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THE CHALLENGE OF GAULT IN ILLINOIS

The first Juvenile Court Act[1] in the United States was signed into law in the State of Illinois on April 21, 1899,[2] and it was not long before similar courts were created in every state in the Union.[3] The court, as conceived, was a new institution different in purpose from any prior court.

> With its jurisdiction defined by the age of the offender (varying from jurisdiction to jurisdiction), it was intended to substitute rehabilitation for punishment. Instead of responding automatically to the offender's misdeeds, the court was to recognize them as symptoms of a basic disorder and to help the child learn how to live in society without coming into conflict with the law.[4]

Judge Julian Mack stated in 1909:

> The problem for determination by the judge is not, Has this boy or girl committed a specific wrong, but What is he, how has he become what he is, and what had best be done in his interest and in the interest of the state to save him from a downward career.[5]

To achieve these ends, it was generally recognized that formal proceedings should be kept to a minimum in order that a personal relationship might exist between the judge and the child.

Parens Patriae

Underlying the justification for informal proceedings was the historic doctrine of *parens patriae*. The origins of this doctrine are derived from the practice of the English courts of chancery in protecting persons having no other rightful protector.[6] The chancellor, by the prerogative of the Crown, was the protector of the estate and person of an infant.[7] This power, historically vested in the English monarch, has been adopted by the several state sovereigns and by the federal sovereign, as exercised in the District of Columbia and United States territories.[8]

The power of the state acting in *parens patriae* is manifest in many areas of the law. The state, for example, may act to protect the insane by an adjudication of incompetency and appointment of a custodian.[9] The incompetent may be committed

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[1] Laws of Illinois, Courts, Juvenile Courts (1899).

[2] Paulsen, *Kent v. United States: The Constitutional Context of Juvenile Cases*, 1966 SUP. CT. REV. 167.

[3] *Id.*

[4] Note, *Juvenile Delinquents: The Police, State Courts, and Individualized Justice*, 79 HARV. L. REV. 775 (1966).

[5] Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 119-20 (1909).

[6] Insurance Co. v. Bangs, 103 U.S. 435, 438 (1880).

[7] *Id.*

[8] *Id.*

[9] *See* ILL. REV. STAT. ch. 91½, §9-6 (1967). Chapter 91½ deals with the power of the state to act on the person of the insane.

[9] *See* ILL. REV. STAT. ch. 91½ (1967) for statutory provisions dealing with the power of the state to act on the person of the insane.

to an institution for his protection.[10] A sexual psychopath is subject to confinement by the state without a criminal hearing.[11] But it is with infants that the need for the state to be a protector is most apparent.

Legislative acts creating juvenile courts invariably contain provisions for dealing with the dependent or neglected child[12] as well as the delinquent child. The use of informal proceedings when the court is dealing with a child who is without support, or without parents or guardians to provide support, or who is physically or mentally in need of assistance, would seem to be clearly justified under the doctrine of *parens patriae*.[13] As stated by Judge Mack, "the state is the higher or ultimate parent of all of the dependents within its borders."[14] The state, when it acts in *parens patriae,* is acting as the youngster's parent, whose duty it is to provide care; and the youngster, it is reasoned, does not require the protection of formal proceedings.

This same reasoning is applied to actions concerning both dependent or neglected children and delinquent children. The basic question that arises is whether such informality is condoned by the *parens patriae* doctrine when a child is faced with the prospect of being adjudicated a delinquent and of being sent to a state institution for delinquent children. Those critics who opposed the court as conceived, level their objections at this feature. Dean Pound wrote, in 1937, that "[t]he powers of the Star Chamber were a trifle in comparison with those of our juvenile courts. . . ."[15] A more pointed attack on informality in juvenile proceedings was issued by the President's Commission on Law Enforcement. Noting that one of the crucial presuppositions of the philosophy of the juvenile court was the availability

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[10] *See* ILL. REV. STAT. ch. 91½, §9-5 (1967).

[11] *See* ILL. REV. STAT. ch. 38, §105-3.01 (1967).

[12] The original Illinois Act of 1899 provided for methods of dealing with dependent or neglected children. Laws of Illinois, Courts, Juvenile Courts §7 (1899). This function remains with the modern Illinois court. ILL. REV. STAT. ch. 37, §§702-4, 702-5 (1967). The present statute, in section 702-4, defines a neglected child as any minor under 18 years of age, who:

> (a) . . . is neglected as to proper or necessary support, education as required by law, or as to medical or other remedial care recognized under State law or other care necessary for his well-being, or who is abandoned by his parents, guardian or custodian; or
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> (b) whose environment is injurious to his welfare or whose behavior is injurious to his own welfare or that of others.

A dependent minor is defined in section 702-5 as any minor under 18 years of age, who:

> (a) . . . is without a parent, guardian or legal custodian;
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> (b) . . . is without proper care because of the physical or mental disability of his parent, guardian or custodian . . . .

[13] *Contra,* Davidson, *In re Gault: The Juvenile's Gideon,* 56 ILL. BAR J. 488, 498 (1968).

[14] Mack, *The Juvenile Court,* 23 HARV. L. REV. 104 (1909).

