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In re Gault was the Supreme Court's initial foray into what Mr. Justice Fortas called "a peculiar system for juveniles, unknown to our law in any comparable context"—the juvenile courts. With becoming modesty, the Court limited its inquiry to one portion of juvenile proceedings, the adjudicatory stage, and passed on only certain aspects of that stage. Starting with the undisputed proposition that the due process clause has "a role to play" in evaluating the juvenile justice system, the Court saw the problem as one of ascertaining the "precise impact" of that requirement on the trial of delinquency cases.

Surely, no one doubts that the Gault decision was "constitutional" in nature. And Mr. Stapleton would be the first to point out that the Court could not have rendered a "sociological" decision—if, indeed, such an animal exists. On the other hand, the Court did take account of certain social science materials in determining the "precise impact" of the due process clause on delinquency cases. And the importance of these materials and, correlatively, of the way in which they were evaluated, depends, in large part, on the exact principle upon which the Court based its decision.
For example, if the majority opinion rested on a political judgement that any person, adult or child, is entitled to a particular set of procedures (presumably those required in criminal prosecutions) whenever official deprivation of liberty is threatened, then the social science evidence discussed in Gault has little real significance. Consequently, Mr. Stapleton’s objections to the way in which this evidence was evaluated have only academic interest; the Court’s decision would have been the same whatever the actual performance of the juvenile courts. And his proposed scheme for evaluating the juvenile justice system would be pointless, as well as almost certainly impermissible.

However, no such political principle has yet been adopted by Gault or, for that matter, any other Supreme Court decision. The panoply of criminal protections is not required in many circumstances which may result in deprivation of liberty: for example, commitment proceedings on account of alleged mental disability,7 civil contempt proceedings8 and proceedings in which the threatened deprivation is not considered “serious.”9

A narrower version of this same approach holds that, since the consequences of adjudication of delinquency and commitment to a state institution cannot meaningfully be distinguished from those of conviction and of imprisonment in the criminal process, the same body of protections should apply in each. In this view, social science information might be valuable on the question of similarity or identity of consequences. Once those consequences were ascertained and characterized, however, it would seem that social science would have little to contribute—at least as far as adjudicative procedures are concerned. The various aspects of adversarial criminal trials would be carried over, in gross, to delinquency proceedings.

While there is language in Gault which may lend support to such a reading, the conclusion that juvenile adjudication hearings are to be little criminal trials is not warranted by the decision as a whole.10 In the first place, the majority concluded its rather broad discussion of the due process clause with this qualification:

"'We do not mean . . . to indicate that the hearing to be held must conform with all of the requirements of a criminal trial or even of the usual administrative hearing; but we do hold that the hearing must measure up to the essentials of due process and fair treatment.'"11

Indeed, it expressly reserved the issues concerning the use of hearsay evidence,12 the correct standard of proof,13 the right to a transcript14 and the right to appeal from an adverse finding.15 Moreover, the majority explicitly rested its decision on considerations of due process rather than on the equal protection analysis offered by Mr. Justice Black.16
These factors, combined with the recognition that the juvenile justice system has some unique and advantageous characteristics, suggest that, under *Gault*, criminal prosecutions should provide a *point of reference* rather than a *model* for delinquency proceedings. Such a reading falls somewhere between Mr. Justice Black's equal protection argument and the strict due process approach of Mr. Justice Harlan, who would have the Court,

"...determine what forms of procedural protections are necessary to guarantee the fundamental fairness of juvenile proceedings, and not which of the procedures now employed in criminal trials should be transplanted intact to proceedings in these specialized courts." 17 (emphasis added)

The approach that the Court adopted in *Gault* and continued in *In re Winship*, 18 then, is a species of what has been called (perhaps metaphorically) "selective incorporation." 19 Certain aspects of criminal procedure are necessary to achieve accuracy, fairness and perhaps parity with the adult defendant. But others, at least in theory, must be held wholly or partially inappropriate to the peculiar requirements of the forum. 20 (A case can be made, certainly, for Mr. Justice Harlan's view, not only on grounds of constitutional analysis but also on the ground that the criminal system is not so thoroughly satisfactory that it should be imposed by segments, warts and all, on the juvenile courts. This is not, however, the occasion for making that argument.)

