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Juvenile Courts and the Legacy of '67

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JUVENILE COURTS AND THE LEGACY OF '67

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Gerald Gault allegedly made a telephone call to a woman living in his neighborhood during which he used some obscene words and phrases. The telephoning violated an Arizona statute[1] and hence Gerald, aged sixteen, was subject to adjudication as a juvenile delinquent. An adjudication was in fact made after a proceeding which failed to offer him the basic procedural protections to which he would have been entitled had been charged in a criminal court for making the call. The youth's case found its way to the Supreme Court of the United States and in May, 1967, the high court decided *In re Gault*,[2] holding that some of the informal procedures which have characterized practice in juvenile courts for over sixty-five years violated the Constitution.

Gault established four propositions of constitutional law directly applicable to juvenile courts throughout the country. First, every fact-finding hearing held to determine whether a young person has comimtted the acts alleged in a delinquency petition "must measure up to the essentials of due process and fair treatment."[3] Second, though the opinion of the Court expressly refused to demand "that the hearing . . . must conform with all of the requirements of a criminal trial or even of the usual administrative hearing,"[4] due process does require the giving of written notice of a specific charge "sufficiently in advance of the hearing to permit preparation."[5] Third, in delinquency proceedings "which may result in commitment to an institution in which the juvenile's freedom is curtailed, the child and his parents must be notified of the child's right to be represented by counsel retained by them, or if they are unable to afford counsel, that counsel will be appointed to represent the child."[6] Fourth, a juvenile respondent has the right to remain silent, fully protected by the privilege against self-incrimination, and the right to be confronted by sworn witnesses who are subject to cross-examination by the respondent's counsel.

THE IMPORTANCE OF LAWYERS

How will the recognition of the rights affect the work of the nation's

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1. ARIZ. REV. STAT. ANN. § 13-377 (1956).
2. 387 U.S. 1 (1967).
3. *Id.* at 30, quoting frmo Kent v. United States, 383 U.S. 541, 562 (1966).
4. *Id.*
5. 387 U.S. 1, 33 (1967).
6. *Id.* at 41.

juvenile courts? The question is impossible to answer unless we know how the right to counsel is to be implemented and what the lawyers will do. Procedural protections in courts employing an adversary system are not likely to have much practical significance if lawyers are not present to press for them on behalf of clients. On the other hand, vigorous lawyers insisting that respondents be given the full advantage of *Gault* will turn the formulation of that opinion into a living reality. Such lawyers, coming before juvenile judges in substantial numbers, will change the practices in many courts.

How many lawyers can we expect to appear for respondents on delinquency petitions? The answer to the question will depend, in large part, on how conveniently lawyers are made available to juveniles. If asking for a lawyer means a substantial delay in the proceedings, the right to counsel is likely to be waived by a youngster and his parents. In many cases working fathers and mothers will not choose to come back another day when an assigned lawyer can be present. The feeling, "let's get it over with," must be very strong. We know, however, from experience in New York City under the New York Family Court Act[7] that if lawyers are coveniently provided, their assistance is readily accepted. In New York City, legal aid lawyers called "law guardians"[8] are housed in the Family Court buildings. To consult with counsel, therefore, involves no delay. According to the most recent statistics, ninety-six percent of all youngsters called to respond to a delinquency petition were represented by counsel—ninety-two percent by the law guardians of the Legal Aid Society.[9]

Not only will large scale utilization of a lawyer's assistance in delinquency cases depend upon immediate access to counsel but also upon the way in which counsel is offered by the judge or court attendant. Consider the difference between these two invitations: 1) "I hereby inform you that, if you want a lawyer, you are entitled to have one and I will assign counsel if you cannot pay but, if you would like to proceed without counsel, you may do so without prejudice;" 2) "Mr. Smith, a law guardian, has been informed about your case and is ready to assist you so that your right to counsel may be fulfilled. Is it agreeable with you if Mr. Smith represents you?" Surely the latter invitation will result in more respondents choosing to use legal assistance than the former.

The importance of the right to counsel in juvenile courts will also turn on how zealous, competent, and loyal the assigned lawyers turn out

7. N.Y. FAMILY CT. ACT (McKinney 1963).

8. This is the term used in the authorizing statute. N.Y. FAMILY CT. ACT § 242 (McKinney 1963).

9. JUDICIAL CONF. OF THE STATE OF NEW YORK, TWELFTH ANNUAL REPORT 289 (1967).

to be. Experience with problems involved in providing counsel in criminal cases teaches us that the mode of organizing defender services is all-important in assuring zeal, competence, and loyalty to a client. The lawyers assigned must be paid an adequate fee (or salary). A public or voluntary defender organization can provide lawyers who quickly gain the special skills useful in juvenile courts. In all but the least populated areas with very small caseloads, a relatively short list from which private practitioners are chosen can also become a list of attorneys specially qualified for juvenile court. Any scheme which brings a particular lawyer into juvenile court only one every year or two is not likely to produce much effective legal assistance for respondents.

NOTES FROM THE FIELD ABOUT COUNSEL

What has happened in the juvenile courts of the United States since *Gault* in respect to implementing the right to counsel? In preparation for this article a number of juvenile court judges were asked about developments in their respective states and sixteen replies were received representing fifteen states.[10] Information was also gathered from three other states—New York, Ohio and Oregon. While the information is fragmentary and unrefined, it is nevertheless instructive. The replies mirror the concerns of the judges, some emerging problems are generally noted, and some trends can be identified.

In many of the larger cities throughout the country, public or voluntary defender services have been extended to juvenile courts since the *Gault* decision. Judge Rubin of Denver reports that "the public defender is now beginning to enter Juvenile Court in Denver, but because of an insufficient budget, it is not yet prepared to routinize its appearances with us."[11] Judge Noyes of Montgomery County, Maryland, reports that "[o]ur County Council has recently enacted a local ordinance establishing a Public Defender's office which would serve the Juvenile

10. The following lettres from juvenile court judges to the author of this Article have provided information respecting practice in various states: From Judge Ted Rubin of Denver, Colorado, February 9, 1968; Judge Margaret C. Driscoll of Bridgeport, Connecticut, February 6, 1968; Judge Mary D. Adams, Idaho Falls, Idaho, March 22, 1968; Judge Walter P. Dahl of Cook County, Illinois (Chicago), February 5, 1968; Judge Creed D. Tucker, Urbana, Illinois, February 15, 1968; Judge Harold N. Fields, Indianapolis, Indiana, February 5, 1968; Judge John L. McKinney, Ames, Iowa, February 5, 1968; Judge Malcolm G. Copeland, Topeka, Kansas, February 7, 1968; Judge James C. Gulotta, New Orleans, Louisiana, February 7, 1968; Judge Alfred D. Noyes, Rockville, Maryland, February 6, 1968; Judge James H. Lincoln, Wayne County, Michigan (Detroit), February 13, 1968; Judge Lindsay G. Arthur, Minneapolis, Minnesota, February 7, 1968; Judge Wilfred W. Nuernberger, Lincoln, Nebraska, February 8, 1968; Judge B. Gordon Gentry, Greenbsoro, North Carolina, March 5, 1968; Judge E. F. Ziegler, Ogden, Utah, February 6, 1968; Judge Edwin A. Henry, Norfolk, Virginia, February 15, 1968.

