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GAULT AND CALIFORNIA

By ROBERT GARDNER*

THE United States Supreme Court has developed a Delphic system of warning of things to come. Thus, in the criminal field, *Miranda v. Arizona*¹ had been presaged by its forerunner, *Escobedo v. Illinois*.² So, also, in the juvenile court field, *Kent v. United States*³ foretold further explorations in the troublesome realm of juvenile justice. The world waited. Then, on May 15, 1967, the wait was over. The other shoe dropped. *In re Gault*⁴ was decided.

To some, *Gault* was the death knell of the juvenile court—to others, *Gault* was long overdue. (Until its current session, the court had never reviewed a state juvenile court case.) Certainly, in some states, the application of the principles set forth in *Gault* must be creating consternation akin to hysteria. However, it is not the purpose of this article to discuss the philosophy, history, problems, or practices of the juvenile court outside of California, but to examine the California Juvenile Court Law in light of *Gault*, and to ascertain, if possible, wherein we had anticipated its directions, admonitions, and principles; to examine the legislative reaction to that case; and to explore the questions left unanswered, both by *Gault* and the California Legislature.

The history of the juvenile court in California has been one of strife between two groups who might be described, at the risk of oversimplification, as the Purists and the Constitutionalists—the Purists being those who believe completely in the *parens patriae*, protective, social welfare philosophy of the juvenile court movement, and the Constitutionalists, those who advocate full constitutional rights and safeguards for minors.

The Purists would probably include almost all of the behavioral scientists—probation, correctional, and welfare personnel—and, very possibly, a majority of the juvenile court judges, particularly those appointed to that duty on a full-time basis. Strangely enough, the Purists find as somewhat uncomfortable bedfellows their severest critics, the police, for the simple reason that law enforcement is very easy when not encumbered with awkward constitutional limitations. Police officers are prone to criticize juvenile court dispositions—but not the practice of trying cases on the probation officer's report. The Constitutionalists, in turn, would probably include a minority of the

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¹ 384 U.S. 436 (1966).

² 378 U.S. 478 (1964).

³ 383 U.S. 541 (1966).

⁴ 387 U.S. 1 (1967).

juvenile court judges and those few lawyers who have had experience in the juvenile court. The public? Well, due to the veil of secrecy which confidentiality has drawn over the juvenile court, the public simply does not have the foggiest idea what goes on in that court.

Until 1961 the Purists were clearly in the saddle. The pre-1961 Juvenile Court Law was "pure" juvenile court law, that is, since juvenile proceedings were not criminal in nature,⁵ the minor was not entitled to the constitutional rights and safeguards of an adult charged with crime. In those few cases which found their way to the appellate courts, the Purist philosophy was followed—almost without exception. Unhappily, these cases were rare, probably because few lawyers appeared in juvenile court, which, in turn, could be traced to the fact that there was no provision in the law for advice as to the right of counsel—nor was there any provision for the appointment of counsel.⁶

A few examples will suffice. For example, it was held:

(1) The minor had no right to notice, since notice to his parents was deemed sufficient to meet the demands of due process.⁷

(2) There was no requirement that the notice contain a copy of the petition or advice of the nature of the proceedings or of the facts alleged to bring the minor within the jurisdiction of the court—mere notice of the time and place of the hearing being sufficient.⁸

(3) The minor had no right to a jury trial.⁹

(4) The reasonable doubt rule did not apply, and any legally sufficient and substantial evidence would sustain the court's order.¹⁰

(5) Hearsay evidence was admissible in the jurisdictional¹¹ phase of the case. Former section 639 of the Welfare and Institutions Code¹² provided that "[t]he probation officer shall . . . inquire into the cause for which each such person is brought before the juvenile court, and shall make his report in writing to the judge thereof."¹³ This report, when filed and considered by the judge, "must be re-

⁵ Cal. Stats. 1937, ch. 369, § 736, at 1037 (formerly Cal. Welf. & Inst'ns Code § 736, now CAL. WELF. & INST'NS CODE § 503); *People v. Dotson*, 46 Cal. 2d 891, 299 P.2d 875 (1956).

