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In re Gault and the Privilege Against Self-Incrimination in Juvenile Court

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COMMENT

IN RE GAULT AND THE PRIVILEGE AGAINST SELF-INCRIMINATION IN JUVENILE COURT

INTRODUCTION

In this era of unparalleled recognition of individual rights, it should ostensibly be difficult, if not impossible, to select the area of the law upon which the weight of recent constitutional pronouncements has been felt most significantly. However, such is not the case as it can hardly be doubted that the field of juvenile law has undergone the most extensive reshaping of any field of law. The changes necessitated by the recent Supreme Court decisions are not merely concerned with isolated activity related to the perimeter of the field but rather are of the most fundamental nature.

It will be the scope of this article to discuss the status of the juvenile court system, necessarily encompassing a brief history of juvenile law in general, in relationship to the recent opinion of *In re Gault,*[1] a case of monumental importance in the constitutional realm of our jurisprudence. *In re Gault* will serve as the basis of this discussion, as any discussion of the present status of juvenile law necessarily must be structured. Constitutional issues of due process abound in *In re Gault,* but the focal point of this article will be limited to *one* of these issues, with the hope of attaining some degree of depth of presentation and meaningfulness of discussion. The issue to be developed: Self-Incrimination.

BACKGROUND

In order to understand the significance of *In re Gault,* one must consider the beginnings of juvenile law and the context from whence it arose. Prior to 1899, there were no juvenile courts, the first juvenile court in the entire world being established in 1899 in Cook County, Illinois. Prior to the creation of the juvenile courts, the criminal law and penalties, in general, applied to children over 14 in the same manner as they were applied to adults. There were exceptions to this adult treatment in that the chancellor, in English practice, could exempt the child, a practice which was followed in the United States until 1899. The ramifications of the general rule of adult treatment of a juvenile offender become more significant when it is considered that over 300 crimes were punishable by death at this time. The harshness of adult procedures and penalties, and the basic unreasonableness of mixing children on long prison sentences with hardened criminals led to the action of the Illinois legislature in 1899.

What was the nature of this new offspring, an innovation which Dean Roscoe Pound called ". . . the greatest step forward in the administration of Anglo-Saxon justice since the signing of the Magna

[1] 387 U.S. 1 (1967).

Charta." From its very beginning, the juvenile court has been based on the philosophy of "individualized justice." This means that the *individuality* of the child is recognized in the court's disposition of the child, necessitating the court's consideration of sociology, psychology, biology, and even medicine. Each of these sciences must play a part in the court's disposition if "individualized justice" is to be realized. Fundamental also to this concept is the *purpose* to which juvenile court procedures are directed: the juvenile court is a remedial tool, and to a degree preventive rather than punitive. It must be admitted, however, that practically speaking it is difficult to eliminate the punitive element. Nevertheless, the question is not what can be done to a child, but what can be done *for* him. The problem of determination by the judge is not, "Has this boy or girl committed a specific wrong," but "what is he, how has he become what he is, and what had best be done in his interest and in the interest of the state to save him from a downward career."[2] Thus, it is realized that there is a substantial difference between an isolated act and a developing pattern of anti-social behavior, e.g., the difference between group acts of superficial vandalism and destruction of property or fire-setting. For children, especially young boys, have a tendency to become somewhat inventive in mischief and this, together with the "mob psychology" factor and the "daring" which is inevitable, occasionally results in acts of superficial vandalism. Though this is neither admirable nor acceptable behavior, it is a far cry from a rebellious attitude toward society and a developing pattern of anti-social behavior. As a consequence, the court would be justified in treating two boys differently even though they have done *exactly* the same thing.

This theory of "individualized justice," however admirable in theory, has resulted in conflicting views as to the essential nature of the juvenile court proceeding. For the emphasis on "individualized justice" is the basis for the traditional view of the juvenile court proceeding as an informal non-adversary session with a kindly white-haired judge with no need for technical rules of procedure and evidence, allegedly because such technicalities would destroy the "effectiveness" of the session.[3] The sins against humanity, particularly youths, which have been committed under the guise of this standard, are only now coming to the fore. It is now generally felt that the juvenile court should be recognized for what it is, a *court of law,* and that the rules of procedure and evidence must *necessarily* be adhered to if any semblance of justice is to be attained in such proceedings.[4] Roscoe Pound, in 1937, wrote: "The

[2] Mack, *The Juvenile Court,* 23 HARV. L. REV. 104, 119-120 (1909).

[3] This philosophy was undoubtedly a "backlash" from the pre-1899 treatment of children in adult criminal courts. As to the inadequacy of such a judge without other measures, see Paulsen, *Kent v. United States: The Constitutional Context of Juvenile Cases,* 1966 SUP. CT. REV. 167.

[4] See Note, *Transfer of Juveniles to Adult Correctional Institutions,* 1966 WIS. L. REV. 866, 868. "This over-all emphasis on the rehabilitative goal and the

powers of the Star Chamber were a *trifle* in comparison with those of our juvenile courts."[5] (Emphasis added.) And Felix Frankfurter, in his oft-quoted statement said: "The history of American freedom is, in no small measure, the history of procedure."[6]

This emphasis upon the child's interest in individualized justice does not mean that he is the sole interested party in the juvenile court determination. The matter is stated quite well in the Wisconsin statutes: "The best interests of the child shall always be of paramount consideration but the court shall also consider the interest of the *parents* or *guardian* of the child and the interest of the *public.*"[7] (Emphasis added.) An example of an instance where the interests of the child and his parents are not identical: where the parents want to retain custody and the child's best interests would be served by placing him in the custody of more responsible adults or an institution. Thus we have a minimum of three interested parties in every juvenile proceeding: the child, his parents or guardian, and the public. That the interest of the parent, guardian, and public are to be weighed heavily cannot be doubted. Perhaps the most direct conflict in these "interests" is between the child's interest and the interest of the public in being protected, a problem which involves the delicate balancing of individual rights and society's rights. Again, although the interest of the child is paramount, the public has a right to be protected from unnecessary threats to person or property.

Another important concept in juvenile court philosophy is that of "parens patriae," the principle that the state is "father of the country." When the child's parents or guardian cannot provide the necessities of life, the state steps into their shoes, as it were, and assumes the parental responsibilities. It is important to note that these necessities are of a moral and emotional nature as well as physical, and thus if these necessities are not furnished by the child's parents or guardian, the state has the responsibility to see that the child is provided with them. The validity and efficacy of the "parens patriae" theory has been criticized extensively, and would seem to be a mere constitutionally necessary corollary to the non-adversary theory of juvenile proceedings. The significance of this theory upon the development of juvenile law is awesome, as the state's authority when occupying the status of *parens partiae* has been almost unlimited:

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corresponding de-emphasis on procedural regularity has led to one major criticism of the juvenile system: *flexibility is achieved only at the expense of sacrificing the juvenile's right to be deprived of his liberty only if it is determined, by procedures consistent with due process of law, that he had violated society's rules.*" (Emphasis added.)

[5] Foreword to YOUNG, SOCIAL TREATMENT IN PROBATION AND DELINQUENCY (1937).

