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KENT v. UNITED STATES AND In re GAULT: 
TWO DECISIONS IN SEARCH OF A THEORY

By THOMAS A. WELCH*

AFTER the 60 years of operation of the juvenile courts, and after nearly every state supreme court had specifically determined that special juvenile court procedures were constitutionally valid under the rationale of parens patriae, the United States Supreme Court has handed down two decisions in the short span of 14 months that have decreed several constitutional prerequisites of the "special" procedure for juvenile justice.

Kent v. United States1 dealt with implied statutory requirements of a fair hearing upon waiver of juvenile court jurisdiction in favor of trial in the criminal courts, under the District of Columbia Juvenile Court Act "read in the context of constitutional principles relating to due process and the assistance of counsel."2 The Court also, in dicta, raised the question of whether the juvenile system of corrective treatment performs "well enough . . . to make tolerable the immunity of the process from the reach of constitutional guaranties applicable to adults."3

In re Gault4 presented squarely a broad range of questions going directly to the constitutional validity of the parens patriae rationale for lessened procedural protections in juvenile delinquency determinations. There was never really time in which to speculate whether the dicta in Kent was intended as a warning of needed statutory reforms. It was clear that the Court, itself, was preparing to embark upon due process reforms.5 The only real question after Kent was how pervasive would be the Court's first venture into the fairness of delinquency determinations, and what dimension it would give to "due process" and "equal protection" within the context of the special "noncriminal" treatment of juvenile offenders.

The Kent Case Premise

The Kent case did not address itself to the question of whether delinquency proceedings are another form of criminal prosecution, or whether they are a distinctively different system without emphasis

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* Member, San Francisco Bar.
2 Id. at 557.
3 Id. at 555.
4 387 U.S. 1 (1967).
5 Certiorari was granted in Gault only 3 months after the Kent decision was announced. 384 U.S. 997 (1966).

[29]
on criminality and the retributive and deterrent-by-example elements of criminal laws. Nor did it raise the question of whether a true difference in the juvenile court system might call for the application of different standards of “due process” from those heretofore applied in criminal cases. Although his initial apprehension and custody prior to the waiver determination were necessarily under the aegis of the Juvenile Court Act, Morris Kent never actually became the subject of a delinquency proceeding because he was surrendered to the district court for trial under the general criminal laws of the District of Columbia. The Supreme Court held that the Juvenile Court Act’s provision for “full investigation” before the juvenile court could waive jurisdiction contemplated more than the summary treatment he received. “Full investigation” meant at least a hearing before the juvenile judge, access by the minor’s counsel to the records and reports considered by the judge in making his determination, and a statement of reasons for the court’s decision.

The Court’s holding was based upon what were termed “vitally important statutory rights” which entitled the minor, absent waiver, to “special rights and immunities” incident to determination and treatment as a juvenile delinquent. Although the Court stated that “the admonition to function in a ‘parental’ relationship is not an invitation to procedural arbitrariness” and that there is concern that a child “gets neither the protection accorded to adults nor the solicitous care and regenerative treatment postulated for children,” these statements had virtually no relation to the waiver procedure under consideration. The juvenile court was neither prescribing treatment nor otherwise exercising a “parental” function. However, the Kent case, contrary to the suggestions implicit in its own dicta, did affirmatively hold, as the basis of the “due process” standards necessary to a valid waiver hearing, that the “special rights and immunities” afforded by the Juvenile Court Act of the District of Columbia were “vitally important” to Kent and, presumably, any other juvenile af-

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6 It is, of course, true that no single justiciable controversy on its own merits can pose a question of such broad compass. Whereas in Kent the Court treated the issues before it on the basis of the governing statutes only, and certain constitutional principles, in Gault it ranged far from Arizona law and institutions and based its constitutional conclusions on the right to counsel and self-incrimination, at least partly on general indictments of juvenile court systems throughout the nation. As Justice Harlan remarked in dissent, “The Court does not indicate at what points and for what purposes such views, held either by it or by other observers, might be pertinent to the present issues.” In re Gault, 387 U.S. 1, 66-67 (1967). For this reason the Court’s decision goes well beyond those rights actually determined in the Gault case.