⁶ See generally Note, *The California Juvenile Court*, 10 STAN. L. REV. 471, 500-04 (1958).

⁷ *In re Florance*, 47 Cal. 2d 25, 300 P.2d 825 (1956).

⁸ Cal. Stats. 1937, ch. 369, § 726, at 1034 (formerly Cal. Welf. & Inst'ns Code § 726). See generally Note, *The California Juvenile Court*, 10 STAN. L. REV. 471, 490-92 (1958).

⁹ *In re Daedler*, 194 Cal. 320, 228 P. 467 (1924).

¹⁰ Cf. *In re Dargo*, 81 Cal. App. 2d 205, 183 P.2d 282 (1947).

¹¹ For the benefit of the tyro in the never-never land of the juvenile court, the jurisdictional phase is comparable to the plea and trial in the adult court.

¹² Cal. Stats. 1937, ch. 369, § 639, at 1027 (repealed 1961).

¹³ *Id.*

garded as legal evidence."¹⁴ Thus, the practice of trying contested cases on the probation officer's report was common.¹⁵

(6) The minor had no right to bail pending a hearing.¹⁶ Former section 828 of the Welfare and Institutions Code¹⁷ provided that the judge in his *discretion* might allow bail. The right to bail, that traditional buffer between the individual and the arbitrary judge, thus was completely emasculated.

(7) There was no duty to advise the minor of his right to counsel.¹⁸

(8) There was no duty to warn the minor against self-incrimination.¹⁹

(9) The defense of once in jeopardy was not available to the minor.²⁰

(10) The minor was entitled to counsel of his own choice at the jurisdictional phase of the case²¹ but not after he had been made a ward of the court and further proceedings were being had for a change in custody based on his alleged misbehavior.²² Pristine logic, carried to its logical conclusion, is irresistible. The state, operating through the juvenile court judge, is, by reason of the wardship, the parent of the minor, and whoever heard of a lawyer interfering between the rights of a parent and a child?—a bit of judicial broken field running which would do credit to the legendary Red Grange.

In only one case was the warning hand of the court raised, the oft-quoted case of *In re Contreras*,²³ in which Justice Thomas P. White, proceeding to set aside a finding based on no legally sufficient evidence, said:

While the juvenile court law provides that adjudication of a minor to be a ward of the court shall not be deemed to be a conviction of crime, nevertheless, for all practical purposes, this is a legal fiction presenting a challenge to credulity and doing violence to reason. Courts cannot and will not shut their eyes and ears to everyday contemporary happenings.

It is common knowledge that such an adjudication when based upon a charge of committing an act that amounts to a felony, is a blight upon the character of and is a serious impediment to the future of such minor. Let him attempt to enter the armed services of his country or obtain a position of honor and trust and he is immediately

¹⁴ *In re Halamuda*, 85 Cal. App. 2d 219, 223, 192 P.2d 781, 783 (1948).

¹⁵ See, e.g., *In re Garcia*, 201 Cal. App. 2d 662, 20 Cal. Rptr. 313 (1962) (decided under pre-1961 juvenile law).

¹⁶ *In re Magnuson*, 110 Cal. App. 2d 73, 242 P.2d 364 (1952) (dictum).

¹⁷ Cal. Stats. 1937, ch. 369, § 828, at 1045 (repealed 1961).

¹⁸ *People v. Fifield*, 136 Cal. App. 2d 741, 289 P.2d 364 (1955).

¹⁹ *In re Dargo*, 81 Cal. App. 2d 205, 183 P.2d 282 (1947).

²⁰ *People v. Silverston*, 121 Cal. App. 2d 140, 262 P.2d 656 (1953).

²¹ *In re Rider*, 50 Cal. App. 797, 195 P. 965 (1920).

²² *In re McDermott*, 77 Cal. App. 109, 246 P. 89 (1926).

