first in that it prohibited a specific form of "treatment" of status offenders. The court held that under no circumstances could a status offender be incarcerated in a secure facility with a criminal offender.\textsuperscript{39} In language virtually identical to that used in \textit{Gault}, the court stated that regardless of the name the state selects for the institution (e.g., forestry camp, industrial school, etc.) if the facility relied on locked doors, fences, guards, and the like then it was indeed a secure facility.\textsuperscript{40}

Pivotal to the holdings in \textit{Harris} was the court's treatment of the issue of \textit{parens patriae}. In \textit{Gault}, the United States Supreme Court never explicitly rejected the entire theory of \textit{parens patriae}. Rather, the primary criticism of the doctrine was that it could not be used to deprive a child of his or her fundamental constitutional rights. The Court argued that the state could not treat a child without first according that child due process of law. It is important to realize however, that the Court did tacitly embrace that part of the theory which required the state to provide treatment to a delinquent child. The \textit{Harris} court also expressed distrust of the \textit{parens patriae} doctrine,\textsuperscript{41} but unlike the \textit{Gault} analysis, \textit{Harris} presented a detailed examination of the state's responsibility to a delinquent child. The reason for differential treatment of the doctrine probably lies in the fact that \textit{Gault} concerned the treatment of a child at the adjudicatory stage, while \textit{Harris} dealt with the treatment of a child at the dispositional stage.

In substance, \textit{Harris} stated that the substantive due process clause required the state to demonstrate that its exercise of the power of \textit{parens patriae} legitimately promoted the rehabilitation and protection of children. The court cited with approval the assertion that the "effective treatment [of children] must be the \textit{quid pro quo} for society's right to exercise its \textit{parens patriae} controls."\textsuperscript{42} Consistent with its application of the concept of substantive due process, the court mandated that the state had to explore all less restrictive alternatives prior to incarcerating a status offender. The concept of the least restrictive alternative can be understood in this context as that mechanism which insures the "effective treatment" of children. The concept of "effective treatment" was never cogently defined by the court, and it is obviously a term that is open to great debate. The court seems to imply that in most circumstances, any treatment short of incarceration in a secure facility

\textsuperscript{32} Id. at 331.

\textsuperscript{39} Id.

\textsuperscript{40} Though Justice Neely never cited \textit{Gault} here, he used the exact words as Justice Fortas in criticizing the traditional concept of the reform school. \textit{Compare} 387 U.S. at 27 with 233 S.E.2d at 325.

\textsuperscript{41} 233 S.E.2d at 326.

\textsuperscript{42} Id. at 328 n.8 (quoting Matarella v. Kelly, 349 F. Supp. 575, 600 (S.D.N.Y. 1972)).
is effective. The purpose of mandating the use of the least restrictive alternative is to limit, as much as possible, the chances that a child would be sent to a state institution. The least restrictive alternative requirement forced judges to explore community-oriented treatment, something many judges prior to Harris had not considered.

Following Harris the West Virginia Legislature revamped the entire juvenile code. Harris had a tremendous ripple effect, in that the least restrictive alternative mandate became the centerpiece of the new legislation. The right to the least restrictive alternative was now accorded by statute to status offenders and those adjudged delinquent of a criminal offense. Though the court and the Legislature dramatically advanced the rights of juveniles, the juvenile justice system itself did not readily accept the changes. The majority of post-Harris cases decided by the court, can be interpreted in one light as the court's attempts to clarify the basic principles enunciated in Harris. Furthermore, it is the position of this author, that but for the reluctance of some circuit judges to follow the basic pronouncements of Harris, many cases would never have reached the West Virginia Supreme Court of Appeals.

B. Post-1977 Cases

The remainder of cases presented in this analysis are divided into two broad categories. The first category relates to those decisions which expanded upon the fundamental concepts raised in Harris. The analyses of Harris' progeny are developed in a manner similar to that used for the case itself. That is, there are those cases which can be traced to Harris' discussion of institutional rights, and those cases which concern the hearing rights of juveniles. The second category of post-1977 cases are whose which represent interpretations of constitutional and statutory issues not specifically raised in Harris.