[15] *In re* Gault, 387 U.S. 1, 18 (1967) *citing* POUND, *Foreword* to P. YOUNG, SOCIAL TREATMENT IN PROBATION AND DELINQUENCY at xxvii (1937).

of "a mature and sophisticated judge, wise and well versed in law and the science of human behavior,"[16] the Commission found that:

> A recent study of juvenile court judges in the United States revealed that half had no undergraduate degree; a fifth had received no college education at all; a fifth were not members of the bar. Almost three-quarters devote less than a quarter of their time to juvenile and family matters, and judicial hearings often turn out to be little more than attenuated interviews of 10 to 15 minutes' duration.[17]

CONSTITUTIONAL LEGALITY OF THE JUVENILE COURT

The legality of the juvenile court remained unquestioned by the Supreme Court of the United States until March 21, 1966,[18] when the Court announced its decision in *Kent* v. *United States.*[19] The case arose in the District of Columbia and, because it involved only the action of the United States, cannot be viewed as having any direct application to the states.

In *Kent,* the defendant, at the age of fourteen, had been placed in the custody of his mother, as a result of several housebreakings and a purse snatching. Approximately two years later, when Kent was sixteen years old, a woman's apartment was broken into, she was raped and her wallet was stolen. Kent's fingerprints were found in the apartment and he was taken into

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[16] A REPORT BY THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY ch. 3, at 80 (1967).

[17] *Id.*

[18] Paulsen, *Kent v. United States: The Constitutional Context of Juvenile Cases,* 1966 SUP. CT. REV. 167.

[19] 383 U.S. 541 (1966). Although the legality of the juvenile court was not questioned in the Supreme Court of the United States until 67 years after the first juvenile court had been created, it has been repeatedly questioned and upheld in state court decisions. *See Paulsen, supra* note 18, at 174-75. "[O]ver forty state supreme courts have upheld the local variants of such laws against the claim that the statutes violated both state and federal constitutions in each case." *Id.* Professor Paulsen cites the leading case of Commonwealth v. Fisher, 213 Pa. 48, 62 A. 198 (1905), in which the court was faced with the contention that the proceedings in the juvenile court were criminal and, as such, that the child was entitled to all the constitutional rights available to a defendant in a criminal case. The court, in refuting this argument, said:

> The design is not punishment, nor the restraint imprisonment, any more than is the wholesome restraint which a parent exercises over his child. . . . Every statute which is designed to give protection, care . . . and performance of parental duty, is but a recognition of the duty of the state, as the legitimate guardian and protector of children where other guardianship fails. No constitutional right is violated. . . .

Id. at 56-57, 62 A. at 201. In Illinois, in the early case of Witter v. Cook County Comm'rs, 256 Ill. 616, 100 N.E. 148 (1912), a constitutional attack on the juvenile court was met with similar language:

> The parental care of the State is administered by the juvenile court, and that court performs a purely judicial function. . . . The infant is not brought before the court as a defendant charged with an infraction of the laws, but is brought within the jurisdiction of the court to receive its care and protection.

Id. at 623, 100 N.E. at 150.

the custody of the police. Because of his age, Kent was subject to the "exclusive jurisdiction" of the juvenile court.[20] However, the juvenile court judge waived his jurisdiction to the criminal court.[21] In the criminal court, Kent was convicted on six counts of housebreaking and robbery and sentenced to serve 5 to 15 years on each count, or a total of 30 to 90 years in prison. On appeal to the District Court of Appeals, the judgment was affirmed. The Supreme Court reversed the decision of the court of appeals on the grounds that the juvenile court's waiver of jurisdiction without a hearing constituted reversible error.[22]

Allegations in the appeal which questioned the constitutionality of the operation of the District of Columbia Juvenile Court were not answered, due to the reversal on the procedural error.[23] However, Justice Fortas, in writing the majority opinion, addressed himself to a general consideration of juvenile courts in the United States:

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

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[20] D. C. CODE §11-907 (1961), now §11-1551 (Supp. IV, 1965).

[21] Extensive statutory provisions for removal of causes from juvenile to criminal court in Illinois are contained in ILL. REV. STAT. ch. 37, §702-7 (1967).

[22] The Supreme Court agreed that the juvenile court judge had wide discretion in determining when a cause could be removed to the criminal court but found an abuse of that discretion in the instant case.

> We agree with the Court of Appeals that the statute contemplates that the Juvenile Court should have considerable latitude within which to determine whether it should retain jurisdiction over a child or — subject to the statutory delimitation — should waive jurisdiction. . . . At the outset, it assumes procedural regularity sufficient in the particular circumstances to satisfy the basic requirements of due process and fairness, as well as compliance with the statutory requirement of a 'full investigation.'

383 U.S. at 552-53.

[23] Other questions raised in *Kent*, were noted by the Court:

> He [Kent] argues that petitioner's detention and interrogation . . . were unlawful. He contends that the police failed to follow the procedure prescribed by the Juvenile Court Act in that they failed to notify the parents of the child and the Juvenile Court itself . . . ; that petitioner was deprived of his liberty for about a week without a determination of probable cause which would have been required in the case of an adult . . . ; that he was interrogated by the police in the absence of counsel or a parent [citation omitted], without warning of his right to remain silent or advice as to his right to counsel, in asserted violation of the Juvenile Court Act and in violation of rights that he would have if he were an adult; and that petitioner was fingerprinted in violation of the asserted intent of the Juvenile Court Act and while unlawfully detained and that the fingerprints were unlawfully used in the District Court proceeding.

383 U.S. at 551.

> is evidence, in fact, that there may be grounds for concern that the child receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children.[24]

Slightly more than a year after its decision in *Kent,* the Supreme Court, on May 15, 1967, announced its opinion in the case of *In re Gault.*[25] For the first time the Court addressed itself to constitutional questions arising from a juvenile court proceeding.

