Comments

IN RE GAULT: CHILDREN ARE PEOPLE

On June 15, 1964, fifteen-year-old Gerald Gault was committed to an Arizona state industrial training school for the remainder of his minority[1] because he and a friend, Ronnie Lewis, had telephoned a Mrs. Cook a few weeks earlier and made mildly lewd remarks to her.[2] Shocked by the boys' remarks, Mrs. Cook called the Gila County, Arizona, sheriff who promptly traced the telephone call, apprehended Gerald and Ronnie and took them to the Gila County juvenile detention center.[3] When a probation officer, Mr. Flagg, questioned the boys, they admitted making the telephone call; each blamed the other.[4] Probation officer Flagg detained the boys at the center pending a juvenile court hearing.

Later that afternoon, Gerald's mother returned home from work to discover that the authorities had taken her son to the juvenile center.[5] She went to Juvenile Hall where Flagg explained that he was holding Gerald for making a lewd telephone call and that the juvenile court judge would consider Gerald's case at a hearing the next day.[6]

Juvenile Court Judge McGhee decided to commit Gerald to the state industrial school after two hearings—the jurisdictional and adjudicatory hearing on June 9th and the dispository hearing on June 15th.[7] Gerald, his mother, and probation officers Flagg and Henderson attended both hearings. In addition, Gerald's older brother was present at the first hearing; Ronnie Lewis and both boys' fathers were present at the second.[8] Mrs. Cook did not attend either hearing.[9] Neither Gerald nor his parents were represented by counsel at either hearing, and no one told them that they had a right to counsel. Judge McGhee questioned Gerald at both hearings but did not tell him that he could refuse to answer questions.[10] Because the court kept no record of either hearing, it is impossible to determine exactly what any of the participants said. Gerald and his parents claimed that although Gerald admitted dialing Mrs. Cook's num-

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[1] *In re* Gault, 387 U.S. 1 (1967).
[2] Record at 79, *In re* Gault, 387 U.S. 1 (1967) [hereinafter cited as Record].
[3] 387 U.S. at 4-5.
[4] Record at 45, 50-51.
[5] *Id.* at 29.
[6] *Id.*
[7] Brief for Appellee at 9, *In re* Gault, 387 U.S. 1 (1967).
[8] 387 U.S. at 5, 7.
[9] *Id.*
[10] *Id.* at 43-44.

ber and asking if the person who answered was Mrs. Cook, he denied making any of the lewd remarks.[11] Judge McGhee testified that Gerald admitted making some of the less serious remarks.[12] No one disputed that at the end of the first hearing Mrs. Gault had asked the judge whether he would commit Gerald to the industrial school, and the judge had replied, "No, . . . I will think it over."[13]

Gerald returned home on June 11th or 12th, and on the same day probation officer Flagg sent Mrs. Gault a note informing her that the court would hold "further hearings on Gerald's delinquency" on June 15th.[14] At that hearing, Judge McGhee decided to commit Gerald to the industrial school. Because Arizona does not provide for appellate review of juvenile court decisions,[15] Gerald and his parents attacked Judge McGhee's action by applying for a writ of habeas corpus. An Arizona Superior Court found Gerald's commitment proper, and the Arizona Supreme Court affirmed that judgment. The United States Supreme Court noted probable jurisdiction of the Gaults' appeal[16] and then reversed the Arizona court.[17]

Gerald and his parents argued before the Arizona courts and the United States Supreme Court that they did not receive due process in the juvenile court hearings because they were not accorded certain specific rights guaranteed to adults charged with crime: (1) the right to counsel; (2) the privilege against self-incrimination; (3) the right to confront and cross-examine witnesses; (4) the right to formal, timely notice of the hearings, charges and possible consequences; (5) the right to an appeal; and (6) the right to a record.[18]

Although the Arizona Supreme Court held that juveniles charged with delinquency are entitled to due process, it defined juvenile due process as encompassing fewer procedural safeguards than those afforded adults charged with criminal conduct. The Arizona court held that juveniles do not have a right to be represented by counsel; that the juvenile's parents do have a right to retain counsel but not to have counsel appointed; that the juvenile court judge need not inform a child appearing before him that he may remain silent; and that although both parents and child have a right to notice of the charges and of hearings, the informal notice probation officer Flagg gave Mrs. Gault was sufficient to satisfy that

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[11] *In re* Gault, 99 Ariz. 181, 184-85, 407 P.2d 760, 763 (1965).

[12] Record at 57-59.

[13] *Id.* at 31; Brief for Appellant at 5-6, *In re* Gault, 387 U.S. 1 (1967).

[14] 387 U.S. at 6.