It appears that extending certain criminal due process safeguards to the juvenile defendant does not imply that the juvenile courts should be transformed into "little criminal courts"—even during the adjudicatory hearings. Mr. Stapleton's point, I take it, proceeds from the analogous proposition that providing the right to counsel does not necessarily imply that attorneys in the juvenile courts should act as "little criminal lawyers." Certainly, there is a considerable body of ambiguous writing on the function of counsel in juvenile cases, 21 and the confusion it engenders is not relieved by the *Canons of Professional Ethics*. Not only may the usefulness of the *Canons* depend on an original decision as to the nature of the proceedings, but identifying the client's "interests" in juvenile cases may pose substantial difficulties. 22 Moreover, there are some areas of the law—such as matrimonial 23 and tax 24 law—in which counsel is said to owe a special duty to the court or to society. Arguably, the same concern for societal interests may be required of a juvenile court attorney.

This reading of *Gault* clarifies Mr. Stapleton's thesis and the relevance of social science materials to the decision: if the attorney's role in juvenile cases has not already been defined by a political judgment of the sort reached in criminal prosecutions or by current rules of professional conduct, information relating to the social and professional consequences of role section may be considered. 25 It is in this light, as Mr. Stapleton notes in some detail, that the Supreme Court used social science data in considering the consequences of traditional juvenile court practice and, to some degree, the institutional results its decision might occasion. But his point is that the Court's evaluation of this material was questionable in some respects and that a more systematic and careful analysis is desirable. Not at all coincidentally, he proposes a method for such an analysis.

As I understand it, Mr. Stapleton's idea is to divide delinquency cases of the sort under investigation into three groups. These groups are defined in terms of the attorney's role when the client has admitted involvement in the alleged offense. In one third of the cases, the accused may resist prosecution by the use of adversarial defense tactics. In another third, the lawyer is enjoined to admit the child's complicity. At this point, the attorney may develop a dispositional scheme with an evaluation team (or teams) and present it to the court. If the desired dispositional scheme is not available, the lawyer may and should take steps before the court, or the legislature if necessary, to secure it for his client. In the last group, the lawyer plays no active role after entering an admission.

The first of these schemes is consistent with the adversarial defense posture contemplated by the criminal process. The last is not unknown in traditional juvenile court practice. Taken with the second proposition, however, they suggest a new and challenging approach.
Despite the promise of Mr. Stapleton’s proposition—and even accepting the reading of Gault set out above—lawyers (including myself) will have substantial reservations about joining the “experimenting society,” at least in this context. Its major justification lies, of course, in the fact that it provides a design for assessing with some rigor the benefits of various approaches to juvenile delinquency. At the same time, it is perfectly clear that securing socially useful information, however desirable, is limited by other norms and, further, that there are instances in which ideological or ethical norms control empirical ones. To take only one example, it may be important to know the exact tolerance of human bodies for cold. Surely the best way to determine this level is by freezing human bodies in carefully controlled stages, until the limit is reached in enough cases to permit one to draw a conclusion. Hopefully, it is clear that an experiment of this sort is forbidden by norms defining the place of the individual in society.

Before endorsing Mr. Stapleton’s plan, then, one must first be satisfied that no supervening value prohibits its implementation. It should be immediately apparent that a simple but very important proposition underlies the experimental program: it necessarily denies the admittedly guilty child any right to resist societal intervention. One can hardly claim something as a right if its availability depends solely on random assignment rather than on something which inhere in the relationship of the person to the state.

Much turns, therefore, on whether an admittedly guilty child can be said to have the right to resist official sanction despite his conceded culpability. Adapting the Gault approach, one might ask whether denying this right would be acceptable if the subject were an adult being tried in the criminal courts. The answer almost surely would be negative. The adversarial assumptions underlying the criminal justice system apparently permit the adult to resist official intervention even if the state staffs an institution with the appropriate experts and gives it a rehabilitative orientation.

