In Re Gault and the Persisting Questions of Procedural Due Process and Legal Ethics in Juvenile Courts

H. Bruce Hamilton

University of Nebraska College of Law

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IN RE GAULT
AND THE PERSISTING QUESTIONS
OF PROCEDURAL DUE PROCESS AND LEGAL ETHICS
IN JUVENILE COURTS*

I. INTRODUCTION

"[N]either the Fourteenth Amendment nor the Bill of Rights is for adults alone."  

With this seemingly obvious statement, the United States Supreme Court has carried the modern day revolution in the area of criminal procedure into the juvenile courts. Although this decision, which seems destined to promote great changes in the juvenile court systems of the country, undoubtedly dismayed some, it actually surprised few. Those who have been aware of the recent ferment in the juvenile court movement were probably only curious as to why such a decision was not reached much sooner.  

In fact, during the past two decades, the legal fraternity and the appellate courts have been questioning with increasing regularity the lack of legal procedure and due process of law in juvenile courts.

Though the implications of Gault, the subject of this article, are clouded with uncertainty, the Court's primary holdings may be simply stated:

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*After the completion of this article the Supreme Court granted certiorari in another juvenile case. In the Matter of Whittington, No. 701, O.T. 1967. This case raises issues as to standard of proof and other fact finding procedures in juvenile delinquency hearings as well as problems of interrogation and detention of juveniles, all unresolved by the Court in Gault.

1 In re Gault, 387 U.S. 1, 13 (1967). The Supreme Court's decision was eight-to-one, with Justice Fortas writing the majority opinion. Justice Stewart dissented and Justice Harlan concurred in part and dissented in part. Separate concurring opinions were submitted by Justice Black and Justice White.  

2 In 1963 it was stated that "the juvenile court is now in the third stage in the cycle of social reform: reforms, regrets and revisions." Dembitz, Ferment and Experiment in New York: Juvenile Cases in the New Family Court, 48 CORNELL L.Q. 499 (1963) [hereinafter cited as Dembitz].  


4 The facts in Gault are examined at length in the Court's opinion. It is sufficient to note that Gerald Gault, aged 15, was taken into custody as the result of a neighbor's complaint that he had made lewd tele-
1) The due process clause of the Fourteenth Amendment applies in cases which may result in the juvenile's commitment to a state institution.

2) Notice of charges against the juvenile must be furnished to the child and his parents or guardian prior to the court proceedings and must "set forth the alleged misconduct with particularity." The commonly used general allegations of delinquency are no longer acceptable.

3) The child and his parent must be advised of their right to counsel and if they are unable to afford counsel, of the right to court appointed counsel. The child and parent may, however, waive the right to legal representation.

4) The privilege against self-incrimination is applicable and juveniles must be adequately apprised of their right to remain silent.

5) Absent an adequate and valid confession, confrontation and sworn testimony by witnesses available for cross-examination are essential for a finding of delinquency.

Previously such fundamental rights, upon which our country's methods of promoting justice are based, have not been considered an essential element of the juvenile court process.\(^5\) The reformers who designed the juvenile court system\(^6\) believed the application

\(^5\) The United States Supreme Court did previously acknowledge the criticism of this lack of fundamental rights by stating that there are "serious questions as to whether actual performance measures well enough against theoretical purpose to make tolerable the immunity of the process from the reach of constitutional guarantees applicable to adults." Kent v. United States, 383 U.S. 541, 555 (1966) (dictum). However, the constitutional questions were not confronted in Kent as the case turned on a statutory interpretation. For a thorough analysis of the Kent decision, see Paulsen, Kent v. United States: The Constitutional Context of Juvenile Cases, 1966 Sup. Cr. Rev. 167.

\(^6\) The first juvenile court was established in Chicago in 1899. For accounts of the origin and evolution of the juvenile court see, e.g., Nicholas, History, Philosophy, and Procedures of Juvenile Courts, 1 J. FAMILY L. 151 (1961); Ludwig, Rationale of Responsibility for Young Offenders, 29 Neb. L. Rev. 521 (1950); Mack, The Juvenile Court, 23 Harv. L. Rev. 104 (1909).
of criminal penalties to juveniles was overly harsh. They sought to protect youth through the doctrine of \textit{parens patriae} (sovereign power of guardianship). Relying on this concept, the notion of a sheltering juvenile court was developed. This court was held to be civil, not criminal,\textsuperscript{7} and was to be helpful and rehabilitative rather than punitive in nature. In theory, the court was to treat youth guilty of criminal acts in non-criminal ways. Consequently, procedural protections afforded defendants in the criminal courts would not be applicable in the juvenile court.\textsuperscript{8} The primary objective of this revolutionary movement was to afford \textit{additional} protection to the vulnerable child; however, prior to the enactment of juvenile acts, criminal prosecutions against juveniles were the same as those against adults, including the same procedural safeguards.\textsuperscript{9} Under the guise of expanded juvenile protection, these procedural rights were removed from the process\textsuperscript{10} and herein has reposed the peculiar paradox of the juvenile courts.\textsuperscript{11}

The juvenile court movement flourished under this concept. No one could quarrel with the idea of enlarged protection for needy juveniles. Such children were to receive individualized attention

\begin{itemize}
  \item \textsuperscript{7} Each of the fifty states has adopted a juvenile court system and in each state it has been held that such proceedings are not criminal cases. \textit{See} \textit{Pee v. United States}, 274 F.2d 556, 561 (D.C. Cir. 1959) for an appendix of citations to such authority on a state by state basis.
  \item \textsuperscript{8} It was originally thought that due process was not at all applicable in juvenile cases. \textit{Commonwealth v. Fisher}, 213 Pa. 48, 56-57, 62 A. 198, 201 (1905). Today most states grant some piecemeal elements of adult due process to juveniles. The rights afforded the juvenile may even vary within a given state.
  \item \textsuperscript{9} \textit{In re Poff}, 135 F. Supp. 224, 225 (D.D.C. 1955).
  \item \textsuperscript{11} Justice Fortas has indicated "there is evidence, in fact, that there may be grounds for concern that the child 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, 559 (1966).  
\end{itemize}
relating to the sources of their delinquency and individualized treatment according to their needs. Consequently a wide procedural discretion was given to the juvenile court judge to ascertain whether a child was delinquent and to apply the rehabilitative techniques needed under the particular circumstances.

Furthermore, in order to reach youth in need of the services of this specialized court, jurisdiction was allowed to include cases in which the child was not accused of violating any law. Most juvenile court statutes provide for original jurisdiction over dependent, neglected, and wayward children as well as over delinquent children who have actually violated a law.\(^\text{12}\)

Thus, an entirely novel system, designed to protect youth, was born. The movement began with the highest of aspirations and was met with immediate acceptance. Certainly if such aspirations had been realized, the juvenile court system would have prospered without serious challenge or attack. Unfortunately the juvenile courts have failed to achieve their goals and have been relentlessly criticized in recent years. As the President's Commission on Law Enforcement and Administration of Justice\(^\text{13}\) stated:

> Studies conducted by the Commission, legislative inquiries in various States, and reports by informed observers compel the conclusion that the great hopes originally held for the juvenile court have not been fulfilled. It has not succeeded significantly in rehabilitating delinquent youth, in reducing or even stemming the tide of juvenile criminality, or in bringing justice and compassion to the child offender.

To say that juvenile courts have failed to achieve their goals is to say no more than what is true of criminal courts in the United States. But failure is most striking when hopes are highest.\(^\text{14}\)

Although the challenge to the juvenile courts has in some measure existed only on the periphery of the broader struggle for protection of the rights of persons threatened with state intervention in their daily lives, special considerations are applicable to the juvenile court and have been the subject of individualized criticism. Such criticisms have been founded on the fact that juvenile court procedures do result in significant governmental restraint upon individual freedom without consent. No matter how benevolent the motives, such interference must be clearly justifiable in order to allow the denial of constitutional procedures. It is argued that the


\(^{13}\) The President’s Commission on Law Enforcement and Administration of Justice, Task Force Report on Juvenile Delinquency and Youth Crime (1967). [hereinafter cited as Task Force].