²³ 109 Cal. App. 2d 787, 241 P.2d 631 (1952).

confronted with his Juvenile Court record. And further, as in this case, the minor is taken from his family, deprived of his liberty, and confined in a state institution. True, the design of the Juvenile Court Act is intended to be salutary, and every effort should be made to further its legitimate purpose, but never should it be made an instrument for the denial to a minor of a constitutional right or of a guarantee afforded by law to an adult.²⁴

By the late 1950's the California juvenile court picture was one of a checkerboard of inconsistent practices and procedures varying from county to county and from judge to judge, with the recognition of constitutional rights for minors depending almost entirely on the discretion of the individual judge. The original Juvenile Court Law of 1903 had not had a basic revision since 1915. It was a hodgepodge of amendments and amendments to amendments. Thus, in 1957 the Governor appointed a Citizens' Committee to survey and evaluate the administration of juvenile justice in the state. In November of 1960 the Commission reported its recommendations,²⁵ which were adopted, almost in their entirety, by the legislature in the Juvenile Court Law of 1961.²⁶ Among the recommendations of the Commission was that "every child and his parents have a right to a fair hearing on the allegations which have brought the minor before the juvenile court and all parties should have their legal and constitutional rights protected."²⁷

It is not the purpose of this article to examine the complete Juvenile Court Law of 1961 nor to attempt an evaluation of all its successes and failures. Suffice to say, it was a gallant, and in many ways a successful, effort to bridge the gap between the social welfare concept of the Purists and the legalistic complaints of the Constitutionalists. Its existence makes the impact of *Gault* much less dramatic than will be the case in most other jurisdictions.

Just what does *Gault* say and how did the 1961 law bear up under its scrutiny?

Primarily, let us look at *Gault*.

First, nothing is to be gained from a prolonged discussion of the four concurring, concurring in part, dissenting in part, and dissenting, opinions of Justices Black, White, Harlan and Stewart except to observe that Justice Black, as an avowed absolutist, went all the way for constitutional rights,²⁸ that Justice White found fault with the record,²⁹ that Justice Harlan argued over the standards established

²⁴ *Id.* at 789-90, 241 P.2d at 633.

²⁵ GOVERNOR'S SPECIAL STUDY COMMISSION ON JUVENILE JUSTICE (1960).

²⁶ Cal. Stats. 1961, ch. 1616, § 2, at 3459-503.

²⁷ GOVERNOR'S SPECIAL STUDY COMMISSION ON JUVENILE JUSTICE pt. 1, at 11 (1960).

²⁸ *In re Gault*, 387 U.S. 1, 59-64 (1957).

²⁹ *Id.* at 64-65.

by the majority by which due process was to be measured,³⁰ and Justice Stewart dissented in toto with a classic example of the futility of blind adherence to constitutional doctrine as a panacea.³¹

Second, just what does *Gault* not say? Explicitly, *Gault* limits itself to what we in California call the "jurisdictional phase"³² of the case. *Gault* concerns itself not with the pre-judicial nor with the post-judicial or dispositional process.³³ *Gault* placed strict limitations on its holding:

We consider only the problems presented to us by this case. These relate to the proceedings about which a determination is made as to whether a juvenile is a "delinquent" as a result of alleged misconduct on his part, with the consequence that he may be committed to a state institution.³⁴

Third, just what does *Gault* say? After a lengthy discussion of the juvenile court movement in which the tenor is definitely that it has not come up to the high expectations of its founders, *Gault* makes the following basic determinations, each on a due process basis:

(1) Due process compels adequate notice.

Notice, to comply with due process requirements, must be given sufficiently in advance of scheduled court proceedings so that reasonable opportunity to prepare will be afforded, and it must "set forth the alleged conduct with particularity."³⁵

(2) Due process compels advice to the minor and his family of the right to counsel and the furnishing of counsel if they are unable to afford same.

We conclude that the Due Process Clause of the Fourteenth Amendment requires that in respect to proceedings to determine delinquency which may result in commitment to an institution in which the juvenile's freedom is curtailed, the child and his parent must be notified of the child's right to be represented by counsel retained by them, or, if they are unable to afford counsel, that counsel will be appointed to represent the child.³⁶

(3) Due process compels (in somewhat murky wording) that the minor is entitled to the privilege against self-incrimination, to be confronted by the witnesses against him, and to cross-examine them.

We conclude that the constitutional privilege against self-incrimination is applicable in the case of juveniles as it is with respect to

³⁰ *Id.* at 65-78.

