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Juvenile Law: Inferential Impeachment: The Presence of Parole Officers at Subsequent Juvenile Adjudications

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NOTES

INFERENTIAL IMPEACHMENT: THE PRESENCE OF PAROLE OFFICERS AT SUBSEQUENT JUVENILE ADJUDICATIONS

I. INTRODUCTION

Evolving from the common law doctrine of *parens patriae* into its Wisconsin statutory codification in 1929,[1] the Children's Code has as its avowed purpose the promotion of "the best interests of the children of this state."[2] Implementing this social policy, the Code provides numerous safeguards of the child's welfare upon his contact with the juvenile court. Thus, for example, the Code excludes the general public from juvenile court hearings,[3] closes juvenile police records except by court order,[4] proscribes detention of children in jails,[5] and generally emphasizes the principle of "individualized justice."[6]

Another significant implementation of this child-protection policy is the Code's constriction of negative effects incident to juvenile court proceedings.[7] The result of these proceedings is not the equivalent of a criminal conviction and, as such, it does not impose upon the child any of the usual civil disabilities, including disqualification in any future civil service examination, appointment, or application. Perhaps the chief manifestation of the state's concern that a child's juvenile court contacts do not have a lasting, deleterious effect upon his future life is the emphatic proscription, in the Children's Code, of the use of the juvenile court disposition and any evidence presented therein in subsequent court proceed-

1. *See* 6 WISCONSIN LEGISLATIVE COUNCIL, RESEARCH REPORT ON CHILD WELFARE pt. 2, at 101-106 (1955); Mentkowski, *Juvenile Court Practice in Wisconsin,* in LEGAL COUNSELING FOR THE INDIGENT 2-1 (1967).

2. WIS. STAT. § 48.01(2) (1969); *see also In re* Aronson, 263 Wis. 604, 58 N.W.2d 553 (1953); State v. Scholl, 167 Wis. 504, 167 N.W. 830 (1918).

3. WIS. STAT. § 48.25(1) (1969).

4. WIS. STAT. § 48.26(1) (1969).

5. WIS. STAT. § 48.30(2) (1969).

6. WISCONSIN STUDY COMMITTEE ON JUVENILE COURT SERVICES, HANDBOOK FOR JUVENILE COURT SERVICES 1-3 (1959).

7. 41 OP. ATT'Y. GEN. 70 (1956).

ings.[8] The key impact of this proscription is the disallowance of the usage of the juvenile court record for purposes of impeachment evidence in subsequent court proceedings.

Also implementing the state's concern over the child's best interests is its desire that the child not appear before the juvenile court alone. Frightening and confusing to most are the mechanics of justice—so much more so to a child. The Children's Code, thus, demands the presence of the person having legal responsibility for the child at juvenile court hearings, whether formal or informal.[9] Usually, the child's legal custodian is one or both of his natural parents.[10] This, however, is not invariably the case. The natural or adoptive parents, in an antecedent juvenile proceeding, may have been relieved of the child's legal custody. Legal custody is then transferrable to a relative of the child, any county agency specified in Wisconsin Statutes section 48.56(1), a licensed child welfare agency, or the state Department of Health and Social Services.[11] If such a transfer of legal custody has occurred, a representative from the organization must accompany the child during the juvenile court hearing. This provision is a codification of case law which regards the custodian of the child to be a necessary party to any juvenile court proceeding wherein the child's welfare is at issue.[12] Although the Code does provide for notice to the parents or guardians of the child as to the pendency, time, and place of the hearing, only the legal custodian *must* attend.

Pursuant to these protective provisions of the Children's Code, there often occurs, interestingly, an untoward result. Upon an adjudication of delinquency by the juvenile court, the child may have his custody transferred to the Department of Health and Social Services, Division of Corrections. He may further be required to reside in any of a number of institutions throughout the state for an unspecified period of time, not to exceed his 21st birthday.[13] The child is assigned a parole officer and, after a period of time, he is usually released. At this time, the child's legal and physical

8. WIS. STAT. § 48.38(1) (1969).

9. WIS. STAT. § 48.21(1) (1969). See also WIS. STAT. § 48.19 (1969), which clarifies formal and informal juvenile dispositions.

10. WIS. STAT. § 48.02(10)-(11) (1969); *see also* Lacher v. Venus, 177 Wis. 558, 188 N.W. 613 (1922).

11. WIS. STAT. § 48.34(1)(d) (1969).

12. *See In re* Aronson, 263 Wis. 604, 58 N.W.2d 553 (1953); *In re* Fish, 246 Wis. 474, 17 N.W.2d 558 (1945).

13. WIS. STAT. § 48.52(1) (1969).

custody may again be returned to his parents or guardians.[14] In the discretion of the department, however, the child's legal custody may be retained until the age of 21 years.[15] Upon his release, it very often happens that the child-parolee, for a number of reasons (usually an alleged delinquency), finds his way back into the juvenile court.

As has been suggested, the Children's Code demands the presence of the child's legal custodian at the juvenile court hearing. In the situation of a child whose *legal custody* has not been returned to his parents or guardians, the child's parole officer, representing the Department of Health and Social Services, is summoned into court. At this point, the parole officer and the child lawfully in attendance at the juvenile court hearing, the difficulty arises. It appears highly likely that the presence of the child's parole officer will communicate to the jury or the court the child's prior aggravated juvenile record. This knowledge, surreptitiously, and perhaps even unconsciously communicated, must certainly affect the credibility of the testifying child.[16] Does not this lack of credibility, albeit inferential, amount to impeachment evidence concerning the child's character? If so, is this not a "civil disability ordinarily imposed by conviction,"[17] and precisely that which the above-mentioned proscription of the usage of the juvenile court disposition in subsequent court proceedings was designed to prevent? It may be that these well-meaning provisions of the Children's Code are contradictory, at least with regard to their practical ramifications. A closer study is warranted.

