1989

Taking *Gault* Seriously: Toward a New Juvenile Court

Gary B. Melton

*Center on Children, Families, and the Law, University of Nebraska–Lincoln*

Follow this and additional works at: [https://digitalcommons.unl.edu/nlr](https://digitalcommons.unl.edu/nlr)

Recommended Citation

Available at: [https://digitalcommons.unl.edu/nlr/vol68/iss1/3](https://digitalcommons.unl.edu/nlr/vol68/iss1/3)
Taking *Gault* Seriously: Toward a New Juvenile Court

TABLE OF CONTENTS

I. Introduction ............................................. 147
II. Historic Rationales for the Juvenile Court ........... 150
   A. Juveniles Are Not Responsible .................... 151
      1. The Legal Framework ............................. 151
      2. The Psychological Evidence ..................... 153
         a. Changing Views of Children's Competence .... 153
         b. The Low Expectations of the Criminal Law ... 155
         c. The Lack of Congruence Between Competence and Responsibility .................. 157
         d. Some Preliminary Conclusions .................. 158
   B. Juveniles Are Especially Amenable to Treatment .... 159
   C. Formal, Adversary Procedures Are Not Conducive to Rehabilitation .......... 164
   D. Summary: A Bankrupt Legal Theory .................. 166
III. Why Due Process Requires a New Juvenile Court ...... 167
   A. The Developmental Psychology of Procedure ........ 167
      1. The Salience of Freedom .......................... 167
      2. The Social Psychology of Procedural Justice .... 168
      3. Developmental Factors in Use of Procedural Protections .................... 168
   B. A Psychological Approach to Due Process .......... 172
      1. Dual-Maximal Doctrine ............................. 172
      2. An Example: The Privilege Against Self-Incrimination ...................... 173
      3. The Need for Empirical Data ...................... 174
      4. The Role of Counsel .............................. 176

* Carl Adolph Happold Professor of Psychology and Law and Director of the Law/Psychology Program and the Center on Children, Families, and the Law, University of Nebraska-Lincoln. B.A. 1973, University of Virginia; M.A. 1975, Ph.D. 1978, Boston University.

This Article is based on the Kendon Smith Lecture presented by the author at the University of North Carolina at Greensboro in March 1988.
I. INTRODUCTION

Non-culpable children faced with the criminal process must be protected, not by the state, but from the state. There is nothing unique in the juvenile process, including the concept of lesser culpability, that excludes it from this conclusion. This, in sum, is the received wisdom of the last twenty-five years of juvenile sociological and jurisprudential study.\(^1\)

More than two decades have passed since the Supreme Court rendered its landmark decision in *In re Gault*.\(^2\) The appellant, Gerald Gault, had been committed at age fifteen to the Arizona State Industrial School "for the period of his minority [to age twenty-one], unless sooner discharged by due process of law."\(^3\) Gerald lost his liberty for up to six years because he had made a phone call of the "irritatingly offensive, adolescent, sex variety."\(^4\) Had he been an adult convicted of making an obscene phone call, he could have been sentenced only to a fine of five to fifty dollars or imprisonment of up to two months.\(^5\) The apparent injustice of the disposition was magnified by several facts: Gerald’s parents were not notified of his arrest; neither Gerald nor his parents were notified of the charge; Gerald was not provided access to counsel or the opportunity to summon and cross-examine witnesses; and the judge interrogated Gerald during the hearing and compelled him to testify against himself.

The egregious facts of Gerald’s case unfortunately were common in juvenile courts before *Gault* was decided. In *Gault*, though, the Supreme Court majority joined in Justice Fortas’s scathing critique of the juvenile court as a "kangaroo court."\(^6\) The Court added meaning to this assessment by its proclamation for the first time that "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone."\(^7\) Accordingly, the Court held that the fact that Gerald had been tried in juvenile rather than criminal court did not abrogate his constitutional right to counsel,\(^8\) confrontation of witnesses,\(^9\) notice of the charges,\(^10\)

---

2. 387 U.S. 1 (1967).
3. Id. at 7-8.
4. Id. at 4.
5. Id. at 8-9.
6. Id. at 28.
7. Id. at 13.
8. Id. at 35.
9. Id. at 56.
10. Id. at 33.
and exercise of the privilege against self-incrimination.\textsuperscript{11}

\textit{Gault} promised radical change in juvenile justice. Founded on the principle that rehabilitation should be the hallmark of the law's response to wayward youth,\textsuperscript{12} juvenile courts rarely had recognized the rights that were denied Gerald Gault by the Arizona trial court. In fact, failure to provide the rudiments of due process was believed to be consistent with the therapeutic aim of juvenile courts.\textsuperscript{13} As a result, and because many juvenile judges had received no legal training at all, juvenile justice was essentially lawless.\textsuperscript{14} Although the Supreme Court stopped short of asserting that the juvenile court was a legal innovation\textsuperscript{15} that had completely failed,\textsuperscript{16} the Court left little doubt that, as a matter of both law and policy,\textsuperscript{17} juvenile justice would have to change radically if it was to survive scrutiny. As the Court noted in a case subsequent to \textit{Gault}:

\begin{quote}
[I]t is simply too late in the day to conclude . . . that a juvenile is not put in jeopardy at a proceeding whose object is to determine whether he has commit-
\end{quote}

\textsuperscript{11} \textit{Id.} at 55.
\textsuperscript{13} \textit{See infra} note 97 and accompanying text.
\textsuperscript{14} \textit{In re} Gault, 387 U.S. 1, 14 n.14 (1967).
\textsuperscript{15} The juvenile court is a relatively youthful jurisprudential invention. Juvenile codes were adopted in virtually every American jurisdiction in the first two decades of the twentieth century. \textit{See} Levine, Ewing & Hager, \textit{supra} note 12, at 100-01.
\textsuperscript{16} The Court's opinion in \textit{Gault} suggested that the juvenile court's failure to remediate delinquents was the result, at least in part, of a lack of adequate resources, rather than inherent flaws. \textit{In re} Gault, 387 U.S. 1 (1967). This view was emphasized four years later in the Court's holding that the Constitution does not entitle respondents in delinquency proceedings to a jury trial:

\begin{quote}
The juvenile concept held high promise. We are reluctant to say that, despite disappointments of grave dimensions, it still does not hold promise, and we are particularly reluctant to say . . . that the system cannot accomplish its rehabilitative goals. So much depends on the availability of resources, on the interest and commitment of the public, on willingness to learn, and on understanding as to cause and effect and cure. In this field, as in so many others, one perhaps learns best by doing. We are reluctant to disallow the States to experiment further and to seek in new and different ways the elusive answers to the problems of the young . . . .
\end{quote}

\textsuperscript{17} \textit{Gault} was a landmark case in many ways. Perhaps the most far-reaching was its "constitutionalizing" children's issues. \textit{See supra} notes 7-11. Accordingly, \textit{Gault} gave a clear message that juvenile courts would have to begin taking the rudiments of due process seriously.

\textsuperscript{18} In a statutory case that presaged \textit{Gault}, the Court had concluded that a juvenile respondent "receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children." \textit{Kent v. United States}, 383 U.S. 541, 556 (1966). In \textit{Gault} itself, the Court made unmistakably clear its view that the juvenile court had failed to accomplish its stated purposes and, indeed, that it had often operated in countertherapeutic ways. \textit{In re} Gault, 387 U.S. 1, 22 (1967).
ted acts that violate a criminal law and whose potential consequences include both the stigma inherent in such a determination and the deprivation of liberty for many years.19

With the abrogation of the myth that juvenile court proceedings were on behalf of, rather than against, the respondents, it was reasonable to expect that juvenile procedure after Gault and its progeny20 would differ little from criminal procedure.

However, the logic of Gault never was followed to its conclusion. Although it is indisputable that Gault led to significant change in juvenile law,21 it is also clear that many juvenile courts have failed to implement its mandate fully. Many juvenile courts persist in the illusion that they are therapeutic instruments22 and, accordingly, neglect the due process rights basic to an adversary system.23 Still more fundamentally, little attention has been given to the question of whether a separate juvenile court can be justified at all when juvenile respondents are entitled to most of the procedural rights owed criminal defendants.24

---

21. Gault led to major revisions in juvenile codes to “legalize” juvenile courts with subsequent major revisions to increase punitive responses to serious juvenile crime. Prior to Gault, procedures were so minimally lawful that many juvenile courts lacked law-trained judges. W. WADLINGTON, C. WHITEBREAD & S. DAVIS, CHILDREN IN THE LEGAL SYSTEM 229 (1983).
22. See, e.g., IDAHO CODE § 16-1801 (Supp. 1988):

The policy of the state of Idaho is hereby declared to be the establishment of a legal framework conducive to the constructive judicial processing of children’s cases where the child’s conduct is in conflict with the law; and the providing of professional assistance to courts handling children’s cases, through a coordinated program of rehabilitation, thereby insuring integrated treatment and assistance to communities throughout the state in their programs of prevention and control of juvenile delinquency . . . .

23. Several studies conducted in the late 1960s and early 1970s showed that Gault had little effect on many juvenile courts. See, e.g., W. STAPLETON & L. TEITELBAUM, IN DEFENSE OF YOUTH (1972); Duffee & Siegel, The Organization Man: Legal Counsel in the Juvenile Court, 7 CRIM. L. BULL. 544 (1971); Platt, Schechter & Tiffany, In Defense of Youth: A Case Study of the Public Defender in Juvenile Court, 43 IND. L.J. 619 (1968). Although directly comparable recent research is not available, studies showing the frequency of an absence of defense counsel in juvenile court, see infra note 132, raise questions about the court’s continuing unlawfulness in many jurisdictions.
24. Because of its adoption of a just deserts approach to juvenile disposition and its application of the full panoply of criminal procedure to juvenile hearings, the Juvenile Justice Standards Project is often characterized as having taken a radi-
With more than two decades of post-\textit{Gault} hindsight, this Article is intended to stimulate new discussion of this issue. Perhaps the time has come to follow \textit{Gault} to its logical conclusion and to "put an effective end to what has been the idealistic prospect of an intimate, informal protective proceeding" and "once again to place the juvenile squarely in the routine of the criminal process."\textsuperscript{25} Although I will not go quite so far, I will argue that \textit{Gault} and its progeny, when examined in the light of empirical evidence, require a truly new juvenile court that relies on knowledge of psychosocial development in order not to treat juveniles, but to ensure protection of their right to due process.