In *Gault,* a verbal complaint had been made to the police early in 1964, charging that Gerald Gault, a fifteen-year-old Arizona boy, and two companions had made lewd or indecent remarks to a Mrs. Cook. The police took Gerald into custody on the morning of June 8, 1964. His mother arrived home from work at about 6:00 P.M. and, not knowing the whereabouts of her son, sent his older brother to look for him. Upon learning from neighbors that Gerald was in the custody of the police, his mother and brother went to the children's detention home where they learned, from an Officer Flagg, the reason for Gerald's detention, and that there would be a hearing the next afternoon. On June 9, 1964, the day of the hearing, Officer Flagg filed a formal petition with the court, reciting only that Gerald Gault was a delinquent minor in need of the court's protection. The petition, however, was never served on the Gaults nor seen by them until a subsequent habeas corpus hearing on August 17, 1964.[26]

At the hearing, Gerald, his mother and brother were present with Gerald's companion and Officer Flagg. Mrs. Cook was not present. No testimony under oath was taken, nor was any transcript or record made of the proceedings. After the hearing, Gerald was returned to the detention home and was kept there until June 11 or June 12, at which time he was released and driven home. At 5:00 P.M. on the day of Gerald's release, Mrs. Gault received a note on plain paper which read:

> Mrs. Gault:
>
> Judge McGHEE has set Monday June 15, 1964 at 11:00 A.M. as the date and time for further Hearings on Gerald's delinquency
>
> /s/ Flagg[27]

At this hearing there was further testimony as to the phone conversation. Judge McGhee, testifying at the habeas corpus

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[24] 383 U.S. at 555-56. For an extensive analysis of *Kent see* Paulsen, *Kent v. United States: The Constitutional Contest of Juvenile Cases,* 1966 SUP. CT. REV. 167.

[25] 387 U.S. 1 (1967).

[26] The Supreme Court's knowledge of what occurred at the juvenile court hearings was derived solely from this habeas corpus hearing. No record or transcript was taken at the hearings in juvenile court. *Id.* at 58.

[27] *Id.* at 6. It is not certain as to the exact date on which the note was delivered and Gerald was released.

hearing, recalled that " 'there was some admission again of some of the lewd statements. He — he didn't admit any of the more serious lewd statements'."[28] Mrs. Gault's request that Mrs. Cook be present was denied on the grounds that such presence was not required. After the hearing and the filing of a referral report by the probation officers, Judge McGhee rendered his decision. At the time of the hearing, the Judge recalled a prior referral report on Gerald in which it had been charged that he had stolen a baseball glove and lied to the police about it. There was no adjudication of this matter, "because of lack of material foundation."[29] In considering the prior report and the present allegation, the judge concluded that Gerald was a delinquent child pursuant to Arizona statute.[30] Gerald was then committed to the state industrial school " 'for the period of his minority . . . unless sooner discharged by due process of law'."[31]

Arizona did not provide any procedure for taking an appeal from the juvenile court finding. As a result, a petition for habeas corpus was filed in the Arizona Supreme Court. The matter was sent to the Superior Court of Arizona for hearing, the superior court dismissed the petition, and, after an appeal, the Supreme Court of Arizona affirmed.[32] Subsequently, an appeal was taken to the United States Supreme Court under 28 U.S.C. §1257(2).

At the outset the Court determined to limit itself to a consideration of six points:

1. Notice of the charges;
2. Right to counsel;
3. Right to confrontation and cross-examination;
4. Privilege against self-incrimination;
5. Right to a transcript of the proceedings; and
6. Right to appellate review.[33]

Addressing itself first to the traditional arguments upon which proceedings in juvenile courts had been upheld against constitutional attack in state courts, the Court observed that the concept of the juvenile court as formulated by the early reformers was that:

> The idea of crime and punishment was to be abandoned. The child

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[28] *Id.* at 7. Judge McGhee testified to similar admissions having been made at the first hearing.

[29] *Id.* at 9.

[30] ARIZ. REV. STAT. §8-201(6)(d) (1955) which provides: " 'Delinquent child' includes . . . (d) A child who habitually so deports himself as to injure or endanger the morals or health of himself or others." Judge McGhee concluded that Gerald was a delinquent child habitually involved in immoral matters.

[31] 387 U.S. at 7-8. Gerald Gault was thus faced with a possible six years of confinement in the school for making vulgar and abusive phone calls. If he had been an adult the maximum penalty he could have received under Arizona law would have been a fifty dollar fine or two months imprisonment. ARIZ. REV. STAT. §13-377 (1955).

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

[33] 387 U.S. at 10. The Court found it unnecessary to deal with points 5 or 6 noted in the text.