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61 Id. at 327. The court noted:

It is generally recognized that the greatest colleges for crime are prisons and reform schools. The most egregious punishment inflicted upon a child incarcerated in a West Virginia penal institution is not the deprivation of his liberty but rather his forced association with reprehensible persons. Prisons, by whatsoever name they may be known, are inherently dangerous places. Sexual assaults, physical violence, psychological abuse and total degradation are the likely consequences of incarceration. Id. (footnotes omitted).

A critical problem with this analysis is that if the court recognizes that institutions do but ill for a child, why not order them shut down? Furthermore, if it is known that institutions in fact exacerbate problems, why are they not reserved for the most dangerous delinquents?

64 The court suggested several alternatives. Id. at 329 n.9. For an up-to-date description of alternatives in the State, see, West Virginia Department of Human Services, Alternatives; West Virginia Child Care Association, Child Care Directory.

62 See generally Withers, supra note 9.
1. Institutional Rights After Harris

The most immediate effect of Harris was that the State was required to release all status offenders held in secure prison-like facilities. Unfortunately, because of the failure of the juvenile system to follow the dictates of Harris, juveniles continued to be illegally incarcerated in secure facilities.\(^6\) The illegal incarceration of status offenders dramatically decreased from 1977 through 1983, with the greatest decreases seen immediately after the Harris decision.\(^7\)

In 1979, the court in State ex rel. C.A.H. v. Strickler,\(^8\) ruled that the West Virginia Industrial Home for Girls was a secure prison-like facility as defined in Harris. Being such a facility, the court found that it was illegal to incarcerate status offenders at the Industrial Home. In addition to relying on Harris, the court noted that West Virginia Code Section 49-5-16(a) statutorily prohibited such an incarceration.

In 1980, in State ex rel. H.K. v. Taylor,\(^9\) the court ordered the release of a ten-year-old boy who was incarcerated in the diagnostic unit of the West Virginia Industrial School for Boys. The court ruled that the young boy, a status offender, was illegally incarcerated, because he was housed in a secure facility with youths adjudged delinquent as a result of committing criminal offenses. The fact that the child was in a “diagnostic center” did not convince the court that his treatment was any different than if he had been in the general population of the correctional center. In fact, the boy was transported to the institution with his hands and feet in shackles, handcuffed to a seventeen-year-old juvenile committed as a result of criminal activities.\(^7\)

In September of 1981, the diagnostic facility was moved from the West Virginia Industrial School for Boys to the West Virginia Industrial Home for Girls. The West Virginia Industrial Home for Girls changed its name to the West Virginia Industrial Home for Youth. The issue of the placement of status offenders in the diagnostic center at the West Virginia Industrial Home for Youth was the subject of State ex rel. L.D.M. v. Lucas.\(^10\) In March of 1983, L.D.M. was incarcerated in the diagnostic center at the Industrial Home.

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\(^6\) For a description of the atmosphere in the State after Harris, see Warner, supra note 9.
\(^7\) In 1976 there were 544 status offenders in secure facilities; in 1977 that number dropped to 225, and it dropped to 74 in 1978. In 1982, 11 status offenders were illegally incarcerated in county jails in the State. (sources: W. Va. State Advisory Group, Dept. of Corrections and Dept. of Welfare).
\(^8\) 251 S.E.2d 222 (W. Va. 1979).
\(^9\) 289 S.E.2d 673 (W. Va. 1980) (The author participated as counsel for the juvenile).
\(^10\) This young boy was sent to the correctional center pursuant to an adjudication, based upon the charge that he did not listen to his mother. The judge evidently believed that he would teach the boy a lesson by sending him away for a little while. When this author, (who was the youth's counsel in the West Virginia Supreme Court of Appeals) found him, he was sitting in the corner of a large recreation room shivering in fear.

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Home for Youth. L.D.M. was initially adjudicated delinquent on a status offense and put on probation. Subsequent to this first adjudication he violated his probation twice by committing status offenses including the failure to attend school. Based upon these probation violations the circuit court found the child to be delinquent pursuant to West Virginia Code section 49-1-4(1); that is, he was found to have committed a criminal-type offense. The judge found that a violation of probation, regardless of the underlying charge, was a criminal-type offense. Within juvenile justice parlance, the boy was "bootstrapped" from a status offender to a criminal offender.