³¹ In the course of his dissenting opinion Justice Stewart remarked: "In that era [prior to juvenile courts] there were no juvenile proceedings, and a child was tried in a conventional criminal court with all the trappings of a conventional criminal trial. So it was that a 12-year-old boy named James Guild was tried in New Jersey for killing Catherine Beakes. A jury found him guilty of murder, and he was sentenced to death by hanging. The sentence was executed. It was all very constitutional." *Id.* at 79-80.

³² See note 11 *supra*.

³³ *In re Gault*, 387 U.S. 1, 13 (1967).

³⁴ *Id.*

³⁵ *Id.* at 33.

³⁶ *Id.* at 41.

adults.

. . . No reason is suggested or appears for a different rule in respect of sworn testimony in juvenile courts than in adult tribunals.

. . .

The recommendations in the Children's Bureau's "Standard for Juvenile and Family Courts" are in general accord with our conclusions. They state that testimony should be under oath and that only competent material and relevant evidence under rules applicable to civil cases should be admitted in evidence.

. . . We now hold that, 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.³⁷

(4) It is suggested, but not made a matter of constitutional requirement, that there be the right to appeal, to a record or to a finding by the court.

[W]e need not rule on this question As the present case illustrates, the consequences of failure to provide an appeal, to record the proceedings, or to make findings or state the grounds for the juvenile court's conclusion may be to throw a burden upon the machinery for habeas corpus, to saddle the reviewing process with the burden of attempting to reconstruct a record, and to impose upon the Juvenile Judge the unseemly duty of testifying under cross-examination as to the events that transpired in the hearing before him.³⁸

The Court also placed a stamp of approval, albeit in some cases with reservations, on (a) handling juveniles separately from adults, (b) avoiding the stigma of "criminal" by the classification of "delinquent," and (c) confidentiality of records.³⁹

Now let us examine the 1961 California Juvenile Court Law and see wherein (in the opinion of the legislature) it fell short of the demands of *Gault* and the steps taken by the legislature to correct these failings.

First, as to notice.

The provisions of the 1961 law pertaining to notice were explicit, thorough, complete, extensive, and repetitious. For example:

Section 554⁴⁰ provided for service of the findings and orders of the referee upon a minor 14 years of age or older and upon his parents or guardian, together with a written explanation of the right to a review of the order by the juvenile court judge.⁴¹

³⁷ *Id.* at 55-57.

³⁸ *Id.* at 58.

³⁹ *Id.* at 22-25.

⁴⁰ CAL. WELF. & INST'NS CODE § 554.

⁴¹ It was not until a 1965 amendment (Cal. Stats. 1965, ch. 393, § 1, at 1699) that the provision was made limiting notice to those 14 years of age or older. Prior to that time there was no limitation and clerks and probation officers found themselves in the embarrassing position of serving elaborate notices on very young children, sometimes pinning same to the diaper, in an effort to comply with the then law.

Section 627⁴² provided that when a police officer takes the minor before a probation officer, he "shall take immediate steps to notify the minor's parents . . . that such minor is in custody and the place where he is being held."

Section 630⁴³ provided that if the probation officer decided to keep the minor in custody, he should immediately file a petition, set the matter for a detention hearing, and notify the parents or guardian of the minor of the time and place of the hearing.

Section 633⁴⁴ provided that at the hearing the minor, his parent or guardian, should first be informed of the reasons why the minor is taken into custody, the nature of juvenile court proceedings, and of the right to counsel.

Section 637⁴⁵ provided that if any parent did not have actual notice of the detention hearing, he should have the right to a re-hearing within 24 hours.

Section 658⁴⁶ provided that upon the filing of the petition, a notice of the hearing *together with a copy of the petition* should be served upon the minor, his parents, guardian, or, if none, any adult relative living in the county or near the court. Incidentally, as though to anticipate the *Gault* demand that the notice shall "set forth the alleged misconduct with particularity,"⁴⁷ section 656(f)⁴⁸ provided that the petition must contain

A concise statement of facts, separately stated, to support the conclusion that the minor upon whose behalf the petition is being brought is a person within the definition of each of the sections and subdivisions under which the proceedings are being instituted.