\textbf{II. HISTORIC RATIONALES FOR THE JUVENILE COURT}

In consideration of the social utility of the juvenile court and its present and future mission and form, a useful starting point is analysis of the validity of the historic rationales for a separate juvenile court.\textsuperscript{26} Social historians now doubt that the founding of the juvenile court is largely or even wholly explained by the stated motives of the turn-of-the-century child savers.\textsuperscript{27} However, examination of the ostensible rationales is most likely to provide an answer to the question of whether any coherent justification exists for a separate juvenile court.

Judge Julian Mack's oft-cited contemporary discussion of the nature and goals of the early juvenile court\textsuperscript{28} provides a snapshot of the...
idealized court:

[The juvenile judge] must be a student of and deeply interested in the problems of philanthropy and child life, as well as a lover of children. He must be able to understand the boys' point of view and ideas of justice; he must be willing and patient enough to search out the underlying causes of the trouble and to formulate the plan by which, through the cooperation, oftentimes, of many agencies, the cure may be effected. . . .

The problem for determination by the judge is not, Has this boy or girl committed a specific wrong, but What is he, how has he become what he is, and what had best be done in his interest and in the interest of the state to save him from a downward career. It is apparent at once that the ordinary legal evidence in a criminal court is not the sort of evidence to be heard in such a proceeding . . . . 29

A. Juveniles Are Not Responsible

1. The Legal Framework

At its deepest roots, this paternalistic vision of the juvenile court was based on the moral premise that youth do not deserve punishment for their violations of law. Rather, in Judge Mack's words, offenders should be "protected" by the state, acting as would "a wise and merciful father" when he learns that his child has erred.30 To pursue that course, the court must concern itself not with the question of whether a given disposition is a juvenile's just desert, but instead whether the dispositional plan is responsive to his needs. Indeed, the court need not worry about whether the juvenile deserves state intervention at all, because the intervention is for his own good, regardless of whether he has broken the law:

[It is] the duty of the state, instead of asking merely whether a boy or girl has committed a specific offense, to find out what he is, physically, mentally, morally, and then if it learns that he is treading the path that leads to criminality, to take him in charge, 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.31

It is easy to approach Judge Mack's assertion cynically and to focus solely on the adequacy of the juvenile court in delivering the promised rehabilitation. Although the failings of the court in that regard now

the power, as the friendly interest of the state; to show them that the object of the court is to help them to train the child right . . . .
Mack, supra, at 116-17.
29. Mack, supra note 28, at 119-20. In his dissenting opinion in Gault, Justice Stewart summarized the import of the offender- rather than offense-based dispositional inquiry in juvenile justice: "[A] juvenile proceeding's whole purpose and mission is the very opposite of the mission and purpose of a prosecution in a criminal court. The object of one is correction of a condition. The object of the other is conviction and punishment for a criminal act." In re Gault, 387 U.S. 1, 79 (1967)(Stewart, J., dissenting).
31. Id.
are well known, it is important to consider the validity of the underlying assumption that it is unjust to brand a juvenile as a criminal. Even if the juvenile court has not matched the rehabilitative ideal, a special system of justice may be defensible if retribution cannot be morally applied to a juvenile.

Indeed, such a line of argument may require merely a showing that youthfulness is a mitigating, even if not an excusing, factor. For example, in a "modest defense" of the juvenile court, my colleague Martin Gardner has contended that the court can be justified by the discrepancy in level of stigma that may exist between delinquent and criminal. If, as he argues, most juvenile offenders are sufficiently mature that they are culpable for their conduct but sufficiently immature that they do not deserve the same level of punishment as adult offenders, then an intermediate level of punishment is just. Given that labeling by the community as a criminal is a part of the punishment meted out by the criminal justice system, a label with less stigma would be appropriate for juvenile offenders. Therefore, Professor Gardner favors retention of the juvenile court even though he accepts a retributive response to most juvenile crime. Consistent with the general principle that punishment should be proportionate to the offense, he would reduce both the sentence (disposition) and the opprobrium imposed on juveniles convicted of a crime, relative to the sanctions to which adult offenders are subject. Although the first object of his partial responsibility theory could be accommodated in the criminal justice system, the latter may require that a special status be maintained for juvenile offenders.

Still, the existence of a juvenile court clearly does not exclude punishment of juveniles, and the absence of a juvenile court does not eliminate the possibility of fully or partially exculpating juveniles on the basis of their immaturity. Even at the zenith of the rehabilitative ideal, some juveniles were expressly the objects of punishment, and most juvenile offenders were subject to de facto punishment. On the other hand, for centuries prior to the invention of the juvenile court, the defense of infancy operated in criminal courts to excuse the criminal conduct of all children under age seven and of those children be-

32. See infra Section II(B).
36. Professor Gardner's argument rests on an empirical assumption about the relative social consequences of the criminal and delinquent labels. He acknowledges that the assumption is speculative. Gardner, supra note 34, at 149-50.
37. See Gardner, supra note 34, at 130 n.8.
38. In re Gault, 387 U.S. 1, 16 (1967).
tween the ages of seven and fourteen who failed to appreciate the wrongfulness of their conduct.39

In short, the desirability of a juvenile court is not perfectly related to the question of the criminal responsibility of juvenile offenders. Nonetheless, it is undeniable that some relationship exists between the modal level of responsibility of juvenile offenders and the age-graded applicability of the usual strictures of criminal law. If most juvenile offenders are not worthy of punishment but the state has a compelling interest, as it undeniably does, in the prevention of continuing antisocial behavior, then a nonretributive justice system is needed to respond to the problem of juvenile delinquency. Therefore, before conclusions are reached about the wisdom of a separate system of juvenile justice, careful consideration is needed of the level of responsibility that may be justly expected of most juveniles.

2. The Psychological Evidence

a. Changing Views of Children's Competence

Such questions are especially acute because of a large body of recent psycholegal scholarship that indicates juveniles, especially adolescents, commonly are more competent decisionmakers than the law historically has presumed.40 Piagetian theory implied that adolescents, at least by age fourteen, would not differ from adults on average in their ability to comprehend and weigh risks and benefits of personal decisions.41 That general proposition now has been supported by numerous laboratory42 and field studies43 of decisionmaking by youth in various legally relevant contexts.

In fact, if research contradicts the Piagetian hypotheses at all, it generally is in the direction of competence of even younger minors to make personal decisions. For example, some studies have shown elementary-school-age children able to identify material risks of psycho-

therapy. Other research has indicated that children in the intermediate grades make adult-like decisions about routine therapeutic and educational matters, even if they are not as competent as adolescents and adults in comprehending and weighing the risks and benefits of the various alternatives. Stated somewhat differently, children can imitate adult models in making decisions for themselves, even when they are not prepared cognitively to explain the merits of those decisions.

Although such studies of actual decisionmaking are most germane to legal concerns, it should be noted that changes in psychologists' perceptions of children's general competence also have occurred among basic developmental psychologists. Recent research has shown children to be capable of sociocentric moral reasoning and behavior at earlier ages than most developmental psychologists (at least those with a cognitive-developmental bent) had believed possible. Although the attribution of subjective responsibility has proven to be one of the most strikingly developmental aspects of moral judgment, researchers who have adjusted their methods to account for young children's poor verbal and free-recall skills have found even preschoolers to apply perceptions of intentionality of behavior to their moral judgments. Observations of empathy and sympathetic distress among children in day care centers are also illustrative of the sociomoral competence of young children, sometimes including toddlers. Indeed, preschoolers refer to others' needs as the basis for their own naturally occurring prosocial behavior.

46. In Piaget's seminal theory of moral development, attribution of responsibility on the basis of intention rather than objective consequences requires sufficient cognitive development that the child is able to comprehend motives of others. Piaget believed this diminution of egocentricity in moral judgment did not occur until the child reached middle childhood. See generally J. PIAGET, THE MORAL JUDGMENT OF THE CHILD (1965) (originally published in 1932).
Similarly, comprehension of physical causality occurs much earlier than children are able to articulate their understanding of causality and, therefore, earlier than Piaget believed was possible. "Adult-like" causal reasoning is well established by age four or five and sometimes observable even among two- and three-year-old children.51 Thus, concepts of agency and intentionality are within the repertoire even of young children.

Although such bodies of research cast doubt on the historic presumption of irresponsibility among juveniles, it is important not to oversell their significance. The capacity to perceive and evaluate the intentionality of behavior does not translate directly into the capacity to form criminal intent.52 Moreover, some of the research by Piagetian critics that shows children capable of higher-level reasoning than cognitive-developmental theorists typically assumed requires unusual conditions. That children may be able to demonstrate higher-level reasoning when the task is presented nonverbally or the demands on memory are minimized probably has little relevance to the law's view of children's maturity.