[6] Malinski v. New York, 324 U.S. 401, 414 (1945) (concurring opinion).

[7] WIS. STAT. §48.01(3) (1965).

> Generally, the courts have treated the problem of a child's right to liberty in terms of the parent's right to custody of the child. . . . The proposition that the child may not assert rights against the state acting as *parens patriae* follows from analogy to the parent-child relationship. [T]he child is not entitled, either by the laws of nature or of the State, to absolute freedom, but is subjected to the restraint and custody of a natural or legally constituted guardian to whom it owes obedience and subjection.[8]

Whether the noble goals of this theory have been attained has been doubted of late.

> While there can be no doubt of the original laudable purpose of juvenile courts, studies and critiques in recent years raise serious questions as to whether actual performance measures well enough against theoretical purpose to make tolerable the immunity of the process from the reach of constitutional guarantees applicable to adults. There is much evidence that some juvenile courts lack the personnel, facilities, and techniques to perform adequately as representatives of the State in a parens patriae capacity, at least with respect to children charged with law violation.[9]

With the foregoing as a basic framework, it is possible to consider the *first* juvenile law case which the Supreme Court decided to handle: *Kent v. United States*.[10] Until *Kent*, the Supreme Court had never passed upon the legality of juvenile court procedures or of police practices respecting juveniles.[11] *Kent* considered the requirements for a valid waiver of the "exclusive" jurisdiction of the juvenile court of the District of Columbia to the adult criminal court of the District. The facts indicated that the defendant 16-year-old boy had been arrested on charges of housebreaking, robbery and rape and interrogated for quite some time while under jurisdiction of the juvenile court. In the course of this day and a half of questioning, he admitted participation in various felonies. As a juvenile he was subject to the exclusive juris-

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[8] Note, *The Parens Patriae Theory and Its Effect on the Constitutional Limits of Juvenile Court Powers*, 27 PITT. L. REV. 887, 909 (1966). In accord: People v. Dotson, 46 Cal.2d 891, 299 P.2d 875 (1956).

[9] Kent v. United States, 383 U.S. 541, 555-556 (1966). See also, Antieau, *Constitutional Rights in Juvenile Courts*, 46 CORNELL L. Q. 387, 392 (1961): "The record of juvenile court judges and authorities is not such that we can safely go on theorizing that constitutional rights are unnecessary. It may be that the alarming recidivism of children exposed to the juvenile courts is due in part at least to the kind of justice administered in these institutions."

[10] 383 U.S. 541 (1966).

[11] Paulsen, *Kent v. United States: The Constitutional Context of Juvenile Cases*, 1966 SUP. CT. REV. 167. However, basic constitutional issues have been presented to state courts, and over forty state supreme courts have upheld the local variants of juvenile court laws against the claim that the statutes violated the state and/or the federal constitution. Witness: Lindsay v. Lindsay, 257 Del. 328 (1913); Mill v. Brown, 31 Utah 473 (1907); In re Sharp, 15 Idaho 120 (1908); Wissenberg v. Bradley, 209 Iowa 813 (1929); Commonwealth v. Fisher, 213 Pa. 48 (1905); Cope v. Campbell, 175 Ohio St. 475, 196 N.E.2d 457 (1964).

diction of the District of Columbia Juvenile Court unless, as the District of Columbia statute provides, that court after "full investigation" should waive jurisdiction over him and remit him for trial to the United States District Court of the District of Columbia. Defendant's counsel filed a motion in the Juvenile Court for a hearing on the question of waiver, and for access to the Juvenile Court's Social Service file which had been accumulated on the defendant during his probation for a prior offense. The Juvenile Court did not rule on these motions and entered an order waiving jurisdiction, stating that this was done after the required "full investigation." In holding the order of the Juvenile Court to be invalid, the Court relied heavily on the federal statute and yet the constitutional overtones of the decision have become the focal point of the case. ". . . As a condition to a valid waiver order, petitioner was entitled to a hearing, including access by his counsel to the social records and probation or similar reports which presumably are considered by the court, and to a statement of reasons for the Juvenile Court's decision. We believe that this result is required by the statute read in the context of constitutional principles relating to due process and the assistance of counsel.[12] And, ". . . it [statute] assumes procedural regularity sufficient in the particular circumstances to satisfy the basic requirements of due process and fairness. . . ."[13] Thus, although the decision turned upon the language of the statute, the court emphasized the necessity that "the basic requirements of due process and fairness" be satisfied in such proceedings. Since the decision did not have to be based upon this issue, there was no further spelling out of what was required by "due process and fairness" in regard to presently existing juvenile court procedures and practices.[14] Much consternation was caused by this phrase; constitutional implications of the present methods were definitely in the wind.[15] Although much soul searching was instigated, "due process and fairness" remained an unknown quantity until the decision which constitutes the landmark of juvenile law: *In re Gault.*

In re Gault was taken on an appeal from a judgment of the supreme court of Arizona affirming the dismissal of a petition for a writ of habeas corpus. The petition sought the release of Gerald Francis Gault, petitioner's 15-year-old son, who had been committed as a juvenile delinquent to the State Industrial School by the juvenile court of Gila County, Arizona. The supreme court of Arizona affirmed dismissal of

[12] Kent v. United States, 383 U.S. 541, 557 (1966).
[13] *Id.* at 553.
[14] Lest opponents of the *Kent* decision draw undue solace from the narrow 5-4 decision, it must be pointed out that the 4 dissenters agreed with the principles espoused, but dissented on the theory that the Courts' general practice of leaving undisturbed decisions of the Court of Appeals for the District of Columbia concerning the meaning of legislation designed to govern the District, should be followed.
[15] Gardner, *The Kent Case and the Juvenile Court: A Challenge to Lawyers,* 52 *A.B.A. J.* 923 (1966).

the writ against various arguments which included an attack upon the constitutionality of the Arizona Juvenile Code because of its alleged denial of procedural rights to juveniles charged with being "delinquents." The Arizona court agreed that the constitutional guarantee of due process of law is applicable to such proceedings, holding that the Arizona Juvenile Code is to be read as "impliedly" implementing the "due process concept." It then proceeded to identify and describe "the particular elements which constitute due process in a juvenile hearing," concluding that the proceedings ending in commitment of Gerald Gault did not offend these requirements.

The facts *of Gault* must be detailed before further consideration is possible. On Monday, June 8, 1964, at about 10:00 a.m., 15-year-old Gerald Gault and a friend, Ronald Lewis, were taken into custody by the Sheriff of Gila County, Arizona. Gerald was then subject to a six months' probation order which had been entered on February 25, 1964, as a result of his having been in the company of another boy who had stolen a wallet from a lady's purse. The police action on June 8 was taken as the result of a *verbal* complaint by a neighbor of the boys, Mrs. Cook, about a telephone call made to her in which the caller or callers made lewd or indecent remarks of a sexual nature.

