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Sarah Gabinet-Morgenstern

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THE REPRESENTATION OF JUVENILES BEFORE THE COURT: A LOOK INTO THE PAST AND THE FUTURE

During the last several decades, the judiciary has become increasingly aware of the disparity between the treatment of juveniles in the juvenile court system and that of their adult counterparts in the larger court system. While the Supreme Court has reduced this disparity by requiring independent legal representation for juveniles at quasi-criminal proceedings, the question remains whether a juvenile has a constitutional right to independent representation at a noncriminal proceeding. This Note addresses that issue by discussing the purposes and goals of the juvenile court system and evaluating the juvenile's due process rights. Following an examination of the legislative and judicial treatment of the issue in Ohio, California and New York, this Note recommends that independent representation be allowed in both quasi-criminal and noncriminal proceedings, with distinctions made as to the function of counsel in each forum. In light of the Supreme Court's recent return to a more traditional, paternalistic view of juveniles, however, the author concludes that the Court will be unwilling to include legal representation at a noncriminal proceeding as one of a juvenile's due process rights.

INTRODUCTION

EVERY STATE of this country has a firmly established juvenile court system which is designed to handle both noncriminal and quasi-criminal matters. In noncriminal disputes such as divorce, custody, abuse, neglect, paternity and termination of parental custody, the juvenile is not a party to the action, even though his or her future may be affected significantly by its outcome. Juveniles appear before juvenile courts in a quasi-criminal context where the juvenile is charged with the commission of an act which would constitute a crime if he or she were an adult. In that context, a juvenile may be declared delinquent or in need of supervision, taken from the parental home, or made a ward of the state.

Since the beginning of this century, juvenile courts have been separate and distinct from adult courts in procedure, atmosphere and attitude. In particular, juvenile courts exhibit a more paternalistic attitude and flexible procedure than their adult counterparts. During the 1950's and 1960's, however, the courts increasingly focused on providing equal protection under the law.
to all persons, and the Supreme Court began to use the due process clauses of the fifth and fourteenth amendments to require fair and consistent treatment of individuals. A parallel consciousness also developed that juveniles in the juvenile court system were receiving unfair treatment in comparison with the new protective treatment guaranteed to adults in the larger court system.

Judicial recognition of the disparate treatment afforded to juveniles culminated in a series of Supreme Court cases in the 1960's and early 1970's which guaranteed certain due process rights to juveniles. One such right, that of representation of juveniles by independent counsel, was established by the Supreme Court in *In re Gault.* Although the Court's ruling marked a significant departure from prior practice in the juvenile courts, the decision applied only to delinquency proceedings where the juvenile risked being removed from the parental home. This holding however, has been used as a springboard for the expansion of a juvenile's right to independent representation in noncriminal juvenile court proceedings.

The lack of constitutional and Supreme Court guidance regarding the precise nature and scope of a juvenile's right to independent representation has made that right unclear. The form of such representation, the mandatory or discretionary nature of the right, and the role and power of the independent representative never have been determined definitively. Thus, the states have been left to enact their own legislation to provide for some form of independent representation for juveniles appearing in court.

To identify areas of agreement and dispute between the states
and to suggest a possible resolution to the controversy, this Note
first examines the historical development of the juvenile court sys-
tem.¹³ This system, born of "the highest motives and most en-
lightened impulses,"¹⁴ was one in which juveniles were denied the
due process rights guaranteed to an adult in a criminal trial.¹⁵ The
Supreme Court responded to this dilemma by establishing
certain due process rights for juveniles,¹⁶ most notably the right to
independent legal representation at a delinquency proceeding.¹⁷

This Note next analyzes the states' legislative and judicial re-
sponses to the Supreme Court's rulings, concentrating on Ohio,¹⁸
California,¹⁹ and New York.²⁰ In particular, the Note focuses on
the provisions in these state statutes for a guardian ad litem²¹ and
legal counsel²² in quasi-criminal and noncriminal juvenile pro-
ceedings and considers alternative approaches advanced by vari-
ous commentators.²³

This Note then recommends that the states use one title for a
juvenile representative and that representation be allowed at both
types of proceedings.²⁴ Furthermore, the Note recommends that
the legal representative's function vary according to the type of
proceeding involved. Specifically, in a quasi-criminal proceeding,
the legal representative should act as an advocate, while in a non-
criminal proceeding, the attorney should serve as a source of in-
formation for the court.²⁵ While arguing that this distinction is
justified,²⁶ the Note concludes that the Supreme Court is unlikely
to extend due process to grant a juvenile's right to independent
legal representation at a noncriminal proceeding.²⁷

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¹³. See notes 28–53 infra and accompanying text.
¹⁴. 387 U.S. at 17.
¹⁵. See notes 53–69 infra and accompanying text.
¹⁶. See notes 70–85 infra and accompanying text.
¹⁷. See notes 72–75 infra and accompanying text.
¹⁸. See notes 97–101, 106 & 112–16 infra and accompanying text.
¹⁹. See notes 102 & 117–25 infra and accompanying text.
²⁰. See notes 103–04, 107, 126–31 & 160–63 infra and accompanying text.
²¹. See notes 94–110 infra and accompanying text.
²². See notes 111–35 infra and accompanying text.
²³. See notes 130–85 infra and accompanying text.
²⁴. See notes 186–202 infra and accompanying text.
²⁵. See note 188 infra and accompanying text.
²⁶. See notes 189–91 infra and accompanying text.
²⁷. See notes 192–202 infra and accompanying text.
I. HISTORICAL DEVELOPMENT OF THE JUVENILE COURT SYSTEM

Because the legal tradition of the nineteenth and early twentieth centuries supported the view that children were totally vulnerable and incapable of forming intelligent judgments concerning their own well-being, and because children were unfamiliar with the law, parents were charged with the duty of monitoring the welfare of their children. This concept of the parents' "constitutional primacy" also meant that the state would not interfere unreasonably with the right of parents to determine how best to rear and educate their children. The courts and society placed great emphasis on the maintenance of the family unit.

If there appeared to be a "compelling justification for interference," however, the courts, under the historical doctrine of parens patriae, would intervene into the family relationship to protect the child from obvious parental neglect, abuse or abandonment. While equity courts were given the power to remove a child from parental custody and to appoint a guardian when the parent clearly had failed to care for the child, "[t]he role of the state then was supplementary to that of the parents until there arose evidence of abuse of parental responsibility." Thus, despite the existence of the doctrine of parens patriae, the courts were viewed as a last resort for ensuring the well-being of a child.

28. CONSTITUTIONAL RIGHTS OF CHILDREN, supra note 5, at 3-4.
29. Id. at 5.
30. Id.
31. Id. at 4.
32. Id.
33. The doctrine of parens patriae first was used to justify the English King's intervention into the lives of the children of his vassals. The King rationalized his intrusion into the family unit by claiming to be the protector of these children. The term is now used to indicate the state's right and duty to protect its young, helpless, and incompetent citizens. D. Besharov, supra note 4, at 2 n.5.
34. Id.
35. CONSTITUTIONAL RIGHTS OF CHILDREN, supra note 5, at 4-5.
36. See J. Goldstein, A. Freud & A. Solnit, Before the Best Interests of the Child (1979) [hereinafter cited as J. Goldstein], in which the authors state that parents and children have a right of autonomy or "family integrity" which protects them from state intrusion for several reasons:

The first is to provide parents with an uninterrupted opportunity to meet the developing physical and emotional needs of their child so as to establish the familial bonds critical to every child's healthy growth and development. The second purpose, and the one on which the parental right must ultimately rest, is to safeguard the continuing maintenance of family ties.

Id. at 9-10. Other justifications for minimal state intervention advanced by the authors are
The traditional reluctance of the state to interfere in family life and the view of the court as a friendly protector of the child clashed with the equally traditional treatment of juvenile violators of the criminal law where a benevolent court and the doctrine of parens patriae were excluded. Thus, juvenile and adult offenders were tried and punished alike, without regard for the special status of the youthful offender.