Mr. Stapleton’s proposal obviously places considerable strain on an analysis-by-comparison of this sort. The criminal process assumes a diversity of interests between the state and the accused. This assumption is reflected in the idea that a “not guilty” plea does not necessarily serve a truth-telling function but says only that the defendant is asserting his right to freedom until his guilt has been proved beyond a reasonable doubt—by lawful evidence and according to proper procedures. Of course, denial of this assumption has always been central to juvenile court philosophy and practice. Traditional juvenile court theory neither presumes nor recognizes an essential conflict between the interests of the state and those of the child. Nor did Gault address this point directly. To be sure, the Court did make clear that neither the doctrine of parens patriae nor “civil” rather than “criminal” characterization of the proceedings justifies the denial of those procedures necessary to fairness in the hearing of delinquency cases. Moreover, it can hardly be disputed that, to the extent that these rights are invoked, delinquency hearings will be more “adversarial” than before. However, it does not necessarily follow that providing procedures designed to ensure accuracy in fact-finding, where the consequences of error are so great, implies a right to insist on such procedures where no real issue of fact exists—or, rather, where the existence of an issue of fact arises solely because a party is entitled to demand proof without having himself to deny the facts to be proved.

There is, however, one feature of the Gault decision which may be read as indicating that delinquency cases are henceforth to be viewed as adversarial in the criminal sense. Mr. Justice Fortas, in discussing the applicability of the privilege against self-incrimination, takes some care to point out that the thrust of the privilege goes beyond concern for the accuracy of confessions, and that,

“One of its purposes is to prevent the State, whether by force or by psychological domination, from overcoming the mind and will of the person under investigation and depriving him of the freedom to decide whether to assist the State in securing his conviction.” (emphasis added)

Since this privilege applies as much to delinquency cases as to criminal prosecutions, it would seem to follow that the child has, as part of the freedom to decide whether to assist the state in securing his conviction, the option to sit back and force the state to its proof.

It may be responded that the foregoing amounts to weaving a garment from a single thread—a thread that should not have been available in the first place. Perhaps there is some justification for such an objection, perhaps not. On the one hand, inadvertence in Supreme Court opinions, while not unknown, is not lightly to be assumed. On the other hand, it would seem curious that resolution of so important an issue—one which not only
affects the basic character of delinquency matters but carries obvious significance for other areas as well—should be accomplished en passant, as it were. For the moment, it’s enough to say that the principle that an accused should be allowed to put the state to its proof should be explicitly established as a general proposition before the criminal justice system can serve as a useful reference point for the juvenile courts. The tendency to forget that procedures follow rather than dictate norms should be resisted vigorously.

It need hardly be added that the weakness of argument-by-comparison also extends to the observation that for some legal purposes, children may be subjected to special regulation. The political distance between the state and any individual varies according to, among other things, the nature and extent of official intervention. The important question is whether for purposes of this kind of action children can be wholly denied the right to oppose the state, at least where they have admitted guilt to counsel.

There is not enough space here to fully develop the fundamental question raised by Mr. Stapleton’s thesis, and it would be presumptuous to attempt a brief answer. In any event, it is not necessary to do so in order to conclude that his experiment is not now permissible. Such investigations must be consistent with fundamental political propositions which may or may not have been authoritatively established in the juvenile court area—surely they have not yet been well considered. Consistency cannot be supplied after experimentation has been concluded; to the extent that an adjustment of the boundary between individual and state is involved, that adjustment must be recognized and its propriety determined on its own merits.

1. In re Gault, 387 U.S. 1, 17 (1967). The Court’s earlier decision in Kent v. United States, 383 U.S. 541 (1966), was directed at the relinquishment, rather than exercise, of juvenile court jurisdiction, and an invitation to consider the constitutionality of adjudicative procedures was expressly declined. 383 U.S. at 556.

2. "We do not in this opinion consider the impact of these constitutional provisions upon the totality of the relationship of the juvenile and the state. We do not even consider the entire process relating to juvenile ‘delinquents’ . . . We consider only the problems presented to us by this case. These relate to the proceedings by which a determination is made as to whether a juvenile is ‘delinquent’ . . . with the consequence that he may be committed to a state institution." 387 U.S. at 13.