In deciding L.D.M., the court stated that a status offender remains a status offender regardless of the number of times he or she commits a status offense. The court read West Virginia Code section 49-1-4(5) which provides in pertinent part that a delinquent child is one "[w]ho willfully violates a condition of a probation order or a contempt order of any court," in para materia with West Virginia Code section 49-5-16(a), which states in material part:

A child charged with or found to be delinquent solely under subdivision (3), (4) or (5) [§ 49-1-4 (3), (4) or (5), section four, article one of this chapter, shall not be housed in a detention or other facility wherein persons are detained for criminal offenses or for delinquency involving offenses which would be crimes if committed by an adult. . . ."

The court concluded that the Legislature intended that such a probation violator as L.D.M. could not be housed with those adjudged delinquent for a criminal offense. Here again, the court demonstrated its willingness to insure that status offenders receive treatment consistent with the purpose of their custody.

Shortly after Harris, the court decided State ex rel. K.W. and C.W. v. Werner, a case which evaluated the West Virginia Industrial School for Boys treatment of criminal-type offenders. Gault and later Harris recognized that little "reform" if any, occurred in reform schools. In Harris, Justice Neely scathingly criticized the youth correctional centers as being "colleges for crime" in which the level of treatment had changed little since "medieval times." However, in K.W., though the court found certain institutional practices to be unconstitutional, it was reluctant to condemn the institution's en-

72 For a discussion of the pervasive practice of bootstrapping whereby a minor status offender through the use of the courts, contempt power is elevated to a criminal offender, see Costello & Worthington, Incarcerating Status Offenders: Attempts to Circumvent the Juvenile Justice and Delinquency Prevention Act, 16 HARV. C.R.-C.L. L. REV. 41, 58-61 (1981).
73 W. VA. CODE § 49-1-4(5) (1980); It is to be noted here that the circuit judge found that a violation of a probation order was a violation of W. VA. CODE § 49-7-20 (1980). This section imposes criminal penalties against persons who violate "an order, rule, or regulation made under the authority of this chapter."
74 W. VA. CODE § 49-5-16(a) (Supp. 1983).
76 233 S.E.2d at 327.
tire program. The court declared the practices of beating, slapping, kicking, bench time, floor time, solitary confinement and other physical abuse of juveniles to be in violation of article III, section 5 of the West Virginia Constitution. The court stated it was presented with insufficient evidence on the issue of the lack of rehabilitative care, therefore, it did not find that the incarceration of boys at the West Virginia Industrial School for Boys was *per se* unconstitutional.

The most salient ruling in *K.W.* was that "juveniles are constitutionally entitled to the least restrictive alternative treatment that is consistent with the purpose of their custody." Though Harris stated that a quid pro quo was implied in the doctrine of *parens patriae*, the court never stated that all juveniles, regardless of their charge, were constitutionally entitled to treatment. The importance of this constitutional pronouncement is that regardless of any future legislative attempts to restrict the rights of juveniles, the right to treatment will be cemented into the State's juvenile justice system. Therefore, *K.W.* represented a dramatic sophistication in the development of juvenile rights in the State.

The analysis thus far has focused on the rights of juveniles in correctional centers. Juveniles in West Virginia are not only incarcerated in correctional facilities, but also in county jails and detention centers. West Virginia state law permits children to be incarcerated in county jails under a very limited number of circumstances. It is the Legislature's intention to minimize the incarceration of youths in county jails, because of the tremendous negative effect such incarcerations have on children. The case of *State ex rel. R.C.F. v. Wilt* concerned the incarceration, in a county jail, of a seventeen-year-old accused of theft. The court held that the confinement was unlawful

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77 242 S.E.2d at 911.
79 Id. at 913, 915.
79 Id. at 913.
80 233 S.E.2d at 328.
81 The figures available demonstrate that in 1980, 27 counties held juveniles in their jails. The figure has dramatically decreased in the last three years. In the last half of 1982, that number was reduced to 6. The number of juveniles held in 1980 in jails was 638; the total held in 1982 was 87. 1983 is projected to produce a reduction over 1982. There are four pre-trial youth detention centers in the State. (Source for county jail statistics, Juvenile Justice Committee, Survey of Juvenile Incarcerations in West Virginia County Jails.)
83 There is ample literature to support this assertion. Juveniles incarcerated in county jails have an eight times greater risk of committing suicide in jail as an adult. For an excellent discussion of the problem nationwide see, K. Wooden, Weeping in the Playtime of Others (1976); Community Research Forum, *An Assessment of the Incidence of Juvenile Suicide in Adult Jails, Lockups, and Juvenile Detention Centers* (1980); The Office of Juvenile Justice and Delinquency Prevention, *National Symposium on Children in Jail* (1980).
84 252 S.E.2d 168 (W.Va. 1979).
on both statutory and constitutional grounds.\textsuperscript{65} On the constitutional level, the court stated that "the loss of liberty and the exposure of juveniles to adult offenders even for a short time can do but ill for the child."\textsuperscript{66} In this case, the court in essence reapplied its theory that secure, state-run facilities are more prone to contribute to crime than reduce it. The language clearly implies that jailing of juveniles is antithetical to a juvenile's constitutional right to treatment.