II. THE STATUTES

A. Section 48.21(1)

Upon filing of a petition alleging facts constituting delin-

14. WIS. STAT. § 48.53 (1969).

15. WIS. STAT. § 48.53(2) (1969):

> All children adjudged delinquent, whose legal custody has been transferred to the department, and who have not been discharged under sub. (1) shall be discharged when they reach the age of 21, except that the department may, in accordance with s. 54.32, petition the court which adjudged the person delinquent to retain legal custody of that person. . . .

16. But in some jurisdictions the presence of the parole officer is announced to the court. Thus, for example, in Milwaukee County the prior aggravated juvenile record is acutely brought to the court's attention.

17. WIS. STAT. § 48.38(1) (1969).

quency, neglect, or dependency, the Children's Code requires the juvenile court to

> issue a summons requiring the person who has legal custody of the child to appear personally and, if the court so orders, to bring the child before the court at a time and place stated.[18]

Although a full discussion of the concept and application of guardianship and custody is beyond the scope of this discourse, a general indication of what is meant by the Code's use of the term "legal custody" is pertinent.[19] Wisconsin has adopted the definition suggested by the United States Children's Bureau.[20] According to the Bureau, legal custody should be used

> to denote those rights and responsibilities associated with the day-to-day care of the child. It includes the right to the care, custody and control of the child. It includes the duty to provide food, clothing, shelter, education, ordinary medical care and to train and discipline.[21]

Obviously, the natural or adoptive parents are ordinarily the legal custodians of a child and, pursuant to this provision of the Code, are required to be notified and summoned to appear before the children's court. As has been noted, however, the natural or adoptive parents are not the only legal custodians of the child. Thus, for example, where parental rights have been terminated,[22] or transferred,[23] the legal custodian may be one of a number of persons or agencies specified in the Children's Code.[24] In such

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18. WIS. STAT. § 48.21(1) (1969). *But cf.* s. 251, 80th Sess. § 48.26(1) (1971), which provides that for both a preliminary appearance and the hearing notice to "the child and his parent, guardian or legal custodian." Should this clause be interpreted as disjunctive, the problem illuminated in this discourse would be for the most part alleviated. The presence of the child's parole officer would, thus, no longer be necessary.

19. *See* WIS. STAT. § 48.02(1) (1969).

20. 6 WISCONSIN LEGISLATIVE COUNCIL, *supra* note 1, pt. 2, at 18-19.

21. UNITED STATES CHILDREN'S BUREAU, STANDARDS FOR SPECIALIZED COURTS DEALING WITH CHILDREN (Pub. No. 346, 1954).

22. WIS. STAT. § 48.40 (1969).

23. WIS. STAT. § 48.34(3) (1969); *cf.* 6 WISCONSIN LEGISLATIVE COUNCIL, *supra* note 1, pt. 2, at 29-34.

24. WIS. STAT. § 48.34(1) (1969):

Type of Disposition. If the court finds that the child is delinquent, it shall enter an order making one of the following dispositions of the case:

. . . .

(d) Transfer legal custody of the child to one of the following:

(1) A relative of the child; or

(2) A county agency specified in s. 48.56(1); or

instances these legal custodians, though not the natural parents of a child, must receive notice of the petition and either voluntarily appear or be summoned into court.[25]

It should be noted that prior to 1955 the statute governing the institution and notice of juvenile delinquency, neglect, or dependency proceedings did not contain the words "legal custody." Rather, Wisconsin Statutes section 48.06(2) only referred to the person having custody of the child. This is illustrated in *In re Aronson*,[26] a case which decided the question of who had the right to appeal from a final order of the juvenile court transferring custody of a child from its parents to the state department of public welfare. Interpreting the notice statute as determinative of the right to appeal and granting the right to the parents as well as the custodians of the child, the supreme court stated:

> Thus the person who has the custody of the child is not only a proper, but also a necessary, party to the proceedings whether or not he or she be the parent or guardian.[27]

Without any clearly enunciated reasons for so doing, the Legislative Council in 1955 changed the notice statute by adding the prefix "legal" to the word custody. This change appears to have been prompted by the difficulty, in cases such as *Aronson*, of determining who are the proper parties to notify in an action where the child lives with one or neither parent.[28] In an apparent effort

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(3) A licensed child welfare agency; or

(4) The department . . . .

See also WIS. STAT. § 48.43(1) (1969).

25. WIS. STAT. § 48.21(1) (1969). *See generally* 44 OP. ATT'Y. GEN. 136 (1955).

26. 263 Wis. 604, 58 N.W.2d 553 (1953). *See, e.g.*, WIS. STAT. ch. 45g, § 573-5(1) (1917):

> Upon the filing of the petition, a summons shall issue from the court, requiring the person having custody or control of the child, or with whom the child may be, to appear with the child at the place and time stated in the summons . . . .

27. 263 Wis. at 608, 58 N.W.2d at 556. *See also* WIS. STAT. § 48.06(2) (1953):

> After a petition shall have been filed and after such further investigation as the court may direct, unless the parties hereinafter named shall voluntarily appear, the court shall issue a summons reciting briefly the substance of the petition, and requiring the person or persons who have the custody or control of the child to appear personally . . . .

28. 6 WISCONSIN LEGISLATIVE COUNCIL, *supra* note 1, pt.2, at 154-55:

> A number of juvenile court judges have raised questions regarding the notice provisions in the present statute. They point out that the present provisions are very vague and general and cite the detailed provisions for similar procedures in the circuit and county court matters.