5. Id. at 13-14.

6. This is not the place to consider either the way in which information of this sort comes before the Court or the appropriateness of the "Brandeis Brief" when used to attack the constitutionality of legislation. Suffice it to say that the Court’s reference to information classifiable as "sociological" is hardly novel. See Brown v. Board of Education, 347 U.S. 483 (1954), particularly footnote 11, and the oral argument in its companion case, Briggs v. Elliott, partially reprinted in J. Maguire, J. Wein­stein, J. Chadbourn & J. Mansfield, Cases and Materials on Evidence 40-42 (5th ed. 1965).


11. 387 U.S. at 30. [Quoting from 383 U.S. at 562.]

12. While the majority does hold that hearsay evidence cannot be the sole basis for a finding of delinquency, 387 U.S. 1, 56, it is not clear that such evidence cannot be received at all. See Dorsten & Reznick, supra note 13, at 3; Teitelbaum, The Use of Social Reports in Juvenile Court Adjudications, 7 J. Fam. L. 425, 431 (1967).

13. 387 U.S. at 11-12. This issue has subsequently been decided in favor of requiring proof beyond a reasonable doubt in delinquency cases where institutionalization may result. In re Winship, 397 U.S. 358 (1970).

14. 387 U.S. at 58.

15. Ibid. In addition, several issues relating to adjudication were not raised at all, including the applicability of the exclusionary rule to evidence (other than confessions) obtained illegally, the right to compulsory process to secure witnesses, the right to a public hearing and the right to trial by jury. The last of these is now before the Supreme Court in In re Burrus, No. 128 (October Term, 1970).
16. 387 U.S. at 61.
17. Id. at 74.
18. 397 U.S. 358 (1970). It can also be argued that the majority opinion has distinct equal protection overtones, despite its rejection of that basis for decision. The Sixth Amendment right to counsel, for example, applies of its own force only to federal criminal prosecutions. See Barron v. Baltimore, 7 Pet. 243 (1833). It applies in state prosecutions because it is considered fundamental to a fair trial and therefore is required by the due process clause of the Fourteenth Amendment. See Gideon v. Wainwright, 372 U.S. 335 (1963). The process by which provisions of the Bill of Rights are "selectively incorporated" into state proceedings is well known. In the juvenile court context, however, a second decision must be made: whether provisions of the Bill of Rights dealing with criminal prosecutions apply to matters which are not considered criminal by the state creating and holding such hearings. In Gault, this determination apparently was made by comparing the consequences of delinquency and criminal proceedings. The fact that similarities were found led the majority to require that certain criminal safeguards be provided in delinquency cases carrying the possibility of incarceration. This argument-by-comparison may be contrasted with Mr. Justice Harlan's classic due process approach, which considers whether any given procedure, in its context, offends basic notions of justice and fairness.
20. See In re Winship, 397 U.S. 358, 366 (1970), for evidence that the Court is concerned with adverse effects on certain aspects of the adjudication hearing, notably "informality, flexibility, [and] speed of the hearing," as well as for a discussion of what may be advantageous in pre-judicial and dispositional processes.
21. For example, the Executive Director of the Philadelphia branch of the American Civil Liberties Union states that "the role of counsel should be basically the same as in criminal cases, namely, to present the defendant's situation in the best possible light at every stage of the proceedings." But he hastens to add, "This does not imply that the lawyer will regard his [juvenile court] client as he would regard an adult accused of crime, or that his technique in dealing with the child's case will be the same. A sensitive lawyer will recognize that his role is not necessarily to help a kid beat the rap." Cokx, Lawyers in Juvenile Courts, 13 Crime & Delin. 488, 490 (1967). See, Isacs, The Role of the Lawyer in Representing Minors in the New Family Court, 12 Buff. L. Rev. 501 (1963); Allison, The Lawyer and His Juvenile Court Client, 12 Crime & Delin. 165 (1966); Note, Rights and Rehabilitation in the Juvenile Courts, 67 Colum. L. Rev. 281, 327 (1967), all suggesting ambiguities in counsel's role, but none pointing out specific situations in which counsel should, on his own, decide that some "right" should be relinquished.