At the time Gerald was picked up, his mother and father were both at work. *No notice* that Gerald was being taken into custody was left at the home and no other steps were taken to advise them that their son had, in effect, been arrested. Gerald was taken to the Children's Detention Home. When his mother arrived home at 6 p.m., Gerald was not home. Gerald's older brother was sent to look for him at the home of the Lewis family where he learned that Gerald was in custody. He so informed his mother and the two of them went to the Detention Home. The deputy probation officer, Flagg, who was also superintendent of the Detention Home, told Mrs. Gault "why Jerry was there" and said that a hearing would be held in juvenile court at 3 p.m. the following day, June 9.

Officer Flagg filed a petition with the court on the hearing day, June 9, 1964. It was *not served* on the Gaults and, in fact, none of them saw this petition until the habeas corpus hearing on August 17, 1964. The petition was entirely formal, making no reference to any factual basis for the judicial action which it initiated. It stated only that "said minor is under the age of 18 years and in need of the protection of this Honorable Court [and that] said minor is a delinquent minor." It prayed for a hearing and an order regarding "the care and custody of said minor." Officer Flagg executed a formal affidavit in support of the petition.

On July 9, Gerald, his mother, his older brother, and Probation Officers Flagg and Henderson appeared before the Juvenile Judge in

chambers. Gerald's father was not there as he was working out of the city. Mrs. Cook, the complainant, was *not there.* No one was sworn at the hearing. *No transcript or recording* was made, nor was a memorandum or record of the substance of the proceedings prepared. At this July 9 hearing Gerald was questioned by the judge about the telephone call,[16] and at the conclusion of the hearing the judge said he would "think about it" and sent him back to the Detention Home. On June 11or 12, Gerald was released after having been detained since June 8. There was *no explanation* in the record as to why he was kept in the Detention Home or why he was released. On the day of Gerald's release, Mrs. Gault received a note signed by Officer Flagg to the effect that "Judge McGhee has set Monday, June 15, 1964 at 11:00 a.m. as the date and time for further hearings on Gerald's delinquency." Though both Gerald's father and mother were present at this hearing, again the complainant, Mrs. Cook, *was not present.* When Mrs. Gault asked that Mrs. Cook be present, the judge stated that her (Mrs. Cook's) presence was not necessary; in fact, the judge did not speak to Mrs. Cook or communicate with her at any time.

At this June 15 hearing, a "referral report" made by the probation officer was filed with the court, although *not disclosed* to Gerald or his parents, listing the charge as "Lewd Phone Calls." At the conclusion of the hearing, the judge committed Gerald as a juvenile delinquent to the State Industrial School "for the period of his minority [that is, until 21], unless sooner discharged by due process of law," and an order to that effect was entered.

Since no appeal is permitted by Arizona law in juvenile cases, a petition for a writ of habeas corpus was filed with the supreme court of Arizona and referred by it to the superior court for hearing. In this hearing the judge, upon cross-examination, stated that he had concluded that Gerald came within ARS §8-201-6(a), which specifies that a "delinquent child" includes one "who has violated a law of the state or an ordinance or regulation of a political subdivision thereof." The law which Gerald was found to have violated is ARS §13-377, which provides that a person who "in the presence of or hearing of any woman or child . . . uses vulgar, abusive or obscene language, is guilty of a misdemeanor. . . ." The penalty specified for this offense which would apply to an adult is *$5 to $50,* or imprisonment for not more than two months. That Gault was committed to a training school for 6 years for an allegedly identical offense borders on the ludicrous, apart from the constitutional issue.

[16] There was conflict as to what Gerald said in response to the judge's questioning. His mother claimed that Gerald said that he only dialed Mrs. Cook's number and handed the telephone to his friend, while Officer Flagg and the Judge were of the opinion that Gerald had admitted making one of these lewd statements.

The superior court dismissed the writ, and the Arizona Supreme Court affirmed this dismissal. In reversing this determination, the United States Supreme Court considered *exclusively* the following proposition:[17]

> They urge that we hold the Juvenile Code of Arizona invalid on its face or as applied in this case because contrary to the Due Process Clause of the Fourteenth Amendment the juvenile is taken from the custody of his parents and committed to a state institution pursuant to proceedings in which the Juvenile Court has virtually unlimited discretion, and in which the following basic rights are denied:
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> 1. Notice of the charges;
> 2. Right to counsel;
> 3. Right to confrontation and cross-examination;
> 4. Privilege against self-incrimination;
> 5. Right to a transcript of the proceedings; and
> 6. Right to appellate review.

Again, this discussion will be limited to number 4: The privilege against self-incrimination.

THE PRIVILEGE AGAINST SELF-INCRIMINATION

The basis of the privilege against self-incrimination is to be found in the Fifth Amendment to the Constitution:

> *No person . . . shall be compelled in any criminal case to be a witness against himself. . . .*[18]

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[17] In re Gault, 387 U.S. 1, 7-8 (1967).

[18] On the general subject, see GRISWOLD, THE FIFTH AMENDMENT TODAY, (1955); HOOK, COMMON SENSE AND THE FIFTH AMENDMENT, (1957); ROGGE, THE FIRST AND THE FIFTH, (1960); April, *A Reappraisal of the Immunity from Self-Incrimination*, 39 MINN. L. REV. 75 (1954); Carman, *A Plea for Withdrawal of Constitutional Privilege from the Criminal*, 22 MINN. L. REV. 200 (1938); Corwin, *The Supreme Court's Construction of the Self-Incrimination Clause*, 29 MICH. L. REV. 1, 191 (1930); Fink, *The Privilege Against Self-Incrimination—A Critical Reappraisal*, 13 WESTERN RES. L. REV. 722 (1962); Grant, *Self-Incrimination in the Modern American Law*, 5 TEMP. L. Q. 368 (1931); Griswold, *Right to be Let Alone*, 55 NW. U. L. REV. 216 (1960); Imlay, *The Paradoxical Self-Incrimination Rule*, 6 MIAMI L. Q. 147 (1952); Kemp, *Background of the Fifth Amendment in England: A Study of Its Historical Implications*, 1 W & M L. REV. 247 (1958); King, *Immunity for Witnesses: An Inventory of Caveats*, 40 A.B.A. J. 377 (1954); Knox, *Self-Incrimination*, 74 U. PA. L. REV. 139 (1925); Kroner, *Self-Incrimination: The External Reach of the Privilege*, 60 COLUM. L. REV. 816 (1960); McGovney, *Self-incriminating and Self-disgracing Testimony*, 5 IOWA L. BULL. 174 (1920); McNaughten, *Self-Incrimination Under Foreign Law*, 45 VA. L. REV. 1299 (1959); Moreland, *Historical Background and Implications of the Privilege Against Self-incrimination*, 44 KY. L. J. 267 (1956); Morgan, *The Privilege Against Self-Incrimination*, 34 MINN. L. REV. 1 (1949); Orfield, *The Privilege Against Self-Incrimination in Federal Cases*, 25 U. PITT. L. REV. 503 (1964); Terry, *Constitutional Provisions Against Forcing Self-incrimination*, 15 YALE L. J. 127 (1906); Comment, *The Privilege Against Self-Incrimination in the Federal Courts*, 70 HARV. L. REV. 1454 (1957); Comment, *Witnesses-Privilege Against Self-Incrimination—Effect of Incorrect Decision by Trial Judge in Compelling Answer When Privilege Asserted*, 41 MICH. L. REV. 1165 (1943).