This confusion is also noted in pt. 2, at 24, wherein the Judicial Council discusses notice and jurisdiction in custody proceedings.

to simplify the notice statute of the Children's Code, the Legislative Council adopted, as previously noted, the concept of "legal custody" promulgated by the United States Children's Bureau. The legal custodian is, thus, the person or agency having the immediate responsibility for the care and welfare of the child. A question arises at this point as to whether, other than for the sake of uniformity and facility, the words "legal custody" were intended by the Legislative Council to bear a severely restrictive connotation. This question shall become critically important in considering the necessity of the presence of a delinquent child's parole officer—the representative of the child's *legal* custodian—at a later juvenile court adjudication.

B. Section 48.38(1)

That Wisconsin allows the record of, or cross-examination concerning, a prior criminal conviction into evidence for the purpose of affecting the credibility of a testifying party or witness is well recognized.[29] Such allowance is in accord with the general evidentiary principle of admitting all relevant data at trial.[30] It has been long held, however, that proceedings in juvenile court "are in no sense criminal proceedings, nor is the result in any case a conviction or punishment for crime."[31] The Children's Code has, thus, forbidden the use of the juvenile court determination and any evidence presented therein in subsequent adjudications.[32] The reasons

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29. WIS. STAT. § 885.19 (1969):

> Convict. A person who has been convicted of a criminal offense is, notwithstanding, a competent witness, but the conviction may be proved to affect his credibility, either by the record or by his own cross-examination . . . .

30. This, of course, is subject to judicial discretion with regard to confusion, undue prejudice or consumption of time. *See, e.g.*, MODEL CODE OF EVIDENCE rule 303 (1942). *See also* Comment, *Evidence—Impeachment of Witness—Use of Adjudications of Juvenile Delinquency and Specific Acts of Misconduct Committed by Juveniles*, 33 N.Y.U. L. REV. 406 (1958).

31. State v. Scholl, 167 Wis. 504, 509, 167 N.W. 830, 831 (1918). *But see* WIS. STAT. ch. 30a, § 573.5 (1901), which refers to the disposition of a juvenile adjudication as a "conviction." The term "juvenile delinquent" is not much of an improvement. *See* Winburn v. State, 32 Wis. 2d 152, 154 N.W.2d 178 (1966).

32. WIS. STAT. § 48.38(1) (1969):

> No adjudication upon the status of any child in the jurisdiction of the juvenile court shall operate to impose any of the civil disabilities ordinarily imposed by conviction, nor shall any such child be deemed a criminal by reason of such adjudiation, nor shall such adjudication be deemed a conviction. The disposition of any child's case or any evidence given in the juvenile court shall not be admissible as evidence against the child in any case or proceeding in any other court, nor shall such

underlying this proscription are two. As noted, the state has traditionally taken an *in loco parentis* attitude toward its youth. Rather than determine the guilt or innocence of a child, the state, through the juvenile court, seeks "to correct, re-educate, redirect, and rehabilitate,"[33] and in so doing proceeds to "an adjudication upon the status of the child."[34] Concomitant with this effort to understand and deal with a child's problems is the realization that juvenile court contacts should not injure or prejudice his future.[35]

The second reason underlying the prohibition upon the use of juvenile records and evidence contained therein in subsequent trials is the inherent inexactness of the juvenile adjudication. This inexactness is nowhere more clearly manifested than in the Code's broad definition of delinquency. Denominated delinquent conduct are not only state law and local ordinance violations, but also habitual truancy, uncontrollability, waywardness, disobedience, and endangering the morals or health of oneself or others.[36] It has been suggested, in light of this virtually all-encompassing definition, that a delinquency finding "in practice might . . . carry implications of wrongdoing neither warranted by the facts nor the procedure."[37] The legislature has, therefore, refused to allow the

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disposition or evidence disqualify a child in any future civil service examination, appointment or application.

33. WISCONSIN STUDY COMMITTEE ON JUVENILE COURT SERVICES, HANDBOOK FOR JUVENILE COURT SERVICES 2 (1959).

34. WIS. STAT. § 48.38(1) (1969). *See also* Thomas v. United States, 121 F.2d 905, 907 (D.C. Cir. 1941).

35. *See generally* Kozler v. New York Tel. Co., 93 N.J.L. 279, 281, 108 A. 375, 376 (Sup. Ct. 1919): "We see no reason why the Legislature may not enact that it is against public policy to hold over a young person in terrorem, perhaps for life, a conviction for some youthful transgression."

36. WIS. STAT. § 48.12 (1969). *But see* State *ex rel.* Schulter v. Roraff, 39 Wis. 2d 342, 354, 159 N.W.2d 25, 32 (1968), which appears to limit the definition of delinquency to violations "of any state law or county, town, or municipal ordinance." Does negative inference permit ignoring the less specific aspects of the delinquency statute? The proposed revision of the Children's Code, note 18 *supra*, appears to remedy such definitional vagueness to a significant extent.

37. 41 OP. ATT'Y GEN. 70, 72 (1952); *See also* the Encyclopedic Commentary to § 16-2308 of the District of Columbia Juvenile Court Act, D.C. CODE § 16—2308 (1961):

> The aim of this section is to avoid the stigmatizing effects of a criminal conviction. . . . It would be a serious breach of public faith to permit these informal and presumably beneficent procedures to become the basis for criminal records which could be used to harass a person throughout his life. Thus, a finding of involvement against a juvenile does not have the same tendency to demonstrate his unreliability as does a criminal conviction in the case of an adult and such an adjudication cannot be made the subject of inquiry for purposes of impeachment. . . .