Shocked by procedures and punishments and the fact that juveniles could be imprisoned for an extended time with hardened criminals, the early reformers vowed to change the treatment of juveniles before the courts. The work of such reformers led to the establishment of separate juvenile courts designed to combine the courts’ protective attitude toward the juvenile in noncriminal proceedings with the courts’ attitude toward the juvenile accused of a crime. These newly founded courts viewed the child as essentially good and abandoned the old ideas of criminality and punishment for juvenile offenders. Instead, “[t]he child was to be ‘treated’ and ‘rehabilitated’ and the procedures, from apprehension through institutionalization, were to be ‘clinical’ rather than punitive.”

The statutory provisions establishing juvenile court systems reflect the courts’ newly adopted attitude. The Ohio provision states, for example, that the purposes of the juvenile court are:

(A) To provide for the care, protection, and mental and physical development of children.

(B) To protect the public interest in removing the consequences of criminal behavior and the taint of criminality from children committing delinquent acts and to substitute therefor a program of supervision, care, and rehabilitation;

(C) To achieve the foregoing purposes, whenever possible, in the court’s inability to “supervise the fragile, complex interpersonal bonds between child and parent,” and the child’s ability to “respond to the rulings of an impersonal court or social services agencies as he responds to the demands of personal parental figures.”

39. Id. at 106-07. Because the early treatment of juvenile offenders was so similar to that of adult criminals, “[t]he result of it all was that instead of the states' training its bad boys so to make of them decent citizens, it permitted them to become the outlaws and outcasts of society; it criminalized them by the very means that it used in dealing with them.” Id. at 107. The “thinking public” shifted from this approach to one in which the child is taken in hand by the state, “not so much to punish as to reform, not to degrade but to uplift, not to crush but to develop, not to make him a criminal but a worthy citizen.”
40. Id.
a family environment, separating the child from its parents only when necessary for his welfare or in the interests of public safety.  

A similar provision in the California Code states:

The purpose of this chapter is to secure for each minor under the jurisdiction of the juvenile court such care and guidance, preferably in his own home, as will serve the spiritual, emotional, mental, and physical welfare of the minor and the best interests of the state; to protect the public from criminal conduct by minors; to impose on the minor a sense of responsibility for his own acts; to preserve and strengthen the minor's family ties whenever possible, removing him from the custody of his parents only when necessary for his welfare or for the safety and protection of the public; and, when the minor is removed from his own family, to secure for him custody, care, and discipline as nearly as possible equivalent to that which should have been given him by his parents.

Both sections stress the importance of maintaining the family unit unless it is absolutely necessary to remove the juvenile from his or her home. The sections also emphasize the court's role as a benevolent body rather than a coldly objective and punitive one.

The impact of the early reformers on today's juvenile court system is seen not only in statutory language but also in practice. All juvenile court proceedings, including delinquency proceedings, are considered "civil," and the juvenile never is perceived as a wrongdoer. Differences in treatment between juvenile and adult offenders appear in the segregation of juveniles from adults during the adjudication process, in detention and correction facilities, and in the differences in substantive and procedural rules of court.

If the juvenile commits a criminal act, the juvenile court has

44. The first step in a juvenile court proceeding is adjudicative and may be either formal or informal. The court determines whether the juvenile is neglected, abused, dependent, or delinquent as alleged. The second step is dispositional, and the court decides what, if any, state action is necessary. D. Besharov, supra note 4, at 12-14.
45. 387 U.S. at 15-17. See Mack, supra note 38, at 109-10; text accompanying note 42, supra.
46. Most state statutes provide for the establishment of special and separate juvenile courts, juvenile court procedures, and juvenile detention facilities. See, e.g., Ohio Rev. Code Ann. § 2151 (Page 1976). Although many procedural safeguards have not been granted to juveniles, "[t]he protective philosophy has endured, and the juvenile court continues to perform its function of tailoring justice to meet the needs of the child as those needs are determined." S. Davis, Rights of Juveniles: The Juvenile Justice System 5 (1974). See generally D. Besharov, supra note 4.
great discretion as to the disposition of the case. The judge may release the juvenile to parental custody, place the juvenile on probation, send the juvenile to a juvenile facility (reformatory) or recommend psychological therapy.\textsuperscript{47} In contrast, sentencing of a guilty adult defendant is outlined by state criminal law,\textsuperscript{48} and variations from the prescribed punishment depend largely upon the language of the relevant statute. A judge, for example, may be authorized to sentence a defendant for a term between the minimum and maximum limits, set a fine between those limits or increase the punishment for a habitual offender.\textsuperscript{49}

The dissimilarity between adult and juvenile proceedings is even more pronounced in noncriminal matters. In divorce custody, adoption, neglect and abuse proceedings, the juvenile is the subject of, but not a party to, the proceedings.\textsuperscript{50} Although the decision of the juvenile court usually seriously impacted on the juvenile's life, the juvenile traditionally was not given the independent right to "argue his or her case." Rather, in abuse, neglect and termination of parental custody proceedings, a governmental or private social agency purported to represent the interests of the juvenile.\textsuperscript{51} In these and other noncriminal juvenile proceedings, it was assumed that a decision by the court based on school, psychiatric or agency reports and the testimony of parents and social workers would reflect sufficiently the best interests of the juvenile.\textsuperscript{52} An interview with the juvenile to determine his or her own views was preferred, but the court's decision was not conditioned

\begin{footnotes}
\item[47] See D. Besharov, \textit{supra} note 4, at 374–92. See, e.g., \textsc{Ohio Rev. Code Ann.} \S 2151.354 (Page 1976) (dispositions allowed for an unruly child); id. \S 2151.355 (dispositions allowed for a delinquent child); id. \S 2151.353 (dispositions allowed for a neglected or dependent child); id. \S 2151.356 (dispositions allowed for juvenile traffic offenders).
\item[48] H. Kerper, \textit{Introduction to the Criminal Justice System} 327 (1972).
\item[49] Id. at 327–29.
\item[50] In the introduction to the \textit{Divorce Reform Act}, an act proposed by the Harvard Student Legislative Research Bureau, the authors state that "[t]here is much authority for the proposition that a child is not a proper party in a proceeding for modification of a custody decree." \textit{Project, A Divorce Reform Act}, 5 \textsc{Harv. J. Legis.} 563, 577 (1968). \textit{But see} \textsc{Ohio R. Civ. P.} 75(B)(2), which allows the court to join the child of parties to a divorce proceeding when it is necessary to protect that child's interest.

With regard to child abuse and neglect cases, "[t]he child is neither the plaintiff nor the respondent. In most states the local department of social services is the plaintiff on behalf of the child, and the adult who inflicted the injury is the defendant." Fraser, \textit{Independent Representation for the Abused and Neglected Child: The Guardian Ad Litem}, 13 \textsc{Cal. W.L. Rev.} 16, 28 (1976).
\item[52] With regard to divorce proceedings, see Project, \textit{supra} note 50, at 577.
\end{footnotes}
II. THE EVOLUTION OF THE JUVENILE'S DUE PROCESS RIGHTS

As early as 1948, the Supreme Court held that the due process rights guaranteed by the fourteenth amendment were applicable to juveniles. In *Haley v. Ohio*, the Court prohibited the use of a coerced confession against a juvenile offender in a state criminal trial. No major Supreme Court cases establishing due process rights for juveniles before the courts, however, were heard for another twenty years.

During these two decades, many juvenile courts denied basic due process rights to the juvenile in the name of benevolence. In *State v. Shardell*, a juvenile who allegedly had conspired with two others to commit a burglary was adjudged delinquent. During the juvenile court delinquency proceeding, the presiding judge compelled Shardell to testify against himself. The judge also admitted hearsay evidence and required no proof of guilt beyond a reasonable doubt.