11. Rubin letter, *supra* note 10.

Court as well as adult courts."[12] From Chicago we learn that legal service offices funded by the Office of Economic Opportunity, the public defender's office, and a research project of the National Council of Juvenile Court Judges have combined to make "approximately eight" lawyers available to the juvenile court. Further, two additional public defenders were added in February, 1968, and one more will be assigned soon.[13] According to Judge Fields of Indianapolis, lawyers there are being supplied by the legal aid office and the legal services offices of the O.E.O.[14] In Ogden, Utah, legal services are provided by an O.E.O.—funded legal services office.[15] Similarly, in Minneapolis and Cleveland defender service in the juvenile court comes from legal aid societies which have been partially funded by the O.E.O.[16]

A news story from Virginia reminds us that local bar associations in many communities will probably undertake to organize legal services in juvenile court:

> [t]he recently formed Junior Bar Section of the Norfolk-Portsmouth Bar has taken over the task of providing representation for indigents in juvenile court proceedings in the Norfolk-Portsmouth area.
>
> Peter Rowe, Chairman of the Norfolk-Portsmouth Junior Bar stated that his group was requested by the Norfolk-Portsmouth Senior Bar Association to provide legal representation in the juvenile courts. The request came as a result of the U.S. Supreme Court's decision in the case of *In re Gault* which required that a juvenile be afforded counsel in any hearing which might result in the juvenile's commitment to an institution in which his freedom would be curtailed. The Norfolk-Portsmouth Junior Bar responded in formal session by overwhelmingly endorsing a resolution to commit the members of the section to provide the required juvenile court representation.[17]

New legislation in Connecticut, Nebraska, and Ohio has provided for the payment of assigned counsel in juvenile court.[18] In some places county governments have approved claims for payment (*e.g.*, downstate Illinois)[19] or the funds to pay fees have been put in the

12. Noyes letter, *supra* note 10.
13. Dahl letter, *supra* note 10.
14. Fields letter, *supra* note 10.
15. Ziegler letter, *supra* note 10.
16. Arthur letter, *supra* note 10; Address by Judge John J. Toner, Ohio Association of Juvenile Court Judges, Jan. 23, 1968.
17. The Docket (Junior Bar Section, Virginia State Bar Ass'n), Dec. 1967, at 3.
18. CONN. P.A. 630 (Jan. Sess. 1967); NEB. REV. STAT. ch. 247 (Supp. 1967); OHIO REV. CODE ANN. § 2151.35 (Baldwin 1968).
19. Tucker letter, *supra* note 10.

juvenile court budget (Montgomery County, Maryland).[20] A New Orleans judge rewards lawyers who serve in juvenile court without pay with appointments as paid counsel in adoption cases.[21] In many states, however, especially in the rural counties, not even this sort of scheme for payments exists.

Whatever the scheme for providing counsel, lawyers are generally being made available to juveniles in serious delinquency cases. We have little information, however, on the all-important question of how clearly the right to counsel is being explained and how conveniently lawyers are being made available. Nor do we know, generally, in what proportion of cases lawyers are being appointed, though the *Wall Street Journal* has reported a general impression among judges that the number of lawyers appearing and the number of contested cases has increased:

> [j]uvenile court dockets are jammed with pending cases as more juveniles demand lawyers. . . Kenneth Turner, a Memphis juvenile judge, notes a 15% rise in the number of contested cases in his court since the Gault decision. Judges in Phoenix, Denver, Houston and Miami report similar increases.[22]

This report is confirmed by some of the correspondence received by the author.

Through parents and children are most often told of their rights orally by a probation officer or court attendant as well as the judge, in some places mimeographed forms have been devised which inform both a respondent and his parents respecting the respondent's rights and which accompany the notice that proceedings are to be begun. The following is taken from a form used in Multnomah County (Portland), Oregon:

> 1. You have the right to remain silent and need not answer questions or discuss the facts with the judge, police officer, juvenile court counselor, or anyone else. If you do discuss with anyone the facts of the alleged violation of the law with which you are charged, your statements may be used against you at any later hearing of the charge. You may have the help of your attorney if one is employed, before you discuss the facts with anyone.
>
> 2. You have the right to be represented by an attorney. *If you are unable to afford an attorney,* the judge will appoint one to represent you if the judge is convinced that you and

20. Tucker letter, *supra* note 10.
20. Noyes letter, *supra* note 10.
21. Gulotta letter, *supra* note 10.
22. Wall Street Journal, Nov. 10, 1967, at 1, col. 1, and at 18, col. 2.

your parents do not have the money to employ one. (Ask the counselor about making application for the appointment of an attorney).

3. You have the right to an attorney and the right to remain silent. You do not have to be represented by an attorney and you do not have to remain silent.

4. You may give up the right to be represented by an attorney or the right to remain silent. You can give up these rights by telling the judge that you wish to do so or by telling this to your counselor.

The written advisements such as this are designed to facilitate waiver of the constitutional rights recognized in *Gault*. Because of these forms, if will be more difficult to claim that the existence of rights was not understood than if rights had only been explained orally.

In Lane County (Eugene), Oregon, the written explanation of rights is accompanied by the following express form for waiver:

> Knowing that I have the above rights and understanding what the rights are, I decide as follows:
>
> I want to have an attorney: /s/————————
>
> I do not want to have an attorney: /s/————
>
> I want to talk about these charges: /s/————
>
> I do not want to talk about these charges: /s/——
>
> I approve of the above decisions made by my child:
>
> _____
>
> Parent
>
> _____

The greater the number of waivers, the less trouble *Gault* creates for the juvenile court judge.[23]

When lawyers come to juvenile court, the work of the court changes. Cases will demand more judicial talent, take more time and require more expenditure. Judge Rubin of Denver writes:

> . . . we have had a few more delinquency injury trials and certainly more adversary type trials and hearings. I have heard great legal advocacies on motions to suppress evidence; whether a lineup meets due process; the admissibility of school social worker testimony regarding truancy records; motions for bond (the Code provides for bond); whether there is authority to pay transportation fees for out of state witnesses; whether the

23. For a more extended discussion of the waiver problem, see text accompanying notes 82-94 *supra*.

> Juvenile Court has jurisdiction on a childhood murderer when the Code says that it does; and many others.[24]

The increase in the number and complexity of legal issues raised will present special difficulities for those juvenile court judges who are not lawyers.

Judge Toner of Cuyahoga. County (Cleveland), Ohio, stated, in respect to his county: "[t]he immediate availability of . . . lawyers has increased the number of denials of charges and, therefore, required more time for the hearings . . . also the number of motions ruled upon has been increased."[25] Judge Lincoln of Wayne County (Detroit), Michigan, also reports that more lawyers have meant more trial time. He writes: "Wayne County now has five full-time Referees in place of three, and two more will be added before the end of the year (total—seven Referees)."[26]

The *Wall Street Journal* story asserted "juvenile court costs are skyrocketing."[27] In Detroit, the referees about whom Judge Lincoln wrote are attorneys who hear juvenile cases and are paid about seventeen thousand dollars per year. The possible added expense has worried Judge Henry of Norfolk, Virginia:

> . . . in 1967 we had slightly [over] four thousand new files on the Juvenile side of the Court and if we were required to provide counsel in every one of these cases, we probably would have to have four or five Juvenile Courts, instead of one. This is no hundred percent reason for denying anyone the right of counsel, but [it] seems to me that any procedure can be followed to unnecessary excess and that this is a definite possibility following the impact of the Gault decision throughout our country.[28]

The total bill is increased by the more frequent use of lawyers to represent petitioners in delinquency proceedings (dare we call them prosecutors?). Judge Whitlach of Cleveland has recently written, "[t]he Gault decision will doubtless result in the prosecutor's office being called upon to assist the Court in the trial of delinquency cases."[29] His colleague, Judge Toner, spoke of more prosecutorial time being devoted to juvenile cases in Cuyahoga County and Lake County, Ohio.[30] Judge Noyes of Montgomery County, Maryland said, "[i]n one County, the State's

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24. Rubin letter, *supra* note 10.
25. Address, *supra* ncte 16.
26. Lincoln letter, *supra* note 10.
28. Henry letter, *supra* note 10.
29. Whitlatch, *The Gault Decision—Its Effect on the Office of Prosecuting Attorney*, 41 OHIO B. J. 41 (January 8, 1968).
30. Address, *supra* note 16.

attorney or an assistant is prosecuting each case."[31] In Bridgeport, Connecticut, the juvenile court "is also paying for court advocates . . . for contested delinquency and neglect hearings in the adjudicatory stage."[32] The term "court advocate" is a new one, designed to avoid the suggestion that anyone is "prosecuting" a juvenile.