> was to be 'treated' and 'rehabilitated' and the procedures, from apprehension through institutionalization, were to be 'clinical' rather than punitive.[34]

From this concept, noted the Court, flowed the traditional defense to constitutional questions directed at the juvenile court:

> These results were to be achieved, without coming to conceptual and constitutional grief, by insisting that the proceedings were not adversary, but that the state was proceeding as *parens patriae*. . . .
>
> The right of the state, as *parens patriae*, to deny to the child procedural rights available to his elders was elaborated by the assertion that a child, unlike an adult, has a right 'not to liberty but to custody.'[35]

In rejecting the *parens patriae* defense as an all-inclusive justification for any act of a juvenile court, the Court observed that the exercise of state power over the individual was subject to the limitations imposed by the requirements of due process:

> Due process of law is the primary and indispensable foundation of individual freedom. It is the basic and essential term in the social compact which defines the rights of the individual and delimits the powers which the state may exercise.[36]

The Court, in dealing with the specific issues raised in the case before it, began its discussion with a consideration of notice.[37] The only notice which the Gaults had received was: (a) oral notice to Mrs. Gault on the evening of June 8, stating why Gerald was in custody and informing her that there would be a hearing the next afternoon; and (b) written notice consisting of Officer Flagg's note,[38] on plain paper, that there would be a hearing on Gerald's delinquency on June 15. This notice had been held to satisfy the requirements of due process of law by the Arizona Supreme Court,[39] but the Supreme Court of the United States disagreed. Holding that the notice to the Gaults was not sufficient, the Court stated:

> 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 misconduct with particularity.'[40]

The Court next addressed itself to the constitutional question of the necessity for advising a juvenile and his parents of the right to counsel.[41] At no time were the Gaults advised that they had a right to counsel. The Supreme Court of Arizona, noting that there was disagreement among the various jurisdictions as to whether an infant must be advised that he has a right to coun-

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[34] *Id.* at 15-16.
[35] *Id.* at 16-17.
[36] *Id.* at 20.
[37] *Id.* at 31.
[38] *See* text at note 27 *supra.*
[39] *In re* Gault 99 Ariz. 181, 190, 407 P.2d 760, 767 (1965).
[40] 387 U.S. at 33.
[41] *Id.* at 34.

sel, had rejected the argument that due process required that the youngster be advised of such right, and held that the infant's interest was protected by his parents and the probation officer. The Supreme Court did not agree and concluded that:

> [T]he Due Process Clause of the Fourteenth Amendment requires that in respect of proceedings to determine delinquency which may result in commitment to an institution in which the juvenile's freedom is curtailed, the child and his parents 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.[42]

The Arizona Supreme Court had held that Gerald was not deprived of his constitutional rights by the failure of the juvenile court to advise him of his privilege to remain silent[43] and of his right to confront his accuser.[44] On both points the Supreme Court of the United States disagreed.[45] Again emphasizing that it was here concerned "only with a proceeding to determine whether a minor is a 'delinquent' and which may result in commitment to a state institution,"[46] the Court upheld Gault's privilege against self-incrimination and stated:

> It would indeed be surprising if the privilege against self-incrimination 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. And the scope of the privilege is comprehensive.[47]

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[42] *Id.* at 41.

[43] The Arizona Supreme Court in holding that there was constitutional irregularity in the failure to advise Gault of his right to remain silent, resorted to the traditional argument, stating that "the necessary flexibility for individualized treatment will be enhanced by a rule which does not require the judge to advise the infant of a privilege against self-incrimination." *In re* Gault, 99 Ariz. 181, 191, 407 P.2d 760, 767-68 (1965).

[44] The Arizona Court, in denying that Gault had the right to cross-examination and confrontation, said:

> [T]he sounder rule allows the judge to consider hearsay though the hearing is contested. . . . But the hearsay upon which the judge can rely must be of a kind on which reasonable men are accustomed to rely in serious affairs.

Id. at 192, 407 P.2d at 768.

[45] 387 U.S. at 42.

[46] *Id.* at 44.

[47] *Id.* at 47. The Court, citing from Murphy v. Waterfront Comm'n, 378 U.S. 52, 94 (1963), further stated:

> The privilege can be claimed in *any proceeding*, be it criminal or civil, administrative or judicial, investigatory or adjudicatory . . . it protects *any disclosures* which the witness may reasonably apprehend *could be used in a criminal prosecution or which could lead to other evidence that might be so used.* (emphasis the Court's).

387 U.S. at 47-48. In deciding the issue of self-incrimination, the Court also looked to the case of Haley v. Ohio, 332 U.S. 596 (1948), in which a fifteen year-old boy had been convicted of murder in criminal court. A confession which had been admitted into evidence was the basis of reversal. Justice Douglas pointed out that special precautions are required when a confession is taken of a child: "Neither man nor child can be allowed to stand condemned by methods which flout constitutional requirements of due process of law." *Id.* at 601.

Although the Court recognized that the privilege against self-incrimination, as applicable to a juvenile proceeding, gave rise to special problems as to waiver,[48] its general position remained unequivocal, and the Court concluded "that the constitutional privilege against self-incrimination is applicable in the case of juveniles as it is with respect to adults."[49]

In holding that Gault should have the opportunity to confront and cross-examine his accuser, the Supreme Court pointed out that:

> [A]bsent 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.[50]

The issues dealing with appellate review and transcript of proceedings were not decided in *Gault,* since reversal could be based on errors which had already been determined. Nevertheless, the Court went on to note the need for an appellate proceeding in cases involving juveniles:

> 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 hearings before him.[51]

In conclusion, *Gault* stood for certain comparatively limited principles. In a juvenile hearing, in which a determination of delinquency is at issue, and a youngster is faced with a possibility of confinement in a state institution, there exists: (1) a right to sufficient notice to prepare for the hearing[52]; (2) a necessity that the youngster be advised of his right to counsel[53]; (3) a privilege against self-incrimination[54]; and (4) a right to cross-examine witnesses and confront the accuser.[55]

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[48] 387 U.S. at 55. The Court stated:

> We appreciate that special problems may arise with respect to waiver of the privilege by or on behalf of children, and that there may well be some differences in technique — but not in principle — depending upon the age of the child and the presence and competence of parents. . . . If counsel was not present for some permissible reason when an admission was obtained, the greatest care must be taken to assure that the admission was voluntary, in the sense not only that it was not coerced or suggested, but also that it was not the product of ignorance of rights or of adolescent fantasy, fright or despair.