Similarly, research on juveniles' competence in decisionmaking is not completely apposite to questions of their responsibility. On the one hand, the cognitive requirements for compliance with the criminal law probably are generally less advanced than the information-processing skills needed to make rational decisions about one's physical and economic welfare. On the other hand, the threshold for personal responsibility should be higher than the threshold for exercise of self-determination. Thus, in considering questions of responsibility, we should be sensitive to developmental trends in judgment that we may find irrelevant to the question of whether interests in liberty are to be recognized and protected in nonpunitive situations. I shall consider these points in turn.

b. The Low Expectations of the Criminal Law

As Stephen Morse has argued in his discussions of the relationship between mental disability and personal responsibility, the expecta-

52. Some psycholegal commentators on children's responsibility have failed to make this distinction clearly. See, e.g., Keasey & Sales, An Empirical Investigation of Young Children's Awareness and Usage of Intentionality in Criminal Situations, 1 LAW & HUM. BEHAV. 45 (1977). Besides the fact that different levels and perhaps even different types of intent are relevant in the domains of psychology and law, the equation of capacity to form criminal intent and laboratory demonstrations of understanding of intentionality ignores the additional moral elements in the former. Attribution of responsibility surely rests on more than an ability to consider subjective factors in assessing blame.
tions of moral behavior that are established in the criminal law generally are quite low.\textsuperscript{53} The foundation for this conclusion is especially clear when one considers the lack of obvious legal significance of infantile moral reasoning. The lowest level of moral development often is said to be an evaluation of the morality of conduct in terms of its personal consequences.\textsuperscript{54} Although few would seek a society in which citizens refrained from \textit{mala in se} only because of the threat of punishment, such a perspective is deeply embedded in the deterrent purpose of the criminal law.\textsuperscript{55}

In a classic essay, Justice Holmes even argued that such a purpose is the \textit{sine qua non} of law:

\begin{quote}
If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience.\textsuperscript{56}
\end{quote}

To a large extent, as a society, we do not care that prospective criminals obey the law for reasons that are not morally praiseworthy. We do not punish unethical states of mind absent illegal conduct. Similarly, we probably would be satisfied if all citizens obeyed the law, even if they did so because they expected the approbation of their peers.\textsuperscript{57}

At the same time, we have few qualms about punishing those who break the law because they have calculated that the risk of punishment is insufficient to warrant foregoing the short-term personal gains often associated with antisocial behavior. Most of us feel little guilt about punishing offenders who are so egocentric that they appear insensitive to the effects of their crimes on the victims, but who are not so socially inept that they are unaware of the community's condemnation of their behavior.\textsuperscript{58} Indeed, our moral intuition tells us that such "cold-blooded" behavior is especially blameworthy.

Our intuition is confirmed to some extent by the fact that most elementary-school-age children and even some preschool children are

\textsuperscript{53} Morse, \textit{Crazy Behavior, Morals, and Science: An Analysis of Mental Health Law}, 51 S. CAL. L. REV. 527 (1978); Morse, \textit{supra} note 35.


\textsuperscript{56} Holmes, \textit{The Path of the Law}, 10 HARV. L. REV. 457, 459 (1897).

\textsuperscript{57} Evaluation of the morality of an event based on the positive consequences and resulting positive emotion associated with it occurs even in early childhood. Hoffman, \textit{supra} note 49; Kohlberg, \textit{supra} note 54.

\textsuperscript{58} Many sex offenders have little appreciation of the impact of their behavior on the victims, and they often fail to comprehend fully why society is outraged by their behavior. See, e.g., A. Groth, \textit{Men Who Rape: The Psychology of the Offender} (1979).
Consideration of intent, including hedonistic or exploitive motives, does not require high levels of cognitive development or educational achievement. For that matter, actual conformity to the primary behavioral norms of the community requires even less sociomoral development. Even young children are not inclined to adopt physically dangerous means of responding to slights by their peers. Similarly, the lack of a substantial relationship between age and honesty\textsuperscript{60} demonstrates that children understand the rules of an orderly society at a very young age and are capable of responding accordingly, whatever their motive for doing so. From an early age, children can imitate normative social behavior.\textsuperscript{61}

c. The Lack of Congruence Between Competence and Responsibility

Although the preceding discussion shows that the social expectations embedded in the criminal law generally do not rest on advanced developmental levels, the fact that juveniles appear more competent decisionmakers than the law historically has presumed does not imply that youth generally should be held fully accountable by the state for their misdeeds. I reach that conclusion even though I have argued elsewhere that the new research and theory on minors' competence should be used to establish lower age thresholds for legal recognition of the validity of their decisions.\textsuperscript{62}

The age thresholds for recognition of autonomy and privacy, cessation of special age-based entitlements, and establishment of criminal responsibility need not be, indeed should not be, the same.\textsuperscript{63} Respect for personhood demands that we err on the side of promotion of autonomy. Therefore, the presumption should be in favor of self-determination and those special entitlements that assist youth in developing the capacity for full exercise of autonomy, but doubt about criminal (or quasicriminal) responsibility should be resolved in the direction of nonresponsibility.


\textsuperscript{63} This point is developed in substantially more detail in Melton, \textit{Are Adolescents People? Problems of Liberty, Entitlement, and Responsibility}, in \textit{THE ADOLESCENT AS DECISION-MAKER: APPLICATIONS TO DEVELOPMENT AND EDUCATION} (J. Worell & F. Danner eds. 1989).
Advocating a "jurisprudence of semi-autonomy" that treats adolescence "as a learner's permit," Franklin Zimring has reached the same conclusion. He has argued convincingly that it is unfair to hold adolescents accountable for their behavior at the same level that we hold adults. When the state systematically has denied adolescents experience in decisionmaking, it is unreasonable for society to expect the same quality of decisionmaking from adolescents that it expects from adults, even if adolescents typically have the same capacity to assess and weigh the risks and benefits of various alternatives.

Professor Zimring's point is rendered more acute by evidence that there may be subtle differences between adolescents' and adults' appraisal of social situations. David Elkind's description of residual egocentrism in adolescence is illustrative. Adolescents typically are unrealistically sensitive to others' reactions (what Professor Elkind terms the "imaginary audience") and insensitive to their own vulnerability (the "personal fable"). Although such differences are insufficient to form legally relevant differences in regard to adolescents' ability to comprehend and weigh risks and benefits, they may be sufficient to cast some doubt about their level of culpability for illegal behavior.

d. Some Preliminary Conclusions

As Thomas Lickona has summarized, "[m]oral judgment, as depicted by Piaget, is indisputably developmental; it changes with age and experience." Nonetheless, the level of moral reasoning expected within the criminal law is achieved by most juveniles at an early age. At a minimum, the several lines of research showing children and youth to be more competent cognitively and socially than the law has presumed cast doubt on the assumption that most juveniles cannot fairly be held accountable for their behavior.

The qualifier to this conclusion, though, is the evidence suggesting that adolescents may be in a transition stage in terms of criminal responsibility. This qualifier is given special credence by research showing that juvenile delinquents are especially immature. Delinquents usually are less competent socially and cognitively than their peers. As a result, age may be sufficiently mitigating to support a theory of only partial responsibility for many adolescents, a point to which I shall return.

64. F. ZIMRING, THE CHANGING LEGAL WORLD OF ADOLESCENCE (1982).
66. Lickona, supra note 47.
67. See infra notes 118-32 and accompanying text.
B. Juveniles Are Especially Amenable to Treatment

Even if juveniles can reasonably be presumed to be responsible for their behavior, a separate system of justice may be a wise policy if juveniles are especially amenable to treatment. The founders of the juvenile court certainly assumed such amenability. Using a social construct that continues to creep into public policy, the early child savers presumed juvenile offenders to be particularly malleable and, therefore, predictably responsive to treatment to prevent their future antisocial conduct. Juvenile crime was perceived as posing relatively little threat to society, and juveniles were believed to be essentially innocent in a Rousseauian sense. If youth were placed in a benign, "natural" setting away from the temptations of the modern city, they could be expected to be restored to their state of innocence and then to be "civilized" appropriately.

The idyllic view of the therapeutic programs planned by the founders of the juvenile justice system is illustrated by Judge Mack's description:

What is needed is a large area, preferably in the country,—because these children require the fresh air and contact with the soil even more than does the normal child,—laid out on the cottage plan, giving opportunity for family life, and in each cottage some good man and woman who will live with and for the children.

The perception of delinquents as innocent creatures led astray by the realities of urban immigrant culture is exemplified by Judge Mack's reference to the purported therapeutic effects of sending wayward youth to the country. This view is further illustrated by the ease with which the judge believed that therapeutic change would occur:

A thorough investigation, usually made by the probation officer, will give the court much information bearing on the heredity and environment of the child. This, of course, will be supplemented in every possible way; but this alone is not enough. The physical and mental condition of the child must be known, for the relation between physical defects and criminality is very close. It is, therefore, of the utmost importance that there be attached to the court, as has been done in a few cities, a child study department, where every child, before hearing, shall be subjected to a thorough psycho-physical examination. In hundreds of cases the discovery and remedy of defective eyesight or hearing or some slight surgical operation will effectuate a complete change in the character of the lad.

In such a view, the traditional strictures of the legal process were inapposite, because delinquency was at root a medical problem that demanded expert diagnosis and treatment, not a moral/social problem.

69. See J. ROUSSEAU, EMILE (Dutton ed. 1955) (originally published in 1762).
70. See J. KETT, supra note 27, at 100.
72. Id. at 120.
that required just resolution. In such a context, social workers, doctors, and even “wise and merciful” substitute fathers\textsuperscript{73} were legitimately more at home than were lawyers intent on using the skills of their profession. The guts of the juvenile court were to be in its ancillary clinics and training schools, not in the trappings of due process and legal authority.

In \textit{Kent}\textsuperscript{74} and \textit{Gault},\textsuperscript{75} the Supreme Court refused to accept the fiction that such good intentions had necessarily—or even often—resulted in therapeutic procedures and effects. Juvenile offenders were subjected to the “worst of both worlds,”\textsuperscript{76} a deprivation of due process based on the promise of a treatment that often was harshly punitive.