7 D.C.C.E. § 16—2308 (1966).

usage of the juvenile adjudication or any evidence presented therein for impeachment purposes, which would "discredit . . . and affect the probability of . . . truthfulness."[38] Also illustrating this inexactness inherent in the juvenile adjudication is the traditional juvenile court laxness with respect to the basic constitutional guarantees.[39] Thus, for example, it was not until the *Kent*,[40] *Gault*,[41] *Winship*[42] pronouncements that a degree of nationwide uniformity regarding waiver hearings, the right to an attorney, notice of charges, confrontation, cross-examination, and quantum of proof was achieved. Even today, the juvenile court's studied informality tends to allow a great degree of flexibility with the rules of evidence.[43] It is submitted that these manifestations of the inexactness inherent in the juvenile court construct also underlie the legislature's refusal, in the Children's Code, to accord to the juvenile adjudication the impeachment validity of an adult criminal conviction.

C. *Judicial Application*

The Wisconsin Supreme Court has applied the proscriptive section 48.38(1) in a variety of situations. Thus, for example, in *Ray v. State*,[44] a municipal court bastardy proceeding, the supreme court deemed proper the trial court's refusal to allow the defendant to introduce evidence as to the "nature" of the complainant's four juvenile court contacts. Although the court appeared to distinguish between evidence of the proceedings themselves and evidence of the nature of the proceedings, this distinction has not been followed in Wisconsin. Commenting upon the *Ray* case, a judge of the Milwaukee County Circuit Court has noted that the evidence of the four juvenile court contacts was actually excluded although the supreme court implied that such evidence was contained in the

38. 3A J. WIGMORE, EVIDENCE § 920, at 723 (Chadbourn rev. 1970).

39. *See generally* THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: JUVENILE DELINQUENCY AND YOUTH CRIME 28-40 (1967).

40. Kent v. United States, 383 U.S. 541 (1966).

41. *In re* Gault, 387 U.S. 1 (1967).

42. *In re* Winship, 397 U.S. 358 (1970).

43. *Cf.* THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, *supra* note 39, at 35. *See also* Brown v. United States, 338 F.2d 543, 547 (D.C. Cir. 1964); Commonwealth *ex rel.* Henderson v. Myers, 393 Pa. 224, 231, 144 A.2d 367, 369 (1958).

44. 231 Wis. 169, 285 N.W. 374 (1939).

record.[45] Accordingly, no distinction between evidence of the adjudication and evidence of the nature of the adjudication can be inferred from the *Ray* decision.

The complainant's juvenile record was also attempted to be introduced into evidence for impeachment purposes in *Sprague v. State*,[46] an appeal from a circuit court conviction of statutory rape. The trial court blocked the defendant's efforts to admit the evidence. On appeal, the supreme court affirmed, suggesting that the ruling was in compliance with Wisconsin Statutes section 48.38(1).[47]

A constitutional challenge to the validity of section 48.38(1) was presented in *Smith v. Rural Mut. Ins. Co.*[48] In this action for personal injuries, one of the key determinations demanded of the jury was whether the plaintiff or the defendant was driving the automobile at the time of the accident. On cross-examination the defendant sought to ask the plaintiff whether she had lost her license as a result of the accident. No objection was made, and the plaintiff responded in the affirmative. A few moments later, on redirect examination, objection was made. The trial court, noting that at the time of the accident the plaintiff was a juvenile and her license suspension within the purview of the Children's Code, ruled the question and answer improper pursuant to section 48.38(1). On appeal, the defendant-appellant alleged the statute to be unconstitutional as violative of the due-process and equal-protection clauses of both the federal and state constitutions. Citing the strong public policy of protecting the child as underlying this proscription, the supreme court held that the legislature had the power, as it here exercised, to provide for "reasonable rules for limiting the admission of evidence."[49] Concluding, the court did not find any undue hardship caused the plaintiff-appellant and, therefore, no denial of equal protection of the laws.

The most comprehensive judicial analysis of the prohibition in section 48.38(1) is found in *Banas v. State*.[50] The defendant having been found guilty in county court of operating a motor vehicle without the owner's consent, the primary assignment of error on

45. Holz, *The Trial of a Paternity Case*, 50 MARQ. L. REV. 450, 507 (1967).
46. 243 Wis. 456, 10 N.W.2d 109 (1943).
47. In 1943 the statute was WIS. STAT. § 48.07(3). It was renumbered in 1955.
48. 20 Wis. 2d 592, 123 N.W.2d 496 (1963).
49. *Id.* at 600, 123 N.W.2d at 501.
50. 34 Wis. 2d 468, 149 N.W.2d 571 (1967).

appeal was the refusal, by the trial court, to allow the defendant to cross-examine the chief prosecution witness regarding his prior juvenile record. It was Banas' contention that section 48.38(1) and the prohibition contained therein only applied where the juvenile himself was in jeopardy or on trial. Rejecting this contention, the supreme court held that the role of the juvenile as *a party or a witness* does not determine the nature of the juvenile court's finding. The key consideration underlying this statute, according to the court, is that of "balancing the interests of the minor and his chances for rehabilitation against the value of the evidence for impeachment purposes."[51] Although the juvenile record may in certain discretionary instances be disclosed if "in the best interests of the child or of the administration of justice,"[52] the supreme court concluded there was no abuse of discretion in this instance since the records would not have been admissible for the impeachment purposes of Banas' design.