Section 659⁴⁹ provided that the notice itself contain the same information, plus a statement as to the right to counsel.

Section 660⁵⁰ provided that the notice must be personally served as soon as possible after the filing of the petition and at least 24 hours before the time set for the hearing on the petition (5 days if served outside the county). Section 700⁵¹ provided for a 7 day continuance for appointment of counsel or to enable counsel to acquaint himself with the case.

A readily apparent criticism of the notice provisions in the 1961

⁴² CAL. WELF. & INST'NS CODE § 627.

⁴³ CAL. WELF. & INST'NS CODE § 630.

⁴⁴ CAL. WELF. & INST'NS CODE § 633.

⁴⁵ CAL. WELF. & INST'NS CODE § 637.

⁴⁶ CAL. WELF. & INST'NS CODE § 658.

⁴⁷ *In re Gault*, 387 U.S. 1, 33 (1967).

⁴⁸ CAL. WELF. & INST'NS CODE § 656(f).

⁴⁹ CAL. WELF. & INST'NS CODE § 659.

⁵⁰ Cal. Stats. 1961, ch. 1616, § 2, at 3479 (formerly Cal. Welf. & Inst'ns Code § 660).

⁵¹ CAL. WELF. & INST'NS CODE § 700.

Juvenile Court Law was with respect to counsel. For some reason the law ignored the right of counsel to be advised of events. Under the stimulus of *Gault*, these notice sections were amended in 1967 to provide:

(1) That the minor himself be served with a copy of the petition and notification of the time and place of the detention hearing in 601 and 602 cases.⁵²

(2) That the age for notice to the juvenile of the jurisdictional hearing be lowered to 8 years in a 601 or 602 case.⁵³

(3) That notice of the jurisdictional hearing be given to the minor's attorney (and to the district attorney if he so requests).⁵⁴

(4) That if the minor is detained, notice is to be given at least 5 days prior to the hearing unless the hearing is less than 5 days from the date of the filing of the petition, in which case 24 hour notice is provided. Ten days' notice is required for non-detained cases.⁵⁵

(5) That upon reasonable notification by counsel representing the minor, his parents, or guardian, notice is to be given to counsel in the manner provided for notice to the parent or guardian of the minor.⁵⁶

Next, as to the right to counsel. Here we were faced with two peculiar provisions of the 1961 Law.

First, as to *advice* and *waiver* of the right to counsel.

Section 633⁵⁷ provided that at the detention hearing the minor and his parent or guardian should be informed of their right to be "represented at every stage of the proceedings by counsel." So far so good.

Section 634⁵⁸ then provided that at this hearing counsel was to be appointed "[w]hen it appears to the court that the minor or his parent or guardian *desires* counsel"

This same language was carried over into section 700,⁵⁹ which provided that at the jurisdictional hearing counsel was to be appointed *if desired*.

These sections were rather casually approved by the majority of

⁵² CAL. WELF. & INST'NS CODE § 630, as amended, Cal. Stats. 1967, ch. 1356, § 3.

⁵³ CAL. WELF. & INST'NS CODE § 658, as amended, Cal. Stats. 1967, ch. 1356, § 5.

⁵⁴ *Id.*

⁵⁵ CAL. WELF. & INST'NS CODE § 660, as amended, Cal. Stats. 1967, ch. 1356, § 7.

⁵⁶ CAL. WELF. & INST'NS CODE § 630.1, added by Cal. Stats. 1967, ch. 507, § 1.

⁵⁷ CAL. WELF. & INST'NS CODE § 633.

⁵⁸ CAL. WELF. & INST'NS CODE § 634 (emphasis added).

⁵⁹ CAL. WELF. & INST'NS CODE § 700.

the California Supreme Court in *In re Patterson*⁶⁰ with a vigorous dissent by then Justice Traynor, who pointed out that merely advising of the right to counsel and appointing counsel "if desired" did not satisfy constitutional requirements and that an intelligent waiver was necessary.⁶¹ Parenthetically, it should be noted that some juvenile courts have been insisting on intelligent waiver in all cases in spite of the latitude apparently offered by the "if desired" language of the law.