8 Id. at 556-57.
9 Id. at 555.
10 Id. at 556.
forded similar rights by any other juvenile court act. These rights included: (1) protection from publicity; (2) provision of a special place of confinement separate from adult offenders; (3) a limitation on the duration of possible confinement (until majority); (4) an announced policy preference for disposition to parental custody rather than institutional confinement; and (5) protection against the loss of civil rights which would normally follow from conviction for a serious crime.11

It was implicit in the Court's holding that these statutory distinctions from criminal prosecution were valid and valuable rights enuring to the benefit of a juvenile processed through a juvenile court system. This foundation for the holding in Kent does relate to the constitutional validity of a special procedure for juvenile delinquency determinations. Moreover, it seemed to recognize a basis of constitutional significance for distinguishing the procedural requirements for juvenile delinquency determination and criminal prosecution. However, little more than a year later the Supreme Court apparently reverted to and confirmed the doubts it had expressed as dicta in the Kent case, thereby throwing substantial doubt on the "vital importance" of the special protections afforded by juvenile delinquency acts.

**Background of the Gault Case**

*In re Gault*12 presented to the Court questions concerning the constitutional requirements for notice to the child and his parents of specific charges, notice of the right to counsel and to remain silent, the right to confrontation by the accusing witness and cross-examination, and the right to a record of the delinquency proceedings and appeal from an adverse determination.13 Other issues of constitutional import that were before the Arizona Supreme Court on the original petition for habeas corpus were not included in the petition for certiorari and were not decided by the Court.14

Gerald Gault had been found a "delinquent child" at the age of 15 years for having participated in a "nuisance phone call" involving the use of obscene language, punishable under the Arizona Criminal Code by a minor fine or imprisonment for 2 months,15 and for being "habitually involved in immoral matters,"16 relating to Gerald's admission of similar previous phone calls, a previous referral to juvenile

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11 Id. at 556-57.
12 387 U.S. 1 (1967).
13 Id. at 10.
14 Id. at 11 n.7. See *In re Gault*, 99 Ariz. 181, 185-86, 407 P.2d 760,-,763-64 (1965).
15 *In re Gault*, 387 U.S. 1, 8-9 (1967).
16 Id. at 9.
court involving a stolen baseball glove, and an outstanding probation for involvement in the theft of a lady’s purse. Gerald was committed to the State Industrial School for the period of his minority unless sooner discharged (up to 6 years).17

The Supreme Court of Arizona had held, on a habeas corpus petition by Gerald’s parents for custody of their son, that the non-punitive and rehabilitative, nonadversary philosophy of the Arizona Juvenile Code justified a procedure within the ambit of “civil due process” that was less technical and less alienative of the juvenile than criminal proceedings. Therefore the Arizona court found: (1) that written notice of the specific charges and a written record of the proceedings were not required because they would add to the stigma of “criminality”; (2) that the nonadversary climate is enhanced by designating the probation officer rather than independent counsel to look after the child’s interests before the court, and by confronting the child with his accuser only when the charges are denied; and (3) that individualized, rehabilitative handling of each juvenile is enhanced by “a rule which does not require the judge to advise the infant of a privilege against self-incrimination.”18 It is clear that the Arizona Supreme Court considered the intent and purpose of its Juvenile Code, to “civilize” the correction of juvenile misconduct, controlling on the elements of procedural protection essential to due process.

A Different Premise in Gault

At the outset the United States Supreme Court properly stated the broad question before it, “to ascertain the precise impact of the due process requirement upon such proceedings.”19 Then it performed an abrupt change of direction, comparing the “differences [which] have been tolerated”20 from the criminal law standard of due process with the procedural protections afforded juveniles and adults alike under criminal law before the juvenile court systems emerged.21 The Court spoke of “[d]epartures from established principles of due process”22 and “[f]ailure to observe the fundamental requirements of due process”23 without having yet addressed itself to what is the content of due process required in juvenile delinquency proceedings. It then concluded that “due process” was indeed applicable to delinquency determinations. Thus, the Court’s introductory discussions did little to advance a determination of the “precise impact

17 Id. at 7-8.
19 In re Gault, 387 U.S. 1, 13-14 (1967).
20 Id. at 14.
21 Id. at 14-17.
22 Id. at 18.
23 Id. at 19.
of the due process requirement upon such proceedings."24 Rather it undertook to discuss whether some due process requirements were applicable, a question not really at issue,25 in a manner which assumed that these "requirements" were already ascertained by reference to criminal procedure.

By this point it was apparent that the Court was not going to undertake a fresh appraisal of the essential content of due process in a unique form of judicial proceeding as its original statement of the broad question before it seemed to suggest. The question the Court had prepared itself to answer was: Which of the traditional criminal procedure safeguards must now be applied to delinquency determinations to ensure their fundamental fairness? Having approached the question from the outset in terms of a "tolerance" of differences from ordinary criminal procedure,26 and having also initially determined that uniquely beneficial features of the juvenile court system are "in no way involved"27 because they "will not be impaired by constitutional domestication,"28 criminal procedure "norms" became the model for what was to follow.