Unfortunately, the reality noticed in \textit{Kent} and \textit{Gault} is not radically different today. The “treatment” available through the juvenile justice system often remains little more than brutal punishment.\textsuperscript{77} Class action suits in the 1970s and 1980s have illuminated inhumane conditions in numerous juvenile correctional facilities and in many adult jails where juveniles also are held.\textsuperscript{78} In fact, substantial change is only beginning to occur in many communities where the threat of personal liability now looms for state and local officials who fail to comply with the Juvenile Justice and Delinquency Prevention Act’s mandate to remove juveniles from adult jails.\textsuperscript{79}

Too often, in fact, the situation at the time of \textit{Gault} has been exacerbated by the growth of the child mental health and social service professions. The child mental health system has become an increasingly misused instrument of state intrusion into the lives of youth and

\textsuperscript{73} See supra notes 30-31 and accompanying text.
\textsuperscript{74} Kent v. United States, 383 U.S. 541 (1966).
\textsuperscript{75} In re Gault, 387 U.S. 1 (1967).
\textsuperscript{76} Kent v. United States, 383 U.S. 541, 566 (1966).
\textsuperscript{77} See, e.g., K. Wooden, Weeping in the Playtime of Others (1976).
\textsuperscript{78} See Soler, Litigation on Behalf of Children in Adult Jails, 34 Crime & Delinq. 190 (1988), and cases cited therein.

The Juvenile Justice and Delinquency Prevention Act and the \textit{Hendrickson} case present new opportunities for reform of the juvenile justice system, if not of the juvenile court itself. It remains to be seen, though, whether the response to such opportunities will be more of the same (i.e., construction of juvenile detention centers instead of housing in adult jails) or new, less restrictive approaches to the prevention and remediation of juvenile delinquency. The raft of juvenile justice bills introduced in the 1989 session of the Nebraska Legislature was illustrative. Compare, e.g., LB 493 (a proposal by Sen. Arlene Nelson and five other senators to authorize the Department of Corrections to operate juvenile detention facilities) with LB 663 (proposed Juvenile Services Act, introduced by Sen. Sandy Scofield and 10 other senators, to provide an array of family- and community-based services for juvenile offenders).
their families.\textsuperscript{80} Without doubt, the scope of the juvenile justice system has expanded as private therapeutic facilities have become available for placement.\textsuperscript{81} Indeed, some of the most egregious abuse of juveniles placed as a result of their misbehavior has been as part of purported treatment.\textsuperscript{82} For example, one high-priced, highly professionalized center that received youth from juvenile courts all over the country subjected them to lie detectors to determine whether their thinking was "correct," forced them to stand or sit at attention when it was not, and engaged in rather innovative physically abusive procedures supposedly intended to quiet upset youth.\textsuperscript{83}

The problem with the implementation of the rehabilitative ideal, though, is not simply a matter of perversion of the juvenile court's purported purpose. Even when the court's therapeutic purpose has been taken seriously, its efficacy has not been demonstrated. As a panel of the National Academy of Sciences concluded, the assertion that "nothing works" in juvenile (and adult) corrections still has not been persuasively refuted.\textsuperscript{84} The most well-validated treatment for

\textsuperscript{80} See generally Morse & Whitebread, Mental Health Implications of the Juvenile Justice Standards, in LEGAL REFORMS AFFECTING CHILD AND YOUTH SERVICE (G. Melton ed. 1982).


\textsuperscript{82} See Melton & Davidson, Child Protection and Society: When Should the State Intervene?, 42 AM. PSYCHOLOGIST 172 (1987).

\textsuperscript{83} Milonas v. Williams, 691 F.2d 931 (10th Cir. 1982).

\textsuperscript{84} THE REHABILITATION OF CRIMINAL OFFENDERS: PROBLEMS AND PROSPECTS (L. Sechrest, S. White & E. Brown eds. 1979). See also NEW DIRECTIONS IN THE REHABILITATION OF CRIMINAL OFFENDERS (S. Martin, L. Sechrest & R. Redner eds. 1981) (examining directions for rehabilitation programs that theory suggests may be most profitable). The National Academy task panel saw no reason for belief that juvenile delinquents would be especially amenable to treatment:

It may be implicitly assumed by many that age is an important element in classification because it is, or should be, easier to rehabilitate youthful offenders. That seems a dubious prospect at best. By any measure currently available, rates of involvement in criminal activity subsequent to adjudication are at least as high for juveniles as for adults with similar offense histories. It could be argued that given the same circumstances it might be more difficult to rehabilitate juveniles than adults because their very youth is indicative that they have no prolonged periods of satisfactory behavior patterns to which they might be restored by proper treatment. In fact, however, very little is known about differential treatment or potential for rehabilitation of juveniles and adults. Certainly when the treatment methods that have been employed are examined, there do not appear to have been any startling differences between what
delinquent behavior remains getting older!85

It may be argued that this dismal picture reflects inadequate re-
resources, poorly conceptualized treatment programs, and failure to pro-
tect program integrity in evaluation studies, rather than intrinsic ineffectiveness of treatment. To a large extent, I agree. Some of the most highly touted negative evaluation studies have focused on pro-
grams so poorly developed and staffed that no one reasonably could have expected them to work.86 Most serious juvenile offenders have a multiplicity of significant, persistent problems—educational delays, family disorganization, a lack of community support, economic pov-
erty, poor social skills, and aberrant social perceptions and expectan-
ties.87 Some small experimental programs that have incorporated an intensive, integrated response to such problems have shown success.88

85. See, e.g., G. MELTON & D. HARGROVE, PLANNING MENTAL HEALTH SERVICES FOR CHILDREN AND YOUTH ch. 2 (in press)(conduct disorders tend to be persistent across time and pervasive across situations); J. MONAHAN, PREDICTING VIOLENT BEHAVIOR 72-73 (1981); L. ROBINS, DEVIANT CHILDREN GROWN UP: A SOCIOLOGI-
CAL AND PSYCHIATRIC STUDY OF SOCIOPATHIC PERSONALITY (1966).

86. Quay, The Three Faces of Evaluation: What Can Be Expected to Work, 4 CRIM.

87. For reviews of the relevant epidemiological literature, see G. MELTON & D.

88. For a comprehensive review of the treatment outcome literature, see G. MELTON 
& D. HARGROVE, supra note 85, at ch. 3. For examples of promising programs, see I. GOLDENBERG, BUILD ME A MOUNTAIN: YOUTH, POVERTY, AND THE CREATION OF NEW SETTINGS (1971); Henggeler, Rodick, Bordo, Hanson, Watson & Urey, Multisystemic Treatment of Juvenile Offenders: Effects on Adolescent Behavior and Family Interaction, 22 DEV. PSYCHOLOGY 132 (1986); Shore & Massimo, Fif-

All of the programs that have demonstrated lasting success in treating youth with persistent and pervasive behavior problems have been small and intensive.
Recent studies of youth who have spontaneously ended delinquent careers also have provided new directions for experimentation in services for delinquents. 89

Even if treatment is potentially effective for some delinquents, though, the argument that the juvenile court's failure really is just a matter of inadequate investment or careless conceptualization misses the point. First, even if juvenile justice programs are potentially effective in preventing further crime, at least by some youth, rehabilitation programs are not differentially effective for juvenile delinquents to a degree that justifies a separate justice system. Although the claim by some that adolescence is too late for significant change is simply wrong, 90 the historic view that youth is a time of great malleability was equally naive. 91 Most juvenile offenders do not recidivate, no matter what intervention is provided. 92 Insofar as rehabilitation is the goal, it is hard to justify any court involvement for such youth. Among those juveniles who are repeat offenders, there is little reason to expect special amenability to treatment, relative to adult offenders. 93

Second, it must be remembered that the court's primary purpose is to administer justice. Even an effective rehabilitation system fails in

---

89. A key to cessation of delinquency appears to be sense of personal efficacy. Mulvey, Cessation of Delinquency as a Worthwhile Research Topic, in 11(1) DIVISION OF CHILD, YOUTH, & FAMILY SERVICES NEWSLETTER 4, 14 (1988). An implication would be that treatment is most likely to be effective when it induces or restores some measure of personal control by youth, a conclusion that also can be derived from other areas of psychological research and theory. See, e.g., Melton, Decision Making by Children: Psychological Risks and Benefits, in CHILDREN'S COMPETENCE TO CONSENT (1983); Tremper & Kelly, The Mental Health Rationale for Policies Fostering Minors' Autonomy, 10 INT'L J. L. & PSYCHIATRY 111 (1987). Such a process of involvement of youth themselves in making decisions about their treatment can hardly be said to be endemic to youth corrections.


91. See supra note 85. See also K. Federle, The Abolition of the Juvenile Court: A Proposal for the Preservation of Children's Legal Rights, at 9-11 (paper presented at the meeting of the American Society of Criminology, Chicago, Nov. 11, 1988)(serious crime is committed disproportionately by juveniles).

92. After an exhaustive review of the literature, Professors Rutter and Giller concluded:

[D]elinquent behavior is very pervasive among children and adolescents, most delinquency is minor, most youths who commit minor delinquent acts are not particularly distinctive in their personal characteristics or family background, and in most cases the delinquency constitutes a passing phase that will come to an end without the need for rigorous intervention.

M. RUTTER & H. GILLER, supra note 87, at 350-51.

93. See, e.g., id. at 361 (noting that antisocial behavior typically begins during adolescence and ceases in young adulthood).
the end if it undermines due process. The traditional quid pro quo theory of juvenile law\textsuperscript{94} denigrates the fundamental interests lost in the name of treatment.\textsuperscript{95} The legal system should be supported in its preservation of the reality and appearance of justice, no matter what the consequences are for treatment.\textsuperscript{96} The fact that the “treatment” often has been ineffective or even harmful simply compounds the insult to the integrity of juvenile respondents and their families.