\(^{14}\) Id. at 7.
present system fails to meet the need for an accurate determination of the facts and that the resulting adjudication of delinquency has become as stigmatizing as being convicted as a criminal. The promise of rehabilitation has failed and it is apparent that the juvenile court system is not single-mindedly devoted to the needs of the child but in fact has assumed the same purposes that mark the criminal law. Thus, it is argued that current practices of governmental interference are not justified and that statistics further show that the exemption of constitutional rights is not warranted. It is further contended that juvenile courts sometimes treat children arbitrarily, that scientific knowledge is not so accurate as to reliably predict future behavior, \(^{15}\) and that the institutions to which children are sent, despite their lofty purpose, are frequently little better than prisons for the young. \(^{16}\) In summary, it has been stated that:

In theory the court's operations could justifiably be informal, its findings and decisions made without observing ordinary procedural safeguards, because it would act only in the best interest of the child. In fact it frequently does nothing more nor less than deprive a child of liberty without due process of law—knowing not what else to do and needing, whether admittedly or not, to act in the community's interest even more imperatively than the child's. In theory it was to exercise its protective powers to bring an errant child back into the fold. In fact there is increasing reason to believe that its intervention reinforces the juvenile's unlawful impulses. In theory it was to concentrate on each case the best of current social science learning. In fact it has often become a vested interest in its turn, loath to cooperate with innovative programs or avail itself of forward-looking methods. \(^{17}\)

The juvenile court is viewed by the public at large as well as by the children with whom it deals as a court of criminal law. It has seemed unthinkable to the critics that constitutional rights could be circumvented by the simple expedient of labeling the proceedings "non-criminal" and yet this, in effect, is what had been permitted. Consequently the growing ranks of the dissenters have been urging that the juvenile court's jurisdiction be limited to children who have been accused of violating laws and that legal norms be

\(^{15}\) As an objection to such "anticipatory controls" it has been argued that: "a sick person has a right not to be treated; it is only when he becomes contagious that he may be quarantined. The same principle of social protection must be applied to the treatment of delinquent children...." Nunberg, Problems in the Structure of the Juvenile Court, 48 J. Crim. L.C. & P.S. 500, 507 (1958).

\(^{16}\) See Handler, The Juvenile Court and the Adversary System: Problems of Function and Form, 1965 Wis. L. Rev. 7; Paulsen, Fairness to the Juvenile Offender, 41 Minn. L. Rev. 547 (1957) [hereinafter cited as Paulsen].

\(^{17}\) Task Force, supra note 13, at 7.
adhered to so that the rights of all children to their freedom may be protected.

The prevalence of juvenile crime is growing ever more alarming and the rising juvenile crime rate tends to substantiate the criticism leveled at the juvenile court system. One in every nine children will be referred to a juvenile court for an act of delinquency before his eighteenth birthday. Considering boys alone, the ratio is one in every six. Specifically,

Arrests of persons under 18 for serious crimes increased 47 percent in 1965 over 1960; the increase in that age group population for the same period was 17 percent. In 1965, persons under 18 referred to juvenile court constituted 24 percent of all persons charged with forcible rape, 34 percent of all persons charged with robbery, 52 percent of all persons charged with larceny, 61 percent of all persons charged with auto theft.

To support its conclusion in Gault, the Court also referred to a study of the Stanford Research Institute which found a high degree of recidivism among juvenile offenders in California during 1965 and 1966. Reliance on these statistics has been criticized on the grounds that they are merely empirical data, but the Court stated that it was unable "... to conclude that the absence of constitutional protections reduces crime, or that the juvenile system, functioning free of constitutional inhibitions as it has largely done, is effective to reduce crime or rehabilitate offenders."

All the criticisms of the juvenile court cannot be directed at the system alone. The blame must also be placed on the legal profession and the community as a whole. Most lawyers have shown little interest in the juvenile court process, many law schools relegate it to a minor role in their curriculum or ignore it completely, and the community has shown continuing unwillingness to provide the resources necessary for realizing the court's potential. This was the state of affairs when the United States Supreme Court entered the controversy and began filling the gap vacated when others chose to abrogate their responsibilities.

Of course it could be argued that the juvenile crime rate might be even more alarming were it not for the juvenile courts. One can only say that if these statistics represent success we certainly cannot afford failure!

19 1965 FBI Uniform Crime Reports 23.
20 In re Gault, 387 U.S. 1, 22 (1967).
22 In re Gault, 387 U.S. 1, 22 (1967).
The most apparent question in relation to *Gault* is: Just how sweeping is this decision? Clearly the decision did not make all the procedural due process safeguards afforded the accused in a criminal proceeding applicable to the juvenile courts. But, if the Bill of Rights and the Fourteenth Amendment are for the young as well as the old, how can the juvenile, threatened with a loss of freedom, be entitled to anything less than the full range of constitutional safeguards made available to the similarly threatened adult?

Furthermore, the Court's opinion does not make clear at what point these limited new juvenile rights spring into being. Mr. Lefstein claims that the rules enumerated by the Court "are aimed solely at reshaping procedures during the juvenile court's adjudication hearing."\(^{24}\) The Court does state that its holding is concerned with neither "procedures or constitutional rights applicable to the pre-judicial stages of the juvenile process, nor ... to the post adjudicative or dispositional processes."\(^{25}\) Yet Lefstein's conclusion still seems dubious at best, for the Court, when dealing with the privilege against self-incrimination, states that "the participation of counsel will, of course, assist the police, juvenile courts and appellate tribunals in administering the privilege."\(^{26}\)

The majority opinion in *Gault* does not definitively resolve the issue of the nature of the juvenile proceedings. The question of whether juvenile proceedings are criminal or civil is not answered explicitly. The Court does state, however, that "proceedings to determine 'delinquency,' which may lead to commitment to a state institution, must be regarded as 'criminal' for purposes of the privilege against self-incrimination."\(^{27}\) It may be implied from these statements as well as from a thorough study of the entire opinion, that the Court is in fact speaking in broader terms than many are willing to believe.

It is the author's firm belief that further steps will be taken by our courts and legislatures to insure that further constitutional requirements of procedural due process are afforded to juveniles faced with the possibility of a loss of their freedom. It is clear that the turmoil in the juvenile court movement has not yet died, for other issues of procedural due process surely will be debated in the immediate future. It will be the purpose of this paper to explore these "new" issues as well as the problems attorneys must confront as they enter into the juvenile court process in increasing numbers and with increasing regularity.

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\(^{24}\) Lefstein, *supra* note 22, at 812.  
\(^{25}\) *In re Gault*, 387 U.S. 1, 13 (1967).  
\(^{26}\) Id. at 55 (emphasis added).  
\(^{27}\) Id. at 49.
II. PROCEDURAL DUE PROCESS

The Supreme Court of Arizona held in Gault that due process of law is requisite to the constitutional validity of proceedings which may result in committing the juvenile to an institution in which his freedom is curtailed. The United States Supreme Court had agreed that "the basic requirements of due process and fairness" must be satisfied in such proceedings. However, as outlined above, the United States Supreme Court, while concurring with the Arizona court that juveniles were entitled to due process guarantees, differed completely as to what rights were therefore fundamental. Since the Supreme Court limited its ruling only to those problems actually presented in the case, the determination of the full impact of the due process requirement upon juvenile proceedings remains unresolved. In short, a determination must be made as to what rights are to be guaranteed by due process.

The concept of due process continues to convey various meanings to different people. Anything but certainty has marked its history and In re Gault provides no exception to that record. It is not the purpose of this article to focus on the historical development of the due process clause or to analyze the various theories which have been relied on in determining that a specific right is or is not contained within that guarantee. Yet the Court's concept of the relationship between the due process clause of the Fourteenth Amendment and juvenile court procedures must be grappled with if one is to attempt to forecast how far the Court may extend its holding in the future.

Unfortunately the Court provides no clear test for ascertaining what rights are required by the due process clause in a juvenile court proceeding. The Court merely concludes that the Constitution necessitates "the procedural regularity and the exercise of care implied in the phrase 'due process.'" The Court states that the rights considered in Gault are required because "fairness, impart-
tiality and orderliness—in short, the essentials of due process" must be met. Consequently, it is difficult to clearly determine by what standards the Court concluded that the Arizona proceedings failed to satisfy the obligations of due process.

The Court's failure to provide a clear standard for the measurement of the due process requirement in a juvenile proceeding is criticized by Mr. Justice Harlan in a separate opinion. He maintains that the due process clause allows the Court "to determine what forms of procedural protection are necessary to guarantee the fundamental fairness of juvenile proceedings." Such proceedings in his view are to be conducted "in a fashion consistent with the 'traditions and conscience of our people.'" This concept of the due process clause has been labeled as the "basic value theory" and would restrict the Court to prohibiting conduct that offends "a sense of justice" or "shocks the conscience." Measured by his test, Mr. Justice Harlan concludes that only three procedural requirements should be required of state juvenile courts: timely notice, right to counsel, and maintenance of a written record of the proceedings.