Based upon the constitutional analysis, one could fairly read \textit{R.C.F.} to hold that the jailing of a youth in a county jail is \textit{per se} unconstitutional. Support for this proposition is found in the fact that the court refers with approval of the juvenile facility standards set forth in West Virginia Code section 49-5-16(a). This Code section requires that any facility detaining juveniles provide certain basic rights for their residents.\textsuperscript{67} The Code section represents the State's attempt to codify the definition of appropriate institutional treatment. While certain jails may maintain separate juvenile sections, there are no jails in the State which comply with the standards set forth in this section.

Unfortunately, \textit{R.C.F.} was not interpreted by the circuit courts as a total prohibition on the incarceration of juveniles in county jails. While the number of juveniles presently incarcerated in county jails is negligible, compared to the numbers previously jailed, numerous children have unnecessarily suffered, because the opinion was too narrowly interpreted by the circuit courts.\textsuperscript{68}

2. \textit{Adjudicatory and Dispositional Rights After Harris}

Though both \textit{Harris} and West Virginia Code section 49-5-13 appear to be very clear on the point that a juvenile offender is entitled to the least restrictive treatment consistent with his or her rehabilitative needs, many circuit courts and attorneys had difficulty in understanding and applying the concept. The following cases illustrate the court's attempts to refine the doctrine of the least restrictive alternative.

In \textit{C.A.H.}, the court reiterated the least restrictive alternative language of \textit{Harris}. In addition, the court enunciated for the first time the role that the defense counsel and the judge should play at a juvenile hearing. The court likened the role of defense counsel at the dispositional hearing to that of

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\begin{itemize}
\item \textsuperscript{65} W. Va. Code §§ 49-5-16(a) and 49-5A-2 (1980 & Supp. 1983).
\item \textsuperscript{66} 252 S.E.2d at 171.
\item \textsuperscript{67} Pursuant to W. Va. Code § 49-5-16(a) (1980 & Supp. 1983) a child must be afforded numerous rights. Some of them are: physical exercise, daily showers, access to education and regular phone calls to family.
\item \textsuperscript{68} See supra notes 81 and 83.
\end{itemize}
counsel at an adult sentencing hearing. "Since most juvenile cases are resolved by guilty pleas, it is clear for most adjudicated delinquents that the dispositional stage is the most critical of all." As to the role of the judge, the court stated that the judge should be familiar with all less restrictive alternative dispositions. This knowledge insures the "prospects for a successful rehabilitation."  

In State ex rel. S.J.C. v. Fox, the court fleshed out its least restrictive alternative treatment position. The court in this case prohibited the incarceration of a juvenile in a correctional center on the grounds that the findings did not warrant the disposition.

S.J.C. stressed two points related to the dispositional hearing. Firstly, the court emphasized the need to make specific findings on the record as to the reason for a particular disposition. Such a requirement is integral to the protection of a child's due process rights, because it insures that all less restrictive dispositional alternatives have been explored. It also insures an intelligent appellate review. Unsupported dispositions to secure facilities were the rule in the pre-Harris days, and they were one of the primary injustices visited upon juveniles by the system. Secondly, the court stressed the need to consider the disposition in terms of the individual needs of the juvenile. In S.J.C., the judge sentenced the relator to the Industrial School, not on the basis of any individual assessment of needs, but on the grounds that his three co-defendants were sentenced to secure facilities. The court resoundingly rejected the circuit court's sentence, because it violated the juveniles right to individualized treatment. The court emphasized that in keeping with the purpose of juvenile law which is to rehabilitate rather than punish troubled children, individualized assessment is imperative.