If defense lawyers come in to juvenile court, this noted increase in representation for the petitioner is likely to continue. Not many will be surprised by Judge Toner's statement, "[i]n a few instances the lawyers [for the respondent] have demanded a prosecutor as they feel they cannot adequately represent their clients in anything but a strictly adversary proceeding."[33] Without prosecutors (or "court advocates" or perhaps "counsel to petitioner") there is no one to interview the petitioner and his witnesses prior to trial, no one to marshal the evidence carefully, no one (except the judge) to conduct the direct examination of the petitioner and his witnesses, and no one to cross-examine the respondent and his witnesses (except the judge). The problems created can be further aggravated by heavy calendars.

The burden on the judges when lawyers appear in juvenile court is increased also by the typical lack of law secretaries and legal assistants. The new questions of law now being raised demand research to provide reasoned, written opinions.

Under some of the state statutes and some court practices, counsel is offered not only in delinquency cases and in cases involving "persons in need of supervision" (habitual truants and youngsters who are beyond the control of their parents) where such children are a distinct legal category, but also in neglect and dependency matters. In other places only children who are respondents on a delinquency petition are offered counsel. For example, Judge Gulotta of New Orleans states, "[w]e have limited our appointment to apply only to delinquency cases and not neglect. . . ."[34]

Some of the correspondence indicates practices that attempt to restrict offers of counsel to the more serious cases or to cases in which the respondent denies the charge. For example, Judge Henry of Norfolk, Virginia says:

> [a]t the present time, this Court offers Counsel to any indigent child, if he is charged in a juvenile petition with an act which would be a felony, if committed by an adult. Furthermore, we offer Counsel, private or Court appointed, to any child who may

31. Noyes letter, *supra* note 10.
32. Driscoll letter, *supra* note 10.
33. Address, *supra* note 16.
34. Gulotta letter, *supra* note 10.

> lose his liberty by commitment to our State Department of Welfare and Institutions.
> . . . . We do not provide Counsel for the average misdemeanor case, but do use a type of Waiver form and we explain to the child and his parents that he is entitled to Counsel if he desires to retain Counsel, and in most instances, it is agreeable that Counsel be waived in these cases of somewhat lesser importance.[35]

Judge Lincoln of Detroit reports that counsel is offered in "all delinquency cases where there is any possibility of the juvenile being removed from the parents or guardian."[36] Judge Gentry of Greensboro, North Carolina tells us, "[a]ttorneys are being furnished whenever a juvenile is charged with a delinquency act which may result in his being committed to a correctional institution, and where the child denies the act."[37] Judge Mary Adams of Idaho Falls, Idaho writes: "[l]egal counsel is provided upon proof of indigency whenever there is a denial of allegations in the juvenile petition, and where action by the court may result in change of custody."[38] Similarly, Judge Gulotta records that in New Orleans, "the court advises the juvenile of his Constitutional rights at the hearing when the juvenile denies the allegations as set forth in the petition. . . ."[39]

In September, 1967, the Supreme Court of New Jersey amended its court rules relating to the juvenile courts. In order to avoid assigning counsel in all juvenile court cases the rules provide that the juvenile court operate with two hearing calendars--the formal and the informal. "All juvenile complaints which in the opinion of the judge may result in the institutional commitment of the juvenile shall be listed on the formal calendar."[40] Juveniles on the formal calendar "shall" be provided with representation by counsel. Thus the difficult issues of whether a minor *can* waive counsel and of whether counsel *has* voluntarily been waived in a given case are avoided. In addition, the juvenile court judge may request the prosecutor to appear in cases put on the formal calendar. While complaints listed on the informal calendar "shall be conducted in summary manner,"[41] at any stage of proceeding on the informal calendar the court may transfer the complaint to the formal calendar for a de novo hearing.

One may doubt whether the New Jersey scheme will succeed in its purpose. It is true that *Gault* emphasized the fact that Gerald lost his

35. Henry letter, *supra* note 10.
36. Lincoln letter, *supra* note 10.
37. Gentry letter, *supra* note 10.
38. Adams letter, *supra* note 10.
39. Gulotta letter, *supra* note 10.
40. N.J. Cr. R. 6:9—1c, d, e.
41. *Id.*

freedom through commitment to a state institution and expressly stated that the right to counsel must be offered in such a case. *Gault* does not say, however, that counsel is *not* reuired in other cases. In fact, in *Kent v. United States,*[42] the Supreme Court emphasized the need for prodedural protections where a decision, described as "critically important" and "of tremendous consequences," was being made. But a case on the informal calendar also may result in an adjudication of "delinquency." The adjudication destroys reputation and harms the young respondent. It may be a factor in later receiving severe treatment as a second offender. Indeed, under the New Jersey rule only commitment to an institution is a disposition forbidden a judge hearing cases on the informal calendar. He may remove a child from his home by "placing" him in someone else's custody or with a public or voluntary child welfare agency.[43] Further, the judge limits freedom simply by the imposition of a regime of probation on the child. Are not decisions followed by such results "critically important" and of "tremendous consequences?"

The New Jersey rule permits counsel to participate in hearings on the informal calendar if the juvenile is represented by a privately retained lawyer. If respondents whose parents have means may enjoy the assistance of counsel, does the equal protection clause permit a state to deny such assistance to the children of the poor? It does not push *Griffin v. Illinois*[44] *or Douglas v. California*[45] too far to suggest that the principle underlying those opinions requires us to recognize here an "invidious discrimination" against the poor.

A legislative change in California after *Gault* provides that counsel *must* be appointed for children who are in juvenile court because of habitual failure to obey parents, violation of the criminal law, or failure to obey a lawful order of the court.[46]

THE LAWYER'S ROLE

It has so far been argued that if lawyers come into juvenile courts in large numbers the operation of these courts will be greatly changed. Is this true because lawyers operate badly, even heartlessly in juvenile court? Judge Whitlach of Cleveland has said, "[a] few members of the Bar proceed with the attitude that they are the savior of the child if they can prevent an adjudication of delinquency, despite the validity of the complaint and the obvious need of the child for the care and protection that

42. 383 U.S. 541 (1966).
43. N.J. CT. R. 6:9—1c, d, e.
44. 351 U.S. 12 (1955).
45. 372 U.S. 353 (1963).
46. CAL. WELF. & INST'NS CODE § 634 (West Supp. 1967). Sec. 3, subsection 634.

the court can give him."[47] His complaint has been echoed by Judge Toner: "[a]n increasing number of lawyers proceed with the attitude that they must prevent an adjudication of delinquency regardless of its validity and the obvious needs of the child and the assistance that can be provided by the court."[48]

Do these comments mean that lawyers should not move to suppress illegally obtained evidence if suppression would release a guilty youth who "needed" treatment? Should a child's lawyer not challenge the use of a confession taken in violation of law if the statement seems quite trustworthy? If parents and child decide to invoke the right of silence should not the attorney assist them to vindicate the right? The assigned lawyer is assigned as the child's lawyer, the child's advocate. Is there not something of a fraud involved in suggesting an undisclosed but a more uncle-like role for counsel? Will not the respondent and his parents count on the lawyer to be an advocate--one who will carry out their instructions? Indeed, is a lawyer trained to be wise regarding the question: does this child need treatment from the state?

The New York Family Court Act,[49] establishing the "law guardian" system—the most comprehensive design for organizing legal services in children's courts—contains little to indicate that the New York legislature thought that juvenile court lawyers were to function in a special way. True, the name "law guardian" suggests the role of wise friend as well as legal counselor, but the statute nowhere expresses the view that the term is actually anything but an attractive name designed, perhaps, to muffle criticism of the Act's sponsors. On the contrary, words suggesting a lawyer's traditional role are employed at significant points. The Act affirms, "minors have a right to the assistance of counsel of their own choosing or of law guardians in neglect proceedings . . . and in proceedings to determine juvenile delinquency. . . ."[50] The law guardian for the poor is thus equated with retained counsel. Further, the "law guardians" are defined as "attorneys . . . designated . . . to represent minors."[51] The statute goes on to express "a finding that counsel is often indispensible to a practical realization of due process and may be helpful in making reasoned determinations of fact and proper orders of disposition. This part establishes a system of law guardians to realize these purposes."[52] The purposes, then, are: "realization of due process," "reasoned determination of fact," and "proper orders of disposition." No mention is

47. Whitlack, *supra* note 29.
48. Address, *supra* note 16.
49. N.Y. FAMILY CT. ACT (McKinney 1963).
50. N.Y. FAMILY CT. ACT § 241 (McKinney 1963).
51. *Id.* § 242.
52. *Id.* § 241.

made of seeing to it that a child who "needs" help receives it.