A large exception to the prohibition of section 48.38(1) has recently been carved out in *Deja v. State*,[53] another appeal from a conviction of operating a motor vehicle without the owner's consent. The defendant's chief assignments of error were the circuit court's refusal to permit cross-examination of the state's juvenile witness regarding his criminal record and the court's examination of the defendant's own juvenile record at the time of sentencing. With regard to the former, the supreme court agreed with the defendant's contention that the question might have been proper had the juvenile witness, seventeen years of age, ever been "waived" into adult court.[54] Fatal to this assignment of error on appeal, however, was the lack of an offer of proof at trial. In addition to advising the trial court of the nature of that being offered, such an offer of proof also serves to preserve the exception to the exclusion of the offered evidence on appeal. With respect to the defendant's second chief assignment of error, the supreme court noted "a clear distinction" between what is admissible as evidence in a trial and what may be considered after a judgment of guilt has been entered. Although the disposition of the child's case in the juvenile court is "not admissible as evidence against the

51. *Id.* at 475, 149 N.W.2d at 575.
52. *Id.* at 474, 149 N.W.2d at 574.
53. 43 Wis. 2d 488, 168 N.W.2d 856 (1969).
54. For elaboration of this waiver procedure see WIS. STAT. § 48.18 (1969).

child in a trial," it is properly before a sentencing court. The reason underlying this deviation from the prohibition of section 48.38(1) is to afford the sentencing court "evidence . . . 'of a pattern of behavior which, in turn, is an index of the defendant's character.' "[55] Such evidence, according to the court, affords as complete as possible a history of the defendant, resulting in a fairer disposition of the case. This exception to the proscription of section 48.38(1) has been reaffirmed in recent cases.[56]

From the foregoing analysis of section 48.38(1) several propositions become apparent. Foremost, this statute has been quite strictly applied. Noted have been cases in civil and criminal court wherein the introduction of a party's or a witness' juvenile record has been consistently denied. Although recognized as an imposition upon litigants, the strong public policy of protecting the child has been held to prevail—even against constitutional challenges. Such public policy has also been held not to depend upon whether the child is a party or a witness. Finally, a recent exception has been carved into the proscription contained in section 48.38(1). This is at the sentencing phase of a criminal prosecution wherein, for purposes of an adequate and fair disposition, the judge is allowed to review a defendant's juvenile court contacts.

III. The Conflict

The determination of the existence of a possible conflict between the provisions of the Children's Code analyzed above revolves around two further considerations. The first of these considerations is the horizontal breadth of the evidentiary proscription. Wisconsin Statutes section 48.38(1), extends the prohibition to "any case or proceeding in *any other court.*"[57] Determining horizontal breadth means nothing more than interpreting these italicized words. That is, does "*any other court*" mean any court, or any court other than another juvenile court? The second consideration integral to a determination of statutory conflict involves the vertical breadth of the evidentiary proscription. The statute

55. 43 Wis. 2d at 493, 168 N.W.2d at 858, quoting Waddell v. State, 24 Wis. 2d 364, 367, 129 N.W.2d 201, 203 (1964).

56. Neely v. Quatsoe, 317 F. Supp. 40 (E.D. Wis. 1970); Hammill v. State 52 Wis. 2d 118, 187 N.W. 2d 792 (1971); McKnight v. State, 49 Wis. 2d 623, 182 N.W.2d 291 (1971); Neely v. State, 47 Wis. 2d 330, 177 N.W. 2d 79 (1970). *But see* Commonwealth v. Myers, 393 Pa. 224, 144 A.2d 367 (1958) (Musmanno, J., dissenting).

57. Wis. Stat. § 48.38(1) (1969); see note 32 and accompanying text *supra.*

provides that "[t]he disposition of any child's case or any evidence given in the juvenile court shall not be admissible . . . ."[58] Does this clause include within its scope the implied or inferential impeachment evidence of our factual setting? That is, does the effect of the parole officer's presence at a subsequent juvenile proceeding fall within the purview of the statute? Should it be determined that the prohibition contained in Wisconsin Statutes section 48.38(1) horizontally extends to all courts, inclusive of juvenile court, and should the "implied" impeachment of the child by the presence in court of his parole officer be vertically included, it shall become necessary to effect some sort of reconciliation between these conflicting provisions of the Children's Code.

A. Horizontal Breadth

An adequate legislative or judicial interpretation of the Code's proscription upon the usage of the juvenile adjudication in *any other court* is not to be found in this state. The prohibition originated with the creation of the juvenile court in 1901, and stated that "[n]o conviction in a juvenile court shall be receivable in evidence in any other court."[59] Of the legislature's intent with respect to *any other court,* nothing is to be discovered. Judicial interpretation of the horizontal breadth of these three elusive words is also relatively unrewarding. Although the prohibition of Wisconsin Statutes, section 48.38(1) has been held to apply in a variety of adult criminal actions, bastardy proceedings, and civil negligence actions, there has been no reported Wisconsin case determining whether or not the proscription applies to later juvenile adjudications.

Recently, however, a Milwaukee County circuit court has dealt with an appeal from the juvenile court which, among other allegations of error, concerned precisely the problem herein presented.[60] The circuit court, regrettably without comment, remanded the case back to the county juvenile court for a new trial. It may well be that the circuit court found the presence of the child's parole officer at the juveniule hearing repugnant to the Code's evidentiary proscription discussed above.

In light of the virtual poverty of Wisconsin interpretation of the

58. WIS. STAT. § 48.38(1) (1969).
59. WIS. STAT. ch. 30a, § 573-6 (1901).
60. *In re* Teague, No. 388-822 (Cir. Ct., Milwaukee County, Mar. 4, 1971).

phrase "any other court," it is necessary to examine interpretation of like statutes in other jurisdictions. Perusal of Wigmore's compilation of these prohibitive statutes reveals a major dichotomy with respect to legislative allowance of juvenile records and evidence therein given in subsequent juvenile courts.[61] A number of jurisdictions expressly except juvenile courts from their ban upon the use of juvenile records in subsequent proceedings. Thus, while adult civil and criminal courts fall within the proscription, later juvenile courts may view the prior record of the juvenile.[62] The majority of jurisdictions, however, do not expressly except juvenile courts from the statutory prohibition. Rather, similar to Wisconsin, they extend the prohibition to "any other court."[63] It is the judicial interpretation of these latter statutes which may offer illumination of our own.