[15] *Id.* at 8

[16] 384 U.S. 997 (1966).

[17] *In re* Gault, 387 U.S. 1 (1967).

[18] *Id.* at 10.

requirement.[19] The court declined to decide whether a juvenile has a right to confront and cross-examine witnesses because Gerald did not deny the charges and "the relevancy of confrontation arises only where the charges are denied."[20] The Arizona court affirmed its prior holding that there is no right to an appeal from a juvenile court adjudication and consequently held that the juvenile court need not record its proceedings.[21]

The United States Supreme Court agreed only with the Arizona court's holding that a juvenile is entitled to due process; it disagreed completely with the Arizona court's definition of juvenile due process. In a lengthy, wide-ranging opinion by Justice Fortas, the court held that: (1) a juvenile is entitled to timely and complete notice of the charges against him, and notice at the time of the first hearing is not timely; (2) a juvenile whom the state may commit to an institution is entitled to the assistance of counsel, and the state must provide counsel for indigent juveniles; (3) a juvenile is entitled to a warning that he need not answer questions; and (4) a juvenile is entitled to confront and cross-examine witnesses against him.[22] The majority opinion did not decide whether the juvenile is entitled to an appeal or to a record of the court proceedings.[23]

The *Gault* case raises problems concerning the procedure a juvenile court should employ during the adjudicatory stage of a juvenile hearing. Generally, juvenile courts have jurisdiction over children who have acquired the status of delinquency by violating a state or municipal statute. The purpose of the first stage of the juvenile court hearing, the jurisdictional or adjudicatory stage, is to find facts. The judge must determine that the child committed the act alleged in order to find him a delinquent subject to the juvenile court's jurisdiction. At the second, dispositional stage, the judge decides what the state should do with the child. The Gaults challenged neither the juvenile court judge's dispositional decision nor the procedures used in reaching that decision. Because they challenged only the procedures he followed at the adjudicatory stage of the hearing, the United States Supreme Court limited its opinion to a consideration of those procedures.[24] This Comment will do likewise.

I

PRE-*Gault* JUVENILE COURT SYSTEMS

A. Individualized Justice

The Arizona court's narrow interpretation of juvenile due process was dictated by its concept of juvenile court philosophy:

[19] *In re* Gault, 99 Ariz. 181, 189-91, 407 P.2d 760, 766-68 (1965).
[20] *Id.* at 191, 407 P.2d at 768.
[21] *Id.* at 192, 407 P.2d at 768.
[22] 387 U.S. at 33, 41, 55-57.
[23] *Id.* at 58.
[24] *Id.* at 13.

> [J]uvenile courts do not exist to punish children for their transgressions against society. The juvenile court stands in the position of a protecting parent rather than a prosecutor. . . . The aim of the court is to provide individualized justice for children.[25]

Individualized justice is a recurring theme in literature dealing with the juvenile court system and in appellate cases reviewing juvenile court decisions.[26] Juvenile courts stress individuation almost to the exclusion of justice. Individuation means that treatment depends on what a person is, not on what he has done. Juvenile statutes typically define as delinquent a child who has done no more than violate a municipal ordinance; hence, almost any child may be subject to juvenile court jurisdiction.[27] Society fines an adult who disobeys a littering ordinance but may treat a juvenile who violates the same ordinance in exactly the same way it treats a juvenile who commits murder.[28]

The legal justification for individual justice is found in the doctrine of parens patriae: Towards its wayward children the state acts not as governor but as parent.[29] Because a child who engages in delinquent conduct needs care, the state, as a loving parent, intervenes to care for him. It is obviously in the child's best interest that the state care for him and cure him of the problems which resulted in his delinquency. Therefore, procedural formality should not block a finding of delinquency. The judge should admit any evidence which will aid him because he is acting as a parent attempting to determine whether the child needs treatment. The child should have to answer questions, because his answers will help the judge to make that determination. A lawyer is not necessary to protect the child because there is nothing from which he needs protection. A finding of delinquency brings the child beneficial, rather than harmful, results.

In a similar vein, the parens patriae argument justifies denying juveniles most of the rights guaranteed adults accused of crime.[30] But remove the keystone and the arch collapses. If juveniles in fact receive no more than custodial care and treatment,[31] if the state incarcerates them and

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[25] *In re* Gault, 99 Ariz. 181, 188, 407 P.2d 760, 765 (1965).