Id.

[49] *Id.*

[50] *Id.* at 57.

[51] *Id.* at 58.

[52] *See* text at note 40 *supra.*

[53] *See* text at note 42 *supra.*

[54] *See* text at note 47 *supra.*

[55] *See* text at note 50 *supra.*

The *Gault* decision may have a more profound effect on future proceedings in juvenile courts of the United States than will the specific issues decided therein. The doctrine of *parens patriae* can no longer be considered the unassailable protector of informal proceedings in juvenile courts.[56] The argument that proceedings in juvenile court are "civil" and not "criminal," thereby making constitutional protections found in the criminal law inapplicable, will no longer shield the juvenile courts from constitutional attack.[57] Most significantly, it is now clear that the due process clause of the fourteenth amendment is a limitation on proceedings in juvenile courts, and that the court's proceedings must adhere to the requirements of fundamental fairness which are the dictates of the due process clause.[58]

PRESENT ILLINOIS COURT

On January 1, 1966, a new Juvenile Court Act was adopted in Illinois.[59] This Act should be examined in the light of the *Gault* decision to determine if it adheres to the constitutional requirements announced in that case.

The purpose and policy of the Act, as stated therein,[60] remain consistent with the aims of the early founders of the juvenile court system. The Act, however, goes substantially further

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[56] "[T]he Juvenile Court Judge's exercise of the power of the state as *parens patriae* . . . [is] not unlimited." 387 U.S. at 30.

[57] Under the doctrine of *parens patriae* it was originally felt that because the state was acting to protect the child and not to punish him the proceedings were civil and not criminal. *See* note 19 *supra*.

[58] This does not mean that the limits of due process, as defined in criminal constitutional cases, are superimposed on the juvenile courts. As Justice Fortas said in *Gault:*

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

387 U.S. at 30.

[59] ILL. REV. STAT. ch. 37, §§701-1 - 708-4 (1967). (Juvenile Court Act).

[60] *Id.* §701-2:

> (1) The purpose of this Act is to secure for each minor subject hereto such care and guidance, preferably in his own home, as will serve the moral, emotional, mental, and physical welfare of the minor and the best interest of the community; to preserve and strengthen the minor's family ties whenever possible, removing him from the custody of his parents only when his welfare or safety or the protection of the public cannot be adequately safeguarded without removal; and, when the minor is removed from his own family, to secure for him custody, care and discipline as nearly as possible equivalent to that which should be given by his parents, and in cases where it should and can properly be done to place the minor in a family home so that he may become a member of the family by legal adoption or otherwise. (2) . . . This Act shall be administered in a spirit of humane concern, not only for the rights of the parties, but also for the fears and the limits of understanding of all who appear before the court.

Ironically no similar provision was found in the original act, Laws of Illinois, Courts, Juvenile Courts (1899), even though these were the very ideas which motivated its passage.

in providing the process by which the juvenile court is to function.

The objections that the Supreme Court voiced to the Arizona proceeding in *Gault* are all but non-existent in the Illinois Act. Section 701-20 states the rights of the parties in the proceedings, which include:

> (1) Except as provided in this Section and paragraph (2) of Section 5-1,[61] the minor who is the subject of the proceeding and his parents, guardian, legal custodian or responsible relative who are parties respondent have the right to be present, to be heard, to present evidence material to the proceedings, to cross-examine witnesses, to examine pertinent court files and records and also, although proceedings under this Act are not intended to be adversary in character, the right to be represented by counsel. . . .
>
> . . . .
>
> (3) At the first appearance before the court by the minor, his parents, guardian, custodian or responsible relative, the court shall explain the nature of the proceedings and inform the parties of their rights under the first 2 paragraphs of this Section. . . .
>
> (4) No sanction may be applied against the minor who is the subject of the proceedings by reason of his refusal or failure to testify in the course of any hearing held prior to final adjudication under Section 4-8.[62]

It is clear from sections (1) and (3) that the necessity for advising the minor or those responsible for him of the right to counsel,[63] and the right to cross-examine witnesses, is recognized by the Act, and, as such, satisfies the dictates of *Gault*. The privilege against self-incrimination contained in section (4), however, falls short of the requirement set forth in *Gault*. First, it should be noted that section (4) is not controlled by section (3); thus, the Act does not provide that the youngster be advised of his privilege not to testify against himself,[64] nor does the privilege against self-incrimination, as provided in the Act, extend to the adjudicatory hearings. Under *Gault*, a finding of delinquency based on an admission by a minor who has not been advised of his privilege against self-incrimination, would be unconstitu-

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[61] ILL. REV. STAT. ch. 37, §705-1 (1967). This section deals with the dispositional hearing and permits the court to make certain departures from the procedural limitations of §701-20. After the minor is adjudicated a ward of the court, the juvenile judge may hear any evidence which would not have been admissible at the adjudicatory hearing, but is admonished to consider such evidence only to the extent of its probative value. The court is permitted to refuse disclosure to the parties of reports prepared for the court's use.