Of course it was central to a satisfactory answer of the question before the Court whether the unique aspects of the juvenile court system are themselves constitutionally significant in giving content to the essentials of fair procedure. Reading some of them out of consideration because they will not be impaired by procedural safeguards is certainly less than forthright treatment.29 It amounts to a rejection of their constitutional significance, making them, henceforth, not an essential part of a constitutionally valid juvenile correction system. Such a result can only serve to further weaken adherence to the special protective provisions of juvenile court acts, especially where a right of appeal does not exist and correction of abuses must be obtained by petition for habeas corpus.

The Resultant Theory of Juvenile Court Due Process

The Court's introductory comments in Gault made frequent reference to the questions it had raised as dicta in the Kent case about

24 Id. at 14.
25 See id. at 13, where the Court notes that "the Due Process Clause has a role to play." The Arizona Supreme Court certainly never denied that due process applied: "The problem is ascertaining the particular elements which constitute due process in a juvenile hearing." In re Gault, 99 Ariz. 181, 187, 407 P.2d 760, 765 (1965).
26 See quotation at note 20 supra.
27 In re Gault, 387 U.S. 1, 22 (1967).
28 Id.
29 As further discussed infra, it is also patently contrary to Kent v. United States, 383 U.S. 541 (1966) wherein these same statutory benefits were deemed "vitaly important" and the threat of their loss was deemed "critical" and of "tremendous consequences." Id. at 556, 554.
the practical validity of special concern, protection and correctional treatment for juveniles under the juvenile court system. Although claiming no purpose to "denigrate the juvenile court process," it once again expressed its disbelief that special institutions for individual corrective treatment separate from adults, the destigmatizing influence of the "delinquency" label, protection from adverse publicity and social disability, the therapeutic influence of a nonadversary atmosphere in court, and the avowed preference for disposition to parental custody, rather than institutionalization, were realized in practice. 

In effect, the Court rejected the practical value and benefit of the very "special rights and immunities" it had held to be "vitally important" in the Kent case. Whereas in Kent it found a waiver hearing to be "critically important" because the rights and immunities afforded by the District of Columbia Juvenile Court Act would have saved Morris Kent from many of the adverse consequences of criminal prosecution, in Gault the Court concluded that the "rights and protections" afforded by the criminal courts were substantial compared to the "mere verbiage" and "cliché" of special benefits under the juvenile court system. The contrast of these fundamentally different premises is relieved only by the fact that Gerald Gault received a substantially longer commitment than he could have received under the criminal law, whereas Morris Kent would have necessarily been exposed to a lesser period of commitment under the Juvenile Court Act than he could and did receive as the result of criminal conviction.

One cannot help but wonder how the holding of Kent and the underlying premise of Gault can be reconciled in a case of waiver of jurisdiction to the criminal courts in which the juvenile could be committed for a longer period under juvenile law than under the criminal law. Are not the special rights and immunities afforded by treatment as a juvenile delinquent then totally a "mere verbiage" and no longer "vitally important" to the juvenile defendant? Or is a waiver hearing then "critically important" because the juvenile finds his rights and immunities under the criminal law of vital importance?

What if he could receive a maximum of 5 years incarceration?

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30 In re Gault, 387 U.S. 1, 17-18, 30 (1967).
31 Id. at 22.
32 Id. at 22-28.
33 See text at note 11 supra.
34 In re Gault, 387 U.S. 1, 29-30 (1967).
35 Gerald Gault was confined for up to 6 years as opposed to a maximum of 2 months under criminal law. In re Gault, 387 U.S. 1, 29 (1967). Morris Kent could have been confined as a juvenile for up to 5 years as opposed to the life imprisonment he received under criminal law. Kent v. United States, 383 U.S. 541, 554, 557 (1966).
36 Cf. White v. Maryland, 373 U.S. 59 (1963); Hamilton v. Alabama, 368 U.S. 52 (1961). It has been suggested that an absolute right of waiver by the
tion under either system of laws? Then the rights and immunities of treatment as a juvenile are the only differences. Are they constitutionally significant enough to make a waiver hearing still "critically important"?

Although it is certainly not here suggested that the quantitative differences in maximum possible loss of liberty is irrelevant to the question of adequacy of procedural safeguards, it seems apparent that the constitutional indicia for due process standards of procedure must encompass a broader spectrum of analysis, including qualitative aspects of incarceration and other aspects of the system. The fact of exposure to incarceration at all, a qualitative consideration, seems, in light of the fourteenth amendment's specific concern for preserving individual liberty, to be an appropriate basis for prescribing procedural safeguards aimed at ensuring the reliability of determinations that state intervention is warranted.37 The right to counsel, reliable evidence, standard of proof, cross-examination, and transcript of record all relate to reliability. Other procedural aspects of criminal prosecution, such as probable cause for apprehension, the right to bail, the right to trial by jury, the privilege against self-incrimination and exclusionary rules for evidence obtained by trespassory searches and seizures, should not be applied verbatim to juvenile proceedings without due consideration of qualitative differences in incarceration and other differences in juvenile law.