Ullman v. United States, 350 U.S. 422, 426-428, (1956), stressed the importance of this privilege:

> This command of the Fifth Amendment . . . registers an important

Though the pertinent language of the Fifth Amendment is quite clear, the history of its treatment by the courts has not been without turmoil, particularly with reference to the applicability of the amendment to the states. The extent to which the Fourteenth Amendment's implementing clause—". . . nor shall any State deprive any person of life, liberty or property, without due process of law. . . ."—prevents state invasion of rights enumerated in the first eight Amendments has been considered in numerous cases by the Supreme Court since the Amendment's adoption in 1868.[19] From the initial position that *none* of the original Amendments were to be applied against the states, the Court has gradually come to hold that several of the Amendments came within the implementing clause of the 14th Amendment, and hence are to be applied against the states. Thus, although the Court as late as 1922 said that "neither the Fourteenth Amendment nor any other provision of the Constitution of the United States imposes upon the States any restrictions about 'freedom of speech' . . .,"[20] three years later *Gitlow v. New York*[21] initiated a series of decisions which today holds immune from state invasion every First Amendment protection for the freedoms of speech, press, religion, assembly, association, and petition for redress of grievances.

The Fourth Amendment has had a similar history. Although *Palko v. Connecticut*[22] suggested that the rights secured by the Fourth Amendment were *not* protected against state action, citing *Weeks v. United States*[23] that "the 4th Amendment is not directed to individual misconduct of [state] officials," in 1961 *Mapp v. Ohio*[24] held that it was taken as settled that ". . . the Fourth Amendment's right of privacy has been declared enforceable against the States through the Due Process Clause

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advance in the development of our liberty—'one of the great landmarks in man's struggle to make himself civilized.' Time has not shown that protection from the evils against which this safe-guard was directed is needless or unwarranted. This constitutional protection must not be interpreted in a hostile or niggardly spirit. Too many, even those who should be better advised, view this privilege as a shelter for wrongdoers. They too readily assume that those who invoke it are either guilty of crime or commit perjury in claiming the privilege. Such a view does scant honor to the patriots who sponsored the Bill of Rights as a condition to acceptance of the Constitution by the ratifying States. The founders of the Nation were not naive or disregardful of the interests of justice. . . .

No doubt the constitutional privilege may, on occasion, save a guilty man from his just deserts. It was aimed at a more far-reaching evil—a recurrence of the Inquisition and the Star Chamber, even if not in their stark brutality. Prevention of the greater evil was deemed of more importance than occurrence of the lesser evil. Having had much experience with a tendency in human nature to abuse power, the Founders sought to close the doors against like future abuses by law-enforcing agencies.

[19] Malloy v. Hogan, 378 U.S. 1 (1964).
[20] Prudential Ins. Co. of America v. Cheek, 259 U.S. 530, 543 (1922).
[21] Gitlow v. New York, 268 U.S. 652 (1952).
[22] 302 U.S. 319 (1938).
[23] 232 U.S. 383, 398 (1914).
[24] 367 U.S. 643, 655 (1961).

of the Fourteenth. . . ." Again, although the Court held in 1942 that in a state prosecution for a noncapital offense, "appointment of counsel is not a fundamental right,"[25] in 1963 this decision was re-examined and it was held that provision of counsel in all criminal cases was "a fundamental right, essential to a fair trial,"[26] and thus was made obligatory on the states by the Fourteenth Amendment.

What has been the fate of the 5th Amendment? In *Adamson v. California*,[27] the appellant Adamson was convicted of murder in the first degree. During the course of trial, the judge commented on the failure of Adamson to take the stand based upon a California statute which permitted the failure of a defendant to explain or to deny evidence against him to be commented upon by court and by counsel and to be considered by court and jury. The appellant, an ex-convict, failed to take the stand due to the interpretation of another California statute holding that "if the defendant, after answering affirmatively charges alleging prior convictions, takes the witness stand to deny or explain away other evidence that has been introduced, the commission of these crimes can be revealed to the jury on cross-examination to impeach his testimony." Thus, an accused who is a repeated offender is forced to choose between the risk of having his prior offenses disclosed to the jury or of having the jury draw harmful inferences from uncontradicted evidence that can only be denied or explained by the defendant. In refusing to accept the appellant's argument that the provision of the Fifth Amendment that no person "shall be compelled in any criminal case to be a witness against himself" is a fundamental national privilege or immunity protected against state abridgment by the Fourteenth Amendment or a privilege or immunity *secured, through the Fourteenth Amendment, against deprivation by state action because it is a personal right, enumerated in the federal Bill of Rights,* the court stated:

> It is settled law that the clause of the Fifth Amendment, protecting a person against being compelled to be a witness against himself, is *not* made effective by the Fourteenth Amendment . . . the Bill of Rights, when adopted, was for the protection of the individual against the federal government and its provisions were inapplicable to similar actions done by the states. . . . We reaffirm the conclusion of the *Twining* and *Palko* cases that protection against self-incrimination is not a privilege or immunity of national citizenship.[28]

Justice Black, in a vigorous dissent, however, urged that the intent of the framers was to make the Bill of Rights applicable to the states.

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[25] Betts v. Brady, 316 U.S. 455, 471 (1942).
[26] Gideon v. Wainwright, 372 U.S. 335, 343-344 (1963).
[27] 332 U.S. 46 (1947).
[28] *Id.* at 50, 51, 53. See also Frankfurter's concurring opinion elaborating the position against the incorporation of the Bill of Rights into prohibitions against the states.

> In my judgment that history conclusively demonstrates that the language of the first section of the Fourteenth Amendment, taken as a whole, was thought by those responsible for its submission to the people, and by those who opposed its submission sufficiently explicit to guarantee that thereafter *no state could deprive its citizens of the privileges and protections of the Bill of Rights.*
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> If the choice must be between the selective process of the *Palko* decision applying some of the Bill of Rights to the States, or the *Twining* rule applying none of them, I would choose the *Palko* selective process. But rather than accept either of these choices, I would follow what I believe was the original purpose of the Fourteenth Amendment—to extend to *all the people of the nation* the complete protection of the Bill of Rights.[29] (Emphasis added.)

In *Cohen v. Hurley,*[30] a state disbarred an attorney who claimed the privilege against self-incrimination in the course of a judicial investigation of unethical practices by lawyers. The Court upheld the disbarment on the theory that the state's action was reasonable based upon the special responsibility of lawyers. However, the decision was 5-4, with the dissenting opinion, written by Justice Brennan, agreeing that the state's action violated the privilege against self-incrimination.