Mr. Justice Black, in his concurring opinion, strongly dissents from Harlan's concept of the due process clause and defends the "incorporation" theory that he has so ably promoted in the past. He concludes that the rights afforded in the Court's opinion should be clearly granted for the reason that they have been specifically provided for in the Bill of Rights and are applicable to the States. He concludes:

Appellants are entitled to these rights, not because "fairness, impartiality and orderliness—in short, the essentials of due process"—require them and not because they are "the procedural rules which have been fashioned from the generality of due process," but because they are specifically and unequivocally granted by provisions of the Fifth and Sixth Amendments which the Fourteenth Amendment makes applicable to the States.

Justice Black criticizes Harlan's view on the grounds that it claims "for the Court a supreme power to fashion new Bill of Rights safeguards according to the Court's notions of what fits tradition and conscience." Justice Black concludes that no such power is vested in the judges. He has long maintained that the due process clause of the Fourteenth Amendment incorporates the entire Bill of Rights.

33 Id. at 26.
34 Id. at 67.
35 Id. at 74.
36 Id. at 67.
37 Id. at 72.
38 Id. at 61.
39 Id. at 63–64.
and makes them applicable to the states. Since the rights in question in *Gault* have been incorporated, they clearly apply in the state juvenile courts. The Court did not adopt either of the rationales formulated by the two concurring justices but embarked on the same course of selective incorporation of the guarantees of the Bill of Rights into the Fourteenth Amendment that it has previously undertaken with respect to the rights of adults in criminal proceedings.⁴⁰

With these various views of the requirements of due process continuing to compete for acceptance it is difficult to attempt a forecast of future developments. Some procedural issues may be promoted on the grounds that they have previously reached constitutional proportions while others must be analyzed in the light of the requirements of fundamental fairness.

It will be the purpose of this section to focus attention on other procedural safeguards which generally continue to be denied the juvenile although generally afforded the adult who is accused of committing a crime. It is obvious that many of these procedures would be of lesser relevance in the case of the dependent, wayward, or neglected child. It is however, the author's belief that these "cases" should be removed from the juvenile court's jurisdiction.⁴¹ In any event, this section of the article will be primarily concerned with the juvenile who is accused of a crime. The issues presented are merely illustrative and not exhaustive.

A. PARTIALLY ANSWERED QUESTIONS

(1) COUNSEL

The issue of the right to counsel has been one of the most heated subjects of the juvenile court debate. The Supreme Court largely settled this question when it ruled in *Gault* that a juvenile has a right to counsel, appointed by the court if necessary in a case which might result in his confinement. Several questions remain unanswered concerning procedural due process and the right to counsel.⁴²

⁴⁰ Dorsen and Rezneck, *In Re Gault and the Future of Juvenile Law*, FAMILY L.Q. 1, 10-11 (1967). The authors of this article were counsel for the appellants in the United States Supreme Court in the *Gault* case.

⁴¹ Others have strongly recommended that the juvenile court's jurisdiction be limited. *See, e.g., Task Force*, supra note 13, at 84 & 91. The court's jurisdiction should be limited to children who violate laws and other agencies should assume responsibility for the remaining "cases."

⁴² This decision also confronts the legal fraternity with many challenging questions in the area of legal ethics. This subject is discussed separately below. *See Part III infra.*
First, when does the right to counsel arise? The holding in *Gault* appears to be limited to the actual hearing before the juvenile court.\(^4\) Procedural due process and fairness would seem to require that counsel be afforded the juvenile before the actual setting of the date for the hearing. Even if the child should willingly admit his guilt there remain the periods both before and after the hearing during which the right to have counsel present would seem to be fundamental. *Gideon v. Wainwright*,\(^44\) *Escobedo v. Illinois*,\(^45\) and *Miranda v. Arizona*\(^46\) have carried this reasoning into the criminal courts and have compelled the appointment of counsel at the earliest practical time—as soon as one is taken into custody and prior to interrogation. Since this right has assumed constitutional dimensions there seems to be no possible justification or plausible reason for denying counsel to the juvenile at the same point in time when counsel is granted to the adult. The right to counsel is without question the most important right in any proceeding. Without this representation all other rights lose their value. Furthermore it would seem that with both his age and experience against him, the juvenile has even a greater need for counsel than does the adult. It seems imperative that juveniles should have a right to counsel at the earliest possible moment after they are taken into custody.

Second, a question arises as to why the Court saw fit to limit the right to counsel to cases in which the juvenile may be institutionalized and his freedom curtailed. Limiting the right to counsel to such cases seems an unreasonable classification. The label of "delinquency" attaches regardless of the offense and the life-long stigma which all too often follows does not differentiate between institutionalization and a different disposition. Therefore, it follows that the necessity for counsel does not vary with the nature of the offense and the right ought to extend to all cases which may result in an adjudication of delinquency.\(^47\)

A third inquiry is whether the juvenile is entitled to counsel or to *competent* counsel. This issue is not unique to the juvenile courts. With the growing frequency of representation in criminal cases by court appointed counsel, the issue of the adequacy of repre-

\(^{43}\) As mentioned above, the scope of the holding may be broader than it appears at first glance.

\(^{44}\) 372 U.S. 335 (1963).


\(^{46}\) 384 U.S. 436 (1965).

\(^{47}\) P. TAPPAN, JUVENILE DELINQUENCY 192 (1st ed. 1944); Welch, Delinquency Proceedings—Fundamental Fairness for the Accused in a Quasi-Criminal Forum, 50 Minn. L. Rev. 653, 670 (1966) [hereinafter cited as Welch]; Dembitz, supra note 2, at 512.
sentation has arisen with greater frequency.\textsuperscript{48} Surely the juvenile or the adult who is represented by court appointed counsel has a right to genuine and effective representation.

(2) \textbf{WAIVER}

The Supreme Court held in \textit{Gault} that the right to counsel, appointed by the court if necessary, could be waived by the child and his parents.\textsuperscript{49} It would appear that allowing this right to be waived opens the door to the possibility of subtle manipulations and pressures which may result in the juvenile, contrary to his own best interests, waiving his right to counsel. In the District of Columbia, where the juvenile's right to court appointed counsel has existed for nearly a decade, in almost ninety percent of the cases parents and juveniles "choose" to waive counsel.\textsuperscript{50} It seems fair to assume that in some of these cases the juveniles were incapable of intelligently weighing the need for counsel. Furthermore, it does not seem overly harsh to conclude that in some cases the juveniles were coerced into believing that they would be better off if they "went along."

If the new program of rights for juveniles is to be effective, it must come to grips with the question of waiver—that is whether a juvenile may ever be of sufficient maturity to knowingly, willingly and intelligently waive his right to representation. One court has stated, "it seems ... to follow as a matter of law that a boy of seventeen cannot competently waive his right to counsel in a criminal case."\textsuperscript{51} Although the parent may be able to waive the right to counsel, assuming no hostility exists between the parent and the child, it has been argued that a youth may not waive the right on his own behalf.\textsuperscript{52} The California Supreme Court, however, recently upheld a minor's waiver of his right to remain silent and his right to assistance of counsel which was made without the advice of an attorney, parent or guardian.\textsuperscript{53}

A number of courts have recognized the right of a criminal defendant to waive his right to counsel and conduct his own de-


\textsuperscript{49} \textit{In re Gault}, 387 U.S. 1, 42 (1967).

\textsuperscript{50} Report of the President's Commission on Crime in the District of Columbia at 646 (1966).


\textsuperscript{53} People v. Lara, 432 P.2d 202, 62 Cal. Rptr. 586 (1967).
fense. In addition, a number of state constitutions provide for the right to waive counsel and this right exists in the federal courts as well. Several cases have gone so far as to state that this right is absolute or unqualified. Yet, it is far from clear that the Federal Constitution extends such an absolute right.

A number of cases indicate that waiver is a qualified right. "More than the rights of an accused is involved in a criminal case." The fundamental basis for limiting the right to waive counsel is society's interest in maintaining the integrity of the truth-determining process. If the defendant's right to represent himself jeopardizes a fair trial of the issues or threatens society's interest in providing full protection for the rights of the accused, the right to waive counsel may be restricted. Consequently, it has been firmly established that the defendant may only waive his right to counsel if he has an intelligent understanding of the consequences. If the defendant lacks a clear awareness of the consequences of his waiver, he must be represented by counsel even if this is directly contrary to his wishes.