In short the legislature of New York, except for the use of the term to describe the lawyers to be assigned to the indigent, gives no hint that a lawyers acts improperly if he asserts all defenses and puts the state to its proof.

There is need for a lawyer in juvenile court and, so it seems to the author, a lawyer who acts as an advocate. He is to test the strength of the petitioner's case, to challenge that which can be challenged, and to question that which is open to question. There is no hint in Mr. Justice Fortas' *Gault* opinion that an advocate's action, which could block an adjudication by proper invocation of law or by appropriate challenge to the adequacy of proof, ought not to be taken because adjudication and commitment would benefit the child. Quite the contrary:

> [t]he probation officer cannot act as counsel for the child. His role in the adjudicatory hearing, by statute and in fact, is as arresting officer and witness against the child. Nor can the judge represent the child. There is no material difference in this respect between adult and juvenile proceedings of the sort here involved. In adult proceedings, this contention has been foreclosed by decisions of this Court. A proceeding where the issue is whether the child will be found to be delinquent and subjected to the loss of his liberty for years is comparable in seriousness to a felony prosecution. The juvenile needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it. The child 'requires the guiding hand of counsel at every step in the proceedings against him.'[53]

Indeed, Mr. Justice Fortas has rejected the propriety of a lawyer's role at the dispositional stage which is limited merely to being "helpful" to the child and instead emphasized the need to put forth the best affirmative case for him. In the Court of Appeals opinion in *Kent*[54]—a case involving the procedural requirements appropriate to a proceeding to determine whether the case of a sixteen year old should be transferred to criminal court—that court stated that the lawyer's role was to present "anything on behalf of the child which might help a court in arriving at a decision; it is not to denigrate the staff's submissions and recommendations."[55] Mr. Justice Fortas sharply disagreed with the court of appeals:

53. 387 U.S. 1, 36 (1967) (footnotes omitted).
54. Kent v. United States, 343 F.2d 247 (D.C. Cir. 1965), *rev'd*, 383 U.S. 541 (1966).
55. *Id.* at 258.

"[o]n the contrary, if the staff's submissions include materials which are susceptible to challenge or impeachment, it is *precisely* the role of counsel to 'denigrate' such matter."[56] Mr. Justice Fortas went on to say that in respect to "critically important" decisions, the material which the judge uses to reach his decision ought to "be subjected, within reasonable limits having regard to the theory of the Juvenile Court Act, to examination, criticism and refutation."[57] The language does not suggest that there is a great difference between the task of a lawyer in a juvenile court and the task of a lawyer in an ordinary criminal case.

A full exploitation of all of the rights of a child in juvenile court will carry the consequence that some guilty youths will escape adjudication. For some young persons this escape may not be, in ultimate terms, a happy occurrence; if juvenile court treatment is beneficial, the beneficial opportunity for the child will be lost. If it is destructive to the child's character for him to go free if he is guilty, that corrupting lesson will be learned in some cases. One cannot have it both ways if the juvenile court is to function as part of the general legal system.

Granted that counsel is properly an advocate, ought not a lawyer seek to achieve what is "best for the child" through persuasion? Should not a lawyer urge a youngster to speak out and admit his guilt? Should not counsel influence his client in proper cases to take advantage of a regimen of character-building through probation or placement in an institution devoted to child care?[58] An affirmative answer puts the lawyer-advocate in the role of a guardian of the person. In the author's view, these roles are not happily united. This position has been articulated by the Supreme Court of Vermont in *In re Dobson*:

> [a]n attorney can effectively argue the alternative courses open to a client only to one assumed to be capable of making a discriminating choice. The minor is presumed incapable and under disability, hence the need of a guardian ad litem to weigh alternatives for him. Yet a lawyer attempting to function as both guardian ad litem and legal counsel is cast in the quandary of acting as both attorney and client, to the detriment of both capacities and the possible jeopardizing of the infant's interests. The counseling of minors called for by 33

56. Kent v. United States, 383 U.S. 541, 563 (emphasis added).
57. *Id.*
58. Mr. Charles Schinitsky, Attorney in Charge, Family Court Branch of the Legal Aid Society, New York City, has discussed the duty of a law guardian in New York in relation to his client. See Paulsen, *The Constitutional Domestication of the Juvenile Court*, 1967 SUP. CT. REV. 233, 262-264. Mr. Schinitsky concludes, "We do not believe that it is the duty of a law guardian, or of any other attorney, to urge a child to assist the state in securing his conviction."

V.S.A. §678 is best provided by a separation of the roles of guardian ad litem and attorney.[59]

There is one final point about the effects of a child's right to counsel. If many lawyers examine, criticize, and refute information submitted to the court by the probation staff at the dispositional stage of the proceeding, we can predict a certain kind of difficulty for the court. The members of the court staff may well see a useful role for lawyers at the fact-finding or adjudicatory stage. If nothing else, television has instructed everyone that counsel has a place at a hearing designed to answer the question, "did he do it?" In contrast, few in the probation staff will take kindly to the challenges put by lawyers to a probation officer's recommendations regarding the disposition of an adjudicated delinquent. The questions asked by advocates seem like an attack on the officer's professional qualifications and his integrity. The staff is likely to view lawyers as interlopers, as persons who will destroy a possible relationship between the probation officer and the respondent, or as misguided amateurs interfering with the benefits which can be derived from a court acting upon expert information.

The staff, it is submitted, is quite mistaken in writing off the contribution which a lawyer can make to a dispositional hearing. A lawyer can articulate the point of view of a family which may be frightened, vulnerable, and without an articulate spokesman. He can bring new suggestions to the mind of the judge. He can call attention to the inadequate basis of some recommendations. At the dispositional stage wise decision-making can also benefit from "constant, searching, and creative questioning."[60]

NOTICE, A COMPLETE RECORD OF PROCEEDING, AND SELF INCRIMINATION

Notice

In requiring that timely, specific, and written notice of a juvenile court proceeding be given to a child and his parents, *Gault* has changed the practice in many places in the country. In Ohio the officers of the Juvenile Court Judges Association, immediately after *Gault*, gave warning to all Ohio judges that a statute "which set forth that a complaint is sufficently definite which merely alleges the child to be delinquent is no longer valid."[61] Judge Driscoll of Bridgeport tells of changing "our require-

59. 125 Vt. 165, 168, 212 A.2d 620, 622 (1965).

60. REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON POVERTY AND THE ADMINISTRATION OF CRIMINAL JUSTICE 10 (1963).

61. Address, *supra* note 16.

ments with regard to the allegations in petitions of neglect, and to some extent, those concerning delinquency as well."[62] In Minneapolis, more particularity is found on notices of violation of parole "even though this does not appear to have been specifically required by the *Gault* case."[63]

The concept of adequate notice not only embraces the point that a respondent should understand the specific facts to which he is being called to answer but also that the law which is being applied is sufficiently precise to make defense possible and decision-making by the judge rational. Many juvenile court acts are quite vaguely formulated, particularly in those sections which permit a court to act in relation to a child who has misbehaved but has not broken the law. For example, a California statute provides that any child "who from any cause is in danger of leading an idle, dissolute, lewd or immoral life, is within the jurisdiction of the juvenile court."[64] Such language presents a most serious constitutional issue of due process of law. The Supreme Judicial Court of Massachusetts has just declared unconstitutional a portion of that state's vagrancy statutes containing words similar to a portion of the language quoted.[65] The Massachusetts court overturned, on two grounds, the conviction of one Albert Patch on a charge of being "an idle person who not having any visible means of support has lived without lawful employment";[66] the statute was struck down on the basis that (1) the conduct could not fairly be classified as criminal and (2) the provision was void for vagueness. Obviously the Massachusetts statute can be distinguished from the California enactment. Yet the case illustrates a new willingness to examine critically language which has withstood constitutional challenge for many, many years. The case is important for our concerns because it is in line with the most recent developments in criminal law which have required greater particularity in the definition of offenses.