In those jurisdictions which have proscribed the introduction into evidence of prior juvenile adjudications in "any other court," the vast preponderance of judicial interpretation of the phrase has arisen in cases originating in adult civil or criminal court. Thus, for example, the New York Supreme Court, in *Murphy v. City of New York*,[64] applied their prohibitive statute to a civil action to recover damages for injuries sustained in an automobile-streetcar collision.[65] Reversing the trial court, the supreme court cautioned that during the new trial the court should not consider the total of six juvenile delinquency adjudications accredited to the plaintiff and his two witnesses. So also have these prohibitive statutes been applied in adult criminal trials. Illustrative is *Love v. State*,[66] a burglary prosecution wherein the Alabama Court of Appeals reversed a trial court's allowance of cross-examination of the defendant concerning his previous juvenile record. Prejudicial error, ac-

61. 1 J. WIGMORE, EVIDENCE § 196 (1940), Supp. (1970).

62. *See, e.g.*, 23 ILL. STAT. ANN. § 2001 (1968):

> Disposition of any child under this Act or any evidence given in such cause, is not, in any civil, criminal or other cause or proceeding whatever in any court, lawful or proper evidence against such child for any purpose whatever, *except in subsequent cases against the same child under this Act* . . . . (Emphasis supplied.)

63. *See, e.g.*, 11 PA. STAT. ANN. § 261 (1965).

64. 273 App. Div. 492, 78 N.Y.S.2d 191 (1948).

65. The court quoted § 45 of the Children's Court Act of the State of New York (1948):

> Neither the fact that a child has been before the children's court for hearing, nor any confession, admission or statement made by him . . . shall ever be admissible as evidence against him or his interests *in any other court.*

273 App. Div. at 495, 78 N.Y.S.2d at 194 (emphasis supplied).

66. 36 Ala. 693, 63 So. 2d 285 (1953).

cording to the court, resulted from this line of questioning before the jury.

Although these decisions indicate the extent of an "any-other-court" proscription in subsequent adult tribunals, again, as in Wisconsin, they do not discuss the impact of the prohibition upon later juvenile courts. Within the knowledge of this author, only one jurisdiction has discussed, in a case properly before it, the impact of an "any-other-court" prohibition upon subsequent juvenile courts. In *Thomas v. United States*,[67] a United States court of appeals affirmed a juvenile court's refusal to permit cross-examination of a bastardy proceeding's complaining witness concerning her prior juvenile record. Interpreting the District of Columbia's evidentiary prohibition, virtually identical to Wisconsin's, the court of appeals, over a strong dissent, cited as prevailing the strong public policy of "amnesty and oblivion for the transgressions of youthful offenders."[68]The court concluded, stating:

> [T]he language of the statute expressly forbids the interpretation that the disposition of a child in a juvenile court proceeding constitutes conviction of a crime . . . .
> [N]othing short of conviction is sufficient to warrant the inquiry which appellant was forbidden to make . . . .[69]

The forcefulness of *Thomas* is undermined to an extent by dicta in a Louisiana Supreme Court decision, *State v. Kelly*.[70] Appealing from a murder conviction in adult criminal court, the defendant's chief allegation of error involved the trial court's refusal to permit cross-examination of the state's fourteen-year-old eyewitness regarding his juvenile record. Controlling, according to the supreme court, was the Juvenile Court Act for the parish of Orleans. Similar to Wisconsin's, this Act provided that the record of a juvenile adjudication was not admissible into evidence in "any other court of the State."[71] Affirming the trial court's refusal, the supreme court noted that to do otherwise would "fly into the very teeth of the purpose of the Juvenile Court Act."[72] That purpose, according to the court, is to correct the delinquencies in children,

67. 121 F.2d 905 (D.C. Cir. 1941).
68. *Id.* at 908.
69. *Id.* at 909.
70. 169 La. 753, 126 So. 49 (1930).
71. Juvenile Court Act, No. 126 § 6, [1921] La. Acts Ex. Sess. 321.
72. 169 La. at ____, 126 So. at 50.

rather than brand them criminals. The supreme court, however, specifically noted that the Act's prohibition did not include within its purview subsequent juvenile courts. That is, "any other court" did not apply to other juvenile courts wherein the juvenile's past record was properly admissible. In the words of the court,

> The effect of this provision of the Juvenile Court Act . . . is to prohibit the use of any proceedings had against any child . . . or any inquiry concerning such proceedings, for the purpose of using them against such child, in any court, except the juvenile court.[73]

Although the supreme court in *Kelly* did not clearly articulate its reasons for excepting juvenile courts from the statute's prohibition, those reasons are implicit in the court's view, in 1930, of the nature and ramification of juvenile proceedings. Juvenile offenses, according to the court, are not crimes but delinquencies. Punishment is not meted out but, rather, the juvenile court merely places "the child under proper influences and . . . subject(s) him to proper correction."[74] Understanding the Louisiana Supreme Court's worthy, but dated,[75] opinion of juvenile incarceration enables an understanding of why it might not extend to a child the rights and safeguards so willingly extended to adults. If juvenile confinement is viewed as but a temporary reallocation of "influences" rather than a very real incarceration, it is quite natural to be unconcerned with the "technicalities" of due process while in the juvenile court.

Perhaps also helpful in explaining why the Louisiana Supreme Court was inclined to extend their prohibitive "any-other-court" statute to adult tribunals but, in dicta, not to juvenile courts is the realization that in 1930 the bifurcated juvenile hearing was not as

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73. *Id.*

74. *Id.* at ____, 126 So. at 50-51.