> The [self-incrimination] privilege is rightly designated 'one of the great landmarks in man's struggle to make himself civilized.' . . . I would hold that the full sweep of the Fifth Amendment privilege has been absorbed in the Fourteenth Amendment.[31]

In *Malloy v. Hogan,*[32] the Court partially accepted the *Cohen* dissent in overruling the *Twining* and *Adamson* cases and holding that the Fifth Amendment's privilege against self-incrimination is also protected by the Fourteenth Amendment against abridgment by the states. The petitioner was arrested for "pool-selling" and placed on probation after his sentence was suspended after 90 days of imprisonment. About 16 months after his guilty plea, petitioner was ordered to testify before a county court appointed referee who was conducting an inquiry into alleged gambling in the county. When the petitioner refused to answer questions related to events surrounding his arrest and conviction, he was found to be in contempt, and was committed to prison. "We hold

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[29] *Id.* at 74, 75, 89.

[30] 366 U.S. 117 (1961).

[31] *Id.* at 160. For an earlier expression of Mr. Justice Brennan's view that once a right specifically protected in the Bill of Rights is recognized as a fundamental right under the due process clause of the Fourteenth Amendment, it has the same meaning as a limitation on the states as it had in the Bill of Rights as a limitation on the federal government, see his opinion in Ohio *ex rel.* Eaton v. Price, 364 U.S. 263 (1960). See also Mr. Justice Brennan's lecture, *"The Bill of Rights and the States,"* printed in 36 N.Y.U. L. REV. 761 (1961).

[32] 378 U.S. 1 (1964).

that the Fourteenth Amendment guaranteed the petitioner the protection of the Fifth Amendment's privilege against self-incrimination. . . ."[33]

Griffin v. California[34] expressly affirmed *Malloy* the next year.

Numerous cases have discussed the effect of immunity on the self-incrimination privilege, whether the privilege is available in an investigative proceeding by a grand jury or Congressional committee, and waiver of the privilege,[35] but such is not our concern here. Of primary concern is the rule of law that the Fifth Amendment's prohibition against self-incrimination has now been brought to bear upon the states. Thus, the question becomes: Of what significance is *Malloy* to the juvenile court? Before discussing the *Gault* case, which directly answers this question, it might be well to state the standard arguments *against* making the privilege applicable in juvenile proceedings,[36] as these arguments are effectively refuted in *Gault:*

1. Confession and self-examination embody important therapeutic values; for example, "in order to rehabilitate a child, he must first admit his crime and so be aware that he is in need of rehabilitation;
2. Encouragement of testimony convinces the youth of the judge's concern for him;
3. Enforcement of the privilege would permit some youths to avoid delinquency adjudications.

In holding that the constitutional privilege against self-incrimination was fully applicable to juvenile proceedings, the Court met head-on with the time-worn argument that juvenile proceedings are "civil" and not "criminal,"[37] and therefore the privilege should not apply. Though the Fifth Amendment uses the term "criminal"—"no person shall be compelled in any *criminal* case to be a witness against himself"—the Court stated that the availability of the privilege turns upon the *nature* of the statement or admission and the exposure which it invites, rather than the *type* of proceeding in which its protection is invoked.[38] For in

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[33] *Id.* at 3.

[34] 380 U.S. 609 (1965).

[35] E.g., Slochower v. Board of Higher Education of New York City, 350 U.S. 551 (1956); Ullman v. United States, 350 U.S. 422 (1956); Knapp v. Schweitzer, 357 U.S. 371 (1958); Brown v. United States, 359 U.S. 41 (1959); Emspak v. United States, 349 U.S. 190 (1955); Rogers v. United States, 340 U.S. 367 (1951).

[36] Note, *Rights and Rehabilitation in the Juvenile Courts,* 67 COLUM. L. REV. 281, 331 (1967).

[37] *Id.* at 330.

[38] 387 U.S. 1, 46 (1967). See Note, *Juvenile Justice: Treatment or Travesty,* 11 PITT. L. REV. 277, 279 (1949):

> Concealing the walls of the institution with cleverly placed foilage might serve to produce more the appearance of a home, but it does little to diminish the capacity of those walls to limit effectively the freedom of activity of the unfortunates therein. Personal independence is restricted—be it for purposes punitive or purposes remedial.

See also Antieau, *Constitutional Rights in Juvenile Courts,* 46 CORNELL L. Q. 387, 392 (1961): "If ever words have obscured issues of legal and consti-

Murphy v. Waterfront Commission,[39] Mr. Justice White stated: "The [Fifth Amendment] privilege can be claimed in *any proceeding,* be it criminal or civil, administrative or judicial, investigatory or adjudicatory . . . it protects *any disclosures* which the witness may reasonably apprehend could be used in a criminal prosecution or which could lead to other evidence that might be so used." (Emphasis supplied.) This would seem to be sound reasoning, for juvenile proceedings instituted to determine delinquency may lead to commitment to a state institution, either by transfer[40] or by waiver of jurisdiction directly to an adult criminal court,[41] and thereby could easily fit within the language of

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tutional right, it is the unfortunate language of 'non-criminal,' 'non-punishment,' and 'protective' indulged in by the legislatures and the courts."

See also Judge Holtzoff's opinion in United States v. Dickerson, 168 F. Supp. 899, 901 (D. D.C. 1958), *rev'd* 271 F.2d 487 (D.C. Cir. 1959), discussed in 45 VA. L. REV. 436 (1959).

See also Rubin & Shaffer, *Constitutional Protections for the Juvenile,* 44 DENVER L. J. 66 (1967).

In accord: In re Contreress, 109 Cal. App.2d 787, 241 P.2d 631 (1952); People v. Lewis, 260 N.Y. 171, 183 N.E. 353 (1932); In re Holmes, 379 Pa. 599, 109 A.2d 523 (1954).

[39] 378 U.S. 52, 94 (1964).

[40] E.g., WIS. STATS. §48.34 (1965), allows the court, upon a finding of delinquency, to make an order *transferring legal custody* of the child to the Department of Public Welfare, who then can transfer the child to a state institution. However, this miscarriage of justice would be alleviated by the proposed §48.515 in Wisconsin. This statute would provide many procedural safeguards for the minor in legal custody of the public welfare department on an adjudication of delinquency before he can be transferred to an adult correctional institution. A hearing by the juvenile review board, with counsel provided, if desired, would be assured the minor, and a transfer by such board can only be made if they find that: (1) the minor is a danger to the safety of others, or (2) the minor is not amenable to treatment in juvenile facilities available to the court, or (3) treatment at the adult institution will better serve the interest and rehabilitation of the child. In addition, the order of the juvenile board would be appealable.

[41] E.g., WIS. STATS. §48.18 (1965). Jurisdiction of criminal and civil courts over children 16 or older:

(1) Except as provided in sub. (2) and s. 253.18(2), the criminal and civil courts shall have jurisdiction over a child 16 or older who is alleged to have violated a state law or a county or municipal ordinance only if the juvenile court judge deems it contrary to the best interests of such child or of the public to hear the case and enters an order waiving his jurisdiction and referring the matter to the district attorney, corporation counsel or city attorney, for appropriate proceedings in a criminal or civil court. In that event, the district attorney, corporation counsel or city attorney of the county or municipality shall proceed with the case in the same manner as though the jurisdiction of the juvenile court had never attached.