A Complete Record

As Judge Toner noted in his speech to the Ohio judges, "*Gault* does not hold that a record must be made in the juvenile court, but there is a strong recommendation that his be done."[67] Judge Arthur of Minneapolis says, "[w]e are also expanding reporting services"[68] in response to *Gault*. The "recommendation" of Mr. Justice Fortas' opinion has also

62. Driscoll letter, *supra* note 10.
63. Arthur letter, *supra* note 10.
4. CAL. WELF. & INST'NS CODE § 601 (West 1963).
65. Alegata v. Commonwealth, ——Mass.——, 231 N.E.2d 201 (1967). The statute is MASS. GEN. LAWS. ANN. ch. 272, § 66 (1956).
66. 231 N.E.2d at 205 (1967).
67. Address, *supra* note 16.
68. Arthur letter, *supra* note 10.

borne fruit in Connecticut: "[w]e also have retained court stenographers for every contested case. . . . We do not request a transcript unless there is an appeal."[69] New court rules in New Jersey provide: "[t]he Administrative Director shall provide for the verbatim recording of all hearings and times in all juvenile courts . . . either by a . . . stenographic reporter . . . or by an electronic sound recording device."[70] The rules also make free transcripts available to the indigent, a result which seems to follow from the demands of the equal protection clause as they were formulated in *Griffin v. Illinois*.[71] The Colorado Children's Code of 1967 requires that a "verbatim record shall be taken of all proceedings which might result in the deprivation of custody."[72] Judge McKinney of Ames, Iowa has summarized the reason for this recent trend:

> . . . I think that the thing that Gault has awakened us to is the making of a complete record in Juvenile Court, so that any Juvenile Court Orders that are made can be justified upon an appeal in that the entire record is available for the appellate Court.[73]

However, more than a transcript of proceedings is required if meaningful appellate review is to be afforded. *Kent* called for a statement of a judge's reasons for his decision as well. A transcript which does not include that information may be inadequate given the present approach of the Supreme Court to juvenile cases.

The Privilege Against Self-incrimination

The correspondence with the judges indicates that the privilege against self-incrimination is implemented, in some places, simply by telling a child and his parents of the privilege immediately before the hearing. "The procedure followed by the judges assigned to our Court is to advise the parent and the juvenile of the right of the juvenile not to testify."[74] Similarly, Judge Gentry of Greenboro, North Carolina, in answer to a question about the implementation of the privilege states, "[t]he child is not required to take the stand and testify against himself. Also, when being questioned [by the court], he is advised of his right to remain silent, and his right to have counsel present, or to have his parents present."[75]

Other judges report practices that give notice of rights under the privilege long before the court hearing. Already illustrated is the sort of

69. Driscoll letter, *supra* note 10.
70. N.J. Ct. R. 6:2-10.
71. 351 U.S. 12 (1955).
72. Colo. Rev. Stat. Ann. § 22-1-7(2) (Supp. 1967).
73. McKinney letter, *supra* note 10.
74. Dahl letter, *supra* note 10.
74. Gentry letter, *supra* note 10.

mimeographed notice sent to parents along with the summons. A letter from Lincoln, Nebrsaka, describes practices which implement the privilege during police interrogation in the preliminary processes of the juvenile court, as well as in the courtroom itself:

> . . . the present practice as well as the previous practice in Nebraska was to advise the child and his or her parents that the child has the privilege against self incrimination. This was done at various stages of the proceeding and is presently done at various stages of the proceeding. It is done prior to the commencement of any court hearing, but it is also done prior to the time any probation officer talks to the child, and so far as we have been able to ascertain, it is done by the law enforcement officials at the time they take the child into custody.[76]

A child's right to silence during interrogation, preliminary investigation, and the hearings in court could bring the single most drastic change in juvenile court proceedings, if the right is frequently invoked with the help of vigorous counsel. Mr. Justice Harlan evidenced awareness of this point in his opinion in *Gault*.[77] He agreed that timely notice and the assistance of counsel were required by due process. He would have required that a complete record be made but he would not have applied the privilege against self-incrimination, or the right to confrontation and cross-examination to the juvenile court: "quite unlike notice, counsel, and a record, these requirements might radically alter the character of juvenile court proceedings."[78] He argued that these rights "would contribute materially to the creation in these proceedings of the atmosphere of an ordinary criminal trial. . . ."[79] It can be observed, further, that the overwhelming number of adjudicated decisions have been entered after a child's admission (in or out of court) even though other evidence might have also been heard. Children in trouble have been encouraged to talk. Talking was not only the first step toward rehabilitation, so it was thought, but it also provided much needed information about the character of the child and the sources of his trouble.

Has *Gault* brought *Miranda v. Arizona*[80] to the juvenile court? Under *Miranda*, it will be remembered, a suspect, taken into custody and subjected to questioning, is entitled to "fully effective" notice of his right to silence. He is entitled to a warning that he has a "right to remain silent, that anything he says can be used against him in a court of law, that he

76. Nuernberger letter, *supra* note 10.
77. 387 U.S. 1, 65 (1967) (concurring in part and dissenting in part).
78. *Id.* at 75.
79. *Id.*
80. 384 U.S. 436 (1966).

has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires."[81]

There is not really much doubt that some such set of safeguards bind those officials who interrogate offending children. After all, the *Gault* opinion does say, "[w]e conclude that the constitutional privilege against self-incrimination is applicable in the case of juveniles as it is with respect to adults."[82] This statement was preceded by the observation that "[i]t would indeed be surprising if the privilege against self-incrimination were available to hardened criminals but not to children."[83] Mr. Justice Fortas surely revealed his assumption that the privilege is applicable in the police station as well as in the courts when he wrote, "[t]he participation of counsel will, of course, assist the *police*, Juvenile Courts and appellate tribunals in administering the privilege."[84]

The ultimate significance of a *Miranda*-type warning cannot be estimated unless it is known how easily the right to remain silent during custodial questioning can be waived. The waiver problem is exceedingly difficult in respect to juveniles, as indeed Mr. Justice Fortas indicated:

> [w]e appreciate that special problems may arise with respect to waiver of the privilege by or on behalf of children, and that there may well be some differences in technique—but not in principle—depending upon the age of the child and the presence and competence of parents.[85]

Some recent case law has already begun to wrestle with the waiver issue. For example, *In re William L.*[86] raised the question of whether a fourteen-year-old had waived his privilege of silence. The opinion describes the circumstances of the questioning:

> William was awakened by four policemen at 3:00 a.m. on November 7, 1966 at his home and brought to the 78th Precinct squad office. His mother was told that a murder had been committed in the neighborhood and that there was no proof that William had done it, but that the police had been informed that he was involved. She asked whether she might accompany William to the police station and was told that it was not a serious matter and that her son would be home in an hour or two.

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81. *Id.* at 479.
82. 387 U.S. 1, 55 (1967).
93. *Id.* at 47.
84. *Id.* at 55 (emphasis added).
85. *Id.*
86. ———App. Div. 2d———, 287 N.Y.S.2d 218 (1968).