Neither Harris or C.A.H. expressed the level of concern for individualized treatment discussed in S.J.C. Individualized treatment became the primary subject of a significant number of cases after S.J.C. The most notable case in this regard was State ex rel. D.D.H. v. Dostert. D.D.H. represented an effort by the court to "make the proper procedures [to be used] at the dispositional stage of a juvenile proceeding."  

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99 251 S.E.2d at 226.
100 Id.
101 268 S.E.2d 56 (W. Va. 1980).
102 Id. at 58-59.
103 Id. at 59-61.
104 269 S.E.2d 401 (W. Va. 1980).
105 The appellate hearing which led to this decision was quite unique, and represented an effort by the court to grapple with a very difficult problem. The case was argued by six attorneys and lasted for over seven hours. During the course of the hearing direct testimony was taken from an expert witness, for perhaps the first time in the history of the court.
106 269 S.E.2d at 405.
Prior to and after its exposition of the proper dispositional procedures, the court discussed its overall juvenile justice philosophy. While the court provided a rather lucid description of the appropriate procedures, its philosophical discussion was confusing and contradictory. Justice Neely initiated his philosophical discussion by stating that juvenile law in West Virginia had been in "substantial turmoil" since *Harris*. The Justice believed that the turmoil resulted from a tension between the State's attempt to insure appropriate treatment for children and society's desire to be protected from the delinquent acts of children. This was the first West Virginia opinion in which the control of children and the protection of society were stated to be goals of the system. This introduction formed the basis of Justice Neely's later assertion that punishment and retribution were permissible goals of the juvenile justice system.

Justice Neely's conclusion that punishment is a permissible goal is based in large part on his exposition of the "age-old philosophical controversy about free will and determinism." Justice Neely's discussion of free-will and determinism only obfuscated and contradicted prior court pronouncements regarding juveniles. The basic thesis of the discussion, if one can be discerned, was that delinquent children fall into two categories of behavior. Firstly, there are those who commit delinquent acts, because of their exposure to such external forces as broken homes, poverty, abuse, learning disabilities, uncaring families and an unhealthy environment. Secondly, there are those children who commit delinquent acts because they want to; that is they are inherently 'bad kids.' Justice Neely clearly implies that there are those children that steal, because they are misdirected souls; and there are those that steal because they enjoy stealing. He concludes that those in the first category deserve solicitous care from the state; while those in the second category deserve punishment.

Justice Neely's theory is fatally defective on two grounds. Firstly, the discussion ignores the realities of the causes of juvenile crime. Justice Neely attempts to resolve in three paragraphs what criminologists, psychologists and others have not been able to define after years of research. Moreover, his statements fly in the face of reality. Delinquency at best is a function of a myriad of psychological, sociological, political and economic problems. One factor is however clear: all delinquency can at some level be attributed to an
"external force." Secondly, the analysis is defective because it implies that the protection of society from delinquent children requires that children be punished. The protection of society and the rehabilitation of juveniles are compatible goals. Certain children clearly require secure care to protect them from themselves as well as to protect society. However, secure confinement does not mean that the child must be punished. For even the most dangerous delinquent, there exist rehabilitative alternatives.

Fortunately, Justice Neely's draconian theory never reared its head in later decisions. This is probably due to the fact that the theoretical discussion was dicta. The discussion clearly did not have the support of the entire court as evidenced by Justice McGraw's concise, but rather acerbic concurrence. Justice McGraw stated that the opinion should not be construed as "an endorsement by this Court of all the attendant legal concepts it purportedly encompasses." Though the philosophical components of D.D.H. are of dubious value to the practice of juvenile law in the State, the court's holdings with respect to the roles of the various participants at a dispositional hearing are relatively sound. D.D.H. is the only state supreme court decision in the country in which there is a specific delineation of the roles that the court, defense counsel and probation officer have at a dispositional hearing. The court's exposition on the role of counsel represents an elaboration of its discussion in C.A.H. and S.J.C. The D.D.H. court stated that the attorney should be thoroughly familiar with the child's background as well as the alternative treatment possibilities available both inside and outside the State. The responsibility of the welfare worker is to evaluate the needs of the child and to "intervene at the first sign of trouble." If the welfare worker concludes that the child cannot be treated in any facility other than a secure one, it becomes the defense counsel's responsibility to determine whether there exist any alternatives other than incarceration.