The juvenile, limited by his age and inexperience, may not possess the maturity needed to assess the complex ramifications of proceeding without counsel. Although there are strong arguments for protecting any individual's right to make a free choice as a free man, it must be borne in mind that in juvenile courts the one who stands to suffer from his improvident choice to reject counsel is only a child. If our society sincerely intends to afford additional

55 For citations to provisions in 37 state constitutions, see United States v. Plattner, 330 F.2d 271, 275 & nn. 6-8 (2d Cir. 1964).
protections to juveniles, every child accused of a crime should be represented by competent counsel unless the judge, after a thorough examination of all the relevant facts, concludes that the child and his parents intelligently desire to waive this right.

B. Unanswered Questions

(1) Arrest and Screening

If Gerald Gault had been an adult at the time of his confrontation with the Arizona authorities, he could have been arrested only if a warrant was first obtained or if his unlawful act was committed in the presence of an officer. The Supreme Court of Arizona held that this requirement was inapplicable in the case of juveniles and the United States Supreme Court did not consider the issue.

This Arizona ruling represents the law in nearly every state. Yet the stigma which may attach to any juvenile who acquires a police record warrants the application of the laws of arrest to the youthful offender. Such a stigma may have adverse effects upon the child's future whether he is actually committed to an institution, placed on probation, warned or simply dismissed. Therefore, the requirements of a lawful arrest are equally essential when dealing with a child since he is still in his early years of development. Furthermore, evidence or confessions obtained after an illegal arrest are suppressed in an adult criminal proceeding. Surely the requirement of a lawful arrest based on probably cause is a matter of fundamental fairness and should be afforded to juveniles as well as to adults.

A thorough study has been made of the screening process which precedes the confrontation between the child and the juvenile court judge. This process has been considered essential since so many children are arrested each year. In 1959 for example, more than 500,000 children were arrested in cities of over 2,500 population. Consequently most juveniles who are taken into custody never see a judge and forty-three percent of all children detained overnight or longer are released without ever being brought into a juvenile court room. The result of this screening process, by both the police

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66 Children have been detained as long as six months while waiting for disposition of their cases. White v. Reid, 125 F. Supp. 647 (D.D.C. 1954).
67 P. TAPPAN, JUVENILE DELINQUENCY 187 (1949).
and the court’s intake department, may be the creation of an official record with either the police, the court, or both and possibly a substantial interference with the child’s liberty—all having developed without constitutional or procedural safeguards. The police are generally free to disclose these records at their own discretion, thus interfering with the child’s future freedom as well. Informal sanctions may be imposed during the screening process and this power is obviously subject to abuse. Surely “a recognition of constitutional rights seems imperative if children are being picked up with such enthusiasm and kept for such periods without a hearing.”

It seems clear that this crucial initial process of arrest and screening should be regulated by statutes which provide for procedural safeguards. Certain aspects of this problem have assumed constitutional dimensions as a result of such cases as *Miranda v. Arizona*, providing for counsel, and *Ker v. California*, requiring arrest by warrant or probable cause. The protections which such cases make available to adults should also be made available to juveniles.

(2) **GRAND JURY INDICTMENT**

Arraignment has long been considered an unnecessary procedure in the juvenile courts. The reasoning has been that since the juvenile is not being charged with a crime, arraignment would be of no value. In fact, not all states provide a constitutional right to indictment or presentment by a grand jury as a prerequisite to criminal prosecutions. Although the Fifth Amendment to the United States Constitution provides for indictment “for a capital or otherwise infamous crime,” the United States Supreme Court held in *Hurtado v. California* that such an indictment is only necessary in state courts if the right is contained in the state’s constitution. Otherwise, prosecution may be commenced on an information filed by the prosecuting attorney. Such states will not be willing to provide for a grand jury indictment in juvenile cases when they do not make such a provision in adult cases. In states which do have a constitutional grand jury clause, the cases are in conflict as to whether that right applies in the case of a juvenile. Since the “information” meets the requirements of fairness and *Gault* provides for specific allegations and adequate notice, it appears that

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71 110 U.S. 516 (1884).

72 *See State ex rel. Cave v. Tincher*, 258 Mo. 1, 166 S.W. 1028 (1914). *But see*, Childress v. State, 133 Tenn. 121, 179 S.W. 643 (1915).
the grand jury issue will be of lesser importance in the debate over fundamental rights.

(3) **BAIL**

In recent years close attention has been directed to the problems of bail and pre-trial detention of adults. The primary criticism of the bail system is that it is but another sanctioned means of discriminating against the poor who are unable to exercise this right. Bail has also been criticized on the grounds that it is subject to abuse and arbitrariness by the judge. In short, better standards are needed so that this right may be guaranteed to all. Although the imperfections of the present system have been challenged, little attention has been given to the same problem in juvenile cases, where this right, albeit imperfect, is generally denied.

The United States Constitution does not expressly grant a right to bail, but the Eighth Amendment provides that excessive bail shall not be required. Federal law has long maintained that in all but capital cases, a person accused of a crime has an absolute right to be admitted to bail. The same right is guaranteed in all but seven states.

Prior to the enactment of the juvenile court statutes this same right extended to children accused of a crime. In fact today, if the juvenile's case is waived to a criminal court, the right to bail exists. The right, however, is not absolute in most juvenile court systems and is in fact denied in the majority. Some states expressly permit bail for juveniles and others expressly deny it. Twenty-seven states have no provision dealing with the question. In these latter jurisdictions only a few cases exist on the subject and those cases which have been decided are in conflict.

The proponents of an absolute right to bail argue that there is no basis for denying this right simply because the child is in a juve-

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73 See, e.g., P. WALD & D. FREED, BAIL IN THE UNITED STATES: 1964 (1964), and the projects enumerated therein.
74 "Excessive bail shall not be required, nor excessive fine imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII.
75 In capital cases the right to bail is discretionary.
77 P. WALD & D. FREED, BAIL IN THE UNITED STATES: 1964 2, n.8 (1964).
79 Antieau, supra note 68, at 393–94.
nile court. Since these tribunals were designed with the view of showing more consideration to the juvenile, there can be no justification for an absolute denial of this right in juvenile courts if the right is provided for in the criminal court. Even though in certain cases the parents may not be an ideal custodian for the child, 

"...until the hearing is held and the juvenile court makes its disposition, it is urged that the child belongs in his home and not in a police lock-up, a county jail, or even a 'detention center.' 80 The argument for an absolute right to bail in the juvenile courts is buttressed by the present general inadequacy of detention facilities. In fact, "youngsters not at all delinquent when picked up may well be deviants after such 'care' by the state before it is ready to try them or return them to their homes and families." 81

On the other hand it has been argued that there should not be an absolute right to bail as this would be inconsistent with the basic policy of the juvenile courts which seek to provide a juvenile coming within their purview with the care and guidance most conducive to his welfare. 82 Opponents of an absolute right to bail contend that there are many cases in which release might be potentially detrimental to the welfare of the child. 83 The judge should be allowed to determine whether the needs of the juvenile and the society would best be served by release or detention. The advocates of this position recognize that many problems exist in managing this selective process, the most basic being a lack of funds. In many instances, due to a lack of adequately trained personnel, no considered determination is or can be made and if it were, the judge's alternatives may be very limited. Many jurisdictions have no detention facilities for juveniles and it becomes a choice between jail detention and release. As a result, the judge's decision is often arbitrary and wrong.

A thoughtful proposal for developing workable and just screening centers has been made. 84 Talent, concern and finances would

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80 Id. at 394.
81 Id. at 387-88.
82 This position is taken by the Standard Juvenile Court Act. STANDARD JUVENILE COURT ACT § 17(6).
83 Paulsen makes this point in his article with these examples; "see, for example, In re Tillotson, 225 La. 573, 73 So. 2d 466 (1954), which tells of a young girl who had sexual relations with a man in 'her mother's bed at her home in New Orleans, with her mother's apparent consent and approval,' and Application of Jones, 206 Misc. 557, 134 N.Y.S.2d 90 (1954), which tells of a fifteen year old who had been abused by her stepfather." Paulsen, supra note 16, at 552 n.21.
be needed to implement such a process and there is little evidence of reform. Consequently, whether one believes in providing an absolute right to bail in juvenile courts or not, it is clear that a state should not be permitted to grant the right to bail to an adult and absolutely deny the right to a juvenile.

(4) TRIAL BY JURY

Presently, there is no federal constitutional right to trial by jury in state courts and this, of course, includes the juvenile courts. This decision was first reached in the case of Maxwell v. Dow and has been frequently reaffirmed, the most famous opinion perhaps being that of Mr. Justice Cardozo in Palko v. Connecticut. However, nearly every state has adopted a guarantee of the right to a jury trial in a criminal case. The Sixth Amendment's guarantee of a right to trial by jury is applicable to criminal proceedings in the federal courts. But the Federal Juvenile Delinquency Act provides the juvenile with an option; he may choose between a juvenile proceeding or a criminal proceeding and if he selects the former he has waived his right to a trial by jury.