[26] *See, e.g., In re* Holmes, 379 Pa. 599, 109 A.2d 523 (1954), *cert. denied*, 348 U.S. 973 (1955); Commonwealth v. Fisher, 213 Pa. 48, 62 A. 198 (1905); Alexander, *Constitutional Rights in Juvenile Court*, in JUSTICE FOR THE CHILD 82 (M. Rosenheim ed. 1962); Mack, *The Juvenile Court*, 23 HARV. L. REV. 104 (1909); Skoler & Tenney, Jr., *Attorney Representation in Juvenile Court*, 4 J. FAMILY LAW 77 (1964).

[27] Paulsen, *Fairness to the Juvenile Offender*, 41 MINN. L. REV. 547, 555 (1957); *See, e.g.*, CAL. WELF. & INST'NS CODE § 602 (West 1966).

[28] *See*, CAL. WELF. & INST'NS CODE §§ 725, 731 (West 1966).

[29] *See, e.g.*, Paulsen, *supra* note 27, at 549.

[30] *See, e.g.*, the Arizona court's discussion of juvenile court philosophy in its *Gault* opinion. *In re* Gault, 99 Ariz. 181, 407 P.2d 760 (1965).

[31] *See* Sheridan, *Gaps in State Programs for Juvenile Offenders*, 9 CHILDREN 211-12

deprives them of their liberty but does not treat them, then they deserve the procedural protections afforded adults. Most juvenile statutes, however, seem to accept the parens patriae doctrine and mold the procedural safeguards of determining delinquency around the presumption that adequate facilities for treatment are available. Courts accept the lack of procedural regularity, assuming that the state will act in the child's best interests but not asking what rehabilitative facilities are available.[32]

In the name of individualized justice and its keystone, the rehabilitative ideal, one appellate court upheld a juvenile court's finding of delinquency based on a policeman's claim that an adult's confession implicated the juvenile in a robbery. Although the adult later retracted the part of his confession incriminating the boy, the appellate court held that because the juvenile judge could believe the confession rather than the retraction, he had sufficient evidence to find the boy delinquent.[33] Another court upheld a fourteen-year-old's commitment for the duration of his minority because he made a "bomb scare" telephone call to the police.[34] A third court affirmed a juvenile court's waiver of jurisdiction over a boy who was not represented by counsel in the juvenile proceedings.[35] The boy did not attempt to persuade the juvenile court to retain jurisdiction because he mistakenly thought he had a perfect defense to the murder charge which he would face in adult court. The court held that the failure to appoint a lawyer did not constitute a denial of due process because denial of counsel in the juvenile court did not deny the boy his day in court; however, it might have meant that the day was in criminal rather than juvenile court, and that a guilty verdict could have severe consequences. A lawyer would have understood the inadequacy of the boy's defense and might have been able to persuade the juvenile court not to waive jurisdiction. In all of these cases, the state, claiming to protect a child, did not afford the procedural protections which it would have had to grant an adult in like circumstances.

B. Due Process and Equal Protection for Juveniles

Two practical flaws have marred the ideal of individualized justice for juvenile offenders; both concern rehabilitation, the announced goal of individualized justice. First, juvenile facilities do not adequately perform the training, counseling, and guidance functions which the rehabili-

(1962): "With few exceptions, the 'treatment' programs . . . go little beyond meeting needs for the care of children away from their own homes, some not even this far."

[32] *See, e.g., In re* Gault, 99 Ariz. 181, 188-89, 407 P.2d 760, 765-66 (1965).

[33] *In re* Holmes, 379 Pa. 599, 606, 109 A.2d 523, 526 (1954), *cert. denied*, 348 U.S. 973 (1955).

[34] State *ex rel* Toney v. Mills, 144 W. Va. 257, 107 S.E.2d 772 (1959).

[35] People v. Dotson, 46 Cal. 2d 891, 299 P.2d 875 (1956).

tative goal requires.[36] Second, because rehabilitation has also become the goal of adult penology, it no longer distinguishes the juvenile system from the adult system.[37]

The first flaw raises a due process issue. The Constitution prohibits a state from depriving a person of liberty without due process of law.[38] Due process means different things in different contexts. In proceedings to determine whether a person has committed a criminal act and so may be deprived of his liberty for punitive purposes, due process demands strict procedural safeguards. On the other hand, in proceedings to determine whether a person is in need of care and treatment and should be deprived of liberty so the state will be better able to treat him, due process may require fewer procedural safeguards.[39] If the juvenile delinquent actually receives custodial care rather than treatment, the state may have difficulty justifying lax procedural safeguards in the name of treatment.