While the subject of waiver is not mentioned in the specific holding of *Gault*, other language in the opinion makes it clear that intelligent waiver is a necessary part of proceedings having to do with the appointment of counsel:

At the habeas corpus proceeding, Mrs. Gault testified that she knew she could have appeared with counsel at the juvenile hearing. This knowledge is not a waiver of the right to counsel which she and her juvenile son had, as we have defined it. They had the right expressly to be advised that they might retain counsel and to be confronted with the need for specific consideration of whether they did or did not choose to waive the right. If they were unable to afford to employ counsel, they were entitled in view of the seriousness of the charge and the potential commitment, to appointed counsel, unless they chose waiver. Mrs. Gault's knowledge that she could employ counsel was not an "intentional relinquishment or abandonment" of a fully known right.⁶²

Thus it would appear clear that the "if desired" provisions had to be removed from the law in cases arising under sections 601 and 602,⁶³ and specific language providing for intelligent waiver substituted.⁶⁴

Second, as to the *appointment* of counsel in cases of indigency.

The same sections which provided for advice as to the right to counsel provided for mandatory appointment where the minor was charged with misconduct which would constitute a felony if committed by an adult, but only permissive appointment in other cases.⁶⁵

Critics of the Juvenile Court Law had taken a dim view of this distinction for several years and it was obvious that under the holding of *Gault*, this distinction no longer was valid. *Gault* said that the situation wherein the child may be "found to be 'delinquent' and subjected to the loss of his liberty for years, is comparable in seriousness to a felony prosecution."⁶⁶ Thus, it was clear that since a violation of

⁶⁰ 58 Cal. 2d 848, 377 P.2d 74 (1962).

⁶¹ *Id.* at 853, 377 P.2d at 77.

⁶² *In re Gault*, 387 U.S. 1, 41-42 (1967).

⁶³ CAL. WELF. & INST'NS CODE §§ 601, 602.

⁶⁴ CAL. WELF. & INST'NS CODE § 634, as amended, Cal. Stats. 1967, ch. 1356, § 4; CAL. WELF. & INST'NS CODE § 700, as amended, Cal. Stats. 1967, ch. 1356, § 10.

⁶⁵ Cal. Stats. 1961, ch. 1616, § 2, at 3475, 3481 (formerly Cal. Welf. & Inst'ns Code §§ 634, 700).

⁶⁶ *In re Gault*, 387 U.S. 1, 36 (1967).

section 602 (which provides for juvenile court wardship of any person under the age of 21 who violates "any law . . . or any ordinance . . . defining crime"),⁶⁷ might result in commitment to the Youth Authority until the age of 21,⁶⁸ it was no longer possible to deny the right to appointed counsel to the indigent charged with misconduct which would constitute a misdemeanor if committed by an adult.

Nothing in the precise holding of the *Gault* case would affect California's dependent children procedures under section 600,⁶⁹ since under section 727⁷⁰ they may not be committed to a state institution. But what about the so-called "incurable" portion of the Juvenile Court Law, section 601,⁷¹ which provides in substance that one comes within the jurisdiction of the juvenile court who persistently or habitually refuses to obey the reasonable orders of his parents, custodian or school authorities, or who is beyond the control of such persons, or who is a habitual truant from school, or who "from any cause is in danger of leading an idle, dissolute, lewd, or immoral life"? This is "pure" Juvenile Court Law and, of course, finds no counterpart in our criminal law. A finding against a minor under this section does not give the judge the jurisdiction to commit him to the Youth Authority,⁷² but a finding of a violation of a court order subsequent to a finding under 601 does permit the judge to commit the minor to the Youth Authority.⁷³ Thus, the clear *potential* of a commitment to a state institution existed upon a finding under section 601.

The legislature met the right-to-counsel issue head-on, and in a series of amendments clearly complied with the mandate of *Gault*. All mention of the distinction between misdemeanors and felonies was removed from the Juvenile Court Law; the word "indigent" was removed and in its place substituted "unable to afford counsel"; and the appointment of counsel was made mandatory in all 601 and 602 cases "whether he is unable to afford counsel or not unless there is an intelligent waiver of the right to counsel."⁷⁴ These provisions pertain to both the detention hearing and the jurisdictional hearing.