Relying on the long prevailing theory that juvenile court proceedings are non-criminal, most of the state courts that have ruled on the issue have concluded that the right to a jury trial is not applicable in juvenile courts. This view has been reaffirmed since Gault by the Pennsylvania Superior Court. The court concluded that trial by jury is not an essential element of due process and that if it were required in juvenile court proceedings it would have an adverse effect upon the ability of the juvenile court to fulfill its unique function. On the other hand, the New Mexico Supreme Court has recently ruled that since the state statute provides for

85 176 U.S. 581 (1900).
91 N.M. STAT. ANN. § 13-8-26 (1953). Nebraska's statute is similar. See Neb. REV. STAT. § 43-201 (Reissue 1960).
juvenile court jurisdiction over a juvenile "who has violated any law" the child must first be found guilty of the violation before jurisdiction attaches. Consequently, the right to a trial by jury, which is guaranteed by the state, is applicable to the juvenile.

With the majority of decisions to the contrary, few of the critics of the juvenile court process have urged the adoption of the right to trial by jury.92 It is contended that a jury trial would not be in the interests of the juvenile and would be contrary to the objectives of the juvenile court acts.93 These arguments may be valid as long as the judge is willing to carefully consider the determination of delinquency before considering disposition.

Again, the majority of states are depriving the juvenile of a right which is afforded an adult accused of the same crime. Again, the juvenile's rights are diminished instead of enlarged. Whether this denial will remain acceptable is therefore open to question. A possible solution to this problem is found in Massachusetts. In Massachusetts, after the juvenile is convicted in the juvenile court, he may appeal to the superior court in which he will receive a trial de novo with full adult protections, including a jury trial.94

(5) SPEEDY AND PUBLIC TRIAL

The United States Supreme Court recently held in Klopfer v. North Carolina95 "that the right to a speedy trial is as fundamental as any of the rights secured by the Sixth Amendment."96 Therefore, the Court concluded that this right applied to the state courts by way of the Fourteenth Amendment. It appears clear that this holding is applicable to the juvenile courts as well as the criminal courts.

Earlier state court decisions operating on the usual theory that juvenile proceedings are non-criminal, have ruled that the right to a speedy trial under state constitutional safeguards is inapplicable.97 As indicated above, juveniles have been held for long periods of time without being brought to trial.98 No possible justification can be thought of for denying the right to a speedy trial in juvenile pro-

92 But see, Antieau, supra note 68, at 400-01.
93 Welch, supra note 47, at 691.
95 386 U.S. 213 (1967).
96 Id. at 223.
98 See note 66 supra. The tactics of delay, detention and denial of bail have also been used as a means of harassing juveniles involved in civil rights demonstrations. See, Quick, Constitutional Rights in the Juvenile Court, 12 How. L.J. 76 (1966) [hereinafter cited as Quick].
ceedings. The same reasons which have warranted the guarantee of this right to adults in criminal courts are equally applicable to children in juvenile courts. No juvenile should be forced to live with the stigma which attaches to the criminally accused while waiting a lengthy period for an actual adjudication of his guilt. Nor should the threat of a loss of liberty indefinitely hang over the juvenile's head. It is submitted that the right to a speedy trial is absolutely essential to fundamental due process and fairness and having been held applicable to the states, this right must be granted in a juvenile proceeding.

In *In re Oliver* the Supreme Court held that the requirement of a public trial is a right guaranteed by the due process clause of the Fourteenth Amendment and thus binding upon the state courts. Forty-one states guarantee this right in their state constitutions and others have provided this right by statute or judicial decision. Yet, this right has frequently been limited or denied in the juvenile courts. Such a restriction has arisen both by judicial decisions and by statutes.

Juvenile court hearings are usually held in private with the general public excluded. Some critics have contended that this policy is similar to the procedure of the Star Chamber. The denial of this right has been supported on the grounds that it affords additional protection to the juvenile; he is not exposed to the gaze of the community. It is also urged that an open trial might have a traumatic psychological effect on the juvenile. Others contend that publicity may have a therapeutic effect on both the child and the public.

Avoiding notoriety may be a laudable objective but the fair trial concept inherent in due process of law demands that a child be given a public trial if he so desires. Public trials have been considered necessary if one is to be protected from abuse of judicial authority. This right provides a healthy check upon the judge. Since the scope of the juvenile court judge's powers have always been broader than that of a criminal court judge and since he is not required to comply with all the standards and procedures which

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101 See *e.g.*, STANDARD JUVENILE COURT ACT § 19 and CAL. WELFARE & INST'NS. CODE § 676 (Supp. 1964).
102 Symposium, *The Public's Right to Know*, 5 N.P.P.A.J. 431 (1959) which sets forth the transcript of a debate on this question at a meeting of the National Institute on Crime and Delinquency, Swampscott, Mass., June 1, 1959.
restrict the criminal court judge, it would seem that this check would be even more essential in the juvenile court system.

Furthermore, the juvenile courts are the public's business. The public's apathy toward the system is probably due in part to the secrecy of the proceedings. Some juvenile courts admit reporters if they do not publish the juvenile's name or any identifying details. This rule improves the community's understanding of the juvenile court and provides for an objective check upon the judge's use of authority.\textsuperscript{103}

The best answer, one which meets the needs of fundamental fairness, would be to inform the juvenile and his counsel of the juvenile's right to a public trial and allow that right to be waived if so desired.\textsuperscript{104} To really protect the child accused of a crime, the accused, with the guidance of counsel, should be allowed to determine if he wishes to dispense with the right to a public trial.

\textbf{(6) HEARSAY EVIDENCE}

When it decided the \textit{Gault} case below, the Supreme Court of Arizona held that the juvenile court judge could consider hearsay if it was "of a kind on which reasonable men are accustomed to rely in serious affairs."\textsuperscript{105} The United States Supreme Court indicated no opinion as to whether or not this decision conflicts with the requirements of the Federal Constitution.\textsuperscript{106}

The informality of juvenile court hearings and the belief that such proceedings are non-criminal has often led to the admission of hearsay testimony. It has been contended that "close adherence to the strict rules of evidence might prevent the court from obtaining important facts as to the child's character and condition which could only be to the child's detriment."\textsuperscript{107} Furthermore, it is argued that the judge will give this normally inadmissible evidence limited weight and that he can distinguish valid evidence from untrustworthy evidence.\textsuperscript{108} Yet, even a judge may have difficulty in ascertaining the credibility of a hearsay statement.

\textsuperscript{103} See generally, Geis, Publicity and Juvenile Court Proceedings, 30 Rocky Mt. L. Rev. 101 (1957).

\textsuperscript{104} Antieau, supra note 68, at 399. But see Blanton, \textit{Juvenile Courts and the Constitutional Rights of Minors}, 18 \textit{The Ala. Lawyer} 12, 22-23 (1957).


\textsuperscript{106} \textit{In re Gault}, 387 U.S. 1, 11 & n. 7 (1967).


The admissability of hearsay evidence has, not surprisingly, been subject to stern criticism. Some children have even been adjudicated delinquent solely on the basis of hearsay. In the famous *Holmes* case, the judge allowed a detective to testify that a boy had participated in a robbery on the basis of a "confession" of another boy. Neither the confessor nor the "confession" was seen by the court. The boy who made the "confession" later repudiated it, but Holmes was adjudicated a delinquent. Fortunately, the majority of jurisdictions do hold that strict rules of evidence are applicable in juvenile courts and these jurisdictions are supported by convincing authority.

It can only be concluded that "hearsay, rumors, gossip, ex parte reports by persons not sworn in court, etc., have no more place in juvenile court proceedings than in any other judicial hearing." There is no justification for discriminating between the child and the adult, as the rules of evidence have a sound basis in human experience and should be considered fundamental in any judicial inquiry which may result in a loss of freedom.

(7) **ILLEGALLY OBTAINED EVIDENCE**

The question of the admissability in a juvenile court of illegally-obtained evidence remains undecided. In the case of *Mapp v. Ohio*, the Supreme Court held that the Constitution bars the use of illegally-obtained evidence in state criminal proceedings as well as in federal courts. Thus the Fourth Amendment's protection "against unreasonable searches and seizures" applies to the state courts. Clearly this exclusionary rule should be extended to the juvenile courts. In a recent decision, a New Jersey Superior Court held the *Mapp* rule applicable in a juvenile proceeding. There is no justification for dispensing with the Fourth Amendment and allowing the police unrestricted zeal simply because the suspect is a juvenile.