Rather than holding that qualitative aspects of incarceration are "of no constitutional consequence" and that other statutory "rights and immunities" afforded the juvenile are "in no way involved," the cause of juvenile correction would be better served by a holding that made these "differences" essential to the constitutionality of carefully tailored "noncriminal" procedures, while insisting upon the realization of these differences in fact in individual cases through appropriate review by appeal and habeas corpus.38 Recent cases decided before Gault have proceeded on the basis that the constitutional validity of juvenile delinquency determinations depends upon the non-criminal and nonpunitive nature of special treatment.39 Indeed, the Court itself recognized that habeas corpus may be available to a juvenile incarcerated in an institution where special treatment and juvenile may avoid the prospect of depriving him of access to criminal due process, although this would be contrary to the purpose of waiver procedures and inconsistent with the philosophy of juvenile court systems. Note, 67 Colum. L. Rev. 281, 318 (1967).

guidance are not in fact provided. Will the quality of treatment during incarceration be of significant “constitutional consequence” after the Gault case?

The Inadequacy of the Resultant Theory

The basically inconsistent conclusions regarding the significance of specialized treatment for juvenile delinquents underlying the Kent and Gault cases, and the consequent theory of determining procedural rights by reference to the criminal prosecution model and the duration of maximum possible incarceration, lead to paradoxical results. Under the Court's analysis the balance of maximum possible incarceration will weigh in favor of conformity to criminal due process in inverse relation to the gravity of the alleged offense. That is to say, where only a minor sentence would be possible under the criminal law, as in Gault, the possibility of commitment under juvenile law for the duration of minority appears less like special treatment and more like excessive punishment. Conversely, where the reverse circumstances are present, as in Kent, the balance of maximum possible incarceration weighs in favor of special treatment, under juvenile law. In the latter case, special statutory “rights and immunities” clearly enhance the credibility of special concern and treatment for juveniles, whereas in the former set of circumstances these wholly qualitative considerations must somehow be balanced within the context of juvenile law against the troublesome prospect of loss of liberty for a longer period of time. The Gault decision suggests that exposure to a quantitatively greater loss of liberty will always weight the balance in favor of conformity with the criminal law model. However, unlike the application of similar principles solely within the context of the criminal law, the result is that the less valuable are a juvenile's statutory rights to be “saved” from the criminal prosecution (i.e. where his delinquency is based upon conduct punishable by incarceration for less than his minority under the criminal law), the more readily will due process require the application of criminal procedure “protections” to special juvenile proceedings. As elsewhere indicated in the Gault decision, the criminal due process standard from which these “protections” will be borrowed on the basis of comparative quantitative loss of liberty is that prevailing in felony prosecutions, even though the child's delinquent conduct would be only a misdemeanor under the criminal law.

A further illogic inherent in the Court's reliance upon quantitative loss of liberty as the factor of controlling constitutional significance

40 In re Gault, 387 U.S. 1, 22-23 n.30 (1967).
42 In re Gault, 387 U.S. 1, 36 (1967).
in juvenile proceedings is the fact that a child's maximum exposure to loss of liberty is a function of age at the time of a delinquency determination. Thus, whether a child's rights under the juvenile law are of "vital importance" in relation to the criminal law will vary, not according to established sanctions for his conduct, but according to a wholly fortuitous circumstance. The State of New York, among others, has removed this fortuitous factor by imposing a limit of 3 years on juvenile commitments, but the Supreme Court in Gault noted that in most states the exposure to commitment varies upwards from 3 years according to the child's age.

Finally, the logic of a due process yardstick based upon maximum loss of liberty and comparison with the criminal law model cannot be applied to various classifications of juvenile conduct, such as "waywardness", "habitual truancy" and "habitually involved in immoral matters", which find no counterpart in criminal conduct. Gerald Gault's delinquency was based upon a determination that he had been "habitually involved in immoral matters," even though it was also based on a determination that he had violated a criminal misdemeanor. Therefore, the Court's decision presumably relates to procedures essential to both "criminal" and "noncriminal" delinquency. The Gault opinion suggests that the blanketing stigma of a finding of delinquency might require identical procedures in "delinquency" determinations based upon criminal and noncriminal conduct. The Court noted that "delinquent" involves "only slightly less stigma than . . . 'criminal'," and its holdings as to the right to counsel, confrontation, cross-examination and the privilege against self-incrimination also noted the seriousness of being found "delinquent."