Shardell's attorney appealed the court's delinquency ruling, arguing that his client's constitutional rights had been violated. Since the juvenile was not labeled a "criminal," and the court's duty was to "take [the child] in hand for the purpose of protecting him from evil influences," the Ohio Court of Appeals concluded that only an informal hearing was required. According to the court, the informality and greater flexibility of the juvenile court were "obviously designed to do away with the usual and customary ceremony and procedure of court trial in order to surround the

53. D. Besharov, supra note 4, at 392-95.
54. The fourteenth amendment of the Constitution states in pertinent part:
   No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
U.S. CONST. amend. XIV.
55. 332 U.S. 596 (1948).
56. Id. at 599. In *Haley*, police questioned a 15 year old boy who was accused of murder from midnight until five a.m. on the morning of his arrest without allowing him to obtain counsel. In addition, evidence showed that the juvenile was beaten by police during the questioning. The juvenile signed a written confession after the questioning. *Id.* at 598.
58. *Id.* at 338, 153 N.E.2d at 511.
59. 107 Ohio App. at 349, 153 N.E.2d at 518. Proof of guilt beyond a reasonable doubt is required in adult criminal trials. 30 AM. JUR. 2d Evidence § 1170 (1967).
60. 107 Ohio App. at 340, 153 N.E.2d at 512.
61. *Id.* at 340, 153 N.E.2d at 512.
child with an atmosphere of friendliness and good will rather than one of hostility and fault-finding. On this basis, the court also concluded that proof by a preponderance of the evidence in a quasi-criminal juvenile court proceeding did not violate the constitutional rights of the juvenile.

In another Ohio case, *Cope v. Campbell*, the court declared a juvenile to be delinquent based on a charge of malicious entry. Because of his prior delinquency record, the juvenile was sent to the state reformatory. When the lack of counsel during all of the proceedings was challenged as violative of the juvenile's rights, the court reasoned that because the juvenile was neither prosecuted for a criminal offense nor "indicted," "convicted," or "sentenced," there was no need to grant the juvenile the right to counsel. The court apparently saw no similarity between the incarceration of a juvenile in a state juvenile reformatory and the confinement of a criminal in prison, although a juvenile could be confined for a substantial length of time.

In 1966, the Supreme Court began a reversal of the apparent trend toward unequal due process rights for juveniles and adults. In *Kent v. United States*, the Court emphasized that "basic requirements of due process" must be satisfied in proceedings to determine whether a juvenile should be tried in an adult criminal court. A year later, the Court announced its landmark decision, *In re Gault*. In *Gault*, the Arizona court adjudged the juvenile defendant delinquent allegedly for making obscene phone calls. The juvenile and his parents appealed this ruling, claiming that

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62. *Id.* at 340-41, 153 N.E.2d at 512.
63. *Id.* at 341, 344, 153 N.E.2d at 513, 514. But see *In re Alger*, 19 Ohio St. 2d 70, 84 249 N.E.2d 808, 816 (1969), in which the Supreme Court of Ohio held that a juvenile court finding of delinquency could be reversed for failure to meet the burden of proof beyond a reasonable doubt.
64. 175 Ohio St. 475, 196 N.E.2d 457 (1964). In *In re Alger*, 19 Ohio St. 2d 70, 76, 249 N.E.2d 808, 812 (1969), the Supreme Court of Ohio overruled that part of *Cope* which held that the presence of counsel in delinquency proceedings is not required constitutionally.
65. *Id.* at 476, 196 N.E.2d at 458.
66. *Id.*, 196 N.E.2d at 458.
67. It also was alleged that deprivation of a jury trial in juvenile proceedings was a violation of the juvenile's due process rights under the sixth and fourteenth amendments. *Id.* at 477, 196 N.E.2d at 458.
68. *Id.*, 196 N.E.2d at 458.
69. *Id.* at 478, 196 N.E.2d at 459.
71. *Id.* at 553.
72. 387 U.S. 1 (1967).
73. *Id.* at 8-9.
the Juvenile Code of Arizona was invalid on its face, or as applied in their case, because "contrary to the Due Process Clause of the Fourteenth Amendment, the juvenile is taken from the custody of his parents and committed to a state institution pursuant to proceedings in which the Juvenile Court has virtually unlimited discretion, and in which the [right to counsel is] denied." In response to this challenge, the Supreme Court narrowly held that a juvenile has a right to independent representation by counsel but only in a delinquency proceeding where the juvenile may lose his or her freedom.

Shortly after its decision in *Gault*, the Supreme Court extended the protection of another constitutional right to juveniles. In *In re Winship*, a juvenile who allegedly had committed larceny faced a possible six-year confinement in a juvenile facility. Focusing on the potential loss of liberty and the stigma of conviction, the Court held that a juvenile can be convicted of a crime only upon proof of guilt beyond a reasonable doubt. The majority also observed that this standard of proof would not affect adversely the beneficial aspects of juvenile proceedings.

The Court, however, has not fully incorporated all of the rights

74. *Id.* at 10. The parents charged that other rights also were denied, including the right to receive notice of charges, the right of confrontation and cross-examination, the privilege against self-incrimination, the right to a transcript of the proceedings, and the right to appellate review. *Id.*

75. *Id.* at 41. The Court also ruled that a juvenile has a right to notice of the charges against him or her, a right to confrontation and cross-examination, and a privilege against self-incrimination. *Id.* at 1-3. Cf. *In re William F.*, 11 Cal. 3d 249, 520 P.2d 986, 113 Cal. Rptr. 170 (1974) in which counsel for a juvenile had requested permission of the juvenile court judge to make a closing argument for his young client who had been charged with obstructing a police officer in the performance of his duties. *Id.* at 251, 520 P.2d at 987, 113 Cal. Rptr. at 171. In refusing the request, the judge stated:

My conclusions are the only ones that are relevant for the record, counsel. Your conclusions, your opinions to have to express on the evidence could in no way support a decision one way or the other any more than my observations do . . . . This has been a relatively short case, not as short as it might have been but it has had very limited issues of fact and I don't believe it would be of benefit to me to have your argument . . . . You have your record, and as I say, nothing you might say is essential to or even will benefit the record if you choose to carry it further.

*Id.* at 253 n.3, 520 P.2d at 988 n.3, 113 Cal. Rptr. at 172 n.3 (quoting the juvenile court transcript). The California Supreme Court reversed the ruling of the juvenile court judge on appeal.

77. *Id.* at 360.
78. *Id.* at 363.
79. *Id.* at 368.
80. *Id.* at 366. Such benefits include the more benevolent attitude of the court toward the juvenile, the attitude that the court is to rehabilitate rather than punish the juvenile,
guaranteed to adult offenders into the juvenile court system. In *McKeiver v. Pennsylvania*, the Court held that the due process standard for juvenile proceedings is "fundamental fairness." In so holding, the Court determined that there is no right to a trial by jury in juvenile court. Hence, the Supreme Court established two important limits to the grant of due process rights to juveniles: the extension of the rights of adult offenders to juvenile proceedings only when necessary to achieve fundamental fairness and the guarantee of these rights only in quasi-criminal delinquency proceedings.

III. IMPACT OF THE SUPREME COURT CASES: PROVIDING INDEPENDENT REPRESENTATION FOR JUVENILES

The Supreme Court cases of the 1960's and early 1970's prompted state legislatures across the country to provide for representation of juveniles in their state court systems. For centuries, the guardian ad litem had served as the court-appointed protector and representative of an incompetent or juvenile party to litigation. Many legislatures retained the traditional guardian ad litem as one such representative for juveniles and other states enacted new provisions for legal counsel to represent juveniles.

and the greater flexibility in finding solutions to the juvenile's problems. *See* text accompanying notes 41-43 supra.