(8) **STANDARD OF PROOF**

Relying on the theory that the court is a civil court, the juvenile courts generally require only a preponderance of the evidence in

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101 *In re Mantell*, 157 Neb. 900, 62 N.W.2d 308 (1954); *People v. Lewis*, 260 N.Y. 171, 177, 183 N.E. 353, 355 (1932); *Antieau, supra* note 68, at 401 & 411; *Welch, supra* note 47, at 684.
102 *Antieau, supra* note 68, at 411.
104 See *Quick, supra* note 98, at 95-98.
order to prove delinquency.\textsuperscript{115} One court has reaffirmed this view since Gault,\textsuperscript{116} while another has recognized the criminal nature of the proceedings and has required that all allegations be proven beyond a reasonable doubt.\textsuperscript{117} A compromise has been proposed:

An attractive solution to evidentiary problems of the juvenile court in the majority of its cases may be to require clear and convincing proof, which the lawbooks denote as more than a preponderance of evidence but less than proof beyond doubt demanded in criminal procedure. Clear and convincing proof is the highest order of civil evidence, which admits of only one reasonable conclusion.\textsuperscript{118}

However, it is still frequently maintained that such caution is unnecessary since the juvenile is not being punished but rehabilitated. This argument insists that "the criminal law test should be confined to criminal prosecutions."\textsuperscript{119}

Although the nature (criminal or non-criminal) of the juvenile proceedings remains in doubt, it is the author's opinion that since committing a child to an institution is unquestionably a deprivation of his liberty, juvenile court objectives cannot justify finding a juvenile "guilty" of a violation of the criminal law on less evidence than if he were an adult.

(9) MENS REA

Our criminal law has long recognized the requirement of a mental element in most crimes. This principle has been expressed "actus non facit reum nisi mens sit rea." (An act does not make a person guilty unless his intention be guilty also).\textsuperscript{120} This essential element of a crime has had a confusing but interesting history, but the necessity for some mental element has not been seriously challenged for centuries.

Mens rea, however, is largely ignored in the juvenile courts.\textsuperscript{121} Frequently juvenile delinquency statutes speak in terms of violating

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\textsuperscript{116} In re Wylie, 231 A.2d 81 (D.C. Ct. App. 1967).
\textsuperscript{117} In re Urbasek, 76 Ill. App.2d 375, 222 N.E.2d 233 (1967). See also In re Madik, 233 App. Div. 12, 251 N.Y.S. 765 (1931); Jones v. Commonwealth, 185 Va. 335, 38 S.E.2d 444, 447 (1946).
\textsuperscript{118} Task Force, supra note 13, Appendix D, Lemert, The Juvenile Court—Quest and Realities, 91, 103.
\textsuperscript{119} Paulsen, supra note 16, at 563.
\textsuperscript{120} Regina v. Tolson, 23 Q.B.D. 168 (1889)
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laws and many of these laws require a requisite mens rea. Therefore, mens rea should clearly be an issue in the juvenile courts and the defenses which are inherent in this concept should be made available to the juvenile.

Mens rea would be of lesser importance in the juvenile courts since the concept is often used in the criminal courts in order to determine the degree of punishment. In the juvenile courts, the disposition made by the judge has no necessary relation to the crime committed. This is no justification for totally abandoning this fundamental requirement for "the concept of mens rea fills a significant need and cannot be disregarded without raising serious questions to which there are no ready-made answers."\footnote{Westbook, Mens Rea in the Juvenile Court, 5 J. of Family Law 121, 135 (1965).}

Furthermore, fundamental fairness would seem to require that:

\textquote{M}ens rea should be viewed as an objective criteria which must be satisfied before a violation of certain statutory or common law offenses is shown. As such, it is a protection to the rights of the juvenile, something which should be of vital concern to every judge of a juvenile court.\footnote{Id. at 138.}

(10) **TRANSCRIPTS AND RECORDS**

The right to a transcript of the juvenile proceedings was an issue presented to the Supreme Court in \textit{Gault} on which it did not rule. Most juvenile courts do not provide for transcripts of their proceedings. Some courts provide a transcript but indigents are still unable to receive them. Since any appeal would be only as effective as the record upon which it is based, records of the proceedings are essential. Provisions should exist for the recording of a court hearing as an automatic right in any juvenile court proceeding.\footnote{E.g., CAL. WELF. & INST'NS CODE § 677 (1961).} An indigent juvenile should have a right to a copy of this record without cost. Such requirements have been objected to on the grounds that formalism would be increased, added personnel would be required, and costs would be excessive. Mechanical recording, however, as proposed by the Standard Juvenile Court Act would avoid these problems.

In theory juvenile court proceedings were to remain confidential so that no stigma would attach to children who confronted the court. For this same reason a child guilty of a crime was to be labeled "delinquent" not "criminal." These procedures have failed to avoid the attaching of a stigma to the guilty child and neither is a valid reason for not having all juvenile court proceedings recorded.

\footnote{Westbook, Mens Rea in the Juvenile Court, 5 J. of Family Law 121, 135 (1965).}
Most juvenile court statutes require, but fail to define, "confidential" records, and discretion is left to the judge to weigh the factors in favor of disclosure or non-disclosure of the juvenile's record. Consequently, practices throughout the country and even within a given state vary; some judges enforce complete non-disclosure and others allow broad disclosure.125

Procedures for expunging records are available in only a few jurisdictions. In addition, it remains an open question as to the effect of expunging the records—may the individual now respond to inquiries by stating that he has never had any contact with the police or the courts? Even if the judge demands non-disclosure, the police may release their records. Perhaps any criticism of these inconsistent procedures is worthless since it is clear that our society attaches a stigma to the juvenile who comes into significant contact with authorities regardless of the result of the adjudication. Establishing a system in which this confrontation remains totally confidential seems impossible and yet it is clear that the existing means of controlling records are inconsistent and inadequate. In order to allow the juvenile to suffer as little as possible from his mistake, a uniform system should be developed with a maximum of non-disclosure of court records.

(11) DOUBLE JEOPARDY

Protection against double jeopardy is provided for in the Constitution of the United States126 and guaranteed by most states to adults accused of a crime. Most state courts, however, presently maintain that this defense is not applicable in the case of a juvenile being tried in a criminal court for the same offense which was previously adjudicated in a juvenile court.127 Again the customary explanation is that this protection is provided only in the defense of a criminal case and that juvenile proceedings are non-criminal. Following this approach, juveniles have been institutionalized for as long as fifteen months and then prosecuted for the same offense in a criminal court!128

126 "[n]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb,..." U.S. CONST. amend. V. (emphasis added).
The Supreme Court has not incorporated this Fifth Amendment ban upon double jeopardy into the due process clause of the Fourteenth Amendment, so as to impose it upon the states. But Mr. Justice Black, discussing the ban upon double jeopardy in a dissenting opinion, stated: "Few principles have been more deeply 'rooted in the tradition and conscience of our people.'"

Denying to children the protection of a tradition which is considered an essential element of fundamental fairness in most adult cases is unsatisfactory. Some states have adopted this view, but the majority continue to deny this right. Surely this safeguard cannot be disregarded by the simple expedient of manipulating the labels which are affixed to the nature of the proceedings. This conclusion has been ably made by the statement that:

Ineluctable logic leads to the conclusion that the constitutional protection against double jeopardy...is applicable to all proceedings, irrespective of whether they are denominated criminal or civil, if the outcome may be deprivation of liberty of the person. Necessarily, therefore, this is true of proceedings in the Juvenile Court. Precious constitutional rights cannot be diminished or whittled away by the device of changing names of tribunals or modifying the nomenclature of legal proceedings. The test must be the nature and the essence of the proceeding rather than its title. If the result may be a loss of personal liberty, the constitutional safeguards apply.

All states should guarantee this right. Those that already make such a guarantee to an adult should afford the same protection to juveniles.

(12) CRUEL AND UNUSUAL PUNISHMENT

As was indicated before, the Arizona juvenile court ordered Gerald Gault, aged 15, committed to the State Industrial School until he should reach his majority. An adult convicted of the same offense, after a trial incorporating all procedural due process guarantees, would have been subject to a fine of $5 to $50 and imprisonment for not more than two months. Gault's period of confinement was not novel, as juvenile courts have frequently been permitted to commit children for far longer terms than an adult could be sentenced for the same act. In fact, the disposition made by the

juvenile court judge has no necessary relation to the offense committed and obviously, the younger the offender, the longer he may be committed.