It would appear that the legislature has fully met the challenge of the *Gault* case in regard to the right to counsel.

Last, as to confrontation, self-incrimination, and cross-examination.

⁶⁷ CAL. WELF. & INST'NS CODE § 602 (emphasis added).

⁶⁸ CAL. WELF. & INST'NS CODE § 731.

⁶⁹ CAL. WELF. & INST'NS CODE § 600.

⁷⁰ CAL. WELF. & INST'NS CODE § 727.

⁷¹ CAL. WELF. & INST'NS CODE § 601.

⁷² CAL. WELF. & INST'NS CODE § 730.

⁷³ CAL. WELF. & INST'NS CODE §§ 602, 731.

⁷⁴ CAL. WELF. & INST'NS CODE § 634, as amended, Cal. Stats. 1967, ch. 1356, § 4; CAL. WELF. & INST'NS CODE § 700, as amended, Cal. Stats. 1967, ch. 1356, § 10.

This brings us to the very troublesome problem of section 701⁷⁵ which represents the most valorous effort of the Governor's Commission and, in turn, the legislature, to bridge the gap between the *parens patriae* theory of the social welfare advocates and the complaints of the Constitutionlists. This section provides that at the jurisdictional hearing the court should first consider only the question of whether the minor is a person described by section 600 (dependent), 601 (incorrigible), or 602 (violation of law); and for this purpose:

[A]ny matter or information relevant and material to the circumstances or acts which are alleged to bring him within the jurisdiction of the juvenile court is admissible and may be received in evidence; however, a preponderance of evidence, legally admissible in the trial of criminal cases, must be adduced to support a finding that the minor is a person described by section 602, and a preponderance of evidence, legally admissible in the trial of civil cases must be adduced to support a finding that the minor is a person described by sections 600 or 601.⁷⁶

This section has already been the subject of review and comment by appellate courts.

In the case of *In re Castro*,⁷⁷ an illegally obtained confession was received in evidence by the juvenile court. The court held that

[t]he procedure expounded in the *Escobedo*, *Dorado* and *Miranda* cases does not apply to juvenile court litigation so as to require the reversal of any proceeding in which the evidence of a confession to a peace officer has been admitted without proof of the preliminary warnings required in criminal cases.⁷⁸

Therefore, since there was sufficient evidence independent of the illegally obtained confession on which the allegations of the petition could be sustained by a preponderance of evidence legally admissible in the trial of a criminal case, the finding of the court was upheld.

This holding was followed in *In re Acuna*,⁷⁹ and artfully dodged in the case of *In re Bueros*.⁸⁰

The obvious question is whether under *Gault*, there could still be admitted constitutionally prohibited, illegally obtained evidence, the admission of which would be reversible error in the adult courts, provided there is other "relevant and material" evidence admissible in a criminal case sufficient to sustain the finding. Again, the language of the *Gault* case lacks a certain clarity in this aspect of the holding. Some language would indicate that constitutionally prohibited evidence should not, under any circumstance, be admitted against the minor:

It would indeed be surprising if the privilege against self-incrimi-

⁷⁵ CAL. WELF. & INST'NS CODE § 701.

⁷⁶ *Id.* (emphasis added).

⁷⁷ 243 Cal. App. 2d 402, 52 Cal. Rptr. 469 (1966).

⁷⁸ *Id.* at 409, 52 Cal. Rptr. at 473.

⁷⁹ 245 Cal. App. 2d 388, 53 Cal. Rptr. 884 (1966).

⁸⁰ 249 A.C.A. 61, 57 Cal. Rptr. 124 (1967).

nation were available to hardened criminals but not to children. The language of the Fifth Amendment, applicable to the States by operation of the Fourteenth Amendment, is unequivocal and without exception. . . .