> At the squad room William was questinoed by Detective O'Rourke in company with four or five police officers. O'Rourke testified: 'I told him he was entitled to a lawyer; that if he did not have one we would get one; that I apprised him if he wished to remain silent he could; and anything he said would be used against him.' William did not respond to these warnings, but 'stated he wanted to talk, and he said he wanted to tell what happened.' The questioning of William and Charles, another juvenile involved in the incident, was completed in about an hour. Both William and Charles were charged with delinquency at 5:00 a.m. William's mother was informed by the police of the charge against William at 7:00 a.m.[87]

The appellate court emphasized the fact that William's mother was not present at the questioning and that she had never been informed of the child's rights. The court overturned the adjudication based on William's confession even though he had supposedly waived his constitutional protections:

> [w]e think it almost self-evident that a boy of 14, aroused from sleep at 3:00 a.m., taken to a police station and questioned by four of five police officers concerning a homicide, would scarcely be in a frame of mind capable of appreciating the nature and effect of the constitutional warnings given him before the questioning begins. More than the making of the confession alone is required in order to find a conscious and understandnig waiver of the juvenile's rights. Indeed, even apart from mandates of *Gault* and *Miranda* (*supra*), the circumstances of William's confession render it invalid under the requirements of due process and the special conditions of care which a juvenile's interrogation demands. The age and immaturity of the juvenile, both emotionally and intellectually, create the need for the advice of counsel and his presence at the questioning when charges of juvenile delinquency may ensue (cf. Family Court Act, §§ 724, 728, 741, 744).[88]

In contrast, an opinion of the Supreme Court of California, *People v. Lara*,[89] has held that a boy not quite eighteen could competently waive the privilege of silence at the accusatory stage of a criminal case. The opinion rejected the notion that minors are incompetent to waive constitutional rights as a matter of law. A conviction based upon the con-

87. 287 N.Y.S.2d at 220.
88. 287 N.Y.S.2d at 221 (citations omitted).
89. 67 Cal.2d 475, 432 P.2d 282, 62 Cal. Rptr. 586 (1967).

fession in *Lara* (a prosecution for murder) was upheld in spite of the fact that the youth was a member of the Mexican-American minority with a ninth or tenth grade education, was in poor physical condition at the time of the questioning, and possessed a low I.Q. The court reasoned:

> [t]o sum up, we have seen that a minor, even of subnormal mentality, does not lack the capacity as a matter of law to make a voluntary confession without the presence or consent of counsel or other responsible adult, or to make a knowing and intelligent waiver of his right to counsel at trial; in either event, the issue is one of fact, to be decided on the 'totality of the circumstances' of each case. We are of the opinion that the same rule governs the issue of the effectiveness of a minor's waiver of his rights to counsel and to remain silent after the accusatory stage has been reached in a pretrial investigation.[90]

The main point in the quotation is most important. By insisting that the "same rule" governs the "voluntariness" of a confession and the issue of whether or not a waiver has been made "knowingly and intelligently," the *Lara* opinion emphasized the question of how much pressure has been put upon the suspect or how great of an inducement has been offered prior to waiver. In other "waiver" contexts such as the waiver of a trial through entering a plea of guilty, it is important to inquire how much the suspect knows about the consequences of waiver. When the issue is one of offering counsel, a respondent can be questioned regarding his understanding of the value of counsel. One of the defendants in *Laura* complained of his lack of knowledge before he waived the privilege:

> Lara further complains, however, that the police did not inform him of 'the elements of the crimes charged against him,' 'the possible defenses available to him,' and the fact that 'he could receive the death penalty.' There is no requirement that an accused be informed of these matters while the case is still in the stage of interrogation by investigating officers. Indeed, it would usually be impossible to do so, for at that stage no crimes have yet been 'charged against him'; the latter decision is subsequently made by the district attorney, after appraising the legal effect of the evidence gathered from all sources in the case.[91]

The court's response would not have met the defendant's contention if he had complained that he had not been informed about the practical and legal effects of a confession or an admission.

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90. 432 P.2d at 219, 62 Cal. Rptr. at 603.
91. 432 P.2d at 210, 62 Cal. Rptr. at 594.

Waiver problems not only raise some of the same issues as the confession case in respect to police pressure but also will involve efforts by officials to induce a person to talk (or waive counsel). Consider, for example, whether the following question and answer taken from a pamphlet published by the Lane County, Oregon, Juvenile Department would invalidate a waiver of the privilege if a child and his parent were to read it at a probation officer's request:

> Is a child required to answer questions or reveal any information about himself prior to a juvenile court hearing?
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> No. He is not legally required to do so. However, it is helped to the court staff to know and understand as much as possible about each child before deciding whether his case should go to court. The decision as to whether any service is needed, or whether the matter even needs to come before the court, is based upon more than the offense alone.[92]

There is a bit of irony presented by the two waiver cases discussed above. *Miranda* has sometimes been defended as a prophylactic rule. The traditional confessions cases are said to be difficult of application because one could never truly know what pressures the police had applied. Inquiry into that question usually resulted in a "swearing contest" between the officers and the defendant. A rule like *Miranda* supposedly would be much easier to apply. The two opinions, however, suggest that all of the circumstances of an interrogation must be explored in order to decide whether a waiver was given knowingly and intelligently. If so, we have not moved very far toward a simple, mechanical rule.

Automatic rules which do not require an inquiry into circumstances are possible. Legislatures could deprive a minor of juvenile court age of the power to waive constitutional rights. Judge Copeland of Topeka does not permit waiver in certain cases: "[m]y practice has been that a statement from any person under the age of sixteen (16) taken without either an attorney or a parent present at the time the alleged 'waiver' occurred is not admissible in evidence."[93] The Colorado Legislature in the Children's Code of 1967 permits the use of a child's statements only if the child is supported by parents, guardian, or legal custodian:

> [n]o statements or admissions of a child made as a result of interrogation of the child by a law enforcement official concerning acts which would constitute a crime if committed by

92. LANE COUNTY JUVENILE DEPARTMENT, JUVENILE COURT 3 (1967).
93. Copeland letter, *supra* note 10.

> an adult shall be admissible in evidence unless a parent, guardian, or legal custodian of the child was present at such interrogation, and the child and his parent, guardian, or legal custodian were advised of the child's right to remain silent, that any statements made may be used against him in a court of law, the right of the presence of an attorney during such interrogation, and the right to have counsel appointed if so requested at the time of the interrogation.[94]

Miranda, of course, applies only to (custodial) interrogation. Thus, the Supreme Court of Illinois has held that the confession of a youngster of fifteen, given without a prior waiver while he was not under arrest, can be admitted in a criminal case. "All agree that *Miranda* does not require police to interrupt a suspect in process of making a spontaneous statement in order to warn him of his contsitutional rights," the Court said.[95] To the argument that a boy, handcuffed, taken from his family and riding in a squad car on the way to the station, cannot be considered to make a voluntary statement, the Court replied, "[i]t seems apparent that his statement . . . was the product of a compulsive conscience or otherwise psychologically motivated rather than the result of a coercive atmosphere."[96]

A confession is also admissible under *Miranda* if the suspect is not in custody when he makes the statement. Such a situation, involving a youngster charged with a crime, was found in *People v. Rodney P.*:

> Daniel W. was arrested by police on May 1, 1966 in connection with the theft of a 1963 Chevrolet. After some questioning he identified the appellant, Rodney P., then 16 years old, as his accomplice. Since he knew where Rodney lived (but not the precise address) Daniel directed two detectives to Rodney's home. They arrived there at about 8:00 P.M. Detective Lally left Daniel in the car with his fellow detective and approached three boys standing by the side of the defendant's house. He asked which of the boys was Rodney. The appellant identified himself, whereupon the detective asked the other two boys if they would leave, which they did.
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> The detective questioned Rodney about being with Daniel W. that afternoon and taking the car. Rodney admitted to Detective Lally that he had taken the car with Daniel W.

94. COLO. REV. STAT. ANN. § 22-2-2(c) (Supp. 1967).
95. People v. Orr, 38 Ill.2d 417, ——, 231 N.E.2d 424, 427 (1967).
96. 231 N.E.2d at 428.

> This interrgation lasted three to four minutes. The detective and Rodney next went inside the house and the officer spoke to Rodney's father over the telephone regarding his son's arrest. Rodney was taken to police headquarters where the sum and substance of his conversation with the detective was reduced to writing and signed by him. He was not advised at any time of his rights either with regard to the assistance of counsel or of his right to remain silent.[97]

The confession was held admissible because, even though the police intended to arrest him, they had not yet done so. *Miranda* did not apply because the suspect had not been deprived of his freedom of movement nor, "as a reasonable person," was he led to believe that his freedom was restrained in any significant way.

This is not the place to discuss the merits of these cases. They illustrate problems which the juvenile court will now face—a set of problems rarely brought into children's court before *Gault*.