As previously stated, state facilities for juveniles are generally grossly inadequate and efforts at rehabilitation usually fail. Consequently, in the author's opinion, an indefinite commitment of a juvenile to a state institution may be contested on the grounds that it constitutes cruel and unusual punishment. Such commitments have been defended on grounds that the child is not being punished and that reformation cannot be accomplished in any definite period of time. Courts have declared that such an indefinite term of confinement is not a denial of due process, or of equal protection by the law, or a cruel and unusual punishment.\(^1\)

In *Robinson v. California*,\(^3\) the Supreme Court assumed that the prohibition of cruel and unusual punishments in the Eighth Amendment had been incorporated into the Fourteenth Amendment by *Francis v. Resweber*.\(^1\) Thus the question of cruel and unusual punishments has assumed constitutional dimensions. Such discrimination between a child and an adult cannot be tolerated when no evidence exists as to the success of such indefinite commitments. Denying a child his liberty for six years constitutes a cruel and unusual punishment when an adult found guilty "beyond a reasonable doubt" of the same offense may be denied of his liberty for no more than two months.

(13) **RIGHT TO APPEAL**

The right to appellate review was another of the issues presented to the Supreme Court in *Gault* on which it did not rule.\(^1\) In fact, the Supreme Court has not held that a state is required by the Federal Constitution "to provide appellate courts or a right to appellate review at all."\(^1\) However, most states have a constitutional provision or a statute which grants this right to adults.

Generally the juvenile court system has operated without any appellate surveillance. Juvenile court procedures prior to *Gault* reduced the value of an appeal. Without an attorney or a court record little basis for an appeal can be established. Although the juvenile is now afforded the right to counsel, the problem of transcripts remains unresolved. Some states do provide the right of

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\(^1\) *Ex parte* Naccarat, 328 Mo. 722, 41 S.W.2d 176 (1931); *Ex parte* Birchfield, 90 Okla. Crim. 197, 212 P.2d 145, 148 (1949).

\(^3\) 370 U.S. 660 (1962).

\(^1\) 329 U.S. 459 (1947).

\(^1\) *In re* Gault, 387 U.S. 1, 58 (1967).

\(^1\) Griffin v. Illinois, 351 U.S. 12, 18 (1956).
appeal, but by and large the judgment of a juvenile court has been questioned only collaterally by way of habeas corpus. A study in New York revealed that in 1959 and 1960 only four cases were reviewed by appellate courts although nearly 20,000 children were adjudicated delinquent or neglected in the Children's Court of the City of New York! It is submitted that lack of appellate review is not only a denial of the juvenile's right to equal treatment, but that in fact the juvenile courts have suffered from this lack of supervision. The President's Commission reported that denial of appellate review had adversely affected the quality of justice in several ways:

First, there has been no appellate forum to rectify errors and injustices in particular cases. Second, the system has been deprived of the kind of sustained examination and formulation of law and policy that appellate review can provide. Third, it has not been possible to develop, through appellate review, uniform application of the law throughout a State.

It seems clear that a right to appeal should be an element of the juvenile court process; statutes guaranteeing this right are needed. It has been suggested that:

Perhaps it would be best to provide for a full transcript of the proceedings, require the judge to state his conclusion of act and law, suspend the treatment pending appeal, and expedite appeal so that treatment will not be excessively delayed if the appeal proves unsuccessful.

(14) RETROACTIVITY

The Supreme Court's opinion in Gault does not discuss whether the holding should be given a retroactive application. Two courts have ruled on this issue since Gault and they have reached opposite conclusions.

The Supreme Court has stated that; "the choice between retroactivity and nonretroactivity in no way turns on the value of the constitutional guarantee involved.... We do not disparage a constitutional guarantee in any manner by declining to apply it retroactively." Furthermore:

We also stress that the retroactivity or nonretroactivity of a rule is not automatically determined by the provision of the Constitu-

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139 Task Force, supra note 13, at 40.
tion on which the dictate is based. Each constitutional rule of criminal procedure has its own distinct functions, its own background of precedent, and its own impact on the administration of justice, and the way in which these factors combine must inevitably vary with the dictate involved.143

Thus the Supreme Court has held that the question of retroactivity is to be determined in each case by examining the peculiar traits of the specific "rule in question." Under this test, the Court has in fact reached a different result in different cases. Johnson v. New Jersey144 held that Escobedo145 and Miranda146 were not to be applied retroactively. In Linkletter v. Walker147 the Court held that the rule in Mapp,148 excluding evidence obtained through an unreasonable search and seizure from state criminal proceedings, was not to be given retroactive application. Likewise in Tehan v. Shott,149 the Court held that the rule in Griffin,150 which forbade prosecutors and judges in a state criminal trial from commenting adversely on the defendant's failure to testify, was not retroactive. On the other hand, the right of an indigent to counsel established in Gideon,151 and the exclusion of an involuntary confession from trial developed in Jackson v. Denno,152 were given retroactive effect. As to these latter two cases, the Court stated that; "in each instance we concluded that retroactive application was justified because the rule 'affected the very integrity of the fact-finding process' and averted 'the clear danger of convicting the innocent.'"153

The decision in Gideon was actually applied retrospectively since the lower court's judgment was attacked collaterally by post-conviction remedies. The Gideon decision would seem to be highly relevant to the question of whether Gault is to be applied retroactively. First, Gideon dealt with the right of an accused adult indigent to court appointed counsel and the granting of a right to counsel to juveniles is the key holding in Gault. Second, Gault attacked the juvenile court's decision collaterally by way of habeas corpus after he had already been committed to the Arizona State

143 Id. at 728.
144 384 U.S. 719 (1966)
147 381 U.S. 618 (1965).
152 378 U.S. 369 (1964)
Industrial School. It would appear to this author that since Gideon was given a retroactive application, Gault may also be applied retroactively, at least as to the issue of the right to counsel. But there are certain distinctions between the retroactivity problem arising from Gideon and that arising from Gault. The states did place greater reliance on not having to furnish counsel in juvenile courts than they did in adult criminal cases prior to Gideon.

It has been suggested that the trend toward a prospective application of newly recognized constitutional procedural rights will probably be maintained in Gault when the issue is ultimately resolved by the Supreme Court.154

III. LEGAL ETHICS

Despite the “privilege” of waiver, it appears certain that attorneys will now be entering the juvenile court process in increasing numbers. They will be confronted with perplexing questions of procedure155 and legal ethics.

Upon entering a juvenile court case the attorney must immediately confront and resolve two basic issues which have unlimited ramifications in the area of legal ethics:

A. To whom does the attorney owe his obligation?
B. What is the nature of that obligation?

A. DUTY TO WHOM?

The Supreme Court concluded in Gault that the child and the parent have the right to legal representation for the child.156 Thus, the possibility of conflicting interests is apparent. Canon 6 of the Canons of Professional Ethics indicates that an attorney may not represent conflicting interests. Therefore, it seems obvious that in certain situations an attorney should not represent both the child and the parents. An early determination of the possibility of conflict is essential, for once the attorney attempts to represent both

155 As pointed out in Part II supra, although the similarities of juvenile proceedings to criminal prosecutions since Gault have increased, the proceedings retain much of their sui generis character. Thus the troublesome questions of how to proceed will be of immediate concern to the attorney. The proper role of the attorney will largely have to be formed by experience. The lawyer will need to acquire an understanding of the aims and ever-changing methods of the juvenile court if he is to successfully serve his client, the court and society. The law schools and bar associations will have to assume greater responsibility in this area.
156 In re Gault, 387 U.S. 1, 40 (1967).
and a conflict develops, total withdrawal may represent the attorney's only way out of the dilemma.

This problem will first arise when the court attempts to determine whether the right to counsel is desired. The juvenile court judge could inquire only of the parent whether the right is to be waived. Obviously when the parent is openly hostile to the child, perhaps having even instituted the proceedings, such a procedure by the judge would be indefensible. Additionally, there are many possible conflicts between parent and child that are not readily apparent. Hence the judge should always base his decision on the needs of the child alone.