82. *Id.* at 543. The traditional "fundamental fairness" test determines which constitutional rights must exist at the state level. More specifically, the test guarantees the exercise of those rights which are so strongly rooted in the conscience and culture of the American people as to be essential to a scheme of ordered liberty. *Palko v. Connecticut*, 302 U.S. 319, 325 (1937). As used in this series of juvenile court cases, however, "fundamental fairness" is slightly different. The question in juvenile court cases is whether the court's procedure "assumes] procedural regularity sufficient in the particular circumstances to satisfy the basic requirements of due process and fairness, as well as compliance with the statutory requirement of a 'full investigation'." *Kent v. United States*, 383 U.S. 541, 553 (1966).
83. *Id.* at 545. In holding that a right to a jury trial is not guaranteed in juvenile hearings, Justice Blackmun stressed that a jury trial is not essential to accurate factfinding and that it may, in fact, be detrimental to the juvenile process in making it too much like a full adversary procedure. Justice Blackmun also observed that "if the formalities of the criminal adjudicative process are to be superimposed upon the juvenile court system, there is little need for its separate existence." 403 U.S. at 551.
84. The test of "fundamental fairness," as described in *McKeiver*, emphasizes the need to provide fair and unbiased factfinding in juvenile proceedings. The rights granted in *Gault*, *Kent*, and *Winship* ensure that a juvenile will have a fair chance to establish that he or she is not a delinquent, and thus are consistent with the *McKeiver* standard.
85. *See* notes 72-75 supra and accompanying text.
88. *See* notes 94-102 infra and accompanying text.
In examining the various state code provisions for juvenile representation, however, several significant problems become apparent. In some states, the provisions are not codified in a single chapter of the code. In California, for example, such provisions can be found in the Civil Code, the Probate Code, and the Welfare and Institutions Code. It is difficult, therefore, for an attorney to determine whether a juvenile should be represented. Furthermore, the codes often do not dictate whether a guardian ad litem or an attorney should represent the juvenile or whether such representation is mandatory or discretionary. The Practice Commentaries, which accompany the New York code provisions for "Law Guardians" in juvenile proceedings, identify a significant cause of this ambiguity:

Although a major reason for the creation of the Law Guardian system was to meet the need for the legal representation of children before the Family Court, lingering behind its creation was the hope that law guardians would not create a fully adversarial system in the Family Court. Hence their title: "Law Guardian," which sought to marry the dual concerns of due process and the child's best interest.

The provisions of the Ohio, California, and New York codes examined below not only represent the wide variance in the clarity and thoroughness of such statutory provisions, but also indicate the spectrum of state responses to the juvenile's needs.

A. Provisions for Representation by a Guardian Ad Litem

The guardian ad litem, chosen by the juvenile's family, a social agency, or the court, is a temporary guardian with limited powers before the court. In general, the guardian ad litem is charged with the duty to represent the "best interests" of the juvenile. To execute this duty, a guardian ad litem may be required to institute or defend a civil suit. The Federal Rules of Civil Procedure provide for these contingencies:

89. CAL. CIV. PROC. CODE § 372 (West 1973).
90. CAL. PROB. CODE § 1607 (West 1973).
92. See notes 97–104 infra and accompanying text.
93. N.Y. FAM. CT. ACT (29A Pt. 1) § 241 note (McKinney 1975) (Practice Commentaries).
94. Fraser, supra note 50, at 29. A guardian ad litem serves only from the time of his or her appointment until the termination of the proceedings and may not have the full powers of an attorney before the court if he or she is not an attorney. But cf. OHIO R. JUV. P. 4(C) which allows a guardian ad litem who is an attorney to act as such for the juvenile.
95. J. GOLDSTEIN, supra note 36, at 16.
If an infant or incompetent person does not have a duly appointed representative he may sue by his next friend or by a guardian ad litem. The court shall appoint a guardian ad litem for an infant or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the infant or incompetent person.96

The Ohio provisions for representation in noncriminal juvenile proceedings demonstrate a more specific role for the guardian ad litem, that is, protecting the interests of a child in any proceeding involving the alleged abuse or neglect of that child.97 The Ohio Juvenile Court Rules add that a guardian ad litem will be appointed when the juvenile has no parent or other legal guardian,98 when the court finds a conflict of interest between the juvenile and his or her parent or legal guardian,99 or when the "[a]ppointment is otherwise necessary to meet the requirements of a fair hearing."100 In quasi-criminal juvenile proceedings, Ohio law also requires the appointment of a guardian ad litem when the juvenile has no parent or other legal guardian or when there is an apparent conflict of interest between the juvenile and his or her parent or guardian.101

In California, provisions for a guardian ad litem in noncriminal proceedings are not particular to the juvenile code but are found in the Civil and Civil Procedure Codes as well.102 There are also no special provisions in California which authorize a guardian ad litem to represent the juvenile in a quasi-criminal proceeding. In contrast, the New York statutes provide for the services of a "Law Guardian" for juveniles who cannot or do not select their own counsel. According to one New York court, the

96. FED. R. CIV. P. 17(c).
Congress has expanded the role of the guardian ad litem to include the representation of every juvenile involved in a neglect or abuse case which results in judicial proceedings by tying such representation to the ability of a state to receive aid under the Federal Child Abuse, Prevention, and Treatment Act § 4(b)(2)(G), 42 U.S.C. § 5103(b)(2)(G) (1976).
98. OHIO R. JUV. P. 4(B).
99. Id. In Barth v. Barth, 12 Ohio Misc. 141, 225 N.E.2d 866 (C.P. 1967), the court held that a guardian ad litem was required to protect the child's interests in a divorce action where those interests "are, or may be, substantially different from either or both of the parties." Id. at 141, 225 N.E.2d at 867.
100. OHIO R. JUV. P. 4(B).
102. CAL. CIV. CODE § 42 (West 1973) states in part that "[a] minor may enforce his rights by civil action, or other legal proceedings, in the same manner as a person of full age, except that a guardian must conduct the same." CAL. CIV. PROC. CODE § 372 (West 1973) states that a guardian ad litem must appear and represent any juvenile, insane, or incompetent person who is a party to a civil action.
Law Guardian in noncriminal juvenile proceedings has "precisely the same functions of a guardian ad litem appointed to represent an infant in a civil action":\textsuperscript{103} to protect the child's best interests and to express the juvenile's views to the court.\textsuperscript{104}

While it appears that a guardian ad litem often is directed to act in a child's "best interests," there is no consensus among courts or legal scholars as to the meaning of that term.\textsuperscript{105} The Ohio Code, for example, states simply that a guardian ad litem is to "protect the interest of the child"\textsuperscript{106} without specifying whether that phrase means that the guardian ad litem is expected to present the juvenile's views or the guardian's own conclusions to the court. The New York Code is slightly more specific, stating that a Law Guardian is to protect the interests of juveniles and help express their views to the court.\textsuperscript{107} These brief descriptions of the representative's function are unsatisfactory because neither description fully defines the extent of the representative's powers or states whether those powers are more or less limited than the powers of an attorney in an adult court. Moreover, the absence of a provision specifying qualifications for service as a guardian ad litem may result in the representation of juveniles by inexperienced, untrained persons unable to serve the juvenile effectively.\textsuperscript{108}

The duties of the guardian ad litem have been outlined with relative consistency, however, in law review commentary. Generally, the role of the guardian ad litem is three-faceted: he or she is to protect the fundamental rights of the juvenile, advance the juvenile's "best interests," and assist the court in formulating its de-


\textsuperscript{104} Id. at 585, 333 N.Y.S.2d at 899 (citing N.Y. Fam. Ct. Act (29A Pt. 1) § 241 (McKinney 1975)).