(2) In counties having a population of 500,000 or more and having a traffic-misdemeanor court branch, the concurrent jurisdiction of said court branch pursuant to s. 48.17 shall not be dependent upon any such order of the juvenile court judge waiving his jurisdiction, and cases specified in said section may be brought and heard initially before the traffic-misdemeanor court branch.

However, repeal and recreation of this section has been recommended to the Wisconsin legislature as a consequence of the *Kent* case, which held that the child has a right to a waiver hearing with the assistance of counsel at such hearing, that counsel have access to the records and reports that are considered by the court, and that the judge must state the specific *reason why* the jurisdiction of the juvenile court has been waived. The proposed §48.18

"criminal" for the purposes of self-incrimination. Applying the facts of this case, when Gerald Gault was interrogated he had no assurance that he would not be treated as an adult in criminal court.

As to the alleged therapeutic value of a confession unhindered by the right to silence, the Court was highly dubious.[42] The Court's position here is unassailable, for it is difficult to fathom how any good purpose can result from deprivation of the fundamental right to remain silent in a proceeding against oneself. Rather, it is more reasonable to believe that a juvenile would be hostile when his paternally induced statements result in confinement on the basis of his "confession." In addition, there is much doubt as to the reliability and trustworthiness of "confessions" by juveniles, as evidenced in *Haley v. Ohio*.[43]

Contrary to the fears of many, this does *not* mean that admissions and legitimate confessions of the juvenile will no longer be available to the court. However, it does mean that counsel is no longer a "nicety" in juvenile court, but is a necessity to the same extent as in criminal courts.[44] Thus if counsel is not present where an admission is obtained, the court must take great care to ensure that the admission was voluntary, in the sense not only that it has not been coerced or suggested, but also that it is not the product of ignorance of rights or of adolescent fantasy, fright, or despair.[45] Therefore, an *additional* factor must be considered by the juvenile judge in making his determination as to the voluntariness of a confession: the fact that an *adolescent* is involved. Wigmore states that "The principle, then, upon which a confession may be excluded is that it is, under certain conditions, *testimonially untrustworthy*."[46] (Emphasis added.) That there are additional factors in determining testimonial untrustworthiness where a juvenile is involved can hardly be doubted. In *Haley v. Ohio*,[47] where the Supreme Court

provides for all of the above in felony cases and serious misdemeanors. Another subsection would establish criteria to assist the judge in making the determination of whether or not to waive the jurisdiction of the juvenile court.

[42] 387 U.S. 1, 48 (1967).

[43] 332 U.S. 596 (1948). See also, *In the Matter of Four Youths*, Nos. 28-776-J, 28-778-J, 28-778-J, 28-859-J, Juvenile Court of the District of Columbia, April 7, 1961.

[44] See Escobedo v. Illinois, 378 U.S. 478 (1964) and Miranda v. Arizona, 384 U.S. 436 (1966).

[45] In re Gault, 387 U.S. 1, 52 (1967).

[46] WIGMORE, EVIDENCE §822 (3d ed. 1940). Escobedo v. Illinois, 378 U.S. 478, 488, 489 (1964) offers food for thought on the general desirability of confessions: "We have learned the lesson of history, ancient and modern, that a system of criminal law enforcement which comes to depend on the 'confession' will, in the long run, be less reliable and more subject to abuses than a system which depends on extrinsic evidence, independently secured through skillful investigation."

[47] 332 U.S. 596 (1948). The facts: a confectionary store was robbed and its owners shot. Five days later—around *midnight*—Haley, aged 15, was arrested at his home and taken to police headquarters. There was conflicting evidence as to whether he was beaten there, but it was uncontroverted that, beginning shortly after midnight, Haley was questioned by the police for about five hours. Five or six policemen questioned him in relays of one or two each.

reversed the conviction of a 15-year-old boy for murder, Mr. Justice Douglas gave express recognition to this additional factor:

> What transpired would make us pause for careful inquiry if a mature man were involved. And when, as here, a mere child—an easy victim of the law—is before us, special care in scrutinizing the record must be used. Age 15 is a tender and difficult age for a boy of any race. He cannot be judged by the more exacting standards of maturity. That which would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens. This is the period of great instability which the crisis of adolescence produces. A 15-year-old lad, questioned through the dead of night by relays of police, is a ready victim of the inquisition.[48]

In *Gallegos v. Colorado*[49] the Court once again reiterated this position:

> He cannot be compared with an adult in full possession of his senses and knowledgeable of the consequences of his admissions. He would have no way of knowing what the consequences of his confession were without advice as to his rights—from someone concerned with securing those rights—and without the aid of more mature judgment as to the steps he should take in the predicament in which he found himself. . . . Adult advice would have put him on a less unequal footing with his interrogators. *Without some adult protection against this inequality, a 14-year-old boy would not be able to know, let alone assert, such constitutional rights as he had. To allow this conviction to stand would, in effect, be to treat him as if he had no constitutional rights.* (Emphasis added.)

Haley had no counsel nor was he advised of such a right—around 5 A.M.—after being shown alleged confessions of two accomplices, he confessed. After signing a question and answer-type written confession, which included an introductory paragraph stating the constitutional right to remain silent, Haley was put in jail and held incommunicado for 3 days. A lawyer retained by his mother tried to see him twice but was refused admission by the police. His mother was not allowed to see him until 5 days after the arrest, but a newspaper photographer was allowed to visit and take his picture *immediately after* he confessed! Haley was not taken before a magistrate and formally charged with a crime until 3 days after the confession was signed.

[48] *Id.* at 599.

[49] 370 U.S. 49 (1962). The facts: Gallegos, a 14-year-old boy, and another juvenile followed an elderly man to a hotel, got into his room on a ruse, assaulted and overpowered him, stole $13 from his pockets and fled. Picked up 12 days later by police, Gallegos immediately admitted the assault and robberty. Over two weeks later he was convicted in a juvenile court of "assault to injure" and was committed to the State Industrial School for an indeterminate period. Subsequently the victim died, and Gallegos was charged with first degree murder and found guilty by a jury in a state court. The crucial evidence introduced at the trial was a formal confession which Gallegos had signed *before* his victim died, *before* he had been brought before a judge, and *after* he had been held for five days without seeing a lawyer, parent or other friendly adult, although his mother attempted to see him.

Although the Gallegos court addressed itself only to the use of the confession in a criminal court, the language of the opinion indicates an *identical* result would have been reached had there been no waiver and the confession been tendered to the juvenile court on a petition to declare Gallegos a delinquent.

The New York Court of Appeals and the supreme court of New Jersey have found in a similar vein, and the same principle is espoused in the New York Family Court Act[50] and the Standards for Juvenile and Family Courts.[51] It is important to note, however, that the Court has *not* stated that any one particular procedural practice is per se a violation of due process. As stated in *Gallegos*:[52]

> There is no guide to the decision of cases such as this, except the *totality of circumstances*. . . . The youth of the petitioner, the long detention, the failure to send for his parents, the failure immediately to bring him before the judge of the Juvenile Court, the failure to see to it that he had the advice of a lawyer or a friend—*all these combine* to make us conclude that the formal confession on which this conviction may have rested (citation omitted) was obtained in violation of due process. (Emphasis added.)