Once the right to counsel is granted, the attorney must personally come to grips with this issue. He must look for possible conflicts of interest. One example of conflicting interest between parent and child would be when the child wishes to admit his guilt but the parents seek to resist jurisdiction which might result in the court preempting their right to custody. Another possibility is that the parents may seek to retain custody even when they are neglecting or abusing the child. The case may be a matter of parental neglect and the child's best defense would be to have proceedings instituted against the parents. On the other hand the child might seek to avoid custody by the state, while the parents want to be relieved of their responsibility for the child. Such possibilities for conflict, and there are probably many more, must be considered by the attorney. He must examine the facts and ascertain to the best of his ability the possibilities for adverse interests between the parent and the child. As long as the slightest doubt exists as to their unity of interest, the attorney should make it clear that the child's interests alone will guide the course of his representation. The attorney should then insist that the parents retain separate counsel if they desire representation. It is the child who is accused of an illegal act and it is the child alone who is in jeopardy of losing his liberty. Consequently, if the right to counsel is to meaningful, the attorney's duty must be first and foremost to the child. The attorney must recognize this obligation at the outset in order to immediately avoid all possible conflicts with that duty.

B. WHAT DUTY?

Once the attorney establishes a relationship which will permit him to serve the child's interest alone, he must confront the more perplexing question—that is, the extent of his obligation to the juvenile. The question is whether the attorney's obligation to the juvenile is the same as his responsibility to an adult accused of a crime in the criminal courts.
This fundamental issue is not resolved by the Canons of Professional Ethics, as they simply were not drafted with juvenile courts in mind. Many references to “civil” and “criminal” cases may not be applicable—since the nature of juvenile proceedings remains in doubt.\(^{157}\) In fact, the Canons have been frequently criticized for failing to sufficiently guide the attorney in the criminal court.\(^{158}\) Nevertheless, the Canons coupled with the attorney’s conscience, are to date the extent of his sources for resolving the issue.

It might be suggested that an attorney’s usual loyalty to his client, and the client’s natural desire to avoid punishment are inappropriate in a juvenile court. Assuming the net result will be a benefit to the child, this line of reasoning might conclude that the lawyer’s responsibilities are vastly different in the juvenile court. If one assumes that the attorney’s obligation to a juvenile is somehow different than his duty to an adult, difficult problems will arise. The attorney’s experience and pattern of behavior will have to be altered and this will not be a simple task, particularly since presently such alterations will have to be largely self-imposed. Defenders of the pre-Gault juvenile court system may urge that the attorney recognize that the primary goal of this system is to assist the child in his development and that therefore many of the defensive tactics used in a criminal court should be forgotten. It has been urged that the attorney should disclose all information which comes to his attention, even if such facts will result in an adjudication of delinquency.\(^{159}\) The success, however, of rehabilitative efforts is now seriously questioned. Moreover, Canon 37 prohibits divulging confidential communications. Others fear that attorneys may urge their client to claim the privilege against self-incrimination.\(^{160}\) Such advice to a juvenile client would now be consistent with due process. Furthermore, Canon 15 requires “warm zeal” in defense of the client’s rights. Also, Canon 5, in criminal cases, im-

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\(^{157}\) The Canons of Professional Ethics are currently being revised by a special committee of the American Bar Association. It is intended that a new Code of Professional Responsibility will be presented to the A.B.A. House of Delegates for its consideration in February of 1969. For a preview of the new code see, Sutton, A Preview of the Proposed Code of Professional Responsibility, 53 A.B.A.J. 901 (1967). This article unfortunately gives no indication that the problem will be specifically resolved but does indicate that the new code will be a modern statement “of the lawyer’s professional responsibilities in the light of the present structure and development of the profession.


\(^{159}\) See National Council on Crime and Delinquency, Procedure and Evidence, in the Juvenile Court 43 (1962). See also, Dembitz, supra note 2, at 511.

\(^{160}\) See Lefstein, supra note 22, at 812.
explores the attorney "to present every defense that the law of the land permits."

Some specific problems might be considered. If the child adamantly maintains his innocence, the attorney should obviously present a zealous defense. But what is the attorney to do when he is convinced that the allegations are true and that the child needs treatment, but the child wants to resist? What should he do when the child privately admits his guilt but, by having the child remain silent, the attorney can obtain a dismissal?

These problems are complicated enough when defending an adult, but some have urged that in such juvenile cases the attorney should admit the allegations over the child’s objections. However, if the attorney dispenses with the delinquency hearing despite his client’s wishes, the juvenile has not been afforded the right to legal representation; rather the attorney has merely set himself up as another parens partiae.161

Despite the present inadequacies of the Canons of Professional Ethics, it is clear that in these suggested cases the attorney has an obligation to represent the juvenile’s legitimate interests. If the attorney does not so act but concedes the child’s guilt, he has personally denied the child his right to due process of law.

Furthermore, since the ultimate goal of the juvenile court process is to rehabilitate the child as far as possible, fairness in the adjudicatory process seems extremely important. The attitude with which the juvenile leaves the courtroom will be singularly important. What methods will best foster a favorable attitude remains an open question. Some contend that if the lawyer succeeds in getting the juvenile “off” when he is actually guilty, the youth will only be encouraged to commit more illegal acts.162 Others contend that the juvenile will have more respect for the legal system if he knows that he was fully and fairly represented.163 The latter argument seems more valid. If the youth feels that he has been deceived by the juvenile court and by his attorney,164 he would be more

161 For an excellent discussion of this problem see, Welch, supra note 47, at 680.


164 In re Bacon, 240 Cal. App. 2d 34, 49 Cal. Rptr. 322 (1966), juveniles objected on appeal that their lawyers had acted as agents of the juvenile court in promoting its philosophy and had overly co-operated with the court’s probation staff. This objection was overruled but is indicative of the demand for “real” representation.
likely to resist the rehabilitative efforts which follow. If, however, he has confidence that he was adequately defended and that the state’s case was tested but proven, he should be more willing to accept correction. These viewpoints are merely speculative since there is no real evidence as to the effects of court procedures and the conduct of counsel upon the juvenile. Perhaps attorneys and courts have no effect on the attitudes of the juvenile.165

Although the attorney should accept the juvenile’s wishes and defend the case, he should make it clear that his objective is to present a competent defense—and no more. He needs to impress upon his client that his responsibility is not to obstruct the state’s presentation or to “win” the case, but rather to attempt to see that his client will be found delinquent only if legally dependable evidence is presented against him. The attorney should attempt to make certain that delinquency is proven before the matter of disposition is considered.

Once the juvenile is found delinquent, the attorney’s obligation does not end. The lawyer can also serve an important role at the dispositional stage. He can disclose factors related to the matter of treatment and suggest possible alternatives. If the attorney is aware of any programs, agencies or other sources of assistance to the juvenile, he can help to provide the child with a treatment plan which best meets his needs. Furthermore, by adequately defending his client, the attorney will gain the confidence which will make him the one best suited for explaining the court’s decision to the child.

Already attorneys in the criminal courts are perplexed by unclear questions of ethics. Attempting to develop yet another code for the juvenile courts would only increase the confusion while serving no real purpose. The attorney should offer the juvenile the same defense he would offer him if he were an adult. By becoming aware of the philosophy, principles and procedures of the juvenile court, the attorney can give the juvenile the added protection that his youth requires by playing a vital role in both the adjudicative and dispositional stages. In short, the real purpose of the juvenile court, to serve the best interests of the young, can only be accomplished if the child has an attorney committed to his client and determined to offer him the best defense that his present ethical and legal limitations will allow. Hopefully, in this manner, both due process and rehabilitation can become a reality.

165 Lefstein, supra note 22, at 813.
IV. CONCLUSION

Although the Supreme Court's decision in Gault will continue to be criticized by a few, it was generally well reasoned and sound. This decision must be built upon if the juvenile court is to completely fulfill its unique function of affording additional protections to our nation's youth.

Juvenile courts were founded on this high ideal. That ideal must not be abandoned. Additional protections, however, cannot be provided until the juvenile's basic rights are first granted. Our country's guarantee of procedural safeguards, both at the state and federal level, represents the basis of our individual freedom. In order to obtain their goal of affording additional protection, juvenile courts must not continue to abandon these standards of procedure but must accept them and build upon them. Therefore, Gault represents a beginning and not an end.

More than court decisions will be needed to reach this high goal. First, the juvenile court's jurisdiction must be limited to actual cases of alleged illegal acts, with other agencies assuming responsibility for "wayward" and "neglected" children. Second, reflection, resources, and research will be essential if we are to learn to rehabilitate the delinquent child. Of course the greatest need is for a broad scale attack upon the social evils which are the root cause of delinquency. Leadership will be the key to reform and this responsibility must be assumed by the legal fraternity and the law colleges. Our juvenile crime rate is shocking and our juvenile courts have been a failure. However, the ideal is not beyond our reach. A single step has been taken; more must follow.

H. Bruce Hamilton, '69

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166 See Omaha World Herald, Nov. 13, 1967 at 4, col. 1. This editorial misstates the holding in Gault and then concludes that the decision "promises to make a bad juvenile crime situation worse."