The second flaw raises an equal protection problem. The state accords an adult offender extensive procedural protection but denies similar protection to a juvenile who the state claims committed the same offense. However, the Constitution demands some rational basis to support differences in treatment not reflecting differences in the nature of conduct.[40] Originally, advocates of the juvenile court system distinguished the adult who, if guilty, was punished from the juvenile offender who, if guilty, was rehabilitated.[41] However, because one of the major goals of current adult penology is rehabilitation through treatment,[42] a rehabilitative disposition no longer differentiates an adjudication of delinquency from a finding of criminal guilt. The equal protection clause, therefore, seems to require that the state either grant a juvenile charged with delinquency the same procedural safeguards granted an adult accused of criminal conduct or find some distinction sufficient to justify different procedures. That the child is younger and less knowledgeable suggests that he should receive more procedural safeguards; there seems to be no difference which justifies a lower standard of procedural protections for juveniles than for adults.

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[36] *See*, Sheridan, *supra* note 31.

[37] "The cold, hard truth, however, is that the theory of punishment and retribution has long since played but a minor role in enlightened criminal courts, and they, too, have adopted as their major purpose treatment and rehabilitation." Quick, *Constitutional Rights in the Juvenile Court*, 12 How. L.J. 76, 78-79 (1966).

[38] U.S. CONST. amend. XIV, § 1.

[39] Rouse v. Cameron, 373 F.2d 451, 453 & n.9 (D.C. Cir. 1966), dealing with the right to treatment of persons incarcerated after having been found not guilty by reason of insanity in a criminal trial.

[40] *See* Yick Wo v. Hopkins, 118 U.S. 356, 373-74 (1886).

[41] *See* Mack, *The Juvenile Court*, *supra* note 26, at 106-09.

[42] Quick, *supra* note 37, at 78-79.

C. *The Juvenile's Admissions*

Most juveniles admit the delinquency petition's factual allegations[43] and many appellate courts treat the admission as a waiver of rights which they might otherwise grant the juvenile. For example, courts have held that having admitted the facts the juvenile need not confront the witnesses against him;[44] that because he does not dispute the facts, the juvenile does not need a lawyer;[45] that because he does not contest the allegations, neither he nor his parents need time to consider the allegations against him and decide what response to make.[46] Moreover, because by admitting the facts the juvenile has already incriminated himself, he has no occasion to invoke a privilege against self incrimination. Unfortunately, the courts have not recognized that the admission which results in denying so many procedural rights may itself result from denying other rights and from a system which gives so much discretion[47] to the juvenile court judge. The Supreme Court's decision in the *Gault* case will obviate some of the problems arising from admissions, because the judge now must tell the child that he need not answer questions. In addition, the Court implied that state officials must give juveniles the warnings which *Miranda v. Arizona*[48] requires officials to give adults.[49]

It has been suggested that individualized justice requires an informal hearing in which the judge and juvenile work together for the child's best interests free from the psychological pressures of a public trial.[50] However, because the judge and the juvenile may disagree about whether commitment is in the child's best interest, the two are necessarily adverse. It is central to Anglo-American legal theory that the state should not force a person to prove his adversary's case, and for this reason alone the state should not be permitted to pressure the juvenile into making admissions.

Even if the child knows that he need not answer questions, he may sense that the judge will react adversely if he does not cooperate, and the judge will be likely to commit an uncooperative child to a state training school. If the child cooperates, on the other hand, the judge may

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[43] Judge Paul W. Alexander, Judge of the Court of Common Pleas, Lucas County, Ohio, estimated that 99% admit involvement. Alexander, *Constitutional Rights in Juvenile Court*, 46 A.B.A.J. 1206, 1208 (1960).

[44] *In re* Gault, 99 Ariz. 181, 191, 407 P.2d 760, 768 (1965).

[45] People v. Dotson, 46 Cal. 2d 891, 895, 299 P.2d 875, 877 (1956).

[46] *In re* Gault, 99 Ariz. 181, 190, 407 P.2d 760, 767 (1965).

[47] The judge has substantive as well as procedural discretion. See discussion following note 58 *infra*.

[48] 384 U.S. 436 (1966).

[49] 387 U.S. at 55. *Cf. In re* Buros, 249 A.C.A. 61, 57 Cal. Rptr. 124 (1967).