The basic issue in *Gault*, therefore, was whether the proceedings in Juvenile Court were to be deemed "criminal" in nature. Once this basic determination was made, the more refined issue appeared: Whether Gault's admission could be used against him when there was no evidence offered that he had knowledge that he was not obliged to speak and would not be penalized for remaining silent, with proper consideration given his propensities as an adolescent on the issue of voluntariness of confession.

To answer this, the pertinent *Gault* facts must be recapitulated. The "confession" of Gerald Gault was first obtained by Officer Flagg, out of the presence of Gerald's parents, without counsel and without advising him of his right to counsel. The judgment of the Juvenile Court was stated by the judge to be *based on Gerald's admission in court.* No record or writing of any type substantiated the confession. *Apart from this "admission," there was nothing upon which a judgment or finding might be based.* There was no sworn testimony. Mrs. Cook, the complainant, was not present.

Once the juvenile delinquency proceeding was determined to be "criminal" in nature, the Supreme Court's decision in *In re Gault* is hardly surprising: this was an invalid confession as the constitutional privilege against self-incrimination is applicable in the case of juveniles in the same manner as with respect to adults. The present law: absent a valid confession, a determination of delinquency and an order of commitment to a state institution cannot be sustained in the absence of sworn testimony subjected to the opportunity for cross-examination in accordance with our law and constitutional requirements.[53]

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[50] N.Y. FAMILY COURT ACT §741 (1962).
[51] STANDARDS FOR JUVENILE AND FAMILY COURTS, p. 49.
[52] 370 U.S. 49, 55 (1962).
[53] One of the remaining unanswered issues is whether the *McNabb-Mallory* exclusionary rule of evidence will be applied in juvenile proceedings as a con-

This application of the privilege against self-incrimination has not met with universal approval, and in fact, has been considered by some to be destructive of the rehabilitative purpose of the juvenile court system. Indeed, this criticism should not be surprising since the privilege has been bitterly attacked in its application to adults as well.[54] In regard to the juvenile courts, the basic objection to the application of this privilege is the one discussed earlier in this article: Confession is good for the juvenile and, in fact, is a necessary element for his rehabilitation. This position, upon which the supreme court of Arizona based its decision, has been advocated by numerous scholars. The standard attack is exemplified by the following:

> The denial of the right against self-incrimination may be justified on several grounds. First, the child is not incriminating himself since criminal conviction cannot result. . . . Second, the child should be encouraged to admit his guilt as an important psychological step on the road to reformation. Third, a refusal to testify could not be 'punished' but would be merely further evidence that the child is antagonistic toward society and in need of guidance. Finally, no prosecuting attorney is present to twist the meaning of the child's words or to employ the tricks of cross-examination.[55]

Modifications in the applicability of the privilege to juvenile proceedings have also been proferred as an alternative solution. A recent article gives credence to the privilege in juvenile proceedings, but would hold the right not applicable (1) in cases that could not be "prosecuted under the general law" and (2) in all other cases when the juvenile court has determined that it will not dismiss the petition but will exercise its exclusive jurisdiction over the child.[56]

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sequence of the recognition of a juvenile's right to silence in such proceedings. A strong argument for the applicability could seemingly be made. See Paulsen, *Kent v. United States: The Constitutional Context of Juvenile Cases,* 1966 SUP. CT. REV. 167; Miranda v. Arizona, 384 U.S. 436 (1966); Ker v. California, 374 U.S. 23 (1963); Aguilar v. Texas, 378 U.S. 108 (1964); Harling v. United States, 295 F.2d 161 (D.C. Cir. *en banc,* 1961); Harrison v. United States, 359 F.2d 214 (D.C. Cir. *en banc,* 1965).

[54] Quick, *Constitutional Rights In the Juvenile Court,* 12 HOWARD L. J. 76, 103 (1966).

[55] Note, *The Parens Patriae Theory and Its Effect on the Constitutional Limits of Juvenile Court Powers,* 27 PITT. L. REV. 887, 910 (1966). Also, Polow, *The Juvenile Court: Effective Justice or Benevolent Despotism,* 53 A.B.A. J. 31 (Jan. 1967). Polow prefaced his discussion on p. 34 with "A *procedural nicety* is not necessarily applicable because it is required in criminal courts." (Emphasis added.) One can only doubt the conclusion reached by Polow when he implies that basic constitutional safeguards are mere "procedural niceties." The position of Felix Frankfurter is much more laudable: "The history of American freedom is, in no small measure, the history of procedure." Malinski v. People of State of New York, 324 U.S. 401, 414 (1945) (concurring opinion). Also see Paulsen, *Fairness to the Juvenile Offender,* 41 MINN. L. REV. 547, 561 (1957): "If the juvenile proceeding is truly protective and non-accusatory in character, there can be little need for a privilege against testifying similar to the privilege against self-incrimination. The latter privilege is tied to the accusatorial scheme of the criminal law."

[56] Weinstein & Goodman, *A Constructive Response for Juvenile Courts,* 53 A.B.A. J. 257 (March 1967).

A better approach is offered in a recent Note.[57] The author suggests a model judicial court structure involving (1) a non-judicial intake service empowered to adjust all cases, whose proceedings are totally veiled from judicial cognizance at the adjudicative hearing; (2) a hearing on the merits; and (3) a disposition hearing. At the intake proceeding the youth would be permitted counsel but strict adherence to Fifth Amendment rules regarding self-incrimination would be unnecessary, for testimony elicited at the intake interview and evidence accumulated by the social work investigation would *not* be admissible to determine the issue of guilt at the later court hearing. This differs from the previously mentioned modification in that the testimony would not be admissible in the *juvenile* hearing on the merits, whereas the former would restrict the privilege only to a consequent *adult* criminal trial. Regarding the latter, if the case reaches the juvenile court and the youth does not then admit the allegations of the petition, the judge would then hold a hearing on the merits to determine whether the charges are substantiated. In this hearing the privilege against self-incrimination would be rigorously applied.[58] Then if the allegations of the petition were established, the judge would proceed to the dispositional hearing, where his first duty would be to establish jurisdiction by establishing that the youth *requires,* and can *benefit from,* the rehabilitative aids of the juvenile system, which would necessarily involve a consideration of *all* the social evidence, including the testimony of the youth. This would seem to be a most reasonable alternative as the conflict between the rehabilitative purpose of the juvenile court and the status of the juvenile court as a court of law would be largely resolved: By postponing any dispositional decisions until the conclusion of the adjudicative hearing, the knowledge of the judge would be broadened at the dispositional hearing while the danger of prejudice to the youth arising from the judge's reference to evidence which is inadmissible on the question of guilt, would be alleviated.

This model act is not a panacea to the conflict between the rehabilitative function of the juvenile court and the concept of such court as a court of law. For example, the suggested procedure of having the

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[57] Note, *Rights and Rehabilitation in the Juvenile Courts,* 67 COLUM. L. REV. 281 (1967).