The description of the court's obligation is unfortunately confounded, because of the interposition of Justice Neely's punishment model of treatment for juvenile offenders. The opinion is, however, clear on the point that it is the obligation of the judge to insure that all alternatives to incarceration are

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104 Of the over 500 juveniles the author interviewed over the three and one-half year period in which he was employed as an advocate for delinquents, he did not find one case where the cause of a child's delinquency could be definitively isolated.

105 It is interesting to note that only one year after D.D.H., the court found that adult inmates were entitled to rehabilitation. Certainly if we believe that there is some hope for the rehabilitation of an adult criminal, should we not accord the same hope to children? Cooper v. Gwinn, 298 S.E.2d 781 (W. Va. 1981).

106 269 S.E.2d at 416 (McGraw, J., concurring).

107 Id. at 412-413.

108 Id. at 413.
explored. The opinion sets forth three distinct grounds upon which a sentence to a secure facility may be allowed. The court must affirmatively find upon the record:

either that the child's behavioral problem is not the result of social conditions beyond the child's control, but rather of an intentional failure on the part of the child to conform his actions to the law, or that the child will be dangerous if any other disposition is used, or that the child will not cooperate with any rehabilitative program absent physical restraint.109

The last two grounds would rationally justify the secure treatment of a child, but said treatment does not have to occur in a state-run institution. It is, however, for the reasons stated above, nearly impossible to make the first finding. In regard to the third finding, Justice Neely stated that if it is concluded that "punishment will provide more effective rehabilitation than anything else, the court must elaborate its reasons."110 Not only is it a contradiction in terms to state that punishment is a form of rehabilitation, but such a pronouncement does violence to basic logic. In no other case and in no West Virginia statute are there references to the punishment of delinquent children; therefore punishment should be regarded as an impermissible goal of the West Virginia juvenile justice system.

In State ex rel. R.S. v. Trent,111 the court again returned to the theme of the necessity for making a detailed record at the dispositional hearing. The specific importance of R.S. is that the court prohibited the incarceration of mentally ill adolescents in correctional centers. The court rationalized this prohibition on both statutory and constitutional grounds. Firstly, it stated that a child who fell within the statutory definition of mentally ill could not be incarcerated in a correctional facility, because such incarceration was specifically prohibited by legislation.112 The second ground was that R.S. was entitled to release based upon his constitutional right to treatment. R.S. was committed to the West Virginia Industrial School for Boys without a thorough investigation of the nature of his problems. As a result, he was inappropriately sent to the Industrial School. The inappropriateness of his sentence was conclusively demonstrated by the fact that the West Virginia Industrial School for Boys wanted to release him, because they did not believe that they possessed the expertise to effectively deal with his acute problems.113

109 Id. at 414.
110 Id.
111 289 S.E.2d 166 (W. Va. 1982) (The author participated as counsel for the juvenile in the case).
112 W. VA. CODE § 28-1-2(c) (Supp. 1983) states in pertinent part: "No youth who is mentally ill or significantly mentally retarded shall be committed to, or retained by, the commissioner of corrections, but shall be returned to the committing court for further disposition."
113 The court on the issue of the institution's discretion as to release decided that it was the perogative of the Department of Corrections to decide issues of release. 289 S.E.2d at 175. In this
In this case, the petition sought habeas corpus relief as well as mandamus relief. The purpose of the mandamus prayer was to require the State to develop an appropriate treatment plan once the child was released. In response to the mandamus petition, the court fashioned a unique form of relief. It ordered that the child's treatment plan be developed through a concerted effort of the Department of Health, Education and Welfare, and Corrections. The court reasoned that representatives from these groups would insure that an effective plan of rehabilitation would be developed. Furthermore, the court suggested the use of such an interdisciplinary approach at all dispositional hearings where there is a question concerning the child's mental health.

Thus, R.S. represented a further refinement of the doctrine of the right to treatment. Only a meticulous review of a child's records coupled with an intimate knowledge of the available therapeutic alternatives will insure the protection of a child's right to due process of laws.

3. Other Juvenile Rights

The three cases analyzed in this section concern the juvenile's right to counsel. As discussed in Gault, the right to counsel is essential in insuring that a child obtain a fair hearing. In fact, as implied in Gault, when the maturity and competency of a child is considered, the right is more important to a child than to an adult.