[62] ILL. REV. STAT. ch. 37, §701-20 (1967).

[63] The Act provides that the fact that the parties have a right to counsel shall be noted on the summons. *Id.* §704-3(2).

[64] A suggestion had been made that the Act include a requirement that the juvenile court judge inform the minor of his right to remain silent. This suggestion was rejected as being inconsistent with the philosophy of the juvenile court in that it would hinder the full cooperation desired in the court. Trumbull, *Proposed New Juvenile Court Act for Illinois*, 53 ILL. BAR. J. 608, 617 (1965).

tional.[65] If a court, following the Illinois Act, fails to inform a minor of his privilege against self-incrimination, it would seem that a finding of delinquency could be reversed.

One of the major objections of the Supreme Court in *Gault* was the failure of Arizona to provide a juvenile and his parents with adequate notice.[66] No similar objection can be raised to the Illinois Act. Article 4[67] of the Act provides that a verified petition must be filed with the court and that the petition must contain facts sufficient to bring the minor within the requirements of section 702-1.[68] A copy of this petition must be attached to the summons which is issued to the parties. Thus, the parties are notified from the outset of the facts upon which the issue of delinquency will be decided.

The Act provides for personal service of summons on both the minor and his parents or guardians.[69] Substituted service is permitted by certified mail if personal service cannot be made, or if it appears that any respondent lives outside the state.[70] Service may also be made by publication in a newspaper of general circulation in the county where the action is pending,[71] but such publication may be utilized only in the event that service cannot be had by certified mail.[72] Service by certified mail and by publication are available only for respondents named in the petitions and are not available for the minor.[73]

In *Gault,* the Supreme Court objected to the notice requirement in Arizona, not only because it failed to give the parties adequate information about the nature of the action, but also because it failed to give the parties sufficient time to prepare for a hearing.[74] The Illinois Act provides for a specific minimum time which must be allowed the parties after service of summons. Where personal service is made, such service must be had at least three days prior to the date set for the parties' appearance.[75] If notice is by certified mail the adjudicatory hearing cannot pro-

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[65] *See* text at notes 47 and 49 *supra.*

[66] *See* text at note 40 *supra.*

[67] ILL. REV. STAT. ch. 37, §§704-1 - 704-8 (1967).

[68] *Id.* §704-1. ILL. REV. STAT. ch. 37, §702-1 (1967), provides for jurisdictional facts required to bring the minor within the jurisdiction of the juvenile court. It reads:

> Proceedings may be instituted under the provisions of this Act concerning boys and girls who are delinquent, otherwise in need of supervision, neglected or dependent, as denied in Sections 2-2 through 2-5.

[69] ILL. REV. STAT. ch. 37, §704-3 (1967).

[70] *Id.* §704-4(1).

[71] *Id.* §704-4(2).

[72] *Id.* §704-4(4).

[73] *Id.* §704-4. The sections of the statute refer only to respondents. Section 704-3, dealing with personal service, differentiates between the minor and the respondents.

[74] *See* text at note 40 *supra.*

[75] ILL. REV. STAT. ch. 37, §704-3(5) (1967).

ceed until five days after mailing of the notice,[76] and in the event of notice by publication, the court may not proceed for ten days.[77] Liberal provisions for continuances are also provided.[78]

The time given to a party to prepare under the Illinois Act should be considered in view of other provisions of the Act. The date for the adjudicatory hearing must be set within 30 days of the filing of the petition.[79] If the child is being detained the hearing must be set within ten days of the filing of the petition.[80] The Illinois Act thus recognizes that while it is essential that a party be given sufficient time to prepare for the hearing, it is equally essential that the hearing take place as soon as possible.

A method of appeal[81] is also provided in the Act, and a transcript of record may be made as in any other judicial proceeding.

With the exception of the provision involving the privilege against self-incrimination, the Illinois Act is in accord with specific holdings in the *Gault* decision; however, the *Gault* decision did more than decide specific issues.

The philosophy set forth in *Gault* cannot be viewed as limited to the specific issues decided in that case. It is reasonable to expect that future opinions of the Court will further develop considerations of due process in juvenile court proceedings. Although the Illinois Act substantially adheres to the specific holdings of *Gault,* the Act must also be examined with an awareness of the probable result of future Supreme Court opinions.[82]

The decision in *Gault* dealt only with the right of an accused juvenile at an adjudicatory hearing; his position prior to this final hearing has yet to be decided. The crucial requirement that

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[76] *Id.* §704-4(1).
[77] *Id.* §704-4(3).
[78] *Id.* §704-7.
[79] *Id.* §704-2.
[80] *Id.*
[81] *Id.*
[82] In the recent case of *In re* Whittington, 36 U.S.L.W. 4466 (U.S. May 20, 1968) (No. 701), the Supreme Court, in an appeal from a decision of the Ohio Court of Appeals, 13 Ohio App. 2d 11, 233 N.E.2d 333 (1967), upholding certain proceedings of an Ohio juvenile court, was presented with the following questions:

> (1) Does finding of delinquency in juvenile court hearing, based only upon preponderance of evidence, violate Fourteenth Amendment's Equal Protection Clause? (2) Does Ohio Juvenile Code, in permitting judge to receive evidence in absence of accused child and his counsel prior to hearing, and failing to provide for jury trial, violate Fourteenth Amendment's Equal Protection Clause? (3) Were accused child's right to counsel and privilege against self-incrimination abridged by admission, in juvenile court proceedings, of statements taken from him during custodial interrogation by police who did not warn him of right to counsel or privilege against self-incrimination?