Nevertheless, more modern juvenile court statutes have taken steps to differentiate between "delinquents," those found to have committed acts proscribed by criminal law, and "persons in need of supervision" who have come under the court's jurisdiction by reason of noncriminal transgressions. If a child is found to be "in need of supervision" because of habitual truancy or general unmanageable-

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44 In re Gault, 387 U.S. 1, 37 n.60 (1967).
45 Id. at 9.
46 Id. at 39.
47 Under normal principles of habeas corpus the Court was bound to find that either basis for Gerald's commitment could not be sustained and that he had an absolute right to discharge from incarceration. See Heflin v. United States, 358 U.S. 415, 420-21 (1959).
48 In re Gault, 387 U.S. 1, 24 (1967).
49 Id. at 36, 39.
ness, can it truly be said this is “comparable in seriousness to a felony prosecution”\(^5\) even though the child is not subject to any liability under the criminal laws but may be exposed to “the awesome prospect of incarceration”?\(^6\) What does the “awesome prospect of incarceration” demand of a juvenile court when it institutionalizes a child under its jurisdiction over dependent and neglected children?

These questions directly relate to problems beyond those decided in the *Gault* case. However, they do point up that comparative loss of liberty is not a realistic constitutional yardstick for importing procedural devices from the criminal law model and, therefore, the Court’s analysis in *Gault* is not a very useful tool for deriving procedural requirements in noncriminal juvenile court determinations. A veritable thicket of procedural questions are presented where a petition alleges a series of incidents, involving noncriminal conduct, and seeks a determination that the child is in need of supervision because he is “wayward” and is “habitually involved in immoral matters.” This situation presents, once again, the whole question of the state’s jurisdiction over children under the *parens patriae* theory, which must be answered without reference to the criminal law procedural model and upon a due process theory that takes account of the qualitative differences of substantive juvenile law from both criminal and ordinary civil proceedings.

**The Constructive Force of Unique Due Process Standards**

It is submitted that the Court’s decision in *Gault* has left latitude for making such a distinctive constitutional determination in a “truly noncriminal” context. Before such a determination is had it would be an unwarranted disservice to the legislative reforms in progress and the whole philosophy of nonadversary, special juvenile courts to endow the *Gault* decision with greater dimensions than its specific holdings by considering it a fundamental foundation from which either to analogize the importation of further criminal procedural devices to juvenile proceedings or to extend the safeguards deemed essential to findings of delinquency based upon criminal conduct into other forms of juvenile court determinations. As Justice Harlan stated in his concurring and dissenting opinion in *Gault*, not all essential protections can be “determined by resort to any classification

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\(^5\) *In re Gault*, 387 U.S. 1, 36 (1967).

\(^6\) *Id.* at 36. Under N.Y. FAM. Ct. Act §§ 731-32 (McKinney 1963) only a “delinquent” may be “confined.” However, a “person in need of supervision” can be “placed” in a custodial institution for up to 18 months with the possibility of subsequent extensions after review of the case. N.Y. FAM. Ct. Act § 756 (McKinney 1963). See generally Welch, Delinquency Proceedings—Fundamental Fairness for the Accused in a Quasi-Criminal Forum, 50 MINN. L. REV. 653, 658-59 (1966).
of juvenile proceedings either as criminal or civil,\textsuperscript{53} and the \textit{Gault} majority has otherwise "fail[ed] to provide any discernible standard for the measurement of due process in relation to juvenile proceedings.\textsuperscript{54} Despite the majority's primary reliance on the "delinquent" label and the criminal law model, "it would . . . be imprudent . . . to build upon [juvenile court proceeding] classifications rigid systems of procedural requirements . . . in accordance with the descriptive label given to the particular proceeding.\textsuperscript{55}

If criminal law procedure importation were to proceed apace from the \textit{Gault} decision in total disregard of any constitutional effect for the special rights and immunities of juvenile law, as Justice Harlan predicts, it seems inevitable that "rigid procedural requirements may inadvertently . . . [serve] to discourage . . . efforts to find more satisfactory solutions for the problems of juvenile crime . . . and development of the systems of juvenile courts.\textsuperscript{56} Were the Supreme Court to adopt standards for the measurement of juvenile court due process which make qualitative differences in the effects of a delinquency determination and special treatment essential ingredients, it would ensure a potent incentive for a more physically and functionally valid juvenile law system. As it is, the pressure to be very different from the criminal system is lessened proportionately to the degree of "essential" procedural identity between the two systems.