\textsuperscript{108} Solender, supra note 105, at 642-43. But see N.Y. Fam. Ct. Act (29A Pt. 1) § 242 (McKinney 1975); Ohio R. Juv. P. 4(C). The former requires the representative to be a practicing attorney and the latter recognizes that a guardian ad litem who is an attorney may serve as legal counsel to the juvenile. Furthermore, the Cleveland Federation for Community Planning has a structured program and printed manual for the training of guardians ad litem which at least attempts to familiarize the participants with their role in the Ohio juvenile court system. Federation for Community Planning, Cuyahoga County Juvenile Court, Ohio, Guardians Ad Litem for Children Project Orientation Manual (undated).
cision. More specifically, the guardian ad litem is an investigator of facts, an advocate to bring those facts to the attention of the court, a counsel to present all possible options to the court, and a guardian to protect the juvenile's interests and to ensure that the orders of the court are fulfilled. Unless the guardian ad litem, however, is apprised of these duties and allowed to exercise these powers, his or her value to the juvenile and the court is diminished greatly.

B. Representation by Legal Counsel

A juvenile's right to independent legal counsel when his or her freedom is at stake in a delinquency proceeding is established firmly. Most states also, either expressly or impliedly, grant a right to legal counsel in many noncriminal proceedings. The Ohio Code, for example, provides that a juvenile is entitled to representation at all stages of the "proceedings" and that such representation "must be provided for a child not represented by his parent, guardian, or custodian." The Ohio Rules of Juvenile Procedure further stipulate that every "party" to a juvenile court proceeding has a right to representation by legal counsel and defines "party" to include a child who is the subject of any such proceeding. Thus, it appears that the scope of "proceedings" at which

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110. See generally Fraser, supra note 50, at 45; Kargman, A Court Appointed Child Advocate (Guardian Ad Litem) Reports on Her Role in Contested Child Custody Cases and Looks to the Future, 3 J. DIVORCE 77 (1979). See also FEDERATION FOR COMMUNITY PLANNING, supra note 108.

111. In re Gault, 387 U.S. 1 (1967), established this right for juveniles charged with criminal conduct. See notes 72-75 supra and accompanying text.

112. OHIO REV. CODE ANN. § 2151.352 (Page 1976) provides in part:
A child . . . is entitled to representation by legal counsel at all stages of the proceedings and if, as an indigent person, he is unable to employ counsel, to have counsel provided for him . . . . Counsel must be provided for a child not represented by his parent, guardian, or custodian. If the interests of two or more such parties conflict, separate counsel shall be provided for each of them.

113. OHIO R. JUV. P. 4(A) states:
Every party shall have the right to be represented by counsel and every child . . . the right to appointed counsel if indigent. These rights shall arise when a person becomes a party to a juvenile court proceeding. When the complaint alleges that a child is an abused child, the court must appoint an attorney to represent the interests of the child.

114. Id. R. 2(16). It is crucial to note, however, that Ohio's Rules of Juvenile Procedure specifically state that the rules shall not apply to appeals, criminal trials, and divorce, annulment, alimony, and paternity actions. Id. R. 1(C).
the juvenile is entitled to be represented by legal counsel is very broad.

The Ohio rules of court also support the juvenile's right to counsel in certain noncriminal proceedings. The Ohio Rules of Civil Procedure authorize the appointment of legal counsel in divorce, annulment and alimony actions if the juvenile is joined as a party and if the appointment is essential to the protection of the juvenile's interests. In abuse cases, the Ohio Rules of Juvenile Procedure require the court to "appoint an attorney to represent the interests of the child."

The California Code contains a more thorough and detailed provision for counsel in noncriminal proceedings. A juvenile may be represented by independent counsel in proceedings to declare the juvenile's home unfit, to determine the temporary custody of a dependent child, to free a minor from parental custody, and to determine custody in divorce actions. Several cases add a significant gloss to these provisions. In In re Dunlap, a California appellate court held that while the court has discretionary power to appoint counsel for juveniles in proceedings to free them from parental custody, the court must appoint independent counsel unless there is a showing why counsel should not be appointed. Similarly, in In re Richard E., the California Supreme Court ruled that a court must exercise its discretion to appoint independent legal counsel where the juvenile's separate interests are not protected by the parent or the petitioner seeking to remove the juvenile from parental custody. The court noted, however, that reversals for failure to appoint independent counsel for juveniles would occur only where that failure resulted in a miscarriage of justice.

115. OHIO R. CIV. P. 75(B)(2).
116. OHIO R. JUV. P. 4(A); see note 96 supra.
118. Id §§ 315–316.
120. Id. § 4606.
122. Id at 439, 133 Cal. Rptr. at 316. The court did not reach the question of when a failure to appoint counsel would be justified.
123. 21 Cal. 3d 349, 579 P.2d 495, 146 Cal. Rptr. 604 (1978).
124. Id. at 354, 579 P.2d at 499, 146 Cal. Rptr. at 608.
125. Id. at 355, 579 P.2d at 499, 146 Cal. Rptr. at 608. The dissent argued strongly that because termination of parental custody is a drastic measure, independent counsel is necessary: "At the minimum, appointed counsel could have interviewed Richard and ascertained his feelings toward his brothers and his father and discussed his future. This information could have been conveyed to the court. Finally, counsel could have supple-
Of the three states whose statutes are under consideration, New York's provisions are the most comprehensive. The New York Family Court Act\textsuperscript{126} provides for independent legal counsel in various proceedings, including those proceedings which determine whether the juvenile is a "person in need of supervision"\textsuperscript{127} or has been abused or neglected.\textsuperscript{128} The reach of this comprehensive statute was extended further in \textit{Borkowski v. Borkowski}\textsuperscript{129} which suggested that the determination of a child's custody is as important to the child as it is to the parents. In support of its determination, the court stated:

\[\text{T}he\ clear\ consensus\ emerges\ that\ the\ child\ has\ a\ legal\ interest\ and\ specific\ rights\ to\ protect\ in\ a\ custody\ dispute,\ that\ neither\ the\ court\ nor\ the\ parents\ can\ adequately\ represent\ those\ interests,\ and\ that\ the\ most\ effective\ means\ of\ protecting\ the\ child's\ interest\ in\ our\ adversary\ system\ is\ by\ independent\ counsel\ for\ the\ child.\textsuperscript{130}\]

Thus, the court held that juveniles who are subjects in a contested divorce custody proceeding are entitled to independent legal representation.\textsuperscript{131}

Providing a juvenile with independent legal counsel in non-criminal proceedings is much more controversial than providing the same services in quasi-criminal proceedings. First, in cases of parental neglect or abuse, the agency which petitions the court for removal of the juvenile from an unsafe home purportedly protects the juvenile.\textsuperscript{132} Moreover, in those cases and also in divorce custody disputes, the juvenile is merely the subject of, but not a party to, the proceedings and is not a wrongdoer in need of a defense.\textsuperscript{133} Second, courts and commentators hesitate to advocate the introduction of an adversarial quality to these proceedings because that

\begin{itemize}
  \item \textsuperscript{126} (29A Pt. 1) §§ 111-121 (McKinney 1975 & Supp. 1980).
  \item \textsuperscript{127} \textit{Id.} § 249(a) (McKinney Supp. 1980). A person in need of supervision is defined as a male less than sixteen years of age and a female less than eighteen years of age who does not attend school in accord with . . . law or who is incorrigible, ungovernable or habitually disobedient and beyond the lawful control of parent or other lawful authority or who violates . . . the penal law.
  \item \textsuperscript{128} \textit{Id.} § 712 (McKinney Supp. 1980).
  \item \textsuperscript{129} \textit{Id.} § 249(a) (McKinney Supp. 1980). \textit{See id.} § 1032 (McKinney 1975).
  \item \textsuperscript{130} \textit{Id.} at 960, 396 N.Y.S.2d at 964. \textit{See generally} N.Y. FAm. CT. ACT (29A Pt. 1) § 249 and note (McKinney 1975 & Supp. 1980) (Practice Commentaries).
  \item \textsuperscript{131} \textit{Id.} § 492 (McKinney Supp. 1980).
  \item \textsuperscript{132} \textit{See} \textit{Ohio Rev. Code Ann.} § 2151.421 (Page 1976).
  \item \textsuperscript{133} \textit{See} note 50 supra and accompanying text.
\end{itemize}
position would be contrary to the original scheme of the juvenile court system. Finally, and perhaps most importantly, because *Gault* established this right only with respect to quasi-criminal proceedings, there is no constitutional directive for such a right in noncriminal proceedings.