22. See Illinois Code of Professional Responsibility, EC 7-10, 7-11 (1970): "The responsibilities of a lawyer may vary according to the intelligence, experience, mental condition or age of a client . . . or the nature of a particular proceeding. . . . Any mental or physical condition of a client that renders him incapable of making a considered judgment on his own behalf casts additional responsibilities upon his lawyer." This comment is appended to the general canon entitled "A Lawyer Should Represent a Client Zealously Within the Bounds of the Law" and makes no particular reference to juvenile court matters.
23. The lawyer in matrimonial cases, it has been suggested, "must always keep in mind the interest of society, and that his duty is not only to represent any party engaged by him, but also the State." Peoples, Lawyers and Divorce, 19 Tenn. L. Rev. 930, 936 (1947). See Harper & Harper, Lawyers and Marriage Counseling, 1 J. Fam. L. 73, 80-81 (1961).
24. It is frequently said that tax counsel owes a dual responsibility: "he must be loyal to his client, but he is also bound to the Government to see that his client does not avoid his just share of the tax burden except by positive command of the law. . . ." Paul, The Lawyer as Tax Advisor, 25 Rocky Mt. L. Rev. 412, 422 (1953). See Hellerstein, Ethical Problems in Office Counseling, 8 Tax L. Rev. 4 (1952); Tarleau, Ethical Problems in Dealing with Treasury Representatives, 8 Tax L. Rev. 10, 13 (1952).
25. The professional consequences of role definition involve the extent to which a lawyer is made to either function as an adversary in a nonadversarial setting or to adopt a judgmental role for which he is ill equipped by training and, perhaps, by inclination. The social consequences of role definition may involve, for example, the freeing—without treatment—that may be much needed and with what may be considerable risk to the community—of a client who has committed a serious breach of law. According to Mr. Stapleton's data, the latter risk cannot be dismissed as negligible. One would expect his data to underestimate, if anything, the incidence of dismissal of guilty children, since there are probably more guilty children who do not admit to their attorneys than there are not-guilty children who do admit.
26. It is sometimes said that a lawyer can never really know whether his client is guilty, even when a confidential confession is supported by corroboration evidence. For purposes of this discussion, it is enough to assume that an attorney can, and sometimes does, know that his client is guilty to the extent that anyone can have knowledge of another man's guilt. See J. Dos Passos, The American Lawyer 158-59 (1907). Whether the residue of error should have institutional significance is a question better reserved for full discussion.
27. As the Attorney General's Committee on Poverty and the Administration of Federal Criminal Justice (1963) observed, "American criminal procedure is accusatorial in nature and founded upon the adversary system." Report of the Attorney General's Committee on Poverty and the Administration of Federal Criminal Justice 11 (1963). The essence of this system is challenge; it presupposes "a constant, searching and creative questioning of official decisions and assertions of authority at all stages of the process"—and not cooperation or accession to governmental demands. Ibid. In resolving the conflicting interests of state and individual, procedure may be as important as outcome. See Skolnick, Social Control in the Adversary System, 11 J. Confl. Res. 52 (1967).
28. See State v. Scholl, 167 Wis. 504, 167 N.W. 830 (1918); Lindsey, Colorado's Contribution to the Juvenile Court, in The Child, The Clinic and The Court 274 (J. Addams, ed. 1927); Mack, The Chancery Procedures in the Juvenile Court, 23 Harv. L. Rev. 104 (1910). As Mr. Stapleton argues, juvenile courts do have features designed to afford juvenile respondents a measure of protection not available to adults defendants. To some extent, these features reflect legislative implementation of a non-punitive philosophy. Conviction for crime, to take one example, is clearly condemnatory and is intended to be so. See Hart, The Aims of the Criminal Law, 23 Law & Contemp. Prob. 401, 404-05 (1958). Adjudication of delinquency is probably not intended to carry such moral content, as shown by the fact that it does not carry the same formal consequences as conviction of crime. See Gough, The Expunge- ment of Adjudication Records of Juvenile and Adult Offenders: A Problem of Status, 1966 Wash. U. L. Q. 147, 168 et seq., for discussion and collection of authorities. This is not to say that an adjudication of delinquency does not involve adverse consequences for the respondent; for indeed it does; it is only to say that the nature and consequences of delinquency proceedings cannot be ascertained simply by characterizing them as "the same as in criminal prosecutions."

29. 387 U.S. at 47.

30. Id. at 55.