The importance of constitutional pressure to be different from criminal prosecution is illustrated by a number of recent state court decisions that have invalidated the transfer of a juvenile delinquent to adult correction facilities or to facilities for the rehabilitation and reformation of youths convicted under the criminal laws, upon the theory that procedural differences from the criminal law made special treatment constitutionally essential.\textsuperscript{57} The illogical extension of the principles stated in \textit{Gault}, whereby the qualitative difference of juvenile treatment are ignored and the criminal law model controls, is well illustrated by a recent decision of the Wisconsin Supreme Court\textsuperscript{58} in which it was determined that insanity is a complete defense to a delinquency allegation based upon a criminal violation requiring spe-

\begin{itemize}
\item \textsuperscript{53} \textit{In re Gault}, 387 U.S. 1, 68 (1967).
\item \textsuperscript{54} \textit{Id.} at 67.
\item \textsuperscript{55} \textit{Id.} at 77.
\item \textsuperscript{56} \textit{Id.} Professor Paulsen recognized after the \textit{Kent} decision that the application of adult criminal due process standards may not fatally disrupt juvenile proceedings, but an improvement in staff and facilities would more greatly benefit the children than would their application. Paulsen, \textit{supra} note 38, at 191-92. \textit{See also} Ketcham, \textit{An International Report on Juvenile Court Achievements and Deficiencies}—1966, 6 \textit{J. Fam. L.} 191, 203-05, 210-12 (1966); Weinstein & Goodman, \textit{A Constructive Response for Juvenile Courts}, 53 \textit{A.B.A.J.} 257, 260 (1967).
\item \textsuperscript{57} Cases cited note 39 \textit{supra}.
\item \textsuperscript{58} \textit{In re Winburn}, 32 Wis. 2d 152, 145 N.W.2d 178 (1966).
\end{itemize}
specific criminal intent. That court decided that the abuses of the parens patriae philosophy, recognized in dicta in the Kent case, warranted a conclusion that "criminal responsibility" is a concern of juvenile law and its retributive and deterrent aims. Since the Gault decision has at least apparently endorsed the premise upon which the Wisconsin Court's conclusion was based, it strains the imagination to predict what other aspects of criminal defense, born of exposure to severe punishment and the death sentence, will be found applicable by analogy to juvenile proceedings.

Implications of Gault's Specific Holdings

What has been said above relates to the inadequacy of the Gault decision as a basis for determining the applicability of procedural rights to juvenile proceedings. It is not here suggested that the Court was wrong in the results it reached on the merits in Gault. Our concern is rather with Gault as a precedent for lower courts' determinations of procedural questions not actually decided in Gault, and with the Court's apparent disavowal of any distinction of constitutional significance between juvenile proceedings and criminal prosecutions.

Insofar as the Court held that notice, counsel, confrontation and cross-examination are essential because they ensure the reliability of delinquency determinations which can result in the loss of individual liberty, its decision comports with general concepts of fairness implicit in due process. So also the Court's finding that a right to remain silent is essential to due process where the juvenile is exposed to criminal prosecution and may be actually self-incriminated by his own statement seems warranted by direct application of criminal due process standards. The exposure to punitive treatment by administrative transfer to criminal correctional institutions as a direct result of a delinquency determination, if applicable in Gerald Gault's case, also affords a direct basis for the Court's holding in this regard.

However, the Court's suggestion that the right to remain silent, which has no relation to the reliability of delinquency determinations, is required solely by the prospect of loss of liberty is not supported by the criminal cases cited, and it is hard to believe that the Court intended the vast ramifications which would follow from a literal appli-

59 Id. at 161-65, 145 N.W.2d at 182-84. In fact, the Wisconsin Supreme Court's holding was contrary to the holding of Kent, which assumed that special treatment and immunities negating criminal responsibility were "vitaliy important" rights under the juvenile court system.

60 In re Gault, 387 U.S. 1, 51 (1967).

61 Id. at 49. The Court mentioned the possibility of transfer to a penal institution and the threat of waiver to criminal trial as reasons for the privilege, but failed to mention whether the former applied in the case before it. See note 6 supra.
cation of such a rule. Similarity, the Court's statement that delinquency proceedings "which may lead to commitment to a state institution, must be regarded as 'criminal' for purposes of the privilege against self-incrimination" because to hold otherwise "would be to disregard substance" constitutes a finding of fact that all juvenile treatment systems are inherently punitive. But this finding relates as much to the label of "delinquent" as it does to incarceration and should not be applied so literally as to render impossible a reformed system of juvenile law that does not incorporate the full regalia of the privilege as heretofore applied in criminal proceedings. Indeed, the Court's reliance upon such a blanket indictment in announcing a rule of general application, without any apparent "substance" in the record before it for making a similar, specific finding as to the treatment actually received by Gerald Gault, is very difficult to understand.