[50] *See* Paulsen, *supra* note 29, at 559-62.

place him on probation. The atmosphere in which the judge questions the child is highly coercive: The juvenile rarely has a lawyer to advise him;[51] his parents are usually poor and often foreign-born,[52] knowing as little as their child about judicial procedure and as impressed as he by the juvenile judge's power. A person subjected to interrogation in such an atmosphere must clearly understand his rights if they are to retain substance.[53]

The child's admission has the same effect as a plea of guilty to a criminal charge. The adult who pleads guilty also waives many procedural rights[54] also in hope of receiving a more favorable disposition. But the adult is guaranteed a lawyer to advise him[55] and therefore knows that he need not plead guilty. Furthermore, there is a limit on the sentence which the court can impose upon the adult if it finds him guilty. That limit turns on the nature of the act of which the court finds him guilty, and the prosecution has to prove he committed a specific and clearly defined act. The juvenile, on the other hand, has no lawyer to guide him. In addition, he knows that no matter how minor his wrongful act, the judge can commit him until he reaches the age of twenty-one. In fact, he knows that the judge need not find he committed any specific acts but only that he is "in danger of leading an . . . immoral life,"[56] or becoming "habitually delinquent."[57] It is certainly not surprising that few juveniles dispute the factual allegations against them. It seems unfair to coerce the child to admit the facts and then to claim that his admission waives many procedural rights.

II

THE SPECIFIC RIGHTS CLAIMED IN THE *Gault* CASE

The juvenile court philosophy, the system's failure to rehabilitate delinquents, and the coercive nature of juvenile court questioning are inherent in the juvenile court system as it exists today. Because each procedural right which the Supreme Court considered in *Gault* is different, each requires separate consideration. The right to counsel, without which all other rights are meaningless, will receive first consideration.

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[51] Skoler & Tenney, Jr., *supra* note 26, at 80-81, report that 59% of the responses to a survey made by the National Counsel of Juvenile Court Judges stated that attorneys appeared in 0%-5% of juvenile court delinquency cases; 22% reported representation in 6%-10% of juvenile court delinquency cases.

[52] *See* Paulsen, *Juvenile Courts, Family Courts, and the Poor Man*, 54 CALIF. L. REV. 694, 695-98 (1966).

[53] *Cf.* Miranda v. Arizona, 384 U.S. 436 (1966).

[54] *See* 22 C.J.S. *Criminal Law* § 424(1) (1961).

[55] Escobedo v. Illinois, 378 U.S. 478 (1964).

[56] *E.g.*, CAL. WELF. & INST'NS CODE § 601 (West 1966).

[57] *E.g.*, *Id.*

A. Right To Counsel

The last few years have seen the criminal defendant's right to counsel vastly extended from the literal language of the sixth amendment that an accused may retain counsel in his defense. Because counsel's advice is so important to a fair trial, the right to counsel for indigents now includes the right to have the court appoint counsel.[58] To make the right meaningful, the police must warn a criminal suspect of his right to have attorney's advice during pretrial custodial interrogation.[59] On the other hand, before *Gault*, few states required that juveniles charged with delinquency be advised of their right to counsel or provided for appointment of counsel.[60] The Arizona court went so far as to imply that the juvenile did not have the right to retain counsel, although his parents did.[61]

A lawyer assigned to represent a juvenile will help the court ascertain the truth just as does a lawyer assigned to represent an adult. A juvenile needs a lawyer's advice to understand the law and its processes at least as much as does an adult. Commentators and courts have argued that counsel is unnecessary in juvenile court because the hearing is not adversary in nature and because the judge and probation officer protect the child.[62] There are two answers to this argnment: First, whether or not it is adversary, the juvenile hearing is a proceeding which may result in incarceration. The child's liberty is precious to him, and he should have a lawyer to help him protect that liberty. In addition, although statutes, commentators, and judges have contended that a finding of delinquency is not the same as a criminal conviction,[63] it actually carries with it many results just as serious as those accompanying criminal conviction.[64] Second, a lawyer's presence need not create a hostile atmosphere in the juvenile courtroom. The reverse may even be true. The lawyer can explain to the child what is happening, discuss with the child the philosophy behind juvenile courts, and help the child to understand the judge's dispositional decision.[65] The child is more likely to accept as an ally the

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[58] Gideon v. Wainwright, 372 U.S. 335 (1963).

[59] Miranda v. Arizona, 384 U.S. 436 (1966).

[60] *In re* Gault, 387 U.S. 1, 37 n.63 (1967).

[61] *See In re* Gault, 99 Ariz. 181, 407 P.2d 760 (1965).

[62] *See In re* Holmes, 379 Pa. 599, 603, 109 A.2d 523, 525 (1954), *cert. denied*, 348 U.S. 973 (1955); Mack, *supra* note 26.

[63] *See, e.g.*, CAL. WELF. & INST'NS CODE § 503 (West 1961); *In re* Gault, 99 Ariz. 181, 187, 407 P.2d 760, 764 (1965); Mack, *supra* note 26, at 109.