C. Alternative Approaches to Independent Representation by Legal Counsel

The debate over the appropriateness of providing juveniles with independent legal counsel in noncriminal proceedings has not subsided. One group of well-known scholars opposed to such representation asserts that the law presumes that parents are capable of determining the legal care needs of their own children; when the court intervenes, therefore, one of its primary considerations must be the maintenance of the family unit. These scholars believe that any court appointment of counsel for the juvenile which fails to consider the parents' views "is a drastic alteration of the parent-child relationship . . . , intrudes upon the integrity of the family and strains the psychological bonds" that hold the family together. Any such appointment would be detrimental to the relationship between parent and child. These scholars propose, therefore, that the juvenile court appoint counsel only when the juvenile's parents have been disqualified as the legal representatives of their child's interests or when the parents request, but cannot afford to obtain, such counsel. Thus, a juvenile would be represented by independent counsel only when his or her parents request or consent to such an appointment or

134. See notes 41–42 supra and accompanying text.
135. See notes 72–75 supra and accompanying text.
136. See notes 132–35 supra and accompanying text.
137. Joseph Goldstein, Anna Freud, and Albert Solnit, authors of *Beyond the Best Interests of the Child* (published in 1973) and *Before the Best Interests of the Child* (published in 1979), are representative of three different institutions, respectively: the Yale Law School, the Hampstead Child-Therapy Clinic, London, and the Child Study Center, Yale University.
138. J. GOLDSTEIN, supra note 36, at 112.
139. Id. at 5.
140. Id. at 112.
141. Id. at 125.
142. Such a disqualification may be warranted where the parent is a minor himself, is declared incompetent due to mental illness or retardation or, in cases of abuse, neglect, or denial of necessary medical care for a child. Id. at 72–90, 95, 109, 143, 194. In such cases, "the protective insulation that parents give children from the law has been broken by the establishment at adjudication of a ground for intervention." Id. at 112.
143. Id. at 111.
when an emergency results in the temporary removal of the child from parental control. Moreover, representation would not be allowed until after the court has determined that there has been parental neglect, abuse or delinquency; counsel thus would serve only during the dispositional hearings.

If a juvenile receives independent representation, many fear that family bonds may weaken as parents are forced to employ an intermediary, the juvenile's counsel, to accomplish what is best for their own child. Since the juvenile and the court, however, lack independent power to obtain separate counsel for the juvenile, parents effectively could suppress any interest in conflict with their own by refusing to consent to separate counsel for their child. This result would be especially troubling in the context of abuse, neglect, delinquency or a divorce custody proceeding where strained family relations already may exist. Hence, maintenance of family bonds is a weak basis on which to disfavor the appointment of independent legal counsel for a juvenile.

At the opposite end of the spectrum is a second approach which would make separate legal counsel available to juveniles at both the adjudicatory and dispositional stages of noncriminal and quasi-criminal proceedings. This approach extends the right to independent counsel established in the 1967 Gault decision by focusing on the dispositional stage of a juvenile proceeding. Thus, regardless of the characterization of an action as quasi-criminal or noncriminal, because the proceeding often results in the juvenile's removal from the parental home and placement in the state's custody, representation is justified. Another justification for the extension is similarity of purpose: "In both custody and juvenile proceedings identical goals are pursued: the protection of society's young and the assurance that they will have a hopeful future." Those individuals who support this expansive view conclude that the juvenile's right to independent legal

144. Id. at 114-15.
145. Id. at 111-12 (emphasis added).
146. Id. at 125.
149. See notes 72-75 supra and accompanying text.
150. See notes 147-48 supra and accompanying text.
counsel should not be predicated on the type of legal action involved. These people believe that any distinction between quasi-criminal and noncriminal proceedings is essentially "contrived, artificial, and without foundation."\footnote{152}

Several commentators have suggested that provisions for legal representation should be extended to all juveniles involved in divorce custody proceedings. According to one proponent of this view, parental judgment in this situation is clouded by emotion and parents are under no obligation to advocate their child's interests over their own.\footnote{153} For these reasons, separate legal counsel for children of divorce is considered the only way for the court to recognize all interests and reach a well-reasoned and appropriate decision.\footnote{154}

The Divorce Reform Act,\footnote{155} proposed by the *Harvard Journal of Legislation*, requires the selection or appointment of independent counsel for children involved in divorce custody disputes\footnote{156} and grants the children all the powers of any other party to the action.\footnote{157} The proposed Act stipulates that the attorney is to "represent the interests of the children as they appear to the lawyers, taking account of the children's own opinions and other relevant considerations."\footnote{158} To date, state legislatures have been unwilling to adopt such a radical extension of the rights established by the Supreme Court in *Gault*.\footnote{159}

A more moderate approach is reflected in the New York Fam-

\footnotesize{152. *Id.* at 119, *reprinted in The Youngest Minority*, *supra* note 147, at 43.}
\footnotesize{153. *Id.*}
\footnotesize{154. *Id.*}
\footnotesize{155. *See* Project, *supra* note 50.}
\footnotesize{156. *Id.* at 583 § 201(b).}
\footnotesize{157. *Id.* at 584 § 201(c)(1).}
\footnotesize{158. *Id.* § 201(c)(2). Section 201(b) of the proposed Act states further:

The court shall appoint lawyers for the children named . . . . At the beginning of or during the proceedings, the court may appoint a single lawyer for children whose interests appear to coincide, or separate lawyers for children whose interests appear to conflict.

*Id.* at 583 § 201(b). The Comment accompanying this section of the Act adds that:

The inability of children to select their own lawyers creates a dilemma. If the court does not assume the responsibility of appointing lawyers, the children will not obtain them; but court appointed lawyers may not pursue their clients' interests as avidly as those selected by the client. The latter problem may be solved in part by involvement of older children in the selection process, and frequent consultation between the children and their counsel.

*Id.*, Comment at 584.}
\footnotesize{159. 387 U.S. 1 (1967). Some courts, however, have extended the right to counsel to noncriminal juvenile proceedings. The New York Supreme Court in *Borkowski v. Borkowski*, 90 Misc. 2d 957, 396 N.Y.S.2d 962 (Sup. Ct. 1977), for example, held that where the parents' views override those of their children in a divorce proceeding, the court can appoint counsel to represent the children. *See* notes 129–31 *supra* and accompanying text.
ily Court Act and its accompanying practice commentaries. The Act attempts to create a dual responsibility in the juvenile's Law Guardian: to ensure a reasoned determination of facts and the proper disposition of the case, similar to that which is required of a guardian ad litem, and to present the juvenile's own views to the court, similar to that which is required of an attorney in an adult court.

Regardless of the reluctance of many legislatures to create a fully adversarial system in the juvenile courts, amendments to the New York Family Court Act exemplify a trend toward providing juveniles with separate legal representation in all juvenile proceedings. Thus, at least in New York, "the adversarial nature of Family Court proceedings has increased and been accentuated beyond anything the original drafters of the Family Court Act probably contemplated." Adding to the already unsettled issue of independent counsel for juveniles are the major conflicts which arise concerning the role and function of such counsel once it is determined that representation of the juvenile is warranted. Because juvenile courts are intended to be nonadversarial, it is unclear whether it is appropriate to have a zealous attorney arguing the juvenile's case and whether counsel should represent the juvenile's views or argue for a disposition which counsel determines is in the juvenile's best interests. The resolution of these issues depends partially on the kind of proceeding in which the juvenile is involved. Arguably, because counsel in a quasi-criminal proceeding is akin to an adult defense attorney, he or she should play a more adversarial role than an attorney for a juvenile in a noncriminal proceeding.