75. *See In re* Gault, 387 U.S. 1, 27 (1967):

> Ultimately, however, we confront the reality of that portion of the Juvenile Court process with which we deal in this case. A boy is charged with misconduct. The boy is committed to an institution where he may be restrained of liberty for years. It is of no constitutional consequence—and of limited practical meaning—that the institution to which he is committed is called an Industrial School. The fact of the matter is that, however euphemistic the title, a "receiving home" or an "industrial school" for juveniles is an institution of confinement in which the child is incarcerated . . . . Instead of mother and father and sisters and brothers and friends and classmates, his world is peopled by guards, custodians, state employees, and "delinquents" confined with him for anything from waywardness to rape and homicide.

prevalent as it is today.[76] Thus, faced in *Kelly* was a complete refusal to allow the juvenile court to view a child's prior juvenile record, even for dispositional purposes. Understandable, therefore, was the supreme court's hesitancy to enunciate so broad an interpretation of the statute's evidentiary prohibition.

From the foregoing analysis of interpretations given "any-other-court" prohibitive statutes in foreign jurisdictions, several conclusions helpful to illumination of our own statute may be drawn. As in Wisconsin, the great preponderance of judicial decisions dealing with the evidentiary prohibition have arisen in adult criminal or civil tribunals. Thus, while discussion of the proscription is relevant to the conduct of those tribunals, it is dicta with respect to our own problem—what is allowable in juvenile proceedings. But one jurisdiction has dealt with the impact of an "any-other-court" prohibitive statute upon juvenile courts in a case properly before it. The interpretation in *Thomas v. United States*[77] must, therefore, be considered as prevailing with respect to the horizontal breadth of such prohibitions. *Thomas,* as has been seen, firmly disallows the use of the juvenile record and any evidence presented therein in subsequent juvenile adjudications. Although *Thomas'* facts confine its ruling to cross-examination concerning the prior record of a juvenile *witness* in a juvenile court, its logic is most certainly extendable to a juvenile *party's* prior record as well.[78] The same social policy which encourages "amnesty and oblivion" for youthful offenders who later appear as witnesses in adult and juvenile proceedings must also extend to, as in adult courts, a youthful party in a subsequent juvenile adjudiation.

It would thus appear that the "any-other-court" juvenile record prohibition in Wisconsin Statutes section 48.38(1) includes within its horizontal breadth not only any other adult criminal or civil court, but any juvenile court as well. It is submitted that had the

76. Although a bifurcated juvenile hearing has not been judicially demanded, it is virtually impossible not to have one today and yet comply with the requirements of *Kent, Gault* and *Winship.*

77. See note 65 and accompanying text *supra.*

78. An interesting definitional ambiguity presents itself in this situation. Although the *Thomas* court continually refers to the complainant as a "witness", is she not a "party" to the paternity proceeding? As in most *ex relatione* actions, paternity proceedings are instituted on behalf of the state but at the instigation of a private citizen. As such, is not that person a "party" to the proceeding as well as the state? If so, the *Thomas* decision should be considered not as confining itself to a juvenile *witness's* prior record, but, in logic, equally applicable to the record of a *party.*

legislature desired to except juvenile courts from this evidentiary ban it would have done so in the fashion of those jurisdictions which expressly except juvenile courts in their statute.[79] "Any other court," as suggested in *Thomas v. United States,* means in reality all courts, be they adult or juvenile.

B. Vertical Breadth

Acknowledging the horizontal breadth of Wisconsin Statutes section 48.38(1) as extending to all courts, inclusive of juvenile courts, is but the first step in determining its conflict with the Code's requirement that the child's parole officer be present at the juvenile hearing.[80] It is yet necessary to determine the vertical breadth of the evidentiary proscription. By its terms, the statute applies to "the disposition of any child's case or any evidence given in the juvenile court."[81] May this clause be interpreted to include within its meaning not only data intentionally sought to be introduced into evidence but, also, the *status* of the parole officer, which effectively indicates the child's prior aggravated juvenile record? More simply, is this "implied" impeachment proscribed by the provision in the Children's Code which prohibits the actual introduction into evidence of a child's prior juvenile record?

Resort to judicial precedent for aid in determining the vertical breadth of the proscriptive statute in later juvenile hearings is fruitless. Such a problem can only present itself in the juvenile court context since only in the juvenile court is the presence of a person's legal custodian deemed necessary.[82] The question of a parole officer's presence at a hearing possibly tending to impeach the credibility of the party witness, thus, does not arise in the adult criminal court, wherein most of the interpretation of these impeachment prohibitions has appeared. Offering assistance in determining whether the proscription of Wisconsin Statutes section 48.38(1) includes the implied impeachment described above are several common sense, perhaps axiomatic, rules of statutory construction. Thus, for example, it is commonly held that absent statutory clarity, "great consideration should be given to the object sought to

79. See note 62 and accompanying text *supra.*

80. WIS. STAT. § 48.21(1) (1969).

81. WIS. STAT. § 48.38(1) (1969).

82. Referred to here is the realm of malefaction.

be accomplished by a statute."[83] As well, although too often overlooked, the Children's Code, itself, makes clear its intent "to promote the best interests of the children of this state"[84] and, to that end, orders that this chapter "be liberally construed."[85]