[64] *See, e.g., In re* Gault, 387 U.S. 1, 24-25 (1967); *In re* Holmes, 379 Pa. 599, 612, 109 A.2d 523, 528-29 (1954) (dissenting opinion), *cert. denied*, 348 U.S. 973 (1955), *In re* Contreras, 109 Cal. App. 2d 787, 789-90, 241 P.2d 631, 633 (1952).

[65] *See generally* Allison, *The Lawyer and His Juvenile Court Client*, 12 CRIME & DEL. 165 (1966); McKesson, *Right to Counsel in Juvenile Proceedings*, 45 MINN. L. REV. 843 (1961).

lawyer who supports him and presents his side of the story to the judge than the probation officer who acts as a prosecutor and presents the allegations which support a finding of delinquency to the judge, or the judge who may send him to reform school. Because he has an ally in his lawyer the child may be more willing to accept the juvenile court as an institution set up to help rather than punish him.

In addition to helping the child understand what the court is doing to and for him, a lawyer may be able to help the court in several ways. He can gather facts about the child's actions which may throw a different light on the probation officer's allegations. He may be able to present objective arguments to the judge, which the child cannot clearly present. More abstractly, a lawyer's presence in the juvenile courtroom may be beneficial to the system itself. Because the juvenile's lawyer is an advocate and protector of his client's interests, he will constitute a built-in check against abuse by the judge of his vast discretion.[66]

Finally, the reasons which led the Supreme Court to expand the right to counsel afforded adult criminal defendants apply to the juvenile system. A criminal defendant needs a lawyer at his trial because alone he will be unable to present his defense adequately.[67] The legal system is a complex machine; those trained in the law are best able to run that machine. A layman accused of crime cannot defend himself adequately because he lacks knowledge of procedural and substantive law. The layman's lack of legal knowledge may be relatively unimportant in juvenile courts—his lack of procedural knowledge because of the juvenile system's flexibility and his lack of substantive knowledge because in juvenile courts the punishment does not fit the crime. However, the layman is also inadequate as an advocate because he is not trained to uncover relevant facts, to assess them, and to present them in a meaningful and well organized fashion. This aspect of the layman's inadequacy is as important in juvenile hearings as in criminal trials because facts are equally important in each. A lawyer representing the child will better present the facts than will a probation officer who is biased in favor of a finding he recommended.

The criminal defense attorney advises his client so that he will be better able to make decisions about such questions as whether to plead guilty, whether to take the stand, and whether to answer questions. The juvenile needs advice no less than the adult. He is younger, less likely to understand exactly what he is deciding, and possibly more likely to be influenced by what he thinks others—the judge and probation officer and perhaps his parents—want him to decide. Counsel's presence at juvenile

[66] *See* Paulsen, *Fairness to the Juvenile Offender*, 41 MINN. L. REV. 547, 571 (1957).
[67] Gideon v. Wainwright, 372 U.S. 335 (1965).

hearings will therefore aid both the juvenile offender and the juvenile court. The Supreme Court's holding that juveniles have the same right to counsel as adults perhaps more than any other aspect of the *Gault* decision will result in better juvenile court procedures and greater fairness to juveniles.[68]

B. The Privilege Against Self-Incrimination

Before the *Gault* case made the privilege against self-incrimination—including the right to be informed of the privilege[69]—obligatory in juvenile proceedings, courts sometimes denied juveniles the privilege; when they did grant it, they often did not require a warning to the juvenile that he had the right to remain silent.[70] In *Gault* the state court did not decide whether a juvenile judge could compel a juvenile to incriminate himself. It did decide that juveniles did not have a right to be told that they need not answer questions.[71] In effect, as the majority of the Supreme Court held, this holding made the privilege meaningless. If the child has a lawyer who can explain the privilege to him and help him decide whether to answer questions, a warning by the judge may not be a necessary part of the privilege. But the child is more likely to believe that he does not have to answer questions if the judge gives him a warning. Because the child probably wants above all to win the judge's approval, the privilege has less meaning if the juvenile believes that the judge will disapprove of his refusal to answer.

The main argument against granting juveniles the privilege against self-incrimination is that rehabilitation will be easier if the child admits his wrongs and tries to cooperate with the judge and probation officer who want to help him.[72] This argument considers the juvenile hearing as part of the treatment which the child receives. It fails to consider that a hearing in which the child is coerced into answering questions may not be rehabilitative. Perhaps it is better to show the child that justice is fair

[68] *See generally* Allison, *supra* note 65; Antieau, *Constitutional Rights in Juvenile Courts*, 46 CORNELL L.Q. 387 (1961); McKesson, *supra* note 65; Paulsen, *Fairness to the Juvenile Offender*, 41 MINN. L. REV. 547 (1957); Quick, *supra* note 37, at 91; Schinitsky, *The Role of the Lawyer in Children's Court*, 17 THE RECORD OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK 10 (1962); Skoler & Tenney, Jr., *supra* note 26.