C. Formal, Adversary Procedures Are Not Conducive to Rehabilitation

The notion that criminal procedure is ill-suited to resolution of matters pertaining to children, youth, and families is deeply embedded in the traditions of the juvenile court. Indeed, in the pre-	extit{Gault} years, it was easy for juveniles to be committed to a training school without ever realizing that they had been in court. The image painted by the words of Judge Mack is illustrative:

> The child who must be brought into court should, of course, be made to know that he is face to face with the power of the state, but he should at the same time, and more emphatically, be made to feel that he is the object of its care and solicitude. The ordinary trappings of the court-room are out of place in such hearings. The judge on a bench, looking down upon the boy standing at the bar, can never evoke a proper sympathetic spirit. Seated at a desk, with the child at his side, where he can on occasion put his arm around his shoulder and draw the lad to him, the judge, while losing none of his judicial dignity, will gain immensely in the effectiveness of his work.\textsuperscript{97}

Even today, juvenile courtrooms often more closely correspond to the conference rooms of child guidance centers than the courtrooms in which other matters are heard. The notion persists among professionals and the general public that formal adversary procedures are inconsistent with the psychological well-being of children and youth, a belief that has been given credence by the Supreme Court.\textsuperscript{98}

In keeping with the historic, still prevalent belief in the innocence

\begin{itemize}
  \item \textsuperscript{94} \textit{Gault} repudiated the idea that juveniles’ right to due process is properly sacrificed in the name of treatment. \textit{In re Gault}, 387 U.S. 1, 13 (1967).
  \item \textsuperscript{95} Cf. O’Connor v. Donaldson, 422 U.S. 563, 578 (1975) (Burger, C.J., concurring).
  \item \textsuperscript{96} Of course, those systems that have a legitimate purpose of personal and social change should not neglect the treatment of troubled and troublesome youth. The emphasis on pursuit of justice in the legal system need not diminish the commitment of the mental health and child welfare systems to assistance to troubled youth. Such an emphasis also need not prevent juvenile justice authorities’ provision of needed treatment as an element of humane care of those juveniles desiring such services.
  \item \textsuperscript{97} Mack, \textit{supra} note 28, at 120.
  \item \textsuperscript{98} See Parham v. J. R., 442 U.S. 584, 610 (1979). It is not mere coincidence that the alternative dispute resolution movement has had its greatest success in legal matters pertaining to children and families. \textit{But see} Melton, \textit{Family and Mental Hospital as Myths: Civil Commitment of Minors}, in \textit{CHILDREN, MENTAL HEALTH, AND THE LAW} (N. Reppucci, L. Weithorn, E. Mulvey & J. Monahan eds. 1984); Melton & Lind, \textit{Procedural Justice in Family Court: Does the Adversary Model
and vulnerability of youth, the intuition of many adults is that children and youth develop most fully when they are shielded from conflict—hence, from adversariness. That view is overly simple. Although chronic exposure to uncontrollable conflict may impair children's development,99 the opportunity to resolve conflict actually may enhance psychological growth, especially in older children and youth who may experience a sense of accomplishment.100 Experience in decisionmaking also may foster a greater appreciation of diverse points of view and, therefore, may stimulate legal and moral socialization.101 Regardless, the reality is that juveniles accused of delinquent or status offenses already are in a state of conflict with the state and specific adverse parties, often including their parents. Otherwise, there would be no reason for court involvement. The question is not whether to foster conflict in juvenile court, but how to resolve the conflict already present most fairly.

In that regard, psychological research and theory support the Gault assumption that the “fundamental requirements of due process” are also the requisites for a psychologically satisfying resolution of the juvenile’s predicament: “[T]he appearance as well as the actuality of fairness, impartiality and orderliness—in short, the essentials of due process—may be a more impressive and more therapeutic attitude so far as the juvenile is concerned.”102

Indeed, benefit to the family as a whole may accrue from due attention to procedural protections. Even when the parents’ and juveniles’ interests are ostensibly in conflict, a structure to assure that less restrictive alternatives are considered is apt to promote family integrity and parental satisfaction by avoiding unnecessary fractionation of the family.103 By the same token, affirmative efforts to ensure that minors have a say in what happens to them increase the likelihood that treatment will be successful.104 Thus, even if the Constitution did

99. See, e.g., Emery, Interpersonal Conflict and the Children of Discord and Divorce, 92 PSYCHOLOGICAL BULL. 310 (1982).
101. See generally Melton, supra note 89.
102. In re Gault, 387 U.S. 1, 26 (1967). The psychological evidence on the significance of due process for children and youth is discussed in Section III(A) infra.
104. See, e.g., Adelman, Lusk, Alvarez & Acosta, Competence of Minors to Understand, Evaluate, and Communicate about Their Psychoeducational Problems, 16 PROF. PSYCHOLOGY: RES. & FRAC. 426 (1985); Brigham, Some Effects of Choice on
not demand recognition of the due process rights of juvenile respondents, preservation of adversary process in juvenile court would be consonant with the state's interests and therefore justifiable on utilitarian grounds.

D. Summary: A Bankrupt Legal Theory

A review of the assumptions underlying the juvenile court shows it to be a bankrupt legal institution. The theories that have guided juvenile law through the twentieth century are without foundation. Adolescents are neither so irresponsible nor so responsive to treatment as to justify a separate juvenile court. Even if the Constitution permits an incomplete application of adversary procedures to juvenile court,\textsuperscript{105} neither common sense nor psychological research supports the premise that a nonadversary approach to delinquency adjudications would foster more effective treatment.

In short, the juvenile court cannot rest on its historic rationales. If \textit{Gault} itself did not result in an outright abolition of the juvenile court, its logic appears to push toward that end. As the Supreme Court recognized, the traditional juvenile court was inconsistent with constitutional mandates for due protection of the liberty interests of juvenile respondents. Post-\textit{Gault} developments give no reason to believe that public policy is consistent with maintenance of the residue of the historic juvenile court, because the philosophical and empirical foundations for the court have been shattered.

---


\textit{In re Gault}, 387 U.S. 1 (1967), made clear that juveniles accused of delinquent offenses are entitled to the rudiments of an adversary system: e.g., representation by counsel, confrontation of one's accusers, and the privilege against self-incrimination. However, subsequent cases have suggested that some constitutionally mandated elements of criminal procedure may not be required in juvenile court. See, e.g., \textit{McKeiver v. Pennsylvania}, 403 U.S. 528 (1971). Also, the Supreme Court has approved of nonadversary procedures in decisionmaking about mental treatment involving minors. \textit{Parham v. J. R.}, 442 U.S. 584 (1979).
Nonetheless, I do believe that a juvenile court is desirable, but only if it is a truly new juvenile court fully consistent with the spirit of *Gault*. I advocate a juvenile court that has more, rather than fewer, procedural protections available than in criminal courts. Such a new court would be based on acceptance of the *Gault* respect for the personhood of juveniles, combined with a psychological understanding of children's and adolescents' comprehension of fundamental legal rights and their (lack of) access to procedures necessary to vindicate those rights.

III. WHY DUE PROCESS REQUIRES A NEW JUVENILE COURT

A. The Developmental Psychology of Procedure

1. The Salience of Freedom

In constructing a new juvenile court, the most fundamental point that must be recognized is that liberty and privacy are important to children and youth, just as they are to adults. Attempts to deny the moral personhood of children must take into account the fact that the attributes associated with concern for human dignity are displayed at a quite young age. Courts cannot legitimately deny rigorous protection of minors' liberty on the ground that it is unimportant.106

Even very young children find choice to be reinforcing and meaningful.107 More directly germane to the circumstances in which juveniles' liberty is threatened by the state, even the best residential treatment programs are experienced as aversive by the children and youth placed in them.108 The more "institutional" and less normalized a placement outside the natural family is, the more intense the resulting anger and sense of degradation are.109

106. *But see* Schall v. Martin, 467 U.S. 253, 265 (1984) ("The juvenile's countervailing interest in freedom from institutional constraints, even for the brief time involved here, is undoubtedly substantial . . . . [b]ut that interest must be qualified by the recognition that juveniles, unlike adults, are always in some form of custody.").


2. The Social Psychology of Procedural Justice

If maintenance of liberty and privacy is important to juveniles, then it should come as no surprise when they desire procedures that provide the level of care due in a matter as serious as the potential diminution of such primary goods. In that regard, the large body of research and theory on perceived procedural justice should be informative. Encompassing scores of studies, such research has produced findings that have proven robust across settings, populations, and methods. To summarize, studies of perceived justice have shown that perceptions of the fairness of procedures for dispute resolution provide much of the foundation for individuals' overall level of satisfaction with the legal and political systems. Indeed, perceptions of procedural justice color perceptions of distributive justice (the fairness of the outcome), especially when the outcome is negative.

Process control—the opportunity for each disputant to have a say and to present one's case as one sees fit—is the strongest element in procedural justice. Consequently, both disputants and observers express greater satisfaction with adversary procedures than inquisitorial ones, even in societies in which the latter predominate in the legal system. Care in ensuring that underdogs are heard enhances the evaluation of authorities and the institutions they represent.

The second most important element in perceived procedural justice is ethical appropriateness—treating the parties with respect for their personal dignity. The legal process is viewed more positively when disputants are treated politely and their rights are protected.

The two remaining factors known to affect perceptions of procedural justice are ones that are well known to legal policymakers: honesty and consistency. People desire to be treated forthrightly; dishonest behavior, especially by those in authority, violates the rudiments of respect for persons and fidelity to social contracts. By the same token, the most basic considerations of equity demand that parties in like circumstances be treated alike. Decisions should be predictable rather than arbitrary, and they should not be based on irrelevant personal or social characteristics. An unreliable legal system administers justice ineffectively.