Many believe that attorneys for alleged juvenile delinquents are expected to defend their young clients to the same extent they

161. Id. § 241 and note (McKinney 1975).
162. The 1970 amendments to section 241 added provisions for representation by a Law Guardian in certain noncriminal proceedings. Recent amendments to section 249 have added provisions for the appointment of a Law Guardian when a minor is sought to be placed in protective custody, Pub. L. No. 1976, ch. 656, § 1, when the guardianship and custody of destitute or dependent children is determined, Pub. L. No. 1977, ch. 859, § 1, when a child is declared in need of supervision and is removed from the parental home, Pub. L. No. 1978, ch. 481, § 46, and when a juvenile's commitment to the commissioner of mental health or mental retardation is to be continued, Pub. L. No. 1979, ch. 531, § 4 (amending N.Y. FAM. CT. ACT (29A Pt. 1) § 249 (McKinney Supp. 1980)).
163. Id. § 241 note (McKinney 1975).
would defend an adult offender. Like an adult, "[t]he juvenile needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it." Thus, in describing the nature of the Law Guardian's role, the Practice Commentaries to the New York Family Court Act state:

For all practical purposes, the factfinding hearing in a delinquency case is handled [like] the defense of an adult criminal prosecution. At the outset the attorney should be disabused of the notion that all juvenile delinquency proceedings involve children's crimes, such as petty larceny and neighborhood fights. Attorneys in Juvenile Court are called upon to defend alleged [murders], rapists, . . . . No matter how the attorney may personally feel about a particular child, the crime allegedly committed, or the possible need for incarceration, his duty is to defend the child with zeal.

Similarly, a New York court recently held that a juvenile's constitutional right to counsel in a quasi-criminal proceeding "extends to the right and duty of such counsel to proceed in the same manner as counsel representing a defendant in a criminal proceeding."

While counsel in quasi-criminal juvenile proceedings may be guided as to their function in juvenile court by their knowledge of how to conduct an adult criminal defense, it is much more difficult to recognize the role and function of independent counsel in noncriminal proceedings. This difficulty may exist because few actions in adult court parallel noncriminal juvenile proceedings. Nevertheless, it generally is agreed that in both quasi-criminal and noncriminal proceedings, an attorney has at least the same duties as a guardian ad litem: to investigate and gather facts, to

164. See note 169 infra and accompanying text.
165. In re Gault, 387 U.S. at 36.
166. N.Y. FAM. CT. ACT § 241, note (McKinney 1975) (Practice Commentaries) (quoting FAMILY COURT BRANCH, NEW YORK LEGAL AID SOCIETY, MANUAL FOR NEW ATTORNEYS 10 (undated)).
167. Rapoport v. Berman, 49 A.D.2d 930, 931, 373 N.Y.S.2d 652, 654 (1975). In Rapoport, the Law Guardian appealed from an order prohibiting him from interviewing the petitioner who, in the Law Guardian's opinion, had information relevant to his juvenile client's case. Although the appeal was dismissed for lack of current controversy, the court did comment upon the power and function of the Law Guardian. In particular, the court stated that counsel has the right to interview "any petitioner or witness who may possess information bearing on the issues before the court." Id. at 931, 373 N.Y.S.2d at 654.
168. But see Note, The Role of Counsel in the Civil Commitment Process: A Theoretical Framework, 84 YALE L.J. 1540, 1544-46 (1975) (suggesting that a civil action to commit a person to a mental institution is similar to a noncriminal juvenile proceeding).
interview the juvenile and other interested parties, and to discover what resolution would be in the juvenile's best interests. Additionally, legal counsel usually is expected to ascertain the views of the juvenile.

Courts and commentators are divided, however, as to what interest counsel for a juvenile should represent in a noncriminal proceeding. Some suggest that counsel must be bound by the juvenile's own determination of his or her best interests. The New York Surrogate Court adhered to this view stating:

[A] court is required to depend upon the professional ability and efforts of an attorney whose sole purpose should be to advocate the cause and rights of the infant; to see that all questions necessary to be raised are raised, and submitted for decision by the court. The attorney for the infant must be strictly an advocate and his efforts should not be left merely to his charitable instincts.

Others believe that while the preferences or views expressed by the juvenile must be recognized, counsel must consider other factors before determining what disposition would be in the "best interests of the child." Such other factors might include the opinions of parents or other interested parties and the views of


170. See, e.g., Davidson, supra note 169.

171. See, e.g., id. The author also asserts that in cases were the juvenile is unable to make a considered decision as to his or her own best interests, counsel should either ask the court to appoint a guardian ad litem to make this determination or argue for the least intrusive intervention possible. Id. at 113-14.

172. In re Guardianship of Mark V., 80 Misc. 2d 986, 988, 365 N.Y.S.2d 463, 465 (1975). Contra, In re Apel 96 Misc. 2d 839, 409 N.Y.S.2d 928 (Fam. Ct. 1978), where an order to dismiss the court-appointed Law Guardian was sought on the ground that he was biased in favor of a certain disposition of the case. Although the court denied the request in this case on other grounds, the court stated:

At the outset of the case, a Law Guardian, who in addition to his role as counsel, advocate and guardian serves also in a quasi-judicial capacity in that he has some responsibility, at least during the dispositional phase of the proceeding, to aid the court in arriving at a proper disposition, should, like the judge, be neutral. Id. at 842-43, 409 N.Y.S.2d at 930. It should be noted, however, that the Practice Commentaries accompanying section 241 of the New York Family Court Act note that this aspect of the decision is troublesome. N.Y. FAM. CT. ACT § 241 note (McKinney Supp. 1980) (Practice Commentaries). Since the Law Guardian is expected to acquire as much knowledge of the case as possible before the hearing, it may be unwise and naive not to expect counsel to form even a preliminary opinion as to the proper outcome of the case. Id.

173. See, e.g., Heilman, supra note 169; Mlyniec, supra note 139.
police, social workers or physicians.\textsuperscript{174} Reasoning that the use of an advocate in custody disputes will not make judicial decisions in these cases easier or more accurate, one commentator suggested that the “best interests of the child” standard be discarded.\textsuperscript{175} This commentator then suggested that custody could be awarded to the parent who would not endanger the child’s health or to the parent with whom the child has a stronger relationship.\textsuperscript{176} Using either of these standards, the juvenile’s attorney would perform primarily an investigative role,\textsuperscript{177} rather than an adversarial one.