[69] 387 U.S. at 55. Justice White dissented from the part of the Court's opinion which included the right to be told of the privilege. He stated that the case did not present the question of whether a juvenile should have the privilege. *Id.* at 64-65.

[70] *See In re* Gault, 99 Ariz. 181, 191, 407 P.2d 760, 767-68 (1965); *In re* Dargo, 81 Cal. App. 2d 205, 209, 183 P.2d 282, 284 (1947); People v. Lewis, 260 N.Y. 171, 174, 177, 183 N.E. 353, 354-55 (1932), *cert. denied*, 289 U.S. 709 (1933).

[71] *In re* Gault, 99 Ariz. 181, 191, 407 P.2d 760, 767-68 (1965).

[72] Paulsen, *Fairness to the Juvenile Offender*, 41 MINN. L. REV. 547, 561 (1957); *see* Van Waters, *The Socialization of Juvenile Court Procedure*, 13 J. AM. INST. OF CRIM. L. & C. 61, 65 (1922).

than to have him admit his wrongs and repent.[73] It is almost impossible to obtain empirical, objective data to support either position. Therefore, even if the hearing is considered solely a rehabilitative experience, it is not clear that the privilege should be denied.

In addition to being part of the juvenile's rehabilitation, the juvenile hearing is the means for deciding whether the child needs treatment.[74] If denying the privilege promotes the truth, such denial will aid the judge to make the proper determination as to whether the state should treat the child. But it is not clear that forcing the child to answer produces truth. He may say what he thinks the judge wants to hear. Because he is likely to believe that the judge will prefer an admission and repentance to a denial,[75] he may confess in order to receive favorable disposition. Therefore, refusal of the privilege will not necessarily aid the judge to ascertain the truth. Finally, because the disposition juveniles receive is in fact punitive as well as, or instead of, rehabilitative, it seems far more just to require the probation officer to prove that the child did something which justifies depriving him of his liberty than to compel the child to incriminate himself. Being a child should not deprive the juvenile of strict standards for determining the need for his incarceration.

C. Confrontation and Cross-Examination

The right of an accused to confront and cross-examine witnesses against him is closely related to the privilege against self-incrimination. If the courts do not grant juveniles the privilege, or need not inform them of it, juveniles will usually admit the delinquency petition's factual allegations, and the state will have no need for witnesses to prove those allegations. Because the Arizona supreme court found that the juvenile court judge did not have to warn Gerald that he need not answer questions, it did not have to decide whether Gerald had a right to confront and cross-examine witnesses. Because the United States Supreme Court held that Arizona should have afforded Gerald the privilege, and that his admissions were therefore inadmissible, that Court had to decide whether a juvenile had the right to confront and cross-examine witnesses against him. The Court held that states have to permit confrontation and cross-examination. The holding seems obviously correct; if the child does not admit the allegations, the state will have to produce witnesses to convince the judge of the child's delinquency. It seems unfair to admit testimony by witnesses whom neither the child nor his attorney may cross-ex-

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[73] *In re* Gault, 387 U.S. 1, 51-52 (1967).

[74] *See In re* Holmes, 379 Pa. 599, 611, 109 A.2d 523, 528 (1954), *cert. denied*, 348 U.S. 973 (1955) (dissenting opinion).

[75] *See* Van Waters, *supra* note 72.

amine.[76] Indeed, cross-examination is almost invaluable in exposing falsehood and bringing out the truth.[77]

D. Notice of the Hearing and of the Charges

The Gaults argued, and the Supreme Court agreed, that the juvenile authority did not give them adequate, timely notice of the charges against Gerald, although Mrs. Gault did know when both hearings were scheduled and on what facts Officer Flagg based his allegation of delinquency.[78] The notice which Mrs. Gault received was not formal, and she obtained notice of the first hearing only by going to the detention home. In addition, the state court held that neither the juvenile nor his parents had a right to receive notice of the specific facts on which the state based its delinquency allegation before the first hearing.[79] Therefore, the Supreme Court found the Arizona juvenile statute unconstitutional in not requiring adequate notice; furthermore, the Court required that adequate notice be timely and found that notice received at the first hearing was not timely.