3. Developmental Factors in Use of Procedural Protections

Whether the conclusions of social psychological studies of proce-


dural justice can be generalized to children and youth is an empirical question. Unfortunately, few studies have addressed that question. Nonetheless, the empirical evidence that is available suggests that the same principles underlie adults' and children's responses to the legal system.\textsuperscript{112} As already noted, even young children appreciate personal control, and a close corollary would be a desire for a voice in disputes involving them. Even first graders evaluate the fairness of dispute resolution at least in part in terms of the procedures used,\textsuperscript{113} and older elementary-school-age children generally understand the basic elements of the adversary process and the reasons for them.\textsuperscript{114} Those children who understand the process best are also those who are most likely to perceive it as fair.\textsuperscript{115}

Taken together, the various lines of research on procedural justice give ample reason for care in the means by which complaints against juveniles are investigated and adjudicated.\textsuperscript{116} Just as for adults, the degree of control that juveniles have in the presentation of their cases and the courtesy with which they are treated by legal authorities are apt to shape their response to the legal system. Consequently, even if not mandated by ethics and the Constitution, the preservation of due process in juvenile court would be important in order to socialize respect for the law as an institution. The appearance of fairness is at least as important in juvenile court as in other legal contexts.

At the same time, though, research suggests that due process for juveniles may be different from that for adults. Evidence from Thomas Grisso's program of research on juveniles' waivers of rights is

\begin{itemize}
  \item \textsuperscript{112} For more extensive discussions of the usefulness of social psychological theory and research in juvenile and family law, see Melton & Limber, \textit{Psychologists' Involvement in Cases of Child Maltreatment: Limits of Role and Expertise}, 44 AM. PSYCHOLOGIST— (1989)(in press); Melton & Lind, supra note 98.
  \item \textsuperscript{114} In a project I am directing that is nearing completion (National Center on Child Abuse and Neglect Grant No. 90-CA-1274), studies of children in sexual abuse cases and children in general are showing substantial knowledge of the legal process by the mid-elementary grades, sometimes with greater knowledge of the nature of the adversary process than of relevant legal vocabulary. The notion that fairness accrues when both parties in a dispute have a say apparently develops quite early.
  \item \textsuperscript{115} Perceptions of fairness of the legal process are positively correlated with level of knowledge about it. \textit{Id}.
  \item \textsuperscript{116} Such research has special meaning, given normative presumptions in favor of respect for the dignity of all persons, regardless of age, and corollary concern for the just resolution of disputes, especially when primary goods like liberty and privacy are at stake. In such an ethical and legal framework, hypotheses from relevant research about the means of enhancing justice should be given serious consideration, even when they have not been conclusively demonstrated. In any event, as discussed supra, there is a solid theoretical and empirical foundation for such hypotheses in regard to procedural justice in childhood and adolescence.
\end{itemize}
especially persuasive in that regard.\textsuperscript{117} In brief, such studies have shown that juvenile respondents rarely assert their fifth and sixth amendment rights; their parents are typically ineffective advocates or even adversaries; they often do not understand key words in the \textit{Miranda} warning; they often do not comprehend critical phrases in such warnings; and experience in the legal system, by itself, does not alleviate such deficiencies.

Such findings stand in contrast to research on adolescents' decisions in other legally relevant contexts, which almost uniformly has shown youth to be substantially more competent in decisionmaking than the law presumes.\textsuperscript{118} The reason for the inconsistency of findings in research on waivers of rights in delinquency proceedings with those in studies of decisionmaking by adolescents in other situations is not entirely clear.\textsuperscript{119} Such a discrepancy probably reflects social class differences to some extent.\textsuperscript{120} However, the hypothesis that social class accounts for most of the variability is rendered less plausible by the relatively greater displays of competence in some other settings that involve disadvantaged youth in serious decisions.\textsuperscript{121}

Particular institutional variables may make adolescents appear to be poor decisionmakers in juvenile court. There is a strong cultural belief that "talking" mitigates children's responsibility for misdeeds, whether minor infractions of home or school rules or serious violations of the law. In a survey of middle-class parents of adolescents,
Professor Grisso found that about one-third would advise their children to confess to police, and about one-half of the remainder said that youth should remain silent temporarily until things "cool down" so that the story could be related in a calm atmosphere.\(^\text{122}\) In actual interrogations, parents of juvenile respondents rarely advised their children to remain silent; in fact, the majority did not give any advice or counsel to their children involved in an undeniably difficult situation.\(^\text{123}\) The picture of the outcome is consistent: juveniles rarely invoke their constitutional rights, and younger juveniles (those under age 16) almost never do.\(^\text{124}\)

Professor Grisso's studies suggest that juveniles' difficulties in applying their rights in delinquency proceedings emanate most directly from a belief that those rights are not rights at all, but instead are privileges revocable by people in authority.\(^\text{125}\) This "immature" belief may be the product of true age differences in reasoning,\(^\text{126}\) but it also may reflect an accurate perception of reality in many juvenile courts\(^\text{127}\) and within many relationships between juvenile respondents and their attorneys.\(^\text{128}\)

Still another explanation for the apparent incompetency of many juveniles in asserting their rights in delinquency proceedings is that many respondents may lack the cognitive skills of most of their peers. Two specific findings lend credence to this interpretation. First, even the oldest juveniles appeared less competent than adults in Professor Grisso's study when the juveniles had IQs less than eighty. Second, there is a high prevalence of learning disabilities among adjudicated juvenile delinquents, despite the fact that learning disabled youth are not disproportionately prone to delinquent behavior, as measured by both self-report and police contacts.\(^\text{129}\) The latter finding suggests that juveniles who are less cognitively and socially adept are also less able to take advantage of options for diversion, whether because of

---


123. Id. at 185-86.

124. Id. at 34-37.

125. Id. at 129-30.

126. See Melton, supra note 120.


128. Despite the fact that In re Gault, 387 U.S. 1 (1967), leaves no question that the juvenile court should be an adversary institution, the proper role of attorneys in juvenile court continues to be a matter of controversy and ambiguity. See generally Institute of Judicial Administration and American Bar Association, Standards Relating to Counsel for Private Parties (1976).

their own lack of adroitness in maneuvering through the juvenile justice system or the appearance (perhaps accurate) that they will be relatively unamenable to treatment.

Whatever the reasons for the apparent incompetence of many youth in the juvenile justice system in exercising their rights, there can be no question of its adverse consequences. Not only do juveniles often waive their rights to silence and counsel during interrogation, they often are not represented by counsel at any stage of the proceeding.130

B. A Psychological Approach to Due Process

1. Dual-Maximal Doctrine

After Gault, it is indisputable that the state's position is adverse to juvenilé respondents in delinquency proceedings and that minors' liberty is protected by the Constitution. In such a context, defenders of the juvenile court can offer no coherent justification in response to Irene Merker Rosenberg's plaintive "question why, in view of age and competency differentials, the child is given less [procedural] protection rather than more."131

As Professor Rosenberg persuasively argued, the logic of Gault implies a "dual-maximal approach" that combines "fundamental fairness" and "functional equivalence" in determining the procedures constitutionally necessary to protect the interests of juvenile respondents.132 In other words, in recognition of the obligation to provide due process, juveniles accused of delinquent offenses should be provided those rights that are necessary to fundamental fairness, even when such rights exceed those possessed by criminal defendants. At the same time, though, juvenile respondents should have all of the rights available to adult defendants, even those not necessarily a part of fundamental fairness as applied to adults, because juvenile proceedings are functionally equivalent to criminal trials. The dual-maximal approach is desirable because "it applies to children all the guarantees already applicable to adult criminal defendants, while also permitting enhanced protection of children because of their vulnerability and im-

130. I. Schwartz, supra note 127, at 153-57. Case law originating in criminal cases shows unmistakably that the requisites for competency to waive the right to counsel are stringent, indeed higher than for any other competency in the criminal process. See G. Melton, J. Petrilla, N. Poythress & C. Slogobin, Psychological Evaluations for the Courts: A Handbook for Mental Health Professionals and Lawyers 99-100 (1987) and cases cited therein. Therefore, it is hard to believe that juvenile courts are exercising due care in accepting waivers of respondents' right to counsel.

131. Rosenberg, supra note 20, at 659.

132. Id. at 661-73. See also Feld, Criminalizing Juvenile Justice: Rules of Procedure for the Juvenile Court, 69 Minn. L. Rev. 141 (1984).
maturity without making the additional protection automatically available to adults."133

2. An Example: The Privilege Against Self-Incrimination

The implications of Professor Rosenberg's theory, to which I also subscribe, can be demonstrated by analysis of the Supreme Court's decision in *Fare v. Michael C.*134 In *Fare*, the Supreme Court held that a juvenile's request for his probation officer during police interrogation was not per se an invocation of *Miranda*135 rights. Further, applying a totality-of-the-circumstances test, the Court held that Michael C. had made a competent waiver of his rights. The Court did so despite the facts that Michael C. had suspected that any attorney provided by the police would in fact be an undercover police officer;136 that he trusted and asked for his probation officer;137 and that he was immature, emotional, and uneducated.138 Michael C.'s request for the assistance of a trusted adult was functionally equivalent to an adult's request for an attorney and should have been regarded as an invocation of the right to silence and the corollary right to counsel under *Miranda*.139 Indeed, Professor Grisso's findings about the misunderstanding of fifth

---

133. Rosenberg, supra note 20, at 671.
137. Michael's probation officer had advised Michael to contact him whenever he had a police contact. *Id.* at 712.
138. This description of Michael was provided by Justice Powell, *id.* at 733, who concurred that a request for a probation officer is not per se an invocation of *Miranda* rights, but who dissented from the holding that Michael had made a competent waiver of his rights.
139. See *Melton*, supra note 117, at 74-76. The Court was concerned that recognition of a juvenile's request for a probation officer as an invocation of the right to silence would open the door to similar rules regarding "one's football coach, music teacher or clergyman." *Fare v. Michael C.*, 442 U.S. 707, 714, reh'g denied, 444 U.S. 887 (1979). However, such an expansion is a logical corollary to the fifth amendment-based right to counsel under *Miranda*. After all, when an adolescent has never been permitted independently to contract for professional services before, why should he be expected to call an attorney when he is in the unusual and difficult situation of interrogation for a serious crime?