Although the role and power of counsel for juveniles remain ambiguous, certain court decisions have given some indication of the scope of that power. The Supreme Court’s use of the “fundamental fairness” test in \textit{McKeiver v. Pennsylvania}\textsuperscript{178} has introduced adversarial elements into the juvenile court system. Particularly in delinquency proceedings, counsel has been granted much of the power and assumes a role similar to that of counsel in an adult court. The California Supreme Court held, for example, that the right to deliver a closing argument in a delinquency proceeding was an “integral part of the right of a juvenile to be represented by counsel” and that the juvenile court’s failure to allow the argument offended the test of “fundamental fairness.”\textsuperscript{179} The California Supreme Court also requires counsel to submit transcripts of arguments advanced on behalf of the juvenile so that the presiding judge is apprised fully of the juvenile’s defense posture before deciding the case.\textsuperscript{180}

Recently, in \textit{James H. v. Superior Court},\textsuperscript{181} a California appellate court ruled that juvenile court proceedings must be suspended until the court determines that the juvenile is competent to cooperate with his or her counsel, since there is no value in providing counsel unless it is effective counsel.\textsuperscript{182} Several New York courts

\begin{footnotes}
\item[174.] See, e.g., Heilman, supra note 169, at 791; Mlyniec, supra note 169, at 16.
\item[175.] Mlyniec, supra note 169, at 13.
\item[176.] \textit{Id.}
\item[177.] \textit{Id.} at 13–15.
\item[178.] 403 U.S. 528 (1970). See notes 81–83 supra and accompanying text.
\item[179.] \textit{In re} William F., 11 Cal. 3d 249, 255, 520 P.2d 986, 989, 113 Cal. Rptr. 170, 173 (1974). The juvenile in this case was charged with obstructing a police officer in the performance of his duty. The court order, which placed the juvenile on a six-month probation, was overruled because of the court’s disallowance of counsel’s request to make a closing argument for the juvenile. \textit{Id.} at 257, 520 P.2d at 990, 113 Cal. Rptr. at 174.
\item[180.] \textit{In re} Damon C., 16 Cal. 3d 493, 497, 546 P.2d 676, 679, 128 Cal. Rptr. 172, 175 (1976).
\item[182.] \textit{Id.} at 174, 143 Cal. Rptr. at 400.
\end{footnotes}
have held similarly, emphasizing that the juvenile must be provided with well-prepared counsel who possess many of the powers of counsel in an adult court.

IV. RECOMMENDATIONS

The prevalent statutory separation of provisions for juvenile representation by a guardian ad litem and legal counsel appears to be a source of confusion and an often meaningless distinction. Perhaps state legislatures could clarify their provisions by giving one title to any representative of a juvenile, as the New York legislature has done by providing for independent juvenile representation by a Law Guardian. Allowing such a representative in all juvenile proceedings, both noncriminal and quasi-criminal, would eliminate further confusion. A distinction then could be made as to the function of the representative in different types of proceedings. In a quasi-criminal proceeding, the juvenile’s representative would be obligated to protect the juvenile’s interests by defending the juvenile against all charges. In a noncriminal proceeding, on the other hand, the representative’s function would be to present all relevant facts to the court to ensure its awareness of the juvenile’s unique status.

This expansion of the limited right to legal counsel established in Gault is justified. Juveniles involved in noncriminal proceedings also have legitimate concerns which often are unrecognized and rights which need the protection of knowledgeable counsel, particularly because the juvenile court has the power to make major decisions affecting the juvenile’s future. For these reasons, the juvenile’s right to legal counsel is as fundamental in noncriminal proceedings as it is in quasi-criminal proceedings. If the juvenile...
nile's own interests are not the sole determinant in the disposition of the case, as suggested, the presence of independent counsel for the juvenile will not detract from the beneficial aspects of treating juveniles specially. Moreover, the use of independent legal representation to provide the court with all relevant facts and interests, including the valid interests of the juvenile, will enable the juvenile court to make truly fair and reasoned decisions regarding the juvenile. To provide such representation would further the aim of the original founders of the juvenile court system to create a judicial forum particularly sensitive to the unique status of juveniles before the court.

Despite the benefits to be derived from the use of independent legal counsel in both noncriminal and quasi-criminal juvenile proceedings, the Supreme Court may be reluctant to extend due process rights, such as the juvenile's right to representation by separate legal counsel, beyond the rights narrowly granted in the Gault, Winship and Kent cases of the 1960's and early 1970's. Several recent Supreme Court decisions which focused on the interrelationship of the parent, child and court suggest that there will be no further extension of these rights. While these decisions did not address directly the issue of providing legal counsel for juveniles, the decisions were concerned with the related issue of whether legislatures and courts may treat juveniles differently from their adult counterparts. The decisions may be helpful, therefore, in predicting how the Supreme Court will decide the issue if presented with it in the future.

In Bellotti v. Baird, the Court held that a Massachusetts statute requiring an unmarried pregnant juvenile to obtain parental consent before having an abortion was unconstitutional. Four Justices asserted, however, that abortion was an exceptional situation in which the state could intervene legitimately between parent and child although the Court ordinarily would give deference to parental child rearing. Justice Powell noted that although

190. See notes 40–43 supra and accompanying text.
191. See notes 39–46 supra and accompanying text.
192. See notes 70–80 supra and accompanying text.
194. The statute was ruled unconstitutional because it permitted an abortion to be withheld even in cases where the juvenile was mature and fully competent to make a decision and because it required parental consent even if obtaining such consent would not be in the minor's best interest. Id. at 644–51.
195. Id. at 643. This concern was asserted by Chief Justice Burger and Justices Stewart, Rehnquist, and Powell.
juveniles have some rights, their status under the law is unique in many respects. Powell continued:

the unique role in our society of the family . . . requires that constitutional principles be applied with sensitivity and flexibility to the special needs of parents and children. We have recognized three reasons justifying the conclusion that the constitutional rights of children cannot be equated with those of adults: the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing.196

In Parham v. J.R.,197 the Court also recognized the special nature of the parent-child relationship, holding that a formal hearing was not required before a parent could commit his or her child to a mental institution and that an informal post-commitment hearing, as required by the Georgia statute, was sufficient.198 Writing for the majority, Chief Justice Burger stated that the Court recognized the presumption that parents act in the best interests of their child,199 and that accordingly greater weight must be given to parents' "traditional interests in and responsibility for the upbringing of their child"200 than to arguments for extending the child's constitutional rights.201 Only Justices Brennan, Marshall and Stevens, in dissent, recognized that "[c]hildren incarcerated in public mental institutions are . . . entitled to some champion who can speak on their behalf and who stands ready to oppose wrongful commitment."202

The majority opinions in these Supreme Court cases reemphasize the traditional belief that parental primacy over the child is essential for the protection of those individuals who are vulnerable and incapable of independent thinking or decisionmaking. Providing independent legal counsel for any juvenile before a ju-

196. Id. at 634.
198. Id. at 607.
199. Id. at 610. Chief Justice Burger stated that to require a "formalized, factfinding hearing" would jeopardize the parent-child bonds by "pitting the parents and child as adversaries." Id.
200. Id. at 602.
201. Id.
202. Id. at 638 (dissenting opinion). Justice Brennan stated that the state should not be permitted to deny that champion simply because the children's parents or guardians wished them to be confined without a hearing. The risk of erroneous commitment is simply too great unless there is some form of adversary review. And fairness demands that children abandoned by their supposed protectors to the rigors of institutional confinement be given the help of some separate voice.

Id. at 638-39 (dissenting opinion).
venile court would appear to be antithetical to such a view since independent counsel could assert interests inconsistent with, and perhaps even superior to, the interests of the parents. Thus, if the Supreme Court is presented with the question of whether juveniles have a right to independent representation at a noncriminal proceeding, it is likely to rule that such representation is not ordered by the Constitution.

V. Conclusion

Since the establishment of the juvenile court system in this country, courts and legislatures have struggled to define the nature of these special courts. Although this establishment was based on a recognition that juvenile offenders must be treated more sympathetically and benevolently by the court than their adult counterparts, the Supreme Court cases of the 1960's and early 1970's narrowed the gap between juvenile and adult proceedings by providing juveniles with many of the due process rights guaranteed to adults, including the rights to independent representation at quasi-criminal proceedings. Since that time, state legislatures and courts have extended this right to noncriminal proceedings. The trend toward expansion of the juvenile's right to independent legal representation, however, may be short lived. The Supreme Court seems to have returned to a much more traditional view of the juvenile, recognizing the superiority of parental rights and views over the juvenile's rights and views. These cases indeed may signal the Court's unwillingness to extend further due process rights to juveniles before the courts, including the right to independent legal representation granted only narrowly in *Gault*.

Sarah Gabinet-Morgenstern