A lengthy discussion of principles governing the taking of pre-trial confessions was clearly unwarranted by the issues before the Court in Gault. Only Gerald's admissions in open court were at issue, and the question was whether the juvenile court judge had a duty to ensure that Gerald knew of the privilege to remain silent before those admissions were received. Previous criminal procedure cases have extended the privilege to pre-trial interrogation in order to protect its courtroom significance, but those cases have little relevance where no pre-trial statement entered into the juvenile court's determination of delinquency. The Court's reliance on the inherent untrustworthiness of statements made by minors seems self-defeating to the conclusion that a privilege to remain silent is meaningful in juvenile proceedings. If admissions by the minor are inherently untrustworthy, the issue would seem to be their competency as witnesses, and the remedy should be the exclusion of all statements that are not corroborated by independent evidence. Inherent untrustworthiness because of immaturity has little logical relevance to the need for or applicability of the privilege to remain silent.

This unfortunate excursion into pre-trial confessions is even less understandable in the light of the Court's reliance upon Miranda v. Arizona. That case dealt with the necessity of a warning of the right to remain silent and the presence of counsel prior to pre-trial inter-

62 Id. at 49-50. Were loss of liberty the sole criterion, a warning of the right to remain silent, and probably the presence of counsel, would be essential in neglect and dependency cases where the child could be placed in a custodial institution such as an orphanage.
63 Id. at 49.
64 Id. at 49-50.
65 See text at note 49 supra.
66 In re Gault, 387 U.S. 1, 44, 56 (1967).
rogation as soon as "freedom of action is curtailed in any significant way." The application of its reasoning to juvenile law necessarily relates to considerations which go well beyond merely giving effect to the "substance" of delinquency determinations in preference to the "civil label-of-convenience." The *Miranda* majority held that the privilege "is as broad as the mischief against which it seeks to guard." That mischief was exemplified by the fact that "our accusatory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independant labors," whereas an immediate warning of the right to remain silent "may serve to make the individual more acutely aware that he is faced with a phase of the adversary system—that he is not in the presence of persons acting solely in his interests." Furthermore, the *Miranda* case held that when an attorney advises his client to invoke the privilege, he is merely "exercising the good professional judgment he has been taught" and thereby "plays a vital role in the administration of criminal justice under our Constitution."

Application of the *Miranda* case to juvenile proceedings raises substantial barriers to the creative, quasi-adversary role of counsel which proponents of the right to counsel in juvenile court almost uniformly envisioned. Is it now to be counsel's "vital role" to precondition his juvenile client to a posture of unremitting resistance where a delinquency determination and incarceration are possible? Is it counsel's duty to his client to instill mistrust in the motives of probation officers and the objectives of the juvenile court and to proceed upon the familiar premise of criminal defense that the system is "seeking to punish" the child he represents? It immediately comes to mind that the attorney's professional responsibilities to his client's best interests become well nigh impossible to resolve in the not uncommon situation where concerned parents have, themselves, filed a petition in juvenile court to enlist its aid in restoring control over a habitually unmanageable child. Furthering the child's resistance to

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68 Id. at 467.
69 *In re Gault*, 387 U.S. 1, 50 (1967).
71 Id. at 459-60.
72 Id. at 460.
73 Id. at 480.
74 Id. at 481.
76 It has been recently recommended that such direct parental access to the juvenile courts and all "noncriminal" juvenile court jurisdiction should
the "prosecuting" parents and court personnel, and instilling in him
a sense of impending punishment, or proceeding in an adversary man-
ner typical of criminal defense seems wholly inconsistent with a result
ultimately in the child's best interests. Since the exposure to com-
mitment in a state institution continues until disposition is resolved
by the court, the attorney may be effectively precluded from a posi-
tive, creative participation in formulating a plan of treatment re-
sponsive to the child's needs.