Retroactivity

Is *Gault* to be applied retroactively? This question has no single answer. *Gault* decided the issues of the right to counsel, the applicability of the privilege against self-incrimination, the right of confrontation, the necessity of sworn testimony and the adequacy of notice. It would seem that retroactivity would be accorded *Gault* on all issues but the issue regarding the privilege against self-incrimination. All others would seem to relate to the integrity of the fact-finding process—the test of retroactivity for the adult criminal cases.[98]

An interesting point was made in a recent New York opinion of the Appellate Division, Second Department.[99] It suggested that *Gault* be given retrospective application to the date June 16, 1966 on the issue of a child's right to silence during in-custody interrogation. It was on the date mentioned that *Miranda* was decided. The court reasoned:

> [w]e observe . . . if William had been an adult, he would have been entitled to the benefits of the *Miranda* principles, including the discharge by the petitioner of the heavy burden of demonstrating an understanding waiver by William of his rights. We do not perceive any valid ground for denying William those benefits simply because he is a child.[100]

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97. 21 N.Y.2d 1, 3, 233 N.E.2d 255, 256 (1967).
98. *See, e.g.*, Stovall .v Denno, 388 U.S. 293 (1967).
99. *In re* William L., ———App. Div. 2d —, 287 N.Y.S.2d 218 (1968).
100. *Id.*—, 222.

In *State ex rel. La Follette v. Circuit Court of Brown County*,[101] the Wisconsin Supreme Court held that *Gault* was retroactive in respect to the newly-recognized right to counsel. As the opinion demonstrates, retroactive application affects many young persons in confinement, many of whom may be quite dangerous: "[t]he pleadings in this action establish that there are approximately 150 juveniles confined in the state reformatory who, as indigents, are presently processing petitions for the appointment of counsel so that they may commence habeas corpus actions based upon *Gault*."[102] To insure that 150 offenders were not immediately sent home, perhaps to disappear from view, the Wisconsin judges decided that the juvenile inmates were not entitled to an absolute discharge but only to a discharge from the institution in which they had been held and a remand back to juvenile court. The opinion sets out a remand procedure in detail:

> [t]he ciruit court shall immediately mail a certified copy of its order to the committing juvenile court. On receipt of such copy of the order, the juvenile court shall direct the sheriff of the county in which it exercises jurisdiction, either in person, or by his undersheriff or a deputy, to proceed to the reformatory and assume the custody of the juvenile and transport him to the county in which the juvenile court sits. It shall be the duty of the department or public welfare to release custody to such sheriff, undersheriff or deputy sheriff. The juvenile court, at the time it issues instructions to the sheriff, shall direct that the juvenile, upon his arrival in such county, be forthwith presented before such juvenile court.
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> Upon presentation of the juvenile before the juvenile court, the court shall proceed as if the juvenile was then making his initial appearance under an orginal petition. . . .[103]

The Burden of Proof

It seems likely that Kent and *Gault* are the first in line of a long parade of juvenile cases which the Supreme Court will decide over the years. During the present October, 1967, Term of Court, two more cases will be heard. In one of them, *In re Whittington*,[104] the adjudication of a fourteen-year-old, based on circumstantial evidence, was upheld by a court of appeals in Ohio on the ground that proof had been established

101. ——Wis.——, 155 N.W.2d 141 (1967).
102. 155 N.W.2d at 145.
103. 155 N.W.2d at 149.
104. 13 Ohio App.2d 11, 233 N.E.2d 333 (1967), *cert. granted*, 389 U.S. 819 (1967) (No. 36 Misc.).

according to the preponderance of the evidence. The court stated, "[t]he proceeding being civil in nature and not criminal, a preponderance of the evidence is sufficient to warrant a determination that a minor is a delinquent, even though such determination involves a finding that a criminal statute had been violated by such minor."[105]

The Supreme Court of Illinois recently handed down a contrary decision respecting the burden of proof.[106] The court was persuaded to reach its position by the possibility that a child may lose his freedon for a greater period than a person convicted of a crime involving an act similar to the act of delinquency. "For this reason, we cannot say that it is constitutionally permissible to deprive the minor of the benefit of the standard of proof distilled by centuries of experience as a safeguard for adults."[107] The Illinois court did not, however, extend the new standard to dependency and neglect cases even though in such cases a child may be removed from his parental home. The difference between delinquency adjudication and a neglect determination was explained. In a neglect proceeding, the court said, "the minor's liberty may not be infringed upon by his commitment to an institution designed solely for the care of delinquent children . . . and he is not punished or regarded as a criminal by society which is genuinely seeking to provide him with a proper home."[108]

The distinction is revealing. There is no question that a neglected child may be separated from his parents for years, perhaps forever. He may also find himself in a public or voluntary institution, and he is likely to experience curtailment in his freedom of movement to some degree. Yet informal proceedings may be used. The key to the difference between a delinquency and neglect adjudication, for constitutional purposes, seems to be the stigma of "delinquency" and the disturbing suggestion that, with respect to a delinquent, society is not "genuinely seeking" to provide the parental care which the founders of the juvenile court movement posited as basic to the juvenile court.

The recently adopted New Jersey court rules employ the "reasonable doubt" standard.[109] It must be said that a change in the quantum of proof required will not, it seems probable, change many results in adjudication. Few judges see themselves reaching an adjudication of delinquency unless they are quite certain that the youngster committed the act alleged. The adoption of a "reasonable doubt" standard, it is true,

105. 13 Ohio App.2d at ———, 233 N.E.2d at 341. *Accord, In re* Wylie, 231 A.2d 81 (D.C. Mun. Ct. App. 1967).
106. *In re* Urbasek, ———Ill.2d———, 232 N.E.2d 716 (1967).
107. 232 N.E.2d at 720.
108. *Id.*
109. N.J. Cr. R. 6:9-1(f).

may have an effect on the willingness of appellate courts to reverse occasionally, but the day-to-day operation of courts is not likely to be transformed by it.

In the Long View

In coming Supreme Court terms we will learn more about a youngster's right to bail, to jury trial, and to counsel at the intake stage and during the dispositional hearing. Whether evidence can be admitted over the objection that it has been illegally obtained or whether hearsay can be used remains an open question. Let us, however, assume that juvenile court hearings and procedures become substantially similar to criminal cases. What will the effect be? An Ohio judge, when he heard of *Gault,* is reported to have said, "the Supreme Court has ended the juvenile court," and he announced immediate plans to dispose of all matters pending before him.[110]

Justice Fortas surely had no such point of view. He held out hope that the benefits of a court stressing rehabilitation might be continued—even maximized:

> [a]s we shall discuss, the observance of due process standards, intelligently and not ruthlessly administered, will not compel the States to abandon or displace any of the substantive benefits of the juvenile process.[103]
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> We do not mean by this to denigrate the juvenile court process or to suggest that there are not aspects of the juvenile system relating to offenders which are valuable. But the features of the juvenile system which its proponents have asserted are of unique benefit will not be impaired by constitutional domestication. For example, the commendable principles relating to the processing and treatment of juveniles separately from adults are in no way involved or affected by the procedural issues under discussion. Further, we are told that one of the important benefits of the special juvenile court procedures is that they avoid classifying the juvenile as a 'criminal.' The juvenile offender is now classed a 'delinquent.' There is, of course, no reason why this should not continue. It is disconcerting, however, that this term has come to involve only slightly less stigma than the term 'criminal' applied to adults. It is also emphasized that in practically all jurisdictions, statutes provide that an adjudication of the child as a delinquent shall not operate as a civil disability

110. Address, *supra* note 16.
111. 387 U.S. 1, 21 (1967).

> or disqualify him for civil service appointment. There is no reason why the application of due process requirements should interfere with such provisions.[112]
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> . . .
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> In any event, there is no reason why, consistently with due process, a State cannot continue, if it deems it appropriate, to provide and to improve provision for the confidentiality of records of police contacts and court action relating to juveniles.[113]
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> . . .
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> While due process requirements will, in some instances, introduce a degree of order and regularity to juvenile court proceedings to determine delinquency, and in contested cases will introduce some elements of the adversary system, nothing will require that the conception of the kindly juvenile judge be replaced by its opposite, nor do we here rule upon the question whether ordinary due process requirements must be observed with respect to hearings to determine the disposition of the delinquent child.[114]

Judge Underwood was equally optimistic in the Illinois burden-of-proof case: ' [t]he unique benefits that are derived from the special dispositional processes under the Act will not be diluted by the changes made here at the adjudicatory stage."[115]

Mr. Justice Fortas also doubted that informal procedures were especially helpful in assisting troubled children. Recent studies, he pointed out, have suggested "that the 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."[116]

We can expect, in my view, new legislation and court rules to embrace more procedural formality. Statutes and rules will probably require more data to be recorded at each stage of the juvenile court proceeding such as exactly who attended, who said what, and exactly what decision was made.