If the assistance of counsel is needed to render the privilege against self-incrimination meaningful for competent adults, surely such protection should also be available to juvenile suspects. See *In re Gault*, 387 U.S. 1, 47 (1967)("It would indeed be surprising if the privilege against self-incrimination were available to hardened criminals but not to children."). As a practical matter, to achieve such protection absent automatic provision of counsel during interrogation, a court should treat a juvenile's request for a trusted adult in terms of both its plain meaning (i.e., access to the adult friend or relative should be provided) and its implicit meaning of a request for legal assistance (i.e., interrogation should be halted until the juvenile's attorney is present and advises his or her client to "talk").
and sixth amendment rights that is endemic among juvenile respondents logically lead further: confessions of juveniles should not be admitted unless counsel was present during interrogation.140

Although the privilege against self-incrimination may be unnecessary to fundamental fairness,141 the doctrine of functional equivalence ensures that juveniles are provided at least those rights that are owed criminal defendants. Once the right has been applied, the doctrine of fundamental fairness requires that its application is meaningful. The latter doctrine leads in some circumstances to rights that are broader for juveniles than for similarly situated adults.

Therefore, not only should the right to silence be unwaivable by juveniles without the advice of counsel, but the right to counsel itself should not be waivable by juveniles except in extraordinary cases, if at all.142 Indeed, the policy of promotion of the appearance and fairness of adjudication of charges of delinquency implies the need for a juvenile court, but the court should be a "super-court" rather than a quasi-social-service agency dispensing a watered-down form of justice.

3. The Need for Empirical Data

In designing the new juvenile court, the overarching question should be the nature and scope of procedures needed to ensure both that respondents are treated fairly and that they feel they are being treated fairly. In other words, legal policymakers should explore the procedural forms necessary to make justice meaningful, in all senses of that word.

For example, the Supreme Court has refused to extend the right to a jury trial to juveniles.143 It has done so because of a nostalgic desire to save a court whose time has passed.144 If Gault were to be taken

140. Grisso, supra note 117, at 1161-63.
142. As already noted, supra note 130, fair application of existing law affecting criminal defendants should result in few, if any, valid waivers of counsel by juvenile respondents. Nonetheless, data on the frequency of waivers permitted by juvenile courts, supra note 130, indicate the need for a stronger standard therein.

I recognize that such an approach would result, in a sense, in fewer rights for juveniles. See Faretta v. California, 422 U.S. 806 (1975) (when the waiver of counsel is knowing, intelligent, and voluntary, the sixth amendment requires courts to permit defendants to proceed pro se). However, research on juveniles' waiver of the right to counsel shows that extraordinary care is necessary if such a waiver is to be executed competently by a juvenile. The assistance of counsel is so important to an adequate defense that some abrogation of the right to self-representation is likely in most cases to ensure greater protection of juveniles' rights.

144. Consider the following quote from McKeiver in the light of the Gault attack on the juvenile court as a "kangaroo court": "There is a possibility, at least, that the jury trial, if required as a matter of constitutional precept, will remake the juve-
seriously, there should be no question of the applicability of the sixth amendment to juveniles under the doctrine of functional equivalence. Nonetheless, the need to preserve fundamental fairness leaves open the question whether the jury must be reshaped to fulfill its purposes when applied to juveniles.\textsuperscript{145} If the sense of equity that the jury embodies\textsuperscript{146} is to be preserved for juveniles, then its form may require some alteration, while not negating the right itself.\textsuperscript{147}

The example of the possible application of the right to trial by jury raises the broad need for psychological research on juvenile procedure, because evidence now is lacking about the meaningfulness of particular procedures when applied in juvenile court. Perhaps under the auspices of the State Justice Institute, the National Center for State Courts, or a similar organization, a large research program is needed to test the effects of various procedures; to determine the symbolism of the procedures; and to identify the specific procedures that are most likely to help juveniles take an active role in their defense, but that still provide due protection of their interests. The initial attempts to establish a new juvenile court in the spirit of \textit{Gault} should be accompanied by appropriate evaluation research and should be modified in keeping with the results of such studies.\textsuperscript{148}

\begin{quote}
"nile proceeding into a fully adversary process and will put an effective end to what has been the idealistic prospect of an intimate, informal protective proceeding." McKeiver v. Pennsylvania, 403 U.S. 528, 545 (1971).
\end{quote}
\textsuperscript{145} In Williams v. Florida, 399 U.S. 78 (1970), the Supreme Court identified the primary purpose of the jury as being the prevention of state oppression, a purpose that is met through "the interposition between the accused and his accuser of the commonsense judgment of a group of laymen, and in the community participation and shared responsibility that results from that group's determination of guilt or innocence." \textit{Id.} at 100. It is at least plausible that such "community participation and shared responsibility" is experienced differently when juveniles are judged.

\textsuperscript{146} \textit{Id.} See also Melton, \textit{Introduction: The Law and Motivation}, in 33 \textit{NEB. SYMP. ON MOTIVATION: THE LAW AS A BEHAVIORAL INSTRUMENT} xvii-xviii (G. Melton ed. 1985)(the significance of the jury may rest primarily in the symbolism entailed in "the expression of the community conscience" and the resulting effects on perceived justice).

\textsuperscript{147} An underlying issue in \textit{McKeiver} may have been the conceptual difficulties in constituting a jury of a juvenile's peers. McKeiver v. Pennsylvania, 403 U.S. 528 (1971).

\textsuperscript{148} A general need in psycholwgeal research is for analysis of the effects of various innovations ("natural experiments") by legislatures and courts by comparing trends across jurisdictions. Steadman, \textit{Mental Health Law and the Criminal Offender: Research Directions for the 1990's}, 39 \textit{RUTGERS L. REV.} 323, 328 (1987). The University of Nebraska's Center on Children, Families, and the Law is the hub of a consortium combining the efforts of similar centers at six universities and in several professional organizations and policy centers. Such a multistate consortium is especially well situated to evaluate the impact of significant juvenile reform when some states do begin to take \textit{Gault} more seriously.
4. The Role of Counsel

As should be obvious by now, I expect that the range of procedures necessary to fundamental fairness in juvenile court is sufficiently disparate from criminal court to merit the existence of the former. I do not expect, though, that a specialized bench is necessary to such a court.\textsuperscript{149} The more lawful the court is, presumably the less need there is for a specialized judiciary.\textsuperscript{150} The sorts of decisions that a judge must make in the new juvenile court should be similar to those in criminal courts and, therefore, well within the expertise of general-jurisdiction judges.

On the other hand, there may be a need for a specialized bar in the new juvenile court. By stating this conclusion I do not mean to imply that attorneys for juveniles should depart from the role of zealous advocate. It is exceedingly rare that children appear in delinquency proceedings when they are so young that they cannot reasonably instruct legal counsel,\textsuperscript{151} an event that is likely to be even more uncommon when the defense of infancy is restored.

Given the just presumption that litigating parties should have the opportunity to have their say,\textsuperscript{152} ascription of a lesser role to juvenile clients establishes an untenably high threshold for assistance in one's defense, as the drafters of the Juvenile Justice Standards recognized:

\begin{quote}
It has sometimes been suggested that all or most of a juvenile court lawyer's clientele is not sufficiently mature to instruct counsel in any usual sense and that counsel must, therefore, usually act as guardian or amicus curiae. The proponents of this view often tend, however, to equate competence with capacity to weigh accurately all immediate and remote benefits or costs associated with the available options. In representing adults, wisdom of this kind is not required; it is ordinarily sufficient that clients understand the nature and purposes of the proceedings, and its general consequences, and be able to formulate their desires concerning the proceeding with some degree of clarity. Most adolescents can meet this standard, and more ought not to be required of them. To do so would, in effect, reintroduce the identification of state and child by imposing on respondents an "objective" definition of their interests.\textsuperscript{153}
\end{quote}

In the instances in which juvenile respondents do not meet such a

\textsuperscript{149} Even under existing juvenile procedure, the necessity of a specialized bench is questionable. For example, Nebraska has a traditional juvenile code; see, e.g., Neb. Rev. Stat. § 43-245 (1988). Nonetheless, only three Nebraska counties have separate juvenile courts with specialized judges. Neb. Rev. Stat. § 43-2,111 (1988).

\textsuperscript{150} The American Bar Association has favored rotation of general-jurisdiction judges through the juvenile or family court. A.B.A. JUVENILE JUSTICE STANDARDS RELATING TO COURT ORGANIZATION AND ADMINISTRATION §§ 1.1 & 2.1 (1980).

\textsuperscript{151} See A.B.A. JUVENILE JUSTICE STANDARDS RELATING TO COUNSEL FOR PRIVATE PARTIES pt. III & commentary (1980) [hereinafter A.B.A.].

\textsuperscript{152} See supra notes 111-17 and accompanying text.

\textsuperscript{153} A.B.A., supra note 151, commentary at 8.
low standard, they should be declared incompetent to proceed.\textsuperscript{154} That possibility negates any possible question about cases in which an attorney might need to move away from an advocate's role.

Attorneys' ethical duty to represent their clients' interests as defined by the client does not mean, of course, that they should abandon any counseling role.\textsuperscript{155} Indeed, effective representation requires substantial investment of time and effort in educating clients about their rights and the options available to the court and the clients themselves. When significant misunderstanding or ignorance about such matters is present, as it often is with juvenile clients, that investment should increase proportionately.