These ramifications of wholesale importation of the *Miranda*
case's rationale demonstrate that if the latter is literally applied in
juvenile proceedings, the *Gault* decision's premise of "criminal" treat-
ment will have become, without exception, a permanent fact of life
as a direct result of the Court's pressures to conform to the criminal
law model.\(^7\) Once again, were a procedure different from that pre-
scribed in *Miranda* constitutionally acceptable in juvenile proceed-
ings, the Court-created pressures would be in favor of reform and
ward a fuller realization in practice of the theory of special non-
criminal treatment. As Justice Cardozo said of trial by jury in *Palko v. Connecticut*,\(^7\) "This too might be lost, and justice still be done."\(^7\)

Proceeding from the *Gault* majority's general mistrust of juvenile
statements made out of court, a better rule than the *Miranda* model
would be the total exclusion of all pre-trial admissions by juveniles,\(^8\)
thus eliminating the necessity for warnings and their undesirable
side effects. With the guaranteed presence of counsel at delinquency
hearings, a warning at that stage by the court would seem to be unnec-
essary surplusage and a voluntary confession could then be received.
If a child were permitted to tell his own story without exposure to

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77 See *In re Carlo*, 48 N.J. 224, 244, 225 A.2d 110, 121 (1966) (Weintraub, C.J. concurring specially):

"Nor does [inadequacy in the juvenile system] suggest that we apply
wholesale to the juvenile process the constitutional rights of one suspected
or charged with crime, for we cannot deal with juvenile delinquency as if it
were a crime without giving it precisely that character."

78 302 U.S. 319 (1937).

79 *Id.* at 325.

80 Compare United States v. Glover, 372 F.2d 43, 46-47 (2d Cir. 1967)
where a statutory limitation against detention of juvenile without a hearing
before a magistrate was considered the essential equivalent of the *Miranda*
procedure for criminal cases. *See also* Note, 67 COLUM. L. REV. 281, 305-06
(1967) as to the importance of erecting no barriers to intake settlement be-
cause of possible referral to juvenile court.
cross-examination, (due evidentiary weight being given to that fact)\(^8\)
or without exposure to the "all-or-nothing" rigidity of waiver standards applicable to exercise of the privilege in criminal proceedings, and without exposure to "impeachment" by his previous juvenile record at the delinquency determination stage, the objectives of the fifth amendment and minimization of the atmosphere of adversary resistance would be better served than by strict compliance with the criminal procedure model.

Forces are already gathering on the horizon to effect the wholesale importation of the exclusionary rule against "illegally" seized evidence into juvenile proceedings.\(^2\) The adoption of the rule for juvenile proceedings would add nothing to the reliability of delinquency determinations. There is also only an approximate analogy at best to the traditional basis for the fourth amendment right—that "a man's home is his castle" and that privately-owned property rights shall be secure from unqualified governmental trespass. Finally, the requirement of criminal procedure that evidence may be sought and taken from the physical possession and control of a person only as incident to a valid arrest upon probable cause, would compel a fundamental revision of present standards for the apprehension of juveniles. Legally and socially recognized differences between the presumed responsibility of adults and minors compel a rule that permits the apprehension of minors who may be looking for, but apparently have not yet found, official trouble with the law.\(^3\) Enforcement of the liquor and narcotics laws are of special concern in the case of minors. And what content can be given to "probable cause" for a juvenile apprehension where delinquency is not based upon violation of a criminal statute but upon "waywardness" of conduct endangering "the morals of himself or others"? The unsuitability of "traditional" rules against search and seizure and "illegal" arrest are based upon substantive social and legal facts-of-life about the special status of minors in our society which must be given effect in formulating appropriate

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\(^8\) The Task Force Report at 37 recommends that the judge be permitted to draw a "reasonable inference" from a refusal to testify. The privilege as known in the criminal law is effectively denied by permitting such an inference to be drawn. Cf. Griffin v. California, 380 U.S. 609 (1965). One must conclude that the Task Force believed the criminal law privilege is not applicable to juvenile proceedings, and some variation of it would be proper and permissible.


due process standards for juvenile proceedings. Application of the principles of *Miranda* in the *Gault* case on the theory that juvenile law is "criminal" in substance and without recognition of any significant differentiation from criminal law provides a convenient and tempting basis for the application of search and seizure rules developed in the criminal law.

Hopefully, lower courts applying the *Gault* decision as a precedent to questions beyond those actually determined therein will resist such temptation, and will re-establish the judicial habit of reasoned determination upon the merits of the particular question presented for resolution. Even though the long-awaited decisions in the *Kent* and *Gault* cases finally assured the fairness and reliability of juvenile court hearings, there remains the unfulfilled necessity for workable constitutional principles of general application which afford a legislative and judicial alternative to criminal treatment or the discredited paternalism of the *parens patriae* rationale. It is unlikely that effective reforms in juvenile law and institutions will rapidly evolve in the face of this continuing cloud on the constitutional validity of *any* special treatment system that is significantly different from the criminal law model. The more likely result is a steadfast march toward the egalitarian ideal of criminal justice for all.