The most important right-to-counsel case is State ex rel. J.M. v. Taylor. In this case the court found, as a matter of law, that a juvenile defendant cannot waive his right to counsel unless he does so upon the advice of counsel. By definition, this standard affords West Virginia juveniles an unwaiveable right to counsel. The basis of the holding was the court's recognition that a juvenile lacked the capacity to waive such an important constitutional right. Initially the court emphasized the strong presumption against waiver in the adult context. The court then considered several juvenile waiver standards,
and concluded that none protected a juvenile as much as the one which absolutely guaranteed that counsel would be present at all proceedings. The court was, however, faced with the problem of the language of the West Virginia Code which permits waiver of counsel.\textsuperscript{120} In order to extricate itself from this apparent dilemma, the court applied the principles which govern the appointment of \textit{guardians ad litem}. The court found that there was no provision for waiver in the statutes relating to the appointment of a \textit{guardian ad litem}. This finding led the court to comment on an interesting contradiction, namely that "an infant could waive his constitutional right to counsel in proceedings wherein his very liberty is threatened, but not do so if someone is about to force the sale of a piece of land in which he owns even a $1.00 interest."\textsuperscript{121} In an effort to reconcile this contradiction, the court concluded that a child could waive counsel only upon the advice of counsel.\textsuperscript{122}

The theoretical importance of this case lies in the court's assertion that "[a] juvenile's waiver of constitutional rights obviously must be more carefully proscribed than adult waiver because of the unrebutable presumption, long memorialized by courts and legislatures, that juveniles lack the capacity to make legally binding decisions."\textsuperscript{123} Unlike traditional pre-\textit{Gault} conceptions of juvenile rights, this analysis recognizes that a juvenile's inherent developmental problems require that he or she be afforded special constitutional protections.\textsuperscript{124} Though the due process issue is not explicitly enunciated here, the holding in \textit{J.M.} can be explained as an attempt to insure greater fairness in the juvenile process. As the \textit{Gault} court stated, the right to counsel is critical, because it is only the attorney who can effectively aid the child in coping with the problems presented by the legal system.\textsuperscript{125} \textit{J.M.} is a resounding affirmation of the \textit{Gault} finding that the presence of counsel is indispensable to according a child full due process of laws.\textsuperscript{126}

\textsuperscript{121} Id. at 203-04.
\textsuperscript{122} Id. at 204.
\textsuperscript{123} Id. at 203.
\textsuperscript{124} The problems a child has in understanding his rights is illustrated in the court's reproduction of the transcript of one of the relator's dispositional hearings. Id. at 200-01, 204.
\textsuperscript{125} 387 U.S. at 36.
\textsuperscript{126} A similar issue to the waiver of counsel, is the admissibility of statements made by a juvenile in custody to a police officer. W. VA. CODE section 49-5-1(d) (1980 & Supp. 1983) as amended, provides that extrajudicial statements made by a child under 16, but over 13 are not admissible unless made in the presence and with the consent of a child's parent or custodian. The section further implies that a child over 16 may make a valid confession. Clearly, the necessity for protecting a juvenile from the excesses of the state is no less in the context of a police interrogation, than it is in the \textit{J.M.} context. \textit{J.M.} expressed clear distrust for a waiver system which relied on the presence of a parent. The court stated, "A parent or other adult, even one intensely involved in and interested in a child's welfare, may not be sufficiently knowledgeable, educated or informed about constitutional law to competently waive protections." 276 S.E.2d at 203. Based upon this analysis, it would appear that a juvenile may not validly waive his rights and give a con-
State ex rel. Kearns v. Fox,127 decided a year before J.M., concerned the right to counsel at the preliminary hearing. The court held that once formal proceedings were instituted against a juvenile by the filing of a petition, the juvenile had an absolute right to counsel. If the judge chose to proceed informally prior to the petition, then counsel was unnecessary.128 In this case the circuit court had a policy that counsel was not appointed if the state did not intend to attempt to incarcerate the juvenile. Such a policy was the by-product of the “Star Chamber”129 consciousness of the traditional juvenile court judge. Fortunately, the court held that constitutional rights must be protected regardless of the purpose or ultimate outcome of the formal proceeding.