E. Right to a Record and to an Appeal

The last two rights which Gerald and his parents demanded were the rights to an appeal and to a record. The Court did not confront the issue whether a juvenile should receive those rights. Because Gerald's case was reviewed by means of habeas corpus proceedings, it is clear that juvenile court decisions will not be immune from appellate scrutiny merely because they are not directly appealable. Therefore, in the *Gault* case, as in earlier criminal cases,[80] the Supreme Court found it unnecessary to hold that a person incarcerated by a state court has a constitutional right of appeal.[81]

The equal protection argument requiring the State to grant juveniles and adults the same procedural protections because there are no meaningful differences between the juvenile court hearing and the criminal trial

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[76] More difficult problems arise in the dispositional stage of the juvenile hearing, at which the court admits less definite evidence. Many judges use social workers' reports, distilled from numerous conversations, to aid them in their dispositional decisions, and it would probably be harmful to require that every witness appear in court. Perhaps the best compromise would be to permit the juvenile's attorney to study the disposition report, and if he challenges parts of it, to require witnesses, sworn testimony and cross examination to prove those parts.

[77] Pointer v. Texas, 380 U.S. 400, 404 (1965).

[78] Record at 40.

[79] *In re* Gault, 99 Ariz. 181, 189-90, 407 P.2d 760, 766-67 (1965).

[80] Douglas v. California, 372 U.S. 353 (1963); Griffin v. Illinois, 351 U.S. 12 (1956).

[81] The Court held that there is no constitutional rigbt of appeal in McKane v. Durston, 153 U.S. 684 (1894) (criminal case).

applies as well to the right to an appeal as to the right to counsel. But the majority of the Court based its decision on due process, not equal protection,[82] and so was not compelled to hold that the state must grant an appeal. Further, it is possible to argue that juveniles, like adults, are granted the right to review, although that review is by means of habeas corpus, not appeal.

CONCLUSION

The *Gault* decision will have numerous and immediate effects on juvenile court systems around the country. Perhaps only the California and New York juvenile systems will be unaffected. In the other states, legislatures will have to rewrite juvenile statutes which permit the lax procedures condemned in *Gault*; juvenile judges who have become accustomed to running their courts without interference will have to listen to lawyers argue for juvenile offenders[83] and will have to inform juveniles that they need not answer questions which the judge and the probation officer ask; probably most important, juveniles who have received individualized, sometimes incomprehensible, treatment in juvenile hearings hopefully will now receive justice and fairness. The changes will undoubtedly be difficult; they will also almost certainly be beneficial. No longer will children be second class citizens when they come before the juvenile court; no longer will the juvenile court be a kangaroo court.[84]

Gault will not serve as a panacea for all the problems of juvenile courts and the juvenile court system. Indeed, it would be surprising if one opinion in one case could solve all the problems which have arisen in over half a century.[85] The almost absolute discretion vested in the juvenile court judge at the dispositional stage of the juvenile hearing is the root of the most serious problems remaining. Because of that discretion, a juvenile may do what he thinks will please the judge even though he has the right to do otherwise. Because of that discretion, the lawyer in juvenile court will have to attempt to protect his juvenile client without antagonizing the judge. Because of that discretion, the exercise of constitutional rights may not place the juvenile in any better position than he would be if he failed to exercise those rights—the judge can commit him to an industrial training school whether he has broken a law or is "in danger of leading an immoral life."

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[82] See text accompanying notes 44-46 *supra*.

[83] However, most juvenile court judges are not opposed to attorney representation of juveniles. Skoler & Tenney, Jr., *supra* note 26, at 96.

[84] *In re* Gault, 387 U.S. 1, 28 (1967).

[85] The first juvenile court act was adopted in Illinois in 1899. *In re* Gault, 387 U.S. 1, 14 (1967).

Discretion, in someone, is a necessary corollary of individual treatment, which is still an aim of juvenile justice. Therefore, the problems stemming from discretion cannot be solved by eliminating discretion. A possible solution might be to separate the discretionary functions from nondiscretionary ones. The juvenile hearing is often divided into two parts, adjudicative and dispositional.[86] It would seem possible to have a different person preside over each part of the hearing, so that the impression made by the juvenile at the adjudicative hearing would not influence the dispositional decision. Indeed, the dispositional decision might be better made by a committee of psychiatrists and social workers, trained to treat people, than by a judge, trained to preside over an impartial hearing and to make nondiscretionary determinations of fact. Legislatures, not courts, will have to act if different persons are to preside over the different parts of the juvenile hearing. One may hope that the legislatures which must rewrite juvenile statutes so that they conform to the *Gault* standards will consider also making basic changes not required by *Gault*. The Supreme Court has taken the first step towards more just treatment for juvenile offenders, and hopefully state legislatures will take the next one.

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[86] See text accompanying note 7 *supra*. *See also* CAL. WELF. & INST'NS CODE §§ 701-02 (West 1961).