36 U.S.L.W. 3192 (U.S. Nov. 7, 1967) (No. 701). The Supreme Court, however, chose not to answer these questions at this time, vacating the judgment and remanding the case to the Ohio Court of Appeals of Fairfield County for consideration in the light of *Gault.* 36 U.S.L.W. at 4467.

an accused be advised of the right to counsel and the privilege against self-incrimination during the investigatory period, available to adult defendants in criminal cases, may well be determined to be equally applicable to a juvenile proceeding. Section 701-20 (3) of the Act[83] directs the court to inform the parties of the right to counsel at the time of the first appearance before the court. If it is decided that the requirement that the youngster be advised of his right to counsel attaches when he is first detained by an officer, the provision of the Act would not be sufficient. However, this does not seem to present too difficult a problem, since judicial decision could direct that officers advise juveniles of the right to counsel, without upsetting the less demanding requirement of the Act. As noted previously,[84] the privilege against self-incrimination provided in the Illinois Act, falls short of the requirement of the *Gault* decision in that a youngster need not be advised of his privilege. This failure can be corrected by judicial decision, and if the need arises to extend the privilege to the time of initial detention, judicial direction should likewise be adequate.

The Illinois Act is not silent regarding the procedures required prior to the adjudicatory hearing. Article 3[85] of the Act relates generally to the early stages of the proceedings. First, a juvenile may be taken into custody by a police officer without a warrant.[86] In the event of a youngster being taken into custody in this manner, the police officer must immediately attempt to notify the parent or guardian of the child, and must also either surrender the minor to the nearest juvenile police officer designated for such purpose in the county of venue, or to a juvenile police officer in the city or village where the offense allegedly was committed.[87] A minor may also be taken into custody when a petition has been filed pursuant to section 704-1,[88] and the court finds cause to detain him at that time.[89]

Once the minor is in the custody of juvenile officers he must be brought before a judicial officer for the purpose of a detention hearing within 48 hours, unless released sooner.[90] If this procedure is not followed, the juvenile must be released.[91] At the detention hearing, the court is required to hear evidence to de-

[83] ILL. REV. STAT. ch. 37, §701-20(1) (1967). *See* text at note 62 *supra.*
[84] *See* text at notes 64-65 *supra.*
[85] ILL. REV. STAT. ch. 37, §§703-1-703-8 (1967).
[86] *Id.* §703-1(1).
[87] *Id.* §703-2(1).
[88] *Id.* §703-1(2). The fact that a minor is taken into custody prior to the filing of a petition does not dispense with the need for a petition, and thus, a summons, to the parties providing notice for the adjudicatory hearing. The petition can be prepared and filed by the juvenile officials. *Id.* §703-5(2).
[89] ILL. REV. STAT. ch. 37, §703-1(2) (1967).
[90] *Id.* §703-5(1).
[91] *Id.* §703-5(3).

termine if there is probable cause to believe the minor is a delinquent minor.[92] If probable cause is not found, the juvenile must be released and the petition discharged.[93] Notice of the detention hearing to the parents, guardians, or counsel of the minor may be oral,[94] but if there is not actual notice the matter may be set for rehearing.[95]

In addition, the rights of the parties, as provided for in section 701-20, are as effective at these early stages of the proceedings as they are at the adjudicatory hearing.[96] The provisions relating to initial proceedings under the Illinois Act are in keeping with the philosophy of *Gault* that fundamental fairness be provided to the minor before the juvenile court, and it is unlikely that these proceedings will be substantially affected by future Supreme Court decisions.

The Illinois Act protects certain rights of the parties to a juvenile hearing which are not mentioned in *Gault*. Specifically, these rights include the right to be present at the proceedings, the right to be heard, and the right to examine pertinent court files and records.[97] Questions concerning the constitutional availability of these rights are questions which lend themselves to judicial decision in the United States Supreme Court.[98] If and when it is decided that due process requires that these rights are available to the parties in a juvenile hearing, the Illinois Act will be unaffected by the Court's affirmance of the Act's provisions.

The only procedural safeguard provided in the original Illinois Act of 1899 was the right to trial by jury.[99] Ironically, no such provision is found in the present Act. The question of the right to a jury trial in a juvenile hearing was recently presented to the Supreme Court in the case of *In re Wittington*,[100] but the Court did not directly decide this or the other constitutional issues raised.[101] If such decision is reached, Illinois will be compelled to provide for a jury in juvenile hearings. This will best be done by amending the Act.

Another aspect of procedural safeguards to be furnished in juvenile courts is the quantum of proof required at the adjudicatory hearing. In *In re Wittington*,[102] the Supreme Court was

[92] *Id.* §703-6.
[93] *Id.* §703-6(1).
[94] *Id.* §703-5(2).
[95] *Id.* §703-6(3).
[96] *Id.* §701-20.
[97] *Id.* §701-20(1). *See* text at note 62 *supra.*
[98] The right to be present prior to an adjudicatory hearing was a question recently before the Supreme Court. *See* authority cited note 82 *supra.*
[99] Laws of Illinois, Courts, Juvenile Courts, §2 (1899).
[100] 36 U.S.L.W. 4466 (U.S. May 20, 1968) (No. 701).
[101] *See* authority cited note 82 *supra.*
[102] 36 U.S.L.W. 4466 (U.S. May 20, 1968) (No. 701).

faced with the question of whether a preponderance of the evidence is sufficient under the equal protection clause of the fourteenth amendment to support a finding of delinquency, but the Court did not decide the issue.[103] The Illinois Act provides that the rules of evidence applicable to civil proceedings (*i.e.* a preponderance of the evidence) shall be used in adjudicatory hearings.[104] The Illinois Supreme Court, in the case of *In re Urbasek*,[105] decided that, in view of the *Gault* decision, it was improper for the quantum of proof in a delinquency proceeding to be that quantum used in civil cases. Rather, the burden of proof required in criminal cases (*i.e.* beyond a reasonable doubt) was declared to be applicable in Illinois delinquency hearings.