[58] See Welch, *Delinquency Proceedings—Fundamental Fairness for the Accused in a Quasi-Criminal Forum,* 50 MINN. L. REV. 653, 663 (1966):

> The juvenile has every right under the Fourteenth Amendment to decline surrendering his liberty in return for "guidance," and to lead his life without official interference until such time as the state can prove in an orderly and reliable procedure that his conduct justifies state infringement of his liberty. . . . *After* such a determination has been made the commendable motives and objectives of reformation and rehabilitation do credit to our society. Before such a determination has been made, however, *these objectives are merely expedient apologies for stripping proceedings of safeguards designed to ensure standards of reliability consistent with the degree of state power being exercised.* (Emphasis added.)

non-judicial intake proceeding first, then the judicial hearing on the merits (a proceeding in which constitutional privileges, including self-incrimination, would apply), *then* a dispositional hearing wherein all social evidence would be admissible, would be confusing to the youth and most probably destructive of the goal of rehabilitation. For he would be encouraged to "open up" at the intake proceeding and then be instructed by counsel not to incriminate himself at the subsequent judicial hearing on the merits. It is hard to imagine that this would not smack of "playing games" to the youth, and hinder his respect for the law in society, a necessary element to his rehabilitation.

It is this author's opinion that the bifurcated proceeding is indeed the best approach to resolving the essential conflict, but that the intake procedure should be merged with the hearing on the merits, with constitutional safeguards and privileges applicable in what would amount to a full-blown criminal trial. Upon the determination by the trier of fact (court or jury) that an offense was committed, and that the defendant youth was the perpetrator, a dispositional hearing would ensue in which the full resources of the public welfare department and the social services in the community could be utilized to determine the precise treatment of the youth which would most effectively lead to his rehabilitation while protecting the community in the process.

The most serious objection to such a proceeding would be that the juvenile court system simply could not handle the resultant increase in case-load. Admittedly, the volume of court proceedings would greatly increase for many of the cases previously dismissed at the non-judicial intake procedure based upon information gained therein, would now be going to trial. It is submitted that the increase in juvenile court facilities would be well worth the price, and, in fact, if constitutional privileges are to be applied across the board in juvenile court in the near future as *Gault* seems to indicate, that such development will be *necessary*. It seems plausible also that the judge would be able to dismiss those cases which have no merit with the same facility as the non-judicial intake proceeding would be able to dismiss.

In the absence of such a model act, however, the fact remains that any modification of the constitutional privilege against self-incrimination is not possible. Nothing less than the full constitutional privilege is to be tolerated; mere partial, or even substantial compliance is to be given the same weight as the defense of being "just a little bit pregnant." Consistent due process in juvenile proceedings will involve large expenditures, inconvenience, and might even hamper the most effective consideration of the needs of an individual child. But the gains inherent in the application of the due process concept would seem to justify such implementation.

In any event, it is likely that this matter of self-incrimination in

juvenile proceedings will be spelled out more fully, for there is an appeal now pending in the Supreme Court regarding the admissibility of confessions in juvenile court. The precise issue in *In re Fischer*:[59]

> Do the Fourth, Sixth, and Fourteenth Amendments bar admission in Ohio juvenile court proceedings of a police station confession made in the absence of counsel by a 17-year-old boy who was not advised of his right to remain silent and who later testified that the confession was false and involuntary?

It is submitted that the values underlying the privilege against self-incrimination—integrity of the person, confidence in the accusatorial system and distrust of compelled testimony—are worth preserving within the juvenile court framework.[60] Indeed, as a corollary, a system which prevents the exercise of a fundamental constitutional privilege is not worth preserving.

CONCLUSION

The basic conflict in the juvenile court system appears to be the alleged dichotomy between the *rehabilitative function* of the juvenile court and the concept of the juvenile court as a court of *law*, with the consequent safeguards of the Constitution of the United States. That these two philosophies are *not* incompatible and can co-exist, indeed *must* co-exist, is the fundamental determination of *Gault*.[61] In regard to the constitutional privilege discussed in this article—the privilege against self-incrimination—it is recognized that special problems may arise with respect to waiver, and that such factors as the age of the child and the presence of parents must be considered when a juvenile is involved. However, it can no longer be debated whether the basic principle of the privilege is applicable to the juvenile proceeding. As stated by *Gault's* precursor, with respect to waiver proceedings, "there is no place in our system of law for reaching a result of such tremendous consequences without ceremony. . . ."[62]

Thus the juvenile court has come of age as a court of law in *In re Gault*. But its final maturation is some time away as, similar to the adolescent, there are problems in the maturation process. In holding juvenile court proceedings to be of a "criminal" nature, the Court has rectified the heretofore repugnant practices in regard to self-incrimination, but may have opened a veritable "Pandora's box." Though limiting the scope of its holding to the delinquency proceeding itself, several basic questions remain unanswered. Should the *McNabb-Mallory* ex-

[59] 36 U.S. L. W. 3037 (*cert. granted*, Oct. 9, 1967).

[60] See Note, *Rights and Rehabilitation in the Juvenile Courts*, 67 COLUM. L. REV. 281 (1967).

[61] As early as 1944, Pound advocated a return to "legalism" in the juvenile court system. POUND, THE JUVENILE COURT AND THE LAW (1944). It should also be pointed out that there is little in *Gault* that was not previously enunciated in THE STANDARD JUVENILE COURT ACT (6th ed. 1959) and the COUNCIL OF JUDGES' PROCEDURE AND EVIDENCE IN THE JUVENILE COURT (1962).

[62] Kent v. United States, 383 U.S. 541, 554 (1966).

clusionary rule of evidence be applied in juvenile proceedings as a consequence of the recognition of a juvenile's right to silence in such proceedings? Should the standard of proof be changed from a "preponderance" of the evidence to the criminal test of "beyond a reasonable doubt?" At what time must counsel be appointed? Must the *Miranda* warning be given to juveniles? May a finding of delinquency now be used to impeach a juvenile's testimony as a witness in a subsequent civil or criminal proceeding? Must the juvenile court provide a jury upon request? Does the juvenile have a right to bail? What compulsory processes are available for obtaining witnesses?

One would hope that the Court will give careful consideration to the ramifications and effect upon the rehabilitative purpose of the juvenile court system which would follow from wholesale application of criminal procedures to the juvenile court. The *Gault* language would seem to indicate that such across-the-board adoption may be forthcoming. This writer sees a threat to the very existence of the juvenile court system by such adoption, for its effect would be to make the juvenile court a full-fledged criminal court, with the juvenile given no special consideration due to his age and proclivities. This would be an anomalous situation, since the juvenile court was instituted to prevent this very thing.

Whatever the long-range implications of *Gault*, it is evident that the convenient theories of "parens patriae," "non-criminal proceeding," and "rehabilitative purpose solely," will no longer be allowed to run roughshod over the basic constitutional rights of the juvenile. For it finally has been recognized that these theories and their corollaries result in, at best, "benevolent despotism." Though admittedly there is great security in hindsight, one can only wonder why this realization was so slow in coming.

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