In 1983 the court decided Arbogast v. R.B.C.130 The case primarily concerned the transfer of a juvenile to adult court; however, one of the issues dealt with whether the juvenile had been unconstitutionally deprived of counsel at the detention hearing. In a short two paragraph opinion that was devoid of any reference to the Constitution, the court held that there was no guaranteed right to counsel at the detention hearing. The sole rationale for the holding was that Kearns stated that the right attached only after formal proceedings were instituted, and formal proceedings were defined as the filing of a petition.131

The Arbogast case is blatantly in error. It contradicts statutory and constitutional law regarding the right to counsel, and it misinterprets the intent of Kearns. The court stated that it did not read any section of the West Virginia Code as guaranteeing the child’s right to counsel, except where the preliminary hearing was held with the detention hearing. The court apparently ignored that West Virginia Code section 49-5-8(d) mandates that the juvenile referee must inform the child of his right to counsel prior to the detention hearing. The court also ignored West Virginia Code section 49-5-1(c) which states that “the child shall have the right to be effectively represented by counsel at all stages of proceedings under provisions of this article.” A detention hearing is clearly a proceeding under this article, and hence the child should be accorded the right to counsel. The adjective “formal” was inserted by the court in Kearns, and it is not used in any Code section to limit the right to counsel.

On a constitutional plane, Arbogast contradicts every juvenile-related case decided since Harris. The presence of counsel at a detention hearing is

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127 268 S.E.2d 65 (W. Va. 1980) (The author participated as counsel for the juvenile).
128 Id. at 67.
129 387 U.S. at 18.
130 301 S.E.2d 827 (W. Va. 1983).
131 Id. at 829.
no less important than the presence of counsel at the preliminary hearing, adjudicatory hearing or dispositional hearing. The purpose of a detention hearing is to determine whether the juvenile should be detained, pending further hearings. The decision to release occurs within the context of an adversary process, and as such requires counsel for all the reasons set forth in Gault and J.M. The primary role of counsel at the detention hearing is to avoid having his or her client incarcerated in a secure facility. The role of the magistrate at the detention hearing is not too different from that of a circuit judge at an adjudicatory or dispositional hearing.\(^\text{122}\) The magistrate in a detention hearing is, in no uncertain terms, making a very crucial decision which directly affects a child's liberty interest.

To require anything less than an absolute right to counsel at the detention hearing, represents a reversion to the days when juvenile judges were thought to be 'philosopher kings.' The Arbogast decision is an aberration within the context of the court's other decisions concerning a juvenile's right to counsel and each day it goes unchallenged, another child will be unnecessarily detained.

**IV. Conclusion**

The juvenile justice system, though well intentioned, was fatally flawed from its inception. By disregarding the Bill of Rights and the fundamental concepts of due process, the "child savers" invited abuse and injustice. Due process of law is indispensable to protecting the citizenry from the excesses of government.

The turmoil in the juvenile justice system is the result of attempts to correct years of abuse. Harris and its progeny caused the most severe problems for those who were used to the old system. Constitutional domestication of the juvenile process was guaranteed to shock those who believed that the application of due process principles detracts from "treatment." The decisions discussed in this article would clearly be a source of discomfort to those who believe that a child's immaturity is grounds for according the child fewer rights than those granted a similarly situated adult.

Except for the aberrational case of Arbogast, the decisions discussed in this article demonstrate the court's willingness to extend to children those rights necessary for their effective treatment and rehabilitation. In most instances this means that children will be given rights equal to those of adults in similar situations. In addition, the court has also demonstrated that it is willing to accord children greater rights than adults, where it is necessary to protect them. The primary example of this is J.M.

The bottom line for the protection of the rights of children is the assist-

ance of an attorney who truly advocates for the child. Unfortunately, most attorneys do not act as advocates for their juvenile clients. In most instances the child's appointed counsel is just another cog in the juvenile justice machine. As *Gault* so eloquently stated: "There is no place in our system of law for reaching a result of such tremendous consequences . . . without effective assistance of counsel."

Finally, scrupulous protection of the rights of juveniles is demanded by the fact that we must instill in our youth the importance of abiding by democratic principles. The extent to which we demonstrate to children that society believes that the protection of individual rights is of paramount value, is the extent to which we guarantee the protection of all the rights of future generations.

133 387 U.S. at 30.