Whatever the importance of more formal procedure and whatever the answers may be to the procedural questions not yet resolved, *Gault* has ultimate importance in terms of its spirit, its approach, and the way

112. *Id.* at 22 (footnotes omitted).
113. *Id.* at 25.
114. *Id.* at 27.
115. *People v. Urbasek*, ——Ill.2d——, ——, 232 N.E.2d 716, 720 (1967).
116. 387 U.S. 1, 26 (1967).

it views the juvenile court and its role. A draft of the Juvenile Procedures Study Committee in Michigan which represents a tentative formulation of rules for the juvenile court reflects this new spirit.[117] Rule 1.3 mentions the importance of procedural rights and the interest of the public in addition to the welfare and best interests of the child as guides for construction:

> [w]hile procedures shall not be deemed criminal, the court and its officers, shall proceed in such manner as will safeguard procedural rights, and the proper interests of the minor, the minor's parents or legal custodians, and the public. These rules shall be construed in keeping with the philosophy contained in the preamble of the juvenile code to the end that each child coming within the jurisdiction of the court shall receive such care, guidance, and control, preferably in his own home, as will be conducive to the child's welfare and the best interests of the state, and that when such child is removed from the control of his parents the court shall secure for him care as nearly as possible equivalent to the care which should have been given to him by them, consistent with protection of such procedural rights.[118]

The *Gault* opinion is only one part of the juvenile court's legacy from the year 1967. The other, to which *Gault* must be linked, is the *Report of the President's Commission on Law Enforcement and Administration of Justice.* The Commission's *Report* fundamentally rejected the idea that a juvenile court, consistent with the plan of its originators, is a gateway to services—a door through which troubled children would pass to receive help. The relationship between *Gault* and the *Report* has been summarized elsewhere:

> [u]nlike the founders of the juvenile court, members of the Commission had little faith in meeting the problem of delinquency by treating and 'curing' individual offender. '[D]elinquency,' the Report reads, 'is not so much an act of individual deviancy as a pattern of behavior produced by a multitude of pervasive societal influences well beyond the reach of action by any judge, probation officer, correctional counsellor or psychiatrist.' The problem requires new methods. A social disease, delinquency should be attacked by economic and social measures, not by methods of effecting change in individuals. The

117. MICHIGAN JUVENILE PROCEDURES STUDY COMMITTEE, RULES FOR JUVENILE COURT (1968) (tentative draft).
118. *Id.* 1.3.

Report urged improvements in schools, in housing, in employment opportunities, in occupational training programs, and the strengthening of the family.' Court adjudication and disposition of those offenders, argued the Commission's task force on juvenile delinquency and youth crime, 'should no longer be viewed solely as a diagnosis and prescription for cure, but should be frankly recognized as an authoritative court judgment expressing society's claim to protection.' The task force agreed that the youth of the offender argued for the vigorous pursuit of rehabilitative efforts for the adjudicated, but the' incapacitative, deterrent, and condemnatory aspects of the judgment should not be disguised.'

The formal juvenile court system and its pronouncements of delinquency, the Report said, 'should be used only as a last resort.' The Report reflects a deep impression made by studies indicating that a court adjudication is harmful to the young. The drafters of the Report recommended that children be kept away from the juvenile court's formal adjudication in as many cases as possible. The Report urged the establishment of youth services bureaus located in neighborhood community centers that would be required to receive both delinquent and non-delinquent children referred by police, parents, schools, and other agencies. Each bureau should embrace a broad range of services designed to assist young people with their problems.

It further recommended that juvenile courts make the fullest feasible use of 'preliminary conferences' to allow for out-of-court adjustments and settlements at the level of court intake. A further device to avoid adjudication is contained in the suggestion that juvenile courts employ consent decrees wherever possible in the hope that the agreements to undertake rehabilitative treatment might free the respondent from the stigma of adjudication and at the same time make certain that an erring youth who needs it will undertake a treatment plan.

Gault prescribes procedure for the court of 'last resort.' The supposed agency of salvation has become the instrument for corruption. It is no longer a gateway to needed services but a court for dealing with 'offenders for whom vigorous measures seem necessary.'[120]

Walter W. and Walter C. Reckless have made a preliminary study

120. Paulsen, *The Constitutional Domestication of the Juvenile Court*, 1967 SUP. CT. REV. 233, 244-246.

of the impact of *Gault* in Ohio. As part of their report certain legislative suggestions are made:

> 1. . . . consideration be given to a separation of the legal procedures which handle delinquency matters (including traffic violations of children) from those which handle child-welfare matters (dependency, neglect, crippled children, etc.), so as to prevent confusions and complications in the future.
>
> 2. Consideration should also be given by the legislative commission to the elimination of all so-called "waywardness clauses" from the definitions of juvenile delinquency in juvenile court law, as covered by subsections B, C, D, and E in section 2151.02 of the Ohio Revised Code. These sections deal with matters of being beyond control, habitual truancy from home and school, deportment injurious to and endangering morals or health, and attempts to enter into a marriage relationship without consent of parents or guardians. Such non-delinquency matters of children could be diverted by law to probate procedures and to welfare agencies and institutions. America is about to "decriminalize" drunkenness in adults and divert such cases to detoxification centers. Certainly, we can consider the "decriminalization" of waywardness.
>
> 3. One of the boldest suggestions which might concern a legislative commission would be the limitation of delinquency by law to young persons 14 to 18 years of age, whereby all children under 14 who committed a criminal or delinquent act would not be dealt with as delinquent, no matter what their offense. If a legislative commission became alerted to the need for such a cutting point in age, it should send a small delegation to Sweden and other Scandinavian countries to examine how their laws, police, and courts work. In Sweden, for example, the law indicates that no child under 15 can be handled as a delinquent. If he comes to the attention of the police, he must be diverted immediately to a welfare agency.[121]

These suggestions fit a court of "last resort." The very young, the merely disobedient, and the neglected ought to be separated from the "toughs."

A similar suggestion was made by the Supreme Court of Washington, when it recommended a change in the Washington law to permit a young offender in a minor traffic offense to be subject to appropriate minor sanctions: "[t]o require the court to declare a juvenile to be a

121. Reckless & Reckless, The Initial Impact of the Gault Decision on Juvenile Court Procedure in Ohio, 11-12 (mineo. 1968).

delinquent child and a ward of the court for the violation of a relatively minor traffic regulation is, in our opinion too harsh a *required* sanction to be imposed."[122]

Finally, the juvenile court's new position may have important effects, in the long run, on the court's role in the community. Juvenile court judges have often acted as coordinators of community services for children and as tribunes for the child in budget hearings and in legislative halls. "The compelling needs of children unmet by specialists in schools, hospitals, social agencies, and the community," writes Judge Justine Wise Polier of New York City, "have repeatedly compelled the juvenile court judge to become the generalist who must observe what is not being done, attempt to coordinate needed services, and find some practical way of filling the gap between compartmentalized services."[123]

Can or ought this role be played by a judge of the "new" juvenile court? It may be that "community coordinators of youth services" or "children's commissions" will take over the judge's lobbying work completely. Surely, the "1967—look" of specialized courts for children does not leave us a court at the center of the enterprise of providing services for children. One senses that 1967 has been the Year of the Big Change for juvenile courts. The change is not properly seen, however, as merely bringing more formal procedures to the juvenile court. The change involves a revised conception of the court's role which will inevitably generate new proposals respecting the kinds of cases this court should hear and the kinds of the things judges should be called to do.

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122. *Lesperance v. Suprerior Ct. for Island Co.*, ——— Wash. ———, 434 P.2d 602, 605 (1967).

123. Polier, *The Gault Case: Its Practical Impact on the Philosophy and Objectives of the Juvenile Court*, 1 FAMILY LAW Q. 47, 51 (1967).