It is true that the statement of the privilege in the Fifth Amendment, which is applicable to the States by reason of the Fourteenth Amendment, is that no person "shall be compelled in any *criminal* case to be a witness against himself." However, it is also clear that the availability of the privilege does not turn upon the type of proceeding in which its protection is invoked, but upon the nature of the statement or admission and the exposure which it invites

It would be entirely unrealistic to carve out of the Fifth Amendment all statements by juveniles on the ground that these can not lead to "criminal" involvement.⁸¹

This language would indicate that constitutionally prohibited evidence should not be admitted, regardless of the language of the local juvenile court law. On the other hand, further along in the opinion appears the already quoted statement that the court recognizes the recommendations of the Children's Bureau of Standards for Juvenile and Family Courts which "provide that testimony should be under oath and that only competent material and relevant evidence under rules applicable to *civil* cases should be admitted in evidence."⁸²

In this connection the reaction of the legislature was peculiar to say the least. *Without changing a word in section 701*, the legislature, in an obvious attempt to comply with (or outdo) *Gault*, provided:

(1) That when the minor is taken into temporary custody by the police officer, the officer shall "advise such minor that anything he says can be used against him and shall advise him of his constitutional rights, including his right to remain silent, his right to have counsel present during any interrogation, and his right to have counsel appointed if he is unable to afford counsel."⁸³

(2) That when the minor is taken before the probation officer, that officer shall again immediately advise the minor in exactly the same terms set forth above and if the minor requests counsel, the probation officer shall advise the judge who shall appoint counsel.⁸⁴

(3) At the detention hearing "the minor has a privilege against self-incrimination and has a right to confrontation by, and cross-examination of, witnesses."⁸⁵

⁸¹ *In re Gault*, 387 U.S. 1, 47-49 (1967).

⁸² *Id.* at 56-57.

⁸³ CAL. WELF. & INST'NS CODE § 625, as amended, Cal. Stats. 1967, ch. 1355, § 1.

⁸⁴ CAL. WELF. & INST'NS CODE § 627.5, added by Cal. Stats. 1967, ch. 1355, § 2.

⁸⁵ CAL. WELF. & INST'NS CODE § 630, as amended, Cal. Stats. 1967, ch. 1356, § 3.

(4) At the jurisdictional hearing under section 701 or the dispositional hearing under section 702, the minor has a "privilege against self-incrimination and has a right to confrontation by, and cross-examination of, witnesses."⁸⁶

The effect of these amendments on section 701 obviously awaits appellate interpretation.

While *Gault* did not demand the right to appeal or a complete record, the 1961 law did provide the right to appeal⁸⁷ and for a court reporter.⁸⁸ A 1967 amendment provides that the appellant unable to afford counsel is to be provided a free copy of the transcript.⁸⁹ This amendment undoubtedly complies with any conceivable attack on the appeal sections of the California Law.

Since the right of confrontation is an empty one unless witnesses are available, the 1967 legislature remedied a long-standing oversight by providing for payment by the county of witness fees in the juvenile court.⁹⁰

Left unanswered by *Gault* and still a matter of pure speculation and surmise is the question of whether the minor who is brought before the court solely on the basis of the violation of a criminal statute is entitled to the rest of the constitutional rights of an adult charged with the same offense, such as bail pending the hearing, a jury trial, the presumption of innocence, and the right to demand that the proof of his alleged violation be beyond a reasonable doubt and to a moral certainty. Certainly the far-ranging language of the decision could give aid and comfort to both the Purists and the Constitutionalists in regard to these rights.

These are questions which *Gault* does not attempt to answer. Any effort to outguess the future would be pure folly and a classic exercise in futility. But one thing is undisputed—the battle between the Purists and Constitutionalists will continue.

⁸⁶ CAL. WELF. & INST'NS CODE § 702.5, added by Cal. Stats. 1967, ch. 1356, § 11.

⁸⁷ CAL. WELF. & INST'NS CODE § 800.

⁸⁸ CAL. WELF. & INST'NS CODE §§ 558, 677.

⁸⁹ CAL. WELF. & INST'NS CODE § 800, as amended, Cal. Stats. 1967, ch. 1356, § 2.

⁹⁰ CAL. WELF. & INST'NS CODE § 664, as amended, Cal. Stats. 1967, ch. 507, § 2.