It has been suggested that the object underlying the Code's restriction upon the introduction into evidence during the adjudicative phase of adult and juvenile proceedings is "amnesty and oblivion" for juvenile offenders. The reasons for such an objective are both the traditional *pater familias* attitude the state has taken towards its youth and the acknowledgement of the inherent inexactness of the juvenile adjudication. The Children's Code, thus, seeks to prevent the record of, and any evidence given in, a juvenile adjudication from becoming the basis of a subsequent attempt to "discredit . . . and affect the probability of . . . truthfulness."[86] In light of this categorical refusal to allow a child's prior juvenile court contacts to impeach his credibility via the actual introduction into evidence of a record, hardly logical is the indirect allowance of evidence having that very same effect.[87] In human experience, it is simply too much to ask or expect of a judge or jury that they not be adversely influenced, perhaps subconsciously, by the knowledge of a child's prior aggravated juvenile record. Given the overriding objective of the Children's Code as protecting the children of the state, it must be concluded that the proscriptive statute includes within its vertical breadth the inferential impeachment of our discussion. The command for the presence of a child's parole officer where he is the representative of a child's legal custodian, the Department of Health and Social Services, is, therefore, in conflict with the evidentiary impeachment prohibition of Wisconsin Statutes section 48.38(1). A resolution of such conflict is necessary.

IV. THE RESOLUTION

It has been suggested that a conflict exists between two provisions of the Wisconsin Children's Code—section 48.21(1), which prescribes the presence of a child's legal custodian at a juvenile

83. Huck v. Chicago, St. P., M. & O. Ry., 4 Wis. 2d 132, 137, 90 N.W.2d 154, 157 (1958).

84. WIS. STAT. § 48.01(2) (1969).

85. WIS. STAT. § 48.01(3) (1969).

86. 3A J. WIGMORE, *supra* note 38 at 723.

87. *See, e.g.*, Harrison v. District of Columbia, 95 A.2d 332 (D.C. 1953).

court hearing, and section 48.38(1), which proscribes the introduction into evidence at subsequent trials, adult and juvenile, of records and evidence given at prior juvenile adjudications. The conflict arises where a child's legal custody has been transferred from his parents or guardians to the Department of Health and Social Services, Division of Corrections. At a subsequent juvenile court hearing a representative from the Department, invariably the child's parole officer, must accompany the child. The presence of the child's parole officer, as has been seen, conveys to the judge or jury the child's prior aggravated juvenile record. This knowledge is precisely that which the legislature sought to prevent through Wisconsin Statutes section 48.38(1). The child, testifying at the adjudicative phase of the hearing, has his credibility impeached inferentially by the presence of the parole officer. In this situation the conclusion that these statutes are in conflict is inescapable.

In resolving these conflicting statutory provisions of the Children's Code, assistance is forthcoming from a time-honored rule of statutory construction, which suggests that

> where two provisions are susceptible of a construction which will give operation to both, without doing violence to either, it is incumbent upon the court to search for a reasonable theory under which to reconcile them so that both may be given force and effect.[88]

The quest to find and effect a harmonious interpretation of these two seemingly irreconcilable provisions of the Children's Code is not as difficult as it may appear. It should be recalled that the juvenile court hearing, as the adult criminal hearing, is bifurcated into adjudicative and dispositional phases. With the "essentials of due process" promulgated in the *Kent, Gault,* and *Winship* decisions confined to the adjudicative phase of the juvenile hearing,[89] the dispositional phase of that hearing has become a repository for data which would have been impermissibly viewed earlier. Juvenile courts and adult courts have, to the lament of some,[90] uniformly perused at this phase social study reports, hearsay statements and allegations, non-adjudicated police contacts, and the

88. State *ex. rel.* Thompson v. Gibson, 22 Wis. 2d 275, 293, 125 N.W.2d 636, 644 (1964).

89. See notes 40, 41, 42 and accompanying text *supra.*

90. Commonwealth *ex rel.* Henderson v. Myers, 393 Pa. 224, 231, 144 A.2d. 367, 369, (1958) (Musmanno, J., dissenting).

like.[91] Using for our statutory reconciliation purposes this distinction between that which is permissible at the adjudicative and dispositional phases of the proceeding, there would appear to be a solid logical mooring for withholding the presence of a child's parole officer until the dispositional phase of the juvenile court hearing. Wisconsin Statutes section 48.21(1) makes no determination regarding the moment the presence of a child's legal custodian is requisite at the juvenile hearing. It merely commands such person or organization to appear personally before the juvenile court. In light of the proffered possibility that the legislature may not have fully realized the ramifications, as here, of adopting the United States Children's Bureau definition of *legal* custody, but merely sought to facilitate and make uniform the notice procedure of the Children's Code,[92] delaying the parole officer's personal appearance before the juvenile court until the dispositional phase of the proceeding would not unduly violate this provision. Since parents or physical custodians almost invariably accompany, indeed were commanded to do so prior to 1955, an allegedly delinquent child to the juvenile court, the presence of a child's parole officer lends little to the adjudicative phase of the proceeding. He offers no testimony or statement on behalf of the Department of Health and Social Services. His professional capacity is not integral to the proceeding until the dispositional phase. At this time, he may aid the court in determining a proper environment for the child. Until this phase, however, he is merely a nonparticipating observer—a spectator who, although passive, by his very status or presence serves to impeach, contrary to statute, the credibility of the child. The Code's proscriptive statute and the child's best interests dictate that the presence of a parole officer be delayed until after the adjudicative process wherein the child is found culpable or not.

The perfect vehicle for effecting this change presents itself in the proposed amendments to the Children's Code.[93] Within the provisions outlining the procedure to be used in the two phases of the juvenile court hearing, the legislature might allow that with its restriction of social study reports to the disposition, the presence of a child's parole officer where applicable shall be similarly restricted.

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91. *See generally In re* Corey, 266 A.C.A. 311, 72 Cal. Rptr. 115 (1968).
92. See note 28 and accompanying text *supra*.
93. See note 18 *supra*.