Effective representation of juveniles does not imply simply an increased allotment of time to counseling. The nature of the counseling also may be qualitatively different. Attorneys representing juveniles should be knowledgeable about the nature of common gaps or errors in juveniles' information about the legal process; the kinds of interventions that are necessary to persuade juveniles that their rights are indeed entitlements; the range of dispositional alternatives (especially those that are relatively unrestrictive) available to the court; and the formal and informal procedural innovations that are useful in promoting juveniles' active involvement in their defense and in ensuring that they are treated fairly and perceive that they have been so treated.

Beyond such specialized knowledge, obviously including knowledge about the law that is specific to juvenile procedure, attorneys representing juveniles should have skills in relating to young clients. Specialized clinical courses and clerkships would be desirable.

Whether such expertise can be easily acquired by practicing lawyers who occasionally handle juvenile cases is an empirical question that ultimately should be answered through empirical research. However, I am skeptical. It is at least plausible that lawyering in the juvenile court—ensuring that juvenile respondents are full adversaries—will require development of a specialized bar.

\textbf{IV. THE PROBLEM OF RESPONSIBILITY: A RETURN TO THE PAST IN THE NEW JUVENILE COURT}

If the juvenile court is to be based primarily on protection of the process due children and youth in an adverse relation to the state, some consideration still must be given to the problem of responsibility. Even if the general presumption of irresponsibility that has guided the juvenile court cannot be justified, surely there are children who are so

\begin{flushright}
\textsuperscript{154} In re Causey, 363 So. 2d 472 (La. 1979); In re S. W. T., 277 N.W.2d 507 (Minn. 1979). See Grisso, Miller & Sales, \textit{Competency to Stand Trial in Juvenile Court}, 10 INT'L J. L. & PSYCHIATRY 1 (1987).
\textsuperscript{155} A.B.A., supra note 151, commentary at 8-9.
\end{flushright}
immature that their behavior would be properly excused. Although prosecution in such an instance is unlikely to say the least, a two-year-old accused of assault and battery on a playmate in the sandbox surely does not deserve criminal punishment, regardless of the malicious, premeditated manner in which sand was thrown.

As the rehabilitative underpinnings of the juvenile court have withered away, courts have increasingly been faced with the problem of determining individual juveniles' responsibility, especially in those jurisdictions in which punitive purposes have been expressly recognized in juvenile codes. In such cases, the question is whether the existence of a juvenile court, even a punitive juvenile court, obliterates the need to resurrect the defense of infancy that applied in criminal law prior to the invention of an ostensibly benevolent court for wayward youth.

In the same manner that pre-Gault courts conclusorily rejected criminal procedural protections in a "civil" juvenile court, some courts have summarily rejected the application of the defense of infancy when the juvenile court still exists. For example, the Rhode Island Supreme Court upheld the finding of delinquency of a twelve-year-old boy accused of raping a five-year-old girl, despite the respondent's attempt to assert an infancy defense:

Once one accepts the principle that a finding of delinquency or waywardness in a juvenile proceeding is not the equivalent of a finding that the juvenile has committed a crime, there is no necessity of a finding that the juvenile had such maturity that he or she knew what he or she was doing was wrong.

Dissenting Justice Feldman understood the critical issue, though. Recalling the United States Supreme Court's insights in Gault, he concluded that failure to provide criminal defenses like the defense of infancy in juvenile court was necessarily dependent on a ruse:

What the State cannot do is impose criminal sanctions upon a juvenile under the guise of treatment or rehabilitation, when confinement and incarceration is the likely or possible result. Allowing criminal prosecution and punishment by the simple expedient of calling such prosecution "civil" or "rehabilitative" confers too much dignity on juvenile court euphemisms. It is only to the love-struck poet that stone walls do not a prison make, nor iron bars a cage. To the rest of mankind, to be "awarded" to the department of corrections and put behind stone walls or iron bars is to be in prison, even if it is called "juve-

---

156. See Gardner, supra note 34, at 132 n.17, and authorities cited therein.
Those courts that have found the defense of infancy to apply in juvenile court often have seemed to take a result-oriented approach that may have satisfied the court's sense of justice in the particular case but failed to address fully the principle at issue. For example, in finding that the New York Family Court Act does not obliterates common-law presumptions in regard to the defense of infancy, a family court judge gave a colorful account of the adjudication of an eight-year-old boy charged with burglary and possession of stolen property:

Standing at full height, the top of Andrew's head barely clears the counsel table in the courtroom.

One look at this respondent is sufficient to prompt the conclusion that the juvenile justice system clearly was not designed for his level of maturity and development. Despite the fact that he meets the technical definition of the jurisdictional statute [regarding age]..., the court has serious doubts that he is capable of understanding concepts of criminal liability or any facets of the judicial process in which he finds himself.

Similarly, even though faced with a specific statutory disavowal of the defense of infancy, a New Jersey court dismissed charges of aggravated sexual assault against three boys, aged six through nine, who had forcibly penetrated the vagina of a six-year-old girl with their fingers. The court found that the boys were incapable of understanding the “intangible elements” and “symbolic knowledge” required for a “knowing sexual penetration.” The court concluded that the state’s interests would not be harmed by a failure to assume jurisdiction over “juveniles who are simply too young to be capable of behavior needful of state oversight.”

One state supreme court has given forthright attention to the implications of Gault for consideration of juveniles’ responsibility for delinquent behavior. In the state with a juvenile justice system most closely tailored to fit a retributive model, the Washington Supreme Court

160. Id. at 814, 398 N.Y.S.2d at 825. The court’s opinion was not purely result oriented. Noting the compatibility between post-Gault conceptions of the juvenile court and recognition of the defense of infancy, the court concluded that the idea that the juvenile court is “almost criminal” is “a historical vestige with roots in pre-Gault philosophy which falls in the face of the reality of minimum periods of secure incarceration” required under recent legislation. Id. at 815, 398 N.Y.S.2d at 826.
161. N.J. STAT. ANN. § 2C:14-5(b) (West 1982).
163. Id. at 233, 514 A.2d at 856.
164. Id.
Court unanimously held that the newly defined "criminal nature" of juvenile proceedings made the infancy defense applicable.\textsuperscript{166}

Assuming, as \textit{Gault} makes clear, that juvenile proceedings are quasicriminal, the defense of infancy should be available to those children who fall within its historic bounds. Complete exoneration of some children does not mean, though, that those youth who are responsible for their misdeeds should be subject to the full force of the criminal law. As I have already discussed, recognition that juveniles are responsible still leaves room for mitigation because of immaturity.\textsuperscript{167} Although such a partial responsibility theory could be accommodated within criminal courts by an age-graded sentencing scheme,\textsuperscript{168} it also is consistent with the model of a new juvenile court which I am proposing.\textsuperscript{169} If juveniles are to be subjected to \textit{any} punishment, then they should be provided the protections embedded within criminal procedure, modified as necessary to ensure that such procedures meet the special demands of fundamental fairness as applied to youth.

\textbf{V. CONCLUSIONS}

Despite the fact that the juvenile court is a relatively recent development in Anglo-American jurisprudence, it has seemed firmly established as a stable legal institution. It has remained so even though its underlying assumptions have been discredited, many of its unique features were eliminated by \textit{Gault} and its progeny, and the court's remaining special aspects have been the object of criticism from both the left and the right.

The time has come to take seriously the message of \textit{Gault} and to institute procedures designed to facilitate justice for juveniles accused of delinquent behavior. Mental health professionals long have been misused in juvenile court to sustain the illusion of a therapeutic institution operating in youth's behalf. Perhaps through critical examination of the court's assumptions and the perceived justice of its procedures (current and potential), psychologists and other behavioral scientists can begin to be used in the service of a more just institution.


\textsuperscript{168} Such an approach was taken under the Youthful Offenders Act that formerly guided sentencing of young adults in federal criminal courts.

\textsuperscript{169} Although I am arguing on other grounds for maintenance of the juvenile court (albeit in substantially altered form), my proposal also would satisfy the need that Professor Gardner has articulated for a separate juvenile court in order to preserve the appearance of reduced culpability of juvenile offenders. \textit{See supra} notes 34-36 and accompanying text.
A NEW JUVENILE COURT

affecting children and youth. For example, psychologists can assist in
developing and applying the knowledge necessary to teach youth how
to use their rights. Similarly, they can evaluate procedures to deter-
mine those that enable youth really to have their say and to feel that
they were treated fairly.

At the same time, withdrawal of reliance on the juvenile court is
likely to make the child mental health and social service systems more
protective of the privacy and autonomy of child clients and thus more
humane and just. Not only have juvenile courts misused mental
health professionals; mental health professionals also have misused
juvenile courts as a coercive “therapeutic” instrument. With a truly
new juvenile court, the integrity of both the justice system and the
human service system is likely to prosper.

In reaching such conclusions, I am mindful of the difficulty of the
task. As Professor Feld noted, “[t]he juvenile court has demonstrated
a remarkable ability to deflect, co-opt, and absorb ameliorative reform
virtually without institutional change.” Nonetheless, the interests
at stake are fundamental. More than twenty years after Gault, it is
certainly time to consider carefully its implications and to design, eval-
uate, and implement procedures consistent with meaningful justice
for youth.

170. An example of such an abuse of the juvenile justice system is the practice that I
have observed occasionally of a mental health or social service professional’s fil-
ing a status offense petition in order to attempt to force another agency to provide
services, pursuant to a court order. Given the statutory label of “children in need
of services” (“CHINS kids”) for status offenders in many jurisdictions, what
could be a better example than a child who apparently needs court jurisdiction in
order to receive services? Such a strategy is obviously flawed, though, by its im-
position of a de facto punitive sanction against an individual child when “the sys-
tem” is the culprit. Similar problems are present when agencies attempt to
compensate for their own understaffing by use of the court’s “hammer” and staff
resources to ensure that juvenile clients comply with treatment plans.

171. Feld, supra note 132, at 276.