The court was not compelled by the specific holdings of *Gault* to make the decision it did in *Urbasek*, but, as stated by the Court:

> [T]he language of that opinion exhibits a spirit that transcends the specific issues there involved, and . . . in view thereof, it would not be consonant with due process or equal protection to grant allegedly delinquent juveniles the same procedural rights that protect adults charged with crimes, while depriving these rights of their full efficacy by allowing a finding of delinquency upon a lesser standard of proof than that required to sustain a criminal conviction.[106]

At this point it should be emphasized that the *Gault* decision does not superimpose the procedural requirements of a criminal trial on juvenile hearings. Justice Fortas, in the *Gault* decision, noted:

> 'We do not mean . . . to indicate that the hearing to be held must conform with all 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.'[107]

It seems unavoidable, however, that courts will look to the standards of fairness found to be applicable in criminal cases when determining the standards to be used in a juvenile proceeding.

In the case of *In re Orr*,[108] an adjudged delinquent sought to raise questions relating to the effect of *Gault* upon proceedings under the Illinois Juvenile Court Act. The respondent contended that the rules formulated in *Miranda* v. *Arizona*,[109] relating to confessions, and the constitutional and statutory provisions regarding bail in criminal cases, are applicable to delinquency proceedings. The court avoided answering the respondent's conten-

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[103] *See* authority cited note 82 *supra*.
[104] ILL. REV. STAT. ch. 37, §704-6 (1967).
[105] 38 Ill.2d 535, 232 N.E.2d 716 (1967).
[106] *Id.* at 541-42, 232 N.E.2d at 719.
[107] 387 U.S. at 30, *citing* Kent v. United States, 383 U.S. 541, 562 (1966).
[108] 38 Ill.2d 417, 231 N.E.2d 424 (1967).
[109] 384 U.S. 436 (1966).

tion, holding that the *Miranda* standards had not been violated,[110] and that the court was not required to determine if the *Miranda* rules were applicable to a delinquency proceeding. The fact is, however, that the court did apply *Miranda*, and it is reasonable to speculate that if a violation had been found, the court would have reversed the finding of the juvenile court. The court did not answer the question as to bail because the question had become moot.

The *Urbasek* and *Orr* cases are not to be interpreted as standing for the proposition that the juvenile court is in reality a criminal court requiring the application of certain pre-defined rules of procedure. What the court does assert in these two cases, is that the philosophy of the *Gault* decision requires that a minor be given a fair hearing. To determine the proper standards of fairness, reliance may be placed on constitutional rules formulated in the field of criminal law, but these need not be controlling.[111] It may be that, in the final analysis, the due process standards which are eventually formulated by the juvenile court will coincide with the standards found in the criminal law. This result, if achieved, should be accomplished by a case-by-case approach, in which the court has the opportunity to examine specific facts and decide specific issues.

When the Illinois Act is examined to determine whether it adheres to possible future constitutional pronouncements of the Supreme Court, the emphasis should be on a determination of fundamental fairness within the context of the juvenile court. Viewed in this manner, the Illinois Act, in section 701-20, and in its provisions for notice, provides for procedural safeguards which should substantially satisfy the constitutional command that a youngster in a juvenile court proceeding be assured due process of law.

CONCLUSION

A revolution has taken place in juvenile court proceedings. The *Gault* decision demands that juvenile court proceedings throughout the country be reorganized. As stated by Justice

[110] The court held that Orr's confession was a spontaneous statement and, as a result, the failure of the arresting police officer to warn him of his right to remain silent did not invalidate the confession. 38 Ill.2d at 423-24, 231 N.E.2d at 427-28.

[111] Juvenile court differs from criminal court. Its primary object, that of aiding the youthful offender, remains, even though juvenile courts have so often failed in this function. The solution is not to abandon this aim, because it is so hard to attain, but rather to attempt to improve the court. It is the position of the Court in *Gault* that the object of rehabilitation is aided, not frustrated, by the proper application of due process of law. The Court stated that, "'[u]nless appropriate due process of law is followed, even the juvenile who has violated the law may not feel that he is being fairly treated and may therefore resist the rehabilitative efforts of court personnel.'" 387 U.S. at 26.

Fortas in *Gault,* "[u]nder our Constitution the condition of being a boy does not justify a kangaroo court."[112] The Illinois lawyer is in the fortunate position of having a Juvenile Court Act which substantially adheres to the holdings and philosophy of *Gault.* The stature of the Illinois Act became apparent when Justice Underwood wrote in *Urbasek*: "the Illinois statutory scheme . . . could well act as a model among the States for protecting the rights of juvenile court defendants."[113]

Thomas R. Fitzgerald

[112] 387 U.S. at 28.
[113] 38 Ill.2d at 542, 232 N.E.2d at 720.